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# **What is the Rule of Law?**

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A thesis submitted in fulfillment of the postgraduate degree of  
Master of Jurisprudence.

Durham Law School

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## Introduction

This thesis proposes an ultra thin definition of the rule of law; it simply means ‘the rule of the law.’<sup>1</sup> It is a descriptive account of the law’s ultimate authority. Whilst Raz originally coined this phrase, it is argued that his formal depiction of the concept is not faithful to the expression. The notion of “the rule of the law” is inherently unconditional; it does not superimpose qualitative conditions on the substantive content of the law. Therefore, an unjust law may still rule. In this sense the rule of law is theoretically compatible with a wicked legal regime. To this extent Raz agrees. However, he suggests that the ‘basic idea’ of the rule of law is that the law must be capable of guiding behavior; it must meet certain minimum formal requirements.<sup>2</sup> For example, the law must be reasonably clear, stable and prospective. It is argued that this capacity to guide creates an intangible political threshold; it displays an inherent ‘political morality’ that differs only in degree not kind from other political definitions of the rule of law.<sup>3</sup> Thus, the formal quality of Raz’s theory is self-defeating. Raz’s rule of law is a model of legal efficiency that inevitably induces a minimum element of procedural fairness; Raz disguises this moral affliction beneath a formal façade. Raz further suggests that in order to qualify as law at a very minimum it must be ‘capable of guiding the behavior of its subjects.’<sup>4</sup> The rule of law is thus thrust into a limbo; it graduates from a simple measure of the law’s efficiency to a formal model of legality. Portraying his basic idea as the minimum foundation of legal validity injects an element of political morality into the nature of law; this inevitably aggravates

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<sup>1</sup> J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Clarendon Press, 1979) 212

<sup>2</sup> Raz (n1) 214

<sup>3</sup> C Synpnowich, “Utopia and the Rule of Law” in D Dyzenhaus (ed) *Recrafting the Rule of Law: the Limits of Legal Order* (Hart Publishing, Oxford- Portland Oregon, 1999) 193

<sup>4</sup> Raz (n1) 213

Raz's overarching legal positivist intentions. Legality should be dictated by social fact not degrees of morality. The ultra-thin endorsement of the "rule of the law" is agnostic towards both the substantive content of the law (however unjust) and its cosmetic appearance (however unclear or retrospective). It broadly incorporates the idea of the *rule of valid law* rather than the *rule of only that law which is capable of formally guiding behavior*.

This ultra-thin model of the rule of law inevitably provokes the complaint that it starves the rule of law of any content. It is viewed as an illiberal distortion of what is conventionally perceived as a force for good. It is conceded that the rule of law is much reduced, *but necessarily so*. The rule of law has succumbed to the fate of a political 'slogan'; it is no more than a strap line for good government.<sup>5</sup> It is this romanticisation of the rule of law as a panacea that results in an 'empty tautology' not the theoretical reductionism displayed in this definition.<sup>6</sup> In a sophisticated legal society, viewed in isolation the notion that the law has ultimate authority is distinctly unremarkable. However, the very fact that "the rule of the law" is perceived as a common denominator in most states is a credit to its fundamental value. The rule of law is a mark of civilization; it reflects the decision to utilize the law as the authoritative social mechanism of organizing the state; as a man-made source of authority it indicates a minimum level of legal sophistication. Its evolution into "a matter of fact" does not detract from its value but on the contrary illustrates its dormant existence at the bedrock of a legal state.

In any event, this thesis supports the view that the rule of law is a type of 'interaction technology'.<sup>7</sup> Therefore, regarding the rule of law in isolation is

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<sup>5</sup> Raz (n1) 210

<sup>6</sup> Raz (n1) 213

<sup>7</sup> M Krygier, "Approaching the rule of law" in Whit Mason (ed) *The Rule of Law in Afghanistan, Missing Inaction* (CUP, 2011) 22

superficial. The rule of law is organic; it interacts with different components within a constitutional framework and responds to variable political conditions. Ironically then, the question “what is the rule of law?” is a subsidiary concern to how best we should optimize the rule of law as a neutral legal mechanism to secure good government. The reality is that the rule of law is not a political ideal; it is therefore essential to adopt a more extrospective outlook and cultivate the prime political conditions inherent in a democratic constitution that would optimize its potential. In essence, it is necessary to harness the ultimate authority of law to help manufacture a just and effective legal system that maximizes the welfare of the citizen. In recognizing the social character of the rule of law and observing how it operates differently on varying constitutional terrain, it is easier to appreciate how the rule of law responds to a helix of political and legal factors. An important detour is made in the first chapter through the realms of Greek philosophy. Socrates’ vision of the rule of law in the *Crito* is synonymous with the ultra-thin definition. We are reconciled to the reality that the rule of law is not an ideal and it is not necessarily fair. It is therefore a useful reference point that encapsulates the ‘dark side’ to the rule of law.<sup>8</sup> Equally, the *Crito* is arguably ahead of its time; it presents the blueprint of the rule of law as an ‘interaction technology’ by initiating a discussion regarding the relationship between the rule of law and a democratic constitution.<sup>9</sup> It touches on the notion of active citizenship in imploring the citizen to change the Laws view of what is just. This level of participation inevitably requires a sophisticated judicial and political system to enable constitutional dialogue. A wicked legal regime exposes the acute danger that the rule of law may be utilized as a means to achieving incredible injustice; this is because the ultimate source of authority is man-made; it is susceptible to the manipulation of its

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<sup>8</sup> B Tamanaha, “The Dark Side of the Relationship between the Rule of Law and Liberalism” (2008) *Legal Studies Research Paper Series Paper#08-0096*

<sup>9</sup> Krygier (n7) 22

creator. However, a failed legal state does not parallel a failure in the rule of law; it exposes an innate problem within that enigmatic constant, a state's political culture.

This thesis is made up of two parts. Chapter I is jurisprudential in tone; it focuses on neatly dissecting the theoretical meaning of the rule of law. The result is a tidy differentiation between the ultra-thin model and its formal and more conventional counterparts. This negative approach to a definition resonates with the nature of the ultra-thin model; it seeks to disaffiliate the rule of law from political associations with morality, justice and democracy. In chapter II the ultra-thin model's tidy theoretical existence is juxtaposed to its messy interaction with constitutional reality. This chapter focuses on ironing out the rule of law's operation within the UK constitutional framework. In order for the law to rule, people must conform to it. Legal conformity is defined in a manner that resonates with the ram doctrine. The rule of law does not require the executive to gain legal authorization for all of its action in advance; it simply must not break the law. It thus dispels any positive discrimination between the individual and the state and *in theory* awards the executive the same legal liberty enjoyed by the citizen. However, it is argued that the executive should be subject to far greater legal regulation, in other words there are more laws to conform to. Equally the citizen's liberties should be protected by law (most desirably statute); this way legal conformity becomes synonymous with the protection of rights *by virtue of the law's utilization* rather than the meaning of the rule of law itself. Thus, whilst in theory the executive, like the citizen, enjoys a degree of residual liberty, in practice the executive has significantly less room to maneuver because the laws it must not break are far more populous.

Chapter II moves on to consider the constitutional hierarchy that exists between different species of laws within the UK. This confuses the meaning of the



*rule of valid law* and potentially supplants its purpose. Greater codification in statute is encouraged to streamline the meaning of valid law and also to encourage a greater fluidity between the rule of law and parliamentary sovereignty. This chapter also considers how the ultra-thin model operates alongside the evolving nature of judicial review that has arguably exceeded its logical boundaries. Finally, the Chapter concludes by arguing that we should not overstate the importance of the law in deterring arbitrary government. The fact that the ultra-thin model does not portray the rule of law as the ‘ultimate controlling factor’ of the constitution does not mean that we are at a loss.<sup>10</sup> Indeed, overstating the importance of the rule of law detracts from the essential value of politics in holding the executive to account. It is argued that a political constitution is invaluable to the rule of law. A political constitution is not depicted as a solution to compensate for the rule of law’s defects; rather it provides fertile ground to cultivate the political conditions in which the rule of law can flourish.

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<sup>10</sup> Lord Hope, *R(Jackson and others) v Attorney General* [2005] UKHL 56, par 126

# Chapter I

## The Rule of Law: the Ultra Thin Model

### The Crito and the Rule of Law

The notion of the rule of law that Socrates proposes in the *Crito* is one based on the ultimate authority of law. Socrates identifies the rule of law as a benchmark of organized society. It is precious and should not be compromised. Socrates' understanding of the rule of law is uncomplicated but in its simplicity inheres controversy. Plato exposes the cruel reality that the rule of law is not necessarily a force for good. In doing so Plato disaffiliates the rule of law from its mythical associations with justice and morality. Socrates is the victim of a concept that has enabled the permeation of injustice. It allows bad laws to rule, just as it does good. The rule of law is essential but it is dangerous. The importance of the *Crito* to this thesis is two-fold. First it encapsulates the ultra-thin understanding of the rule of law—simply that the law has ultimate authority. Presented in the context of an under-developed society this definition is not perceived as minimalistic but appreciated by Greek philosophers as a revolutionary decision at the heart of organized society. In the contemporary context of a sophisticated political community the decision to organize a state *by law* is taken for granted and yet ironically this in itself illustrates its existence as the core component of a legal state. Thus, defining the rule of law in these simple terms is neither minimalistic nor deprecatory. Second, the rule of law is envisaged to operate alongside an effective political system. This is implicit in the *Crito* from the citizen's option to either obey the laws or change their view of what is just. Thus, what is clear is that the law rules whatever the quality of its content.

However, Plato envisages that the citizen must ‘do what his country and his city order him; or he must change their view of what is just’ in order to ensure that the law that does rule is good.<sup>11</sup>

Plato’s *Crito* contains two dialogues: the first occurs between Socrates and his close friend Crito, the other, an imagined conversation between the Laws and Socrates. Socrates is unjustly condemned for alleged impiety and corrupting youth. Crito visits the philosopher in prison and attempts to persuade him to escape Athens in order to avoid execution. Crito argues that in refusing to flee, Socrates not only risks shaming his friends, who would be presumed unable to finance his escape, but also leaves his children fatherless. It is an emotive plea that epitomizes Crito as an ‘ordinary decent citizen’ and a ‘practical man.’<sup>12</sup> Socrates, however, insists on submitting to this unjust punishment and persuades Crito that ‘the laws should be obeyed even if he was condemned unjustly’; he thus ‘reconciles Crito to the rule of law’.<sup>13</sup> His martyrdom secures Socrates’ reputation as the ‘model citizen’ and man of reason.<sup>14</sup> The political philosophy behind Socrates’ acts is expressed through the personification of the Laws: Socrates entered into an ‘implied contract’ with the Laws, in return they ‘nurtured and educated’ Socrates and he is thus their ‘child and slave’.<sup>15</sup> This exchange of political freedom for legal security bears clear resemblances to early social contract theory.<sup>16</sup>

The personification of the Laws is not purely for ‘emotional’ impact.<sup>17</sup> It ‘corresponds to the sense that the rule of law must appear as a supreme force that

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<sup>11</sup> Plato, *Crito* (360 B.C.E) (trans) Benjamin Jowett

<sup>12</sup> M J Rosano “Citizenship and Socrates in Plato’s “Crito”” (2000) 62(3) *The Review of Politics* 454

<sup>13</sup> Rosano (n12) 452

<sup>14</sup> Rosano (n12) 451

<sup>15</sup> Plato (n11)

<sup>16</sup> See T Hobbes, *Leviathan* (ed) M Oakeshott (US, First Touchstone Edition, 1997); J Locke *Second Treatise of Government* (ed) C B Macpherson (Indianapolis, Cambridge, Hackett Publishing Inc, 1980)

<sup>17</sup> N A Greenberg, “Socrates’ Choice in the Crito” (1965) 70 *Harvard Studies in Classical Philology* 45, 61

stands above the fray.’<sup>18</sup> The Laws are ‘oratorical bullies’ which reinforces their supreme authority over man.<sup>19</sup> Indeed, there can be no doubt that the law “rules” in the *Crito*. Furthermore, by giving the Laws their own voice it distinguishes them as a living entity in their own right, independent from the legislators who made them. As in *Salamon v A Salamon (1897)*<sup>20</sup> where a company is identified as a separate legal person, a corporate veil is drawn between the law and political actors. Whether the ‘...views espoused by the Laws are the views of the Laws- not of Socrates’ exceeds the scope of this discussion; we are not concerned with how “Socratic” the Laws’ views are but how they present the rule of law.<sup>21</sup> The Laws hypothetically address Socrates:

*‘...if you go forth, returning evil for evil, and injury for injury, breaking the covenants and agreements which you have made with us, and wronging those whom you ought least to wrong, that is to say yourself, your friends, your country, and us...the laws of the world below will receive you as an enemy; for they will know that you have done your best to destroy us.’<sup>22</sup>*

This passage is concerned with assigning liability for injustice. The Laws proclaim that disobedience is unjustified on three counts. Firstly, disobedience breaks the ‘covenants and agreements’ made with the Laws and sanctions their destruction. This is because ‘every time any one disobeys a law he weakens that set of institutions which holds society together and keeps it from lapsing into chaotic barbarity.’<sup>23</sup> The

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<sup>18</sup> M J Rosano (n12) 468

<sup>19</sup> R Weiss, “Socrates dissatisfied: an analysis of Plato’s *Crito*” (New York, Oxford University Press, 1998) (Oxford Scholarship Online 2003) 133

<sup>20</sup> *Salamon v A Salamon & Co Ltd* (1897) AC 22

<sup>21</sup> Weiss (n19) 1-2

<sup>22</sup> Plato (n11)

<sup>23</sup> Greenberg (n17) 61

rule of law is essential to organized society. Greenberg expresses two concerns with this argument. First, he objects on the grounds that ‘it justifies and demands obedience to any law, just or unjust...’<sup>24</sup> Of course this is undesirable. However, equally the ‘practice of doing particularized justice’ clearly conflicts with the necessary universal application of law.<sup>25</sup> The law cannot be obeyed subject to individual convenience and subjective perceptions of what is just. Weiss’ proposition that a citizen is ‘bound only by correct verdicts’ invites disingenuous conceptions of what is “correct” and “just”; this is arguably more detrimental to the citizen’s welfare.<sup>26</sup> Indeed, Lewis F Powell Jnr rightly remarked that ‘(a)n ordered society cannot exist if every man may determine which laws he will obey...that only “just” laws need to be obeyed and that every man is free to determine for himself the question of “justness”.’<sup>27</sup> It is a social reality that the ‘unique potential’ of ‘every individual can only be realized within organized society’.<sup>28</sup> Those ‘sources of coercion that prevent us from achieving our highest potential’ simultaneously enable the optimum conditions for an individual to thrive within a contained setting.<sup>29</sup> After all, without society, justice has no value. Therefore, the idea that the citizen must submit to the law, however unjust, resonates with the effective survival of a political community. Society aspires towards efficiency: ‘the best political system will be one that allows each individual to satisfy egoistic drives in the most *efficient* way.’<sup>30</sup>

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<sup>24</sup> Greenberg (n17) 61

<sup>25</sup> L B Solum “Equity and the Rule of Law” in I Shapiro (ed) *The Rule of Law* (New York University Press 1994) 123

<sup>26</sup> R Weiss (n19) 84

<sup>27</sup> Lewis F Powell Jnr, Miami Convention August 1965

<sup>28</sup> A J Minton, *Philosophy- Paradox & Discovery* (University of Missain, Kansas City, McGraw-Hill Book Company, McGraw-Hill Inc, 1976) 371

<sup>29</sup> A J Minton (n28) 372

<sup>30</sup> A J Minton (n28) 373

Greenberg however objects to this prioritization of the ‘survival and continued well-being of the state’ as a ‘primary goal’.<sup>31</sup> He argues that if this is the case ‘one need not obey a law which is conducive to that goal.’<sup>32</sup> His criticism is anarchic in tone; he simply delegates the task of deducing when a law supports the well being of society to the citizen. The rule of law cannot be conditional on how “just” the law is perceived; subjectivity is equally as dangerous as universality. Greenberg is right to challenge the injustice of Socrates’ situation. However, Greenberg’s “solution” is, like Crito’s, inappropriate. It is retrospective, as opposed to preemptive and it undermines the legal infrastructure that acts as the ultimate safeguard of the citizen’s liberty.

Secondly, the Laws question whether Socrates would ‘flee from well-ordered cities and virtuous men’, a challenge is made as to whether ‘existence is worth having on these terms?’<sup>33</sup> The rhetorical question clearly indicates that the rule of the law with the potential for injustice is better than no law at all. Bolt similarly alludes to this philosophy in his historical play *A Man For All Seasons*. In Act One whilst Roper proclaims that he would ‘cut down every law in England’ to get after the devil, Sir Thomas More responds, ‘And when the last law was down, and the Devil turned on you, where would you hide, Roper, the laws all being flat?’<sup>34</sup> More clearly values the default safety inherent in the law’s existence over an equity-driven prioritization of selective justice. Making exceptions in the name of fairness is potentially more arbitrary than the universal application of arbitrary laws. Indeed, More concludes that he would ‘give the devil benefit of law, for my own safety’s sake.’<sup>35</sup> Dyzenhaus neatly summarises Hobbes’ own philosophy that ‘...peace and order, whatever its

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<sup>31</sup> Greenberg (n17) 61

<sup>32</sup> Greenberg (n17) 61

<sup>33</sup> Plato (n11)

<sup>34</sup> R Bolt, *A Man For All Seasons*, (Methuen Drama Modern Classics, London, 1995) 41-42

<sup>35</sup> Bolt (n34) 42

nature are preferable to chaos...'<sup>36</sup> It is debatable whether chaos would ensue in the absence of law but MacCormick validly notes that 'where law is faithfully observed, the rule of law obtains; and societies that live under the rule of law enjoy great benefits by comparison with those that do not', 'our life as humans in community with others is greatly enriched by it.'<sup>37</sup> Bolt neatly encapsulates the philosophy that the existence of bad law is arguably better than no law at all. Certainly any substantive inadequacy in the laws is reflective of a *politically deficient system* that has allowed bad governments to flourish, rather than the legal framework. However, governments are inevitably temporary reflecting the ebb and flow of political sentiment. The law, on the contrary, is a permanent institution that stabilizes society. The existence of bad law at least indicates that there is a legal foundation in place that can be utilized for good purposes.

Finally, the Laws allude to the 'unequal terms' of the implied contract between the Laws and the citizen.<sup>38</sup> The Laws aggressively rebuke the citizen: 'you are not on equal terms with us, nor can you think that you have a right to do to us what we are doing to you?'<sup>39</sup> The citizen is both child and slave to the Laws, thus the level of justice due to each party is unequal. The depiction of the citizen as slave to the state is evidently outdated. However, whilst the Laws' notion of *unequal justice* is fallacious, the allusion to *misdirected justice* is of significant importance in relation to a formal perception of the rule of law. Indeed, the Laws propose that by disobeying the law the citizen wrongs 'those whom you ought least to wrong'.<sup>40</sup> In particular, wronging 'us',

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<sup>36</sup> D Dyzenhaus, *Legality and Legitimacy*, Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar (Clarendon Press, Oxford 1997) 9

<sup>37</sup> N MacCormick "Rhetoric and the Rule of Law" in D Dyzenhaus (ed) *Recrafting the Rule of Law: the Limits of Legal Order* (Oxford, Hart Publishing, Portland Oregon 1999) 165-166

<sup>38</sup> Plato (n11)

<sup>39</sup> Plato (n11)

<sup>40</sup> Plato (n11)

the Laws, is unjust.<sup>41</sup> This relates to identifying culpability for unjust laws. A law against criminalising impiety and the corruption of youth is not innately unjust; it is legitimate. It is the *application* of this law to Socrates' own circumstances where the injustice arises. The Law is not self-enforcing; it is not responsible for its own application. It is the political actors that chose to unjustly misapply the law. The Laws allude to this reality by insisting that Socrates is the victim of "men" not of law. It is therefore wrong to blame the legal infrastructure, or in essence the rule of law, for the activities of political actors. If, then, Socrates was subject to a law composed of unjust content, rather than simply its unjust application, are the Laws responsible? Arguably not: It has already been ascertained from the process of personification that the Laws are independent living entities distinct from the legislators or political actors who dictate the content of legislation. In summary, the rule of unjust law does not indicate a flaw in the concept but the political system.

### **Socrates- Options?**

The conception of the rule of law in the *Crito* (where the law rules however unjust) is 'distinctly unappealing'.<sup>42</sup> The *Crito* exposes the reality that the rule of law is not necessarily a force for good, nor is it synonymous with connotations of justice and morality. Rather the rule of law represents an essential but potentially dangerous truth that the law has ultimate authority. In light of this, it is necessary to discuss how the citizen may defend its welfare without undermining the ultimate authority of the law. At a critical point the Laws give Socrates a choice: 'he must do what his city and his country order him; *or he must change their view of what is just.*'<sup>43</sup> It is this latter

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<sup>41</sup> Plato (n11)

<sup>42</sup> D Bostock, "The Interpretation of Plato's *Crito*" (1990) 35(1) *Phronesis* 1

<sup>43</sup> Plato (n11) (emphasis added)



“persuasive” option that is most striking.<sup>44</sup> Primarily, despite initial perceptions, it is not an alternative to submission. The *concept* of the rule of law is non-negotiable but the *quality* of the law that rules is. In changing *the Laws’* view of what is just it equally recognises their ultimate authority to retain the last say. Persuasion may be compartmentalized into three categories. Primarily, pre-emptive political action may inhibit the legalization of bad laws in the first place. This inevitably requires an efficient political system with the resources to enable active political citizenship. Second, if political pre-emption is ineffective (or comes too late), recourse must be had to the courts where the citizen may persuade the government to change the substantive content of the law. Alternatively, Valcke proposes a theory of civil disobedience that upholds the rule of law.<sup>45</sup> It reconciles an apolitical rule of law with a ‘feedback mechanism’ designed to encourage political participation and relieve, but not negate, legal submission.<sup>46</sup> What can be inferred from the “persuasive option” is that the rule of law is envisaged to operate within a politically efficient and legally sophisticated society. Indeed, it is a running argument within this thesis that the rule of law provides the foundation of a legal state. However, the rule of law alone is not enough. Political and legal infrastructure is required to provide an ideal constitutional landscape.

Socrates is given the option to ‘either obey the Laws or by persuasion to change their views of what is just.’<sup>47</sup> However, Greenberg rightly questions ‘how one goes about attempting to persuade a state or laws, particularly if one makes the distinction between men on the one hand and the state and the laws on the other.’<sup>48</sup> Indeed, the

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<sup>44</sup> See D Bostock (n42) 13

<sup>45</sup> C Valcke, “Civil Disobedience and the Rule of Law- A Lockean Insight” in I Shapiro (ed) *The Rule of Law* (New York and London, New York University Press, 1994)

<sup>46</sup> Valcke (n45) 54

<sup>47</sup> Greenberg (n17) 66

<sup>48</sup> Greenberg (n17) 66

Laws may be independent entities distinct from political actors, however they remain inanimate and incapable of persuasion. Thus, Greenberg concludes that ‘if the option means anything at all, persuasion must be directed not at laws but at people.’<sup>49</sup>

Evidently the object must be capable of being persuaded in the first place. Therefore, it is clear that persuasion must be directed at *the political actors or legislators* who operate in the political system; they are the only ones capable of being moved by rhetoric. However, it is unclear what this method of persuasion actually entails.

Rosano simply refers to persuasion as a ‘privilege’ as opposed to an ‘absolute right.’<sup>50</sup>

This is vague and unhelpful. However, whilst Weiss reduces the option to mere ‘fawning and flattering’, she does appear to presume that persuasion occurs through the *political* system as she contemplates how a citizen ‘ought to proceed in the Assembly to prevent unjust laws from being passed or to have already existing unjust laws repealed.’<sup>51</sup> She clearly envisages persuasion occurring in the *political* domain through *political* institutions such as the Assembly. Whilst Weiss suggests that the Laws do not ‘extol the virtues of the democracy in which citizens function regularly as persuaders’, Greenberg insists that the possibility of persuasion is ‘a mighty one’ and ‘to the extent that a society allows the centers of power to be approached by persuasion, to that extent such a society is praiseworthy.’<sup>52</sup> Greenberg here implicitly endorses persuasion as a *political* tactic by emphasizing its direction at the ‘centers of power’ rather than tempering legal authority. The level of persuasion exercised by an individual on the substantive content of the law is an indication of a state’s political health. What can be drawn from these interpretations is that *the rule of law is envisaged to co-exist alongside an effective and developed political system*. In this

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<sup>49</sup> Greenberg (n17) 66

<sup>50</sup> Rosano (n12) 470

<sup>51</sup> Weiss (n19) 105-107

<sup>52</sup> Weiss (n19) 107-108; Greenberg (n17) 80

sense, Socrates hinted at progressive political aspirations. The *Crito* reinforces the fact that the rule of an unjust law is not a legal but a *political* concern. Consequently, the rule of law is distinctly less unappealing. Failing pre-emption, persuasion in the legal courts may provide the necessary impetus to change the law. Of course, this requires a degree of legal sophistication, at a minimum: a court system, an experienced and independent judiciary and equal access to the courts. These are *not* definitive characteristics of the rule of law but they depict a political and legal landscape that would complement the rule of law and discourage the bad press inflicted on the ultra-thin model.

In the alternative, Valcke reconciles disobedience with the rule of law in a manner that may please Greenberg. At the core of both the *Crito* and Valcke's theory on civil disobedience and the rule of law is social contract theory. Valcke explicitly builds on this theory to encourage political activism. Indeed, Valcke interprets Locke's social contract as 'embodying a commitment on the part of all citizens to partake in the process of deciphering the law of nature, and on the part of the elected officials in turn to enforce the rules produced by this deciphering process.'<sup>53</sup> Thus, the interpretive part of the process is deemed a 'collective enterprise involving all citizens.'<sup>54</sup> Valcke argues that the citizens' 'duty to manifest their disapproval stems from the commitment they made in the social contract to contribute to the law-making process.'<sup>55</sup> We have seen that the *Crito* also encourages political activism and engagement with the political law-making process. Indeed, whilst the citizen is clearly depicted as a "slave" to the law, in contrast the Laws encourage the citizen to exert political fortitude by insinuating that the content of the law is open for discussion, though the law's authority is not. Valcke's lockean idealization of the social contract

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<sup>53</sup> Valcke (n45) 52

<sup>54</sup> Valcke (n45) 52

<sup>55</sup> Valcke (n45) 53

certainly echoes the contractual relations between the Laws and the citizen in the Crito.<sup>56</sup> Furthermore, this alternative of persuasion mirrors Valcke's inclusion of the citizen as a participant in the law-making process. Indeed, persuasion also acts as a healthy, political 'feed back mechanism' that simultaneously secures the rule of law.<sup>57</sup>

However, Valcke goes a step further by arguing that civil disobedience itself may act as a helpful 'feedback mechanism' that promotes the gradual improvement of the laws.<sup>58</sup> Certainly, Raz agrees that civil disobedience is essentially 'a political act, an attempt by the agent to change public policies.'<sup>59</sup> It is argued that whilst the Crito expressly condemns *legal* disobedience, it is not incompatible with the text to condone *political* disobedience. Valcke argues that if civil disobedience is performed 'in all willingness to bear whatever legal sanction comes with the offense, it is no challenge to the official's legislative authority.'<sup>60</sup> Whilst Raz is skeptical whether individuals engaged in civil disobedience should 'voluntarily submit to punishment', he encourages this position by suggesting that legal submission proves the 'purity of one's motives; a trial or a term in gaol may serve as a focal point for the mobilization of more opposition to the law or policy protested against, etc.'<sup>61</sup> In this sense, legal submission to punishment is politically effective. He further accepts that 'some writers have included submission to punishment in their definition of civil disobedience.'<sup>62</sup> Valcke argues that 'while disobeying, the citizens willingly undergo whatever penalty the officials have provided for the offense', therefore 'civil disobedience does not here constitute a challenge to the official's authority, and thus a

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<sup>56</sup> See J Locke *Second Treatise of Government* (ed) C B Macpherson (Indianapolis, Cambridge, Hackett Publishing Inc, 1980)

<sup>57</sup> Valcke (n45) 54

<sup>58</sup> Valcke (n45) 54

<sup>59</sup> Raz (n1) 278

<sup>60</sup> Valcke (n45) 54

<sup>61</sup> Raz (n1) 265

<sup>62</sup> Raz (n1) 265

violation of the rule of law'.<sup>63</sup> This is arguably a valuable way of improving the political content of a law without detracting from the law's ultimate authority. Civil disobedience may therefore legitimately act as a method of *persuasion*. In other words, accepting the supremacy of the law does not necessarily equate to a political ultimatum.

