

**LOSING FAITH IN DEMOCRACY: WHY JUDICIAL SUPREMACY IS
RISING AND WHAT TO DO ABOUT IT**

LAUNCH OF POLICY EXCHANGE JUDICIAL POWER PROJECT

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1. INTRODUCTION

I am honoured to have been invited to launch this important Policy Exchange Project on judicial power, especially in such distinguished company. For a considerable time, judicial power has been expanding at the expense of legislative and executive powers, and promises to continue to do so. But if it is to continue – and there are powerful reasons why it should not – it should be brought about not just by changes in the thinking of legal elites such as academics and judges, but with the understanding and assent of the public, or at least of those elected to represent the public. Furthermore, they must possess the knowledge needed to decide whether to assent or to oppose the change. This Project is intended to provide that knowledge.

I begin with two disclaimers. First, I do not intend to focus on particular recent decisions of courts either here or in Strasbourg that have caused political controversies. As an Australian lawyer with a somewhat patchy knowledge of the relevant case-law, that would be unwise. Instead, my task is to describe recent developments, and to promote a better understanding of them by providing a broader philosophical and comparative context.

Second, while I will sometimes speak critically of judges expanding their own powers, I do not intend to impugn their motives. I hold the judiciary in this country in the highest regard. Decisions that have expanded judicial power have always been motivated by the laudable goal of promoting justice or the rule of

law, and often with success. It should be acknowledged that the philosophical and political issues I will discuss are difficult ones, about which well informed and reasonable minds can and do disagree. On the other hand, it is this very fact – the existence of reasonable disagreement – that underpins the case for substantial constitutional change being brought about only through democratic reforms, and not by unilateral judicial innovation.

2. PARLIAMENT’S TRADITIONAL ROLE

The British constitution – which is uncodified and fundamentally customary – rests on the principle of parliamentary sovereignty. After sometimes violent political conflicts, and for many reasons, by the end of the 17th century Parliament had come to be entrusted with ultimate responsibility for safeguarding the welfare of the community, including the rights and freedoms of the people. For centuries it was commonly said that only in Parliament could all the diverse and conflicting opinions and interests within the community be properly heard and brought to bear upon public decision-making. It was often said, starting in the early 13th century, that Parliament represents and speaks for “the community of the kingdom” - “the body of all the realm”.¹ It was described in the 16th century as “the mouth of all England”.² This long-standing rationale for Parliament’s sovereignty pre-dated, but was fortified by, the establishment of democracy in the modern sense in the 19th and early 20th centuries. It was also frequently said to follow that Parliament embodied the combined wisdom of the community, which was necessarily superior to that of any other human authority. Parliament was the principal guardian of the liberties of the

¹ J Goldsworthy, *The Sovereignty of Parliament, History and Philosophy* (Clarendon Press, 1999), 30, quoting The Statute of York (1322) and Chief Justice Thorpe (1365).

² Peter Wentworth, quoted in *ibid*, 68.

community - the “storehouse of our liberties” and “the bulwark” between rights and “all designs of oppression”.³

In a recent paper Dinah Rose QC claims that Sir William Blackstone “clearly spelt out” the concept of “absolute”, “fundamental common law rights” of which the courts were “the supreme arbiters”.⁴ With respect, I believe that this is a misreading. The “absolute rights” that Blackstone discussed were rights given “by the immutable laws of nature”,⁵ although he added that they were “coeval with our form of government”, in which Parliament was sovereign. As he said, “[t]o preserve these [rights] from violation, it is necessary that the constitution of parliament be supported in its full vigour”.⁶ He listed many petitions, statutes and declarations in which Parliament had reasserted the rights of Englishmen when they had been threatened.⁷ It is true that he regarded these rights as embodied in “the ancient doctrine of the common law”,⁸ which the courts played a crucial role in enforcing, but his understanding of the common law as immemorial custom was quite different from our modern notion of judge-made law.⁹ He also acknowledged Parliament’s supreme power to declare what the common law was, and to reform the law to accommodate changes in circumstances or to correct “the mistakes . . . of unlearned judges”.¹⁰ Parliament was, after all, regarded for centuries as the highest court in the kingdom from which no appeal was possible.¹¹

³ Ibid, 106, quoting James Whitelocke and Bulstrode Whitelocke respectively.

⁴ D Rose QC, “What’s the Point of the Human Rights Act? The Common Law, the Convention, and the English Constitution” (Politeia, 2015), 3-5.

⁵ G Jones (ed), *The Sovereignty of the Law, Selections from Blackstone’s Commentaries on the Laws of England* (University of Toronto, 1973), 58.

⁶ Ibid, 63.

⁷ Ibid, 61.

⁸ Ibid, 62.

⁹ Ibid, 33, 48-50.

¹⁰ Ibid, 54.

¹¹ See Goldsworthy, *The Sovereignty of Parliament*, above n 1, Index, 318 (under “Parliament, as highest court”).

3. THE GLOBAL EXPANSION OF JUDICIAL REVIEW OF LEGISLATIVE AND EXECUTIVE ACTS

The principle of legislative supremacy was not unique to Britain. Until after the Second World War, judicial enforcement of written constitutions was relatively unknown in most of the world. But we now live in a very different world in which, to quote an eminent constitutional comparativist, “From France to South Africa to Israel, parliamentary sovereignty has faded away.”¹² In 1939 only a handful of countries had judicial review under a written constitution; in 1951, 38% had adopted it; by 2011 that number had grown to 83%.¹³ This extraordinary transformation of methods of governance around the globe is now being studied by constitutional comparativists and political scientists. It is the subject of books with titles such as “The Global Expansion of Judicial Power”,¹⁴ “The Judicialization of Politics”,¹⁵ and “Towards Juristocracy”.¹⁶

This phenomenon is often called the “rights revolution”.¹⁷ As one leading scholar puts it: “In today’s world, the ideology of rights has, arguably, achieved the status of a civic religion.”¹⁸ The ancient idea that the legitimacy of government depends on conformity to a “higher law” remains, but for those who no longer believe in the law of nature or of God, this higher law is the law

¹² T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003), 3.

