CHAPTER 3

THE RULE OF LAW AND THE "LIBERTIES OF THE ENGLISH": THE INTERPRETATION OF ALBERT VENN DICEY

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1 LAW AND THE LIBERTIES OF THE ENGLISH

At the close of the seventeenth century, following the Glorious Revolution and the victory of the Parliamentarians, it was widely believed among the English that the "rule of law" had been established and that individual liberty would therefore be assured. Jurists and political theorists began to maintain that judicial procedures, the public nature of trials, and the rules relating to evidence, together with the role of the jury, ensured solid legal guarantees to those accused of any crime, by protecting the fundamental rights of their countrymen.

The rhetoric accompanying the battle fought in seventeenth-century England against monarchical absolutism did not put direct emphasis on subjective rights and freedom but raised the banner of objective law. Sir Edward Coke's arguments best exemplify this attitude. In his works the cry for liberty is drowned by his exaltation of the "law" as the primary condition for freedom itself: "the law is the surest sanctuary, that a man can take, and the strongest fortress to protect the weakest of all".[1] The objective application of the laws and the action of the courts provide individuals with a protection, Coke's[2] "birth right", that enables everyone to keep safe his goods, lands, wife, heirs, body, life, and honour.

The law invoked by Coke was none other than "common law". Common law was considered to be the source of liberty, the legal apparatus limiting the power of the monarch, and protecting personal freedom. Whig[3] rhetoric owed its legitimacy to the fact that, during the seventeenth century, common law had almost eliminated feudal differences of status, ensuring the near equality of English subjects before the law (with the notable exception of women). The relationship between feudal lords and tenants had, by then, come to be based on abstract rights as defined by the Royal courts, and were beyond a landlord's discretion.[4] Certainly, as Douglas Hay[5] has pointed out, the conquests of the civil war proved to be essential for the protection of the gentry – the newly enriched merchant class, which, during the seventeenth century

P. Costa and D. Zolo (eds.), The Rule of Law: History, Theory and Criticism, 153–199.

had begun to rival landowners for the control of English society – against the greed and tyranny of the monarch. One of the anti-monarchists' main victories was the establishment of a normative framework guaranteeing the protection of basic rights in fundamental areas, such as the transfer of property, inheritance laws, contracts, wills, and writs. The fact that these achievements were grafted on to the well established tradition of common law greatly favoured their stability.

Since its very early stages, common law had been characterized by a system of writs designed to safeguard relations between citizens dealing with each other on a par. A seventeenth-century Englishman might well have had the impression of conducting his life within the framework of horizontal legal relationships among formally equal citizens. The vertical dimension was based on the relationship between the citizen and his sovereign, who could not, by definition, damage or encroach upon the rights of his subjects, which made it impossible for him to be called to judgement or to answer for his actions. In theory, then, citizens' rights were not guaranteed in the case of arbitrary action by the sovereign. But the sovereign's immunity was soon neutralized by the judicial doctrine that, as Blackstone writes,[6] while it was impossible for the king to "misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished". On the basis of this doctrine a citizen could claim for damages he had suffered from the Crown, i.e. from the state, and though the king in person could not be called into question, the particular minister, or public official, considered responsible for the abuse had to answer for it. The courts did not recognize him as having any particular privileges: ministers and public officials, like any private citizen, had to answer for damages caused. During the eighteenth century, therefore, public authority came to be subsumed in the horizontal dimension of the legal framework: the absolute equality of all before the law was guaranteed. All English subjects, regardless of rank, would be tried by the same judges in the higher courts according to the same principles; as Hay[7] has pointed out, justice could be said to be assured even to the poorest man.

This situation constituted a formidable basis for the legitimization of Whig rhetoric, presenting England as the "kingdom of law and equality". The Whigs, reacting to the monarch's attempt to import legal-political models from the continent in order to legitimize the consolidation of his own power, re-elaborated the relevant tracts of the common law. They upgraded its role from a mere organizational instrument resolving daily legal disputes to the central pivot of the constitution. Whig rhetoric covers this slide: from championing the equality of all Englishmen before

the law it passes to the exaltation of the law as the custodian of the nation's liberty. Herein lies the shift that gave birth to the myth of the rule of law and of "the liberty of the English".

In the period that spans from the end of the seventeenth century to the mid nineteenth century, a host of diaries, letters, memoirs, and works by notable jurists reflected this Whig self-glorification. The remarks of occasional travellers bear witness to the admiration that the English legal system aroused among continental visitors. As early as in the eighteenth century, foreigners were struck by the care and attention given by judges to the rights of the accused, a solicitude not equalled in the law courts of any other nation. By the seventeenth century, England was seen as a country, in which torture was practically unknown and where the executive power had already been curtailed by an independent judicial system. England certainly owed this image to the Revolution Settlement and the common law tradition, which imposed limits on the discretionary power of the executive. Above all, however, this perception stemmed from the belief that the common people were quite capable of forcefully reminding the magistrates of the rights of "free-born Englishman", which comprised freedom of association, freedom of the press and, to a lesser extent, religious freedom.

In the 1970s the idea that, following the Glorious Revolution and the Whig victory, 1689 witnesses the emergence of a constitutional system based upon the law and capable of guaranteeing the "rights of Englishmen" became the focus of studies by Edward P. Thompson and his followers, Douglas Hay in particular. The results of their research caused considerable controversy.[8] Thompson and Hay substantially accepted the Whig rhetoric. They maintained that a system of government based on the rule of law actually came into being in England in the eighteenth century and they accepted that this was a fundamental step forward in Western political development. A system of government offering effective protection to the rights of citizens, they argued, had been outlined for the very first time. The lower classes, religious dissidents, and politicians in post-revolutionary England enjoyed a degree of real "constitutional" guarantees and were in a position to appreciate the protection of "the Rule of Law" against the "Rule of Might".

Thompson did emphasize that recognizing the basic historical truth at the heart of Whig propaganda does not amount to the wholesale acceptance of the idea that the revolution heralded the administration of "impartial" justice in English society. Historical research tells us otherwise. Thompson maintained that "the English revolution of the seventeenth century, although defeated in many of its aspirations, created

a system of legal boundaries to the power, which, however manipulated, produced a relevant cultural achievement".[9] According to Hay and Thompson, English culture and rhetoric in the eighteenth century were deeply imbued with the concept of "law". Law came to be affirmed as a dominant value, the ideological pivot of a whole society. It undermined religion and laid new foundations for the organization of the society:

> The hegemony of the eighteenth-century gentry and aristocracy was expressed, above all, not in military force, not in the mystification of a priesthood or of the press, not even in economic coercion, but in the rituals of the study of the Justices of the Peace, in the quarter-sessions, in the pomp of Assizes and in the theatre of Tyburn.[10]

Reference to the gallows at Tyburn is significant. Thompson and Hay were keen to point out that the criminal code and its application amounted to a sort of didactic "theatre" allowing Whig ideology to permeate into social life.[11] Hay in particular emphasized that the criminal code, more than any other social institution, made it possible to govern England in the eighteenth century without the need of a police force or of a large army.[12] The guarantees characterizing criminal procedures are certainly surprising when compared with standards in continental Europe at the same time:

> Many prosecutions founded on excellent evidence and conducted at considerable expense failed on minor errors of form in the indictment, the written charge. [...] If a name or date was incorrect, or if the accused was described as a 'farmer' rather than the approved term 'yeoman', the prosecution could fail. The courts held that such defects were conclusive, and gentlemen attending trials as spectators sometimes stood up in court and brought errors to attention of the judge. [...] The punctilious attention to forms, the dispassionate and legalistic exchanges between counsel and the judge, argued that those administering and using the laws submitted to its rules.[13]

The exaltation of the English system, despite its often brutal severity, is more readily understood when it is compared to that of the French. In France the institution of the *lettre de cachet* allowed the police[14] to remove an individual and keep him imprisoned indefinitely, without a specific charge.[15]

Despite the existence of procedural guarantees and trial by jury England should not be seen as the realm of "mild" criminal justice.[16] Here, perhaps more than elsewhere, the need was perceived more keenly to establish criteria and to ensure fixed and moderate[17] punishments proportionally suited to the crime, to create an effective system of prevention that avoided mere displays of arbitrary severity.[18]

The English criminal system in the eighteenth century could certainly not be described as "impartial". The majority of offences were configured in such a way as to almost always end up being committed by the

poor. A feeling of equality before the law was nevertheless reinforced by famous cases of gentlemen and nobles on the gallows: their "martyrdom" seemed to demonstrate that law was sovereign in England. It should be added that the poor were also very often the victims, as well as the perpetrators of murder and theft, and that the severity of the law and its zealous application safeguarded their interests, as well as those of the gentlemen who saw to its administration.[19]

The Whig strategy of maintaining order clearly hinged upon the obvious and often harsh concern with the protection of property. This, however, hinged upon the law, and was accompanied by the moral and economic aversion to the creation of a police state.[20] In the course of the eighteenth century the law increasingly provided the reference point, as well as the framework for the new economic and social order. Landed property was regulated by inalienable bonds. Marriage agreements were articulated according to the complexities of common law. Most importantly, the unassailable fortress of the law constituted a formidable obstacle to monarchical absolutism. But, as Hay stresses, the efforts made by the ruling class to appear spontaneously subjected to the rule of law proved to be of the greatest import. This class, in fact, strove to present the law, by virtue of its equity and of the universal character of its norms, organs, and procedures, as the source legitimizing its hold on power. This attitude provoked what Thompson[21] has defined as a process of osmosis between legal ideology and popular culture: the law was perceived as an important conquest in the eyes of the agricultural and mercantile middle classes, and remained an essential point of reference for the yeomen and craftsmen who supported them.

The law was established as a corpus of norms, procedures, and values legitimizing the power of the dominant classes. Thompson[22] points out that, when it takes on the role of a legitimizing ideology, the law inevitably acquires autonomy and an identity, and develops its own logic, "which may, on occasion, inhibit power and afford some protection to the powerless". And so, in his opinion, the legitimizing function bestowed by the Whigs upon the law made it difficult to present the law as a mere instrument serving the interests of one group above another. An openly unjust law would not be able to cover any one party's abuse of power, and would therefore prove useless as a form of legitimization. The law conceived of as a set of norms, procedures, and structures had to be devoid of flagrant manipulation if it were to fulfil a legitimizing function. It had to appear substantially just. Eighteenth-century England was not a society of consensus. The law was employed explicitly to impose the predominance of a certain class, and at the same time – protected

this class against the monarchy and represented this class's source of legitimacy. The upshot of this was that the law could not be considered a pliable instrument to be handled by anyone with a share in power. It was from this peculiar context, according to Thompson's analysis, that the figure of the "free-born Englishman" emerged. This individual was assured of the inviolability of his privacy and freedom, and protected by *Habeas Corpus*; he would have been fully convinced of the equality of all men before the law.

During the protracted clash between the monarchy and the parliamentarians, which had successive phases throughout the sixteenth and seventeenth centuries, the law was not an instrument in the hands of either party but rather the prize at stake. By the time the gentry inherited the law as modified by the Glorious Revolution, law had become a bastion against royal absolutism and the abuse of power. In the eighteenth century, the victors considered the law to be the key to the control of power, as well as to safeguarding their goods, property, and wealth. In the course of the revolution Whigs came to believe that only the law could protect their property and lives from the abuse of monarchical power and aristocratic arrogance.[23]

This peculiar historical situation, writes Thompson,[24] engendered the rule of law as "an unqualified good". Thompson admits that in a society divided by class conflict the action of the law does not correspond to justice; but he emphasizes that its positive action should not be belittled, and that the workings of a legal "proceduralization" with recorded acts is a far cry from the mere implementation of brute force.

