MASTER OF THE ROLLS

LORD NEUBERGER OF ABBOTSBURY MR

THE EQUITY OF HUMAN RIGHTS

THE ATKIN LECTURE 2009

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(1) INTRODUCTION

1. Lord Atkin was one our finest judges. He embodied all that was best about our judicial House of Lords and will no doubt be an inspiration to its successor the Supreme Court. He was responsible for some of the most significant developments the common law experienced in the 20th Century. Two examples will do for the moment. There was *Donoghue v Stevenson*,[1] the famous case about the snail in the ginger beer bottle, which established the law of negligence both here and abroad. Then there was *Bell v Lever Brothers*, a seminal case on the law of mistake[2]. These decisions have been the focus of many lectures and articles, and I do not propose to talk about them tonight. So which of Lord Atkin's judgments am I going to talk about, and what is my topic to be?

2. To answer the second question first, I am going to talk about the equity of human rights. A somewhat gnomic expression, you may well think. In order to explain what I have in mind, it is convenient to refer to last year's lecture, as in it lies the answer both to the meaning of this year's topic, and to the question which of Lord Atkin's judgments I intend to talk about. Before doing so I should like to thank John Sorabji who, as the saying goes, is responsible for the good bits tonight, while I take credit for the rest.

3. No doubt, many of you here tonight will recall that my immediate predecessor as Master of the Rolls, Lord Clarke of Stone-cum-Ebony, as he now is, gave last year's lecture. He is a hard act to follow. But I aim to be trying my best – or as my children would say, I am trying, at best. Lord Clarke gave a wide-ranging, even a magisterial, lecture last year; it centred on a discussion of Karl Popper's vision of open societies and the rule of law. He concluded his lecture with a discussion of what was perhaps Lord Atkin's most famous judgment. So famous that it is

[1] [1932] AC 562.
[2] [1932] AC 161.

almost legendary so that it forms part of the current exhibition of our legal history in the UK Supreme Court. I have been Master of the Rolls for less than five weeks, and am only just starting out from where Lord Clarke finished, and it seemed to me that I should do the very same tonight: i.e. to start where he left off last year: *Liversidge v Anderson.*[3] It forms both the centrepiece and the starting point for my lecture tonight.

4. Lord Atkin's judgment in that case forms the subject-matter of the first part of this talk, and it illustrates the debt our legal and constitutional development owes to Rome. In particular it demonstrates how Lord Atkin sided with Julius Caesar and the sometime Roman Tribune Publius Clodius Pulcher against the great Roman orator Marcus Tullius Cicero. (And I should say that by Julius Caesar I mean *the* Julius Caesar and not my Elizabethan predecessor as Master of the Rolls between 1614 and 1636, who revelled in the same name and who unlike his more famous namesake was succeeded as Master of the Rolls by his son rather than his adopted son.) This classical Roman debate forms the second part of my lecture. In the final part of my lecture I move on to discuss what I take to be the equity of human rights; that is to say our commitment to the rule of just law and constitutionality – a commitment which like the maxims of equity has long formed part of our society's legal framework. It is a commitment which, long before the Human Rights Act 1998, the European Convention on Human Rights or, even the US Bill of Rights, has underpinned, and continues to inform, our constitutional development and its commitment to constitutional justice. It is a commitment which, to borrow a line from one of that great Welsh poet R S Thomas' finest poems, can properly be said to be '*of the bone [this] island is made of.*'[4]

5. I am however also conscious of, as R S Thomas also put it, *the clock's commentary, the continuing prose that is the under-current of all poetry.*' I cannot promise any more poetry tonight. But conscious of the ticking clock, I will now begin with *Liversidge v Anderson.*

(2) *LIVERSIDGE v ANDERSON*

6. The background to *Liversidge* is well known. It was 1940. Great Britain found itself facing the might of the Axis powers alone. Continental Europe had been overrun. Japan was rampant in the Far East. The United States were equivocating. Churchill had just become Prime Minister. On 13 May, he delivered his first speech in the House of Commons, and famously said this:

   "*I would say to the House as I said to those who have joined this government: I have nothing to offer but blood, toil, tears and sweat. We have before us an ordeal of the most grievous kind. We have before us many, many long months of struggle and of suffering.*

   You ask, what is our aim? I can answer in one word: Victory. Victory at all costs — Victory in spite of all terror — Victory, however long and hard the road may be, for without victory there is no survival."[5]

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[3] [1942]AC 206.