¹³ T Ginsburg and M Versteeg, “Why Do Countries Adopt Constitutional Review?” (2014) 30 *Journal of Law, Economics, and Organization* 587, 587.

¹⁴ C Neal Tate and T Vallinder (eds), *The Global Expansion of Judicial Power* (NYU Press, 1995).

¹⁵ R Sheehan et al, *Judicialization of Politics: the interplay of Institutional Politics, Legal Doctrine and Politics on the High Court of Australia* (Carolina University Press, 2012); M Shapiro and A Stone Sweet, *On Law, Politics and Judicialization* (Oxford UP, 2002); B Dressel, *The Judicialization of Politics in Asia* (Routledge, 2012);

¹⁶ Ran Hirschl, *Towards Juristocracy; The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).

¹⁷ Charles Epp, *The Rights Revolution; Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998).

¹⁸ A Stone Sweet, “Constitutional Courts”, in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 816, 829.

of human rights. Moreover, we are witnessing a global conversation about rights among judges of apex courts, who increasingly meet at conferences, share ideas, and cite and sometimes follow one another's judgments. Some scholars envisage the eventual emergence of a homogenised global constitutional law. It is also suggested that this is being propelled by a constant "ratcheting up" process, in which courts outdo one another in discovering new rights and expanding existing ones.¹⁹ The decision of the United Kingdom Supreme Court in the recent case of *R (Nicklinson) v Secretary of State*,²⁰ on assisted suicide, may be a first step in that direction. The Court held that it has the power to adopt a more expansive interpretation of a protected right than that adopted by the European Court in Strasbourg.

One common method of "upping the ante" in rights protection is to adopt a theory of interpretation commonly called "living constitutionalism". The most extreme version of this theory holds that judges are not limited to the original meaning of a constitutional or rights provision, but can give it a new, more expansive meaning that they believe is more consistent with evolving social values. In this way the judges, in effect, amend the provision to keep it "up to date", although the only authority they have to do so is a self-conferred one. Lord Sumption recently criticised the European Court of Human Rights for following this approach.²¹

These developments amount to a constitutional experiment on a global scale. They raise the danger of democratic decision-making being subject to override

¹⁹ See, e.g., M de S-O-l'E Lasser, "The Judicial Dynamics of the French and European Fundamental Rights Revolution", in D Kapiszewski, G Silverstein and R A Kagan (eds), *Consequential Courts; Judicial Roles in Comparative Perspective* (Cambridge University Press, 2013), 289.

²⁰ [2014] UKSC 38, [2014] 3 WLR 200.

²¹ Lord Sumption, "The Limits of Law" (The 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013), 7-11.

not only by local judges, but by reference to a global judicial consensus about rights.

4. THE EXPANSION OF JUDICIAL POWER IN THE UNITED KINGDOM

Judicial power, including power to protect rights, has expanded massively in British law, as a result of both judicial creativity and legislative reform.

Since the 1960s, the judiciary has continuously expanded the availability and grounds of judicial review of administrative acts. A distinction was traditionally drawn between enforcing the legal boundaries within which the administration exercises discretionary powers, and interfering with the merits of the administration's decisions inside those boundaries. The role of the judiciary was to hold firm the legal boundaries, but not to intrude into the merits of a decision: the executive was responsible only to Parliament and the electorate for decisions that were lawful but arguably unfair or unwise. However, judges were able to shift the legal boundaries within which decisions could be made, and they did so regularly and usually so as to expand their own powers of review. Eventually, the orthodox theory that they were merely enforcing legal limits imposed (expressly or impliedly) by statute came to be seen as implausible, and was replaced by the theory that they were in fact enforcing limits imposed by the common law – or, in other words, by the judges themselves, since they make the common law.²²

A very limited form of merits review was allowed on the ground that an administrative decision was so unreasonable that no reasonable person could possibly have made it. Increased judicial concern about human rights led to the relaxation of this standard: it eventually came to be accepted that if a decision

²² See the essays collected in C Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, 2000), and for a defence of the common law theory, especially the contributions of Paul Craig.

impacted on a right, it should be given more “anxious scrutiny”, whereby a less extreme degree of unreasonableness would justify overturning the decision. By this and other means judicial interference with administrative decision-making continued to expand, well beyond what is permissible in Australia, where review of the merits of administrative decisions is still regarded as contrary to the separation of judicial and executive powers.

Judicial review was further expanded in the United Kingdom by the enactment in 1998 of the Human Rights Act (“HRA”), which requires all public bodies to act consistently with protected rights and authorises the courts to invalidate decisions that they believe are not consistent. Judicial review on this ground seems clearly to concern the merits of a decision.²³ Thomas Poole of the London School of Economics is of the opinion that the HRA may be “the catalyst for . . . a reformation of English administrative law”, which “could mean that courts in effect remake – and do so quite openly – agency decisions.”²⁴ Whether or not this occurs will depend on the outcome of a debate as to whether or not the judges should sometimes choose to “defer” to administrative decision-makers, and if so on what grounds. Some legal academics are resolutely opposed to that possibility when human rights are at stake.²⁵

There is much to admire in modern administrative law, although the continuing expansion of judicial review may now be going too far. As Professor Timothy Endicott at the University of Oxford concludes, the expansion of judicial review of administrative action has improved the fairness and openness of

²³ See further the paragraphs preceding n 37 below.