The instrument chosen by the ruling classes to defend their interests and to legitimize their power had inbuilt mechanisms that prevented them from using it to their exclusive advantage. Whig rhetoric about the law therefore contributed to the creation of the legal ideology connected to the "rights of the free-born Englishman", albeit in a somewhat circular manner. The peculiar nature of law soon lent the rhetoric substance:

> [T]he rulers were, in serious senses, whether willingly or unwillingly, the prisoners of their own rhetoric [...] they played the games of power according to rules which suited them, but they could not break those rules or the whole game would be thrown away.[25]

According to this historiographical current, therefore, the particular development of the Glorious Revolution, which took up the ideological stance of Coke and other jurists, created a situation in which

> Not only were the rulers (indeed, the ruling class as a whole) inhibited by their own rules of law against the exercise of direct unmediated force (arbitrary imprisonment, the employment of troops against the crowd, torture, and those other conveniences of power

with which we are all conversant), but ideological rhetoric, to allow, in certain limited areas, the law itself to be a genuine forum within which certain kinds of class conflict were fought out.[26]

The fact that the law being invoked was identified first and foremost with common law softened the otherwise traumatic impact of the coming of private property in its modern conception, and favoured the establishment of this model. Common law is after all a manifestly historical construction, formed out of layers of judicial precedent and interpretation, and therefore very difficult to change *ex abrupto*. These characteristics dragged "law" into the battlefield where the social conflict was being fought. Together with their legal rhetoric the Whigs used the "law" as the main instrument for imposing a new definition of property: they abolished by decree the habitual but ill-defined rights to the use of land, thus encouraging and reinforcing the practice of enclosure. The struggle between the classes became manifest in the conflict between the written law passed by Parliament and customary law. At the basis, it was a clash between two distinct conceptions and practices of property and its relative rights. The conflict unfolded before the Common Law Courts, and was therefore highly proceduralized. Copyholders – whose right to land had been endorsed by legal decisions – fought effectively in the courts, when they were able to pay a lawyer. In certain cases where they were able to cite common law, they even came out victorious. This situation changed, in part, the nature of the conflict; the emphasis shifted from the question of the property itself to a question of legal procedure. Every time landowners tried to obstruct the judicial path adopted by copyholders, they triggered violent popular reactions. The battle to defend the interests of those expelled from the countryside was transformed into "a fight for their rights", i.e. a campaign for defending their rights in front of a court.[27]

In the wake of Thompson's interpretation, other British historians praised the virtues of the rule of law as a strategy for integrating the social classes. The idea that Whig rhetoric about the rule of law had helped Britain avoid a crisis after the French Revolution gained much favour. It allowed many anti-Jacobins, first of all Edmund Burke, to argue plausibly for the Glorious Revolution against the ideological strain developed by the French Revolution. This, according to Harvie,[28] provides the key to understanding social conflict in the first half of the nineteenth century. Faced with social disorders from 1790 to 1832, the English ruling classes might have chosen to abandon the egalitarian ideology of the *rule of law* and its universal connotations, to abolish the complex system of legal constrains afforded by the Constitution and to transform their power into a violent machinery of repression. Indeed, they took some steps in this direction, as

the campaign against Paine, the Combination Acts (1799–1800), the Peterloo Massacre (1819), and the Six Acts (1820) seem to suggest. In the end, however, the ruling classes preferred to take the path of legality instead of shattering their own image and repudiating one and a half centuries of constitutional legitimacy. In contrast to what had happened in other European countries, the government maintained order by applying the law, and did not resort to arbitrary measures. Even at the peak of Chartist[29] agitation, while the lower classes experienced repression, they also enjoyed constitutional protection and legal guarantees. Electoral reform and the extension of the suffrage in 1832 served to revitalize the image of the law and reinforced the idea of a state ruling impartially according to the law. Great Britain was thus able to weather 1848 without any of the dramatic repercussions experienced on the continent. According to Harvie, the Reform Act of 1832 restored the credibility of the law as an impartial instrument to limit social and political conflict.[30] In this interpretation the Reform Act performed the same function that Thompson recognized in the judicial system, which grew out of the Glorious Revolution.

Similarly, McKibbin[31] argues that the preservation and rigorous application of the rule of law saved the legitimacy of the prevailing system in the face of social conflict at the end of the eighteenth and in the early nineteenth century. The struggle between trade unions and entrepreneurs was carried out in a correct legal context, and this once again lent credibility to *fair play* and "the rule of law", which were shown to be more than empty slogans. Those in power recognized that to "tinker" with the law so as to affect the operation of the labour market and tip the balance against the workers, as well as resorting to coercive measures, would prove ideologically indefensible and politically risky. In view of these risks, statesmen such as Peel, Gladstone, and Disraeli aimed to build up a *liberal consensus* founded on the rule of law and designed to make a class-based society acceptable to the lower orders.[32] Their success was largely determined by the pre-existence of an established order of ideas. They did not have to invent a tradition out of nothing: they restored the constitutional myth that had been developed by the Whigs, reviving the rhetoric of the Puritan Revolution and of its aftermath.

2 DICEY'S CONSTITUTIONAL THEORY: THE RULE OF LAW AND PARLIAMENTARY SOVEREIGNTY

Whig rhetoric and historiography covering the political events of the last 300 years in Britain seem to put forward the *rule of law* as the secret which allowed the "rights of the English" first to emerge and

then to be gradually affirmed as the fundamental basis of the social order. Paradoxically, however, no jurist had attempted an exact definition of the *rule of law* until the end of the nineteenth century. Up until then, no one had tried to identify the fulcrum of Great Britain's constitutional apparatus, nor had anybody asked what it was that made this system so unequalled in the whole of Europe when it came to maintaining individual freedom. Albert Venn Dicey tackled these issues in his *Introduction to the Study of the Law of the Constitution* of 1885. In this work he described the workings of the English constitutional system and identified the *rule of law*[33] as its main pivot.

Dicey's treatise is remarkable for its clarity, and represents the first strictly legal approach to English public law, which up to then had been dominated by historical studies. These qualities ensured *The Law of the Constitution* an immediate and enduring success. To this day, it is the cornerstone of English constitutional law studies. No previous work can be said to deal with British law from such a perspective – it is almost as though Dicey invented British jurisprudence studies. This impression is further reinforced by the mandatory discussion of Dicey's theories[34] in almost every work on constitutional history and analysis published in the last 30 years. Today in Great Britain jurists and political scientists discuss and criticize the theories embodied in *The Law of the Constitution*, more than 100 years after its appearance.

Reading Dicey today, we must bear in mind the contemporary context in legal theory. Late nineteenth-century legal theory in England had been dominated by the ideas of John Austin. Austin maintained that in order to exist as such, a state required a sovereign body whose competence was not predefined, whose power could not be limited. This theory gained ground easily as it seemed to re-propose, in more general terms, that fundamental element of Whig constitutional rhetoric (second only to the rule of law), i.e. the principle of parliamentary sovereignty.[35] One of the reasons for the success of *The Law of the Constitution* was that it perfectly blended Austin's theory with the Whig tradition rooted in the achievements of the Glorious Revolution; Dicey maintained that both parliamentary sovereignty and the rule of law[36] were the two fundamental principles of the English constitution. Having linked these two ideas, Dicey maintained that *the rule of law* was not capable of limiting the power of the whole state, but of government exclusively. In arguing this, Dicey was close to the notion of the *Rechtsstaat*, which was emerging at the same time on the continent. The rule of law was presented as the best form of protection against the arbitrary action of executive power:

> [A] study of European politics now and again reminds English readers that wherever there is discretion there is room for arbitrariness, and that in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects.[37]

The unlimited nature of parliamentary sovereignty, which is dealt with in the first part of *The Law of the Constitution*, seems, by contrast, to pose few problems. According to Dicey, the principle of parliamentary sovereignty implies that Parliament has the right to make or abolish any law and no organ or individual in Great Britain has the right to ignore parliamentary legislation. In other words the principle of parliamentary sovereignty implies that every Act, or section of an Act, creates new law, or abrogates or modifies an existing one, and must therefore be observed by the courts. On the basis of this principle no person or organ has the right to abrogate or ignore parliamentary legislation, nor to issue rules, requiring enforcement by the courts, conflicting with Acts of Parliament.[38] Dicey opens the chapter on "The Nature of Parliamentary Sovereignty" in this way:

> Parliament can legally legislate on any topic whatsoever which, in the judgement of Parliament, is a fit subject for legislation. There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament. Not one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence, or receives any countenance, either from the statute-book or from the practice of the Courts.[39]

His interpretation of the legislative sovereignty of Parliament is therefore close to Austin's: Parliament is sovereign as holder of an absolute power, and its power cannot be limited by any agent. Any measure defining the limits of its power would necessarily create a "non-sovereign" Parliament. Dicey makes it quite clear that such a conception of parliamentary sovereignty rules out the distinction, adopted by jurists on the continent, between constitutional (or fundamental) laws and ordinary laws. This distinction is based in fact on criteria that either have to do with the formal aspect of laws, or are related to their mode of production. While in Great Britain

> [T]here is no law which Parliament cannot change, or (to put the same thing somewhat differently), fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character.[40]

The English constitution, therefore, which is by definition founded on the sovereignty of Parliament, does not provide a list of fundamental or unalterable rights. The sovereignty of Parliament, according to Dicey,[41]

is incompatible with the existence of a pact defining the competence of *every* authority. The legislative power of Parliament has no limits, *moreover* no organ exists that can annul legislation on the grounds that it has violated constitutional principles, and even less so on the grounds of having overridden the citizen's fundamental rights.[42] Dicey is nonetheless anxious to emphasize that Parliament holds legal, but not political, sovereignty. The latter belongs to the electorate. There does not however appear to be any "constitutional" guarantee protecting the "rights of Englishmen". Parliament is unhampered by any legal restrictions and is only subject to political ones (both internal and external).[43] As with the *Rechtsstaat* theory prevailing on the continent, the legislator is only subject to political control.

The second and more extensive section of *The Law of the Constitution* is devoted to the other essential principle of the constitution, the rule of law. Dicey first analyses the constitutional *status* of the individual's rights to freedom; he gives ample space to personal liberty as guaranteed by the *habeas corpus writs* and dwells in detail on freedom of assembly and freedom of speech and of debate. This section includes a chapter on martial law and Dicey's celebrated discussion of administrative law.

In the fourth chapter of the book, "The Rule of Law: Its Nature and General Applications", Dicey stresses that the supremacy of the *rule of law* determines three fundamental aspects of the United Kingdom constitutional order:

> [I]n virtue of the 'supremacy of the rule of law' in Great Britain no man is punishable ... except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.[44]

The absorption into the constitution of the fundamental principles of liberalism is therefore attributed to the absolute supremacy of the rule of law. This primacy ensures that the constitution embodies above all else the principle of strict legality: every action by the government infringing upon the sphere of individual liberty or private property has to be ratified by law. Secondly, the constitution lays down the principle of the uniqueness of the legal subject, regardless of status or rank. The reference to the "ordinary courts" in the passage quoted above draws attention to the singularity of Dicey's formulation of the second principle, which underlines the equality of all before the law, as well as the equal subjection of all to the same jurisdiction:

> [W]e mean ..., when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.[45]

The principle of the rule of law demands more than the mere equality of all before the law: it imposes the submission of everyone to the same laws administered by the same courts. Dicey here splits the liberal doctrine of the uniqueness of legal status into two principles: he insists both on the traditional one that the law should be the same for all and adds that so should the jurisdiction. This second principle causes the English constitutional system to sharply diverge from the continental ones, which normally only recognize the principle of the competence of the judge as established by law.

Dicey's insistence on the importance of the uniqueness of jurisdiction is central to his conception of the rule of law and is also instrumental in his attack on administrative law. He stresses, in fact, that the possibility of the executive making untoward use of discretionary power can only be ruled out if the principle of the same jurisdiction is combined with the principle of legality. The principle of legality does not alone suffice to guarantee the absolute predominance of ordinary law or to exclude the exercise of arbitrary power, privilege, or the abundant use of discretionary power by the government. The only guarantee is provided by "the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts". Only this equal subjection can preclude the possibility of any exemption of public officials or others from the jurisdiction of the ordinary tribunals; a selective observation of ordinary law is thus prevented and ordinary law remains applicable to all. France is chosen to exemplify the continental system and many examples are provided of how there officials "are, or have been, in their official capacity, to some extent exempted from the ordinary law of the land, protected from the jurisdiction of the ordinary tribunals, and subject in certain respects only to official law administered by official bodies"[46].

Equality before the law and the illegitimacy of administrative law and administrative tribunals are therefore presented by Dicey as two sides of the same coin, in accordance with the tradition of common law dating back at least to Blackstone:

> In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to payment of damages, for acts done in their official character but in excess of their lawful authority.[47]

The principle of the uniqueness of jurisdiction neither exempts the activities of public officials from being regulated by *additional* particular laws,

which are not to be applicable to the private citizen, nor does it prevent that special courts should try these officials for the infringement of these special regulations. Nevertheless, Dicey insists on the principle that official status should not guarantee privilege. A public official, whatever his rank, cannot exploit his position to escape the duties of the ordinary citizen.[48] This was not found to be the case in continental Europe, and France in particular, where the system of administrative law was based on the principle that controversies involving the government and its officials were not subject to the judgment of the ordinary courts, and should be dealt with by ad hoc organs.[49] By establishing the illegitimacy of administrative law, the *rule of law* guaranteed that the equality and rights of citizens were safer in England than in France; the statement that "all persons are subject to one and the same law, or that the Courts are supreme throughout the state"[50] could not be said to hold true for France.

