THE IDENTIFICATION OF FUNDAMENTAL LAW AND ITS BASIC PRINCIPLES

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THE IDENTIFICATION OF FUNDAMANTAL LAW AND ITS BASIC PRINCIPLES

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ABSTRACT

'The Identification of Fundamental Law and its basic Principles'

This thesis argues that the doctrine of absolute Parliamentary Sovereignty does not have a proper legal basis and is a political doctrine. The most superior form of law is Fundamental Law which, contrary to the existing legal view, does have a legal basis for its existence. Fundamental Law is that body of law which expressly or by implication states in its rules the fundamental rights and freedoms of the individual. These fundamental rights and freedoms are intrinsically linked to a concept which can be properly called Fundamental Justice. A principle inherent within a rule of Fundamental Law is natural equity. When a rule of Fundamental Law is properly operative then a specific form of Justice is created or the same form of injustice is prevented.

Research has been undertaken dating back to the 17th. century with particular emphasis upon the period around the English Civil War and the charges brought against King Charles I. This research continued through to the Second World War and onwards to modern times. There is particular analysis relating to the Nuremburg War Crimes trials and the judgments of the Tribunal; the Universal Declaration of Human Rights; the European Convention on Human Rights and the recognized concept of Compelling Law or Jus Cogens.

The methodology used during this thesis is the same as that which is applied throughout the courts in the UK legal system. It applies a combination of 'black letter' law; documentary analysis; identification at various stages of the distinction between political and legal issues; establishing facts from the evidence and most importantly drawing proper and reasonable inferences from those established facts and factual situations. This being in accordance with the accepted practice of all the courts in the UK. Evidence is provided of a number of specific rules which can properly be called rules of Fundamental Law. These rules are identified by analysing existing recognized rules of Compelling Law and certain specific rules found in Human Rights Law and demonstrating the common factors between them.

This thesis accepts that the doctrine of Fundamental Law is not recognized as a legal concept in the UK legal system but provides compelling evidence that such

a failure has little to do with the fact of its existence, as a question of law, but is simply a refusal to recognize it, apparently based on political expediency.

This thesis further demonstrates the benefits to individuals by the proper recognition of Fundamental Law.

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INTRODUCTION

There is one topic which regularly tends to dominate, in one form or another, discussion amongst members of the public as well as members of the legal profession, which is the issue of ‘rights’ and ‘freedoms’. There appears to be a perception amongst virtually the whole of the population in a country such as the UK that people have true rights and freedoms. Amongst the legal profession as well as many of those in academic circles there would also appear to be a belief that such rights and freedoms are somehow guaranteed by, for example, Human Rights Laws and Conventions. Few people appear to question the existence of true rights and freedoms and lawyers generally tend to focus on their meaning and ambit as opposed to looking deeper and ascertaining whether the right is a true one, properly so called, which belongs to each individual person. Merely because people believe that they possess true rights and freedoms does not mean that in fact they do possess them, even if the population of a whole country so believes. If individuals do have true rights and freedoms properly so called which belong to them then it is not unreasonable to state that, in many aspects, such rights and freedoms would be fundamental to them. Equally, one could reasonably expect that such fundamental rights and freedoms would in some way be protected by some form of guaranteed recognition.

The most supreme form of law, presently recognized as such in the UK, is Statute Law. This is as a result of the doctrine of Parliamentary Sovereignty which has been given legal force due to recognition by the judiciary. In legal terms, as presently adopted by the courts, this doctrine permits Parliament to pass *any* law it so wishes and imposes a duty upon the people to comply with and abide by such law in accordance with their duty and obligations as citizens to the rule of law. If it is legally correct that the doctrine is an absolute one, then there is no legal restriction which can be enforced to prevent the most horrendous and otiose rules of law being passed, in reality, by the government of the day.

It is therefore important to examine whether there is a more superior form of law to Statute Law and accordingly one which even Statute Law is subject to and which, thereby, Parliament can be held to account. There are two principle reasons for such an examination. Firstly, if there is not, then the consequences to the people are grave in the extreme for while they may or may not like any particular law that is a wholly different situation to being forced to comply with, for

example, repugnant laws which have little or no connection with their understanding of justice. Secondly, a true right or freedom cannot be a conditional one. If it is, it is likely to be little more than a form of privilege as opposed to a true right.[1] Accordingly, any so called 'right' which is guaranteed by a statute would be entirely dependent on the continued existence of that statute or its particular wording which guarantees the right. A repeal of the statute or an amendment to its relevant wording in relation to the 'so called' right would remove it.

This thesis will demonstrate that there is a branch of law, properly referred to as Fundamental Law, which is the true supreme form of law and which all other forms of law must either comply with or at least not be inconsistent with. This form of law consists of a series of specific rules which directly relate to individual rights and liberties. .

What is this concept of Fundamental Law? Where is it to be found? What is its source? What are its principles? What is its relationship, if any with Human Rights Law? What are its benefits to individuals? Why, if it exists, has it not been recognized in most states, in particular the UK? These are all questions which this thesis seeks to answer in accordance with its aims and objectives.

The research has illustrated a paucity of literature upon, not merely a most important topic, but one which could properly be argued as being the most important topic to the people. For if the people have true rights and freedoms what is it which exists in law which can legally prevent a government from removing each and every one of such rights and freedoms? It is necessary to emphasize that this thesis is not grounded in theory. It is not a thesis about what *is* law but more about what is a particular type of *the* law. Over the course of history scholars have attempted to find the answer to the elusive question of what *is* law? Around the period 300BC Aristotle differentiated between man-made law and the law of nature. The former varied from place to place dictated by custom. The latter was universally the same.[2] To him law supported a virtuous existence and promoted the 'perfect community'.[3] Cicero suggested that Natural Law or True

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[1] W.N. Hohfeld. 'Fundamental Legal Conceptions.' Chapter 1. (1917) JSTOR. Explained by Dias, RWM in *Jurisprudence* 4th. Ed. London. Butterworths. 1976, pp.33-65.

[2] *Politics* book III Ch 16.

[3] Marett Leiboff and Mark Thomas, *Legal Theories in Principle* (Lawbook, 2004.)

Law was based upon 'right reason in agreement with nature'.[4,5] In the 13th. century St. Thomas Aquinas was to build upon the ideas of the ancient Greeks. He argued that law was 'nothing else than an ordinance of reason for the common good, promulgated by him who has care of the community'.[6] There were four kinds of law. Eternal; Divine; Natural and Human. Natural Law is the process whereby man, as a rational being participates in the Eternal Law.[7] Natural Law is called law only because of man's participation.[8] "The Natural Law is nothing else but the participation of the Eternal Law in a rational creature."[9] Human law emerges when a public person entrusted with 'care of the community' exercises human reason in order to interpret the Eternal Law and create laws.[10] Aquinas has been cited in support of the view that an unjust law lacks legal validity.[11] However, what he stated was that an 'unjust law does not 'bind in conscience''.[12]

In the modern era the Law of Nature is to be " deduced from the nature of man as it reveals itself in the basic inclinations of that nature under the control of reason".[13] Development of the idea of Natural Law was 'Natural Law with variable content' and its connection with the concept of 'justice'.[14] Professor Jerome Hall was to assert that moral value was to be included in any definition of law.[15] Professor Lon. L. Fuller was to further identify 'morality' as "internal morality" and

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[4] Vilho Harle, *Ideas of Social Order in the Ancient World* (Greenwood Press, 1998) 99.

[5] John Finnis, Natural Law and Legal Reasoning' in Kenneth Himma and Brian Rix (Eds.), *Law and Morality*

[6] *Summa Theologiae* n 40,17.

[7] Leiboff and Thomas, ibid 18.

[8] Ibid n 7,60.

[9] Aquinas Q.91 Art. 2.

[10] Ibid 18.

[11] Norman Kretzmann, 'Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Consience' (1998) 33 American Journal of Jurisprudence.

[12] Aquinas n.40,14.

[13] Jean Dabin, *General Theory of Law* (trans. Wilk, 20 Century Legal Philosophy Series: IV)

[14] Stammler, *The theory of Just Law.* Ref. R.W.M. Dias *Jurisprudence* (4th. Ed. Butterworths.)

[15] Dias, ibid p. 676.

"external morality".[16] Professor Ronald Dworkin in his work[17] referred to 'political morality' and law as 'integrity' to be dispensed through the 'Herculean' judge.

A further and as asserted by its supporters, distinct theory is the theory of Positivism whereby law is a command by a sovereign entity with a sanction in default of compliance.[18] To the positivist law and morality are two distinct entities. However, perhaps recognizing the difficulties professor Hart asserts that there may well be law "which is too iniquitous to be applied or obeyed."[19] It being nonetheless still law. Perhaps in order to try and reconcile these different schools of thought a variation has developed which is referred to as 'inclusive' and 'exclusive' positivism or 'soft' and 'hard' positivism. Inclusive positivists assert that it is conceptually possible for, but not necessary, that the legal validity of a norm should depend on its consistency with moral principle or values. Exclusive positivists assert the opposite, that the legal validity of a norm can never be a function of its consistency with moral principles or values.[20]

It is hardly surprising given the above that Dworkin states in the preface to his work: "I have not tried generally to compare my views with those of other legal and political philosophers, either classical or contemporary, or to point out how far I have been influenced by or have drawn from their work."[21]

The reason that this thesis is not grounded in theory is not because it would or may be thought to be unhelpful but because such groundwork is not relevant and is unnecessary. The probative value of this thesis lies in its legal analysis of historical and in most cases undisputed facts.

It should not however be thought that legal theory may not be of benefit. However, in order to be of benefit it requires critical analysis of the relevant theories and then to apply that analysis of those theories to the legal analysis which has taken place during this thesis. This would then determine the relationship between this

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[16] Lon. L. Fuller, *The Morality of Law* (New Haven; Yale University Press.)

[17] *Law's Empire* (Hart Publishing, Oxford 1998.)

[18] J. Austin. *The province of jurisprudence determined.*

[19] Hart, *The Concept of Law* (Clarendon Law Series, Oxford University Press.)

[20] W. Wauchow (2001). 'Legal positivism, inclusive versus exclusive' In E. Craig (Ed.) *Routledge Encyclopaedia of Philosophy.* Routledge: London.

[21] R. Dworkin *Law's Empire* Hart Publishing. Oxford (1998) P. ix.

thesis and the particular legal theory being lo oked at. The constraints of the thesis prevent this from occurring. It is a thesis not a tome. In any event no theoretical argument can undermine the legal analysis which is to be undertaken unless it is being argued that there is a ‘right’ theory which denies to people true rights and liberties.

The methodology which will be applied during this thesis is a combination of ‘black letter’ law; documentary analysis, undisputed relevant historical facts, identification at various stages of the distinction between political and legal issues and most importantly drawing reasonable inferences from established facts and factual situations. It utilises in essence the same type of methodology which is used throughout all the courts in a land such as the UK. In addition there is little point in a research topic of this nature unless it is possible to identify at relevant stages what actually occurs in the practice of the legal system. This is achieved by bringing to bear ‘first hand’ experience from some thirty five years of such practice, principally as a barrister practising in criminal law which has involved regular appearances in the High Court and the Court of Appeal. However, because this work is one of an academic nature such experience is kept to a bare minimum. That having been stated if such experience was to be removed completely, for example because of the absence of corroborative or supporting evidence, then the reader would be denied in relevant areas what actually occurs in practice which, it is properly arguable, cannot be said to be in the public interest.

Chapter One examines the doctrine of Parliamentary Sovereignty as to whether it is a legal concept properly so called. The reason for that examination is that if it is, then Fundamental Law cannot exist as a legal concept. By definition there cannot be two bodies of law each maintaining that they are absolutely supreme. This chapter tends to suggest that while Parliament in the UK is supreme it is not absolute and that throughout this thesis the doctrine of Parliamentary Sovereignty is not one which is possessed of a proper legal basis but is one based on political expediency. Chapter Two identifies various references to Fundamental Law tracing its origins back some four hundred years and demonstrates its existence as a concept. Three chapters provide the evidence from the research of the recognition of Fundamental Law, expressly or by implication, in various forums. Chapter Three examines some of the failings of the doctrine of Parliamentary

Sovereignty and identifies the commencement of the recognition of Fundamental Law in the international arena after the Second World War. Chapter Four examines the situation in more modern times and provides evidence of recognition of the words Fundamental Law in the international arena by the express use of words which translated mean ‘Compelling Law’. Chapter Five provides further evidence of such recognition and begins to identify some of the underlying principles of Fundamental Law. Chapter Six evaluates and analyses the source of Fundamental Law as identified in Chapters Three, Four and Five. In addition this Chapter seeks to identify some of its normative principles. Chapter Seven answers the question that if, as the evidence shows, Fundamental Law exists as a proper legal concept why has it not been recognized as such in the UK? It examines the reality of the position of those responsible for providing authoritative opinions on the law and declaring its existence. Finally, Chapter Eight brings together the findings from the previous chapters and provides in its conclusions the answers to the various questions posed and some of the benefits to humanity from recognition of Fundamental Law.

In its most simplistic terms this type of examination within the constraints of the above chapters ought to identify the existence of Fundamental Law as a *legal* concept, coupled with some of its rules and perhaps most importantly its essential principles. In the alternative it ought to be able to reject that Fundamental Law exists as a legal concept. This thesis is about what the law *is* not what it *ought* to be.

CHAPTER ONE

EXAMINATION OF THE DOCTRINE OF PARLIAMENTARY SOVEREIGNTY AND ITS RELEVANCE TO FUNDAMENTAL LAW

INTRODUCTION

This chapter examines the concept of Parliamentary Sovereignty, that is to say the right of parliament to make laws and amend or repeal existing laws. Such examination is necessary in the context of Fundamental Law for the doctrine of Parliamentary Sovereignty is one which is put forward as being the justification for Statute Law being the most supreme form of law and it follows that there can be no place for any other form of law, including Fundamental Law, which can be said to be equal or superior to Statute Law. The examination of the concept includes its operation and its consequences to the individual in the existing legal order.

In order to achieve an effective examination of the concept it is necessary to clearly identify its meaning and to show that it has been accepted by the courts as being a legal doctrine. It having been shown as being recognized as a legal doctrine this chapter then looks at whether there has been any challenge to the courts' acceptance of the legality of the doctrine and the effects of the doctrine in the UK now that the UK is part of the European Community. This examination will demonstrate that there appears to have been little more than an apparent automatic acceptance of the doctrine by the judiciary without adequate thought having been given to its juridical basis. The words 'automatic acceptance' are not intended to denote any form of criticism of individuals but simply to make the point that the duty of the court is to apply and enforce the will of Parliament without consideration as to the merits or demerits of the law in question. Its justification for so doing is the doctrine itself. To the judiciary, the simple fact of acceptance of the doctrine avoids the necessity to look further into it.

There are those in more recent times both in the judiciary and the academic world who have questioned the doctrine.[22] However, the fact remains that all courts in the UK follow the doctrine to the letter, subject only to the canons of construction and whatever the concerns of the individual judge or scholar the undoubted truth

[22] See below.

remains that such doctrine reigns supreme in English law. That having been stated its relevance in the context of this thesis is there is no other law which is recognized, in reality, as being superior to Statute Law.

The chapter will then proceed to examine the historical sources of the doctrine and demonstrate that it has been incorrect to accept it as a legal doctrine it being, in reality, a political one. That is to say, that it is little more than a means whereby those in positions of political power in government put forward the doctrine as the justification for the possession of absolute power and the exercise of such power in law making.

It is necessary to emphasize at the very outset of this thesis that the doctrine of Parliamentary Sovereignty, as will be seen, has a profound effect on individual rights and freedoms and for that reason alone it is necessary not merely to simply accept the doctrine but to analyse it in detail in order to ascertain whether it does have a solid legal foundation which justifies its recognition by Parliament, the judiciary and others, as possessing legal validity. It has been suggested that the doctrine is a Common Law principle.[23] The problem here is that it is the doctrine which is said to provide the authority for Statute Law. On any recognized view Statute Law is superior to the Common Law as well as the Law of Equity. It can therefore repeal or amend any rule of Common Law. If a statute were to repeal every rule and principle of Common Law it could hardly be suggested that statutes thereafter did not have a lawful basis. The reason for that, as will be seen later in this chapter, lies within the origins of the lawful power for Parliament to pass laws by way of statute which bind the people. This would appear to have little or nothing to do with the Common Law as understood by the overwhelming majority of the judiciary, jurists and parliamentarians.

The Doctrine Stated

Parliament means, to the lawyer, (though the word has often a different sense in ordinary conversation), the Queen, the House of Lords, and the House of Commons; these three bodies acting together may be aptly described as the ‘Queen in Parliament’, and constitute Parliament. The principle of Parliamentary Sovereignty means; “ neither more nor less than this; namely that ‘Parliament’

[23] See below, *Dr. Bonham’s case.* (1610) 8 Co Rep 118

thus defined has, under the English Constitution, the right to make and unmake any law whatever;" and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[24]

The doctrine of Sovereignty can, to some extent, be traced back to Hobbes, and a full statement of the principle of unlimited legislative power was made by Sir Edward Coke, albeit that he appeared to consider that any restriction was a Common Law one.[25] However, the specific formulation of the doctrine, as stated above, is attributed to Professor Albert Venn Dicey and contained within his famous book, *Law of the Constitution.*[26] To Dicey, Sovereignty meant absolute power in law making. He makes it clear that the doctrine is a legal concept; one which is fully recognized by the law of England.[27] He defines law as 'any rule which will be enforced by the courts'.[28] Although there are no legal restraints upon the law making powers of Parliament, he concedes that there are some laws that Parliament could not and would not pass; but to Dicey any such restraint is a political one and not a legal one.[29] That is to say such restriction is within the province of the politicians not the judiciary in a court of law.

If Professor Dicey is correct, it follows that there is no such thing known to English law as Fundamental Law or any other law which could properly be put forward as being superior to the absolutism of the doctrine of Parliamentary Sovereignty.

A review of the case law of the United Kingdom provides powerful and compelling evidence that the doctrine of Parliamentary Sovereignty is recognized by the courts within the State. The judgments' of these cases, with the exception of Dr. Bonham's case,[30] expressly state that Parliament is supreme and that a court of

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[24] Dicey, A.V. *An Introduction to the Study of the Law of the Constitution,* 10th ed. Universal Law Publishing Co. Pvt. Ltd. 5th. Indian Reprint 2008. p. 40.

[25] Fourth Institute, p. 36.

[26] Ibid.

[27] Ibid. p. 41.

[28] Ibid. p. 40.

[29] Ibid. pp. 70–76.

[30] See below.

justice is not permitted to enquire into the mode by which a bill was introduced into Parliament or once it becomes Statute Law, subject it to scrutiny on its merits.

These legal authorities provide ample evidence that, as far as the judges are concerned, the doctrine of absolute Parliament Sovereignty is one recognized by law. Accordingly, the perception of Professor Gough in his book to the effect that there is no such thing as Fundamental Law would appear, at first sight, to be justified.[31] Yet these cases representing the legal authorities, tend to amount to little more than a bald statement by the judges that the most supreme form of law is Statute Law which is made under the legal power derived from the doctrine of absolute Parliamentary Sovereignty. There appears to be virtually no judicial reasoning behind the statement. In any event, it does not of course follow that because there is a perception of a particular principle such a principle is correct. These legal authorities include *Hampden's case (case of ship money)* (1637) 3. St. Tr. 825; *Stockdale* v *Hansard* (1839) 9. Ad. & E. 1; *Edinburgh and Dalkeith Railway Co.* v *Wauchope* [1842] 8 Cl. & F.; *Lee* v *Bude and Torrington Railway Co.* (1871) 6 CP 576; *Ellen Street Estates Ltd.* V *Minister of Health* [1934] AER 385, CA; they provide abundant evidence that as far as the courts' are concerned the supremacy of Parliament is acknowledged and accepted and any law passed by Parliament cannot be subject to scrutiny by the courts. The doctrine of Parliamentary Sovereignty is not restricted to the UK but applies everywhere in the Queen's dominions.[32]

It is apparent in the United Kingdom, from the above cases without the necessity for detailed analysis of the cases individually, that the courts recognize the doctrine of Parliamentary Sovereignty and there is nothing to suggest that such supremacy is anything other than absolute. The exception to this is *Dr Bonham's case*[33] of which Professor Gough argues[34] is not authority for the proposition that a sovereign Parliament is anything other than absolutely supreme. In any event

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[31] J.W. Gough, *Fundamental Law in English Constitutional History.* Oxford University Press, 1955.

[32] *British Coal Corporation* v *The King* [1935] A.C. 500; *Harris* v Minister of the Interior [1952] 2.S.A., *Att-Gen for New South Wales* v *Trethowan.* [1932] A.C. 526.

[33] See above

[34] Gough, J.W. *Fundamental Law in English Constitutional History* (Oxford University Press, 1955.)

the basis of Coke's judgment in that case is that parliamentary excesses can be controlled by the Common Law, yet it is common ground that the Common Law is subservient to Statute Law, therefore such Common Law control would seem to be unlikely.

It appears somewhat strange that Parliamentary Sovereignty, one of the most important of all doctrines, has not been subject to scrutiny by the courts or any of the normal forms of judicial analysis, but that the courts would appear content with such apparent automatic acceptance of the doctrine. It may be thought that such analysis could be found within the various academic works which have examined the doctrine and it is therefore necessary to examine this area.

Existing Academic Analysis of the Doctrine of Parliamentary Sovereignty

A number of well-respected academics have examined the doctrine of Parliamentary Sovereignty itself in analytical detail. A useful starting point is Professor E.C.S. Wade's introduction to the tenth edition of Professor Dicey's book.[35] Wade's view is that as a legal doctrine it is too late to question the supremacy of Parliament.[36] Citing Bryce[37] and Cowen,[38] the suggestion appears to be that to look at the historical facts behind why someone or something is sovereign causes nothing but confusion.[39] Yet he asserts that the doctrine in its present form 'can be traced to the alliance effected in the seventeenth century between Parliament and the common lawyers'.[40] The legal justification for the doctrine lies in the authority of the court to support certain propositions. These are: (i) that a court will not take any note of the procedure in Parliament whereby a bill comes to be enacted; (ii) that a court will not allow a judicial process to be used in the sphere where Parliament, and not the courts, has jurisdiction; and (iii) that Parliament cannot bind itself as to the form of subsequent legislation, and

[35] A.V. Dicey *Introduction to the Study of the Law of the Constitution,* (10th ed. Univ. Law Publishing Col Pvt. Ltd. Fifth Indian Repr. 2008)

[36] Ibid. xxxix.

[37] J. Bryce, *Studies in History and Jurisprudence.* (Oxford University Press, vol. II, p.57, 1901)

[38] D. V. Cowen, 'Legislature and Judiciary' 15 M.L.R. pp.295-296. 16 M.L.R 3

[39] Ibid. xxxix.

[40] Ibid. xl.

therefore the provisions of a later Act, in so far as they are inconsistent with an earlier Act, must prevail.[41]

Unfortunately, again, there is nothing in the introduction or in any of the legal authorities which illustrates the legal basis for the doctrine, meaning the distinction between the justification for a doctrine and its true legal basis. In the most simplistic terms, it is little more than Dicey stating words to the effect 'I have the support of the courts for this doctrine and a fortiori it is a legal doctrine'. Equally, the courts could state: 'We agree entirely with Professor Dicey's doctrine. Therefore, as we agree, it is a legal concept'.

Various other academic authors including James Bryce in his two volume work[42] and Sir William Wade in his paper 'The Basis of Legal Sovereignty',[43] have examined the doctrine of Parliamentary Sovereignty. All appear to come to a similar conclusion namely that it is a legal doctrine because it is recognized as such by the courts. None of the academic papers appear to identify and demonstrate the legal basis for the doctrines existence. Yet if one could identify the source of the doctrine then it may be possible to argue whether it does or does not exist as a legal doctrine.

Parliamentary Sovereignty and the European Community

Towards the end of the twentieth century, the UK joined with a number of other nations in Europe to form what was essentially a European Economic Community. The immediate question which arises is whether this had any effect upon the doctrine of Parliamentary Sovereignty. This will now be looked at, but its relevance in the present context is not in relation to European law generally but simply its legal effect on the doctrine of Parliamentary Sovereignty.

On 17 October 1972, the European Community Act received the Royal assent. The effect of the provisions of Sections 2(2) and Sections 2(4) of the Statute is to make all UK law subject to directly applicable European Community law expressly

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[41] Ibid. xliii.

[42] J. Bryce, *Studies in History and Jurisprudence.* (1901),Oxford University Press. Vol. II p.p. 503 –554.

[43] H. R. W.Wade, 'The Basis of Legal Sovereignty' (1955), Vol. 13, No. 2, The Cambridge Law Journal, pp. 172 –197.

or even by implication.[44] This Statute generated a plethora of academic views and papers under such headings or observations as 'The Decline and Fall of Parliamentary Sovereignty'[45], 'Parliamentary Sovereignty and the European Community: The Unfinished Revolution?'[46], 'The Unreality of Parliamentary Sovereignty'[47], as well as others of a similar nature. The approach of the various authors is to examine the judgments in cases which arose as a result of the Act[48] and then to argue in effect that the doctrine of Parliamentary Sovereignty could not survive the legal effect of these judgments. This appears to be because, whatever the theory, the reality is that it is the European Community Law which is supreme.

The difficulties faced by all these academics, who argue that, because of European Community Law the doctrine of Parliamentary Sovereignty is either dead or at the least severely undermined, is similar to the problems relating to the Statute of Westminster,[49] which provided legal mechanism on the grant of independence to the dominions. If the doctrine is a correct legal one then there would appear to be no reason in law why such statutes could not be repealed and a dominion could be reclaimed by the UK although any such action is likely to be ignored by the dominion in question. It is a simple illustration of how the doctrine does not appear to accord with the reality of such a situation. It matters not how unlikely it may seem that such UK Statutes would be repealed; the relevant issue in the context of this thesis is whether they are capable of repeal as a question of law. If they are not; that would be powerful evidence that the theory behind the doctrine of Parliamentary Sovereignty is flawed. If they are so

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[44] *R* v *Secretary of State for Transport ex.p. Factortame.Ltd.* (No.1) [1989] UKHL. (The case lasted some 11 years, culminating in November 2000).

[45] T.Ginsberg, 'Judicial Review in New Democracies' (2003) Introduction The Decline and Fall of Parliamentary Sovereignty, Cambridge University Press.

[46] I. Loveland, 'Parliamentary Sovereignty and the European Community: The Unfinished Revolution?' (1996) 49(4), Parliamentary Affairs, , pp. 517-535.

[47] M. Elliott, 'United Kingdom: Parliamentary Sovereignty under Pressure'. (2004) 2 Int'l J. Const. L. 545.

[48] *Bossa* v *Nordstress Ltd.* [1998] EAT; *Bulmer* v *Bollinger* [1974] CA; *DEFRA* v *Asda* [2003] H. L; *Foster* v *British* [1991] H.L.; *Thorburn* v *Sunderland City Council.* [2001] Q.B.D. et al.

[49] Statute of Westminster 1931

capable, which is obviously the case, the doctrine is unaffected, as a question of law, by the European Community legislation.

The European Community Act is a UK statute. The fact that it imports other 'law' into the UK is as irrelevant on the issue as to the correctness of the doctrine, as would be a statute which permitted the import of fruits from a country outside the UK. Another statute could be passed to prevent such fruits from being imported, just as a statute could be passed prohibiting the application of such law or repealing a statute which permitted such law. Of course, if Fundamental Law existed, all statutes, including the European Communities Act, would be subject to such law and no 'European law' or any other form of law could be imposed upon the UK which was inconsistent with Fundamental Law. The doctrine of Parliamentary Sovereignty does not state that no new laws emanating from outside the UK can be imposed upon citizens within the UK but that such laws can only be imposed by legislation of the UK Parliament.

A good example would be that, if European law permitted the types of law declared in Germany in 1939,[50] such laws may, prima facie, eventually become part of UK law by virtue of an amendment to the European Communities Act. Only by repealing the Statute or by demonstrating that the specific law in question could not be imposed, for example, because it contravened some other higher form of law, such as Fundamental Law, would such law cease to be operative or be void ab initio. It may be suggested that the European Community Act as well as other statutes are some form of 'higher law' or 'constitutional law'.[51] The problem which such arguments face is that they have to demonstrate why if that Statute was repealed such a repeal would somehow be unlawful and the courts would recognize such illegality. This would be totally inconsistent with, not only the doctrine of Parliamentary Sovereignty as presently accepted, but also with the numerous court judgments previously referred to.

What is becoming clear is that the doctrine of absolute Parliamentary Sovereignty, as a legal doctrine, has the support of the judiciary and a number of leading academics. To them, it is a lawful doctrine in the sense that it will be

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[50] See below. Chap. Three.

[51] *Thorburn* v *Sunderland City Council*, (2002) 3 WLR 247; [2002] EWHC 195 (Admin.); [2003], QB 151. Obiter.

enforced by the courts and because of that fact alone has a legal basis for its existence. If that is right, as previously stated, there can be no place for any other form of higher law whether it be called Fundamental Law or anything else.

Recent Judicial Approach

In more modern times there appears to be the origins of a movement away from the absolutism of the doctrine of Parliamentary Sovereignty. Lord Steyn observed in a case concerning the Hunting Act 2004, for example, that:

"The classic account given by Dicey of the doctrine of the Supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of parliament is still the 'general' principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish Judicial Review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is 'a' constitutional fundamental which even a sovereign parliament acting on the behest of a complaisant House of Commons cannot abolish."[52]

The difficulty with this observation is that the words 'constitutional fundamental' are not clarified by the learned judge. However, it could be properly construed as a 'fundamental constitution' whereby the word 'constitution' means law. If that were to be the case then it would be consistent in many ways with the justification and legality of the charges brought against Charles I in which the words 'fundamental constitutions' appear. [53]

In another dictum in the same case Lord Hope of Craighead, stated: "Parliamentary Sovereignty is no longer, if it ever was, absolute. It is not uncontrolled… …it

[52] *R. (Jackson)* v *Attorney General* [2005] UKHL; [2006] 1 A.C. para. 102.

[53] See below this chapter.

is no longer right to say that its freedom to legislate admits of no qualification whatever."[54]

Does this mean that this apparent 'legal' doctrine is one which the most senior judges, unelected by the people in the UK, can change and therefore is dependent only upon the individual who occupies the particular office or which year the challenge to the doctrine arises? In other words is it a similar situation when, during the growth and development of Equity, such law was considered to be dependent upon 'the length of the Lord Chancellor's arm'. It appears to have little bearing to right reason, logic or the doctrine of 'stare decisis'.

Dicey, envisaged certain objections to his theory and does deal with a variety of such objections to the doctrine in the assertions by critics. For example Blackstone, who would suggest that Acts of Parliament are invalid if they are opposed to the principles of morality or the doctrines of international law;[55] or an Act of Parliament cannot impinge upon the (Royal) Prerogative.[56] Dicey's answer in effect is, that from a legal perspective, Parliament can do whatever it wishes in relation to law making. Any restriction upon Parliament passing laws contrary to morality or the doctrines of international law would be a political one not a legal one.[57] An Act of Parliament is incapable of binding future Parliaments.[58] He differentiates between the word 'sovereignty' in the political sense with the meaning of the word in its legal sense,[59] by emphasizing that political reality lies in the form of the ultimate will of the electorate.[60] However, the ultimate will of the electorate may only be relevant on this issue if the electorate are aware that Parliament's power is absolute and that it is free to remove each and every right and freedom which the individual perceives he possesses. Further, the power of the individual lies in his ability to vote for another individual to represent him in Parliament, albeit in reality it is a vote for a political party. Neither he nor his

[54] Ibid. paras. 107 and 120.

[55] Ibid. p.62.

[56] Ibid. p. 63.

[57] Ibid pp.70-76

[58] Ibid. p.64.

[59] Ibid. p.73

[60] Ibid. pp 70-76.

representative has any power to change the doctrine of Parliamentary Sovereignty in its absolutism.

Only by looking at the historical references in order to create the 'building blocks' of the doctrinal development is it possible for a critical analysis to take place. There are few such blocks contained within Dicey's book or the writings of any of the other supporters of the doctrine. The mere fact that one can justifiably defend a doctrine from those who criticize it with the kind of examples as provided by Dicey is not sufficient to prove the existence of the doctrine in the first place. It is equally unhelpful to look to early forms of legislative authority such as the King in Council[61] or to vilify monarchical proclamations and ordinances[62] unless one simply accepts that the basis for legal power was in the monarch because he was the monarch. Further, a doctrine, which is to a significant extent dependent on the fact that there is some form of defence to the attacks made upon it, is not that dissimilar to a situation whereby someone builds a house surrounded by a large type of barrier and states to all comers to try and knock it down. Failure does not mean that the house had solid foundations.

A similar observation can be made relating to judicial comments whether in favour or against absolutism. Such comments are akin to the making of law as opposed to illustrating any logical development enabling a proper declaration of law. However, it is clear that in modern times certain members of the judiciary are questioning not so much the supremacy of Parliament but its absolute supremacy. They do not appear to provide argument as to why such supremacy is not absolute or what law, if any, has such absolute supremacy and why. Given that no proper analysis has been put forward by Dicey or in the judgements' of the courts which crystallizes in the creation of the doctrine of Parliamentary Sovereignty being a correct legal concept, in order to perform an analysis, as previously stated, such building blocks have to be put in place. These building blocks necessitate looking at the position of the monarch prior to the existence of Parliament and the period when power became vested in Parliament.

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[61] Ibid. p.50.

[62] Ibid. p.50.

Relevant historical evidence as to the possession by the sovereign of supreme power prior to the Civil War of the 17th. Century[63]

A useful starting point is between the eleventh and twelfth centuries. The reason for choosing this period is simply that it belonged to a time when the King was believed to be all powerful. Such a power appears to have been recognized and accepted by his subjects. Whether they were right to so accept his supremacy is a different issue upon which some would argue the education and perceived protection of those subjects was dependent. In 1100, King Henry I issued the Charter of Liberties.[64] This was a decree to appease the Church and many of his noblemen. The Charter also recognised that the King granted the laws, of Edward the Confessor, as amended by William the Conqueror, to the people.[65]

The Charter's relevance in the present context is that it is one of the earliest documents which evidenced a willingness on the part of the Sovereign to surrender or share part, albeit de minimis, of his so-called supreme power in the interests of others. Of course, this presupposes that he did have absolute power in the first place. On 10 June 1215, many of the most important barons in England forced King John to agree to the Articles of the Barons. This guaranteed various freedoms, liberties and rights, in particular the right to due process under the law. This agreement was recorded in a formal document issued on 15 July 1215 and which became known as the original Magna Carta.[66]

Article 39 of the Magna Carta stated:

"No free man shall be captured, and or imprisoned, or disseised of his freehold, and or of his liberties, or of his free customs, or be outlawed, or be exiled, or in

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[63] M. Strickland. *War and Chivalry – The Conduct and Perception of War in England and Normandy 1066-1217.* Cambridge, 1996. Oxford Dictionary of National Biography. www.oxforddnb.com/public/themes/93/93691/html accessed for re-checking February 13th. 2014.

[64] Also referred to as the Coronation Charter it consisted of a written Proclamation by the King.

[65] Clause 13.

[66] Various amended versions appeared until the 1297 version, of which what is left remains on the statute books.

any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by lawful judgment of his peers, and or by the law of the land."[67]

Given that, at that time, a parliament did not exist,[68] the 'law of the land' was taken to mean by 'due process of law', which in those days was interpreted to mean a trial by twelve peers. While this Article is often cited as the legal authority for trial by jury, the Magna Carta itself has been amended and repealed over the centuries by different parliaments and various governments until, in modern times, there is little of it left. Certainly, Parliament to-day considers that it has the lawful authority to amend or repeal the Magna Carta. However, the singularly important point in the context of this thesis, is not whether Parliament does in fact have such lawful authority, but the inclusion of the words 'his liberties' and 'his free customs' in the Magna Carta. These words are declaratory of the legal existence of such liberties and customs belonging to individuals. This is recognition of a restriction on absolute power by the King, for if he had absolute power all the freedoms and liberties in the realm would belong to him. Can Parliament, when repealing the Magna Carta, also deprive the individual citizen of 'his liberties and free customs'? If the Magna Carta is no different in law to any other statute then whatever it states in relation to liberty it can, as has been seen, always be amended or repealed. Such repeal or amendment then can readily remove the liberty created or evidenced by it. Unless, of course it either is subject to some higher law which could properly be stated as Fundamental Law or it is not a normal statute but a document which is declaratory, at least in part, of an individual's liberty and customs.

There is further evidence as to the restriction of absolute power in the King to be found in the sixteenth century during the reign of King Henry VIII. The situation relating to his attempts to divorce, imprison or execute his various wives for failing to deliver him a male heir is well documented. The historical milestone of the era which is usually focused upon by lawyers, historical commentators and the like is

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[67] Translated by Lysander Spooner in *An Essay on Trial by Jury* (Classic Reprints, Forgotten Books, 1852) www.forgottenbooks.org Accessed 2013

[68] The traditional view is that the first Parliament was convened at the behest of Simon de Montfort in 1265 although the term Parliament appears to have been used in 1236 at a meeting between the sovereign and various members of the nobility. 'The evolution of Parliament' www.parliament.uk Accessed 2014.

how the King's various devices would lead to a breakaway from the Church of Rome and the establishment of the Church of England; this specific period being referred to as the Reformation. The relevance in the present context is the simple fact that he accepted that he could not obtain a divorce unless he complied with the law. Had his power been absolute, there would have been no necessity to have perpetrated the various intrigues which he did. For example, he could simply have said to Catherine of Aragon: 'I am the King. My power is absolute. I divorce you.' There are those who may argue that the issue here is because King Henry VIII had to remove the authority of the Pope in relation to the Roman Catholic religion as it applied to his personal situation, which was preventing him from achieving his aims. That, however, misses the point which is that if absolute supreme power vested in him as the King he would not need the Pope, the Roman Catholic religion or anything else to achieve his aims. He would not have needed to create the Church of England or proclaim himself Defender of the Faith or any other spiritual or quasi spiritual method. He recognized that he did not have absolute power notwithstanding the fact that he was the King. The creation of his 'new' church allowed him to remove a particular obstacle. It does not follow that such was the only restraint upon absolute power.

It may be suggested that the difficulties that King Henry VIII had, arose by his acceptance that he was subject to the law of the All Mighty but still considered that his power was absolute in relation to his own people. The problem with this argument lies in the fact that both his 'new' religion and the Catholic religion accepted the concept of the All Mighty. He could always 'claim' a divine right irrespective of his religious beliefs. Of course if he remained part of the Catholic religion then the Pope would not have recognized that claim for a 'divine right'. Consider this. Assume that it was not King Henry VIII who attempted the well documented means and devices to rid himself of various wives but it was one of his subjects who wanted a divorce. The subject did not approach the Pope, the church or other members of the Roman Catholic religion but applied to the King to permit his divorce. If the King's power was truly absolute why could he not grant such a divorce simply because *his* power was absolute? However it is viewed, the existence of the church in question restrained the possession or use of absolute legal power.

It is clear that, in fact, subsequent kings and queens after the Magna Carta considered that they alone were the supreme law making power; they could revoke or amend any laws of their predecessors. Henry I did not consider himself bound by the Charter of Liberties. Numerous other sovereigns did not consider themselves bound by their predecessors.[69] The majority of the Magna Carta itself was repealed in the nineteenth and twentieth centuries by Parliament.[70] Indeed, in a not so dissimilar political jurisdiction to that of the UK, a so-called statesman known as the Chancellor of Germany, did not consider himself bound by the documentary undertakings he gave to Prime Minister Chamberlain shortly prior to the Second World War.[71] The monarchical approach, in that those who perceived themselves as the possessors of sovereign power, considered that they were not bound by anything a previous sovereign power did and that, being vested with sovereign power, they were able to impose any law they wished, continued up to the seventeenth century. It does not mean that such actions were lawful; it simply means that there was no one with such power at the time to prevent any action being exercised by a power which perceived itself to be absolutely sovereign.

Some may argue that because there was no remedy there was no wrong. The absence of an enforceable remedy at the time does not mean that there was no wrong or even that there was no remedy. Power and law are two distinct concepts and must not be confused. The mere exercise of monarchical or sovereign will would only be automatically lawful by virtue of the office, albeit a throne or a parliament, if that office was above any form of human law, for example, by virtue of a divine right[72] and even that would require recognition of the existence of such a divine right as being the most superior form of law. Then it may well create a different situation. If, in the case of a monarch, he was lawfully able to make or unmake any law he so wishes, dependent upon his will, it may be a simple process to assert subsequently that the Sovereign in Parliament is able to do exactly the same thing.

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[69] For example, King Henry VIII.

[70] Various Statute Law (Revision) Acts and Statute Law (Repeal) Acts between 1863 and 1969.

[71] Hitler's promise to Chamberlain during the visit to Germany in March 1939.

[72] For example, Henry VIII's claims.

The Historical Source of Parliamentary Sovereignty

Before reaching the present-day position of the Sovereign 'in' Parliament, it is necessary to look at how Parliament lawfully acquired its power to make laws to begin with. In other words, what is the legal basis for Parliament's power to legislate? There are three potential legitimate sources for such power: (i) it derives from the monarch; (ii) it is as a result of conquest; and (iii) it is a mixture of both.

If it is assumed that, historically, the monarch did have absolute power, how was such power transferred to Parliament? Clearly, the monarch is capable of voluntarily transferring some of his or her power to others, as in the above examples, but the issue here is the transfer of the whole or nearly the whole of such power. In this context, the events in the middle of the seventeenth century are both pertinent and relevant. Prior to 1640, Parliament was an advisory body to the Sovereign. If the Sovereign did not heed the advice of Parliament, various remedies were open to Parliament such as withholding revenue. Nonetheless, in law it was perceived to be no more than an advisory body. In 1642, the first of the English Civil Wars was fought. This war was fought between the Royalist armies led by King Charles I and the Parliamentarians under the overall control of Oliver Cromwell. Many issues appertained to the cause of the conflict, including those relating to the Church, the situations in Scotland and Ireland, as well as a multitude of individual grievances.[73] However, at the very heart of the problem lay the issue in the form of a simple question: In whom did power ultimately vest?

King Charles I and those who supported him considered that it vested in the King. He was the Sovereign and entitled as Sovereign to supreme power. Parliament was little more than his advisors. He was free to dissolve Parliament if he wished to and rule over his kingdom absolutely. Parliament and its supporters considered not simply that such power was vested in Parliament as the elected representatives of the people to be shared, if Parliament saw fit, with the King but, of singular importance to them, that it did not rest with the King alone. Thousands of people fought and died over this very question. Parliament, for

[73] E. Hyde, *History of the Rebellion and Civil Wars in England.* (Printed by H.P. for J. Wilford and T. Jauncy, 1720) ; D. Scarboro, *England 1625-1660 Charles I, The Civil War and Cromwell* Hodder Murray. 2005; P. Ackroyd, *The History of England Civil War Volume III,* Kindle.

many who fought for the Parliamentary cause, clearly meant their elected representatives in the Commons. In truth, neither the King nor the House of Commons could properly have been said to represent the people. One only has to look at the voting requirements at the time, the absence of female suffrage and emancipation, which was still a few hundred years off, coupled with the property ownership requirements, to understand that even the House of Commons represented but a minority of the people. However, that having been stated, it was more representative of the people, albeit a very restricted class, than could be said of the King alone.

Following the Second Civil War,[74] King Charles I was arrested and tried for (among various other allegations) Treason. He was convicted and then executed on 30 January 1649. What is also clear is that at no stage prior to his execution did King Charles I voluntarily agree to assign or in any way transfer any of his remaining powers to Parliament.

England was ruled by a republican government between 1649 and 1653 and between 1659 and 1660. Between 1654 and his death in 1658, Oliver Cromwell ruled England as Lord Protector. On 23 April 1661, the coronation of Charles II took place and the monarchy was restored. However, the Restoration was only with the consent of Parliament, not as of right, notwithstanding that, while negotiating terms, Charles had insisted that, at the Convention Parliament declared on 8 May 1660, he, Charles II, had reigned as the lawful monarch since the execution of Charles I. It is arguable that the phrase ‘there is no interregnum in England’ can be traced back to this period. One can easily see that after the execution of Charles I, Parliament was in fact supreme, and a basis for the present day doctrine can readily be traced to this period of time. The mere fact that a basis exists for the doctrine does not mean that such is the legal basis for its existence and it does not answer the question which has been posed which is: What is the legal basis for the doctrine?

