MASTER OF THE ROLLS

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OPEN SOCIETIES AND THE RULE OF LAW
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1. It is with great pleasure that I give tonight's Atkin lecture; I will have something to say about Lord Atkin a little later. When I accepted the invitation to give this year's lecture I was sent a list of previous speakers. Reading it was something of a double-edged sword. On the one hand it provided a useful guide as to what I might speak about tonight. On the other hand it revealed that I am following in some very distinguished footsteps indeed: Lords Hoffman, Hope, Slynn, Bingham, Phillips, Woolf and Judge, Lord Justices Sedley and Wilson, two Lord Chancellors, Lord Mackay and Lord Falconer and Dame Rosalyn Higgins amongst others. Reviewing that list put me in mind of the fear Harold Bloom, the great American literary scholar, ascribed to aspiring writers who looked back at those that came before them, Chaucer, Shakespeare, Milton and so on, and the debilitating effect it had on their efforts:. Bloom called that fear the anxiety of influence.[1] I hope I can do justice to my predecessors and not be borne down by such anxiety tonight. Members of the jury, as I might once have said, whether I do or not is entirely a matter for you.
2. However, before I begin, I must recognise publicly that, in putting together this evening's lecture, I owe a great debt to John Sorabji, who is both a lawyer and a

[1] Bloom, *The Anxiety of Influence*, (OUP) (1997).

constitutional scholar.[2] Indeed, not to put too fine a point on it, without him I could not have done it. All the good bits are his. The rest are mine.

3. I would like to begin by telling you a story. It is a story which many of you may have heard before. It is not a story of derring-do. Nor is it a story of skulduggery. It is, on the contrary, a story drawn from the usually tranquil groves of academia. It is a story of cut and thrust, but not the cut and thrust of debate. It started at 8.30 p.m. on a cold autumnal Friday night in October 1946 in room 3 on staircase H in the Gibbs Building in King's College, Cambridge, which as it happens is my old college. H3, which is a dark and gloomy room, replete with drafts and (I like to think) guttering lights, was the usual Friday meeting place of the Cambridge Moral Science Club. The cold and the gloom were reasonably predictable features of its Friday night gatherings as anyone who has ever spent a night in Cambridge at that time of year will readily tell you. That Friday differed from the norm however. It differed because of the keenly anticipated attendance of the evening's particularly distinguished guest speaker. He was the London School of Economics' newly appointed Reader in Logic and Scientific Method: Dr Karl Popper. His attendance was all the more significant that night because it was to give rise to what would be the only meeting between him and that other titan of 20th Century philosophy, Ludwig Wittgenstein, who was at the time Professor of Philosophy at Cambridge. We can all imagine the intellectual pyrotechnics that the gathered audience must have eagerly anticipated. In those terms the evening would prove a disappointment. In other terms however it would prove anything but, as perhaps is best illustrated by David Edmonds and John Eidinow's rendering of the tale in their recent book entitled *Wittgenstein's Poker*.[3]

4. So the scene is set; the room is filling with students, one of whom was Sir John Vinelott the future High Court judge, each of whom was eager to see this clash of philosophical titans,. Bertrand Russell was there too, no doubt as enthused by the prospect that lay ahead as everyone else. The two protagonists had (it is suggested) two very different views about the evening's significance. Edmonds and Eidinow suggest that Popper approached the evening anxious both to impress Russell and to expose what '*he saw as Wittgenstein's destructive influence on philosophy*.'[4] Wittgenstein is said to have approached the evening in

[2] MA (Oxon), M Phil, LLM.
[3] Edmonds & Eidinow, *Wittgenstein's Poker*, (Faber & Faber) (2002) (Edmonds (2002)).
[4] Edmonds (2002) at 207 – 208.

a rather different frame of mind. A matter of weeks before the meeting when Popper's name was mentioned to him by one of his students who had previously studied with Popper, his reply was said to have been, "*Popper? Never heard of him*."[5] For him it was a meeting no different from any other.