We now come to the third aspect of the constitution deriving from the supremacy of the rule of law. Dicey considers this not to be a normative principle but an historical fact; it is presented as a specific outcome of the English tradition of common law and therefore a characteristic of the "English Constitution", which sharply distinguishes it from its European counterparts. He affirms that the constitution of Great Britain

> is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.[51]

Dicey does not treat this third aspect of the rule of law as a principle, unlike the others, and omits to stress its normative valence. He rather describes it as a representative of the core of truth in the by and large "erroneous", though constantly repeated, idea that "the constitution has not been made but has grown". Dicey does not make use of this Whig notion, which at the time was still dogma in English legal theory,[52] to legitimize the whole of the constitutional structure. Moreover he wanted to reveal the absurdity, once and for all, of the notion that in Great Britain "the form of government is a sort of spontaneous growth so closely bound up with the life of a people that we can hardly treat it as a product of human will and energy". As John Stuart Mill argued, this idea is logically untenable: every legal norm is the product of active human will, quite unlike a tree that, once planted, continues to grow of its own accord.[53] The important historical fact that can and should be

extrapolated from Whig rhetoric concerning the spontaneous development of the constitution is that it was not created all at once. The theory that "the English constitution has not been made but has grown" has the exclusive merit of indicating, if only in "a vague and imprecise way" the *fact* that the constitution is one created by judges, with all the advantages and disadvantages of judge-made law. In particular it casts light on the essential fact that the "liberties of the English" "far from being the result of legislation, in the ordinary sense of that term, are the fruit of contests carried on in the Courts on behalf of the rights of individuals".[54]

The third aspect of the rule of law is therefore not presented as a principle, but as a "formula" clarifying that the laws, which are normally part of the Constitution in continental Europe, in Great Britain "are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts".[55] This "formula" does not fix the limits of the constitutional legitimacy of norms and institutions: it is, rather, a simple reminder that the English constitution is not the fruit of extraordinary activity bent on its creation but "the result of ordinary law". One might think that Dicey here attributes a prescriptive content to this "formula", insofar that it may indicate what he believes to be the correct way forwards. He does not appear to think, however, that the constitution can continue to develop in a jurisprudential manner.[56] In highlighting this third aspect of the rule of law, Dicey's main concern remains to emphasize the different origins of the English and European constitutions.

His real interest is in stressing that, in England, as opposed to Europe, the courts, with the help of Parliament, are the fundamental agents in the constitutional process, and have incorporated rights traditionally guaranteed by common law into the constitution:

> [T]he principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants.[57]

In this process courts and Parliament have not played the same role and should not be considered on the same level. Parliament, acting as a legislative body, has limited itself to ordering and incorporating the jurisprudential output of the courts. When it has performed a creative role in the process of incorporating law into the constitution, it has done so in its role as High Court of the country, not as its legislative organ.[58] The process has been one of re-elaboration of common law, not one of creation of new law.[59]

Dicey claims that if judge-made rights were to be codified, the constitution of Great Britain would be identical to those of Europe. He compares the English constitution to the Belgian one, which was approved at

the end of the nineteenth century, to demonstrate his thesis. The Belgian constitution was considered a model in so far as it had been designed as "an admirable summary of the leading maxims of English constitutionalism". The idea common in Europe that Great Britain had no constitution at all, and that there are no constitutionally guaranteed rights, argues Dicey, is therefore absurd. If we compare the continental constitutions with English legal provisions, and above all with those of judicial origin, we realize that the English constitution with its fundamental core of rights guaranteeing liberty exists, though it is not sanctioned by any single document. It contains none of the declaration of rights that are typical of the constitutions of other countries. The protection of personal freedom comes from judicial decisions: constitutional rights are no more than the generalization of these decisions.

Dicey's aim is to show that the "English constitution" ensures rights as effectively as the continental ones, and that the difference in the origin of these rights is merely formal, not having a real bearing on their effective guarantee. In the development of his argument, however, the judicial creation of rights slowly ceases to be mere historical fact. Dicey almost imperceptibly shifts the argument and transforms the "formula", which should only serve to remind us of the origin of English rights, to a position of central importance in his conception of the rule of law. The fact that laws ensuring freedom are the circumstantial result of judicial decisions becomes the fundamental guarantee of their enjoyment. The point here is that these laws, described by Dicey as "constitutional principles", are not the fruit of some official proclamation, but were created in response to particular cases brought before the courts. The real problem, he continues, is not that the absence of a written constitution in Great Britain makes for difficulties in the defence of individual rights but that those same rights are badly protected by written constitutions. The relationship between individual rights and the constitution in countries like Great Britain, where such rights are founded on the deliberations of the courts, is very different from the relationship between individual rights and the constitutions of continental Europe, where fundamental charters are produced by a constituent act. In these countries

> the rights of individuals to personal liberty flow from or are secured by the constitution. In England the right to individual liberty is part of the constitution, because it is secured by the decisions of the Courts, extended or confirmed as they are by the *Habeas Corpus* Acts.[60]

According to Dicey[61] the constitutions of the different European countries were devoted exclusively to "defining" individual rights, and gave

scant attention to the need to provide for the protection of those rights. Dicey accentuates the effective execution given by the courts to the constitutional dispositions and further stresses the pertinence, especially in matters of constitutional law, of the Latin saying *ubi jus ibi remedium*. Often, in fact, constitutional rights are no more than empty declarations.[62] But the English have a guarantee in that they

> gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or (what is merely the same thing looked at from the other side) for averting definite wrongs, than upon any declaration of the Rights of Man or of Englishmen.[63]

In other words, the judicial production of measures protecting individual rights has a clear advantage both over the legislative process and over the declaration of rights: the judicial alternative, by its very procedures, creates an inseparable link between the methods used to protect rights and the right to be guaranteed. The English constitutional system therefore has the great advantage that laws relating to rights, such as *Habeas Corpus* Acts, only articulate the guarantees created by the courts. These constitutional laws, according to Dicey, do not proclaim any principle or define any right, but "are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty".[64]

Individual rights provided for by the constitutions of continental Europe are mere "deductions" drawn from constitutional principles. The constitutional provision of rights offers the citizen no protection against the suppression or suspension of those rights; in fact, it favours it. This is evident in those countries where the validity of the declaration of rights is frequently suspended. The fact that they are laid down in a special regulatory text, that they are "something extraneous to and independent of the ordinary course of the law", makes them more easy to set aside without upsetting normal legal procedures. Thus constitutional provision that in theory aims to reinforce the protection of fundamental rights by preventing Parliament from tampering with them, and which requires the whole of the constitution to be explicitly modified in order to do so, ultimately undermines them.[65]

History shows that rights regarding personal freedom are better guaranteed in England, where "the law of the constitution is little else than a generalisation of the rights which the Courts secure to individuals",[66] and where it makes no sense to talk of 'fundamental' rights or of some rights more guaranteed than others.[67] The experience of the nineteenth century demonstrates that, where the only safeguard to personal freedom

is provided by constitutional principles, the validity of the constitutional charter often ends up being suspended or abrogated. In Great Britain, on the other hand, rights concerning freedom have always been perceived as part of "ordinary law"; it is inconceivable that they could be disregarded "without a thoroughgoing revolution in the institutions and manners of the nation". The historical basis of the judicial production of constitutional rights, the third aspect of the rule of law, represents an important daily guarantee of a citizen's right to freedom even though it is not a precept. It is this third historical-factual aspect that prompts Dicey to maintain that in Great Britain,

> the constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution.[68]

3 THE RULE OF LAW AND PARLIAMENTARY SOVEREIGNTY IN THE TRADITION OF COMMON LAW

Having clarified what Dicey means by the rule of law and by the sovereignty of Parliament we are now faced with a problem of compatibility between these two principles. This is probably the most controversial issue for British constitutionalists.

Writers who are most sensitive to the protection of fundamental rights have severely criticized the conception of parliamentary sovereignty elaborated by Dicey. He stands accused of not having understood that, as August Friedrich von Hayek writes:

> The whole history of constitutionalism, at least since John Locke, which is the same as the history of liberalism, is that of a struggle against the positivist conception of sovereignty and the allied conception of the omnipotent state.[69]

Dicey failed, they argue, to take into account that, without the imposition of precise limits on legislative power, the rights and liberties that the common law traditionally guarantees in Great Britain could be abolished by Parliament overnight. Here Dicey's theory was not only criticized on an "ideological" level but had its legal validity called into question. In the opinion of these critics of Dicey, parliamentary sovereignty is not one of the principles of the English constitution. Geoffrey De Q. Walker, for example, refers to "Dicey's dubious dogma of parliamentary sovereignty", accusing *The Law of the Constitution* of being "like some huge, ugly Victorian monument that dominates the legal and constitutional landscape and exerts a hypnotic effect on legal perception".[70]

Dicey's critics maintain that *The Law of the Constitution* is marred by a legislation-centred reading of the constitutional system. They accuse him of having reduced the principle of the rule of law to a mere "rule of recognition". They interpret the notion of the rule of law in the light of the "sovereignty of Parliament", then Dicey stands accused of affirming that Parliament is "the source of ultimate political authority, which is free from all legal restraint and from which every legal rule derives its validity".[71] These critics read *The Law of the Constitution* as if it maintained that every act produced by Parliament, in accordance with the norms regulating its activity, should have its validity taken for granted by the courts, without assessing its impact on individual rights and legitimate aspirations. Rather than being the father of British constitutionalism, Dicey is held responsible for having propagated Austin's dogma of parliamentary sovereignty, significantly weakening the safeguards on individual rights.

More charitable critics of *The Law of the Constitution* noted the juxtaposition of the principle of parliamentary sovereignty with that of the rule of law. Such juxtaposition leads to a "pragmatic contradiction"[72] that damages the whole constitutional model. Dicey is therefore accused of proposing a substantially weakened version of English constitutional law, founded on contradictory, uncertain and insecure bases.[73] Supporters of this thesis take it for granted that it is impossible to reconcile the emphasis on the rule of law with the theory of the unlimited sovereignty of Parliament. These writers, too, accuse Dicey of not having been able to resist the influence of Austin's legal positivism,[74] which prevented him from elaborating a coherent vision of the constitution.[75] Allan even goes as far as to postulate the existence of two Diceys: the supporter of parliamentary sovereignty on the one hand, and the constitutionalist struggling to free himself from the chains of the Hobbesian authoritarianism received via Austin,[76] on the other.

Whilst it is true that Dicey's reconstruction of the English constitutional system is a product of its time, his critics too have been strongly influenced by their cultural environment. The crisis surrounding the common law in the second half of the nineteenth century heralded the success of Austin's ideas and of a legislation-centred constitutional theory. This theory was eagerly embraced by the Whig rhetoric on parliamentary sovereignty, and gained favour as a result of the extensions of the electorate between 1866 and 1884, which undoubtedly reinforced parliamentary authority. The dogma of parliamentary sovereignty was at that time so well absorbed by English jurists that any conflicting theory appeared as far removed from reality.[77] It is not therefore surprising that

The Law of the Constitution was immediately received as an Austinian work, and that parliamentary sovereignty, rather than the rule of law, was understood to be its supporting theoretical pillar. Dicey's work was conceived, written, revised, read, and discussed in an environment coloured by Austin's all-pervading influence.[78] It is easy to understand that English jurists of the late nineteenth and of early twentieth century gave the *Law of the Constitution* a legislation-centred interpretation, which carried on as the standard interpretation of the constitutional debate until after the Second World War.[79]

The complexity of the ideal of the rule of law in contrast to the theoretical superficiality and the strongly pragmatic approach adopted by Dicey certainly had a hand in making this interpretation *The Law of the Constitution* the most accepted one. It is difficult to deny, however, that Dicey tried to give content to the rule of law, albeit with an almost complete lack of philosophical sophistication, considering it to be, as he did, the cornerstone of the English constitution. Although he failed to make a clear distinction between constitutional theory and the contingent aspects of British legal institutions,[80] the "durable merit"[81] of his analysis lies in the emphasis he put on the general principles of the Constitution, as has been justly pointed out. By maintaining that the rule of law consists in the application by the courts of the "general principles of the constitution", which are no more than the traditional rights to liberty,[82] Dicey insisted on the necessity of studying the English legal system with regard to the protection of civil liberty, and not only paying attention to the limits placed upon the power of government. The fact that Dicey exaggerated the merits of the British system and the protection that it afforded to fundamental rights in comparison with other western democracies does not mean that he represents it falsely.[83]

Dicey's attack on continental constitutionalism, particularly on the French model, was primarily directed against systems with the power to modify constitutional rights "with the stroke of a pen". The notion of parliamentary sovereignty has to be considered in the light of this debate. For Dicey the English system was superior in that it entrusted a judicial body born out of the tradition of common law, besides and before Parliament, with the safeguarding of rights. Then to put Dicey at odds with the tradition that sees "the liberty of the English" as the pillar of the constitution appears to be a gross misinterpretation of his work.

In *The Law of the Constitution* it is evident that Dicey was proud of the tradition of common law that had protected basic liberties and principles of fairness in England earlier than in other countries. It therefore seems legitimate, both on the historical and theoretical level, to separate

his theories from the legislation-centred imposition of Austin and to realign them with the tradition of common law. However strong Austin's influence on Dicey may have been he never maintained that Parliament was the source of every legal measure. Dicey is therefore far removed from the theory of Austin and, earlier, of Hobbes, for whom common law was valid in so far as it was tacitly accepted by the sovereign. My aim is to show here that Dicey, quite to the contrary, maintained that the common law courts were the arbiters of parliamentary authority. *The Law of the Constitution* can be seen as an attempt to outline a common law constitution. In the absence of a real constitutional law, consecrated in a written document venerated as the foundation of legal authority, Dicey charged the *rule of law* with the function of conferring constitutional status to those rights traditionally recognized in English common law. In Dicey's framework, more than in the definition he provides, the rule of law reflects and incorporates ideas and values around which common law has gradually developed. The rule of law is in itself a largely meaningless label, because its contents are determined by common law, which, in the end, defines the characteristics of the constitution.

