
**LIONS IN THE WHIRLIGIG OF TIME—STEPHEN
SEDLEY’S *LIONS UNDER THE THRONE: ESSAYS
ON THE HISTORY OF ENGLISH PUBLIC LAW** AND
*LAW AND THE WHIRLIGIG OF TIME*****

PATRICK BIRKINSHAW¹

University of Hull

Stephen Sedley retired from the Court of Appeal in 2011. In retirement at Oxford he delivered the lectures that became *Lions under the Throne*. As the subtitle to the book explains, these were essays on the history of English public law. As well as being a barrister, judge and visiting professor, he is also an author and reviewer of numerous pieces on law, legal doctrine, legal history and legal biographies. The latter, together with sketches on musicians, including Bob Dylan with whom he gigged in 1962, and occasional writings constitute the contents of the *Whirligig* collection which followed on from *Ashes and Sparks* in 2011.

Both volumes under review continue the display of Sedley’s consummate control and grasp of legal doctrine, knowledge of legal history, the broader context of legal development and sharp observation of character and personality. Added to which is a literary style which is pellucid, engaging, witty, graphic and easily accessible to a non-lawyer. His style mixes respectful levity with the sharp sting of appreciation of the worms-eye view of the law: its injustices, its often adventitious nature, its human foibles and defaults, and its unpredictability. To take one of numerous examples of the latter, consider his treatment of secret trials and special advocates introduced in the UK to deal with the threat of terrorism (Sedley 2015: 167). The Court of Human Rights in the *Chahal* case in 1996 was informed that Canada had already introduced such a secret system: ‘In fact, it was not until 2002 that Canada legislated for closed hearings on security-sensitive immigration cases, and the legislation was struck down by the Canadian Supreme Court for incompatibility with the [Canadian] Charter right to a fair trial.’

* Cambridge University Press 2015.

** Hart 2018.

¹ Emeritus Professor of Public Law. Once again, I am grateful to Martin Gallagher for his advice and comments.

The title of *Lions* is taken from a quote by Francis Bacon. The image of lions *under* the throne contains an ambiguity: wild powerful beasts in subservience, not unlike those in the zoo. They know their place. Is there a hint that on occasion they may unleash their strength when occasion demands it?

Lions sets out to provide a ‘series of test-drillings into a land mass’ and not a ‘panoptic history of English public law’. When he wrote *Lions*, the latter was not provided for, he explains. I am of the generation that still felt the influence of the Diceyan view that administrative law did not exist in England because special courts separate from the civil courts did not adjudicate upon the administration and the citizen as in France. I was fortunate to have been educated in a law school which not only debunked Dicey but which gave prominence to the emerging field of public law when old principles were put to new use in an expanding state. Dicey’s nostrums and weaknesses were exposed. Nor was the course’s focus fixed solely on the courts. While it is easy to see that now not only have administrative law and administration been heavily influenced by judicial principle, it was common not to look far beyond the courts in explaining our constitution and redress of grievance. The public lawyer often missed the core elements of how our constitution worked and on which judges said little, despite Dicey’s strictures that the ‘English’ constitution was a judge-made constitution based on precepts of private law relationships, and how limited courts were in effective grievance redress. Today, the courts’ contribution to constitutional law and human rights protection has been revolutionised. A public law matrix has evolved. As we shall see, this has caused a reaction in government, not for the first time, and one suspects not for the last. Non-judicial redress of grievance is now also commonplace on the syllabus.

Lions traces the re-emergence from earlier centuries of public law litigation in England after the comatose interlude of much of the 20th century—the ‘Lions in winter’. It is a personal account, for he was a barrister then judge in some of the most significant cases. As he is aware, it was a re-awakening of the necessity for legal protection in much of the common law world and beyond (Sedley 2015: 44). One case not referred to was where he represented a prisoner named Williams who had been subjected to prolonged detention in the control unit (CU) at Wakefield prison (*Williams v Home Office* (1981)). His case for Williams was a masterclass in its invocation of basic principles of common law and the European Convention on Human Rights (ECHR) (in pre-Human Rights Act 1998 (HRA) days) in its attack on the illegality of a brutal regime. The regime was not unlawful, the court ruled. The Bill of Rights prohibited

‘cruel and unusual punishment’; while the CU may have been cruel, it was not unusual in the context of England’s prisons.

Prior to the judicial self-denial of the 20th century, Sedley describes how in the 19th century the judiciary set about overseeing the regulatory state spawned by the economic expansion of the industrial revolution. The civil service became professionalised, careerist and powerful. It was a jurisdiction the extent and nature of which was determined by the judges themselves. He highlights the grievous error in Dicey’s strictures about no *droit administratif* existing in England. We didn’t call it that, but F W Maitland famously wrote how, by 1888, over half the cases reported in the Queen’s Bench Division concerned administrative law.²

Long before that, as Sedley explains in the section in *Lions* entitled ‘Histories’, the Court of Common Pleas had ruled that the King’s ministers did not have powers of judicial officers of the state to order arrest or search and seizure warrants. It was not as clear cut as that in terms of historical precedents, but Lord Camden’s famous judgment in *Entick v Carrington* (1765) struck a resounding chord for some semblance of a separation of powers and protection of liberty from arbitrary power. That is how it came to be seen by later generations. The fact that ministers were liable in a personal capacity, seized on by Dicey as an example of his Anglo-centric account of the rule of law, did not prevent attempts to confer on ministers the immunity of the sovereign. This was eventually scotched in *M v Home Office* (1994).³ The result otherwise would have meant that the outcome of the English Civil War would have been reversed.

There are no doubt people who would like to do this, but it would return us not to good King Charles’s golden days – an imagined tranquil age of benign absolutism – but to a seething quarrel between monarch, ministers, Parliament and judges about where state power lay (Sedley 2015: 82).

