Introduction

Is the rule of law optional for liberal democratic societies? In the wake of the attacks on the United States on 11 September 2001, the Bush administration seemed to say that it is. And in the wake of the attacks on London in July of 2005, Tony Blair has indicated that the rule of law is a luxury, dispensable when the going gets rough. In particular, he has indicated that judges have to be reined in from their disposition to enforce the rule of law against the executive, even if this requires both legislating how they are to balance liberty against security and amending the Human Rights Act 1998. In contrast, the Spanish government elected in the immediate aftermath of the attacks on Madrid on 11 March 2004 did not see fit to renege on a commitment to the rule of law.

Blair's comments fit within a trend whereby many liberal democracies since 9/11 have used either legislation or executive order to create a variety of legal black holes, situations in which individuals suspected of being threats to national security are detained indefinitely. In the United Kingdom, they were detained because, while they were aliens who would ordinarily be deported after a determination that they threatened security, the government is committed to not deporting anyone to a country where that person faces a serious risk of torture. In this situation, the government's respect for one human right – the right not to be tortured – leads to an individual being stripped of another human right, that is the right not to be detained except for certain legitimate purposes, for example, that one is awaiting trial on a criminal charge or that one's deportation is imminent. Thus, when the United Kingdom amended its anti-terrorism law to provide for this kind of situation, it also expressly derogated in advance from its domestic and international human rights commitments in regard to detention.

In some respects, those detained were not altogether in a legal black hole, a lawless void, as they were able to contest the validity of the determination that they were risks to national security before the Special Immigration Appeals Commission (SIAC), a tribunal with expertise

in law, immigration, and security. Moreover the anti-terrorism statute required periodic reviews by SIAC of the particular decisions to detain and the statutory provisions allowing for indefinite detention expired unless renewed on a set date. But, given the assumption of the government that the terrorist threat it faces is permanent and that threats do not have to be imminent to justify emergency measures, the detainees were in a legal black hole in that they faced detention without criminal charge for the foreseeable future.

Even more dramatic are the legal black holes created by the government of the United States. Notorious here is the situation of aliens detained offshore at Guantanamo Bay, which the government claimed to be beyond the jurisdiction of the federal courts. These individuals are not detained because the US government refuses to deport them to face torture. Indeed, the government of the United States has deported people in order that they will be tortured in countries in which torture is condoned. Moreover, its own treatment of detainees has raised questions about whether it practises torture, spurred by signals from the highest reaches of the Bush administration that torture is acceptable, given the severity of the emergency. Rather, they are detained because it is alleged that they fall into the category of 'enemy combatants', a category which is beyond the reach of both domestic and international law. In addition, there is the situation of those citizens who are detained within the United States, but who are by executive order placed in the same enemy combatant category.

It is hardly a new claim that in a time of emergency even liberal democracies have to suspend the rights which those subject to the law enjoy in ordinary times in order to preserve themselves. All that is new is the prevalence of the claim that this emergency has no foreseeable end and so is permanent. For those who are troubled by the trend towards permanent emergency powers, that is the normalization of the exceptional, the central question has become how such a trend might be resisted.

I will argue that a response to emergencies, real or alleged, should be governed by the rule of law. My conception of the rule of law is substantive: the rule of law is a rule of fundamental constitutional principles which protect individuals from arbitrary action by the state. Substantive conceptions of the rule of law are often contrasted with procedural ones, where the contrast is between what kinds of decisions are made and how they are made. For example, the procedural right to a hearing before a decision is made is not a substantive right to a particular decision. But I will argue there is more to the rule of law than principles that are procedural in the sense that all they protect is rights to how decisions are made. The

principles do constrain the decisions of those who wield public power in a way that protects the interests of the individuals subject to those decisions.

