



# Democratic Civilisation or Judicial Supremacy?

A discussion of parliamentary sovereignty  
and the reform of human rights laws



**David G. Green**

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CIVITAS

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**David G. Green**

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He writes occasionally for newspapers, including in recent years pieces in *The Times* and *The Sunday Times*, the *Sunday Telegraph* and the *Daily Telegraph*.

## *Preface*

Since the 1980s there has been an increase in what has often been called 'judicial supremacism'. Its declared aim in the UK is to allow judges to overrule Parliament. The movement had grown strong by the early 1990s and was further stimulated by two developments: the Human Rights Act of 1998; and the introduction of conditional fee agreements (no win no fee) in stages from 1995 onwards.

The result has been a series of harmful or absurd judicial rulings, especially under the Human Rights Act, leading to a direct confrontation with Parliament over prisoner voting rights and to criticisms that judges were giving weight to the lesser rights of offenders, such as to 'family life', while simultaneously endangering the most fundamental of all rights of others, the right to life itself.

Moreover, since the 1972 European Communities Act, EU law has had primacy over UK law, which in practice allows judges to overturn the express wishes of Parliament, although the reality had not truly hit home until the Factortame case was settled by the House of Lords in 1990, permitting the Merchant Shipping Act of 1988 to be overridden.

Pressure for judges to be able to defy Parliament raises fundamental questions about democratic civilisation. How should our laws be made and where does final power lie? The rise of judicial supremacism came at a time when there was already longstanding concern about the great power of the executive compared with the legislature. Courts were playing their constitutionally valid role of providing a legal check on the actions of the executive, but because the executive usually had the support of a majority of MPs in the House of Commons

the distinction between the executive and the legislature had become blurred. Simultaneously, trust in politicians was diminishing even before the expenses scandal, which erupted from 2009 onwards, with the result that opponents of parliamentary sovereignty were able to portray judges as people who were reining in despised politicians, when they might more accurately have been seen as members of a self-appointed elite who regarded themselves as morally and intellectually superior to the majority of voters.

As some observers noted, the animosity to democracy, was the 'dirty little secret' of this group.<sup>1</sup> True democrats recognise that some people are wiser than others but expect the wise people to have the humility to wait until the majority have come to share their view (if ever). We have made the mistake of allowing this self-serving elite to weaken confidence in parliamentary democracy by caricaturing it as the 'tyranny of the majority'.

Some say that we need a new British bill of rights, but I will argue that instead we need to reinvigorate what I will call 'democratic civilisation'. I use that term rather than 'democracy' to emphasise that the issue is not 'the unlimited power of the majority' versus 'the rule of law', as some claim. The challenge is to restore our confidence in the wider civic culture that allowed Western nations, especially since the seventeenth century, to develop accountable systems of government in place of absolutism.

Free societies that are respectful of majorities and minorities alike depend on civic virtue, the spirit of mind that enjoins us to seek what we have in common with other people who live in the same land despite frequent strong disagreements and clashes of interest. A

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parliamentary system encourages people who disagree to work out a mutual accommodation. When disputes about fundamentals are handled by courts there are always winners and losers, which leads to a tendency to sharpen disputes into conflicts between victims and oppressors that can only be resolved by victory for one and defeat for the other. Unlike in the courtroom, winning and losing is not at the heart of parliamentary debate. It's true that a parliamentary system can deteriorate into an all-out struggle for power, but when it does it has failed. The ruling spirit is to learn from one another through discussion and counter-argument and to search for a *modus vivendi*. Parliamentary debate discourages sectarianism whereas courtroom conflict promotes it, even more so now that the no-win-no-fee system has added material gain to the emotional attractions of victory.

Chapter 1 discusses the historical background, focusing on the attempt in the seventeenth century to establish judicial supremacy. The outcome was a victory for Parliament and the gradual struggle from the seventeenth century onwards to develop the democratic ideal. In chapter 2, the case made for judicial supremacism in the UK since the 1980s is described, followed by a brief description of the response of leading critics. Chapter 3 advances the case for democratic civilisation. Chapter 4 suggests some directions for public policy.

I am very grateful to everyone who took the trouble to read and comment on the earlier drafts, including David Conway, Alan Taylor, Justin Shaw, Malcolm Davies, Anastasia de Waal, and Catherine Green. It goes without saying that any remaining faults are my responsibility.

*David G. Green*



## *Summary*

1. Parliament, rather than the judiciary, has had and ought to have responsibility for passing legislation and for checking the misuse of executive power because Parliament's composition reflects the settled opinions, interests and rights of the nation as a whole; because ministers who are drawn from Parliament can be more effectively held to account by it; because governments and MPs can be, and frequently are, replaced through the electoral process; and because, unlike that of the courts, Parliamentary decision-making involves an exhaustive and searching process of public debate, outside Parliament itself, within the two Houses, and in committees.
2. The campaign for judges to be able to override Parliament is best seen as a disguised attempt to strengthen the aristocratic element in our system. Members of the educated elite believe they should be able to impose their preferences on everyone else without going to the trouble of taking part in public discussion.
3. Judicial supremacists treat knowledge as a kind of property owned by them, when in truth it is an artefact of public reasoning. Openness to contradiction from many quarters raises the quality of public knowledge. Pericles famously summed it up in 431 BC when he said that Athenians did not regard discussion as a stumbling block to action but rather the indispensable preliminary to any wise action at all.

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4. Many public decisions are perpetually contestable and are best handled by finding a mutual accommodation between the rival parties, not by one side seeking victory over the other. This is why the convention that one Parliament cannot bind a successor is wise. It leaves open the possibility of rapidly correcting errors and injustices. Courts do not function in this way. There are winners and losers, and rulings today are binding precedents for the future.
5. The case for judicial supremacy lacks constitutional legitimacy. Contrary to some claims, there was no common law constitution, common law was not created solely by judges, and reform of the common law is not solely for judges. Moreover, when Parliament transferred power to the EU in 1972 it was not permanent. It can take power back. So too with devolution. The Human Rights Act has increased judicial activism and extended the realm of the courts, but Parliament retains ultimate authority and could rein in the courts if it chose to.
6. Rights are no longer understood by the courts as protections against the abuse of power, but opportunities to use power against someone else. They are often one-sided demands made under cover of universal law by sectarians who assert group rights against everyone else by falsely defining themselves as victims and others as their oppressors.
7. Who is the best guardian of rights, for everyone – both majorities and minorities? It is democratic civilisation as a whole, not merely judges: not only MPs and

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Parliament but the people themselves with their civic culture. If Parliament is unjust, the remedy lies in the political process, not with judges.

8. Liberalism in the sense advocated by Locke and Mill is not majoritarian. It protects minorities by ensuring their voice can always be heard, and by promoting public spirit – seeking the common good, and not imposing majority views or making sectarian demands. The modern human-rights movement has become a vehicle for elites who want to rule according to their own preferences. Historically we have been wary of activists with rigid self-righteous minds. Since the seventeenth century and the brief reign of the major-generals, such people remind the English of the Puritan mentality.
9. Modern human-rights supremacism is a reversion to the era before the legitimacy of law was based on consent. The idea of law making by consent was based on a view of human nature that assumed all were capable of exercising conscience and must be free to do so (liberty), that all were equally capable of judging right from wrong (equality), and that all were capable of seeing that one law for all was best for everyone (fraternity).
10. To resist judicial supremacism we must rebuild political virtue, and not allow self-serving authoritarians to usurp the role of the electorate. Knowledge of truth and right emerge in a public process open to all.

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11. We should annul the Human Rights Act. As signatories of the European Convention on Human Rights (ECHR), British citizens would still be able to take cases to the Strasbourg court, but Parliament should resolve that its rulings have no legal force until Parliament has deliberated and made a decision.
12. There is no need for a British bill of rights. We already have ample laws that protect our rights. A home-grown grand declaration would serve no useful purpose and, because of its inevitable vagueness, it would create new openings for judicial supremacy.
13. We should not renounce a valuable statement of basic rights, such as the ECHR, so long as Parliament has final control of interpretation. The European Convention on Human Rights should be treated like the Universal Declaration Of Human Rights – as a moral code that may be a useful guide to political decision making by the people and Parliament.
14. Judges should be required to swear an oath of loyalty to parliamentary sovereignty.
15. We should cancel contingency fees (when lawyers take a share of the civil damages) and conditional fee agreements (CFAs) – often called no-win-no-fee agreements – to reduce the number of cases that are primarily driven by the desire of lawyers for financial gain.
16. Being a citizen of a free society is no light matter. During our revolutionary century, the defenders of

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liberty emphasised that without virtue among the citizens there could be no liberty. Civic virtue is of equal importance today, which is why our schools should offer education that is both factual and moral.



# 1

## The historical background

I use the term 'democratic civilisation' to emphasise that the system worthy of defence is more than majority rule. There are two main elements of our democratic civilisation: (1) Parliament and its conventions; and (2) the civic culture. I argue that an informed public opinion is a better guardian of liberty than judicial supremacism.

It was during the seventeenth century that the fundamental elements of our modern political system were established, and in the early decades of that century three institutions claimed the right to have the final say in law making: the King, Parliament, and the judges. The issue was finally settled by the revolution of 1688, which made Parliament (strictly the King or Queen in Parliament) the legal sovereign and the electorate the political sovereign.

The main struggle in the seventeenth century was between kings and Parliament. The Stuart kings claimed to have the authority of God; while Parliament based its claim on the consent of the people. For a short time, judges also asserted their power to discover and enforce the eternal principles of natural law. Their claim to dominance was very similar to the demands of modern human-rights supremacists.

Giving sovereign power to Parliament rather than kings or judges was not the same kind of surrender of power. It built in checks and balances. The executive was drawn from Parliament, but only held office so long as it commanded the confidence of the House of Commons. Moreover, individual ministers were accountable and

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their decisions were expected to be made in the open after public discussion. Looking back with hindsight, we can see that our ancestors stumbled across institutions that cope with human fallibilities in knowledge, reasoning and morality more effectively than any available alternative.

Campaigners for government by consent based their view on assumptions about the human condition. Above all, they emphasised that all individuals had within them the capability to learn, reason and discern right from wrong, from which they inferred that everyone should be free to exercise judgement. This view implied individual liberty, including freedom of thought, expression and conscience; and it assumed equality of potential, because every person was capable of reason, even if some turned out to be wiser than others. And yet at the same time all were fallible, which meant that uncontrolled power was not safe in anyone's hands. Political institutions should, therefore, encourage open discussion, public criticism, self-criticism, and the examination of conscience. Permanent decisions were to be avoided in order to leave open the possibility of learning from mistakes, hence the convention that no Parliament can bind its successor. Such were the assumptions behind Milton's famous claim in his pamphlet *Areopagitica*, published at the height of civil war in 1644: 'Who ever knew Truth put to the worse, in a free and open encounter?'<sup>1</sup>

There was no blind trust in representative government. Rather there was confidence in a public process of learning and adaptation, during which knowledge and understanding could grow through discussion. We will return to the true character of democratic civilisation in a moment, but first we must appraise the claims of the judicial supremacists.

*The judicial claim to supremacy*

There are no serious defenders of the divine right of kings today, but there are a large number of defenders of judicial supremacy. Modern enthusiasm for human rights is based on the doctrine that we possess permanent rights simply because we are humans, not because we are members of a society. In the seventeenth century this doctrine was called the law of nature and in a few instances was applied by our courts.

A clear statement of judicial supremacy is found in one of the most important cases of the seventeenth century, Calvin's case of 1608. It was heard by all the judges of England, which included Sir Edward Coke, chief justice of the Court of Common Pleas.

Robert Calvin was a Scot who had acquired land in England. An alien could not own land, and his property was stolen by Richard and Nicholas Smith. Calvin took his case to court and argued that he was born three years after King James VI of Scotland became King James I of England, and consequently that he was a subject of the King and not an alien.

The judges found that the allegiance of the subject was due to the King by the 'law of nature', which was part of the law of England and 'before any judicial or municipal law'. Moreover, the court held that the law of nature was 'immutable' or eternal.<sup>2</sup> In his *Reports* Coke describes the law of nature as 'that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction'. This law had been 'written with the finger of God in the heart of man' and the 'people of God' had been governed by it before the law of Moses.<sup>3</sup> The natural 'obedience of the subject to the Sovereign cannot be altered'. Such obedience was due

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'many thousand years before any law of man was made'.<sup>4</sup> The laws of nature were 'most perfect and immutable, whereas the condition of human law always runs into the infinite and there is nothing in them which can stand for ever'. Unlike natural law, human laws were 'born, live and die.'<sup>5</sup>

Coke quotes Cicero who had examined the ultimate justification for law, arguing that we could not assume that laws were just merely because they had been passed by the correct procedure: 'The most stupid thing of all ... is to consider all things just which have been ratified by a people's institutions or laws.'<sup>6</sup> 'If justice were determined by popular vote or by the decrees of princes or the decisions of judges, then it would be just to commit highway robbery or adultery or to forge wills if such things were approved by popular vote.'<sup>7</sup> On the contrary, there was a built-in sense of justice that allowed us to appraise the laws of the day, a 'law of nature':

Those who have been given reason by nature have also been given right reason, and therefore law too, which is right reason in commands and prohibitions; and if they have been given law, then they have been given justice too. All people have reason, and therefore justice has been given to all.<sup>8</sup>

Writing before the birth of Christ, Cicero thought that the law of nature came from the Roman supreme god. Law 'was not thought up by human minds ... it is something eternal which rules the entire universe through the wisdom of its commands and prohibitions.' The 'first and final law is the mind of god who compels or forbids all things by reason'. And this 'true and original law' was 'the right reason of Jupiter, the supreme god'.<sup>9</sup>

The idea of natural law has appealed to people since Greek times. It is the idea of an eternal and unchanging

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feeling common to all. It has been perceived to be inherent in the universe, in human nature, or ordained by God. Aristotle had distinguished between the particular law of peoples and the universal law of all mankind. There exists in all of us a natural sense of the just or unjust that is common to everyone, even when there is no contract to bind us. It became prominent under the influence of the Stoics and came to Rome via Zeno. Romans distinguished between the *jus civile* and *jus natural*. For them *jus natural* was a consequence of our common humanity whose force resulted from reason in response to human needs, but it was more like a spirit of humane interpretation and not the law itself. It can be seen as resembling our idea of the 'spirit of the law', which we contrast with the 'letter of the law'.

At one point in his life, Sir Edward Coke also argued that the common law of England (as distinct from natural law) was above statute and above the royal prerogative. He did not claim the power to legislate, only that common law had an existence of its own, independent of the will of any person. By common law he meant the laws enforced by the courts of England, especially since the reign of Henry II (1154-1189) who introduced a national (common) system of courts.