‘Histories’ also contains an account of the law reforms of the interregnum (see also Sedley 2018: chapters 1 and 4) which had a beneficial influence on subsequent developments including the 1688-1689 Bill of Rights, although the connection was not acknowledged by succeeding generations (2015: chapter 4). Like the Remainer cause in the EU referendum, the republican Commonwealth after 1649 had a bad popular press and its

² The lectures, which Maitland delivered in 1887-88, were published in *The Constitutional History of England* (1908). See page 505.

³ The court found contempt for breaching an injunction but did not order a judicial penalty against the erring minister, leaving that to Parliament.

beneficent legal reforms have been overshadowed by the banning of Christmas and outlawing *la dolce vita*! The last chapter in this part (chapter 5) offers a prognosis of the future of public law. The mood has become ominous.

The self-confidence with which the legal profession entered the 1990s, reflected both in the anxious tone of the civil service's handbook [on trying to stay clear of judicial strictures] and in the amusement it generated among administrative lawyers, are no longer part of the landscape (Sedley 2015: 108).

And what if Parliament itself becomes the oppressor? Quoting Lord Radcliffe, Sedley writes that parliamentary sovereignty had long become the instrument of sovereign power invoked by government rather than the institutional holder of sovereign power in its representative capacity as the grand chamber of the nation. His hope is that the respective sovereignties of Parliament and the courts do not assume a deference of the latter to the former but generate 'a constitutional morality built on the rule of law and adapted to its time' (2015: 119). Although senior judges have supported such a union, it is doubtful whether many MPs would willingly accept their role being demoted to a partner and not a manager.

This leads Sedley (2015: 119) to a discussion of the radical questions opened up by the House of Lords in 2005 in *Jackson v Attorney General* (2015),⁴ in particular Lord Steyn's question whether, if Parliament were to set about disrupting fundamental constitutional standards or processes, its sovereignty—'a principle', said Lord Steyn, 'established on a different hypothesis of constitutionalism'—might have to be 'qualified' by the courts. Judicial objection to unconstitutional acts of the legislature is not new but has a centuries-old heritage, he explains.

What may be developing in this situation is a constitutional model in which the respective sovereignties of Parliament and the courts, rather than assuming an ultimate deference of the latter to the former, interact (as common law, prerogative and statute did four centuries ago) in generating a constitutional morality built on the rule of law and adapted to its time (Sedley 2015: 119).

The sovereignty of Parliament is continued in chapter 7 in the section entitled 'Themes' (Sedley 2015: 149). The Levellers in the Civil War, he writes, saw the risk of abuse of Parliament's power 'in the first days of parliamentary supremacy' and the antithesis between abuse and natural law. They argued that Parliament was no more than a delegate of the

⁴ The case concerned the legality of the Hunting Act 2004, which was made under the procedure in the Parliament Act 1949, as well as the legality of the 1949 Act itself.

people. '[S]ince natural law denied the people the power to tyrannise over others, Parliament was under the same constraint: We could not confer a power that was not in ourselves' (quoted at 149).

The Levellers' Agreement of the People in 1648, he continues, sought to lay down: 'That no representative shall in any wise render up, or give, or take away any of the foundations of common right, liberty or safety' (ibid).

The acceptance by the court in the *Jackson* case mentioned above that the judges had power to determine whether a statute was lawful and whether it complied with the Parliament Act 1911 may not be 'a recognition of such radical limitations on the legislative power; but it is not unrelated, at least in kind, to the larger stride taken by the US Supreme Court in *Marbury v. Madison* when it established the reviewability of congressional legislation for unconstitutionality' (Sedley 2015: 149). *Factortame v Secretary of State for Transport* (1990) was not dissimilar when, in upholding Parliament's will in the European Communities Act 1972, the Law Lords decided that part of Parliament's merchant shipping legislation was void for inconsistency with the European Communities Act and EU law. As he is correct to emphasise, 'the larger question is whether the rule of law makes the courts custodians of fundamental standards which they are required to uphold even if Parliament says otherwise' (Sedley 2015: 149; and see Birkinshaw 2020b—my review of Sumption 2020).

'Themes' also discusses the royal prerogative, orders in council and the Privy Council. The prerogative has featured in both *Miller* cases in the Supreme Court concerning Article 50 of the Treaty on European Union and the prorogation of Parliament (*Miller v The Secretary of State for Brexit* (2017) (No 1) and *Miller v The Prime Minister* (2019) (No 2)). The judgment on Boris Johnson's proroguing of Parliament in September 2019 partially answers a question (posed at Sedley 2015: 141) as to whether there are unreviewable prerogative powers:

What if honours were to be granted in return for payment? What if a war of aggression were to be launched in breach of international law? What if a prerogative Order in Council were to be made for an ulterior purpose or a corrupt motive? Would the courts be forbidden by constitutional principle to intervene; or might constitutional principle, on the contrary, require them to do so?

In a case which still has to be fully unravelled for its constitutional significance, the Supreme Court ruled unanimously that the Prime Minister did not have power to advise Her Majesty that Parliament should be prorogued for an unusually prolonged period in the absence of good

reasons which were not forthcoming. Such a prorogation undermined Parliament's sovereignty and its own responsibility for exacting accountability from the executive. Parliament's voice at a crucial stage of Brexit negotiations had been throttled.

Sedley's discussion of the Ram doctrine under which ministers purport to exercise personal powers of the Monarch as a third source of law distinguished from statute and prerogative offers valuable warnings. What should be taken to mean that ministers have implied powers to do what is necessary to achieve legitimate statutory or prerogative objectives was invoked to attempt to justify the use by ministers of personal powers for public purposes without specified limit. Individuals in their personal capacity have power to act stupidly without restriction save damage to themselves or their property. Ministers *qua* ministers have no such power other than to act in the public interest which brings with it controls based on public law. His belief that the doctrine is really an ancillary implied power to do what is necessary to achieve lawfully conferred objectives and is subject to public law controls protecting human rights, fair process and so on clearly merits support. But, as he writes, 'this leaves open the question of the existence and ambit of the power itself' (Sedley 2015: 139).

