Judicial Power and the Left

Policy Exchange

Notes on a sceptical tradition

Edited by Richard Ekins and Graham Gee

Foreword by Jon Cruddas MP

Judicial Power and the Left

Notes on a sceptical tradition

Edited by Richard Ekins and Graham Gee

Foreword by Jon Cruddas MP

Policy Exchange

Policy Exchange is the UK's leading think tank. We are an educational charity whose mission is to develop and promote new policy ideas that will deliver better public services, a stronger society and a more dynamic economy.

Registered charity no: 1096300.

Policy Exchange is committed to an evidence-based approach to policy development. We work in partnership with academics and other experts and commission major studies involving thorough empirical research of alternative policy outcomes. We believe that the policy experience of other countries offers important lessons for government in the UK. We also believe that government has much to learn from business and the voluntary sector.

Published by
Policy Exchange, 8 – 10 Great George Street, Westminster, London SW1P 3AE
www.policyexchange.org.uk

ISBN: 978-1-910812-37-2

Printed by Heron, Dawson and Sawyer

Contents

About the Judicial Power Project

This project examines the role of judicial power within the constitution. There is rising concern that judicial overreach has the potential to undermine the rule of law and to impair effective, democratic government. The project considers the ways in which the judiciary's place in the constitution has been changing, and might change in the future. If we are to maintain the separation of judicial and political authority, we must restate, in the context of modern times and modern problems, the nature and limits of judicial power within our constitutional tradition and the related scope of proper legislative and executive authority.

www.judicialpowerproject.org.uk

Acknowledgements

We would like to thank Dominic Burbridge, Martin Kendrick, Rebecca Lowe and Christopher White for their assistance preparing the manuscript, and to Dean Godson and Julia Mizen who gave valuable advice throughout this project.

About the Authors

Chris Bickerton is a Reader in Modern European Politics at the University of Cambridge, and a Fellow of Queens' College, Cambridge.

Alan Bogg is Professor of Labour Law at the University of Bristol.

Keith D. Ewing is Professor of Public Law at King's College London.

Richard Ekins is Head of Policy Exchange's *Judicial Power Project*, an Associate Professor in the University of Oxford, and a Tutorial Fellow in Law at St John's College, Oxford.

Graham Gee is Professor of Public Law at the University of Sheffield and Editor of the website for Policy Exchange's *Judicial Power Project*.

Carol Harlow QC (Hon) FBA is Emeritus Professor of Law at the London School of Economics.

John Hendy QC is a barrister at Old Square Chambers.

Brian Highsmith is a Skadden Fellow at the National Consumer Law Center, Boston, Massachusetts.

Chye-Ching Huang is Deputy Director of Federal Tax Policy at the Center on Budget and Policy Priorities, Washington, D.C.

Jane Kelsey is a Professor of Law at the University of Auckland.

Mike Macnair is an Associate Professor of Law at the University of Oxford and Tutor in Law at St. Hugh's College, Oxford.

Danny Nicol is Professor of Public Law at the University of Westminster.

Gerald N. Rosenberg is Associate Professor of Political Science at the University of Chicago Law School.

Helen Thompson is Professor of Political Economy at the University of Cambridge.

Richard Tuck is the Frank G. Thomson Professor of Government at Harvard University.

Foreword

Jon Cruddas MP

The retreat towards the law and the continental constitutional separation of powers, and away from democracy and parliamentary sovereignty, have been very powerful tendencies within the left over the past fifty years. This collection of essays exposes this political detachment. In short, those who gave priority to procedural justice and utility defeated a stubborn attachment to the ancient Constitution and democratic authority that used to characterise the Labour tradition. This booklet, a startling and original collection of essays, indicates that Labour has the resources and imagination to re-assert its commitment to democracy and the painstaking work of building a democratic coalition that can deliver the sustainable parliamentary majority necessary for transformational politics.

The referendum vote to leave the European Union might well have provided the disruption necessary to upend what Danny Nicol calls the 'general elevation of the unaccountable' that is embodied in the EU, particularly after the Lisbon Treaty. In a superb essay on judicial power and the left, Mike Macnair defends the integrity of the mixed constitution based on the balance of powers within the frame of the common law as opposed to the separation of powers and judicial primacy that was embodied in the clamour for a written constitution and the supremacy of the EU. Alan Bogg's essay develops this argument that 'the common law may be the last refuge of the vulnerable'.

Chris Bickerton's essay makes the argument that the growing interest in judicial power on the left was driven by electoral insecurity and the managerialism of social democracy. The law is a poor substitute for democratic politics but the experience of Thatcherism led broad sections of the left to 'prefer the shelter of continental structures', and the EU vision of Jacques Delors came as a godsend as it 'made it possible for hitherto fundamentally political disputes to be sent up to the European Court of Justice and resolved as technical matters of compliance with European treaty law'. The majority of the Parliamentary Labour Party have lost faith in British Courts to defend liberties despite the evidence that they have been preserved over time in Britain while continental Europe experienced a variety of tyrannies. Bickerton argues that a market economy is one thing, but a market society is

something else entirely, and the constitutional structure of the EU made resistance to that virtually illegal.

Helen Thompson's essay pursues this argument with verve, pointing out that Labour's acquiescence to a judicial managerialism, and to rights theory within the framework of the European Union meant that it was dispossessed of its fundamental history and meaning. As Thompson puts it:

> *As a consequence of the repudiation of this Eurosceptic heritage, Labour has been left to confront the wreckage of Britain's membership of the EU without any political language that it can claim as its own in the democratic political space that Brexit has opened… Post-Delors Labour disavowed this political discourse in which British citizens possess by virtue of their membership of a historical political community 'ancient liberties' and 'ancient rights', including the right to choose freely their own parliament to decide upon the laws to which they are subject and by which their lives can be changed for the better. It also sacrificed a once politically potent story for the left arising from this narrative in which citizens had the potential through elections to make power responsive to their beliefs and interests, and in which the purpose of the Labour Party was to give them the chance to exercise that potential. In sum, by turning to European constitutionalism, Labour disowned an older faith of the left in the capacity of ordinary people to be part of democracy.*

This gets to the heart of the matter. In reality it is a story of how the left rejected what we used to describe as 'legal abstentionism' – especially over the regulation of labour itself. Overall, institutions, citizenship, participation and the central role of democratic politics within a national polity were relegated to a subordinate position within the left compared to welfare, utility and rights. This collection explains how this happened.

The work of articulating a national renewal through the rebuilding of democratic institutions remains the central task of Labour today. Richard Tuck outlines in a compelling way how the constitutional forms of the EU subordinated democratic sovereignty in a unilateral way. Tuck explains that

> *The right way to theorise the EU… is as in effect a coordinated set of constitutional structures for each of the member countries … A set of principles and institutions are entrenched in a position beyond the reach of governmental legislation. They are entrenched within the legal order of each country. They cannot be amended by the same process as they were imposed. You can only repudiate the whole structure.*

The essays outline a common position of great richness and seriousness. The abandonment of democratic participation and power in favour of rights and the sovereignty of judges meant that the left abandoned a politics of democratic

transformation that could resist the domination of capital and the commodification of labour and land. The distinctiveness of the British polity, in term of parliamentary primacy due to the unique speed and timing of British industrialisation was over time subordinated to judicially-enforced treaty law that voided politics of power. Consequently, Tuck makes the point that the objection raised by the people during the EU referendum was not to immigration but to powerlessness. More generally, the warnings from America are profound. Gerald Rosenberg writes that:

> *…in the mid-twentieth century the Progressive agenda was hijacked by a group of elite, well-educated, and comparatively wealthy lawyers who uncritically believed that rights trump politics and that successfully arguing before judges is equivalent to building and sustaining political movements.*

And they were indeed Trumped.

The rebuilding of a Labour politics built around the common good and a coalition between working class and middle class interests that can retrieve and strengthen what Thomson calls 'a national political community' with its own traditions and institutions after a half a century of technocratic and legal abandonment is daunting but necessary. But the clock is ticking. This collection offers the best possible starting point for the paradoxical politics of our time, not the least of which is that radicalism requires an appreciation of history and tradition. We used to know that. As such, the journey is one of self-discovery.

1
Introduction

Richard Ekins and Graham Gee

The constitutional kaleidoscope has been shaken and politics is in flux. One consequence of this is to bring into clearer focus changing patterns of political and legal thought, some of which have been a long time in the making. One such pattern is the erosion of the left's traditional scepticism about expansive judicial power. There is of course no single 'left' tradition, whether within the UK or beyond. The left has embraced in various degrees and at various times elements of socialism, liberalism, and Marxism, with the history of the Labour Party defined in large part by relations between Fabianism and Syndicalism. Nevertheless, a thread that traditionally ran through constitutional thought on the left in the UK was a shared concern to curb judicial power. Those committed to social justice and to protecting the interests of the working class have long distrusted the courts and the common law — with some reason in light of the long shadow cast by infamous cases such as *Taff Vale*.[1] Legislation was viewed as a much more reliable engine of social and economic change than litigation, with the judiciary suspected of often manipulating the common law to defend the power and privileges of the propertied classes.[2] Distrust of the courts extended to the international sphere, as illustrated by the Attlee's government's resistance to the creation of the European Court of Human Rights (ECtHR). Opposition to judicially enforceable bills of rights — domestic and international — was once an article of faith on the left. This concern to limit judicial power formed one part of the left's more general confidence in and attachment to the UK's customary constitution and all that went with it (strong government, parliamentary democracy, and the primacy of the nation state).

It is striking just how far dominant views on the left have shifted. Today, the Labour Party defends 'our' Human Rights Act and takes pains to stress that

[1] *Taff Vale Rwy Co v Amalgamated Society of Railway Servants* [1901] AC 426 (where the Law Lords disturbed settled law to hold that true unions can be liable at common law for loss of profits to employers as a result of strike action).
[2] See J.A.G. Griffith's classic critique of the reactionary conservatism of the English judiciary: Griffith, JAG, *The Politics of the Judiciary*, Fontana, 1977, now 5th edn 1997.

democracy is 'founded upon the rule of law and judicial independence'.[3] Many progressive politicians now instinctively turn to supranational institutions such as the ECtHR and (for the time being) the Court of Justice of the European Union (CJEU) to compensate for what they regard as the deficiencies of a customary constitution based on parliamentary sovereignty. Amongst lawyers on the left, in particular, there is growing enthusiasm for the introduction of legally enforceable constraints on legislative power, constraints of the sort that are at odds with the UK's constitutional tradition. In an effort to insulate discrete policy victories secured in the national arena from reversal, many on the left have now cast aside their distrust of powerful courts, loosened their embrace of the nation state, and turned instead to 'the shelter of continental-style constitutional structures',[4] such as the European Union (EU) and the European Convention on Human Rights (ECHR). Many on the left are now close to giving up on parliamentary democracy and casting in their lot with the courts instead.

In making sense of the changing political landscape, and in addressing challenging questions about the future of the constitution after Brexit, the left's tradition of scepticism towards the courts is an invaluable resource on which to reflect. This collection of essays offers a range of perspectives on this tradition. Its basic aim is to restate the sound reasons why those on the left ought to favour an appropriately circumscribed judicial role. Many (but not all) of the contributors to this collection self-identify as left-leaning, and most (but not all) lament the rise of judicial power. Their essays cover the historical, political, social, and academic lineages of the left's traditional scepticism towards judicial power, and they furnish important insights into both the causes and consequences of its atrophy. That said, the collection does not purport to offer a comprehensive range of views. Several important questions are not addressed in these essays. For example, in the years ahead there will likely be challenging questions about the devolutionary politics of the judiciary, questions which require the left to interrogate the proper scope of the judicial role within a multi-layered constitution. Hence, these essays should be read as a starting point for the restatement of and reflection on the left's traditional attachment to parliamentarianism on the one hand and a limited judicial role on the other. They are the beginning of a vital debate, not the last word on it.