[4] R S Thomas, *Countering* in *Collected Poems 1945 – 1990*, (Dent) (1993) at 499.

[5] https://www.winstonchurchill.org/learn/speeches/speeches-of-winston-churchill/92-blood-toil-tears-and-sweat

The retreat from Dunkirk was to start less than three weeks later, and the Battle of Britain would be underway within two months. Dark and desperate times indeed.

7. It was against this sombre and challenging background that, on 26 May 1940, a certain Mr Robert Liversidge was detained at Brixton Prison on the order of the then Home Secretary, Sir John Anderson. He was detained indefinitely, that is to say interned, without trial under Regulation 18B of the Defence (General) Regulations 1939. The 1939 Regulations were made under the Emergency Powers (Defence) Act 1939. Regulation 18B was, materially, in the following terms:

   "*If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts 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.*"

   Sir John Anderson issued the detention order in those very terms; that is to say, on the ground that he had '*reasonable cause to believe*' Robert Liversidge '*had hostile associations*'. Neither the grounds for that belief nor the nature of the hostile associations, were in any way identified, let alone particularised. Following his imprisonment Liversidge issued a writ seeking a declaration that his detention was unlawful, together with damages for false imprisonment. The immediate question for the House of Lords was whether the courts could lawfully inquire whether the Home Secretary's belief was a reasonable one. And could it direct the Home Secretary to disclose to Mr Liversidge any particulars as to the grounds on which his belief was based? Framing the question in today's terms, and in the context of control orders, could the court require the Home Secretary to disclose the gist of the case, or more, against Liversidge?

8. To borrow a phrase from US Supreme Court Justice O'Connor, from her judgment in *Hamdi v Rumsfeld* in 2004, the answer given to these questions by the majority, four out of five, of the Law Lords was based on an acceptance that a '*state of war*' had given the executive a '*blank check.*'[6] In the *Hamdi* case, the US Supreme Court reviewed the legality of detention under Presidential powers which were, in many ways, similar to the powers provided in 1939 by the Emergency Powers (Defence) Act. The view adopted by Justice O'Connor, representing the majority of the US Supreme Court was very different from that of the majority of the House of Lords some 64 years earlier. Her view was as follows:

   "*Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. . . . (The war power is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does*

[6] *Hamdi v Rumsfeld* 542 (US) 507 2004 at 536.

not remove constitutional limitations safeguarding essential liberties). Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. . . Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process."[7]

9. In other words, however dire the emergency, due process was always to be afforded to US citizens absent suspension of habeas corpus. Moreover, as Justice O'Connor went on to note, better evidence had to be brought before a court reviewing decisions to detain than an affidavit drafted in such general terms that, in effect, it simply asked the court to confirm the detention on the government's '*say-so*'.[8] As she made it clear, the judicial branch of government had an important role to play in safeguarding liberty within the framework provided by the Constitution.

10. As I have said, that was not the view of the majority in the Law Lords in 1940. For them the position was clear. As Viscount Maugham LC put it:

    "*. . . I cannot myself believe that those responsible for the Order in Council [that is the Regulation] could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law.*"[9]

    Despite the reference to reasonable belief in Regulation18B, he could not contemplate that the legislature intended that the court should be able to assess whether the Secretary of State's belief was reasonable. The sole arbiter of whether the belief was reasonable was the Secretary of State; the individual whose belief it was. For Viscount Maugham then, as Wittgenstein might have put it (to recall last year's lecture), the Secretary of State was to be in the same position as the man who confirmed the truth of a newspaper report by checking it against another copy of same edition of the same newspaper.[10] Lords Macmillan, Wright and Romer agreed.

11. For the majority, then, the position was as described in Justice Scalia's dissent in *Hamdi*, namely a situation where '*. . . civil rights [had been] curtailed during wartime . . . openly and democratically . . .*'[11] In *Liversidge*, the Lords simply acknowledged that this is what had been achieved by regulation 18B, whereas

[7] O' Connor J, *ibid*.
[8] O' Connor J, *ibid*.
[9][1942] AC 206 at 220 – 221.
[10] Wittgenstein, *Philosophical Investigations*, (Blackwell) (1989) at $265: ". . . *(As if someone were to buy several copies of the morning paper to assure himself that what it said was true.*"
[11] Scalia J, *ibid* at 578.