²⁴ T Poole, “Between the Devil and the Deep Blue Sea; Administrative Law in an Age of Rights”, in L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 34, 36. But cf the rejoinder by J Varuhas, “The Reformation of English Administrative Law? “Rights”, Rhetoric and Reality” (2013) *Cambridge Law Journal* 369.

²⁵ See, e.g., T R S. Allan, *The Sovereignty of Law; Freedom, Constitution, and Common Law* (Oxford University Press, 2013), 268-78.

administrative decision-making, and emboldened the judges to stand up to abuses of power. But on the other hand, it has generated a “massively expensive litigation industry” and “occasionally” inspired “a form of judicial imperialism as the judges succumb to the temptation constantly offered to them . . . to replace administrative decisions with decisions that [they] think would have been better.”²⁶

The HRA also greatly expanded judicial power over Parliament’s statutes, by requiring that the courts interpret statutes as far as possible so as to be consistent with protected rights, and to issue a declaration of incompatibility if this is impossible. The courts adopted a very expansive view of their power of interpretation, holding that they may in effect add words to or subtract them from a provision, or otherwise change their meanings, to make the provision consistent with protected rights, even if the result is inconsistent with the meaning Parliament intended. In Australia, the High Court has expressly rejected this British approach on the ground that it would violate the separation of powers by authorising judges (within limits) to amend statutes.²⁷ In Britain the courts can, with some plausibility, argue that Parliament intended the HRA to confer such a power upon them.²⁸ It follows that those opposed to this power should not hold the judges to be solely, or even mainly, to blame. If Parliament did intend to confer such a wide power on them, they have merely done their duty. If it did not intend to do so, it should have made its intentions much clearer.

The power to issue declarations of incompatibility is also a cause for concern. It was plainly intended to preserve parliamentary sovereignty by giving Parliament the final word as to whether or not a statute should be amended or

²⁶ T Endicott, *Administrative Law* (Oxford University Press, 2nd ed, 2011), 60.

²⁷ *Momcilovic v The Queen* (2011) 245 CLR 1 .

²⁸ Lord Neuberger, “The Role Of Judges in Human Rights Jurisprudence: a Comparison of the Australian and UK experience” (Speech at Supreme Court of Victoria Conference, 8 August 2014), 6.

repealed in response to such a declaration. The courts were to enter into a helpful “dialogue” with Parliament by providing it with a dispassionate analysis of compatibility, without being able to impose their opinions by force of law. On this view, Parliament should feel free to disagree with the courts, after carefully and conscientiously reconsidering the matter. Yet I understand that so far, on only one occasion has a declaration not been followed by remedial legislation. This has inspired the claim that judicial review under the HRA is almost equivalent to strong constitutional review in countries with entrenched constitutions, because in practice, British courts exercise much the same sway over legislation they regard as incompatible with rights.²⁹ If this is so, and if it is problematic, then once again this is the fault of the politicians rather than the judges.

The other major concern about the expansion of judicial power concerns the European Court of Human Rights in Strasbourg. Here, too, if blame is to be laid, it is mainly at the feet of the British government that ratified the treaty conferring power on that Court – no doubt thinking that it would be directed at other less enlightened countries and not its own - although the Court itself is widely regarded as having consistently adopted an overly creative and self-aggrandising interpretation of its own powers. Neither the treaty nor the decisions of the European Court under it form part of British law: they are binding and enforceable only as a matter of international law, although the incentives to comply are very powerful. The HRA, which incorporates the rights protected by the treaty into British law, requires British judges to take decisions of the European Court into consideration. It does not expressly require them to follow those decisions, although there is lively debate regarding the extent to which they should feel free to take a different view.

²⁹ A Kavanagh, “What’s so Weak about ‘Weak-Form Review’? The Case of the UK Human Rights Act 1998”, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548530>.

5. REASONS FOR THE GLOBAL EXPANSION OF JUDICIAL POWER

For many people these developments, here and globally, are merely the next inevitable advance in the progressive evolution of constitutionalism – a term referring to the subjection of governmental power at the highest level to the rule of law. On their view, just as democracy came to be widely adopted because it was an indisputable improvement on autocracy, so too has the judicial enforcement of constitutional rights spread because it is innately superior to unchecked majoritarian democracy, which is thought to endanger the rights of unpopular and vulnerable minorities.

As an empirical hypothesis, this idealistic explanation of the rights revolution is highly questionable. Social scientists who have examined the global expansion of judicial power have come to a less flattering conclusion: the development has been driven much more by domestic electoral competition than by genuine idealism, when political elites whose influence is waning vest power in independent courts hoping to load the dice in favour of their policies over those of their political rivals.³⁰

Be that as it may, I believe that in most western democracies the impetus towards the adoption of bills of rights has been motivated largely by a genuine commitment to protecting individual rights from violations resulting from thoughtlessness, or pandering to popular prejudice or hysteria. Respect for politicians and the business of politics seems to have declined. As a South African lawyer once said, “the moral authority of the judiciary is expanding into the space vacated by the contraction of the moral authority of the executive and the legislature.”³¹ The global rights revolution has had an enormous influence on lawyers in particular.

³⁰ T Ginsburg and M Versteeg, “Why Do Countries Adopt Constitutional Review?” (2014) 30 *Journal of Law, Economics, and Organization* 587.

³¹ E Mureinik, “Administrative Law in South Africa” (1986) *South African Law Journal* 615, 616.