In the collection's opening essay, **'Judicial Power, the Left and the LSE Tradition'**, Carol Harlow sets the scene by reflecting on the working classes' experiences of the criminal courts and civil courts, noting in particular how suspicion of the judiciary was rooted in the judges' development of the common

[3] The Labour Party, *For the Many, Not the Few: The Labour Party Manifesto 2017* (2017) 80.
[4] Tuck, R, 'The Left Case for Brexit', Dissent, 6 June 2016.

law in ways supportive of capital and hostile to trade unions. Harlow explains how this suspicion of the courts was an important factor driving research on law reform undertaken by a pioneering group of academics at the London School of Economics and Political Science (LSE) — a group that included several intellectual giants of the twentieth century, such as Harold Laski. Their academic work was marked by a practical focus. Much of it was directed towards devising cheaper and more accessible institutions for dispensing justice for the poor. In her essay, Harlow points to several examples of where academic work at the LSE subsequently shaped the policy choices of Labour governments. Much of this work sought to highlight the political nature of the judiciary. The most famous example was J.A.G. Griffith's book on *The Politics of the Judiciary*,[5] first published in 1977, which excoriated the judiciary for being drawn from an extremely narrow class of social elites that was inevitably characterised by a bias towards reactionary conservatism. For Griffith, as for so many on the left, the homogenous social and professional backgrounds of senior judges went a long way to explaining why the courts were unable to respond to the problem of social injustice.

In **'The Left, Capitalism, and Judicial Power'**, Danny Nicol reflects on some of the reasons why the Left in the UK now appears so amenable to ascendant judicial power. According to Nicol, the embrace of expansive judicial power is in line with liberalism displacing socialism as the dominant left ideology. With liberalism taking root on the left, there is no longer the traditional emphasis on upending capitalism and replacing it with a regime of economic planning, redistribution and nationalisation. Liberalism's displacement of socialism has seen the left's policy ambitions scaled back, and correspondingly the concern that judges might frustrate economic and social change has withered away, as well. Nicol explains that 'when the left favours socialism, it seeks to restrain judicial power', ever mindful that the courts 'may present a threat to a radical, interventionist programme', but that this concern dissipates whenever the left relaxes its embrace of socialism. This leads Nicol to argue that the dominant view on the left is no longer that judges are conservative-minded social elites who instinctively favour established interests, but rather that judges are liberal-minded guardians of the weak and downtrodden against right-wing policies. Nicol links the accommodation of an inflated role for the judiciary to the left's increasing enthusiasm for supranational institutions. He notes with alarm that the EU and ECHR are each policed by powerful courts, whose case law and legal reasoning have emboldened the UK's domestic judges. Nicol's alarm is not limited to the way in which the EU and ECHR regimes have contributed

[5] Griffith, JAG, *The Politics of the Judiciary*, Fontana, 1977, now 5th edn 1997.

to the judicialisation of national politics, but also the ways in which both regimes are inimical to transformative social and economic change.

In **'Can Judges Be Trusted With the Common Law?'**, Mike Macnair reflects on the extent to which the left should trust the judiciary. A reason commonly cited for trusting judges is their professional obligation to decide the questions that come before them solely on the basis of the relevant law, which contributes to legal certainty (i.e. the stability of the law). However, like others before him, Macnair views the common law with some scepticism, keenly aware that it can be used as an instrument of the ruling class. Macnair uses an example from land law — namely, the doctrinal distinction between a lease and a tenancy — to question the extent to which the left should rely on judges to honour that professional obligation to apply settled law. He cites a series of cases from the 1950s to explain how the Court of Appeal disturbed a settled area of law to craft in effect a partial loophole for private sector landlords from the statutory rent control regime. For Macnair, the judges' mishandling of this seemingly discrete doctrinal question of land law had a very substantial social and political impact. It contributed to the erosion of public support for the rent control regime, with the ultimate abolition of rent control in turn contributing to the creation of housing benefit. As Macnair puts it, '[m]aking housing policy in the Court of Appeal in the interests of landlords as a class has…turned out to be very expensive in the long term'.

The legal regulation of the workplace is the setting for Alan Bogg's reflections on the scope of judicial power. In his essay, **'Judicial Power and the Left: Deference, Partnership and Defiance'**, Bogg argues that it may be time to recalibrate traditional attitudes on the left towards judicial power. Arguments for or against judicial power in the abstract are meaningless, Bogg explains. Rather, cogent arguments against judicial power are always grounded in and informed by, amongst other things, the relevant political and constitutional context. For Bogg, the relevant context has changed. Legislation can be used to denude as well as defend workers' rights, and collective bargaining no longer supplies sufficient protection for most private sector workers. According to Bogg, in that changed context, 'the strategic calculations of workers and trade unions in using the law [is] more finely balanced'. Bogg draws attention to two aspects of the judicial function that have not featured prominently in the left's traditional attitude towards courts and the common law, but which he argues should enjoy a greater prominence in the changed political and constitutional context. The first is the judicial duty to defend fundamental rights in the face of infringement by public or private power. The second is a duty to protect the weak and vulnerable from the abuse of power. In the appropriate case, and subject to established limits on the judicial role provided by the constitutional order as a whole,

these twin responsibilities can require the judiciary to resist oppressive governmental action in the name of fundamental rights. Although alert to the risks associated with an expanded judicial role, the thrust of his essay is that in a changed world the left needs to recognise that 'judicial defiance' might become an increasingly important way of protecting the vulnerable against abuses of power.

While Bogg's focus is squarely on the changing contours of domestic judicial power and their implications for the politics of the workplace, the object of K.D. Ewing and John Hendy's essay is the ECtHR's evolving attitude to labour rights. In **'The Politics of Labour Law in the European Court of Human Rights'**, Ewing and Hendy discuss how the protection of labour rights under the ECHR has evolved over almost fifty years. The ECHR was initially not fertile ground for progressives looking to expand labour protections. After all, the ECHR contains no express recognition of labour rights beyond Article 11's guarantee of freedom of association, with the ECtHR reluctant throughout the 1970s to enlarge this to include the right to strike or the right for trade unions to be consulted. Ewing and Hendy explain that by the 1980s this reluctance to use the ECHR to protect labour rights had been replaced by an outright hostility to trade unions, as best reflected in the fact that the ECtHR decided that closed shop arrangements fell foul of Article 11. By the start of this century, however, the ECtHR was carving out a new approach, using its 'living instrument' interpretative approach to give Article 11 an expanded scope that encompasses the right to bargain collectively and the right to strike. However, Ewing and Hendy explain how the politics of the UK's fraught relationship with the ECtHR has prevented the ECtHR's new approach to Article 11 from having any impact in the UK. In a pincer movement, the domestic courts have refused to embrace the ECtHR's new approach on the right to strike and the right to bargain collectively, whilst the ECtHR has declined to follow through on its new approach to Article 11 in a series of cases involving the UK. The upshot, as Ewing and Hendy see it, is that the ECHR and the Human Rights Act have 'failed to modernise the law, which clings like a limpet to its foundations in the industrial revolution to serve the interests of business'.

It is the EU rather than the ECHR on which Chris Bickerton's essay on **'The Left's Journey from Politics to Law'** chiefly centres. The left's conversion to judicial power is a complex phenomenon with multiple causes, and Bickerton begins by pointing to some of the intellectual and political background to the left's changed attitudes to law and courts. For Bickerton, perhaps the decisive factor explaining the changed attitude was the left's declining confidence in the capacity of the political apparatus of the nation state to serve as an engine of enduring social and economic reform. This represented a crisis in the very idea of social democracy itself. Growing pessimism about politics was coupled with an emerging confidence in law's ability

to substitute for politics, although, as Bickerton notes, there remain real doubts amongst parts of the left about whether the law can ever be an effective vehicle for securing social and economic equality. Bickerton identifies the 1970s as an important turning point across Europe, as left political parties increasingly resorted to supranational rules and bodies to tackle price and wage inflation and industrial unrest. This turn away from the nation state towards supranational frameworks occurred at the same time as left political parties across much of Europe pursued less ambitious and less transformative policies in national arenas. This is the vital context for understanding why much of the left are now willing — as Bickerton puts it — 'to strike a bargain with judicial power'. Bickerton closes by reflecting on how peculiar it is that the left in the UK now seeks to rely on supranational judicial bodies at the European level to insulate policy gains against domestic reversal given that in the UK's constitutional tradition progressive change has been secured largely via legislation enacted by the Westminster Parliament and only occasionally via the courts.

Taking up similar themes in her essay, **'Returning to Democracy: The British Left and the Constitutional Temptation of the European Union'**, Helen Thompson explores some of the consequences of the Labour Party's repudiation of the UK constitutional tradition. Thompson's essay is a reminder of just how far the majority view within the Labour Party has shifted: from the Euroscepticism of the early 1970s (and the related emphasis on the ballot box and the national institutions of representative democracy) to the later embrace of the EU as effectively a new constitutional regime (in which the primacy of EU law is jointly policed by the CJEU and domestic courts). Thompson points to a speech by Jacques Delors to the Trade Union Congress in 1988 as pivotal in persuading the Labour Party that the primacy of EU law provides a means of entrenching progressive policies and thereby reducing the costs for the left of electoral defeat at the national ballot box. In her essay, Thompson identifies three primary and overlapping consequences of Labour's rejection of the UK constitutional tradition and its acceptance of the EU's new constitutional order. First, by accepting the constraints on national politics that are an integral feature of the EU legal regime, the Labour Party had forsaken some of its capacity to respond to and safeguard the economic interests of the working classes. Second, by so enthusiastically participating in the European project, the Party's elites degraded their own political antennae, and above all would later fail to appreciate the impact of free movement on Labour's heartlands. Finally, by signing up to the EU's supranational regime that imposed limits on national institutions, the Party now finds itself ill-equipped to confront the post-Brexit political scene, lacking as it does "a coherent narrative about the value and place of democratic politics".

The positive case for the UK's permissive constitutional structure is outlined in **'Constitutional Restraints and Radical Politics'**, where Richard Tuck argues that this structure is more conducive to radical left-wing politics than the restrictive shape of the EU legal order. The significance of the referendum on the UK's membership of the EU was that the public expressed its preference for a *less* restrictive constitutional framework, something that Tuck welcomes. Political elites on the left lost sight of the fact that progressive policies are best secured through legally unconstrained democratic processes. Noting the large gap between popular and elite opinion on the EU, Tuck argues that the public was much better placed than elites to think clearly about a supranational legal regime that places constraints on national politics because they have the most to lose wherever legally enforceable constraints are placed on ordinary politics. Tuck suggests that those on the left should welcome the rejection of the EU's constitutional order, an order that — like Danny Nicol — he believes consistently advances a neo-liberal agenda. Turning to the post-Brexit political landscape, Tuck sounds a positive note, predicting that parliament is likely to resist any attempt to impose legally enforceable constraints on its legislative capacity of the sort experienced during the UK's membership of the EU.

Tuck's analysis of the opportunities presented by Brexit and his concern about constitutional orders that provide for judicial supremacy is informed by the constitutional history of the United States of America. The American experience is the focus of the next two essays. In **'Protecting Privilege: The Historic Role of the U.S. Supreme Court and the Great Progressive Misunderstanding'**, Gerald N. Rosenberg reflects on the lessons that US history teaches about the potential for courts to advance progressive social change. It is well known that litigation has featured prominently in American political life, especially from the mid-twentieth century, with the US Supreme Court issuing high profile rulings on a wide range of contentious policy questions. This has encouraged the left to assume that courts are key agents of social change, or at least reliable allies in the fight for social justice and the campaign to secure the rights of minority groups. But, as Rosenberg shows, progressive lawyers, activists, and politicians overlook the fact that, in US history, courts have more often been defenders of privilege and the status quo than champions of social and economic transformation. Reprising the argument of his seminal book, *The Hollow Hope: Can Courts Bring About Social Change?*,[6] Rosenberg argues that the political left's flirtation with the courts is misguided. He explains that the legal victories commonly cited as evidence that courts can secure lasting social change either did not produce the desired change or were reflective of political and social changes that had already occurred. The best example is the 1954 case of Brown,

[6] Rosenberg. GN, *The Hollow Hope: Can Courts Bring About Social Change?*, University of Chicago Press, 1991.

where the US Supreme Court held that racial segregation of public schools was unconstitutional.[7] Piercing the mythology that has built up around the case, Rosenberg explains that there is no evidence that the decision heightened the political salience of civil rights, motivated political elites to act, or energised the civil rights movement. He points instead to some unintended consequences of the decision, including increased resistance to segregation in other contexts such as public transportation and public spaces. Using examples such as this, Rosenberg concludes that progressives have failed to understand the limits of litigation and ignored the need for robust social movements in order to secure enduring and transformative change.

