# WHO IS THE ULTIMATE GUARDIAN OF THE CONSTITUTION?


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***IN REPLY TO SIR JOHN LAWS***


*Part of our series on "Debating Judicial Power: Papers from the ALBA Summer Conference".*

1. Sir John Laws writes, whether on or off the bench, with brilliance and brio. He presents an apparently utterly persuasive account of judicial creativity and activism and its limits wreathed in the glories of the common law. Many readers will be left persuaded that Sir John is right; and those whose scepticism is not entirely washed away by the waves of brilliance will still struggle to know how best to meet his arguments. Is it not easier simply to give way? But, if the sceptic perseveres, he or she will find an argument in this paper that is unorthodox and potentially dangerous.

2. Sir John puts forward a vision of the judicial function in which the judges "mediate Parliament's legislation so that, so far as possible, it conforms to civilized constitutional principles whose guardians are the courts." Many will accept much of this…up to a point. It is not very far from what Lord Steyn said in *R v Home Secretary, ex parte Pierson* [1997] UKHL 37; [1998] AC 539: "Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary."

3. Since in most cases legislation will be an expression of those European liberal values this will reconcile those "principles and traditions of the common law" (which I think includes Sir John's "constitutional principles") with the intent of Parliament. But where such reconciliation is not possible, the dictum from *Pierson* makes plain that Parliament has the final word.

4. This is the vital issue. In Professor Jeffrey Goldsworthy's words: "What is at stake [here] is the location of the ultimate decision-making authority – the right to the 'final word' in a legal system"(*The Sovereignty of Parliament: History and Philosophy* (1999) at 3). But if Parliament is to have the final word – whatever the issue – the courts cannot be the exclusive or supreme guardian of constitutional principle. Parliament must in the final analysis be the ultimate guardian – above all others – of constitutional principle.

5. Is this Sir John's view? I think not; Sir John has a dim view of Parliament as a guardian of constitutional principle. He says: "If I am right that the judges do and must make law when construing statutes, and that they do it and must do it for the vindication of

constitutional principle, there is inevitably the question: where is the proper boundary between judicial and political power? Is not the legislature also responsible for constitutional principle? In our uncodified constitution, the question offers no single answer. …. But elected government is buffeted by the rancour and asperity of party politics and the dictates of populism: so that elected governments will always struggle – sometimes they will not even try – to confine their legislative endeavours within the disciplines of constitutional principle. Democracy is our best guarantee against arbitrary and capricious government; constitutional principle is our best guarantee against democracy's own occasional aspirations to arbitrary and capricious rule. Constitutional principle is in the keeping of the judges; they are protected from overweening aspirations of their own, not by any inherent wisdom – for certain, they have no more of that than anyone else – but by the method of the common law, matured over centuries: the balance between precedent and innovation, the gradual construction of principle case by case: in short, the continuous process of self-correction."

6. Whew! The question that I asked – whether in Sir John's view was Parliament the final guardian of constitutional principle – has to be answered no. "Constitutional principle is in the keeping of the judges". Judges have no "overweening aspirations of their own" and are not "buffeted by the rancour and asperity of party politics and the dictates of populism". They are patently much better placed, in Sir John's view, to guard constitutional principle than the elected representatives of the people.

7. But the ultimate guardians of constitutional principle are the elected representatives of the people. Thus the words of a statute are not an empty vessel into which the courts, in a process of "constitutional interpretation", pour a meaning they consider consistent with "constitutional principle" or "the rule of law" or the "principal of legality" or whatever. Those constitutional principles howsoever they might be articulated must – in our constitutional order – contain within them as the "head and the hoof" the principle of obedience to parliamentary supremacy. However wise and wonderful might be the meaning accorded to the statute by the judges in pursuit of the "constitutional principle" what matters is the meaning that Parliament chose or may reasonably be taken to have chosen. Within this context there is much scope for judicial wisdom and creativity; outside this context the judges threaten the constitutional order.