The democratic process is alleged to suffer from a variety of defects:

- Westminster Parliaments are widely regarded (rightly or wrongly) as too subservient to the executive governments that dominate their lower houses. Lord Hailsham’s famous description of “elective dictatorship” is still often quoted.³²
- There are said to be “agency problems”: failures of elected representatives to faithfully represent the interests of their constituents. They are sometimes suspected of being unduly influenced by powerful interest groups, lobbying behind the scenes after purchasing privileged access to Ministers.
- In Britain, the democratic credentials of governments and Parliament are questioned. Vernon Bogdanor argues that “the first past the post system no longer yields majority rule either at national nor at constituency level.”³³ This is because no single-party elected government is likely to represent more than 35% of the voters, while the formation of a multi-party government is based not on a direct expression of majority preference, but on post-election wheeling and dealing.³⁴
- Conversely, politicians are sometimes criticised for being too subservient to public opinion. They are sometimes regarded as self-serving careerists and populists who put winning and retaining power before respect for human rights. In Australia, for example, very harsh treatment of asylum seekers who arrive, unauthorised, by boat – a paradigm case of a vulnerable and unpopular minority – is widely condemned for being driven mainly by a desire to pander to popular hysteria.

³² See, e.g., T Bingham, *The Rule of Law* (Penguin, 2010), 26, 169.

³³ V Bogdanor, *The Crisis of the Constitution; The General Election and the Future of the United Kingdom* (The Constitution Society, 2015), 35.

³⁴ *Ibid*, 29-31.

My impression is that in countries such as Britain, Canada, Australia, and New Zealand, a substantial proportion of the tertiary educated, professional class has lost faith in the ability of their fellow citizens to form opinions about public policy in a sufficiently intelligent, well-informed, dispassionate and carefully reasoned manner. They may be attracted to the judicial enforcement of rights partly because it shifts power to people (judges) who are representative members of their own class, and whose educational attainments, intelligence, habits of thought, and professional ethos are thought more likely to produce enlightened decisions.

The obvious rejoinder is that the attraction of judicially enforceable rights is due much more to the procedures that judges follow than to the personal qualities of the judges. These procedures are said to promote more thorough, impartial and carefully reasoned enquiries into the actual effects of laws on the flesh-and-blood individuals who come before the courts.

Of course there is something to this rejoinder, but I do not find it completely convincing. Courts do focus on the predicaments of the individual parties appearing before them, but for that very reason, they are less well equipped to take into account relevant interests of other people or groups who may be affected by the laws in question. Also, if the main problem is deficiencies in the deliberative procedures of elected legislatures, the most obvious remedy is to improve those procedures to promote more careful and well-informed decision-making. Judicial enforcement of rights would then become a fall-back position, to be resorted to only if such reforms are unsuccessful.

6. THE IMPACT OF JUDICIAL RIGHTS REVIEW ON DEMOCRACY

Judicial review of constitutionality may be highly desirable, or even essential, to preserve democracy, the rule of law, and human rights in many countries, in

which corruption, populism, authoritarianism, or bitter religious, ethnic, or class conflicts are rife. But in mature, stable and tolerant democracies, it is not so obviously desirable. The main argument against it is based on the following premises.

First, any enumeration of rights must be couched in terms of abstract rights to free speech, due process of law, equality before the law, and so on. Secondly, no abstractly stated right can be absolute. Even the most fundamental right of all – the right to life – can be over-ridden, as in self-defence. The abstract right to free speech is subject to many exceptions, to protect reputation, privacy, confidentiality, national security and so on. Thirdly, it is impossible to decide in advance how, in particular cases, abstractly stated rights should be weighed against competing rights and interests. It follows that the power of judges to interpret and enforce these rights is the power to decide a vast number of controversial questions of public policy, and in a system of strong judicial review, to substitute their decisions for those reached by lawmakers elected to represent the public. These questions include virtually all serious moral and political issues likely to arise in societies such as ours.

When a community must decide important questions – including questions of principle involving rights – but its members are in disagreement, the fairest way of settling the disagreement is for unfettered debate in which every person's opinion can, in principle, have an equal influence on the final decision - which must therefore be by majority vote. (And note that judges decide disagreements among themselves in the same way.) One of the most fundamental of all rights is therefore the right of ordinary people to participate, on equal terms, in the political decision-making that affects their lives as much as anyone else's. This

right was hard won, through centuries of political struggle, and should not readily be surrendered.³⁵

As Jeremy Waldron has argued, the large size of legislatures enables all significant interests and opinions within the community to contribute to debate, ensuring that none are overlooked. All participants are treated with equal respect, rather than ignored or shouted down for being ignorant, prejudiced, or dishonest.³⁶ Decision-making by majority vote is the only way of giving each individual's view the greatest possible weight compatible with an equal weight being given to the views of everyone else.

Politicians, like the people they represent, are imperfect. They sometimes do the wrong thing, including the occasional enactment of unjust laws. But just as the considered choice of a majority may be wrong, so too may the opinions of a minority. And in the absence of any independent, objective method of determining who is right, it is better that the majority should prevail. At this point, an advocate of judicial supremacy might say: but judges do now have an independent, objective method of determining who is right – the method of proportionality analysis developed by rights-enforcing courts throughout the world.

To those who are unfamiliar with the term, proportionality analysis (ignoring different variants) involves: first, identifying both the right claimed to be infringed by some legislative or executive act, and the objective of that act (fostering some competing interest or right); and then determining whether or not the objective is legitimate, infringing the right was necessary to achieve it, and the benefits of doing so outweigh the losses.

³⁵ This paragraph owes much to the writings of Jeremy Waldron, especially *Law and Disagreement* (Clarendon Press, 1999).

³⁶ Ibid, 111-12.