While a substantive conception gives a significant role to judges, it also requires the cooperation of the legislative and executive branches of government[1] in what I call the rule-of-law project. There are limits to judicial competence and it will sometimes take imaginative exercises in institutional design to craft solutions to problems about how to impose the rule of law on certain kinds of executive decisions. Decisions about national security considerations, for example, decisions to detain individuals as risks to security, starkly pose such problems and SIAC, the tribunal just mentioned, is an attempt at a solution. A substantive conception of the rule of law has to find a way of coordinating the roles of the judiciary and the other branches of government, when the latter are productively engaged in the rule-of-law project.

But what is the judicial role when such cooperation ceases altogether or is half-hearted? An example of total cessation is when the statute that responds to the emergency either explicitly exempts the executive from the requirements of the rule of law or explicitly excludes judicial review of executive action. Half-hearted cooperation comes about when a tribunal is put in place to police decisions about security, but its procedures make it look more like a rubber stamp for executive decisions than a forum in which executive claims are properly tested. In the first example, the legislature seeks to create a legal black hole, a situation in which there is no law. In the second, the legislature seeks to create a hole that is grey rather than black, one in which there is the façade or form of the rule of law rather than any substantive protections. As we will see, the appropriate judicial reaction to a black hole will vary according to the way in which it is created. But judges should avoid any part in the creation of grey holes; indeed, they should try their hardest to turn the form of the rule of law into something substantive, to turn grey holes into situations which are properly governed by the rule of law. For grey holes are disguised black holes, and if the disguise is left in place governments will claim that they govern in accordance with the rule of law and thus garner the legitimacy that attaches to that claim.

These concerns might, as I have already suggested, seem misplaced if the thought is right that a substantive conception of the rule of law has no or little role in an emergency situation. It would follow that responses to emergencies have in the nature of things to be partly or even wholly

[1] I will at times use 'government' and 'executive' interchangeably.

exempted from the requirements that we associate with the rule of law in ordinary or normal times. The government or the legislature or both in tandem cease to cooperate in the rule-of-law project, not out of ill will, but because of a good faith judgment about necessity. Necessity has no law, as the saying goes; and we will see that the fascist legal theorist Carl Schmitt challenged liberal theories of the rule of law on the basis that even liberals have to recognize that the rule of law has no application in a state of emergency.

I will respond to that challenge in arguing that judges have a constitutional duty to uphold the rule of law even, perhaps especially, in the face of indications from the legislature or the executive that they are trying to withdraw from the rule-of-law project. Indeed, the legislature and the executive have that same duty to uphold the rule of law in emergency times no less than in ordinary times, which is why judges are entitled to assert the rule of law in the face of what seem to be legislative or executive indications to the contrary.

My claim that judges have this duty because of a shared commitment of all three branches of government to the rule of law is questionable, not only because of the issue about necessity. It might also seem viable only when judges are explicitly given the constitutional resources by their legal order to stand up to a legislature or executive which chooses to depart from the rule of law. If, that is, one equates the rule of law with the rule of fundamental constitutional principles, it might seem that a duty exists to protect those principles against the legislature and the executive only when judges have the resource of an entrenched bill of rights which makes them guardians of those principles. While judges might have a moral duty always to uphold the rule of law, only the existence of a bill of rights can turn that moral duty into a legal one, let alone a constitutional one.

However, if the argument about necessity is right, the existence of a bill of rights is irrelevant during a state of emergency. The thought that the law applicable in normal times has no or little application during a time of emergency extends to all law, including a bill of rights. Moreover this book is titled 'The Constitution of Law' because my argument is that, in circumstances when a society chooses to rule through law, it also chooses to subject itself to the constitutional principles of the rule of law, whether or not it articulates those principles in a bill of rights.

Law presupposes the rule of law, in the substantive sense. Therefore, if there is no written constitution, these principles will be unwritten or implicit; in common law legal orders, they will be part of the common law constitution. For this reason, my argument will rely for the most part on

cases drawn from jurisdictions where there is or was no bill of rights which protects the principles of the rule of law, from, that is, countries which belong to the common law family of the Commonwealth. My overall argument is that what we might think of as the Commonwealth constitution exhibits the values of a substantive conception of the rule of law and that these values make the exercise of legal authority legitimate.