Ram has not attracted the controversy of several years ago, but a recent case of the Investigatory Powers Tribunal has provided an examination of a not dissimilar question in relation to MI5 (*Privacy International v Secretary of State for Foreign Affairs* (2019): the tribunal split 3:2 in favour of the government). The claimants challenged a policy in a direction which was publicly acknowledged to exist by the Prime Minister on 1 March 2018, which they submitted purports to 'authorise' the commission of criminal offences through participation in criminal activity by officials and agents of the security service MI5. This was in order to gain intelligence to assist MI5 in its statutory objectives. The claimants submitted that the policy was unlawful, both as a matter of domestic public law and as being contrary to the rights in the ECHR, as set out in Schedule 1 to the HRA.

The specific episodes involved 'running' agents in terrorist groups to gather assistance and information for MI5. Such groups had allegedly been engaged in murder, including the notorious episode of solicitor Pat Finucane in Northern Ireland. The use of terrorist groups to assist MI5 was not empowered specifically by the Security Service Act 1989 which stated there shall continue to be a security service (previously under prerogative powers) under the authority of the Secretary of State. The majority ruled that the powers in the direction were a necessary

implication of the services' statutory powers which continued prerogative 'pre-existing activities' under the 1989 Act.

It is impossible, in our view, to accept that Parliament intended in enacting the 1989 Act to bring to an end some of the core activities which the Security Service must have been conducting at that time, in particular in the context of the 'Troubles' in Northern Ireland (*Privacy International*: paragraph 62).

The power did not authorise and did not confer an immunity under criminal or civil law for wrongdoing such as murder or wrongful homicide, and it was not unlawful for being secret.

Sedley is right to ask (2015: 190-191) whether the security and intelligence services' powers, here and elsewhere, operate outside effective legal control? Are they outside the tripartite separation of powers—legislature, judiciary, executive? 'Do the security services now possess a measure of autonomy in relation to the other limbs of the state which requires constitutional recognition'? Do their secret operations outside effective public scrutiny and their autarchic existence make this inescapable?⁵ 'The argument also invites the further question whether, and to what extent, developments of this kind are now an unpalatable necessity'.

Quoting Bagehot's 'prophetic' observation that the English constitution is framed on the principle of choosing a single sovereign authority and making it good and the American upon the principle of having many sovereign authorities and hoping that their multitude may atone for their inferiority, Sedley takes the opportunity to make some transatlantic observations (2015: 174). We have moved on from a position in the USA where the President and legislature can be locked in mutual paralysis while the Supreme Court remakes the law as Sedley describes it—although that scenario may be revisited. Trump's presidency has been a remarkable exercise in autocracy. Presidential nomination of federal judges, his control of the Senate and the lack of security of senior officials such as James Comey together with his rule by executive order, exercise of pardoning powers and reliance on fake news and plain lying offer a frightening spectre of populist constitutionalism and a disregard of what

⁵ The Intelligence and Security Committee of Parliament oversees the security and intelligence services and its powers were bolstered by the Justice and Security Act 2013. The committee produced a report on Russian involvement in British political activity, the publication of which Boris Johnson controversially delayed before the 2019 general election (Intelligence and Security Committee 2020). The report was not published until July 2020 when a new committee was appointed in dramatic circumstances when Johnson's preferred chair was rejected by the committee in favour of an alternative.

W D Guthrie (1912) termed ‘constitutional morality’.⁶ One is looking for judicial towers and Damascene conversions such as that undergone by former Ku Klux Klan clansman and subsequent Supreme Court justice Hugo Black who, as Sedley reminds us, wore white robes frightening black people and who became the judge who wore black robes frightening white people! Exaggeration is easy but it is difficult to think of so much turning on one presidential election.

I might cavil over a few points. His description of the Court of Star Chamber being ‘in substance’ the first court of public law in England perhaps deserved a reference to Holdsworth’s description of the *Cursus Scaccarii* as ‘possibly the nearest approach to a body of administrative law that the English legal system has ever known’ (1922: 239 and see 246–264)?

At page 210 he writes that the ‘state’ is never used in statutes. The penumbra of uncertainty over the legal concept of the ‘state’ in UK law which is addressed below does not mean the term ‘state’ is not used in statutes. The Official Secrets Act 1911 famously provided opportunity to raise defences against unauthorised disclosure ‘in the interest(s) of the state’ which allowed Clive Ponting to be acquitted from charges under the Act in relation to his disclosure of the ‘Crown Jewels’ concerning the sinking of the *General Belgrano* in the Falklands war. Secretary of State is used ubiquitously in statutes—our government would find it impossible to operate if it wasn’t—and the civil service is termed the ‘Civil Service of the State’ in the Constitutional Reform and Governance Act 2010 and so on.

Let me follow with these powerful insights, and I quote directly:

For much of the twentieth century the constitutional dominance of the executive was a practical reality which rested on the weakness of Parliament and the acquiescence of the judiciary. That relationship changed radically in the later part of the twentieth century as the judiciary became more interventionist, and there is every reason to think it will go on changing in the twenty-first as government becomes increasingly presidential and a professional civil service grimly watches the repopulation of Whitehall by ministerial placemen and policymakers (Sedley 2015: 192).

⁶ The phrase did not of course originate with Guthrie. Guthrie upbraided political demagoguery, but the article is a conservative defence of US Supreme Court decisions striking down social and labour regulatory statutes under the 14th amendment. The legislators, he argued, acted under distortion of the facts—‘fake news’? I am grateful to Martin Gallagher for this reference.