5. At this point I turn to Edmonds and Eidinow's account of what happened next.

"*In H3, the coal fire, the only source of warmth, had been banked up and produced a dismal heat. Braithwaite [that is to say Richard Braithwaite, the future Knightsbridge Professor of Moral Philosophy] picked up a poker and cleared out some of the ash in the hope of making the fire draw better. His efforts were rewarded with an indecisive plume of smoke that died away as he watched. . . .Braithwaite turned . . . to his guest with a question, but that too died in the air as Popper, absorbed in his notes, muttered to himself in German.*

The members who packed the room – many more than the available chairs – were indifferent to their surroundings. The atmosphere was expectant. Dr Popper's newly published book was something of a cause célèbre. A Girton don had forbidden her students to read it as it was too scandalous in its attack on Plato. Communists and Labour left-wingers were up in arms, too, but over its attack on Marxism and planned societies. The speaker was Viennese, like the club's chairman, Professor Wittgenstein, but was understood to be flatly opposed to the language-based approach of his fellow Austrian. Braithwaite, who knew Popper, had predicted fireworks, a fraught occasion. The word had spread: here at last was someone who could take on Wittgenstein, who would not be crushed beneath the juggernaut. . . .

Popper couldn't wait to begin. His energies were surging, his heart was banging with extra adrenalin . . .This was the moment, and he was the man. Recognition was his at last . . . He would dispatch the rubbishy notion that playing with words was philosophy, dispatch this Scharfmacher [agitator] with his impossible Wichtigtuerei [self-importance] – this self-important agitator. . .

And could one ask for a greater victory? Wittgenstein exposed. The exalted brought down.

[5] Edmonds (2002) at 209.

When [Popper] opened the meeting, there was no question of normal courtesies. . . Popper went straight in with a frontal assault against the wording of [his] invitation: to deliver a 'short paper, or a few opening remarks, stating some philosophical puzzle'. Whoever [he suggested] had written the reference to puzzles had, perhaps unwittingly (said with a slight smile), taken sides.

This was a comment the guest felt had been made in a suitably light-hearted manner. But for one person present it was more of a challenge than a piece of light-heartedness: the gauntlet was picked up.

Intolerable. This was intolerable. Wittgenstein wouldn't allow it. . . The wording was his. The point of it was to cut the twaddle and get down to business. Wittgenstein sprang to the secretary's, his student's, defence. Loudly. Insistently. And, felt Popper, angrily. The evening had started as it was to go on.

[There then followed] quick-fire interchanges, the voices rising and falling over each other like angry seas running on to a beach . . . But now, by a sort of reflex, Wittgenstein's hand had gone to the hearth and tightened around the poker, its tip surrounded by ash and tiny cinders. . . [Braithwaite] watched anxiously as Wittgenstein picked it up and began convulsively jabbing with it to punctuate his statements. Braithwaite had seen him do it before. This time Wittgenstein seemed especially agitated, even physically uncomfortable – unaccustomed to a guest's counterpunching, perhaps. . . .Braithwaite suddenly felt uneasy: should he try for the poker? Things were beginning to look somewhat out of control.

Someone – was it Russell? – said, 'Wittgenstein, put the poker down'.

[And then] . . . Wittgenstein had thrown down the poker and was now on his feet. So was Russell. In a sudden moment of quiet, Wittgenstein was speaking to him.

'You always misunderstand me Russell.' [And with that the] door slammed behind Wittgenstein.

Popper stared disbelievingly . . . Had he won?"[6]

6. Had he indeed? I can see little scope for seeing anyone as having won. Those present lost the opportunity of learning from what ought to have been reasoned debate by two of the finest minds of the 20th Century. Popper and Wittgenstein both lost the opportunity to learn from each other and, perhaps, advance the course of human knowledge. Popper, most of all perhaps, lost the opportunity to discuss the principle that reason and knowledge grow by mutual criticism and that in fostering the growth of such knowledge a '*rationalist attitude*' should be struck, which '*considers the argument rather than the person arguing . . .*'.[7] This was a principle to which Popper was, ordinarily, a firm supporter, but then even Homer nodded.[8]

7. What has this to do with the subject of tonight's lecture (apart from ensuring that you can at least take away from it a good anecdote about what happens when philosophers disagree or, perhaps even, the lesson that it is best not to disagree with philosophers)? The answer rests in what Edmonds and Eidinow described as Popper's newly published book; a book that, as they said, one Cambridge don, no doubt unaware of the irony in doing so, had forbidden her students to read. That book was called *The Open Society and Its Enemies*: Popper's magisterial defence of liberal democracy and critique of totalitarian societies.[9]