In order to ascertain the legal basis for the doctrine, it is necessary to examine the legality of the execution of Charles I. He raised the question himself at his trial by stating (in modern language): “By what lawful authority am I brought here?”

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[74] 1648–1649.

An examination as to legality requires an analysis of two principal areas: (i) the mode of trial; and (ii) the charge(s).

During this period, the criminal courts were those of the King. That is to say they were 'his' courts. The judges acted in his name for the purpose of trying all those who were accused of criminal offences. He clearly could not be tried in one of his own courts for he could not try himself! In December 1648, the House of Commons set up a committee to draft legislation to erect a High Court of Justice to proceed with the trial against the King. This resulted in a proposed Ordinance, which was rejected by the House of Lords.[75] It is of note that, unlike many other jurisdictions where the legislative and judicial functions are truly distinct and separate, both the House of Lords and the House of Commons had an inherent judicial function; the Commons having exercised this judicial function until 1399 hearing appeals from other courts. Did the Commons have lawful authority to unilaterally create itself as a form of High Court of Justice?

If absolute sovereignty vested in the King, then the House of Commons did not have the lawful authority to unilaterally declare itself to be able to sit as a High Court of Justice, for the King clearly did not consent to the creation of such a court. He could readily object to its creation which would result in the court being devoid of any legal basis. If absolute sovereignty vested in Parliament, comprising the King, the House of Lords and the House of Commons, then, by parity of reasoning, again it did not for the King had not consented to the creation of the court. What would be the effect if, today, the House of Commons were to create a court, for any purpose, without the consent of the House of Lords or the formal assent of the sovereign? It could use the Parliament Act[76] to nullify the lack of consent by the House of Lords. If the Parliament Act is lawful, it could, by a similar method, introduce legislation dispensing with the formality of the Royal assent. Such arguments do not support the doctrine of the Sovereignty of Parliament but one of the Sovereignty of the House of Commons. Such Sovereignty, however, would then be based upon written Statutory Law; not on any form of unwritten constitutional principle.

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[75] S. Kelsey. 'Politics and Procedure in the Trial of Charles I'.(2004) Vol. 22 Issue 1, Cambridge. Law and History Review , 1-25.

[76] Parliament Acts 1911 and 1949.

The only convincing argument justifying the legality of this particular court is the one put forward by the House of Commons: namely that, ultimate Sovereignty is vested in the people and the people alone. The House of Commons is the people's representative, who will exercise such power on behalf of the people. The presence of the monarch and the House of Lords as part of the decision-making process is simply one of political not legal expediency; the consequence of a balancing approach between the parties over the passage of time. If that is correct, the doctrine of Parliamentary Sovereignty may also be a political doctrine; not a legal one. It would equally follow that, while the King had been the supreme lawgiver for hundreds of years, the legal basis for such laws was not because of the King's entitlement by virtue of his position as King but because of his position as representing his subjects. A principal difficulty with the argument put forward by the House of Commons, as has been touched upon, is that the House was not in fact expressly the representatives of the people but only part of the people.[77] The King could only be a representative of his subjects if such were implied in the office of kingship. Whether it is described as a social contract or some form of trust matters not if it is the people who give the power, for in the same manner in which they so give it they can take it away.

A stronger argument for the legality of the proceedings may lie in looking at the charge. If the charge is lawful, then it is absurd to suggest that it cannot be tried because of the absence of a lawful court. The charge preferred against the King was as follows:

'That the said Charles Stuart, being admitted King of England, and therein trusted with a limited power to govern by and according to the laws of the land, and not otherwise; and by his trust, oath, and office, being obliged to use the power committed to him for the good and benefit of the people, and for the preservation of their rights and liberties; yet, nevertheless, out of a wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will, and to overthrow the rights and liberties of the people, yea, to take away and make void the foundations thereof, and to all redress and remedy of misgovernment, which by the fundamental constitutions of this kingdom were reserved on the people's behalf in the right and power of frequent and successive

[77] The right to vote was dependent upon being male with certain property rights.

Parliaments, or national meetings in Council; he, the said Charles Stuart, for accomplishment of such his designs, and for the protecting of himself and his adherents in his and their wicked practices, to the same ends hath traitorously and maliciously levied war against the present Parliament, and the people therein represented, particularly upon or about the 30th day of June, in the year of our Lord 1642, at Beverley, in the County of York; and upon… (the charge carries on to particularize the various battles), at which several times and places, or most of them, and at many other places in this land, at several other times within the years aforementioned, and in the year of our Lord 1646, he, the said Charles Stuart, hath caused and procured many thousands of the free people of this nation to be slain; and by divisions, parties and insurrections within this land, by invasions from foreign parts, endeavoured and procured by him, and by many other evil ways and means, he, the said Charles Stuart, hath not only maintained and carried on the said war both by land and sea, during the years before mentioned, but also hath renewed, or cause to be renewed, the said war against the Parliament and good people of this nation in this present year 1648, in the Counties of Kent, Essex, Surrey, Sussex, Middlesex, and many other Counties and places in England and Wales, and also by sea. And particularly he, the said Charles Stuart, hath for that purpose given commission to his son the Prince, and others, whereby, besides multitudes of other persons, many such as were by the Parliament entrusted and employed for the safety of the nation (being by him or his agents corrupted to the betraying of their trust, and revolting from the Parliament), have had entertainment and commission for the continuing and renewing of war and hostility against the said Parliament and people as aforesaid. By which cruel and unnatural wars, by him, the said Charles Stuart, levied, continued, and renewed as aforesaid, much innocent blood of the free people of this nation hath been spilt, many families have been undone, the public treasure wasted and exhausted, trade obstructed and miserably decayed, vast expense and damage to the nation incurred, and many parts of this land spoiled, some of them even to desolation. And for further prosecution of his said evil designs, he, the said Charles Stuart, doth still continue his commissions to the said Prince, and other rebels and revolters, both English and foreigners, and to the Earl of Ormond, and the Irish rebels and revolters associated with him; from whom further invasions upon this land are threatened, upon the procurement, and on the behalf of the said Charles Stuart.

All which wicked designs, wars, and evil practices of him, the said Charles Stuart, have been, and are carried on for the advancement and upholding of a personal interest of will, power and pretended prerogative to himself and his family, against the public interest, common right,liberty, justice, and peace of the people of this nation, by and from whom he was entrusted as aforesaid.

By all which it appeareth that the said Charles Stuart hath been, and is the occasioner, author, and continuer of the said unnatural, cruel and bloody wars; and therein guilty of all the treasons, murders, rapines, burnings, spoils, desolations, damages and mischiefs to this nation, acted and committed in the said wars, or occasioned thereby.'[78]

The charge merits some analytical construction for, in many ways, it is powerful supporting evidence of many of the points alluded to above.

'…and therein trusted with a limited power to govern by and according to the laws of the land, and not otherwise…' This wording within the charge is evidence that the power of the King was not absolute and was subject to the laws of the land.

'…being obliged to use the power committed to him for the good and benefit of the people and for the preservation of their rights and liberties…' This wording within the charge is evidence that the power held by the King was in trust for the people and such power had to be exercised for the benefit of the people.

'….out of a wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will…' This wording within the charge is evidence that, although he was King, he could not lawfully rule simply in accordance with his own personal will.

'…to overthrow the rights and liberties of the people, yea, to take away and make void the foundations thereof, and of all redress and remedy of misgovernment, which by the fundamental constitutions of this kingdom were reserved on the people's behalf in the right and power of frequent and successive Parliaments…'

The word 'law' only appears once in the whole of the charge and then in general terms at the beginning. 'Fundamental constitutions' clearly means fundamental

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[78] S.R.Gardiner, *The Constitutional Documents of the Puritan Revolution, 1652 –1660.* (Clarendon.)

rules of which the frequency of Parliament was but one. Accordingly, if the law recognized the substance of the charges against King Charles I, then the charge would have been lawfully brought unless, in his capacity as King, he was above such charges or indeed any charges to be brought. Certainly, many lawyers and judges considered such charges to be lawful. That, however, does not make them lawful. Whether the law recognized such charges against the King is in many ways to answer his question: “By what lawful authority I am brought here?”

If the lawful authority was the law itself, then Parliament was acting no more than any modern-day prosecuting authority. That does not answer the question as to what kind of law was it? The parchment which contained the charge against the King is a singularly important document. It is a piece of real evidence and a legal document, which had been prepared not simply by lawyers but in consultation with the judges. On 10 January 1649, the King’s judges instructed prosecutors to prepare and present the charge against the King, according to the *Act of the Com(m)ons assembled in Parliam(en)t.* On12 January, the court ordered that the charge be brought in on 15 January. There had been a meeting in the Exchequer chamber of the Committee of the High Court, which debated shortening the original charge. On 17 January, counsel presented a shorter draft but it was ordered to recommit it again as it was still too large. On 15 January, the High Court of Justice had ordered the Committee to compare the charge with the evidence. On 20 January, after further amendments, the prosecutor was permitted to present the charge to the court.[79]

It follows from this that experienced lawyers and judges considered that the charge was lawful. If those lawyers and judges were correct, then the King’s power was not absolute but was subject to certain restraints, as evidenced by the charge. (This is independent of the qualifications on absolute power by the King already referred to above.) Such restraints were those recognized by some form of law. It does not follow that the charge is exhaustive of all such restraints as opposed to being mere samples or examples of them. The restraints are not simply a curb on the absolute power of kingship but on absolute power irrespective in whom such power vests. If such restraints operated to divest a king of absolute power in the seventeenth century, how can it now be properly

[79]S. Kelsey. S. ‘Politics and Procedure in the Trial of Charles I’. (2004), Vol. 22, Issue 1 Cambridge. Law and History Review.

argued that, somehow, although denied to a king, it vests in another organisation known as parliament?

It also follows that if the source of parliamentary power derives from the King then such power cannot be absolute as the King's power was not absolute to begin with, as has been seen. The difficulty, however, lies in the fact that the King was executed. Whether such execution was lawful or not is dependent upon whether he had committed a wrong prohibited by law which was subject to the sentence imposed. This is a separate question to the principal point, which is what occurred to any power he had after his execution. The fact remains that after his execution there was an interregnum and no amount of fiction can alter this fact. The difficulty is not resolved by the Restoration or by the various attempts by Charles II and Parliament of charging regicide against those it considered responsible, both alive and dead, for the execution of Charles I, because Parliament refused to give back most of the powers which may have previously vested in the King. Any powers that it did permit the sovereign to have were by the grace and favour of Parliament; not because the sovereign had a right to such power. Indeed, in the present era, the theory that laws can only be passed with the assent of the sovereign is in reality a fiction, that is to say a pretence. The House of Commons cannot properly state that it derives its power from the King once the monarch had been executed.

Could Parliament have lawfully acquired such powers by virtue of conquest because its forces won the war? Assume that it had not been Parliament which had defeated the King but that the King had won. Could it be properly argued that Charles I had greater power in relation to people's recognized liberties than he had before? Assume that another ruler of another nation had defeated Parliament, the King and the people, then that ruler would be the supreme lawful power in the kingdom by conquest in the same way as William of Normandy did in 1066, for he would have defeated the people, their Parliament and their King in battle. The victor would have been entitled by virtue of conquest to impose his own laws upon the people of the nation provided always that any war waged which resulted in victory was a lawful one. In this case, Parliament had only defeated the King and his supporters, that is to say, part of the people of the kingdom. The legality for waging war against the King and his supporters arose by virtue of the King's failure, among other matters, to abide by the fundamental

constitutions of the kingdom. These fundamental constitutions included upholding people's 'liberties'. Accordingly, Parliament recognized as a lawful basis for the Civil War a restriction on absolute power by any ruler or ruling body; namely, that such ruler or body could not, for example, violate the fundamental constitutions of the kingdom.

If the charge was lawful, it was contrary to law to deprive the people of their fundamental freedoms. If it was unlawful for the King to deprive his subjects of their fundamental freedoms it is difficult to see how it would not have been unlawful for Parliament to take for its own use the fundamental freedoms of the people without their express voluntary consent, for absolute power is absolute power irrespective in whom such power is vested. Further, as many of these fundamental freedoms belonged to the individual, qua individual, any such consent could not be given for future generations, for those generations usually obtain such freedoms by virtue of their birth within the country.

It appears that, however it is viewed, Parliament cannot have more power by itself than the King had by himself. Further, as long as there is some power or true rights properly so called which remain vested in the people the combination of Parliament and the King can still never amount to complete and total power.

There is one issue which has to be addressed further, albeit briefly, namely whether Parliament had the right to power because it represented the people. As has been seen Parliament only represented a small proportion of the people. However, assume that there had been universal suffrage in the sense that all citizens had the right to vote, similar to the modern era. Given, as appears clear from the charge sheet and the historical circumstances referred to above, that the people had fundamental rights and liberties, whatever these may mean how can it be said that these fundamental rights and liberties were transferred to Parliament? The political party which has the majority of votes is given the right to govern by the people. There is a substantial difference between the right to govern and the right to seize fundamental rights and liberties from the people. Further, it may be argued that the right to govern by implication includes the transfer of some rights and liberties but even if that were correct such rights and liberties could only be those which were reasonably necessary for the ability to govern and would not include those which could properly be said to be fundamental for they belonged to the people and could only be assigned to a

parliament expressly by the people which does not occur merely upon a vote for an individual or a political party.

It would seem from the above analysis that while Parliament is the most supreme law making body, in the sense that it can make new law or unmake the Common Law or the law of Equity or other Statute law it does not have a lawful right to absolute power in the sense that it can make or unmake any law it so wishes, particularly if to do so would deprive the people of their fundamental constitutions or their fundamental rights and liberties. This should not be interpreted as suggesting that Parliament has the legal right to make or unmake any law other than ones which have the effect of depriving the people of their fundamental rights and liberties, for as has been seen[80] the legal right to possession of fundamental rights and liberties belonging to the people is clearly stated in the charge sheet levied against King Charles I. As touched upon above that would involve issues as to the right to govern following a democratic election and whether laws can be passed which do not expressly or by implication form part of the particular political party's manifesto who, as a result of such election, were able to form a government. Those issues begin to stray from the relevant legal concepts with which this thesis is concerned.

Consequences of the Doctrine

Given the absolute nature of the doctrine, it follows that laws passed by Parliament which, for example, extended the life of Parliament, abolished opposition parties, abolished the rights of any group within society to vote, abolished judicial review and, to provide a most extreme example, called for the death at birth of all babies born with blue eyes, would all be lawful according to the doctrine of absolute Parliamentary Sovereignty. Dicey and those who support the doctrine would argue that such extreme examples could not occur because the government in Parliament would be thrown out of office. To which the answers are firstly, how, not when and secondly how is that relevant to whether or not Parliament legally had absolute power to begin with? Further, such supporters of the doctrine who would add that the examples postulated could never happen in

[80] See above.

the UK, may be assisted by looking back to a comparatively recent period in a historical context:

In 1932, Germany had a political and legal system not so materially different (in the context of this thesis) to the one presently in the UK. On 6 November 1932, the National Socialist Party obtained 33.1 per cent of the popular vote.[81] On 30 January 1933, the leader of the party, Adolf Hitler, was made Chancellor of Germany.[82] On 15 September 1935, the German Parliament passed its race and citizenship laws.[83] Within a few years, opposition parties were abolished and laws made by decrees were passed, which included permitting the German Parliament to continue without the need for new elections.[84] There is no necessity to delve into the detail of the laws themselves, however abhorrent they were. The fact is that these laws were, on the face of it, lawful and enforceable by judges in German courts. They complied with Dicey's doctrine. Indeed, the Chancellor of Germany was at pains to comply with the perceived issue of legality.

It may be suggested by some that Hitler's rise to power was somehow illegal as being undemocratic in the fact that he used force to stifle the Communist vote in the Reichstag. Therefore the Communists were deprived of their vote. The difficulty with this argument is that it has little relevance to the issue of legality. Germany had a constitution. At that time in order for absolute power to vest in Hitler he needed to amend the constitution. In order to do that he required a sufficient majority in the Reichstag to enact the Enabling Act of 1933. There were not sufficient Nazi party members to achieve that majority. Accordingly, he obtained the support of the 'Centre Party'. The combination of these two parties was sufficient for him to obtain the powers he required in accordance with the constitutional provisions. It may be further argued that the support of the 'Centre Party' only occurred because of various promises which Hitler made to that

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[81] Government archives. D. Nohlen and P. Stover, *Elections in Europe: A data handbook'* Nomos (English) 2010.

[82] Government archives. Jennifer L. Goss. www.history1900s.about.com/od/1930's/a/Hitler-Appointed-Chancellor.htm accessed February 13th. 2015.

[83] Nuremburg Race Laws 1935. T. Kuntz, 'NY Times' 4th. July 1999. www.britannica.com/EB checked/topic/422660/Nurnberg-Laws accessed 13th. February 2015.

[84] Enabling Act 1933.

party.[85] That, however, is of little relevance for as has been seen in the UK even if an Act of Parliament was enacted by some form of fraud the court has no power to rule it unlawful.[86] In any event it is doubtful whether the failure to comply with such a kind of promise could in the circumstances be said to amount to fraud, for the Centre Party must have realised that they would have no power to enforce such promises once dictatorship powers were vested in Hitler by the statute.

The argument that it 'couldn't happen here' ought not to merit reply. The above is but the 'tip of the iceberg' in relation to the real and potential consequences of the doctrine. It equally follows that all the examples above would be lawful whether politically expedient or not. A pertinent question which can be asked is: What would have been the legal consequences if Germany had won the war, invaded Great Britain and installed its own people in Parliament by some form of 'democratic' process, for example, only particular individuals being entitled to vote? It then passed 'any laws' it wished to. Would all such laws have been lawful?

There are those who may attempt to differentiate between the English legal system and that which prevailed in Germany during the Nazi era. Indeed they may say that the Reichstag at the time of Hitler dropped all pretence of pluralistic representation and only rubber stamped the few laws which Hitler bothered putting up. Those who did 'rubber stamp' such 'laws' were no more than 'hand-picked' stooges. Further that over the long life of this parliamentary principle Britain never has degenerated into such horror. Such a view is a perfectly understandable and rightly patriotic response to anyone who would suggest that the horrors which occurred during the Nazi period could occur in a great nation such as the UK. In answer it is necessary to pause and firstly ask the question whether such response is in truth based on logic and reason or is it one which, again understandably, comes from the heart. If the response was correct there may be little need for a thesis of this nature. The people in the UK would all have true rights and true liberties and an effective means of enforcement which may prevent such an occurrence. Accordingly consider these questions.

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[85] L.E. Jones, 'Franz von Papen, the German Centre Party and the failure of Catholic conservatism in the Weimar Republic'. (2005), Vol. 38, issue 2, Central European History. Cambridge, pp.191-217.

[86] *Lee* v *Bude and Torrington Junction Railway Co.* (1871) LR 6 CP 57 .

Putting to one side the nature and character of the individuals what is the material difference between a cabinet presided over by any of the Prime Ministers in the UK, irrespective of their political colour and one presided over by Hitler? Are not the members of each in one sense 'hand-picked stooges'? Would the Prime Minister of the UK have people around his cabinet who would be prone to disagree with his policies? To prevent such policies being imposed? Assume that, instead of making laws by decree, Hitler convened the Reichstag. Would he not have had a majority for each of his decrees? It is doubtful whether there is anything in *law* in the UK which prevents delegation of power which may normally be exercised through a cabinet after a parliamentary vote from being exercised by an individual, providing a statute makes that clear.

It is perhaps not strictly correct to say that the UK has not been responsible for the creation of 'horrors' over generations, albeit that such 'horrors' were of a different category and scale to the ones created by Hitler. Let us assume, however, that the statement to the effect that the UK has not degenerated into such horror over generations is true. It could equally be said that prior to the Nazi's acquiring power Germany had not previously degenerated into such horror. This then involves examination of the treaty after the First World War and the consequences to Germany of such treaty. The undeniable fact remains that the political system in the UK is one whereby a member of a political party with, what may be considered, extreme views could easily be elected. The relevant issue which has to be focused on is simply the question what in *law* is there to prevent a similar situation occurring in the UK? The answer is that there is none which at present is recognized as such.

While the above provides examples of laws, abolition of judicial review and the like which have not in fact presently been passed, examples of laws which have been passed are instructive. Laws are passed which permit an individual to be convicted of a criminal offence on the basis of hearsay, rumour and other forms of general 'tittle tattle'.[87] Laws represented to the public as being designed to protect them against terrorism are used to catch people who have barking dogs,

[87] Criminal Justice Act 2003 S.114 permitting hearsay evidence, in particular S. 116 (2) (c) and (d).

noisy children or for putting too much refuse in their dustbins.[88] Laws professing to grant people human rights are inferior to other laws which in their particular application may be inconsistent with such rights.[89] Laws can be created by a single individual under delegated legislation.[90]

Laws may even be created to change the voting system, without giving the people the opportunity to be heard, by a government who had been given the authority to make law under a previous and different type of voting system. The objectives of such a new system could include being able to keep one political party in power or to prevent another from obtaining power. An obvious reason for preventing the people's voice to be heard on such a topic is simply in case they disagreed with the new voting system. All the above examples, both hypothetical and real, would be enforced by judges who are appointed directly or indirectly by government or government agencies with key criteria to such appointment. In simple terms, such individuals would not do anything which might embarrass the government or damage their own interests. This area is dealt with later in this thesis.[91]

References to the phrase 'Constitutional Law'[92] in relation to the doctrine perhaps forming part of this branch of the law seem to be a recurring theme without any great assistance as to its meaning other than its connection to a political system. Yet it is referred to as Constitutional 'Law'; not, for example, 'constitutional politics'.

There is a clear relationship between the doctrine of Parliamentary Sovereignty and the rights and freedoms of individuals. This doctrine is in a number of ways incompatible with the notion of individual rights and freedoms. Thus, it is believed by millions of people in the great nation which forms the UK that they have rights and, to them, many of these rights are true ones, which they would say were

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[88] Sunday Telegraph, 7 September 2008 relating to the way numerous councils are using the Regulation of Investigatory Powers Act (RIPA) 2000.

[89] Human Rights Act 1998 S.4 (permitting a court to make a declaration of 'incompatibility') and the Criminal Appeal Act 1968 S.2 as amended by Criminal Law Act 1977 S.44 and Criminal Appeal Act 1995 S.2(1) only permits the court to allow an appeal if *they* (author's italics) think the conviction is unsafe.

[90] Statutory Instruments Act 1946.

[91] Prerequisite for judicial appointments see below, Chapter Seven.

[92] *Thorburn* v *Sunderland City Council* [2001] QBD supra.

absolute. It must follow that there cannot be such a thing as a true freedom in a country which accepts the doctrine of absolute Parliamentary Sovereignty. This is because true freedom properly so called is fundamental to a free country properly so called and fundamental freedom is itself dependent upon a fundamental right. An individual cannot have a fundamental right if it is always subject to the discretion of an absolute Sovereign Parliament.

However, that is not what individuals in the UK are told. Indeed, they are regularly taught from an early stage in their lives that they do have such rights and freedoms. As they carry on their lives within their particular society, that which they have been taught, in the sense that they do have true rights and freedoms is regularly reinforced, not only through the media but also through those in positions of power; in government, parliament and the judiciary. In simple terms individuals in the UK have a variety of privileges and powers. For example the 'right' not to be tortured can only be a true right if it is one which is 'vested' or 'owned' by the individual for then it would belong to him in a similar way to any other form of property. At present this 'right' like all others is dependent upon the will of Parliament. If the doctrine of Parliamentary Sovereignty is legally correct, Parliament is lawfully entitled to remove this 'right' any time it wishes. The 'right' therefore is a privilege possessed by the individual. If it is violated the individual has a power to take court proceedings. It follows that the use of the word 'right' is quite improper for that is not what the individual possesses. What he is doing is utilizing a power (to take court proceedings) to enforce a privilege. (Granted by the Statute or recognized by law.)

In 1950, following lengthy discussions, the member States of the Council of Europe adopted a variety of principles and rights, which became enshrined in documentary form and became known as the European Convention for the Protection of Human Rights and Fundamental Freedoms. This was ratified by the UK in 1951. In 1998, the European Commission on Human Rights was abolished and replaced by the European Court of Human Rights. In the UK, the Human Rights Act 1998, which gave effect to those human rights and fundamental freedoms, became law in a piecemeal way between 1998 and 2000. One would have thought that the individual in the UK would then be able to properly state: "Not only do I have these absolute rights but they are firmly enshrined in Statute."

The reality, it is necessary to state, is the exact juxtaposition. The Convention was subordinated to Statute Law in its incorporation.

Conclusion

The doctrine of Parliamentary Sovereignty is the doctrine which is said to give legal efficacy to the law making powers of Parliament and further that Parliament is the supreme law making power. Parliament, in the modern era, as representatives of the people, is the supreme law making body under the political concept of democracy. It possesses its legal law making powers not simply by virtue of the concept of democracy but as has been seen from the law making powers of the sovereign in a bygone era or as a result of the revolution in the seventeenth century or both. It matters not, in the context of this thesis which it is. The fact remains that the possession of such power and its exercise has a lawful basis.

However, the doctrine of the absolutism of the Sovereignty of Parliament as meaning that Parliament in the UK 'has the right to make or unmake *any* law whatsoever' has no proper legal basis. It never lawfully existed before the revolution or subsequently. The fact that sovereigns, parliaments or judges support the doctrine is relevant only to the recognition of the doctrine by sovereigns, parliaments and judges. That does not make the doctrine in its absolutism is lawful if such recognition is devoid of legal merit.

It may be suggested that it is a 'political' doctrine. If such a suggestion is made, the word 'political' has to be defined, for there appears little room in any civilized country for the existence of such a doctrine; legal or political. By using the word 'political', credibility is given to the very existence of the doctrine and implicitly acts as a brake on any challenge to its efficacy. If it is, as appears to be the case, a political doctrine then in supporting and acting upon it the courts are acting in one way as political courts upholding this political doctrine. The doctrine has further prevented the proper development for more than three and a half centuries of those rules of law which identify the restrictions imposed upon absolutism which exist for the benefit and protection of the people. Parliament in the UK is the supreme law making body, which, if it is acting properly in accordance with the democratic process, can make or unmake any law. This excludes such law which can properly be said to be inconsistent with the fundamental constitution,

or other rules, for the benefit and protection of the people of the kingdom, as expressly or implicitly stated in the Magna Carta, the charge sheet proffered against King Charles I and as being a fundamental right or freedom of the individual during the period of some nine hundred years subsequent to the Magna Carta.

The reason for that is that if *fundamental* rights and liberties never vested in a monarch who claimed *absolute* power it is difficult to see how they could somehow be vested in a Parliament. True it may be that Parliament may claim to be the representative of the people but that is substantially short of the people's *fundamental* rights and liberties being somehow vested in such Parliament. Perhaps the simple point is that whereby Parliament in the UK may lawfully claim the power to make or unmake laws on behalf of the people, in order for it to properly claim that it holds absolute power it needs to be possessed of the rights and liberties of the people, properly so called, whatever they may be. Without such possession, which as has been seen it was never entitled to, it cannot lawfully hold 'absolute' power.

There are those in the political and legal establishments in the UK who would or may seek to reject the above analysis or find flaws with the arguments herein. This is notwithstanding that the doctrine of Parliamentary Sovereignty has been or at the very least, on any view, can be used to deprive their fellow countrymen and women of their fundamental rights and freedoms, yet they will continue to attempt to justify this doctrine in its absolutism. Such people may well find the words of the government's own leading counsel in 1945 at Nuremberg instructive.

"They (the great powers responsible for the Charter enabling the prosecution of the Nazi war criminals) refused to reduce justice to impotence by subscribing to the out worn doctrines that a sovereign state can commit no crime……."[93]

More than sixty five years after the above words were spoken and in the twenty first century there are still many individuals who would seek to uphold this doctrine of absolute parliamentary sovereignty.

This chapter has dealt with the doctrine of Parliamentary Sovereignty and touched upon the powers of the monarch, King Charles I. It has not referred to

[93] See below. Chapter Three.

the doctrine of State Sovereignty. That is because it is not relevant to this chapter which is concerned with the authority of Parliament in relation to law making. The doctrine of State Sovereignty is a technically different concept and may be relevant later where it is touched upon.[94]

It now becomes necessary to move away from the concept of Parliament being absolutely supreme, in the sense that it can make or unmake any law whatsoever and to examine the evidence of the existence of a form of law which is or may be superior to an Act of Parliament. If it existed, it could properly be referred to as Fundamental Law. Such a law would act as a restraint upon parliamentary absolutism. This will be done in the next chapter.

[94] See below. Chapter

CHAPTER TWO

HISTORICAL REFERENCES TO FUNDAMENTAL LAW

Introduction

Having concluded that the doctrine of Parliamentary Sovereignty, in so far as it purports to grant absolutism to a UK Sovereign Parliament, is a legal fiction or a myth, it is necessary to ascertain whether there exists any higher form of law which can be properly said to be truly absolute. This higher form of law could properly be called Fundamental Law and identifying its existence lies at the heart of this thesis. Fundamental Law, in the sense that it is the highest form of law, superior to any other form of law including Statutory Law has not been and is not presently recognized as a branch of law in the UK. There is, however, a substantial difference between existence and recognition. Merely because something has not been recognized does not mean that it does not exist. The starting point must be to ascertain whether there have been references to such a form of law and in what circumstances. There can be little doubt that, if such a law did exist, it would be fundamental to society in the sense that all other forms of law and doctrines, legal or political, must comply with its principles or at least not violate them. It would prevent excesses by rulers and prevent injustice to its citizens.

This chapter examines the references to Fundamental Law between the period of the English Civil War and the commencement of the Second World War. It demonstrates that there are numerous such references from a variety of individuals including lawyers, parliamentarians, jurists and the like. It includes those who fought supporting the Parliamentarian cause at the time of the Civil War and in one case Chief Justice Coke. Most if not all of these were highly respected individuals within society. These references tend to fall into the following general categories: (i) it is used to suggest that certain property rights of the individual are inalienable; (ii) it is used as part of the Common Law; (iii) it is said to be part of the law of Nature, which itself at the time was sometimes said to be part of Divine Law; (iv) it is preached, particularly by those with a religious approach, with a view to justify the exercise of power by a king; (v) it is used to justify the exercise of power by a Parliament; and (vi) it is little more than a general appeal to morality. However, the fact that so many individuals of repute

have supported the doctrine does not necessarily mean that it exists any more than individuals of repute who have supported the doctrine of Parliamentary Sovereignty means that such doctrine has a true legal basis for such existence.

To the above references has to be added that phraseology consistent with Fundamental Law was used, not only in the charge against King Charles I, as identified in the last chapter, but also in charges against some of his supporters. Is there any other legal manner in which the word 'fundamental' has been used? For example the word 'fundamental' is often used to describe a breach of contract which is more than a mere 'warranty' but which goes to the essence of the agreement itself. The Royalists would no doubt have said that there was no relevant agreement between themselves and the Parliamentarians and, even if there was, the King could not be in fundamental breach of it because he was asserting his rights qua King which no doubt they would argue was part of Fundamental Law per se.

If there is no such thing as Fundamental Law, then the execution of King Charles I was unlawful, for his power would have been absolute, people would not have had any true fundamental rights and liberties and neither Parliament nor anyone else had the legal power to charge him for violating something which did not legally exist. It is the fact of the existence of Fundamental Law, enshrined within the words fundamental constitutions, rights and liberties, contained within the charges against the King which lent legality to the trial and the subsequent sentence. Similar reasoning can be applied to many of the charges which resulted in the conviction and sentence of his supporters. They would no doubt have argued or been able to argue, that they were merely following the orders of the Sovereign with absolute power. Their violation of Fundamental Law gave legality to their trials in the same way as it did to the trial of the King. This by itself is sufficient to provide cogent evidence as to the existence of Fundamental Law, in the sense that there was a basic or compelling law which acted as a restraint upon the notion of absolute power being vested in a monarch.

While the charge brought against the King and many of his supporters provide recognition of the *legal* existence of the concept of Fundamental Law, being a doctrine protecting fundamental rights and liberties, this chapter provides further evidence as to the belief by so many as to the fact of its existence and why such existence was thought to be necessary. This chapter also demonstrates that the

protection of the rights and liberties of the people appears to be connected with a concept of justice. Unfortunately, that does not explain what is meant by those words. Neither does the evidence in this chapter explain any of the principles which underpin the concept, although as will be seen later such principles do begin to emerge when considering Human Rights Law and the meaning of a very specific type of Justice in the particular context of Fundamental Law.[95] It could be argued that, regrettably, one is left with little more than a vague understanding of the phrase well illustrated by the response of a colleague to the Honourable Member of Parliament who uttered it to one of his colleagues in Parliament that "if he doesn't know what Fundamental Law is, he has no right to be in this house."[96]

Given the mass of evidence provided in this chapter coupled with the charges brought against the King and his supporters, illustrating at least the existence of the concept of Fundamental Law, it is perhaps not unreasonable to have anticipated numerous papers dealing with the topic. Regrettably, there would appear to be very few. The leading work appeared after the Second World War by Professor John Gough in which he dismissed the suggestion that Fundamental Law existed as a legal concept.[97] His work is an 'Aladdin's cave' of source material and this chapter is indebted for the efforts made by the able professor and his team. It is, however, arguable that it is somewhat surprising to see so much effort and so many references dedicated to a concept which apparently has no legitimate basis for its existence. He took the view that references to Fundamental Law are often little more than an appeal for people to retain property rights or an argument in favour of some form of higher morality. Part of his conclusions include the observations that the origins of Fundamental Law lie in "confusion of thought" and its meaning is "so vague" and elastic. He further argues that Sir Edward Coke's judgment in *Bonham's case*[98] is not

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[95] See below. Chapters Five and Six.

[96] Referred to by V. Bogdanor in 'The Sovereignty of Parliament or the Rule of Law', Magna Carta Lecture (2006) p. 7

[97] J.W.Gough, *Fundamental Law in English Constitutional History.*(Oxford University Press, 1955.)

[98] See further below in this chapter.

authority for the existence of Fundamental Law and is supported by Professor Plucknett in that view.[99]

The difficulty with Professor Gough's work is that it is in many ways similar to that of Professor Dicey and other academics who are dismissive of the concept of Fundamental Law. Namely, that the justification for his conclusion appears to be based on the fact that all the judicial authorities, with the odd exception which he argues does not support the existence of the concept in any event, are contrary to such existence. However, the reason for the absence of such authorities lies in the support of the judiciary for the doctrine of Parliamentary Sovereignty and as has been seen in the last chapter, this doctrine is a legal fiction. Further, in dismissing Coke's judgment in *Bonham's case* he fails to take into account that the judge's opinion could equally be properly interpreted not that Fundamental Law was 'part' of the Common Law but in certain of its characteristics, for example reason, it was the source of the creation and development of the Common Law. It is perfectly possible for Parliament to amend or revoke Common Law but it could not amend or revoke the basic reasoning for the existence of such law. Throughout the whole of Professor Gough's work there is little or no analysis of the concept of Fundamental Law and it fails to answer many of the questions raised herein, in particular those in relation to the substance and nature of the charge brought against King Charles I and his supporters. The concept of Fundamental Law was briefly looked at again by Professor Vernon Bogdanor in 2006[100] in his lecture during which he appears to have taken a more neutral stance.

The evidence in support of the existence of Fundamental Law is not restricted to the express evidence from those who support it, for there is also implied evidence. Firstly, at the time of the civil war there is compelling evidence of an agreement between the Levellers (an organization upholding people's rights and liberties) and Parliament's army in the form of the reason why many of these people supported the Parliamentary cause and were prepared to give their lives for it. Such reason did not simply lie in the fact of the removal of absolute power from a king or that it was only to remedy social injustices; it also lay in how such

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[99] See below.

[100] V. Bogdanor, 'The Sovereignty of Parliament or the Rule of Law' (2006) Magna Carta Lecture.

power was being exercised. The representations which were being made by Parliament to its supporters in order to raise its army are important. It is absurd to suggest that Cromwell in order to raise his army said to his men words to the effect that 'we take away the power of a king to rule in accordance with his subjective will and we shall give it to someone else to rule in accordance with their subjective will'. This chapter provides cogent evidence as to the type of agreement the people were demanding around the time of the Civil War for the protection of their rights and liberties. Did so many of those people give their lives to see their perception of absolute power being vested in a monarch merely to be replaced by such absolute power being vested in a Prime Minister or the government of the day without the recognition of their true rights and liberties? Secondly, further implied evidence is to be seen in the international arena when the United States of America adopted its written constitution declaring that people had 'inalienable rights'.

Express References

One of the earliest references to Fundamental Law appears to have occurred in 1635 when Parliament was being asked to force the Sovereign into a French alliance at a time of a dispute about the payment of ship money. The writ stated that such monies would be 'contrary to Fundamental Laws'. Gardiner commented that "no one could point out what those fundamental laws were, any more than their ancestors could have pointed out precisely what were the laws of Edward or Edgar, the renewal of which they claimed…. …Not in statute or precedent…. …not even in the Great Charter itself, but in the imperishable vitality of the nation, lay the Fundamental Laws of England."[101]

In Bonham's case,[102] Sir Edward Coke stated:

"And it appears in our books that in many cases the common law will controul acts of parliament, and sometimes adjudge them to be utterly *void*: for when an act of parliament is against common right and reason, or repugnant, or impossible

[101] S.R. Gardiner, *History of England 1603-1642*, (Longmans, 1900 viii. 84,85.)

[102] 8 Co. Rep.

to be performed, the common law will controul it, and adjudge such act to be *void*."[103]

Coke cited five cases as precedents to support his opinion:

(i) In the case of Thomas Tregor, involving the Statute of Westminster II, "Herle saith, some statutes are made against *law and right*[104]**,** which those who made them perceiving, would not put them into execution."

(ii) In the case Cessavit 42, in the year 33 Edward III, "because it would be against common *right and reason***,** the common law adjudges the said act of parliament as to that point void."[105]

(iii) The Statute of Carlisle, 35 Edward I, concerned the legality of deeds being sealed if the seal had not been kept in a particular place. The court held that this statute was **void**, since it was "impertinent to be observed."[106] Gough appears to have interpreted the words "impertinent to be observed" as 'impossible to put into effect.'[107]

(iv) The statute 1 Edward VI, c.14 gave chantries to the king, saving to the donor, etc. all such rents, services, etc. The court ruled "and the common law controuls it and adjudges it void as to services, for it would be against common right and reason that the king should hold of any or do service to any of his subjects."[108]

(v) An Act of Parliament conferred on a man the right to have cognizance of all manner of pleas arising within his manor of Dale. It was held "yet he shall have no plea to which himself is a party."[109]

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[103] Ibid. p. 117b–118b. Italics are mine to emphasize that the word 'void' is used not 'voidable'

[104] Italics mine to emphasise that the word 'right' is expressly used.

[105] J. Gough, *Fundamental Law in English Constitutional History.* (Oxford University Press, 1955 p. 33).

[106] Annuity 41.

[107] J. Gough, *Fundamental Law in English Constitutional History.* (Oxford University Press, 1955 p. 33).

[108]*Stroud's case.* 16 & 17 Eliz.

[109]J. Gough, *Fundamental Law in English Constitutional History.*(Oxford University Press, 1955, p. 33).

Professor Plucknett, on analysing the above cases, came to the conclusion that one of these authorities was doubtful and three valueless in support of Sir Edward Coke's view.[110]

When a highly respected judge of his time expresses a view that there exists a legal restraint upon the doctrine of the Sovereignty of Parliament, it is hardly an answer to distinguish the cases which formed the basis for his view by the normal legal tools. Such arguments are based upon the accepted techniques in distinguishing principles of law. Those principles of law, which are being asserted as the 'correct' ones, will necessarily lead back to the acceptance of the doctrine of Parliamentary Sovereignty. It is the singular fact that a leading judge has expressed the view that there is a restriction upon absolute parliamentary power, which is relevant in the context of this topic. It is true that the judge may have been trying to utilize accepted legal methods to justify that view but that does not detract from the fact of the obvious concern, from a legal perspective, which results from the vesting of absolute power in a parliament.

In 1627, Sir Henry Finch published his *Law or a Discourse thereof.* In this work, laws he states "receive their light" from the law of reason, "and hereupon are grounded… …divers rules of reason, that everywhere go for undoubted oracles…: yea, such is their singular and incomparable use, that as Lords paramount they rule and overrule the grounds themselves. And rather than any of these should fail, the very maxims and principles of the positive law will yield, as to a *higher* and *more perfect* law."[111]

In *Day v Savadge*, Chief Justice Hobart gave amongst his reasons for his judgement "…because even an Act of Parliament, made against natural equity, so as to make a man judge in his own cause, is *void in itself***,** for jura naturae sunt immutabilia, and they are leges legume."[112]

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[110] T. Plucknett. 'Bonhams Case and Judicial Review'(1926) 40 Harvard Law Review, pp. 35 0 44. JSTOR

[111] Pp. 5 and 6. Italics mine to emphasize the recognition or belief of a higher and more perfect law.

[112] Hobart, pp. 85-87. Italics are mine and used to emphasize how a Statute can be void and not merely voidable. The latin translated means that the law of nature is unchangeable and relates to the law of plants which have their seeds in a pod. However, as will be seen below

In *Lord Sheffield* v *Ratcliffe*, Hobart stated that if asked "by what Rule the Judges guided themselves in this diverse exposition of the selfsame word and sentence", his answer was "by that **Liberty and Authority** that Judges have over Laws, especially over statute laws, according to Reason and best convenience, to mould them to the truest and best use".[113]

With reference to the Magna Carta, Coke stated that it, "is called the great, Great Charter in respect of the great weightiness and weighty greatness of the matter contained in it in few words, being the foundation of all the **fundamental laws** of this realm, and therefore it may truly be said of it that it is magnum in parvo… This statute is but a confirmation or restitution of the common law."[114]

Later, he stated that Magna Carta was "for the most part declaratory of the principle grounds of the **fundamental laws** of England."[115] However, he also stated that "the **highest** and most binding laws are the statutes which are established by Parliament."[116]

Coke describes the 'power and jurisdiction of the Parliament, for the making of laws, in proceeding by Bill', which is "so transcendent and absolute as it cannot be confined either for causes or persons within any bounds"[117]

In the Epistle Dedicatory to Bacon's *Maxims of the Law*, dated 1596, the author states that "King Edward 1… after he had in his younger years given himself satisfaction in the glory of arms, …bent himself to endow his state with sundry notable and *fundamental* laws, upon which the government ever since hath principally vested."[118]

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in Chapter's Four, Six and Eight the phrases 'natural equity' and 'natural law' have distinct and separate meanings.

[113] Hobart, p. 346.

[114] Co. Litt. 81.

[115] J.Gough, *Fundamental Law in English Constitutional History.* Oxford University Press, 1955 (p. 40).

[116] 2 Inst., Proeme.

[117] Inst., p. 25 et seq.

[118] Works vii. 314. Italics mine.

King James I was to make frequent references to Fundamental Law. To him, however, the meaning of the phrase was the basis of his right to exercise power as a king in keeping his subjects in their proper place, as far as he was concerned.

Professor Gough, with reference to Miss Margaret Judson, provides a miscellany of instances during the time of King James I, when bills were objected to on the basis that they conflicted with Fundamental Law, for example, a proposed change in procedure regarding Fundamental Law, a bill to avoid trial by battle, and a bill proposing legal reform. Professor Gough points out in his book that these; "were arguments against Bills in debate, and do not necessarily imply that once passed as Acts they could be set aside for repugnancy to fundamental law……."[119]

In the case of the five knights who were imprisoned in 1628 for refusing to contribute to a forced loan, Sir Dudley Digges, one of the Commons' spokesmen, considered that there were certain rights possessed by the citizen which in one sense belonged to the citizen absolutely and stated:

"It is…an undoubted and fundamental point of this so ancient a law of England, That the Subjects have a true property in their Goods, Lands and Possessions: The Law preserves as sacred this Meum and Tuum, which is the Nurse of Industry, and Mother of Courage; for, if no property, no Care of Defence. Without this Meum and Tuum, there can be neither Law nor Justice in a Kingdom; for this is the proper object of both."[120]

In 1641, the Commons drew up a list of grievances against the King's government known as the Grand Remonstrance, which stated: "The root of all this mischief we find to be a malignant and pernicious design of subverting the *fundamental laws* and principles of government, upon which the religion and justice of this kingdom are firmly established."[121] Impeachments against royal servants and ministers took place with similar language.[122]

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[119]J. Gough, *Fundamental Law in English Constitutional History.* (Oxford University Press, 1955 p. 61).