Judges, Coke argued, could hold a statute void on two grounds: first, when they considered it to be against reason or natural (divine) law; or second, if it infringed the royal prerogative. Coke cites precedents but F.W. Maitland of Cambridge University, the great legal historian of the period who was writing mainly in the 1880s and 1890s, found them unconvincing. Judges of the middle ages, Maitland showed, did not think they could question statutes in the belief that they were against

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natural law, although it is true that some judges did claim the right to declare that a statute was not valid law.<sup>10</sup> Bonham's Case of 1610 is the landmark ruling.

Dr Bonham was a medical doctor who had trained at the University of Cambridge and who started to practise in London in 1606. The College of Physicians had been chartered by an Act of Parliament that gave it the sole right to license individuals to practise medicine. The College refused to license Dr Bonham and when he continued to practise he was fined £5. He carried on treating patients and the College arrested him. Dr Bonham sued for false imprisonment and Coke, sitting in the Court of Common Pleas, ruled that the Act of Parliament gave the College the right to issue licences in order to protect its monopoly and not for the benefit of the public. Moreover, when it fined and imprisoned Dr Bonham it was acting as a judge in its own cause, contrary to common law. Coke concluded that, under the authority of the common law, the courts could declare the relevant Act of Parliament void.<sup>11</sup> When ruling that the College could not act as a judge in its own cause, he said:

And it appeareth in our Books, that in many cases, the common law doth control Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void.<sup>12</sup>

Coke was replaced as Chief Justice of the Court of Common Pleas but his successor, Sir Henry Hobart, took the same line in 1614 in *Day v. Savadge*: '... even an Act of parliament, made against natural equity, as to make a man Judge in his own case, is void in it self, for *jura naturae sunt immutabilia*, and they are *leges legum*.' [The

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laws of nature are immutable, and they are the laws of the laws.]<sup>13</sup>

However, years later Coke himself took a different line and upheld parliamentary sovereignty. He is believed to have written the third and fourth volumes of his *Institutes of the Laws of England* between 1629 and his death in 1634, although they were not published until after his death. He argued that Parliament was sovereign.<sup>14</sup> He even held that its power was absolute when it had obviously behaved unjustly.<sup>15</sup> He gave the example of Thomas Cromwell who had been attainted by the House of Lords in 1540. (A bill of attainder punishes an individual as an act of law and not as a result of a judicial process.) False accusations had been made and he had been condemned to death without a hearing. Coke conceded the execution had the force of law, but argued in Latin that, because of the blatant injustice, it should be forgotten: '*Auferat oblivion, si potest; si non, utcunque silentium tegat.*' [Let oblivion sweep it away, if possible; if not, let it be covered in silence'.]

The High Court of Parliament, as Coke called it, should always act according to the highest principles, to set an example to the lower courts, but if it did not Parliament must remedy itself:

Of the power and jurisdiction of the Parliament for making of laws in proceeding by Bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds. Of this Court it is truly said: *Si antiquitatem spectes, est vetustissima, si dignitatem, est honoratissima, si jurisdictionem, est capacissima.*' [If you consider its antiquity, it is the oldest, if its worthiness, it is the most honourable, if its jurisdiction, it is the most extensive.]<sup>16</sup>

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Maitland's studies confirm Coke's conclusion in the *Institutes*. During the fourteenth, fifteenth and sixteenth centuries parliament had made laws about virtually everything and had not recognised any theory of law above the King or Parliament.<sup>17</sup> The supremacy of common law, divine law or natural law, was never accepted.

In fact there was only a brief period, during the reigns of James I and Charles I, when judges were serious contenders for the final say in law making. It is true that Blackstone defended the natural law tradition in the early part of his *Commentaries on the Laws of England* (originally published between 1765 and 1769), but later in the same work he came down firmly in favour of parliamentary sovereignty.

He argued that, when God created man he endowed him with 'freewill to conduct himself in all parts of life' and 'laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.'<sup>18</sup> He elaborated:

This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.<sup>19</sup>

And yet the law of nature had to be discovered by human reason, which meant that divine law 'found only in the scriptures' was superior to the law of nature. As he put it:

Yet undoubtedly the revealed law is (humanly speaking) of infinitely more authority than what we generally call the

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natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law.<sup>20</sup>

Jeremy Bentham was famously contemptuous of the natural rights enunciated during the French Revolution. In *Anarchical Fallacies* he said: '*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.'<sup>21</sup> Earlier, in 1776, he had attacked the remarks Blackstone had made about the law of nature in *Commentaries on the Laws of England*. He found the law of nature to be 'nothing but a phrase' that Blackstone confused with divine law:

if, in a word, there be scarce any law whatever but what those who have not liked it have found, on some account or other, to be repugnant to some text of scripture; I see no remedy but that the natural tendency of such doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like.<sup>22</sup>

However, he does not seem to have been aware that, when Blackstone asked directly whether courts could overrule Parliament in the name of natural law, he concluded that Parliament was sovereign. In addition to divine law and the law of nature, he said, there was also the law of particular nations:

Acts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void.

But, he continues:

I lay down the rule with these restrictions; though I know it is generally laid down more largely that acts of parliament

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contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it: and the examples usually alleged in support of this sense of the rule do not of them prove, that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.

He allows judges a minor role: 'where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* [to this extent] disregard it.'

He gives the example of an act of parliament that allows a person to be a judge in his own cause, widely accepted as contrary to natural justice. Even if parliament did provide for a person to try his own case, 'there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.'<sup>23</sup>

He goes further still. Even when the law is applied to particular cases he opposes the application of 'equity', by which he means the adjustment of general laws in particular cases:

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave

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the decision of every question entirely in the breast of the judge.

He concluded that:

... law, without equity, though hard and disagreeable, is more desirable for the public good than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.<sup>24</sup>

Cicero's argument that laws made by recognised procedures were not necessarily just is undoubtedly true but the question remains, 'Who should decide how to correct unjust laws?' Should judges be able to overrule the legislature? A court that can override democratic consent is no answer to human fallibility in morals and reason. Judges themselves are all too human. Under our system, as even the authorities like Coke and Blackstone who were most sympathetic to the idea of immutable principles of justice accepted, it was up to Parliament to correct itself. In law, no other institution can contradict it.

Modern human rights thinking is a reversion to the principles laid down by Coke in *Bonham* and Blackstone in the early part of his *Commentaries*. In practice, as Blackstone acknowledged, it is a rationale for the arbitrary power of judges who increasingly act as if they are politicians, but without the safeguards of open discussion, removability and accountability. The role of judges is to check the executive, not to overrule Parliament. That is for the people themselves. In our system, the executive and the legislature are easily confused because the executive at any one time must command the confidence of the House of Commons, but Parliament has the final say in

law making, not the government. This is not only because parliamentary sovereignty is a brute fact. It is because parliamentary debate is a better way of searching for truth and agreement than adversarial combat in a court room, as chapter 3 will argue.

*The development of democratic civilisation after 1688*

Britain has been fortunate that after England experimented with different constitutions in the seventeenth century we hit upon a system that leaves open the possibility of continuous error correction, even of the constitution itself. The parliamentary system that developed after 1688 made governments conduct themselves more in the open, encouraged full discussion, promoted the accountability of office holders, and allowed an unpopular government to be removed immediately and face an election. The result was to give office holders a strong reason to take notice of public opinion. Legal changes can be made only after full and open discussion. It is a serious misunderstanding to confuse our constitution with simple majoritarianism. It promotes deliberation and accountability and equalises the influence of the numerous minorities who make up society. Crucially, it also discourages sectarianism and class rule.

By common consent our democratic process is much in need of substantial improvement, and we should focus on how to strengthen it, but permitting judges to take over the legislative role is the opposite of what is needed. This makes being a citizen no light matter, and during our revolutionary century, the defenders of liberty emphasised that without virtue among the citizens there could

be no liberty. Hence education that was both factual and moral was vital.

### *Democracy and virtuous citizens*

Leading writers of the seventeenth century such as Algernon Sidney and John Milton emphasised the importance of virtuous citizens. Without virtue, they thought, freedom would not last long. Many who took this view also contended that monarchy and dictatorship undermined virtue. The court of Charles II, in particular, was seen as decadent, encouraging sycophancy and venality. The common good, virtue and self-sacrifice were in short supply.

Algernon Sidney had fought as a colonel in the civil war and became an MP. He was executed in 1683 for criticising royal absolutism in his book *Discourses Concerning Government*. He had argued that 'if vice and corruption prevail, liberty cannot subsist; but if virtue have the advantage, arbitrary power cannot be established'.<sup>25</sup> He had been strongly influenced by Machiavelli's account of the experience of the northern Italian cities in the middle ages:

Machiavelli discoursing of these matters, finds virtue to be so essentially necessary to the establishment and preservation of liberty, that he thinks it impossible for a corrupted people to set up a good government, or for a tyranny to be introduced if they be virtuous; and makes this conclusion, 'That where the matter (that is, the body of the people) is not corrupted, tumults and disorders do no hurt; and where it is corrupted, good laws do no good.' Which being confirmed by reason and experience, I think no wise man has ever contradicted him.<sup>26</sup>

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The vital importance of virtue among the citizens was recognised by the American founders in the following century and by their Whig contemporaries in Britain. Montesquieu's interpretation of English liberty in *The Spirit of the Laws*, which first came out in 1748, was among the most influential accounts on both sides of the Atlantic.

In his discussion of republican states (including constitutional democracies) the foundation stone, he said, was not human nature but political virtue. A person with political virtue would love the laws of his country and act out of love of those laws. Political virtue was love of the homeland and of equality, and involved a renunciation of each person's private wants for the sake of the public interest.<sup>27</sup> He had become deeply conscious of the destructive effects of factions in Italian cities and consequently saw the importance of establishing a political culture that renounced factionalism and encouraged everyone to seek the common good.

Moreover, he argued that a government most in conformity with nature was one that best related to the disposition of the people for whom it was established. The laws should be appropriate for each people and, because there were numerous differences, including climate, natural resources, and ways of life, it was very unlikely that any two countries would have the same laws.<sup>28</sup> Enforcing the same 'natural' laws everywhere would prevent peoples from adapting to the unique conditions they faced.

For Montesquieu the vital thing was to work out how a particular people with unique problems could best make the shared rules they live by. Without self-sacrifice or political virtue it would not work. Montesquieu also famously defended the separation of powers, contending

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that there was no liberty 'if the power of judging is not separate from legislative power and from executive power' and he goes on to warn that if the power of judging is joined to the power of law making 'the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator'.<sup>29</sup>

It is equally important that judges should not take over the role of the executive, as our courts long understood until very recently. Judicial review is supposed to be about lawfulness, not the merits of decisions. Traditionally courts could quash decisions and require decision makers to reconsider, but were not permitted to substitute their opinion for that of the policy maker. The speech of Lord Greene in the *Wednesbury* case was long taken as the benchmark. In 1947 Associated Provincial Picture Houses was granted a licence by the Wednesbury Corporation in Staffordshire to operate a cinema on condition that no children under 15, whether accompanied by an adult or not, were admitted on Sundays. The cinema owners argued that the condition was unreasonable. The court held that it could not intervene to overturn the decision of the local authority simply because the court disagreed with it:

The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a

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case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.

The judge ruled that the public body had been entrusted by Parliament with the decision because it had the relevant knowledge and experience. The court must not substitute its opinion for that of the decision-maker, and must rule only upon the legality of a decision and not upon its merits or correctness.<sup>30</sup>

Lord Irvine voiced concern about the abuse of these principles of judicial review in 1996, especially the role played by pressure groups:

Unquestionably, judicial review has caught the imagination of those affected by controversial public decisions (and perhaps more importantly their legal advisors) and the number of applications for judicial review continues to grow apace. These challenges come not only from individuals but increasingly also from pressure groups, who seek to use judicial review as a means of influencing the policy of government when conventional tactics of political persuasion have failed.<sup>31</sup>

Some senior judges continue to uphold the longstanding view. In 2001 Lord Hoffmann in *Alconbury*, warned that the courts should not substitute their decision for that of the policy maker. On questions of policy, the law 'does not require that the court should be able to substitute its decision for that of the administrative authority.' Such a requirement would, he said, 'not only be contrary to the jurisprudence of the European court but would also be profoundly undemocratic. The Human Rights Act 1998

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was no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers'.<sup>32</sup> The case concerned an application to build a distribution centre on a disused American airbase near Huntingdon. 7,000 new jobs were promised and the Secretary of State overruled the decision of the local council to deny planning permission. Lord Hoffmann did not think that it was for the court to make the decision in place of the Secretary of State.

And yet some judges have found it impossible to resist the temptation to impose their own preferences. In a case heard in 2015 concerning the teaching of religious studies, the education secretary was found to have made 'an error of law' in leaving 'non-religious world views' out of the new religious studies GCSE. Justice Warby ruled in the High Court that Nicky Morgan had unlawfully asserted that the GCSE to be implemented in 2016 would cover the state's legal duty to provide religious education. The judge decided that it would not, which meant in practice that a single judge presumed to decide what should be taught in schools. He was aware of the warnings of earlier senior judges that courts should not stray into moral territory best left to the Parliament and individual schools, but ignored their advice. He said he was mindful of the warnings given by Lords Bridge and Templeman in *Gillick*: 'They warned of the dangers of the Court straying into issues having a moral, social or political dimension which fail to raise a clear issue of law.' But, he continued, 'in my judgment this question does raise an issue of law, and one that is sufficiently precise to allow a clear answer.'<sup>33</sup>

The case had originally been brought by the British Humanist Association but it was considered to lack legal

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standing and so the case was taken forward by some parents under human rights law, relying on the combined effect of Article 9 of the Convention (Freedom of thought, conscience and religion) and Article 2 of the First Protocol (Right to education). Article 9 states:

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

Article 2 of Protocol 1 provides that:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

There is nothing in these words that tells an individual with certainty what the law requires. To be free is to live under known laws and the absence of predictability means the loss of freedom. As Blackstone warned above, we may destroy all law if we 'leave the decision of every question entirely in the breast of the judge'.