8. In developing his thesis Popper attributed certain features to what he called *Open Societies*.[10] They are societies committed to humanitarianism and the development of individual rights. They are societies where debate and discussion are open to all and are conducted rationally and calmly, where decisions are taken and social policy is determined on the merits and not by unthinking recourse to tradition or claims of authority. They are societies that are democratic in nature, that are committed, as Philip Bobbitt has recently put it, to government by consent through free and fair elections.[11] They are societies committed to the rule of law. Perhaps they are societies which will be encouraged by the new President of the USA. Only time will tell. These several aspects of Popper's account are

[6] Edmonds (2002) at 210 – 215.
[7] Popper, *The Open Society and Its Enemies*, Vol. II, Routledge (1945) at 250 – 251.
[8] Horace, *Ars poetica*, at 358.
[9] Vol. I & II, Routledge (1945).
[10] For a summary see: O'Hear, *The Open Society Revisited*, in Catton & Macdonald (ed), *Karl Popper Critical Appraisals*, Routledge (2004) at 189ff.
[11] Bobbitt, *Terror and Consent: the Wars for the 21st Century*, (Allen Lane) (2008).

mutually supportive and I intend to say something about each of them, under the headings (1) rationalism, (2) humanitarianism and (3) democracy and the rule of law.

(1) Rationalism

9. Open societies are ones where everything is open to criticism whether it is social policy, art, religion, science, traditions, politics, politicians, law, laws and, even (dare I say it) judges. Criticism and debate are however only of value where they are conducted rationally, with cogent argument being put forward. For Popper, criticism and debate were not assisted by the resort to tradition, authority or *ad hominen* attacks. As Professor Anthony O'Hear describes it:

   "*The open spirit is one which listens . . . to the other fellow's point of view. Differences are resolved and decisions reached through this process of rational discussion, and the spirit of compromise and cooperation.*"[12]

   This was perhaps a point that Popper, who pithily put it that you '*don't kill a man when [you adopt] the attitude of first listening to his arguments*', ought to have remembered when considering his attack on Wittgenstein.[13] It was certainly something Wittgenstein would have done well to have regarded as his hand went to the poker.

10. It is only through such rational criticism and open debate, which is something we in the legal profession know well through the sifting of evidence and the weighing of argument, that social policy can validly change and society properly evolve. Only in this way can social systems and institutions be reformed and the problems society faces resolved properly, justly and fairly. Decisions are made and conclusions formed based on consent after debate. That is not to say, as Popper recognised readily, that the decisions taken and conclusions reached are the right ones, let alone are the right ones for all time.[14]

11. We have a long tradition of reforming our political and legal institutions in ways which Popper would, I think, have found entirely consistent with his understanding of how open societies ought to operate. As you all know, Jane

[12] O'Hear, *ibid*, at 190.
[13] Popper (1945) Vol. II at 263.
[14] Popper (1945) Vol. I at 125.

Austen's *Pride and Prejudice* begins: *"It is a truth universally acknowledged, that a single man in possession of a good fortune must be in want of a wife"*. It is a truth almost as universally acknowledged that our constitution and political institutions have been work in progress since 1066, with the majority of that work, latterly at least, being conducted through vigorous, open, and (in the main) peaceful public debate.[15] While the foundations of our democracy may lie in the feudal institutions of England, Wales, Scotland and Ireland, in Magna Carta, the civil war, the Glorious Revolution and the Bill of Rights, the greatest shaping of our institutions perhaps took place through a number of reforming Acts in the 19th and early 20th centuries. Not least of these was the great Reform Act of 1832, an Act which not only radically extended the democratic franchise but also gave rise to the founding of the Reform Club itself in 1836. That reforming instinct would see further extensions of the franchise until, belatedly, universal suffrage became a reality as a consequence of the Sex Disqualification (Removal) Act 1919.

12. Equally, the 19th and 20th centuries saw our political and legal institutions reformed. Our antiquated, inefficient and overly expensive legal system was subject to wide-scale reform throughout the 19th Century as Royal Commission after Royal Commission strove to improve it. That striving resulted in a number of reforming Acts, which culminated in the creation of the High Court and Court of Appeal in the 1873 – 1875 Judicature Acts. The debate did not conclude there however. reform continued throughout the 20th century, which so far as civil justice was concerned, culminated in the 1999 Woolf Reforms. The debate continues today as the baton is passed to Sir Rupert Jackson, now Lord Justice Jackson, who I am pleased to see here this evening. Over the next twelve months he is to conduct a fundamental review of the cost of civil litigation – not before time it might be thought – a daunting task indeed.