At one level, then, my ambition is to sketch the basis for a productive account of the relationship between the three powers – the legislature, the government, and the judiciary. I will try to show that it is better to understand their relationship in terms of what they share and not in terms of what separates them, since their separation is in the service of a common set of principles. The powers are all involved in the rule-of-law project. They are committed to realizing principles that are constitutional or fundamental, but which do not depend for their authority on the fact that they have been formally enacted. In order to count as law or as authoritative, an exercise of public power must either show or be capable of showing that it is justifiable in terms of these principles.

The countries from which most of my examples are drawn are the United Kingdom, Canada, and Australia. Together they present a fertile ground for testing my claims because, until quite recently, Canada and Australia had what I will refer to as a 'division of powers constitution', a constitution which set out the parameters of the country's federal structure. Even today, Australia has not decided to adopt a bill of rights and the move into the era of domestic human rights documents by the United Kingdom through the enactment of the Human Rights Act 1998 does not give judges the authority to invalidate legislation. Instead, that Act requires them to interpret statutes in such a way that they are rendered consistent with the United Kingdom's human rights commitments. If a statute cannot be so rendered, then the judges are entitled only to declare it incompatible with the human rights commitments, a declaration which leaves it up to the government and the legislature to decide whether to amend the statute. Moreover, the Canadian Charter of Rights and Freedoms explicitly gives Canadian legislatures the power to override most judicial determinations that legislation is unconstitutional. So my argument is that there are continuities across the United Kingdom, Australia, and Canada that transcend in importance orthodox distinctions based on (a) an unwritten constitution, (b) a federal constitution but no enacted bill of rights, (c) an enacted but not entrenched bill of rights, and (d) a federal constitution and an entrenched bill of rights. That is why I speak of the Commonwealth constitution.

The idea that the legal rights of the subject, even when protected by an authoritative written source of law, may be overridden by the legislature is the direct result of the fact that the common law tradition of these countries is one in which the common law coexisted in the same space as a doctrine of parliamentary supremacy.[2] One view of that tradition is that judges are entitled to interpret legislation in the light of the values of the common law until the point where Parliament decides to use its supreme legislative authority to override them and, as I have indicated, it is when Parliament is considered more or less supreme, in the sense that it can override judges, that one has the best testing ground for a claim about the unwritten constitution of law. Only when judges must resort to an unwritten constitution to unearth the principles of the rule of law because their legal order does not entrench rights, can one investigate the hypothesis that the choice to rule through or by law necessarily involves ruling in accordance with constraints that make that rule legitimate. So it is in exploring the idea that constitutional constraints can be both genuinely binding and yet overridable that we begin to understand what is involved in the political choice to rule by or through law.

The claim that rule by law presupposes the rule of law is controversial. For example, the central theme of a recent collection of essays on democracy and the rule of law is the distinction between rule by law and the rule of law, where the former means the use of law as a brute instrument to achieve the ends of those with political power while the latter means the constraints which normative conceptions of the rule of law place on the instrumental use of law.[3] The contributors argue that the normative conception of jurists is a 'figment of their imagination'.[4]

Law, they say, is not an autonomous constraint on actions but a constraint which those with political power will accept or not depending on their relative strength. If accepting the constraint is the only way to maintain their power they will accept, otherwise not. Not only is the choice to abide by the rule of law a matter of political incentives, the same is true of the choice to use rule by law to achieve one's ends. It follows that the weaker one's relative position, the closer one will find oneself to the normative, rule-of-law end of the continuum that stretches between rule by law and rule of law. One who is in a very powerful position will submit to

[2] See Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707–60, for a detailed analysis of these features.
[3] José María Maravall and Adam Przeworski (eds.), *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003).
[4] *Ibid.*, 'Introduction', p. 1.

ruling at various points away from the rule-by-law end of that continuum only when it is expedient to do so; for example, when it is convenient to have public attention and thus also possible hostility deflected onto officials such as judges.