Valcke's theory is compatible with the *Crito*; her advocacy of political disobedience does not temper the law's ultimate authority. It is a challenge to the content of the law, not to its authority. Indeed, a citizen may disobey the content of legislation but nevertheless accept the consequential legal sanctions. In both, the political legitimacy of a law is an independent issue from the ultimate legal authority of the law. It is then the act of *legal conformity* that upholds the law's ultimate authority; the moral or political quality of the obedience is superfluous to the act itself. In light of this, *civil disobedience may be an unconventional way of submitting to legal sanctions*. However, it simultaneously expresses a point of view that may be persuasive in the eyes of political actors and legislators. Rev Martin Luther King argued that 'to accept passively an unjust system is to cooperate with that system... non-cooperation with evil is as much a moral obligation as is cooperation with good.'<sup>64</sup> The *Crito* does not envisage passive citizenship. However, an effective political and legal system must be in place to enable participation and dialogue. Alternatively, by dissecting the distinctive aspects of "obedience" it is arguably possible both to satisfy moral conscience and uphold the rule of an unjust law. In other words, it is possible both to submit to the authority of law and challenge its political legitimacy. Valcke's theory is then academically pleasing. The precise dissection of law and politics results in a neat reconciliation of the rule of law and

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<sup>63</sup> Valcke (n45) 58

<sup>64</sup> Martin Luther King Jr, *Stride Toward Freedom*; see M L King, "Loving Your Enemies" Sermon delivered at Dexter Avenue Baptist Church, Montgomery, Alabama (17 November 1957)

civil disobedience. However, beyond the academic domain, the result is still unsatisfactory. The model citizen, similar to Socrates, is entitled to disobey the law in the face of injustice so long as he accepts the penalty for doing so.

Socrates was a philosopher making a point about the rule of law. The point is that the rule of law is necessary but it is not necessarily fair. It is this reality that drives this thesis. Indeed, ‘Developing the rule of law does not ensure that the law or legal system is good or deserves obedience’, it is a ‘necessary but not sufficient condition for a fair and just legal system.’<sup>65</sup> The reality is that the rule of law is not immune from the ‘passion’ of men.<sup>66</sup> The law is independent of politics; however, it is always susceptible to abuse by those in power. Therefore, it is essential to cultivate the political and legal avenues to ensure that the law is utilized for the correct purposes. In the *Crito* The Laws invite the citizen to submit or change their view of what is just. Thus it appears to envisage an open discussion between the citizen and the state about the content and purpose of the law. In order to facilitate such dialogue, the appropriate constitutional forum needs to be in place. In particular political accountability mechanisms need to be adopted to pre-empt the creation of unjust law and sophisticated legal infrastructure needs to be constructed, including an experienced and independent judiciary, to challenge those laws that manage to slip through the political net. The rule of law is not an ideal but with a little persuasion it could contribute to an ideal state of affairs.

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<sup>65</sup> B Tamanaha, “A Concise Guide to the Rule of Law” in G Palombella & N Walker (eds) *Relocating the Rule of Law* (Oxford and Portland, Oregon 2009) 14

<sup>66</sup> Aristotle, *Politics*, Book III, 1286, p78

## **The rule of the law**

Raz states that “(t)he rule of law” means literally what it says: the rule of the law.<sup>67</sup> The pedant would point out that the additional lexeme (“the”) supplies new meaning. However, literalism does not seek a mirror image but an interpretation faithful to the plain meaning of the text.<sup>68</sup> The concept, literally interpreted, states that the law *rules*. It does not indicate why, nor does it supply conditions of the law’s supremacy; it simply states that the law rules. This thesis therefore supports an ultra-thin understanding of the rule of law. The rule of law is not a measure of how *efficient* a law or indeed a legal system is; it reflects a choice to use law as the authoritative mechanism of organizing a state. The “rule of law” is thus inherently *descriptive* of a process by which the law is supreme, the automatic consequence of this is an explicit demand of neither more, nor less, than legality. The demand of legality may vary in scope depending on one’s view of the nature of law. For instance, “legality” to some may necessarily impose moral conditions.<sup>69</sup> This thesis lends support to the opposing legal positivist distinction between law and morality. The question “what is law?” is not essential to the question “what is the rule of law?” Indeed, the latter describes the law’s supremacy, not its quality. However, it is useful in terms of understanding the legal and political consequences of the law’s rule when the law is understood as a legal positivist phenomenon; the Law, amoral in nature, is supreme. It is a description of a process by which the law rules; it does not prescribe desirable political conditions. It indicates the legality of a state, not its political adequacy. The rule of law is then not a political ideal; it is not a litmus to indicate how “just” a regime is, nor does it indicate whether formal standards of procedure are met.

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<sup>67</sup> Raz (n1) 212

<sup>68</sup> See *R v Harris* (1836) 7 C&P 446, *Fisher v Bell* (1961) 1 QB 394

<sup>69</sup> See L Fuller, *The Morality of Law* (Yale University, 1964)

Raz similarly argues that the rule of law places no constraints on the substantive content of the law; it is not synonymous with ‘the rule of the good law’.<sup>70</sup> In this limited sense it is legitimate to adopt Raz’s definition of the rule of law as simply “the rule of the law”. It boasts an appealing literalism that awards the definition clarity. However, it is questionable how consistent Raz’s ‘basic idea’ of the rule of law is with his own initial definition.<sup>71</sup> Raz differentiates between ‘the rule of the law’ ‘in its broadest sense’ which he states means that ‘people should obey the law and be ruled by it’ and its ‘narrower’ meaning in political and legal theory which proposes that ‘government shall be ruled by the law and subject to it.’<sup>72</sup> Whilst the former prioritises *legal obedience*, the latter is specifically concerned with the *legal conformity* of the executive. It is the former that in Raz’s opinion provides the ‘basic idea’ of the rule of law.<sup>73</sup> In order to obey the law, a person must have a necessary minimum knowledge of it. Therefore, ‘if the law is to be obeyed *it must be capable of guiding the behavior of its subjects*. It must be such that they can find out what it is and act on it.’<sup>74</sup> The concept thus adopts a more particularized meaning: the rule of *only that law which is capable of being obeyed*. Various principles ‘can be derived from this one basic idea’ that the law must be capable of guiding its subjects.<sup>75</sup> For example, the laws must be clear, open, prospective and stable; the independence of the judiciary must be guaranteed and natural justice must be observed. This thesis argues that the rule of law is based on *legal conformity* rather than *legal obedience*; the former is more conducive to the ultra-thin model. Raz explains that ‘a person

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<sup>70</sup> J Raz “The Rule of Law and its Virtue” in R L Cunningham (ed) *Liberty and the Rule of Law* (eds) (Texas A&M University Press, College Station and London, 1979) 4

<sup>71</sup> Raz (n1) 214

<sup>72</sup> Raz (n1) 212

<sup>73</sup> Raz (n70) 5

<sup>74</sup> Raz (n1) 213

<sup>75</sup> Raz (n1) 214



conforms to the law to the extent that he does not break the law'.<sup>76</sup> For the lawyer 'anything is the law if it meets the conditions of validity laid down in the system's rules of recognition or in other rules of the system.'<sup>77</sup> Therefore, from this perspective, the "rule of the law" means simply *the rule of valid law*. It will be further argued in chapter two that this notion of legal conformity should not be conditional upon the entity being monitored: the individual or the state. Raz suggests that both are ruled by the law; however, whilst the people *obey* the law, the government must be *subject* to it. It is necessary to dispel this positive discrimination to do justice to the universality principle inherent in the concept of "the rule of the law".

A law that is clear, prospective and public may well be unjust. The rule of law is agnostic towards the substantive value of the law; it does not discriminate between the type of law that rules. In this sense Raz validly claims that the rule of law 'is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or the dignity of man.'<sup>78</sup> To this extent the formal and ultra-thin concepts overlap. Indeed, the rule of law is a 'necessary but not sufficient condition for a fair and just legal system'.<sup>79</sup> It imposes a requirement that the government's actions are legal but not necessarily just. Certainly then the rule of law 'is just one of the virtues which a legal system may possess and by which it is to be judged.'<sup>80</sup> Legality is an essential component of a regime and a *defining legal feature*. However, beyond legalism lie other political elements that assist in characterizing a regime. To this extent Raz correctly identifies the fallacious 'assumption of its overriding importance'; the rule of law is only useful in indicating

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<sup>76</sup> Raz (n1) 213

<sup>77</sup> Raz (n1) 213

<sup>78</sup> Raz (n1) 211

<sup>79</sup> Tamanaha (n65)

<sup>80</sup> Raz (n1) 211

the legality of a regime, rather than its political or moral achievements.<sup>81</sup> He validly notes that ‘a non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law... It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.’<sup>82</sup> Here Raz appears to agree that it is the “legality” of the system that satisfies conformity to the rule of law. However, it will be argued that this becomes problematic when Raz inadvertently hints that the *capacity to guide is in itself a condition of legality* which inevitably results in the uncertain scenario whereby rule of law (and indeed legality) is a ‘political ideal which a political system may possess to a greater or lesser degree.’<sup>83</sup> It is argued that there are no degrees of legality; either something is legal or it is not. This is dictated by social fact rather than political values. Raz’s formal conception of the rule of law sits uneasily with Raz’s exclusive positivism.

Furthermore, Raz’s reconciliation of the rule of law with an unjust legal regime adheres to an ultra-thin concept but is arguably inconsistent with his formal theory. It will be argued that Raz’s formal depiction of the rule of law promotes a degree of ‘political morality’ through its pursuit of procedural fairness.<sup>84</sup> Indeed, the basic idea that inheres in Raz’s conception of the rule of law is this capacity to guide which surely interacts with human rights, equality and ultimately demonstrates a respect for persons. Whilst Raz purports to discourage the rule of law’s misguided synonymy with the rule of good law, one will discuss how his alternative proposal displays a political morality inherent in the formal requirements of *procedural* justice.

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<sup>81</sup> Raz (n1) 211

<sup>82</sup> Raz (n1) 211

<sup>83</sup> Raz (n1) 211

<sup>84</sup> Synpnowich (n3) 193

The rule of *efficient* law is not necessarily a moral but it is a political ideal that strives to preserve “good” law. A system that conforms to a ‘political ideal’ (as Raz himself labels the rule of law) is surely substantially less wicked.<sup>85</sup> Therefore, an element of inconsistency pervades Raz’s understanding of the rule of law. Thus in relation to the moralization of the rule of law, Raz firmly bolts the front door but leaves the backdoor discreetly ajar. It is thus important to distinguish between Raz’s formal conceptualization of the rule of law and the ultra-thin definition pursued in this thesis. It is necessary to dissect Raz’s theory in order to justify one’s further political reduction of the rule of law from a formal political ideal to an ultra-thin legal concept.

It may seem rash even to dismiss Raz’s formal conception of the rule of law. It inevitably prompts the challenge: What are we left with? The distinguishing factor of Raz’s formal definition is that he requires the law to be capable of guiding behavior; this is the defining and distinctive “political” feature of Raz’s theory. Raz insists that these minimum principles that derive from his basic idea are necessary to prevent the rule of law from becoming an ‘empty tautology’.<sup>86</sup> However, what is suggested is that Raz’s definition is in itself inherently political and thus differs from the more substantive conceptions of the rule of law only in degree not kind. What distinguishes the ultra-thin concept is that it is a form of legal mechanics. It is not a political ideal.

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<sup>85</sup> Raz (n1) 211

<sup>86</sup> Raz (n70) 5-6

## **The dangers of politics**

In order to retain its conceptual identity it is essential that the rule of law has no political content. This immediately begs the question as to what content classifies as “political”. Ironically, the inability to accurately answer this question defines the nature of politics. Political norms have contestable meanings; this indeterminacy invites conflict. Hampshire argues that the ‘normality of conflict’ in the political domain requires a ‘kind of moral conversion...a new way of looking at all virtues, including the virtue of justice.’<sup>87</sup> This new perspective realizes that ‘there will always be a plurality of different and incompatible conceptions of the good’, it thus negates the existence of a ‘single comprehensive and consistent theory of human virtue.’<sup>88</sup> Political virtues are both a consequence and a source of conflict: They have inevitably prevailed as ‘rejections of their rivals’ but are equally subject to competing claims; ‘all modern societies are, to a greater or lesser degree, morally mixed with rival conceptions of justice, conservative and radical, flaring into open conflict and needing arbitration’.<sup>89</sup> Using Hampshire’s theory as a template, if the rule of law is deemed to embody *a single conception* of “justice” and “fairness” it is reduced to another competing claim, condemned to the fate of any other political virtue within a pluralistic society; it may prevail but it will inevitably be overridden. As a constitutional ultimatum, by its very nature, the rule of law must not be overridden. On the other hand, if it is perceived as embodying the current *prevailing conception* of justice identifying what the rule of law *is* becomes a futile task because it naturally becomes a matter of conflict. It becomes a template for subjective notions of justice. This is because, ‘Justice and fairness in substantial matters...will always vary with

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<sup>87</sup> S Hampshire, *Justice is Conflict: The Soul and the City* (The Tanner Lectures on Human Values, Harvard University, Oct 30-31 1996) 163

<sup>88</sup> Hampshire (n87) 164

<sup>89</sup> Hampshire (n87) 164 & 162

varying moral outlooks and with varying conceptions of the good.’<sup>90</sup> This is not to say that conflict is the ‘sign of a vice, or a defect, or a malfunctioning’, it is simply stating that politics is necessarily a matter of conflict and the rule of law is necessarily not.<sup>91</sup> If the rule of law is to have any practical purpose it must be known. It must not become acclimatized to the ‘antagonistic pluralism’ that commands political territory.<sup>92</sup> What qualifies as “political” covers anything deemed arguable in character.<sup>93</sup> Politics invites an impractical intangibility that jeopardises the rule of law’s function as a determinate legal threshold. Raz warns that when a political ideal ‘captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated.’<sup>94</sup> Politicizing the rule of law sets the precedent for its further infiltration by intangible political ideals. The rule of law is defunct if no one can agree on what it is.

Ironically, it is the politicization of the rule of law that empties the concept of any value as a force for good. We have observed that what is “moral” or “just” is a matter of conflict. ‘Whatever a person’s moral outlook and conception of the good, and whatever his beliefs about issues of substantial justice, he knows that he will sometimes clash with others who make contrary judgments...he will find himself to some extent constrained by certain nearly universal habits of argumentative behavior...’<sup>95</sup> By “bulking” out the rule of law with political concepts, it loses objective value. Indeed, if all the rule of law demands is legal conformity, the limit it imposes on the government may be limited (or at worst formal) but it is at least

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<sup>90</sup> Hampshire (n87) 148

<sup>91</sup> Hampshire (n87) 163

<sup>92</sup> Loughlin M, *Swords and Scales, An Examination of the Relationship between Law and Politics* (Oxford, Hart Publishing, 2000) 123

<sup>93</sup> See N MacCormick “Rhetoric and the Rule of Law” in D Dyzenhaus (ed) *Recrafting the Rule of Law: the limits of legal order* (Oxford, Portland, Oregon 2009) Especially see note on how law itself may be political.

<sup>94</sup> Raz (n1) 210

<sup>95</sup> Hampshire (n87) 161

tangible. Equally, if the rule of law can only ever indicate the legality of a regime it provides only a limited resource to a government seeking to establish a wicked regime. In this sense, the rule of law is pre-emptive. It disarms a government from utilizing the rule of law as a legitimating factor. It may *excuse* a regime in terms of legality but it can never *justify* a regime in the language of morality. This is because the rule of law is ‘agnostic’ towards politics and morality.<sup>96</sup> Indeed, ‘(r)espect for a process can, as a matter of habit, coexist with the detestation of the outcome of the process...’<sup>97</sup> Appreciating the rule of law as a process allows one to both appreciate the efficiency of its operation and condemn a possible immoral outcome. If the rule of law is saturated with political ideals, a government may defend their regime in the name of the rule of law by simply asserting what they perceive as just or moral. What limited constraint the rule of law did impose in terms of legality is lost. To the extent that the Nazi regime was legal, it was in conformity with the rule of law. However, equally, this legal stamp of approval does not disable any form of moral disapproval. However, the danger of the rule of law’s politicization is heightened in light of what Bentham termed ‘obsequious quietism’.<sup>98</sup> Dyzenhaus neatly summarises this as the ‘danger that the existing law may supplant morality as a final test of conduct and so escape criticism.’<sup>99</sup> Similarly, if a government pays lip service to the rule of law that is presumed to epitomise notions of justice then this discourages citizens to challenge the government on moral grounds. Reducing morality to an offset of legal validity discourages challenges to be made on independent moral grounds. In other words,

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<sup>96</sup> S J Shapiro, *Legality* (Cambridge, Massachusetts, London, England, The Belknap Press of Harvard University Press, 2011) 214

<sup>97</sup> Hampshire (n87) 170

<sup>98</sup> J Bentham, *A Fragment on Government* (ed) J H Burns and H L A Hart (London, 1977) 498

<sup>99</sup> D Dyzenhaus, S R Moreau & A Ripstein (eds) *Law and Morality, Readings in Legal Philosophy* (3<sup>rd</sup> edn, University of Toronto Press Incorporated 2007, Toronto, Buffalo, London, Printed in Canada) 29

they will ‘unthinkingly obey bad laws instead of doing what Bentham thinks to be morally required- criticizing the law with a view to its reform.’<sup>100</sup>

‘We cannot escape the need for an explicit conception of the rule of law’ - to this extent most agree.<sup>101</sup> Indeed, as the ‘preeminent legitimating political ideal in the world today’ it is essential that we secure ‘...agreement on precisely what it means’.<sup>102</sup> Tamanaha’s analogy of the rule of law as ‘the notion of the “good”’ usefully captures the idea that the rule of law is largely considered to positively contribute to civilization; as an authoritative rule-making system law provides structure and stability.<sup>103</sup> It is in this *purely legal capacity* that the rule of law should be deemed ‘essential’ but this does not necessarily translate to an understanding that it is ‘good for everyone’; this overarching claim jeopardises its agnosticism towards “good” government.<sup>104</sup> The rule of law has been interpreted as incorporating ‘protection of individual rights’, others contend that ‘democracy is part of the rule of law’ whilst others still interpret the rule of law as ‘purely formal in nature’.<sup>105</sup> Its multi-faceted character is not indicative of an inherent ideological complexity; rather it reflects a misplaced insulation of the debate about what is “good for everyone”. It is ‘thanks to ideological abuse and general over-use’ that the rule of law has been emptied; what remains is a ‘meaningless’ notion.<sup>106</sup>

Under my understanding, a commitment to the rule of law is at least a claim to legality, rather than an empty promise of “good” government. A commitment to establishing the rule of law is reduced to a catch phrase; a government is relieved of

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<sup>100</sup> D Dyzenhaus, *Hard Cases in Wicked Legal Systems, Pathologies of Legality* (2<sup>nd</sup> edn, Oxford, Oxford University Press, 2010) 5

<sup>101</sup> T R S Allan, *Law, Liberty and Justice. The Legal Foundations of British Constitutionalism* (Clarendon Press, Oxford 1993) 9. Cf W. Blackburn, “Dicey and the Teaching of Public Law” (1985) PL 679

<sup>102</sup> B Z Tamanaha, *On the Rule of Law, History, Politics and Theory* (Cambridge, CUP 2004) 4

<sup>103</sup> Tamanaha (n102) 3

<sup>104</sup> Tamanaha (n102) 1-3

<sup>105</sup> Tamanaha (n102) 3

<sup>106</sup> T Carothers, “The rule of law revival” (1998) 77 Foreign Affairs 95

identifying the policies behind establishing “the rule of law” because it is generally seen as a good thing. This argument draws parallels with Bentham’s positivist argument against “obsequious quietism”; that merging law and morality disarms moral scrutiny.<sup>107</sup> Furthermore, the politicization of the rule of law may detrimentally impact the quality of legal judgments. Already there are instances of judges paying lip service to an ideal without fully explaining (or indeed realizing) what it is they are endorsing; in particular it has been romanticized as the ‘ultimate controlling factor’ of the constitution but it is unclear what this actually means and entails.<sup>108</sup> Inadequate precedent is dangerous for two reasons: First, it provides the judiciary with a scapegoat to avoid proper reasoning; second, the sheer scope of the political meaning of the rule of law as a ‘method with the perceived potential to tackle problems ranging from poverty to conflict to corruption to lack of human rights’ has the potential to inadvertently politically affiliate the judiciary.<sup>109</sup> Raz argues that if the rule of law is ‘the rule of good law then to explain its nature is to propound a complete social philosophy’ and it ‘lacks any useful function’.<sup>110</sup> However, the fear is that it becomes useful for the wrong purposes whether in the form of political deception or judicial laziness. Furthermore, on the international stage, exporting the rule of law becomes inherently more difficult if it is simply reduced to a matter of converting others to the belief that ‘good shall triumph’.<sup>111</sup>

By insisting that conflict is the ‘proper domain of politics’, Hampshire assumes the existence of such a “domain” whereby politics can exist as an independent and insular entity in which conflict is a normal and defining characteristic.<sup>112</sup> Thus

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<sup>107</sup> Bentham (n98) 498

<sup>108</sup> See Lord Hope in *R(on the application of Jackson) v Attorney General* [2005] UKHL 56, par 126

<sup>109</sup> R Coniglio, *Methods of Judicial Decision-making and the rule of law: the case of apartheid South Africa* (2012) 30 Boston University International Law Journal 497, 498

<sup>110</sup> Raz (n70) 4

<sup>111</sup> Raz (n1) 211

<sup>112</sup> Hampshire (n87) 165



isolating the rule of law from the ‘normality of conflict’ is not superficial; it simply situates the rule of law in an alternative *legal* domain. This insistence that the rule of law is a legal rather than a political phenomenon fundamentally assumes that there is a distinction between the two; Cerar supports this distinction as both ‘necessary and indispensable’.<sup>113</sup> It is certainly essential to an appreciation of the ultra-thin model on two levels: the beneficial interaction between legal authority and political power is vital to the effective operation of the ultra-thin model and the distinction between law and politics is essential to its conceptual lucidity. Law and politics *interact* but they do not *react*. The difference is equivalent to that between a mixture and a compound in chemistry. With the former, the two elements mix but do not combine chemically; they retain their integrity as distinct components of a mixture. The difference may appear negligible to the naked eye but this illusion should not deny its existence. The British Constitution is similarly heterogeneous. Law and politics interact to the extent that it is difficult to decipher where law ends and politics begins. On a practical level it is not always necessary to delineate the parameter. However, in conceptualizing the rule of law it is essential to recognize that the law is concerned with authority and politics with power.

Allan contends that the ‘stark separation of legal rule from political principle...is ultimately incoherent.’<sup>114</sup> He grounds this prognosis in the theory of ‘unbounded legislative supremacy’ that, he argues, is ‘unlimited not merely as a matter of practical politics but even as a matter of legal principle.’<sup>115</sup> However, it is exactly Dicey’s theory of parliamentary sovereignty that neatly clarifies the distinction between legal authority and political power. Dicey in *The Law of the Constitution* states that

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<sup>113</sup> Cerar Dr Miro, “Relationship between Law and Politics” (2009) 15(1) *Annual survey of International and Comparative Law*, Article 3) 2

<sup>114</sup> Allan (n101) 2

<sup>115</sup> Allan (n101) 1

Parliament has ‘the right to make or unmake any law whatever’.<sup>116</sup> Parliament’s ability to legislate freely is presented purely in terms of “right” he explicitly denies that this right is equivalent to ‘unrestricted power’.<sup>117</sup> He thus clearly recognizes a distinction. Parliament has the legal right to make any law but whether it will do so is inevitably dictated by political factors. However, Dicey’s distinction between law and politics should not be misconstrued in terms of theory and practice. Elliott points to the incoherent ‘gap’ between ‘the theory of unlimited legislative authority and the political reality which in practice constrains the exercise of that power.’<sup>118</sup> He therefore suggests that there is a ‘divergence between what is theoretically possible and what is actually possible.’<sup>119</sup> In theory Parliament can legislate freely but in practice it cannot. This is wrong. Dicey captures the political reality of the legislature’s restricted power within his definition. Both in theory and in practice there exists a very real distinction between what Parliament has the legal right to do and what political conditions will allow it to do. Dicey does not paper over the “gap”; he accepts it as a political reality. This does not mean that legal right exists in theory alone- Parliament’s unlimited legal authority is just as much a political reality as its restricted power. Authority and power are simply distinct standards of measurement- the former measures an entity’s right to act, the latter its capacity to do so.

The tendency to deprive legal authority of practical force derives from this uncertainty over what authority actually is. Authority is an unknown quantity; it is both ‘numbingly familiar’ and a ‘daunting mystery’, ‘at once indispensable but also

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<sup>116</sup> A V Dicey, *An Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> edition, London, Macmillan Press Ltd, 1959) 39-40

<sup>117</sup> Dicey (n116) 71

<sup>118</sup> M Elliott, “Parliamentary sovereignty and the new constitutional order: Legislative freedom, political reality and convention” (2002) 22(3) *Legal Studies* 340, 341

<sup>119</sup> Elliott (n118) 341

elusive.’<sup>120</sup> However, Arendt insists that ‘authority has vanished from the modern world...Practically as well as theoretically, we are no longer in a position to know what authority really *is*.’<sup>121</sup> A lack of understanding cannot simply eradicate its existence. Hart’s certainly assists us in deducing what authority is *not*; authority is not power. Hart understands obligation and authority as ‘correlative concepts- different sides of the same coin.’<sup>122</sup> This is epitomized in his analogy to a gunman who orders you to give him your money or be killed.<sup>123</sup> Smith explains, ‘you might say that you were “obliged” to give the gunman your money, but you surely would not say that you hold an obligation or a “duty” to pay him anything.’<sup>124</sup> Smith thus concludes that “the power to coerce conduct in *that* way just isn’t what we understand “authority” to be”.<sup>125</sup> ‘We have a conception of what authority is- or at least a dim or inchoate notion- and the gunman’s power to coerce just doesn’t fit within that conception. Or what the gunman possesses (power to coerce) just isn’t what authority *is*.’<sup>126</sup> Thus there is a distinction between feeling obliged to act and having an obligation to do so, between power and authority, between politics and the law. This is a logical distinction that resides in Dicey’s theory on sovereignty. No amount of political cohesion can mutate into a form of legal authority, the difference is in kind, not degree.

Smith further identifies the ‘undeniable fact that...people surely do *talk about* authority; and they routinely make (or reject) claims and ascriptions of authority with

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<sup>120</sup> S D Smith, “Hart’s Onion: The Peeling away of Legal Authority” (October 2006) *Legal Studies Research Paper Series*, Research paper No. 07-68, 1

<sup>121</sup> H Arendt, “What was Authority?” in *Authority: Nomos I* (ed) Carl J Friedrich (Cambridge, Harvard University Press, 1958) 81, 81-2

<sup>122</sup> Smith (n120) 9

<sup>123</sup> see H L A Hart, *The Concept of Law* (2<sup>nd</sup> edn, Oxford, Oxford University Press, 1994)

<sup>124</sup> Smith (n120) 9

<sup>125</sup> Smith (n120) 10

<sup>126</sup> Smith (n120) 10-11

respect to various institutions and legal regimes.’<sup>127</sup> Indeed, people don’t merely *talk about* authority but act on the resolute assumption that it must exist. The “gap” between unlimited authority and restricted power is not one between theory and practice but it *in itself a political reality* and is arguably becoming more pronounced in the constitutional system. For example, section 4(2) of the Human Rights Act 1998<sup>128</sup> enables judges to declare domestic legislation incompatible with Convention rights. It encapsulates the dichotomy of Parliament’s unlimited authority and unrestricted power. To revert back to Hart’s example, section 4(2) equips the judiciary with a *power to coerce*; a declaration politically *obliges* Parliament to repeal legislation but there is no *obligation* for it to do so. Section 4(2) respects the very real differentiation between Parliament’s unlimited legal authority and restricted power. Just because an act is “unthinkable” it does not mean that it is not possible.<sup>129</sup> In fact, the very exercise of contemplating its likely occurrence confirms its feasibility. One would suspect that the Anti-Terrorism Crime and Security Act 2001, which severely inhibited the rights of non-UK suspected terrorists, would fall into this unthinkable category.<sup>130</sup> Equally, the Asylum and Immigration Act 1996 created an immigrant’s welfare scheme that ‘no civilized nation can tolerate’.<sup>131</sup> Elliott diverts this challenge by suggesting that these ‘substantial inroads into fundamental rights’ ‘fall short of being utterly extreme’.<sup>132</sup> This exercise in subjectivity fails to strengthen his argument. The “unthinkability” of legislation reduces the *likelihood* but not the *possibility* of enactment; it has no effect on Parliament’s “right”, to steal Dicey’s phraseology, to do

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<sup>127</sup> Smith (n120) 43

<sup>128</sup> Human Rights Act 1998, s4(2)

<sup>129</sup> Lord Woolf, ‘Droit Public- English Style’ (1995) PL 57-58

<sup>130</sup> Anti-Terrorism Crime and Security Act 2001, s23

<sup>131</sup> *R v Secretary of State for Social Secretary ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 at 292; see also *The Telegraph*, “The ‘unthinkable’ is coming true” (04 March 2004)

<sup>132</sup> Elliott (n118) 345

so. Legal authority is both very real and arguably very dangerous; the institution in possession of it requires political management.