Justice Scalia required the curtailment of rights to be achieved consistently with the provisions of the US Constitution and specifically in accordance with its power in certain circumstances to suspend the writ of habeas corpus. No such constitutional requirements existed in wartime Britain, or indeed exist today. We, of course, have an uncodified constitution and one which, unlike the US Constitution, does not form the Supreme law of the land.

12. Not for Lord Atkin however the majority's view. For him the question before the House was a constitutional one. He said this:

"*[This] matter is one of great importance both because the power to make orders is necessary to the defence of the realm, and because the liberty of the subject is seriously infringed, for the order dos 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. . .*"

Those who fight monsters should look to it that they too do not become a monster.[12] Lord Atkin continued,

"*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 disputing it prove the opposite? – the minister has been given a 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 . . .*"[13]

13. Having identified the importance of the issue Lord Atkin embarked upon as fine a demolition of a majority view as you will find. In an authoritative examination of common law and statutory authority, including the Regulations themselves, he demonstrated how Parliament had clearly and, in his words, '*intentionally introduced the well known safeguard . . .*' against arbitrary imprisonment into the Regulations of requiring the Secretary of State to have '*reasonable cause to believe*' the subject of the order fell within the terms of Regulation 18B.[14]

14. The need to have reasonable cause rendered the decision subject to judicial scrutiny. Scrutiny of the very type which the majority of the US Supreme Court in *Hamdi* would so many years later call for i.e., scrutiny of the evidence on which the belief was based. For Lord Atkin Parliament had ensured there was a role for the court: a role which the US Supreme Court in *Hamdi* would describe as a due process role – one of scrutiny, one which ensured procedural justice had been done. And of course, the due process provision of the 5th Amendment of the US

[12] Nietzsche, *Beyond Good and Evil*, (Penguin Classics) (1973) at 84: "*He who fights with monsters should look to it that he himself does not become a monster.*"
[13] [1942] AC 206 at 222 – 227
[14] [1942] AC 206 at 237.

Constitution is the descendent of the wording used in the 1354 statutory version of Magna Carta, which provided for the right to fair trial.[15]

15. Lord Atkin did not stop there. In approaching the conclusion of his judgment he set out a sharp criticism of his fellow judges noting how the approach they favoured was one which adopted a form of statutory interpretation previously known only to Humpty Dumpty in *Alice through the Looking Glass*. As Lord Atkin put it,

   "*I know of only one authority which might justify the suggested method of construction: "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.*"[16]

   That was not all though. He also said 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, cited with approval by my noble and learned friend Lord Wright in Barnard v. Gorman: "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., [i.e., predicated on the divine right of kings]*"[17]

16. Coming to the end of his judgment Lord Atkin enunciates, and does so emphatically, a clear and unequivocal commitment to constitutionality and the rule of law. Amidst the clash of arms, laws are not silent. Coercive action is to be justified by law and to be carried out within a framework of law, of just law. It is to be justified in a democratic state through democratic processes and institutions. It is a view with which Justice Scalia would no doubt agree. Concluding his dissent in *Hamdi* he said this, echoing Lord Atkin's commitment to the primacy of the rule of law and constitutionality:

   "*Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a*

[15] *Jackman v Rosenbaum Co.* 260 U.S. 22, 31 (1922).
[16] [1942]AC 206 at 245.
[17] [1942]AC 206 at 244.

Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it."[18]

17. It is said that Lord Atkin suffered for his splendid independence and fearlessness: his fellow Law Lords for ever thereafter declined to have lunch with him. But, unlike their rather craven effort, his judgment has resonated since 1942, and will hopefully resonate down the ages. It is of obvious relevance to legislation brought in to assist the Government in what used to be called the War on Terror. War is perhaps a misnomer, but, whether it is or not, we do live in an unsafe world, in which the Government has a duty to take steps to protect the realm, and innocent law abiding citizens, from bombs and other outrages. And the judiciary have a duty to support the government in performing that role, but it has an equally important duty, as in all areas, to ensure that the Government acts within the rule of law.

18. Indeed, it is precisely when we are under threat from vicious and violent maniacs that the rule of law comes into its own. It is when society is under attack, that our freedoms and rights should come into their own. It is easy to support the rule of law in times of peace and tranquillity. It is when we are under pressure that the genuineness of our commitment to constitutional propriety is really tested. And, while his four colleagues sadly buckled under the pressure, Lord Atkin resoundingly showed that he was up to the challenge, and, nearly seventy years on, his judgment still echoes in any self-respecting lawyer's ears, and will, I hope, continue to resonate down the ages.