[120] L.J.iii. 718; Rushworth, i. 528.

[121]S. R. Gardiner, *Constitutional Document*s. www.jstor.org/stable/546603. p. 206. (accessed 2013) Italics mine.

[122] For example, Articles of Impeachment of Sir R. Berkeley (1640), S.T. iii. 1283.

In 1642, Parliament argued that, although the King was acknowledged to be the fount of justice and protection, yet "the acts of justice and protection are not exercised in his own person… but by his courts and…ministers, who must do their duty therein, though the King in his own person should forbid them." Thus, Parliament, as a High Court, could "adjudge and determine the rights and liberties of the kingdom."[123] These legal arguments lay at the core of the dispute. Parliament had the right, according to them, to call the people to arms. The King had a right, according to him, to call upon the people to disobey and, if need be, call the people to arms himself.

A barrister writing in 1642 declared that Fundamental Law "is such a one as is couched radically in Nature herself (and so becomes the very pin of law and society) and is written and enacted irrepealably in her *Magna Carta*, which we are not beholden to any sublunary power for, but belongs to us as we are living and sociable creatures."[124]

In the 1640s, Philip Hunton argued that: "the sovereignty of our king is radically and fundamentally limited" in 'five particulars': first, the king's 'nomothetical' power is limited, for he cannot make a law except with the concurrence of Parliament; second, in exercising his government "there is confinement to the fundamental common laws and to the superstructive statute laws;" third, justice must be administered through the recognized channels; fourth, the King cannot leave his crown to whom he pleases, for his successor is designated by Fundamental Law; and fifth, there are limits in his power of levying taxes and impositions.[125]

The English Civil War occurred between 1641 and 1651. In fact, there were three periods of fighting between the armies of the King and those of Parliament: the first period from 1642 until 1646; the second from 1648 until 1649; and the third

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[123] J. Gough, J. *Fundamental Law in English Constitutional History*. (Oxford University Press, 1955 p. 83).

[124]'Animadversions Animadverted' (1642). H. Parker, quoted in M.A. Judson, ' Henry Parker and the Theory of Parliamentary Sovereignty', found in C.Wittke (ed.), 'Essays in History and Political Theory' In honour of C.H. Mcllwain. (1936) Cambridge, Mass, pp.155-156; also found in L. Stones *The Causes of the English Revolution (1529 – 1642)* (Ark paperbacks 1986.)

[125] P. Hunton, 'A Treatise of Monarchy' (1643). Referred to in Gough, J. *Fundamental Law in English Constitutional History.* Oxford University Press, 1955 pp. 90-91.

from 1649 until 1651. King Charles I was executed on 30 January 1649. The third period of fighting took place between supporters of King Charles II and the supporters of what has become known as the Rump Parliament. From 1653 until his death in 1658 Oliver Cromwell ruled over England as Lord Protector.[126]

In 1645, a movement was created, which became known as the Levellers. A further movement, not dissimilar but perhaps more extreme in nature and not that dissimilar to what was possibly to be referred to in later years as a Marxist philosophy, became known as the Diggers.[127] The Levellers were founded by John Lilburne (a Lieutenant-Colonel in the Parliamentarian army before resigning his commission on the grounds of his conscience) and a number of friends and supporters, including William Walwyn and Richard Overton. At various times, a number of the supporters of the Leveller movement, including Lilburne, Walwyn and Overton, were arrested and imprisoned. Lilburne was tried for treason in 1649 and was acquitted. In November 1649, Walwyn and Overton were also released from prison. Many of the other supporters of the movement were not so lucky, being either executed or killed during clashes with the forces of Cromwell and Fairfax, by whom they were considered to be mutineers.[128]

The views of the Levellers are central to a proper understanding of the concept of Fundamental Law. These views are made known in a number of pamphlets and other documents including: (i) *Agreement of the People* (October 1647, December 1648 and May 1649); (ii) *England's New Chains Discovered;* and (iii) the movement's own paper entitled *The Moderate* (published between July 1648 and September 1649). In the first of the *Agreement*(s) *of the People*, Parliament was to be limited by *Fundamental Law* which was unalterable. Parliament could not legislate against the freedom of religion, or exempt anyone from due process of the law, or abridge the freedom to trade abroad, or impose the death penalty in case of murder, or abolish trial by jury. The third *Agreement of the People*

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[126] Numerous historical sources. See e.g. B. Coward. *Oliver Cromwell* (Longman,1991)

[127] www.brittanica.com/EBcheckedtopic/700945/Digger and https:libcom.org/history/1642-1652-diggers-levellers accessed February 14th. 2015.

[128] R. A,Moore, *Chronology of the Leveller Movement.*(1994)Libertarian Alliance.

declared "all laws made, or that shall be made contrary to any part of this Agreement, are thereby made null and void."[129]

An agreement of the people declared Lilburne:

"is not proper to come from Parliament, because it comes from thence…with a command…it ought not so to do, but to be voluntary and free. Besides, that which is done by one Parliament…may be undone by the next…but an Agreement of the People begun and ended by the People can never come justly within the Parliament's cognizance to destroy."[130]

In 1653, the *Instrument of Government* was created by Cromwell in his capacity as Lord Protector. It is suggested that this was the first time England had any form of what could be described as a written constitution. When addressing the first Parliament of the Protectorate in 1654, Cromwell told its members that, "In every government there must be somewhat *fundamental*, somewhat like a Magna Carta, that should be standing and unalterable." When dealing with the provision that "Parliaments should not make themselves perpetual" he argued, "Of what assurance is a law to prevent so great an evil if it line in one and the same legislator to unlaw it again?"[131]

What is perfectly clear is that by the time the Civil War had ended the concept of Fundamental Law had been recognized by numerous individuals of standing. These included judges and parliamentarians as well as, no doubt, various ordinary citizens who had fought during that war. What its principles were is a wholly different issue. It is somewhat ironic that, in an era when only a small proportion of the population had the right to vote, the importance of Fundamental Law was being raised. In the twenty-first century, when almost every citizen of a certain age, in the UK has the right to vote, and words such as 'freedom', 'democracy', and 'justice' are said to be essential characteristics illustrative of the

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[129] V, Bogdanor. 'The Sovereignty of Parliament or the Rule of Law'. The Magna Carta Lecture 15 June 2006. In the lecture he appears to refer, in error, to the 'third *Agreement of the People*' being 1653, when it is dated 1 May 1649. www.constitution.org/eng/agreepeo.htm (para. xxx)

[130] Ibid. V, Bogdanor.

[131] Ibid. (Referring to Gough, *Fundamental Law,* pp. 129 -130) Italics in the quotation are mine.

advancement of civilization, Fundamental Law, which provide the citizens with true rights and liberties is said not to exist. Absolute power is said to vest in a ruling Parliament or, more accurately, the government of the day.

Implied References to Fundamental Law in the United States of America

In July 1776, the United States of America (USA) formally declared its independence from Great Britain. The text of the declaration contained the following statement: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that amongst these are Life, Liberty and the pursuit of Happiness." [132]

Later in the text a substantial list of alleged wrongs by King George III, even if only some of which were correct, could properly be said to amount to tyranny. Many commentators[133] have looked for indications as to the source for relevant parts of the content of the Declaration, concluding that it may have been inspired by John Locke. It may be that, whatever the actual source, they are, in truth, a combination of the jurisprudence of Locke and the underlying principles of the Levellers.

In 1789, the USA adopted a written constitution. Its heading states:

'We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.'[134]

It is somewhat further ironic that a former British colony, subsequently to become the United States of America, appears to have had no hesitation in wishing to grant its citizens entrenched rights in the adoption of a written constitution stating certain rights. This arose following a war which was as a result of perceived tyranny on the part of those who claimed to possess absolute power. A little over a hundred years earlier, the Civil War in England had been fought for a similar

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[132] United States Declaration of Independence. www.archives.gov

[133] E.g. Carl L. Becker*, Declaration of Independence* Vintage 1958. P. 27.

[134] www.archives.gov

reason: namely, the abuse of power. Whereas the USA commenced putting into place some measures in its constitution to protect its citizens and prevent such an abuse reoccurring, the UK had not. It is not by adherence to a doctrine of the type of Parliamentary Sovereignty that certain freedoms for the citizens of the USA had been obtained.

Conclusion

It is clear that there is a mass of evidence which supports the existence of the concept of Fundamental Law. True it is, as Professor Gough points out, that some of this evidence is vague but such vagueness lies in trying to explain its principles not in its existence. Further this evidence cannot be brushed aside on the basis that at its highest it only shows the people's 'belief' in the concept not that it has the force of law. There are two reasons why such an argument is of little merit. Firstly, on any reasonable view ultimate sovereignty rests with the people. To suggest that the Common Law has its origins in customs and tradition, which presumably means that the people believed in such customs and traditions, is to recognize that at least one branch of the law lies in the belief vested in the people, that certain customs and traditions are the correct ones which are eventually given the force of law. Is there any weightier belief than one whereby the people believe that they have true rights and liberties? Secondly, in answer to those of positivist inclination who may assert that such an argument amounts to little more than an appeal as to what law ought to be as opposed to what it is, one has the most cogent evidence contained expressly and implicitly within the charge sheets against the King and his supporters that Fundamental Law exists as a legal concept and was recognized as such.

The real problem is surely this: If, given the mass of evidence as to the existence of the concept of Fundamental Law, why (with the odd exceptions referred to above) has Fundamental Law not been properly recognized, for example, in England and subsequently the UK after the Civil War? The reason for the academic world's lack of recognition appears to be simply the paucity of judicial authority, but why is there a lack of such authority? The mere fact that a judge states that something is 'not the law' is as relevant as stating that it 'is the law'. If it is accepted that wholly unelected people have the power based upon legal right to make law then that is a good answer to the issue. If, on the other hand, the power of a judge is restricted to declaring what the law is and that such

declaration has to accord with sound legal rules then the answer that something ‘is the law because it is the law’ (see above) appears to be a manifestly unreasonable and dangerous thing to do.

What this chapter demonstrates is that there is compelling evidence as to the existence of Fundamental Law, not only as a legal concept but also in the minds of many people of repute. It does not answer the questions: What are these rules of Fundamental Law? What are its principles? Before these questions can be answered, it is important to move away from the 17th. century and ascertain and look in more detail as to whether Fundamental Law has been recognized expressly or by implication in more modern times. This will be examined in the next chapter which identifies the recognition of a form of superior law around the period of the Second World War.

CHAPTER THREE

FAILURE OF THE DOCTRINES OF PARLIAMENTARY SOVEREIGNTY AND ABSOLUTE STATE SOVEREIGNTY: INTERNATIONAL RECOGNITION OF THE SEEDS OF FUNDAMENTAL LAW

Introduction

The previous chapters established that there is or at the very least may be, a legal concept properly referred to as Fundamental Law which appears to have been first recognized around the middle of the 17th. century in England. In addition numerous individuals of repute considered that such law existed and that it protected an individual's rights and freedoms. The charges against King Charles I and many of his supporters demonstrate the link between Fundamental Law and the fundamental rights and liberties of the subject, for once it is accepted that people had such rights and liberties it is not unreasonable that they ought to have been recognized somewhere and protected in some way. The fact that one is unable to point to expressly stated rules which were recognized as rules of Fundamental Law is only evidence of the lack of development of the body of law into rules not of the absence of existence of that body of law from which the rules derive. The very fact of the nature of the charges within the charge sheet against King Charles I, is some evidence that the beliefs of the people as to the existence of Fundamental Law was a belief recognized by law, albeit that the law may not have recognized many of the areas of that belief put forward by the various individuals.

Numerous questions remain including what are these rights and liberties of the subject which Fundamental Law protects? Can they be stated by express words? What are the principles from which such rules can be crystallised? Are there any other references to Fundamental Law which may assist in answering these and other questions which remain?

This chapter identifies further evidence as to the legal recognition of what could be properly said to be Fundamental Law immediately after the Second World War. It is able to go one step further and identify some of its rules and principles, albeit in general terms, consistent with the aims and objectives of this thesis.

This chapter focuses on two areas. Firstly, the Tribunal at Nuremberg which had been set up immediately after the Second World War by the Great Powers and secondly the Universal Declaration of Human Rights issued on behalf of the Great Powers and accepted by a number of other states. These two areas provide cogent evidence, not merely as to the existence of a body of law which could be properly referred to as Fundamental Law, but a number of the rules of Fundamental Law as recognized by some of the Great Powers at that time. These rules include such matters as the prohibition on Waging Aggressive War; prohibition on conduct which amounts to a Crime against Humanity; prohibition against Torture; prohibition against Slavery; requirement of a Fair Trial before liberty is denied and many others.

The proceedings at Nuremberg and the Universal Declaration of Human Rights amount to recognition by the Great Powers, who had been victorious during the Second World War, not merely of general fundamental rights and freedoms but that such rights and freedoms were possessed by the individual. These fundamental rights and freedoms were not merely rights and freedoms which the individual *ought* to have but that something which they did have and which were protected by law.

The Nuremberg trials are sometimes unhelpfully referred to as ‘victor’s justice’. This, however misses a number of important points: Firstly, justice is trying to be achieved because actual law has been violated. Secondly, while the prosecutor in the indictment was technically the United States of America, in reality there were three prosecutors namely the United States of America, Russia and Great Britain. The prosecutions however were not in truth being brought by any of these States on behalf of themselves. For example, Great Britain was not bringing a charge because Coventry had been bombed or the United States were not bringing a charge because some of its ships had been sunk at Pearl Harbour or by submarines and the like. These charges were being brought on behalf of the whole of humanity which formed part of what was perceived to be the civilised world. The principles to be identified during the trials are those demanded not by, for example the government of the United States of America, but by all human beings of the civilised world.

THE NUREMBERG TRIALS

Towards the end of the Second World War, it became apparent that a number of what had previously been considered unimaginable wrongs had been committed by various individuals and organizations in Germany. Many of these wrongs are, even today, well known and it does not require further detailed evidence within the context of this thesis. In October 1943, the Moscow Conference, attended by the governments of the USA, the UK, the Soviet Union and China declared, among other matters relevant to the war, under the heading Statement of Atrocities and signed by President Roosevelt, Prime Minister Churchill and Premier Stalin, that:

"…the aforesaid three Allied powers, speaking in the interest of the thirty-two United Nations, hereby solemnly declare and give full warning of their declaration as follows: At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the… atrocities, massacres and executions will be sent back to their countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries…" [135]

The words 'according to the laws of these liberated countries' are singularly interesting because they tend to suggest that these 'abominable deeds' were somehow already contrary to a form of existing law. It is regrettable that this form was not expressly identified and clearly stated.

On 8 August 1945, an International Military Tribunal was established pursuant to an agreement between the government of the USA, the provisional government of the French Republic, the government of the United Kingdom of Great Britain and Northern Ireland and the government of the United Soviet Socialist Republics. The principal purpose of the Tribunal was for the just and prompt trial and punishment of major war criminals of the European Axis. The agreement took the form of a charter (often referred to as the London Charter) containing many Articles. Article 6 stated:

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[135] Statement on Atrocities: Moscow Declaration 1943. www.ess.uwe.ac.uk/documents/moscwdecl.htm

"The Tribunal… shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing; (b) War Crimes: namely, violations of the laws or customs of war (*it then particularized as to meaning*); (c) Crimes against Humanity (*it then particularized as to meaning)* …Leaders, organizers, instigators and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[136]

The problem was that a number of these so-called offences, Crimes against Humanity and Waging Aggressive Wars (to give but two examples) had not previously been recognized in Germany (or other countries for that matter). Even the charge of conspiracy, while recognized in the UK had only very limited recognition in the USA and many other countries did not recognize the concept at all as a 'crime'. It was apparent that this may well create significant legal and juridical problems to anyone who was to approach the charges from the perspective of legal positivism, in the sense that these crimes already existed having been commanded by a sovereign entity. To a number of such individuals, many of these crimes simply did not exist. The proceedings provide an illustration of the distinction between a concept of a crime which 'does not exist' and one whose existence 'had not been previously recognized'.

Be that as it may, the German Parliament was a Sovereign Parliament. The Nazi Laws and decrees were prima facie 'lawful'. One could go further. Had the German Chancellor specifically used his power of making law by decree, or had the German Parliament specifically enacted a positive law which covered and permitted each and every aspect of the appalling behaviour which took place, a

[136] The Charter of the International Military Tribunal. 8th. August 1945. www.cfr.org and Avalon.law.yale.edu/imt/imtconst.asp www.refworld.org/docid/3ae6b39614.html [UNHCR]

large number of positivists would be driven to accept that such laws were lawful. They would have been commands laid down by a sovereign entity.

What then is the relevance of the Nuremberg War Crimes' proceedings to the question of Fundamental Law? If the conduct in question had taken the form of being authorised by laws which had been passed (or which could have been passed by the German Parliament and were simply being promulgated by decree) and it is now said that such conduct is unlawful, on what basis is it said? There can only be one: namely, that such laws were or would have been subject to a 'higher law'. Members of the Tribunal were not suggesting that the offences, stated in the expressly format, were somehow derived from Natural Law, as generally understood. These offences must have had their origins somewhere. It is difficult not to postulate that in all probability there was only one candidate for that law, which is higher than the sovereignty of any state or its Parliament. That candidate is Fundamental Law. The nature of the origins for the specific offences can be gleaned from the judgments of the Tribunal.

The research has already established: (a) In the charges brought against a King that it was contrary to law to overthrow a person's fundamental rights and liberties; (b) that a number of respected people in politics, the judiciary and other positions of power believed in the existence of Fundamental Law; (c) this law appears to have a relationship with certain words such as 'justice', 'liberty' and 'fairness'. These proceedings at Nuremberg were to use these words and similar words in order to justify, as a question of law, certain aspects of those proceedings, in particular, the indictment and how the Tribunal responded to many of the defences which were put forward on behalf of the accused. While it may be true that the specific words 'Fundamental Law' were not in themselves used, an analysis of the legal basis for many of the issues which were being raised and disposed of may well show further development of those principles which, for present purposes (without delving at this stage into the meaning of the words) can simply be referred to as justice and liberty. This has been shown as appearing to be an inherent characteristic of Fundamental Law at the time of the English Civil War. Further, such analysis may add to the clarity of meaning of such words and reduce still further the vagueness implicit in the words themselves.

The Indictment and the Proceedings relevant to the Concept of Fundamental Law

The indictment contained four counts in which twenty-two defendants were jointly charged. The statement of offences in relation to each count was as follows: Count 1: Conspiracy to commit War Crimes; Count 2: Planning, Preparing, Initiating or Waging Aggressive War; Count 3: Violation of the Laws and Customs of War; and Count 4: Crimes against Humanity.

A question which immediately arose related to the issue of jurisdiction. An answer favoured by one commentator was that, as each of the states concerned possessed sovereignty, there could be no logical objection why such sovereignty should not be shared among them.[137]

Another commentator has provided a reasonably detailed account of the various aspects of the judgment.[138] It was recognized that the proceedings were being brought against individuals and organizations and not against a sovereign state.

However, there are two difficulties with these arguments. Firstly, it does not deal with the principal question, which is: Had the 'sovereign' state enacted legislation authorizing the conduct complained of, how could it then be argued that such conduct was not unlawful unless the individuals or organizations had the legal right to refuse to recognize and obey such sovereign legislation? If the individual did not have the legal right to refuse to comply with such 'law', it is difficult to see how proceedings could lawfully be taken against such individuals or organizations. Secondly, it is suggested that the Nuremberg trials are little more than the legal exercise of the application of the principle of sovereignty, albeit in the form of joint sovereignty there being a number of sovereign nations responsible for the setting up of the Tribunal its procedure and the charges brought. Such an argument would appear to possess little merit for while the sovereignty of a State, such as the UK, may permit it to make laws in relation to foreign nationals it does not permit it to make such laws and apply them to a foreign state. While it is true that there were no specific charges against the State

[137] S.L. Paulson, 'Classical Legal Positivism at Nuremberg.' (1975) Philosophy and Public Affairs, Vol. 4 No. 2. P.136 et seq.

[138] Q. Wright, 'The Law of the Nuremberg Trial.' (1947) Vo. 41, No. 1, Am. Journal of Int. Law. p. 50 et seq.

of Germany which may have led directly to consideration of the doctrine of State Sovereignty, it must have been obvious that the defences being put forward would have been related to the doctrine of sovereignty whether that sovereignty is 'State' Sovereignty preventing action being taken against the 'state' or its most senior officers or Parliamentary Sovereignty which had or could have given lawful authority for the abominable acts pursuant to that doctrine to begin with. The doctrine of State Sovereignty can be traced back to the middle of the 17th. century.[139]

It has been defined as: "……in the sense of contemporary international law denotes the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive, or judicial jurisdiction of a foreign State or to foreign law other than public international law."[140]

In simple terms one cannot say that the legal right to bring charges is based upon the doctrine of sovereignty but that the defendants have no right to justify a defence based upon the same doctrine. In any event the doctrine is not absolute.[141] The purpose of the doctrine is to prevent outside interference in a State's right to govern. It is difficult if not impossible to see how the murder of millions of innocent men women and children is somehow related to the right to govern. This may well be the reason why leading counsel for the prosecution for the UK appeared to discard the doctrine during the proceedings.[142]

A legal argument raised by a number of the able German defence lawyers, consistent with that raised earlier, related to the issue of ex post facto laws. This is often embodied in the Latin phrase maxim nullum crimen sine lege. The Tribunal appeared to accept that this maxim is a general principle of justice.[143] Therefore, it followed that, unless the laws of which the defendants stood indicted existed as laws at the time the alleged offences were committed, the law could

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[139] Peace of Westphalia 1648

[140] Steinberger, H, "Sovereignty", in Bernhardt, R (Ed.) *Encyclopaedia of Public International Law* Vol. IV (Amsterdam, etc: Elsvier, 2000), 501

[141] M. Miyoshi. www.dur.ac.uk/ibru/conferences/sos/masahiro-myoshi-paperpdf

[142] See below this chapter.

[143] Ibid.

not impose liability upon the defendants for actions perpetrated during the war, by stating at the end of the war what in effect would have been new laws. The Tribunal's answer in relation to this issue concerning aggressive wars was in effect to state that there was a rule of International Law which rested upon 'general principles of justice' supported by various international declarations that waging an Aggressive War is an international crime. This rule had made 'resort to a war of aggression not merely illegal but criminal'.[144] The words 'general principles of justice' are inherently vague. Yet, they are a classic example of most people's understanding as to what they meant in the context in which they were being used. That 'understanding' arose not by providing any specific definition of the word 'justice', for example, but by associating the word with the factual situation which actually existed.

The Tribunal, having cited various draft treaties, resolutions of the League of Nations and other organizations declaring Waging Aggressive War to be criminal, added:

"All these expressions of opinion and others that could be cited, so solemnly made, reinforce the construction which the Tribunal places upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of Pacts and Treaties to which the Tribunal has just referred.[145]"

The phrase 'the conscience of the world', however vague this may be, gives a legalistic basis for the prohibition of Aggressive War. The phrase has not previously been encountered in the context of Fundamental Law. However, the phrase 'natural equity' is a recognized legal concept. These two phrases would appear to be very similar in meaning and may further assist later in the eventual formulation as to the meaning of Fundamental Law.

Baron Wright, Lord of Appeal in Ordinary and Chairman of the United Nations War Crimes Commission, made the following observation:

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[144] Judgment pp. 216–220. Wright. Ibid. p. 54

[145] Ibid. p. 220.

"The common lawyer is familiar with the idea of customs which developed into law and may eventually receive recognition from competent Courts and authorities. But the Court does not make the law, it merely declares it or decides that it exists, after hearing the rival contentions of those who assert and those who deny the law… …International Law is progressive. The period of growth generally coincides with the period of world upheavals. The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules of law deliberately and overtly recognized by the consensus of civilized mankind. The experience of two great world wars within a quarter of a century cannot fail to have deep repercussions on the senses of the peoples and their demand for an International Law which reflects international justice. I am convinced that International Law has progressed, as it is bound to progress if it is to be a living and operative force in these days of widening sense of humanity. An International Court, faced with the duty of deciding if the bringing of aggressive war is an international crime, is, I think, entitled and bound to hold that it is."[146]

In relation to War Crimes and Crimes against Humanity, the Tribunal stated: 'In so far as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the Aggressive War, and therefore constituted Crimes against Humanity'.[147]

The preamble to the Hague Convention on laws and customs of war on land refers to the 'laws of humanity' and the 'dictates of the public conscience'.[148] International conferences have used language such as 'in violation of the most elementary dictates of humanity' and 'repugnant to the conscience of civilised nations'.[149] The phrases 'dictates of public conscience' and 'dictates of humanity'

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[146] 'War Crimes under International Law' (1946) Vol.62,Law Quarterly Review, pp. 40, 51.

[147]Judgment of the Tribunal, p.80. http://crimeofaggression.info/documents/6/1946_Nuremberg_judgment.pdf accessed re-checked February 15th. 2015

[148] Q. Wright, Ibid. p. 60.

[149] Q.Wright, Ibid. p. 60 referring to resolutions of the Council of the League of Nations.

are yet further examples of the type of phrases that have either all been previously associated with Fundamental Law or could properly be used to justify the existence of such law.

The sources of General International Law are general conventions, general customs, general principles, judicial precedent and juristic analysis.[150] It is perhaps the meaning of the phrase 'general principles' which is of singular relevance. When discussing Common Law, Sir James Stephen described it as less like a series of commands than "like an art or a science, the principles of which are first enunciated vaguely, and are gradually reduced to precision by their application to particular circumstances."[151] An illustration of part of the meaning of the phrase 'general principles', in addition to all the above, can be observed in an explanation as to the true meaning of the rule against ex post facto Criminal Law, as follows:

"A crime can only be regarded as a violation of a law in existence at the time of its perpetration. When a punishment is inflicted at common law, then the case is brought within the principles just stated by the assumption that the case obviously falls within a general category to which the law attaches indictability. It may be said, for instance – 'all malicious mischief is indictable. This offence (although enumerated in no statute, and never in the concrete the subject of prior adjudication) is malicious mischief. Therefore this offence is indictable.' Strike out 'malicious mischief' and insert 'nuisance' and the same conclusion is reached. It is no reply to this reasoning that we have, by this process, judge made law, which is ex post facto…"[152]

One legal commentator attempted a highly complex legal analysis of the law which prevailed during the Nuremberg trials.[153] The principal purpose appears to be to demonstrate that the rejection by the Tribunal of the principal defences, namely 'act of state' and 'absolute sovereignty', was achieved on legal and juridical grounds, and challenges the suggestion that the trials were illegitimate and simply based upon political considerations of policy. The paper accepts that the

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[150] Q. Wright, Ibid. p. 58 referring to Statute, International Court of Justice, Article 38.

[151] J.F. Stephen, *Digest of Criminal Law*, (Macmillan & Co. 1887, Sec. 160.)

[152] Wharton, Sec. 29, Vol. I, pp. 41-42; referred to by Wright. Ibid. p. 58.

[153] S.L. Paulson, 'Classical Legal Positivism at Nuremberg.' (1974)Vol. 4, No. 2, Philosophy and Public Affairs, Princeton, (Winter 1975), pp. 132–135.

defences were put on the basis of legal positivism. It then suggests that there are two doctrines of what is referred to as 'classical' legal positivism;[154] the command doctrine and that of absolute sovereignty, utilizing the views in particular of Austin. The paper looks at the distinction between lawful acts of a state official and unlawful acts of the official in relation to domestic law.[155] It then differentiates when referring to International Law by showing that Austin's analysis of a legal right requiring a triadic relationship (a sovereign who sets positive law, an individual on whom a right is conferred and another individual upon whom a duty is conferred), in the context of Domestic Law, has no place in International Law when the issues relate to two 'sovereigns' having equal power. Accordingly, there can be no positive law between such powers.[156] The author goes on to state that: 'classical legal positivism, restricting as it does the scope of legal obligation to the extent of state power, must be rejected in any system of law that recognizes the legal validity of a state's obligations'.[157] The paper illustrates that the links between the line of defences based upon positivism presented at Nuremberg were not contingent upon the theory of positivism, and that classical legal positivist doctrines have no place in International Law.[158]

There were a number of problems faced by the Tribunal. International Law had been steadily evolving for more than one hundred years. It tended to be used to settle disputes between states in accordance with generally recognized custom[159] and not used, with the exception of piracy on the high seas, between a state and an individual. A major problem by, in effect, stating that the crimes were crimes recognized by and contrary to International Law and which does not appear to have been addressed either by the Tribunal or by the various jurists lies in the basic premise that International Law did not permit a sovereign state or a number of sovereign states to enter the territory of a forum sovereign state, set up its own court in the forum state, try the citizen's of that sovereign state for crimes which did not exist in that sovereign state. The doctrine of Universal Jurisdiction had not been developed at that time. It is necessary to differentiate

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[154] Ibid. p. 133.

[155] Ibid p. 141.

[156] Ibid p. 142.

[157] Ibid. p. 144.

[158] Ibid. p. 157-158

[159] See below, Chapter Four.

between the crimes per se and the jurisdictional issue. The offences may well have existed based on conduct being contrary to the 'conscience of humanity' but they were not offences which were triable as being contrary to International Law for International Law did not provide for a trial of such offences as the one which took place.

Perhaps an equally salient point is that a law which purports to violate the conscience of humanity has no place in any system of law; international or otherwise. Those who commit such abhorrent conduct should not be permitted to hide behind the 'screen of jurisdiction' invoking issues of sovereignty. Sir Hartley Shawcross, leading counsel for the prosecution for the UK, put the position succinctly:

"Legal purists may contend that nothing is law which is not imposed from above by a sovereign body having the power to compel obedience. That idea of the analytical jurists has never been applicable to International Law. If it had, the undoubted obligation of States in matters of contract and tort could not exist."[160]

Dealing with a separate issue, leading counsel stated:

"International law, it may be said, does not attribute criminality to states and still less to individuals. But can it really be said on behalf of these defendants that the offence of these aggressive wars, which plunged millions of people to their deaths… is only an offence, only an illegality, only a matter of condemnation perhaps sounding in damages, but not a crime justiciable by any tribunal…. They (the powers responsible for the Charter) refused to reduce justice to impotence by subscribing to the out worn doctrines that a sovereign state can commit no crime and that no crime can be committed on behalf of the sovereign state by individuals acting in its behalf."[161]

The Great Powers clearly wished to demonstrate to the rest of the world that the people responsible for the various atrocities would not escape 'justice'. However, justice in this context meant little more than punishment for their wrongdoing,

[160] IMT, p. 463. Ibid. p. 144.

[161] Record of the Tribunal, 4 Dec 1945, p. 832.

which was categorised as crimes. To some, as mentioned earlier, it was referred to as ‘victor’s justice’.

However, the question remains the same: If a number of states were to recognize certain conduct as being ‘criminal’ and contrary to law, from which branch of the law does it arise? It is hardly an answer to say that, because we are a number of sovereign states entitled to ‘make new law’ and call it International Law, any violation prior to the making of such law amounts to a violation of International Law.

The procedure agreed upon by the Great Powers was essentially that of the Common Law countries, such as the UK and the USA, but without a jury. It was accusatorial in nature. The prosecution lawyers were chosen by the UK and the USA; the judges by the Great Powers. The defendants could choose their own lawyers, presumably paid for by the Great Powers. The odd one, notably Goering, chose to represent himself. Prosecution counsel opened his case to the panel of judges. Witnesses were called to give evidence and were cross-examined and re-examined. Speeches were delivered and the Tribunal reached its verdict and imposed sentence. The odd defendant escaped ‘justice’ by committing suicide while in custody.[162] It had all the trappings of a ‘fair trial’; a prerequisite of justice, whatever reasonable meaning was attributed to the word, for ordinary people who had suffered so much during the war years.

There is a substantial difference between populist justice in the form of retribution and justice according to law. The real difficulty, as is becoming clear, was not so much in recognition that the conduct complained of was contrary to recognized ‘principles’ of International Law, in the sense of being recognized by the international community, but in the transfer of such principles into expressly stated rules of law in the form of criminal offences which had not previously been recognized as crimes. The International Criminal Court was not established until the very end of the twentieth century.[163] The offence of genocide was given express statutory recognition by the International Criminal Court Act 2001. Accordingly, much of the conduct complained of may well have been ‘criminal’ in

[162] Himmler.

[163] Statute of the International Criminal Court. Rome, 1998.

nature but there was inadequate recognized law, in the form of such expressly stated rules which stated that such conduct amounted to a specific crime.

One could readily and unhesitatingly argue that the words of Baron Wright are a correct statement of principle and theory underlining the reasoning for criminality in Waging Aggressive Wars. Then why are not the same or similar principles equally operative in any form of law? Why not in domestic Criminal Law? The terms ‘Natural Law’ and ‘moral ideas’ are all terms which have previously been used in the context of Fundamental Law. The learned Baron expressly states that these are converted into ‘rules of law’. It may well be that following such conversion they become recognized principles of International Law but, if that is so, such principles must have existed previously and what has progressed is the recognition of such principles. Such principles are deemed fundamental to society. What is the body of law called which encapsulates those principles if it is not Fundamental Law? A simple appeal to Natural Law or moral ideas is wholly unsatisfactory. In every war someone is the ‘aggressor’. Has every war that has ever been fought been contrary to say Natural Law? Further, was the carpet bombing of Dresden during the Second World War contrary to Natural Law? Was the dropping of atomic bombs on Hiroshima and Nagasaki during the same period in violation of Natural Law? Or to put it another way, albeit to stray from the legal focus of this thesis, is the use of force, which some may say to be ‘aggressive’ in the defence of an individual’s rights and freedoms contrary to Natural Law?

The legal rules which positively state the prohibition of War Crimes, Waging Aggressive Wars and Crimes against Humanity are expressly stated as being rules of law which are directly connected to what has been described as the ‘conscience of humanity’ and similar phrases. They are not ‘normal’ rules of Criminal Law due to the doctrine nullem crimen sine lege. This is not merely evidence of the existence of a form of law superior to the above doctrine but actual recognition of such law. This branch of the law, whatever it is, is superior to such an entrenched doctrine. It would appear that it is equally superior to any doctrine of Sovereignty, whether it be Parliamentary or State or decrees or dictates by rulers, whoever they may be. Which body of law, whose perceived existence originated hundreds of years previously, properly equates with what was occurring during the legal arguments before the Tribunal? It is the most compelling evidence that there is, and always has been, only one such body:

Namely, Fundamental Law which is now being recognized in the international forum.

While Common Law may well have developed over time as a result of custom and usage, Common Law itself is still subject to certain principles. In particular it is subject to amendment and repeal by a statute. If it conflicts with a rule of the law of Equity, the latter prevails. Had the complaint about conduct of the Nazis during the Second World War been conduct which had previously occurred at the time of the development of Common Law, there may well have been specific Common Law offences to be tried upon indictment, such as Waging Aggressive Wars and Crimes against Humanity.[164] If such conduct had previously occurred and its prohibition had been recognized as a Common Law offence, it would still be subject to a doctrine of Parliamentary Sovereignty or a doctrine of State Sovereignty. A fortiori, that State could render the conduct lawful unless it was prohibited from doing so by some higher form of law.

This goes some way to illustrate the distinction between the approach raised by Sir John Stephen, Baron Wright and that which appears to be developing in this thesis. In simple terms, the approach of the former involves the recognition of 'principles', which eventually can be moulded into rules of positive law when faced with the type of abhorrent conduct which occurred during the Second World War. Presumably, if such abhorrent conduct had not occurred, although the principles would have remained, the positive rules would not have existed. Further, such positive rules based upon that approach could always be subject to repeal by statute. The evidence from the proceedings at Nuremberg appears to be consistent with the fact that the rules of law which had been violated, always existed. What the Tribunal was doing was to give recognition to such rules by expressly stating them. This the Tribunal could do because the principles behind such rules had always existed.

The approach which appears to have been adopted by the International Military Tribunal is that there is common ground for the existence of the principles which result in the formulation of a rule, for example Crimes against Humanity, Waging

[164] Crimes against Humanity may well have been considered after the First World War but the offence had not been specifically formulated at that time by any of the Great Powers.

Aggressive Wars. However, those principles do not develop into a rule of Common or Statute Law unless specific situations arise. When the specific situation arises, as occurred during the Second World War, the offences are deemed to have existed based upon the pre-existing principles.

Consider this: Assume a state passed legislation to prohibit the act of genocide and made such conduct which resulted in Genocide, a criminal offence. The state under a differently constituted Parliament then decided to repeal such legislation. Would it then be lawful for that state to carry out acts of genocide? Assume further that a subsequent Parliament expressly legislated that such acts of genocide would henceforth be considered legal. Would such actions be illegal and if so on what basis? Only if those principles result in a rule of Fundamental Law, does it become irrelevant what the statutory position is, as Fundamental Law is superior to Statute Law. Thus, a rule created by statute prohibiting genocide, for example, would be merely declaratory of the rule prohibiting genocide, and its repeal by, say, a subsequent statute, would be irrelevant because the rule is one of Fundamental Law. Thus, when the Tribunal rules that the principles of, say Crimes against Humanity, have always been recognized as existing why was there not a specific offence prior to1945 which expressly stated that fact? It appears to be little more than an exercise in semantics attempting to reconcile doctrines of sovereignty and what occurred at the Tribunal. Yet, individuals who are alleged to have broken the law are entitled to certainty of the rule which they have broken. There has to be a distinction between principles which result in an expressly stated rule and the principles themselves. That having been said conduct which violates the conscience of humanity is conduct which all human beings, without mental disability, ought to be able to recognize. Offences such as Crimes against Humanity, Waging Aggressive Wars have always been contrary to Fundamental Law independently of the legal arguments which appeared to be taking place at the International Military Tribunal.

This identifies as to how, if Fundamental Law had been officially recognized by states and those in positions of power, it could have been formally developed over hundreds of years in order to remove the vagueness of meaning and to have provided by now a definition with some acceptable precision. All that was required was for the Tribunal to state that the conduct complained of violated Fundamental Law. The specific rules of such law, which prohibited Genocide, Crimes against

Humanity and the like, are examples of such law. The absence of a specific rule or legal 'precedent', would be irrelevant when there had been a breach of Fundamental Law. The precedent lies in the very concept of Fundamental Law. The rule violated is no more than the 'identification' of a rule of Fundamental Law, albeit negative in effect, for example, Fundamental Law prohibits acts of genocide. An expressly stated rule contained within a statute which specifically enacts what the offence would be, it is necessary to reassert, in such circumstances, is no more than declaratory of an existing rule of Fundamental Law. What has in reality occurred at the Tribunal is for the Tribunal to in effect state that these offences have always existed because the principles behind them have always existed. What is taking place is express recognition of such existence by the specific rules. These rules have not originated by virtue of a command from a sovereign entity or a joinder of three sovereign entities. These sovereign entities are declaring pre-existing rules. It may be relevant to add that to Austin, International Law was law 'improperly so called'.[165]

Here is yet further evidence as to how many legal concepts including 'sovereignty' can legally be rejected in circumstances demanded by justice. It is not the 'rule of law' which is rejected but those particular concepts. The prevailing 'higher law' is that which is interwoven with the necessity to produce a 'form' of justice. As has been demonstrated, such higher law is not merely law but either must have a name or be given one. Law which is so intrinsically connected to a form of justice, independent of doctrines such as sovereignty or theories such as positivism and which is fundamental to the dictates of conscience within humanity, may well be said to be fundamental to the very existence and creation of law generally. However, such an argument cannot be developed within the constraints of this thesis. Many of the offences in the situation which prevailed put into express words what that law is. These rules were and are rules of Fundamental Law. The body of Fundamental Law is like the bark of a tree; the specific rules are its branches. The principles amount to its seed.

There are a number of consequences from the approach of those who insist in the doctrine of Sovereignty. If law can only be properly so called if it is contained within a statute or a pre-existing judgment of a court then it can only apply to

[165]S.L. Paulson, ibid. p. 137.

Domestic Law. International Law is, according to those who adopt classical theories of positivism is not law at all. The evil tyrant who kills his own people under what may be perfectly valid domestic Law, in the sense that there is no domestic legal restriction preventing such conduct, may well have to answer to a Military Tribunal, not because he has violated law but simply because he has violated rules laid down by the international community. If that is correct, whichever way one views the situation, the ordinary citizen has no protection in his own domestic law in such circumstances, for barbaric and atrocious conduct committed by the tyrant and permitted by the tyrant's own laws. Putting to one side all the rhetoric and emotional arguments against such manifestly absurd consequences, what it means is simply this: A meaning is given to the word 'law' and the term 'rule of law', which deprives it of weight and respect; something the very word 'law' alone deserves in any free society of mankind. One cannot expect people to have respect for the rule of law if atrocious and barbaric conduct is not prohibited by their own domestic law. The rules laid down at Nuremberg and being argued in this thesis as forming part of Fundamental Law would be responsible for the attainment of such weight and respect.

Assuming that the International Military Tribunal was indeed acting in accordance with law, by definition, such law would indeed be law 'properly so called'. The nature of the words it regularly used, as has been illustrated, provide unequivocal evidence of the seeds of some form of law, which the Tribunal was applying. Words and phrases such as 'laws of humanity', 'dictates of public conscience', 'natural law', 'moral ideas' and 'general principles of justice' are used not only as justification for the specific laws themselves appearing upon the indictment but also in how such laws were to be interpreted and applied by the Tribunal.

The principal issue which this thesis raises is not that the laws, as stated in most of the criminal offences tried at Nuremberg, did not exist; they did. However, they were not rules of International Law or any other law based upon any form of previously recognized source of law with acceptance of the principle of nullem crimen sine lege but in the circumstances were express statements of rules designed to remedy violations of Fundamental Law. Thus, the statement of offence, 'Crimes against Humanity' is a violation of a rule of Fundamental Law which prohibits such conduct.

Putting to one side, at this stage, what each of the above phrases such as 'dictates of public conscience' and the like may actually mean, it is evident that, in so far as this branch of the law is concerned, many of the dictates of the classical theory of positivism have little place. In this situation, law is not simply a command from a sovereign body, the letter of which has to be obeyed and which, if violated, justice is dispensed by application of the words themselves. Here, 'justice', is a necessary ingredient of the very creation of the words forming the rules which are law. This, in one sense, supports the arguments of Professor Fuller,[166] insisting on an element of morality built into law. The problem here is with the word 'morality' for it is clear that the morality of those who committed the offences and those who were the victims were so juxtaposed that it is regrettable that one has to use the same word for such wholly different forms of human nature.

In most if not all legal systems, there is the phrase known to most right-minded people who believe in the rule of law (although not usually properly understood), which is that 'justice is dispensed according to law'. To the classical positivist, this means that the law is applied, whether it be good or bad law, and that justice is dispensed in consequence of such an application, whether it be justice or injustice, subject only to the semantics involved in interpretation. Just because a judge subjectively believes that, by applying the literal interpretation of the rule with which he is concerned, may not provide justice, does not, in his own view, permit an interpretation which would deny the rule in order that objective justice is in fact dispensed. However, when words and phrases such as 'justice'; 'conscience of humanity' and 'moral ideas' are used in the very creation of law, the rules of law itself, as created, contains the principles of those or some of those words and terms and has to be applied, as the Tribunal tried to do, in accordance with those principles. Such principles become the key to interpretation; not an abstract literal meaning. This approach would eventually lead to some form of precision in the meaning of Fundamental Law, if such law was officially recognized. The rules were necessary in order to achieve a form of justice. While legal justice resulted by the mere fact of applying the rules the necessity for the rule lay in the necessity for justice of a different form.

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[166] Lon. L. Fuller, *The Morality of Law,* (New Haven. Yale University Press, 1964, pp. vii – 202):
'Positivism and Fidelity to Law – A reply to Professor Hart' (1958) 71. Harv. Law Rev. 593.

A number of questions arise. Why should Fundamental Law be confined only to International Law? Is it seriously suggested that justice and a fortiori Fundamental Law is only necessarily an essential ingredient of a rule of law in the international forum but has no place in the domestic one? Do the dictates of the human conscience only exist in the international arena but not in the domestic one?

Those who seriously insist on continuing to argue that there is no such thing as Fundamental Law on the basis that, simply because one could have bad laws, they are nonetheless laws, must accept that the consequence of such an approach leads to bad laws creating 'bad' justice. The difficulty here is that there is no such thing as bad justice for bad justice is, by definition, not justice at all. In most legal systems, the courts are often not properly described as courts of 'law' but courts of 'justice'. They are never described by those in positions of power as courts of 'injustice'. The term 'law courts' is little more than the term given, in common parlance, to what it means not what it ought to mean: 'Courts of Justice'. The approach of the Great Powers and the Military Tribunal was to recognize that you cannot deny the fundamental rights and liberties of the victims of such appalling and barbaric conduct and look to a rule of law or absence of a rule of law to escape liability and thus prevent justice being obtained for those victims. These rules and this type of law is interwoven with the concept of a particular form of justice which the conscience of humanity demands.