The ultra-thin model draws on this distinction between authority and power. The law is a source of authority that is utilized by the state. This authority has been utilized to achieve the unthinkable. Hitler did it; the Nazi regime was indescribably horrific but it was authorized in law. History is dotted with examples of legal authority being abused. However, the fault here is not with the source of authority but the political entities using it and the political landscape which has enabled this circumstance to come about. Unjust legal regimes are politically, not legally, flawed. The deficit therefore lies in their political legitimacy not legal authority. The rule of law is a dangerous legal phenomenon, as a man-made entity it is at the mercy of its creator. It is necessary to configure the political conditions to ensure that the rule of law is a good thing. It is important to dilute any concentration of both authority and power in one given institution. A substantial degree of political coercion must remain at the will of the demos; the aim of political accountability is not to combat or qualify the source of authority but to coerce its users into responsible government. Ultimately Valcke's theory of civil disobedience has the same objective. The ultra-thin model is conducive to the ongoing interaction between law and politics. The rule of law does not deny the possibility, nor the independent value, of political persuasion. Conventional perceptions of the rule of law artificially amalgamate law and politics within the parameter of one entity; this dilutes its conceptual clarity and discards with a valuable autonomy between authority and power. 'Majority rule by itself, and legality on its own, are insufficient to guarantee a civil and just society' but together we have the makings of a beneficial constitutional formula.<sup>133</sup>

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<sup>133</sup> Lord Steyn "Democracy, the rule of law and the role of judges" (2006) EHLR 243, 246

## **Raz's formal requirements**

Kelsen's paradigm legal positivist philosophy that 'any content whatsoever can be legal' arguably does not sit comfortably with Raz's formal theory.<sup>134</sup> It is inherently unclear whether Raz classifies the rule of law as a measure of the law's *efficiency* or its *validity*. On one hand, Raz stresses that the rule of law is simply a 'specific virtue' of the law; it is a 'virtue of efficiency' and is thus 'morally neutral.'<sup>135</sup> From this perspective, a discrepancy from the rule of law results in a *less efficient law*. The result is a legal deficiency rather than an invalid law. Indeed, 'an object is a deficient knife if it can cut, but cuts badly because it is blunt.'<sup>136</sup> A blunt knife is a deficient knife, but it is a knife all the same.<sup>137</sup> From this perspective, Raz reinforces legal positivist thinking by ensuring that legal validity is established 'by showing that it conforms to tests of validity laid down by some other rules of the system which can be called rules of recognition'.<sup>138</sup> The law is a 'social fact' because 'all laws have a source. The validity of every law is conditional on the existence of certain facts' i.e. an Act of Parliament.<sup>139</sup> Conformity to the rule of law, on the other hand, 'is essential for securing whatever purposes the law is designed to achieve.'<sup>140</sup> It is thus focused on efficiency rather than validity.

However, this stance is complicated by Raz's later remark that 'the law to be law must be capable of guiding behavior, however inefficiently.'<sup>141</sup> He downplays 'the extent to which generality, clarity, prospectivity, etc., are essential to the law' as

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<sup>134</sup> H Kelsen, *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre of Pure Theory of Law* (trans and eds) B Litschewski-Paulson and S L Paulson (Oxford, 1992) 56-7

<sup>135</sup> Raz (n1) 226

<sup>136</sup> A Fagan, "Delivering Positivism from Evil" in D Dyzenhaus (ed) *Recrafting the Rule of Law: the Limits of Legal Order* (Oxford, Portland, Oregon, Hart Publishing, 1999) 109

<sup>137</sup> See also S J Shapiro, *Legality* (Cambridge, Massachusetts, London, England, The Belknap Press of Harvard University Press, 2011) 391

<sup>138</sup> Raz (n1) 150-151

<sup>139</sup> Raz (n1) 152

<sup>140</sup> Raz (n1) 224

<sup>141</sup> Raz (n1) 226

‘minimal.’<sup>142</sup> However, they are portrayed as essential all the same. Raz notes that as with other ‘tools, machines, and instruments a thing is not of the kind unless it has some ability to perform its function. A knife is not a knife unless it has some ability to cut.’<sup>143</sup> Arguably, this dramatically transforms the ‘basic idea’ from a ‘specific virtue’ of law to a qualifying condition of legal validity: In order to qualify as law, the law must be capable of guiding behavior.<sup>144</sup> The capacity to guide is in itself a mark of efficiency. This exposes the additional dynamics of a functional definition. Raz superimposes a minimum level of efficiency as a qualifying requirement for legal validity. This insinuates that a blunt knife is *not* a knife if it cannot cut: ‘A knife’s function is to cut. Thus an object is not a knife if it cannot cut at all.’<sup>145</sup> This is because its function dictates its definition. Thus, a knife may cut with varying degrees of efficiency and still constitute a knife. However, it only qualifies as such once it has met a minimum threshold of efficiency in the first place: the ability to cut (or as it were the capacity to guide). Raz’s analogy is a double-edged sword. To qualify as law it must be functionally capable of guiding behavior. Raz’s “basic idea” contradicts his legal positivist intentions because it supersedes the understanding of legal validity as a social fact. It will be further argued that this efficiency target is not ‘morally neutral’, as Raz would claim.<sup>146</sup> It is certainly agnostic towards the moral ends for which the law is used; however, his basic idea has a moral aim; it displays a respect for ‘human dignity’ that ‘entails treating humans as persons capable of planning and plotting their future.’<sup>147</sup> However, this is not simply an anomaly in otherwise legal positivist thinking. Raz upgrades the rule of law from a ‘specific virtue’ of law to its ‘specific

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<sup>142</sup> Raz (n1) 223-224

<sup>143</sup> Raz (n1) 226

<sup>144</sup> Raz (n1) 226

<sup>145</sup> Fagan (n136) 109

<sup>146</sup> Raz (n1) 226

<sup>147</sup> Raz (n1) 221

excellence' to the extent that 'conformity to the rule of law is the virtue of law in itself.'<sup>148</sup> He further contends that it is 'of the essence of law to guide behavior'.<sup>149</sup> This points to the fact that the law's capacity to guide is a defining political, and possibly moral, characteristic of the law; it is an existential condition of legal validity.

McIlwain praises Raz for successfully distinguishing between 'a conceptual definition of the rule of law, and any definitions which pick up on political preferences over the *contents* of the law and translate them into conceptual requirements of the rule of law.' However, it is difficult to see how this is the case. Certainly Raz does not enumerate political preferences over the *substantive* content of the law in the conventional sense. However, he equally denies that his formal theory is 'devoid of content', insisting that this is in fact 'far from the truth.'<sup>150</sup> As evidence of this he cites 'requirements which were associated with the rule of law' which 'can be derived from this one basic idea.'<sup>151</sup> The mere "association" between these requirements and the rule of law suggests Raz is keen to deny their conceptual status. However, these requirements relating to the formal content of law, for example, that laws should be 'prospective, open, and clear' or 'relatively stable' do not simply complement his basic idea but are inextricably wound up with the law's capacity to guide.<sup>152</sup> Raz, however, suggests they merely 'illustrate the power and fruitfulness of the formal conception of the rule of law'; 'they directly concern the system and method of government in matters directly relevant to the rule of law.'<sup>153</sup> However, a citizen cannot be guided by a secret or retrospective law; in order to *guide* a law must be 'prospective, open and clear'.<sup>154</sup> Thus, these requirements are definitive conceptual

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<sup>148</sup> Raz (n1) 225

<sup>149</sup> Raz (n1) 225

<sup>150</sup> Raz (n1) 214

<sup>151</sup> Raz (n1) 214

<sup>152</sup> Raz (n1) 214

<sup>153</sup> Raz (n1) 218

<sup>154</sup> Raz (n1) 214



conditions; they are pre-requisites to the law's capacity to guide. If this capacity to guide is a mark of a minimum level of efficiency of the law necessary for it to function *as law*, then these requirements not only quietly obtain a conceptual status but discreetly effectuate the definitive conditions of the law's validity. Indeed, Raz logically distinguishes between these principles and more 'indirect influences' such as a free press which may 'strengthen or weaken the rule of law' but are not directly intertwined with its basic idea.<sup>155</sup> Raz's clumsy interchangeability of labels from "requirements" to "principles" to mere associations is unhelpful. Whilst the former two exhibit foundational connotations, the latter implies a more tenuous link. The status of the requirements is at best conceptual, at worst unknown. Here it is argued that Raz's definition of the rule of law introduces a condition that only the law that is capable of guiding behavior may rule. This automatically requires that the minimum qualifications necessary to achieve effective guidance are internalized into the concept's definition. It will further be argued that these requirements are indeed *political*; there is an inherent political morality in the basic idea that the law should be capable of guiding behaviour. The line between conceptual conditions and political preferences is blurred.

In any event, if Raz's intention is to disassociate the formal quality of the rule of law from political considerations, it was counterintuitive to enumerate common characteristics associated with the rule of law. This encourages extrinsic associations to realize a determinative conceptual status. This is not helped by the fact that Raz's list is not exhaustive; it invites further contributions and heightens the risk of the rule of law evolving into an unrecognized political 'slogan', an exercise he previously claims to condemn.<sup>156</sup> Thus Raz does not effectively distinguish between the political

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<sup>155</sup> Raz (n1) 218-219

<sup>156</sup> Raz (n1) 210

and conceptual; he fails to pre-empt the rule of law's dangerous political dilution. In other words, even Raz's "formal" theory risks politicizing the rule of law. A retreat to legal conformity must be made.

### **The Political morality of Raz's theory**

The first three principles that Raz enumerates apply standards designed to enable the law to effectively guide action. Thus the laws should be 'prospective, open, and clear', 'relatively stable' and the making of 'particular legal orders' should be guided by 'open, stable, clear and general rules.'<sup>157</sup> Despite disguising his theory in terms of legal formality, these principles are clearly political. First, whilst Raz claims that the rule of law says 'nothing about how the law is to be made', requiring the substantive content of legislation to be prospective, open and clear surely automates the demand for safeguards to be incorporated into the legislative process.<sup>158</sup> Thus Raz's requirements are "political" in an institutional sense; they engage political processes.

The principles are political. Their contestable meanings connote an argumentative nature that is naturally accommodated in the 'antagonistic pluralism' of the political domain.<sup>159</sup> The first symptom of politics is conflict; these principles display an internal struggle for clarity in meaning whilst also conflicting with each other. It is uncertain how clear, stable, open or prospective a law must be; Fagan validly notes that 'a statute may be unclear, but not so unclear that it fails to qualify as law.'<sup>160</sup> Furthermore, Raz discounts the ambiguity inherent in requiring a law to be "prospective." In light of the 'retrospective nature of almost all legislation', it is

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<sup>157</sup> Raz (n1) 214-215

<sup>158</sup> Raz (n1) 214

<sup>159</sup> Loughlin (n92) 123

<sup>160</sup> Fagan (n136) 108-109

unclear whether he eliminates both retroactive and retrospective legislation.<sup>161</sup> He overlooks the inevitable ‘intertemporal conflict of laws’.<sup>162</sup> Raz also fails to appreciate the difficulty in ‘differentiating between prospective laws which almost inevitably have a retrospective effect, and retroactive laws’ for instance ‘a prospective tax increase can be said to “impair legal rights” just as a law changing the terms of contracts currently in effect, which would surely be considered an illegitimately retroactive law.’<sup>163</sup> The retrospective nature of a law is a ‘question of degree’; there may be a negligible degree of distinction between a legitimate retrospective law and an illegitimate retroactive law.<sup>164</sup> Indeed, Troy identifies a category of laws that ‘do not mention prior events but that change the legal consequences of such events’ and are thus ‘*impliedly retroactive*’.<sup>165</sup> This inherent ambiguity aggravates Raz’s alternative demand for clarity in the law. Furthermore, the principle of stability may antagonize the demand for rapid change in order to achieve the required clarity. Raz admits that the principles require ‘further elaboration and further justification’.<sup>166</sup> However, it should not be presumed that this additional elaboration would necessarily negate the principles’ inherently political character. This is a false assumption. The notion of “clarity” does not stop being contestable by requiring a law to be “reasonably clear” or “extremely clear”. Indeed, these additional adjectives display political characteristics in their own right that only serve to further conflict as to what is “reasonable” or “extreme”. Furthermore, Raz’s argument that the principles must be ‘constantly interpreted in light of the basic idea’, enabling the law to guide,

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<sup>161</sup> D E Troy, *Retroactive Legislation* (Washington DC, American Enterprise Institute for Public Policy Research, 1998) 4

<sup>162</sup> J N Eule, “Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity” (1987) Vol. 12, No 2/3 Am. B. Found. Res. J. 379, 443

<sup>163</sup> Troy (n161) 5

<sup>164</sup> Troy (n161) 5-6

<sup>165</sup> Troy (n161) 7

<sup>166</sup> Raz (n1) 218

displays backwards reasoning.<sup>167</sup> The ambiguity of his principles cannot be excused in light of the uncertainty inherent in his basic idea. His theory displays signs of inevitable political fluctuation that detracts from the rule of law's function as a predictable legal threshold. It is pragmatic but inevitably impractical. Raz's basic idea is political; it enjoys degrees of conformity and is thus an intangible political ideal. If the minimum function of the law is to guide, the degree to which these principles must be adhered to is inherently uncertain. This reduces legality to a selective and subjective exercise of perception.

Synpnowich argues 'there is moral content in the requirement that law be framed in a way that renders it capable of being obeyed.'<sup>168</sup> This indicates that Raz's formal conception of the rule of law has a moral dimension; it seeks to secure a degree of 'procedural morality'.<sup>169</sup> This exposes the superficial distinction between Raz's concept of the rule of law and his political principles. The requirements simply elaborate on his basic political idea of 'procedural justice.'<sup>170</sup> Therefore, the distinction between Raz's principles and his concept is one of degree not kind. In this light it is logical to perceive Raz's principles as extended *conceptual* requirements of the rule of law. Arguably, there is a resemblance between Raz's requirements and Fuller's principles that form the inner morality of the law.<sup>171</sup> The only clear difference is their label. Whilst Raz classifies these principles as merely formal, Fuller identifies them as moral. Shapiro notes that '(m)uch ink has been spilled over the question of whether the principles Fuller identifies are best characterized as moral, and, hence whether he has discovered an important link between law and morality.'<sup>172</sup> Even more

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<sup>167</sup> Raz (n1) 218

<sup>168</sup> Synpnowich (n3) 192

<sup>169</sup> Synpnowich (n3) 192

<sup>170</sup> Synpnowich (n3) 183

<sup>171</sup> L. L. Fuller, *The Morality of Law* (New Haven and London, Yale University Press, 1964)

<sup>172</sup> S J Shapiro, *Legality* (The Belknap Press of Harvard University Press, Cambridge, Massachusetts, London, England, 2011) 394

ink could be spilled in identifying the morality of Raz's basic idea. However, the very fact that their status is debatable insinuates their political quality. Raz covertly allows political requirements to dictate the concept of the rule of law. Whilst Synpnowich retreats from totally equating the formal rule of law with the 'substantive' in a classical sense, labeling this as 'misleading', she simultaneously appears to suggest that it is substantive, just to a minimum degree.<sup>173</sup> Indeed, Synpnowich claims that the formal rule of law is 'political morality of the narrow, circumscribed kind'.<sup>174</sup> Procedural justice has a minimum substantive quality. Certainly, these formal requirements are less political than the 'morality of social justice, care or democracy'; however, the difference is not of kind but degree.<sup>175</sup> The formal requirements are only able to compete against the latter principles in the first place because they share this common denominator of political morality. In other words, the formal requirements supply a minimum degree of substantive political morality. Raz thus arbitrarily distinguishes between the degree and category of justice that he deems most "formal" and adaptable to subtly complement his legal positivist intentions and "bulk up" a politically vacant concept. This logically explains why Raz categorises the rule of law as a 'political ideal.'<sup>176</sup> Raz's initial proposition that his version of the rule of law can co-exist with an unjust regime is thus fallacious.

Synpnowich identifies certain risks created by the "formal" approach. For example, she warns of the possibility that 'not only is procedural justice protected at the expense of substantive justice, but the former provides an ideological justification for the absence of the latter. The rule of law, trumpeting the morality of procedures,

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<sup>173</sup> Synpnowich (n3) 193

<sup>174</sup> Synpnowich (n3) 193

<sup>175</sup> Synpnowich (n3) 194

<sup>176</sup> Raz (n1) 211

thereby occludes the issue of a more contentful morality of equality.<sup>177</sup> Therefore, Raz's theory arguably risks prioritising procedural over substantive justice.<sup>178</sup> His focus on procedural adequacy could actually actively injure substantive justice. This is especially true in light of the fact that procedural justice is often a 'shabby compromise' of a 'specific form of substantial justice'; it is therefore often 'imperfect and not ideal.'<sup>179</sup> In comparison, the simple requirement of legal conformity is agnostic towards justice. Indeed, an apolitical rule of law does not compete with substantive justice because there exists no common moral denominator to enable this comparison. The rule of law is not more important than substantive justice; *it is simply a separate concern altogether*. The danger with the 'political morality' in Raz's theory is that procedural justice may be deemed politically sufficient.<sup>180</sup> The beauty of the rule of law as legal conformity is an overt confession that it is necessary but not politically sufficient. Political participants are not discouraged from compensating for this political deficit in the political domain nor are they duped into thinking that procedural morality will make do. Furthermore, one agrees with Fagan that '...to the extent that a legal positivist were to give the rule of law a substantive content, he would be depriving the rule of law of its significance and usefulness. The more substantive the rule of law becomes, the less reason a positivist has to pay it attention.'<sup>181</sup> By inadvertently supplying a minimum degree of political morality, Raz jeopardises the remarkability of the rule of law's legal neutrality.

McIlwain insists that the 39<sup>th</sup> Chapter of Magna Carta contains the 'classical statement of a principle that was always insisted upon and usually enforced as a rule of positive coercive law, and not, as the Austinians would say, as a mere maxim of

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<sup>177</sup> Synpnowich (n3) 183

<sup>178</sup> Shapiro (n172) 214

<sup>179</sup> Hampshire (n87) 162-163

<sup>180</sup> Synpnowich (n3) 193

<sup>181</sup> Fagan (n136) 110

positive morality.’<sup>182</sup> The rule of law was never intended as a moral phenomenon. However, McIlwain provides useful support for the suggestion that Raz’s formal version does not totally inhibit the rule of law’s mythical association with political morality. The alternative to positivism is the elevation of morality ‘to the ultimate criterion of validity’.<sup>183</sup> McIlwain rightly questions whether Raz’s definition of the rule of law ‘via requirements’ ‘does really provide a pure and neutral depiction of the rule of law.’<sup>184</sup> McIlwain summarises Raz’s definition as a ‘service conception of law: its ability to issue valid reasons for action, that is to guide behavior, is connected with the ‘dependence’ conception which refers those reasons back to the expectations and reasons of individuals.’<sup>185</sup> It is inherently intertwined with human dignity. McIlwain is particularly skeptical of Raz’s inclusion of ‘natural justice’ as a basic requirement of the rule of law as it “should intuitively also incorporate premises such as those banning arbitrary killing, brutality, violence, torture, genocide, slavery, as well as unjustified discrimination’ which ‘all converge in weakening the positivistic closure of the rule of law “neutrality”.’<sup>186</sup> Indeed, the inclusion of “Natural Justice” may act as a covert floodgate prompting the rule of law’s inundation with abstract political ideals. On one hand, Raz achieves a desirable differentiation between the ‘conceptual definition’ of the rule of law and ‘any definitions which pick up on the political preferences over the contents of the law and translate them into conceptual requirements of the rule of law.’<sup>187</sup> This is because, for Raz, the rule of law is a concept “which embraces technical requirements, and its virtue is efficiency in the light of its role as a “behavioural guide”, regardless of the good or bad goals for

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<sup>182</sup> C H McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, CA: Cornell University Press, 1940) 86

<sup>183</sup> McIlwain (n182) 36

<sup>184</sup> McIlwain (n182) 36

<sup>185</sup> McIlwain (n182) 36

<sup>186</sup> McIlwain (n182) 37

<sup>187</sup> McIlwain (n182) 37

which it may from time to time serve as a means.’<sup>188</sup> However, in light of Synpnowich’s dissection of the political morality inherent in procedural justice; Raz arguably still fails to faithfully differentiate between the rule of law and ‘the rule of (this or that) good law’; his basic idea is inherently selective; it promotes only that law which is capable of guiding behavior.<sup>189</sup> That capacity to guide is *necessarily* dictated by political variables such as clarity, certainty and stability. Interpreting this as a political preference over the content of the law reflects a departure from the conventional understanding of “political” and reflects a more three dimensional adaption of the term which is not confined to substantive justice and is more in tune with political morality.

### **Why does it matter if Raz’s theory dictates legal efficiency or legal validity?**

Fagan remarks that ‘those who regard non-compliance with the rule of law as a legal failure are not always clear about the meaning of this.’<sup>190</sup> Let us recall Raz’s formal theory. On one hand Raz suggests that a subversion of the rule of law results in a *legal deficiency*. However, if this is correct, it has impractical consequences that antagonize the legal system; a law may be simultaneously valid and in compliant with the rule of law. It is legally valid but it does not “rule”. This may be a law, which has passed the necessary thresholds of validity within the law-making process, but the result is a piece of legislation that is unclear, unstable and retrospective. In this sense the rule of law becomes something with which ‘existent law is asked to comply’; the aim exceeds mere legality; ‘it is not just the law’.<sup>191</sup> This would result in a scenario whereby ‘the law does not mirror or live up to the rule of law...it has and can be at

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<sup>188</sup> McIlwain (n182) 37

<sup>189</sup> McIlwain (n182) 38; see Synpnowich (n3) for comments on political morality

<sup>190</sup> Fagan (136) 107

<sup>191</sup> McIlwain (n182) 38



odds with valid rules.’<sup>192</sup> The ultra-thin model departs from this outlook. It is inappropriate to measure the compatibility of valid law with the rule of law; the rule of the law is neither a measure of a law’s efficiency nor its validity; it reflects a valid law’s state of being and is inherently intertwined with social fact. In Raz’s view a law rules if it is capable of guiding the behavior of the citizen so that the individual may be ruled by the law and obey it. With Raz there is deemed to exist a hierarchy between a law that is valid and a law that rules. This begs the question: In what way can a law be legally valid but not rule? The legal status of a legally defective law is uncertain. At a minimum, surely being publicly identified as a “deficient” law justifies legal disobedience and thus undermines the authority of the law. Equally, if conformity with the rule of law does not dictate legal validity, then the concept has no legal bite. Understanding the rule of law simply as *the rule of valid law* circumvents these impractical consequences and is faithful to the unconditional notion of the “rule of the law”.

However, Raz simultaneously appears to suggest to qualify as law it must have a fundamental capacity to guide behavior. The basic idea of law then becomes a condition of legality. This would dispel the problems that result from an artificial hierarchy between laws that rule and those that are merely valid. However, it aggravates the legal positivist understanding that legal validity is simply a social fact dictated by legal rules and procedures within a given legal system. If this unquantifiable political consideration is internalised as a requirement in the legal validation process, legal validity becomes merely a question of degree. It is at this point when conceptual clarity and legal certainty are inherently interlinked, despite

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<sup>192</sup> McIlwain (n182) 38

the fact that Alexy argues to the contrary.<sup>193</sup> If the certainty of legal validity is compromised by a contestable political consideration, how is the citizen able to deduce with certainty what is valid law and what is not? Surely this disables all potential guidance in the law. It is also dangerous because legality necessarily becomes subjective. The citizen is not guided by the law; on the contrary the citizen dictates legal validity by estimating whether or not a law is sufficiently clear, prospective, stable and general to be valid. Legality necessarily becomes a matter of conflict and non-compliance with the rule of law results in both a moral and a legal failure.

In Raz's theory we see an inadvertent transition of the rule of law from an unconditional legal concept (rule of all valid law) to a conditional political ideal (rule of law only that law capable of being obeyed). Raz claims to do so in order to discourage the perception of the phrase 'government by law and not by men' as an 'empty tautology'.<sup>194</sup> In other words, Raz is keen to ensure that the rule of law lives up to its manifesto promise. However, the rule of law is incapable of guaranteeing this political commitment. Hutchinson admits the idea of 'a government of laws, not persons' is both 'legally impractical and politically dubious' anyway.<sup>195</sup> It is better to simply expose the reality that the rule of law is essentially "rule through law by men", rather than to liberalise the rule of law to fit the descriptive slogan. This aggravates the 'old-age question of how- or indeed whether- the government can be limited by law when it is the ultimate source of law.'<sup>196</sup> This tension is relieved by understanding the law as the ultimate authoritative mechanism utilized by men to organize a state.

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<sup>193</sup> R Alexy, "A Defence of Radbruch's Formula" in *Recrafting the Rule of Law: the Limits of Legal Order* (ed D Dyzenhaus) (Oxford, Portland, Oregon, Hart Publishing, 1999) 29

<sup>194</sup> Raz (n1) 213

<sup>195</sup> A C Hutchinson, "The Rule of Law Revisited: Democracy and Courts" in D Dyzenhaus (ed) *Recrafting the Rule of Law: the Limits of Legal Order* (Oxford, Portland, Oregon, Hart Publishing, 1999) 196

<sup>196</sup> Tamanaha (n102) 28

Men have ultimately engineered this fate; it is a social fact that reflects a *societal decision*. Man is bound to the extent that it has committed itself to law. Man acts under law but this legal canopy may act as both a shelter and a pressing injustice. The law is man-made; it is a tool; it is therefore essential that it is not only used but used correctly. The rule of law as one of many potential components of a regime. Legality should not be artificially perceived in isolation. It is how well a system enables the beneficial interaction between the rule of law and other political virtues that is a testament to how sophisticated and politically developed a state is; it is this that gives a state bragging rights rather than empty commitments to a politically diluted version of the rule of law.

### **Bingham: the conventional understanding of the rule of law**

As a result of the politicization of the rule of law, arriving at a succinct answer to the question “What is the rule of law?” necessarily requires first identifying *what it is not*. This thesis has thus far adopted a rather unorthodox approach to a definition of the rule of law; it has taken Raz’s formal understanding of the concept as “the rule of the law” and interpreted this broadly to eradicate any political conditions attaching to the quality or type of law that rules. In essence, one has deconstructed Raz’s understanding of the rule of law as more “formal” than “thin”, though it claims to qualify as both. The rule of law demands legal conformity rather than legal obedience because the latter necessarily requires that the law be capable of guiding behavior; this inevitably inculcates an idea of political morality within the concept of the rule of law. Bingham picks up where Raz finishes. He expands on the formal conception of

the rule of law listing a series of sub-rules which elaborate on the more conventional perception that ‘...all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.’<sup>197</sup> For Bingham, the rule of law ‘expresses the fundamental truth’ propounded by John Locke that ‘Where- ever law ends, tyranny begins’.<sup>198</sup> From the outset there is a fundamental distinction between Bingham’s and my understanding of the rule of law. For Bingham, the rule of law can never be compatible with tyranny; it indicates more than simply the legality of a system. In contrast, the notion of the “rule of the law” does not impose qualitative conditions on the type of law that rules; the executive is subject to the law but a manipulative government may minimize the scope of this restriction. Bingham enumerates eight sub-rules of the Rule of Law. It is necessary to assess these in turn in order to differentiate the conventional contemporary perception of the rule of law from one’s ultra-thin version.

Bingham’s first sub-rule encapsulates Raz’s same requirement that the law must be capable of guiding behavior. Bingham states that ‘the law must be accessible and so far as possible intelligible, clear and predictable.’<sup>199</sup> Both agree that the rule of law has a certain formal quality; ‘if everyone is bound by the law they must be able without undue difficulty to find out what it is.’<sup>200</sup> Bingham usefully cites English authority to this effect. In particular, *Sunday Times v United Kingdom* [1979]<sup>201</sup> states that ‘...a norm cannot be regarded as a “law” unless it is formulated with sufficient

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<sup>197</sup> T Bingham, “The Rule of Law” (The Sixth Sir David Williams Lecture, 16<sup>th</sup> November 2006) 5 (emphasis added)

<sup>198</sup> Bingham (n197) 5; J Locke, *Second Treatise of Government* (1690) (Cambridge University Press, 1988) 400

<sup>199</sup> Bingham (n197) 6

<sup>200</sup> Bingham (n197) 6

<sup>201</sup> [1979] 2 EHRR 245

precision to enable the citizen to regulate his conduct'.<sup>202</sup> This case illustrates the symbiotic relationship identified between Raz's utilization of the rule of law as a formal drive for legal efficiency and a minimum condition of legality. This dicta indicates that a law must demonstrate *a minimum capacity to guide* in order to qualify as law. It has been argued that this proposal is not wholly consistent with a legal positivist agenda. Indeed, to reiterate Sypnowich's comment it demonstrates a substantive 'political morality of the narrow, circumscribed kind' by imposing a political threshold on legal qualification.<sup>203</sup> The law-making body should be encouraged to produce sufficiently clear and precise legislation; however, this is merely part of the constitutional job description, the quality of the end product is an indication of the efficiency of the institution rather than a measure of legality. It is not disputed that the law should be accessible, clear, stable and prospective; it is simply argued that these are not requirements of the rule of law nor are they conditions of legal validity.