19. But it is not only to the future that it resonates: it also resonates with the past, with a much older tradition. It articulates a fundamental commitment to the rule of law, which we can trace back to Ancient Rome. It does so because, by denying that *inter arma silent leges*, he repudiated a claim made by Marcus Tullius Cicero to the contrary, and sided with Caesar and Clodius in answering the question whether in times of war, or other national emergency, law falls silent, and arbitrary unchecked executive power begins, or whether, in such national emergencies, law continues to provide the framework within which the executive can act to protect the state. So I turn now to Caesar, Clodius and Cicero.

(3) CAESAR, CLODIUS AND CICERO

20. As those of you who were here last year may remember Lord Clarke began his lecture by taking you back to a dark, autumnal night in Cambridge in 1946 when Ludwig Wittgenstein and Karl Popper, two of the finest philosophers of the past century, had a disagreement which led to the former brandishing a poker at the latter. But I want to travel back to another dark night almost exactly two millennia earlier. A dark winter's night in January 52 BC on the road to Bovillae. The road was, of course, the Appian Way; one of the many roads that led to, and from, Rome. There was be a disagreement that night on the Appian Way. The consequences would be much worse than those which took place in Cambridge so many years later. That night there would be murder on the Appian Way: the murder of a certain Publius Clodius Pulcher.

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[18] Scalia J, *ibid* at 579.

21. Clodius, as he is commonly known, was murdered by his political rival Titus Annius Milo: Milo for short. Neither individual could be said to have been of good character, but both of them were seeking high political office in Rome. And in running for office that each of them was at the head of what might fairly be described as his own street gang. And, when they weren't running riot, those gangs were busily engaged in trying to wipe each other out. As a contemporary account put it:

   "*Milo and Clodius with their gangs fought continual battles with each other at Rome: each was as ruthless as the other.*"[19]

22. It was against such a background of violence, near anarchy on the streets of Rome and repeated clashes between the rival factions, that Clodius, Milo and their respective armed retinues crossed each others' paths that fateful night on the Appian Way. It was a meeting which left Clodius dead and to Milo being prosecuted for murder. And it is here that Cicero enters the story.

23. Cicero, Roman Consul, lawyer, philosopher, orator – and most recently hero of Robert Harris's novels *Imperium* and *Lustrum* – needs little introduction. He was no friend of Clodius, having been sent into exile in 58 BC as a consequence of a law passed by Clodius. I return to that shortly. In light of the enmity which existed between them, it is unsurprising that he decided to defend Milo. It was a case that Cicero, unusually for him it must be said, was to lose. That did not stop him publishing, as he did in many other cases, his closing speech, known as the *Pro Milone* – although this published version is understood to be markedly different from his speech as delivered. So different in fact that when Milo, by then in exile in what is now Marseille, received a copy of it he is said to have wryly commented, that

   '*it was lucky for him that the speech had not been made in that form in court, because if any defence of that kind had been made he would not now be enjoying the excellent [mullet] of [Marseille].*'[20]

24. Cicero's published defence of Milo is on one level straightforward. On another it raises an interesting question because it can also be read as a defence of Cicero. What do I mean by that? The answer lies in the *Pro Milone* itself, in which Cicero said this:

   "*There is . . . a law, gentleman, not one written down anywhere but a natural law, not one that we have learned, inherited, and read, but one that we have seized, imbibed, and extracted from nature herself, a law for which we were not taught, but made, which we know not from instruction but from intuition, the law which states that, if any attempt is made upon our lives, if we encounter violence and weapons, whether of brigands or enemies, then every method of saving ourselves is morally justifiable. When swords are drawn the laws fall silent [***In the Latin, Silent enim leges inter arma or in its more famous translation: Laws become silent amidst the clash of arms.***]; they do not require you to wait for them, because the man who chooses to wait will have to pay an undeserved penalty before he can exact a deserved one. And yet the law,*

[19] Cicero, *Defence Speeches*, *Pro Milone: Asconius' Account*, (Oxford World Classics) (2008) (Berry ed) at 172.
[20] Cicero, *Defence Speeches*, *Pro Milone: Asconius' Account*, (Oxford World Classics) (2008) (Berry ed) at 169.