Justice in such circumstances is being dispensed, according, not to some form of adjunct to law, in the simplistic sense of one must obey the rule for by so doing justice is created, but its elements or some of them are necessary for the very creation of the rule in the first place. In this form the wording of the rule, which is being called law, is little more than the vehicle to achieve those aims which this form of justice demands. What the word 'justice' actually means in this context is a different question and is to be looked at and addressed later,[167] but whatever that is, it is not the type of 'justice' which one regularly sees when laws are promulgated by a sovereign body. The word 'justice' appears as a common theme throughout the Tribunal's proceedings. It is not unreasonable to suggest that it was a word used by literally millions of people worldwide, listening to the proceedings, reading about them or discussing such proceedings with others.

[167] See below, Chapter Six.

The Tribunal did not provide a definition as to the meaning of the word; perhaps understandably. However, the word can mean many different things. It does not appear that it was some form of 'social justice' which the Tribunal was referring to. It could readily be argued that, in waging war, putting to one side the various atrocities committed by people during the war, Germany was trying to remedy what it perceived as the 'injustice' which followed from the Treaty of Versailles.[168] In addition, the Japanese could no doubt argue that their waging of war against the USA was as a result of a perceived injustice emanating from the oil 'saga' between the two countries prior to the Second World War. It would appear that there is a clear relationship between the word 'justice' and Fundamental Law which may assist in crystallizing the concept further in the identification of some of its underlying principles. This is something which will be examined later during this thesis.[169]

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Immediately after the Second World War, the people and their leaders of the free world were substantially aggrieved at what they perceived as being the total violation of fundamental rights and freedoms which had occurred during the war. The representatives of the various governments got together as nations, united in a common understanding as to the existence of such fundamental rights and freedoms.[170] The result of this common understanding was to be a document referred to as The Universal Declaration of Human Rights.

It has been seen that the concept of Fundamental Law is inextricably bound with what in populist language is referred to as human rights, in the strict sense that such 'rights' are fundamental rights and freedoms belonging to the individual human being. The evidence for this lies in the charge sheet against King Charles I, the various observations of numerous individuals from around that period, and the proceedings which took place at Nuremberg.

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[168] 28 June 1919. Located in the Hall of Mirrors, Palace of Versailles, Paris, France.

[169] See below. Chapters Five and Six.

[170] General Assembly: Resolution 217 (III): 10 December 1948.

It may be argued that the Nuremberg Tribunal somehow contributed to the creation of Human Rights Law. However, it was not the Tribunal which so contributed but the abhorrent conduct complained about which contributed to the Universal Declaration of Human Rights. Express recognition of the rights and freedoms of the individual had to be given. Human Rights Law is a body of positive law culminating in the form, for example, of the European Convention on Human Rights. It is distinct from the Universal Declaration of Human Rights.

Human Rights Law, in the form, for example, of the European Convention, appears to have shirked many of the express obligations expressly and implicitly stated in the Declaration. The relationship between such positive law and Fundamental Law is dealt with later. [171]

On 26 June 1945, the Charter of the United Nations was signed by fifty out of fifty-one of the original member countries (Poland was not present and signed it later). In its preamble, it stated (among other matters):

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED:

"To regain faith in **fundamental human rights**, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small…"[172]

The Charter entered into force on 24 October 1945, after having been ratified by the five permanent members of the Security Council and a majority of other signatories. The Commission on Human Rights, which was a standing body of the United Nations, drafted the Universal Declaration of Human Rights (the Declaration). This was adopted by the General Assembly on 10 December 1948 by a vote of forty-eight in favour, nought against and eight abstentions. Those in favour included the USA and the UK; those abstaining included the USSR and Saudi Arabia.

At its outset, the Declaration called upon all member countries to publicize the text of the Declaration and 'to cause it to be disseminated, displayed, read and

[171] See below. Chapter Five.

[172] Universal Declaration of Human Rights. www.un.org/en/documents/udhr/ (Last accessed 2014.)

expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories'. Included in its Preamble, the Declaration stated:

"Whereas recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world… Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law… Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in equal rights of men and women… Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms…"[173]

The Declaration then set out in some thirty Articles the various rights and freedoms of which it spoke. These Articles are important in the context of this thesis.

The Preamble, having set out in terms that equal and inalienable rights were the 'foundation of freedom and justice', then identifies in specific wording what these rights are. Articles 3, 4, 5, 9, 10 and most of 11 do not require the rights contained therein to be guaranteed or subject to any positive law created at the behest of a sovereign law maker, such as a parliament. Further, as Article 2 makes clear, such rights are not subject to any doctrine of sovereignty. This is a 'declaration' of such rights.

The Declaration was created immediately after the conclusion of the Second World War and it may well be that, had there not been such a war, the Declaration may not have been made. Nonetheless, that ought not to detract from the fact that it was made and was a 'declaration'. That declaration was one of existing rights, not new rights. Given the facts of the earlier chapters, it is strongly arguable that if a declaration of individual rights and freedoms had been made in the aftermath of the English Civil War, while there would be differences between the seventeenth century and the modern era, it is doubtful that there would have

[173] Ibid.

been much relevant and material argument as to the existence of fundamental rights and freedoms in modern times. It is not so much that the rules contained within the Universal Declaration of Human Rights can properly be stated to amount to rules of Fundamental Law but that fundamental rights and fundamental freedoms belonging to the individual were so recognized. The rules contained within the Articles of the Universal Declaration amounted to recognition by numerous states as to the type of right which an individual possessed, simply because he was a human being.

On 5 May 1949, the Treaty of London was signed which created the Council of Europe. There were ten signatories, including the UK. In 1950, the Council of Europe drafted a Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. This became known as the European Convention on Human Rights (ECHR). The Convention also established the European Court of Human Rights. The Convention came into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the Convention at the earliest opportunity. The Convention rights amounted to expressly stated rules of law.

Although the UK was party to the Convention in 1953, it did not form part of the UK's Domestic Law until the year 2000, when the Human Rights Act 1998 received royal assent and became law. In many other states, such as Germany, Austria and France, the Convention became part of their 'recognized' Domestic Law, in one form or another, within a comparatively reasonable time.

The situation is that, in 1945, there is recognition of certain concepts, such as freedom and justice. These concepts, are then developed into a number of specific rules, which are referred to as Articles. The Declaration of 1945 referred to thirty such Articles. The ECHR coming into effect in 1953 has been subject to amendment by various Protocols over the years.

There are now fifty-eight Articles and thirteen Protocols, which themselves contain a number of Articles, many of the latter being procedural. Accordingly, there are two relevant documents: the Universal Declaration of Human Rights; and the

European Convention on Human Rights. The Convention rights are to be looked at later in this thesis.[174]

The wording of many of these rights contained in the Universal Declaration is instructive: Article 2 states that 'Everyone is entitled to all the rights and freedoms set forth in this Declaration'; Article 3 states that 'Everyone has the right to life, liberty and security of person'; Article 4 states that 'No one shall be held in slavery or servitude'; Article 5 states that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'; Article 10 states that 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'; Article 11 states that 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he had all the guarantees necessary for his defence'; and Article 26 deals with the right to education.

What is clear from the wording is that virtually all of the Articles are declaratory of pre-existing rights belonging to the individual. (With the exception of Article 29 declaring community duties) and the wording in almost all cases, semantics apart, is clear and relatively unambiguous. Yet, there have been no court judgments in relation to any of these Articles as contained in the Declaration because, of course, only the Convention[175] is recognized as having legal force, and then in some countries such as the UK only when it has been formally enacted some half a century later. Why? Given that Article 2 tends to suggest that these rights are not subject to any limitation of sovereignty, why is a statute, which can always be repealed, necessary?

All the countries who were party to the Declaration recognized its importance and merit, yet some refused to give it any 'legal' effect within their own domestic systems until a manifestly inordinate delay had elapsed.

Conclusion

The proceedings before the Tribunal identified a body of law superior to 'any' doctrine of Sovereignty. That law was posited in a few specific offences which

[174] See below, Chapter Five

[175] See below, Chapter Five.

were given express wording. Various phrases including ‘conscience of humanity’, ‘justice’, ‘general principles of justice’, ‘morality’, ’laws of humanity’, ‘dictates of public conscience’ were used. Every criminal offence contains two essential ingredients. The actus reus and mens rea. (Mens rea is the mental element, usually an intention to commit the act to be differentiated from motive.) The Tribunal, in dismissing the defence arguments, concluded in effect, that the offences had always existed, they were simply being given express wording. It follows from that it is possible in law to recognize an offence which had not previously appeared by express wording.

How can it be said that the defendant’s had the intention (mens rea) to commit an offence which they did not know previously existed? The answer lies not in words such as ‘morality’ or ‘general principles of justice’ but in words such as the ‘conscience of humanity’. As each defendant was part of humanity he can be presumed to have had the intention to carry out an act contrary to the ‘conscience of humanity’.

Is it possible to state that these laws, recognized and acted upon by the Tribunal were laws of Fundamental Law? A possible difficulty with that is it could be met with the criticism that such is a circular argument to the effect that Fundamental Law is violated when the conscience of humanity is violated. What is the ‘conscience of humanity’ it is when Fundamental Law is violated. However, the answer to such a suggestion is that such law would not be violated simply by the mens rea (the state of mind, for example a state of mind which is contrary to the conscience of humanity.) but it requires in addition the actus reus. (The specific acts containing all the elements of the offence, except the mental element.) The reason for the necessity of, for example, the specific offence of Crimes against Humanity is not because the offence violates the conscience of humanity but the conduct, which identifies the actus reus of the offence, violates the conscience of humanity. Fundamental Law is not violated simply by virtue of the ‘conscience’ but by reference to that ‘conscience’ **and** the particular acts in question. However it is viewed those who commit acts of the kind specified in the indictment break a body of law which is related to the concepts of justice and the conscience of man. Further, specific examples of rules, under the heading of Articles, relating to concepts of justice, freedom and the conscience of humanity were to be included

in the Universal Declaration of Human Rights along with the express statement that such rights were fundamental.

Most of the Articles appear to declare true rights in the sense that they are not subject to caveats, provisos or the like, and any qualification exists within the definition of the right itself. The Declaration is or comes very close to a declaration of a number of the type of rules which can properly be said to be specific rules of a branch of law.

It is clear that references to Fundamental Law, which appear from the middle of the seventeenth century, regularly used in the context of the concept words such as ‘justice’ and ‘freedom’ (to provide but two examples), whatever those words actually mean. They would often couple those words with the word ‘fundamental’. Some three centuries later, the same and similar words appear in a declaration endorsed by numerous civilized nations, which purported to be of universal application and specified numerous Articles. Some parts of that ‘law’ may well be ‘new’ law in the sense that it is law whereby the rules had not previously been expressly stated, as opposed to being officially recognized, but other parts may well be so closely interrelated with those same concepts of justice and freedom as were always part of the characteristics of Fundamental Law as referred to throughout previous centuries. It is little short of absurd, based upon the evidence which this research has produced, to suggest that ‘out of the sky’ some completely new body of law arrives, the principles of which had never previously existed. The Declaration cannot properly be referred to as Human Rights Law (unlike the Convention) in those states which still insist on absolute sovereignty within their own domestic systems as it has not been ratified in the appropriate manner, such as by legislation. But does that mean that it cannot be evidence of the recognition of the existence of some form of law? Is the Universal Declaration of Human Rights a meaningless document without any ‘teeth’ whatsoever?

The words used by the leaders of the world’s Great Powers, adopted by numerous other nations following the end of the Second World War and encapsulated in the Declaration, amount to statements of principles which must, not ought, to prevail among civilized nations. The Articles annexed to it are express rules which declare specific rights. The use of words such as ‘freedom’ and ‘justice’ are words which were regularly used during the Nuremburg trials. The Declaration is a different document to the subsequent ECHR. The Declaration is a declaration **of**

human rights; the Convention is one **on** human rights. If the rules of the Convention adopted by a state in its own domestic legislation are inconsistent or incompatible with the Declaration, why should they not fall into the same category as any other rule of law created by, say, a sovereign ruler or a parliament?

Consider an expressly stated rule of law of a sovereign Parliament which permitted genocide. Go one step further and assume that it was included in a statute which the Parliament had decided that an appropriate title was 'Human Rights Act No. 2'. It would be plainly inconsistent with the Declaration. If the Declaration, as to evidence of the recognition of the prohibition of genocide was not to prevail, one could easily be back in the same position as immediately before the various atrocities and abominations which took place during the Second World War.

The specific use of the words 'fundamental', 'freedom' and 'justice' in the context of the Declaration tends to illustrate the superiority of a branch of the law which is based upon such words over any other branch of the law. It matters not what that other branch is called or however such law is imposed, whether by acts of a legislature, judicial pronouncements or decrees. It beggars belief that the Great Powers along with numerous other civilized nations get together and formally agree that a multitude of rules and principles apply in the civilized world and yet somehow none of these rules and principles amount to 'law' because there is no statute which expressly states that they do.

That does not mean to say that the Articles themselves may not need some form of clarification in the sense that they must not significantly undermine a state's ability to govern, but the stated principles from which the rules are formed are not there for the personal interests of any state but for the benefit of its citizens.

Reverting back to the Nuremberg Tribunal if it was not Fundamental Law that was being applied what law was being applied?

It is difficult, if not impossible, to comprehend that it was some form of International Law. At the time of the Second World War, International Law applied only between States. Both Public International Law and Customary International Law were in the embryo of development. The Tribunal relied on the Pact of Paris of 1928[176] which came into force in 1929. It is an extremely short General Treaty

[176] UN Treaty Series.

between States. It is little more than an agreement between States to renounce war. Nowhere is there any mention of ‘Crimes against Humanity’ or ‘Conspiracy’. It is true that renouncing war in the Treaty includes by implication the promise not to wage aggressive wars. However, even that promise was a promise made by States for the benefit of each other. No-where in International Law at that time did it permit one state to enter the territory of another, arrest its citizens and put them on trial. The doctrines of Sovereignty in its various forms is but another reason for rejecting that the law being applied was International Law. There is a difference between principles which are recognized by the International Community and express rules which can properly be said to be rules of International Law.

Was it a form of law which gave effect to a theory of Positivism in either of its presently recognized forms? As has already been referred to, the fact that they are positive laws which could have been commanded by ‘joint’ sovereigns, it fails for one of the reasons International Law fails. Namely that no previous rule of positivism has permitted one sovereign entity to enter the territory of another, arrest its citizens and make them stand trial. That is apart from the fact that many of the express crimes had not previously been expressed in a traditional positivist format. If the various defendant’s had neither broken the law under the traditional doctrine of positivism or under International Law does that mean that there was no lawful remedy for the almost unimaginable injustice which had been caused to millions of innocent people by virtue of the abhorrent conduct of the defendants, as well as numerous others which were never tried?

Could it be Natural Law which was being applied? Here there are numerous problems. The laws which were being violated were man made. The actions which were the subject of such violation were or certainly could have been man made in a lawful manner. All such laws were express statements of law whether acted upon by the Tribunal in creating a remedy for the crimes committed or acted upon by the defendants as a result of a decree which was prima facie lawful. The standard of behaviour favoured by the defendants as well as thousands, if not millions of others, in Germany was a wholly different standard of behaviour to that favoured by millions of people in the world. The nature of the human perpetrators of the crimes was wholly different to the nature of the human victims of those crimes, not to mention the nature of those who were involved in bringing the

defendants to justice. How can it therefore be properly said that the charges represented violations of Natural Law as presently understood? It cannot. Throughout the Tribunal hearing the words ‘fundamental’ and ‘law’ were regularly referred to and in the Universal Declaration the words ‘fundamental’ and ‘law’ appear. Yet for some reason there appears to have been a reluctance to state the obvious which would have occurred if there had been joinder of those two simple words. The law which was being applied was Fundamental Law and no other.

It is now necessary to move on in time in order to ascertain whether there is more evidence as to the existence of Fundamental Law.

CHAPTER FOUR

THE CONCEPT OF JUS COGENS

Introduction

It has been established in Chapter Three that, in the international arena since the end of the Second World War, a state which acted in a way which the civilized world considered was sufficiently wrong would not be permitted to rely on concepts such as a doctrine of sovereignty, whether it be Parliamentary or State, as a defence to their actions, or the actions of individuals acting on behalf of the state.[177] It has been further established that certain forms of conduct, for example genocide and waging aggressive wars are such that no sovereign ruler can legally authorise such conduct by virtue of a doctrine of supremacy possessed by a sovereign ruler. It matters not whether the sovereign ruler is a monarch, dictator or a parliament. Express rules of a particular form of law, for example, prohibitions against Torture, Crimes against Humanity, Genocide and the like as well as the mandatory requirement of a fair trial were formally recognized expressly or by implication at the Nuremberg trials. Some were subsequently to be expressly stated and recognized in International Law and the domestic law of various states. At the Nuremberg trials specific charges were laid. Many of these offences however, such as, Crimes against Humanity and Waging an Aggressive War were not charges that had previously formed part of the domestic laws of any country.[178] Further, in Chapter Three it was established by virtue of the Universal Declaration of Human Rights that individuals possessed fundamental rights and freedoms independently of any sovereign power.

Many of these rules are not ones which have simply occurred 'out of the blue', or by way of judicial reasoning when considering the facts of a particular case, or by way of a legislative debate in a sovereign parliament. The rules have occurred because of particular situations which have arisen resulting in the civilized nations of the world demanding some form of law which demonstrated their abhorrence at certain types of situations and the fundamental necessity of legal concepts to

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[177] Nuremberg Trials supra.

[178] There had been political discussions at the end of the First World War in relation to a potential criminal offence of crimes against humanity.

restrain the excesses of absolute sovereignty. Underpinning the various specific rules which have been created and recognized are norms. In this context the word norm is not intended to be restricted to a mandatory rule of social behaviour but includes the essential requirements possessed by human beings when faced with any series of facts which call for a decision to be made or a view to be taken and which form part of the 'make up' of most civilized human beings. For example the requirement to see fairness being applied, justice being dispensed and the like. Inherent within words such as fairness and justice are examples of norms in this context. Phrases such as the 'human conscience' is an attempt to give a meaning, linguistically, to the principles which have necessitated the particular rules and are also an element of those rules. The specific rules, some of which are referred to above, which have been so created, are examples of that norm being put into action.

This chapter identifies further recognition of the concept of Fundamental Law in the international arena after the Second World War. It will demonstrate that numerous states, meeting at a convention in Austria, formally recognized the existence of the concept of Fundamental Law in international relations between themselves, albeit that they were to use the word 'compelling' in substitution for the word 'fundamental'.

This chapter will demonstrate that there were substantial reservations expressed by many states, including the UK, prior to agreement of the recognition of Fundamental Law principally because of their apparent concern as to some loss of their own perceived sovereignty. It appears that they did not want to lose any part of what they considered to be their absolute power. This is directly relevant to an issue in this thesis as to whether recognition of Fundamental Law is being denied, not because it doesn't exist as a legal concept, but for political reasons of self-interest alone. In simple terms, this prevarication by a number of states, is an example of a state not wishing to lose any portion of its perceived absolute power. However, it is viewed this is recognition at long last, more than three hundred years after the English Civil War and more than twenty years after World War Two of the doctrine of Fundamental Law.

This chapter further identifies, consistent with the aims and objectives of this thesis in attempting to ascertain the underlying principles of Fundamental Law that at its source, in the international arena, lies a peremptory norm or a series of such norms. For a norm to be recognized as a peremptory norm it must be recognized as such by the international community as a whole as being one from which there can be no derogation. In order to assist with the meaning of the words 'peremptory norm' various papers from respected academics are identified and examined in order to ascertain whether they can be of such assistance by providing clarity as to the meaning. The phrase 'as a whole' is significant. Presumably, at least in International Law, if a norm is not recognized as being peremptory by all the international community even if it is by almost all, it could be argued that it cannot be a peremptory norm. Be that as it may it is of particular note that the existence of a peremptory norm was recognized by the international community, as was the necessity for the offences at Nuremberg, as was the Universal Declaration of Human Rights. It may not necessarily have consisted of precisely the same member states on each occasion but it was nonetheless the international community. Further, it will be seen that whatever may be the position in International Law, Fundamental Law, was not and is still not recognized by the judiciary in the domestic law of various states, in particular the UK, principally due to the absence of a domestic statute from a sovereign entity permitting such judicial recognition.

The Vienna Convention: Recognition of the Peremptory Norm

In 1969, a convention was adopted in Vienna by a large number of states of the developed world. It became known as the Vienna Convention on the Law of Treaties and was a result of a number of years of discussions and debates between the various representatives of those states. Article 53 of that Convention states:

"Treaties conflicting with a peremptory norm of general international law (*jus cogens)"*

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general International law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no

derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[179]

Article 64 states:

"**Emergence of a new peremptory norm of general international law ('jus cogens')"**

"If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[180]

This provision is a clear statement of the existence in International Law of a law which is superior to any other form of law and from which 'no derogation' is permitted except as provided for by the provisions of Article 64. Recognition of such superior law is recognition by the states who were parties to the Convention.

The words 'jus cogens' translated mean 'Compelling Law'. As will be seen, many commentators refer to 'rules' of jus cogens. While the words 'jus cogens' appear in brackets, such brackets form part of the heading to the specific Article. What Article 53 expressly states is that there exists a 'norm' of general International law. It does not define what it means by norm. It would appear to be a principle which identifies a standard of conduct which cannot be derogated from. If that is correct, any expressly worded rules derived from such a principle would be rules of Compelling Law.

After the 1963 session of the International Law Commission (ILC), which formulated Articles 50 and 51 of the Convention, forty-three nations, including the USSR, the USA and the UK, favoured the concept of jus cogens as part of the draft treaty. Schwelb's outline as to the views of the nations is singularly helpful.[181] Independently of his own observations and the points he was taking the paper provides clear evidence as to the prevarication by various nations prior to their agreement to the treaty. This prevarication is cogent evidence not of their willingness to sign up to a treaty which many would argue was in the interests of

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[179] United Nations , *Treaty Series* (1969) Vol. 1155. P.18.

[180] Ibid. p. 22.

[181] E Schwelb, ' Some Aspects of International Jus Cogens as formulated by the International Law Commission' (1967) Vol. 61. No.4,The American Journal of International Law, pp. 946–975.

preventing wholly improper behaviour by one state towards another but of their concern as to the loss of absolute power. Simply by looking at the approach of the delegates from various states a picture begins to emerge of the difficulties being encountered by those who seek support for the simple issue that there are some things more important and more beneficial to the world's people than insistence on the concept of sovereignty. Those who appear to be trying extremely hard to emphasize the importance of rules for the benefit of humanity generally would seem to be facing hurdles of a political nature from others whose interest would appear to lie with the preservation of power for their own particular state.

A large number of countries, The Netherlands, Italy, Austria, Panama, Uruguay, Czechoslovakia, Bulgaria, Algeria and Ethiopia recognized and accepted the efforts of the Commission in advancing the proper and progressive development of international law. This was particularly illustrated by the representative of Ethiopia who observed that: "The Commission had given a new dimension to treaty law by introducing peremptory rules of jus cogens, thus recognizing the inalienable rights of states to live in independence and dignity."[182] Presumably, it may follow that such inalienable right applies to the citizens of the state as well. However it is looked at, a large number of countries have recognized the existence of a concept referred to as 'Compelling Law'.

Two of the world's great powers, the U.S.A. and the U.S.S.R. had lent their support for the recognition of Fundamental Law. Their views before so doing were instructive as indicating that, whatever reservations they may have had, recognition of the concept was considered important. In the view of the USSR, Articles 50 and 61 were intended to prevent the use of international treaties as a screen to conceal actions conflicting with the basic principles of contemporary international law. Legal force could be accorded only to such treaties as were in full conformity with those principles. The approach of the USA was that the concept embodied in the provisions (Articles 50 and 61) would, if properly applied, substantially further the rule of law in international relations. The provisions should be supported if it could be made certain that they would not be conducive to abuse and create undesirable disruption in treaty relations.

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[182] Ibid. pp. 960–961.

The UK Government considered that, if Articles 50 and 61 were accepted, their application must be very limited and made subject to independent adjudication. There was not as yet any generally recognized criterion by which to identify a general rule of international law as having the character of jus cogens. The French representative recalled the reservations which his delegation shared with others concerning the alleged supremacy of peremptory norms of General International Law over other rules of law. Another French representative pointed out that it would be advisable for the time being to rely on the evaluative flexibility of international practice until jurists were able to define the criteria which would make it possible to determine with certainty whether a given international rule possessed the character of jus cogens. The representative from Chile characterized the Article as an invitation to arbitrariness. The Government of Turkey commented that it was not customary today for nations to conclude treaties dealing with the use of force, with crime, traffic in slaves and genocide. One should act with caution before including the notion of jus cogens in International Law. The lack of a definition would make it possible for every nation to interpret jus cogens to fit its own needs. The government of Luxembourg was the only one to expressly propose that Articles 50 and 61 be deleted on the basis that the proposed clause, far from serving its purpose, was likely only to have the effect of creating uncertainty and confusion. Much to its regret, the Luxembourg government concluded that in the present state of international relations it is not possible to define in juridical terms the substance of peremptory International Law.[183]

The important point, however, is that a failure to accept the existence of a ‘norm’ by suggesting it lacks clarity and certainty prevents the development of the principles inherent within the norm in order to give those principles such clarity and certainty. The norm when operated results in rules. Without the rules being expressly stated, there will always be uncertainty of varying degrees, and justice is or may well be, denied.

It is difficult to understand any logical basis for the approach of those states to the issue of acceptance of norms as opposed to positive identifiable rules. It is a proper inference to draw that a principle purpose of the Convention was to get

[183] Ibid. pp. 962–963.

the states to accept that even they are subject to certain minimum standards in relation to their dealings with each other. There is a distinction between a state expressing genuine concern and using the word concern to mean little more than not wishing to comply with something which would restrict wholly unacceptable conduct in their dealings with each other. For example once it is accepted that such minimum standards have to be imposed the details of the rules which relate to such standards could readily be discussed thereafter.

The French delegate, M. Hubert, pointed out the following: (a) he expressed a general concern that the Article was imprecise as to scope, formation and effect. He stated that 'it declared void… …an entire category of treaties but failed to specify what treaties they were, what were the norms whereby they would be avoided, or how those norms would be determined'; (b) he stated that imprecision in the Article would mean that disputes would become a permanent feature in its interpretation and as a result both legal instruments and international relations would be undermined; and (c) he stated that, if the Article was interpreted to mean that a majority of states could create rules of jus cogens, the result would be the creation of a source of international law subject to no control and lacking all responsibility.[184]

Of course, it can be properly and rightly argued that states have to possess a reasonable amount of freedom in order to go about their business with each other and it may be that sometimes absolute justice can rarely occur. That is not the same as states retaining absolute or virtually absolute power to deny Compelling Law. The apparent concern in the absence of a positive rule of law is no excuse for at least striving to achieve the objectives of Compelling Law and preventing the consequences of failure by refusing such attempts from the outset. Preventing abuse of the utilization of Compelling Law is hardly 'rocket science'. Formulating the meaning of the norm or norms which underpin the rules of such Compelling Law is more likely to be akin to such science.

It may not be too difficult to understand the prevarication by many of the States who took part in the Convention. It is extremely difficult to justify such behaviour. It is true that, in a modern age, all states are, in one sense, part of an international

[184] Reported by D.R. Nieto-Navia in his paper 'International Peremptory Norms (Jus Cogens) and International Humanitarian Law.' (2001) Iccnow.org. (accessed 2014)

community. The concern about losing or surrendering even the most miniscule part of their perception of their own sovereignty may well be something that they find difficult, if not impossible, to accept. However, most states do not exist in some form of isolationist vacuum; they wish to be recognized as being part of the international community. But those in positions of power, be they a government or representatives of it, do not 'own' their state. They have a duty to act at all times in the interests of the people. This is not simply because they are representatives of the people; it is an inherent duty of those in power. They are not there to represent themselves or a particular class of people. The Convention was not about their subjective or self-centred interests. It was not about some form of social or quasi social legislation. It was the starting point about the acceptance of rules of behaviour which were capable of development for the benefit of all mankind. (Clauses, for example, in a treaty between two states which permitted the sale of 'slaves' between themselves, permitted genocide, permitted torture and the like are hardly relevant to perceived notions of sovereignty. These are no more than examples of rules relating to liberty.) They are individual freedoms possessed by all mankind. If those in positions of power have no interest in such individual freedoms, they ought to publicly announce that. If their real interest is simply to retain power for themselves or a particular class, they should say so. It is not unreasonable to comment that the leaders of any civilized nation, properly so called, would not only wish to preserve the freedom of all the individuals which they represent but would also wish to at least try and develop the principles underlying such freedom. It is doubtful whether many people in the UK, for example, would have even heard of jus cogens, and that includes lawyers (other than international or human rights lawyers). One would have thought that media institutions, who often profess to be some form of guardian of individual liberty, would have considered it worthwhile to inform people of issues crucial to personal freedom. Apparently, for most, this is not the case. Perhaps one has to continually wait for miscarriages of justice, barbaric acts, aggressive wars, Crimes against Humanity and the like before any such issue occupies their attention.

The above Articles would appear to have generated such a plethora of academic scholarly discussion and continue to so generate. The word 'fundamental' is used repeatedly by many scholars in their papers. Yet there appears to be a substantial

reticence to link it with the word ‘law’. The treaty amounts to recognition of Fundamental Law in the international arena.

The Academic Approach as to the Interpretation of Articles 53 and 64

There were many commentators in the academic world who appeared to be concerned about jus cogens from a legal point of view. They tended to fall into two principal camps. Firstly, those who sought to preserve the concept of State Sovereignty and secondly, those who saw the benefits to humanity by the approach of the Commission.

They were to write a number of academic papers in relation to the concept of jus cogens. The arguments advanced in such papers include a refusal to accept that jus cogens is some new branch of the law and that it does not undermine the doctrine of State Sovereignty. This is because everything a sovereign state does in relation to another sovereign state must be consent based and those who argue to the contrary are progressive thinkers. A further argument is that it is a development of existing law which can be found in contract or municipal legal systems through to recognition that it is a form of law which has always existed but which can now be formally recognized. If the latter argument is correct then this lends substantial support to a principle point in this thesis namely that Fundamental Law exists and the difficulty lies not in the fact of its existence but in its recognition.

Why should a rule of Compelling Law be consent based? Consent is relevant to agreement. If, for example, six states were all in favour of supporting the concept of genocide and therefore refused to consent to the prohibition of such conduct, does that mean that the prohibition does not exist and that such prohibition is not one according to any form of law?

It is difficult to see how those who are trying hard to put certain types of conduct beyond the reach of doctrines such as sovereignty or even the traditional theories of positivism should be accused of being ‘progressive’ thinkers. One would have thought that those who still deny that the ultimate purpose of rules of law always was, and still is, to achieve justice for people, were in some ways ‘regressive’ thinkers.

An argument against jus cogens being a 'legal concept'.

This is illustrated by George Schwarzenberger who published an article following the ILC's draft convention on the law of treaties. The article attempted to answer a simple question which the author had posed: "The problem of international jus cogens can be stated in a simple question: Are there rules of international law which, by consent, individual subjects of international law may not modify?"[185] His principal point appears to be that as the jus cogens rule is consent based, that is it only came into existence because of agreement between the states, it is not a rule of law at all and is subordinate to the doctrine of State Sovereignty. If that is correct then acceptance of the rule of jus cogens is a political decision of policy. The difficulty here is that in one sense every rule of International Law can be argued as being consent based. His example of the right to self-defence of one state against an aggressor only exists because the states agree that such a right is a legal one. Is there a material difference between states agreeing that self-defence exists as a legal concept and that jus cogens exists as a legal concept? There is a distinction between a consent based policy based upon political considerations and recognition of law. The states may well have consented to the treaty but in so doing they also recognized jus cogens and a fortiori Fundamental Law as having the force of law.

His approach in answering the question which he posed was to use the Commission's view that, in order to constitute international jus cogens, a rule of International Law must have attained relative universality, which to Schwarzenberger meant that it must form part of General International Law. To Schwarzenberger, for a rule to form part of General International Law, it must comply with the seven fundamental principles of International Law: sovereignty; consent; recognition; good faith; international responsibility; freedom of the seas; and self-defence. Having attempted to show why these principles applied to general international law, he then looked at each one in order to try and ascertain whether any of these rules had been transformed into jus cogens on a consensual basis.[186]

[185] G. Schwarzenberger, 'International Jus Cogens'. 43. TXLR.55

[186] Ibid. p. 8.

Although there is no sub heading in the part of the article titled *Conclusions*, he does appear to take the view that, while jus cogens is consent based, it is not a rule of international customary law. Further, and perhaps of particular significance, is his statement: "...it is not the function of the doctrine of international law or the international judiciary to transform discretionary powers into legal duties."[187] This pre-supposes that a state's powers are so absolute than any concession it may make is as a result of the exercise of its discretion and not because it is legally obliged to make that particular concession.

Perhaps his most telling comment appears at the end of his paper, in which he states:

"As a result of these deliberations, a draft article, perfectly adapted to the idiosyncrasies of a hypocritical age, has emerged. It has all the trappings of fashionably 'progressive', if unrealistic thinking. Yet, in a weak world confederation, in which international judicial organs are likely to continue to be condemned to a subordinate position, it is more likely that the function of this draft article, like the clausula rebus sic stantibus before it, will be to serve as a means of undermining the sanctity of the pledged word."[188]

His arguments are dependent upon the absolutism of the doctrine of State Sovereignty existing as a legal concept. Namely, that as a question of law a state is free to do anything and everything it pleases in accordance with its subjective will. As has been seen from the earlier chapters, whether it is sovereignty per se, Parliamentary Sovereignty or State Sovereignty this is incorrect.[189]

The principle argument for the justification of jus cogens and as to why it is necessary.

In January 1966, Alfred Verdoss, a member of the ILC, published a paper[190] in which he felt obliged to defend the ILC's draft convention on the law of treaties against the observations upon that draft by Schwarzenberger (supra). His

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[187] Ibid. p. 9.

[188] Ibid. p. 12.

[189] See above, Chapters 2 and 3.

[190] A. Verdoss, 'Jus Dispositivum and Jus Cogens in International Law.' (Jan 1966) Vol. 60, No. 1, The American Journal of International Law, pp. 55–63.

principal point appears to be that the law of jus cogens is not there to satisfy the interests of any particular state but in the interests of international humanity generally. If that is correct then it lends some support to the proposition in this thesis that Fundamental Law is superior to any other form of law including international law. It would be strange indeed if a state's domestic law was by some means superior to International Law and also superior to Fundamental Law. Yet such was the type of argument which prevailed in the UK prior to the Human Rights Act being given statutory force. His starting point was to identify the principal issue as to whether all norms of International Law have the character of jus dispositivum (law adopted by consent) or if there exist some norms of international law having the character of jus cogens , from which no derogation is permitted by an agreement inter partes. His view was: "In the modern positivist doctrine of international law no settled opinion can be found on this question."[191]

Verdoss looked at the position in the Natural Law school, observing that the starting point lay in an idea that there was necessary law which all states are obliged to observe. That, according to some views, "nations cannot alter the (sic that law) law by agreement."[192] He reviewed the arguments of those writers who have adopted the view that General International Law consists exclusively of non-compulsory norms because states are always free to conclude treaties which may deviate inter partes from general International Law. This was to be contrasted with the view that there are some rules which have the character of jus cogens and that all treaties which are at variance with such rules are null and void. He indicated that the Commission found it difficult to indicate any criterion by which rules of jus cogens may be distinguished from other rules of General International Law and came to the conclusion against including any examples of jus cogens for two reasons: (i) because it may lead to misunderstanding as to the position of other possible cases; and (ii) because a complete list of such cases was impossible without a prolonged study of this matter.[193]

Verdoss identified the criterion for jus cogens rules in that they consist "…in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community. Hence these rules are

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[191] Ibid. p. 55.

[192] Ibid. p. 56.

[193] Ibid. p. 57.

absolute. The others (*having solely the character of jus dispositivum*) are relative, because the rights and obligations created by them concern only individual states inter se."[194]

Verdoss makes reference to the advisory opinion of the International Court of Justice concerning reservations to the Genocide Convention, which stated: "…In such a convention the contracting states do not have any interest of their own; they merely have, one and all, a common interest: namely, the accomplishment of those high purposes which are the raison d'etre of the Convention…"[195]

He went on to identify three groups of general international law which possessed the character of jus cogens. In his defence to the observations from Schwarzenberger, he states: "In considering this first part of the criticism of Professor Schwarzenberger" (*dealing with how a rule having the character of jus cogens can be created inter partes and its legal effect is therefore limited to the contracting parties*) he "cannot understand how, by 'bilateral' agreement, a rule having the character of jus cogens can be created."[196] It is arguable the point being made by Verdoss is of substantial weight and applies equally to the 'conscience of humanity'. While states may be 'ad idem' as what conduct violates the conscience of humanity it is difficult to understand how the meaning of 'conscience of humanity' should be consent based.

Once it is accepted, as Verdoss appears to do, that there is some higher form of law than sovereignty and that it is accepted that such law has existed for a lengthy period of time, it matters little whether one refers to it as 'necessary law', 'compelling law', etc. In many ways, it is like describing a tree with branches. For some reason, there is a tendency to want to either describe the branches without wishing to mention at all the bark of the tree from which the branches are growing. It is true that the branches may have an existence independent of the tree once they have been cut but when they are cut they will wither away and no longer grow. Why there appears to be this reluctance to state the obvious, namely that this is all part and parcel of Fundamental Law, is somewhat incredible, even to

[194] Ibid. p. 60.

[195] Ibid. p. 60.

[196] Ibid. p.61.

the extent that the word 'fundamental' is regularly bandied about but not the words 'Fundamental Law'. It may be necessary to repeat yet again that the bark of the tree equates to the body of law properly known as Fundamental Law. The branches are the specific rules of such law. Substitute the words 'Fundamental Law' for 'Jus Cogens' or 'Compelling Law' and it is a distinction without material difference.

Perhaps one of his most telling remarks is when he states that the rules of Compelling Law exist to satisfy "the higher interest of the whole international community".[197] The 'international community' is supposed to represent international humanity. A higher form of law which is in the interests of and fundamental to international humanity is not one which is subservient to any individual, ruler, government, parliament or the like, any more than a rule of jus cogens is subservient to the interests of any individual state. The fact that Verdoss is even having to defend the existence and recognition of compelling law demonstrates how little, legal thought which would benefit civilization, has progressed over hundreds of years. Taking an extreme example, one can visualize a situation hundreds, if not thousands, of years ago when there was no prohibition against what now would be described as murder; rulers getting together and deciding against its express prohibition because it lacked 'certainty' and accordingly there could be no 'consent' to such prohibition.

Various other academic views in relation to jus cogens.

Egon Schwelb's[198], main point appears to be that international law is no different to various other branches of the law in preventing agreement in relation to actions which would violate a norm of mandatory requirements. If that is correct that would support the proposition in this thesis that Fundamental Law, if its existence was recognized in the domestic arena, would contain a norm which was a mandatory requirement. He tends to suggest that all that occurred by Article 53 is recognition of an existing situation. If that is correct then that lends yet further

[197] Ibid, and above in this chapter.

[198] Schwelb, E. 'Some Aspects of International Jus Cogens as Formulated by the International Law Commission', (Oct.1967) Vol. 61, No. 4, The American Journal of International Law, pp. 946–975 and see above.

support to the argument that even in International Law there are limits to the absolutism of a state's sovereignty and supports the contention in this thesis that legal restrictions, restrict such sovereignty. He looked at: (i) jus cogens in municipal legal systems; (ii) the origins of the concept of jus cogens in International Law; (iii) state practice on jus cogens; (iv) the views of the various state powers; and (v) a miscellany of jurisprudential and quasi jurisprudential issues. Schwelb considered that the origins of the concept of jus cogens in International Law as being part of an official codification of the law of treaties originated in Lauterpacht's *First Report on the Law of Treaties* of 1953.[199] In municipal legal systems, he looked at public policy and the law of contract and identified various situations in which a provision in a contract could be held void because it conflicted with certain legal provisions. Accordingly, he appears to submit, by analogy to Article 61 of the Convention, that these provisions are examples of the application of the 'rule' of jus cogens. He identifies a number of specific instances, for example, that an agreement between two spouses that their marriage would be contracted for one year only would be void as contrary to a rule of jus cogens; it being inconsistent with the premise that a marriage contract is for life. On the international front, he looks at a number of cases, many outlined above, and in one case points to the judgment of the Arbitral Tribunal in the case of the *United States of America* v. *Alfred Krupps and others* (a slave labour and armament case tried at Nuremberg after the Second World War), in which the Tribunal held that any agreement with respect to the use of French prisoners of war in German armament production would be void under the law of nations as it was manifestly contra bonos mores.[200]

Phrases such as 'contrary to public policy', 'contrary to the laws of nations' and 'contra bonos mores' may well (when applied to a particular factual situation) amount to a violation of the jus cogens norm. However, that does not assist with being able to define what the jus cogens norm actually is.

Further, and perhaps most importantly, phrases such as 'contrary to public policy' and 'contra bonos mores' have been around, if not since time immemorial, certainly for hundreds of years. This period is well before probably anyone had thought of the words 'jus cogens' in an international legal context. If there was

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[199] Ibid. p. 949.

[200] Ibid. p. 951.

specific conduct which was fundamental as being contrary to law protecting the interests of humanity all those years ago prior to the introduction of jus cogens, which law did it breach? It permits only one reasonable answer, which is Fundamental Law. Of course, there may well have been forms of conduct that governments of nations wished to prevent, which was easy to do by simply stating that it was contrary to the 'law' of public policy without necessarily violating a modern-day jus cogens norm. However, there were other forms of conduct which were recognized or ought to have been recognized as abhorrent all those years ago, which would violate a modern-day jus cogens norm. Torture, is but one example. To suggest that torture is merely contrary to 'public policy' is an understatement in the extreme. 'Violation of Compelling Law or Fundamental Law' appear far more adequate words to describe the situation. If that is correct then violation of Fundamental Law can only occur if Fundamental Law exists to begin with. The establishment of that existence being, of course, a principal point in this thesis.

The paper published by Merlin Magallona is also instructive.[201] At the beginning, the author tends to suggest that there is a connection between the concept of jus cogens in international law and that of public policy in municipal legal systems. The point being made that the common good of the community overrides the interests of individuals. A fortiori the common good of the international community takes precedence over the will of any individual state. The difficulty with that argument is that in order to decide whether a rule is one of jus cogens or Fundamental Law in the international arena it is necessary to ascertain whether the act or conduct complained about is such as to violate a peremptory norm. Most municipal legal systems may well take into account the common interests of that municipality but such interests are not dependent upon peremptory norms. They are dependent upon the political nature of the municipality. In other words they have little to do with peremptory norms. Fundamental Law makes it clear that there are certain forms of conduct which a state is prohibited from carrying out in its international relations with other states. Fundamental Law also prohibits a state or anyone possessing a sovereign power from carrying out certain forms of conduct against individuals. The doctrine of jus cogens recognises this in

[201] M.Magallona, 'The Concept of Jus Cogens in the Vienna Convention on the Law of Treaties' (1976) Vol. 51,.Phillipine Law Journal, pp.521 –542.

interstate relations where treaties between the states are concerned and which have to be construed.

However, the author does take the view that in its operation, jus cogens , is restricted due to the stance taken by the Western powers, as has been seen above, when highlighting their various concerns to the concept from the outset. This paper lends significant support to the view that what is preventing recognition and acceptance of rules of Fundamental Law as a supreme concept is the political approach of many of the great powers. The retention of power within their own municipal legal systems appears paramount; hence, the necessity for the insistence of the doctrine of their own sovereignty. If they were to relinquish any portion of sovereignty in the international arena, they may well have difficulty in attempting to cling on to it in their own domestic systems. It lends support to the view that rules of law are often little more than those rules created by government and their agencies not simply for the benefit of their populations but perhaps more importantly to them, for control of those populations. It may be that there are many such rules which do tend in some circumstances to promote or further the interests of justice but it is doubtful whether that is always the prime objective; retention of power and control often being a principal aim.