8. We may take it then that Sir John, on this occasion as on several others, is in fact a proponent of judicial supremacy. He considers that if Parliament, driven by the rancour and asperity of party politics and the dictates of populism, were to pass a law that excluded some "constitutional principle" valued by the judges, the judges, as guardians of such principles, are entitled not to give effect to the Parliamentary will.

9. Although Sir John expresses these views with skill and elegance my response to these assertions of judicial supremacy has a certain blunt predictability to it. First, it is not the law. The supremacy of Parliament is one of the most firmly established of all constitutional principles as many cases attest. Most recently, in *R (Miller & Anor) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) – the Brexit Judicial Review at first instance – the principle of parliamentary supremacy is unequivocally and unconditionally affirmed by the Lord Chief Justice, the Master of the Rolls and Sales LJ (paras 20-23). Dicey's famous dictum that Parliamentary sovereignty means that Parliament has "the right to make or unmake any law whatever; and, further that no body or person is recognised by the law ...as having a right to

override or set aside legislation of Parliament" is cited with approval (para 22) as is Lord Bingham's remark in *Jackson* [2005] UKHL 56, para 9 that "the bedrock of the British constitution is…the supremacy of the Crown in Parliament". Thus those who would abandon the supremacy of Parliament must also abandon *stare decisis*.

10. Secondly, if it is recognised that at some point in its history stretching back over nine centuries Parliament was sovereign, then some account – I believe none is given by Sir John – needs to be given of how the change to a non-sovereign legislature came about. The only account that can realistically be given is that the judges did this by themselves through the development of the common law. But this is profoundly unsatisfactory. As Lord Bingham remarks, "the principle of parliamentary sovereignty has 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." (*Rule of Law* (2011), 22). Its vigour depends not only upon the judges' loyalty to it but upon its acceptance by the relevant officials in all the branches of government.

11. Lord Bingham does not make the blunter point. For the judges to attempt so to "develop" the common law as to deprive parliament of its supremacy, would amount to a group of unelected officials taking over the ultimate decision-making authority in our constitutional order. No misty eyed rhetoric about the wisdom or the method of the common law can conceal the fact that this would be a coup, a seizure of power. However imperfect our constitution might be and however imperfect our democracy might be, that surely could not be tolerated. We could, of course, abandon Parliamentary supremacy –perhaps we should – but it is not to be done by judicial fiat hidden in a sophisticated approach to the interpretation of statutes. Let the people – by referendum or Constitutional Convention or Act of Parliament offer supremacy to the judges – but they are not to take it themselves.

12. Of course it is not to be supposed that the judges would openly challenge the supremacy of Parliament in a judicial decision. The real danger is that the judges will pay lip service to supremacy but in fact not heed the clear purpose of the legislature. The majority judges in *Evans v Attorney-General* [2015] UKSC 21 did not heed the clear intent of the legislature and severe criticism is due to them for that reason. In *Evans*, one sees imaginative and sophisticated approaches to interpretation being deployed to deny Parliament's will, as Richard Ekins and I argued here.

13. Beneath its polish then Sir John's stance is unorthodox. But why is it potentially dangerous? Because, as I said on another occasion: "…if the judiciary, frustrated by the failings of the elected legislature, were to assert a power to hold Acts of Parliament invalid it would be stepping from law into politics and the outcome of its efforts impossible to predict" (Wade and Forsyth, *Administrative Law* (11th ed, 2014), 23). We live in an age of populism. There is little trust in all institutions. The rancour and asperity of party politics and the dictates of populism is everywhere. Some criticism of the judiciary is already unpleasantly strident and vociferous (and generally unjustified).

14. The judiciary, being independent, will not be swayed in the slightest by this criticism in the making of decisions. But those of us who defend the judiciary in general and judicial independence in particular must hope sincerely that the judiciary stay true to

their vital task of simply applying and interpreting the law. Giving themselves grandiloquent tasks – guardians of constitutional principle, etc – as a mask for the arrogation of power properly that of the legislature or the executive lends credence to the criticism of judges as unelected officials who stray too readily into the realm of the demos.

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