with great wisdom, tacitly concedes the right of self defence . . . when a court looks [at the motive why a man has a weapon], a man who has used a weapon to defend himself is not considered to have had it for the purpose of killing. So let the point apply in this particular trial, gentleman; for I am confident that I will convince you of my case, if you will only keep the fact (which you could hardly forget) that a bandit may indeed be lawfully killed."[21]

25. At one level, this could be read as a straightforward conventional submission that Milo acted in self-defence and could not therefore properly be convicted, so that Rome's express laws against violence and carrying weapons fall silent in life and death situations. They fall silent in the face of a higher more fundamental law: the law of self-defence. Milo was thus justified in his actions because he had a valid defence, according to a higher, albeit not express, law. He acted in self defence in killing Clodius, who was in this context no more than a bandit.

26. However, more critical analysis suggests that Cicero's argument is one which goes further than this. To understand how and why, I need to go back a little further into Roman history and the relationship between Cicero and Clodius. In 100 BC, Rome was, as it became again in Clodius and Milo's time, in tumult. Elections were the subject of violence; one candidate for the Consulship having been beaten to death by his rivals. Anarchy was on the verge of taking hold. In order to deal with the situation the Roman Senate passed what was known as its '*last and final decree*': *the senatus consultum de re publica defendenda.*[22] The wording of the decree, at least as Julius Caesar would later describe it. required those to whom it was addressed, the members of what today would be the executive, to '*take care that the state suffers no harm.*'[23]

27. The individuals responsible for the civil disturbance were eventually captured by the authorities and placed under arrest pending trial. While under arrest however they were killed by some members of the Roman aristocracy. They were killed, as Cicero, was later to put it '*in obedience to a decree of the senate, entrusting the safety of the republic to the consuls.*'[24] They were, on Cicero's view, killed according to law, according to the terms of the '*last and final decree.*' As Adrian Goldsworthy puts it:

"*The senatus consultum ultimum gave the magistrates the power to use force against citizens who were threatening the Republic, but it was less clear whether these lost all legal protection once they had given in and were no longer in a position to do harm.*"[25]

You might say by reference to Milo, that self-defence is permissible in the heat of the moment – amidst the clash of arms – but not afterwards. For Cicero, amidst the clash of arms went beyond the heat of the moment.

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[21] Cicero, *ibid* at 186.
[22] Cf Caesar, *Civil War*, (2008) (OUP) (Carter ed.) at 5.
[23] Caesar, *ibid*.
[24] Cicero, *Pro Rabiri*, in *The Orations of Marcus Tullius Cicero Vol 2: Three Orations on the Agrarian law, the four against Catilinem the orations for Rabirius, Murena, Sylla, Archias, Flaccus, Scaurus, etc* (Yonge ed) (1917) (http://files.libertyfund.org/files/655/0043-02_Bk.pdf) at 263.
[25] Goldsworthy, *Caesar: The Life of a Colossus*, (2006) (Weidenfeld & Nicholson) at 122.

28. Many years later in 63 BC, Julius Caesar would, as Cicero put it, secure the prosecution of a certain Caius Rabirius, one of the individuals who did the killing in 100 BC. Caesar then, it is said, ensured that he was one of the two judges who tried the case (they did that kind of thing then). The point in issue was simply this: was the last and final decree a higher law? Was it a law which implicitly authorised any action in defence of the state? Was it a law which overrode ordinary laws, such as those guaranteeing due process? Was it a law, which amidst the clash of arms, rendered other laws silent? Cicero thought so. Caesar, it has been said, clearly did not (which carries a certain irony given his later career). Nor did Clodius. They took the view that the decree simply empowered specified individuals to take any and all steps within the ordinary lawful framework of the state to resolve the crisis. How do we know?

29. Well, in the first instance Cicero defended Rabirius. Concluding his defence he said this:

"*. . . If you wish this state to be immortal, if you wish your empire to be eternal, if you wish your glory to continue everlasting, then it is our own passions, it is the turbulence and desire of revolution engendered among our own citizens, it is intestine evil, it is domestic treason that must be guarded against. And your ancestors have left you a great protection against these evils in these words of the consul, "Whoever wishes the republic to be safe." Protect the legitimate use of these words, O Romans. Do not by your decision take the republic out of my hands; and do not take from the republic its hope of liberty, its hope of safety, its hope of dignity.*"[26]

In other words, do not find the accused guilty. Do not do so because if you do you neuter the power of the executive, and those it empowers to act on its behalf, to take any and all steps it deems necessary to defend the Republic. Finding the accused guilty would be to decide that the '*last and final decree*' was subject to laws and not a law above laws.