13. Political reform over many years has seen the supremacy of the House of Commons firmly and finally established through the Parliament Act 1911; Britain's entry into what was then the European Economic Community in 1973 as a consequence of the European Communities Act 1972 and then reform to our constitutional settlement with, in 1998, the Scotland Act and the Government of Wales Acts creating respectively the Scottish Parliament and Welsh Assembly and devolved power from Westminster. Reform to the governance of Northern Ireland was made through the Northern Ireland Act 1998.

14. In 2005, after much debate and despite an ill-fated start - when the office of Lord Chancellor was abolished and unabolished when it was appreciated that he had many statutory powers – we saw the creation of the UK Supreme Court and the reform of the office of Lord Chancellor. The structural changes are of fundamental constitutional importance, in both the legally and politically. For the first time in its history Britain now has a constitutional settlement consistent with the views of Locke and Montesquieu.[16] That is to say our constitutional settlement has been formally recast on lines consistent with the doctrine of the separation of powers: an essential aspect of any system that is firmly committed to the rule of law. This is not to say that we did not operate consistently with the doctrine previously; we did so in practice, despite two striking constitutional anomalies. The first was that the Lord Chancellor was a Cabinet minister, a member of the legislature and also the head of the judiciary a senior judge. The second was (and will be until October 2009) that the Supreme Court is embodied in the collective body of the Lords of Appeal in Ordinary sitting in the House of Lords. While there was much to be said for the old saying that if it ain't broke don't fix it, Popper would no doubt have been happy to see the developments introduced by the Constitution Reform Act 2005, especially given that they arose not through revolution or revolt but as a consequence of democratic and open debate. I return to the significance of these changes in a moment.

(2) Humanitarianism

15. Rational, open debate has not just resulted in structural changes to our democracy and its legal and political institutions. It has brought forward far-reaching reforms that are directly related to another of Popper's themes: humanitarianism and the rights of the individual. He put it this way when discussing the importance of rational debate:

"*Rationalism is . . . bound up with the idea that the other fellow has a right to be heard, and to defend his arguments. It thus implies the recognition of the claim to tolerance, at least of all those who are not intolerant themselves.*

. . . Ultimately , , , rationalism is linked up with the recognition of the necessity of social institutions to protect freedom of criticism, freedom of thought, and thus the freedom of men. And it establishes something like a moral obligation

[16] Locke, *Two Treatises on Government*, at section 91; Montesquieu, *De L'Esprit des Lois*, Book XI, 6

towards the support of these institutions. This is why rationalism is closely linked with up with the political demand for practical social engineering . . .for planning for freedom, and [its control]. . . by reason which is aware of its limitations, and which therefore respects the other man and does not aspire to coerce him – not even into happiness."[17]

By intolerant, Popper refers to those who are unwilling, for whatever reason, to enter into rational debate. He does not, nor could he consistently with his overarching theory, refer to the content of their views. Popper's point is simple. Open societies exist as a means to facilitate, as best they can, individual self-determination.

16. In the 20th century (and now the 21st century) our institutions have moved, in what has admittedly been a piecemeal way to facilitate individual self-determination and mutual respect for all members of society. The decriminalisation of homosexuality in the Sexual Offences Act 1967, followed by the equalisation of the age of consent in 2000 through the Sexual Offences (Amendment) Act, is one such example of how through rational debate, and insofar as the age of consent was concerned debate in Parliament following an adverse decision from the Strasbourg court in *Sutherland v UK*, we have become a society that is properly respectful of individuals.[18] We have moved towards sex, race, gender and most recently disability, religion and age equality through, for instance the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Age) Regulations 2006. Whether Popper would have agreed with the results of these reforms I cannot profess to know, although I very much expect that he would have done, given the emphasis he placed on respect for individuals' rights.

17. Mutual respect for individuals is something which is well known to the courts. Justice is traditionally said to be blind. It takes no account of who is before the court; it looks simply to ensuring that they are afforded both procedural and substantive justice i.e., a fair and just process and a fair and just result arrived at by the application of the true law to the true facts. If the courts did not at least

[17] Popper (1945) Vol. II at 263.
[18] (25186/94) (27 March 2001).

strive towards those ends, there would be a risk that the rule of law would falter with individuals, instead of resorting to the courts for justice, taking the law into their own hands.