In an age of Boris Johnson and Dominic Cummings, how prescient is this? And look at the consequences of the absence of the ‘state’ as a legal concept in the explanation of the public realm of governance in our law:

The insubstantiality of the state itself in public law reflects the fact that the state has never been a monolithic entity. The constitutional unity of an iconic Crown elegantly disguises the heterogeneity of the state which it represents. For centuries the state has been, as it still is, a site both of collaboration and of conflict among its separate but interdependent powers – the legislature, the judiciary, ministers and their executive departments, and today arguably the security establishment. All of these now function in the name of a monarch whose throne since 1689 has been in the gift of Parliament. Unlike the many states in which power flows down from a written constitution, power in the United Kingdom flows up from the state’s component elements, making the Crown its receptacle, not its source (Sedley 2015: 228).

The last example comes from his discussion of autocratic executives. The growth of unbridled executive power, in many countries today despotism, has been a recurrent theme along with the rise of populist nationalism and a retreat from international cooperation and global networking in the 21st century. In countries which do not have a despotic tradition, I include the USA and UK, nonetheless the success of Brexit and the election of Donald Trump signal an attack on balanced constitutionality. Read Sedley on the antimony between the rule of law and the rule of government, i.e. an executive which does not answer, and feels no need to answer, for decisions of high governance.

The authoritarian view – that the state (like the heart) has its reasons of which reason knows nothing – has never gone away. In recent years it has been emerging from the law and economics movement in the US, where critics point to the endemic failure of modern democracies to curb executive power. They argue from this not to the need for a renewal of representative democracy or an intensification of judicial review of executive action but to a need to accelerate the trend towards executive autonomy, brushing aside what they call tyrannophobia and trusting public opinion, much as Dicey did, to control a technocratic presidential executive. In the American context of a directly elected presidency, the proposal may be doing little more than conferring intellectual respectability on what is already happening. For parliamentary rather than presidential democracies, the idea is arguably retrogressive and even dangerous – but that does not mean that we shall not hear more of it (Sedley 2015: 274).

On the next page, he continues:

The fact that five years later Berkeley [the judge in *R v Hampden* (1637) (the *Shipmoney* case) who ruled that the King’s case to tax without consent of Parliament was justified by the rule of government

not the rule of law] was impeached by the Long Parliament, along with the rest of the high court bench, for high treason – he was eventually convicted of a lesser offence and fined – does not diminish the significance of his pronouncement. First, he uses the expression ‘the rule of law’ not in the limited sense of some specific proposition (e.g. that it is a rule of law that you may not profit by your own wrong) but in the generic sense in which, three and a half centuries later, Dicey was to use it. Secondly, he counterposes the rule of law to the rule of government. This is a subtlety which was to escape Dicey; yet the dichotomy is critical, because it points up the risks inherent in a separation of powers – a topic to which Dicey devoted very little attention – unless each of the powers is itself checked by the others or (in the case of Parliament) by a free electorate (Sedley 2015: 275).

Where does one draw the line on what is included in the rule of government and what is subject to the rule of law and judicial supervision? Proroguing of Parliament is clearly a subject which the present Prime Minister believes to be a matter of unchecked governmental will. But in Boris Johnson’s ideal world would this be true of political decisions generally—and if so, all of them? If not all, which? The courts in the last 20 years have wrestled conscientiously to calibrate levels of justiciability in the most sensitive of questions. The higher the level of policy touching upon international or diplomatic matters, the less inclined they will be to review a decision. The more the rights or interests of an individual are involved, the more exacting a scrutiny will become. Sometimes, I would have preferred the courts to have gone further in their supervision than they did.⁷ The lions in Bacon’s trope, from which the title of the book is taken, have to support the throne; but they should not be deprived of their claws and teeth.

Lions concludes with a brief resumé of the rule of law. Perhaps the author could have spent longer on setting out different conceptions of the rule of law. The throw-away comment in the quotation below about making the poor richer and the rich less opulent displays a less substantive version of the rule of law which requires justification. His

7 There are three very difficult cases which come immediately to mind, and I do not argue without more that the decisions were wrong: *R (Corner House Research) v Director of the Serious Fraud Office* (2008), concerning the pulling of an investigation into corruption in arms contracts by the director, widely believed to be under prime ministerial instruction. Compare *R (Campaign against Arms Trade) v Secretary of State for International Trade* (2019) and legality of export licences and sale of arms to Saudi Arabia where the award was struck down on the assessment of breaches of international humanitarian law. Secondly, *R v Gentle* (2008) and use of the HRA and ECHR to question the legality of a war in which the plaintiff’s son (a member of the armed services) died; and *R (Carlile) v Home Secretary* (2014)—where an Iranian dissident was excluded from the UK, preventing her addressing meetings in the palace of Westminster. Her objective was to establish a democratic secular and coalition government in Iran committed to the rule of law and respect for human rights. Her presence in the UK ‘would not be conducive to the public good for reasons of foreign policy and in light of the need to take a firm stance against terrorism’, the Home Secretary insisted.

account is not a detailed theoretical analysis of the concept, although he argues it is linked to democratic government, an independent judiciary and competent and uncorrupt administration. This is not a concept which is fixed immutably in time. His coda is not a prescription for perfection but sets a premium on reducing injustice, and I quote his own words:

What it signals today is a shared ideal that individuals and society should not be subject to the whim of the powerful, and that their rights and obligations should be determined by laws made by an elected legislature which respects fundamental rights, administered without discrimination by independent and competent judges, and enforced by an uncorrupt executive. To this extent the rule of law is egalitarian, though it cannot make the poor richer or the rich less opulent. But so long as it can contribute to Amartya Sen's project of minimising injustice in the world, it will still be an ideal worth pursuing (Sedley 2015: 280).