30. As it happens, there was ultimately no decision in the case, as an appeal from a guilty verdict had to be abandoned in dubious circumstances, so under the Roman law rules as they then were, there was no clear outcome. No retrial was ever commenced. None needed to be for Caesar's purposes at any rate: he had made his point. In future, those acting under such a decree would have to be, as Goldsworthy has it, more cautious.[27] Any people who acted outside the normal laws pursuant to powers given by the last and final decree did so at their peril: at the peril of being held to account in a court of law that would determine whether their acts were illegal by reference to the ordinary laws of Rome.

31. This point came back to haunt Cicero. As Consul in 63 BC he found himself faced with Cataline's conspiracy to overthrow the Republic constitution of Rome. He too would be granted powers to defend the state under '*a last and final decree*'. He gave warning in his first speech against Cataline that he would deploy those powers to the utmost degree, when he said this:

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[26] Cicero, *Pro Rabiri* at 277.
[27] Goldsworthy, *ibid* at 124.

"*We have a senatorial decree like those earlier ones, but it is filed away. As if hidden in a sheath – but on the strength of that decree, you, Cataline, should have been killed instantly.*"[28]

Amidst the clash of arms, why are we keeping our swords sheathed?, Cicero could have asked.

32. While he may not have used the powers which he believed the last and final decree gave him against Cataline, he did in fact deploy them to have a number of conspirators put to death without trial after they had surrendered. He therefore placed himself in the same position as Rabirius was said to have been in. Was he prosecuted? You might expect so, but Caesar did not seek to prosecute. During the Senate debate concerning what was to be done with the prisoners he had expressed the view that he knew Cicero would never act unlawfully, but that he was concerned that others in the same position in the future might do so.[29]

33. Clodius however was not so emollient. He certainly threatened to prosecute. But in the end took an easier root to attack Cicero and set a precedent for the future. As Tribune, Clodius secured the enactment of a law which effectively exiled Cicero from Rome in 58 BC. Why waste time on a trial, when retrospective punitive legislation can do the trick instead? Not for Clodius, respect for two fundamental principles adhered to by those who believe in the rule of just law. Those being, as Justinian would in a later Roman period put it: first, that '*laws are not established with regard to specific individuals, but in generic terms*,' i.e., for the benefit of all[30]; and second, that '*no laws shall be retrospective.*'[31]

34. Clodius may not have considered those principles, but, following Justinian's lead, they have long been a hallmark of our commitment to the rule of just law. I need only remind you of Article 7 of the European Convention on Human Rights, which states that '*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.*' That of course simply states the position here, as noted for instance, by the English Court of Exchequer Chamber in 1870 in *Phillips v Eyre*, the general principle has always been that '*legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried out upon the faith of the then existing law.*'[32]

35. Cicero's approach, like that of Clodius, is one for which I, at least, have little sympathy. Caesar's approach on the other hand, even if it did involve the suborning of what might be said today to be a show trial, was much the better view. It simply laid down a warning to future magistrates that if they acted outside the ordinary laws they would be susceptible to future prosecution; that the last and final decree did not, arguably, give them, *carte blanche* to act

[28] Cicero, *In Catilinam I*, in *Political Speeches*, (Oxford) (2008) (Berry ed.) at 159.
[29] Goldsworthy, *ibid*, at 136.
[30] *The Digest of* Justinian Vol. 1 (Watson ed.) (1985) (University of Pennsylvania Press) at 1.3.8.
[31] Justinian, Code, at 1.14.7 (http://uwacadweb.uwyo.edu/blume&justinian/Code%20Revisions/Book1rev%20copy/Book%201-14rev.pdf)
[32] (1870) 6 QB 1 at 23.

however they saw fit. We might properly disapprove of Caesar's method, while properly approving the point he was making against Cicero. It was the same point Lord Atkin would make properly many years later: amidst the clash of arms, law did not fall silent.