It is questionable to what extent it is unreasonable to leave this capacity to guide out of a definition of the rule of law. Indeed, Bingham admits that even the UK legal system suffers from a 'legislative hyperactivity which appears to have become a permanent feature of our governance'; he cites as evidence the 3500 pages of primary legislation in 2004 and 9000 pages of statutory instruments in 2003.<sup>204</sup> It is therefore questionable to what extent this accessibility is capable of being practically achieved. It is further questionable to what extent it *should* be; sometimes the law is necessarily complex in order to achieve justice. Indeed, there is a potential tension between how the law is perceived by the citizen and how the citizen is best protected. Furthermore, we should not discount the role of the lawyer to clarify the law and indeed the legal

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<sup>202</sup> *Sunday Times v United Kingdom* [1979] 2 EHRR 245, 271

<sup>203</sup> Sypnowich (n3) 193

<sup>204</sup> Bingham (n197) 7

system to navigate its uncertainties. The accessibility of the law is inevitably determined by the sophistication of the legal system and the technical efficiency of legislators, judges and lawyers. These variables inevitably determine how *favorable* the notion of the rule of law is perceived, however, they are not conceptual requirements of the thing itself.

The second sub-rule states that ‘questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.’<sup>205</sup> This is an issue analysed in far greater detail in chapter II. It intertwines with the synopsis of legal conformity. Legal conformity is a normative requirement that derives from the law’s ultimate authority; because the law has ultimate authority, people (citizens and the executive alike) must conform to it. It will be argued that legal conformity embodies the idea that the executive may do anything that does not break the law. From this perspective, in theory the executive enjoys the same legal liberty of the citizen. The rule of law does not determine *how the law is used*. However, it is clearly desirable that the actions of the executive are subject to greater legal regulation and scrutiny than the ordinary citizen. Thus, whilst *the rule of law requires only that the executive conforms to the law* i.e. does not break the law, it is envisaged that the scope of its legal liberty will be far more restricted. Bingham, for example, already illustrates that ‘discretion imports a choice between two possible decisions and orders, and usually the scope for choice is very restricted.’<sup>206</sup> This inevitably depends on how pro-active and efficient the law-making institution is and the extent of the separation of powers. These variables are *external* to the rule of law but inevitably impact on its perception. In order to optimize the rule of law, one agrees with Bingham that questions of legal right and liability *should* ordinarily be

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<sup>205</sup> Bingham (n197) 10

<sup>206</sup> Bingham (n197) 10

resolved by the law rather than at the whim of the executive. However, the questions of whether the law has ultimate authority and how the law is to be used are two independent but related issues.

Third, ‘the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.’<sup>207</sup> Bingham provides the example that ‘we would regard legislation directed to those with red hair...as incompatible with the rule of law.’<sup>208</sup> Equality before the law is a fundamental requirement of the rule of law. The law’s ultimate authority is universal; all must conform to the law: rich or poor, powerful or weak, government or individual. There is value in this so long as the law is not manipulated and used discriminately. This is incorporated to a degree within Bingham’s sixth sub-rule that reflects the idea that laws ‘duly made, bind all to whom they apply’.<sup>209</sup> However, equality before the law is not synonymous with the law’s equal application or non-discrimination. A law that is directed towards people with red hair will still bind everyone; however, those with red hair will feel its effects unequally and inevitably unfairly. Thus an individual may be subject to a law without feeling its tangible effects whilst another individual may be worse off because of that same law. The fact that legislation addresses a particular group does not mean that all men are not equally subject to it. It simply means that the *impact* of this law will be unequal. The rule of law is only receptive to the notion of equality in terms of its equal and universal authority; it is not concerned with how non-discriminatory or subjective the content of the law is.

Bingham’s fourth and arguably most controversial sub-rule is that ‘the law must afford adequate protection of fundamental human rights’.<sup>210</sup> He admits that this

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<sup>207</sup> Bingham (n197) 12

<sup>208</sup> Bingham (n197) 13

<sup>209</sup> Bingham (n197) 23

<sup>210</sup> Bingham (n197) 16

would not be ‘universally accepted as embraced within the rule of law’.<sup>211</sup> Indeed, Raz and I agree that the rule of law is not concerned with how democratic or just a legal system is. Therefore a legal system that does great injury to fundamental human rights is potentially compatible with the rule of law. This is because the rule of law is not concerned with the substantive content of law. Bingham, on the contrary, argues that a ‘state which savagely repressed or persecuted sections of its people’ could not be viewed as observing the rule of law.<sup>212</sup> He certainly cites strong evidence of the confusion between the rule of law and protection of human rights. For instance, he argues that the Universal Declaration of Human Rights 1948 state that ‘...human rights should be protected by the rule of law’.<sup>213</sup> Furthermore the European Court of Human Rights has referred to ‘the notion of the rule of law from which the whole convention draws its inspiration.’<sup>214</sup> He also refers to the fact that the European Commission ‘has consistently treated democratization, the rule of law, respect for human rights and good governance as inseparably interlinked.’<sup>215</sup> However, this simply proves the extensive scope of the confusion and the rule of law’s transformation into a political slogan. It has been argued that the utilization of the law as the authoritative tool to organize the state provides an inherent protection of the citizen; the citizen is fundamentally better off with law than without it because it maintains a foundational order that is fundamentally essential to the welfare of the citizen.

However, incorporating the protection of human rights within the meaning of the rule of law is problematic. Bingham himself admits that there is not ‘a standard of

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<sup>211</sup> Bingham (n197) 16

<sup>212</sup> Bingham (n197) 18

<sup>213</sup> Bingham (n197) 17-18; see Preamble to the Universal Declaration of Human Rights 1948

<sup>214</sup> *Engel v Netherlands* (No1) [1976] 1 EHRR 647, 672, par 69

<sup>215</sup> Bingham (n197) 18; see *Commission Communication to the Council and Parliament*, 12 March 1998, COM (98) 146



human rights universally agreed even among civilized nations’, this results in ‘an element of vagueness’ concerning this sub-rule as ‘the outer edges of fundamental human rights are not clear cut.’<sup>216</sup> However, Bingham attempts to assuage this problem by suggesting that ‘within a given state there will ordinarily be a measure of agreement on where the lines are to be drawn.’<sup>217</sup> There are two problems with this. First, the presumption of an element of consensus regarding rights is inherently optimistic. Even in states at the forefront of the protection of rights this is not the case. For example, in the US there is the ongoing debate on the right to arms. In the UK what is presumed to be the fundamental right to life is the constant subject of conflict in relation to abortion and euthanasia.<sup>218</sup> Therefore, even in the confines of a nation state an agreement on fundamental human rights cannot be drawn with adequate accuracy to allow its incorporation within the meaning of the rule of law. Second, this artificial domestication of the rule of law is fundamentally in conflict with Bingham’s eighth sub-rule which requires ‘compliance by the state with its obligations in international law.’<sup>219</sup> Bingham rightly identifies the rule of law as an international concept. However, conceptualizing the rule of law in accordance with national perceptions of human rights resists its transition into international currency. *The law should be utilized to protect fundamental rights.* This is an essential requirement of a *democratic constitution*, but *not* of the rule of law.

Bingham’s fifth sub-rule that people should be able ‘to go to court to have their rights and liabilities determined’ is described as an ‘obvious corollary’ of the principle that ‘everyone is bound by and entitled to the benefit of the law’.<sup>220</sup> Thus Bingham suggests an essential element of the rule of law is ‘the right of unimpeded

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<sup>216</sup> Bingham (n197) 19-20

<sup>217</sup> Bingham (n197) 20

<sup>218</sup> See E Wicks, *The right to life and conflicting interests* (Oxford, Oxford University Press, 2010)

<sup>219</sup> Bingham (n197) 29

<sup>220</sup> Bingham (n197) 20

access to court’.<sup>221</sup> It is inevitably intertwined with his seventh sub-rule that ‘adjudicative procedures provided by the state should be fair.’<sup>222</sup> Raz similarly prioritises the independence of the judiciary, principles of natural justice, the courts’ review powers, accessibility of the courts and the discretion of crime preventing agencies.<sup>223</sup> An obvious means of ensuring the enforcement and practical maintenance of the rule of law is to ensure there is access to an independent court occupied by an experienced and active judiciary. Certainly the principle of the separation of powers has the potential to invigorate the rule of law as a means to prevent the consolidation of power and encourage the accountability of the executive. However, under the ultra-thin model rule of law may respond positively to a number of political variables. Indeed, Raz himself helpfully questions why the courts and not some other body should be in charge of securing legal conformity; a qualified substitute may perform the same role.<sup>224</sup> However, judges are not necessarily ‘essential for the preservation of the rule of law’ and may do more damage than good.<sup>225</sup> For example, an independent and experienced judiciary may act to the detriment of the rule of law. For example, it may create misconceptions about the meaning of the rule of law in order to achieve a “just” result or utilize the concept as a scapegoat to providing proper reasoning. Furthermore, Tamanaha argues that one should be wary of the rule of law precisely because ‘it may evolve into the rule of judges (or lawyers).’<sup>226</sup> Indeed, the court may interpret the law beyond its legal means; this effectively results in the rule of judicial discretion rather than the rule of the law. It is then dangerous to over-familiarize the rule of law with the court system.

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<sup>221</sup> Bingham (n197) 20

<sup>222</sup> Bingham (n197) 26

<sup>223</sup> Raz (n1) 217-218

<sup>224</sup> Raz (n1) 218

<sup>225</sup> Raz (n1) 217

<sup>226</sup> Tamanaha (n65) 15

Yes, the rule of law requires practical enforcement. This is probably best achieved by securing equal access to an independent and experienced court. However, judicial independence is simply another aspect of the legal and political framework that may be configured to optimize the rule of law. The rule of law may be partial to judicial independence and better accessibility to courts; these conditions do justice to the rule of law. However, the law may rule without them, a dissatisfactory state of affairs no doubt, but a possible one under the ultra-thin model. Equally it is important not to overstate the judges' guardianship of the rule of law; it must not covertly evolve into rule by judges. It is essential to secure a 'delicate balance...in which judges strive to abide by the law and render decisions with an awareness of the proper (limited) role of the courts in a broader polity.'<sup>227</sup>

Bingham devotes his sixth sub-rule to ensuring that public officials exercise their powers 'reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers.'<sup>228</sup> Bingham clearly perceives a significant overlap between the rule of law and judicial review. The operation of the ultra-thin model, in particular its relationship with judicial review will be discussed in far greater detail in Chapter II. It is argued that the rule of law feeds into the foundational *ultra vires* principle, the ground of legality; the judiciary police the extent to which the executive acts in conflict with the law. The doctrine of Parliamentary sovereignty has engineered a very statutory focused conception of legality. Often the question of legality is not clear-cut; the ambiguity of language is the Achilles heel of the law and the question of legality is often a matter of legal interpretation. Thus, for example, statute may require the executive to act "reasonably" or "in the interests of the state", such determinations necessarily have legal

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<sup>227</sup> Tamanaha (n65) 15

<sup>228</sup> Bingham (n197) 23

consequences. However, Bingham suggests that the rule of law is concerned with monitoring how *governmental* an executive acts; this reflects the evolution of judicial review; it demonstrates the development of grounds of procedural impropriety and irrationality which do not share the same legal pedigree but appear to have adopted the same legal force. The development of good administration principles that now substantiate judicial review reflects a fundamental difference in motive; judicial review is designed to protect individual liberty and keep a check on the executive, the ultra-thin model is agnostic towards both. That does not mean that the rule of law plays no role in judicial rule, it is simply articulated via the narrow *ultra vires* principle. It constitutes merely one component, be it an essential one, of an increasingly liberal administrative practice that expects more of its executive than statutory compliance, it demands good government. Such development should be welcome but not confused. Equally, those proponents of judicial activism should not discount the value of, nor discourage, the cardinal importance of a political constitution to optimize the rule of law.

Bingham's eighth sub-rule has already been touched upon. It states that the rule of law 'requires compliance by the state with its obligations in international law'.<sup>229</sup> Like Bingham "I do not think this proposition contentious."<sup>230</sup> Indeed, the notion of the "rule of the law" incorporates the idea that all valid law rules; what constitutes valid law is dictated by the rules and procedures of the legal system. It is therefore the product of social fact rather than the result of an inherent moral impetus in the nature of law. International law is increasingly being recognized within national legal systems. Therefore, the "rule of law" is inclusive of international law. It has already been highlighted that Bingham's inclusion of fundamental human rights as an

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<sup>229</sup> Bingham (n197) 29

<sup>230</sup> Bingham (n197) 29

essential element of the rule of law aggravates this eighth sub-rule because in order to define the nature of fundamental human rights national rather than international perspectives are relied upon. This inevitably cultivates national conceptions of the rule of law that detract from its value as an international concept. The value of the ultra-thin depiction of the “rule of the law” is its neutrality and thus easy adaption as an international language. This is especially important in light of the modern strategy of exporting the rule of law to developing states.

Bingham concludes by suggesting that the rule of law cannot exist without democracy. He states that the rule of law depends on an ‘unspoken but fundamental bargain between the individual and the state...by which both sacrifice a measure of the freedom and power which they would otherwise enjoy.’<sup>231</sup> The individual ‘accepts the constraints imposed by laws properly made because of the benefits which, on balance, they confer.’<sup>232</sup> However, the rule of law itself embodies an agreement between the individual and the state to respect the authority of the law. This is not necessarily a fair bargain but it provides the foundation of a legal relationship. The rule of law can exist without democracy; it may accompany many means of government, good and bad. Similarly, in a sufficiently civic population it is not inconceivable that democracy can exist without law. However, ‘law provides essential support for democracy’.<sup>233</sup> The rule of law is independent of democracy; it provides that essential legal foundation of a state. Democracy, however, builds on these necessary foundations to provide an infrastructure of governance. Democracy is a means of distributing power and encouraging the equal participation of eligible citizens in the running of the state; *it inevitably relies on rules*. The result is this:

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<sup>231</sup> Bingham (n197) 35

<sup>232</sup> Bingham (n197) 35

<sup>233</sup> B Tamanaha, “The Dark Side of the Relationship between the Rule of Law and Liberalism” (2008) *Legal Studies Research Paper Series Paper#08-0096*

viewed in isolation the rule of law exists but it is naked; it is vulnerable without the clothing of democracy. In the *Crito* we see how the rule of law is far from ideal; it has the potential to accommodate injustice. Equally, Socrates reconciles us to the fact that the law is invaluable as a social mechanism; it provides the ‘minimal conditions necessary for a livable social existence.’<sup>234</sup> This is because a ‘peaceful social order is marked by the absence of routine violence’ and the presence of ‘a substantial degree of physical security and reliable expectations about surrounding conduct.’<sup>235</sup> However, this alone is not enough. Indeed, Socrates does not discount the value of participation and encourages active citizenship by imploring the individual to change the state’s mind of what is just. Thus it encourages the idea that the law should reflect the values and opinions of the demos. The rule of law should operate alongside a democracy. They enjoy a complementary rather than symbiotic relationship. Accepting this independence is crucial to the ultra-thin definition of the rule of law. It accepts that the rule of law is essential but not necessarily sufficient.

The rule of law is neither conventional, nor formal, nor is it essentially normative: it is a descriptive indication of the law’s ultimate authority. However, it would be wrong to assume that the ultra-thin model deprives the rule of law of any value. Rather it identifies the concept as the defining legal virtue in the constitutional blueprint of any nation state. The ultra-thin model places significant expectations on the constitutional framework, not by virtue of its definition but its conceptual expediency. It comes to terms with the reality that the political morality of a state cannot be neatly packaged under one heading; it is essential that we do not allow the rule of law to devolve into a strap line for good government. Instead it is necessary to cultivate a kind of political constitution that celebrates political values and acts as a

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<sup>234</sup> Tamanaha (n65) 8

<sup>235</sup> Tamanaha (n65) 8

suitable partner to the rule of law. If the law rules people (individual and government) must conform to it. This is the definitive and sole requirement of the rule of law. The next chapter deduces what is meant by legal conformity; it considers how this reaches fruition and interacts within the messy reality of the constitutional landscape.

## **Chapter II**

### **The Ultra Thin Model in Practice**

#### **Introduction**

Viewed in isolation the “rule of valid law” is not an ideal. It secures the ultimate authority of the law. This assessment rests on three main points: First, it is not necessarily easy to identify what constitutes “valid law” in the first place; this inevitably depends on the complexity of the constitutional framework. Second, even if it is reasonably clear what qualifies as “valid law” the rule of law does not guarantee that this law is necessarily moral, desirable, clear or prospective. Finally, the notion of legality which is coterminous with the rule of law is minimalistic; it does not require every government action to be legally authorized in advance. The extent to which the rule of law is able to contribute to an ideal state of affairs is dependent upon the political framework in which it operates. Therefore, in order for us to optimize this concept it is necessary to cultivate the appropriate political conditions for a state to flourish. Of course, it is inherently superficial to view the rule of law in isolation; it is one necessary component of a community of factors that contribute to a desirable constitutional framework. In this sense, the rule of law boasts an innately social aspect to its character, which, if only in a limited operative sense, is certainly valuable.



Indeed, Krygier similarly refers to the rule of law as a kind of ‘*interaction technology*’ not dissimilar to a Toyota car which may look ‘much the same all over the world’ but inevitably behaves ‘very differently on different roads and with different drivers.’<sup>236</sup> The term “rule of valid law” is able to permeate international boundaries. However, it will operate differently in relation to local legal and political conditions. The difference is not in the efficiency of the technology but the external climate. Whilst these three points illustrate why the rule of law, considered in isolation, is less than politically ideal, this does not logically translate to their interpretation as failures of the concept itself. What is not ideal is not necessarily flawed. However, improvements need to be made to the political landscape, not to compensate for the rule of law’s failures, but to optimize its potential for good government.

This chapter will first address the meaning of the rule of law in terms of legality. It engages with the current understanding under the UK constitution that the executive enjoys a residual legal liberty comparable to that enjoyed by the ordinary citizen. The law’s rule is not indicative of its monopolization. It is argued then that the rule of law is only a disabling constitutional mechanism in the sense that it demands a legal process; however, within this legal landscape it still potentially awards the executive significant room for manoeuvre. It thus seems odd to label the rule of law as the ‘ultimate controlling factor’ of the constitution.<sup>237</sup> It is therefore imperative to locate the most efficient accountability mechanism to hold the executive to account. Elliott’s proposal to extend judicial review to the monitoring of the executive’s residual acts will be countered against alternative political constitutionalist proposals.<sup>238</sup> The latter are deemed more efficient and desirable. However, the

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<sup>236</sup> Krygier (n7) 22

<sup>237</sup> Lord Hope, *R(Jackson and others) v Attorney General* [2005] UKHL 56, par 126

<sup>238</sup> M Elliott, *The Constitutional Foundations of Judicial Review* (Oxford and Portland, Oregon, Hart Publishing, 2001)

intention is not to compartmentalize one's proposals as "political constitutionalist", this label inevitably provokes constricting stereotypes, yet is increasingly ambiguous. However, the emphasis on the significance of politics and the realization that any normative account of the constitution will inevitably be 'prescriptive without prescribing much' certainly illustrates a fostering of political constitutional elements within one's prescription of a political framework that best complements the operation of the rule of law.<sup>239</sup> As well as endorsing the invigoration of politics, this chapter further proposes the codification of common law liberties and powers to cultivate an association between the rule of law and statutory supremacy. By consolidating the source of law which has ultimate authority it brings clarity both to the "rule of valid law" and its operation within the constitutional framework. It thus does not necessarily supplant law for politics but engages with the real-life messy interface between the two.

### **The nature of law**

'A valid law is a law, an invalid law is not.'<sup>240</sup> To this extent both natural law theorists and legal positivists agree. However, legal positivists contend that legal validity is a question of 'objective determination to which one's moral or political views are essentially irrelevant.'<sup>241</sup> In contrast, natural lawyers identify a 'necessary, not a contingent, relationship between law and morality.'<sup>242</sup> The natural law proponent believes that 'all law must be morally justified if it is to be legitimately called "law" at all'.<sup>243</sup> Legal positivist thinkers, on the contrary, argue that all laws have a "source" which is 'an action or a series of actions' thus the questions regarding

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<sup>239</sup> G Gee & G Webber, 'What is a Political Constitution?' (2010) 30(2) OJLS 273, 289

<sup>240</sup> Raz (n1) 146

<sup>241</sup> Raz (n1) 152

<sup>242</sup> W C Starr, "Law and Morality in H L A Hart's Legal Philosophy" (1984) 67 Marquette Law Review 673

<sup>243</sup> Starr (n242) 674

the validity of laws ‘revolve on factual questions, on issues susceptible of objective determination to which one’s moral or political views are essentially irrelevant.’<sup>244</sup> In sum, the law is a ‘social fact’, not a moral one.<sup>245</sup> In contrast, like Shapiro it is ‘easy for me to imagine legal systems that are evil...human history is littered with examples’; the Nazi regime is the most obvious.<sup>246</sup> Shapiro neatly summarizes the legal positivist position that ‘a very unjust rule can still be a law as long as it satisfies the criteria of legal validity applied by the institutions of the legal system in question.’<sup>247</sup>

Identifying law and morality as distinct entities does not discount the potential moral value of law. Indeed, law and morality have a ‘very close relationship’, similar to that shared between law and politics.<sup>248</sup> Indeed, Starr argues that it is a ‘sheer nonsense and a gross misrepresentation of legal positivism’ to maintain it denies an interaction between law and morality or contend that ‘law is not concerned with morality.’<sup>249</sup> Hart in particular impresses upon his reader that the law shows ‘at a thousand points the influence of both the accepted social morality and wider moral ideals.’<sup>250</sup> There is no discounting the fact that the law *can* be of great moral value but it is not necessarily so; it may be used as a means to achieve moral ends. To argue that legal positivists are not concerned with morality is a severe understatement. Starr emphasizes that Hart’s distinction between law and morality is in itself a ‘moral argument.’<sup>251</sup> Indeed, it is dangerous to encourage a synonymy between legal validity and morality because it induces an ‘obsequious quietism’ in the behaviorisms of

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<sup>244</sup> Raz (n1) 152

<sup>245</sup> Raz (n1) 151

<sup>246</sup> Shapiro (n96) 16

<sup>247</sup> Shapiro (n96) 23

<sup>248</sup> Starr (n242) 683

<sup>249</sup> Starr (n242) 686

<sup>250</sup> H L A Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961) 199-200

<sup>251</sup> Starr (n242) 688

society.<sup>252</sup> This creates the danger that ‘the existing law may supplant morality as a final test of conduct and so escape criticism.’<sup>253</sup> In other words people take for granted that what is law is moral; it thus disables their instinct to subject the law to moral scrutiny. Hart is consequently keen to ensure that ‘the certification of something as legally valid is not conclusive of the question of obedience’.<sup>254</sup> Therefore, distinguishing between law and morality enhances the value of morality and confirms the moral value of law.

*The law is not inherently moral. However, a law may have moral value subject to the existence of a healthy political system. Laws are after all merely ‘expressions of the human will’.*<sup>255</sup> This is because political actors (the government, MPs, the electorate and arguably even the judiciary in its political capacity) dictate the substantive content of legislation, not the rule of law. In other words, “human will” is capable of moral insight but the law as a neutral template is not. Shapiro insists that ‘what makes the law *the law* is that it has a moral aim, not that it satisfies that aim.’<sup>256</sup> Shapiro’s Moral Aim Thesis seems to exist in limbo between legal positivism and the natural law theory. It is unclear how the law can both be amoral but have a moral aim. Certainly, one agrees with Shapiro that the ‘moral benefits generated by a just legal system are not accidental or side effects of legal activity’.<sup>257</sup> However, these moral benefits result from the political actors rather than a moral aim within the law itself. Indeed, these moral benefits derive not from the legal system but the political system that dictates a regime’s just character. These moral benefits are neither deliberately

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<sup>252</sup> J Bentham, *A Fragment on Government*, J H Burns & H L A Hart (eds) (London, 1977) 498

<sup>253</sup> D Dyzenhaus, S R Moreau & A Ripstein (eds) *Law and Morality, Readings in Philosophy* (3<sup>rd</sup> edn, University of Toronto Press Incorporated, Canada, 2007) 29

<sup>254</sup> Hart (n250) 205-06

<sup>255</sup> H L A Hart, *Essays on Bentham* (Oxford, Oxford University Press, 1982) 26

<sup>256</sup> Shapiro (n96) 214

<sup>257</sup> Shapiro (n96) 216

produced by the law nor are they “side effects” of its existence, they are genetically linked to the moral aspirations cultivated in the political domain.

Raz further contends that ‘actions not authorized by law cannot be the actions of a government as a government.’<sup>258</sup> This is because ‘they would be without legal effect and often unlawful.’<sup>259</sup> Thus, Raz suggests that the requirement of explicit legal authority does not merely indicate the legality of executive acts but it also dictates their governmental nature. However, perceiving the legal status of executive actions and their governmental nature as synonymous characteristics threatens to devalue the former attribute. This perception of formal legality justifies Allan’s complaint that formal legality then ‘serves only to distinguish the commands of the government in power (whatever their content) from those of anyone else.’<sup>260</sup> He thus concludes that it ‘offers little of value to the constitutional theorist.’<sup>261</sup> Actions taken by the executive outside the law should not be denied *governmental* status; when the executive acts *ultra vires* it is still acting as the government but simply abusing its position. Legality should not simply be perceived as a distinguishing criterion between governmental and non-governmental acts. Furthermore, just because an action lacks explicit legal authority does not mean that it is negligent or immoral. This association derives from an assumption that legal authorization necessarily connotes efficiency, morality and democratic approval. In many legal systems this may be the case; however, this cannot be guaranteed. Just as the law is not, by necessity, moral, neither is it politically efficient. Nor is this prospect desirable. Indeed, the incentive to disassociate *governmental* and *legal* actions as coterminous litmus tests can be located

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<sup>258</sup> Raz (n1) 212

<sup>259</sup> Raz (n1) 212

<sup>260</sup> Allan (n101) 22

<sup>261</sup> Allan (n101) 22

in the criticism of ‘obsequious quietism’.<sup>262</sup> Viewing law and morality as indistinct discourages people from making an independent moral judgment of executive actions; the law is taken for granted as the primary moral indicator. Similarly, if legality is perceived as the unit of measurement for how “governmental” an action is, it discourages people from making independent political assessments of official activity. A stamp of legality indicates a lack of conflict with the law; it does not indicate how “governmental”, “moral” or “politically efficient” an action is. This is partly because “legality” is not a label preserved solely to describe government actions; it navigates the behavior of both the individual and the state.

### **A necessary distinction**

A distinction has been alluded to that requires further discussion. There exist two independent questions: The first asks whether the law has ultimate authority in a state, the second, whether this ultimate authority is optimized for the good of the state. They are related but distinct; the former does not guarantee the latter. The rule of law is concerned with the first. Whilst a positive response to both questions depends on a state’s legal sophistication and political culture, a greater degree of both is required for the second. However, this does not understate the initial significance of assigning the law ultimate authority. Indeed, in some countries, such as Communist Bulgaria, law is thought of as ‘like a door in the middle of an open meadow. Of course, you could go through the door, but why bother?’<sup>263</sup>

It is legitimate to question the value of legality if it has no moral or political merit. Hobbes claims that the social condition without law and government would be essentially ‘a war of all against all’ in which life would be ‘solitary, poore, nasty,

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<sup>262</sup> Bentham (n252) 498

<sup>263</sup> Krygier (n7) 23

brutish and short.’<sup>264</sup> However, Shapiro adequately dismisses this hypothesis by insisting that ‘cooperation and order have not only been possible throughout human prehistory: they have been the norm.’<sup>265</sup> He alludes to the fact that 12,000 years ago humans lived in groups called “Bands”; despite no law, life was neither short nor brutish.<sup>266</sup> In essence, without law, *people got by*. However, the introduction of law clearly proved a valuable social and regulatory resource. Indeed, Shapiro comments that people were able to use the law to ‘create, modify, and apply rules, and thereby manage the myriad aspects of social life without having to rely solely on custom, tradition, persuasion or consensus.’<sup>267</sup> In other words, with law, society does not merely survive; it develops. Laws are ‘universal means that enable us to coordinate our behavior intra- and interpersonally’ and their ‘very point is to create norms that are supposed to settle questions about how to act.’<sup>268</sup> In this sense, the law saves time, it in essence attempts to pre-empt conflict by setting pre-configured standards. The law therefore has real social value. Regarding the “rule of the law” as an empty concept underestimates the law’s social and regulatory merits. ‘Orderliness is a demand we make on the world... This is not to say that the world itself is chaotic, lacking a prior order, but it may not be the order we desire or need.’<sup>269</sup>

In a state where the law exists but it fails to have ultimate authority there is no rule of law. Arguably such a state of affairs exists in Afghanistan where disparate sources of “law”, Shari’a Law, State Law and Customary Law in the form of Tribal Codes compete for ultimate authority; there exist ‘competing models of

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<sup>264</sup> T Hobbes, *Leviathan* (ed) R Tuck (2<sup>nd</sup> edn, Cambridge, Cambridge University Press, 1996) 89

<sup>265</sup> Shapiro (n96) 36

<sup>266</sup> Shapiro (n96) 36

<sup>267</sup> Shapiro (n96) 36

<sup>268</sup> Shapiro (n96) 194 & 202

<sup>269</sup> K Winston, “Connecting Law’s Mandate” in D Dyzenhaus (ed) *Recrafting the Rule of Law: the Limits of Legal Order* (Oxford, Portland, Oregon, Hart Publishing, 1999) 283

legitimacy'.<sup>270</sup> No Law, as such, rules. Thus, acknowledging the existence of a single door in the first place is not necessarily a simple task; 'a major problem of transitional architecture is to get people to approach the door, let alone go through it...'<sup>271</sup>

However, Krygier differentiates between acknowledging the door and actually using it; recognizing that the law has ultimate authority does not necessarily mean that it will be 'used-even better, useful.'<sup>272</sup> Admittedly, accrediting the law with ultimate authority is arguably the first incentive to use it. Yet this does not qualify the independence of the two questions. The law may be utilized as a beneficial source of technology. However, this is ultimately a political choice, engineered by political means. If at a very minimum the rule of law simply requires that the executive *must not break the law*, in a state where the law does not play an important role in regulating the powers of the executive or protecting the liberties of the citizen, the rule of law will not act as a safeguard for a fair and just legal system. However, it is legitimate to expect that the areas unregulated by law will be sparse in a society where positive law is properly utilized. Equally the law must not suffer from "over-use" and the courts must not supplant Parliament in securing political accountability of the executive. The optimum operation of the rule of law ultimately depends on a state's political culture.