I will argue that as one approaches the rule-by-law end of the continuum not only does the rule of law disappear entirely but even the claim that there is rule by law starts to seem implausible. The choice to order a society through the institutions of legality entails a commitment to abiding by the rule of law so that where one does not have the rule of law, one finds that there is also no rule by law. Moreover, we will see that the idea of overridable constraints affords a new perspective on the rule of law, one which shows that the operation of the rule of law is not confined to limiting public power. The rule of law is also constitutive of a certain kind of power – of legal authority; and with the aid of that insight, we can also see why the different institutions should not be understood in terms of 'competing supremacies',[5] but rather as involved in the rule-of-law project. The rule of law turns out, then, to be constitutive in that legislatures and executives which understand their role in its maintenance will undertake experiments in institutional design in order to make law's rule into reality; and judges have a crucial role in keeping these institutions of government on that path.

I will also argue that the principles are inherent in the constitution of law itself. So, at another level, my claim is about law or legal order, including international legal order, not just about the values inherent in the law of a particular legal order or family of legal orders. Moreover, I want to claim that only by understanding the rule of law and its limits can we understand the nature of law. With Sir Hersch Lauterpacht, but perhaps unlike most contemporary legal theorists, I believe that the question of the limits of the rule of law is the central question of jurisprudence.[6]

It is important at this juncture to mark the distinction between 'the legal order' and 'legal order' because the model of the Commonwealth constitution that I am proposing recognizes that one positive legal order will differ from another in terms of the positivized or determinate content

[5] See Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in Nicholas Bamforth and Peter Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003), pp. 337–70.

[6] 'As in any other system of law, so also in that which governs the relations of states *inter se*, the question of the limits of the rule of law is the central problem of jurisprudence'. Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), p. vii.

of its laws, including its constitutional law. Legal orders will also differ from each other, sometimes quite dramatically, in the way they arrange the institutions that are principally involved in bringing the principles of the rule of law to realization. In fact, the Commonwealth constitution is just one example of institutional arrangement. But what the model shows is that the idea of legal order, of government in accordance with the rule of law, is an aspirational ideal,[7] an attempt to make the law serve justice, which has the result that judges legitimately understand the positive law in terms of that inspiration. Their interpretative duty then is not, as legal positivism might have it, first to determine the content of the positive law without relying on their own moral sensibilities and, second, to apply that content. Rather, their duty is to determine the content of the law in accordance with the aspirations of (ideal) legal order; and the legislature and the executive have exactly the same duty.

It is not, I must hasten to add, that the content of the enacted texts of a legal order, statutes and constitutions, become secondary considerations for judges who share this understanding of duty. But in the cases I will discuss such texts were never sufficient in themselves for the judges, often they were of little or no assistance, and sometimes obviously unhelpful. The texts were never sufficient in themselves because any claim about how precisely a particular text spoke to the question the judge had to answer could not be extracted from the text alone. Rather, it relied on an interactive process of interpretation that moved between the text and the judge's understanding of the ideal, or political point of legal order. And because that process is interactive or two-way, the judge will work up the ideal from the text as well as work down in constructing the meaning of the text in light of the ideal.

The best account of this interpretative process is that of Ronald Dworkin. He argues that judges who approach the interpretation of positive law with the right set of questions will find that the law provides principled answers to those questions, answers which show the law in its best light, by which Dworkin means the best moral light. For Dworkin, the leading candidate to shed this light is the political principle of liberalism that the state should treat all individuals with equal concern and respect.[8]

But while I accept Dworkin's interpretive approach to understanding legal texts, it does not suffice for the situation in which there is little or no text that is relevant. This situation can come about because it is

[7] See Lon L. Fuller, *The Morality of Law* (rev. edn, New Haven: Yale University Press, 1969).
[8] Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986).

the case that all would agree that no legal text speaks directly or at all to the question the judges have to answer. Of course, judges can draw on principled solutions that rely on the positive law in domains other than the one in which the question arises. And Hercules, Dworkin's ideal judge, is supposed to survey the legal order as a whole in order to arrive at his solutions. But it is important to keep in mind that in an emergency situation, the question can arise as to whether texts that would dictate a solution in ordinary times are relevant. Text is no help when the question is whether text is relevant.