(4) THE EQUITY OF HUMAN RIGHTS

36. It should not surprise us that Cicero took the approach that he did. His guiding principle, enunciated in *The Laws* was simple. It was this: '*. . . the safety of the people shall be the highest law.*'[33] It was the highest law of the Roman Republic and one which was to guide its government and officials. The safety of the people can however mean different things to different people and different things at different times. It can be a moveable feast. It could, as Cicero, wanted mean that the state could in emergencies set aside the ordinary laws and commit acts that would otherwise be illegal. For Cicero, the ordinary laws against violence and state-sponsored killing without trial, could be set aside in times of emergency, or even after the emergency had passed, through recourse to this higher law. Amidst the clash of arms for Cicero, only the highest law did not fall silent.

37. For others, like Lord Atkin, like Caesar it would seem, Cicero's position was unacceptable. They would have agreed with the rather different view Cicero set out in *The Republic*, that a state is nothing if it is not '*an equal partnership in justice*' or as it is sometimes translated a '*union of citizens based on law.*'[34] Law and justice place proper limits on what the State can legitimately do. They ensure that rule of law remains the rule of just law, and not as Cicero's plea to a higher law ultimately involves, the rule of arbitrary law. Caesar's point, Lord Atkin's point is that Cicero's plea to a higher law justifying all and any steps taken in the executive's sole discretion as to what is in the common good leads inexorably to tyranny. Cicero's plea leads to Locke's warning that '*where-ever law ends, tyranny begins.*'[35] It brings law, the rule of just law, to an end. The claim that the clash of arms silences law is a claim that the executive can act without accountability. It is a plea for executive power, the likes we last saw in this country, as Lord Atkin reminded us, when James I and Charles I relied on the Divine Right of Kings as a justification for their actions.

38. Lord Atkin's position in *Liversidge* is one which rested on an appreciation of some fundamental features of our constitution; even if they were and immanent features rather than, as in the US, express parts of their Constitution. Lord Atkin's views were echoed by another US Supreme Court Justice, Felix Frankfurter, in 1950. In *Solesbee v Balkcom* he said this about the due process clause in the 14th Amendment to the US Constitution – a clause which though it differs in some ways from the 5th Amendment due process clause is substantially the same –

   "*It is . . . the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the*

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[33] Cicero, *The Laws* in *The Republic and The Laws*, (Oxford) (2008) (Rudd ed.) at 152.
[34] Cicero, *ibid* at 22.
[35] Locke, *Second Treatise of Government*, Book II, Chapter XVIII, Section 202.

deepest notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause."[36]

39. Due process was, and remains, today a fundamental tenet of US law. Indeed, the provisions in the US Constitution which give due process explicit form are a fundamental feature of US society. It is a deeply embedded feature and one which, as I mentioned earlier, derives from Magna Carta. Although sometimes less faithfully, or literalistically, adhered to on this side of the Atlantic, due process is as deeply an embedded feature of our society and our legal framework as it is in the US. For us it remains part of our constitutional framework in that Magna Carta, in this respect, has remained on the statute book for over 700 years. It also is part of our constitutional framework because it is now reinforced by the right to fair trial set out in Article 6 of the European Convention. It is a right the fundamental nature of which Lord Atkin's judgment acknowledges and rests on. It is a right which protects that other right which we have long been committed to: liberty of the person and of security. Again this now finds expression in Article 5 of the European Convention. That principle of liberty, embraced and articulated in the US Constitution is one which we have long held dear. It is a right which the US owes to John Locke, father of '*legal liberty and constitutional government*'.[37] As Locke put it:

"*Absolute arbitrary power, or governing without settled standing laws [in other words governing according to arbitrary and unaccountable executive power as per Cicero and the majority in Liversidge] can neither of them consist with the ends of society and government, which men would not quit the freedom of the state of nature for, and ties themselves up under, were it to preserve their lives, liberties and fortunes, and by stated rules of right and property to secure their peace and quiet. [For] all the power the government has, being only for the good of society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may now their duty, and be safe and secure within the limits of the law; and the rules too kept within their bounds.*"[38]

40. Locke did not however provide for judicial review of legislative acts, as the US Supreme Court in *Marbury v Madison* would accept existed under the US Constitution.[39] He did not provide for full separation of powers between the judiciary and the legislature. For that we had to wait for Montesquieu with his impressively analysed, if touchingly idealistic, description of the British constitution.[40]