18. One of the criticisms that is however often levelled at the courts, and rightly so, is that they do not properly reflect the diversity that is a feature of 21st Century British society. The small number of women and black and ethnic minority judges reflects badly on society. Remedying this problem will take effort on the part not just of the Judicial Appointments Commission to ensure that all suitably qualified candidates for judicial posts come forward and the best from that widened pool are chosen on merit, but of us all. To my mind it requires all parts of the legal profession to facilitate their members taking steps towards sitting as judges. This includes, not only the Bar, but also solicitors. It is part of the ethos of the Bar that practitioners give part of their time to sit as recorders – in my time it was four weeks a year – so that they may gain experience in areas in which they may not practise, in particular crime, which will stand them (and indeed the system as a whole) in good stead when in due course they apply to become a permanent (and perhaps in the future permanent but part time) judge. For example those who practice at the Commercial Bar obtain experience of crime in this way. I hope that it will become equally common for members of the Chancery Bar to do the same. I also hope that it will become part of the ethos of the solicitors' branch of the profession to do the same. All parts of society are represented in the solicitors' profession, which therefore has a huge pool of potential applicants for judicial office, including of course both women and men, and people from all ethnic origins. The obvious way to increase diversity on the bench is to encourage them to apply to the JAC for appointment. It would be quite wrong in principle to introduce any kind of quota system but urgent steps should be taken to encourage application from as wide a group as possible. This is how diversity has been achieved in countries like Canada. It can be done here too. Both society and the development of our law cannot but benefit immensely if we can attract the very best from the very widest pool of talent to judicial office.

19. However, although there is always room for improvement, I think we can safely say that the advances that we have made in the various discrete Acts I have mentioned and, so far as the judiciary is concerned, the change in the appointment process brought about by the creation of the Judicial Appointments Commission, were overshadowed by the truly significant step we took in 1998

towards the development of a society that respects individual rights and humanitarian values. Although the British played a significant role in drafting the European Convention on Human Rights and indeed the United Kingdom was the first State, on 08 March 1951, to ratify it, it was not until 1998 that it was finally incorporated into British law through the Human Rights Act 1998, which came into force in October 2000. Again, in true Popperian fashion it was only incorporated after much detailed and open debate, not least contributed to by Lord Bingham, or as he was then Sir Thomas Bingham MR, in his 1993 Denning lecture entitled *The European Convention on Human Rights: time to incorporate*.[19]

20. The European Convention is a powerful means by which self-determination is protected. Thus, as the ECtHR in Strasbourg court has held, Article 8 protects '*gender identification, name and sexual orientation and sexual life. . . .[It] protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world.*[20] Equally, the Convention protects our right of self-determination in other ways: Article 2 protects the right to life; Article 3 prohibits torture; Article 4 prohibits slavery; Article 5 protects liberty and security; Article 6 and 7 protect our right to due process and prohibit retrospective criminal offences; Article 9 protects freedom of thought, conscience and religion; Article 10 protects freedom of expression; Article 11 protects freedom of assembly and association; while Article 12 protects the right to marry.

21. That each of these rights are now protected by our laws and by the requirement that our public bodies act in conformity with them is something of which Popper would have been proud, given his understanding that open societies are ones which maintain a fundamental commitment to humanitarian ideals and the development of the individual. The debate is not however over as far as these rights are concerned. Popper was clear in his view that any conclusion that society arrived at was only ever provisional. Debate could, and no doubt he expected, would continue even after a democratic society arrived at its decision.[21] It would because, as Popper accepted, no decision taken or conclusion arrived at is necessarily correct. Experience may show that conclusions reached are flawed or

[19] (1993) 109 LQR 390.
[20] *Bensaid v UK* [2001] ECHR 44599/99 at [47].
[21] Popper (1945) Vol.1 at 125.

that decisions taken are wrong. But the commitment to openness and critical discussion, in which it is based, ensures that decisions taken and conclusions reached are always susceptible to future change and reform. Future debate may show that certain rights need to be added to the list of those protected; certain rights may in future need to be amended, varied or perhaps removed from the list. Some may say it is right to do so. Some may differ. But the central point is that consistently with Popper's ideas of openness, critical debate and the acknowledgement that they are central to our democratic tradition will ensure that any change comes as a consequence of rational discussion articulated through our elected representatives.