If Rosenberg's essay is mostly a reflection on the constitutional experience in the United States across the twentieth century, Chye-Ching Huang and Brian Highsmith focus on some of the challenges confronting progressive politics in the age of Trump. In **'Progressive Politics and the Courts: Lessons from the United States'**, Huang and Highsmith offer a cautionary tale to those on the left in the UK who might be inclined to advance a more expansive policymaking role for judges. There have been several high profile successes before the courts for progressives of course; for example, the 2015 decision of the US Supreme Court about same-sex marriage.[8] However, Huang and Highsmith explain how decisions such as these obscure a much more complex picture about the merits of litigation as an instrument for progressive social and economic change. There have been notable victories on certain social issues before the current US Supreme Court, but Huang and Highsmith explain how this court is also more likely than any of its predecessors since WWII to resolve cases in ways favourable to business interests. Even the bald suggestion that progressives will have more success litigating social issues than economic issues conceals trends that should worry the left in the US. Huang and Highsmith explain how judicial decisions on economic issues can undercut progress on social issues; cases on contract or regulatory questions, for example, can be decided in a way that effectively constrains the ability of workers or consumers to access social rights. Huang and Highsmith also point to the risk that systematically using the courts to decide contentious policy debates will cause the 'muscles' of citizen participation in democratic politics to weaken. This is bad in its own right, they argue, for reliance on courts risks enervating citizens' participation in politics and also raises the stakes for judicial appointments. But putting these concerns aside, Huang and Highsmith argue that it is strategically unwise for progressives to allow the relative authority of judicial power to increase at the

[7] 347 U.S. 483 (1954).
[8] *Obergefell v Hodges* 576 U.S. (2015).

expense of democratic politics. If the routes for citizens to shape democratic politics weaken, those that benefit will be interest groups on the right that have the greatest access to money and power.

The left's long-standing concern about how best to address the socially harmful consequences of capitalism is complicated by a new phenomenon: the rise of international investment agreements. These agreements have acquired a heightened political salience as socio-economic fissures have become more visible following the international financial crisis. In **'The Crisis of Legitimacy in International Investment Agreements and Investor-State Dispute Settlements'**, Jane Kelsey surveys the contentious questions raised by the rapid growth of such agreements. International investor agreements have been criticised for constraining the ability of future national governments to regulate in policy areas covered by them and for the way in which foreign states and investors can enforce these agreements via extra-territorial arbitral tribunals. Kelsey explains how views on the political left tend to converge in opposition to investor rights and enforcement provisions in such agreements, with left critiques concentrating on how these agreements demonstrate a bias towards neo-liberalism. Opposition from the left to the international investor regime is likely to intensify across the globe, Kelsey argues, thereby adding a new frontier to the more familiar debates about the expanding reach of law, lawyers, and judicial institutions.

* * *

Each of these essays makes rich and compelling reading, and together they help to bring into perspective the challenges confronting the left as the UK enters a new period in its constitutional history. A recurring theme throughout this collection is that the left has good reason to think about the constitution again, and more particularly the appropriate scope of the judical role within it. The left has a robust and reasonable tradition on which to draw, although, as some of the essayists note, there is also reason to worry about how well equipped the left is to engage with the new reality of the post-Brexit constitution. In the face of some of the political and legal uncertainties that will inevitably flow from leaving the EU, it will be tempting for the left to bury once and for all its commitment to the UK's constitutional tradition of a limited judicial role. Many on the left may seek to cling to the bargain that they have struck over the last forty years or so with domestic courts and international courts such as the ECtHR. Or worse yet: they may learn the wrong lessons from the current political flux, and attempt to ratchet up the role for the

courts within the post-Brexit constitution. As several of the essays in this collection make clear, that would be a mistake. Those on the left should not shelter behind an inflated role for the courts, but should instead embrace parliamentary politics within the nation state.

2
Judicial Power, the Left, and the LSE Tradition

Carol Harlow QC (Hon) FBA

It is hardly surprising if the attitude of the left — which I shall leave undefined, though I shall concentrate on the Labour Party — towards judicial power is not entirely friendly. Labour has always been a working-class party rooted in trade unionism, and, traditionally, the working class experienced the law largely through the criminal courts. The courts that impinged most frequently on offenders were local courts, for centuries operated by justices of the peace ('JPs'), a voluntary unpaid office that combined executive and judicial functions and was hence usually confined to the 'squirearchy'. JPs were involved in all criminal cases and tried misdemeanors, infractions of local ordinances, and bylaws. Class, politics, and law were closely linked; JPs often had a political background, as indeed did judges. In his masterly account of the eighteenth-century Black Act, designed against poachers, but used widely and repressively in public order cases, E.P. Thompson cites Lord Hardwicke, who had helped as Attorney General to draft and secure the passage of the Act. Hardwicke canvassed for more severe penalties against rioters and used his position as Lord Chief Justice to hear cases that substantially widened its aspect.[1] Radical writers and activists came up against the judiciary in other circumstances. Sedition — the offence of exciting disaffection against the Crown or governmental institutions of the country — was a common law offence, famously used in 1792 against Tom Paine, author of the *Rights of Man*. The Tolpuddle Martyrs were convicted and transported for swearing an illegal oath to combine and raise wages for agricultural workers.[2]

In the civil courts, too, the relationship of the law to trade unions was one of hostility. Judges in the late nineteenth century developed the tort of conspiracy to provide an action for employers against collective action by unions,[3] for decades

[1] Thompson EP, *Whigs and Hunters*, Peregrine Books, 1977, 210 and 250.
[2] *R v Lovelass and Others* [1834] 172 ER 1380.
[3] *Quinn v Leathem* [1901] AC 495; *Taff Vale Rwy Co v Amalgamated Society of Railway Servants* [1901] AC 426.

resisting and whittling down parliament's attempts to protect the unions.[4] In general, judges supported capital, developing the common law to deprive workers of redress for industrial injury. An 'unholy trinity' of defences to actions for employers' liability emerged, based on the notion that workers were free to choose their employment: the defence of voluntary assumption of risk and partial defence of contributory negligence and the doctrine of common employment, which meant that employers were not liable for accidents caused by fellow workers. Not until the late 1930s did the courts change tack decisively by developing an employer's duty of care towards the workforce.[5] In the meantime, it was left to parliament to mitigate the situation created by the judges with successive Workmen's Compensation Acts (1897, 1906). The performance of county court judges in workmen's compensation cases was poor, leading to a flood of conflicting decisions emanating from pro- and anti-employer judges — a discouraging experience allegedly partly responsible for the radical Liberal government's choice of tribunals around 1910 to adjudicate disputes under the first welfare legislation.[6] The preference for tribunals as an informal, inexpensive substitute for the formal 'atmosphere of uncomfortable dignity' of courts became a marked feature of all modern welfare legislation.[7] Litigation in the civil courts was, in any event, beyond the reach of most working people. The procedures were complex and tended to require legal assistance. There was some charitable provision for legal aid, but no general legal aid scheme before the Legal Aid and Advice Act 1949;[8] this was partial, extended to the county courts in 1960.

Between the World Wars

Against this background, suspicion of judges, magistrates, and the common law on the part of radical reformers was not unwarranted. In the inter-war years, the viewpoint found expression in the work of an outstanding group of left-wing academics intent on law reform, working at the London School of Economics (LSE). The work was inter-disciplinary (indeed, the LSE had no distinct law department before the late 1920s), and legal studies were an integral part of the teaching from early days.

[4] Notably the Trade Disputes Act 1901, passed to reverse the *Taff Vale* Decision. See generally, Lord Wedderburn, *The Worker and the Law*, Pelican Books, 1965.
[5] *Wilsons and Clyde Coal Co v English* [1938] AC 57.
[6] More precisely, the Old Age Pensions Act 1910, and National Insurance Act 1911. And see Wraith, R.E, and Hutchesson, P.G, *Administrative Tribunals*, Allen & Unwin, 1973, 33 e.s.
[7] Street, H, *Justice in the Welfare State*, 2nd edn, Stevens, 1975, 9.
[8] Abel-Smith, B, and Stevens, R, *Lawyers and the Courts*, Heinemann, 1967, ch 6; Smith, R, *Justice: Redressing the Balance*, Legal Action Group, 1997, ch. 2.

The two academics with the strongest interest in law reform were in fact non-lawyers: Harold Laski, a political scientist, and William Robson, the first professor of public administration at the LSE. Laski campaigned actively for a Crown Proceedings Act to end crown immunity from liability in contract and tort, a reform carried through by Sir Hartley Shawcross in the post-war Labour government in 1947. Laski also pressed on Lord Sankey, the Labour Lord Chancellor from 1931-35, the need to copy the American practice of providing legal representation to the poor through salaried law centres.[9] Robson's main field was administrative justice: he never ceased to push for a system of administrative tribunals "in the main independent of the courts of law"; also amongst his objectives was the development of user-friendly machinery for the resolution of 'small claims'. Robson castigated the judiciary for doing "absolutely nothing to modernize, to cheapen or to bring into accord with modern needs a fantastic procedure which has been obsolete for at least a century".[10] He claimed too that, although the lawyers still regarded themselves as champions of the popular cause, that honour lay with "the great departments of state". These were not only "essential to the well being of the great mass of the people, but also the most significant expressions of democracy in our time".[11] Robson's long-term interest in administrative justice led, in time, pioneering studies of welfare administration and a movement for better administration of tribunals to provide justice for the poor.

Central to the inter-war campaign were two journals: the Political Quarterly (PQ) and Modern Law Review (MLR). The former was founded in 1930 by Leonard Woolf to discuss social and political questions from a progressive point of view. It carried an important series of 'Essays in Law Reform', opened in 1933 by D.N. Pritt, a prominent radical barrister, with an article on how to set about reform. Pritt complained that a system based on judge-made precedent created uncertainty, delay, and expense, and that the complexity of the procedure was fit only for "wealthy litigants or powerful corporations".[12] As reform would be difficult "due to the conservative nature of lawyers", Pritt argued for a Poor Persons Department to help the poor obtain justice. This introduced another regular theme for the reformers: the case for a Ministry of Justice, ultimately instituted by Tony Blair in 2007.

Theo (later Lord) Chorley, in his contribution focused on the political nature of the judiciary, and argued for a new system of judicial appointment to redress the

[9] Glasser, C, and Harlow, C, 'Legal Services and the Alternatives: The LSE Tradition' in Rawlings, R (ed.) *Law, Society and Economy*, Clarendon Press, 1996, 325
[10] Robson, WA, 'The Report of the Committee on Ministers' Powers', *3 Political Quarterly*, 1932, 346.
[11] Robson, WA, *Justice and Administrative Law*, 1st edn 1928, Stevens, citation from 3rd edn, 1951, 421.
[12] Pritt, DN, 'Essays in Law Reform' 1 Methods of Approach' 4 PQ, 1933, 157, 161. The expense and delay of the legal system was the subject of a separate essay: Thompson, WH, 'Essays in Law Reform. V Expense and Delay' 5 PQ, 1934, 209. Likelihood of reform was addressed in the final essay by Claud Mullins, a radical, campaigning stipendiary magistrate: Mullins, C, 'Essays in Law Reform. VI Conclusion: The Outlook', 5 PQ, 1934, 517.

problem of judicial appointments going to "lawyers who have been actively engaged in politics"; he added for good measure that the "system of amateur Justices of the Peace should be abolished".[13] This theme was taken up by Alexander Carr-Saunders in his article on the civil courts, [14] who noted a change from JPs who were "persons of a certain social standing", independent of the police and with a sense of duty and "judicial outlook" to a magistracy that was 'normally a reward for political services' and where judicial outlook had been lost. Ivor Jennings, in a parallel article on county courts, described these as providing "cheap justice for poor men", a "class distinction" based on the "inaccessibility of the High Court to the proletariat". The outcome was a judiciary out of touch with its clientele. Both Chorley and Carr-Saunders drew heavily in their articles on the comparative work of a third left-wing intellectual, barrister and Labour councillor, R.C.K. Ensor. [15] Jennings believed that the system should be decentralised, assize courts abolished, and county courts distributed throughout the country; [16] for Carr-Saunders, the solution lay in a three-man bench composed of one stipendiary and two lay magistrates. Note the 'bottom up' emphasis on courts that dispensed justice for the working classes.