Dicey sought to show that the rule of law and parliamentary sovereignty were the two principles, which gave rise to the development of English constitutional law. He did not recognize any problem of incompatibility between parliamentary sovereignty and the rule of law; on the contrary, the rule of law was presented not only as being absolutely compatible with the sovereignty of Parliament but also as insolubly linked to it. The supremacy of the law is "intimately" bound to the sovereignty of Parliament and both represent the secure guarantee of individual rights provided by the English constitution. Parliamentary sovereignty and the supremacy of the law are presented as equal notions. This however reduces the rule of law to a mere principle of legality. In other words, if the supremacy of the law is made to coincide with parliamentary sovereignty, the rule of law is reduced, as Dicey's critics maintain, to nothing more than a "rule of recognition" making it difficult to maintain that it ensures the respect of "the freedom of the English".

Dicey explicitly deals with the problem,[84] maintaining that parliamentary sovereignty, as opposed to any other form of sovereign power, favours the supremacy of law, while the predominance of rigorous legality requires the exercise, and therefore increases the authority of parliamentary sovereignty.[85] The two principles are not mutually limiting or conflicting but strengthen one another.

Dicey's line of argument is derived from Austin's assumption that a state, by definition, must have a sovereign body: that is an organ whose

power is original, not derived from any norm and therefore without any predefined limits. The argument suggests, at least at first, that the rule of law consists in a mere principle of legality: the behaviour of the executive and administrative authorities in general is legitimate only if they conform to the law. With this in mind, Dicey's theory appears obvious: that the sovereignty of Parliament favours the supremacy of ordinary law. His reasoning seems tautological. If a sovereign body must of necessity exist in a state, only the sovereignty of Parliament can guarantee the rule of law. In fact only Parliament expresses its will through Acts of Parliament. The sovereignty of Parliament and the rule of law guarantee that the executive power can do no more than apply laws passed by Parliament.

Dicey, however, affirms that the relationship between the sovereignty of Parliament and the rule of law, presented as the fundamental characteristic of the English constitution, is not automatic. While it is true that the sovereignty of Parliament, as it has developed in England, promotes the supremacy of the law, this is not found to be the case in all countries that have a parliamentary government.[86] Choosing once again the French model by way of comparison, Dicey maintains that the French National Assembly, whose powers substantially correspond to those of the English Parliament, exercises its sovereignty in a "different spirit". The legacy of the Bourbon monarchy and the Napoleonic Empire encouraged it to interfere in the minutiae of administrative practice and to be diffident in the face of judicial independence and authority. But more importantly it was discouraged from opposing "the system of *droit administratif* which Frenchmen – very likely with truth – regard as an institution suited to their country". This meant that the French National Assembly left ample executive, but also legislative, powers in the hands of the government, powers, which the English Parliament never conceded to the government or its officials.[87]

Although the comparison is to some extent forced, Dicey's analysis grasps an important fact about the English constitutional tradition. The difference between the behaviour of the English Parliament and that of the French National Assembly with regard to public administration originated in the fact that English members of the public administration had never lost their status of "servants of the Crown", even after Parliament's power in government increased. According to Dicey, Parliament's behaviour towards public officials was, in 1915,[88] quite the same as when the "servants of the Crown" had depended on the king, that is, on a power that naturally aroused the suspicion and vigilance of Parliament. The compatibility between the rule of law and the sovereignty of Parliament therefore stemmed from the role of Parliament.

> Even when in a sovereign position, Parliament was never able to use the powers of the government to interfere with the regular course of the law – unlike the sovereign monarch, who was not only a legislator but also a governor, and therefore head of the executive power. Even more importantly, Parliament regarded with suspicion the exemption of officials from the ordinary responsibilities of citizens or from the jurisdiction of the ordinary courts, and discouraged it; Parliamentary sovereignty was therefore fatal to the development of 'administrative law'.[89]

Here Dicey provides us with an historical guideline to help us understand the basis of his conception of the rule of law. The relationship between Parliament, government, and the judicial body developed in England from the conflict, in which the courts and Parliament allied against the crown. This conflict saw its most intense period in the seventeenth century and culminated in the victory of the alliance of Parliament and the courts, which, from the eighteenth century onwards, had a free hand in drawing up the constitutional order.[90] Dicey stresses that these events show that Parliament had displayed a tendency to protect the independence of the judiciary, whereas, the monarchy had endeavoured to guarantee public officials in the exercise of their powers.[91] The historical evolution led to a situation in which Parliament was sovereign, but had to exercise its sovereignty in accordance with its ally, the courts. The judicial practice engendered by this peculiar relationship and by its historical roots lends plausibility to the conception of the rule of law proposed in *The Law of the Constitution*.

In order to follow Dicey's reasoning it is useful to take a step backwards and re-examine his comparison between the rule of law and the principle of legality: certainly the most ambiguous and controversial element in Dicey's theory. Dicey often seems to take it for granted that the rule of law does not guarantee any fundamental rights, and is limited to protecting the individual from the arbitrary power of government. Comparing the situation in seventeenth-century England with continental Europe, he recognized that many foreign governments were not particularly oppressive, although there was no country in which citizens were thoroughly protected from the exercise of arbitrary power. In other words, Dicey recognized that England's unusual situation arose not so much from its inherent goodness but from the legality of its system of government.[92] It would therefore seem that the rule of law does not directly define the rights attributable to citizens, but limits itself to guaranteeing the predictability of the actions by the state authorities, the certainty of law. The liberty guaranteed by the rule of law would appear to be a residual liberty: the liberty to do what the law does not prohibit. In a system devoid of a declaration of rights and reliant on rule of law

alone, there cannot exist a core of fundamental rights that the law is bound to respect.

The rule of law, therefore, does not refer to a list of fundamental and protected rights but comes to be identified with a mere principle of legality.[93] However if we accept this reduction of the rule of law to a principle of legality, it makes no difference, Dicey maintains,[94] whether individuals are protected from the risk of arbitrary arrest thanks to the personal liberty that a constitution affords them in countries like Belgium, or whether the right to personal freedom and protection from arbitrary arrest is part of the constitution as guaranteed by ordinary law, as is the case in England. It is clear that whilst the constitutional provision of fundamental rights can allow Parliament to abrogate these very rights with the stroke of a pen, the rule of law as a mere principle of legality may protect citizens against arbitrary acts from the executive but cannot offer them absolute guarantees on any of their liberties, for Parliament retains the power to pass extremely restrictive laws whenever it chooses. Such a principle in fact only means that interference with life, liberty, and property has to be authorized by law.

The key to resolving this apparent contradiction in Dicey's theory lies in the emphasis it places on the fact that Parliament only expresses its will through the Acts of Parliament. This, claims Dicey, notably increases the authority of the judiciary. The assumption that by definition – and not by virtue of a constitution limiting parliamentary sovereignty[95] – every law enables the ordinary courts to apply it and to check on its application by any administrative authority is crucial to the idea of the rule of law as elaborated by Dicey. As confirmed by Jennings,[96] the fundamental principle of the English constitution is not the sovereignty of Parliament but the rule according to which the courts apply as law that has been approved according to prescribed legal form.[97] This "rule" allows Dicey to present parliamentary sovereignty and the rule of law, as being not only mutually compatible but actually synergic, and to maintain that the supremacy of the law requires the exercise of parliamentary sovereignty.[98]

But he does not stop here. Dicey also states that it is essential for the enforcement of the rule of law that the courts, as has been traditionally the case in England, only refer to their own texts in interpreting the laws:

> A Bill which has passed into a statute immediately becomes subject to judicial interpretation, and the English bench has always refused, in principle at least, to interpret an Act of Parliament otherwise than by reference to the words of the enactment.[99]

This prescription might seem a ritual genuflection to the principle of the subordination of the courts to the will of the legislator, a reaffirmation of the principle that in France led to the brief introduction of the *référé législatif*.[100] The opposite is the case. By referring judges exclusively to the words of the legal text, Dicey sought to remind them that *they must on no account take into consideration the intention of the legislator*: "An English judge will take no notice ... of the changes which a Bill may have undergone between the moment of its first introduction to Parliament and of its receiving the Royal assent."[101] Dicey believes that this hermeneutic, interpretive rule provides the foundation for maintaining judicial authority and the stability of the law.

The concept of the legislator disappearing, leaving only the legislative text is the vital presupposition in the constitutional system outlined by Dicey: it is the precondition, which allows the courts to exercise their own autonomous normative activity. It in fact creates a framework, in which judicial activity does not follow the work of the legislator, but is independent in its purpose.[102] The courts should not execute the will of the legislator but must amalgamate it with the constitutional tradition incorporated in common law. Behind the interpretive rule preventing judges from considering the law as an expression of the will of Parliament lies the understanding that the judges called to interpret the law are influenced not only by feelings typical of the courts, which, as we have seen, are "jealous" of the executive power, but also by the spirit of the common law. It is this dual attitude of the courts, protected by their fidelity to the letter of the law,[103] which represents the strength of Dicey's conception of the rule of law. This same attitude neutralizes the voluntarism inherent to the principle of the sovereignty of Parliament and ensures the protection of the "freedom of the English".

This doctrine, however strange it may appear to a continental jurist, is not at all eccentric: on the contrary, it is in perfect accord with the tradition of common law. The theory that judges should interpret the law in accordance with "the norms and spirit of the common law" goes back to Sir Edward Coke.[104] Carleton Kemp Allen, in his monumental *Law in the Making*,[105] underlined that Coke's maxim is an "essential guide", ensuring continuity in the development of the law and regulating the impact of new legislative provisions in order to include them in the existing constitutional scheme. As Postema[106] recently reminded us, this tradition and the myth surrounding it have created the conviction that a statute can only be absorbed into English law in so far as it can be integrated into common law. This idea was first aired by Sir Mathew Hale,[107] who, together with Coke, might be considered the founding

father of common law. In his *The History of the Common Law,* Hale maintains that the role of the judge is to interpret parliamentary legislation as a corpus of acts declaring common law or, at the most, acts correcting some perceived shortcomings.[108] The theory was widely accepted and appears in Blackstone's celebrated *Commentaries*.[109]

Hale's theory is relevant to our discussion of Dicey's conception of the rule of law because he was the first British jurist who treated, if implicitly, the legislative sovereignty of Parliament and grafted it on to the existing legal tradition. This combined the principle of parliamentary sovereignty with the idea that the common law and the customs of the realm are the important substratum of the law.[110] If the norms of parliamentary production do not find a place in this "substratum" they are deprived of any significant influence in the complex regulatory framework and are therefore incapable of damaging the "rights of Englishmen". Hale's writing clearly anticipates the theory Dicey was to make his own. Hale in fact maintains that Parliament has the power to produce new statues but that these have a limited impact and significance unless incorporated into common law.[111] Without this "incorporation" the legislative act is valid, on the strength of constitutional procedure authorizing its production – defined by Dicey as "sovereignty of Parliament" – but exists exclusively as an isolated act, like a temporary disturbance on the surface of law without leaving an enduring impression.

This way of thinking naturally leads to a theory – similar to twentieth-century legal realism – that legislative acts are not automatically law: judges can, with due caution and deliberation, refuse to accept them as such. As Postema[112] writes, Hale's discussion of this matter is "schematic" but it makes it quite clear which rules, according to the tradition of common law, regulate incorporation of new legislative acts into English law. Statutes are seen as normative acts to be inserted into the framework of the principles of common law, operating on the basis of this same framework. When it appears impossible to follow this interpretive method, because the statute is far removed from the framework defined by common law, the judiciary is bound to give a restrictive interpretation to the language of the legislative norms, in order to preserve the regulatory discipline of common law as far as possible. The judiciary must operate from the assumption that Parliament can restrict or enlarge the scope of these norms of common law but cannot change their substance or add new norms completely outside their frame of reference. They can interpret and apply statutes exclusively on the basis of the traditional legal categories of common law and reconstruct legislative norms that appear far removed from the frame of reference in the light

of that "artificial reason and judgement of law" that Coke had raised to the specific dominion of the jurists.

Parliament has the constitutional power even to approve a totally new discipline, not normally allowed in common law, but approval alone does not amount to its recognition as "law": it only becomes "law" when the courts include it in common law, substituting pre-existing regulation. Parliamentary sovereignty in a sense implies not the power to *produce* law but rather to *propose* law, with the understanding that while these proposals might have immediate legal validity, the validity might be short-lived.[113] Parliament therefore exercises legislative sovereignty, but the judiciary remains, to use Lewis Carroll's celebrated quip, the real master of law, establishing the rules on the basis of the principles of common law. The classic theory of common law[114] is founded on the idea that "through interpretation" the judiciary exercises constant "control" over legislation. The dominant principle, emphasized by Allen and forever present in the minds of the judiciary, is that common law has a broader scope and is more fundamental than the statutes passed by Parliament, and therefore "wherever possible – and that means every time that the judges deem it to be opportune – legislative enactment should be construed in harmony with established Common Law principles rather than in antagonism to them".[115]

When inserted into Hale's framework, which was soon accepted as the point of reference for the classical theory of common law, Dicey's constitutional theory strikes us as remarkably cogent and coherent. Hale's theories made it clear that parliamentary sovereignty is not the expression of popular sovereignty in the constitutional order outlined by Dicey. Sovereignty, in the final analysis, is not even the prerogative of Parliament defined as an organ of the state. Sovereign are the Acts of Parliament. The "sovereignty of the law", however, does not mean the sovereignty of any formally valid Act of Parliament: only those Acts accepted as law, with their validity recognized by the judges and grafted on to the body of the common law, can be considered sovereign. The context of the common law, not the will of Parliament or of the electorate, is what determines the content of the law. Dicey, in other words, reduces the idea of the rule of law to the principle of legality because he works within a tradition, dating back to Hale, in which a law is established not simply because it has been passed by Parliament and become an Act, but because it has been scrutinized against the standards, values, and principles pertaining to common law. This is the key to understanding Dicey, and it accounts for his acceptance of two apparently contradictory principles: parliamentary sovereignty and the rule of

law, the latter interpreted as the protection of fundamental individual rights.