Needless to say I can say very little, given the demands of space, about the stimulating insights on the right to be heard, sitting (the 'private' bodies subject to judicial review), the separation of powers, tribunals and other subjects covered. On legal standing the role of public interest groups has been crucial, and the courts have been accommodating for well explained reasons. Liberty has been central in human rights litigation as has Privacy International. Gina Miller was crucial in the Brexit litigation and all parties accepted in *No 1* that the case was properly before the court. In *No 2* the Supreme Court ruled the matter was justiciable. The Good Law Project (GLP)⁸ has been at the forefront on cases dealing with the award of government contracts in the Covid crisis without, it is claimed, procedural safeguards. Procedures have been waived under regulations and the result, GLP argues, has been award of contracts amounting to billions of pounds, some in extremely questionable circumstances which have raised the most serious questions of waste of public money and, it is alleged, favouritism. The only parties with a private law interest are the government departments and the contractors, including those who were not awarded contracts who are 'economic operators' under the relevant regulations. The courts have confined the law of standing under relevant regulations in procurement cases (see e.g. *R (Chandler) v Secretary of State* (2009); *Wylde v Waverley BC* (2017)).⁹ Public interest groups must have a right to argue the case on behalf of the public interest where there is the possibility of an abuse of power where they are not acting frivolously or as busybodies. Who else can,

8 See the [Good Law Project](#) and its page on 'The PPE Fiasco'. The latter contains the government response rebutting the claim.

9 GLP argues that, as there are no unsuccessful bidders, only GLP can make a public interest challenge.

apart from the Attorney General? The latter is a member of the very government that is allegedly acting unlawfully.¹⁰

We have seen Sedley's allusion to the less confident ambience of judicial review post the 1990s. Labour and Conservatives have attacked judges, judicial review and human rights judgments. Autocrats do not like to be checked, whether by law or any other opposing force. The Conservative manifesto of December 2019 promised a Constitution Commission to examine the working of our constitution, especially judicial review and human rights, the prerogative and the House of Lords. On 31 July 2020 an 'independent panel' was appointed by the Secretary of State for Justice to examine judicial review.¹¹

Nearly three-quarters of a century ago, Sir Alfred Denning, delivering the 1949 Hamlyn lectures, believed that English justice had just about reached perfection. In concluding his Hamlyn lectures in 1998, Sir Stephen said: 'Half a century on, as it seems to me, we have a lot to be glad of and a lot to build on, but much still to worry about and with luck and judgment, to resolve' (Sedley 2015: 56). The one theme to emerge from this book is that the pursuit of justice and governmental accountability is never-ending. One has to hope that there will continue to be judges of Sedley's ability, courage and humanity to carry on that pursuit.

There are no large thematic claims for his work in *Whirligig* (Sedley 2018). Most of it is reactive—coats hung on other people's pegs, as the author puts it in the 'Introduction'.

Whether he is exploring (chapter 1) an anti-historicism denying law's past in any present or future role (Dicey who believed, for instance, that Magna Carta had nothing to do with our present constitution) or the

¹⁰ The present Attorney General, Suella Braverman, has been notable for her attack on a 'politicised judiciary': 'Politicians must take back control from unelected, unaccountable judges who are acting like political decision-makers' (Fouzder 2020). Braverman provoked political controversy when on 23 May 2020 she tweeted her public support for Dominic Cummings' notorious apparent breach of lock-down when he travelled to Durham in the height of the Covid pandemic, a journey for which he was under police investigation. She and the justice secretary both believed that upholding the law and rule of law under the Ministerial Code and oaths of office did not include international law in relation to the UK Internal Market Bill in September 2020. See *R (Gulf Centre for Human Rights) v The Prime Minister* [2018] EWCA Civ 1855 for a contrary ruling i.e. that the omission of 'international' was not a matter of substance as 'law' includes 'international law'.

¹¹ See Press Release, 'Government Launches Independent Panel to Look at Judicial Review' (31 July 2020). It is chaired by Lord Faulks QC, who has written as a former minister of the time wasted in policy development by judicial review, and contains three academic lawyers. The terms of reference include: 'Whether the terms of judicial review should be written into law; whether certain executive decisions should be decided on by judges; which grounds and remedies should be available in claims brought against the government; and any further procedural reforms to judicial review, such as timings and the appeal process.'

pressing of the past into the service of today without regard to the passage of time and changed context, Sedley analyses the almost adventitious progress towards a coherent public law from common law process by using and advancing precedents such as *Anisminic v Foreign Compensation Commission* (1969), rather than confining them. Jonathan Sumption attempted such a confinement in his dissenting judgment in *R (Privacy International) v Investigatory Powers Tribunal* (2019) without success. Sedley's concern is the ebb and flow of leading precedent and reaction to it. 'Without history there is no law' stands in stark contrast to Dicey's 'there is no legal history only law'.

Between the short-sightedness of either ignoring history or its wrongful application to the present, Sedley argues for an analysis which, for instance, when one looks closely at the 1215 Magna Carta, what it produced over centuries was 'the nourishment of a deep-lying and long-term consensus that no power stands outside law and that there exist fundamental rights which no government, whether monarchical or elective, has power to deny' (Sedley 2018: 4). The common law has filled this 'insatiable maw'. The theme of ebb and flow, progress and retreat, is continued in the history of English law. Sedley shows a gimlet eye for detail and irony in all the essays in this work.

Given his background, there is an unfeigned reverence for the common law technique and its development, at least, should he add, in the hands of the right craftsmen? That, of course, begs the question. The world of chance, uncertainty, the unexpected comes from his many years in legal practice as advocate and judge. While he is quick to criticise Panglossian accounts of history, does he come close to this when dealing with the common law? That despite bad decisions, bad or short-sighted judges and lawyers, it will, somehow, be alright on the night? To claim too much for the common law technique is acknowledged, as he shows in debunking Dicey's claims that ours is a 'judge-made constitution'. There again, he displays a fascination for time's revenge on things which people may consider timeless. The changing contours of what is meant by human rights for instance, as he shows in the partly eponymous chapter 3, are shaped by human argument and not a universal truth. He explores the contingency of human rights development in space (latitudinal), time (longitudinal) and varying philosophical bases, relativism and absolutism. The only certainty is that human rights will not stay as they are today (Sedley 2018: 50).