22. That debate is as we all know ongoing insofar as the European Convention is concerned. There is a suggestion, for instance, by the Conservative Party that its incorporation be repealed and it be replacement by a British Bill of Rights.[22] Equally, the Labour Government has raised the question in its *Governance of Britain* review whether it might be supplemented in some way by a British Bill of Rights and Duties.[23] Examples of such ongoing debates can of course be multiplied. There is, for instance, Lord Goldsmith's review of British citizenship, its rights and duties. Its examination of that issue was one which was explicitly framed in terms that echo Popper. The first of its terms of reference, specified how the review was:

"*To clarify the legal rights and responsibilities associated with British citizenship, in addition to those enjoyed under the Human Rights Act, as a basis for defining what it means to be a citizen in Britain's open democratic society.*"[24]

23. The most striking example at the present time of an ongoing debate is that which surrounds the role, or otherwise, that Sharia law may play in the United Kingdom in the future. This is a debate which has garnered opinion and comment from, amongst many others, the Archbishop of Canterbury, Rowan Williams, Lord Phillips, Lord Chief Justice as he was at the time, Senior Law Lord as he is now; the Lord Chancellor, Jack Straw and most recently at this year's Bar Conference, Lord Bingham. It is a debate which raises questions not just about the nature of

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[22] David Cameron, '*Balancing Freedom and Security – A Modern British Bill of Rights*', (http://www.conservatives.com/tile.do?def=news.story.page&obj_id=130572&speeches=1), (Speech given at Centre for Policy Studies, London), (26 June 2006).
[23] See http://governance.justice.gov.uk/; *The Governance of Britain*, Green Paper (July 2007) at 60.
[24] Lord Goldsmith QC, *Citizenship: Our Common Bond*, (March 2008) (http://www.justice.gov.uk/docs/citizenship-report-full.pdf) at 124.

our law but wider questions about the nature of our society and the role we all, as citizens, play in that society.

24. I do not wish to add to that debate tonight, if only because I have not yet formed a view about many of the issues. I would however say this. The debate is taking place in a manner in which Popper would have approved. It is taking place calmly, rationally, and openly. It is taking place in accordance with the nature of our open democratic tradition, where each voice that adds to the wealth of the debate is listened to respectfully regardless of its origin, or background, with each view weighed and considered on its merits. This is something of which we should be proud, even if in our way we are quietly proud. And where it is not being conducted in this way, where shrill voices attempt to drown out the debate rather than engage with it rationally, cogently and with reasoned argument, we should be equally proud and resolute as we contend with those voices who, while they claim to defend our traditions, would rather the dead hand of authority silenced debate.

(3) Democracy, the Rule of Law – Now and in the Future

25. But what of the rule of law – *the golden metwand* of our constitution, as Dicey put it? Rationalism, debate, a commitment to humanitarian values and individual rights are all very well but just like faith and hope, without something else they are as nothing.[25] Without a firm and unyielding commitment to the rule of law the existence of these other commitments remains in peril; they depend on the goodwill of those who govern. If we accept Jennings description of our Constitution as one that is based on the idea that, ". . . *strictly speaking . . . there is no constitutional law in Great Britain; there is only the arbitrary power of Parliament*", we might perhaps be led to the belief that our Open Society is contingent on the goodwill of those who govern.[26]

26. A number of points can be made here. First, whether or not Parliamentary sovereignty is and ever was as untrammelled as Jennings, and before him Dicey, put it, it is limited in a fundamentally significant way.[27] It is of course subject to the consent of the governed in that Parliament is elected at regular intervals through free, fair and peaceful elections: a fundamental feature of Popper's open

[25] See, 1 Corinthians: 13.
[26] Jennings, *The Law of the Constitution*, (CUP) (1959) at 65.
[27] Dicey, *An Introduction to the Study of the Law of the Constitution*, (10th edition) (1959) (Macmillan Press) at 39 – 40.

societies.[28] Through the existence of free and fair elections, as Popper put it, '*the rulers may be dismissed by the ruled. . .*'[29] Through the commitment to such elections and the creation and maintenance of political institutions that both facilitate them and give proper expression to their results open democratic societies are able to fulfil their proper function, to which I return in a minute, and guard against the tyranny of arbitrary power. Regular, fair elections therefore provide the shield that protects the rule of law from anti-democratic urges.