Elaborating his theory of the rule of law Dicey returns to Hale, but identifies the principles, standards, and values of common law, recognized by Hale as the *substratum* of English law, with those of liberal philosophy. Dicey therefore changes the legitimating basis of common law. Common law has to be accepted as the context in which new laws come into being not only because it expresses the law of the land but also because it guarantees rights recognized as fundamental by the liberal tradition; what's more, it does so better than any other legal arrangement. This is the hidden framework, which lurks behind Dicey's comparisons between the English and the liberal constitutions of continental Europe. By showing that the rights usually provided for in constitutions are recognized in common law and by maintaining the superiority of the protection offered by it, Dicey ascribes the centuries-old English legal tradition to a liberal one. The common lawyers, although perhaps unaware of it, created the most impressive liberal legal edifice ever devised. The success of *The Law of the Constitution* in the field of English constitutional law, as well as its theoretical-legal and theoretical-political interest, stem from this attempt to fuse together the common law and the liberal tradition. This operation, at end of the nineteenth century, led to the revitalization of the myth of common law, and created a firm basis for liberal values both from the point of view of legal positivism and of sociology. Liberal values were finally translated into positive law, which is common law, and were validated by a time-honoured legal tradition (which, paradoxically, predated the same liberal doctrines). This framework allows Dicey to assert that in England a violation of constitutional rights could only take place in the case of a revolution that would radically change the existing legal system.

4 THE COURTS AS THE BASTION OF INDIVIDUAL LIBERTY

Once Dicey's constitutional doctrine has been placed in the framework of the classic theory of common law, the juxtaposition of the rule of law, as guarantee of fundamental rights, with parliamentary sovereignty wanes; parliamentary sovereignty is not in fact *formally* incompatible with the traditional role played by the common law courts in defence of justice and liberty. Dicey finds the necessary balance in the idea that the courts cannot formally annul laws produced by Parliament, as this would deny its sovereignty, although they can interpret them restrictively, reducing them, if necessary, to becoming impracticable, should the

defence of those individual rights traditionally guaranteed by common law or the defence of the "freedom of the English" make this necessary.

The historical soundness of the fundamental role attributed to the courts by Dicey is even recognized by Jennings,[116] who otherwise harshly criticizes Dicey's notion of the rule of law. Jennings writes:

> To a constitutional lawyer of 1870, or even 1880, it might have seemed that the British Constitution was essentially based on an individualist rule of law, and that the British state was the *Rechtsstaat* of individualist political and legal theory. The Constitution frowned on 'discretionary' powers, unless they were exercised by judges. When Dicey said that "Englishmen are ruled by the law, and by the law alone" he meant that "Englishman are ruled by the judges, and by the judges alone".[117]

Parliament, unlike government, works through the statutes and these, unlike administrative rules, are applied and therefore examined exclusively by the ordinary courts. The courts can only guarantee the effectiveness of the rule of law when the rules are produced in Parliament; or rather only in this case they are able to ensure the values and rights of the common law constitution. According to Dicey, the examining role played by the courts between the promulgation of a statute and its application, the fact that the statute can only be translated by the courts into individual norms, meant that in Great Britain (and this was still applicable at the turn of the nineteenth century) legislation was subject not only to formal and methodical restrictions but also to effective limitations in content and scope. The protection of individual rights guaranteed by the courts represented something that came close to a tried and true scrutiny of constitutionalism: it was the factor allowing Dicey to maintain that the rule of law, defined as the judicial protection of individual rights, and parliamentary sovereignty are not only compatible but complementary.

That Dicey's conception of the rule of law, when read in line with the tradition of common law as outlined by Hale, depicts a system of guarantee is clearly shown by his discussion of periods of crisis. This discussion also makes clear the reasons for Dicey's deep aversion to administrative justice.

Emblematic here is his exploration of the possibility, which came about on a number of occasions, of Parliament suspending the validity of the *Habeas Corpus* Acts, those laws regulating the emission by the courts of *Habeas Corpus* writs. This provision was an order a court would issue to those suspected of holding an individual in detention. The writ insisted that the detained individual be brought to court in order to examine the legality of his imprisonment. The court demanded the

release of anyone whose arrest was deemed illegal, or guaranteed that the detained person be swiftly brought to trial. The writ could be requested by the detainee himself or in his name by anyone considering the detention to be illegal. The right to obtain a writ of *Habeas Corpus* was recognized by common law long before 1679, when the first celebrated *Habeas Corpus* Act was approved. As Dicey writes, the *Habeas Corpus* Acts clearly show that English constitutional law is fundamentally judge-made law. These acts can be considered the practical basis supporting the freedom of the citizens of England:

> [T]he *Habeas Corpus* Acts are essentially procedure Acts, and simply aim at improving the legal mechanism by means of which the acknowledged right to personal freedom may be enforced. They are intended, as is generally the case with legislation which proceeds under the influence of lawyers, simply to meet actual and experienced difficulties.[118]

The right to freedom was already guaranteed by common law, but the procedures did not always operate correctly. The *Habeas Corpus* Acts were passed because magistrates or those responsible for illegal detentions would resort to any tactic to avoid issuing or serving the writ. The first *Habeas Corpus* Act, promulgated by Charles II, guaranteed judicial control to all those detainees accused of committing a crime. A person accused of a minor crime had the right, with appropriate guarantees, to remain free while awaiting trial. In the case of more serious crimes, the suspect only had the right to be brought swiftly to trial. The second *Habeas Corpus* Act, passed under George III, further guaranteed the right of those deprived of their liberty without having been accused to turn to the courts: for example, a child separated from the parents, a wife imprisoned by her husband, or the mentally ill forcefully confined in an asylum.[119]

At times of political upheaval, continues Dicey,[120] the power and duty of the courts to issue a writ of *Habeas Corpus* has often been regarded with suspicion or considered a danger by the executive. At such times Parliament responded by approving the *Habeas Corpus* Suspension Acts. These normally blocked the courts from freeing or putting on trial those accused or suspected of high treason. Dicey stresses the limited effect of these Acts. Even though they limited the guarantees designed to protect individual freedom they had nothing to do with the "the suspension of constitutional guarantees" or with a "state of emergency" proclaimed in the countries of continental Europe under similar circumstances. They never sanctioned a complete suspension of the power to promulgate the writs of *Habeas Corpus*, as their name might suggest. Normally a Suspension Act

in no way affects the privileges of any person not imprisoned on a charge of high treason: it does not legalise any arrest, imprisonment, or punishment which was not lawful before the Suspension Act passed: it does not in any way touch the claim to a writ of *habeas corpus* possessed by everyone, man, woman, or child, who is held in confinement otherwise than on a charge of crime.[121]

Furthermore these laws always had an annual validity and the power of arrest outside judicial control had to be granted therefore from year to year. Their effectiveness was also limited: during the period of the Suspension Act, the trial of prisoners accused of treason could be constantly postponed. The trial nevertheless had to take place at a certain point and if the arrest was proved to be illegal, those responsible were brought to law. The suspension of *Habeas Corpus* did not therefore legitimize an otherwise illegal provision, but was limited to deferring matters from the legalizing scrutiny of the courts. If Parliament wanted to ensure the immunity of public officials who had acted on the basis of the Suspension Act it had to shield their actions with an Act of Indemnity (as usually Parliament did). This gave public officials confidence about the consequences of actions they had carried while following orders.[122] This Act legalized earlier violations of the law, and was the greatest expression of parliamentary power.

An Act of Indemnity is clearly a manifestation of arbitrary power and when follows a Suspension Act amounts to granting the executive arbitrary power. Dicey maintains, however, that the Suspension Act, even when followed by an Act of Indemnity, did not deprive citizens of their right to freedom. Even though it is an arbitrary act, the Act of Indemnity is promulgated by a parliamentary assembly; "this fact of itself maintains in no small degree the real no less than the apparent supremacy of the law"[123] and with it the control by the ordinary courts. This control is the real guarantee of individual liberty. There is nothing that can prevent Parliament from suspending control of the courts and from conceding a safe conduct to public officials.[124] If there were such a prohibition, Parliament would cease to be sovereign. Freedom is therefore in the arbitrary control of Parliament. The only genuine guarantee of individual freedom lies in the power of the courts to issue writs of *habeas corpus*, and therefore to control the restriction of liberties, provided by common law. The *Habeas Corpus* Acts only incorporated and regularized this power:

The repeal of the Habeas Corpus Acts [...] would deprive every man in England of one security against wrongful imprisonment, but since it would leave alive the now unquestionable authority of the judges to issue and to compel obedience to a writ of Habeas Corpus at common law, it would not, assuming the bench to do their duty, increase the

power of the government to imprison persons suspected of treasonable practices, nor materially diminish the freedom of any class of Englishmen.[125]

Therefore even when the *Habeas Corpus* Acts are suspended by a law, which is the clear expression of the will of Parliament to place arrest for certain crimes outside of the boundaries of the protection granted by judicial control, judges have the *duty* to continue safeguarding the freedom of those citizens accused of treason. This does not imply that the law suspending the *Habeas Corpus* Acts is illegitimate or unconstitutional and therefore invalid. It is legitimate in so far as it expresses the constitutional principle of parliamentary sovereignty, but, as it is unreasonable in the light of common law, the courts have the *duty* to minimize its effects. For this reason, the suspension of the *Habeas Corpus* Acts, an extremely serious measure, does not erode the right to freedom – as does the suspension of the constitution in the countries of continental Europe – but only handicaps a particular instrument designed to safeguard personal freedom. It is therefore the specific relationship between statute law and common law that allows Dicey[126] to insist that, notwithstanding the suspension of the *Habeas Corpus* Act, the English continue to benefit from nearly all the guarantees to their freedom. Like Hale, he maintains that the sovereignty of Parliament does not preclude the courts' role as the real masters of law.

Dicey develops his discussion of the Acts of Indemnity on the same lines. An Act of Indemnity, he writes, is the supreme and extreme expression of parliamentary sovereignty: "Legalising illegality". It is approved, both to improve the situation created by the suspension of the *Habeas Corpus* Acts, in cases of emergency – e.g., during an invasion or widespread civil unrest – when Parliament recognizes that, in order to safeguard the very legality, the rule of law has to be violated. In such cases, which lie by definition outside the normal principles of legality, the members of the executive often find themselves obliged to violate the law and they do so claiming Parliament will later heal the violation by an Act of Indemnity.[127] Dicey underlines that this practice, while apparently merely formulaic, is of enormous importance as it unequivocally establishes the principle that even the most arbitrary powers of the executive must always respect parliamentary law. Parliament, as with the Act of Indemnity of 1801, can confer legality on only some behaviours of public officials[128] and this restrains them from committing particularly oppressive or cruel acts. But this principle, more importantly, as with the case of the Suspension Act, means that executive power must act, "even when armed with the widest authority, under the supervision, so to speak, of the Courts":

> Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, *what is more, by the interpretation put upon the statute by the judges*.[129]

The simultaneous reference to respecting the statute to the letter and insisting on its judicial interpretation may appear to be contradictory. This apparent contradiction lies at the heart of Dicey's rhetorical strategy. He uses it to demonstrate that the interpretation by the ordinary courts has, in the first instance, the role of adapting the significance of statutes (attributing immunity) to the framework of the principles of common law. Even when exercising its sovereignty to the maximum, Parliament is obliged to exercise its power, if not in accordance with the ordinary courts, certainly mindful of their examination in the light of the canons of common law.