His perspective throughout many of these essays is, understandably, that of the practitioner; the user and maker of common law substance.

The topsy-turvy world of happenstance will not fit many academic models of law. Sedley sees the rough edges, the dangerous waters, the opportunist's cunning, the tyrant's greed and institutional imperfections. Out of this mess, good men and women have striven for a better and fairer world. He illustrates the common law's contribution.

A review of Richard S Kay's *The Glorious Revolution* is an opportunity to revisit the tumultuous events of 1688-1689. The Glorious Revolution, Sedley writes, was 'a defining moment in Britain's constitutional history because it placed the authority of the Crown in the gift of Parliament and thereby decisively shifted the location of sovereign power from monarchy to legislature' (Sedley 2018: 56). The interregnum did not commence until 1688, argues Kay, and ended on William and Mary's accession in 1689. It did not arise in 1649 on Charles I's trial and execution because his son inherited the throne although not crowned. But on the same argument in 1688 on James's purported abdication, or later on his death, his son James Edward Stuart would be the rightful king on the constitutional rules of regal succession. The 'interregnum' of 1649-1660 was a legal nullity according to conservative historiography because there was no sovereign to approve Bills and summon Parliament! Both in *Lions* and *Whirligig* Sedley shows the enormous reforms in law in the period 1642-1660, including our one and only written constitution. Parliament legislated without the King. Sovereignty could exist without a Crown.

Sedley's gifts as an exponent of graphic prose are illustrated whether dealing with: judges and ministers (reprising the *Entick v Carrington* discussion in *Lions*); the margin of appreciation and Strasbourg's failure to take rights seriously (*Handyside v UK* (1976)—the 'Little Red Schoolbook' case); domestic law and Strasbourg jurisprudence; the separation of powers and the fourth estate—MPs naming parties involved in legal proceedings protected by confidentiality; the role of the judge and judicial misconduct (while it is true that no English judge has faced impeachment for 300 years, Harman J and Peter Smith J, both Chancery judges, took early retirement (1998 and 2017 respectively) after controversial behaviour as judges); anonymity and the right to lie—'no-body believes there in a utopian forum, a marketplace of ideas, where truth drives out the false' (Sedley 2018: 92; and consider events in UK and US public life since 2016).

I pause to say a little about judicial misconduct and parliamentary motions and royal assent for removal of senior judges (Sedley 2018: chapter 13). No procedure is laid out for this and Sedley reasons that this method for removing senior judges is far from desirable. Just think of

judges ruling against parliamentary legislation (see above) which abuses human rights or abolishes judicial review where Parliament and sponsoring ministers have an interest. The parliamentary process originally based in the Act of Settlement should be replaced by a panel of ‘appropriate status’ with a power of recommendation to the Lord Chief Justice of dismissal of a senior judge (New Zealand has such a panel). The possibility of political bias, he believes, would be significantly reduced.

Judicial recusal deals with the question of apparent bias in judges and switches to the role of juries in the internet age. At the Krays’ trial for the murder of one of their victims, long before the internet age, the trial judge allowed defence counsel to question the prospective jurors on their knowledge of the twins. ‘Within half an hour they had a jury of twelve citizens who apparently never read a newspaper or watched the television news’ (Sedley 2018: 125).

The right to die highlights the abomination of how the private Bill procedure may be sabotaged to prevent humane, popular and widely supported reforms. The 2017 Brexit case (chapter 16) was not about the legalisation of political issues: it was about the politicisation of legal issues when the judges were defamed for doing their job and the Justice Secretary, Liz Truss, failed to defend them from press calumny. There is a vivid short passage (Sedley 2018: 135) on Article 50 and the legislation that followed *Miller No 1* (2017) and ‘petulant’ deficiency in parliamentary drafting authorising notification to the EU of the UK’s intention to leave the European Union. *Whirligig* was published before *Miller No 2* (2019), dealing with the prorogation of Parliament in 2019. Both cases involved different aspects of the prerogative power. While I agree now with the majority outcome in the first case, that ministers *alone* cannot bring about a fundamental change to the UK constitution, I can see why there was unanimity in *No 2* in ruling unlawful actions by the Prime Minister that undermined our constitutional foundations (Birkinshaw 2020a).¹²

Arbitration (Sedley 2018: chapter 18) in a constitutional legal system addresses non-judicial dispute resolution. In *Lions* he wrote on the new tribunal system and, although he is not engrossed solely by judicial

¹² I write ‘now’ because, despite Lord Reed’s powerful dissent, there was, as the majority ruled, an overriding constitutional change brought about by the government. All parties and the courts operated on the basis that the service of notice under Article 50 was ‘irrevocable’; see *Wightman v Secretary of State for Exiting the European Union* (2018) where the European Court of Justice ruled this not to be the case. My view before the domestic litigation commenced was that notice was revocable and that a conventional understanding of dualism meant that serving notice was a matter for the prerogative (Birkinshaw 2016).

bodies, he made one of the most critical judgments on ombudsman inquiries before a judicial/ombudsman rapprochement emerged in later case law (see *Cavanagh v Health Service Commissioner* (2005)). I felt the criticism of the ombudsman was overly harsh and might inhibit effective ombudsman investigations. Sedley would argue that all public bodies must operate within their allotted boundaries and fairly.