This is typically how courts now decide disputes about rights. The problem is that rather than being an objective mode of analysis peculiar to dispassionate legal reasoning, at best proportionality analysis just formalises how any thoughtful person, including a politician, might think about such issues. Political judgment is all about trade-offs: whether some controversial measure adversely affecting one group of people is justified by the benefits it provides to other groups or the public as a whole. Balancing benefits and costs and deciding whether the benefits make the costs worthwhile is the very stuff of politics. Adding impacts on individual rights to either side of the scales does not change the subjective, value-laden nature of the choice that must be made.³⁷

Democratic participation is also thought to have beneficial consequences. Since prejudice and intolerance tend to diminish when people engage in genuine dialogue with one another, democracy is thought to promote mutual respect, moderation, and compromise. Moreover, legislators must build coalitions to be effective: all majorities are groupings of minorities that have joined forces in a political party, a coalition, or a temporary alliance. Political power is impermanent, and opponents defeated today might turn the tables tomorrow. The impetus towards moderation is propelled partly by the need to build the necessary coalitions, and the fear of backlash should adversaries defeated today gain the upper hand tomorrow.

“Democratic debilitation” is a label used for ways that rights litigation may damage the health of representative democracy.³⁸ Some fear that legislators might devote less attention to the compatibility of proposed legislation with protected rights, if it is likely to be litigated in the courts. They might become reckless as to compatibility or, worse still, “pass the buck” to the courts, and

³⁷ F J Urbina, “A Critique of Proportionality” (2012) 57 *American Journal of Jurisprudence* 49; see also T Poole, above n 24, 36.

³⁸ M Tushnet, “Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter-Majoritarian Difficulty” (1995) 94 *Michigan Law Review* 245.

shirk responsibility for unpopular decisions. Frequent resort to litigation to advance rights claims might also divert vital funds and energies from grass-roots political mobilisation. In addition, if political debate is subsumed by legal debate, couched in legalistic jargon and formulae, the general public (including legislators) may feel excluded and become politically enervated and apathetic.³⁹

On the other hand, active participants in political disputes who are defeated in the courtroom may become embittered or enraged. Two Canadian scholars have argued that:

Rights-based judicial policymaking . . . [leads to] issues that should be subject to . . . ongoing . . . discussion [being] presented as beyond legitimate debate, with the [winners] claiming the right to permanent victory. As the moralism 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 . . .⁴⁰

Genuine and lasting respect for one another's rights cannot be imposed by judicial fiat; it can only emerge from the dialogue and compromise that characterise politics in a democracy.

It might be argued that some groups will never be adequately represented in politics because they lack the necessary numbers, resources or organisational ability. Indigenous peoples, the aged, the poor, the chronically ill, and some migrant groups are of concern. Judicial review has been defended as a way of redressing their inability to get a "fair go" in the political arena, by providing them with an alternative forum in which decisions are made that cannot be ignored. But these groups are typically not significantly assisted by judicial

³⁹ On the unfortunate effects of confining political debate to a procrustean bed of constitutional formulae, see J Waldron, *Law and Disagreement*, above n 35, 220, 289-90.

⁴⁰ T Morton and R Knopff, *The Charter Revolution and the Court Party* (Broadview Press, 2000), 166.

enforcement of constitutional rights: they usually need positive government assistance - land rights, education, employment, or financial or other forms of assistance - which courts cannot effectively provide. Enforceable “positive” rights to government assistance or empowerment might require judicial power to amend the budget and possibly rates of taxation. Indeed, it is partly because of the need for the democratic process to provide such assistance or empowerment - and the danger of judicially enforced negative rights being invoked to obstruct it - that judicial supremacy has often been most staunchly opposed by people to the left of politics.⁴¹ And it is notable that the countries that have best protected the welfare rights of the most vulnerable members of society – such as in Scandinavia – have historically not had constitutions protecting negative rights against the exercise of governmental power.

7. DANGER OF JUDICIAL TRANSFORMATION OF THE BRITISH CONSTITUTION

This powerful democratic case against judicial review of legislation becomes even stronger when judges take it upon themselves to transform a constitution, by expanding their own powers to enforce rights. Lord Neuberger rightly observed that “it is a feature of all constitutional courts that that they generously interpret the constitution and tend to bestow power on themselves.”⁴² But in doing so the courts sometimes usurp the most fundamental right of the people: the right to change the constitution under which they live.

⁴¹ See, e.g., J A G Griffith, *The Politics of the Judiciary* (HarperCollins, 5th ed, 1997); R Bellamy, *Political Constitutionalism; A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007), R Hirschl, *Towards Juristocracy; The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004), M Mandel, “A Brief History of the New Constitutionalism, or ‘How we changed everything so that everything would remain the same’” (1998) 32 *Israel Law Review* 250; M Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999).

⁴² Lord Neuberger, “The Role of Judges in Human Rights Jurisprudence: a Comparison of the Australian and UK experience”, above n 28, 19.

There are various methods by which judges in common law countries can expand their powers to amend or partially invalidate statutes. Gradual expansion of these methods could lead to the death of parliamentary sovereignty by a thousand cuts, or by gradual, incremental steps that lay the groundwork for a large-scale transformation in the future.