Much of the paper concerns construction of the various Articles within the Vienna Convention on the Law of Treaties particularly in relation to the consequences following the identification of a jus cogens norm.[202] He puts forward the point of view that:

"…The logic of the municipal-law analogy may lend support to the existence of an international public order overriding state sovereignty, implying that international jus cogens could acquire validity as legal norms independent of the consent of the individual members of the international community. From the municipal law concept of ordre public it is a short step to transforming the interest of the community into a common will that stands above the wills of the individual states and creates norms binding upon them. This would then place the concept of jus cogens along the thinking which rejects the juridical equality of states,

[202] Ibid. pp. 526–541.

namely, that a group or a majority of states may dictate international law rules binding upon the rest of the international community."[203]

At the end of the paper, the author observes:

"…It may be recalled that the major capitalist powers whose exploitive interests are subserved by those obsolete rules indicated their opposition to jus cogens in the Convention or opted for the restriction of its application; on the other hand, the Third World states and the socialist community firmly supported the principle of jus cogens in all the stages towards the conclusion of the Convention……

Despite the fact that the overwhelming majority of states have recognized the existence of jus cogens, the operation of jus cogens rules under the Convention is seriously restricted, largely on account of the stand taken by the Western powers…"[204]

A further difficulty with this paper is that it tends to confuse the issues of politics and law. It is accepted that the two are often interwoven, particularly in the international arena, but they are nonetheless distinct. A rule may or may not become law because of a prevailing political situation. Equally, a rule may be law but not recognized as such because of perceived political consequences. Such rules of Fundamental Law which do exist, however, are nonetheless rules of Fundamental Law irrespective of whether one is discussing a Third World country, a communist one, a socialist one, a conservative one, or indeed whatever is the political make-up of the country concerned.

Some have argued [205] that the origins of Human Rights Law lie within Customary International Law. Their point is that international jus cogens is fundamental human rights.[206] This again supports the contention within this thesis that there exists Fundamental Law which is for the benefit of individual human beings.[207]

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[203] Ibid. p. 522, including part of a statement from the representative for Yugoslavia at the 683rd meeting of the International Law Commission.

[204] Ibid. p. 542.

[205] B. Simma and P. Alston 'The sources of Human Rights Law: Custom, Jus Cogens and General Principles'. (1992) 12 Australian YBIL, 82.

[206] Ibid. p. 103

[207] See below, Chapters Five and Six.

Much of that kind of argument is concerned with the extent to which it can be said that the origins of Human Rights Law lie within Customary International Law. If this is correct it lends further support for the existence of Fundamental Law independent of Human Rights Law, for the authors do not state that international law is the source of Human Rights Law but that jus cogens can be associated with a fundamental human right. That is to say not any human right but a 'fundamental' one. The relationship between Fundamental Law and Human Rights Law is dealt with in the next chapter. The paper recites the opinion of the ILC that: "(I)t is not the form of a general rule of international law but the particular nature of the subject matter with which it deals that may… …give it the character of jus cogens…"[208] The paper then construes the definition used in Article 53 of the Vienna Convention on the Law of Treaties, focusing on the phrase 'international community of states as a whole' adopting an approach of:

"If we compare the interpretations given to the term 'international community of states as a 'whole' with the prerequisites for 'general practice' eventually leading to the formation of custom, we are safe in concluding that the threshold requirement for the emergence of jus cogens, namely the generality, or universality, of acceptance and recognition, is set at least as high as that necessary for the development of general (or universal) customary law."[209]

The authors then refer to the report of the Committee on the Formation of Customary Law, entitled *The Role of State Practice in the Formation of Customary and Jus Cogens Norms of International Law*, reiterating the view that it is doubtful whether rules of jus cogens can ever meet the generality of practice criterion, as most, if not all, rules of jus cogens are prohibitive in substance; they are rules of abstention.[210] Here the authors appear to accept that there are rules of Fundamental Law. The difficulty is that with a few exceptions contained within the paper of Rafael Nieto-Navia[211] no-where is there a definitive list as to what these rules are.

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[208] Ibid.

[209] Ibid.

[210] Ibid. p. 103.

[211] See below.

If rules of jus cogens are or can be equated to fundamental human rights, which body of law do they properly fall into? It is properly arguable that it belongs to the same body of law with which the Tribunal at Nuremberg[212] was readily concerned and which part of the Universal Declaration on Human Rights was also concerned.

The point taken by Michael Byers in his paper published in 1997,[213] was that jus cogens rules were: "constitutional rules which help define the fundamental characteristics of the international legal system… …being derived from the long established process of customary international law…"[214]

While it is easy to see that jus cogens rules were constitutional in nature and could lead to a form of constitution in International Law, it is more difficult to see how such rules could be derived from Customary International Law. Most of the learned academic authors appear to accept that Customary International Law is 'consent based' in the sense that such rules require the consent of the nations to be operative. However, acceptance of rules which are specific rules of Compelling Law is the acceptance by imposition upon the nation of particular rules, which has little to do with consent, other than that required for being accepted as part of the international community of nations. It is true that a state can always say that they do not agree with any particular rule of Compelling Law in the same way that they can say that, in its view, there is nothing wrong with genocide, for example, but this may well lead to the state not being accepted by the international community of nations.

L.M. Caplan has argued that the real problem lies within the concept of 'state immunity'.[215]. The author adopts the view that the concept whereby sovereign states enjoyed absolute immunity from suit is a myth. If it is a myth for a state to claim that it enjoys immunity from suit because it is sovereign this lends some support for the proposition, as argued in this thesis, that a doctrine whereby a

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[212] See above, Chapter Three.

[213] M.Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules'(1997) Nordic Journal of International Law, 66, pp. 211–239.

[214] Ibid. p. 239.

[215] L. M. Caplan,. 'State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory'. (2003) Vol. 97. The American Journal of International Law, p. 741.

parliament can make any law it wishes because it is sovereign is equally a myth, for if it could make any law it wishes it would not be liable to any action for implementing a repugnant law, for example, because it would be immune from such action under the doctrine of State Sovereignty. The author examined the case law and found that the normative hierarchical approach was unsatisfactory before coming to the following conclusion:

"State immunity is the product of a conflict between two international law principles, sovereign equality and adjudicatory jurisdiction, which conflict is resolved more persuasively in favour of adjudicatory jurisdiction."[216]

"The awkward development of the doctrine of foreign state immunity in the twentieth century, which derived from the myth that states once enjoyed absolute immunity from suit, has, however, distorted the perception of how state immunity operates. Today, the prevailing formulation of state immunity laws improperly reverses the presumption of adjudicatory jurisdiction by establishing a catchall rule of immunity. Consequently, in many national jurisdictions state immunity laws grant foreign state defendants more protection than customary international law requires."[217]

"With respect to certain core state conduct, the practice of waiving adjudicatory jurisdiction has crystallised into a rule of customary international law binding on states… …sufficient evidence testifies that customary international law does not compel immunity protections for state conduct that violates human rights. Any immunity that a foreign state receives for such conduct is solely conferred by domestic laws."[218]

"The normative hierarchy theory offers an unpersuasive solution to the human rights litigation problem. The theory assumes a clash of international law norms of human rights and state immunity that, in fact, does not occur."[219]

Caplan appears to suggest that there is no clash between the norms of human rights and state immunity. If that is correct, both human rights and state immunity

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[216] Ibid. p. 780.

[217] Ibid.

[218] Ibid. pp. 780 –781.

[219] Ibid. p. 781.

ought to exist as independent concepts, which certainly appears to be the case. However, while it is easy to see that human rights have a 'normative' foundation in the sense that many of them are underpinned by a norm consistent with justice (whatever that may mean), it is difficult to see that there is a normative basis for state immunity. State immunity appears to be little more than a rule created by the states for their own self-protection from legal proceedings in a court.

It is doubtful that there is or would be a 'human rights litigation problem'. The problem appears either in the outright refusal to recognize certain human rights or attempts by various means and devices to get around something which, for whatever reason, may not be palatable to the state concerned. The necessity for jus cogens arose because it was accepted, eventually, by the states who signed up to the Treaty that there were norms which prevented a state from doing everything it wished to do in accordance with its will. These norms result in rules of Compelling Law. What such rules are is a different question.

In 2003, Kerstin Bartsch and Bjorn Elberling [220] focused primarily on the decision in the case of *Al-Adsani* v. *the United Kingdom*. They identified two main arguments in support of the proposition that state immunity exists in cases such as *Al-Adsani.*[221] First: "…there is no actual conflict of rules between jus cogens norm allegedly violated and the reliance of states on state immunity before the courts. In international law which knows no central law-making and law executing authority, one must always distinguish between material rules and the ways in which these rules are enforced…. state immunity only concerns the enforcement, not the material content of the jus cogens rule;[222] and second: 'state immunity, is of a largely political rather than legal character. It is feared that any denial of state immunity could potentially result in judicial chaos."[223]

They were of the opinion that neither argument was fully convincing and, referring to the narrowest of majorities in the *Al-Adsani* judgment, concluded that "there is

[220]K. Bartsch and B. Elberling, 'Jus Cogens vs State Immunity; Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al v Greece and Germany Decision'. (2003) Vol. 4. No. 5, German Law Journal, p. 477

[221] See below, this chapter.

[222] Ibid. p.484

[223] Ibid.

a certain potential for a welcome change in the jurisprudence of the Strasbourg court".[224] Perhaps this is a politically correct way of stating that state sovereignty is an 'outworn doctrine' [225] in the modern world's legal systems.

Identification of the source of Compelling Law and its distinction from Natural Law[226]

Rafael Nieto-Navia [227] identifies the validity of international law, recognition of the concept of jus cogens in international law and formal legal recognition of the concept of jus cogens in the Vienna Convention. His principal point is that the rules of jus cogens are rules of positive law the source of which is normative. This legal proposition is now recognized by the international community. Substitute for the words jus cogens the words Fundamental Law and that statements is ad idem for many of the aims and objectives of this thesis.

Nieto-Navia is able to make this point by identifying that the validity of international law occurred from the growing institutionalization of the international community. This required regulation. He makes the point that often, this was achieved by agreement between states but also by individual states recognizing a 'so-called international conscience'.[228] Laws have been developed or created "…not by an international legislator or sovereign, but very generally through the consensus of states which have recognized that certain 'values' amount to norms which must be respected as between states….[229] sources of international law are generally regarded as having been exhaustively enumerated in Article 38(1) of the Statute of the International Court of Justice, which does not expressly mention jus cogens norms."[230] However, it does state in (c) general principles of law recognized by civilized nations. He further makes the point that the basis of the jus cogens norm, in part, goes back hundreds of years. Whether that is a result of theories akin to Kelsen's grundnorm or a theory of natural law matters little. An

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[224] Ibid. p. 491

[225] See above. Chapter Three.

[226] See also pp. 12-16 above.

[227] R.Nieto-Navia, 'International Peremptory Norms (Jus Cogens) and International Humanitarian Law'. (2001) Iccnow.org

[228] Ibid. p.2.

[229] Ibid.

[230] Ibid. p.3.

important point, in the context of this thesis, if the author is correct, is that compelling law may well have had its origins hundreds of years prior to it being called compelling law, albeit that only in more recent times has it been recognized by the international community. What was such law called hundreds of years ago?

Nieto-Navia further argues that the theoretical acceptance of the concept of jus cogens can be traced back to the Fourth century AD by noting the use by the Stoics of the phrase 'universal reasoning' and a 'universal state' in which all men should be equal.[231] The author then refers to 'necessary natural law', referring to Wolff, Vattel and Grotius. He then appears to adopt a definition that "natural law was the dictate of right reason involving moral necessity, independent of any institution – human or divine"[232] He clarifies this interpretation further as being 'necessary law which all states are obliged to observe'.[233] The phrase 'the common good of humanity' looms large and refers to Bodin's admission that "the sovereign was always subject to the overriding 'laws of God', natural law and the laws of nations…."[234]

"Natural law theories began to disappear and …what began to dominate thinking in the international arena were both new rules from state practice and what became known as the Positive Law doctrine… …Although the notion of jus naturale necessarium still maintained what could be described as a moral significance… …The overriding notion became rather the idea that international law was created solely through the will of states and was therefore subject to neither limitation nor restriction. Based on such interpretation in theory states could enter into treaties having any object or purpose.[235] Nevertheless, for some authors the very foundation of law remained what was contained in fundamental hypothetical norms (grundnorm), natural law or la solidarite naturelle.[236] The concept of norms of jus cogens developed partly from these concepts. However, they are not the sole source of origin. This is because,

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[231] Ibid.

[232] Ibid.

[233] Ibid. p.4.

[234] Ibid.

[235] Ibid.

[236] Ibid. p. 5.

although natural law theory is based on a belief that there exist concepts exterior to and above positive law and which are contained in overriding fundamental norms, jus cogens is not; on the contrary. Norms of jus cogens form an integral part of positive law which are accepted and recognized by the international community… …their character derives from within international law and from the will of states."[237]

The underlying acceptance that there has always been certain types of behaviour that were considered to warrant prohibition is a further salient point. It was considered fundamental to the workings of a civilized legal system for such types of behaviour to be prohibited. Notions of the nature of grundnorm or Natural Law are considered by many to amount to rules fundamental to the working of a civilized legal system. If a rule can be properly called fundamental, it is not unreasonable that together such rules form part and parcel of a body of law which is fundamental to law itself. That is fundamental to any expressly stated rule, however and by whomever such rule is imposed. Once the word 'conscience' is used in legal terms that equates with a form of 'equity'. By definition, international conscience equates to international equity. What is imperative is not to lose sight of the fact that the basis of equity was normative in the same way that conscience is normative. Once specific rules are developed from a norm they can easily become rigid in form and further development occurs not from the norm but from the rule itself. For example, if the Compelling Law norm is interpreted simply as a variety of rules such as the prohibition against genocide, torture and the like, development can easily occur by applying the principles of the prohibited conduct to each new factual situation. If, on the other hand, the body of law referred to as Compelling Law has a normative source, which can be given a meaning, development could take place by looking at whether the new factual situation was consistent or inconsistent with that meaning. This would result in a wholly different kind of legal development taking place, as illustrated above, based not so much on the rigidity of rules of law but on the very meaning of the norm.

When language in the nature of 'right reason', 'moral necessity', 'universal conscience', 'universal reasoning', 'values' and the like is used, one is using the same or similar language as used on many occasions earlier in this thesis in relation to

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[237] Ibid.

Fundamental Law. All such language can properly be said to form the normative base of Fundamental Law.

It is clear that a substantial proportion of the international community recognizes and favours the concept of Compelling Law. Some, notably the UK and France, appear to be driven into the acceptance of specific rules of Compelling Law but seem to mainly argue about any acceptance of the norm from which the rules derive. They appear, by implication (as argued above), to be somewhat unhappy about any reduction in their professed absolute power. That having been stated, the concept of Compelling Law exists in the field of International Law. It is therefore necessary to look at its application, if at all, in domestic law.

The Modern Judicial Approach to the Concept of Fundamental Law

It has been seen[238] that with very few exception the judicial approach in the UK to Fundamental Law since the middle of the seventeenth century was that it was a concept whose existence they refused to recognize. This was justified on the basis that it was the doctrine of Parliamentary Sovereignty which reigned supreme. Thirty years after the Vienna Convention which recognized Fundamental Law as a concept of international law at least in relation to treaties between states, the case of *Al-Adsani v The United Kingdom* [239] fell to be determined, firstly in the UK. The principal point which arose in the UK proceedings was whether the UK had jurisdiction to try a case where the potential defendant was a foreign sovereign state, namely the state of Kuwait. The relevance in the context of this thesis is that the arguments and judgments moved away from simply whether Fundamental Law only applied, if it applied at all, in treaties between states but could be used as a concept to confirm a right and provide a remedy to an individual.

This case concerned one of the accepted rules of jus cogens, namely the absolute prohibition against torture. The state of Kuwait claimed sovereign immunity under the Section 1(1) of the State Immunity Act 1978 which contained certain exceptions to the right to claim such immunity. Torture was not one of

[238] See above, Chapters One and Two.

[239] Al-Adsani v UK (2001) 100 Int. Law. Rep. 465, ECHR, Strasbourg judgment, 21/11/01.

them. This case clearly showed that as far as the UK courts were concerned the Statute prevailed, continuing to give effect to the doctrine of Parliamentary Sovereignty. Not only is torture not an exception to such immunity but neither are such offences as genocide, crimes against humanity, waging aggressive wars and the like. Further, while the Act creates an exception to immunity if bodily injury is caused such injury has to have occurred in the UK.[240] In addition an exception to immunity applies in relation to criminal proceedings[241] . This has to be distinguished from criminal offences to which immunity prevails. Whether or not criminal proceedings are commenced is nearly always at the discretion of the state and even in those circumstances in the UK where a private prosecution could be commenced in the criminal courts, it is always open to the Attorney General to intervene and issue his fiat preventing the continuance of such proceedings.

The High Court and the Court of Appeal upheld the claim of sovereign immunity. The House of Lords refusing leave to appeal. This is further evidence of the continuing theme throughout this thesis of the absence of true rights for the individual, any such so called right being contingent upon Parliament permitting it. The fact that the UK has accepted the doctrine of Compelling Law in an international treaty appears to be irrelevant as far as its courts are concerned.

The applicant, having exhausted the legal process in the UK then took his case to the European Court of Human Rights claiming violation of his rights protected by the Convention. Here again his application was dismissed this time by a bare majority on the issue as to whether there had been a violation of Article 6.1 of the European Convention on Human Rights. (Entitlement to a fair and public hearing established by law etc.) The bare majority argument adopted a constructional approach utilizing positive Human Rights Law. The substantial minority view appeared to differentiate between Human Rights Law and Compelling Law. To the minority, there was no place for doctrines such as sovereignty if there had been a violation of a rule of Compelling Law. Here, there is a clear indication of a legal movement towards refusing a plea of sovereignty in order to deny jurisdiction of a forum state when the allegation involves a violation of a positive rule of Compelling Law. In Europe, an approach more consistent with recognition

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[240] S.5.

[241] S.16(4)

of the concept of Compelling Law was being taken by many, but not all. There were still many in the, albeit bare, majority who appeared concerned with the political consequences of the failure to uphold the concept of state immunity, which to them would appear to prevail over what they may well have considered a developing concept of Compelling Law.

It is singularly significant that this legal movement, as evidenced by the minority view, has little to do with the presence of such Compelling Law or the norm which underpins it in treaties or other agreements. It is moving towards recognition of conduct which is considered to be sufficiently objectionable as to justify universal jurisdiction and, in one sense, universal condemnation.

This illustrates the point as to the weakness of Human Rights Law when the concept of sovereignty is being raised and how both in the UK and in Europe the so called rights of the individual are regularly being treated by the courts as being subservient to the perceived interests of states. It matters little whether there is a treaty which expressly recognizes the concept of Fundamental Law. The courts appear wholly unwilling to uphold an individual's right to it, in the sense of providing a remedy for its violation by a foreign state, unless this forms part and parcel of proceedings brought by the forum state or a European Court against the foreign state or individuals within it. Political policy appears to take precedence over the rule of law.

That having been said the proceedings in Europe are instructive as to the movement towards the rectification of the above approach by proper recognition of Fundamental Law which would uphold the rights of the individual against a foreign sovereign state and what occurred in the proceedings in Europe is relevant for the purpose of ascertaining such movement. The point being made by eight leading European judges could be simply stated that once it is formally recognized that the type of conduct which violates a specific rule or the norm providing such universal jurisdiction, while the specific charge may well be a form of, for example, torture, the reality is that what has been violated is a fundamental humanitarian principle.

It is regrettable that instead of trying to find a form of words to include such conduct as is the case with crimes against humanity or violation of a jus cogens norm,

the simple answer is conduct contrary to Fundamental Law, whereby the specific rules or crimes amount to the statement of the law.

The dissenting judgment provides compelling evidence of a movement towards recognition of Fundamental Law. If these eight judges were correct, it is the most superior form of law and overrides any other rule of international law, doctrines of sovereignty and accordingly a fortiori domestic statute law. Their judgment would not be incorrect if one or more of the judges in the majority judgment had supported their judgment on a basis other than legal grounds, for example purely political ones. A look at the principle for that dissenting judgment is therefore important. Most of the dissenting judges joined together in a single dissenting opinion. The following statements taken from that opinion are particularly significant.

"…By accepting that the rule on prohibition of torture is a rule of jus cogens, the majority recognise that it is hierarchically higher than any other rule of international law, be it general, particular, customary or conventional, with the exception, of course, of other jus cogens norms. For the basic characteristics of a jus cogens rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a jus cogens rule and any other rule of International law, the former prevails…"[242]

"…since jus cogens rules, protecting as they do the 'ordre public', that is the basic values of the international community, cannot be subject to unilateral or contractual forms of derogation from their imperative contents."[243]

"…Due to the interplay of the jus cogens rule on the prohibition of torture and the rules of state immunity, the procedural bar of state immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on state immunity cannot be

[242] Ibid. para 1 of the dissenting judgment.

[243] Ibid. para. 2.

invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of jus cogens."[244]

It is not the nature of the proceedings which determines the effects that a jus cogens rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. The prohibition of torture, being a rule of jus cogens, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere. The criminal or civil nature of the domestic proceedings is immaterial.[245]

A number of scholars have cited a variety of cases either by way of background to the formal recognition in positive form of compelling law or to illustrate how the concept has developed.[246] One of the earliest cases cited is that of *The Schooner Exchange* v. *McFaddon*[247] in which a privately-owned schooner had been converted into a ship of war by order of the French government. On entering US territory, the owners commenced litigation for the recovery of their ship. Chief Justice John Marshall stated on the one hand that: "(t)he jurisdiction of the nation within its own territory is necessarily exclusive and absolute,"[248] and on the other hand he observed that: "the world is composed of distinct nations each possessing equal rights and equal independence."

Accordingly, while the USA had jurisdiction to hear and determine the case, it would not exercise that jurisdiction in relation to another sovereign state. This is sometimes referred to as the doctrine of sovereign equality. While this case can be cited as support for the doctrine of sovereignty generally and whether there are competing jurisdictional issues within the concept of State Sovereignty specifically, it has little or no bearing on the issue whether there is some form of superior law to that of State Sovereignty in the sense that the doctrine of State Sovereignty cannot be used as a defence for violation of such superior law.

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[244] Ibid. para. 3.

[245] Ibid para. 4.

[246] For example, L. M. Caplan and section on academic approach (supra).

[247] 11 U.S. (7 Cranch) 116 (1812)

[248] Ibid. p. 126.

In the nearly two hundred years between the *Schooner Exchange* case and the *Al-Adsani*[249] case, various other cases[250] came before the courts, which have been identified by lawyers and scholars (infra) alike as being somehow relevant to the issue of compelling law. These cases, however, appear to be more supportive of the doctrine of State Sovereignty than concern issues of Compelling Law; acceptance or express recognition. Further, the operative words in the *Al-Adsani* judgment[251] are singularly instructive: "The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that states are not entitled to immunity in respect of civil claims…"[252]

This raises two points: (i) the Court does not use the language of jus cogens or Compelling Law but specifies the rule against torture; and (ii) the Court is looking for guidance in the form of acceptance by the international community before deviating from its established course of upholding the principle of State Sovereignty to defeat a variety of claims originating from forms of humanitarian law.

Observations

It is clear that the concept of Fundamental Law exists in international law. It may be suggested, notwithstanding the arguments in the case law referred to above, that it applies only in a legal relationship between states. Such a statement is of doubtful accuracy for there would always be the excuse for a state's violation of Fundamental Law by stating that there was never any intention to enter into a legal relationship between the states. Fundamental Law guides behaviour

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[249] See above, this chapter.

[250] *The Case of the S.S. Wimbledon* (1923) P.C.I.J. (Ser.A) No 1, at 22. *The Case of the S.S. Lotus* (Fr. V Turk.)(1927) P.C.I.J. (Ser.A) No. 10 (Sept 7) p.6. *The Barcelona Traction Case.* Belgium v Spain. (1970) I.C.J. Reports p.3; *The Nuclear Test Cases.* (1973) I.C.J. 20 December 1974, p.2; *Nicaragua* v *United States of America* (27th. June 1986) I.C.J. 14; *Argentina Republic* v *Amerada Hess Shipping Corporation* (23rd. Jan. 1989) 488 U.S. 428; *Hugo Princz* v *Federal Republic of Germany* (1993) 26 F. 3rd. 1166 U.S. App. D.C. 102; *Democratic Republic of Congo* v *Belgium* (Feb. 2002), I.C.J. General List No. 121 (arrest warrant cases.)

[251] See above.

[252] Ibid.

between states and prevents conduct which violates its underlying norms. The specific rules which amount to rules of Fundamental Law are subject to recognition by development over time, although some, such as the prohibition of torture, genocide, slavery and similar rules, appear to be accepted as rules.

In domestic law, many countries still appear either to refuse to recognize the concept of Fundamental Law in their own legal systems, particularly if it is inconsistent with their belief in the absolutism of State Sovereignty, or undermines their doctrine of Parliamentary Sovereignty. Alternatively, they will not deny the existence of the concept but will differentiate on a factual basis as the reason for applying State Sovereignty to defeat a claim based on Fundamental Law. However, one country, Switzerland, appears to have recognized the manifest absurdity of a body of law of the nature of Fundamental Law being recognized in the international arena but not in domestic law, and bound all levels of domestic law to Compelling Law.[253] Other countries, including the USA, Canada and Israel, already have a number of expressly stated laws in place, entrenched within their constitutions or basic law, which they consider to be fundamental to their domestic laws. Whether one wishes to refer to such rules as rules of Compelling Law, Basic Law or another form of words, they are all expressly stated rules which could be properly referred to as rules of a law, the principles behind its existence being, as has been seen,[254] first recognized by many, hundreds of years ago in the form of Fundamental Law.

The civilization of those countries which recognize Fundamental Law is likely to progress in the interests of its own people much faster than those countries who still cling to notions of absolute supreme power producing rules to be imposed upon, at any time, their own people, irrespective of whether they contravene Fundamental Law. This is justified by ‘sound bites’ such as democracy, parliamentary democracy, ‘wishes’ of the people and the like. Perhaps in the most simplistic terms states which still refuse to recognize Fundamental Law have to answer one core question which is: If Fundamental Law is considered necessary to regulate a state’s conduct with another state why is not thought that the norms resulting in expressly stated rules regulating conduct between states should equally apply between the state and its citizens? In other words why should the

[253] Artikel 139 Volksinitiative auf Teilrevision der Bundesverfassung.

[254] See above, Chapters Two and Three.

citizens of a state not be protected from certain conduct of the state by recognition of a body of law, in the same way that a state is so protected?

The case law does not appear to attempt to identify the theory behind Compelling Law. Many academic papers attempt to trace the origins through various other branches of the law such as general customary law or customary international law or argue consent-based theories as the reasons for its existence. There are a few, notably Nieo-Navia and Verdoss, who have attempted to identify the true theoretical basis for Compelling Law. The former puts it succinctly in the phrase 'the interests of the international community'. One would have thought that if something is in the interests of the international community it would be in the interests of all the citizens who make up that community. The citizens who make up the international community, as referred to above, together form international humanity. It is the principles which underpins compelling, Basic or Fundamental Law which has to be ascertained.

However it is viewed, this chapter is probative of yet further recognition of a concept which can properly be referred to as Fundamental Law and which exists as a body of law. That body of law has produced rules, some of which have been identified and recognized, for example, torture and prohibition of genocide. Others await identification and recognition. What has been identified but not given meaning with reasonable clarity is the existence of a 'peremptory norm'. It is that norm which has to be given sufficient meaning because within such meaning the principles behind the rules emerge, and from such principles further rules can be developed. However, the question which has to be asked is why should it be necessary for the international community of states as a whole to recognize a norm as being a 'peremptory' one? What if a particular norm is recognized as being peremptory by the majority of states but not by the states as a whole? Perhaps even more important still what if the norm is recognized as a peremptory one by the people at large who make up that international community but is not recognized, for example on political grounds, by many of their own states?

In the academic papers referring to Compelling Law, there is regular reference to Human Rights Law. In 2000, more than fifty years after the Universal Declaration of Human Rights and some thirty years after the Vienna Convention, the provisions of the Human Rights Act 1998 were finally given statutory recognition

in the United Kingdom. It is now important to examine the relationship between Human Rights Law and what has been referred to as Fundamental Law.

CHAPTER FIVE

THE RELATIONSHIP BETWEEN FUNDAMENTAL LAW AND HUMAN RIGHTS LAW

Introduction

It has been seen that as from as early as the mid seventeenth century, people in the UK possessed fundamental rights and liberties 'supposedly' protected in the UK by a law of some description. Some three hundred years later the possession of rights and liberties by individuals were recognized at the Tribunal in Nuremberg and if certain of these rights were violated criminal offences followed. Accordingly these rights and liberties were protected by law and recognized in International Law. Shortly after the conclusion of the Second World War the Great Powers expressly stated what they considered to be the rights and liberties of the people in a document known as the Universal Declaration of Human Rights. In the latter part of the twentieth century numerous nations entered into a treaty which expressly recognized the concept of Fundamental Law albeit that it was given Latin terminology which translated means 'Compelling Law'.

On 5th. May 1949 the Treaty of London was signed, which created the Council of Europe. There were ten signatories, including the UK. In 1950, the Council of Europe drafted a *Convention for the Protection of Human Rights and Fundamental Freedoms,* signed in Rome on 4th. November 1950. This became known as the European Convention on Human Rights (ECHR). The Convention also established the European Court of Human Rights. The Convention came into force on 3rd. September 1953. All Council of Europe member states are a party to the Convention and new members are expected to ratify the convention at the earliest opportunity.

Although the UK became a party to the Convention in 1953, it did not form part of the UK's domestic law until the year 2000, when the Human Rights Act (HRA) 1998 received the Royal assent and became law. In many other states, such as Germany, Austria and France, the Convention became part of the domestic law of those states, in one form or another, within a comparatively reasonable time.

Relevance of Human Rights Law to Fundamental Law

Human Rights Law in the UK is a domestic law which grants certain fundamental rights and liberties by virtue of a statute. This statute, like any other statute can be amended or repealed at any time. It is pertinent to mention that it is not unusual for governments in the UK to express consideration for repealing the Human Rights Act, albeit with the possible substitution of another statute. There can be no doubt that if it were to be repealed, for example, government and the judiciary would be treating any claim to any of the rights and liberties presently contained within the statute of little or no relevance for any individual who attempted to claim the particular right or liberty which had previously been stated prior to the repeal.

Similarly, in relation to the ECHR[255] its relevance lies in the continuation of its recognition by any country. The Human Rights Act in the UK substantially followed and reproduced the ECHR with a few comparatively minor reservations. Both the ECHR and the Human Rights Act appeared to have utilised the UDHR as some form of template for further identification by way of express wording of those rights contained in the UDHR.

The Universal Declaration of Human Rights (the Declaration) was issued on behalf of numerous nations in 1945. The ECHR came into effect in 1950 and has been subjected to amendment by various protocols over the years. There are now fifty-nine Articles and thirteen Protocols, which in themselves contain a number of Articles; many of the latter being procedural. This is to be contrasted with the Declaration,[256] which referred to thirty such Articles.

There are a number of substantial differences in the wording of the various Articles contained within the UDHR and the ECHR. It appears that the Declaration was being utilized as little more than a basis for formulating the particular rules to be contained in the Convention. This provides more than a reasonable inference to suggest that the states were far from happy with the wording of the original Declaration and set about making numerous and various qualifications to the individual rights which had been stated in it. Most of these

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[255] There are other Conventions pertinent to individual rights, improperly so called, eg. Convention on the Rights of the Child (1989) but it is the ECHR which is focused on in this chapter as being directly relevant.

[256] See above, Chapter Three.

qualifications went much further than can reasonably be said to be necessary for proper government but to simply preserve for the state as much power as possible over the people. Yet at the same time accepting the notion that people did have rights and freedoms.

Perhaps two of the most striking qualifications are: (i) as has been seen,[257] the language of the Declaration is mainly couched in terms of true rights, properly so called, with little import of caveats, provisos and other forms of qualification, whereas the Convention tends to be the opposite; (ii) only six of the Articles in the Declaration qualify the right with phrases such as 'before the law' (Article 6), 'protection of the law' (Articles 7 and 12), 'by law' (Article 8), 'according to law' (Article 11), and 'determined by law' (Article 29). In the Convention, there are some fifty-nine Articles in addition to various additional Protocols, which also contain numerous Articles. Of the fifty-nine Articles, the first eighteen contain what could be reasonably referred to as substantive provisions, of which twelve state the substantive rights (Articles 2–13). Of these twelve, ten qualify the 'right' by phrases with specific reference to 'law'.

There is a clear distinction in substance between the rights contained within the Universal Declaration and those contained within the Convention. The latter containing numerous caveats and provisos. The reason why the states appeared to insist on 'watering down' the rights contained within the Declaration to such a substantial extent and further appeared to deliberately seek to omit the word 'fundamental' from the substantive rights contained within the Convention appears to be to make such rights contingent upon the will of the states' government, parliament or the like. They are all conditional upon the grace and favour of the state in permitting the relevant instrument, be it a statute or convention, to remain in force when the right is claimed. That is, the rights are contingent upon the will of the states' government, parliament or the like.

One thing which can be stated is that the ECHR and the HRA may well amount to law but they do not grant a single true right, properly so called, to any individual human being. It needs re-emphasizing, they are no more than privileges granted by a sovereign entity whose alleged absolute power has no proper legal basis. This is in complete juxtaposition to the Declaration, which mainly declares such

[257] See above, Chapter Three.

rights, independent of any method necessitating the creation of domestic law as a condition precedent for the existence of the right.

When the various representatives of the member states came together to formulate by expression of language the various ‘rights’ now embodied in the Convention, it is self-evident that they took into account the interests of their own state and the importance of governability. Hence, the necessity for the various qualifications, caveats and provisos to those stated as ‘rights’. Yet, while the importance of the retention of the necessity for the ability to govern, with minimal interference, is perhaps perfectly reasonable and understandable, these ‘fundamental rights’ and ‘fundamental freedoms’ which they were to ‘tinker’ with belonged to the people; to human beings. No one totally independent of government or state appeared to represent the people when the ‘rights’ contained within the Convention were being formulated and agreed upon. The perceived political interest of the state appears to have always been paramount when drafting the wording. The evidence of that is to be found in the nature of so many of the provisos and caveat contained within many of the Articles which are there to benefit the state. They do not benefit the human being. Accordingly, one appears to be left with a field of law referred to as Human Rights Law, which takes its place alongside all other branches of the law and which is subject to similar issues such as construction, amendment and repeal as with any other branch of the law.

The overwhelming majority of the people, including lawyers and scholars, in the UK for example, actually believe that not only do they possess fundamental rights and liberties but that such rights are protected by, in particular, the Human Rights Act. The reality is that, it is necessary to emphasize, they do not possess a single true right and liberty properly so called. The reason for that as is referred to above, is the inclusion of the words such as ‘according to law’ or ‘by law’ and the like. The law referred to is the form of law presently recognized, in particular Statute Law. The repeal of the statute is the removal of those ‘rights’. The words ‘according to law’ or the like are there to preserve in the UK the perceived doctrine of the absolutism of Parliamentary Sovereignty and in other jurisdictions where they may have similar wording but perhaps a different political structure. It is as if the state is saying in one breath ‘we accept that you, the people, do have vested fundamental rights and liberties as we accepted, in the case of the UK, during the trial of King Charles I; as we accepted when we were a party to the formation of

Nuremberg Tribunal or agreed with its formation and agreed with its judgment; as we accepted when we were a party to or supportive of the UDHR; as we accepted when we were a party to and agreed with the doctrine of Compelling Law. We will therefore grant you the 'privilege' of such rights and liberties which we, the State, are free to remove at any time by the will of any government.'

The effect of the argument that nothing can be said to be law unless it is as a result of some form of command from a recognized sovereign body produces an effect which undermines the fundamental reason why rules of law have to be obeyed and why they ought to command respect amongst the overwhelming majority of the citizens of any state. That reason is the intrinsic belief by millions of individuals in the world that law is directly related to justice in its various forms.

Consider this. Assume that there had been no European Convention and no domestic legislation based upon the Convention. Does that mean that the law as referred to in the charge sheet against King Charles I; or the declaration within such charge sheet that people have rights and liberties; or that the reasoning behind the judgments at Nuremberg often resulting in the death sentence being passed; or that the Universal Declaration of Human Rights declaring fundamental freedoms are all collectively or individually irrelevant and devoid of any legal basis? Simply put are they all meaningless in legal terms, devoid of any legal effect? If the answer is, as it would appear to be, that they are so devoid, it follows that judges, lawyers and academics are prepared to ignore, in a legal sense, the words, for example, of the Declaration. This is because the Declaration is not an accepted format of law. The fact that such words emanated from the world's great leaders appears to be of little consequence. Equally, the horrendous events which necessitated the Declaration do not appear to find relevance in legal terms. Many of the judges, lawyers, academics and, in particular, the states themselves, would no doubt argue that these points, like the Declaration, are little more than 'political' statements. It is the Convention, they would no doubt say, which is important in legal terms.

It is properly arguable that the reality is exactly the opposite: namely, that it was the Declaration which in certain areas had the force of law as declared. It is true that it would not be Statute Law or other presently so-called recognized source of law, that is recognized by the judiciary, but that does not mean that it is not law or capable of being law. The issue is simply what law would it be? To which

the answer is Fundamental Law and some of its rules as expressed in some of its Articles are rules of such law.

In order to identify how a rule of Human Rights Law can properly be said to amount to a rule of Fundamental Law it may be useful for a short overview as to the rights, improperly so called, contained within the Human Rights Act.

Categories of Convention Rights

The law, as stated in the Convention and adopted by member states in their domestic legislation, tends to fall into the following distinct categories:

(i) There are those rights from which no derogation is permitted. An example of such a right is to be found in Article 3: Prohibition of Torture. It is pertinent to mention that the right to life, as contained within Article 2, is often a presumed 'absolute' right in that it prohibits capital punishment. It is not one which is recognized in certain states of the USA. Does that mean that the USA or some of its states by not recognizing such an 'absolute' human right do not recognize that people have fundamental human rights and freedoms?

(ii) There are those rights which are substantially qualified by provisos, caveats and the like. An example of this is to be found in Article 4: Prohibition of Slavery and Forced Labour. The latter section of the Article contains qualifications: here, subsection (3) of the Article provides various, understandable, exceptions to the forced labour part of the Article.

(iii) There are rights which are akin to social justice. An example of this is to be found in Article 11: Freedom of Assembly and Association, which states that:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime and for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

Freedom of assembly is a major part of the political and social life of any country. It is an essential part of the activities of political parties……..and the conduct of elections under Article 3 of the First Protocol, which are to ensure the free expression of the opinion of the people.[258]

(iv) There are those rights which, while they may touch upon areas of social justice, are fundamental for the delivery of justice to the individual human being. Examples of these rights are to be found in Article 5: Right to Liberty and Security, and Article 6: Right to a Fair Trial.

There are a number of rights contained both within the UDHR and the ECHR which would appear to fall, not simply into a different category to many other rights contained within Human Rights Law, but to be different in nature from those other rights. This is because inherent within the particular right is that it appears to be personal to the individual or for the protection of the individual and that there is little or no qualification within the ECHR to the right. These are: Article 3: Prohibition of Torture; Article 4 (in part): Prohibition of Slavery; Article 5: Right to Liberty and Security; Article 6: Right to a Fair Trial; Article 7: No Punishment without Law; Article 9, Freedom of Thought, Conscience and Religion; Article 21: Criteria for Office; and The First Protocol to Article 2: Not to deny Education. Why can it be properly said that these Articles appear singularly special?

In demonstrating that these rights are true rights, properly so called, which do have an existence independent of the ECHR and the Human Rights Act and indeed any statute or order from a sovereign body there are two points to be made. The first is one based on common sense as opposed to law and lies in the perhaps rhetorical statement that it is difficult to imagine anyone who would properly consider themselves civilised to state, for example, that a state should have the right to torture its own citizens; that an individual should not have a right to a fair trial or that an individual should not be permitted the right to think for themselves. In so far as the latter is concerned one may properly ask that isn't that one of the reasons why Hitler commanded such strong support amongst the citizens of Germany in the build up to the Second World War? Such citizens following him more like 'sheep' compared to a human being able to think for themselves. The second is the legal basis. It is common ground that the

[258] *The Greek Case.* (1969) 12 Yearbook ECHR1, pp. 170-1, para. 392.

normative base for the prohibition of Torture; the Prohibition of Slavery; the Right to a Fair Trial as well as the others within this specific category are rules of Compelling Law and that any treaty between states which permitted such conduct would be void for any rule which permitted such conduct would be in violation of the peremptory norm which underpinned the rule. They are rules which the conscience of humanity demands and are rules which are wholly consistent with the approach of the Tribunal at Nuremberg and with the UDHR.

It is a comparatively straightforward task to provide the detail of each of the rights within the particular category referred to above contained within the ECHR and the Human Rights Act for the purpose of illustrating the approach of the courts from the case law and reconciling that approach with the approach of the Tribunal at Nuremberg, the UDHR and the accepted doctrine of Compelling Law. Regrettably, the restrictions imposed upon a thesis of this nature prevents such detailed precision. However, a short examination of that case law in relation to two of the accepted rights required by Compelling Law ought to illustrate how politics appears to be interfering with the proper legal recognition of the right as being one of Fundamental Law in some domestic legal systems. Articles 5 and 6, because of they are directly related with the Criminal Justice systems, are referred to in the next chapter.

Article 3: Prohibition of Torture

1. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

This is one of the few Articles for which there is no qualification within the wording of the Article itself. In addition, it cannot be derogated from in times of war or other public emergency.[259] Many of the cases have involved issues such as: conduct by soldiers during armed conflict;[260] conduct while in police custody;[261] conditions of detention;[262] corporal punishment;[263] extradition and deportation;[264] and

[259] Article 156. *Tyrer* v *UK* (1978) 2 EHRR 1, A 26

[260] *Ireland* v *U.K.* (1978) ECHR 1,A25 .

[261] *The Greek Case* (1969) ECHR 12YB 1 504.

[262] *East African Asians* v *U.K.* (1973) 3 EHRR 76

[263] *The Greek Case* (1969) ECHR 12 YB 1 p. 86.

[264] *Tyrer* v *UK* (1978) 2 EHRR 1, A 26 para 29.

racism[265]. There is an obvious overlap between the words 'torture', 'inhuman' and 'degrading', which has led the Commission to state that: 'all torture must be inhuman and degrading treatment.[266] However, all degrading treatment or punishment is not necessarily inhuman as well.[267]

Given the difficulties as a result of the absence of any qualifications to the wording of the Article, the Commission and the European Court of Human Rights are only left with the interpretation of those words in order to ascertain whether the conduct complained about violates the Article's terms. Much criticism has centred on the importance of not 'watering down' the literal wording.

Judge Fitzmaurice stated that the temptation to lower the threshold of Article 3 is great, since: "the Convention contains no prohibition covering intermediate forms of maltreatment…. (sic so) that, if they are not actually caught by the strict language of the Convention, they deserve to be… because… they are nevertheless irreconcilable with the high ideal of human rights…."[268]

In addition, the 'dynamic' approach is prevalent within the case law under this article.

The approach of the Commission and the European Court of Human Rights make it clear that certain forms of conduct cannot be justified in any circumstances. For example, the need to fight terrorism cannot justify violations of physical integrity.[269] If one dares to ask the question why, the answer would include such comments as 'minimum or ordinarily recognized standards of civilized human behaviour' that a civilized human being should not 'lower his standards to accord with those who are less civilized' and similar types of views. However, a brief consideration of the question illustrates that the answer is not as simple and as straightforward as that. The Declaration states that (among other matters) dignity and 'inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.[270] In addition, it

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[265] *Ireland* v *UK* (1978) A 25

[266] *The Greek Case* (1969) ECHR 12 YB 1 p. 86.

[267] *Tyrer* v *U.K.* (1978) 2 EHRR 1 A 26 para 29.

[268] *Ireland* v *UK* (1978) ECHR 1, A 25 .

[269] *Tomasi* v *France* (1993) 15 EHRR 1; A 241 para 115

[270] Preamble to the Universal Declaration of Human Rights, 1948. U.N.

makes it clear that if human rights are not protected by law man could be compelled to rebellion. These statements appeal to common sense and right reason in the case of a fundamental right or a fundamental freedom but it is difficult to see how a breach of other forms of rights should necessarily affect justice or compel people to rebellion, as also referred to in the Declaration, notwithstanding that they fall under the general category of human rights.