‘Detention without trial’ (chapter 19) reviews A W B Simpson’s book. There is a timely reminder of the fact that, after Atkin’s resounding and widely lauded case for constitutionalism in *Liversidge v Anderson* (1942), Atkin in effect accepted a little further on in his judgment that little could be done to defend liberty when national security *was* cited by the Home Secretary to be in issue (Sedley 2018: 149). There is good sense in the old legal aphorism: read, read on, read carefully! There is also a nice sense of irony illustrated on the ending of executive detention regulation 18B—the communists wanted the ban on the *Daily Worker* lifted but Oswald Mosley’s detention to continue! A Denning quotation on a detention in Leeds during the Second World War brings home qualifications on that judge’s presumed liberalism (Sedley 2018: 149 and chapter 34).

‘Originalism’ (chapter 20), which Sedley describes as ‘a form of resistance not to judicial law-making but to the law that judicial liberals make’, may not be the burning issue of several years ago in debate about US Supreme Court judges and their rulings. Why? Because the US Supreme Court judicial pendulum has swung to the right and conservatism (Sedley 2018: 154). He argues that ‘politicisation of the US Supreme Court has collapsed a major part of the distinction between law and politics in the USA and significantly realigned the separation of powers’ (Sedley 2018: 150). The Supreme Court case *Citizens United* (2010) on removing legal limits on corporate financial interventions in elections is, he writes, an example of ‘living originalism’ (Sedley 2018: 155), i.e. painting the law in a right-wing gloss. We are reminded of executive prerogative today and Trump’s nomination of federal and Supreme Court judges. To their credit Supreme Court recent decisions have given judgments against Trump. The demise of Ruth Bader Ginsberg, and the battle over her replacement, will have a pivotal outcome on the future balance of the court. But I point out above the almost unbridled concentration of power in the President is an issue which has to be revisited in the US constitution before the President becomes the American Crown.

There are reviews of works on the British constitution—by Loughlin—and Bogdonor’s *The New British Constitution*. In the latter Sedley’s view is

that the attack on the HRA has gone quiet after the real Eurosceptic target, Brexit, was achieved (Sedley 2018: 169). This is not true, and the UK government's non-commitment to the ECHR has been a major issue in UK/EU trade talks. Boris Johnson highlighted 'updating' the HRA as an issue for examination by his commission on the constitution, but so far the HRA has not been included (see above, although see the Overseas Operations (Service Personnel and Veterans) Bill 2020). Reviewing Bogdanor gives Sedley the opportunity (Sedley 2018: 171) to ponder a clash between judiciary and Parliament mooted by some judges 'off parade' and subsequently in case law, notably by Lords Steyn and Hope (post Parliament Acts' legislation above) and then *obiter* in other case law (Birkinshaw 2020b).¹³ How would it end, he asks? 'We do not know and most of us would prefer not to find out!' A constitutional moment of truth is not on the cards, Sedley believes. Does he know his judicial brethren too well to sense they would never force the issue? Some constitutional changes are irreversible, he believes, and these include devolution and the new systems of judicial appointment in England and Wales. Appointment of part-time judges (recorders) by tick-box and examination may well reward those self-promoters who may be mediocre and discard those with real talent. The old system of judicial patronage was open to abuse, but clearly he has problems with its replacement.

Bogdanor's arguments for the emergence of a new constitution will have to address MPs' behaviour, the private members' Bill procedure and composition of the House of Lords. An appointed House of Lords is capable of restraining, albeit temporarily, a government-controlled Commons bent on ill-considered actions. Would an all-elected upper chamber remove the superiority of the Commons? If so, with what consequences? Without answering these points any new constitution 'would be a lame thing' (Sedley 2018: 174).

The UK's constitution is not a fact but a process, a space to be watched (Sedley 2018: 174). Like Heraclitus, Sedley is arguing that the constitution is like the moving river: one never steps twice into the same river; the water has moved on. Declaring a new constitution is therefore 'jumping a gun that may never go off' (*ibid*).

¹³ The Supreme Court and Court of Appeal have both accepted the possibility that, in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law would be able to declare such legislation unlawful. See *Moohan v Lord Advocate* (2014), paragraph 35 per Lord Hodge with Baroness Hale and Lords Neuberger, Clarke and Reed; *Shindler v Chancellor of Duchy of Lancaster* (2016), paragraphs 49-50; and *R (Public Law Project) v Lord Chancellor* (2016), paragraph 20.

‘Abuse of power’ allows him to revisit some themes from *Lions*—not uncommon in *Whirligig*. It also allows him to quote the wife of the dictator: ‘power is delightful and absolute power absolutely delightful’ (Sedley 2018: 178).

Sharp-eyed, insightful studies of individuals, including senior influential judges such as Diplock, Scarman, Denning, Bingham and Sumption, are in ‘People’. Sedley is right to criticise Sumption’s 2011 Mann lecture, developed in his 2019 Reid lectures, warning judges not to meddle in politics (Birkinshaw 2020b). I find the critique spot on and he clearly shows that Sumption did not fully understand how *droit administratif* operates. Neither mentions, however, one crucial constitutional reform of 2008 in France that allowed the Conseil d’Etat (and the civil appeal court) to refer a case to the Conseil Constitutionnel for the latter to determine the constitutionality of legislation and to declare it invalid. From a former century, he includes among the judicial vignettes Lord Mansfield, and words quoted by Lord Mance chime well here:

In another famous decision, *Alderson v Temple* (1768) 4 Burr 2235, 2239, he showed a different concern: ‘The most desirable object in all judicial determinations, especially in mercantile ones (which ought to be determined upon natural justice, and not upon the niceties of the law) is to do justice’. [According to Junius in the *Evening Post* 1770] ‘In contempt of the common law of England, you [Mansfield] have made it your study to introduce into the court where you preside, maxims of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinions of foreign civilians, are your perpetual theme; but whoever heard you mention Magna Carta or the Bill of Rights with approbation or respect?’ (Mance 2011)

Sir Thomas More is also there—Henry VIII’s protagonist and not the NHS Covid 2020 hero, as is the far lesser known John Warr, 17th-century polemicist, radical and fierce (fervent) egalitarian.