Montesquieu's emphasis on civic virtue was widely shared in the eighteenth century and later. Edmund Burke, writing in 1777 soon after the American Declaration of Independence, argued strongly that: 'Among a people generally corrupt liberty cannot long exist.'<sup>34</sup> And in a famous passage he asked:

But what is liberty without wisdom, and without virtue? It is the greatest of all possible evils; for it is folly, vice, and madness, without tuition or restraint. Those who know what virtuous liberty is, cannot bear to see it disgraced by

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incapable heads, on account of their having high-sounding words in their mouths.<sup>35</sup>

John Adams, the second American president from 1797 said:

Statesmen, my dear sir, may plan and speculate for liberty, but it is religion and morality alone, which can establish the principles upon which freedom can securely stand. The only foundation of a free constitution is pure virtue; and if this cannot be inspired into our people in a greater measure than they have it now, they may change their rulers and the forms of government, but they will not obtain a lasting liberty. They will only exchange tyrants and tyrannies.<sup>36</sup>

Thomas Jefferson, a Founding Father and third president from 1801, shared his view: 'It is the manners and spirit of a people which preserve a republic in vigour. A degeneracy in these is a canker which soon eats to the heart of its laws and constitution.'<sup>37</sup>

So too did the fourth president, James Madison: 'To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.'<sup>38</sup>

The intimate connection between democratic institutions and the civic culture that prevails among the people themselves was well understood long before modern times, but as the next chapter shows, it has not stopped recent writers from caricaturing democracy as the 'tyranny of the majority'.



## 2

### **Doubts about democracy**

#### **Should judges be able to overrule Parliament?**

The campaign to allow judges the power to contradict the UK Parliament began in earnest in the 1980s. Charter 88 was established in 1988 to campaign for a bill of rights. Its main line of attack was that the state was a threat to the freedom of the individual, a view that found support across the political spectrum. The left wanted less surveillance of anti-establishment protest and the free-market right wanted less interference with commercial enterprise.

The phrase that repeatedly crops up was the ‘tyranny of the majority’ and it was argued that the courts alone could protect minorities. It was assumed that democracy was majoritarianism and little else. The vast literature on civic virtue and checks and balances was disregarded and democracy was caricatured as crude majoritarianism. The argument is still put forward today by no less a person than the president of the UK Supreme Court.<sup>1</sup> Frequently arguments against the ‘tyranny of the majority’ were portrayed as a defence of the ‘rule of law’, which was said to be incompatible with parliamentary sovereignty, understood as the idea that Parliament can make any law whatsoever. Critics often used extreme cases to challenge Parliament. F.A Mann, for example, asked what we should do if a law were passed depriving Jews of their nationality or confiscating the property of all red-haired women. Would we really expect the judges to enforce such laws?<sup>2</sup>

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The first prominent modern judge openly to challenge parliamentary sovereignty in a court is usually said to have been Sir Robin Cooke, the President of the New Zealand Court of Appeal. He said in 1984 that some 'common law rights presumably lie so deep that even Parliament could not override them.'<sup>3</sup>

Other contributions came in extra-judicial speeches. In 1995, while he was Master of the Rolls, Lord Woolf flirted with judicial supremacy when he asserted that there are 'even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold'.<sup>4</sup> However, in 1998 he backed away from a confrontation and said that 'the courts accept the sovereignty of Parliament'.<sup>5</sup>

The chief argument of judicial supremacists is that there is a 'common law constitution' under which Parliament and the courts share sovereignty. Trevor Allan, one of the most prominent academic critics of Parliament, argued in *Law, Liberty and Justice* that parliamentary sovereignty was incompatible with the rule of law: 'An insistence on there being a source of ultimate political authority, which is free from all legal restraint and from which every legal rule derives its validity, is incompatible with constitutionalism.'<sup>6</sup> He quoted Hayek extensively, though Hayek did not sympathise with calls for power to be transferred from elected assemblies to the courts.<sup>7</sup>

Sir John Laws argued in 1995, when he was a High Court Judge, that true sovereignty belonged not to Parliament but to the 'unwritten constitution'. Parliament had political sovereignty but constitutional sovereignty lay with the courts. The 'power of democratically elected bodies must be subject to limits', which he conceded some

had seen as a plea for 'judicial supremacy'.<sup>8</sup> Later in 2002, as Lord Justice Laws, he made judicial pronouncements:

In its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy... Parliament remains the sovereign legislature ... there is no statute which by law it cannot make. But at the same time, the common law has come to recognise and endorse the notion of constitutional, or fundamental rights.<sup>9</sup>

Laws anticipates 'a gradual re-ordering of our constitutional priorities to bring alive the nascent idea that a democratic legislature cannot be above the law.'<sup>10</sup> His most radical departure came in the 'metric martyrs' case, *Thoburn v Sunderland City Council*. The policy of the EU was to introduce a compulsory system of weights and measures to replace pounds and ounces, but there were exceptions and postponements. Steven Thoburn was a market trader in Sunderland who sold fruit and vegetables measured in pounds and ounces. He was prosecuted by Sunderland City Council and found guilty. Counsel for Mr Thoburn held that section 2(2) of the 1972 European Communities Act had been 'impliedly repealed' by subsequent legislation, namely section 1 of the 1985 Weights and Measures Act. Laws held that the European Communities Act was one of a number of 'constitutional statutes' that could only be repealed if Parliament used an express form of words, but not merely by implication.

It has long been accepted that, if Parliament passes a law that is incompatible with an earlier law then there is an 'implied repeal' of the earlier law. It has also long been acknowledged that Parliament might accidentally pass a

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law incompatible with an earlier statute, in which case courts have accepted that an 'implied repeal' only took effect if Parliament expressed itself in the clearest possible words.

Lord Justice Laws could have followed earlier case law that asked Parliament to make its intentions abundantly clear, but instead invented a new doctrine that the European Communities Act was 'constitutional' by 'force of the common law'. He claimed that the doctrine of implied repeal 'was always the common law's own creature' and could only be changed by the courts 'to which the scope and nature of parliamentary sovereignty are ultimately confided'.<sup>11</sup>

Lord Justice Laws said: 'In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental... We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes.' He thought the constitutional statutes included the Magna Carta, the Bill of Rights of 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the Human Rights Act, the Scotland Act 1998 and the Government of Wales Act 1998. The European Communities Act was also, 'by force of the common law, a constitutional statute'.<sup>12</sup> The significance was that ordinary statutes may be impliedly repealed, whereas constitutional statutes may not. A constitutional statute could only be repealed, or amended 'by unambiguous words on the face of the later statute'.<sup>13</sup>

Reference has already been made to Blackstone's remark that courts should always follow the wishes of Parliament so long as it used words that left no doubt

about its intentions. Modern judges have accepted this doctrine. For example, Lord Denning said in 1979 in a case concerning equal pay regulations under the EEC Treaty, as it was called in the official record:

Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act — with the intention of repudiating the Treaty or any provision in it — or intentionally of acting inconsistently with it — and says so in express terms — then I should have thought that it would be the duty of our courts to follow the statute of our Parliament... Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty.<sup>14</sup>

Professor Jeffrey Goldsworthy, the foremost historian of parliamentary sovereignty, concludes that Sir John Laws and other judges seem to have been intent on 'building up a body of dicta' that in the future will be regarded as authority for the proposition that certain principles, as judged by the courts, lie beyond the reach of statute.<sup>15</sup> Other commentators noticed the trend. Sir Stephen Sedley, writing in 1995 when he was a High Court judge, welcomed it. He argued that the 1970s and 1980s had seen a 'reassertion of judicial oversight of government'. We had a 'still emerging constitutional paradigm' of 'a bipolar sovereignty of the Crown in parliament and the Crown in its courts'.<sup>16</sup> Lord Irvine remarked in 2003 that we are 'on a constitutional journey' that in time 'will leave parliamentary sovereignty behind altogether'.<sup>17</sup> He had become concerned some years earlier and in June 1996 organised a debate in the House of Lords, ostensibly in the hope of discouraging judicial supremacy. As it happened he became Lord Chancellor in 1997 and the

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white paper that preceded the Human Rights Act reaffirmed that judges could not invalidate acts of Parliament.<sup>18</sup> His efforts, however, did not stop judicial supremacists from using the Human Rights Act to extend their power.

The intention of inventive judges was to increase the power of the courts at the expense of Parliament. The *obiter dicta* of Lord Steyn and other law lords in the fox-hunting trial, *Jackson v Attorney General*, strongly support Goldsworthy's thesis. Parliamentary sovereignty, said Steyn, was 'a construct of the common law':

The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.<sup>19</sup>

Lord Hope said that parliamentary sovereignty had been 'created by the common law'.<sup>20</sup> Our constitution is dominated by the sovereignty of Parliament, but 'parliamentary sovereignty is no longer, if it ever was, absolute'.<sup>21</sup> He thought the courts could define the limits of parliamentary sovereignty:

The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. The fact that your Lordships have been willing to hear this appeal and to give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty.<sup>22</sup>

Lady Hale said that:

The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.<sup>23</sup>

To summarise: the argument has been made that there is a common law constitution; that the common law was made by judges; and that they alone can change it. Parliament is not sovereign, rather the courts share sovereignty with Parliament. The counter argument is that there has never been a 'common law constitution'; moreover, the common law was not exclusively made by judges; and finally that any changes to the common law are for Parliament to make. Parliament has the final say, not the courts.

But the case against judicial supremacy does not rest on historical practice alone, it depends ultimately on the moral argument that law derives its legitimacy from the consent of the people who live under it. For this consent to be effective it must always be possible to amend or cancel laws by the established procedure. If law is to give people the freedom to live their lives as they believe best it is vital that their legal rights and obligations should be certain. If judges are able to change law at will, without consent and without the possibility of further reform, there is no real freedom.

### *The myth of the common law constitution*

In his 1999 study Professor Goldsworthy has shown how the historical case lacks credibility. He calls it the myth of the common law constitution. Lord Bingham, who retired as a judge in 2008 having been Master of the Rolls, Lord Chief Justice and a senior law lord, said in his book *The Rule of Law*, that Goldsworthy had demonstrated 'wholly convincingly' that the principle of parliamentary sovereignty had been endorsed without reservation by our greatest authorities on the constitution from the late middle ages onwards.<sup>24</sup>

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Moreover, Lord Bingham disagreed with the observations of Lord Hope and Lady Hale in *Jackson*: 'I cannot for my part accept that my colleague's observations are correct'.<sup>25</sup> The principle of parliamentary sovereignty had been recognised as fundamental in this country: 'not because the judges invented it but because it has for centuries been accepted as such by judges and others officially concerned in the operation of our constitutional system. The judges did not by themselves establish the principle and they cannot, by themselves, change it.'<sup>26</sup> He continued:

The British people have not repelled the extraneous power of the papacy in spiritual matters and the pretensions of royal power in temporal in order to subject themselves to the unchallengeable rulings of unelected judges.

And he goes on to quote with approval an MP in 1621:

the judges are judges of the law, not of the Parliament. God forbid the state of the kingdom should ever come under the sentence of a judge.<sup>27</sup>

Goldsworthy has shown that the great authority on the common law in the seventeenth century, the leading judge Sir Matthew Hale, thought that many common law precepts had originally been acts of parliament. The records had regrettably been lost but like many legal doctrines deemed to have existed 'before time of memory', or 'time immemorial', they had been incorporated into common law. The date before time of legal memory is construed as 1189, the first year of Richard I's reign.<sup>28</sup>

The claim that there had been a 'golden age of constitutionalism' in which the judiciary enforced limits on Parliament defined by common law or natural law was

not supported by the facts. Goldsworthy's careful examination of the historical record led him to conclude that: 'There never was such an age'.<sup>29</sup> Moreover, Goldsworthy found that during the eighteenth century, most British reformers wanted to improve the constitution by bringing about a more representative Parliament and curtailing the growing power of the executive, which often relied on extensive bribery. Reformers did not want judges to limit Parliament but to make both Parliament and king more accountable to the voters. Joseph Priestley, for example, was confident that if Parliament were more representative 'every other reform could be made without any difficulty whatever'.<sup>30</sup>

### *Government as a trust*

Goldsworthy also found that citizens who were dissatisfied with Parliament did not appeal to judges; instead they petitioned the King, not to overrule Parliament but to dissolve it to force an election so that public opinion could assert itself. For example, in 1773 the King was petitioned in protest at the exclusion of John Wilkes from Parliament. The petitioners asked the King to trigger an election by dissolving Parliament, arguing that their elected representatives, 'who were chosen to be the guardians of our rights, have invaded our most sacred privileges ... We therefore ... supplicate your majesty to employ the only remedy now left by the Constitution, the exercise of that salutary power with which you are intrusted by law, the dissolving of the present parliament.' The claim that it was the 'only remedy' often featured in petitions of the period.<sup>31</sup>

This was the mechanism by which the people made a reality of Locke's arguments for government to be seen as

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a trust (to be discussed more fully below). Violent rebellion was not necessary when a petition to the King requesting him to order an immediate election could bring down the government without bloodshed. Locke had seen clearly that Parliament must be sovereign, but also recognised that Parliament might act unjustly. In extreme cases, when the legislature undermined the very basis of the constitution, the people were entitled to rebel. The Second Treatise of Government was first published in 1689 at a time when extra-parliamentary action had been common for 50 years. There had been a civil war, a King had been executed for betraying the trust placed in him, a republic had been established, two written constitutions had been enacted and then abandoned (the Instrument of Government of 1653 and the Humble Petition and Advice of 1657), an irregular convention parliament had been held in 1660 to restore the monarchy, and while Locke was writing another convention parliament was in the process of deposing James II, installing William and Mary, and devising the Bill of Rights.

Locke argued that freedom in society meant to live under a legislative power that could only act with the consent of the people:

The liberty of man, in society, is to be under no other legislative power, but that established, by consent, in the common-wealth, nor under the dominion of any will, or restraint of any law, but what the legislative shall enact, according to the trust put in it.<sup>32</sup>

Moreover, to be free was not to do as we like but to live under law. Freedom under government was: 'to have a standing rule to live by, common to everyone of that society, and made by the legislative power erected in it.'<sup>33</sup>

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People should be free to do anything not prohibited by law and must not be subject to arbitrary commands:

A liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.<sup>34</sup>

Locke's conception is that a community makes a political agreement to sustain a system for upholding the natural rights granted to people by the law of nature, because a system of impartial justice is better than self-enforcement in the 'state of nature' that preceded 'civil society'. But the relationship between the people and the government is not a mere contract like that of Hobbes, who saw it as a kind of surrender to the ruler for the sake of security.<sup>35</sup>

The idea that government was based on a contract between rulers and subjects was already well established by the middle ages. It found mature expression in the work of St Thomas Aquinas, who argued that it was legitimate to remove a tyrannical ruler:

A king who is unfaithful to his duty forfeits his claim to obedience. It is not rebellion to depose him, for he is himself a rebel whom the nation has a right to put down. But it is better to abridge his power, that he may be unable to abuse it. For this purpose, the whole nation ought to have a share in governing itself; the Constitution ought to combine a limited and elective monarchy, with an aristocracy of merit, and such an admixture of democracy as shall admit all classes to office, by popular election.

Lord Acton called these words, written in the thirteenth century, 'the earliest exposition of the Whig theory of the revolution'.<sup>36</sup> They travelled to Locke via Richard Hooker, who is often quoted in Locke's *Second Treatise of Government*.