The MLR, edited from 1937 by Chorley, provided a platform for radical LSE reformers. In the first edition, for example, we find Ivor Jennings fulminating against the damage inflicted by the "excessive influence of common law methods of thought in the interpretation of modern legislation".[17] The MLR was able to carry on in slimmed-down editions throughout the war with articles that — like the more famous Beveridge Report on 'Social Insurance and Allied Services' — reflected preparations for Labour government after the war with which several members of the department were intimately involved. Thus, a lively discussion in the journal of workmen's compensation law and practice formed the background for the introduction by the Attlee government of a state insurance scheme in 1946, and a series of articles concerning legal aid contributed to the introduction of funded legal aid in 1949.[18]

[13] Chorley, RST, 'Essays in Law Reform. III A Ministry of Justice & Reform of Judicial Institutions', 4 PQ, 1933, 544, 554, 557.
[14] Carr-Saunders, A, 'Essays in Law Reform. IV The Courts System 1. The Police Courts', 5 PQ, 1934, 83.
[15] Ensor, RCK, *Courts & Judges in France, Germany, and England*, Oxford University Press, 1933.
[16] Jennings, WI, 'Essays in Law Reform. IV The Courts System 1. The Civil Courts', 5 PQ, 1934, 74, 77.
[17] Jennings, WI, 'Judicial process at its Worst', 1 MLR, 1937, 111.
[18] Notably, Schmitthoff, CM, and Terry, J, 'Legal Aid and Social Security, 7 MLR, 1943-1944, 138. And see generally for the influence of the MLR, Glasser, C, 'Radicals and Refugees: The Foundation of the Modern Law Review and English Legal Scholarship', 50 MLR, 1987, 688.

The post-war period

It is convenient to date the end of the inter-war period of law reform with the fall, in 1951, of the Labour government, which had carried so many of their ideas into law. But a new period opened in the 1960s in which LSE lawyers also played a significant part. The career of Michel Zander, entirely devoted to law reform, opened with the publication of the restrictive practices of lawyers in 1967.[19] Working closely with colleagues from other departments (Brian Abel-Smith, Robert Stevens, and Rosalind Brooke), Zander helped to found a tradition of solid scholarly research into the organisation of the profession, legal services, unmet legal need, and administrative justice,[20] using his position as legal correspondent of the Guardian to publicise their views. Zander's Hamlyn lectures in 1999 reprise his long-term work on legal aid and access to justice.[21] While highly critical of the Woolf reforms of civil justice,[22] Zander approved of Tony Blair's Human Rights Act 1998, for which he had fought long and hard.[23]

It is said that the book that provided the blueprint for the concrete reforms of Harold Wilson's Labour governments of 1964-70 was *Law Reform Now*, sponsored by the Society of Labour Lawyers and edited by Gerald Gardiner QC (then soon to be Harold Wilson's Lord Chancellor) with Andrew Martin.[24] Gardiner was responsible for the Law Commission, set up in 1965 to keep law reform consistently on the agenda. Wilson's government was also impelled by Richard Crossman to establish a parliamentary ombudsman to handle complaints against the administration unlikely to reach the courts.[25] The Labour governments of Tony Blair (1997-2007) and Gordon Brown (2007-10) were equally reformist: think of the Human Rights Act 1998; the Constitutional Reform Act 2005, which set up the Supreme Court; and the thorough remodelling of the administrative tribunal system in 2007.[26] These changes had figured on the agenda of left-wing reformers for many years.

One cannot end this short account of the left's relationship with the judges, however, without a mention of the controversial work of the disputatious J.A.G. Griffith, life-long critic of the judiciary and leading advocate of judicial self-

[19] Zander, M, *Lawyers and the Public Interest*, Weidenfeld & Nicolson, 1967.
[20] Notably, Abel-Smith, B, and Stevens, R, *Lawyers and the Courts*, above n.8; Abel-Smith, B, and Stevens, R, *In Search of Justice*, 1968; Abel-Smith, B, Zande, M, and Brooke, R, *Legal Problems and the Citizen*, 1973; and Stevens, R, and Drewry, G, *Law and Politics: The House of Lords as a Judicial Body 1900-1976*, London, Weidenfeld and Nicolson, 1979.
[21] Zander, M, *The State of Justice*, Sweet & Maxwell, 2000.
[22] Lord Woolf, *Access to Justice, Report to the Lord Chancellor on the civil justice system in England and Wales*, London, Lord Chancellor's Department, 1996.
[23] Zander, M, *A Bill of Rights?*, 1975, 4th ed.1997.
[24] Gardiner, G, and Martin, A, (eds), *Law Reform Now*, Gollancz, 1963.
[25] By the Parliamentary Commissioner for Administration Act 1967.
[26] The report of the Leggatt Committee (Leggatt, A *Tribunals for Users, One System, One Service*, London, HMSO, 2001) was implemented by the Tribunals, Courts and Enforcement Act 2007.

discipline.[27] In his 'little book', *The Politics of the Judiciary*, Griffith presented the judiciary as a class that was 'broadly homogenous in character' and saw itself as protector and conservator of 'what has been' — though he presented a set of short case studies that certainly suggested a bias towards 'reactionary conservatism'.[28] The book created a furore. Lord Hailsham, then soon to become a Conservative Lord Chancellor, attacked it in a broadcast, and Kenneth Minogue, colleague and right-wing reviewer, said that it formed part of a tradition that "rip[ped] the mask off the sacred name of justice and reveal[ed] the political passions pulsing underneath". Minogue aligned Griffith with the Baader-Meinhof gang for 'believing that every criminal trial is categorically unjust.'[29] An unrepentant Griffith went on to attack the proposals for radical constitutional change advanced by "a number of rather improbable people" — namely Lords Hailsham and Scarman.[30] In a daring case for the existing "political constitution",[31] Griffith (in common with many left-wing writers)[32] rejected a human rights culture based on "the imprecisions of Bills of Rights or the illiberal instincts of judges". Ironically, in a modern context, this standpoint aligns the unremittingly Labour Griffith with the right wing of the contemporary Conservative Party, a paradox that seems the right place to sign off.

[27] Griffith, JAG., 'The Political Constitution', 42 MLR 1, 1979, *Judicial Politics since 1920*, Blackwell, 1992, 'Judges and the Constitution', in Rawlings (ed.) *Law, Society and Economy*, above n. 9.
[28] Griffith, JAG, *The Politics of the Judiciary*, Fontana, 1977, now 5th edn 1997, 208.
[29] Minogue, K, 'The biases of the bench', *Times Literary Supplement*, 6 January 1978, 11.
[30] See Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription*, Collins, 1978; Scarman, L, *English Law – the New Dimension*, Stevens, 1974.
[31] Griffith, JAG, 'The Political Constitution', 42 MLR, 1979, 1, 12, 14.
[32] Notably, Ewing, K, and Gearty, C, *Civil Liberties under Thatcher*, Penguin Books, 1990, and *The Struggle for Civil Liberties, Political Freedom and the Rule of Law in Britain, 1914-1945*, Oxford University Press, 2000. And see Campbell, T, Ewing, K, Tomkins, A (eds) *Sceptical Essays in Human Rights*, Oxford University Press, 2001.

3
The Left, Capitalism, and Judicial Power

Danny Nicol

Why is the British left so tolerant of the rise of judicial power? By 'the left', I refer to those in the Labour Party — a majority of members but minority of MPs — who supported the transformative election (and re-election) of Jeremy Corbyn as party leader. Whilst there may be multiple reasons why the left is 'judge friendly', I would argue that the main reason is that the left has been overrun with liberalism. It no longer seeks to replace the capitalist system with a system based on economic planning and public ownership. This scaling back of the left's ambitions contrasts with earlier generations of left-wingers who sought a planned economy, in which public ownership would be the dominant form of property ownership. The assumption now on the left is that capitalism is to be retained, tamed, and managed by more state spending. Since most of the left no longer seek fundamental change, they are less critical of institutions that would block such change, and that includes, centrally, the judiciary. Accordingly, the once-familiar litany of cases that judges have decided against working-class interests has become unfamiliar. It has been replaced by a quite different narrative, whereby a liberal-minded judiciary defends the oppressed from right-wing British governments and therefore deserves respect. The fact that the judiciary did little to soften the tsunami of neoliberalism is brushed under the carpet.

The left's commitment to socialism waxes and wanes. At times, its support for socialism has been strong. In the wake of the 1945 nationalisations of public utilities, for example, the *Keep Left* 'manifesto' of 1947 called for public ownership to be "extended to embrace every industry with a hold over the national economy". And again in 1973, *Labour's Programme* proposed the nationalisation of 25 of the top 100 manufacturing companies. At the time, Neil Kinnock, then on the left, pronounced that "the future of Britain is with socialist nationalization […] the capitalist system is a failure". The '25 companies' proposal was, however, vetoed by party leader Harold Wilson, prompting a campaign to democratise the party. Even in the mid-

1980s, when the parties were converging on a pro-corporate stance, some socialists nonetheless stood firm — Eric Heffer arguing that it was impossible to create a classless society, as long as there was private ownership of major industries.[1] The desire to replace capitalism has itself been replaced by the excessively modest and snail's-pace extension of public ownership in the manifesto of the Corbyn-led Labour Party. When the left favours socialism, it seeks to restrain judicial power, mindful that the judiciary may present a threat to a radical, interventionist programme. When the left abandons socialist objectives, this motivation evaporates.

Evidence for this argument is readily apparent from the track record of the Labour Party as a whole. The 1945-51 Labour government, fresh from extending public ownership, opposed the creation of the European Court of Human Rights (ECHR), the right of individual petition, and the inclusion of the right to property ownership in the ECHR. Labour's manifestos of the 1970s and 1980s committed the party to protecting individual rights through a series of specific statutes, enabling parliament not judges to retain the upper hand. There was an emphasis on workplace rights, women's rights, and legal aid. Only in its 1992 manifesto, by which time Labour's transition to neoliberalism was virtually complete, did the party propose entrenchment of constitutional rights. Even then, though, it suggested creating an elected second chamber with a delay power to safeguard individual and constitutional rights for the period of one parliament. However half-baked, this proposal nonetheless acknowledged the democratic contestability of human rights. Only with the advent of 'New Labour' in 1997 did the manifesto propose full-blooded incorporation of the European Convention on Human Rights. Thus, Labour's warming to judicialisation went hand-in-hand with its embrace of a more capitalistic settlement. The same is the case with the Labour left.

Yet why has the left shifted towards liberalism? Perhaps the major reason is that its support for socialism has been worn down by the neoliberal hegemony that has dominated British politics since the 1980s. As is well known, Margaret Thatcher, alongside ally Ronald Reagan, established a programme — later known as the 'Washington consensus' — of free trade, privatisation, small government, and unfettered markets. This neoliberal globalisation brought with it a massive extension of the role of the judiciary as part of a more general elevation of the unaccountable.[2] Thus the World Trade Organisation panels came into being, and the European Court of Justice flexed its muscles in the wake of the Single European Act. Before too long, the Labour Party capitulated to the new consensus, notably in its policy review of 1987-8. When Labour returned to office, instead of dismantling Thatcherism, it

[1] Heffer, E, *Labour's Future: Socialist or SDP Mark II?*, Verso, London, 1986, 4.
[2] See Vibert, F, *The Rise of the Unelected*, Cambridge, CUP, 2007.

supercharged it.[3] Along with privatisation, 'New Labour' ushered in further judicialisation and supranationalism. Those changes placed capitalism on a more secure footing. As Jim McGuigan has noted, capitalism has never been considered so legitimate, as a virtually natural state of being, as it has over the past 40 years.[4]

The left is not impervious. It was unable to cocoon itself from this crushing hegemony. Although the small left band in the Parliamentary Labour Party resisted the blandishments of neoliberalism, they nonetheless re-emerged as liberal, seeking somehow a kinder, gentler capitalism, rather than a new economic system. They seek a "nice new, fluffy sort of capitalism that, should it ever come to pass, we may all grow to love".[5] By what alchemy the left will bring it into existence is anyone's guess. In any event, for all the hysteria from Blairite MPs, Jeremy Corbyn's election as leader heralded not a swing towards socialism but a return to social democracy.