As a future judge who played a session with Dylan in 1962, he clearly appears disenchanted with the star Dylan was becoming by 1965; by 1966 an icon. Dylan has ‘given up the effort to write better songs’ (in May 1965: Sedley 2018: 258). *Highway 61 Revisited* and *Blonde on Blonde* followed in 1965 and 1966 respectively and, maybe after a motorbike crash revived his talents, Dylan hasn’t stopped recording since!

Finally, the short ‘Occasional Pieces’ show his skill as a story-teller and humourist.

These two books are richly entertaining, full of insight, wisdom and humanity. *Lions*, he writes, is written primarily for judges, practitioners and students, although he hopes legal academics, legal historians and

political scientists will find things to think about. This comes after an apologia for not being a professional academic. I am reminded of Karl Llewellyn's aphorism on lawyering: 'Technique without ideals is a menace. Ideals without technique is a mess' (1945: 346). This is far from saying that a possessor of technique and ideals may not utilise them for evil purposes. It does emphasise the aridness of technique alone in the law unless combined with deeper objectives—one hopes aiming for justice.

In 'Colonels in horsehair' (Sedley 2018: chapter 21, 162), which is a review of sceptical essays on human rights by academic lawyers, Sedley expresses his own reservations on human rights in operation: capture of rights litigation by the already powerful and wealthy; a billiard-table view of society where individuals simply bounce haphazardly and momentarily off each other; the state viewed as the natural enemy and not powerful private concerns so graphically illustrated by data tech and tech and finance corporations. But of the book itself, he writes, it is a 'jeremiad' not against the 'deep structures of law but at the modes of its administration' (ibid). Sedley has set the examination of the deep structures of common law, the 'grain within the stone' as Jacob Bronowski in the TV series from the 1970s—*The Ascent of Man*—almost expressed it, at the heart of his writings. His work deserves a readership far beyond judges, practitioners and students. It should be read by anyone who cares about justice, the rule of law and the accountability of those, at whatever level, who wield governmental power. I end with the submission that the judicial guardians of the constitution must be independent, display fortitude, and act with integrity and sagacity in following the deep structures of the law. Otherwise *facilis est descensus averno*.

References

- Birkinshaw, P (2016) 'Brexit Means Brexit' 22 *European Public Law* 589.
- Birkinshaw, P (2020a) 'Brexit's Challenge to the UK's Unwritten Constitution' 26 *European Public Law* 29.
- Birkinshaw, P (2020b) 'Jonathan Sumption, *Trials of the State: Law and the Decline of Politics*' 1(3) *Amicus Curiae* (Series 2) 459.
- Fouzder, M (2020) 'New Attorney General Criticised "Unelected, Unaccountable" Judges' *Law Society Gazette* 13 February.
- Guthrie, W D (1912) 'Constitutional morality' 196(681) (August) *North American Review* 154-73.
- Holdsworth, W (1922) *History of English Law*, vol 1 London: Methuen.
- Intelligence and Security Committee (2020) *Russia* HC 632 31 July.

Llewellyn, K (1945) 'The Place of Skills in Legal Education' 45 *Columbia Law Review* 345.

Maitland, F W (1908) *The Constitutional History of England* Cambridge: Cambridge University Press.

Mance, Lord (2011) 'Should the Law be Certain?' The Oxford Shrieval Lecture, 11 October.

Sedley, S (2011) *Ashes and Sparks: Essays on Law and Justice* Cambridge: Cambridge University Press.

Sedley, S (2015) *Lions Under the Throne: Essays on the History of English Public Law* Cambridge: Cambridge University Press.

Sedley, S (2018) *Law and the Whirligig of Time* Oxford: Hart.

Sumption, J (2019 and 2020) *Trials of the State: Law and the Decline of Politics* London: Profile Books.

Legislation cited

Constitutional Reform and Governance Act 2010

European Communities Act 1972

European Convention on Human Rights

Human Rights Act 1998

Official Secrets Act 1911

Parliament Act 1911

Security Service Act 1989

Treaty on European Union

Cases cited

Anisminic v Foreign Compensation Commission [1969] 2 AC 147

Cavanagh v Health Service Commissioner [2005] EWCA Civ 1578

Chahal v UK (1996) 23 EHRR 413

Citizens United 558 US 310 (2010)

Entick v Carrington [1765] EWHC KB J98

Factortame Ltd v Secretary of State for Transport [1990] UKHL 7

Handyside v UK [1976] 1 EHRR 737

Jackson v Attorney General [2005] UKHL 56.

- Liversidge v Anderson* [1942] AC 206
- M v Home Office* [1994] 1 AC 377
- Miller v The Prime Minister (No 2)* [2019] UKSC 41
- Miller v The Secretary of State for Brexit (No 1)* [2017] UKSC 5
- Moohan v Lord Advocate* [2014] UKSC 67
- Privacy International et al v Secretary of State for Foreign Affairs et al* [2019] UKIPTrib IPT_17_186_CH
- R v Gentle* [2008] UKHL 20
- R v Hampden* (1637) 3 State Tr 826 (the Shipmoney case)
- R (Campaign against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020
- R (Carlile) v Home Secretary* [2014] UKSC 60
- R (Chandler) v Secretary of State* [2009] EWCA Civ 1011
- R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60
- R (Gulf Centre for Human Rights) v The Prime Minister* [2018] EWCA Civ 1855
- R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22
- R (Public Law Project) v Lord Chancellor* [2016] UKSC 39
- Shindler v Chancellor of Duchy of Lancaster* [2016] EWCA Civ 469
- Wightman v Secretary of State for Exiting the European Union* (2018) Case C-621/18
- Williams v Home Office* [1981] 1 All ER 1211
- Wylde v Waverley BC* [2017] EWHC 466