27. Secondly, any government that acted contrary to the rule of law would cease to be a government of an open society and would lose its legitimacy. This is an argument that Philip Bobbitt has made in his recently published book *Terror and Consent*; a book which as I mentioned earlier is predicated on the distinction that Popper drew between open and closed (or totalitarian), societies. Bobbitt makes the following point in assessing the role that adherence to the rule of law has; he says this:

"*. . . respect for the rule of law is the indispensible element in legitimate governance …. because protecting our rights is the purpose that empowers government in the first place.*"[30]

28. He describes the State's true purpose as being to '*protect the rights of the people*', by which in Popperian fashion he means their human rights. The need to protect those rights for Bobbitt '*justifies the vigour and power of the state*'.[31] Bobbitt here links respect for rights and the protection of individual rights with the rule of law. Government legitimacy is predicated on strict adherence to the rule of law; it is only through this that it can properly protect our rights.

29. Where does this leave the courts? Bobbitt writes as an expert in, amongst many other things, US constitutional law. He writes from the perspective of a country, whose government is limited by the terms of both the Declaration of Independence and the US Constitution, which explicitly specify that the government's role is, subject to the Constitution, to secure and protect the

[28] O'Hear, *ibid*, at 190.
[29] Popper (1945) Vol. I at 124.
[30] Bobbitt (2008) at 285 – 286.
[31] Bobbitt (2008) at 244.

inalienable rights of US citizens.[32] The role of US courts is straightforward. It is to ensure that the US government acts within its constitutional bounds. Bobbitt sees it as an abiding failure on the part of the US that, what Lord Neuberger is reported to have described recently as the disgrace of Guantanamo Bay, was permitted to take place.[33] It is a failure because for Bobbitt, and for many, it represents an abnegation of the rule of law.[34] Bobbitt's criticism is thus aimed not just at the executive and legislative branches of the United States, but also at its judicial branch.

30. The role of English courts is not so straightforward. We operate in a framework where Parliament is supreme and the courts apply and interpret the law. While judicial activism has increased to some degree since the enactment of the Human Rights Act, that Act takes great care to preserve parliamentary supremacy. The courts can only issue declarations of incompatibility and not strike down legislative acts. This is to my mind an important feature of our commitment to Popper's open society. It places a reviewing power in the courts, but ultimately it leaves policy decisions in the hands of the people's representatives. It gives the courts a role in the debate; but it does not set them up as superior to the people or their representatives. In this way it insulates the judiciary from the form of criticism that can be levelled at other judiciaries, where they are seen as taking an active, and at times political, role in developing public policy. One of the great strengths of our democracy is the absence of a politicised judiciary; it is a strength that underpins the independence of the judiciary that has prevailed here since the Act of Settlement 1701.

31. There is sometimes talk of our judiciary becoming more politicised; that with the soon-to-be Supreme Court to replace the Law Lords we could see the development of a more robust, activist approach taken by our most senior court. This is, of course, not the intention, but again as Lord Neuberger noted as this year's Bar Conference, if there is one certain law it is the law of unintended consequences. It seems to me to be at least a possibility that the judiciary may become more activist. However, any move in that direction should not in my opinion be by stealth or by accident, but only after a full, open and careful public debate; one which assesses the benefits and drawbacks of such a system because

[32] Bobbitt (2008) at 243.
[33] http://business.timesonline.co.uk/tol/business/law/article5080873.ece
[34] Bobbitt (2008) at 285.

there are clearly both benefits and drawbacks; and one which assesses the possible consequences intended or otherwise. Constitutional change should only come after such a debate. Otherwise we may see respect for the judiciary and their independence weakened to the detriment of all.

32. Finally I want to mention Lord Atkin. In 1942 he was famously the sole dissenting voice in the case of *Liversidge v Anderson*.[35] In that case the courts were faced with a question concerning detention without trial. He put it this way:

"*These cases raise the issue as to the nature and limits of the authority of the Secretary of State to make orders that persons be detained under reg. 18B of the Defence (General) Regulations, 1939. The matter is one of great importance both because the power to make orders is necessary for the defence of the realm, and because the liberty of the subject is seriously infringed, for the order does not purport to be made for the commission of an offence against the criminal law. It is made by an executive minister and not by any kind of judicial officer, it is not made after any inquiry as to facts to which the subject is party, it cannot be reversed on any appeal, and there is no limit to the period for which the detention may last. The material words of the regulation are as follows: "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.""*[36]

These were he said:

"*simple words and as it appears to me obviously give only a conditional authority to the minister to detain any person without trial, the condition being that he has reasonable cause for the belief which leads to the detention order. The meaning, however, which for the first time was adopted by the Court of Appeal in the Greene case and appears to have found favour with some of your Lordships is that there is no condition, for the words "if the Secretary of State has reasonable cause" merely mean "if the Secretary of State thinks that he has reasonable cause." The result is that the only implied condition is that the Secretary of State acts in good faith. If he does that - and who could dispute it or*

[35] [1942]AC 206.
[36] [1942]AC 206 at 225 – 226.

disputing it prove the opposite? - the minister has been given complete discretion whether he should detain a subject or not. It is an absolute power which, so far as I know, has never been given before to the executive, and I shall not apologize for taking some time to demonstrate that no such power is in fact given to the minister by the words in question."