In relation to this Article all states have 'universal jurisdiction' in their ability to try those alleged to have violated this Article. The evidence certainly points in the direction that prohibition of Torture is a fundamental human right whose existence is not dependent upon the Convention or any domestic legislation. If it truly is a fundamental human right it can properly be argued to be a rule of Fundamental Law. That in turns lends yet further support for the proposition, argued during this thesis, that Fundamental Law is superior to Statute Law and a fortiori supplants any concept of sovereignty. The difficulties in this area is when Fundamental Law would appear to clash with Statute Law and is well illustrated by a case, during which that issue arose.

This case concerned a former Head of State, Senator Pinochet, against whom the government of Spain issued an arrest warrant and who at the material time was in the United Kingdom. The warrant alleged a variety of offences while he was Head of State in Chile including torture. The case was decided in the House of Lords[271] on two occasions, the first being set aside due to an apparent connection, albeit totally innocent, between one of the learned Law Lords and one of the parties who had been granted permission to intervene in the case.[272] While there were numerous issues raised during the legal arguments, the case was eventually to turn on the legal question as to whether Senator (as he was referred to then) Pinochet was entitled to immunity from suit as a former Head of

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[271] *R* v *Evans and another and the Commissioner of Police for the Metropolis and another EX parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division)* 25th. November 1998. (1) *R* v *Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; R* v *Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)* 24th. March 1999. (2) H.L. Publication of internet judgments.

[272] Amnesty International.

State when the alleged offences were committed and as such could not be extradited to Spain to stand trial. A United Nation's convention which in effect granted universal jurisdiction to states in relation to torture was ratified by the United Kingdom on the 8th. December 1988. Its relevant provision being enacted in United Kingdom legislation coming into force on the 29th. September 1988.[273] The majority judgment of the House of Lords was to the effect that Senator Pinochet could not claim immunity for the whole of the period while he was Head of State for offences carried out at certain times during that period. One of the Law Lords held that that the doctrine of sovereign immunity persisted throughout and he could not be extradited. (Per. Lord Goff) Two of the Law Lords held that he could be extradited for offences which occurred after the 8th. December 1988. (The date when the United Nations convention against torture was ratified by the United Kingdom). (Per Lord Hope and Lord Saville) One of the Law Lords held that he could be extradited for offences which had been alleged to have occurred after the 29th. September 1988. (The date when effect was given to the convention in domestic legislation.) (Per Lord Hutton). One of the Law Lords that he could be extradited for all offences which amounted to extradition crimes. (Per. Lord Phillips.) It appears clear from an analysis of the somewhat complex issues that this case only supports the concept of 'universal jurisdiction' within the legal system of the United Kingdom if the state has enacted the appropriate rule of law within its own domestic legislation. The ratification of the convention treaty provided evidence of that intention of parliament in relation to earlier legislation.[274] Granting immunity could not survive such ratification. The case is not so much authority for the concept of universal jurisdiction forming part of United Kingdom law when Human Rights, such as the prohibition against torture, have been violated but a continuation of the doctrine of the Parliamentary Sovereignty coupled with the concept of State Sovereignty (sovereign immunity) which the court was giving effect to. Had the relevant provisions of the Criminal Justice Act of 1988 not been enacted then almost certainly the immunity granted

[273] Criminal Justice Act 1988 S. 134.

[274] State Immunity Act 1978 and Diplomatic Privileges Act 1964.

by the State Immunity Act and Diplomatic Privileges Act would have prevailed and Senator Pinochet could not have been extradited.[275]

Consider this. Assume that the State Immunity Act and Diplomatic Privileges Act had not become law in 1978 and 1964 respectively but had become law in say 1939. Adolf Hitler had not committed suicide but to-wards the end of the Second World War had fled to the UK along with Rudolf Hess. On landing in the UK and arrested he claimed Sovereign Immunity under that legislation. What would have been the *legal* effect of such a claim? What law would be used to defeat the claim?

What can be ascertained from many of the arguments put forward by those who would say that the prohibition from torture is a fundamental human right? First, the civilized world considers the act of torture barbaric and is to be prohibited because it is barbaric. The Convention has created a specific Article to deal with such barbarism. Second, the motivation behind Torture is often to make someone talk, for example, confess to certain conduct often prohibited by law within a civilized society. Here, the complaint goes much further than the barbaric act it-self. The rule protects the wrongful adducing of evidence probative of guilt against someone who is or may be innocent. Therefore the rule, in such circumstances, is a rule which acts in personam; protects the innocent and prevents injustice.

There is however a difficulty which has to be recognized which is that in a world where acts of terrorism are prevalent it may be properly argued that on occasions torture is necessary to prevent tragic consequences to humanity for example in trying to ascertain where a terrorist has planted a bomb. The answer perhaps lies within the word ‘necessary’, it is the duty of the forces responsible for law and order, the detection of crime and the protection of the public to obtain evidence without recourse to violating a fundamental human right if civilisation is to progress.

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[275] In the event the Home Secretary was to intervene, citing Pinochet’s ‘health’ as the relevant factor against extradition. See also: Helena Cook. ‘ A Discussion Of The Recent Proceedings In The House Of Lords In Connection With The Proposed Extradition Of Senator Pinochet From The UK To Spain’ The International Council On Human Rights Policy, Review Meeting, Universal Jurisdiction, Geneva 6-8 May 1999. www.ichrp.org/files/papers/97/201_-_UniversalJurisdiction_-_Exparte_Pinochet_Cook_Helena_1999.pdf

Article 9: Freedom of Thought, Conscience and Religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The rights of freedom of thought and conscience are unqualified, as is the freedom of religion, although in one sense religion is in itself a form of belief. The only restriction lies in the way that belief or religion is manifested, as specified in paragraph 2.

There have been a number of cases brought under this Article. A member of the Jehovah's witnesses objecting to performing military service and any kind of substituted service on the basis of being contrary to his conscience and religious beliefs whereby the Commission concluded that objections on the basis of conscience or religion per se do not entitle a person to exemption from substitute service.[276] Applicants who were members of the Church of Scientology of California, which the UK authorities considered to be harmful. Accordingly, they decided to take certain measures against it, including: the denial or withdrawal of student status for the members; the refusal or termination of work permits and employment vouchers; and the refusal of extensions of stay within the UK to continue studies at its establishments. The application that their human rights had been violated was rejected by the Commission on the basis that that there had been no violation of Article 9 rights on the basis that the measures complained of did not prevent the members, whether resident or coming from abroad, from attending the college of the Church in the UK or otherwise manifesting their religious beliefs.[277] An applicant had been convicted under Greek law of proselytism (in simple terms, undermining the religious beliefs of others, often for

[276] *Grandrath case.* Yearbook 10, 626.

[277] 3798/68, Yearbook 12, 306.

the purpose of persuading them to change their religious beliefs). The European Court of Human Rights found by a majority of six to three on the facts that the applicant had not made any improper approach and, although persistent, he had done no more than to try and persuade someone who believed in another Christian religion of the virtues of the applicant's faith. The application of the Greek law on such facts was disproportionate and incompatible with Article 9. The position would have been different had there been attempts at coercion or other 'manipulative techniques'.[278]

In the fourth case, the applicant had wished to show a film that was likely to offend the religious feelings of Catholics, who constituted the majority of people in the region where the applicant proposed to show it. The state seized and ordered the film to be forfeited. The applicant claimed a breach of Article 9. This was rejected. The Court stated: '…the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines…'. Further, '…in the context of religious opinions and beliefs may legitimately be included an obligation (sic on individuals) to avoid as far as possible expressions which are gratuitously offensive to others…'[279]

In other cases, there are examples of: the rejection of a claim by an applicant that compulsory motor insurance was contrary to his beliefs on the basis that prosperity and adversity were meted out by the Almighty;[280] the rejection of a claim based on the refusal of prison authorities to provide a prisoner with books which he considered necessary for the exercise of his religion;[281] and the rejection of a claim by a Sikh to enable him to be excluded from the mandatory requirement that all motor cyclists had to wear crash helmets, notwithstanding that by the time the decision was given an exception in favour of Sikhs had been provided for in domestic legislation.[282]

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[278] *Kokkinakis* v *Greece* (1993) A 260 – A paras 45–50

[279] *Otto-Preminger* v *Austria* (1994) ECHR 96,A 295

[280] 2988/66, Yearbook 10, 472.

[281] 1753/63, Yearbook 8, 174 at p. 184.

[282] *X* v UK (1981) ECHR A7992/77.

There are many learned academics and textbook writers who have been critical of the approach of the Commission and the European Court of Human Rights in their approaches to the Convention. Language in the form of comment about various decisions, particularly in relation to the interpretation approach to this Article, ranges from 'unsympathetic' to 'unsatisfactory'.[283]They appear to use what could be termed politically correct language to suggest a failure to give the words of the Article their ordinary and natural meaning. The states' do not appear to want to permit, many would say understandably, this Article to be used to undermine their own traditions and culture. In order to obtain a clearer picture, it may be useful to consider a series of hypothetical examples of a similar nature by way of illustration: (i) The rightful heir to the English throne decides shortly prior to his coronation to adopt the Catholic religion and surrender his Protestant religion. The State refuses to crown him king; (ii) votes are cast for a new Pope. The successful applicant informs the world that he has given up Catholicism in favour of becoming a Protestant. He is denied the papacy; (iii) the successful applicant for the post of Chief Rabbi informs everyone that he has 'seen the light' and now embraces Christianity. He is refused the post; and (iv) the Arab sheik or king prior to being formally appointed makes it clear that he will no longer practise Islam as he has adopted Judaism. He is not permitted to become the leader.

A host of similar examples could be provided. From the perspective of Human Rights Law and the approach of the Commission or the European Court of Human Rights it is easy to envisage the answer that in each and every such case that there has not been a violation of Article 9 because the state has not interfered with the right itself; just the consequence of its exercise. All the individuals in the above examples are still free to practise the religion of their choice, albeit that such religion has been newly found by them.

Compelling reasons exist for restriction on the manifestation of an individual's religious beliefs, as stated in paragraph 2 of Article 9. One only has to have lived at the beginning of the twenty-first century or to know what occurred in previous centuries to understand this when terror resulting in the loss of the lives of the innocent it is so often perpetrated under the name of religion. Few could deny

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[283] For example, F.C.Jacobs, *The European Convention on Human Rights,* (5th. Ed. Clarendon 1975, pp. 148–150.)

that within this area and within the scope of this Article can be found many of the world's problems particularly in relation to terrorism.

That having been said, the rights to freedom of thought, conscience and religion were unqualified and absolute within the Article contained in the Universal Declaration (Article 18). The right to freedom of religion was qualified, understandably, in the Convention. The rights of freedom of thought and belief are distinct. They are intrinsically related to the concept of personal justice, as stated in the Universal Declaration: for if an individual does not have freedom of thought he cannot work out for himself that which he believes. These freedoms are a prerequisite for him to be able to differentiate between right and wrong. They are also intrinsically related to the concept of the necessity for the rule of law.

The fact that the rights to freedom of conscience and belief should have the force of law, not simply in the Convention but also for all those states which have made the Convention part of their own domestic law, is directly relevant, yet again, to a principal issue with which this thesis is concerned: namely, whether Fundamental Law exists. Those who reject its existence in favour of the supremacy of a doctrine such as Parliamentary Sovereignty must surely accept that the doctrine itself could not possibly exist unless they believed in its very existence, and in order to so believe without pressure or coercion is dependent upon their right to be free to so believe. There is no doctrine without such belief, for such doctrine cannot be created in the first place.

Equally, the doctrine of the rule of law is dependent upon the right to freedom of belief. That is to say, those who have participated in the creation of a specific rule of law believe that such a rule should be created, for whatever reason. Of course, specific rules may be, in theory, churned out mechanically but the underlying theory behind any particular rule, requires the right of freedom of belief. The suggestion that Parliament is somehow so supreme that it can pass a law removing such freedom requires the pre-existence of the right to believe prior to such formal legislation. The rights to freedom of belief and conscience are inextricably related to a right to think for oneself. The suggestion that there is somehow something legalistically superior, such as the doctrines of Parliamentary Sovereignty or State Sovereignty, to such rights is, quite frankly, logically absurd, and inherent within the meaning of those rights is that there is

no physical abnormality in those of mankind who possess such rights which would prevent them from exercising them.

The rights of freedom of conscience and belief are both rights in personam. The denial of them causes or is likely to cause injustice to the individual. The right to believe in a particular religion is a right in personam but substantial injustice to others can be caused in the manifestation of that religion. Only when no such injustice is caused can it be properly said that the deprivation of the right creates injustice for the individual.

Conclusion

The HRA does not create a single true right, properly so called. At most, it creates a series of conditional rights improperly so called, which are contingent on the absence of repeal or amendment of the Statute. The words themselves in the Statute which express those rights, as with the Convention, are subject to interpretation by the courts, and it is clear that in such construction the courts will regularly depart from the literal meaning of the words used in order to take into account the interests of the state or other factors and apply what it considers to be a 'margin of appreciation'[284] in favour of the state.

There are a number of 'rights' that would appear to fall into a singular category of their own. These, as has been observed, are: Article 3: Prohibition of Torture; Article 4 (in part): Prohibition of Slavery; Article 9 (in part) Freedom of Thought, Conscience and Religion (the latter being subject to the qualifications set out in the Article); and Article 2: First Protocol: Right to Education. With the rare exceptions identified in Article 9, and which will be identified later they have little or nothing to do with social justice. That is to say, the rights are not there in the interests of an existing society but are there for the sole benefit of the individual. In their essential characteristics many of the rights have been recognized as rights before the advent of the ECHR and their existence is independent of it. The Convention and the HRA are no more than declaratory of such rights. All these

[284] See e.g. *Handyside* v *U.K.* 5493/72 [1976] ECHR 5 (7th. December 1976); *Lawless* v *Ireland* (Judgment 1.07.61)

rights act in personam and are connected with the concepts of freedom and justice of a kind which is different to other forms of justice such as social justice.[285]

When the great powers, along with other nations, stated the Universal Declaration of Human Rights they did not do so simply by creating in that Declaration a myriad of previously unrecognized true rights for the individual. A principal reason for the revulsion at the appalling conduct which occurred during the Second World War lay not simply in the conduct itself but in the violation of the existing rights of the innocent victims.

'Human rights', as the words suggest, are those rights which belong to the human being because he is a human being. A number of them are capable of amounting to 'true rights' properly so called, not necessarily by reference to the express language used in stating the right but in the underlying spirit behind the specific wording. Those true rights which have been identified above, being rights in personam, are for the benefit of the individual and appear to be intrinsically connected with 'a' concept of justice, which is dealt with in the next chapter. It is necessary to emphasize that the relevant Articles of the HRA, as with the ECHR, do not create those specific true rights, except in so far as such express wording is required by a legal system in order that effect may be given to the wording within a particular legal system, but they are declaratory of them. Human Rights Law as it presently exists, be it in statutory form or a European Convention, is subject to the whims of rulers, states and those who cling on to absolute power. Human rights, as opposed to Human Rights 'Law', contained within Fundamental Law, are not. Accordingly, if these rights are rules of Fundamental Law, it can be stated that, while the rules of Fundamental Law can be said to amount to human rights, the rules of Human Rights Law will only occasionally correspond to rules of Fundamental Law.

The specific rules which have been identified are essential not only for existing society but, it is necessary to emphasize, for the furtherance and progressive development of civilization generally. They are fundamental to such development. One may believe that they live in an advanced and civilized country, particularly when compared to those less advanced. However, a

[285] See below, Chapter Six.

country which: denies freedom to the innocent;[286] finds guilt of criminality on the basis of an unfair trial;[287] permits torture and slavery; denies to its people a reasonable standard of education; and attempts to stifle freedom of thought and conscience, can hardly properly believe that it is civilized. Neither can a country which insists that those specific rights so identified can be removed by the exercise of a supreme sovereign power. They would appear to be rules which are truly fundamental to any civilized legal system. However it is viewed doctrines such as Parliamentary Sovereignty or State Sovereignty being construed in absolutism are individually and jointly, mutually exclusive to and incompatible with *fundamental* human rights properly so called.

Consider this. Assume that Fundamental Law had been recognized in the middle of the 17th. century would it have been necessary to wait some three hundred or so years before there was evidence of the acceptance of the prohibition against torture, slavery and the like? Would humanity still be at the very beginning of having to clearly clarify and elucidate the meaning of words such as 'peremptory norm' or would, by now, such meaning be apparent from the judgments of wise judges?

It is little short of amazing that by the middle of the twentieth century, at the end of the Second World War, the great powers along with the civilized nations of the world had recognized, in the Universal Declaration, the existence of rules which were superior to any other rules. That is superior to law made by any sovereign entity. Yet instead of developing those rules and its principles for the benefit of humanity many states get together to create a 'new' law which would be referred to as Human Rights Law. However, such law was not law to be utilized in the recognition of 'true' rights for human beings, which Fundamental Law provides, but often in the preservation of a State's own powers over such 'rights'. In simple terms a new field of law was being created with the high sounding title of Human Rights Law, giving the impression that such law gave true rights for the people when the reality is often exactly the opposite for it denies or is capable of denying to the people those very rights, by preserving the states powers over them. Whereas the Universal Declaration of Human Rights, the judicial pronouncements at Nuremburg, the concept of Jus Cogens were all positive

[286] See below, Chapter Six.

[287] See below, Chapter Six.

steps forward for the benefit of humanity the European Convention on Human Rights and a State's laws incorporating convention rights in its domestic legislation were a step backwards, in that it prevented proper development of Fundamental Law and deflected from formal recognition of the same.

It is clear that many of the so-called civilized nations of the world recognize a concept of human rights. They have created a Convention which includes those words and have created a court to adjudicate upon matters relating to the concept. The UK has enacted a statute in such recognition. But all these states appear to steadfastly refuse to give many of the words their ordinary and natural meaning. They regularly refuse to accept that some rights are true rights belonging to individuals and are properly enforceable against themselves that is to say against the state. Only the Universal Declaration, both in its spirit and wording, recognized such rights as being true rights. It is not merely a tragedy but the most unbelievable arrogance for those same states who were a party to the Declaration to fail to formally accept and declare by virtue of their positive laws within their domestic systems many of the true rights within that Declaration. That means *declare* them as being existing law, Fundamental Law, not to purport to *create* them by virtue of positive statutory law. While the various courts and institutions created in consequence of the ECHR are clearly better than no institutions at all, they have hardly progressed the advancement of civilization. While such advancement is not de minimis compared to that of bygone eras, it is not substantial and, it is arguable, is only barely significant. It is not Human Rights 'Law' whether it is in the form of a convention or a statute which can always be relied upon to regularly protect the fundamental rights and freedoms of the human being but the proper unambiguous recognition of a higher form of law, namely Fundamental Law.

This chapter has identified that there are a number of rules which much of the civilized world has recognized as being rules which are fundamental for the benefit of the human being. Many of these rules could properly be said to represent rules which equate with the meaning of rights and liberties as expressed in the charge sheet against King Charles I some three hundred years earlier.[288] The substance of a number of rules also appear to have been

[288] See above, Chapter One.

recognized by the Tribunal at Nuremburg[289] and some it can be properly argued contain the peremptory norm referred to in the Vienna Convention on the Law of Treaties.[290] These rules can properly be argued as forming together a body of law properly referred to as Fundamental Law. In addition, it is properly arguable that it would appear that the source of many of the Articles contained within Human Rights Law is Fundamental Law.

What then are the principles of such law? What is it which connects these specific rules with each other? Throughout many of the observations referred to above, specific words or phrases keeps recurring, such as ‘justice’, ‘conscience’ and the like. It is now necessary to move on and further examine these words restricted, it is necessary to emphasize, within the context of this thesis.

[289] See above, Chapter Three.

[290] See above, Chapter Four.

CHAPTER SIX

IDENTIFICATION OF FURTHER RULES OF FUNDAMENTAL LAW AND ITS CONNECTION WITH A PARTICULAR TYPE OF JUSTICE.

Introduction

This thesis has so far attempted to establish that: (i) there exists a concept which has regularly been referred to throughout history, at least as far back as the seventeenth century, as Fundamental Law;[291] (ii) This concept has a legal basis, in the UK, as has been observed from the charge sheet against King Charles I;[292] (iii) it has been recognized from that charge sheet that individuals in the UK have 'rights' and 'liberties';[293] (iv)in more modern times, some of these rights and liberties have been described as 'fundamental';[294] (v) phrases such as 'fundamental rights', 'fundamental obligations' and 'compelling law' have been accepted in the international arena as being appropriate terminology relating to certain factual situations.[295] However, it appears that these phrases are often little more than a different form of terminology to describe the concept of Fundamental Law and the concepts which the rules of such law recognize;[296] (vi) the doctrine of Parliamentary Sovereignty in the absolute sense that Parliament is free to make or unmake any law it wishes is a fiction in the sense that it has no proper legal basis;[297] (vii) there is a clear relationship between the concept of Fundamental Law and certain particular rules of Human Rights Law;[298] (viii) A number of specific rules which can reasonably and properly be said to be rules of Fundamental Law have been identified. [299] These rules appear to have been recognized in the international arena and also recognized in the UK. However, in the UK the rules are said to be conditional upon the existence of a

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[291] See above, Chapter Two.

[292] See above, Chapter One.

[293] See above, Chapter One.

[294] See above, Chapter Three, UDHL.

[295] See above, Chapters Three and Four.

[296] See above, Chapter 4.

[297] See above, Chapter One.

[298] See above, Chapter Five.

[299] See above, Chapters Three and Five.

statute which makes law in accordance with the doctrine of Parliamentary Sovereignty.

There appears to be from the evidence so far adduced a clear interrelationship between the concept of Fundamental Law and *a* concept of justice. This Chapter then identifies by analysis that the type of justice which is directly relevant to the rights and freedoms of the individual as has been identified in the earlier chapters of this thesis takes a specific form.

It is necessary to pause here and emphasize a point of essential importance. This chapter is not about *the* concept of justice it is about *a* particular type of justice. The word 'justice' is a word which not merely scholars, but also millions of ordinary people believe that they understand. Yet one does not need some form of empirical research to be aware that the meanings that people attribute to the word will often substantially differ. Equally, the scholars, as will be touched upon, differ in their search for a meaning and their own theory behind as to what *is* justice. The various theories are not analysed in substantial depth for two reasons. Firstly, to do justice to the word justice (a simple example in seven words of two readily apparent meanings!) would require a thesis all on its own. Secondly and most importantly it would only be relevant if and only if the justice referred to in the multiplicity of theories by numerous scholars can properly be said to equate with the type of justice referred to so far in this thesis. For example, is it relevant to the justice referred to in the trial of King Charles I? Is it relevant to the justice referred to by the Tribunal at Nuremberg? Is it relevant to the justice referred to in the Universal Declaration of Human Rights? Is it relevant to the justice implicit within the recognized concept of Compelling Law?

This chapter is not concerned with numerous matters which many will argue are relevant to the concept of 'justice'. It is not, for example, concerned with the remuneration of individuals; whether health should be free to all; transport systems; general taxation; immigration; consumerism; minimum wage; unemployment generally as well as various other issues which properly fall within the domain of a democratically elected parliament or other form of ruling entity.

When the phrase 'fundamental rights' is used in this thesis it means fundamental rights for the individual. It is justice in personam that is to say justice for the

individual with which this chapter is concerned. Social justice in its various forms is either wholly irrelevant or tenuous in the extreme in the context of this thesis. Equally, many of the various theories which have been touched upon above in relation to social justice are irrelevant. However, an overview as to how the concept of justice has been dealt with by other scholars may be helpful simply to illustrate why the meaning attributed to the word justice has little bearing upon the meaning in the context in which it has so often been used during court or tribunal hearings, discussions relating to such hearings and the like during this thesis.

Outline overview as to the academic approach to justice

There has been a substantial amount of wisdom and learning devoted to what can reasonably be called social justice. That is to say a form of justice which focuses on the obligations and duties of an individual within a particular society and the result of the benefits to that society by the discharge of such obligations. The philosophers and scholars have examined the concept in various forms only some of which can be touched upon here.

Aristotle's attempt to define justice based on reason is by aiming at a system of virtues of which justice is the 'perfect virtue'.[300] Aristotle claimed to have found a scientific method of defining virtue, which means the morally good. Virtue is a mean state between two extremes, which are vices (one of excess and one of deficiency). The similarities are with geometry, whereby a line can be divided into two equal parts, if, but only if, the two extremes are known. However, as Kelsen points out, if we know what the vices are, we also know what the virtues are, as they are the exact opposite. The difficulty is that 'vices' and 'virtues', for example, are determined by a pre-existing social order.[301] Aristotle distinguished between justice in a general sense and justice in a particular sense, maintaining that there are two concepts of justice: lawfulness and equality.

The term 'unjust' is held to apply both to the man who breaks the law and the man who takes more than his due, the unfair man. Hence it is clear that the law

[300] Aristotle, *The Nicomachean Ethics,* (1129b.)

[301] H. Kelsen, *What is Justice?* (The Lawbook Exchange Ltd. Union, New Jersey 2000. p. 19.)

abiding man and the fair man will both be just. The 'just' therefore means that which is lawful and that which is equal or fair and the 'unjust' means that which is illegal and that which is unequal or unfair.[302]

The word 'fairness' appears to be a common theme in relation to a number of the rules which can be said to amount to rules of Fundamental Law. What is not identified by Aristotle is the answer to the question; fairness to whom?

He goes on to suggest that everything unfair is unlawful.[303] Justice is 'not a part of virtue but the whole of virtue'.[304] With the qualification that it is displayed towards others.[305] He continues to state:

"We saw that the lawbreaker is unjust and the law abiding man just. It is therefore clear that all lawful things are just in one sense of the word, for what is lawful is decided by the legislature and the several decisions of the legislature we call rules of justice."[306]

Further:

"Now all the various pronouncements of the law aim either at the common interest of all, or at the interest of a ruling class determined either by excellence or in some other similar way; so that in one of its senses the term just is applied to anything that produces and preserves the happiness, or the component parts of the happiness, of the political community."[307]

In relation to the justice which consists in equality, there is a sub division into distributive and corrective justice. Distributive justice "is exercised in the distribution of honour, wealth and the other divisible assets of the community which may be allotted among its members in equal or unequal shares" by the

[302] Aristotles *Ethics* 1129a. (Kelsen Ibid. p. 125.)

[303] Kelsen. Ibid. p. 126.

[304] Ibid. p. 126.

[305] Ibid. p.126.

[306] Ibid. p.126

[307] Ibid. p. 126

legislator.[308] Corrective justice is "that which supplies a corrective principle in private transactions… those which are voluntary and those which are involuntary".[309] The corrective justice is exercised by the judge. Distributive justice equates to proportional equality: "justice involves at least four terms: namely, two persons for whom it is just and two shares which are just. And there will be the same equality between the shares as between the persons: for if the persons are not equal, they will not have equal shares."[310]

Kelsen adopts a different view and points out that there are in nature no two individuals who are really equal, since there is always a difference as to age, sex, race, health, wealth and so forth.[311] Aristotle appears to equate justice to that which is exercised by a judge in deciding cases, for he states: "To go to a judge is to go to justice, for the ideal judge is, so to speak, justice personified"[312] It is easy to agree with the proposition that the ideal judge is 'justice personified'. But what is the ideal judge? Unfortunately, Aristotle is driven into giving up his quasi mathematical formulae in relation to the concept of justice for, as Kelsen points out, crime and punishment, for example, cannot be 'equal' in the same way as two halves of a line are.[313] The 'ideal' judge according to Dworkin was one with 'Herculean' characteristics.[314]

A singularly interesting observation is that of the philosopher Aurelius Augustinus, whose philosophy was primarily based upon theology and who followed many of the routes of Aristotle. He stated that a social order is law only if it is just. He expressly stated: "Where there is no true justice… there can be no law. For what is done by law is justly done and what is unjustly done cannot be done by law".[315] It may be argued that Augustinus did not intend the literal interpretation of those words. However, if the manifestation of the fountain of justice exists in Fundamental Law, as opposed to law generally, such would be

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[308] Ibid. p. 126.

[309] Ibid. p. 126.

[310] Ibid p. 126

[311] Ibid. p.127.

[312] Ibid. Ethics. 1132a.

[313] Ibid. Kelsen. p. 130.

[314] R. Dworkin, *Law's Empire* ibid.

[315] Ibid. p. 135.

compelling evidence that law which is inconsistent with Fundamental Law is not in truth law at all but merely rules devoid of legal content. This tends to yet further support the argument earlier in this thesis that the doctrine of Parliamentary Sovereignty as expounded by Dicey is a myth in the sense of not possessing a proper legal foundation, and some rules passed and enforced pursuant to that doctrine may not necessarily be law if inconsistent with Fundamental Law or, if adopting the words of Augustinus, 'inconsistent with justice'.

Another method of defining the concept of justice in accordance with theology is to look at the teachings of the various religions, for example, the Old Testament states 'an eye for an eye; a tooth for a tooth', which in many ways underscores the principle of retribution and the New Testament teaches the 'new justice', which comes through the Almighty by faith. In other words: Divine Justice.

The more modern academic approach to justice has been illuminating and has included papers such as: 'Distributive Justice';[316] 'Procedural justice';[317] 'Frontiers of Justice'[318] (which tends to relate the concept of justice to something akin to the property within political norms); 'Justice and Equality';[319] 'Justice as Fairness'[320] (which attempts to relate the concept to the mutual acceptance within a society upon which a practice is founded); 'The Economics of Justice'[321]; 'Restorative Justice in India';[322] 'Community and Justice in Constitutional

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[316] M. Deutsch, 'Equity Equality and Need: What determines which value will be used as the basis of Distributive Justice?' (2010) Vol. 31, issue 3, Journal of Social Issues, 137-149.

[317] J. Rawls *A Theory of Justice* (Rev. Ed. The Belknap Press, Camb. Mas. 1999 pp.73-77) and see C. Wendorf, S. Alexander and I. Firestone. 'Social Justice and Moral Reasoning. An Empirical Integration of Two Paradigms in Psychologic Research' Presented at 10th. Annual meeting of the APA August 1999. Boston M.A.

[318] M, Nussbaum,' Frontiers of Justice' (2007) Vol. 9, No. 2, Scand. Journ. Of Dis. Res.Taylor & Francis, and Belknap, Harvard Univ. Press, 133-136

[319] R.M.Hare, 'Dialectics and Humanism', (2012) Philosophy Documentation Cent(e)r, 6.

[320] J. Rawls, ' Justice as Fairness: Political not Metaphysical' (1985) Vol. 14 No.3, Philosophy and Public Affairs, 222-251.

[321] R.A.Posner, *The Economics of Justice* (Harvard. Library of Congress Cataloging in Publication Data 1983)

[322] S. Dey .and B.N. Chattoraj, 'Restorative Justice in India' Vol. 29, issue 1, Indian Journal of Criminology and Criminalistics.

Theory';[323] 'Justice, Nature and the Geography of Difference'[324] (dealing with justice in the context of class distinction and labour exploitation); and 'Justice as Political not Metaphysical'.[325] These are but a selection from the vast body of academic papers. In addition, a number of books have been written, including *Justice: Views from the Social Sciences*[326] and *A Theory of Justice*[327]. This body of academic knowledge mainly follows the Greek philosophers in one essential characteristic: namely, they look at the word 'justice' in its social context. Attempts are made to attribute meaning to the word by analysing various situations within society and occasionally attempting to demonstrate the connection between justice and utilitarianism.

A singularly interesting approach is to be found in the work of John Rawls,[328] where he looks at justice in the context of fairness, which he describes as the fundamental idea behind the concept. He adopts the approach, not that dissimilar to many of his contemporaries, whereby he considers justice only as a 'virtue of social institutions, or what I call practices.'[329] He suggests that the meaning of the concept varies 'according to whether it is applied to practices, particular actions, or persons',[330] and that justice is 'but one of the many virtues of social institutions'.[331] He takes the view that the principles behind the concept consist of a 'complex of three ideas: liberty, equality and reward for services contributing to the common good'.[332] One of his theoretical observations is that "Justice is the virtue of practices where there are assumed to be competing

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[323] M.C. Regan Jr. ' Community and Justice in Constitutional Theory'(1985) Wis. L. Rev., 1073

[324] D. Harvey, and B. Braun, *Justice, Nature and the Geography of Difference* (Wiley-Blackwell 1996; Wiley On line Library.)

[325] J. Rawls, 'Justice as Fairness: Political not Metaphysical', (1985) Philosophy and Public Affairs.

[326] R.L. Cohen. *Justice: Views from the Social Sciences.* (1986. Books.google.com and JSTOR.Org/stable/1957407)

[327]J. Rawls, *A Theory of Justice,* (Rev. Ed. The Belknap Press of Harvard Univ. Press, Camb. Mas. 1999)

[328] J. Rawls, 'Justice as Fairness' (April 1958) Vol. 67, No. 2, The Philosophical Review, pp.164 –194.

[329] Ibid. p. 164.

[330] Ibid. p. 165.

[331] Ibid. p. 165.

[332] Ibid. p. 166.

interests and conflicting claims, and where it is supposed that persons will press their rights on each other"[333] He comments that: "it is… the possibility of mutual acknowledgement of principles by free persons who have no authority over one another which makes the concept of fairness fundamental to justice."[334] This thesis tends to agree that fairness is fundamental to justice. It further tends to agree that the concept of justice is not the same in its application to persons as it might be in its application to practices. If it is not the same why is the same word used for different situations? Does that necessarily result in various different meanings for the word justice?

He then attempts to describe what is meant by 'fairness'. He compares the notion of fairness in the concept of justice with what he describes as 'classical utilitarianism as represented by Bentham and Sidgwick', whereby justice is assimilated to benevolence which leads to 'the most efficient design of institutions to promote the general welfare'.[335] In his conclusions, he states that "every people may be supposed to have the concept of justice, since in the life of every society there must be at least some relations in which the parties consider themselves to be circumstanced and related as the concept of justice as fairness requires."[336]

In his work *A Theory of Justice,*[337] Rawls separates justice and desert, maintaining that desert claims, play no part in the determination of just outcomes. He appears to make clear that a person with a particular natural or social attribute ought not to constitute a ground for determining how much he gets.

Rawls' theory was substantially criticised by Steinberger, who adopted a realistic approach in his arguments.[338] He provided various examples, such as society 'desperately needing people willing to work in construction jobs'[339] to illustrate how in such circumstances the ability of the few able to perform such work may provide such unjust desert and how, if a 'society established, as an absolute

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[333] Ibid. p. 175.

[334] Ibid. p. 179.

[335] Ibid. p.184.

[336] Ibid. p. 194.

[337] See above.

[338] Steinberger, P.J. 'A Fallacy in Rawls Theory of Justice'(1989) Vol. 51, No. 1, The Review of Politics, Cambridge Univ. Press, Vol. 51, No. 1 , pp. 55–69.

[339] Ibid. p. 58.

principle, that only persons with blond hair should rule it basing (sic) its principle that only blonds can be trusted and the principle is thought of as a deep moral truth'.[340] He then develops the various consequences from adopting such an approach to illustrate the inconsistency with justice if such consequences occurred and how the so-called 'difference principle' between individuals is in one sense based upon the theory of desert.[341]

While the above is but the briefest outline as to the theoretical approach to the concept of justice with the exception of the theory of justice as fairness it is difficult if not impossible to identify how the multiplicity of the various theories of justice are relevant in the context of Fundamental Law. They would appear to be wholly irrelevant to the reasoning behind the various rulings and judgment at Nuremberg. Of course the Tribunal, indeed most of the whole world, was looking for justice for the victims of the atrocities but that justice was essentially because the victims had been denied rights which resulted in those atrocities. These rights by definition pre-existed. If they pre-existed they must have done so in a form of law. Of course there are scholars who have written about 'right based' justice which in turn has often led to a particular theory as to why the law has to be obeyed,[342] but this is part of a much wider attempt in order to provide a meaning to the word justice and examine its theoretical base. It would also appear to have little relevance to the justice being demanded at the trial of King Charles I, or the reasons for the UDHR or the UNCHR or the concept of Jus Cogens.

Overview of the position so far

So far it has been established that in the middle of the 17th. century people had rights and liberties. Such rights and liberties were fundamental. They belonged to each individual. Anyone who would seek to deny to the individual such rights and liberties would have to pay the penalty imposed by law, even if the one who was seeking to deny to the individual their rights and liberties was a sovereign. At Nuremberg we saw that in the middle of the 20th. century a similar situation occurred in the sense that those who denied the individual their rights and

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[340] Ibid. p. 62.

[341] Ibid. pp. 62–64.

[342] See e.g. H. Kelsen,

What is Justice? (below) p. 257.

liberties would be dealt with according to law. After the Second World War a number of these rights and liberties were identified in positive format by being given express wording in the Universal Declaration of Human Rights. By the second half of the 2Oth. century there was express recognition of Fundamental Law in the international arena albeit that the phrase ‘Compelling Law’ was used.

All these events had one thing in common. They were concerned with the recognition of rights for the individual. Such recognition, with the possible exception of the Universal Declaration, was legal recognition. Not something which the individual ought to have but was something which they did have. These legal rights and liberties were fundamental to the individual. There were not there for any purpose other than to protect the individual, qua individual, as a human being within the society in which he lived. No sovereign entity was lawfully vested with the power to remove these rights and liberties.

The reason it was essential to recognize the rights and liberties of the individual was because such recognition was demanded by ‘justice’. It was for the *individual* that justice was demanded not for society at large. This justice was of a different type to the justice which has variously been referred to as social justice, distributive justice, economic justice and the like. This ‘justice’ was acting in personam. Any benefit to society from this form of justice was consequential in the sense, for example, that a progressive society demanded, in order for such progression to take place, this form of justice for the individual.

The meaning of the type of Justice created by a rule of Fundamental Law

Liberty in its most simplistic form means freedom. It is self-evident, that, if absolute freedom was to be enjoyed as of right by every member of society, social justice in any number of its various ways could never be achieved. Every human being is born absolutely free and equal, legalistically speaking, at birth. The restrictions upon that freedom following birth are those imposed by the rules and practices of the society into which he is born. In the early years of his development, he has no capacity to enter into any form of ‘social contract’ or the like. If the society in which he develops is to be recognized as civilized and for civilization generally to achieve progressive advancement, he must be entitled as he develops to a reasonable degree of freedom. What that degree is, amounts to

a different series of questions. In this context, freedom means freedom to the individual personally, qua individual, not as a member within a society; membership of the society being consequential to the existence of such freedom and not imposing obligations upon the individual towards the society in order for him to possess that significant degree of freedom. It is necessary to repeat, how much freedom is a different question, but, if he has no freedom whatsoever, it is difficult to argue that justice to and for him in any shape or form has been dispensed or could be dispensed in the future.

The meaning of this type of justice lies, as stated by the Tribunal at Nuremberg, within the conscience of humanity. That, of course, immediately raises the question what is meant by the conscience of humanity to which this thesis does not profess to have, at this stage, a precise and accurate answer. However, it would appear to be distinct from morality and in any event 'morality' and 'conscience' are two different words with distinct meanings. It would appear to be related to a phrase which has been recognized in a juridical manner which is natural equity. While definition is difficult, illustration by building upon existing knowledge is of assistance.

Some of the most simple examples are to be found in rules as has been seen such as: not being forced into slavery; not being subject to genocide as a result of an individual's beliefs or personal characteristics; not being deprived of his freedom in an unfair way, for example, by a mere allegation of committing an alleged wrong against society or its members; and not to have enforced against him rules which could be considered contrary to the rules of jus cogens and the like. These are specific examples of rules of Fundamental Law but they all have an intrinsic relationship with not simply freedom but with personal freedom which results in justice in personam.

We know that there is a law which prohibits 'Crimes against Humanity'. Put entirely to one side the emotive reaction to the abominations which were committed in violation of that law. We know that the law prohibiting such conduct had existed previously albeit that it had not been formerly expressed in words by a sovereign power prior to the Nuremberg Tribunal. The principle purpose of that rule of law is not simply to punish those who transgress, that is a consequence of the violation of the rule, but to protect a fundamental right or series of fundamental rights. The rights that the Nuremberg Tribunal were concerned with

was the right that an individual had. For example not to be prejudiced as a result of his religious beliefs; the right to be a free man (c/f slave labour); the right not to be tortured; the right not to be killed simply because the individuals possessed a different ideology than their killers, to name but a few. The conscience of humanity insists that individuals do have such rights because if they did not the consequences are what has been witnessed. Recognition of the possession of such rights in a forum with universal jurisdiction and the appropriate powers of enforcement would seek to prevent abhorrent injustice occurring.

This can be taken further by examining the rule for the necessity of a fair trial before, in criminal law, a sentence often denying liberty is imposed. Few would argue other than that a fair trial is essential for justice to be achieved. Legal justice is primarily achieved following a verdict in a criminal trial. If the verdict is one of guilty it is often said that such a verdict satisfies the requirements of society, assuming of course that such a verdict is the correct one. Accordingly, social justice can be said to be achieved. The type of justice inherent within the requirement of a fair trial is not merely dependent on the outcome of the trial but exists from its commencement and continues throughout the trial. Here for justice to be achieved the trial has to be fair. This illustrates that there appears to be a relationship between the word fair and justice. That is fairness[343] for the individual, as a result of which, this type of justice is delivered to the individual. What then is meant by the meaning of the word fair?

It may be said that what is fair to one person may not be fair to another and that the word is inherently subjective. This may be correct in many instances encountered in daily life but it is of doubtful accuracy in the context of justice. It will be recalled that in the Nuremberg trial the phrase ‘conscience of humanity’ occurred in relation to arguments connected to the injustice of a charge or the justice sought to be achieved by the proceedings. This would appear to have some relevance to the meaning of the word fair. Accordingly, whether something can properly be said to be fair is whether it is fair in the form of a natural equity. The vagaries of language being such that would appear to be as far as it can be taken at present However, it is not completely vague. The reason being that it can be seen whenever mankind is called upon to apply his conscience in the form

[343] See above J. Rawls.

of natural equity to a specific factual situation, the judgment he makes is likely to be fair providing always, it is necessary to re-emphasize, all relevant facts have been brought to his attention. In simple terms the phrase natural equity of mankind has to be looked at objectively but having formed such an objective view it is then applied subjectively to the individual in question.

It is easy to move into the realms of norms in order to attempt to explain the meaning of the word fair, but that is not particularly helpful if the object is to achieve some better form of understanding. The word ‘fair’ can mean ‘just’ which again is unhelpful and involves a circular argument. It can also mean compliance with a set of rules. The difficulty here is that this meaning only complies with the meaning as understood by ordinary people if, in the context of a fair trial for example, any other separate rules required by the trial are also fair. For example, if there was a rule which stated to the effect that an individual was presumed guilty from the mere fact of his arrest and once this fact was proved at his trial he was to be convicted and deprived of his liberty it could not reasonably be said that the proceedings were fair. The reason why it could not be said is that it is contrary to the conscience of ‘mankind’. Yet as will be touched upon later in this chapter the word fair would appear, in the justice system of the UK for example, to mean little more than compliance with a set of rules irrespective whether the rules themselves are fair or unfair. Further, while a specific rule itself may appear on the surface as being fair it can be interpreted in a way which is manifestly unfair.

Perhaps a proper meaning of fair as understood by most reasonable individuals within a society, simply means that actions should be free of bias and dishonesty of any form including intellectual dishonesty in order that a just result is created or an unjust one is not. In the context of a criminal trial specific rules have been created to identify the minimum requirements of the meaning of the word fair in a criminal trial. Unfortunately, many of these rules can and often are, more honoured by their breach than their observance.

Consider this further in the context of a fair trial and assume, as previously stated, that there existed a separate rule which stated that once a police officer arrested someone who he believed was guilty, that in itself is proof positive of guilt of the allegation. The individual stands his trial and denies the allegation. The police officer gives his evidence that he believed the defendant to be guilty which is why

he arrested him. He does not offer any other evidence apart from such belief. The judge identifies the rule which clearly states that on the basis of such evidence the defendant is to be found guilty. Would that be a fair trial? The answer from the overwhelming majority of humanity ought to be no. But why not? The answer is simply that within that humanity referred to above, the conscience has been triggered to say 'no' because that humanity by virtue of such conscience has formed the view that such proceedings were unfair and no amount of rules can make it fair according to that conscience. It is natural equity within the conscience of a human being which prevents that conscience from determining in the above factual scenario something from being fair when it is not.