7.1 DEATH BY A THOUSAND CUTS: THE GROWTH OF “CONSTITUTIONAL” PRINCIPLES AND RIGHTS

For centuries, the most fundamental principle of statutory interpretation has been that courts should seek out and give effect to what Parliament intended to communicate. Common law principles, rights and freedoms have been protected mainly through presumptions that Parliament did not intend to interfere with them. These presumptions have now been bundled together under the label “the principle of legality”. The traditional justification for these presumptions was entirely consistent with parliamentary sovereignty, given that they depended on intentions that could reasonably be attributed to Parliament but which it is able to disavow. But this justification is increasingly regarded as an artificial rationalisation or polite fiction. Some now claim that the common law presumptions “no longer have anything to do with the intent of the Legislature; they are a means of controlling that intent”.⁴³ For others, the very idea of legislative intention is a fiction: they consider it implausible that a legislature incorporating two different Houses with hundreds of members can have any meaningful intention other than merely to enact a statutory text. All this has led some observers to conclude that the presumptions “can be viewed as the courts’

⁴³ L Tremblay, ‘Section 7 of the Charter: Substantive Due Process’ (1984) 18 *UBC Law Review* 201, 242. See also A Kavanagh, *Constitutional Review under the Human Rights Act* (Cambridge University Press, 2009), 335.

efforts to provide, in effect, a common law bill of rights”.⁴⁴ Judges have claimed that, by relying on such presumptions, “the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries” with a written constitution,⁴⁵ and that “we *already have* constitutional guarantees . . . given by the common law.”⁴⁶

There are two reasons for concern about these developments. The first is that if judges interpret legislation according to common law rights that they themselves have developed, regardless of Parliament’s intentions, they become co-authors of the law that results from their interpretations. This is to subordinate Parliament’s chosen means of communicating its intentions and purposes to moral values chosen by the judges. Parliament is no longer the sole author of the statute it enacts; no matter what words it uses, their meaning will be determined partly by values preferred by the judges. This is applauded by opponents of legislative supremacy, who say that the meaning of any statute is “the joint responsibility of Parliament and the courts”⁴⁷ and is therefore a collaborative enterprise.

To a limited extent courts necessarily do contribute to the meanings of statutes. If, for example, a statute is ambiguous or vague on some crucial point, judges may be forced to fill in the gap in order to decide a case before them. But in doing so, they should act as Parliament’s faithful agents, seeking to implement its objectives. If they do not then, as Richard Ekins has argued, it is difficult to see how their interpretations can be reconciled with the fundamental notion that it is Parliament that has the authority to make statute law. If making statute law

⁴⁴ D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (Butterworths, 5th ed, 2001), 131.

⁴⁵ *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann) .

⁴⁶ Sir John Laws, ‘Constitutional Guarantees’ (2008) 29 *Statute Law Review* 1, 8.

⁴⁷ T R S Allan, “Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority” (2004) *Cambridge Law Journal* 685, 689 n 13.

were a collaborative enterprise, Parliament would merely provide raw material, in the form of a text, which the judges would then combine with their own material to make the law.⁴⁸ This, incidentally, is an objection to s. 3 of the HRA which, as construed by the courts, authorises them to act as co-authors who can (within limits) rewrite statutory provisions to ensure compatibility with protected rights.

The second reason for concern about this increasing judicial tendency to describe common law rights as “constitutional” is that it may in the near future pose a more fundamental challenge to the doctrine of parliamentary sovereignty.⁴⁹

Describing important principles as “constitutional” is a long-standing feature of British constitutional discourse, and in itself is entirely consistent with parliamentary sovereignty. Sir Robert Chambers, Blackstone’s successor at the University of Oxford, embraced parliamentary sovereignty whole-heartedly, but condemned a particular statute on the ground that “though not illegal, for the enactment of the supreme power is the definition of legality, [it] was yet unconstitutional”, because it was “contrary to the principles of the English government.”⁵⁰ This distinction between law and constitutional principle was perpetuated by other writers in the 18th and 19th centuries, and survives today in the distinction between law and constitutional convention.⁵¹ Dicey, for example, referred to “the fundamental principles of the constitution and the

⁴⁸ R Ekins, ‘The Relevance of the Rule of Recognition’ (2006) 31 *Australian Journal of Legal Philosophy* 95, 100.

⁴⁹ The following paragraphs borrow from J Goldsworthy, *Parliamentary Sovereignty, Contemporary Debates* (Cambridge University Press, 2010), 314-18.

⁵⁰ R Chambers, *A Course of Lectures on the English Law Delivered at the University of Oxford 1767-1773*, T M Curley (ed) (University of Wisconsin Press, 1986), vol I, 141.

⁵¹ J Austin, *The Province of Jurisprudence Determined*, H L A Hart (ed) (Weidenfeld & Nicholson, 1954), 257-58.

conventions in which these principles are expressed”.⁵² He also described as “constitutional” certain principles that were extrapolated from judicial decisions, including principles that protected personal liberty.⁵³ But of course all these principles were subject to Parliament’s legislative authority.

The problem is that today, the subtle distinctions encoded in this traditional terminology are increasingly liable to be misunderstood or obfuscated. It is already being claimed that “the incremental development by the courts of a body of ‘constitutional rights’ . . . ha[s] rendered our traditional understandings of the subordinate role of courts in relation to Parliament obsolete.”⁵⁴ This may be aimed at eventually enabling the judiciary to claim the power to protect rights from legislative interference. Having laid the foundation for doing so, judges may eventually feel emboldened to declare that “of course, if these principles are constitutional, they must by definition control even the power of Parliament”.

Critics of parliamentary sovereignty, including some judges, openly talk about the courts “chipping away at the rock of parliamentary supremacy”,⁵⁵ “inching forwards with ever stronger expressions when treating some common law rights as constitutional,”⁵⁶ and as “[s]tep by step, gradually but surely” qualifying the principle of parliamentary sovereignty.⁵⁷ One senior judge has said that “the common law has come to recognise and endorse the notion of constitutional, or

⁵² Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 10th ed, 1964), 445; see also 434. See also Goldsworthy, *The Sovereignty of Parliament*, above n 1, 190-92.