It is evident that Dicey's theory of the rule of law assigns the role of custodians of constitutional rights to the courts, even when we look at his discussion of the exceptional powers granted to the government in times of crisis. Dicey recognizes that there are times when the government, in order to cope with a particular situation, cannot rigidly adhere to the law as interpreted by the judges without putting the public interest at risk. To facilitate the government, Dicey[130] continues, Parliament by an extraordinary statute must confer it with a power ordinarily denied by common law. This procedure does not however remove government power from the control of the courts. The power is attributed to the executive by a statute and consequently the acts it carries out return to the judgement of the ordinary courts, the competent authority for judging the correct application of every statute:

> The English executive needs therefore the right to exercise discretionary powers, but the Courts must prevent, and will prevent at any rate where personal liberty is concerned the exercise by the government of any sort of discretionary power.[131]

Even in the case of a concession of exceptional power to the government, the judicial power is not therefore subordinated to the will of Parliament: it is instead an independent power whose role of interpretation guarantees citizens' rights. If the courts, which are traditionally opposed to granting extraordinary powers to government, do not consider the attribution of such powers consonant with the principles of common law, the government and public officials are held responsible for their actions as if the special law had never existed. Once again the validity of the law and the legitimacy of public officials' behaviour depend, as Hale put it, on whether the courts "endorse" the extraordinary statute or not:

Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are *influenced by the feelings of magistrates no less than by the general spirit of the common law*, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament if the Houses of Parliament were called upon to interpret their own enactments.[132]

To conclude his examination of the constitutional framework regulating the exercise of extraordinary power in times of crisis, Dicey[133] claims to have achieved his goal, to have shown that in England parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law demands the exercise of parliamentary sovereignty, which Parliament is forced to exercise in a spirit of legality. Certainly his discussion explains his determined opposition to the institution of administrative tribunals. The risk of these tribunals, constitutionally outside the tradition of common law, adopting a supine attitude to the will of the legislator, is very high. Should that happen, as the structure of the English constitution is centred on parliamentary sovereignty, nothing could then guarantee the citizen's right to freedom.

5 DICEY'S NOTION OF THE RULE OF LAW AND THE THEORY OF *RECHTSSTAAT*

In the light of Dicey's theoretical account it might be useful to attempt a comparative assessment of his notion of the rule of law with the theory of *Rechtsstaat*[134] (and the other analogous Euro-continental theories), which was formulated and reached its maturity at about the time *The Law of the Constitution* was published.

The essential element of the theory of the *Rechtsstaat* is the conviction that a virtuous circle exists between the sovereignty of the state, general law and liberty, a conviction that spread as the principle of popular sovereignty gained ground. This virtuous circle was centred on a number of theories: Locke's idea that the limits imposed by the law on individual liberty are limits sought by the rational ego of the subject whose liberty is to be limited,[135] or Rousseau's idea of the General Will, according to which the collective body never seeks, by definition, to limit the liberty of any of its members. This "democratic" ideology combined with Montesquieu's aristocratic conception of the judge as the "mouth of the law", and of the judicial power as "null".[136] These two ideologies, paradoxically, gained strength and gave life to an ideal type of constitutional organization, which could be defined as a unification of the ideas

of Rousseau and Montesquieu. This model hinges on the role of Parliament, the sovereign organ in virtue of its connection with the electoral body, and gives judges the role of applying the law, as faithful executors of the will of the legislative body (and therefore ultimately of the people). Judicial power is essentially an instrument for ensuring that the will of Parliament is carried out.

The Rousseau–Montesquieu model, which gained strength in Revolutionary France, spread throughout Europe during the nineteenth century, where it managed to be dominant for 200 years. Despite this success, the progressive disillusionment with contractual doctrine led to increased uncertainty about the bases of this constitutional theory: the idea that the legislator, by his very nature, was set on guaranteeing individual freedom came to be seriously questioned from the end of the eighteenth century. It became increasingly clear that the order most able to ensure freedom rested on the same sovereign power capable of denying it. As Pietro Costa points out in the present volume, a large part of nineteenth-century liberalism is permeated by an uneasiness deriving from an understanding of the fragility of the protection of fundamental rights offered by the legislation-centred paradigm.

In the middle of the nineteenth century German legal theory with Lorenz von Stein and Otto Bähr tried to rein in the state Leviathan, transforming Montesquieu's theory of the division of power into one specifying the diverse functions of the state (administrative, judicial, legislative). As a result the administrative state became subject to the rules of the legislative state and to the judgements of the state as judge, which the teachings of the Enlightenment has already made independent of executive power and subject exclusively to the law. From the second half of the nineteenth century the *Rechtsstaat* (and the other similar continental experiences) was the state in which the principle of legality was recognized not only in adjudication (*nullum crimen sine lege* and *nulla poena sine lege*), as eighteenth-century Enlightenment had maintained, but also in administrative affairs. Even the German legal school had difficulties about the role of the state as legislator, however, relying for its control only on extra-legal elements, such as public opinion, the civic awareness of the people, and the history of the nation. Even the most sophisticated theories of the state-under-law had to resort to ideas such as Rudolf von Jhering's theory of state self-limitation and the theory of subjective public rights proposed by Georg Jellinek.

The thorny relationship between (legislative) power and law was not tackled satisfactorily until the beginning of the twentieth century, by Hans Kelsen. The Austrian jurist on the one hand identified the state

with the legal order, depriving it of any voluntarist overtones. On the other hand, he highlighted the hierarchical theory of the legal order and reduced the relationship between the constitution and statutes to one of normality, comparing it to any relation between two rules of different status, requiring appraisal from a legal point of view. In this framework Parliament was no longer a sovereign body but one called upon to act on the basis of precise constitutional norms, which were to define its competence and the procedures it had to follow. The exact compliance with these regulations, and therefore the formal and substantial correctness of the laws, could be controlled by a judicial court. By establishing the hierarchical relationship between the constitution and the law, Kelsen's *Stufenbautheorie* did away with the nineteenth-century dogma of parliamentary sovereignty and, by subordinating it to legal restrictions, made the legislative power subject to judicial control. This paved the way to bringing the European public law and the North American constitutional traditions closer.

The problem Dicey aimed to resolve with his theory of the rule of law did not differ from the one which had long haunted European theorists, namely how to reconcile the protection of citizens' freedom with the sovereignty of the state, and the legislative body in particular. Both Dicey and continental lawyers tried to muster up the two forces, which had defined the arena of theoretical-legal debate over the last four centuries: voluntarism on the one hand, which had found its maximum expression in the absolutist conception of the modern state and the universal, formal, and rationalist conception of law, and liberal individual rights on the other.

Dicey's solution was very different from continental theories because his idea of the rule of law originated in the legal tradition of common law. His solution undermined notions that continental Europeans considered to be crucial to the rule of law. By adhering to Austin, Dicey rejected the idea that the English constitution was founded, as Montesquieu maintained, on the principle of the division of powers,[137] and that Parliament was subject to constitutional law. Dicey also maintained that the rule of law is based on the principle of legality and therefore, like the German *Rechtsstaat*, is primarily meant to limit the discretionary power of the executive. But he also claimed that the rule of law, as a principle of legality, guaranteed the fundamental rights of Englishmen. Paradoxically, he presented the protection of these rights as a corollary of parliamentary sovereignty.

This paradox is resolved by the different role Dicey affords to the judicial power. It is this element that distinguishes Dicey's theory from

those on the continent: he flatly refuses the Rousseau–Montesquieu model. Montesquieu's conception of an independent judicial power is far removed from the tradition of common law assumed as a starting point by Dicey. While the Rousseau–Montesquieu paradigm attributes the courts an independence that is only organic, though deemed essential to the neutral application of the will of the legislator, Dicey grants them an independent prescriptive power. In this perspective, as Dicey writes in *Law and Public Opinion*,

> the explanation of a rule may, especially where the rule is followed as a precedent, so easily glide into the extension or the laying down of the rule, or in effect into the extension or the laying down of the rule, or in effect into legislation, that the line which divides the one from the other can often not be distinctly drawn.[138]

The Rousseau–Montesquieu model undermines the traditional role of the defence of individual rights that the courts play in common law. It considers the role of the courts to be an usurpation of political power,[139] as individual rights by definition limit the power of the majority and of rulers to transform their (possibly despotic) will into law. Dicey's conception of the rule of law is sharply opposed to the "phonographic" conception of judicial power, to the idea that the judge merely echoes the legislators' will. He attributes to the courts not only a formally independent power but also an independent normative power meant to protect citizens' rights.

Dicey's rule of law therefore emerges as a judge-made principle. Parliamentary legislation is seen as part of a democratic process. Its legitimacy depends on the respect for certain fundamental rights, the historic "rights of Englishmen". A judge respects the popular will, as expressed through law, because his "normative ideology"[140] embodies the value of democracy (or more simply the principle of parliamentary sovereignty). But the legitimacy of a statute is only a *prima facie* legitimacy: the democratic nature of Parliament should not automatically persuade judges to apply a law approved by it, whatever its contents. The rule of law requires that a formally valid law violating important civil rights should be interpreted by the courts in keeping with the values of freedom and independence which, according to Dicey, are the traditional values guaranteed by common law.

It could be argued that the traditional British constitution produced an alternative model to the one resulting from the French Revolution, which was based on the idea that the constitution allows for the division of powers and by so doing guarantees fundamental rights.[141] The idea that rights are born of judicial protection[142] and that the constitution is

no more than the "entrenchment"[143] of this protection is central to Dicey's notion of the rule of law. This entrenchment is independent, at least in principle, from the division of powers (even if achieved historically through the independence of the courts), and is founded on a deep-rooted legal tradition that makes law almost immune to the excesses of legislative voluntarism.

Once placed in the tradition of common law, Dicey's theory opens an important theoretical space, in which it is now possible to reassess the very general notion of the rule of law. The continental experience of the *Rechtsstaat* appears to be an ambitious attempt to subject power to law. Kelsen undoubtedly represents the culmination of this process as he opened the way to a constitutional engineering capable of placing legislative power under judicial control. By placing emphasis on substantial rather than formal aspects, the development of the *Rechtsstaat* can be interpreted as an attempt to harmoniously combine the sphere of sovereign power with the legal sphere of individual freedom, removed from that power. In the course of the nineteenth century this undertaking seemed impossible. Kelsen's theory provided a formal solution to the problem, as it eliminated the dogma of the sovereignty of the legislative body. In his wake, many of the post-war constitutions have been engaged in ensuring not only the right to freedom, but social rights too. Kelsen's formalism soon turned out an unsatisfactory solution. The progressive expansion of state intervention from the 1970s onwards has brought back the Leviathan's menace to the freedom of the individual. Kelsen, in the Enlightenment tradition, saw judicial review as the most effective method of reining in the power of the state. More precisely, he saw the judiciary as best suited to this task because of its being, in Montesquieu's words, a "null power". The judicial body was merely the "mouth of the constitution". Dicey compels us radically to question this conception of the judge's role and to focus on the problems related to the application of the law, construction techniques, legal training, and culture. Starting with Dicey's teaching it might be possible to work at a legal-realist conception of the "rule of law" that might overcome the formalistic dilemmas and the doubts about its effectiveness that have characterized this notion so far.

NOTES

1. E. Coke, *The Second Part of the Institutes of England Containing the Exposition of Many Ancient and Other Statutes*, 3rd edn., London: Crooke, p. 56.
2. Ibid., p. 56.

3. *Whig* was the name given to the political party that, in the course of the seventeenth century, struggled with the Tories for the transfer of power from king to Parliament.
4. William Blackstone in his celebrated *Commentaries on the Law of England* (Oxford: Clarendon Press, 1765–9, vol. 2, p. 77) hails the abolition of military tenures as "a greater acquisition to the civil property of this kingdom than even Magna Carta itself". In his *An Analysis of the Civil Part of the Law* (sects. xix, xxi) he also points out that, at the time he was writing, the equality of all citizens before the law was almost achieved. He sees no need to make a distinction in the relationship between "lord" and "tenant" and the relationship between "lord" and "villein", namely between the landowner and one holding the land on the basis of some agreement, or between the landowner and a serf. We must therefore assume that even villeins, traditionally subject to the discretionary power of the lords, had gained abstract rights that had weight in law. About a century earlier, Coke (*The Second Part of the Institutes of England*, pp. 4, 45) had claimed that the liberties granted by Magna Carta had by then been virtually extended to villeins, who should consider themselves free with regard to everyone except their lord.
5. D. Hay, "Property, Authority and the Criminal Law", in D. Hay *et al*. (eds), *Albion's Fatal Tree. Crime and Society in Eighteenth-Century England*, London: Penguin Books, 1988, p. 32.
6. W. Blackstone, *Commentaries on the Law of England*, vol. I, p. 237.
7. D. Hay, "Property, Authority and the Criminal Law", p. 32.
8. For criticism of Thompson and Hay see P. Anderson, *Arguments within English Marxism*, London: Verso, 1980, in particular pp. 87–99; B. Fine, *Democracy and the Rule of Law*, London: Pluto Press, 1984, pp. 169–89; A. Merrit, "The Nature of Law: A Criticism of E.P. Thompson's *Whigs and Hunters*", *British Journal of Law and Society*, 7 (1980), 2, pp. 194–214; M.J. Horwitz, "The Rule of Law: An Unqualified Human Good?", *The Yale Law Journal*, 86 (1977), pp. 561–7.
9. N. Gallerano (ed.), "Un'intervista a E.P. Thompson", *Movimento operaio e socialista*, 1 (1978), 1–2, p. 85.
10. E.P. Thompson, *Whigs and Hunters. The Origins of the Black Act*, Harmondsworth: Penguin Books, 1977, p. 262.
11. See E.P. Thompson, "Patrician Society, Plebeian Culture", *Journal of Social History*, 7 (1974); D. Hay, "Property, Authority and the Criminal Law", pp. 40–9.
12. D. Hay, "Property, Authority and the Criminal Law", p. 56.
13. Ibid., pp. 32–3.
14. A clear indication that the police were long considered as extraneous to the English system and typically "French" is the entry "Police", included for the first time in the seventh edition of the *Encyclopaedia Britannica* in 1842 (vol. XVIII, pp. 248–56): six columns, out of eighteen, are devoted to a description of the French system. In the following edition, the space devoted to France was even greater (even if slightly less proportionally): covering 15 of the 50 columns (*Encyclopaedia Britannica*, 8th edn., 1859, vol. XVIII, pp. 183–209). The theory was that France had "the most elaborate police machinery that human ingenuity has yet built up, by dint of long-continued application, and under little check from outside".
15. The French legal system of the period was still based on the absolutist principle, making the sovereign, as the author of the *lettres*, the source of all power.
16. Suffice it to remember that the translation of the second edition of *Dei delitti e delle pene* by Cesare Beccaria, in the second half of the eighteenth century, underlined

the fact that "the number of criminals put to death in England is much greater than in any other part of Europe" (Preface to the second English edition of 1769, quoted in W. Holdsworth, *A History of English Law*, London: Methuen, 1938, vol. XI, p. 576).