33. The majority disagreed and in Lord Atkin's view upheld an '*absolute power*', which in effect the courts could not in any real way review. He went on to say this:

"*I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. Their function is to give words their natural meaning, not, perhaps, in war time leaning towards liberty, but following the dictum of Pollock C.B. in Bowditch v. Balchin* [32] *, cited with approval by my noble and learned friend Lord Wright in Barnard v. Gorman* [33] *: "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute." In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.*"[37]

Stirring stuff.

34. Today, especially since and in the light of the events of 9/11, we face threats to our open society. These are threats to which the government has sought to respond in various ways, not always successfully: see eg *A v Secretary of State for the Home Department* [2005] 2 AC 68, where detention without trial of non UK nationals was held by the House of Lords to be unlawful. The government's present response is *inter alia* through the creation of non-derogating control orders under the Prevention of Terrorism Act 2005. That Act provides a mechanism for review of those orders. The correct approach to such a review has given rise to no

[37] [1942]AC 206 at 244.

little disagreement between the judges: see eg *Secretary of State for the Home Department v E* [2008] 1 AC 499; *Secretary of State for the Home Department v JJ* [2008] 1 AC 385; *Secretary of State for the Home Department v MB* [2008] 1 AC 440; and most recently, *Secretary of State for the Home Department v MB, AF & Others* [2008] EWCA Civ 1148. The relevant principles will be reviewed in the House of Lords in the New Year, when the House will have to grapple yet again with the problem how to balance the risk to national security and thus to the lives of the people on the one hand with the human rights of alleged terrorists on the other.

35. This process is evidence of the operation of the rule of law in practice. Lord Atkin would I think have approved of the process of review. Whether he would have approved of the results of the process, I am not sure but on balance I think he would. As I see it, Lord Atkin, and for that matter Popper, would have approved, even if they regretted the need to introduce some restrictions on individual liberty as a means to provide security. As Popper put it:

"*. . . there is no freedom [though] if it is not secured by the state; and conversely, only a state which is controlled by free citizens can offer them any reasonable security at all.*"[38]

36. We have adopted an approach that respects the rigour of the rule of law. It is an approach that ultimately rests on the consent of the people, free citizens, and which is subject to review by the courts. To my mind, we have adopted an approach that both respects the fundamental nature of our open, democratic society and respects the rule of law. It is of course another question, and one for Parliament and the electorate, as to whether the steps taken are necessary and proportionate. That however is a matter of consent, and as Popper said rightly, it is a matter for a democratic society to settle through the institutions of democracy.

Postscript

37. Since completing a draft of what I was going to say this evening, I heard a poem being read on the Remembrance Sunday Songs of Praise, which I had not heard before and which I thought could be a tailpiece to my lecture. It is by a US Soldier called Charles M Province and is entitled "*It is the Soldier*". It reads.

[38] Popper (1945) Vol. 1 at 111.

"It is the Soldier, not the minister
Who has given us freedom of religion.

It is the Soldier, not the reporter
Who has given us freedom of the press.

It is the Soldier, not the poet
Who has given us freedom of speech.

It is the Soldier, not the campus organizer
Who has given us freedom to protest.

It is the Soldier, not the lawyer
Who has given us the right to a fair trial.

It is the Soldier, not the politician
Who has given us the right to vote.

It is the Soldier who salutes the flag,
Who serves beneath the flag,
And whose coffin is draped by the flag,
Who allows the protester to burn the flag."

38. In this I think we can see the synthesis of the duality that Popper drew between open and closed societies; between freedom and security. In a closed, totalitarian society the soldier will do none of the things attributed to him in the poem; he will be an instrument of oppression or of terror. In an open society, a democratic society, the soldier will, as Province so eloquently puts it, provide the sphere of security within which freedom can grow and develop. In doing so we owe them a great debt.