One cannot however attribute socialism's marginalisation entirely to the decades-long domination of neoliberalism. The commitment of many established left-wingers to socialism has been at best flaky even in more progressive times. Indeed, some on the left might be described as 'left-wing on everything except socialism': they tend to divert themselves into different territories such as opposition to nuclear weapons or to Britain's various ill-fated interventions in Arab and Middle East countries. It would require meticulous research to establish to what extent figures such as Jeremy Corbyn, John McDonnell, and Diane Abbott ever supported the socialist transformation of society, and how their politics contrast with the previous generation of left figures, such as Tony Benn, Eric Heffer, Dennis Skinner, and Joan Maynard. Any analysis would be further complicated by the likelihood of political denial by all those involved: when left-wingers work and vote together day in, day out, unable to break out of their marginalisation, the sense of solidarity lends itself to the glossing over of political differences. Disagreements tend to be downplayed and not openly discussed.

This shift on the part of the left towards the acceptance of capitalism partly explains the left's tolerance of the rise in judicial power. Yet the issue of judicialisation is also strongly linked to the growth of supranational regimes to which the left has belatedly lent its support: the European Convention on Human Rights system and the European Union. Both of these institutions contain particularly powerful judiciaries, which, in turn, have empowered our domestic judiciary in various respects. By bestowing legitimacy on these regimes, the left has disregarded Colin Crouch's argument that the present supranational organisations, far from bringing about a compromise between democracy and capitalism, are

[3] Jenkins, S, *Thatcher and Sons*, London, Penguin, 2007.
[4] McGuigan, J, *Cool Capitalism*, London, Pluto, 2009: xi.
[5] Ibid., 227.

mainly in the business of breaking down barriers to corporate freedom by creating global oligopolies. On Crouch's reading, the supranational organisations have contributed to post-democracy rather than softened it.[6]

The ECHR, for example, protects the peaceful enjoyment of private property. The left would not touch the ECHR with a bargepole were it serious about the socialist transformation of society. Aileen Kavanagh, a strong supporter of the judicial role, has conceded rather strikingly that the ECHR/HRA only results in marginal gains for the cause of liberty, but, she reasons, "marginal gains are better than no gains at all".[7] Yet, for socialists, the calculus is entirely different because there is a 'minus' side to the equation. The right of property ownership is a severe obstacle to the attainment of democratic socialism, particularly since the European Court of Human Rights has interpreted it as protecting the existing pattern of property ownership, and has smuggled in a proportionality test by which to assess the lawfulness of its restriction.

The left's change of heart over the highly-judicialised EU is yet more alarming. An opponent of every EU Treaty since the 1975 Referendum, Jeremy Corbyn switched to the 'Remain' cause on his third day as party leader. It is hard to imagine that this Damascene conversion was occasioned by any great change in the EU. Rather, it seems to have been motivated by considerations of placating the Parliamentary Labour Party — not a successful tactic, since Labour MPs passed a vote of no confidence in him anyway. It is difficult to envisage a legal regime more inimical to the socialist transformation of society than the rules of the EU single market. One insuperable obstacle (among many others) is the series of liberalisation directives that constitutionalise privatisation in crucial fields such as energy, postal services, rail, and telecommunications. These guarantee the rights of firms from all Member States to operate on the national market, thereby precluding sectoral nationalisation. 'Socialism' may only take the form of publicly owned companies having to compete in a market with private operators along with the state providers of other countries. These directives cannot be wished away; they can only be repealed by unanimity on the council, presupposing the miracle of a complete absence of neoliberal governments in all the member states.

To justify the EU *volte face*, Corbynistas fell in with a ludicrously selective reading of EU law, whereby they advanced the argument that withdrawal from the EU would somehow mean a 'bonfire of workers' rights' (an argument that patently failed to convince Britain's workers). A convenient veil was drawn over cases such as *Viking* and *Laval*, which show the Court of Justice favouring the neoliberal four

[6] Crouch, C, *Post-Democracy*, Cambridge, Polity Press, 2004, 106.
[7] Kavanagh, A, 'Judging the Judges Under the Human Rights Act', PL, 2009, 304.

freedoms over workers' interests. More fanciful still was the left's 'Another Europe is Possible' thesis, which contended that the EU could be reformed into something socialistic. This argument studiously ignored that Treaty amendment may only be effected by common accord of the member states. Most fundamentally, the entrenchment of capitalism by the EU treaties went unmentioned, since the left now appears to favour capitalism's indefinite retention.

Class analysis of the judiciary has also been a casualty of the left's abandonment of socialism, and is readily apparent in the reverential tones towards judges. Thus the pro-Corbyn Shadow Justice Secretary, Richard Burgon, defended the *Miller* judges by invoking the rule of law. Yet, on a class reading, the Supreme Court did not 'bungle the law' in deciding *Miller*, as if it were all some complex technicality. Rather, judges form part of that section of the politico-economic elite that favours the capitalistic settlement of 'soft Brexit'. In *Miller*, the judges figured that their best prospect for achieving soft Brexit lay in empowering the strongly pro-EU House of Commons. They decided the case accordingly. Judges are frequently called upon to determine cases in the context of the public interest, but their view of the public interest generally coincides with their personal political views.[8] On this reading, *Miller* can be perceived as something of a British version of *Bush v. Gore*: a case in which the political bias of the judges was particularly glaring. As for Burgon's evocation of the rule of law, as J.A.G. Griffith observed, "the Rule of Law is an invaluable concept for those who wish not to change the present set-up".[9]

Conclusion

The British left's support for judicial power begins to make more sense when set in context. It is the contemporary left's dogged liberalism — its acceptance of capitalism, and its wishful thinking that it can somehow tame capitalism — that leads it to accept the growing power of the judges. Yet capitalism is not easily tamed, and social-democratic programmes tend to collapse into neoliberalism. Should the time come when the left comes to regret its turn towards liberalism, it may also turn against judicial power.

[8] Griffith, JAG, *The Politics of the Judiciary*, London: Fontana, 5th ed, 1997, 336.
[9] Griffith, JAG, 'The Political Constitution', 42 MLR 1, 1979, 15.

4
Can Judges Be Trusted with the Common Law?

Mike Macnair

The question posed by this title may seem meaningless — but it is not. The reason *why* it is posed is the underlying issue: why should judges be trusted more than other branches of government?

Our eighteenth-century forebears, like Blackstone, thought of their constitution as 'mixed', in the sense that it contained elements monarchical (the executive), aristocratic (the House of Lords and professional judiciary), and democratic (parliament, juries, and local government). These 'checked' each other, and had to act together for the most powerful effects. Even Montesquieu, who inaugurated the idea of the 'separation of powers', saw the 'judicial power' in England as resting in *juries*, not judges. In 1688-89, the whole senior judicial bench was sacked, a number of their recent decisions were characterised by parliament as criminal, and the Lord Chancellor and one Chief Justice died in jail awaiting trial for them (the other Chief Justice fled into exile). For a century afterwards, the lay peers routinely voted in the judicial appeals, recognising a constitutional responsibility in their office to control the professional judiciary. For example, in *Donaldson v Beckett* (1774), the lay peers ruled by a 2:1 majority that there could be no copyright at common law, reversing the decision below reported as *Millar v Taylor* (1769), and rejecting the advice of the majority of the judges. They did so on the basis of the arguments of the then Lord Chancellor Lord Apsley and the former Lord Chancellor Lord Camden that it was *unconstitutional* for the courts to create new property rights.[1]

Since the middle of the nineteenth century, trust in the lay parts of the constitution has declined, while trust in the professional judiciary has tended to increase, albeit with ups and down over the years. But *why* should we *particularly* trust judges?

[1] *Donaldson* v. *Beckett* [1774] 2 Brown PC 129, 1 ER 837, and 17 Cobbett Parl. Hist. 954, 1003. *Millar* v. *Taylor*, [1769] 4. Burrow 2303, 98 ER 201 was a fictional 'issue' referred to the King's Bench from Chancery in the *Millar* v. *Donaldson* litigation, which reached the House of Lords as *Donaldson* v. *Beckett*, not a separate case.

A traditional point of view would say that, as a part of the aristocratic element of the constitution, judges can be trusted to protect *property rights* against the aspirations both of the executive, and of the *hoi polloi*, for taxation and expropriations. This, however, could hardly be an argument for a paramount trust in judges that could commend itself to the political left.

More recently, and particularly since the ending of the spoils system of judicial appointments in 1945, the case for trusting judges has rested essentially on their professional commitments to *the law as such*. The idea is that judges' professional commitments mean professional judges are more trustworthy than other branches of the constitution.

But how deep do judges' professional commitments to the stability of law as such go? Much in this territory can be and has been argued, most famously in J.A.G. Griffith's *The Politics of the Judiciary* (Fontana 1977); much of the law Griffith and other similar authors have discussed is inherently politically controversial. Here, I want to give what I think is an example of judicial conduct which seriously calls into question judicial fidelity to law. In the early 1950s, a stable dogma of real property law, nearly 500 years old, was overthrown by the Court of Appeal for the sake of creating a loophole for landlords in the Rent Acts. It was only after the effective decontrol of private sector rents in 1980 that the House of Lords saw fit to restore an approximation to the orthodox doctrine.

The instance is a striking example because it is in real property law, an area where long-term stability of the law is generally understood to be particularly important — because of the antiquity and stability of the original rule; because some of the early cases on the change make explicit reference to the Rent Acts, as implying that the rule should change; and because the change was substantially abandoned more or less as soon as rent control in the private rented sector was got rid of. It is thus a very spectacular example of the judiciary usurping the legislative power for the benefit of a class — landlords — *at the expense of* law or the 'rule of law'.

The doctrinal issue is the distinction between a lease or tenancy of land, which under modern law is a property right technically binding all the world, and a licence to enter land, which is technically a mere personal permission given by the landowner, which at most leads to the licensee having a contractual claim against the landowner in the event that it is part of a binding contract.

The loophole in the Rent Acts was that these acts were so drafted as to cover tenancies and not licences. This was in itself sensible: a typical licence is an invitation to a dinner party, or a 'contractual licence', the position of a holder of a theatre ticket, or a hotel guest, and so on; and various arrangements in which the landowner is still in occupation of the land, while allowing the licensee to come on to it. Obviously, such arrangements should not be subject to rent control. It became

an *operative* loophole when the courts became willing to say that arrangements in which the landowner *moved out of* occupation, leaving occupation to the 'licensee', were licences rather than leases.

A lease was originally merely a personal right under a contract, like a modern contractual licence. From the 1230s onwards, however, the use of leases for periods of years led to the introduction of partial remedies for the lessee, first against purchasers from the lessor (1230s), then against unrelated third parties who evicted him or her (later 1200s), and then against those who created a 'nuisance' by pollution, and so on (1350s). By the 1460s, when Thomas Littleton wrote his property law book *Tenures*, the lease for years was beginning to be capable of being seen as an 'estate' in the land, a property right, as Littleton did in his book.[2] So it became necessary to draw the line between leases and licences.

The first case in which the point was argued was *Prior of Bruton v Ede* in 1470, in which the landlord argued that a licence to occupy amounted to a lease (if so, as a corporation they could only lease by deed). The case was settled out of court, but the point was treated as decided by an anonymous case in the 1480s, where it was also observed that a licence would only be a lease if the licensee's occupation was exclusive (as opposed to cases where the landowner continued in occupation). By 1489, the rule that a licence to occupy is as a matter of law a lease was well enough settled to be used by counsel in *Lord Dudley v Lord Pole* to build an analogy: that a licence to take a necklace as security for a debt was, and hence should be pleaded as, a pledge. The court conceded the rule that a licence to occupy is a lease, but distinguished the case at hand.