17. This finds its clearest expression in the call for reform in the pages dealing with criminal law in Blackstone's *Commentaries*. The critical tone in these pages is not discernible anywhere else in the book. Sir William Holdsworth (*A History of English Law*, vol. XI, p. 578) writes that "it was Beccaria's book which helped Blackstone to crystallize his ideas, and it was Beccaria's influence which helped to give a more critical tone to his treatment of the English criminal law than to his treatment of any other part of English law".
18. Hay emphasizes that many of the legislators' objectives were pursued primarily through an "exhibition of power" by magistrates. Such "exhibitions" included the "impartial" application of punishments but also their suspension or commutation in certain select, but frequent cases: so, on the one hand the law was seen to be "the same for all", and on the other, the "people" were shown that their rulers were merciful.
19. D. Hay, "Property, Authority and the Criminal Law", pp. 36–7.
20. Ibid., pp. 17–65; E.P. Thompson, *Whigs and Hunters*, pp. 245–69.
21. E.P. Thompson, *Whigs and Hunters*, pp. 263–6.
22. Ibid., p. 266.
23. Ibid., p. 264.
24. Ibid., p. 267.
25. Ibid., p. 263.
26. Ibid., p. 265.
27. Ibid., p. 260.
28. C. Harvie, "Revolutions and the Rule of Law", in K. Morgan (ed.), *The Oxford Illustrated History of Britain*, Oxford: Oxford University Press, 1984, esp. pp. 421–60.
29. Chartism was a political movement that developed in England in the nineteenth century. It takes its name from the "People's Charter", including the radicals' demands for universal male suffrage, secret ballots, annual elections, payment for Parliamentary members, eligibility not based on the census, and equal size of boroughs. It began as a largely peaceful movement, gathering signatures in support of the Charter, which was presented three times for Parliamentary approval and rejected thrice.
30. The reform of the representative system was followed by a series of laws in the 1830s and 1850s, aimed at adapting state structures to the new requirements of industrial society, or – as Harvie described it – laws to "incorporate" the ascending "provincial" middle classes.
31. R. McKibbin, "Why was there no Marxism in Great Britain?" *English Historical Review*, 99 (1984), pp. 305–26.
32. H. Perkin, *The Origins of Modern English Society*, London: Routledge & Kegan Paul, 1969, pp. 340–407.
33. The rule of law had already been discussed by William Edward Hearn, former Dean of the Faculty of Law at the University of Melbourne, in *The Government of England. Its Structure and its Development* (London: Longmans, 1866, 2nd edn.). Dicey (*Introduction to the Study of the Law of the Constitution* [1915], Indianapolis: Liberty Fund, 1982, p. cxxxviii) acknowledges no debt to Hearn. On the contrary he

maintains that both Hearn and Walter Bagehot, "deal and mean to deal mainly with political understandings or conventions and not with rules of law".

34. See, for example, P. McAuslan and J.F. McEldowney, *Law, Legitimacy and the Constitution. Essays Marking the Centenary of Dicey's Law of the Constitution*, London: Sweet & Maxwell, 1985; I. Harden and N. Lewis, *The Noble Lie. The British Constitution and the Rule of Law*, London: Hutchinson, 1986. Both begin with a section on "Dicey and the rule of law"; the first chapter of P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America*, Oxford: Clarendon Press, 1990, is devoted to an analysis of Dicey's thought.
35. Dicey claims that it will not escape the attention of those who study English constitutional law that "Austin's theory of sovereignty is suggested by the position of the English Parliament"; and he adds: "as to Austin's theory of sovereignty in relation to the British constitution, sovereignty, like many of Austin's conceptions, is a generalisation drawn in the main from English law, just as the ideas of the economists of Austin's generation are (to a great extent) generalisations suggested by the circumstances of English commerce" (A.V. Dicey, *The Law of the Constitution*, pp. 26–7).
36. Dicey points out in his Preface to *The Law of the Constitution* that his book is not simply a manual but, as the title indicates, an introduction to the subject based on "two or three guiding principles which pervade the modern constitution of England" (ibid., p. xxv). The two "leading principles" of the English constitution are: "first, the legislative sovereignty of Parliament; secondly, the universal rule or supremacy throughout the constitution of ordinary law" (ibid., p. cxlviii). Less importance, at least prima facie, is given to the third principle: "the dependence in the last resort of the conventions upon the law of the constitution" (ibid., p. cxlviii).
37. Ibid., p. 110.
38. Ibid., p. 4.
39. Ibid., pp. 24–5.
40. Ibid., p. 37.
41. Ibid., p. 78.
42. "There does not exist in any part of the British Empire any person or body of persons, executive, legislative, or judicial, which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution, or on any ground whatever, except, of course, its being replaced by Parliament" (ibid., p. 39).
43. For a discussion of the distinction between legal and political sovereignty and of the internal and external restrictions on legislative power, see ibid., pp. 26–35 and 285–9.
44. Ibid., p. 110.
45. Ibid., p. 114.
46. Ibid., p. 115.
47. Ibid., p. 114.
48. Ibid., p. 115.
49. Ibid., p. 120.
50. Ibid., p. 115.
51. Ibid.
52. For a detailed discussion of this idea, which has long dominated English legal history, see E. Santoro, Common law *e costituzione nell'Inghilterra moderna. Introduzione al pensiero di Albert Venn Dicey*, Torino: Giappichelli, 1999.

53. "Political institutions (however the proposition may be at times ignored) are the work of men, owe their origin and their whole existence to human will. Men did not wake up on a summer morning and find them sprung up. Neither do they resemble trees, which once planted, are 'aye growing' while men 'are sleeping'. In every stage of their existence they are made what they are by human voluntary agency" (J.S. Mill, *Consideration on Representative Government*, London: Longman, 1865, p. 4).
54. A.V. Dicey, *The Law of the Constitution*, p. 116.
55. Ibid., p. 121.
56. Dicey states this idea more explicitly in another of his celebrated works, *Lectures on the Relations between Law and Public Opinion in England during the Nineteenth Century* (London: Macmillan, 1914, p. 489): "it might be inferred that the sphere of judicial legislation must gradually become narrower and narrower, and judicial legislation itself come at last completely to an end. This conclusion contains this amount of truth, that no modern judges can mould the law anything like as freely as did their predecessor some centuries ago. No Lord Chief Justice of to-day could occupy anything like the position of Coke or carry out reforms, such as were achieved or attempted by Lord Mansfield. There are whole departments of law, which no longer afford a field for judicial legislation".
57. A.V. Dicey, *The Law of the Constitution*, p. 121 (italics added).
58. On the dual legislative and judicial role of the English Parliament and on the implications for the Anglo-Saxon constitution, see C.H. McIlwain, *The High Court of Parliament and its Supremacy* [1910], New York: Arno Press, 1979. For a criticism of McIlwain's theses, see J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, Oxford: Clarendon Press, 1999.
59. "Such principles, moreover, as you can discover in the English constitution are, like all maxims established by judicial legislation, mere generalisations drawn either from the decisions or dicta of judges, or from statutes which, being passed to meet special grievances, bear a close resemblance to judicial decisions, and are in effect judgements pronounced by the High Court of Parliament" (A.V. Dicey, *The Law of the Constitution*, p. 116).
60. Ibid., p. 117.
61. Ibid., pp. 117–18.
62. "The question whether the right to personal freedom or the right to freedom of worship is likely to be secure does depend a good deal upon the answer to the inquiry whether the persons who consciously or unconsciously build up the constitution of their country begin with definitions or declarations of rights, or with the contrivance of remedies by which rights may be enforced or secured" (ibid., p. 117).
63. Ibid., p. 118.
64. Ibid.
65. Ibid., p. 117.
66. Ibid., p. 119.
67. "Freedom from arbitrary arrest, the right to express one's own opinion on all matters subject to the liability to pay compensation for libellous or to suffer punishment for seditious or blasphemous statements, and the right to enjoy one's own property, seem to Englishmen all to rest upon the same basis, namely, on the law of the land. To say that the 'constitution guarantees' one class of rights more than the other would be to an Englishman an unnatural or a senseless form of speech" (ibid., p. 119).

68. Ibid., p. 120.
69. A.F. von Hayek, *Law, Legislation and Liberty*, London: Routledge, 1973–9, vol. II, p. 61.
70. G. De Q. Walker, "Dicey's dubious dogma of parliamentary sovereignty: A recent fray with freedom of religion", *The Australian Law Journal*, 59 (1985), pp. 283–4.
71. T.R.S. Allan, *Law, Liberty, and Justice*, Oxford: Clarendon Press, 1993, p. 16.
72. D. Dyzenhaus, *Hard Cases in Wicked Legal Systems: South Africa Law in the Perspective of Legal Philosophy*, Oxford: Clarendon Press, 1991, pp. 236–8.
73. R.W. Blackburn, "Dicey and the teaching of public law", *Public Law* (1985), pp. 692–3.
74. For the influence of Austin's positivism on Dicey see M. Loughlin, *Public Law and Political Theory*, Oxford: Clarendon Press, 1992, pp. 13–23.
75. T.R.S. Allan, *Law, Liberty, and Justice*, p. 16.
76. Ibid., p. 2.
77. Ibid., p. 16.
78. For an analysis of the English legal debate at the end of the nineteenth century and Austin's role, see E. Santoro, Common law *e costituzione nell'Inghilterra moderna*, pp. 56–107.
79. It does seem that most critics were opposed to the interpretation of Dicey's theories as developed in the course of the twentieth century, rather than to the theories themselves. Dyzenhaus (*Hard Cases in Wicked Legal Systems*, pp. 236–8), for example, links Dicey's theories with those of the contemporary jurist Sir William Wade, and his criticism is in the end more directed at Wade than at Dicey. Also Dicey's theories were not blamed per se but for having encouraged the dogmatic use of the notion of the "sovereignty of Parliament" (T.R.S. Allan, *Law, Liberty, and Justice*, p. 16). For an analysis of the legal debate and of Dicey's role, see M. Loughlin, *Public Law and Political Theory*, Oxford: Clarendon Press, 1992.
80. T.R.S. Allan, *Law, Liberty, and Justice*, p. 46.
81. N.S. Marsh, "The Rule of Law as a Supra-National Concept", in A. Guest (ed.), *Oxford Essays in Jurisprudence*, series 1, Oxford: Clarendon Press, 1961, p. 241.
82. See A.V. Dicey, *The Law of the Constitution*, chaps. 5–7 and p. 115.
83. Sir Ivor Jennings (*The Law and the Constitution*, 5th edn., London: London University Press, 1967, p. 39), who spent his life constructing an alternative model of English constitutional law to Dicey's, maintained that to say general constitutional principles were founded on jurisprudential decisions is "the very partial representation of the facts". It should be noted that Jennings intends the expression "general principles of the constitution" in a literal sense, choosing as an example "the sovereignty of Parliament". Dicey, on the other hand, only applies this expression to the right to freedom.
84. See chap. XIII. "Relation between parliamentary sovereignty and the rule of law". This chapter caused a stir among English legal theorists: E. Barendt ("Dicey and civil liberties", *Public Law*, 1985, pp. 600–1), described it as "surely one of the least happy chapters of his book".
85. A.V. Dicey, *The Law of the Constitution*, p. 268.
86. Ibid., p. 271.
87. Ibid. In his attempt to highlight the contrast between the French and English systems Dicey's theory is both forced and anachronistic. He bases the compatibility of Parliamentary sovereignty and the rule of law on the fact that the English Parliament

has never directly used executive powers nor nominated executive officials (ibid., p. 269). But, a few years earlier, Walter Bagehot – in his *The English Constitution* [1872], London: Oxford University Press, 1928 – had stressed that Parliament and Government in England formed a single constitutional body.