### **Legality**

One has agreed with Raz that the rule of law means the 'rule of the law.'<sup>273</sup>

The law has ultimate authority; legality is the cardinal principle at the heart of the rule of law. It is therefore necessary to deduce what legality requires. Raz argues that in its

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<sup>270</sup> W Maley "The Rule of Law and the Weight of Politics" in Whit Mason (ed) *The Rule of Law in Afghanistan, Missing Inaction* (CUP, 2011) 69

<sup>271</sup> Krygier (n7) 23

<sup>272</sup> Krygier (n7) 23

<sup>273</sup> Raz (n1) 212



broadest sense, “the rule of the law” necessarily means – the rule of only that law which is capable of guiding behavior. He imputes a degree of political morality into the concept. This interpretation has been rejected. The rule of law means simply *the rule of valid law*; it requires legal conformity and does not impose additional procedural conditions on the law enabling guided obedience. Raz states that ‘a person conforms to the law to the extent that he does not break the law’.<sup>274</sup> Legal action can therefore be compartmentalized into two categories: the law *commands it*, because it is enabling as well as disabling, or the law *does not prohibit it*. On the other hand, if legal conformity rested on the extent to which a person acts *in accordance* with the law, legal actions would simply be those actions regulated by the applicable law. In this sense, a person conforms to the law if explicit legal authority supports his actions. Under these conditions, activities not regulated by law are necessarily illegal. This is clearly undesirable; the law cannot have a say on everything, nor should it. Nor can we necessarily infer the law’s treatment of the citizen in these blind spots. The law is usually silent on an issue either because it remains undecided, agnostic or simply because legal regulation is not required. Yet, arguably the same criticism could be made of Raz’s perception of legal conformity; simply because an action does not break the law is it *necessarily legal*? Should there exist an alternative category in which an action is considered “non-legal”, for example, in relation to those day-to-day activities which the law does not need to regulate?

The answer is no. In a legal state the law does not have a say on *everything*; indeed, this is both impractical and arguably impossible. Therefore, to a degree, every legal state will ‘lack law’; it accommodates pockets of ‘lawlessness’.<sup>275</sup> However,

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<sup>274</sup> Raz (n1) 213

<sup>275</sup> Krygier (n7) 19 and 16

contrary to Krygier's opinion, this is not 'antithetical' to the rule of law.<sup>276</sup> This is because the essence of legality is not constricted to the law's *application* but to its *authority*; legality indicates more than 'the mere existence of law'.<sup>277</sup> *An action is classified as legal if it recognizes the ultimate authority of the law.* The authority of the law exceeds the tangible limits of its application. Thus, it makes sense to state that every act must be legal but not necessarily explicitly authorized by law. These legal "vacuums" in which we are at liberty to act in any manner which does not break the law are "legal" (and cannot be classified as "non-legal") because their parameters are negatively defined by the law itself- where the law begins, these vacuums end. Importantly, it is not beyond the law's authority to extend its application to these "non-legal" actions; the law dictates the scope of my liberty. In this sense, the significance of the law is not restricted to its application but the threat of its potential application, its authority. If a 'person conforms to the law to the extent that he does not break the law', he is not necessarily actively *ruled by a specific law* but he is still *subject to the law's ultimate authority*.<sup>278</sup> Hobbes argued that the social condition without law would result in a 'war of all against all' in which life would be 'solitary, poore, nasty, brutish and short.'<sup>279</sup> If his philosophy were correct surely every legal state would be a continuous mix of chaos and order. However, this is not the case; there are certainly elements of societal affairs that exist without laws. It is thus necessary to qualify Hobbes' statement. The order that derives from the law originates from the consequences of its ultimate authority rather than the tangible evidence of its universal application. In reality a legal state can operate without many laws but not without the law's ultimate authority.

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<sup>276</sup> Krygier (n7) 19

<sup>277</sup> Krygier (n7) 19

<sup>278</sup> Raz (n1) 213

<sup>279</sup> Hobbes (n264) 89

### **Positive Discrimination**

Raz reserves legal conformity as a method by which the ‘people’ preserve legality in a state.<sup>280</sup> Raz’s liberal construction of legal conformity encapsulates the idea that the citizen is always subject to the law but not necessarily always *ruled by* it. The legality of people’s actions is secured to the extent that their actions do not break the law. Essentially, this conception of legal conformity distinguishes between two different notions: “rule of” law and “ruled by” law. The latter requires a positive legal authority to precede every action; it thus dissolves any expectation of liberty. The former “rule of” law encapsulates the ultimate authority of law in a state; legal conformity secures legality and is thus the quintessential component of a legal state. However, Raz indicates that in relation to executive acts more than legal conformity is required; ‘government shall be ruled by law and subject to it.’<sup>281</sup> Raz thus hints that the *rule of* law is not enough; the government must also be *ruled by* it. The legal threshold is raised when measuring the legality of governmental acts. This suggests that legality is Janus-faced, for the citizen it means one thing and for the executive it means another. The requirement of legality is then naturally more demanding on the executive than on the individual. The law thus contracts with each party on different terms.

It is argued that legality should not have a multi-faceted character; it should mean the same thing for the individual and the executive. Of course governmental

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<sup>280</sup> Raz (n1) 213-214

<sup>281</sup> Raz (n1) 212

activity should be subject to greater legal regulation. However, ensuring this consistency in the definition of legality is not equivalent to placing equal legal demands on the individual and the state. Primarily, surely this bi-polar aspect to legality brings the notion of equality before the law into disrepute. Equality before the law is formal; it simply demands that all are subject to the law. This has no bearing on how substantively discriminatory a particular law is. Thus, for instance, it was argued that section 23 Anti-Terrorism Crime and Security Act 2001 undermined the rule of law because it discriminated against non-British suspected terrorists.<sup>282</sup> However, whilst this legislation certainly treated citizens unequally and in a discriminatory manner, it did not undermine the principle of equality before the law. British and non-British suspected terrorists were equally subject to the law; the consequences of this subjection were however unequal and inevitably unfair on one of the parties. The term “equality” is thus misleading because it necessarily connotes principles of fairness and non-discrimination. It is more accurate to refer instead to the *universality* of the law rather than its equal application. On first appearance, this heightened version of legality imposed on the executive still requires the minimum level of subjection to the law. In this sense it does not undermine the principle of equality before the law. However, unlike the arguments on the discriminatory substantive content of legislation, requiring the executive to be also *ruled by* the law threatens to alter the terms of the relationship. The executive and the citizen are not equal before the law because the terms of the relationship regarding the former are inherently more demanding. Simply stating that this is justified does not alter this detriment to the conceptual consistency of the rule of law.

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<sup>282</sup> See *A (and others) v Secretary of State for the Home Department* [2004] UKHL 56

Secondly, this heightened version of legality in relation to executive acts is arguably inconsistent with precedent. Indeed, whilst in *Eshugbayi Eleko v Government of Nigeria* [1931]<sup>283</sup> Lord Atkin states that ‘As the executive he can only act in pursuance of the powers given to him by law’, this judgment sits uneasily with other case law.<sup>284</sup> *Entick v Carrington* (1765)<sup>285</sup> epitomizes the required legality of executive acts. It is debatable to what extent this case confirms the notion of legal justification in terms of legal conformity. On one hand, Lord Camden appears to dismiss the legality of the warrant sanctioning the seizure of a man’s property on the grounds that it was ‘not supported by one single citation from any law book extant.’<sup>286</sup> This arguably indicates the need for a preceding statute for every executive act. Indeed, Cane interprets the adjudged illegality of the warrant in light of the fact that the powers were not ‘legally recognized’; this contradicted the ‘principle that all governmental acts be justified by reference to legal powers.’<sup>287</sup> Yet, on further analysis, it appears that the case upholds the more liberal conception of legal conformity. Indeed, the objection to the warrant derives not from the government’s failure to explicitly validate the action in existing statute but rather from its active breach of the ‘laws of England’ which held that ‘every invasion of property, be it ever so minute, is a trespass.’<sup>288</sup> Thus, the executive actions do not qualify as legal because they break the law. This is not a matter of debate. What is at issue is whether having broken the law ‘an excuse can be found or produced’ in ‘the books’ which indemnifies the executive’s illegal actions.<sup>289</sup> The ‘silence of the books is an authority

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<sup>283</sup> *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] AC 662

<sup>284</sup> Lord Atkin (n283) at 670

<sup>285</sup> (1765) 19 Howell’s State Trials 1029

<sup>286</sup> Lord Chief Judge Camden (n285)

<sup>287</sup> P Cane, “Prerogative Acts, Acts of State and Justiciability” (29(4) *International and Comparative Law Quarterly* (1980) 680, 686

<sup>288</sup> Lord Chief Judge Camden (n285)

<sup>289</sup> Lord Chief Judge Camden (n285)

against the defendant.<sup>290</sup> Thus, whilst every executive act must be justified in law (in terms of conforming to the law), every excuse for an illegal act must be found in statute. This secondary resort to the ‘books’ does not change the fact that the activity is deemed ‘illegal and void’, it merely provides a temporary ‘lawful’ excuse to act in an illegal manner.<sup>291</sup> However, Lord Camden concludes that ‘it is said that it is better for the government and the public to seize the libel before it is published; if the legislature be of that opinion they will make it lawful’, but it had not done so.<sup>292</sup> What is clear from this is that the primary determinative factor dictating the “legality” of executive acts is legal conformity. The government is at liberty to act as it deems appropriate as long as it does not break the law. Lord Camden’s consistent reference to “man” rather than government further implies a level playing ground for both individual and executive.<sup>293</sup>

This interpretation of *Entick* is certainly consistent with the court’s approach in *Malone v Metropolitan Police Commissioner* [1979]<sup>294</sup> which held that as seen as ‘[telephone] tapping entailed no breach of the ordinary law, no authorization by statute or common law was needed... It could lawfully be done because there was nothing to make it unlawful.’<sup>295</sup> Allan disputes the integrity of this statement claiming it is ‘weak authority for treating the state, or the Crown, as if it were a private individual.’<sup>296</sup> He contends that ‘the whole point of the rule of law would be lost if the government were treated in all respects like an ordinary citizen, even in private law.’<sup>297</sup> This criticism is flawed for two reasons: First, proposing that legality for the

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<sup>290</sup> Lord Chief Judge Camden (n285)

<sup>291</sup> *John Entick, Clerk v Nathan Carrington and Three Others, Messengers in Ordinary to the King* (1765) 2 Wils K.B. 275 at 292, 95 ER 807 at 818

<sup>292</sup> Lord Chief Judge Camden (n285)

<sup>293</sup> Lord Chief Judge Camden (n285)

<sup>294</sup> [1979] 19 St Tr 1030

<sup>295</sup> [1979] 19 St Tr 1030 at 1067

<sup>296</sup> Allan (n101) 159

<sup>297</sup> Allan (n101) 157-158

government means simply acting in a manner which does not break the law certainly indicates that “legality” means the same thing for the executive as it does for the private individual. However, this does not necessarily mean that the law will treat the government as it does a private citizen. In a legally sophisticated society it is anticipated that the government will be subject to far greater legal regulation and scrutiny. Thus, whilst the executive is at liberty to act in a manner which does not break the law, the probability of it running into legal barriers is far greater than it is for the private individual. Thus, I agree that there is ‘no simple analogy’ between government and individual action because the former is inherently different from the latter: ‘it asserts the authority of the state.’<sup>298</sup>

Second, the purpose of the rule of law exceeds merely controlling the executive. By perceiving the ‘whole point’ of the rule of law as navigating the distinction between governmental and individual acts, legality is portrayed merely as a distinguishing criterion.<sup>299</sup> Allan suggests that the “whole point” of the rule of law is to ensure that the executive is treated differently. Arguably this encourages a negative perception of the rule of law. Conveying the rule of law as merely a disabling mechanism undermines its social wide significance. However, portraying the rule of law as the ‘ultimate controlling factor’ artificially devalues its purpose and scope.<sup>300</sup> The notion of the ultimate authority of law must be respected not just by the executive but by other institutions and, of course, the people. Thus, the rule of law is not just concerned with the executive. Indeed, Allan himself comments that ‘If the law were largely a mechanism for the execution of government objectives, it would be right to accept his (Raz’s) contention that the rule of law was only a ‘negative’ virtue,

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<sup>298</sup> Allan (n101) 159

<sup>299</sup> Allan (n101) 157-158

<sup>300</sup> Lord Hope, *R (Jackson and others) v Attorney General* [2005] UKHL 56, par 126

restraining government from certain kinds of arbitrary rule.’<sup>301</sup> However, the law is clearly a tool at large for society, not necessarily one customized for executive-use; the rule of law necessarily has a correlative societal impact.

### **The executive can do anything not prohibited by law.**

Legality is the cardinal principle at the heart of the rule of law. It is argued that the legality of an action is determined to the extent that *it does not infringe the law*. This perception applies both to the individual and the state. It is necessary to assess to what extent this version of legality “holds up” in political reality. The existence of the Ram doctrine in the UK, accompanied by a plethora of case law discussing the meaning of legality, is a useful reference point. Indeed, Harris helpfully summarises the doctrine in the following terms:

*‘The current law of England and Wales hesitatingly accepts that the Government does not have to find authority in positive law for its every action, since like a natural legal person it has the freedom to do that which is not prohibited by law.’*<sup>302</sup>

The hesitancy referred to reflects an intuitive reluctance to award the executive legal liberty. In *R v Somerset County Council ex p Fewings* [1995]<sup>303</sup> (*Fewings*) whilst Laws LJ recognises that ‘public bodies and private persons are both subject to the rule of law’, he contests that ‘the principles which govern their relationships with the law are wholly different.’<sup>304</sup> Therefore, for private persons ‘the rule is that you may do

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<sup>301</sup> Allan (n101) 24

<sup>302</sup> B V Harris, “Government “third source” Action and Common Law Constitutionalism” (2010) LQR 373

<sup>303</sup> [1995] 1 All ER 513

<sup>304</sup> Laws LJ (n303) 524



anything you choose which the law does not prohibit...for public bodies the rule is opposite, and so of another character altogether.<sup>305</sup> However, one questions whether his subsequent summary of the executive's position was truly "opposite" to that detailed for the private individual. Indeed, he concludes that in relation to the executive 'any action taken must be justified by positive law.'<sup>306</sup> However, he fails to explore the meaning of legal justification. Certainly, it has been argued thus far that those actions taken which are not directly regulated by law remain legally justified because by setting the limits, the law still defines the parameters of executive action. It is therefore possible for those executive actions without a positive legal authority to be justified *by* law, if not *in* law. Furthermore, Laws LJ's argument assumes an obvious distinction between public bodies and private persons. In light of recent case law on the application of section 6 of the Human Rights Act 1998, this appears to not be a foregone conclusion and the potential for confusion to infiltrate non-human rights case law cannot be discounted.<sup>307</sup> However, Laws LJ's approach certainly has appeal. His argument is particularly attractive because it would essentially "bulk up" one's rather minimalistic approach to the rule of law; the demand for every action to be substantiated in positive law accredits law with an obvious value and quietens the inevitable criticism of this piece: what is the point of law? However, it will be argued that Laws LJ's approach is unrealistic, unnecessary and potentially counter-intuitive.

Initially it is necessary to point out the technical deficiencies in Laws J's judgment in *Fewings*. Elliott illustrates that whilst the '*conclusion* in *Fewings* was

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<sup>305</sup> Laws LJ (n303) 524

<sup>306</sup> Laws LJ (n303) 524

<sup>307</sup> See A Williams, "Public authorities: What is a hybrid public authority under the HRA?" in *The Impact of the UK Human Rights Act on Private Law* (D Hoffman, Cambridge, CUP, 48-65); A Williams, "A fresh Perspective on Hybrid Public Authorities under the Human Rights Act: Private Contractors, Rights-Stripping and "Chameleonic" Horizontal Effect" *Public Law* (1): 139-163; H Quane, "The Strasbourg Jurisprudence and the meaning of "Public Authority" under the Human Rights Act" (2006) *Public Law* 106; "The Meaning of Public Authority under the Human Rights Act" *Joint Committee on Human Rights* (Seventh Report of Session 03-04) (HL Paper 39, HC 382)

sound, the same is not true of the *reasoning* process which preceded it.’<sup>308</sup> The respondent council, which had decided to prohibit deer hunting on certain land, was a creature of statute. Elliott therefore concludes that it was ‘entirely unsurprising’ that the Court accepted the applicant’s argument that the council had to prove it was acting within the scope of its statutory power.<sup>309</sup> Indeed, it is a ‘well-established principle that local authorities, being statutory corporations, possess only those powers which are expressly or impliedly given to them by Act of Parliament.’<sup>310</sup> However, Elliott points out that it does not necessarily follow that ‘*all* public authorities have to demonstrate legal authorization for *everything* which they do.’<sup>311</sup> Thus Laws J’s conclusion does not logically flow from his reasoning. Indeed, as pointed out by Harris, Laws J’s conclusion ‘contrasts starkly with both government practice and established legal principle.’<sup>312</sup>

Beyond these technicalities, Harris further emphasizes that *Fewings* is an anomaly in case law. Primarily, Laws LJ’s judgment directly contradicts the outcome in *R (on the application of Hooper and others) v Secretary of State for Work and Pensions* [2005]<sup>313</sup> in which the court refused to find the government’s provision of pensions to widowers unlawful, despite failing to find positive legal authorization for the policy. It demonstrated ‘recognition at the highest judicial appellate level that the government is free to do that which is not legally prohibited or contrary to the legal rights of others.’<sup>314</sup> Furthermore, it was held in *Malone v Metropolitan Police Commissioner* [1979]<sup>315</sup> that as seen as ‘[telephone] tapping entailed no breach of the ordinary law, no authorization by statute or common law was needed...It could

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<sup>308</sup> Elliott (n238) 169 (emphasis added)

<sup>309</sup> Elliott (n238) 169

<sup>310</sup> Elliott (n238) 169

<sup>311</sup> Elliott (n238) 169

<sup>312</sup> Elliott (n238) 170

<sup>313</sup> [2005] UKHL 29

<sup>314</sup> B V Harris, “The third source of authority for Government Action Re-visited” (2007) LQR 225, 230

<sup>315</sup> [1979] 2 All ER 620

lawfully be done because there was nothing to make it unlawful.’<sup>316</sup> Laws LJ’s judgment also sits at odds with political practice. In the UK ‘thousands of government actions’ occur daily which are not substantiated in positive law.<sup>317</sup> Examples include: entering into contracts, making pensions available to widowers<sup>318</sup>, making ex gratia payments, making available lists of persons ‘whose suitability to work with children was in doubt’.<sup>319</sup> Daintith further lists the government’s ordinary capacity to ‘make promises, conclude contracts, acquire and dispose of property, acquire and disseminate information, make and receive gifts, form companies, set up committees and agencies, and perform a wide variety of other functions within the policy process.’<sup>320</sup> Indeed, Cohn identifies such actions as a necessary consequence of ‘modern reality’ which calls for ‘executive leadership and initiative.’<sup>321</sup> Therefore, ‘since statute can never fully provide answers to all future needs...some non-statutory action is bound to emerge.’<sup>322</sup> This reality is not exclusive to statute; the common law cannot foresee all necessary future action either. Therefore, Laws J’s perception of legality is wholly unrealistic.

Furthermore, inherent in Laws J’s perception of legality is an implicit presumption that such a requirement will inevitably increase Parliamentary scrutiny of executive acts. It assumes that such a requirement constrains executive action by requiring it to be substantiated in positive law. However, this is counter-intuitive. In practice such an approach would not guarantee pre-action scrutiny and accountability. On the other hand, it would likely result in the enactment of very broad legislative

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<sup>316</sup> [1979] 2 All ER 620 at 1067

<sup>317</sup> Harris (n314) 226

<sup>318</sup> *R (on the application of Hooper and others) v Secretary of State for Work and Pensions* (2005) UKHL 29

<sup>319</sup> *R v Secretary of State for Health, ex parte C* [2000] 1 FLR 627

<sup>320</sup> T C Daintith, “The Techniques of Government” in *The Changing Constitution* (eds) J Jowell and D Oliver (Oxford, Clarendon Press, 1994) 211

<sup>321</sup> M Cohn, “Judicial Review of non-statutory executive powers after Bancourt: a unified anxious model” (2009) PL 260 at 264-265

<sup>322</sup> Cohn (n321) 264-265

powers designed to legitimate a spectrum of government actions without wasting time or resources. Indeed, Harris similarly anticipates ‘inevitably incomplete specific authorization...and the provision of more general authorisations which would ensure that the government was not left short of positive law authority when needed.’<sup>323</sup> Furthermore, simply requiring legislation to precede government action does not logically guarantee parliamentary scrutiny. Indeed, the Constitutional Committee exposed a number of dangers deriving from fast-tracked legislation. When legislation is introduced and passed in a matter of ‘a few weeks or even days it is impossible for Parliament to fully analyse and debate the proposals put before it.’<sup>324</sup> It essentially entails a ‘trade off between speed and the quality of scrutiny’.<sup>325</sup> The Law Society thus concludes that ‘legislation that is introduced in a rushed manner is invariably bad.’<sup>326</sup> The Anti-Terrorism Crime and Security Act 2001, for instance, was passed in record time and legitimated discriminatory and arbitrary governmental action. This pressure for pre-action legislative endorsement can also have ‘knock on’ effects.<sup>327</sup> For instance, the Aggravated Vehicle Taking Act 1992 and Dangerous Dogs Act 1991 disturbed and delayed the parliamentary itinerary.<sup>328</sup> The heightened demand for legislation is also likely to disable other pressure groups and interested organisations from scrutinizing prospective legislation.<sup>329</sup> Furthermore, the extent to which legislation evidences effective scrutiny inevitably depends, in the UK at least, on the executive’s dominance in the legislative arena. In other words, it depends on the political climate. The heightened demand for legislation is likely to compromise effective scrutiny and therefore it ‘may not have the benefit of appropriate focused

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<sup>323</sup> Harris (n314) 237

<sup>324</sup> House of Lords Select Committee on the Constitution, Fifteenth Report (2009) *Fast Track Legislation: Constitutional Implications and Safeguards* (par 33)

<sup>325</sup> House of Lords Select Committee on the Constitution (n324) par34 (clerk of the parliaments)

<sup>326</sup> House of Lords Select Committee on the Constitution (n324) par39 (The Law Society)

<sup>327</sup> House of Lords Select Committee on the Constitution (n324) par43

<sup>328</sup> House of Lords Select Committee on the Constitution (n324) par 43 (Lord Baker)

<sup>329</sup> House of Lords Select Committee on the Constitution(n324) par44

consideration and approval by the legislature before the government action takes place.<sup>330</sup> Thus, Laws J's perception of legality is not necessarily more effective as a controlling mechanism on the government. On the contrary, it may actually inhibit accountability. Furthermore, the focus of debate on pre-action scrutiny neglects consideration of post-action political mechanisms of accountability, a topic that will be returned to in due course.

Harris also draws on Laws J's extra-judicial writing to provide a 'possible explanation' for his judgment.<sup>331</sup> He suggests that 'Laws J was thinking only of situations where the public body was in its actions intending to assert legal rights over the residuary freedoms of others', as was occurring on the facts of the case relating to the local authority's ban on hunting.<sup>332</sup> Elliott agrees that '[a]ction which aims to produce legal consequences - by, for example, affecting the legal rights or status of others - must be justified by reference to positive law.'<sup>333</sup> However, Harris contests that the third source 'has never been recognized as giving the central government rights over others. Citizens are always free to ignore without legal consequence that which the government attempts to do under the third source.'<sup>334</sup> This indicates that whilst this residuary freedom is legally justified it bears no legal consequences on the individual. Indeed, '[t]heory would say that the government does not have the potential to interfere under the third source with an individual's liberty because the individual can ignore the government's action if that action is not authorized by positive law.'<sup>335</sup> In other words, the executive's actions conform to the law but they have no *legal bite*. Harris in particular draws on Sir John Laws' extra-judicial writings

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<sup>330</sup> Harris (n314) 237

<sup>331</sup> Harris (n314) 232

<sup>332</sup> Harris (n314) 232

<sup>333</sup> Elliott (n238) 170

<sup>334</sup> Harris (n314) 232

<sup>335</sup> Harris (n314) 233

to highlight the distinction between his approach and the understanding of the third source. Whereas Sir John Laws argues that ‘any interference with another’s liberty stands in need of justification’, the third source ‘does not recognize a bald natural right to the guarantee of freedom of the individual from interference.’<sup>336</sup> In other words, the individual enjoys freedom from interference to the extent that it is ‘judicially enforceable’, therefore when there is ‘available identifiable and relevant positive law, often in the form of torts, criminal law, common law recognition of fundamental rights in the course of judicial review or statutory human rights law.’<sup>337</sup>

However, admittedly, Sir John Laws validly exposes a weakness in the third source theory and indeed the rule of law. As it stands the residual freedom of the individual is susceptible to interference by the government’s abuse of liberty. This interference is not positively substantiated in law but it has practical consequences. The interference may not legally obligate the individual but the government may act in a way that ‘physically or for another practical reason, rendered it impossible for an individual to do what they wished to do.’<sup>338</sup> The individual is not protected by positive law; even though the government cannot pursue its motive through the courts ‘the individual cannot from a practical point of view escape the effect of the interference by the government.’<sup>339</sup> The effect is not legal but it is intrusive and inescapable. Harris points to *R v Secretary of State for Health ex p C* [2000]<sup>340</sup> as an example of such a scenario.<sup>341</sup> The government’s decision to construct a list of persons who might not be suitable to work with children and subsequently advise employers on its contents did not conflict with positive law. However, whilst the

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<sup>336</sup> Sir John Laws, “Public Law and Employment Law: Abuse of Power” (1997) PL 455 at 465; and Harris (n314) 232

<sup>337</sup> Harris (n314) 232

<sup>338</sup> Harris (n314) 233

<sup>339</sup> Harris (n314) 233

<sup>340</sup> [2000] 1 FCR 471; [2000] 1 FLR 627

<sup>341</sup> Harris (n314) 233

effects on the individual were not “legal” as such, in reality there was no practical way for the individual to avoid the inevitable negative impact on his employment prospects and reputation. It is presumed that for Sir John Laws the third source should be modified to the extent that the government is at liberty to act in any manner that does not conflict with the law *or the liberty of the individual*. The law is thus allocated the role as mediator between the conflicting residual freedom of the government and the individual. Where there is conflict, statutory authority is required to determine the outcome. This proposal inevitably determines that the individual’s residuary freedom always prevails over that of the executive by requiring the state to demonstrate positive legal authority for interference with the individual’s freedom. However, this suggestion is inherently problematic: By requiring positive legal authority for interference with “the rest”, that residual liberty left unregulated by the law, it inevitably demands it for the whole. Yet, requiring every executive act to be supported by positive legal authority is simply unrealistic and impractical. On the other hand, if the intention is to protect certain types of non-legal *liberties* existing *within* this residual freedom, there exists an inevitable problem of identification.