There can be little doubt that while vagaries of language and an individual's views may permit different interpretations of the meaning of the word fair in different circumstances there are some situations whereby the overwhelming mass of people, if not all, would agree that some things are manifestly unfair. The illustration above is one such example. Denying to an individual their liberty by means of arrest without any evidence whatsoever which suggests that they are guilty of an offence is another. However, the word fairness appears inappropriate in other related instances. For example, the murder of millions of people on the basis of their ethnicity, colour of their skin, religious beliefs and the like requires far greater condemnation than the use of the word 'unfair'. As would keeping another human being as a slave; using torture against someone who is or may be innocent. All these kind of examples and many more which could readily be provided are not those which require some form of empirical research amongst millions of people comprising the population of a country to reach the conclusion that such examples trigger the human conscience. The reason that the conscience of humanity has been triggered in such situations is that a form of natural equity is operative within that conscience.

There can be little doubt that there will be those who would argue that phrases such as the 'human conscience', 'natural equity', lack proper and precise definition. It may well be that in the far distant future medical science identifies a gene which awakes whenever the individual is having to ascertain whether he accepts that a rule is fair and just, but until then such individuals have to accept that these rules which can properly be called rules of Fundamental Law, have been recognized as being essential in the interests of civilization. They have not

arisen because of states making positive law under various kinds of doctrines such as sovereignty but have been created as a result of the conscience of mankind insisting upon justice. Arguments which attempt to dismiss these facts may not be that dissimilar to those put forward by the various states at the Vienna Convention[344] in an attempt to prevent recognition of the existence of a peremptory norm. The fact remains that these rules have been considered necessary to achieve justice in a particular form.

It would appear to be that for a rule to amount to a rule of Fundamental Law it must: (i) State a right or freedom; (for example the concept of 'negligence' could not reasonably be said to state a right or freedom whereas the prohibition against torture could be said to amount to a right prohibiting being tortured.) For something to be a right or freedom it is likely to be a right or freedom the substance of which is presently, but not necessarily, recognized as a right or freedom in humanitarian law generally or Human Rights Law in particular. It matters not at this stage that the 'right' is a 'right' improperly called. (ii) Act in personam in the sense that it must be for the benefit of the individual; (for example a rule which created an efficient and economical transport system would be for the benefit of society at large whereas a rule entitling an individual to a fair trial would be one which was for the benefit of the individual being tried.) (iii) Be a rule which is considered necessary by the human conscience when it applies natural equity within such conscience for the protection of the individual. (For example prohibitions on torture, slavery, genocide coupled with positive rules such as the requirement of a fair trial before liberty is denied are examples wholly consistent with this requirement.) Natural equity being inherent in the human conscience, is an essential ingredient for the creation of the type of justice which results in the operation of a rule of Fundamental Law and is the meaning of the norm which is partly responsible for a rule being a rule of Fundamental Law properly so called. Compliance with these principles produces Justice for the individual or prevents injustice occurring to that individual. Once all these principles are complied with, the right stated within the rule would be a right properly so called.

A point may properly be taken that a difficulty with phrases such as the 'human conscience' or the 'conscience of humanity' is not simply a lack of precision in

[344] See above, Chapter Four.

definition but also the fact that it does not sufficiently explain the conduct of those who violate rules of Fundamental Law. For example taken at its highest is it being suggested that those who commit such very serious violations did not possess a conscience? The answer is that, putting to one side those with mental disability, they did but they did not act in accordance with it. Their actions were because they believed in a particular ideology, which humanity in general would consider to be warped. This ideology was allowed to 'over ride' that conscience by perpetrating various acts contrary to Fundamental Law.

Further specific rules of Fundamental Law

It has been seen that a number of rules may be properly said to amount to rules of Fundamental Law. These include: (i) the prohibition on waging aggressive war; (ii) the prohibition on genocide; (iii) the prohibition against torture; (iv) the prohibition against slavery; (v) prohibition on punishment for something not recognized by law; (vi) the prohibition on restrictions of freedom of thought and conscience; (vii) the prohibition on denying an individual an education. In addition it will be seen later that a number of further rules can be added these include (viii) the requirement of a fair trial and the individual rules necessary to ensure a fair trial. All these rules are for the benefit of the individual. Qua individual. They are not there for the benefit of society at large. They are not there to create social justice or to prevent social injustice. This is readily apparent from the words of rules (iii) – (viii). However, even rules (i) and (ii) act in personam. The crime of genocide is usually one which seeks the destruction of a class of people as a result of their religious beliefs or ethnic origins. Each individual within that class shares that belief or those origins. The rule protects that individual albeit that the nature of the crime is one waged against a particular class of individuals. Similarly, when a state wages an Aggressive War it is each individual who together make up the victims of such war who are protected by the rule. If these rules are not in place justice for the individual would be denied. Such rules recognizing the rights and freedom of the individual are fundamental to justice being achieved for that individual.

Many of the rights and freedoms which individuals believe that they have and which results in the particular type of justice referred to already exist, in various forms, often subject to caveats or provisos, in the European Convention on Human Rights. Such Convention whether or not it is also reproduced in the

Statute Law of any country is relevant, as contended by this thesis, only as being evidence of recognition of the substance of the right or freedom in a recognized legalistic format. Its presence in such a Convention or even Statute is of no relevance to the existence of the right or freedom as being one which amounts to a rule of Fundamental Law. The Universal Declaration of Human Rights is declaratory of the existence of the rights and freedoms. The list which follows is a list of the substantive rights or freedoms which appear to contain the various principles referred to above, devoid of legalistic language, caveats and provisos included by the various states and which could properly be said to be rules of Fundamental Law.

(1) No one shall be subjected to torture (as defined by the United Nations Convention against torture but subject to the proviso that the caveat to the definition which appears to permit 'lawful' torture (permitting conduct which is 'inherent in or incident to lawful sanctions' or when torture according to the definition appears restricted to conduct by someone in an 'official capacity') is to be interpreted as meaning that such conduct which, apart from the caveat, would amount to torture is not itself contrary to Fundamental Law) or to inhuman or degrading punishment.[345] (2) No one shall be held in slavery or servitude.[346] (3) A person arrested upon suspicion of having committed a criminal offence shall not be denied his liberty unless it be in relation to the progression of the investigation and then only for the shortest time considered by a court of justice which is reasonable in all the circumstances. (4) A person charged with a criminal offence and facing trial shall not be denied his liberty unless it is reasonably considered by a court of justice that if released he would interfere with witnesses, abscond or cause a danger to himself or other members of the community.[347] (5) Everyone charged with a criminal offence or any matter requiring the determination of his civil rights and obligations shall be entitled to a fair hearing within a reasonable time.[348] (6) Everyone charged with a criminal offence is entitled: (i) to be informed promptly in a manner whereby it could reasonably be said that he would understand the nature, cause and relevant detail of the accusation against

[345] Co-relative right. UDHR Article 5. ECHR Article 3.

[346] Co-relative right. UDHR Article 4. ECHR Article 4.

[347] Co-relative right. ECHR Article 5(3).

[348] Co-relative right. UDHR Article 10. ECHR Article 6.

him;[349] (ii) to have adequate time and facilities for the preparation of his defence;[350] (iii) to defend himself in person or through legal assistance of his own choosing or if he has insufficient means to pay for legal assistance, to be given it free.;[351] (iv) not to be deprived of his property which is to be used for the reasonable payment of legal assistance in accordance with sub paragraph (iii) above;[352] (v) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him unless he has prevented the attendance or examination of such witness or witnesses.[353] The word 'examine' shall include 'cross examine'; (vi) to have the free assistance of a properly qualified and competent interpreter if he cannot properly understand or speak the language used in court.[354] (7) Everyone charged with a criminal offence shall be presumed innocent unless proven guilty in accordance with the principles of a fair trial.[355] (8) No one shall be found guilty of any criminal offence unless the tribunal of fact is satisfied so that it is sure of such guilt.[356] (9) Everyone is entitled to their trial taking place in public unless the interests of security, which includes the interest of the state, require that it should take place in private.[357] (10) No one shall be held guilty of any criminal offence or lose his freedom for any matter on account of any act or omission which was not recognized as constituting a criminal offence under national or international law at the time when it was committed or the matter was not recognized under such law as being one whereby he could be deprived of his freedom. (11) No individual innocent of any criminal offence or any other matter whereby he could be deprived of his freedom and of which he is innocent, shall be deprived of such freedom and no one shall be convicted of a criminal offence if, at the time of the alleged commission of the offence he did not have

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[349] Co-relative right. ECHR Article 6 (3)(a)

[350] Co-relative right. ECHR Article 6 (3)(b)

[351] Co-relative right. ECHR Article 6 (3)(c)

[352] Arguably Co-relative right UDHR Article 17(2) whereby the word 'arbitrary' to be construed as being deprived of personal property while presumed innocent in accordance with Article 6(2) ECHR.

[353] Co-relative right ECHR Article 6(3)(d)

[354] Co-relative right ECHR Article 6 (3)(e)

[355] Co-relative right UDHR Article 11. ECHR Article 6(2)

[356] Co-relative right. Common Law.

[357] Co-relative right UDHR Article 10. ECHR Article 6(1)

the required mental capacity for its commission. (12) Everyone has the right to freedom of thought, conscience and belief.[358] (13) Everyone has the right to a reasonable education.[359] (14)No one shall be appointed to the office of judge and sit in judgment upon any individual unless he possesses sufficient merit as understood by the majority of reasonable people within the society.[360] (15) Everyone has the right to anyone sitting in judgment upon him in relation to any proceedings to be impartial and independent of the state and all parties to those proceedings.[361] (16) In a trial by jury where the jury representing the people are the tribunal of fact the judge is not permitted to influence the verdict of the jury by any form of persuasive opinion.[362](17) In a trial by jury a judge is not permitted to discharge that jury merely because of his subjective view as to any potential verdict but should only be able to discharge them from reaching a verdict on the basis of specific rules developed in accordance with the principles of Fundamental Law.[363] (18) Every victim of crime has the right to insist that the state uses its best endeavours in the obtaining of all relevant evidence against the perpetrators of the criminal act and to use their best endeavours in a fair and proper manner to ensure that such perpetrators are duly convicted and sentenced appropriately for their criminal conduct. [364] (19) No one shall be deprived of their life, suffer any injury or be subject to any other form of recognized wrongdoing merely because they belong to a class of individuals, identified by virtue of their race or any form of ethnicity, religion, colour or sex.[365] (20) Everyone shall have the right; (i) that words herein, which state the individual's rights shall be given their ordinary and natural meaning; (ii) that words which are normative, for example the word 'fair' shall be interpreted according to the meaning of the majority of ordinary members of that society;[366] (iii) that irrespective of the words used the spirit and substance of the right shall always take precedence over any

[358] Co-relative right UDHR Article 18. ECHR Article 9

[359] Co-relative right UDHR Article 26. ECHR Article Protocol No. 1, as amended by Protocol No. 11, Article 2.

[360] No co-relative right.

[361] Co-relative right UDHR Article 10, ECHR Article 6(1)

[362] No co-relative right.

[363] No co-relative right.

[364] No co-relative right.

[365] Co-relative right UDHR Article 7, ECHR Article 14.

[366] No co-relative right.

form of interpretation of the words used;[367] (22) Everyone has the right to work. (This is not to be interpreted as a right to employment or any particular type of employment.)[368] (23) Every national of every state has the right not to be extradited to another state to face trial unless it has been demonstrated in accordance with the principles of Fundamental Law that there is a reasonable basis to form the view that the person to be extradited is guilty of the alleged wrongdoing and the legal process in the receiving state recognizes and applies the principles of Fundamental Law.[369] (24) Everyone has the right of self-defence.[370] (25) Everyone has the right to be protected by the state against action from another state or group of people which, if successful, would remove their fundamental rights and liberties. (26) Everyone shall have the right to enforce any violation of a rule guaranteed by Fundamental Law in a court of justice created in accordance with the rules of Fundamental Law.[371] (27)(a) Every citizen of the state having reached a certain age has the right to vote at a referendum the subject matter of which is the determination of their fundamental rights and liberties. (27(b) Every right which can properly be referred to as a rule of Fundamental Law shall be subject to amendment by referenda of the citizens of the state but not by any other means.[372] It has to be emphasized that the above list is not exhaustive.[373]

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[367] No co-relative right.

[368] Co-relative right UDHR Article 23

[369] No co-relative right.

[370] Co-relative right. Common Law

[371] No co-relative right.

[372] No co-relative right.

[373] For example is trial by jury a rule of Fundamental Law? Certainly many libertarians consider it a fundamental right. The jury's essential purpose is to identify facts from the evidence it accepts and deliver a verdict. Trial by one's peers is often considered essential where issues of fact are concerned mainly because judges cannot be 'trusted' in relation to findings of fact. However, if the judge was *truly* appointed on merit (see Chapter Seven below) would trial by 12 of one's peers be necessary? It may be that proper protection of the innocent requires a fundamental right to appeal on an *issue of fact* to a jury. Why shouldn't jury trial be open to all who stand in danger of losing their good character or be found to have committed reprehensible conduct? Why is it just for alleged 'more serious' offences. These are just some of the difficult and complex issues on this subject. It is of note that the necessity for a trial by jury is considered an essential requirement for the preservation of liberty in the U.S.A. and to

The substance of the majority of these rules have already been recognized as being necessary rules, for example in Human Rights Law. The distinction is that these rules, as being rules of Fundamental Law, are not dependent upon the existence of a sovereign power. They are dependent upon the existence of people. All these rules when properly applied create a specific form of Justice or prevent injustice occurring to the individual. The rules themselves all act in personam. The necessity for the rules is the specific requirement to achieve this specific form of justice or prevent injustice occurring.

The fact that the above are 'true' rights amounting to rules of Fundamental Law does not mean that they can be exercised in a wholly unreasonable manner. There is a distinction between the exercise of a right and the view that with rights come reciprocal obligations. The rights of Fundamental Law do not require any reciprocal obligations but inherent within the nature of a particular right may be a requirement for reasonableness in its exercise. The word 'reasonableness' does not mean some objective test based upon the perceived views of society, for that would be to qualify the word 'right'. Such reasonableness is usually implicit by virtue of the nature of the right itself. Thus the right to a lawyer of one's choice cannot be exercised if the lawyer is dead, ill, is not available or demands remuneration which is manifestly excessive in the extreme. In addition it may be necessary in rare and exceptional circumstances in the interests of the protection of Fundamental Law for certain rights and liberties to be suspended. For example in a time of war or realistic potential war when the state's national security is involved. The important point here is that any such suspension must *genuinely* be in the interests of national security such as in times of war and not utilised for other political motivations. Any such suspension must always be absolutely necessary for the protection of the fundamental rights and liberties of the people.

There is one further problem which has to be addressed. It is doubtful whether a rule can amount to a fundamental right or freedom if in its exercise it would necessarily and substantially interfere with the right to govern. Even if it can then the exercise of the right or liberty has to be controlled if it would necessarily and substantially interfere with the right to govern. Individuals do not normally live alone in their own island. The word necessarily means exactly that and

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a lesser extent in the UK. Yet it is apparent that the UK parliament considers that it has the lawful power to abolish trial by jury.

substantially does not mean minimally. An individual is not to be denied a fundamental right or liberty merely because those in government do not like it, or that it somehow interferes with a policy in their manifesto, or a policy which they would like to put into effect. What occurs at present in the UK for example, is that those responsible for government accept that people have fundamental rights and liberties but it is not the people in whom such rights and liberties are vested who control them but the government.

The majority of the above rights and freedoms have been recognized by numerous states. True it is that they have not formally recognized Fundamental Law but they nonetheless have recognized the majority of the rights and freedoms and the words compelling law. They have done so, not because they thought it was a 'good thing' for their citizens to have such rights and freedoms, but in most cases because they have been driven into it by a collective international conscience representing the conscience of humanity.[374] However, although there is a clear admission by the states in recognizing the existence of the right or freedom they are not prepared to see that right or freedom actually vest in their individual citizens but only to permit such existence to be contingent upon their own practices for the creation of laws. In simple terms if it exists in a statute or other form of law which 'we' the state recognize it exists. If it is not in one of those formats its existence is not recognized.

Methodology used by the State in preventing justice as demanded by Fundamental Law and the consequences resulting from such prevention.

There is a substantial amount of evidence which the experienced practitioner within the Criminal Justice System of the UK is or ought to be aware of, which is directly relevant to illustrating how individuals are often denied justice in trial proceedings. The limits imposed by this thesis make it impossible to provide anything other than the barest outline which, hopefully, will at least produce a picture of the approach of the state.

Having recognized at least in principle the substance of the existence of many of the above rights and freedoms the states' then often considered it necessary to remove from the right or freedom various characteristics which they considered

[374] See above, Chapter Four.

necessary in the interests of the state culminating in the various caveats and provisos to Human Rights Law.[375] If that was not sufficient they then considered that it was in their power to manipulate the meaning of some of the words expressing the right in order to comply with the state's subjective interpretation of the word justice. This manipulation essentially exists in a number of forms. Firstly, by watering down the right simply by the inclusion of various caveats and proviso. The states would no doubt argue, often perfectly reasonably, that this was necessary in the interests of the state. The second form was by interpretation in such a way that the substance of the right or freedoms was removed or partially removed. It is this latter method which produces a violation of Fundamental Law. For example when such interpretation produces a result whereby the word fair, in relation to the concept of a 'fair trial' is given a different meaning to that which accords with the conscience of mankind.

The rights and freedoms properly expressed in the form of rules of Fundamental Law do not belong to the state. They belong exclusively to individual human beings and by formal recognition of the very existence of such a right or freedom, albeit in a form referred to as Human Rights Law and irrespective of caveats and provisos, the state can be presumed to have accepted that fact.

A third method favoured by states' in denying fundamental rights and freedoms is by the manipulation of its criminal justice system. The essence of freedom in any civilized country lies or ought to lie in the essential character of a country's Criminal Justice System. Many countries such as England for example, would consider that the essential character of its Criminal Justice System is some form of shining light to a developing world. The standard which others have to achieve. At the heart of this is one essential principle namely that an individual innocent of any criminal offence should not be denied his freedom by being wrongly convicted of an offence. This is often referred to as the presumption of innocence whereby everyone is presumed to be innocent of a criminal offence until found guilty following a fair trial. This is a rule which lies at the heart of most, if not all, the Criminal Justice Systems of any civilized country and the development in practice of that country's legal system pays proper allegiance to that rule. When

[375] See above, Chapter Four .

this rule is complied with in practice justice fundamental to the individual is achieved.

The practice demands rules, both procedural and substantive. Having accepted the presumption of innocence in the overwhelming majority of cases a state such as the UK then created rules whereby the evidential proof' necessary to re-but the presumption took into account and prevented evidence which can properly be said either to be matters of prejudice or amount to little more than hearsay. These rules were considered necessary because of the awareness that without them there was a real danger that the innocent would be wrongly convicted. Thus, for example they prevented evidence being adduced of an individual's bad character in the sense that they had previous convictions except in special circumstances.[376] They prevented convictions being obtained upon the evidence of accomplices or for certain types of offences unless there was corroboration of a witness's evidence.[377] They made sure that those responsible for prosecuting did not go 'all out' to seek a conviction but adduced the evidence in a fair and balanced manner.[378] Hearsay evidence itself was prevented, except in certain understandably exceptional circumstances. They prevented an adverse inference being drawn against an accused person, on arrest, charge or being interviewed who remained silent. Only a barrister's professional organization was responsible for deciding who was qualified to represent individuals accused of a criminal offence. The emphasis was on the protection of the innocent and the presumption of innocence. These rules had existed for a substantial period of time. In some cases well over a hundred years. They had been supported and applied regularly in criminal trials by the judiciary and indeed many of the rules had been further developed by them.

In the latter part of the twentieth century and the beginning of the twenty first century these rules have either been completely swept away by statute or substantially undermined.[379] The so called logic behind this legislation appears

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[376]Criminal Evidence Act 1898

[377] *Davies* v *D.P.P.* [1954] A.C. 378; *R* v *Marks* [1963] Crim.L.R. 370

[378] Rules of Professional Conduct by a barrister.

[379] Criminal Justice Act 2003; Criminal Justice and Public Order Act 1994 S.34; QASA the ability of a judge, appointed by the state (directly or indirectly) to decide whether a properly

to have been based upon the perception that too many 'guilty' people were 'getting off' and somehow the rules were unfair to the prosecution. Those with experience of the practice of the Criminal Justice System whereby for the more serious offences trial was by jury knew that a jury was loathed to acquit someone if the evidence disclosed that the individual was guilty of the offence. If indeed individuals who were in fact guilty were acquitted nearly always, in all probability, it was simply as a result of the failure to adduce the appropriate evidence. Instead of looking to those who were responsible for adducing such evidence as a remedy for the perceived problem the state decided to change the established rules of evidence resulting in convictions being much easier to obtain.

Common sense dictates that if this is done one automatically increases the likelihood of a wrongful conviction. That is to say the innocent being wrongly convicted. Many of the convictions which are presently achieved in England in the 21st.century based upon this 'new' approach would never have been obtained over the previous hundred or so years. Does that mean that all these 'new' convictions are of people who were guilty? Common sense again dictates that many are in all probability likely to be innocent and have languished or are languishing in English prisons for offences which they have not committed. Further, a singular point is that how can a trial be said to be fair if the state removes many of those rules which were designed to insure that it was fair?

How is the fact of the innocent being wrongly convicted to be proven? The answer is one can't; not directly. True it is that an individual who is innocent has the right to appeal. However, an appeal court will only quash a conviction if *they* think it is unsafe. An innocent individual wrongly convicted by his peers is most unlikely to be able to persuade two or three judges of his innocence. Here the appointment system for the judiciary is relevant.[380] Even when an appellate court is 'driven' into quashing a conviction it is almost unheard of for that court to state that an individual is 'innocent' and tend to use words to the effect that the verdict was unsafe. It is almost impossible to find a single case were an appellate court which has quashed a conviction has clearly stated that the defendant was innocent, the conviction was wrong and a miscarriage of justice has occurred. The strong

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qualified barrister is 'suitable' to be represent an innocent man charged with a criminal offence.

[380] See below, Chapter Seven.

inference is that the state and the judiciary take the view that it is somehow in the public's interest for the public to believe that a defendant 'got off' on some form of legal technicality or the like.

The core of the problem lies in the fact that as yet no system in the world has created a fully guaranteed method whereby only the guilty are convicted of criminal offences and denied their liberty. An individual on occasions has been acquitted whom those in positions of power considered were guilty of the alleged offence. If the offence is one which has aroused public disquiet, usually as a result of portrayals by the media, then the necessity for a conviction becomes a political requirement. Instead of examining ways to improve, for example, the quality of the evidence which is obtained by increasing the efficiency of those responsible for obtaining such evidence the simpler solution appears to be to simply amend the rules making it easier to obtain convictions.

One can provide numerous examples which can properly be said of the innocent being wrongly convicted[381] but as has been alluded to above, space within this thesis does not permit it. However, if there be one case which encapsulates just some of the problems it is a case which was tried under the old system before the various changes referred to above, occurred.[382] This case resulted in the conviction of an innocent man, on any reasonable view, of the offence of murder which resulted in his execution. The summing up of the trial judge was unfair as being biased in the extreme. One only has to read it to reach that conclusion. The trial judge occupied one of the highest positions in the judiciary namely that of Lord Chief Justice of England. His judgment was supported by numerous other judges at the time including the appellate court. The Home Secretary at the time ignored applications from various quarters to prevent the execution going ahead, but to no avail. The conviction was eventually quashed years later by a new

[381] See for example those cases which are known to many of the general public : Timothy Evans (1950); the 'Birmingham Six' (1975); the Guildford Four (1974); Barry George (2008).

[382] *R* v *Craig and Bentley* (1952) (Unreported); *R* v *Derek Bentley* (Deceased)(1998) EWCA Crim. 2516; *R* v *Bentley* (Deceased)(2001) 1 Cr. App. Rep. 307: See also: D. Yallop, *To Encourage the Others* (Bantam Books, N.Y. 1991.); I. Bentley, 'A tissue of lies', Sunday Times 1st. September 1995.

appellate court[383] but even then the criticism of the trial judge was comparatively muted.

If this situation can occur when rules were supposedly in place to protect the innocent, common sense dictates the substantial increase in risk of that occurring when a substantial number of them are removed. Accordingly in England at the beginning of the 21st. century it is considered by the state to be perfectly lawful to remove numerous rules which were designed to prevent the wrongful conviction of the innocent. For those who would dismiss some of the examples postulated earlier in this thesis as being unbelievable , for example guilt being proved simply by the fact of an arrest, must accept that it is open to Parliament to pass a law to give effect to that or any such extreme situation. Only recognition of Fundamental Law and its enforcement can prevent such a situation occurring.

Any legal system which permits or significantly increases the risk of the innocent being wrongly convicted and deprived of their liberty is one which violates Fundamental Law and the English system in the 21st. century does just that. Only by clear recognition of Fundamental Law; the proper preservation of an individual's rights and freedoms can the innocent be protected against a system which in the 21st. century does little more than pay 'lip service' to the presumption of innocence. Only by proper recognition and acceptance of the rules of Fundamental Law can miscarriages of justice be minimised or prevented. It has to be emphasized that it is not legal justice which has been miscarried in these type of circumstances for that has been achieved but the type of justice which necessitated the relevant rule of Fundamental Law which has been miscarried.

For a State, such as the UK, to pretend to openly assert that it believes and supports human rights and fundamental freedoms when it is prepared to pass laws which substantially increase the inherent risk of the innocent being wrongly convicted and deprived of their liberty is pure hypocrisy. It is no answer for the state to say that its record is better than other states for often those other states do not pretend to uphold an individual's fundamental rights and freedoms. Many of the problems which have occurred in relation to the English Criminal Justice System of the 21st. century have arisen by a refusal or reluctance to properly put into practice the theory of that system in relation to protecting the innocent, which

[383] *R* v *Bentley (Deceased)* (2001) 1. Cr. App. Rep. 307

has been developed over centuries. This has been coupled with the insistence of the right to absolute power in law making under the doctrine of Parliamentary Sovereignty irrespective of the violation of Fundamental Law.

The situation which presently exists could be simply stated in basic language as follows: 'We the elected government intend to increase the number of convictions as we believe that too many people who are guilty are 'getting off'. We have the absolute power to amend or repeal any such laws we wish, in order to bring that objective into effect. If that means innocent people are wrongly convicted and imprisoned, which we do not accept, then so be it. It is a small price to pay for increasing the rate of convictions'. As long as people are unaware of what is occurring then such an attitude may be 'politically' acceptable under the sound bite of 'fighting crime'. Until, of course, the "bell tolls for thee."[384]

It is essential in a state such as the UK with a long and admirable tradition in relation to fairness within its Criminal Justice System, that it makes certain that the practice of that system complies with the core of its theoretical basis, in protecting those who are or may be innocent, in order that individuals have confidence in that system and miscarriages of justice which result in the deprivation of liberty to the innocent are prevented.

Conclusion

There is a strong connection between rules of Fundamental Law and a particular type of Justice. That type of Justice is to found in the conscience of man-kind who are members of a particular society or societies. It is to be differentiated from morality. The connection exists because a rule of Fundamental Law cannot exist unless it is accepted by that conscience. In acceptance by that conscience a form of natural equity has been delivered by that conscience. Acceptance by that conscience alone is not sufficient for it to amount to a rule of Fundamental Law. In addition it must be a rule which is capable of amounting to a fundamental right or fundamental liberty and act in personam that is for the benefit of the individual.

[384] John Donne (1624). E. Hemingway.

CHAPTER SEVEN

THE JUDGE

Introduction

It is clear from the evidence which has so far been adduced that the concept of a form of law which can be reasonably and properly referred to as Fundamental Law is not something which merely exists in the minds of a few individuals. From the Levellers of the Seventeenth Century, through to the Nuremburg trials, the Universal Declaration of Human Rights and the Vienna Convention identifying compelling law, they all combine together to provide cogent and, some would say, overwhelming, evidence of its existence. Its existence is not restricted to belief or something which one ought to have. The charge sheet against King Charles I, the judgments at Nuremberg and the doctrine of Jus Cogens, demonstrate that its existence is that of a legal concept. Therefore, why is it that there are very few judicial references in the UK to the concept and barely a single case,[385] the ratio of which could be properly said to support its existence? This chapter answers that question by identifying that it is because of the judiciaries' unswerving allegiance to the doctrine of absolute Parliamentary Sovereignty in insisting that Statute law is the most supreme form of law. This is notwithstanding that it is properly arguable that such a doctrine has no legal basis whatsoever, being purely political in nature.[386]

This chapter will demonstrate that the reason why there is not such judicial recognition is interwoven with the system whereby individuals are appointed to the office of judge to begin with. It is this system which is responsible, in a country such as the UK, with the proper allegiance of its citizens to the rule of law. A judge is able to use a doctrine, which is not a legal one, to deny to the people their true fundamental rights and freedoms which, as has been seen throughout this thesis,[387] form the bulwark of Fundamental Law. This approach prevents the kind of justice which the rules of Fundamental Law produce in their operation. In order

[385] The possible exception being Coke in *Bonhams case*. See above, Chapter Two.

[386] See above, Chapter One.

[387] See above, Chapter Six.

to demonstrate this point this chapter examines that system by looking at the requirements for appointment to office at the outset. It then looks at the nature of the Commission responsible for ascertaining that such requirements are complied with. It outlines the weaknesses of the existing manner in which trials are reported which can easily prevent the public being made aware when justice has been denied to an individual be it a defendant or an alleged victim. It looks at the lack of real judicial protection when justice has or may have been denied to that individual. It examines some of the issues which prevent the exercise of judicial power to protect the individual citizen from parliamentary abuse if it were to pass abhorrent laws.

This chapter is not restricted merely to illustrating why there has not been judicial recognition of Fundamental Law. The office of judge itself requires compliance with Fundamental Law. The particular type of Justice, referred to in the previous chapter, is created when a rule of Fundamental law has been recognized and implemented. It is a fundamental right of every individual that a judge possesses the required qualities which together satisfy the meaning of merit as understood, not by a parliament or the subjective views of other judges, but by ordinary right minded people. The European Convention on Human Rights has recognized that there are certain rules which have to be complied with before an individual can be appointed to the office of judge.[388] To-wards the end of this chapter various observations are made as to the consequences of the Parliament in the UK failing to comply with Fundamental Law in relation to adopting and applying the rules of such law when an appointment is made to judicial office. In particular by failing to give the word merit its ordinary and natural meaning as understood by ordinary right minded people. For those who wish to argue the meaning of 'ordinary right minded' people it does not mean those from a particular class in society.

The importance of the position of judge in society cannot be underestimated. Law has to be created or declared as being law, before it can benefit the people. It matters not whether such law is fundamental or of any other type. Only one body of people is generally responsible for declaring by way of opinion what the law is. The judges are that body. Even Parliament in its capacity of legislature does not,

[388] See above, Chapter Five.

in reality, apart from certain aspects relating to codification of existing law, usually declare law, as in the majority of cases it confines itself to making law or repealing or amending existing law. Any law made by Parliament is then subject to interpretation by the judiciary using the rules of construction.

Most, if not all, legal works, whether they are classified as judicial or academic, having merit or not, whatever the format, have one area in common. This common area is that all such works will, at some stage, in order to support or detract from a particular point, make reference to a judicial authority. Such judicial authority is put forward as representing the law, at least until a higher court alters it. Without such authority, there would be few academic papers or works in the legal field at all. Very few authors, whatever their position or reputation, even raise the issue as to the relevance or importance of the occupant of the office of judge.[389] This amounts to stating that a principle, often in support of an ultimate theory, is accepted as the law because the particular principle has been stated by a judge. If the judge was a person without any academic qualifications whatsoever, who had never been to school and had no experience of life, it would make no difference, for it would be the judicial authority relied upon by such authors as the evidence to support their respective arguments.

The judge is the person who provides an opinion as to the law. It is necessary to emphasize just that: namely, the judge's statement is one of 'opinion'. It is he who commences the machinery for its enforcement. It is vital that whatever attributes society lays down for the office of judge are fully possessed by the holder of such office. Respect for the rule of law is an inherent characteristic of a democratic, civilized society. The fact that such rules are fair, just and important for maintaining order within such society, is presumed, rightly or wrongly, by its members. The elasticity of language coupled with the multiplicity of different factual situations necessitates the existence of a person who can be trusted by the people to discharge the requirements of that judicial office.

Prior to the start of the twenty-first century, if anyone outside the legal profession had tried to find out what qualifications are required in order to become a judge he would have had the greatest difficulty. Members of the legal profession,

[389] Hobbes and Bentham did touch upon it.

dependent upon their experience, would have found the answer easier to provide but even they would have come across significant problems.

Yet, in any civilized society which is dependent upon law for its proper functioning, the judge's position is of paramount importance. He will so often decide whether a person has or does not have a so called right, whether they are liable to pay money, forfeit property or lose their liberty, as well as a host of other issues. Some writers have clearly understood how vital it is to properly identify the extent of his role.[390]

What then in England are the requirements for judicial appointment? In a modern, computer-based age, some may think that it is simple to find the answer by going to the appropriate website. Given that the judiciary appears to have its own website, perhaps at least the seeds of the answer ought to be found there. The website is called 'History of the Judiciary'. It is a brilliant summary of such 'history' but not a word is mentioned which may properly assist in providing the answer to the question posed. Why not? Is it necessary in any form of free society to appear to keep secret or to have kept secret the nature of appointment to what may properly be suggested is the most important, in the context of liberty, of all offices? The website appears to proudly and emphatically declare that the judiciary 'is fully and officially (sic since the Constitutional Reform Act 2005) independent of government'. It is somewhat regrettable that such a statement appears, in reality, on a government website, but what does that mean? This chapter will try and find the answers to these questions, in particular, whether the real reason that Fundamental Law has not, so far, been recognized by the courts in the UK, has in reality anything to do with whether the concept itself does or does not exist. What is clear at the outset is that the people of England have absolutely no say whatsoever in the appointment of those who will sit in judgement upon them. In addition, neither do the overwhelming majority of lawyers with first-hand experience of such an individual.

This thesis refuses to automatically accept without question that those who hold judicial office must automatically meet the proper standards for such office merely because the individual occupies the office. It also refuses to accept that something cannot be the law until it is recognized as such by the appropriate

[390] For example, Bentham.

judge in a particular court. A common theme throughout this thesis is that there is a substantial difference between the existence of law and the recognition of such existence. The Nuremburg trials are one illustration of that difference;[391] the general concept of existing law being subsequently declared is another. Further, these refusals in this thesis are based upon similar reasoning as a refusal to accept the bald statement made by a judge, lawyer, academic, politician or anyone else, that something 'is the law because it is the law'.[392]

The existing recognized legal requirements for appointment to the office of Judge.

The Constitutional Reform Act (CRA) (2005) states that judges must be appointed solely on merit.[393] Somewhat interestingly, having used the word 'solely', it further states that a person must not be selected unless the selecting body is satisfied that he is of good character.[394] By utilizing the word 'merit' as the appropriate test, it is not, in many ways, that dissimilar to the appointment system for Queen's Counsels (QCs). The overwhelming majority of judges, if not all of them, are likely to state that by long tradition judges have always been appointed on merit.[395] Regrettably, it does not appear possible to find within the Statute what is meant by the word 'merit'.

The suggestion, whether express or implied, that judges have always been appointed upon merit is singularly interesting. Could it be argued that the seventeenth-century[396] Judge Jeffreys, Recorder of London, Lord Chief Justice of England and eventually Lord Chancellor, was appointed upon merit? His trials and the barbaric cruelty with which he conducted them are legendary, as was his apparent utter contempt for distinguishing between guilt and innocence and his obvious failure to understand and apply concepts of fairness and justice. It could be properly argued that his attributes were necessary for 'the times'. However,

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[391] See above, Chapter Three.

[392] See above, Chapter One.

[393] S. 63(2).

[394] S. 63(3).

[395] See Lord Browne-Wilkinson, 'A Bill of Rights for the United Kingdom – The Case Against.' (1997) 32 Texas International Law Journal, 435, p. 438.

[396] Trevelyan, G.M. *England under the Stuarts.* (1904): Helm, P.J. *Jeffreys*. (London, Robert Hale 1966). (2nd. Ed.Routledge ,2002).

the fact remains that he was appointed a judge well before the various trials for which he would become famous.

The high judicial offices he held exist today and, whereas appointment in his era was, in one sense, by the Sovereign; until the Constitutional Reform Act (CRA), appointment was made by or on the recommendation of the Lord Chancellor, a high judicial office, to the Sovereign, which in more recent times has become political in nature. Observations, similar to those above relating to 'fairness' and 'justice' could be made in relation to Lord Chief Justice Goddard,[397] as well as a number of other judges.

The CRA changed the method by which the majority of judges were to be appointed. They were no longer to be appointed, in reality, by the Lord Chancellor (or for many years previously technically by the Sovereign upon the recommendation of the Lord Chancellor) but would be subject to the recommendation of an 'independent' Judicial Appointments Commission (JAC). Applicants are to be barristers or solicitors of a minimum number of years standing. They would complete the appropriate application form and, if successful, the Commission would, in essence, 'recommend' the individual concerned to the Lord Chancellor, who could then accept or reject the recommendation. If accepted, formal approval would be given by the Sovereign.

Prior to the CRA, such appointments tended to be made on the basis of 'soundings', i.e. an individual wishing to become a judge would apply to the Lord Chancellor's office, which would then enquire of other judges as to the applicant's 'suitability' for a judicial appointment. It follows that, unless the applicant had the support of other judges, he would have virtually no chance of becoming a judge, whatever his true individual merits actually were, for so-called merit was dependent on the subjective views of the judges who took part in the soundings. Such an approach perpetuated the way that judges were appointed for hundreds of years and bore little material difference to the way judges had been appointed at the time of Jeffreys. In theory at least, the new approach laid down by the CRA appeared to provide a long overdue reform to the method of appointing individuals to this most important of offices. The question which arises is whether this reform was real or apparent, and if the latter, whether it was little

[397] See above, Chapter Six.

more than an attempt to appease those who had rightly seen the gross unfairness of a system of appointment which had existed for hundreds of years. A system which was so obviously inappropriate in modern times and, further, could not reasonably be argued as being in the public interest.

The Statute rightly puts merit as the 'sole' criteria for appointment. The JAC identifies a number of qualities and abilities which it, again arguably rightly, associates with merit.[398] These are: (i) intellectual capacity: evidenced by: (a) high level of expertise in your chosen area or profession; (b) ability quickly to absorb and analyse information; (c) appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary; (ii) personal qualities: evidenced by: (a) integrity and independence of mind; (b) sound judgement; (c) decisiveness; objectivity; ability and willingness to learn and develop professionally; (iii) an ability to understand and deal fairly: evidenced by: (a) ability to treat everyone with respect and sensitivity whatever their background; (b) willingness to listen with patience and courtesy; (iv) authority and communication skills: evidenced by: (a) ability to explain the procedure and any decisions reached clearly and succinctly to all those involved; (b) ability to inspire respect and confidence; (c) ability to maintain authority when challenged; and (v) efficiency: evidenced by: (a) ability to work at speed and under pressure; (b) ability to organise time effectively and produce clear reasoned judgments expeditiously; (c) ability to work constructively with others (including leadership and managerial skills where appropriate).

It is clear that the formulation of the various qualities and abilities referred to above required substantial thought, and it is reasonable to assume that it had the input from numerous individuals. Many experienced practitioners who regularly appear before the judiciary may have little hesitation in stating that the majority of judges do have many of the qualities, with the possible exceptions of (iii) (a) and (b) and (ii) (c) (objectivity). Further, according to the appeal courts, i.e. according to their own brethren, most of them appear to produce 'sound judgments' most of the time.[399] The problem is not what is contained within the apparent meaning of merit but what is excluded from the list of qualities and abilities. What has been excluded, to many, if not all, right-minded 'ordinary'

[398] J.A.C. web site. http://jac.judiciary.gov.uk/ accessed September 2014.

[399] Author's personal experience.

people could well form the very essence of merit in the context of this type of office.

One would have reasonably thought that one of the most powerful pieces of evidence that ought to equate with merit is whether the applicant was successful as a barrister or solicitor. This appears to be wholly irrelevant among the variety of qualities and abilities required of an individual in order for him to become a judge. Even the ability ‘to maintain authority when challenged’ is considered far more relevant and therefore more important than whether the applicant had been successful as a barrister or solicitor. Accordingly, a barrister, whether acting for prosecution or defence, claimant or defendant, and who has lost, say, his last twenty cases consecutively, is treated in the same way as one who has won the same amount of cases. A barrister or solicitor could have been, by the standards of ordinary people, a failure in his professional practice but would remain eligible for becoming a judge, and in many instances would be so appointed. A successful practice, in that sense, does not appear to have any relevance to merit. A criminal practitioner who, because of the system which prevents him from ‘picking and choosing’ his cases, may have lost his last twenty cases on the basis that they were, in truth, all hopeless in the sense of nigh on impossible to win, yet his efforts are recognized and rewarded by those who instruct him. His practice is, arguably, that of a successful practitioner, as recognized by those who instruct him. Such a situation would also appear to have little relevance to merit. It may well be argued that the qualities for being a good judge are not necessarily the same as those for being a successful barrister or solicitor, but does that mean that they are not relevant at all when giving the word ‘merit’ its true meaning? This question is particularly pertinent when taking into account a system whereby a barrister has to interact with ordinary members of the public in jury trials.

Fundamental Law is principally connected with individual liberty. The issues mainly, although not exclusively, relate to criminal trials. Criminal Law tends to be ‘looked down upon’ by the profession at large as being something which, compared to the so-called intricacies of tax law, land law or the law of trusts (to give but a few examples), virtually ‘anybody’ within the profession is believed to be capable of doing. For that reason, in criminal cases, particularly some of the very serious ones, it is not unusual to find a judge trying the case who has little experience in Criminal Law, let alone experience based upon a successful

practice. In the Court of Appeal, when dealing with a criminal matter, it is even not unusual to find a judge with a background mainly in a branch of the law such as shipping![400] Whatever the general views of the profession may be, the reality is that Criminal Law, properly done, is, as a matter of common sense, the most difficult of all branches of the law. A good lawyer with some experience ought to have little difficulty in arguing tax law before the Commissioners; land law or contract before a judge. True it is that he may not be able to argue it anywhere near as well as someone very experienced in that field but he ought to still be able to argue it reasonably. He requires little knowledge of the rules of evidence, for such rules are sparse in civil proceedings. However, the lawyer who practices Criminal Law is not faced with judge alone but is often faced with judge and jury. He has to be a true advocate as well as a lawyer and have a good knowledge of the rules of evidence.

Another prerequisite missing from the list required for judicial appointment is perhaps to many the most important of all: the ability to dispense justice. This ability is not mentioned as a requirement. While at first glance the absence of such a requirement may cause dismay and consternation among many ordinary people, a moment's reflection illustrates a reason, rightly or wrongly, for such absence. The function of a judge, as apparently understood by judges, lawyers and academics for centuries, is jus dicere not jus dare[401]. They do not make law; they merely declare it and uphold it. The concept of justice appears to be for others; not for them. Apart from the reason just provided, why?

Experience of life is not a requirement for judicial appointment. Accordingly, an individual who has been fortunate in having a privileged or quasi privileged type of upbringing, attending a public school before going to a so called 'top' university and then through family connections, obtains a place in, say, a recognized tax set of chambers, is, apparently, prima facie suitable material for appointment. Assuming he satisfies the other criteria, he can then sit in judgment in criminal cases, which regularly involve questions of fact and inferences to be drawn from such facts, as well as human rights. Inferences will often point to the guilt or otherwise of the defendant. Common sense dictates that some reasonable experience of life is so obviously often a prerequisite in order for

[400] Author's personal experience.

[401] Generally, accepted interpretation is to 'interpret (and apply) law not to make it'.

proper inferences to be drawn from the facts of any particular case. However, it would appear that judges are not required to have such experience. It is necessary to emphasize that it is not the privilege or quasi privilege background to which objection could or ought to be properly taken; it is only when this results in little experience of life that it may and often does become relevant.

It is strange that a statute, which clearly states that selection for judicial appointment should be solely on merit, almost in the same breath states that a person must not be selected unless the selecting body is satisfied that he is of good character. By itself, that would seem innocuous and understandable, but given that the majority of appointments are made from those who are practising barristers and a person who was not of good character would not normally be allowed to practise as one, what then is the reason for such an express statutory provision? The operative words are ‘the selecting body’ (the Commission or possibly the Lord Chancellor as well) must be satisfied that the applicant is of good character. In this context, the application form is instructive.