88. It would be more correct to say "in 1885", when *The Law of the Constitution* first appeared, as Dicey did not return to this theory in later editions. Bagehot's description of the role of "Government" shows that Dicey's description was anachronistic even in 1885. On the various editions of *The Law of the Constitution*, see E. Santoro, Common law *e costituzione nell'Inghilterra moderna*, pp. 9–15.
89. A.V. Dicey, *The Law of the Constitution*, p. 270.
90. As Jennings explains (*The Law and the Constitution*, pp. 158–60), after the Glorious Revolution the border between parliamentary power and the power of the courts was defined by the *modus vivendi* established between courts and Parliament. The judges did not oppose the power of the Long Parliament, the restoration of Charles II, the accession of William and Mary established by the Bill of Rights, or the claims of the House of Hanover in the Act of Settlement. As emerges from Coke's *Reports*, the courts might have opposed these Acts on the grounds of common law but they did not. The limits of their power and those of Parliament never occasioned political conflict. This meant that it was never necessary to give a formal, unequivocal definition to the relationship between common law and Acts of Parliament.
91. A.V. Dicey, *The Law of the Constitution*, p. 270. According to Dicey, evidence of this interdependence was the fact that everybody considered quite normal that judges were, strictly speaking, not irremovable; they could be removed following a decision approved by both Houses. The magistrates accepted with good grace to be "independent of every power in the state except the Houses of Parliament".
92. Ibid., p. 111.
93. It is significant that the section of *The Law of the Constitution* devoted to the rule of law opens with a long quotation from Alexis de Tocqueville exulting the spirit of English legality as superior to that of the Swiss, even though the Swiss have a written (and moreover "rigid") constitution. Dicey sometimes identifies the spirit of legality with the rule of law. He writes, for example, that the peculiar characteristic of English institutions is "the rule of law or the predominance of the legal spirit" (ibid., p. 115).
94. Ibid., p. 117.
95. Dicey, to be coherent, cannot maintain that Parliament has no power to issue a law excluding the competence of the ordinary courts concerning matters the law is regulating. Such a thesis would go against Austin's theory, and admit at least a partial limitation of Parliamentary sovereignty. The existence of a limit to Parliamentary competence, even in recent times, was at the centre of several controversies in the field of administrative law. See, for example, the famous decision in *Anisminic v. Foreign Compensation Commission* ([1969] 2 AC 147), which supports Dicey's conception of the rule of law.
96. I. Jennings, *The Law and the Constitution*, pp. 152–3.
97. Jennings continues by emphasizing that "the courts have no concern with sovereignty, but only with the established law. 'Legal sovereignty' is merely a name indicating that the legislature has for the time being power to make laws of any kind in the manner required by the law. That is, a rule expressed to be made by the Queen, 'with the advice and consent of the Lords spiritual and temporal, and Commons in

this present Parliament assembled, and by the authority of the same', will be recognised by the Courts, *including a rule which alters this law itself*". According to Jennings (*The Law and the Constitution*, p. 156), implicit in Dicey's notion of "legal sovereignty" is that the power of Parliament is neither original nor absolute, but it "derives from the law by which it is established", otherwise it would be difficult to understand what makes it "legal".

98. A.V. Dicey, *The Law of the Constitution*, p. 271.
99. Ibid., p. 269.
100. According to this system, introduced at the time of the revolution, when the law was unclear or there were lacunae, the court was bound to ask the legislator to set the rule clearly.
101. A.V. Dicey, *The Law of the Constitution*, p. 269.
102. The heart of Dicey's constitutional doctrine was well expressed by Lord Wilberforce before the House of Lords during the discussion of *Black-Clawson v. Paperwerke Waldhof-Aschaffenburg* ([1975] AC 591, 629–30, cited by T.R.S. Allan, *Law, Liberty, and Justice*, p. 79): "This power which has been devolved upon the judges from the earliest time is an essential part of the constitutional process by which subjects are brought under *the rule of law – as distinct from the rule of the King or the rule of Parliament*. [...] The saying that it is the function of the courts to ascertain the will or intention of Parliament is often enough repeated. [...] If too often or unreflectingly stated, it leads to neglect of the important element of judicial construction; an element not confined to a mechanical analysis of today's words, but [...] related to such matters as intelligibility to the citizen, constitutional propriety, considerations of history, comity of nations, reasonable and non-retroactive effect and, no doubt, in some contexts, to social needs"(italics added).
103. Some observations by Stanley Fish ("What Makes an Interpretation Acceptable?" in *Is There a Text in This Class? The Authority of the Interpretative Communities*, Cambridge (MA): Harvard University Press, 1980, pp. 353–4) on the importance of fidelity to the text clarify Dicey's theory. Fish observed that invoking the literal meaning of the text only appears to suggest disregarding any interpretation in favour of the text itself. In reality with this strategy "a set of interpretative principles is replaced by another that happens to claim itself the virtue of not being an interpretation". Dicey appears to be perfectly aware that "returning to the text" *a rigore* is not a possible strategy, because in any case the meaning of the "text" will be based on some interpretation. At the same time he seems convinced that this strategy is not invalidated by the fact that nobody can invoke the literal meaning of the text. Its effectiveness depends on the degree to which jurists believe in the importance of the text standing on its own. Dicey appears sure that insistence on this referral to the literal meaning of the text would amount to a return to the interpretive canons of common law. He is therefore able to separate the legislative text from its source and deliver it to the hands of its interpreters (paradoxical in the context of a return to the letter of the law).
104. Jennings (*The Law and the Constitution*, p. 326) maintains that Coke considered common law as normal law and recognized that Parliament, in virtue of its "transcendent and absolute" power, was able to make exceptions to general law or, as the preface of the ninth volume of the *Reports* states, "to take away one of the pillars of the common law". As this colourful language suggests, Coke considered such power quite exceptional and advised Parliament "to leave all causes to be governed

by the golden and straight wand of the law, and not to the uncertain and crooked cord of discretion" (E. Coke, *The Fourth Part of Institutes of the Law of England Concerning the Jurisdiction of Court*, 4th edn., London, 1669, p. 41, quoted in I. Jennings, *The Law and the Constitution*, p. 327). Coke claimed only common law jurists attain to the cognizance of "artificial reason and judgment of law" during his celebrated controversy with James I; for a discussion of Coke's theories related to this dispute and of his notion of "right", see E. Santoro, Common law *e costituzione nell'Inghilterra moderna*, pp. 23–8.

105. C.K. Allen, *Law in the Making*, Oxford: Clarendon Press, 1964, pp. 456–7. The first edition of this work appeared in 1927 and there were six subsequent editions. The quotations are taken from the seventh, published in 1964.
106. G.J. Postema, *Bentham and the Common Law Tradition*, Oxford: Clarendon, 1986, p. 17.
107. Hale's theories are presented and compared with those of Coke in E. Santoro, Common law *e costituzione nell'Inghilterra moderna*, pp. 29–32, 37–41; see also C.M. Gray, Editor's Introduction, in M. Hale, The History of the Common Law, Chicago/London: The University Press of Chicago, 1971, esp. pp. xxi–xxxvii.
108. M. Hale (*The History of the Common Law*, pp. 101–6) also presents the great legislative reforms of Edward the Confessor as a matter of "settling the law", which had become chaotic following the unification of different peoples into the English nation.
109. W. Blackstone, *Commentaries on the Law of England*, vol. I, pp. 85–7.
110. M. Hale, *The History of the Common Law*, p. 46.
111. Hale also emphasizes that the English constitutional framework is in continual evolution and only the reception of a legislative act within common law keeps it from being abolished when it has become incompatible with the new constitutional framework. It is naturally the exclusive competence of the courts to decide on the unconstitutional nature of any law. According to Hale this was the fate of many laws in the past, now almost completely forgotten.
112. G.J. Postema, *Bentham and the Common Law Tradition*, pp. 24–5.
113. This idea, as Postema (ibid., p. 26) makes clear, leaves no room for Bentham's project to reform English law by issuing legal codes. Every reform approved by Parliament can be a real reform of the English law only if the statutes are sanctioned by the courts; therefore it is excluded a priori the idea of a code.
114. By the "classical theory of common law" I mean the one prior to Austin. By the "modern theory of common law" I refer to the one that gained ground from the mid nineteenth century, under the influence of Austin's teaching. This distinction is developed in the second part of E. Santoro, Common law *e costituzione nell'Inghilterra moderna*.
115. C.K. *Allen, Law in the Making*, p. 456.
116. I. Jennings, *The Law and the Constitution*, p. 310.
117. Among continental jurists G. Radbruch (*Der Geist des englischen Rechts*, Göttingen: Vanderhoeck und Ruprecht, 1946) was perhaps the first to propose that the "secret" of the rule of law consists in a class of jurists and magistrates accustomed to interpreting positive laws in the light of historical values engrained in the system. See also the Foreword of A. Baratta to the Italian translation of Radbruch's essay (Milan: Giuffrè, 1962, p. xi ff.); G. Alpa, *L'arte di giudicare*, Rome-Bari: Laterza, 1996, pp. 32–3.

118. A.V. Dicey, *The Law of the Constitution*, p. 134.
119. Dicey (ibid., p. 133) underlines that the procedures recommended in the second *Habeas Corpus* Act, in effect until 1856, were less respectful to the rights of those accused of a crime, and less effective.
120. Ibid., p. 139.
121. Ibid., p. 140.
122. Ibid., pp. 141–4.
123. Ibid., p. 145.
124. Dicey rarely mentions the police, not even listing them in his index, as he regards them as extraneous to the English legal system. It should however be noted that, when he alludes to public officials in general, he is often referring to the authority and power of the police. This strategy is clearly designed to make administrative law appear more of a threat.
125. A.V. Dicey, *The Law of the Constitution*, p. 140, note 29 (italics added). That this thesis, as paradoxical as it might seem, belongs to the tradition of common law, is testified by Dicey quoting the *Commentaries* by Blackstone (*Commentaries on the Law of England*, vol. III, p. 138).
126. A.V. Dicey, *The Law of the Constitution*, p. 120.
127. Dicey (ibid., p. 273) sees this procedure, laboriously established in the course of the eighteenth century, as combining "the maintenance of the law and authority of Parliament with the free exercise of that kind of discretionary power or prerogative which, under some shape or other, must at critical junctures be wielded by the executive government of every civilised country".
128. "Reckless cruelty to a political prisoner, or, still more certainly, the arbitrary punishment or the execution of a political prisoner, between 1793 and 1801, would, in spite of the Indemnity Act, have left every man concerned in the crime liable to suffer punishment" (ibid., p. 145).
129. Ibid., p. 273 (italics added).
130. Ibid., p. 271.
131. Ibid., p. 272.
132. Ibid., p. 273 (italics added).
133. Ibid.
134. As stated in the Foreword, I use the German expression *Rechtsstaat* to indicate the first and perhaps most important politico-constitutional model among the many (*Stato di diritto, État de droit, Estado de derecho*, etc.) that developed in the second half of the nineteenth century in continental Europe. We lack an English counterpart for these terms, perhaps because, as Neil MacCormick maintains, "British constitutional usage avoids much reference to 'the state' as a concept at all, preferring to treat executive government as an emanation from 'the Crown', while legislation depends on a Parliament which was historically the rival of the Crown, not its partner, and the judiciary seek to distance themselves from both" (N. MacCormick, "Constitutionalism and democracy", in R.P. Bellamy (ed.), *Theories and Concepts of Politics. An Introduction*, Manchester: Manchester University Press, 1993, pp. 128–9).
135. See E. Santoro, *Autonomy, Freedom and Rights. A Critique of Liberal Subjectivity*, Dordrecht: Kluwer, 2003, in particular pp. 123–59.
136. Montesquieu, in book XI, chap. 3, of *Esprit des Lois* maintains that judicial power is "in a certain sense nothing" (*en quelque façon nul*).

137. On this matter Dicey (*The Law of the Constitution*, pp. 74, 86) is peremptory: "the principle, in short, which gives its form to our system of government is (to use a foreign but convenient expression) 'unitarianism', or the habitual exercise of supreme legislative authority by one central power, which in the particular case is the British Parliament. [...] All the power of the English state is concentrated in the Imperial Parliament, and all departments of government are legally subject to Parliamentary despotism".
138. Ibid., p. 491.
139. It is this aspect of the doctrine of the separation of powers that Dicey finds incompatible with the English constitutional system. In *Law and Public Opinion* (pp. 59–60), he writes: "democracy in England has to great extent inherited the traditions of the aristocratic government, of which it is the heir. The relation of the judiciary to the executive, to the Parliament, and to the people, remains now much what it was at the beginning of the century, and no man dreams of maintaining that the government and the administration are not subject to the legal control and interference of the judges."
140. I borrow this expression from Alf Ross. Normative ideology, according to Ross (*On Law and Justice*, London: Steven, 1958, pp. 75–6) "constitutes the foundation of the law system and consists of directives which do not directly concern the manner in which a legal dispute is to be settled but indicate the way in which a judge shall proceed in order to discover the directive or directives decisive for the question at issue".
141. Emblematic of this idea is the celebrated article 16 of the "Declaration of the Rights of Man and of the Citizen" of 26 August 1789: "Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no constitution."
142. In *Law and Public Opinion* (p. 487) Dicey writes: "where there is no remedy there is no right. To give a remedy is to confer a right".
143. See Nelson Goodman (*Fact, Fiction and Forecast*, Cambridge (MA): Harvard University Press, 1983, p. 94 ff. According to Goodman, a predicate is "entrenched" when its use (its "projections") appears natural. Dicey regards the courts of common law as the natural place to "project" the freedom of the English in settling controversies. They are the real guarantors of rights in Great Britain.