In addition, there is the situation where the texts are obviously unhelpful, for example, where there is no bill of rights and the legislature explicitly gives to the executive the power to operate unconstrained by principles of the rule of law, which express the ideal of legal order. When texts are recalcitrant to interpretation in the light of the ideal, Dworkin has suggested that judges might simply have to step outside of the interactive process because they can no longer find any purchase within law's texts for the principle of equal concern and respect.[9]

My argument is that the details of what is involved in such a step, indeed, the question whether judges are ever forced to take it, cannot be elaborated by attention only or even mainly to the principle of equal concern and respect, or to any other candidate for the ultimate principle of liberalism. Getting the details of that step right is one of the central tasks of this book. But to get them right is not just a question of close attention to the facts. As we will see, characterization of those facts depends here as elsewhere on theory, on my argument for a rule-of-law project common to the judiciary, the legislature, and the executive.

In setting out this argument, I will have to contend with what I will call the rigid doctrine of the separation of powers. This is the doctrine that asserts that the legislature has a monopoly on law-making, the judiciary a monopoly on interpretation of the law, while the executive is left with the task of implementing the law. I will argue that we should not even regard a unitary common law legal order as one in which sovereignty is divided between Parliament and the judges, as one in which there is a 'bi-polar' constitution, to use Stephen Sedley's term.[10] If anything, as I have indicated, the constitution is tri-polar, divided between Parliament, the judges and the executive. But even that description smacks too much of

[9] Ronald Dworkin, 'A Reply to Critics' in Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984), pp. 247–300 at pp. 254–60.

[10] For a recent essay on this theme, see Stephen Sedley, 'Everything and Nothing: The Changing UK Constitution' (2004) 26 *London Review of Books* 10.

the language of competing supremacies and so I will support a conception of the powers of government which is divided more by function than by areas of exclusive power or jurisdiction.

A further foil for my argument is legal positivism, which manifests itself in a family of loosely connected positions: the conceptual version which argues on theoretical grounds that there is no necessary connection between law and morality, or as I prefer to put it, between legality and legitimacy; political positivism, the Benthamite and neo-Benthamite positions which argue on political grounds for an understanding of law which will maintain the legislature's supremacy over judges; constitutional positivism, the version developed by judges who work within a common law legal order which they make sense of in accordance with the rigid doctrine of the separation of powers; and, finally, functionalism, a theory of the administrative state that seeks to tame the judiciary in order to facilitate the work of public officials.

Finally, I will set out a conception of the judicial role that is rather different from Dworkin's Herculean one, where judge Hercules is regarded as the guardian of the abstract principle of equal concern and respect. Rather than looking to such abstract principles of political philosophy, I will argue that we should look to the principles of the rule of law or legality which are by way of being structural principles of the integrity of legal order. Here I will rely on Lon L. Fuller's idea that legal order must aspire to realize principles of an 'inner morality of law'.[11] It is such principles which provide us ultimately with the basis for understanding how judges should approach the cases discussed in this book. They can rightly be seen as mediating between liberalism as an abstract political doctrine and an account of how judges are to decide cases in which the rule of law is at issue. Certainly, when there is compliance with the principles, the results will be consistent with liberalism's concern for the rights of the individual and their inclusion into an account of judicial duty is not hostile to the spirit of Dworkin's approach.[12]

However, as already indicated, the realization of the principles of the rule of law is as dependent, if not more, on legislative and executive

[11] Fuller, *Morality of Law*.

[12] Indeed, in more recent work Dworkin has come to rely more on the idea of legality as an organizing principle of legal order: see Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1–37. He has also suggested that judges need not be the only site for the moral elaboration of the requirements of law: Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996), pp. 33–4.