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Sir Ernest Barker follows Maitland in arguing that the trust conception was less favourable to government than a 'social contract'. A contract is between two independent parties, but a trustee is not an independent party in the same sense. Trustees have obligations to beneficiaries and no rights against them. As Barker puts it, the government is not an independent institution facing the community, 'it only exists in, through, and for the community.'<sup>37</sup>

When he was writing most of Locke's readers would have been wealthy and familiar with the law of property in which trusts were prominent. He refers to the property trusts of private individuals and says that what is good for them is good for everyone: 'If this be reasonable in particular cases of private men, why should it be otherwise in that of the greatest moment, where the welfare of millions is concerned, and also where the evil, if not prevented, is greater, and the redress very difficult, dear, and dangerous?'<sup>38</sup>

It was widely understood that the obligations of a trustee went well beyond ordinary business relations. Above all they were required to act completely in the interests of the beneficiary and never take into account their own – they had a 'fiduciary responsibility'. Locke also speaks of a 'fiduciary power',<sup>39</sup> a 'fiduciary trust',<sup>40</sup> and on another occasion he says that political power is an 'express or tacit trust'.<sup>41</sup>

He asks, 'Who shall be judge, whether the prince or legislative act contrary to their trust?', and replies, 'The people shall be judge'. Who else should decide whether his trustee or deputy acts according to the trust placed in him? It must be, 'he who deposes him, and must by having deposed him, have still a power to discard him, when he fails in his trust.'<sup>42</sup> The legislature was 'only a

fiduciary power to act for certain ends' and there remained 'in the people a supreme power to remove or alter the legislative' if it acted contrary to the trust placed in it. The 'community perpetually retains a supreme power of saving themselves from the attempts and designs of any body, even of their legislators, whenever they shall be so foolish, or so wicked, as to lay and carry on designs against the liberties and properties of the subject.'<sup>43</sup>

The right to rebellion also applied when kings betrayed their trust:

What I have said here, concerning the legislative in general, holds true also concerning the supreme executor, who having a double trust put in him, both to have a part in the legislative, and the supreme execution of the law, acts against both, when he goes about to set up his own arbitrary will as the law of the society. He acts also contrary to his trust, when he either employs the force, treasure, and offices of the society to corrupt the representatives, and gain them to his purposes.<sup>44</sup>

Locke defends his view against critics who said it would lead to constant rebellion.<sup>45</sup> He foresaw frequent changes in the membership of the legislature as a result of elections, which he expected would be 'the best fence against rebellion, and the probablest means to hinder it'.<sup>46</sup>

There are strong resonances of Locke's view in the thought of Edmund Burke. He disagreed with writers such as Thomas Paine, who claimed that a simple majority could overthrow the constitution or remove the King. Burke did not oppose resistance to unjust rule. In *Reflections on the Revolution in France* he had said: 'The punishment of real tyrants is a noble and awful act of justice.'<sup>47</sup> But he argued that it was only justified in

extreme cases as in 1688, when the King threatened the ancient constitution itself.

By 1791 Burke was under severe criticism from the 'New Whigs', led by Charles James Fox, for criticising the French revolution, and in *An Appeal From the New to the Old Whigs*, he defended himself, arguing that he upheld the principles of the 1688 revolution. He took the statements made by Whig leaders at the trial of Henry Sacheverell in 1710 as examples of Old Whig ideals and declared his continued commitment to them.

Sacheverell was an Anglican vicar who published sermons highly critical of Whig policies. In December 1705 the Whig-dominated Parliament had resolved that the Church of England was 'in a safe and flourishing condition' and that anyone who argued otherwise was 'an enemy to the Queen, the Church and the kingdom'. Sacheverell condemned the revolution of 1688 and claimed the Church was threatened by Dissenters (who tended to be Whigs). Matters came to a head in 1709, when he criticised the academies run by Dissenters for teaching 'fanaticism, regicide and anarchy'. He was impeached, and during his trial, the Whig leaders in the House of Lords went to great lengths to explain their philosophy.

They made unambiguous statements in favour of the right of resistance, but only in limited circumstances. Burke quotes Sir Joseph Jekyl, who he regarded as 'the very standard of Whig principles in his age'. Jekyl said that in 1688 Parliament had not intended to legitimise any sort of rebellion:

and they persuade themselves that the doing right to that resistance will be so far from promoting popular licence or confusion, that it will have a contrary effect, and be a means

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of settling men's minds in the love of, and veneration for the laws; to rescue and secure which, was the ONLY aim and intention of those concerned in resistance.<sup>48</sup>

And again:

we have insisted, that in no case can resistance be lawful, but in case of extreme necessity, and where the constitution cannot otherwise be preserved; and such necessity ought to be plain and obvious to the sense and judgment of the whole nation; and this was the case at the Revolution.<sup>49</sup>

To sum up: for many centuries the whole nation had accepted parliamentary sovereignty. It was agreed that there had to be an ultimate decision-making power and that historically it had been the King so long as he had the consent of the people. After 1688, to remain consistent with this heritage, laws were made by the King in Parliament. In practice this meant that Parliament was the highest court in the land from which no appeal was possible, and which could make new laws and repeal old ones. But this supreme power was only legitimate if exercised as a trust for the common good of the people themselves.

### *Sovereignty diminished by the Human Rights Act, the European Communities Act and devolution*

Some judicial supremacists concede that scholars such as Goldsworthy are correct in arguing that Parliament was sovereign in the past but contend that the position has changed because of our EU membership, the Human Rights Act and devolution. The Human Rights Act of 1998, the European Communities Act of 1972 and the three devolution acts of 1998 all qualify sovereignty. Aileen Kavanagh and others have gone so far as to argue

that the declaration of compatibility under the Human Rights Act resembles a judicial strike-down power because Parliament has no real choice of leaving the law unchanged.<sup>50</sup>

However, Lord Bingham repudiated these arguments in his 2010 book. He found that none of the examples supported the proposition that the power of Parliament had been curtailed. The measures did limit the powers of Parliament but only by the 'express authority' of Parliament. Its decisions could be revoked.<sup>51</sup> There was no irrevocable transfer of power under the devolution acts. For example, Section 28(7) of the Scotland Act says: 'This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.' The legislation for Northern Ireland contains a similar clause.<sup>52</sup>

Sections 2 and 3 of the European Communities Act gave supremacy to EU law and it was duly held by the landmark cases, *Factortame* and *EOC* that EU law overrode UK law, in the form of the Merchant Shipping Act 1988 in *Factortame* and the Employment Protection (Consolidation) Act 1978 in *EOC*. Bingham conceded that in these cases courts had invalidated statutes:

But the courts act in that way only because Parliament, exercising its legislative authority, has told them to. If Parliament, exercising the same authority, told them not to do so, they would obey that injunction also.<sup>53</sup>

He found the contention that the Human Rights Act challenged sovereignty even weaker. It allows for declarations of incompatibility, but it remains for Parliament to act. He quotes the white paper that introduced the bill: 'The Government has reached the conclusion that courts should not have the power to set

aside primary legislation, past or future, on the ground of incompatibility with the Convention.’<sup>54</sup>

To summarise: so far I have argued that the case for judicial supremacy lacks constitutional legitimacy. There was no common law constitution, common law was not created solely by judges, and reform of the common law is not solely for judges. Moreover, when Parliament transferred power to the EU in 1972 this transfer was not permanent. It can take power back. So too with devolution (any practical difficulties are political not legal). And, even though the Human Rights Act has increased judicial activism and extended the realm of the courts, Parliament retains ultimate authority and could rein in the courts if it chose to. Chapter 3 goes on to consider the more fundamental objection to judicial supremacy, namely that its advocates have a tendency to disregard the strengths of our democratic system.







### 3

## Democratic civilisation

The starting point of judicial supremacists is a purported fear of the tyranny of the majority. They go on to claim that judges will protect minorities against the majority. They frequently write as if the dominant characteristic of a democratic system is majority rule and that over long periods there is a majority, comprising largely the same people, that oppresses minorities.

But the aim of a democratic system is not crude majoritarianism, as the slightest familiarity with the historic literature defending democracy against absolutism reveals, not to mention a growing body of modern scholarship, which exposes the flaws in the case for judicial supremacy. Leading the charge in legal scholarship have been writers such as Jeffrey Goldsworthy, Jeremy Waldron, John Finnis, Larry Kramer and Mark Tushnet. They follow an earlier group of American academics who were worried about 'government by judiciary' or the 'rule of lawyers' in their own country, notably Raoul Berger.<sup>1</sup> The excessive power of the US Supreme Court goes back to the beginning of the republic and America's federal system means that comparisons with the UK are not exact, but nevertheless there are useful parallels. Moreover, many of the campaigning judges and legal academics in the UK hanker after the powers of the United States Supreme Court, which has frequently disallowed laws passed by Congress and the states.

The chapter is organised as follows. First, it discusses the case for 'popular constitutionalism' as it has been advanced in America, under which the legislature and the

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people themselves would be the 'forum of principle', not the courts. Second, it examines the true character of judicial supremacy, particularly the claims that it is anti-democratic and self-serving. Third, it goes on to discuss three strengths of democracy: (a) by allowing everyone to add whatever they have in them to the collective search for agreement, democracy creates outlets for the full moral, intellectual and civic development of individuals; (b) by seeking truth in a spirit of humility, promoting reason over force, pooling all abilities, and allowing all moral concerns a voice, democracy raises the quality of public reason; and (c) by encouraging clashing interests to search for a *modus vivendi*, democracy promotes the common good, avoids sectarianism, and encourages public virtue.

### *The people themselves: the debate in America*

As earlier chapters showed, our greatest interpreters of liberty and democracy argued that a free system depends on civic virtue and, if a commitment to liberty does not lie in the hearts and minds of citizens, no mere paper declaration can save the day. As the respected American judge, Learned Hand, put it in war-torn 1944 when Americans were reminding themselves of what they were fighting for:

I often wonder whether we do not rest our hopes too much on constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.<sup>2</sup>

In any free system there are bound to be times when momentous decisions about fundamental rights have to be taken. Who should have the final say? Many have argued that it should be the people themselves. In America judicial supremacy has been allowed to reach absurd lengths, and there is now a strong movement in favour of 'populist constitutional law' in place of 'elitist constitutional law'.<sup>3</sup> These are the terms used by Mark Tushnet, in his book, *Taking the Constitution Away From the Courts*, written while he was professor of law at Georgetown University.<sup>4</sup> Much of his argument is shared by Larry Kramer, whose book, *The People Themselves*, written when he was Dean of the Stanford University Law School, deploys the term that was used by Thomas Jefferson and James Madison when resisting judicial elitism in the earliest years of the American Republic, and which has been constantly repeated over the years. Its roots lay in Britain, notably in the writings of Locke about government as a trust, described earlier.

Madison said in 1788 that constitutional disputes could not be resolved 'without an appeal to the people themselves, who, as grantors of the commission, can alone declare its true meaning and enforce its observance.'<sup>5</sup> Jefferson argued that the exemption of judges from accountability to the people was undesirable:

The exemption of the judges from that is quite dangerous enough. I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power.<sup>6</sup>

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The sentiment was still strong at the time of Abraham Lincoln. As President, he ignored some court rulings and in his first inaugural address of 1861, he argued against judicial supremacy:

A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or to despotism. Unanimity is impossible. The rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.

He argued that the Supreme Court was entitled to resolve legal disputes in particular cases:

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice.

He warned against allowing Supreme Court decisions to prevent the people themselves through Congress from adapting to changing circumstances:

At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary

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litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.<sup>7</sup>

However, from the beginning, popular constitutionalism had strong authoritarian opponents. Gouverneur Morris, a Founding Father and participant in the 1787 constitutional convention, said:

Look into the records of time, see what has been the ruin of every Republic. The vile love of popularity. Why are we here? To save the people from their most dangerous enemy; to save them from themselves.<sup>8</sup>

In the early years of the republic, the Federalists were the party that wanted a limited role for the population. Larry Kramer argues that we can gain a good insight into their ethos through the work of James Kent, an author who was widely read at the time. He spoke of defending the 'equal rights of a minor faction' from the 'passions of a fierce and vindictive majority'.<sup>9</sup> Superficially it sounds like the argument of the human rights activists but the minority he had in mind was the wealthy few. Kent portrayed himself as opposed to faction but was really against 'the force of public opinion'.<sup>10</sup>

These attitudes were still common at the end of the nineteenth century. In 1893 one Justice of the Supreme Court called the court the salvation of the nation against populist pressure.<sup>11</sup> The Supreme Court at this time feared the growing labour movement and Kramer shows how the court restricted measures enacted by Congress to

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improve workplace conditions. Under the guise of 'freedom of contract' the court annulled several federal and state laws that were widely supported.

Today many judicial supremacists want decisions to be made in courts because they think judges will support their preferences. They fail to see the danger of giving power to people who can't easily be removed. Courts and parliaments may both act unjustly. In a democratic system it is easier to reverse the mistakes and injustices of a parliament than to correct the same faults in a court. The approach of the US Supreme Court to labour legislation and the New Deal should serve as an especially strong warning to campaigners on the political left who think the court will always be their friend in forcing through changes in the law. As President Lincoln put it, if decisions are 'irrevocably fixed' by the decision of a court then we have ceased to be our own rulers.

The period in which the court struck down federal and state laws that aimed to improve labour conditions is often called the *Lochner* era, after a case concerning a baker, Joseph *Lochner*, who worked in a New York bakery. A New York law prevented employers from expecting employees to work more than ten hours a day or 60 hours a week. In 1905 the Supreme Court ruled by 5:4 that:

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.

Oliver Wendell Holmes, dissenting, said the case had been 'decided upon an economic theory which a large part of the country does not entertain.' He thought the court should allow states to regulate life as they believed right:

a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

He thought the word 'liberty' in the 14th Amendment had been perverted. A reasonable person might think that limiting work to 10 hours a day was 'a proper measure on the score of health' and others might have further valid reasons.<sup>12</sup>

The political movement called 'progressivism' grew in America from the 1890s to the 1920s, partly in opposition to judicial supremacy but also as a reaction against the overly partisan character of American party politics. It called for direct democracy, stronger accountability to voters, the end of machine politics, and the weakening of party bosses.<sup>13</sup> The 1912 Progressive Party platform declared the people masters of their own constitution and this brought the progressives into conflict with the Supreme Court.<sup>14</sup> Theodore Roosevelt (who had been president from 1901 to 1909) said in 1912 that the American people should be 'the masters and not the servants of even the highest court in the land' and the 'final interpreters of the Constitution' for 'if the people are

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not be allowed finally to interpret the fundamental law, ours is not a popular government.'<sup>15</sup>

He supported the idea of the dean of the University of Pennsylvania Law School to allow recall of state supreme court decisions. 'If any considerable number of people' felt the court was wrong they should be able to petition for the matter to be put to the voters. This would 'permit the people themselves by popular vote, after due deliberation and discussion, but finally and without appeal, to settle what the proper construction of any constitutional point is'.<sup>16</sup> However, the proposal did not gain enough support.