⁵³ Dicey, above n 52, 197, and more generally, 195-98, 201-202.

⁵⁴ J Murkens and R Masterman, “The New Constitutional Role of the Judiciary” (LSE Law, Policy Briefing, July 2014), 3.

⁵⁵ J Jowell, ‘Parliamentary Sovereignty Under the New Constitutional Hypothesis’ [2006] *Public Law* 562, 575.

⁵⁶ Robin Cooke, ‘The Road Ahead for the Common Law’ (2004) 53 *International and Comparative Law Quarterly* 273, 277.

⁵⁷ *Jackson v Attorney-General* [2006] 1 AC 262, [104] (Lord Hope).

fundamental, rights”,⁵⁸ and although Parliament at the present time remains sovereign, this may change through “the tranquil development of the common law.”⁵⁹

7.2 SUDDEN TRANSFORMATION: JACKSON’S CASE AND THE CHALLENGE TO PARLIAMENTARY SOVEREIGNTY

All of this raises the question of whether statute law or common law is ultimately more fundamental. The orthodox view is that Parliament can override any part of the common law, because statute law is superior to common law. But according to an alternative theory, Britain’s uncodified constitution rests ultimately on fundamental common law principles, from which Parliament derives its authority to make statutes. According to Professor Trevor Allan, of the University of Cambridge, this entails that “the common law is prior to legislative supremacy, which it defines and regulates.”⁶⁰ This theory is called “common law constitutionalism”.⁶¹

For some time, common law constitutionalists have been advocating a peaceful constitutional revolution, by incremental steps aimed at replacing the doctrine of parliamentary sovereignty with a new constitutional framework in which Parliament either shares ultimate authority with the courts or – if push comes to shove – is subordinate to them.

In *Jackson v Attorney-General*, the famous “fox hunting case”, Lord Steyn embraced this theory, declaring that the doctrine of the supremacy of Parliament:

⁵⁸ *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] EWCA Civ 158; [2002] 3 WLR 344 [71] (Laws LJ).

⁵⁹ Sir John Laws, ‘Illegality and the Problem of jurisdiction’, in M. Supperstone and J. Goldie (eds), *Judicial Review* (Butterworths, 2nd ed, 1997), 4.17.

⁶⁰ T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001), 271. See also *id.*, 139, 225, 229, 240, 243.

⁶¹ P A Joseph, ‘Parliament, the Courts, and the Collaborative Enterprise’ (2004) 15 *King’s College Law Journal* 333, 334.

is 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.⁶²

Two other judges in *Jackson* made similar or supporting observations,⁶³ and like-minded dicta have appeared in other cases.⁶⁴

It can be argued that too much should not be made of the expression of unorthodox opinions in the obiter dicta of a few senior judges. After all, they may not persuade a majority of their peers, some of whom have already responded by reaffirming the doctrine of parliamentary sovereignty.⁶⁵ Moreover, these dicta are either based on demonstrable falsehoods or are implausible.⁶⁶ I have argued at length in my two books on the subject that the central claim of “common law constitutionalism” is false, partly because, as a matter of historical fact, the doctrine of parliamentary sovereignty was not created by the judiciary. Rather, it is the outcome of sometimes violent struggles for constitutional supremacy in which judges mainly sat on the sidelines, or were on the losing side and had no alternative but to accept the outcome.⁶⁷

But we should not be too complacent. No matter how often the common law constitutionalists’ central claim is refuted, it continues to be asserted. The

⁶² *Jackson v. Attorney-General* [2005] UKHL 56; [2006] 1 AC 262, [102].

⁶³ *Ibid.*, [104, 107 and 126] (Lord Hope); [159] (Baroness Hale).

⁶⁴ *Thoburn v Sunderland City Council* [2003] QB 151 [60] (Lord Justice Laws); *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46; [2011] 3 WLR 871 [51] (Lord Hope); *Moohan v Lord Advocate* [2014] UKSC 67 [35] (Lord Hodge).

⁶⁵ *Jackson v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 [9] (Lord Bingham); [168] (Lord Carswell); T Bingham, *The Rule of Law* (Penguin, 2010), ch 12; Lord Neuberger, “Who Are the Masters Now?” (2nd Lord Alexander of Weedon Lecture, 6 April 2011).

⁶⁶ The claim that the judges or the common law created the principle of parliamentary sovereignty is demonstrably false: see J Goldsworthy, *The Sovereignty of Parliament*, above n 1, *passim*; J Goldsworthy, *Parliamentary Sovereignty, Contemporary Debates*, above n 49, ch 2. Suggestions that the Acts of Union 1707, the European Community Act 1972, and the Human Rights Act 1998 have all qualified or limited parliamentary sovereignty are implausible: *ibid.*, ch 10.

⁶⁷ *Ibid.*

process by which the common law gradually evolves allows the expression of judicial opinions that are false, through sheer repetition, to come to appear true. Indeed, sufficient repetition can eventually clothe them with authority. Common law constitutionalism could in this way pull itself up by its own bootstraps.

There are powerful reasons of democratic principle for not accepting that the courts have authority to unilaterally modify or repudiate the doctrine of parliamentary sovereignty. If they did, they could impose all kinds of limits on Parliament's authority with no democratic input or warrant. As Lord Millett said in *Ghaidan v Godin-Mendoza*: "any change in a fundamental constitutional principle should be the consequence of deliberate legislative action and not judicial activism, however well meaning."⁶⁸

Constitutional change in contemporary democracies requires appealing to the principles of political morality that are the source of modern constitutional legitimacy, in particular the sovereignty of the people. Such changes require democratic deliberation and decision-making. Officials who favour constitutional change must persuade other officials, and the public at large, that it is desirable.