Thereafter, the basic rule that a licence to occupy land is as a matter of law a lease was repeatedly stated as a basic dogma, and used from an early date to build various analogies. It was applied as decisive in a good many cases. I give merely some dates: 1579, 1601, 1677, 1768, 1844, and 1899, and, by the Privy Council in 1867, 1904, and 1913. It is perfectly clear in the cases that (contrary to some modern interpretations) the rule was a rule of law, not a rebuttable presumption or rule of interpretation.[3]

In the nineteenth century, there was some tendency for the language used to shift from 'occupation' to 'possession'. But down to the 1930s, the test used by the courts to distinguish tenant from licensee remained one of the *factual occupation and control of the land*, not one of the intentions of the parties.[4]

[2] Summary account of these developments in Baker, JH, *An Introduction to English Legal History*, 4th ed., London, Butterworths, 2004, 298-301, 424-425.
[3] References for the points above in Macnair, M, 'Sham: early uses and related and unrelated doctrines' in Simpson, E, and Stewart, M, ed. *Sham Transactions*, Oxford, OUP, 2013, ch 2 at p. 49, except for the 1899 case, which is *Lynes v Snaith* [1899] 1 QB 486.
[4] 'Possession' e.g. *Lynes v Snaith*, above. Control test, e.g. *Stening v. Abrahams* [1931] 1 Ch. 470.

The rule was thus, as I have already said, stable over the better part of half a millennium. It was overthrown by a short series of cases mostly in 1951-52. These were *Marcroft Wagons* v. *Smith* (23 May, 1951), *Errington* v. *Errington & Woods* (19 December, 1951), *Cobb* v. *Lane* (1 April, 1952), and *Facchini* v. *Bryson* (7 April, 1952).[5] I have given the full dates to indicate just how close together these cases were.

The context of the change was the Rent Acts. Rent control was introduced in the UK as a war measure in 1915, in response primarily to the Glasgow rent strikes of that year and secondarily to lobbying from munitions manufacturers. After 1918, it proved to be politically impossible to move to full de-control, and rent control was extended in a series of acts while *partial* decontrols were introduced by Conservative governments, with full control restored in 1939. After 1945, Labour continued full control, eliminated the major loophole — the exclusion of furnished property — by the Furnished Houses (Rent Control) Act 1946, and eliminated a series of other judicially-created loopholes by the Landlord and Tenant (Rent Control) Act 1949.

The politics was contentious. The Conservative party won office in 1951 with an *internal belief* — stronger at the grass roots than at the top — that 'free market' rents should be restored; but at the same time, with its senior leadership believing that it was politically impossible to move rapidly in this direction.[6] It is in this context that the judiciary delivered the means for a non-statutory form of partial decontrol of the private rented sector by loopholing the new acts.

The starting point was *Marcroft Wagons* v. *Smith*. The lead judgment given by Evershed MR is replete with anti-Rent Acts rhetoric, and explicit that the old rules as to occupation or possession leading to a tenancy have to be rejected in the light of the Rent Acts. Denning LJ is equally explicit: "it is no longer proper for the courts to infer a tenancy at will, or a weekly tenancy, as they would previously have done from the mere acceptance of rent. They should only infer a new tenancy when the facts truly warrant it". Only Roxburgh J was a little more cautious.

Next, came the celebrated case of *Errington* v. *Errington*. This case raised no Rent Act issues, since it concerned a family arrangement for the purchase of a house with the father providing the deposit and the son and daughter-in-law paying the installments. This should have been a straightforward case of a legal tenancy at will

[5] *Marcroft Wagons Ltd. v. Smith* [1951] 2 K.B. 496; *Errington v Errington & Woods* [1952] 1 KB 290; *Cobb v Lane* [1952] 1 All ER 1199; *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386. *Booker v Palmer* [1942] 2 All ER 674 is an outlier. Lord Greene MR's extempore judgment wholly disregarded the authorities cited to him for the defendant, and cited no authorities for the position it states, so that it is plainly *per incuriam*. The editors of the Incorporated Council Reports, the Law Times Reports, and the Times Law Reports rightly decided not to print it; the editors of the All England Reports, who did print it, printed an editorial note indicating that it depended on its particular facts (i.e. should not be cited). If it had not been cited in the 1951-52 cases, it would have fallen into well-deserved oblivion.

[6] Introduction of rent control: Harrison, R, 'The War Emergency Workers' National Committee 1914-1920' in Briggs, A, & Saville, J, ed., *Essays in Labour History 1886-1923*, London, Macmillan, 1971, Ch 9, 233. The statutes through the inter-war period can be traced on Justis. Conservative party policy as of 1951: Weiler, P, 'The rise and fall of the conservatives' grand design for housing', 1951–64', 2000, 14 *Contemporary British History*, 122-150, 123.

accompanied by an equitable right to a share in the property under the agreements between father, son, and daughter-in-law. The judgments of Somervell and Hodson LJJ were somewhat confused. Denning LJ *introduced* the Rent Acts issue into the case to justify finding that what was created was a contractual licence, on the basis of the hypothesised intention of the parties.

Cobb v. *Lane* was similarly a case not about the Rent Acts, but about limitation of actions where a person had lived in a house for thirteen years under a family arrangement; if this was a tenancy at will, the claim of the estate of the paper owner was barred by the Limitation Act 1939. As in *Errington*, the existence of the Rent Acts was given by Somervell and Denning LJJ as a reason for reversing the old law as to the creation of tenancies.

Finally, *Facchini* v. *Bryson was* a Rent Act case, and the court, led by Somervell LJ, was given the opportunity to show that 'honest, guv', they weren't, as Denning LJ put it "[making] a hole in the Rent Acts through which could be driven — I will not in these days say a coach and four — but an articulated vehicle". In reality, by adopting the 'intention' test they adopted in *Marcroft*, *Errington* and *Cobb*, they *were* revising the fundamental principles of land law in order to enable such a hole to be created. *Facchini* merely penalised poor drafting by the landowners' lawyers, which had the arrangement described in one place as not a tenancy, in another as a tenancy.

The effect of the loophole created was, in the long run, to undermine public support for rent control, since the bulk of private sector landlords could escape through it. There was little *immediate* political effect, because the incoming Conservative government introduced both a large-scale council house-building programme, and tax incentives for freehold-mortgage, so that the private rental sector became relatively marginal. But, by the 1970s, the squeeze had been put on public-sector house-building, and the remaining areas of rent control therefore appeared, to those who were unprotected thanks to 'occupational licences', as an unfair advantage for those still had rent-controlled tenancies. As a result, the Thatcher government was able in the Housing Act 1980 to largely formally decontrol the sector. Further reform in this direction followed.

With the reasons for the new doctrine as a means of limiting the statute gone, the courts were able in *Street* v. *Mountford* (1985) and following cases to go a considerable distance towards returning to the long-term orthodoxy. Not completely, since 'exclusive possession' is still read as a matter of the terms of the agreement, rather than as 'exclusive occupation'. [7] But the partial return to orthodoxy in *Street* illustrates precisely that the point of the heresies in *Marcroft Wagons*

[7] *Street* v. *Mountford* [1985] AC 809; *AG Securities* v. *Vaughan, Antoniades* v. *Villiers* [1990] 1 AC 417.

and following cases *was* to drive lorries through rent control, and thereby set up the political conditions for its repeal.

The effect, in turn, of the abolition of rent control has been the creation of housing benefit as a £23bn p.a. element of the welfare bill, roughly 17 per cent of that bill.[8] Beyond that immediate cost to the taxpayer, there are probably other adverse effects both on the housing market, and on wage costs. Making housing policy in the Court of Appeal in the interests of landlords as a class has thus turned out to be very expensive in the long term. We probably *shouldn't* trust judges to do this job.

But this particular case has broader implications. As I said at the outset, the modern argument for trusting judges more than juries, and more than elected representatives (local or national), is that judges' professional commitments to law and the rule of law make them *particularly* trustworthy. Griffith and others have argued before now that this view is false: judges have political commitments, commonly undisclosed and concealed behind a fiction of 'merely following the law'. A common pro-judicial response to these arguments has been that the law in the field discussed is debatable, and it is not clear that the judges are acting for the political or other reasons complained of. Here, I have examined a single issue in relation to which it *is* clear: the old rule of law was clear and stable for centuries; the judges explicitly referred to the Rent Acts and the interests of landlords when they overturned it; and, once rent control was gone, the courts went a large part of the way back to the old rule. The clarity of this example supports the other, less obvious, examples.

This is not a case for not trusting judges *at all*. It is a case for not trusting them to the extent that there is no check or balance on *their* conduct. It is thus a case against leftist support for judicial review of legislation on human rights grounds,[9] or for the EU architecture that allows decisions of the Court of Justice on the treaties only to be overturned by treaty amendment, requiring unanimity. It is a case positively for a 'mixed constitution' approach rather than a 'separation of powers' approach: for elected representatives, and the general public, seeing themselves as having a constitutional duty to pay attention to what the courts are up to, and to keep the judges within limits, as well as the other way round.

[8] http://budgetresponsibility.org.uk/forecasts-in-depth/tax-by-tax-spend-by-spend/welfare-spending-housing-benefit/. Cf also Wilson, W, *Private rented housing: the rent control debate*, House of Commons Library Briefing Paper Number 6760, 3 April 2017.

[9] Lord Finkelstein argues in The Times, 17 July 2017, that 'Tories should embrace the Human Rights Act', since it provides protection for property rights against — for example — expropriation of vacant property to provide housing. My argument is consistent with this view: it is leftists and democrats who should oppose judicial sovereignty, while Tories as the landlord party should support it.

5
Judicial Power and the Left: Deference, Partnership, and Defiance

Alan Bogg

The moment of conception for British labour law might be traced to an act of great courage in Germany in 1933. Otto Kahn-Freund, a judge in the German Labour Court, upheld the dismissal claims of three employees of the Empire Radio Company. The dismissals had occurred in the febrile atmosphere of the Fuhrer's first address to the entire nation. The dismissed employees were alleged to be communists bent on sabotaging the broadcast. Kahn-Freund awarded maximum damages to the claimants, in a case that few of his judicial brethren would have touched with the proverbial bargepole. Kahn-Freund's reasoning was based in part upon the employees' freedom of expression under the constitution. Shortly afterwards, Kahn-Freund's home was ransacked and he left the country in fear of his life.[1] The rest, as they say, is history. In due course, British labour law would be born at the London School of Economics. There, Professor Kahn-Freund forged his destiny as the one of the leading legal scholars of his generation.

These experiences left a deep imprint on Kahn-Freund. Some years later, Kahn-Freund was rather less caustic about judicial power than many of his social democratic contemporaries in the British legal academy. For example, Kahn-Freund was evidently moved by the deep aversion of the English common law to any form of legal compulsion in the individual contract of employment, and "the refusal to have even a vestige of compulsory labour in peacetime".[2] In this respect, Kahn-Freund lauded the speech of Lord Atkin in *Nokes v Doncaster Amalgamated Collieries* where Lord Atkin had stood against the transfer of contracts of employment in an amalgamation of companies: "I had fancied that ingrained in the personal status of a

[1] See Ewan McGaughey's translation of a fascinating conversation between Kahn-Freund and Wolfgang Luthardt, which took place a year before Kahn-Freund died: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2768439.
[2] Kahn-Freund, O, 'Labour Law', reprinted in Kahn-Freund, O, *Selected Writings*, London, Stevens & Sons, 1978, 1, 31, reprinted from M. Ginsberg (ed), *Law and Opinion in England in the 20th Century*, London: Stevens & Sons, 1959, 215.

citizen under our laws was the right to choose for himself whom he would serve, and this right of choice constituted the main difference between a servant and a serf".[3]

Debates about the proper limits of judicial power have been central to the development of post-war social democratic thought, and nowhere has this been more acute than in the deeply politicised context of work and its legal regulation. There is an enduring tradition of social democratic thought that is animated by a democratic concern to limit the power of the judiciary and the English common law in favour of legislation. I will turn to the characteristic elements of this tradition shortly. Before doing so, however, Kahn-Freund's story exposes two elements of judicial responsibility that have sometimes been obscured from view in the social democratic tradition. The first is a judicial responsibility to uphold the fundamental rights of the citizen, where powerful public or private actors threaten to violate those rights. Whether it be freedom of expression (as in the radio dismissal case) or freedom from forced labour (as in *Nokes*), the English common law serves to protect the citizen's fundamental rights. The second is the judicial responsibility to protect the vulnerable from abuse of power. Given the persecution of communists in Nazi Germany, these thoughts may have been acute in Kahn-Freund's mind when he handed down his judgment. It must have been especially poignant for Kahn-Freund as a German Jew.