A similar conflict emerged in the 1930s when the court repeatedly struck down measures aimed at overcoming the Great Depression, known as the New Deal. F.D. Roosevelt wanted curtailment of the Supreme Court, but also failed.<sup>17</sup> In 1937 he said the constitution should be seen as a layman's document not a lawyer's contract:

This great document was a charter of general principles. ... But for one hundred and fifty years we have had an unending struggle between those who would preserve this original broad concept of the Constitution as a layman's instrument of government and those who would shrivel the Constitution into a lawyer's contract.<sup>18</sup>

In America the struggle against judicial supremacism continues.

## THE TRUE CHARACTER OF JUDICIAL SUPREMACISM

### *When judges are self-serving*

As we have seen, seventeenth and eighteenth century writers were worried that law makers would use their power to advance their own interests, ideological or

otherwise. One problem with legal proceedings is that there are few observers. Courts may be open to the public but few can attend and, even if the press reports proceedings, relatively few can see what courts are really like. Even at its best it is a closed world compared with Parliament. The less exposed courts are to public view the more unjust their decisions are likely to be.

In practice many court rulings open up new business opportunities for colleagues. Judges often retain links with their old chambers and cannot be unaware of what they are doing. Decisions on human rights, in particular, have opened up new areas that can be exploited by law firms. The most notorious recent example is the taking out of human-rights cases against the actions of British soldiers in overseas conflicts. Other cases have concerned so-called ouster clauses in legislation. Lady Hale in *Jackson*, for example, reserved her indignation for ouster clauses, which exclude some government decisions from judicial challenge, and thereby deny business opportunities to lawyers.<sup>19</sup>

It is of no small relevance that judges are members of a profession that has been transformed by a combination of the no-win-no-fee system of payment and the vagueness of the European Convention on Human Rights. Together, they have had a corrupting effect on the legal profession and have promoted the politicisation of the judiciary. Until very recently the Law Society and the Bar Council were stalwart opponents of contingency fees, but recently they have been captured by less scrupulous members of the profession. The legal profession has become less a vocation guided by a code of ethics and more a business which looks upon particular statutes as opportunities for financial gain. The time has come for lawyers with a sense

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of vocation to reassert themselves. Lawyers have traditionally had an obligation to the court as well as to their client. They are not supposed to be the mere hired guns of one side in a dispute, prepared to pull every stroke in the book to win. They have a duty to seek the truth, which they should put above the narrow interests of their clients or their own interests in making money. But the opportunities offered by the Human Rights Act have proved too much for some.

Human rights should be narrowly defined, to exclude only those things that should never be done, such as torture; or to require only such things as should always happen, such as free elections. But the European Convention on Human Rights is so vague that it has opened up opportunities for anyone who thinks there might be money or other advantage to be gained from legal confrontation. Even Lord Woolf criticised a case in 2003 brought by a gentlemen from Lithuania who argued that his human rights had been infringed by Southwark council. He had left a large house in Vilnius with a large garden and orchard and claimed that it infringed his human rights to be offered a maisonette in South London. The trial cost over £100,000, not counting the appeal.<sup>20</sup>

Judges are supposed to be impartial, but are as prone to pursue their private interests as anyone else. As the distinguished barrister and author, Michael Arnheim, has shown, when they extend their own powers they act as judges in their own cause. The 'descent of the law, and especially human rights law, into a morass of vagueness, uncertainty, subjectivity and conflicting concepts' present lawyers with opportunities to use the law for their own benefit.<sup>21</sup> A Scottish judge who opposed the prevailing trend, Lord McCluskey, said in a Scottish newspaper that

the European Convention on Human Rights was a 'Trojan horse' resulting in a 'crackpot's field day, a pain in the neck for judges and a goldmine for lawyers'.<sup>22</sup>

One of the most significant expansions of their own domain by judges concerned the powers of the Home Secretary to sentence murderers under section 29 of the Crime (Sentences) Act 1997. The Appellate Committee of the House of Lords ruled that it was incompatible with Article 6 of the European Convention on Human Rights for the Home Secretary to decide how long a convicted murderer should spend in jail when serving a mandatory 'life' sentence.<sup>23</sup> By ruling that the decision was solely for the courts, judges expanded their own powers.

And yet such decisions have generally not been seen as incompatible with the longstanding principle that judges should not act in their own cause. It is accepted that, if a judge has a financial interest in a case, he must withdraw. Judges are also supposed to withdraw when the interest is non-pecuniary, for example, if he has a commitment to a political cause. This kind of conflict arose in the Pinochet case that came before the law lords in 1999. Lord Hoffmann was found to have sat on the first Pinochet case when his wife had worked for Amnesty International since 1977 and when he was himself an unpaid director and chairman of Amnesty International Charity Limited. In reviewing the case, Lord Hutton said:

there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the public administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.<sup>24</sup>

Lord Hope said:

I think that the connections which existed between Lord Hoffmann and Amnesty International were of such a character, in view of their duration and proximity, as to disqualify him on this ground. ... he could not be seen to be impartial. ... his relationship with Amnesty International was such that he was, in effect, acting as a judge in his own cause. I consider that his failure to disclose these connections leads to the conclusion that the decision to which he was a party must be set aside.<sup>25</sup>

To summarise: judicial supremacists portray judges as the guardians of individual rights against the tyranny of the majority, but the behaviour of judges also reflects a strong element of self-interest, often to such an extent that judges are in breach of the ancient principle of natural justice, long part of our common law: *nemo iudex in causa sua* [no one should be a judge in their own cause].<sup>26</sup>

*Is judicial supremacism anti-democratic?*

Jeremy Waldron, writing while he was director of the Center for Law and Philosophy at Columbia University, quotes Roberto Unger who argues that the 'dirty little secret' of contemporary jurisprudence is its 'discomfort with democracy'.<sup>27</sup> Is this fair comment? On close analysis we can see that the main attraction of judicial enforcement at the expense of Parliament is that it transfers power to the educated class. It strengthens what some critics have called the aristocratic element in society. Goldsworthy argues that hostility to Parliament reflects the fact that the educated class has lost faith, not in politicians, but in fellow citizens.<sup>28</sup> They look down on the rank and file, but usually attack 'politicians' or 'the tabloids' because they

dare not openly admit their contempt for ordinary voters. In truth, their aim is to leave very little room for politics.<sup>29</sup>

Jeremy Waldron shares Professor Goldsworthy's concern. Law is not seen as the creation of a free and democratic people. Legal writers are 'intoxicated with courts and blinded to almost everything else by the delights of constitutional adjudication'.<sup>30</sup> Their search for finality ignores the unavailability of disagreements about rights. The persistence of disagreement about fundamentals is not a sign of limitations or ignorance or prejudice; it is inescapable.<sup>31</sup>

The underlying problem is that judges, both in the UK and in Strasbourg, have got into the habit of hiding their personal political preferences behind judicial decisions, endangering both the reputation of the judicial system for impartiality and usurping the role of Parliament as the representative of public opinion. Lord Neuberger, president of the UK Supreme Court, said in a speech in June 2015 that the legislature was sometimes 'too divided or too uncertain to take difficult or unpopular decisions' and he gave the example of assisted suicide as an issue on which 'legislative indecision' was 'starting to become a reason for increased judicial activism'. The Supreme Court's message was that Parliament 'should properly face up to this issue' and, if not, 'the courts might have to step in'.<sup>32</sup>

In reality Parliament had not been indecisive. The majority in Parliament did not agree with assisted suicide, for very good reasons. The House of Lords has rejected assisted suicide on a number of occasions, notably in 2006 and 2009. Subsequently former Lord Chancellor, Lord Falconer, tabled a bill to permit assisted suicide for the terminally ill, initially in 2013 and again in 2014, when the

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House approved a second reading, which led to two days of debate in committee.

In June 2014, nine Justices of the Supreme Court considered the case of Tony Nicklinson, who was seeking a declaration that the law on assisted suicide was incompatible with his right to a private life under Article 8. The Court decided by a majority of seven to two against making a declaration of incompatibility in Mr Nicklinson's case. The minority of two considered that the courts had the constitutional authority to make a declaration and thought it should do so in this case. Three of the seven considered that the courts had the constitutional authority to make a declaration, but should not do so in this case. They wanted Parliament to be given the opportunity to consider the issue. The other four Justices ruled that the compatibility of the law on assisted suicide with Article 8 was an 'inherently legislative issue' and that the courts lacked the constitutional authority to make a declaration.

After Neuberger's speech of June 2015 there were long debates in both Houses, in which all views were thoroughly aired. Parliament decided in favour of the prevailing law. The clear majority feared that legalising assisted suicide would make it more likely that elderly or disabled people would be pressurised into taking their own lives, perhaps for their money or to eliminate an inconvenience. Like all laws, prosecution is not inevitable and, if a case goes to court, the sentence may be anything from an absolute discharge to a prison term. But Parliament was not being indecisive. After careful thought, it decided that assisted suicide should continue to be against the law.

It's true that Lord Neuberger tacked onto the end of his speech some lip service to parliamentary sovereignty. But he did so after listing seven justifications for judicial supremacy. The judicial power, and with it our liberty, is not safe in the hands of the current generation of senior judges. Now is the time for Parliament to remind judges that we as a free people make the laws we live by and that we do so through MPs who can be removed from office in elections. Judges are given independence so that they can act 'without fear or favour, affection or ill will', not so that they can impose their personal preferences on everyone else.

Judicial supremacy puts into doubt the liberal conception of law that has been accepted in Britain since the age of absolutism was ended by the revolution of 1688.<sup>33</sup> In Tudor and Stuart times monarchs had got into the habit of claiming that laws were commands from them that must be obeyed. The rival view is that laws are the accepted rules for civilised living together that have come to be accepted, either from the passage of time or because Parliament has given formal consent.

Human rights are often spoken of as if they are permanent principles for all times and all places, but from the earliest days declarations of rights have found it necessary to declare rights to be subject to lawful changes. Magna Carta's famous clause 29 (based on the original clauses 39 and 40 of the 1215 version) says:

No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land. To no-one will we sell or deny or delay right or justice.<sup>34</sup>

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No one can be punished unless permitted by the law of the land. So far so good, but this makes the power to change the law of the land rather important. If it can be changed at will by judges there is no freedom. The same is true of many rights under the European Convention. They are qualified, which leaves open the possibility of very different interpretations being enforced.

Take Article 8 on the 'right to respect for private and family life'. Clause 1 declares that, 'Everyone has the right to respect for his private and family life, his home and his correspondence.' But clause 2 adds the following qualifications:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In similar vein, Article 9 on 'freedom of thought, conscience and religion' says in clause 1:

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

Clause 2 goes on to say:

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

These exceptions leave open a vast area of uncertainty for citizens. By comparison, the greater certainty of common law makes it compatible with the free development of individuals in a democracy. One of the main reasons that common law provides greater certainty is it remains close to the facts of each case. Precedents are based on the similarities between the facts of different cases, not abstract terms open to different readings. Human rights laws are, however, so vague and qualified that they have been interpreted to mean one thing and then the opposite as cases proceed from the initial trial through stages of appeal. There is now a growing list of these 'yo-yo' cases.<sup>35</sup>

Defenders of the Human Rights Act contend that the Act protects us from the abuse of state power, but in truth it has the opposite effect. Because the European Convention on Human Rights uses abstract phraseology, it allows judges to make radically different interpretations. On fundamental matters like press freedom and safety from terrorism, the Human Rights Act can mean one thing today and the exact opposite a few months later.

For example, the right to 'respect for private and family life' under Article 8 was upheld when Catherine Zeta Jones and Michael Douglas sought to prevent a magazine from publishing their wedding photographs. In another case concerning privacy in March 2002, it was decided that the *Mirror* should not have published details of Naomi Campbell's drug treatment. Then, in October 2002, the Court of Appeal decided that the publication of articles about the claimant's treatment for drug addiction did not breach her right to confidentiality and that the press should be given reasonable latitude under Article 10

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to publish information in the public interest. Subsequently that decision was reversed.

Consider also the foreign terrorist suspects previously detained at Belmarsh. In July 2002 it was held that the imprisonment was unlawful because it applied only to foreign nationals. Then, in October 2002, the Court of Appeal, decided that the detention was consistent with the Human Rights Act. Finally, in 2004 the House of Lords ruled against the Government.

Giving judges the power to decide these balances is not preferable to allowing Parliament to decide. There are dangers, including the tyranny of the majority, but making judges the final arbiter is no solution. It is a form of dictatorship. In practice words do not guarantee anything. We must rely on the moral spirit of a people armed with institutions for discussion, thought and decision.

## THE STRENGTHS OF DEMOCRACY

### *The development of individual civic and personal capabilities*

Belief in the virtue of citizens as vital for the survival of freedom and democracy explains why one of the strongest elements of European civilisation has been the distinction between the society and the state, combined with the belief that the purpose of the state is to serve society. The ultimate value is the development of the individual and the purpose of the state is to create the conditions in which individuals can develop their capacities to the fullest extent compatible with everyone else enjoying the same freedom.

To be free is to live under laws intended to allow the full beneficial unfolding of each personality. The

fundamental idea is that individuals alone have intrinsic and ultimate worth because each has the capacity to change and improve. We find liberty where the conditions for personal development are met: to be able to grow from the present self to a better self is the aim.

But a moral personality cannot act in isolation. Each must act with others and in turn be acted upon. The conception of people as moral personalities implies a society of similar persons, which further implies respect for the same right of self-determination in others. And yet, as we each pursue our view of what is good or right, we draw on the shared inheritance of common thought. This inherited stock of propositions accepted as true or false and values held up to be right or wrong is simultaneously separate from any one individual but also reliant on each moral personality. Accepted knowledge and moral beliefs change and adapt in the light of each person's decisions to give or withhold support.

Religions have played a central role in offering moral codes for human guidance, often in combination with views about natural law understood as moral sentiments that were an integral part of human nature. Natural law sometimes seems to be a rather fuzzy concept, but a list of nineteen laws of nature that would have been widely accepted as moral precepts was produced by Hobbes in *Leviathan*.