This problem of classification lies in the meaning we allocate to “liberty”. On an elementary level, it is difficult to determine what constitutes an interference with a citizen’s non-legal liberty. Surely it is usually the law that acts as a valuable indicator of which liberties deserve protection. There is certainly a distinction between liberty and liberties. Dworkin distinguished between rights to particular liberties and the idea of a general right to liberty.<sup>342</sup> Allan helpfully explains:

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<sup>342</sup> R Dworkin, *Taking Rights Seriously* (London, 1977) ch12

*'My right (for example) to freedom of speech is the outcome, first, of my undifferentiated residual liberty- whose restriction needs lawful authority- and, secondly, of the court's attachment to freedom of speech.'*<sup>343</sup>

He therefore concludes that 'a constitutional right at common law is a product of these two interacting faces of the rule of law.'<sup>344</sup> One agrees that liberties protected by common law may well derive from that initial residual liberty. Liberty by its very nature is residual in character. Liberties, however, may acquire legal protection because they are *identifiable* and often of obvious significance; they therefore may be easily segregated from residual liberty and given legal standing. However, Allan argues that the 'idea of liberty as residual reflects the fundamental principle of the rule of law that every invasion of individual liberty by the state is *prima facie* illegal...No government measure or action which infringes my liberty is lawful unless it is authorized.'<sup>345</sup> He draws authority from the case of *Entick v Carrington* [1765]<sup>346</sup> which he believes asserted the 'foundation of constitutional rights.'<sup>347</sup> He and I depart ways early: *It is only once a court attaches importance to a liberty that its restriction requires lawful authority.* Indeed, *Entick's* significance derives not from the infringement of that residual liberty enjoyed by every individual but those specific liberties (in this case relating to the protection of property) protected by the 'laws of England' which held that 'every invasion of property, be it ever so minute, is a trespass.'<sup>348</sup> On the facts, this case did not require lawful authority to protect that residual liberty enjoyed by every citizen but those specific liberties protected by valid

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<sup>343</sup> Allan (n101) 136-7

<sup>344</sup> Allan (n101) 136

<sup>345</sup> Allan (n101) 136

<sup>346</sup> [1765] 19 Howell's State Trials 1029

<sup>347</sup> Allan (n101) 136

<sup>348</sup> Lord Chief Judge Camden (n346)



law. Arguably, then, this case does not directly contradict the contention that the government is at liberty to act in any manner that does not conflict with valid law. Admittedly, in the UK such a proposal is inevitably more complex because what constitutes “valid law” is in itself slightly more confusing as a result of the unwritten constitution. This is because in the UK constitution common law qualifies as valid law. It will be argued that confidence would be restored in this controversial model of legality if the border between liberty and the law were more accurately defined and the *liberties* of the citizens more *visibly* protected in law through statute.

It may be argued that such a proposal inevitably intrudes on the rule of recognition.<sup>349</sup> However, it does not demand an alteration in the recognition of what classifies as valid law, nor does it change the dynamic of the hierarchical relationship between common law and statute. Rather, it calls for greater use of statute in order to secure a conceptual consistency between the rule of law and statutory supremacy. It therefore demands greater utilization of a source of law already recognized as supreme; the exploitation of statute as a means to protect liberties and authorize governmental powers lends itself to the current rule of recognition. It therefore accommodates more neatly primary and secondary rules within the constitutional working structure. The rule of recognition is ‘a rule about rules’.<sup>350</sup> It is a secondary, as opposed to a primary, rule because it is a ‘rule about the validity of other rules’; it sets out ‘the criteria of legal validity’ and also ‘specifies orders of precedence among sources of law’.<sup>351</sup> It is both a “social” and “ultimate” rule because ‘its existence is secured simply because of its acceptance and practice.’<sup>352</sup> In the context of the UK Constitution both common law and statute meet the criteria of legal validity. However,

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<sup>349</sup> Hart (n250)

<sup>350</sup> S J Shapiro, “What is the Rule of Recognition (and does it exist)?” *Public Law and Legal Theory, Research Paper Series, Research Paper No.181*, 3

<sup>351</sup> Shapiro (n350) 4

<sup>352</sup> Shapiro (n350) 5

it is a recognized fact that statute trumps the common law.<sup>353</sup> Therefore, the incentive to greater utilize statute lies in the rule of recognition itself. It is logical to assume that those liberties or powers deemed most significant should acquire the support of the highest form of legal authority. Thus one is proposing merely to exploit the rule of recognition in order to first, encourage a more beneficial use of statute and second, ascertain greater logical fluidity between the concept of the “rule of valid law” and constitutional practice. It is a practice of aligning primary and secondary rules.

### **How do we monitor the executive’s residual liberty?**

It is necessary to discuss the most effective mechanism to remedy the susceptibility of the citizen to interference by an executive who acts in the realms of its residual liberty. One solution is essentially defensive; ensure that valid law effectively protects those liberties deemed significant. The protection of liberties is therefore bound up with the rule of valid law. This is not because the rule of law is inherently virtuous but because an abuse of the citizen’s liberty is coterminous with legal conflict. Logically, then, an abuse of its own liberty therefore constitutes an illegality. In the UK it is suggested that the complexity as to what constitutes valid law should be clarified through greater codification in statute and the dilution of common law rights. A second possibility is the extension of judicial review. The paradox of subjecting the residual liberty of the executive to judicial review is a proposal observed in recent case law and discussed in detail by Mark Elliott.<sup>354</sup> Elliott argues that judicial review has evolved and outgrown its hereditary links with parliamentary intent; a trend solidified by the development of good administration

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<sup>353</sup> *Attorney General v De Keyser’s Royal Hotel Ltd* [1920] AC 508

<sup>354</sup> *R (Shrewsbury & Atcham BC and Congleton BC v Secretary of State for Communities and Local Government and Shropshire CC* [2008] EWCA Civ 148; see M Elliott, “Beyond the Logical Boundary? Judicial Review of Non-Statutory Power”, Chapter 5 in *The Constitutional Foundations of Judicial Review* (Oxford and Portland, Hart Publishing, 2001)

principles. In this light, extending judicial review to the executive's residual acts does not necessarily breach its 'logical boundaries' as Wade presumes, especially if these good administration principles are transformed into positive legal obligations.<sup>355</sup>

However, it is necessary to discuss whether the extension of judicial review is actually necessary. This discussion inevitably assumes that the political accountability mechanisms are inadequate. It is argued that we should be focused on developing pre and post-action political accountability mechanisms designed to enhance the individual's participation in promoting good government. Politics ensures that the law is used; legal liberties epitomise the law at its most useful.

### **Statute**

In the United Kingdom greater statutory codification of legal liberties and executive powers is desirable. A distinction was previously made between a question of the law's ultimate authority and the role it is appointed in society. The law's status and its utilization are two different issues; however, strengthening the latter naturally reinforces the value of the former. It is suggested that, in the UK in particular, increased use of statute in the place of the common law would give greater bite and clarity to the concept of "the rule of valid law".

### **Statutory Supremacy**

It is initially necessary to point out that confirming the existence of the executive's residual liberty does not devalue or disable law-making in this field. In *Fewings*, Elliott suggests that the court's unorthodox reasoning derived from an

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<sup>355</sup> H W R Wade, "Judicial Review of Ministerial Guidance" (1986) 102 LQR 173, 175

understandable reluctance to allow the government to rely on its residual liberty to avoid a statutory scheme. However, Elliott relies on *Attorney General v De Keyser's Royal Hotel Ltd* [1920]<sup>356</sup> to assuage such fears. The case considered whether the Crown was required to make compensation payments when taking possession of property in connection with the defence of the realm. Existing prerogative did not require it but the Defence Act 1942 did. It was held by Lord Atkinson that statute 'abridges' prerogative and that following the enactment of legislation in this field 'the thing it empowers the Crown to do can thenceforth only be done by and under the statute'.<sup>357</sup> The later statute therefore supplanted the prerogative. Whilst admitting that this case concerns the relationship between statute and the prerogative, Elliott argues that the 'logic which underpins this decision is equally applicable to the relationship between statutory power and residual liberty.'<sup>358</sup> Therefore, residual liberty is not eternally immune from statutory intrusion. Where it is deemed appropriate for greater legal regulation in a certain field, a statute may be enacted and even retrospectively applied. Lord Lester of Herne Hill agrees that the Government cannot rely on its residual liberty 'to enable the Government to pre-empt Parliament's legislative process, and to contend otherwise would be contrary to the rule of law.'<sup>359</sup> One has already highlighted a lack of aversion to the accommodation of retrospective laws within the rule of law. Here retrospective law-making may be beneficial as a legitimate means to control the executive. Therefore, the legislature is not prohibited from interfering with the executive's residual liberty where it deems it appropriate for the law to intervene.

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<sup>356</sup> [1920] AC 508

<sup>357</sup> Lord Atkinson, *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 539-40

<sup>358</sup> Elliott (n238) 172

<sup>359</sup> Lord Lester of Herne Hill in *The Pre-emption of Parliament* (Constitution Committee, Thirteenth Report) Chapter 3 "The Legal Basis of Pre-emption", par 61

## **Rule of “valid law”?**

At first instance, the concept of the “rule of valid law” is not a complicated one. It simply allocates ultimate legal authority to the law. However, in the UK there exists an internal legal hierarchy within the category of “valid law” that complicates matters. In the previous chapter a criticism was made of Raz’s apparent differentiation between laws which are said to rule and those laws that are simply valid but less efficient and therefore not of the ruling variety.<sup>360</sup> It was argued that this approach superficially created a legal hierarchy within valid law. However, in the UK, this hierarchy is genetic rather than externally imposed by the conceptualization of the rule of law. Indeed, the notion of Parliamentary Sovereignty indicates that whilst all valid law rules, there exists a constitutional hierarchy which places statute above the common law. Of course this simplification that statute trumps common law fails to do justice to a debate that exceeds the scope of this thesis.<sup>361</sup> However, for our purposes, what is important to recognize is that there is no single item neatly marked “the law”, rather different sources of law exist (for example, legislation, case law, customary law, European Law) which inevitably compete for pre-eminence. Thus, the notion of the ‘rule of valid law’ encounters difficulties when it interacts with the constitutional framework. For instance, the conclusion that the common law has ultimate authority (as a natural derivation from the notion of the rule of valid law) is arguably constitutionally false in light of the notion of parliamentary sovereignty. This suggests that in the UK context the rule of law is demoted to a penultimate issue. It has initial relevance in distinguishing valid law but it is the constitutional status quo that deliberates which type of valid law has “ultimate” authority. It is therefore desirable to tidy-up the constitutional landscape in order for the “rule of valid law” to be more

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<sup>360</sup> See Chapter I

<sup>361</sup> See J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999) and T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001)

appropriately accommodated. It will be argued that it is in the interests of conceptual and constitutional clarity to encourage the transition from common law to statute in relation to the protection of liberties and the empowerment of the executive. This will encourage a stronger and more coherent association to be made between the rule of law and *statutory* supremacy.

### **Statutory Powers**

Conservative normativists ‘believe strongly in the legal supremacy of statute and in a rather weak, largely formal, notion of the rule of law.’<sup>362</sup> In other words, the executive should ‘govern through legal forms and instruments, through rules rather than discretion’.<sup>363</sup> This ensures that government policy ‘should, on the whole, remain a matter for Parliamentary government and should not be generally subject to wide-ranging substantive review by the judges.’<sup>364</sup> In this light, Tomkins conjoins two proposals which one would seek to segregate. His first is the abolition of prerogative powers, in the form of the Prerogative (Abolition) Act, and their replacement in legislation.<sup>365</sup> Such a move is welcome. It tidies up the current dispersal of powers between statute and the common law and embraces the supremacy of statute. It would consolidate the relationship between the rule of law and statutory supremacy. This is not a novel proposal. Indeed, the Public Administration Select Committee made a similar suggestion in March 2004.<sup>366</sup> Admittedly, simply codifying prerogative powers does not necessarily correlate with heightened parliamentary scrutiny of executive action. Indeed, the Government highlighted in its response to the 2004

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<sup>362</sup> A Tomkins, *Our Republican Constitution* (Hart Publishing; Oxford and Portland, Oregon, 2005) 34

<sup>363</sup> Tomkins (n362) 34

<sup>364</sup> Tomkins (n362) 34

<sup>365</sup> Tomkins (n362) 133

<sup>366</sup> *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (Public Administration Select Committee, March 2004)

report that ‘Ministers are already accountable to Parliament for action taken under prerogative powers, as for anything else.’<sup>367</sup> In particular prerogative powers are subject to scrutiny by Departmental Select Committees and the Prime Minister undergoes twice yearly questioning by the Liaison Committee. The Government therefore argued that ‘It is for ministers to account for and to justify their actions to Parliament and for Parliament to hold ministers to account.’<sup>368</sup> Certainly, the primary source of accountability in the constitution *should* be political. Codification does not seek to subvert this. However, those powers *already constitutionally recognized by the common law* should be placed clearly on a statutory footing. In other words, *existing legal powers* should be clarified as such. Prerogative powers are legal and are already largely subject to judicial review. Therefore, here, codification is not a legal subversion of political accountability mechanisms but a process of *clarification*.

Of course ‘Parliamentary scrutiny and accountability can also be increased without statutory provision.’<sup>369</sup> However, increased use of statute would provide Parliament with the important opportunity to decide whether such a power is justly maintained or whether it requires amendment or abolition. It provides the legislature with the opportunity to ‘delimit the government’s powers and attach appropriate conditions to their exercise.’<sup>370</sup> However, the very fact that legislation is no guarantee of securing political accountability is one reason why one does not endorse Tomkins’ further proposal that ‘Government should possess only those powers which the people, through their elected representatives in Parliament, have expressly or by necessary implication conferred upon it by statute.’<sup>371</sup> Indeed, whilst one endorses the statutory codification of *existing* legal powers, this does not necessarily correlate to the

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<sup>367</sup> Mr Hoon, House of Commons Hansard Written answers for 22 Nov 2005: Column 1887W

<sup>368</sup> Lord Bassam of Brighton, Lord Hansard Text for 5 March 2004 (240305-02) Column 928

<sup>369</sup> Standard Note: SN/PC/03861, L Maer & O Gay, *The Royal Prerogative* at 4.1

<sup>370</sup> Elliott (n238) 178

<sup>371</sup> Tomkins (n362) 132

requirement that all government actions require statutory authority, nor would such a suggestion be feasible in terms of legislative efficiency. Indeed, referring back to Tomkins' proposal, maintaining the executive's residual liberty to act does not necessarily mean that such actions are no longer deemed matters for Parliamentary government. Certainly, Parliament does not have to legislate on a matter for it to hold the Government to account for its policies. Indeed Harris proposes a number of political methods by which the government may be held to account without resorting to legislation.<sup>372</sup> It is later argued that such actions should be subject to political scrutiny rather than distorting the logical boundaries of judicial review.

### **Statutory Liberties**

If the law has ultimate authority it is natural to bring fundamental liberties under its protection. Or at least it is to be expected that a state with a degree of legal sophistication would adopt such a philosophy. In the UK constitutional context, this is not to suggest that the Common Law is somehow less sophisticated; indeed, it is often the Common Law that nurtures these fundamental liberties in the first place.<sup>373</sup> However, their graduation to statutory status should be encouraged. Indeed, in order to do justice to the importance of fundamental liberties in a legal state it is essential to bring them under the protection of that legal source which retains ultimate authority. Therefore, when alluding to the importance of bringing fundamental liberties under the protection of the law in the UK, it is envisaged that this will primarily occur through statutory means. This merely effectuates in practice what is already considered a theoretical status quo.

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<sup>372</sup> see B V Harris "The "third source" of authority for Government action revisited" (2007) LQR 225 at 247-248

<sup>373</sup> See T Poole "Back to the Future? Unearthing the theory of Common Law Constitutionalism" (2003) 23 OJLS 435



Allan, on the other hand, is against such a proposal. His initial reluctance clearly derives from his misperception that the common law is an inherently better vehicle by which to realize the rule of law. Allan overstates the association between the common law and the protection of liberties. In turn arises the politicization of the rule of law as a force for “good”. Indeed, Tomkins particularly opposes Allan’s contention that important liberties only gain protection ‘ultimately because...they find expression in the common law.’<sup>374</sup> From this Tomkins deduces Allan’s assumption that Acts of Parliament ‘are instruments only of repression and not of liberation’ and that we owe all our freedom to the courts.<sup>375</sup> However, this is ‘simply wrong...Parliament has frequently legislated, often in face of overt judicial hostility, to extend liberty.’<sup>376</sup> After all, it was Parliament which passed the Human Rights Act 1998. Furthermore, Tomkins contends that the ‘entirety of British social justice- of the welfare state- is a creation of progressive governments enacting law in Parliament’.<sup>377</sup> In contrast, Tomkins correctly argues that the courts have often been deemed ‘more executive minded than the executive’.<sup>378</sup> If the opposition to placing constitutional common law rights on a statutory footing derives from this mythical association between liberty and the common law, this fallacy must be exposed. The citizen’s liberties are not necessarily safer in the hands of the judges. Indeed, the UK judiciary have ensured that ‘...even the extraordinary counterterror measures of detention without trial and subjection to control orders are clothed in legal authority and apparent human rights compliance.’<sup>379</sup> Fenwick and Phillipson refer to ‘a kind of

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<sup>374</sup> Tomkins (n362) 13, See T R S Allan (n101) 4

<sup>375</sup> Tomkins (n362) 13

<sup>376</sup> Tomkins (n362) 13

<sup>377</sup> Tomkins (n362) 13-14

<sup>378</sup> Lord Atkin, *Liversidge v Anderson* [1942] AC 206 at 244

<sup>379</sup> H Fenwick & G Phillipson ‘Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond.’ (2011) 56(4) *McGill Law Journal* 863, 865

unholy trinity of decisions by the UK Court of Appeal<sup>380</sup>: accepting the lawfulness of detention without trial in *A v Secretary of State for the Home Department* [2002]<sup>381</sup>, finding the admissibility of torture evidence obtained by foreign agents did not violate article 6 in *A v Secretary of State for the Home Department (No2)* [2004]<sup>382</sup> and finally finding that article 6 imposed no irreducible minimum of disclosure of the case against the suspect in control order cases in *Secretary of State for the Home Department v AF (No3)* [2008].<sup>383</sup>

Allan further argues that it is ‘mistakenly thought that *restatement* of individual rights in a constitutional document could transform their strength, when they have to be asserted in opposition to countervailing public interests.’<sup>384</sup> He suggests that it is ‘quite confused’ to presume that the ‘weight or force of basic rights may be enhanced by enactment’.<sup>385</sup> This is because whether in statutory or common law form, both mediums essentially express principles that by their very nature vary in weight according to the circumstances of the case, no degrees of expression can alter this inherent characteristic. Allan therefore argues that there is simply no point in codifying constitutional rights as both common law and convention should be understood as ‘analogous expressions of principle’.<sup>386</sup> However, Allan contradicts himself. He initially argues that the manner of expression of a principle has no impact on a principle’s structural integrity; hence he sees *no point* in codification. However, he then suggests that ‘it is in the nature of principles to resist enactment’ because their ‘range or scope...cannot be dictated in advance...Nor can their appropriate compass

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<sup>380</sup> H Fenwick and G Phillipson (n379) 869

<sup>381</sup> [2002] EWCA Civ 1502

<sup>382</sup> [2004] EWCA Civ 1123

<sup>383</sup> [2008] EWCA Civ 1148

<sup>384</sup> Allan (n101) 143

<sup>385</sup> Allan (n101) 144

<sup>386</sup> Allan (n101) 148

or scope be exhaustively defined.’<sup>387</sup> He thus appears to condemn codification for the very reason that it corrupts the intrinsic qualities of legal principles. There is an inconsistency here. Furthermore, it is not clear whether the manner of expression of a principle is irrelevant to its *weight*. Codification may not alter the genetic makeup of a principle but it does alter its status. Even Allan is willing to concede that a “higher” constitutional status’ does have practical value in the sense that a Charter of Rights ‘may serve to frustrate rules’ which would otherwise jeopardise constitutional rights.<sup>388</sup> Status then clearly counts for something. It does not necessarily change the nature of a principle *as a principle* but it certainly contributes to a principle’s constitutional rather than intrinsic weight. However, he argues that codification fails to ‘enhance the value of fundamental rights, or alter the intrinsic weight of principles.’<sup>389</sup> Yet surely a decision to place a specific liberty on a constitutional pedestal “weighs-in” to its value when it is matched against other non-statutory common law rights. The value of codification is not *restatement* but *recognition*. The manner of expression may not intrinsically alter the principle but the way in which it is perceived, externally weighed-up, does change. This is an inevitable consequence of status.

Allan’s next objection arises from the possible consequence of putting common law rights on a statutory footing. He argues that ‘...a principle, which enshrines a fundamental right, cannot be reduced to a rule.’<sup>390</sup> Allan therefore assumes that the result of statutory codification is inevitably a legal rule. He argues that codification inevitably distorts that inherent malleability of a principle. Again this proposition conflicts with his original contention that statutory codification is simply

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<sup>387</sup> Allan (n101) 151-153

<sup>388</sup> Allan (n101) 154

<sup>389</sup> Allan (n101) 154

<sup>390</sup> Allan (n101) 153

a method of restatement that has no impact on the inherent nature of a principle. However, it is not necessarily correct that statute cannot accommodate legal principles. Indeed, the European Convention on Human Rights appears to be a clear example of a codified set of principles that in its very structure compensates for the inevitable weights and balances inherent in their nature. Finally, Allan in dismissing the value of codification focuses too intently on the end product; in doing so he fails to appreciate the value of the *process* of statutory codification itself. This process inevitably involves detailed scrutiny, discussion and clarification of those rights actually deemed to be fundamental. Such a process may even result in a principle losing its status at common law if it is snubbed by the legislature. It also inevitably puts a decision on liberties in the hands of a *political institution* rather than consolidating power in the hands of the unelected judges.

If the purpose of legality is to distinguish between residual acts of liberty and acts that break the law, it is important that we can differentiate between the two. It is also important that those interests/liberties deemed significant enough to deserve legal protection should acquire it. This is certainly not a requirement of the rule of law, nor is the desirability of clarity in statute. However, it beneficially exploits that ultimate authority appropriated to the law. In other words, it means approaching the door and walking through it.<sup>391</sup> The notion of the “rule of valid law” is not a complex idea. However, in the UK it is inevitably more complicated because valid law is itself an ‘eclectic mix’ of sources.<sup>392</sup> It is argued that the label “valid law” should become more closely associated with statute to both clarify the concept and reinforce an existing constitutional truth of statutory supremacy. The problem of abuse of liberty is not remedied but mitigated by strengthening and clarifying the legal boundaries

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<sup>391</sup> See Kyrgier (n7) 22

<sup>392</sup> B V Harris, “Government “third source” action and common law constitutionalism” (2010) LQR 373, 377

within which the executive is able to act. A privileged legal upbringing in the UK constitution prompts the presumption that “valid law” will be sufficiently clear and precise to have qualified as valid law in the first place. However, this is a dangerous presumption as it draws in quality criteria within the meaning of the rule of law and threatens to politicise the concept. It should be noted then that clarifying what “valid law” means does not in itself guarantee that the law will be clear. This is a further political demand that must be secured by the political system.

## **Judicial Review**

### **Ultra-thin and *Ultra Vires***

It is necessary to discuss the relevance of judicial review in relation to monitoring the executive’s residual liberty. However, before doing so, it is necessary to clarify how the ultra-thin model translates in practice, in particular its relationship with judicial review. The ‘traditional British understanding’ of Judicial Review is ‘dominated by the notion of *ultra vires*’ hence the ‘primary function of judicial review is to enforce the commands of Parliament as expressed, for the most part, in enacted statutes.’<sup>393</sup> It is this narrow *ultra vires* principle that resonates with the ultra-thin model; it supports the notion that the executive cannot exceed its legal capacity as demarcated in statute. The notion of *ultra vires* in a UK Constitutional context draws together the cardinal doctrines of the rule of law and Parliamentary Sovereignty. Indeed, Jowell notes that ‘the sovereignty of Parliament and the principle of the rule of law justify the courts in insisting that officials properly implement the instructions

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<sup>393</sup> T Poole, “Back to the Future? Unearthing the Theory of Common Law Constitutionalism” (2003) 23(3) OJLS 435 at 451

of the legislature (and therefore provide the principal support for the ground of legality).<sup>394</sup> This is not to say that the ultra-thin model is synonymous with Parliamentary Sovereignty; the latter is a means of tailoring the rule of law to the UK Constitutional context; within the expanse of the law's ultimate authority, Parliamentary Sovereignty assigns legal supremacy to statute. Parliamentary Sovereignty and the *ultra vires* principle necessarily exist to domesticate the rule of law; the upshot of this legal triumvirate is a 'very limited role' role for the courts in 'interpreting the will of the legislature- express or implied.'<sup>395</sup>

However, the reality is that judicial review has outgrown the rule of law (or at least, the ultra-thin model). Indeed, Jowell points out that 'legality' only provides *one* ground of judicial review; he points also to the alternative grounds of 'procedural propriety and rationality.'<sup>396</sup> It is clear, that Jowell has a far more substantive and liberal conception of the rule of law; it is through this conceptual liberalisation that Jowell justifies the expansion of judicial review. For example, he argues that the rule of law 'also requires that no person be condemned unheard (thus supporting much of the ground of procedural propriety)' whilst also remarking that the rule of law 'provides that power not be arbitrarily exercised (a principle which underpins a good deal of the ground of irrationality).'<sup>397</sup> For Jowell then, the rule of law requires *more than legality* and these additional substantive characteristics find fruition in the alternative grounds of judicial review. He even suggests that some of the 'qualities of the rule of law have been implicitly subsumed under administrative law standards.'<sup>398</sup> For example, 'the requirement that a fair hearing must be provided where legitimate expectations have been disappointed (the breach of the expectation being a violation

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<sup>394</sup> J Jowell, "Beyond the rule of law: Towards constitutional judicial review" (2000) PL 671 at 672

<sup>395</sup> Jowell (n394) 673

<sup>396</sup> Jowell (n394) 672

<sup>397</sup> Jowell (n394) 672

<sup>398</sup> Jowell (n394) 672

of the rule of law's demand for legal certainty)' whilst other qualities such as 'the requirement of equal application of the law, or no punishment without a law' have been 'endorsed under the notion of irrationality or unreasonableness.'<sup>399</sup>

Jowell clearly envisages a mutual evolution of the rule of law and judicial review. However, one questions why this is deemed necessary. Having an ultra-thin conception of the rule of law does not automatically translate into a demand for the parallel emasculatation of judicial review, though it does require constitutional clarification. Nor does the emancipation of judicial review require a conceptual liberalisation of the rule of law. Constricting the practice to parliamentary interpretation would be a retrograde step for judicial review- hence this thesis does not suggest it. However, it is argued that the ultra-thin model continues to provide the foundation of judicial review via the *ultra vires* principle; it is only one component but it is an important one at least. It would be a mistake to allow the rule of law to define judicial review (the latter being a far more diverse and politically motivated practice).

Jowell's additional grounds of review do not impose a condition of legality; they are political principles requiring the executive to act in a *governmental* rather than explicitly *legal* fashion. The grounds of legality, irrationality and procedural impropriety all enjoy a "legal" status by virtue of their articulation in the common law. Their legal status, as such, is an inadvertent consequence of common law articulation. However, requiring the executive to act reasonably or in a procedurally coherent manner are not *substantively* legal impositions. The very essence of these additional grounds of review is to require the executive to act in a *governmental* manner beyond simply compliance with the letter of the law. They are political demands fashioned in

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<sup>399</sup> Jowell (n394) 672-673

the legal attire of obligation. Therefore, the ground of review which resonates with the ultra-thin model is the ground of legality i.e. the *ultra vires* notion of compliance with parliamentary intent. This is because it is the ground of review which *explicitly requires* legal conformity by virtue of its substance rather than status. As a result of constitutional engineering (the principle of Parliamentary Sovereignty) this requirement of legal conformity is primarily directed at statutory compliance. Therefore, in the UK context, the ultra-thin model is principally articulated in terms of statutory compliance.

An on-going theme of this thesis has been to argue that the rule of law alone does not secure the individual's liberty nor does it guarantee or indeed promote good government. This must be counterbalanced by the shaping influences of a flourishing political system. In the context of judicial review, the rule of law is very statutory focussed; it has been argued that the "legality" of the executive's actions are measured by the extent to which they conflict with the law. Thus the rule of law is inevitably interwoven with the will of Parliament. Judicial review has outgrown the rule of law; it has evolved from the traditional *ultra vires* model into an eclectic mix of legal and political grounds of review. Jowell has listed various factors that the court now takes into account: legal certainty, a fair hearing, the grounds of irrationality and reasonableness. This evolution of the administrative practice epitomises the realisation that legality (in terms of navigating the executive's conflict with the law) is not a sufficient check on the executive. This does not mean that the ultra- thin model is redundant in practice. Rather, it simply reiterates the reality that simply requiring the executive to act in a legal fashion is insufficient. It will however further be argued that politics is the best vehicle to optimise the rule of law; the common law constitutionalist belief in a 'higher order of rights' which emanate not from



parliamentary intent but modern democracy has the potential to dilute or even subvert the ultra-thin model with a higher source of ‘fundamental standards of political morality.’<sup>400</sup> Thus, whilst the ultra-thin model is not inconsistent with the development of judicial review; equally this thesis foresees an end point; judicial review must not be permitted to usurp the role of the political constitution. Political growth best complements the rule of law. However, before embarking on this debate, there remains another outstanding issue; having argued that the rule of law awards the executive residual liberty, how are these residual actions to be held in check and, indeed, does the scope of judicial review extend to the executive’s legal liberty?