But let us return to the dominant social democratic theory of judicial power. On this view, the common law represented a highly regressive and anti-democratic impediment to progressive social and economic change. Political change was to be achieved through the deployment of governmental power, in the form of primary legislation and the growth of the administrative state.[4] Many of these concerns were crystallised in J.A.G. Griffith's famous lecture, *The Political Constitution*, where Griffith articulated the view that law is simply another site in which political conflicts are carried on or resolved.[5] In later work, Griffith's encapsulated this insight in the arresting statement that "law is politics carried on by other means".[6] This characterisation of law as a form of politics had a particular significance in labour law, for in the hands of Lord Wedderburn (Kahn-Freund's intellectual heir), it provided a fresh perspective on the common law as a deeply politicised form of regulation. The image of the common law as accreted wisdom based on public reason was thoroughly debunked. The common law was an instrument of the ruling

[3] Ibid., 32, citing Lord Atkin in *Nokes v Doncaster Amalgamated Collieries* [1940] AC 1014. Kahn-Freund also noted Lord Atkin's dissent in *Liversidge v Anderson* [1942] AC 206, and his role 'as one of the champions of civil liberties in our time'.
[4] See Lord Wedderburn, 'Laski's Law Behind the Law. 1906 to European Labour Law' in Rawlings, R (ed), *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1985–1995*, OUP, 1997.
[5] Griffith, JAG, 'The Political Constitution', 1979, 42 MLR 1, 20.
[6] Griffith, JAG, 'The Common Law and the Political Constitution', 2001, 117 LQR 42, 64.

class, crafted by judges trained in particular habits of mind and with conservative dispositions, to use the coercive techniques of the law to support existing distributions of power, wealth, and social authority. The common law was often used by reactionary judges to frustrate the democratic will of the people, as expressed through social legislation and other forms of public power wielded by elected officials.

Of course, constitutional theories take shape in specific contexts of political power and conflict. They are never (or at least never should be) exercises in abstract philosophising. As a constitutional theory of judicial power in post-war Britain, there was a great deal of sense in the dominant social democratic theory of the judicial role and its limits. It rested upon the following conjunction of institutional factors that together supported an abstentionist framing of judicial responsibilities:

- The common law was based upon the protection of property rights and upholding the sanctity of freedom of contract, which in turn provided a juridical anchoring for the established social order. This obscured the subordination that lay at the heart of the employment relationship.
- The majority of workers were protected through autonomous collective bargaining, based upon collective agreements between employers and employers' associations and independent trade unions, supported by the social democratic state. The maintenance of this equilibrium rested upon a broad consensus of mainstream political parties.
- Public political power was harnessed by elected representatives, based upon free and fair periodic elections between competing political parties, to secure the progressive realisation of social and economic equality of citizens. This democratic model was based upon a viable Labour party supported by trade unions. Sometimes, public power would lead to the enactment of protective legislation to guarantee the social rights of worker-citizens through a universal 'floor of rights' for employees.

The context has now shifted radically. Legislation such as the Trade Union Act 2016 has been used as an instrument to attack the funding of the Labour Party and undermine the competitive democratic process. Legislation is also routinely used to deregulate employment protection legislation. At worst, legislation may threaten the worker-citizen's fundamental rights, especially in the sphere of freedom of

association. Historically, of course, employment legislation was traditionally the bulwark against an oppressive common law, and it provided a source of emancipation for workers. Collective bargaining is no longer an effective source of norms for the majority of private sector workers, and trade union strength has declined precipitously as a result of anti-union legislation and a hostile public policy environment.

Should the common law simply stand aside if legislation is put to oppressive ends? In public law, for example, judges have developed the common law as a source of protection where legislation cuts against the citizen's fundamental rights.[7] The historical picture of the legislator as hero and judge as villain is now far too simplistic. Common law and statute interact in a multiplicity of ways, the constitutional considerations are increasingly complex in character, and the strategic calculations of workers and trade unions in using the law more finely balanced.

In short, the world has changed. We are now living in an era where the judicial responsibilities to protect the vulnerable and to protect fundamental rights from oppressive encroachment need to be reasserted by the progressive left. Judicial abstention is a luxury that the poor and dispossessed in our political community can no longer afford.

This may strike a disturbing note. After all, the social and economic impact of a maverick judiciary may be indiscriminate in its impact. Judges may take an eccentric view of who the 'vulnerable' are. It could be the small employer faced by a legitimate claim for collective bargaining rights by a representative trade union. Or it could be the dissenting individual trade unionist, standing against the democratic wishes of his fellow workers while taking the economic benefits of the collective agreement. Furthermore, without the constraints of an authoritative constitutional text, judges might be as likely to protect the employer's right to private property as the employee's freedom of expression.

These concerns are not fanciful. But there is an answer to them. The judicial responsibility to protect fundamental rights and to protect the vulnerable is shaped by the generally subordinate position of judges in our constitutional order. Judges are obliged to apply statutes as a pre-eminent source of law in the democratic community. The common law must be developed in an incremental fashion. Judicial creativity is constrained by precedent and other canons of legal reasoning. In other words, the overarching duty of the judge is to apply the law. Where a line of common law development is open, the judge must try to ensure consistency and 'fit'

[7] See e.g. Lord Hoffmann's articulation of the legality principle in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) 131, to the effect that 'Fundamental rights cannot be overridden by general or ambiguous words […] In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual'.

with existing legal norms. The judiciary must be particularly sensitive to the special position of statutes in the legal order, and the common law must be developed harmoniously with the body of statutory law. In this way, judicial responsibilities to protect the vulnerable and to uphold fundamental common law rights operate within the perimeter set by other constitutional limits on the judicial role.

This vision is best captured in the idea that law-making is a 'collaborative' venture between different legal and political institutions, as defended by Professor Aileen Kavanagh: "Law-making is a collaborative enterprise […] In this enterprise, the legislature plays the lead role and the courts have a supporting role, assisting the legislature in the implementation of its laws whilst being prepared to stand up for certain values and principles in the appropriate case".[8]

Sometimes this collaboration will necessitate judicial deference. Sometimes it will necessitate a closer partnership between courts and legislature. In extreme situations, the collaborative model will require the judges to stand against an oppressive government in support of fundamental rights and the basic elements of the liberal democratic order. Let us call these three modes **judicial deference**, **judicial partnership**, and **judicial defiance**. All three modes are legitimate examples of judicial power being exercised responsibly. The demands of judicial responsibility will always be sensitive to context.

It is, of course, meaningless to be for or against judicial power in the abstract. It depends upon political and constitutional context; the degree of 'polycentricity' involved in adjudicating that dispute; the content of any primary legislation; and the extent to which fundamental rights are engaged.

Judicial deference

It is appropriate to begin with *Johnson v Unisys* as an example of appropriate judicial deference.[9] Mr Johnson was employed in a senior position in a computer software company. He was summarily dismissed and given a month's wages in lieu of notice. He lodged an internal appeal that was unsuccessful. He then made a successful claim for unfair dismissal, a statutory claim now contained in Part X of the Employment Rights Act 1996 (ERA 1996), receiving the maximum compensation of £11,691.88 available at that time under the legislation. Following his dismissal, Mr Johnson suffered a major psychiatric illness involving a period of hospitalization. During his period of recovery, Mr Johnson was unable to find alternative employment. It seemed very likely that his difficulties in finding another job were associated with

[8] Kavanagh, A, 'The Role of Courts in the Joint Enterprise of Governing' in Barber NW, Ekins R, and Yowell P,(eds), *Lord Sumption and the Limits of the Law*, Hart, 2016, 139–140.
[9] [2001] UKHL 13, [2003] 1 AC 518.

having suffered from the psychiatric illness that had been triggered by the manner of his dismissal.

Mr Johnson then instituted proceedings in the County Court for breach of contract and negligence under the common law in order to circumvent the limits on the compensatory award under the statutory unfair dismissal framework. His principal claim was an alleged breach of the implied term of mutual trust and confidence. He further alleged that the manner of his dismissal caused his mental breakdown and his subsequent inability to work, leading to a loss of earnings in excess of £400,000. The employer's application to strike out this claim was successful in the County Court and on appeal to the Court of Appeal,[10] and in a unanimous House of Lords. While the House of Lords decision rested upon a variety of legal bases, *Johnson* is most widely known for Lord Hoffmann's 'parliamentary intention' argument. According to Lord Hoffmann:

> For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent.[11]

Mr Johnson had already been successful in his unfair dismissal claim, and he had been awarded what was due to him under its scheme of limited remedies.

The deference in *Johnson* reflects strong general arguments requiring the fidelity of judges to primary legislation enacted by democratic legislatures.[12] Within the context of unfair dismissal legislation, the statute embodies a comprehensive scheme of regulation of dismissal with carefully crafted limitations on the scope of the right, its available remedies, and the creation of special adjudicative mechanisms for considering complaints of unfair dismissal. Furthermore, this is not a legislative settlement that was finalised and forgotten by the legislature. On the contrary, its limits and restrictions have been revised at regular intervals across its 40-odd-year lifespan. In these circumstances, the judicial obligation of fidelity and obedience to democratically enacted legislation has significant weight. In his important work on the adjudication of social rights, King has rightly observed that the democratic argument supporting what he describes as "finality of legislation" is subject to limits.[13] Specifically, it might be possible to modify the default of strong judicial deference to primary legislation where there has been an absence of deliberative

[10] [1999] 1 All ER 854 (CA).
[11] *Johnson* [58].
[12] The leading work is Jeremy Waldron, *Law and Disagreement*, OUP, 1999.
[13] King, *Judging Social Rights*, 163–169.

legislative focus on the relevant rights issues in the enactment of the legislation.[14] The modification of strong judicial deference might also be warranted where the legislative process has failed to consider the interests of groups that are "particularly vulnerable to majoritarian bias or neglect".[15]

These concerns were rather attenuated in *Johnson*. The claimant was a high-status employee with considerable earning capacity. We must, therefore, weigh in the problem of "giving the middle classes and the wealthy powers to obtain benefits from the constitutional jurisdiction of courts, over and above the unequal influence they already enjoy in the legislature".[16] Otherwise, wealthy high-status employees might deploy their superior resources in litigation to benefit from a common law circumvention of the remedial limits in the statutory jurisdiction. This might be at the expense of lower-skilled employees in the shape of redundancies, or overall reductions of wages and other financial benefits, or fewer employment opportunities for the unemployed. It undermines norms of democratic equality where courts compound the advantages of wealthy middle-class employees who may already be privileged in the wider democratic process. Of course, the rich and the poor are each entitled to their rights. They are also entitled to go to the courts to vindicate those rights. In *Johnson*, however, the claimant had already secured the remedies available to him under a comprehensive legislative scheme, which reflected a set of democratic compromises. The court was rightly sensitive to its subordinate constitutional position.

In short, there are many good normative criticisms that can be made of the legislated social right not to be unfairly dismissed in the ERA1996. None of this gives any warrant to the judiciary to usurp the constitutional power to develop its own competing conception of that fundamental right through the common law of wrongful dismissal. Where the legislator has made a good faith attempt to legislate for the citizen's rights, the judges should respect that legislative determination. Where there is scope for reasonable disagreement about the content of rights, there is no reason to think that judges will be better positioned than elected representatives to resolve those normative controversies. It is better to entrust that determination to legislation.