Any attempt by the judiciary to unilaterally change the most fundamental rules of the system is also hazardous. Parliament might resist a judicial attempt to change the rules that were previously generally accepted, and take strong action to defeat it. If the judges were to tear up the consensus that constitutes the basic rules of the constitution, they would be poorly placed to complain if it were replaced by a power struggle that they are ill-equipped to win.⁶⁹

⁶⁸ [2004] UKHL 30; 2 AC 557 [57]. See also T Bingham, *The Rule of Law* (Penguin, 2010), 168-170.

⁶⁹ See also D Oliver, "Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament", in A Horne, G Drewry and D Oliver (eds), *Parliament and the Law* (Hart Publishing, 2013), 309.

8. WHAT TO DO ABOUT IT?

The advertised title of this lecture concludes with the words “and what to do about it”. But I will say only a little about this, for several reasons. I have insufficient time tonight to provide concrete advice about statutory reforms to administrative law or the HRA. There are too many possibilities, and too many complexities, to be sensibly canvassed here. Moreover, as an Australian lawyer I lack the detailed knowledge that is required. The objective of the Project this lecture is launching is to develop and propose practical reforms, and I see little point in making specific recommendations before that process has even begun. I would, however, offer the following advice.

First, by all means consider possible changes to the European Convention on Human Rights and the HRA, but do not neglect more fundamental trends such as the labelling of common law principles as “constitutional”, possibly with a view to their elevation at some future time to constitutional status in the American, rather than the traditional British, sense of the term.

Second, if Parliament is to retain its capacity to control constitutional developments, and not be outflanked by judicial development of a common law constitution, then its Members must robustly assert and defend its legislative sovereignty from critics and sceptics. I do not mean that Parliament should necessarily seek to maintain its sovereignty forever. If public opinion came to strongly support the adoption of a written constitution limiting Parliament’s powers, there would be good reasons for Parliament to act accordingly. Rather, I mean that such a profound transformation of the constitution should not be brought about solely by changes in the jurisprudential theories favoured by legal elites. It is vital that members of the legislative and executive branches of government keep abreast of these changes, and develop the intellectual self-confidence needed to respond. In saying this, I do not mean to encourage

intemperate attacks on the judiciary. It is essential that the debate be conducted on terms of mutual respect.

Third, a successful defence of parliamentary sovereignty over the long term will require considerable bi-partisan (or multi-partisan) support. If criticisms of expanding judicial power come from only one side of politics, they may not have a sufficiently broad influence on public opinion. That is partly why I have emphasised that resistance to the expansion of judicial power has historically, in Britain and elsewhere, been even more popular on the left than on the right.⁷⁰

Fourth, Parliament will only be able to retain its sovereignty over the long-term if it continues to be widely regarded as deserving to be entrusted with it.

Members of Parliament must be sensitive to the root causes of the expansion of judicial power. In particular, they must persuade not only the general public but influential elites that they are sensitive to rights issues and give them careful consideration. If Members of Parliament believe it is untrue that they have been supine and ineffective in holding the executive to account, due to its dominance in the House of Commons, then they must demonstrate this. In other words, if Parliament has a public relations problem, it must be effectively addressed. But if there is more than just a public relations problem – if the electoral system or parliamentary processes needs improvement – then those problems should also be tackled.

How has Parliament discharged its historical responsibility to protect the rights and freedoms of the community? Its track record over the centuries is far from perfect. But as Christopher Forsyth recently argued, judging by statutes passed over the last fifty years or so it has done very well indeed.⁷¹ Legislation has abolished the death penalty, decriminalised homosexual conduct and legalised

⁷⁰ See n 41 above.

⁷¹ C Forsyth, “Judicial Review: The Handmaiden of Democracy” (Inner Temple Lecture, 14 November 2011), 8.

same-sex marriage, outlawed various kinds of invidious discrimination, and legalised abortion within limits – the list could go on and on.

It is no coincidence that in rankings of nations according to the freedoms of their residents, the United Kingdom consistently falls within the top 10-20, and considering the company it is in, this is nothing to be worried about. Nor is its failure to rank higher due to its not having a written constitution with a bill of rights. For example, in a reputable index of World Freedom published by Canada's Fraser Institute in 2012, New Zealand ranked first out of 123 countries, despite having no written constitution and only a statutory bill of rights, and Australia ranked fourth, despite having no national bill of rights at all. The Netherlands ranked second, and as usual the Scandinavian countries also ranked highly, even though none of them have had a long attachment to rights-protecting judicial review.

These are reasons not for complacency, but rather, for refusing to agree that the HRA opened a new era of enlightenment after a long dark age in which rights were suppressed.⁷²

Robert Dahl, the pre-eminent modern theorist of democracy, once said: "The democratic process is a gamble on the possibilities that a people, in acting autonomously, will learn how to act rightly."⁷³ To adopt full judicial review of constitutional rights would amount to a verdict that the British people have failed. It would indicate a lack of confidence in their ability to maintain a tolerant and fair society without the supervision of judicial chaperons, overseeing their decisions and correcting their mistakes. It would impose on the British people a kind of political guardianship. I do not believe that Britain's

⁷² Cf Lord Neuberger, "The Role of Judges in Human Rights Jurisprudence: a Comparison of the Australian and UK experience", above n 28, 1-3.

⁷³ R Dahl, *Democracy and Its Critics* (Yale University Press, 1989), 192.

enviable reputation as a world leader in the development of democracy and liberty warrants such pessimism. Indeed, I believe the opposite.