### **Judicial Review- Beyond its logical boundaries?**

Judicial review is relevant in relation to the executive’s exercise of its residual liberty. Indeed, as we have seen, there is still an expectation that the courts will first look for statutory authority and then, in the absence of such, assess whether the government action contravenes the law. These issues still engage questions of legality that inevitably enlist the courts. Indeed, the principle of legality certainly ‘lies at the heart of any conception of the rule of law.’<sup>401</sup> Furthermore, it is certainly ‘constitutionally imperative that governmental claims of legal power must be open to judicial scrutiny’, however, the question of legality is not confined solely to issues of power.<sup>402</sup> The courts patrol and demarcate the boundary between what is legal and what is not. The former territory is not solely occupied with legal power but also legal liberty. Thus, the question of legality, in this elementary sense, is applicable to determining the legitimate exercise of residual liberty. However, judicial review has evolved to exceed the simple question of legality and the *ultra vires* principle (i.e. the

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<sup>400</sup> Jowell (n394) 675; Poole (n393) 452

<sup>401</sup> Elliott (n238) 177

<sup>402</sup> Elliott (n238) 177

extent to which executive actions conflict with parliamentary intent). It is now concerned with monitoring *good administration*, and indeed, more judges are prone to conceive of legality as a notion that transcends the letter of the law and is embedded with ‘fundamental standards of political morality’.<sup>403</sup> Elliott proposes a method to encompass this development within the issue of legality. However, the question of good administration is essentially a political one; it asks not whether a power is legally permitted but how that power is exercised and for what purpose. It therefore seems logical to allow it to be asked by a political body apt to deal with actions that affect the political, rather than legal, interests of the citizen.

Traditionally judicial review is concerned with statutory power. Exercise of legal power must ‘be shown to have a strictly legal pedigree.’<sup>404</sup> Elliott neatly summarises the process: ‘cases of this type involve, first, a determination that legal power is needed to support the relevant action and, secondly, examination of whether the government remained within or trespassed beyond the limits of the power, properly defined.’<sup>405</sup> Judicial review is then concerned with ascertaining if the government has exceeded the appropriate limits of its *statutory power*. At a very minimum, judicial review encapsulates the courts patrolling the legal border. It evaluates the legality of executive acts. To this extent, Wade is wrong to suggest that judicial review has no bearing on non-statutory actions of the executive.<sup>406</sup> After all it is necessary to ascertain whether the government’s actions have conflicted with the law in order to see if it is conforming to it. In the same way as reviewing purportedly “legal actions” the courts must ‘ensure that the state has remained within the bounds of the legal authority upon which the legality and effectiveness of its action depends’,

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<sup>403</sup> Poole (n393) 452

<sup>404</sup> H W R Wade and CF Forsyth, *Administrative Law* (Oxford, OUP, 2000) 20

<sup>405</sup> Elliott (n238) 167

<sup>406</sup> H W R Wade, “Judicial Review of Ministerial Guidance” (1986) 102 LQR 173 at 175

the court must also check that the government remains within the bounds of its liberty upon which the legality of its action depends.<sup>407</sup> The claim to residual liberty must be justified by reference to statute; the courts still need to check that the executive is acting within the bounds of its legal liberty by ensuring that Parliament has in fact left room for manoeuvre. Therefore, this minimum level of judicial review is still necessary.

The court then, in both circumstances, patrols the borders of the law. Elliott notes that when acting in its field of residual liberty, ‘the government does not need to identify any “power” in order to justify its conduct. Rather, it can argue that its action is lawful because nothing makes it unlawful.’<sup>408</sup> However, this does not mean that its actions will not be the subject of elementary review; Elliott implies this in stating that the government may still be expected to “*argue*” its case. The reality is that in order to defend its liberty the government must prove that its actions do not conflict with law. This is a question of legality. Therefore, logically the courts may legitimately proceed with review by the two-stage process outlined by Elliott above. However, Elliott is keen to disassociate ‘vires-based’ judicial review from that review required of its residual liberty by arguing that this category of review necessarily ‘concerns the identification of the scope of the actor’s legal power; an excess of power renders the act invalid or unlawful.’<sup>409</sup> He reinforces elsewhere that with the government’s residual liberty we are not concerned with the ‘scope and contours of the relevant power’.<sup>410</sup> However, one questions whether such a clear distinction exists. Indeed, of course, whilst with residual liberty we are not concerned with the scope of the government’s *legal powers*, the judiciary still navigates the parameters of its legal

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<sup>407</sup> Elliott (n238) 167

<sup>408</sup> Elliott (n238) 168

<sup>409</sup> Elliott (n238) 227

<sup>410</sup> Elliott (n238) 174

activity. Elliott concedes that ‘narrow review’ of the *prerogative* is ‘premised on the fact that, like statutory discretionary power, it is not infinite but, instead, exists only within defined areas.’<sup>411</sup> However, paradoxically, the same can be said of residual liberty which is similarly contained by law, hence the juxtaposition *legal liberty*. Legal liberty exists in vacuums that are negatively defined by the law’s boundaries.

The question of legality is not always clear-cut. Indeed, for instance, if statute prohibits “unreasonable” interference with a particular right, deducing whether the government is acting in its residual liberty or in conflict with the law necessarily requires a review of the “reasonableness” of the government’s actions. Indeed, often it is through this legal channel that questions of reasonability are precariously subsumed within the question of legality. However, this uncertainty is arguably circumvented through the adoption of Harris and Cohn’s endorsement of ‘the principle of residuality’ which ‘reflects a systemic commitment to the supremacy of statute law over non-statutory executive powers.’<sup>412</sup> Thus, if the government purports to act in a field regulated by statute, statute automatically prevails. The question of legality in relation to the government’s residual liberty is therefore less complex because the border exists between the government’s liberty and *fields* of activity regulated by statute. *The scope of the government’s liberty is therefore not determined by the interpretation of a particular statutory provision.* The boundaries are therefore more clearly defined. Actions taken within a “field” regulated by statute may be legitimately subject to judicial review taking into account the intentions and purpose behind any relevant legislation in that field. Therefore, when assessing whether the government’s activities conflict with law, we are really reviewing whether the government is acting in a field completely unregulated by law. The conflict therefore

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<sup>411</sup> Elliott (n238) 176-177

<sup>412</sup> M Cohn, “Judicial Review of non-statutory executive powers after Bancourt: a unified anxious model” (2006) PL 260, 272 & 274

arises from mutual operation in a legal field. There is evidence of a common law reversion to this “territorial” language which complements the underlying message of the Residuality Principle. Indeed, Elliott insists that *De Keyser*<sup>413</sup> represents the idea that residual liberty only exists so long as ‘...Parliament desists from enacting a statutory framework governing the *relevant area*’.<sup>414</sup> This certainly indicates that statute prevails in a general field rather than simply in relation to a specific government action. Lord Mustill in *Fire Brigades Union Case*<sup>415</sup> reinforces this consistency between the *De Keyser* Principle and the Residuality Principle. Indeed, he comments that ‘Once the superior power of Parliament has occupied the *territory* the prerogative must quit the *field*.’<sup>416</sup> There are of course weaknesses in this model. Indeed, Cohn admits that it is ‘highly malleable’ and the government may simply avert further scrutiny by arguing its operation in a different field, as occurred in *Laker Airways Ltd v Department of Trade* [1977]<sup>417</sup> where the Court of Appeal upheld Government action by finding that the case concerned the field of foreign affairs rather than civil aviation, thus the Civil Aviation Act did not apply.<sup>418</sup> The Government also successfully argued in *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989]<sup>419</sup> that the Police Act 1964 was not intended by Parliament to create a monopoly over regulation in this field. However, this undermines the advantage of the residuality principle. Under my understanding, this would still require judicial review of legal powers in the normal sense because the government is still acting in the field of policing regulated by law. Therefore, to the extent that judicial review manages the legal boundaries of the

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<sup>413</sup> *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 75

<sup>414</sup> Elliott (n238) 172 (emphasis added)

<sup>415</sup> *R v Secretary of State for the Home Department ex p Fire Brigades Union & others* [1995] 2 AC 513

<sup>416</sup> Lord Mustill, *R v Secretary of State for the Home Department ex p Fire Brigades Union & others* (1995) 2 AC 513 at 564

<sup>417</sup> [1977] 1 QB 643

<sup>418</sup> Cohn (n412) 272

<sup>419</sup> [1989] QB 26 CA

government's actions, it is applicable to these actions taken at the government's liberty.

However, there are two stages to judicial review: The first is purely a question of legality, the second concerns abuse of power. Elliott prefers to distinguish between two widths of review: narrow and broad.<sup>420</sup> The former concerns jurisdictional limits, the latter relates to good administration. Regardless of taxonomy, the latter stage exceeds the question of bare legality and reviews the quality of government decision-making in relation to the intentions of the statute. However, there is no statute to act as a necessary reference point; the issue is not an *abuse of power* but an *abuse of liberty*. However, in order to prevent the government's abuse of liberty, which infringes the individual's non-legal interests, it has been proposed that the judiciary should review the quality of the government's decision-making. Indeed, in *R v the Secretary of Health ex p C* [2000]<sup>421</sup> the court reviewed whether the Secretary of State had the power to maintain a Consultancy Service Index. The Court of Appeal stated that the Crown, as a corporation sole, could do anything that an individual could yet 'it nonetheless held (oblivious of this obvious contradiction) that the court could find that what it did was unlawful as an abuse of power.'<sup>422</sup> Thus, Howell highlights the paradox that even the Court of Appeal 'who thought that ministers...could do anything that an individual may do, did not accept the logical consequence of that approach.'<sup>423</sup> It also took the view that the government could not enjoy 'unfettered discretion to operate it in whatever way it chooses', and 'if exercised unreasonably or unfairly, such powers as it thus had would not be lawfully

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<sup>420</sup> Elliott (n238) 176

<sup>421</sup> [2000] HRLR 400

<sup>422</sup> J Howell, 'What the Crown may do' (ALBA Summer Conference, St John's College, Cambridge, 25 July 2009) par29

<sup>423</sup> Howell (n422) par28

exercised.’<sup>424</sup> Carnwath LJ confirmed in *R (Shrewsbury & Atcham BC & Congleton BC) v the Secretary of State for Communities and Local Government and Shropshire CC* [2008]<sup>425</sup> (*Shrewsbury*) that the Government’s powers ‘were not confined to those conferred by statute or prerogative, but, subject to any relevant statutory or public law constraints and to the competing rights of other parties, they extended to anything a natural person do’.<sup>426</sup> However, Carnwath LJ also emphasized that this residual class of ministerial power was ‘exceptional and should be strictly confined.’<sup>427</sup> Therefore, he concluded that whilst ‘as a matter of capacity [the Crown] had the power to do anything which a private person could do...as an organ of government it could only exercise that power for the public benefit, and for identifiable “governmental” purposes.’<sup>428</sup> In other words, Carnwath LJ adopted the paradoxical position that an abuse of liberty was unlawful. This arguably clearly displays how judicial review has ‘burst through its logical boundaries.’<sup>429</sup>

Elliott agrees that the “logical boundaries” of judicial review have evolved. Indeed, he suggests that judicial review has out-grown its ‘one-dimensional foundation of judicial implementation of legislative intention’.<sup>430</sup> He therefore argues that the ‘will of Parliament’ whilst ‘constitutionally important’, only ‘represents part of the picture.’<sup>431</sup> This indicates that the focus has shifted from the source of power to the way it is exercised- those principles of good administration. In other words, judicial review is now equally as focused on the *lawfulness*, rather than simply the *legality*, of government actions. He thus concludes that a ‘much richer set of constitutional principles’ underlies judicial review and the ‘question of sources is now

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<sup>424</sup> Hale LJ, *R v the Secretary of Health, ex p C* [2000] HRLR 400 at 407; Howell (n422) par28

<sup>425</sup> [2008] EWCA Civ 148

<sup>426</sup> Carnwath LJ (n425) at 223

<sup>427</sup> Carnwath LJ (n425) at 223

<sup>428</sup> Carnwath LJ (n425) at 223

<sup>429</sup> H W R Wade, “Judicial Review of Ministerial Guidance” (1986) 102 LQR 173, 175

<sup>430</sup> Elliott (n238) 165-166

<sup>431</sup> Elliott (n238) 165

largely irrelevant to the question *whether* a particular government activity may be reviewed' though it is not irrelevant to the question of *why* it must be.<sup>432</sup> Elliott thus endorses the subjection of 'other forms of power' (such as *de facto* powers) to judicial review.<sup>433</sup> However, he helpfully footnotes that this expression 'power' does not connote legal power; rather it is used more broadly to describe factual 'control or influence over individual legal persons or a section of the community.'<sup>434</sup>

Before discussing this expansion of judicial review, it is necessary to relay how this discussion intertwines with the meaning of the rule of law. It has been argued that the rule of law is purely concerned with formal legality. In practice this "version" of the rule of law can be enforced by the courts which police the boundaries of the law. It has been conceded that identifying what is legal and what is not is not always clear-cut but this task is relieved by the residuality principle so what is "legal" does not rest on the subjective interpretation of a particular phrase, instead statute automatically applies in particular "fields". However, recent case law such as *ex p C* and *Shrewsbury* indicates that the judiciary has exceeded the logical boundaries of judicial review by declaring unlawful the actions of the government that are within its liberty to perform but are *politically* questionable. This therefore begs the question how the rule of law, and indeed legality, can "fit" with the evolution of the role of the judge who looks beyond pure legality and analyses the political adequacy of executive action. The answer is quite simple. It is not the rule of law that has evolved but the role of the court. The rule of law, and therefore legality, is simply an element determining the executive's capacity to act; it is an element that is rightly being overtaken by political controls. The constitutional confusion arises because it is the

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<sup>432</sup> Elliott (n238) 166

<sup>433</sup> Elliott (n238) 165

<sup>434</sup> Elliott (n238) 166, footnote 3; see B V Harris "The "Third Source" of Authority for Governmental Action" (1992) 108 LQR 626, 629



judiciary (speaking in the name of the rule of law) that has adopted a new political role and is evolving into a political institution. However, it is important to remember that when the judge is acting politically he is not defending the rule of law; he is playing a vital constitutional role that complements its operation. It is thus important to distinguish between the court's legal and political responsibilities in order to maintain the integrity of legality.

Despite this evolution in judicial review, it is still incoherent to declare that an abuse of liberty is legally invalid when it never purported to express explicit legal authority. Indeed, Elliott remarks that 'it simply makes no sense to impugn the legality of an act for want of legal power when such power is not in the first place a condition precedent to the act's legality.'<sup>435</sup> However, it is possible to realign this new emphasis on good administration with legal formality. For example, it is possible to incorporate these principles of good administration into this 'condition precedent' that determines the legality of residual liberty; this is the requirement that the Government's acts are legal to the extent that it does not break the law. Indeed, Elliott similarly proposes that 'the principles of good administration must be conceptualized as a set of positive legal obligations'.<sup>436</sup> Therefore, failure to adhere to one of these principles constitutes 'a breach of the corresponding common law rule.'<sup>437</sup> Thus, Elliott effectively circumvents the previous illogicality of subjecting the government's liberty to judicial review because the unlawfulness 'derives not from an absence of legal power...but breach of a common law rule which makes it unlawful to act in such a manner.'<sup>438</sup> However, whilst Elliott argues that this is an area in which 'a common law model of review is both appropriate and necessary', placing these administrative

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<sup>435</sup> Elliot (n238) 193

<sup>436</sup> Elliott (n238) 194

<sup>437</sup> Elliott (n238) 194

<sup>438</sup> Elliott (n238) 194

principles on a statutory footing would arguably more obviously distinguish them as positive legal obligations.<sup>439</sup> Indeed, the question of good administration therefore becomes a legal one and is accommodated within the rule of law as a formal legal concept. Note, this is not a requirement of the ultra-thin model but a means of clarifying the relationship between the rule of law and the judicial review of the executive's residual liberty. This is a clear example of accepting more than simply the law's existence but *using* the law and moreover ensuring that it is *useful* in securing good government. The rule of law alone cannot secure this; it is a form of '*interaction technology*'.<sup>440</sup>

However, the codification of good administration principles into a set of legal criteria is arguably still inappropriate. There exist outstanding issues as to how Carnwath LJ's proposals would work in practice. Indeed, it is difficult to ascertain and therefore legally codify what the "public benefit" means and in what way a government's actions may or may not qualify as "governmental" in nature. It further risks jeopardising the residuality principle; if the good administration principles apply to *all* government decision-making it would appear that there is no "field" vacant of legal regulation. This suggests that the Government would enjoy no legal liberty whatsoever, a prospect that arguably undermines the trust inherent in the operation of a representative democracy. Equally, conceding the political evolution of the judiciary does not jeopardise the legality of the rule of law. It simply further illustrates that legality is increasingly not enough to control the actions of the executive. The law must work alongside political controls in a sophisticated legal state. However, the court's adoption of a political role appears to complicate the interrelationship between the judge's political and legal personalities. An alternative would be to allow the

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<sup>439</sup> Elliott (n238) 194

<sup>440</sup> Krygier (n7) 22 (emphasis added)

existing political institutions to reclaim the role of assessing the political adequacy of executive acts. The evolving role of the courts has triggered an expectation that the rule of law should mimic this politicization. However, it is important to maintain a comfortable distance between the rule of law and the courts. Legal formality can and should complement good politics but good politics is not synonymous with the rule of law. Furthermore, by re-distributing political responsibility to other political institutions such as the legislature, pressure groups and the electorate, it inhibits the court's monopoly over accountability in the state that has the potential to stagnate what must be a multi-faceted operation. Certainly, requiring greater scrutiny earlier on in the government's decision-making process would pre-empt the increasing reliance on the court's limited *reactionary* input. It is thus necessary to discuss how the rule of law can operate alongside political ideals to secure a good administration.

### **The Conventional Expectation Model**

Tomkins' first proposition in his republican constitution is that all government powers should be put on a statutory footing.<sup>441</sup> This has onerous consequences for the meaning of legality, which, it has been proposed, is central to the meaning of the rule of law. The notion that all government action should be legally authorized in advance is not a legal condition of the rule of law because it is not a requirement of legality. The law should rule but it should not monopolise. It has been argued that whilst the dilution of common law prerogative powers is wise, the universal requirement that *all* powers be legally authorized in advance is undesirable, impractical and unnecessary. This does not contradict the previous endorsement of greater use of statute. Promoting a closer association between the rule of valid law and statutory supremacy is in the

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<sup>441</sup> Tomkins (n362) 132

interests of conceptual clarity and constitutional fluidity. However, denying the executive a residual liberty to act arguably flies in the face of an alternative ‘reality of government’ overlooked by Tomkins.<sup>442</sup> Harris’ conventional expectation model appreciates and builds upon this reality. Harris suggests that whilst the meaning of legality does not require every executive act to be rooted in legal authority, the ‘clear expectation from constitutional convention could be that executive action will normally be authorized in advance by statute put in place with appropriate scrutiny through the parliamentary processes.’<sup>443</sup> Indeed, in the hands of an efficient legislative body, the law provides a useful tool to clearly and publicly demarcate the powers of the executive. Whilst one is reluctant to endorse the constitutional undertones of Harris’ proposal, diluting Harris’ language of *convention* to that of *political expectation* still ingrains the utilization of statute into the political culture of a state without endorsing an overly prescriptive approach. It promotes the idea that the law, if it is recognized, should be used well and for the correct purposes. If this expectation is neglected the political consequences that ensue should only be deemed constitutional in the sense that they are an example of ‘what happens.’<sup>444</sup> The Government is not breaking any constitutional “rule” as such but it is acting contrary to the expectations of the political community. Of course political accountability mechanisms such as parliamentary scrutiny, back-bench rebellions and the threat of not being re-elected are likely, and designed, to pre-empt this. Equally the media and pressure groups will play an important role in forcing the government to justify its actions in the law.

Cohn offers a different model. It requires that all executive action anticipated to have a ‘long-lasting bearing on society’ must be authorized in statute

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<sup>442</sup> Tomkins (n362) 15

<sup>443</sup> Harris (n314) 246-247

<sup>444</sup> J Griffith, “The Political Constitution” (1979) 42(1) *Modern Law Review* 1, 19

beforehand.<sup>445</sup> However, there is the inevitable problem of identifying ‘What is meant by “long-lasting bearing”?’ and Harris points out that government actions ‘having a short-term impact’ may be just as ‘deserving of parliamentary pre-action scrutiny.’<sup>446</sup> Harris’ model discards with these semantic issues; he does not specify a particular type of action that requires legislative endorsement. Instead, there exists an overarching political expectation that all government action will usually be legally authorized in advance. This flexible approach does not artificially delineate between significant powers on the longevity of their impact. Harris rightly presumes that in a legally sophisticated and politically developed society there will exist an accepted expectation that because the law has ultimate authority, it will be *used*. To the extent that this is evidence of ‘what happens’ in the UK constitution; it may be classified as vaguely “constitutional”.<sup>447</sup> This loose adoption of constitutional language aligns itself with Griffiths’ tendency to be ‘prescriptive without prescribing much’.<sup>448</sup> It is politically unwise for the UK government to act extra-legally because it aggravates an underlying political consensus interlinked with the UK’s representative democracy. It is the inevitable political backlash that deters the government from bypassing the legal framework; this discontent is the product of a political expectation embedded in political culture rather than a constitutional convention. Harris’ model does not have to be classified as conventional to have a constitutional effect. What is important is that this expectation occupies the mind of the electorate and political institutions.

Indeed, in the UK this political expectation is habitually recognised without the assistance of a constitutional convention. For example, in *R v Secretary of State*

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<sup>445</sup> M Cohn, “Medieval Chains, Invisible Links: on Non-statutory Powers of the Executive” (2005) 25(1) OJLS 97, 100

<sup>446</sup> Harris (n314) 246

<sup>447</sup> Griffith (n444) 19

<sup>448</sup> Gee and Webber (n239) 289

*for the Home Department ex parte Northumbria Police Authority [1989]*<sup>449</sup> the Court, in assessing the legality of the government's acts, primarily sought evidence of pre-action statutory authorization. This does not infer *a rule* that all executive action requires positive legal authority but reflects an imbedded expectation in the political culture of the UK that for the courts, statute is logically still the first port of call.<sup>450</sup> Acting without statutory authority is essentially viewed as a 'last resort'.<sup>451</sup> This is a sentiment arguably shared by the executive itself. For example, in the UK we have seen the government insist on procuring Parliamentary approval for both the Iraq War and the 2011 Libya conflict, Brown's commitment to surrendering certain prerogative powers and in 2013 Cameron's decision to put a vote to the Commons on involvement in the Syria conflict, which was subsequently lost. This suggests that there has been a subtle shift in the behaviorisms of the executive. Therefore this assumption that the executive *wishes* to act in the territory of its residual liberty rather than under statutory regulation is false. Tomkins certainly presumes that '[n]o government can realistically be expected to volunteer such powers: this is not the way politics works.'<sup>452</sup> However, arguably this is exactly how politics works. Pre-action legislative approval (whether in the form of a vote or actual statute) provides legitimacy and offers the benefit of dispersing culpability. These inherent insecurities of the executive are themselves products of a state's healthy political culture which imposes political consequences on an inadequate governmental decision. Even if Tomkins is unwilling to accept that seeking parliamentary approval is a voluntary concession by the executive, he is willing to concede that Parliament ensured that the decision to move troops into Iraq was a decision for which Blair would be 'fully

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<sup>449</sup> [1989] 1 QB 26

<sup>450</sup> see, however, Harris (n314) 231

<sup>451</sup> Harris (n314) 247

<sup>452</sup> Tomkins (n362) 134

constitutionally responsible.<sup>453</sup> What this illustrates is that a discussion of judicial review of the government's residual liberty is potentially an ancillary concern. In the UK such actions will be rare and inevitably a last resort. What is essential is that the political mechanisms in place in the UK pre-empt the executive's resort to such measures in the first place.

Of course, it must be remembered that there is a distinction between seeking parliamentary approval and obtaining statutory authority. The former provides political justification whilst the latter is concerned with legal authority. We have already discussed that statutory authority does not necessarily indicate democratic consent. Indeed, a disproportionately representative legislature is capable of passing legislation. Legislation is often unpopular with the people. Therefore, the democratic significance of legislation should not be overstated. Moreover, statutory authority should not be deemed to be synonymous with democratic consent. Equally, Parliament's political responsibility exceeds mere law-making. Thus, even when the executive is acting within its residual liberty, it may still seek parliamentary approval by means of a Commons' vote or, as has been the recent trend, the government may demonstrate a more direct democratic approach by procuring a referendum instead.<sup>454</sup> Ironically, in the context of Britain's membership of the EU, it has been Parliament that has encouraged the executive to optimize the residual liberty awarded by a representative democracy rather than resorting to a referendum on the matter. What this demonstrates is that "non-legal" executive action is not free from political restraint nor does the executive intend it to. Furthermore, there are alternative means of gauging the popularity of measures without demanding the impractical resort to statutory authorization. It is interesting that Francois Hollande has labeled Cameron's

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<sup>453</sup> Tomkins (n362) 129

<sup>454</sup> For example, Cameron's proposed 2017 EU referendum and see Scottish Independence Referendum Bill 2014

insistence on a Commons vote on the Syria conflict as a ‘schoolboy error’.<sup>455</sup> It is a reminder that every state is different and political culture is *uni generis*.

Harris reinforces the argument that politics should be utilized as a check on the residual liberty of the executive. This approach clearly complements Wade’s opinion that Judicial Review should not be extended to this realm of political activity. For example, Harris proposes that in the scenario where the “third source” was used, it should be ensured that this only occurs in ‘justifiable circumstances’.<sup>456</sup> Harris makes the valid point that in a society where there exists a political consensus that executive actions should be authorized in law, ‘there obviously would be an increased consciousness of any use of the third source.’<sup>457</sup> Thus, he suggests that ‘formal accountability mechanisms could be put in place by positive law’.<sup>458</sup> For instance, actions under the residual liberty of the executive could be required to be ‘fully recorded and reported upon to Parliament.’<sup>459</sup> He further proposes that ‘such a report be referred by Parliament to an appropriate select committee within a specified time period of the action being taken.’<sup>460</sup> This would have the additional advantage that upon receiving the report, Parliament ‘could not only call the executive to account, but in theory could enact legislation to counter the action taken by the government.’<sup>461</sup> Arguably, the impact of these suggestions is two-fold. In requiring formal accountability mechanisms to be put in place by “positive law”, this effectively shrinks the liberty of the executive by constructing *legal* hurdles which it must overcome in order to enjoy its liberty to act. These legal obligations put the political institutions on notice and enable them to scrutinize the government’s actions

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<sup>455</sup> See H Samuel “Francois Hollande: David Cameron committed ‘schoolboy error’ on Syria” *The Telegraph*, 11 Sept 2013

<sup>456</sup> Harris (n314) 247

<sup>457</sup> Harris (n314) 247

<sup>458</sup> Harris (n314) 247

<sup>459</sup> Harris (n314) 247

<sup>460</sup> Harris (n314) 247

<sup>461</sup> Harris (n314) 247



and anticipate whether legislation is required. Furthermore, it is necessary to re-state that allowing the government to exercise its residual liberty, free of statutory authorization, does not pre-empt the future application of statute to this field. Indeed, ‘retrospective statutory authority’ may be awarded whilst similarly retrospective illegalization may also be exercised.<sup>462</sup>

Of course the effectiveness of these political accountability mechanisms depends on the political makeup of Parliament. Indeed, a government-dominated legislature, such as that of the Labour Government in 1997 and 2001, would hardly ensure the executive is kept to account. Yet, equally the current Coalition arrangements and division within the Conservative majority, particularly over gay marriage issues and the EU, would suggest the political climate is ripe for political methods to be exploited. The success of political accountability ultimately rests on the political culture and climate at a given time, thus it is difficult, and ill advised, to translate these political proposals into exact constitutional prescriptions. In turn, the efficiency of political accountability has inevitable consequences for the perception of the rule of law. In a weak political system, the suggestion that the executive should enjoy the same residual liberty as the citizen is an unfavourable one. However, what this circumstance elucidates is that if we do not trust the Government to act constitutionally or we do not have confidence in the political institutions which are designed to pre-empt this, our political expectations are too low. Equally, the proposal that the rule of law does not require justice, clarity or “prospectivity” in the law is not a radical suggestion if I expect the political system to guarantee these political demands. Denying the rule of law a political title is not an arbitrary suggestion once

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<sup>462</sup> Harris (n314) 248

the rule of law is contextualized as a significant but not sole component of the constitutional framework.