The first law of nature, he said, fell into two parts. We should 'seek peace, and follow it'; but if it was not possible, we should use all means we can, to defend ourselves'.<sup>36</sup> The second was 'whatsoever you require that others should do to you, that do ye to them.' and 'be contented with so much liberty against other men, as he would allow other men against himself.'<sup>37</sup> The third was

to keep agreements, and others included showing gratitude and a willingness to forgive people who had repented.<sup>38</sup> Another was not to hate or hold in contempt, followed by not allowing pride to cancel out equal respect for others. When judging, impartiality was essential; people should be willing to submit to arbitrators, and give them safe conduct.<sup>39</sup> No one should be a judge in their own cause and no arbitrator should gain profit or honour from taking one side in a dispute. At the heart of all such laws of nature, Hobbes thought, was the ancient Biblical injunction: *'Do not that to another, which thou wouldst not have done to thyself'*.<sup>40</sup>

Jeremy Waldron links the understanding of individuals as moral personalities to the claim of human rights activists that we should respect the dignity of every person. He points out that judicial supremacists are curiously partial in their attribution of human dignity. They treat minority individuals as worthy of autonomy and respect but not the individuals making up the majority.<sup>41</sup> He shows that judicial override is not compatible with the respect and honour normally accorded people in a theory of rights. Judicial supremacists claim that rights are necessary out of respect for the basic dignity of humans, but they deny many people the most basic of rights, namely to take part in government. Waldron shares William Cobbet's view that participation was the 'right of rights'.<sup>42</sup> We all know that any one voice may be small but judicial override guarantees that non-judicial voices will make no contribution at all. Judicial control resembles 'government by proclamation' rather than 'government by consent' following open discussion. As Waldron shows:

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When one confronts a right-bearer, one is not just dealing with a person entitled to liberty, sustenance, or protection. One is confronting above all a particular *intelligence* – a mind and consciousness which is not one's own, which is not under one's intellectual control, which has its own view of the world and its own account of the proper basis of relations with those whom it too sees as others.<sup>43</sup>

A majority decision respects individuals in two ways: the *opinions* of participants are heard; and the *individuals* themselves are valued. No one's view is hushed up.<sup>44</sup> Democracy, according to this understanding, is far more than counting heads: it encourages wisdom, constraint and mutual respect.

Judicial supremacists are also selective in their hostility to majority voting. They condemn majoritarian democracy but pay little attention to the widespread practice in the supreme courts of Britain and the US of majority voting. In America, many vital decisions have been imposed by a 5:4 majority, often with a solitary justice described as the 'swing vote'. Supremacists see no problem because they define themselves and the judges with whom they identify, as the wise few. Majority votes are just fine when judges disagree, but not for the untutored masses.<sup>45</sup>

To sum up: a democratic system provides opportunities for all individuals to develop their moral and intellectual qualities by being active citizens. Judicial override narrows the opportunities for such development.

### *Democracy raises the quality of public reason*

Decisions by judges are a device for avoiding government by means of a continuous search for agreement and mutual accommodation. Discussion is cut short and

decisions given greater permanence by the creation of binding precedents. Parliament, on the other hand, makes laws but cannot bind successors, which makes it easier to learn from and rectify earlier mistakes.

The underlying assumption behind a parliamentary system is that all humans are fallible, even people who seem very clever. Judges are no exception. Recently the UK Supreme Court judges have been making regular speeches revealing their opinions, exposing not only considerable differences between them but also some all-too-human frailties. Moreover, lawyers belong to a fraternity that is fond of describing some of its members as having brilliant legal minds, which is often lawyers' code for exceptionally devious minds, skilled in using vaguely related precedents to justify meeting contemporary political objectives. People drawn from such a group are not the best guardians of the common good.

Judges who wish to take over the responsibilities of Parliament do not want to test their wisdom in the fire of debate, they want to hide. They avoid fighting their corner in open discussion and dismiss democracy as too slow or indecisive, even spineless. Parliament is accountable; courts are deliberately not. But if we want our laws to be just, they should never be made by individuals alone or by small groups who are insulated from the opinions of the people who will have to be governed by them.

Parliament works better than any alternative, especially one that curtails discussion. Lord Neuberger, president of the UK Supreme Court, has spoken of 'stepping in' if politicians are too slow.<sup>46</sup> But democratic civilisation rules out impatient would-be rulers who find that defending and explaining their opinions is tedious.

Judicial law-making is a form of rule by the few without full and open discussion and consent. In an open system no view is neglected when debate is open to all comers, which gives individuals a reason to form a considered view. Many will not make the effort but more will do so than if there were no opportunity. It is harder for factual errors and mistaken reasoning to continue among rulers, and their true motives are more likely to come out.

Democracy can be seen as a code of conduct: it seeks agreement by confining methods to persuasion; and it avoids actions that would be resented in others. Even with an electoral mandate, it is accepted that the prevailing majority should not avoid discussion. Because democracy is a continuous never-ending search for agreement and compromise, to say something is non-negotiable, as the European Commission repeatedly does, is to reveal an undemocratic mind. The attitude of judicial supremacists is similar.

The way in which toleration and wisdom can be gradually acquired through the free discussion of public affairs was well put by Mill:

In the case of any person whose judgment is really deserving of confidence, how has it become so? Because he has kept his mind open to criticism of his opinions and conduct. Because it has been his practice to listen to all that could be said against him; to profit by as much of it as was just, and expound to himself, and upon occasion to others, the fallacy of what was fallacious. Because he has felt, that the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his

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wisdom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner.<sup>47</sup>

Mill argues that 'He who knows only his own side of the case, knows little of that.' Consequently, we should always try to ensure a full understanding of opponents' views.

In *Essay Concerning Human Understanding* John Locke described the philosophy of knowledge that, for him, justified an open system. He rejected Platonism, the idea that at birth the human mind is already furnished with ideas and concepts that owe nothing to experience. For Locke the mind was 'white paper, void of all characters' and only experience could provide the ideas we use in our lives. A close associate of the leading scientists of his day, Locke's approach recommended the experimental method in science. Knowledge was gradually revealed in a slow, piecemeal process through the co-operation of scientists questioning, correcting themselves and others in the light of observations, revising theories and conducting experiments to test them. He was sceptical of all-embracing theories that bestowed power on one group or a ruler. There was no certainty about general truths about the world. Natural science would only yield probable or provisional truths.

The doctrine of innate ideas justified subservience to prejudice, superstition and intellectual tyranny. It 'eased the lazy from the pains of search, and stopped the inquiry of the doubtful concerning all that was once styled innate.' Locke continued:

And it was of no small advantage to those who affected to be masters and teachers, to make this the principle of principles, 'that principles must not be questioned:' for having once established this tenet, that there are innate

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principles, it put their followers upon a necessity of receiving some doctrines as such; which was to take them off from the use of their own reason and judgment, and put them on believing and taking them upon trust, without farther examination: in which posture of blind credulity, they might be more easily governed by, and made useful to, some sort of men, who had the skill and office to principle and guide them.<sup>48</sup>

He disapproved of people who ‘... misemploy their power of assent, by lazily enslaving their minds to the dictates and dominion of others in doctrines, which it is their duty carefully to examine, and not blindly, with an implicit faith, to swallow.’<sup>49</sup>

Locke warned that we should always be wary of self-appointed elites who had acquired high-sounding words as proof of their wisdom:

artificial ignorance, and learned gibberish, prevailed mightily in these last ages, by the interest and artifice of those who found no easier way to that pitch of authority and dominion they have attained, than by amusing the men of business and ignorant with hard words, or employing the ingenious and idle in intricate disputes about unintelligible terms, and holding them perpetually entangled in that endless labyrinth.<sup>50</sup>

Deeply conscious of the qualities needed to be a member of a free political association, Locke wrote at length about how children should be brought up to equip them for freedom. *Some Thoughts Concerning Education* began as a series of letters to Edward Clarke and Mrs Clarke about the education of their son and daughter. The letters were written while Locke was in exile in Holland from 1683-1688, and not published until 1693.

It is important to understand the context in which he was writing. Britain had lived through a civil war and a

long struggle to establish parliamentary democracy. Locke was trying to describe an alternative basis for truth that did not rest on established authority or give an excuse for the possession of absolute power. He argued against those who held that truth was possessed by religions. Truth could not be justified by referring to a sacred book or the authority of priests. To be free was to be self-governing and to be self-governing was to be guided by reason. To be guided by reason was to judge and act fairly by overcoming interests, passions and prejudices:

... the great principle and foundation of all virtue and worth is placed in this, that a man is able to *deny himself* his own desires, cross his own inclinations, and purely follow what reason directs as best though the appetite lean the other way.<sup>51</sup>

Virtue must lie within and so individuals should acquire 'habits woven into the very principles of his nature'. Virtue should not be the result of fear. Locke opposed physical punishment and instead favoured esteem: 'If you can once get into children a love of credit and an apprehension of shame and disgrace, you have put into them the true principle, which will constantly work and incline them to the right.'<sup>52</sup>

Like all defenders of freedom, he emphasised the importance of virtue: 'I place *virtue* as the first and most necessary of those endowments that belong to a man or gentleman.'<sup>53</sup> Virtue meant loving God, telling the truth and being good-natured to others: 'all injustice generally springing from too great love of ourselves and too little of others'.<sup>54</sup> And he thought that children should not be allowed to be cruel to animals: 'the custom of tormenting and killing of beasts will, by degrees, harden their minds

even towards men'.<sup>55</sup> Instead, children should take pleasure in being kind, liberal and civil to others:

Covetousness and the desire of having in our possession and under our dominion more than we have need of, being the root of all evil, should be early and carefully weeded out and the contrary quality of a readiness to impart to others implanted.<sup>56</sup>

He warned against teaching debating skills regardless of the truth of the case being argued:

If the use and end of right reasoning be to have right notions and a right judgement of things, to distinguish between truth and falsehood, right and wrong, and to act accordingly, be sure not to let your son be bred up in the art and formality of disputing ... unless ... you desire to have him an insignificant wrangler, opinionated in discourse, and priding himself in contradicting others or, which is worse, questioning everything and thinking there is no such thing as truth to be sought but only victory in disputing.<sup>57</sup>

Children should be taught virtue and respect for the objective truth. They should be indifferent to which propositions turned out to be true but not indifferent to whether truth prevailed over falsehood. There was an unavoidable fallibility about the human condition – hence the need for mutual criticism. He emphasised self-criticism, not just scepticism towards authority. Criticism was not about moral indignation, scepticism or protest, but a commitment to reason – objective testing and openness to contradiction.

Burke, writing a few decades later in defence of Whig principles, had similar concerns. In *An Appeal From the New to the Old Whigs*, he explained what he meant by 'the people' and how his conception differed from the notion that was prevalent in revolutionary France. Any mob or

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faction was inclined to call itself 'the people', but Burke argued that no such declaration was justified unless the people had agreed to incorporate, that is to create a political association which accepted majority decisions. Above all, Burke wanted a system in which people of manifest virtue and demonstrated achievements could find their voice. He used the term 'natural aristocracy', which is very misleading to the modern eye. It is, however, plain from his remarks that he did not imply anything like an inherited right to have political influence. He wanted to allow outlets for people of merit to apply themselves thoughtfully to public affairs. He had in mind a system that allowed people to become prominent in public life only because they deserved it.

They were of recognised and deserved merit, not merely the hereditary aristocracy. Their qualities defined their position, not their birth:

To be taught to respect one's self; To be habituated to the censorial inspection of the public eye; To look early to public opinion; ... To have leisure to read, to reflect, to converse; ... To be habituated in armies to command and to obey; To be taught to despise danger in the pursuit of honour and duty; ... To be formed to the greatest degree of vigilance, foresight and circumspection.

People who could come to the fore were those who had earned respect by their achievements: those employed as administrators of law and justice, 'thereby amongst the first benefactors to mankind', professors of science or liberal arts, rich traders 'who from their success are presumed to have sharp and vigorous understandings, and to possess the virtues of diligence, order, constancy, and regularity, and to have cultivated an habitual regard

to commutative justice'. Without such people there is no nation.<sup>58</sup>

He thought this was the natural human condition:

The state of civil society, which necessarily generates this aristocracy, is a state of nature ... For man is by nature reasonable; and he is never perfectly in his natural state, but when he is placed where reason may be best cultivated, and most predominates.<sup>59</sup>

Burke asks what we mean when we speak of 'the people': 'In a state of *rude* nature there is no such thing as a people. A number of men in themselves have no collective capacity. The idea of a people is the idea of a corporation. It is wholly artificial; and made like all other legal fictions by common agreement.'<sup>60</sup> When the agreement that gave corporate capacity to a state is ended the individuals are no longer a people; they have no corporate existence. They must begin again. The majority in this new situation had no right to be respected. To be legitimate there must be a new incorporation based on unanimity and an explicit agreement that a majority can act for the whole.<sup>61</sup>

When 'great multitudes act together' under such constitutional constraints, he said, then 'I recognise the PEOPLE... In all things the voice of this grand chorus of national harmony ought to have a mighty and decisive influence.'<sup>62</sup> But not when there was no more than a disorganised mob. Then we cannot speak of the 'rights of man'. Only a people properly incorporated under a legitimate constitution could have rights.<sup>63</sup>

Let's compare the advice of Locke and Burke with the assumptions behind the arguments of one of the most determined defenders of judicial supremacy in recent times. Ronald Dworkin argues that Parliament makes decisions according to power alone; he prefers courts,

which he claims are 'forums of principle'. Rights are said to prevail over (trump) policy. But can we truly say that courts are forums of principle?

There is a major comparative disadvantage of court procedures. Reasoning in courts creates antagonism because there are winners and losers – the court process looks for victory rather than a peaceful accommodation. John Finnis describes this and other distortions of the court process.<sup>64</sup> The underlying problem is that judges are expected to interpret documents such as declarations of rights as if they were rules of conduct, when they were often produced as inspirational writings rather than maxims for enforcement. Moreover, the rulings of courts are influenced by precedents, some with only a tenuous connection to the case in hand; textual formulae often mislead; the style and effectiveness of pleading can sway the opinions of judges; the special interests or circumstances of the case can distort the outcome; the political views of judges (including those currently favoured by the 'sophisticated' people) often determine rulings; and political theories (including mistaken ones) capture judicial minds (as in the *Lochner* case described earlier). On top of all that, legal training is not a preparation for resolving fundamental clashes of value.

In a court, there are two sides and the outcome will identify the winner and the loser, often with sanctions for the loser. It is suitable for handling many individual disputes but not for making law. The legal mentality is attractive to those who seek to triumph over rivals, but they are political supremacists, not defenders of pluralism, diversity, and toleration. Parliamentary discussion takes place over a longer period. It is not

forced into two camps, but makes space for opinion in all its diversity.

The merits of political debate have even been acknowledged by one of the UK's Supreme Court judges, Jonathan Sumption.<sup>65</sup> He compared the handling of abortion in Britain and America. The US Supreme Court decision in *Roe v Wade* left opponents of abortion with no legitimate political outlet. This may explain why some opponents have taken extreme measures (though it is no excuse). The compromise achieved in Parliament kept the peace more effectively. The door to change has not been slammed shut, although there has been no change since the original 1967 Abortion Act.