41. So how do we reach the position, which Lord Atkin clearly subscribed to, that, as Unger put it, '*the rule of law [that is the rule of just law can] . . . truly [be] said to be the soul of the modern [liberal] state*' or modern state?[41] How did we reach the

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[36] 339 US 9 (1950) at 16; cf *Snyder v Massachusetts* 291 US 97 (1934) at 105; *Scott v Sandford* 60 US (19 How.) 393 (1857) at 450
[37] Tamanaha, *ibid* at 49.
[38] Locke, *ibid* at section 23.
[39] 5 US 137 (1803).
[40] Montesquieu, *De L'Esprit des Lois* (1748), (Cambridge, 1989), Book XI, 6.
[41] Unger, *Law in Modern Society*, cited in Tamanaha, *ibid* at 82.

point where Lord Atkin could properly conclude that it was for the court to stand between the individual and the state and to ensure that amidst the clash of arms, law was not silent?

42. The answer to that question seems to me to flow from the development of the common law and equity. Equity owes its origins to Canon law and through it Roman law[42] - another link to Rome, but not only classical: also ecclesiastical. Common law has, over the centuries, encompassed the development of the right to a fair trial: a common law right, which as Coke CJ put it in the *Institutes of Law*, was simply given declaratory form in Magna Carta.[43] And equity has provided the yeast for the grain of the common law. Equity and common law have overseen the acceptance that originally the sovereign, and now the executive, is subject to the law.[44] They have accepted the Roman notion that law should not be retrospective, and that the liberty and security of the subject are rights to be protected. They have accepted, in *Somersett's case*, that slavery is a condition not recognised here – our prohibition of slavery long predates Article 4 of the European Convention.[45]

43. What they have not done is go so far as to say that the legislature is constrained by any legal limits, as the US Congress is by the US Constitution. It is clear that if Parliament had expressly provided for an untrammelled power in 1939, Lord Atkin would have joined the majority. His judgment clearly shows that to be the case, as he drew attention to the fact that Parliament had not given an untrammelled power because it specifically introduced a reasonable belief test into Regulation 18B. Absent that, Parliament would have provided the same form of power Cicero believed he had been given by Rome's '*last and final decree*'.

44. What the common law and equity have provided for however, as has the development of our society through its acceptance of the political philosophy of Locke and Montesquieu, is an acceptance on the part of all that our omnicompetent Parliament is constrained, albeit not by law. It is constrained, as Hayek put it, by our '*moral tradition*', by a '*common ideal shared and unquestioningly accepted by the majority*'.[46] That is a tradition that is fundamentally committed to constitutionality and the rule of just laws applied equally to all: to, as Lord Clarke put it last year, our being an open society. It is a fine tradition. It is one which our modern human rights tradition is founded in, and to which documents like the European Convention on Human Rights or the US Bill of Rights, give expression. It is a tradition which, and for this we can all be thankful, Lord Atkin forms a central part.

(5) CONCLUSION

45. Before I finish tonight, I would like to step back and recall the quote from Churchill's maiden speech as Prime Minister, which I recited earlier. If you remember Churchill said this:

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[42] Spence, *The Equitable Jurisdiction of the Court of Chancery*, (Stevens & Co) (1846) Vol. 1 at 322ff;
[43] Coke, *Institutes of the Law*, Vol. II at 50.
[44] See Tamanaha, *On the Rule of Law: History, Politics, Theory*, (CUP) (2004) at 25ff.
[45] (1772) 20 State Tr 1.
[46] Hayek, *The Constitution of Liberty*, cited in Tamanaha, *ibid* at 58.

"*You ask, what is our aim? I can answer in one word: Victory. Victory at all costs — Victory in spite of all terror — Victory, however long and hard the road may be, for without victory there is no survival.*"[47]

46. Churchill rallied Parliament that day. Victory was his aim then, at all costs. But it was, I am sure, intended to be, and would in fact be, victory achieved within the framework of law. Victory without law and the rule of just law would have been no victory at all. That is what Lord Atkin teaches us. That is what the clash between Caesar, Clodius and Cicero teaches us. It is what our commitment to constitutionality, the rule of just law and to human rights, such as the right to fair trial and the right to liberty and security teaches us. It is a commitment to, as I said at the outset, the equity of human rights.

47. Thank you very much.

[47] https://www.winstonchurchill.org/learn/speeches/speeches-of-winston-churchill/92-blood-toil-tears-and-sweat