### **The rule of law and political prescriptions**

The rule of law will operate most effectively in a system that optimizes political accountability as the vehicle for securing good government. A legal state accommodates vacuums of residual liberty. These vacuums are externally defined but not internally monitored by the law. Here, politics is the appropriate check on government. Those who perceive the rule of law as the epitome of good government jeopardise the clarity of an essential component of any legal constitutional structure. What constitutes “good government” is not easily prescribed and any attempts at listing explicit criteria is inevitably defeated by changing political, economic and legal circumstances. This is a constitutional reality that Griffith engaged with in his formulation of a political constitution. Whilst his theory has been criticized for its normative deficit, Gee and Webber suggest that Griffith’s theory exceeds a mere ‘reading of prevailing practices in the British political system’ and argue that it is necessarily ‘prescriptive without prescribing much.’<sup>463</sup> Rather Gee and Webber identify a primary direction within Griffith’s political constitution: ‘that it is for us all...to do the prescribing’ as political actors.<sup>464</sup> The operation of politics is messy, as is its interface with the law. This is a constitutional reality. Any attempts to prescribe in exacting terms how the constitution should operate reeks of legal constitutionalist philosophy and fails to appreciate this reality. Thus, one endorses Griffith’s intention to prescribe ‘no more than the bare minimal conditions for political equality and

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<sup>463</sup> Gee & Webber (n239) 275 and 289

<sup>464</sup> Gee & Webber (n239) 289

accountability and non-domination.<sup>465</sup> The key argument in this section is that the rule of law should operate alongside a constitution that prioritises political accountability. Political accountability is a central, but not the only, claim of political constitutionalists. Further, what is meant by a political constitution is a ‘beguilingly simple question’ which will not be resolved in this thesis.<sup>466</sup> However, this section seeks to propose that the “rule of valid law” can help secure good government when it interacts with a healthy political system.

Underlying the debate about the normative value of Griffith’s political constitution is a presumption that a descriptive theory is somehow less useful. However, this is not necessarily true, particularly in a scenario where academics cannot agree on an accurate description of what actually “happens”. Certainly, for our own purposes of deducing the meaning of legality within the UK constitution, Griffith’s observations are enlightening. Indeed, according to Griffith, what lies at the ‘heart’ of the UK constitution is the idea that the government ‘may take any action necessary for the proper government of the UK, as they see it...’<sup>467</sup> Thus, on Griffith’s account, the executive is allocated a degree of political freedom. He states that the executive’s liberty is subject to two limitations. For our purposes the first is the most significant as it states that the executive ‘may not infringe the legal rights of others unless expressly authorized to do so under statute or the prerogative.’<sup>468</sup> The second illustrates the principle of Parliamentary Sovereignty which insists that any change in the law must be approved by Parliament.<sup>469</sup> Returning to the former, Griffith’s reading of the constitution clearly supports a minimal version of legality;

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<sup>465</sup> Gee & Webber (n239) 287

<sup>466</sup> Gee & Webber (n239) 273

<sup>467</sup> Griffith (n444) 15

<sup>468</sup> Griffith (n444) 15

<sup>469</sup> Griffith (n444) 15

the executive is at liberty to act as it deems necessary unless its actions conflict with the law.

Yet, arguably Tomkins' description does greater justice to the idea of political accountability that plays an imperative role in Griffith's overarching theory. Indeed, whilst Griffith explicitly highlights two legal limitations to the executive's freedom, he fails initially to allude to the additional political mechanisms that inhibit executive action. Griffith's initial description is arguably incomplete. Griffith insists that what qualifies as 'necessary' action should be determined by the government 'as they see it.'<sup>470</sup> It is therefore suggested that what lies at the "heart" of Griffith's description fails to do justice to his over-arching aim. Griffith simultaneously reinforces politics as the foundation of constitutionalism, yet, initially omits to allocate political controls as limitations of the executive's liberty. Whilst this discrepancy between his constitutional sketch and political aspiration arguably evidences a prescriptive element to his theory, arguably, what Tomkins identifies as the 'reality of government' is more appropriate: 'those in political office are liable to try to do *whatever they can politically get away with*.'<sup>471</sup> This clearly anticipates actions that the government will not be able to *politically* get away with. It thus incorporates an inherent political limitation within the notion of the executive's legal liberty (though admittedly it omits to mention the inevitable legal boundaries). What is "necessary" then is not a matter solely determined by the executive but monitored in the political arena. Tomkins' description is arguably more accurate and explicit.

Tomkins' perception of the "reality of government" usefully complements the notion previously argued that the executive, like the natural legal person, may do anything as long as it does not break the law. Viewing this concept in the context of

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<sup>470</sup> Griffith (n444) 15

<sup>471</sup> Tomkins (n362) 2 (emphasis added)

Tomkins' "reality of government" portrays a far less radical picture. Identifying the individual and the state as natural legal persons does not equate to a political equilibrium. In constitutional terms it is easy to distinguish between the two. First, the executive's residual liberty is a lot more confined considering its subjection to greater legal regulation. This is the result of a politically sophisticated society that appreciates the power: legal regulation ratio. Thus, whilst the executive can do anything that does not break the law, these laws are far more prevalent resulting in far less room to maneuver. Second, within its designated area of residual liberty the executive is subject to political accountability mechanisms. Therefore, it is an over-simplification to insist that the Ram doctrine somehow places the executive and the citizen on the same footing. It is not the case that 'a minister may do anything an individual may do'.<sup>472</sup> This narrow interpretation superficially isolates a concept that should be viewed in its political and constitutional context. The formal version of the rule of law has suffered from similar unfair treatment. What this discussion illustrates is that descriptive theories should not simply be dismissed as less valuable or worthy of our attention.

Gee and Webber summarise a political constitution as a 'constitutional model which oscillates between the descriptive and the normative.'<sup>473</sup> There are certainly descriptive components to Griffith's theory. Indeed, the most obvious example is his testament that the constitution is 'no more and no less than what happens'.<sup>474</sup> However, both Griffith and Tomkins emerge from the same necessarily descriptive standpoint: 'The law is not and cannot be a substitute for politics.'<sup>475</sup> There are two stages to this analysis: the "is not" and the "cannot". Any prescriptive account of the

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<sup>472</sup> Howell (n422) par3

<sup>473</sup> Gee and Webber (n239) 276

<sup>474</sup> Griffith (n444) 19

<sup>475</sup> Griffith (n444) 16

constitution must commence from a descriptive footing. Indeed, no prescription about what the constitution *should be* is complete without an initial accurate account of what it *is*. Thus Tomkins similarly sketches out what he believes is ‘beautiful’ about the constitution; its utilization of ‘politics as the vehicle through which the purpose of the constitution (that is, to check the government) may be accomplished.’<sup>476</sup> This is arguably something that Elliott, in his promotion of judicial review, overlooks. Both Griffith and Tomkins observe that politics, not law, is the most effective means of holding the government to account. ‘Only political control, politically exercised, can supply the remedy...’ to tyranny.<sup>477</sup> This reality is reflected in the prevailing attempt to substitute the legal heart of the rule of law with political concepts in order to make the law’s ultimate authority compatible with the ultimate constitutional effectiveness of politics. However, this is possible without superficially forcing the marriage of the two under one concept.

Tomkins prescribes various constitutional mechanisms to maintain this “beauty”. However, he perceives Griffith’s ‘wholly descriptive’ account of the political constitution as the ‘one major limitation’ of his work as it limits Griffith’s theory to a mere ‘political preference’ rather than a constitutional blueprint.<sup>478</sup> In other words, Griffith may have believed that ‘the political model of accountability was to be preferred over the legal’ and even considered it to be ‘more democratic and more effective’, however, it was not deemed ‘constitutionally required, still less constitutionally entrenched.’<sup>479</sup> Tomkins, however, believes that the government is accountable to Parliament ‘because the constitution insists upon it’, not simply

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<sup>476</sup> Tomkins (n362) 3

<sup>477</sup> Griffith (n444) 16

<sup>478</sup> Tomkins (n362) 37

<sup>479</sup> Tomkins (n362) 38

because it is ‘what happens.’<sup>480</sup> Thus, Tomkins perceives the role of politics as a constitutional requirement and prescribes set criteria to ensure that this remains a constitutional reality. What may be deduced from this criticism is that Griffith’s theory is arguably still prescriptive, it is simply not *constitutionally* prescriptive. He still presents a political preference of how things *should* work but fails to translate this into constitutional terms. Thus, Tomkins’ label of Griffith’s political constitution as ‘wholly descriptive’ is contradictory and false.<sup>481</sup> Certainly, Gee and Webber note Griffith’s ‘not infrequent appeal to the vocabulary of “ought”’.<sup>482</sup> Indeed, Griffith testifies that ‘political decisions should be taken by politicians’ and advocates forcing governments ‘out of secrecy and into the open.’<sup>483</sup> Furthermore, he encourages ‘greater opportunities for discussion, more open government, less restriction on debate, weaker Official Secrets Acts, more access to information, stronger pressure from backbenchers, changes in the law of Contempt of Court.’<sup>484</sup> Indeed, Harlow insists that Griffith’s political constitution is a ‘benchmark for those who see representative and parliamentary government as important constitutional desiderata.’<sup>485</sup> Thus, Griffith’s political constitution is prescriptive, if not constitutionally so.

However, arguably such a translation to constitutional language would be counter-intuitive; it fails to engage with the messy reality of the constitution. In other words, it is the very nature of the constitution that prevents it from being prescribed in exacting terms because there is something ‘inherent’ in its very idea ‘that invites some

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<sup>480</sup> Tomkins (n362) 38-39

<sup>481</sup> Tomkins (n362) 37

<sup>482</sup> Gee & Webber (n239) 279

<sup>483</sup> Griffith (n444) 19 and 16

<sup>484</sup> Griffith (n444) 18

<sup>485</sup> C Harlow, ‘The Political Constitution Reworked’ in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (Wellington, LexisNexis, 2006) 190

necessary (and welcome) ambiguity.<sup>486</sup> Indeed, Gee and Webber argue that the ‘workings of a political constitution are themselves less visible than a legal constitution.’<sup>487</sup> A political constitution is thus ‘difficult to identify as a phenomenon distinct from day-to-day political activity’ as it ‘works primarily, and often imperceptibly, inside Parliament and the executive and, where visible, its workings will often appear less dignified and more haphazard than court proceedings...’<sup>488</sup> Tomkins however overlooks this reality by proposing to constitutionally entrench the idea of ‘open government.’<sup>489</sup> He states that in order to enable ‘effective scrutiny’ of the executive, ‘what the government is doing and is proposing to do must be freely available.’<sup>490</sup> Certainly, if this is the case then the prospect of the executive retaining its residual liberty is less severe. This is because the law is not perceived as the sole device by which the government’s actions are publicized and communicated to the citizens. In light of Tomkins’ dissatisfaction with the Freedom of Information Act 2000 which enshrined a ‘discretionary power to choose what information to disclose’, returning us to ‘an all-pervasive culture of secrecy and of seeking to find a reason for not disclosing’,<sup>491</sup> he proposes that ‘all government information is presumed to be open and freely available both to Parliament and to the Public unless it can be objectively shown (and independently verified) that its disclosure would cause substantial harm to a specified public good.’<sup>492</sup>

However, classifying “open government” as a constitutional requirement creates complications and contradictions which derive from its constitutional status.

For example, it is unclear how this proposal would sit with the convention of

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<sup>486</sup> Gee and Webber (n239) 287

<sup>487</sup> Gee and Webber (n239) 286

<sup>488</sup> Gee and Webber (n239) 286

<sup>489</sup> Tomkins (n362) 134

<sup>490</sup> Tomkins (n362) 134

<sup>491</sup> R Austin, ‘The Freedom of Information Act 2000- A Sheep in Wolf’s Clothing?’ in J Jowell and D Oliver (eds) *The Changing Constitution* (5<sup>th</sup> edn, Oxford, OUP, 2004) 415

<sup>492</sup> Tomkins (n362) 136



collective responsibility that necessarily impresses on the cabinet an obligation of confidentiality. In this context, the value of secrecy is crucial; it is in itself the key to political accountability within the inner circle of government as cabinet members feel free to openly criticize and debate matters with the reassurance of confidentiality. This may also contribute to dispelling factions within the cabinet. Ironically the dilution of party politics is also one of Tomkins' proposals. Equally, the Government must maintain an air of secrecy. Indeed, Griffith and Hartley (272) concede that 'secret operations are a legitimate means of achieving foreign policy objectives and that deceit cannot always be avoided in affairs of state.'<sup>493</sup> A key modern day US example is Operation Neptune Spear 2011. It is clear that such a delicate balance is hard to constitutionally entrench in a calculated manner. Tomkins also overlooks the reality of an "open secret." For instance, after wikileaks it was revealed that legislation allowed the government to tap into various online sources of private information. Thus the government was openly allowed to act in secret. Again Tomkins' constitutional prescription fails to take note of these loopholes of day-to-day politics.

This discussion arguably highlights the reality that "open government" is inherently a "political preference" and cannot be genetically reconfigured as a constitutional requirement. Griffith, however, indicates a political preference for open government without constitutionally eradicating the value of secrecy within a state. Arguably his political preference is more realistic and desirable. He recognises "open government" as an ideal that should be sought not only within the constitution but in the wider political framework. Indeed, he comments loosely on forcing governments

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<sup>493</sup> T C Hartley & J A G Griffith, *Government and Law, An Introduction to the Working of the Constitution in Britain* (2<sup>nd</sup> edn, London, Weidenfeld & Nicolson, 1981) 272

‘out of secrecy and into the open’.<sup>494</sup> Griffith depicts “open government” as not merely a constitutional issue but one relating to political culture. He therefore does not refine his suggestions in the same way as Tomkins. Instead he more generally encourages ‘greater opportunities for discussion, more open government, less restriction on debate, weaker Official Secrets Acts, more access to information, stronger pressure from backbenchers, changes in the law of Contempt of Court.’<sup>495</sup> Whilst he endorses the strengthening of existing institutions such as the House of Commons, he openly admits to being ‘more concerned to create situations in which groups of individuals may make their political claims and seek to persuade governments to accept them.’<sup>496</sup> Indeed, Griffith lays particular emphasis on the role of the press. He and Hartley suggest that ‘Politics is impossible without communication’ and that ‘[c]orruption or inefficiency in public bodies, scandals involving prominent politicians, in-fighting among opposition leaders, or the failure of Government policies- all these can be exposed in the press with considerable effect.’<sup>497</sup> Griffith therefore appears to realize that notions of “open government” exceed the scope of the constitutional framework and his political prescriptions are therefore far less confined. Perhaps the reason for his reluctance to enter the realm of constitutional prescription is because his ambitions exceed a mere constitutional discussion. Griffith is less concerned with “constitutional” issues such as minority governments and sees greater danger in the prosecution of investigative journalists.<sup>498</sup> He is therefore more concerned with the political landscape outside the immediate constitutional territory. Arguably Griffith did himself an injustice by naming his theory the “political constitution” when his ideas resonate beyond these constitutional

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<sup>494</sup> Griffith (n444) 16

<sup>495</sup> Griffith (n444) 18

<sup>496</sup> Griffith (n444) 18

<sup>497</sup> Griffith and Hartley (n493) 261

<sup>498</sup> See Griffith (n444) 18

boundaries. Indeed, arguably Griffith cannot be taken as ‘sketching his vision of a good constitution’ but a good society with a cultivated political culture.<sup>499</sup> A political constitution is oxymoronic in the sense that politics cannot be constitutionally contained; it has a viscous quality that fluctuates in its embodiment of both constitutional and cultural norms.

Tomkins’ third republican proposal is another example of the discrepancy that exists between his prescriptive approach and political reality. The ‘separation of interests’ between parliament and government would enable political accountability to operate most effectively.<sup>500</sup> Tomkins argues that the current partisan nature of parliament means that there is ‘no way of securing or guaranteeing that parliamentarians will not allow loyalty to party to obscure or even to obstruct loyalty to Parliament’s constitutional function of holding the government to account.’<sup>501</sup> However, his proposal that ‘whips should be prohibited’ is a rather naïve suggestion that would arguably not threaten the prioritization of party-loyalty and ambition.<sup>502</sup> This goes to the nature of man, not politics, which in turn makes it a political reality. Indeed, just as Griffith argues that a society by laws and not by men is an ‘unattainable ideal’, so is a society by constitutional rules and not by men.<sup>503</sup> He insists that the abolition of the whips would bring about ‘radical’ changes in the way Parliament operates.<sup>504</sup> However, it is unclear how this would be the case. The operation of Parliament will always be obscured by political motives. Indeed, it is personal ambition and factionalism that often motivate political accountability. Arguably strong backbench factions within a party often apply greater coercion than

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<sup>499</sup> Gee and Webber (n239) 281

<sup>500</sup> Tomkins (n362) 137

<sup>501</sup> Tomkins (n362) 137

<sup>502</sup> Tomkins (n362) 138

<sup>503</sup> Griffith (n444) 16

<sup>504</sup> Tomkins (n362) 138

the government's own whips. Furthermore, abolishing party whips is not necessarily beneficial to political accountability. Indeed, party whips secure party discipline and may maintain the credibility of political accountability that would otherwise suffer disrepute if frivolous objections frequently took up valuable parliamentary time. The prevalence of backbench rebellions in the current Conservative government, particularly in relation to gay marriage and the EU in 2013, suggests that even with the existence of party whips, the government cannot silence its own party. Political accountability inevitably enjoys an ebb and flow depending on the issue at hand and the current status of the political and economic climate. The success of political accountability is not simply dependent on constitutional rules but it is often dictated by external circumstances. Perhaps Griffith's apprehension to prescribe derived from an understanding that what *should* happen and what is possible are two very separate things.

### **Rule of law and political culture**

The law is worthless if it counts for nothing. Accepting the notion that the law "rules" and has ultimate authority in a state illustrates a pivotal step in a state's development; it demands authority above power and beyond man. Allocating ultimate authority to a neutral "higher" entity is a stabilizing concept in a state, a continuing presence above the fluctuations of politics. Indeed, in fear of over simplification, the English Civil War arguably demonstrates the state displacing the law of God (embodied in the divine right of the king) with the law of man (communicated through Parliament). It was the fact that this was a dispute about ultimate authority rather than power that meant it shook the foundations rather than the political

cosmetics of the state. Accepting the rule of law reflects a point of view about how the state should be run: those who have power must justify it in authority. Whether this process of justification is an extremely restrictive task or simply red tape does not detract from the rule of law as an indication of allocation rather than efficiency. Certainly those who urgently seek the rule of law are not focused on a package of legal techniques but an “outcome”: ‘that salutary state of affairs where law counts in a society as a reliable constraint on the possibility of arbitrary exercise of power.’<sup>505</sup> Justification is still restricting, even if to a minimal degree. That desire to dress power in legal authority reflects an inner legal consciousness of a state. This is what the rule of law encapsulates. Equally, portraying the rule of law as a ‘state of affairs’ may be dangerously misleading; it encourages a perception of the rule of law as a package deal.<sup>506</sup> From this angle, the law does not just “count” in terms of authority but it counts for something *good*. Thus, those states that seek to ascertain the rule of law, such as Afghanistan, do not disassociate between the rule of law and the political culture within which it operates; the concept is idealized as an “outcome” rather than a means to an end. This view is dangerous; it encourages the naïve assumption that constructing the legal mechanics of a state is enough. However, deciding which political bodies will run this legal machine and how they will do so inevitably determines the success of the end product.

The potential of the rule of law is inevitably dictated by society and its culture. The rule of law only matters if the law ‘counts’ for something; culture dictates whether we take the law seriously.<sup>507</sup>

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<sup>505</sup> M Krygier “Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?” in *Getting to the Rule of Law: NOMOS L* (New York and London, New York University Press, 2011) 99

<sup>506</sup> Krygier (n505) 99; see also Krygier (n7) 27

<sup>507</sup> See Krygier (n7) 28

*‘These traditions and this culture grow around and encrust the rules and institutions, shaping the routine expectations of participant and observers. Moreover, the wider social efficacy of official law requires not merely that elites observe and seek to enforce it, but also that it enter into the normative structures that nourish, guide, inform and coordinate the actions of ordinary people’*<sup>508</sup>

Krygier goes a step further; he warns that ‘too much emphasis on problems of “culture” might simply blind us to the real problems that remain to be addressed’.<sup>509</sup> Indeed, Krygier suggests that problems often exceed even cultural boundaries and are ‘embedded in social structures, networks, institutions, and the ways all of these operate and interconnect...’<sup>510</sup> Krygier thus differentiates between political and social factors, associating culture with the former. Arguably such a clean delineation is unrealistic. However, what Krygier does rightly indicate is that there are a host of factors that dictate how well a state operates; the rule of law is merely a piece of the jigsaw. Krygier thus concludes that ‘with regards to the rule of law, it pays to be a contextual universalist: universalist about the value of it; deeply contextual about how to get there’.<sup>511</sup> Those seeking to replicate a “state of affairs” should not solely look to the rule of law for the blueprint. The rule of law does not encapsulate “the good constitution”. It is certainly a necessary piece of machinery. However, whilst it may be possible to export the rule of law, the same cannot be said of a political culture.<sup>512</sup> Furthermore, nurturing the conditions for the law’s ultimate authority to be used for good purposes is inevitably a long process of evolution. Post-war Iraq is testament to

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<sup>508</sup> Krygier (n7) 30

<sup>509</sup> Krygier (n7) 31

<sup>510</sup> Krygier (n7) 31

<sup>511</sup> Krygier (n7) 32

<sup>512</sup> D. Robert Worley, “Exporting Liberal Democracy, Market Capitalism, and Rule of Law”, Huffington Post, Huffpolitics Blog, 30<sup>th</sup> October 2013

this. ‘Institutions and codes are important, but without the cultural and political commitment to back them up, they are rarely more than window-dressing.’<sup>513</sup>

It is interesting to consider what should be given the highest priority when re-establishing a state- the law and the necessary institutions for its enforcement or political reform. Paddy Ashdown, the high representative in Bosnia, stated that in Bosnia ‘we thought that democracy was the highest priority and we measured it by the number of elections we could organize. In hindsight, we should have put the establishment of the rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, and public confidence in police and courts.’<sup>514</sup> Ashdown appears to adopt a contextual universalist approach to the rule of law. However, a state cannot simply “start” with the rule of law. It reflects a political attitude, be it only that ultimate authority should lie with the law rather than any other entity. Furthermore, to be sufficient, rather than merely adequate, the rule of law requires political commitment. It is therefore inevitably a product of a state’s legal and political conscience. Ashdown rightly identifies the interdependency of political and legal factors to create an effective system; without the rule of law political and social factors struggle to develop. However, equally, without these factors the rule of law has little positive value. Thus, identifying which has highest priority is a futile and unfruitful task. However, realizing the interdependency (without doubting the distinction) of law and politics is essential to one’s understanding of the rule of law. Contrary to Brooks’ opinion, the rule of law is not ‘in its substantive sense... a culture’.<sup>515</sup> However, its potential is dictated by the culture within which it operates. In this light, it is easy to observe how

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<sup>513</sup> J Stromseth, D Wippman & R Brooks, *Can Might Make Rights?* (NY, CUP, 2006) 311

<sup>514</sup> P Ashdown, “What I learned in Bosnia” Press Office, Office of the High Representative, October 8, 2002

<sup>515</sup> R Brooks, “The new imperialism: Violence, Norms and the “rule of law”” (2004) *Michigan Law Review* 101 (Brooks 2004: 2275 and 2285)

the rule of law is mistaken for a state of affairs rather than a simple, succinct, legal concept. This is an inevitable consequence of the concept's incredibly sociable character, as a form of interaction technology, which makes it so hard to export and decipher from the political conditions with which it so easily cooperates. This inherent difficulty of segregating the rule of law has meant that 'exporting the rule of law has become harder'.<sup>516</sup>

Adopting Griffith's quasi-prescriptive approach, it is necessary to provide a non-exhaustive list, of these political factors which best complement the operation of the rule of law. Primarily, a state should have strong mechanisms of political accountability and an independent institution concerned with policing the legality of executive acts. This independence must not be jeopardized in an attempt to compensate for the inadequacy of legislation. Valid law should therefore be easily identifiable and clear. The law should be used to achieve ends which correlate with the moral direction of the community. There should exist a strong attachment to justice, not simply by the executive but society at large. Outside the immediate constitutional framework a strong press who are willing to act as watchdogs is crucial. However, recent events with the News of the World should discourage the media from being too invasive; this is a delicate balance that cannot be exactly prescribed. The executive must be strong but not arbitrary and it must be constantly reminded of the political consequences for its negligence. Arguably, a necessary component of any state structure is experience, a history of having suffered the consequences of mistakes. A culture of political activism is also essential. Such intangible assets are a necessary component of growth. Meanwhile, in the modern state, strong international relations are inevitably crucial. Many of these suggestions would find fruition in a

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<sup>516</sup> R Worley, "Exporting Liberal Democracy, Market Capitalism, and Rule of Law" *Huffpost Politics* (10/30/2013)



constitutional framework, others are not so easily prescribed or simply resist tangible expression. If these suggestions appear abstract and random, this is because they are. They are merely tasters of a climate in which the rule of law could help obtain an ideal. They are political prescriptions which would complement the rule of valid law. Equally, without the correct formula the rule of law could be a recipe for disaster.

## Conclusion

The rule of law alone cannot silence the ‘passion of men’; moreover, it is essential that it does not do so.<sup>517</sup> Mandela foresaw a ‘government bound by a higher body of rules- an empire of laws’ which ‘will not govern at its discretion.’<sup>518</sup> He rejected “an empire of man” and instead demanded “the rule of law”.<sup>519</sup> However, these are not mutually exclusive. The reality is that the law has ultimate authority *as a constitutional mechanism*; but this authority is worthless if the law is not used. The rule of law requires the passion of men to drive it. The law may be used for good and bad; this is the inherent risk of government. It is therefore essential to ameliorate this risk. This thesis has touched upon three layers of risk aversion: First, establish *the rule of the law*; second, *use the law*; third ensure that *it is used well* i.e. it is managed by and for the benefit of the demos.

It is in the first layer where we find the rule of law. It provides the legal foundation of a state. The rule of law is not concerned with monitoring the morality or the formal efficiency of laws; it is not a constitutional unit of measurement. Rather it

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<sup>517</sup> Aristotle, *Politics*, Book III, 1286, p78; see also N Mandela, *Address of Nelson Mandela at his Investiture as Doctor of Laws* (1 August 1993, Soochow University, Taiwan)

<sup>518</sup> Mandela (n517)

<sup>519</sup> Mandela (n517)

reflects an idea of law, the basic notion that the law has ultimate authority as a social ordering mechanism. The rule of law is not an endorsement product for good government. Equally this does not mean that it is an empty self-evident truth. It reflects an important liberating ideal, that we must sacrifice a degree of liberty to enjoy our freedom.

A society based on law may exist in all kinds of guises; it is often the common denominator within a continuum of governance structures. The question of how to utilize the law is a lot more divisive than the issue of acknowledging its existence and authority. There exists a global eclectic mix of legal states indicating that the rule of law does not impose a formulaic expectation of government. The rule of law responds to an infinite number of political and legal variables. It is a canvas that does justice to the intricate contours and colours of political landscape. However, the ultra-thin model is not just a *blank* canvas, an inevitable prescription derives from the notion of the rule of the law; if the law rules, people must conform to it. The term “people” serves two purposes: it reiterates the universality of the law’s authority encapsulated in a more unconventional interpretation of the phrase “equality before the law”; it is also inclusive of both the individual and the state. Both Government and the citizen must not act in conflict with the law. The *use* made of the law (at the second level of risk aversion) must compensate for this equalization by subjecting the government to greater legal regulation. It has been argued that in the UK in particular, greater codification of Common Law powers and liberties would serve to more certainly delineate the boundaries of the government’s legal liberty and heighten the conceptual compatibility of the rule of valid law with the existing legal constitutional hierarchy. Furthermore, the ultra-thin model is not incompatible with judicial review. Judicial review has outgrown its legal pedigree; legal conformity now only reflects one

component of this judicial exercise. It is important not to romanticize the relationship between the judiciary and the rule of law; the politicization of the judiciary need not be mirrored by the concept. Codifying the good administration principles may be a means of creating a greater consistency between the rule of law and judicial review. However, this is arguably unnecessary; a more suitable alternative is to encourage political accountability as a complementary partner to the rule of law.

The rule of law should not displace politics as the ‘ultimate controlling factor’ of the constitution.<sup>520</sup> The contemporary perception of the rule of law as a device to restrain government ironically understates its social significance. The ultra thin model certainly induces the executive to conform to the law. However, it imposes the same demand on the citizen; it therefore provides a mutual means of managing the relationship between the individual and the state. The rule of law should not be artificially construed as the antithesis of arbitrary government; it may equally liberate as well as constrain the executive. It has been consistently argued that the rule of law may co-exist with a wicked regime. The law is the authoritative tool of social ordering but it remains a tool; it is a creature of man. It is therefore essential that it is the passion of the demos, rather than the whim of a few men that dictates the terms of its use. Democracy is essential to the rule of law, not as a defining element but as an extrinsic mitigation of its wicked potential. Equally, conventional perceptions of the rule of law display a naïve assumption that the makings of a “good government” can first, be easily prescribed and second, neatly packaged under the heading “the rule of law”. This approach to conceptualization fails to engage with the messy reality of the constitution and deprives the rule of law of its interactive quality. The third layer of risk aversion is not so easily prescribed; it constitutes that enigmatic ideal, a political

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<sup>520</sup> Lord Hope, *R(Jackson and others) v Attorney General* [2005] UKHL 56, par 126

constitution. The ultra thin model starkly exposes the delicate complexity of a nation state; “good government” is the result of an intricate network of political, legal and cultural threads. This is impossible to replicate; we can export the notion of “the rule of the law” but we cannot guarantee how well it will function on foreign soil. Thus, the rule of law constitutes the foundation but it does not provide the whole story. The real complexity arises not in defining the concept but in deciding how best to optimise its potential.

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