Today there is often a high degree of scepticism, even cynicism, about politics, which does not reflect how Parliament actually functions. When the government of the day would like Parliament to pass a new law, it has to follow a strict process. Often it will encourage public discussion by publishing a 'green paper' inviting public comment before it takes any action at all in Parliament. It is usually followed by a 'white paper' in which the government describes its intentions and explains what it is trying to achieve.

Draft legislation, a bill, is then presented to the Commons. Each bill goes through several stages in both Houses. The first stage is called the first reading. It is a formality, essentially giving notice that the bill is on the agenda. The second reading is an occasion for debating the general principles of the bill. After debate the House can support the bill by passing the motion 'That the bill be now read a second time'.

The bill then goes to a committee, usually consisting of between 16 and 50 members. Sometimes a committee of

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the whole House is used. The committee considers the bill clause by clause, makes amendments, and reports back to the House. This is called the 'report stage', when further detailed consideration takes place. After discussion, the third reading follows and the House votes on the motion, 'That the bill be now read a third time'.

In the House of Lords further amendments to the bill can be made and the House must vote on the motion 'That the bill do now pass'. The bill is then sent to the Commons. If both Houses pass the bill it goes to the Queen for her assent. However, if one House passes amendments that the other will not accept, then the bill fails, unless the Parliament Acts of 1911 or 1949 (below) are relevant. Before that stage is reached bills often go back and forth between the two houses in a process nicknamed parliamentary ping pong, during which time legislation is frequently refined for the better.

Since the passing of the Parliament Act of 1911 the ability of the House of Lords to reject bills passed by the Commons has been limited and the Parliament Act of 1949 added more constraints. If the House of Commons passes a public bill in two successive parliamentary sessions, and the House of Lords rejects it both times, the Commons may submit the bill to the Queen for her assent. However, these rules do not apply to bills originated in the House of Lords, or to bills seeking to extend the duration of a Parliament beyond five years.

In addition there is a special procedure for 'money bills', which deal with national taxation or public spending. If the House of Lords refuses to pass a money bill within one month of its approval by the Commons, the bill can be submitted immediately for Royal Assent. This provision in the Parliament Acts was a reaffirmation

of longstanding practice under which the House of Lords has not been permitted to introduce a bill relating to taxation or supply, nor allowed to amend a bill relating to taxation or supply. This convention was to protect the principle of taxation only by consent.

The internet has made it very easy for anyone to follow the progress of bills through both houses. Lists of measures under consideration are available and reports on how bills have been amended at each stage are kept up to date. These procedures do not prevent Parliament from passing unwise laws but they make it less likely. We can say that they are designed to encourage thoughtfulness.

Parliament's procedures can be compared with those of the UK Supreme Court, as described on its own website. The UK Supreme Court Justices usually hear cases in a panel of five, although they have the potential to hear cases as a panel of seven or nine depending on the importance of the appeal. Most of the case is presented through oral argument and hearings usually last around two days. The appellant (the party that brings the appeal) and the respondent (the party who argues against the appeal) are usually represented by senior barristers, or solicitors with 'rights of audience' who address the court. Other lawyers (typically solicitors) usually attend court to pass information between clients and their representatives.

The UK Supreme Court Justices hearing an appeal hold a preliminary meeting before the hearing to discuss their initial thoughts on the case. This meeting is private, and not attended by any staff. Straight after a hearing, the Justices meet to deliberate, again in private. The most junior Justice begins the deliberations, and the most senior (usually the President or Deputy President) speaks

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last. During this meeting one Justice is asked to write a judgment reflecting the view of the majority. After circulation of the draft, further discussions may follow. Justices might decide to accept the judgment of a colleague, or write a concurring (or dissenting) judgment of their own. Once the majority judgment is ready, it is published or 'handed down'.

Do judges reason better than parliaments? Larry Kramer was law clerk to Justice William Brennan Jr, a Justice of the Supreme Court from 1956 until 1990, and describes how the quality of Supreme Court discussion has deteriorated. Justices used to do all their own work and hold discussions that lasted for days. They discussed each other's opinions in detail and at length, but by the time he was writing in the early 2000s, he said:

most of the Justices rely on law clerks to prepare a case for them, seldom reading more than a 'bench memo' or the parties' submissions. Oral argument is limited to one hour, which the Justices use essentially to get clear on the facts and to signal their thinking to one another. One reason they need to signal each other this way is that they spend so little time talking. Conferences are as short as possible, consisting mainly of terse declamations by each Justice explaining his or her vote, with little or no actual debate or discussion. The detailed legal analysis is done almost exclusively by the clerks, recent law school graduates with at most a year or two of experience. ... The Justices almost never meet to discuss a drafted opinion and they never work out their reasoning as a group. The veneer of careful deliberation is generated almost entirely by the law clerks.

This does not mean that the Justices are not in control, he concludes, 'but there is a considerable gap between this kind of control and the stories told to justify judicial supremacy'.<sup>66</sup>

The process of the UK Supreme Court, too, is nowhere near as sophisticated or thorough as the parliamentary process. Many MPs rightly complain that much law is passed without full scrutiny, especially when it is initiated in Brussels, but even so parliamentary procedures are more thorough and open than those of the UK Supreme Court.

To sum up: the issue is not who should decide – judges or MPs – but how we can uphold and maintain decision making through a continuous search for truth and right. In an open, democratic system no one rules for long and, because decisions are open to constant challenge, the quality of public reasoning is higher.

*Democracy encourages civic virtue*

The most effective argument of judicial supremacists is their claim that they protect minorities against the majority. In a democracy it is possible for the majority to disregard or oppress a minority. This is why class-war theories are dangerous. They assume a group with an irreconcilable grievance that requires victory over the oppressor. However, in Britain it is rare for the majority to be made up of the same people on every issue.

One of the most prominent campaigners for judicial dominance, Ronald Dworkin, argues that if a majority shows contempt for the needs of minorities it is illegitimate. He is right, but the remedy is political not judicial, as he contends. Monopolising power is always unjust. When judges take power unto themselves they deny a voice to others. Such a non-democratic solution is a bigger threat to freedom than majoritarian democracy.

As John Finnis has shown, writers like Dworkin invent an abstraction, 'the majority', and assume that it always

oppresses non-members, 'the minority'. The majority is tacitly assumed to be made up of the same people over time and to be hostile to the minority. Moreover, the majority are assumed to have little or nothing in common with the minority.<sup>67</sup> We can find examples of entrenched majorities. In Malaysia, for instance, the majority Malays discriminate against the minority Chinese; and in nearby Indonesia, the Muslim majority barely tolerates minorities.<sup>68</sup> But the situation in the UK is nothing like this. The majority varies on more or less every decision. We all move back and forth between majority and minority positions, depending on the issue. Because we all find ourselves in both the majority and the minority from time to time, we have a common interest in protecting the freedom of everyone to participate. Moreover, what the majority thinks does not always determine parliamentary decisions. Hanging, for example, has often had clear majority support among voters but has not been supported by Parliament.

Permanently disadvantaged minorities are difficult to find in the UK. Indeed, our political system gives exaggerated weight to minorities so much so that a common political tactic is to create a manufactured sense of identity or grievance and appeal to the majority to compensate for claimed victim status. Courts have frequently been used as part of this stratagem. They were used first by racial groups, and later by groups defined by gender, sexual orientation, religion, and disabilities. As it became useful to be in a privileged (protected) category more people tried to get into one. The 2010 Equality Act extended the categories and by 2015 there was a long list. According to the relevant government website, it is against the law to discriminate against anyone because of

age, being or becoming a transsexual person, being married or in a civil partnership, being pregnant or having a child, disability, race including colour, nationality, ethnic or national origin, religion, belief or lack of religion/belief, sex, and sexual orientation. In addition, individuals are also protected from discrimination if they are associated with someone who has a protected characteristic, such as a family member or friend, or have complained about discrimination or supported someone else's claim.

The law-making process has been distorted into a scramble for preferential treatment by groups who are sufficiently well organised to secure political recognition of their victim status. Sometimes their interests clash. For example, Muslim women tend not to do paid work which means that an employer with a racial quota (such as the police) would have to meet it by recruiting ethnic minority men. However, this would lead to the under-representation of females.

We are in danger of repeating the factionalism that undermined the early experiments with democracy in the northern Italian cities of the late middle ages. As chapter 1 showed, this fear was prominent among writers defending government by consent against absolutism in the seventeenth and eighteenth centuries. Montesquieu, Sidney, Milton, Harrington and Locke were conscious of the danger of selfish excess and wary of factions. For them, a free society was a political association of people capable of civic virtue, self-sacrifice, and solidarity.

Hitler's Germany is often mentioned as an example of the tyranny of the majority. But Hitler never had a majority. His regime is an example of rule by a brutal minority that was handed office by the President of

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Germany without majority support. It is generally recognised that the Weimar republic had a highly liberal-democratic constitution, with individual rights and a supreme court, but it was of little value against a faction that was allowed to monopolise power and suppress all dissent by exploiting hatreds, grievances and the desire to settle scores.

The Weimar constitution looked ultra-democratic, but the spirit of democracy was lacking. Both communists and fascists used violence in pursuit of supremacy. Open democratic debate, however, is solidarity building. It can encourage civic virtue by resolving disagreements without factionalism. Awareness that others are conscious of the need to avoid excess self-interest in turn encourages others to do the same. Democratic civilisation is not majority rule. The majority *can* enforce its view but it *should* not. It is not class rule, nor the cult of the individual, nor non-interventionism. It is government that seeks consent following a period of thoughtfulness and open discussion.

Grandly worded declarations of rights are of no use when thuggery takes over. If a government were bad enough to confiscate the property of all red-haired people, for example, it is not going to be stopped by a handful of judges. There must be a balance of powers, a strong and viable opposition, pluralism, and above all an ability to get rid of the government without violence. Many people must have assets sufficient to allow them to make a living and defy the government when necessary. Strong private organisations are vital, including commercial companies, voluntary institutions, families, localities, and churches.

The fundamental principle of the Glorious Revolution of 1688-89 was that dictators or 'the few' should not make

the laws. By permitting judges to become law makers we are reversing the constitutional settlement that has worked well since 1689, through numerous upheavals and further constitutional changes. Positive law is not always just. We may look to natural law or 'higher law' for guidance in making our decision, but we should not hand over the decision to 'the few' of any kind. In the words of philosopher Michael Ignatieff, human rights have become a kind of idolatry. A higher purpose is to seek consensus.<sup>69</sup> Democracy discourages 'morality as superiority' and promotes 'morality with modesty'. It discourages sanctimonious puritans and encourages people with self-sacrificing convictions.

To some writers seeking consensus seems weak. They prefer 'conviction politicians'. But English writers have never rejected the possibility of political resistance driven by moral conviction. Of course, they thought the law must be obeyed, and accepted that defiance might lead to punishment. But often reformers sought arrest and punishment to try to change an unjust law. That is the British way. Reformers may need to take their punishment and show bravery on the road to reform, by going outside the law in order to change it. Our political culture has never celebrated compromise at any price, but it was wary of convictions that were beyond persuasion and that inclined individuals to the use of force.

Today demands for human rights are often sectarian demands for preferential treatment or efforts by individuals to escape responsibility for their actions. They are about as far from civic virtue as can be imagined. Such law is a weapon against others; not a rule we can all live by, reflecting what we have in common. A well-balanced democratic system discourages sectarianism and encour-

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ages reciprocity; courtroom battles inflame sectarianism and destroy mutuality.

We British have always been keen on our rights, but until recently a right meant an entitlement to be protected against the abuse of power by the government or powerful private organisations or individuals. Today a right is less an entitlement to protection against the abuse of power (a protection we can all share with each other); rather it has become a claim against other people, an opportunity to gain financially or to secure preferential treatment at the expense of others. Rights as 'opportunities for private gain' instead of 'protections for all', have encouraged a compensation culture based on the exaggeration of grievances.

The vital point is that, if fundamental disagreements are turned into courtroom battles, the habits and temperament of democracy are weakened. As Morton and Knopff remarked after studying the effects of Canada's Charter of Rights and Freedoms:

To transfer the resolution of reasonable disagreements from legislatures to courts inflates rhetoric to unwarranted levels and replaces negotiated, majoritarian compromise politics with intensely held policy preferences of minorities. Rights-based judicial policymaking also grants the policy preferences of courtroom victors an aura of coercive force and permanence that they do not deserve. Issues that should be subject to the ongoing flux of government by discussion are presented as beyond legitimate debate, with the partisans claiming the right to permanent victory. As the moralist of rights displaces the morality of consent, the politics of coercion replaces the politics of persuasion. The result is to embitter politics and decrease the inclination of political opponents to treat each other as fellow citizens.<sup>70</sup>

## 4

# Solutions

What should be done to combat judicial supremacism? The most urgent task is to reform the Human Rights Act because it has caused the most serious departures from the elementary principles of a free, just and democratic society. But judicial supremacism was growing before the Human Rights Act and, therefore, further measures are necessary. It is my contention that responsibility for making decisions about fundamental principles should lie with the people themselves, through Parliament, not with the courts.

### *Scrap the Human Rights Act*

First, how should we reform human rights law? The 2015 Conservative manifesto promised to scrap the Human Rights Act and introduce a British bill of rights in order to 'make our own Supreme Court the ultimate arbiter of human rights matters in the UK'. However, a bill of rights is not necessary. We already have ample laws that protect our rights and they can be improved or added to by Parliament as required. A home-grown grand declaration would serve no useful purpose and, because of its inevitable vagueness, it would create new openings for judicial supremacism.

The simplest approach would be to annul the Human Rights Act. As signatories of the European Convention on Human Rights (ECHR), British citizens would still be able to take cases to the Strasbourg court, but Parliament should resolve that its rulings have no legal force until Parliament has deliberated and made a decision. Until

that point, the rulings of the Strasbourg court should be no more than ideas for consideration by Parliament and the people themselves.

In a Civitas pamphlet published in 2011 Dominic Raab MP argued that the Human Rights Act should be amended to ensure that adverse Strasbourg rulings against the UK were subject to a debate in the House of Commons leading to a free vote. This would go a long way but my approach is for Parliament to stipulate that every decision of the Strasbourg court should have no legal standing until Parliament has ruled one way or the other.