The application form deals with financial issues, such as questions of insolvency, payment of taxes and the like, as well as previous criminal convictions. However, it is the wording of some of these questions which, on scrutiny, ought to be a matter of singular concern. The first question asks: Have you ever been convicted of, or cautioned for, any criminal offence (other than parking offences), or are any other proceedings pending? It then goes on to ask for details. It is the word ‘ever’ which many may properly question. Accordingly, an individual who at university was arrested and cautioned or charged with, say, smoking cannabis when he was 20 may be classed unsuitable for judicial appointment some twenty or thirty years later. Equally, a person convicted of exceeding the speed limit when he was of a similar age, or one who forgot to pay his rail fare because the ticket office was closed and he was fined by the railway body or taken to court, are but a few further trivial examples. Yet such examples, however trivial, however many years ago they may have occurred, are deemed to be relevant. Why? They can only be relevant to merit if merit includes the overall type of person suitable to become a judge. It provides an opportunity for someone to say that such an individual is not suitable for an appointment if he has exceeded the speed limit, etc. some twenty or thirty years previously. It is no answer to suggest that such would not happen in the above

circumstances, for then it would not be relevant to pose the question in the way it so deliberately has been. It provides substantial leeway for those responsible for an appointment to apply their subjective view as to ‘character’.

A further difficulty arises with allegations of professional misconduct. It is not that unusual for a judge to take a particular dislike to a barrister and to do everything he can to ‘trap him’ into making a mistake. Once made, the judge could then refer the individual to his professional conduct body. Even if the allegation was dismissed or considered to be so trivial to merit no more than a warning, and irrespective of when it occurred, its details are considered to be relevant.

The Judicial Appointments Commission (JAC)

Having looked at the elusive quality of merit, the next step is to look at the JAC. It is said that it is independent and, of course, in one sense it technically is; separate to government and to the Lord Chancellor. However, to the ordinary people, ‘independent’ means a lot more than in some form of technical sense. It infers a degree of trust, which results from impartiality. It is true that ‘impartiality’ and ‘independence’ are different words but there is nonetheless a degree of overlap. A judge may well be technically independent of the executive but, if only those who are appointed are those who share the same or similar views of the executive, they could hardly be said to be truly independent, as understood by the majority of ordinary people. The ordinary person’s trust of impartiality permits the public to infer that the right person will be picked for such an important position.

As at 2010, the Commission consisted of eight women and seven men. This, of course, provides a degree of assurance of equality. It is stated that the Chairman must always be a ‘lay member’. Five must be members of the judiciary. Two must be professional members. Five must be lay members. One must be a tribunal member and one must be a lay justice member. In 2010, the barrister professional member was a QC; itself an appointment. The tribunal member sits in the upper tribunal and sometimes as a Deputy High Court judge. The lay Chairman (Chairwoman) was the first Civil Service Commissioner between 2000 and 2005 and sat in the House of Lords. While it is true that a QC is not a judge any more than he is a member of a tribunal or a lay ‘justice’, the reality is that the judiciary have an ‘in built’ majority. Yet, if it were truly independent in the objective sense

why should it not be independent of the judiciary? One could readily see the importance of a judicial view in an advisory capacity but that is a different matter to being part of the Commission.

The obvious and compelling inference is to continue the centuries-old tradition that the type of person who is to be appointed a judge should be of a similar type to those who have always previously been appointed, notwithstanding that such an approach is or may be against the public interest. What of the lay members? One is Dean of the Faculty of Laws at a well-known university, one has been knighted with a strong military and public service background, one has worked closely with government organizations and one is a journalist. Such is the JCA, which is allegedly independent and can be trusted to act in the public interest in appointing the 'right' people to become judges.

There is no place on the Commission for the nurse, the teacher, the scientist, the housewife and mother, the clerk, the dentist, the accountant, the successful businessman, the exporter, the honest tradesman or the host of others who are representative of the millions of people in a great country such as the UK. There is not even room for the objective opinions of others who have worked with the individual candidate over the years prior to the appointment, apart from the odd one, such as Head of Chambers, in the case of a barrister or partner in the case of a solicitor. Yet, an individual who is appointed judge in the present system can sit in judgment upon any of the men, women and children in the U.K.

For those concerned with liberty, there is, in so far as that most important branch of law, Criminal Law, is concerned, an obvious method of proving true merit. Throughout his professional life, the barrister who practises Criminal Law will almost certainly have regularly appeared in front of juries. A jury can so easily comment on the ability or lack of it of the barrister concerned. If the barrister subsequently wishes to apply for an appointment, whether as a QC or a judge, the views of representatives of the people who have actually seen the individual in action ought to be compelling evidence as to whether that individual has merit, coupled with a judge's view in relation to competence when having to deploy a legal argument. It is true that different cases require different abilities of the advocate but after a reasonable number of years in practice, in most cases, a picture will usually have developed. Perhaps, unsurprisingly, given the system which actually exists, it may be thought that it is not in the interests of the

government or the judiciary to take account of the views of those who are truly representative of the public.

Reporting Judicial Proceedings and Judicial Interference during the Trial Process

For many academic writers and lawyers their primary source of law is to be found in the reports of cases. It is often believed that any important matter of principle relevant to the suitability as to the type of person appointed as judge would be found in a law report of the case. Such, it is regrettable to say, is far from the truth.

Interference by a judge during a criminal trial is a fairly normal practice.[402] The overwhelming majority of times, the nature of his questioning is such that the answers are likely to benefit the prosecution. Rarely do they truly have the effect of trying to obtain clarity of a point for the jury, and rarer still is such questioning likely to benefit the defendant. The Court of Appeal's general approach, subject only to the rarest of exceptions, sees absolutely nothing wrong with such interventions, and any suggestion of unfairness in the trial process is one which, according to them, is frequently said to be devoid of merit or of little merit. It is often difficult to find supporting evidence for the various types of occurrences, as stated above, and which often occur. Such cases do not normally find their way into the usual law reports.

The Bar and the Bench appear loathe to inform the public of their own experience, either because they do not consider it to be in the public interest or for fear that it may affect their professional careers. The doctrine of collective responsibility is prevalent. However, every now and then one does 'break ranks' and such evidence is provided. A good example of this is to be found in the excellent short book by a former judge,[403] who provides a number of relevant situations from his own personal experience; one of which is particularly pertinent. He states the facts as follows:[404]

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[402] Author's personal experience; see above, Chapter Six, summing up in the trial of D. Bentley.

[403] Henry Cecil.

[404] Cecil, H. *The English Judge.* (The Hamlyn Lectures, Stevens 1970) pp.71-76.

"Two men (I will call them Smith and Robinson) were charged at the Old Bailey with obtaining goods by false pretences… I appeared for Smith and another counsel for Robinson. Robinson was a young man with no previous criminal convictions and he had made a statement to the police which, if true, showed that both he and my client were guilty. My client was a much older man and had several previous convictions for similar offences. There was, however, extremely little evidence against him and the statement made to the police by Robinson could not be used in evidence to show that my client was guilty. (*The reason for this is not simply because of some technical rule of evidence but because Smith had never been given the opportunity to answer the allegation and that Robinson was a co-accused)*. On the other hand if Robinson pleaded guilty, he could be called as a witness for the prosecution and he could then give evidence against my client. Robinson refused to plead guilty and the case… (*proceeded*) against both defendants. At lunchtime the prosecution had concluded its case and the judge said to counsel for the prosecution:" 'After lunch I shall want to know what evidence you say there is against Smith.' (*If at the close of the prosecution case there is no evidence upon which a jury could properly convict a defendant the judge would have to direct an acquittal and discharge him)*. The court then adjourned for lunch.

"…I felt morally certain that the judge had asked to see counsel for Robinson. So, before the court reassembled, I spoke to Robinson's counsel and I told him that I did not want him to answer the question I was going to ask if he did not want to do so but, if he did answer it, I should use his answer in my speech to the jury. I then inquired whether the judge had asked to see him during the adjournment and he said that he was not prepared to answer. It was obvious to me from this that he had in fact been to see the judge. There could be only one reason for this. The judge wanted to persuade counsel to get his client, Robinson, to plead guilty so that he should be available as a witness for the prosecution against Smith. He duly gave evidence which, if true, completely damned my client. When I came to cross-examine him I asked him why he had changed his plea. He gave no reason. I then asked him this: "Have you not been promised by the judge through your counsel that, if you changed your plea and gave evidence against my client you would not be sent to prison?" Robinson said "No." (The judge did not intervene). The case then proceeded and eventually my client was called and gave his evidence. He denied his guilt but he was not a very good witness and,

after the summing-up and a short retirement, the jury found him guilty. When the judge asked me if I had anything to say about sentence I said this: “My Lord, in view of the fact that there is likely to be an appeal in this case, I feel bound to ask you, did you not in fact promise my learned friend that, if his client changed his plea to guilty and gave evidence for the prosecution you would not send him to prison?” The judge replied: “I am not bound to answer that question.” My client then appealed against his conviction. I approached Robinson’s counsel and asked him to confirm that the judge had promised him that, if his client pleaded guilty and gave evidence for the prosecution he would not send him to prison and he told me that this promise had in fact been made.

“Normally, when counsel can give information to a court about what has happened during a case, he gives this information from his place at the Bar without taking the oath but, in case of accidents I had also asked the court for leave to call counsel for Robinson as a witness, so that he could give in evidence what had actually taken place between him and the judge. The court (presided over by the Lord Chief Justice……) refused to hear counsel from the Bar and refused to let me call him to give evidence and, when they gave judgment, they said that it was quite plain that nothing of the kind suggested by me in my Notice of Appeal had happened but that all that had taken place was that counsel for Robinson had very wisely advised his client to change his plea to guilty. This was simply untrue, but the Court of Criminal Appeal refused to allow evidence of the truth of the matter to be given.”

“….One rather odd feature about the case was the failure of the Press to mention it at all. …the primary object of all these judges was the attainment of justice…. They all firmly believed that my client was a guilty man and that he should not be allowed to escape just because there wasn’t enough evidence against him, or just because the judge in the court below had behaved improperly. But unquestionably a secondary object of the judges in the Court of Criminal Appeal was to prevent the conduct of the judge in the court below from being made public. In order to achieve this secondary object, they said something in their judgment which was untrue…”

The reality of the present situation is that a judge can do virtually whatever he wishes in order to assist the Crown in obtaining a conviction, and the Court of Appeal are most unlikely to interfere whatever errors may have taken place

during the trial procedure unless they, i.e. those who have been appointed to sit in the Court of Appeal to hear the case, are satisfied that the conviction is unsafe. Even if the Court of Appeal finds errors by the judge which may well have effected a jury's verdict, such errors are often irrelevant unless the judges of the Court of Appeal take the subjective view that the verdict was unsafe. Further, they are unlikely to find a trial as being 'unfair' unless they are also satisfied that the verdict was unsafe in their subjective view, notwithstanding that a 'fair' trial and a 'safe' verdict are two totally distinct concepts. There can be little doubt that the subjective views of judges in the Court of Appeal would often be materially different than the subjective views of ordinary members of the public who sat on the jury. It is properly arguable that the clear effect of the present judicial approach is to undermine the objective concept of a 'fair trial' as well as that of trial by jury.

Judicial Views Regarding the Existence of Judicial Power to Prevent Parliamentary Abuse by the Passing of Abhorrent Laws

There have been a number of judicial 'murmurings' relating to the doctrine of Parliamentary Sovereignty. In 1994, at the Pilgrim Fathers' lecture in Plymouth, Judge Bingham stated: "…if Parliament were clearly and unambiguously to enact, however improbably, that a defendant convicted of a prescribed crime should suffer mutilation, or branding, or exposure in a public pillory, there would be very little a judge could do about it – except resign."[405] In 1996, he was appointed Lord Chief Justice.

In 1944, the traditionalist approach was restated by Lord Greene, the Master of the Rolls: "The function of the legislature is to make law, the function of the administration is to administer the law and the function of the judiciary is to interpret and enforce the law. The judiciary is not concerned with policy. It is not for the judiciary to decide what is in the public interest. These are the tasks of the

[405] R.Stevens, *The English Judges Their Role In The Changing Constitution* (Hart Publishing, Oxford and Portland, Oregon 2005. p. 66.)

legislature, which is put there for the purpose, and it is not right it should shirk its responsibility."[406]

In 1972, Lord Reid, the former Law Lord stated: "There was a time when it was thought indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words 'open sesame.' Bad decisions are given when a judge muddles the password and the wrong door opens. But we do not believe in fairy tales anymore"[407]

In 1995, Lord Woolf in his Mann lecture argued that Parliament could not abolish judicial review and stated: "If Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent. Some judges might choose to do so by saying that it was an irrebuttable presumption that Parliament could never intend such a result. I myself would consider there were advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold. They are limits of the most modest dimensions which I believe any democrat would accept."[408]

In 1995, Sir John Laws, a High Court judge stated: "The true distinction between judicial and elective power cannot be arrived at by a mere factual account of what judges do or Parliament… do… As a matter of fundamental principle, it is my opinion that the survival and flowering of a democracy… requires that those who exercise democratic, political power must have limits set to what they may do: limits which they are not allowed to overstep… the doctrine of Parliamentary sovereignty cannot be vouched by Parliamentary legislation; a higher-order law confers it and must limit it."[409]

What, then, is this 'higher order of law' if it is not Fundamental Law?

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[406] Ibid p.26.

[407] Ibid p.40.

[408] Ibid p. 59.

[409] Ibid p.60.

Potential Underlying Reasons for the practice of the existing system for Judicial Appointments

What are the reasons for the system, which often would appear to permit only those who originate from a particular 'type' of background to be appointed as a judge? There is clear recognition that the 'proper' basis for judicial appointment is merit. Yet there is an attempt to construe the word 'merit' in such a way as meaning that the 'right' people are appointed. Whether someone is the right person depends upon the view of those who are already judges, coupled with those who, while not judges, appear to come from an 'acceptable' background to those who are.

Apart from blatant discrimination, various reasonable inferences can be drawn in answering this question. In every court in the U.K. appear the words 'honi soit qui mal y pense'. The motto appears on an image of the garter, which surrounds the shield of the royal coat of arms. It is strange that in the twenty-first century the language is in French or Norman-French and very few people who appear in the courts probably know what it means. Even fewer, one suspects, of the ordinary litigants and their witnesses in such courts would know what it means. Literally translated, it means 'shame be to him who thinks evil of it'. It is part of a tradition going back hundreds of years and whose origins are believed to stem from the time of King Edward III. Further, in many courts, particularly the Central Criminal Court, paintings of sculptors depicting kings and queens abound. One small plaque relating to a conflict between judge and jury hundreds of years ago is 'hidden away' near one of the smaller courts at the end of a corridor. All this emphasizes that the judges are the sovereign's judges.

There is little that ought to be the subject of any justifiable criticism of the maintenance of fine tradition. Indeed, it forms part of the heritage of a country, particularly one such as the UK. The problem only arises if it is taken seriously in the sense of not being evidence of tradition of a perceived glorious past but somehow actually exists today as being relevant evidence for, say, the doctrine of the separation of powers. There can be little doubt that only those who emanated from a particular 'class' would have been appointed to judicial office hundreds of years ago. This is no reason why the same should occur or appear to occur in a modern age. Further, it is no answer to provide an example of the 'odd' judge whose background may be from a different 'class'. Indeed, there are

numerous reasons why it should not, in particular, a civil war that had to be fought with its tragic loss of life and misery suffered by so many.[410] The word 'class' is intended to mean not simply from a particular social background although often that may be the case, but from a restricted section of society which tends to believe that they and they alone know what is in the 'public interest'.

The experienced judge, lawyer or academic ought not to find much to surprise him in that which is written above. However, the average member of the public may well be little short of horrified. Judges in England are held in high esteem. The reason for that is because the office of judge is, rightly, so held. It is assumed and quite proper to make such assumption that the holder of the office will possess the necessary qualities and attributes to justify his occupation of the office. In simple terms, that he would have merit judged by the standards of ordinary people. It is clear that appointments are not made on merit, as properly defined. In reality, it is not going too far to state that at the time of appointment judges can be properly viewed as little more than potential agents of government.

In 1996, the House of Commons' own Select Committee on Home Affairs described the Prime Minister's involvement in senior judicial appointments as 'nothing short of naked political control.'[411] It is true in the technical sense that the judiciary are independent of the executive and probably the legislature, but can it be properly argued that, given the nature of the appointment system, they are truly independent, as understood by ordinary, right-minded people, so as to be able to protect the individual against the state? Anyone who looks to the judge for such protection is likely in the majority of cases to be deluding themselves, for anyone who is likely to cause embarrassment to the executive is most unlikely to have been appointed a judge to begin with. There can be little greater embarrassment to the executive than a judge who wishes to curb the powers of the executive in the interest of fundamental rights and liberty.

Some may well 'slip through the net' but the system is designed to make sure that any who do are de minimis in numbers. On the assumption that Fundamental Law does exist, many of those appointed to judicial office would

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[410] See above, Chapter One.

[411] Ibid. p. 95.

surely do everything within their power to make sure that such law stays ‘hidden behind a brick wall’, to be released only when their own leaders state that it is right to do so.

As things stand in the UK, for example, if judges are only there to rule on and apply rules of law, justice cannot form any part of a judge’s function. If justice does not form any part of such function, their ability to dispense it is wholly irrelevant when it comes to their appointment. Yet, the essential importance of the office of judge is such that the correct qualifications, experience and expertise for the holder of such office is part of Fundamental Law. That, one would reasonably and properly assume in accordance with the dictates of humanity and a civilised society, would include the willingness and ability to dispense not only legal justice but also particularly the type of justice referred to in the previous chapter.[412] For the avoidance of doubt, it is not suggested in this thesis that it is any part of the function of a judge to dispense social justice. That is a matter for Parliament alone, and the judge’s task in relation to such form of justice is restricted to interpreting and applying the law. The dispensation of the particular type of justice as occurs when a rule of Fundamental Law is operative, as this thesis tries to make clear, is a wholly different issue. The failure to dispense such justice results from a failure to apply a rule of Fundamental Law. The refusal to recognize that the true meaning of the word ‘merit’ in the context of a judicial appointment includes the ability to ensure that such justice is created or is not violated, means that the appointment has been made independently of true merit, properly so called. By refusing to accept that the dispensation of such justice is not merely part of their task, but an essential part, the phrase that courts are ‘courts of justice’ is yet another illusion in the country’s legal system, for they can only be properly described as ‘courts of law’ and even that be failing to recognize Fundamental Law is only partially accurate.. A system which, in the twenty-first century, permits people to be appointed to judicial office without adequately taking into account the essential relevance of the kind of justice referred to within the meaning of the word ‘merit’ as a necessary ingredient for judicial office, has no place in any civilized country. Further, it restricts the proper development of true rights for the people and acts as a brake upon the

[412] See above, Chapter Six.

progressive development of civilization. Judges are not there simply to act as some form of mouthpiece or agents for government or a parliament.

However, there would appear to be something far more serious in the approach by judges towards the mere fact of a refusal to recognize Fundamental Law. It arises from the observations of Lord Chief Justice (as he was to become) Bingham in the Pilgrim's Fathers lecture, in which he appears to make clear that the only remedy open to a judge when faced with having to give effect to certain forms of otiose or abhorrent legislation is to resign.[413] It follows that, if a UK Parliament was to pass laws similar in nature to the laws and decrees that were passed in Germany during the Second World War, the judge is supposed to resign and 'run away'. He could then be replaced by another judge with no such qualms. The people would then have no one to protect them; no court to go to in order to prevent injustice. Once a judge accepts, as some of them appear to have done, that the doctrine of Parliamentary Sovereignty as expounded by Dicey in its absolutism is a 'political' as opposed to a 'legal' doctrine, the courts are not implementing and enforcing law for the benefit of the people but are implementing and enforcing political policy. The courts become, not courts of justice, but political courts, imposing the will of, in reality, those in positions of power in government.

A people can only achieve progress in the furtherance of their own civilization if the concept of the true meaning of liberty is properly recognized. Such recognition can only occur if Fundamental Law is recognized. From the principles of the rules of Fundamental Law new rules spring forth and in their operation an essential form of justice is created. This ought to be an essential task of judges, but only those who possess true merit have the intrinsic ability to develop such principles and rules.

Without Fundamental Law, the judiciary will become even more divorced from the true meaning of justice and will contribute, unintentionally, to the undermining of their own legal system, which cannot be continually defended by a miscellany of myths, fictions, illusions and the like. That is something which, from any

[413] See above, Chapter Six.

viewpoint, cannot be said to be in the interests of the people of any nation and no civilized and progressive country should permit its occurrence or its continuance.

CHAPTER EIGHT

CONCLUSIONS AND BENEFITS TO THE PEOPLE BY THE RECOGNITION OF FUNDAMENTAL LAW

Fundamental Law is a body of law which has existed in the UK since as far back as, at least, the middle of the 17th. century. It consists of a number of positive rules. Each rule states a fundamental true right or a fundamental true freedom, possessed by the individual. Each one of these rights either directly or indirectly protect the individual throughout his lifetime within society. They are personal to that individual. They may be either positive or negative in nature. For example the right to a fair trial would be positive and the right not to be tortured would be negative. These fundamental rights and freedoms are interwoven with a particular concept of justice. This justice is personal to the individual and fundamental to the proper and peaceful enjoyment of his life within the society in which he lives. This form of justice differs from social and legal justice in the sense that it is not dependent upon rules passed by any sovereign entity or other body presently accepted as being able to impose rules. Neither does such justice take into account the perceived interests of any particular society. The principles which are contained within the word 'justice' of this type can be said to be principles of natural equity in the sense of being a fusion or combination of fairness and the human conscience. These principles are inherent within a rule of Fundamental Law. Accordingly for a rule to be a rule of Fundamental Law it has to be: (a) capable of amounting to a right or freedom; (b) be personal to the individual; (c) meet the requirement of Natural Equity in the sense of a fusion of the concepts of fairness and the demand of the human conscience. When a rule of Fundamental Law is properly operative then this type of justice has been created for the benefit of the individual. Often in some systems social and legal justice will also have been created but this type of justice is independent of legal or social justice.

At the commencement of this thesis it was made clear that it would not be grounded in theory and would not require theoretical arguments for the purpose of proving the existence of Fundamental Law. However, a few observations in one paragraph may seem relevant for those who often focus on such theoretical arguments. Fundamental Law would appear in many ways to be substantially

different from Natural Law,[414] Positivism, International Law or Human Rights Law. It is man-made and not dependent upon any sovereign entity for its existence. Its principles are those which while recognized in the international arena are not dependent upon the consent of states for such recognition. It does not exist for the benefit of states but for the benefit of mankind, by which is meant the individual human being. It is not dependent upon morality, although it can be properly argued that the effect of the operation of some of its rules are related to a form of morality. It is conscience which is an ingredient and even then only an ingredient, for its rules. Its rules are those which protect fundamental rights and liberties only. It is not concerned with any other branch of the law. It is superior to any doctrine of Sovereignty, whether it be State Sovereignty, Parliamentary Sovereignty or the perceived sovereignty of a monarch, dictator or other ruler. It should not be thought that theoretical argument is something which should not be properly considered. It should. It is now, having proved by recognized means the existence of Fundamental Law, that such theoretical arguments may be of benefit and carry weight. This, however, would be the subject matter of another thesis.

Although Fundamental Law exists, such existence is not presently recognized by most states. Yet the substance of the vast majority of its rules are recognized in the form of another kind of law. This, in the UK for example, is Statute Law. The only apparent legal reason for the failure to recognize Fundamental Law as a distinct and separate body of law is because of, in the UK for example, the doctrine of Parliamentary Sovereignty. It is clear that this doctrine has no proper legal basis. It is purely political in nature. Its effect is to preserve power in the hands of the government at any particular time. The government wrongly believes that such power is absolute.

The effects of a failure to recognize that Fundamental Law exists means that the individual citizen does not have a single true right or liberty, properly so called, vested in himself or herself. What they do have is a series of powers and privileges which can be removed at any time at the whim of the particular government in power. The effect that has had and will continue to have various consequences. For example the Magna Carta can be amended or even

[414] See Introduction

abolished whenever the government wishes. As can the rule of trial by jury. The notion of a fair trial can be accorded any meaning which the government of the day wishes to attribute to the word ‘fair’. These are but a few of the numerous consequences by refusing to permit a single right to be vested in an individual citizen. The overall majority, if not all, of the citizens of states, such as the UK, are completely unaware that they do not possess a single true right or liberty properly so called, as would appear to be the case with the majority of lawyers and scholars.

The rules of Fundamental Law declare either expressly or inferentially a true fundamental right or a true fundamental freedom and are consistent and compatible with the presently recognized existence of many improperly so called rights or freedoms for the individual.

The citizens of a country such as the UK possess fundamental rights and liberties. These fundamental rights and liberties collectively form a body of Fundamental Law. A few of these rights and liberties have been recognized in the international arena. Those which have been recognized are all personal to the individual. All of them are required by natural equity. Applying such principles of existing rules new rules can be synthesised and developed. In the operation of such rules a particular type of justice is created or that type of injustice is prevented.

Once a rule is recognized and given a positive form by express words whether in a statute declaratory of the rule’s existence or proper judicial recognition it is formally so recognized by the present acceptable forms of recognition in most legal systems. However, a rule of Fundamental Law is not dependent for such existence, as opposed to recognition, on a statute or judicial acquiescence.

Fundamental Law is the most superior form of human law. It is superior to any form of political doctrine such as the doctrine of Parliamentary Sovereignty which has no proper legal basis for its existence. Fundamental Law is not recognized by the judiciary in the legal system of the UK. The reason for such lack of recognition lies within the appointment system for judicial office which in effect denies appointment to anyone who does not accept or would be unlikely to accept the doctrine of absolute Parliamentary Sovereignty. The office of judge is political or quasi political in nature. Words and phrases such as ‘independent of

the legislator' and 'separation of powers' are illusory when the absolutism of Parliamentary Sovereignty is the issue.

It is necessary to re- emphasize that Fundamental Law is not law which people ought to have. It is something which according to the evidence they do have but which those in power refuse to recognize. In the domestic arena Fundamental Law provides true rights to the people. It is not something referred to as a right, the existence of which is dependent upon some ruler or ruling body. Those improperly called rights referred to as such in, for example Human Rights Law in the UK, are not true rights at all but more akin to a number of powers and privileges conditional upon the grace and favour of, in practice a government, in theory a parliament, for their continued existence. Such a right as presently improperly referred to in the UK is no more than a privilege or a power.

In the UK, the system which ought to be properly recognized by Parliament and the judiciary alike is one whereby a sovereign parliament properly and democratically elected has the right to make or unmake, by statute, any law it wishes, *other* than a rule of Fundamental Law. A rule of Fundamental Law can only be amended by the express agreement of the people in whom ultimate sovereignty vests.

Benefits to humanity by recognition of Fundamental Law

A principal benefit to human beings which results from recognition of Fundamental Law lies in the fact of possession of true rights and freedoms. Fundamental Law does not interfere with the normal process of democratic government. A political party's right to power under the present system in the UK whereby such right can be achieved with a minority of the votes cast would be unaffected. Whether the government is viewed as one whose political ideology is more to the so called 'left' or 'right' would also appear to be materially unaffected by recognition of Fundamental Law. The only thing a government 'loses' is *absolute* supreme power over the people, which as this thesis demonstrates it never lawfully had to begin with.

What Fundamental Law does do is act as a restraint when the normal processes of government violate Fundamental Law. It prevents a government with extremist ideology being in power which wishes to repeal laws which created the privileges and powers of the individual citizen which are presently granted substantially only

by Statute, that is to say entirely dependent upon the will of the government of the day. Equally it prevents such extremist ideology being imposed by new laws inconsistent with the privileges and powers which the citizens, at present, possess. For example it prohibits torture and individuals being held as slaves or held in servitude. It prevents or substantially minimises the risk of the innocent being wrongly deprived of their freedom. It ensures a fair trial and guarantees a true interpretation of the word fair. It provides a rule whereby only those who have true merit as understood by ordinary people within that society are appointed to the office of judge.[415] These rules as identified during this thesis are but examples. All such rules would no longer be recognized as being only dependent upon the will of the government of the day but would be recognized as vesting in each individual citizen. In simple terms the ordinary citizen can go about their daily business with the knowledge that whatever the government of the day may be 'up to' it cannot interfere with that individual's fundamental rights and freedoms.

It is not just in the domestic arena were the benefits of recognition of Fundamental Law can be clearly seen but also in the international one. As has been observed Fundamental Law prevents certain abuses of power by those in positions of power by acting as a restraint upon absolutism. In the international arena had the restraints on sovereign absolutism imposed by Fundamental Law been recognized it does not mean that World War II would not have occurred. Neither does it mean that many of the atrocities committed during that period would not have happened. What it does mean is that the Nazi party and their leaders could not have created many of the laws, decrees, ordinances, orders and the like which they did or if necessary were prepared to do, in the sense that they did believe or may have believed them to be lawful under existing legal doctrines. It would not have required some of the convoluted arguments that were advanced at Nuremburg to justify the illegality of such conduct. [416]Neither, is it likely that the defences, which on the face of them were wholly consistent with a doctrine of absolute sovereignty, would have been put to begin with.[417] Those who took part would have known that such behaviour in relation to many of the

[415] See above, Chapter Six.

[416] See above, Chapter Three.

[417] Ibid.

atrocities was unlawful as being contrary to Fundamental Law. Of course that does not mean that many would not have broken the law. But if one individual knew what he was being asked to do or to take part in, had been recognized as being manifestly unlawful then lives may well have been saved, for had that been recognized then, any individual would or ought to have been possessed of the knowledge of his illegality. There can be little doubt that some lives would certainly have been saved. While how many is a matter of conjecture, if only one was saved that in itself speaks volumes. If the German Chancellor during the Second World War had decided not to rule by decree but by the German Parliament itself and he had made sure that the majority of the parliamentarians were his own 'cronies', that parliament could have passed all the abhorrent laws it wished. But Fundamental Law would have prevented such 'laws' not merely being unenforceable but in all probability unlawful to begin with, being no more than rules given the term 'law'.

Further, had Fundamental Law been recognized by civilised nations then those nations would also have known at a very early stage that what was occurring in Germany, was not simply distasteful or abhorrent but violated Fundamental Law and such nations would not have had difficulty, after the war, in deciding what charges to bring against the perpetrators of the various atrocities which occurred.

Those countries such as the United Kingdom that rely on phrases such as 'it could never happen here' because 'our members of parliament can be trusted' etc. totally ignore the fact that the people are entitled to be protected by law which is recognized from the possibility of such occurrences and are entitled to certainty within the law. That law is Fundamental Law. They must not be dependent upon the ideology of their particular rulers at any given moment in time. It is inherently doubtful if a substantial number of the people in Germany who voted for the National Socialist Party in the 1930's knew of the specific details of that party's ideology and the consequences which could reasonably be said to flow from such ideology.

In the international arena Fundamental Law prevents any ruling body of any nation killing its own people or denying them freedom merely because they disagree with the ideology of the ruling body. It is not so much a question of human rights in the sense of positive law such as Human Rights Law, the law

violated is Fundamental Law of which an example in this thesis, colloquially referred to as Crimes against Humanity, is but one of its prohibitive rules. The fact that the crime is or may be given additional recognition in a presently recognized form of positive law does not detract from that argument. The various states which together make up the world consist of a multiplicity of different cultures, ideologies, religious beliefs, languages and the like. The similarities are often fewer than might reasonably be expected notwithstanding the peoples are from different nations. The one common factor is, whatever their differences, they are all human beings, usually intent on obtaining a better life for themselves and their families and living in peace together. The people of some nations are often aware that they do not possess any rights, while those of other nations believe that they do have such rights and that those rights are true ones, albeit that the belief may have little connection to reality and be a result of understandable naivety.

At the beginning of the 21st. century there are numerous wars occurring throughout the world, particularly involving those states around the African continent and the Middle East. In addition there are repressive regimes in the Far East. Almost all these wars have one common factor which is that those who have commenced the wars have done so in order to obtain power. The purpose of obtaining power is rarely to free the people from some form of oppression, but more often to impose the ideology of those who have obtained such power by force, upon the people. The ideology which it is sought to impose is usually one inconsistent with fundamental rights and fundamental freedoms. In many ways it resembles an ideology which belonged to an era long passed and inconsistent with Fundamental Law. If those states who consider themselves advanced and who wish to progress their own societies for the benefit of their own people formally recognized Fundamental Law and enforced its rules then it is not too difficult to see the benefit to the people in many, albeit it not all, of these war torn countries. However, that involves delving into issues which stray from the aims and objectives of this thesis.

It is a comparatively simple task for the implementation of a system which deals with the benefits from recognition of Fundamental Law. It needs little more than a true ‘Constitutional Court’ being created. The problem is likely to lie not in the fact of its creation but in the appointment of the judges to sit. That having been

said while this thesis has been critical of aspects of the judiciary and in particular the present system of their appointment it should not be thought that there are not presently in the judiciary those who are more than capable of dealing with the various issues involved. There are many such individuals, providing always that there was no material government interference and most importantly of all the shackles of the doctrine of Parliamentary Sovereignty in its absolute form were removed.

Thesis tested

Having provided this summary it may be useful to apply the principles of Fundamental Law as ascertained in this thesis to a very simple practical situation in order to go some way to-wards testing the correctness of this thesis as opposed to the situation which presently prevails. Consider the phrase 'the right to work' within ones' own country of birth (as opposed to a perceived 'right' to be *in* work, or the 'right' to a particular job). Is there anyone in a position of power in the whole world who would deny such a right? The answer is self-evident and yet there is no 'Human Right' within the European Convention on Human Rights designated as the 'right to work'.

Somewhat strangely in the Social Charter[418] , Article 1 of Part II is titled 'The Right to Work'. What 'rights' there are tend to be concerned with the maintenance and stability of employment and the rights of the worker as opposed to the right to work per se. The right within the Charter appears to be an implicit one as opposed to an express one. Equally, under the doctrine of absolute Parliamentary Sovereignty, parliament, apparently could legislate to deny such a right or restrict it to a certain number or class of people or impose any age limit upon an individual being able to work. The right to work is one in personam which belongs to the individual. It is the *individual's* right to work *within* a society. The right to work by implication requires a co-relative obligation to be rewarded for such labours. If it did not and the individual received no benefit for his work the situation would be akin to slavery which has been seen is now recognized as being unlawful and was always contrary to Fundamental Law.[419]

[418] European Social Charter (Revised), 1996

[419] UDHR Article 4

The right to receive a benefit for a person's labours is a requirement of natural equity. It is the individual's personal right and one which prevents injustice to the individual personally if he were to be denied it. By working and receiving a reasonable benefit for ones labours a form of justice has been achieved. Is the individual entitled to retain 'all' the benefit of his labours? The answer is no because the individual is working within a society and *social* justice demands that part of those benefits go to the society within which he performs his labours in order to assist amongst numerous other matters, those less fortunate than himself who may, for example, for whatever reason, be physically or mentally genuinely unable to work. The political question then arises as to what proportion of those benefits from his labours should go to that society? One view is that *one takes from each according to his abilities to give to each according to their needs.*[420] The problem with this approach is not simply that it has been tried and found not to be workable[421] but that it is contrary to Fundamental Law for the following reason. If the ability of man A is such that the benefits from his labours are to satisfy the needs of six other people and those benefits are taken from him to satisfy such needs then he is receiving little or no fruit from his labours. What is the difference between man 'A' working for a master for little or no reward or working for six members of society for little or no reward? However it is 'dressed up' they are both examples of a form of slavery which is contrary to Fundamental Law.

How much of the benefit man 'A' should be permitted to retain is a political question in accordance with the concept of social justice to be determined, usually by a democratically elected parliament and is not directly relevant to this thesis but the right to work and the retention of the reasonable amount of the fruits of his labours is a question relating to the type of justice preserved by Fundamental Law. It is Fundamental Law alone which provides the rule amounting to the legal guarantee of the right to work within an individual's society of his birth. No other form of law.

The consequences of the failure to recognize the 'right to work' as a true right is one simple example which not only demonstrates the weakness of so called

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[420] Some attribute this to K. Marx, in the 'Critique of the Gotha Program' (1875) others, L. Blanc, cite its origins in *The organization of work* (1840)

[421] A. Brown. *The Rise and Fall of Communism* (Harper Collins, 2009)

Human Rights Law but also the weakness of the 'rule of law' itself as it is presently recognized, without the protection afforded by Fundamental Law.

Consider this. In the modern era there are a number of states, including the UK that could well in the not too distant future see political power vested in a political party with extreme views or such a political party holding the balance of power in a parliament. That party utilising the presently recognized doctrine of Parliamentary Sovereignty could readily impose or be responsible for imposing laws on the people which expressly removed any presently so called fundamental rights and freedoms which the people believed they possessed or even undermined other such rights and freedoms until they either withered away or became of little benefit to the people. What is there to prevent such a situation occurring? What remedy is open to the ordinary member of the public? The answer is at present that there is none for only Fundamental Law will protect the people from such a situation.

Final observation

A great nation such as the United Kingdom, steeped in glorious traditions, of some sixty five million people ought not to be permitted to continue, through its institutions, in perpetuating various myths which have or have the potential of, detrimental effects on the lives of each and every one of its citizens. The people of this great nation are entitled to proper absolute recognition of their true rights and freedoms which are protected, not by a statute or other rule of presently recognized law which can be amended at the whim of a ruler; but by Fundamental Law. It is the refusal to recognize Fundamental Law that has deprived people not only of true enforceable rights, properly so called, but a whole body of law.

The United Kingdom in centuries long gone, through the wisdom of its judiciary gave to the world one of the most important assets, namely the Common Law. It is little short of a tragedy that in the hundreds of years following, the judiciary and others in a position of power, have been unwilling to build upon that legacy by the recognition and proper development of Fundamental Law. The real losers for that failure have not been the state per se but the ordinary hard working citizens not only of this great nation, but of the world generally. The same as the UK led the way all those years ago it was and is, more than capable of doing so again. All it

requires is acceptance of an existing situation that is so obviously wrong to any right minded individual who properly understands what has occurred and why it continues to occur. No government, whatever its political colour, ought to carry on trying to defend the indefensible. No amount of legal argument or semantics can justify it. It is time to put right that which is wrong. In the most simple terms 'what is wrong' is the denial to people of true fundamental rights and liberties by the refusal to expressly recognize Fundamental Law.

It should not be thought that in the United Kingdom the State or the judiciary are unaware of the existing situation which denies to the people true rights. The very facts of the Universal Declaration of Human Rights,[422] the part played in the Nuremburg trials,[423] the part played in the Convention in Vienna,[424] the Human Rights Act and the nature of the judgments in the Al-Adsani proceedings all amount to cogent evidence of such awareness.[425]

There is nothing wrong with lawyers disagreeing with a colleague or lending ones support to a colleague whose view one shares. Indeed such an approach is not only healthy but is deserving of the fullest possible support in any civilized society. However, that pre-supposes that the view formed is genuinely one in accordance with legal reasoning consistent with being, for example, a judge and not on the basis of political or quasi political views which, for example, take into account the political effect of a decision. It is difficult not to draw the strong inference that inherent in the views of those who formed the barest of a majority judgment in the above case of Al-Adsani, political consideration where, at least in part, a factor.

It is fairly clear that what has been utilised by those in power to deny to the people recognition of true rights and true freedoms has been little more than a combination of the rule of law which is a legal doctrine and that of Parliamentary Sovereignty, a political doctrine.

With the proper recognition of Fundamental Law then a reasonable degree of freedom can be properly said to be dispensed to the people. Had such

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[422] See above. Chapter Three

[423] See above. Chapter Three

[424] See above. Chapter Four

[425] See above. Chapters' Five and Six.

recognition taken place shortly after the civil war then by the 21st. century it is not unreasonable to suppose that society would, to-day, have a body of rules truly compatible with freedom and justice. Further, the cause of civilisation would have been substantially enriched and this thesis would have been unnecessary. It is nearly two hundred years since the death of Jeremy Bentham, recognized as one of the United Kingdom's finest philosophers. His works[426] regularly use the word 'corruption', albeit with apparent different meanings, to describe many of the individuals and institutions in positions of power in relation to their use or abuse of power. This thesis does not wish to use such a word but the fact remains that the wisdom and learning from such an individual appears to have fallen upon deaf hears in relation to his primary interest which was the people of a great nation, as has the wisdom of many others before and after him. One can only hope that another two, three or more centuries are not permitted to escape before the advent of recognition by those in positions of power of the legal doctrine properly referred to as Fundamental Law.

While this thesis has examined the relevant issues required of it and endeavoured to answer the questions posed by such issues there is one question which remains unanswered. This question is a simple one to ask and now, unlike at the commencement of this thesis, is perhaps not that difficult to answer. That question is how did a great nation such as the UK get in the present position as referred to in this thesis by refusing to recognize true rights and freedoms which actually belonged to the individual citizen, to begin with? There was a civil war. Thousands of people died as a result of it. It is doubtful, certainly during the 'first' civil war that Cromwell or the Parliamentarians or the Levellers wished to put the King on trial and execute him. This occurred as a result of continued battles and a refusal by the King to renounce his claim to his perceived extent of power.

The principal claim of Cromwell, the Parliamentarians and the Levellers lay, not simply in representation of a small minority of the people, but for the clear recognition of the fundamental rights and liberties of the people. The existence of which was clearly stated in those charges against the King some 350 years ago.

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[426] J. Bentham, e.g. *First Principles Preparatory To Constitutional Code* (Ed. By P. Schofield, Oxford Univ. Press, Clarendon, reprint 2006. Eg. Pp 15- 25 et. seq.)

The evidence for the probable answer to the question posed above, lies in Cromwell's own words, which in part in modern day English were: "*Of what assurance is a law to prevent so great an evil if it lay in one and the same legislator to unlaw it again?"*[427] The real 'evil' was the denial and violation of the fundamental rights and liberties of the people. The 'same legislator' was a parliament. It would appear that Cromwell did not know how to prevent such a violation re-occurring. Yet all it required was for those same judges who had found the charges against the King to be lawful and who had pronounced what they considered to be a lawful judgment to expressly state that no person, office or institution has the legal power to deny to the people their fundamental rights and liberties for those rights and liberties belong to the people themselves. Had this been done the restrictions on absolute power, whether such power was vested in a monarch or a parliament, would have been clear and Fundamental Law expressly recognized. It would then have developed over the centuries to the present day. Instead one is left with the claim to absolute power not by a King based on kingship but by a Parliament based upon the spurious soundings and interpretation of the word democracy. Parliament represents the people by virtue of the true meaning of democracy. 'Representation' of the people is wholly different to claiming that the representing institution is somehow actually possessed of the people's fundamental rights and liberties.

If there is one short paragraph which succinctly concludes this thesis it would be this:

This thesis rejects the proposition that: (1) Law is merely a set of rules created by a sovereign power for whom there is no mandatory requirement of compliance with the concept of justice. It advances the proposition that: (2) The concept of Justice, properly so called, necessarily involves the concept of a specific form of justice which is fundamental to the existence of liberty, properly so called, for an individual human being. Agreement with the rejection of the first of those propositions and acceptance of the second of those propositions as stated, are

[427] See above, Chapter Two.

essential for the proper progression of civilisation in the 21st. century in a way which benefits mankind.[428]

This thesis began with an analysis of Dicey's doctrine that parliament is free to make and unmake *any* law whatsoever. It concludes with the statements that Parliament is free to make or unmake any law whatsoever, adopting the political democratic process, providing that it is not inconsistent with a rule of Fundamental Law. While a rule of Fundamental Law can always be amended by the people to take into account the ongoing development of society it is doubtful whether a true rule of Fundamental Law can ever be revoked for that would amount to a retrograde step for the advancement of the cause of civilization generally. For example if society decided to go back to an era and tyrants and slaves Fundamental Law would then no longer be recognized, yet it would still exist. Further, parliament does not possess the lawful power to amend a rule of Fundamental Law for, it may be necessary to re-iterate, such a rule can only be amended by the people themselves as civilization progresses. For it is in the people that true absolute sovereignty vests, as it always has done.

Malcolm D. Sinclair. London. 2015.

[428] A classic example to illustrate the above two propositions in operation is to consider the meaning of the word 'fair' in the concept of a 'fair trial', which presently appears to be dependant for its meaning on rules created by a sovereign power and not on the meaning as understood by ordinary people. Thus rules allow the word 'fair' to be given a meaning which to ordinary people means 'unfair'. This permits an interpretation of the word justice which is incompatible with the people's aspirations and beliefs in the 21st. century.

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