Some supporters of the Human Rights Act argued that it would 'bring home' jurisdiction but it has not had that effect. Many of our judges have been too willing to follow Strasbourg decisions, when there was no legal requirement to do so. Dominic Raab also advocates repeal of sections 3 and 6 of the Human rights Act, as does Michael Arnheim.<sup>1</sup> Under Section 3 of the Human Rights Act, legislation 'must be read and given effect in a way which is compatible with the Convention rights'. As Raab argues, section 3 effectively compels judges to re-write the law, changing its original meaning contrary to the wishes of Parliament. He quotes a former Parliamentary Counsel who concluded that the Human Rights Act 'instructs the courts to falsify the linguistic meaning of other Acts of Parliament, which hitherto has depended on legislative intention at the time of enactment'.<sup>2</sup> Raab calls for section 3 to be amended to make clear that forced judicial interpretation is not permissible where it would undermine the 'object and purpose' of the legislation as enacted by Parliament.

## SOLUTIONS

Raab also argues that Section 6 of the Human Rights Act should also be amended to prevent the courts striking down the decisions of public bodies in circumstances where it would serve to undermine the 'object and purpose' of the authorising legislation according to the will of Parliament at the time of enactment.

Section 6 says: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.' It does not apply if, under primary legislation, the authority could not have acted differently. The term 'public authority' is very broad and includes courts and tribunals, and 'any person certain of whose functions are functions of a public nature'. However, it does not include the two Houses of Parliament or 'a person exercising functions in connection with proceedings in Parliament'.

Amendment of sections 3 and 6 would remove the worst features of the Act, but it would be better to scrap the Act completely to eliminate all ambiguity. If the Act is annulled there would be no point in renouncing a valuable statement of basic rights, such as the ECHR. Parliament would have final control of interpretation and might well take the Convention into account during its debates. The European Convention on Human Rights should be treated like the Universal Declaration Of Human Rights – as a moral code that may be a useful guide to political decision making by the people and Parliament. Disagreements with other countries should be handled by diplomacy as intended.<sup>3</sup>

There is a duty to abide by final judgments of the Strasbourg Court under Article 46 of the ECHR. However, Raab points out that the architects of the ECHR built in a safeguard against the abuse of judicial power, namely that the Strasbourg court has no mechanism for

enforcing its own rulings directly. In the event of non-compliance, the Committee of Ministers, the decision-making body of the Council of Europe, reviews the case and seeks information from the relevant government. In particular, there is no power directly to enforce compensation awards made by the Strasbourg Court, either directly or through the UK courts. This reality was recognised by the High Court and Ministry of Justice legal advice in February 2011.<sup>4</sup> We should welcome discussion at the Committee of Ministers, but on occasion we should respectfully disagree with fellow signatories, as other member states do from time to time.

*A judicial oath of loyalty to parliamentary sovereignty*

The Human Rights Act is not the only cause of judicial supremacism. Judges should be required to swear an oath of loyalty to parliamentary sovereignty.

When judges are sworn in they currently swear by almighty God to 'do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will'. It would be a very simple matter to add a clause: 'and to uphold the sovereignty of Parliament'. The effect would be that judges who invent new laws without public or parliamentary approval will be in breach of their oath and liable to removal from office.

Under existing law, judges can be dismissed if the House of Commons and the House of Lords petition the Queen. Provision was first made under the Act of Settlement of 1701. Until then judges held office 'during good behaviour' and could be removed by the King at will. To ensure their independence from the monarch, Parliament stipulated that judges could only be removed

if both Houses of Parliament agreed. Current law states: 'Her Majesty may on an address presented to Her Majesty by both Houses of Parliament remove a person from office as Lord Chief Justice, a Lord Justice of Appeal or a judge of the High Court.' The same provision was made for Supreme Court judges by section 33 of the 2005 Constitutional Reform Act: 'A judge of the Supreme Court holds that office during good behaviour, but may be removed from it on the address of both Houses of Parliament.' The power has never been used against senior judges in England and Wales. The mere threat has been enough, although an Irish judge was removed for corruption in 1830.

### *Abolish contingency fees and conditional fee agreements*

We should cancel contingency fees based on lawyers taking a share of the civil damages, including the new damages-based agreements (DBAs). Conditional fee agreements (CFAs) – often called no-win-no-fee agreements – should also be cancelled to reduce the number of cases that are primarily driven by the desire of lawyers for financial gain.

Conditional fee agreements were made legal by the Courts and Legal Services Act 1990 and implemented from 1995. Lawyers who won a case were allowed to increase their fees by a percentage of their normal fees, but initially such 'success fees' could not be recovered from the losing side. However, from April 2000 the practice was permitted.<sup>5</sup>

For most of our history conditional fees were illegal under common law and the strongest opponents were the lawyers themselves. Now that we have had CFAs for some years we can see that the fears of earlier generations

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were understandable and that the laws against 'maintenance' and 'champerty' were justified. Maintenance was the name for funding or supporting litigation by another person and champerty was taking a share in the spoils of victory. These laws still have some legal force but have been progressively weakened since 1967.

Both maintenance and champerty gave rise to criminal and civil (tortious) liability. Blackstone listed them as among the offences against public justice.<sup>6</sup> He described maintenance as:

an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it ... This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression.

It was illegal to support another's lawsuit, with 'money, witnesses, or patronage', but a person could 'maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity.'<sup>7</sup>

Champerty was a kind of maintenance:

being a bargain with a plaintiff or defendant ... to divide the land or other matter sued for between them, if they prevail at law. ... In our sense of the word it signifies the purchasing of a suit or right of suing; a practice so much abhorred by our law, that it is one main reason why a *chose* in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right.

He adds that these 'pests of civil society, that are perpetually endeavouring to disturb the repose of their neighbours, and officiously interfering in other men's

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quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law.<sup>8</sup>

In 1993, Lord Mustill accepted much the same reasoning when giving judgment in the House of Lords:

My Lords, the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims, which the defendant lacked the resources and influence to withstand.<sup>9</sup>

This was long after the 1967 Criminal Law Act abolished criminal and civil liability for maintenance and champerty, following a Law Commission report in 1966. The Act, however, left room for champerty and maintenance to be enforced as a matter of public policy. It included a provision that abolishing liability did not 'affect any rule of law as to cases in which a contract is to be treated as contrary to public policy or otherwise illegal'.<sup>10</sup> As a result, the Bar and the Law Society continued to prohibit contingency fee arrangements and the courts continued to regard them as unlawful. The view of the courts was stated clearly by Lord Denning in 1975:

English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a 'contingency fee', that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty.<sup>11</sup>

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In another case in 1980 he expressed strong disapproval of lawyers who charged a fee payable only if the case was won:

[Champerty] exists when the maintainer seeks to make a profit out of another man's action, by taking the proceeds of it, or part of them, for himself. Modern public policy condemns champerty in a lawyer whenever he seeks to recover not only his proper costs but also a portion of the damages for himself, or when he conducts a case on the basis that he is to be paid if he wins but not if he loses.<sup>12</sup>

Denning reflected prevailing legal opinion at the time and in 1979 the Royal Commission on Legal Services had unanimously rejected contingency fees because it feared they would have a corrupting influence on lawyers:

The fact that the lawyer has a direct personal interest in the outcome of the case may lead to undesirable practices including the construction of evidence, the improper coaching of witnesses, the use of professionally partisan expert witnesses, especially medical witnesses, improper examination and cross-examination, groundless legal arguments, designed to lead the courts into error and competitive touting.<sup>13</sup>

The Thatcher Government proposed to introduce CFAs in 1989 but the Bar strongly opposed their plans. However, a limited scheme was introduced for solicitors in 1995 when a success fee of up to 25 per cent of normal fees was permitted. Soon afterwards 'after-the-fact insurance' began to develop covering the fees of the rival solicitor and the disbursements of both solicitors. (The fees of the client's solicitor were covered by the CFA.) Sometimes the client paid the premium, sometimes the lawyer paid and, in some cases, nothing was payable until the case was concluded.<sup>14</sup>

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In 1998 Lord Irvine proposed to change the rules so that the winner could recover his insurance premium and his success fee from the loser. The Legal Aid Board warned that his reforms would lead to 'lawyer-driven litigation' but the 1999 Access to Justice Act extended CFAs to all civil cases except those involving the welfare of children. The Act (with effect from 2000) also allowed insurance premiums and success fees to be recovered from the losing side. Criminal work was still excluded.<sup>15</sup> Indeed lawyers and judges who work in the criminal courts remain untainted by these changes in civil law.

The final report of the Jackson review of civil litigation costs came out in 2010 and led to further changes. The report examined third-party funding (mainly by insurers), including after-the-event insurance policies. The sector was unregulated and its position was somewhat ambiguous under the laws of champerty and maintenance. Lord Justice Jackson recommended that it should be permitted so long as it was regulated by a code of conduct. Third-party funders that complied with the code would not be guilty of champerty or maintenance.<sup>16</sup> A code was introduced in 2011.

Later regulations gave further stimulus to damages-based (contingency) fees. Under the 2013 Damages-Based Agreements Regulations, a cap was placed on the proportion of damages that could be taken as a success fee: 25 per cent for personal injury cases, 35 per cent for tribunal cases, and 50 per cent for others. However, successful parties could no longer recover success fees from the losing party or recover the premium paid for after-the-event insurance. Moreover, both sides in a dispute were obliged to provide detailed budgets to the

court and to stick to them. Any higher costs had to be sanctioned in advance by the court.

The Law Society, representing solicitors, opposed contingency fees for many years, and as late as 1998 it supported CFAs but not contingency fees. However, by the time of the Jackson review opinions were shifting. Solicitors had become accustomed to contingency fees in tribunal cases because they were classified as 'non-contentious'. Jackson remarked that this classification was 'an oddity, to say the least' because the procedure in employment tribunals was just like adversarial litigation.<sup>17</sup> Because they had experience of making money from tribunals, and no doubt tempted by the rich rewards earned by American lawyers, solicitors changed their view. Evidence of the corrupting effect on justice in America was played down and 'access to justice' was played up as an excuse for increasing money-making opportunities.

The longstanding fears of judges who had enforced the laws of champerty and maintenance were disregarded. The smokescreen of increasing 'access to justice' for the least well-off members of society has proved to be a very effective device for opening up vast new opportunities for money making by exploiting private disputes. For many years to be free was to be able to go about your life, without ever having to speak to a lawyer or go near a court from one year to the next. If you obeyed the law, costly encounters with lawyers and courts could easily be avoided. It is now widely accepted that these relaxations of the law have permitted a vast increase in lawyer-driven litigation.

When the preliminary report of his review came out in 2009 Lord Justice Jackson conceded that liability insurers

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complained that costs paid to lawyers were disproportionate to the damages paid to claimants; that defamation proceedings had become excessive; that costs were increased by the procrastination of liability insurers; and that there had been an 'explosion' of litigation about costs themselves. In 2008 the Lord Chancellor had said that the behaviour of some lawyers in 'ramping up their fees' was 'nothing short of scandalous'.<sup>18</sup> Moreover, the cost of personal injury claims to the NHS had weakened its ability to provide comprehensive care and numerous perverse human rights cases had undermined respect for the law.

In a speech in 2014 reviewing progress since his report was published Lord Justice Jackson went so far as to say that:

Between April 2000 and April 2013 the CFA regime was an instrument of injustice and, on occasions, oppression. It meant that one party litigated at massive costs risk, while [the] other party proceeded at no or minimal costs risk. None of those objectionable features are present in hybrid DBAs [damages-based agreements].<sup>19</sup>

He thought that the DBAs introduced in 2013 would bring an end to the injustices he described and was annoyed that they had not been more widely used. He thought pressure from large companies, who were the ones most likely to be sued, was to blame:

I suspect that the real opposition to hybrid DBAs comes from those who oppose DBAs in principle. Many large organisations who are on the receiving end of claims find the notion of DBAs abhorrent. ... Understandably, a regime which prevents people bringing meritorious claims suits their interests. A set of DBA Regulations which no-one uses is admirable from that viewpoint.'

He referred to the evidence given to him by the general counsel representing FTSE 100 companies. His Preliminary Report of 2009 summed up their fears. Their overriding concern was to avoid the introduction of 'US style' litigation in the UK, such as no cost shifting, contingency fees, class actions, vast discovery, huge irrecoverable costs for defendants, and the majority of settlement proceeds going to lawyers. The counsel viewed 'with abhorrence' a regime in which litigation was conducted as a speculative business by lawyers who enrolled plaintiffs through advertising campaigns.<sup>20</sup>

By 2014, he had little sympathy for their fears. Many voices, however, have noted that since 1995 reform has promoted lawyer-driven litigation. It also increases the power of pressure groups anxious to assert their interests without regard to the common good. They have the money to support lengthy legal disputes.

He continues to believe, however, that the system can be reformed by tinkering with cost controls. In a speech in January 2016 Lord Justice Jackson argued that the ending, in April 2013, of the regime of recoverable no-win-no-fee success fees and after-the-event insurance premiums had cut one layer of excessive cost. Previously they had been 'a massive driver of high costs and inefficiency'. From that date, courts only allowed 'proportionate costs'. Nevertheless, he thought that more needed to be done, and advocated the imposition of fixed costs for claims up to £250,000.<sup>21</sup>

Now is the time to restore the integrity of the legal profession by complete abolition of both CFAs (no win no fee agreements) and contingency fees (damages-based fees). There are still many members of the legal profession

who disapprove of recent trends and want to return their sector to its true vocational roots.

*Government as a trust*

This is not the place to discuss the full measures necessary to make a reality of Locke's ideal of government as a trust, but it would be a significant step forward if the powers of Parliament compared with the executive were strengthened. One straightforward way of doing so would be to increase the powers of parliamentary committees. The Public Accounts Committee provides a better model than the select committees. It is served by the Comptroller and Auditor General, who is an officer of the House of Commons, not a civil servant. He leads about 800 staff in the National Audit Office (NAO), who are independent of the Government and serve Parliament as a whole. The Comptroller does not report to a minister but to the Public Accounts Committee of the House of Commons. To further secure their independence, the Comptroller and the NAO are funded by Parliament in a separate supply estimate, not included in the proposals for departments that are put forward by the Treasury.

If select committees were reconstituted on these lines, with staff serving Parliament as a whole, it would be more worthwhile for people of ability to enter Parliament in order to be a legislator and to hold the government to account, rather than with the ambition of getting into the government. Active involvement in committees is already providing many MPs with a worthwhile alternative to serving in the Government and, if the independence of committees were increased, it would strengthen the trend. In their turn, strengthened committees would provide a focal point for public contributions to policy debate.

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Deeper public involvement would serve to remind the authorities where power ultimately lies.

As it stands Parliament does not consistently exercise a strong enough check on the Government. Rather than allow the courts to usurp its role still further, Parliament should organise itself more effectively by strengthening the investigative powers of its committees.

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CIVITAS Institute for the Study of Civil Society

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How should our laws be made and where does final power lie? This question has grown increasingly salient in recent years as the judiciary has pitted itself against Parliament in a series of harmful and absurd rulings.

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