Judicial partnership

Statutory employment rights are allocated to different types of personal work contract. Some rights are confined to the narrow category of 'employees' working

[14] ibid 164–165.
[15] ibid 165–169.
[16] ibid 185–186.

under a contract of employment, such as the right not to be unfairly dismissed. Other rights are allocated more widely to the category of 'worker', as under the national minimum wage and working time protections. The tests for identifying 'employees' and 'workers' are regarded fundamentally as common law tests, and the courts have developed complex common law criteria for determining the appropriate characterisation of personal work relations. One of the principal regulatory difficulties faced by the courts is the disjunction between the written contractual documentation and the factual reality of the day-to-day working relationship. The written documentation, which is increasingly standard form contractual boilerplate, may be designed to reflect a legal relationship of self-employment through its construction of contractual terms. The factual reality is the parties behave as if the legal relationship was one of employment.

This regulatory problem was central to the decision of the Supreme Court in *Autoclenz Ltd v Belcher*.[17] The car valeters signed comprehensive written contracts that contained 'terms inconsistent' with employment status. If those written terms were contractually valid, the effect would be to negate a legal characterisation that the car valeters were 'employees' or 'workers'. This would disqualify the individuals from bringing statutory claims under the working time and minimum wage legislation. The written contracts had been signed, which as a matter of ordinary contract law is generally dispositive: a signatory to a written contract is bound to its terms.[18] Taking its inspiration from landlord and tenant law and the problem of 'sham' arrangements, contexts that led to "the courts concluding that relevant contractual provisions were not effective to avoid a particular statutory result",[19] the Supreme Court determined that the written documentation was *not* the same as the 'true agreement'.[20] In an important statement of principle, Lord Clarke SCJ concluded that:

> [T]he relevant bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.[21]

[17] [2011] UKSC 41, [2011] ICR 1157.
[18] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 (KB).
[19] *Autoclenz* [24].
[20] ibid [35].
[21] ibid.

This doctrine enabled tribunals to disregard 'terms inconsistent' with employee or worker status in the written documentation if those terms did not reflect the reality of the working arrangements. *Autoclenz* represents this partnership conception of the court's role, developing the common law tests for 'employee' and 'worker' in support of a general legislative policy of worker protection in protective employment statutes.

It should also be noted that the fundamental common law right of access to a court provides the hidden background to cases like *Autoclenz*. Disputes about personal work status are usually disputes about the jurisdiction of the tribunal to consider the merits of the substantive statutory claim. If the court concludes that the claimant is not an employee or a worker, the tribunal does not have jurisdiction to consider the legal merits of the claim. For these reasons, any interpretive doubts about status should be resolved in the putative worker's favour. This is not the same as rewriting the parties' bargain. The common law test must also be formulated in accordance with the constitutional value of legality, and this requires that the legal characterisation should be congruent with the reasonable expectations of the parties. Ideally, neither party should be caught unawares by the court's judgment. In most disputed cases of employment status, such as the recent Uber litigation, the employer often knows very well what the reality of things is.

This common law right of access to a court sometimes leads to courts and legislatures acting collaboratively in a partnership, with the courts performing a supportive role as in *Autoclenz*. Sometimes, however, common law fundamental rights such as access to a court may trigger a stance of judicial defiance. Sometimes, this will be the only conscientious course of action open to the court, based upon the judicial responsibilities to protect the vulnerable and to protect fundamental rights. This leads to the final example.

Judicial defiance

Statutory employment rights were rendered largely inaccessible and unenforceable, especially for the most vulnerable workers, by initiatives taken by the British coalition government in July 2013 through secondary legislation. The most significant of these initiatives was the introduction of employment tribunal fees. Beneath the seemingly dry technicality of tribunal procedure, something momentous was at stake: respect for the Rule of Law. The fee structure imposed two separate fees for the issuing of a claim and for the hearing. The level of fee depended upon the type of claim being brought. 'Type A' claims attracted lower total fees (currently £390) because these claims were adjudged to be less complex and time-consuming for employment tribunals to resolve. These 'Type A' claims covered 61

distinct employment law claims, and this list included complaints of unauthorised deductions from wages, breach of contract, refusal to allow annual leave or to make a payment in respect of annual leave, and complaints that the employer has failed to permit time for carrying out trade union duties. 'Type B' claims attracted higher fees (currently £1200) and this covered discrimination claims, equal pay claims and unfair dismissal. There was a separate fee regime for appeals from the employment tribunal to the Employment Appeal Tribunal.

Predictably, the effect of the fee regime was catastrophic for workers' access to justice. The figures detailing the collapse in employment tribunal claims were dramatic. The research was reviewed by the House of Commons Justice Committee.[22] According to that Committee, the number of single cases brought between October 2013 and June 2015 dropped by about 67 per cent. In the restrained words of the Committee, 'the timing and size of the drop in the number of cases brought places the onus of proof on those who would argue that the drop is not primarily attributable to the introduction of fees.'[23] Evidence from the Trades Union Congress and Unison provided to the Committee provided a more fine-grained analysis of the drop in respect of different types of claim: "Working Time Directive, down 78 per cent; unauthorised deductions from wages, down 56 per cent; unfair dismissal, down 72 per cent; equal pay, down 58 per cent; breach of contract, down 75 per cent; and sex discrimination, down 68 per cent".[24] The impact of the fee regime appears to have been particularly marked on individuals pursuing discrimination claims, especially given the elevated fees for 'Type B' claims.

In July 2017, the fees regime was declared unlawful by the UK Supreme Court in a courageous stance against a callous and brutal attack on the most vulnerable in our society.[25] The main basis for the judgment was the common law's protection of the fundamental right of access to a court — a right that had been curtailed severely by the tribunal fee regime. According to Lord Reed,

> At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are

[22] House of Commons Justice Committee, 'Courts and tribunal fees', Second Report of Session, 2016-17 HC 167.
[23] Ibid. para 61.
[24] Ibid. para 70.
[25] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51. For an excellent discussion, see Michael Ford QC, *It's the Common Law Wot Won It*: http://www.ier.org.uk/blog/its-common-law-wot-won-it.

> applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.[26]

Accordingly, the fees regime was struck down as unlawful. Whether the government will be bold enough to undertake a fresh attack on the rule of law through primary legislation is unclear at the present time. It may be that the Conservative Party is so weakened by the recent election and the stuttering progress of the Brexit negotiations, that it will settle for a tactical retreat. In the meantime, our judiciary may need to reflect on how far the judicial responsibilities to protect fundamental rights and to protect the most vulnerable will go in the face of primary legislation that mounts an attack on both.

The common law constitution at work

The *UNISON* case may herald a paradigm shift in the social democratic theory of judicial power. Defenders of the old constitutional dispensation are likely to mount two objections to such a shift. The first is based in a democratic objection. The judiciary are unelected. The common law is undemocratic. The common law should always be an object of suspicion in a constitution of social *democracy*. Against this democratic objection, it is the relative insulation of the common law from the sway of populist majoritarianism that gives it a special role as a backstop to protect the most vulnerable groups in society. Those same groups will often be democratically disempowered, and so especially exposed to populist measures. As Lord Reed observed in *UNISON*, in extreme cases the courts may be called upon to safeguard the basis of the democratic order, for example by safeguarding the rule of law against legislative abrogation. The same judicial defiance may be necessary if the legislature continues to attack the basic elements of freedom of association, and the ability of trade unions to provide financial support to the Labour Party in a way that comports with international human rights standards. In short, we on the left may have mistaken the common law's lack of democratic pedigree for a vice, when in fact it is a virtue in a balanced constitution.

[26] Lord Reed, ibid, para 68.

The second is based in a competence objection. The judiciary are not well qualified to undertake the politically charged assessments necessary in the field of social and economic policy. Nor are they institutionally well placed to assess the polycentric issues that dominate the specification of social rights, such as the right to strike. It is better to entrust the design of social rights to a political process of deliberation, channelling adjustments and trade-offs into legislative channels. Adjudication in bipolar disputes between two parties is not an apt way of resolving sharp material conflicts about the distribution of economic power.

Of course, it is true that the judiciary should always be subordinate constitutional actors in the collaborative realisation of social rights. The right to collective bargaining or the right to strike are simply not amenable to judicial implementation. The rights are too complex and too politically controversial for that. They depend upon implementing legislation in order to be realised in the social democratic constitution. The distinctive political virtue of the common law constitution is in providing a defensive constraint on fundamental abuses by elected representatives and powerful private actors. The judges are there as a backstop, intervening to restrain the abuse of public and private power. That defensive power of the judiciary in the constitutional order is to safeguard the citizen's fundamental rights.

We will not build the New Jerusalem through judicial action. We must entrust that process to democratic action, through parliament and through the mobilisation of civil society. The encroachment of the judiciary on matters of social policy is a symptom of democratic sickness, not a sign of democratic health. Yet we must start where we are, not where we would like to be. We are living in extraordinary times. Consequently, and just like Professor Kahn-Freund in 1933, our judges may yet be called upon to do extraordinary and courageous things in the face of tyranny.

For now, there is some comfort in the restrained and civilised discourse of the common law as public reason. Kahn-Freund saw it at a time when others did not. Its tenor provides a stark contrast to the coarsening decline of our public political discourse. There are things that can be said now in public by elected politicians that would have been unthinkable 20 years ago. Shame has ceased to operate as any kind of constraint on populists and demagogues. None of this is a mark of democratic progress. In these circumstances, the common law may be the last refuge of the vulnerable in flight from the predations of a government that has lost its moral compass.

6
The Politics of Labour Law in the European Court of Human Rights

K. D. Ewing and John Hendy QC

The objection to the courts on the labour left is based on the nature of law and the nature of the interests served by law. In common law systems, the judges are rule-makers and are indulged to a great extent as authors of the law, including a great deal of private law. One area of law that remains the province of the judges is the contract of service, which the courts have developed to protect the interests of employers, whether intentionally or otherwise, though only willful blindness could fail to see the impact of these developments.

The contract of service is built on freedom and the fiction of the equal freedom of both parties to negotiate acceptable terms. There is no recognition of the inequality of bargaining power between the parties — the worker being treated as having the same liberty as a multinational monopoly employer, and the same power to negotiate the terms and conditions on which he or she will be employed. In recognising their equal liberty, the courts also recognise the equal liberty of the parties to exercise that liberty in a discriminatory fashion. So the employer is free to refuse to employ someone because of the colour of his skin, or to pay a woman less than a man simply because of her sex.

Why not? This is freedom of contract, and the worker is equally free not to apply to work for an employer who will discriminate against him on racial grounds, or to work for someone who proposes to pay her less than than a male counterpart. Protection against discrimination was eventually won, though not by judicial innovation, but by parliamentary legislation. Once in employment, the worker is then required to obey the employer and to comply with any lawful and reasonable order. If the worker fails to do so, the employer is entitled to dismiss them instantly. In the absence of that kind of legal justification, so long as the employer gives notice

(which at common law was measured in minutes, hours, or days) the latter is free to dismiss them for good reason, bad reason, or no reason at all.

The judges (for it is they and they alone who are responsible) have thus created the common law to give maximum power to employers as a class over workers as a class, a power forged as we have explained on the anvil of economic liberty. The common law developed no countervailing power for workers to that it had developed for the employer. There are thus no competing underlying principles based on the dignity of the worker, respect for human rights, the idea that labour is not a commodity (which the common law goes a long way to confound), or any other default position to constrain the unbridled power of the employer.

Yet contract law developed by judges does not simply empower employers in their relations with workers individually. It is also the foundation of the employer's power to contain trade unions, which developed to defend workers from the abuse of that power and to ensure workers just reward for their labour. The judges found that anyone who induced workers to break their contracts with their employer by taking industrial action could face liability in tort for inducing breach. This meant that if workers took strike action to increase their wages or defend their jobs, their union could be restrained by injunction and made liable in damages.

The control of trade unions in this way was a purely judicial invention. It was not mandated by parliament, but created only by the judges, who appeared to resent any attempt by trade unions to interfere with the liberty of contract or the ability of employers to run their businesses without restraint. In a period of just four years (1901 – 1905), the House of Lords decided not only that organising strike action (for whatever purpose) was tortious as a breach of contract, but also an unlawful conspiracy to injure, there being no defence in either case. To top it off, the House of Lords also famously treated trade unions as corporations so as to make them liable in damages for losses caused by a strike to defend a victimised worker.[1]

The formation of the Labour Party was crucial to forcing parliament's intervention to protect trade unions and their members from these liabilities — the Trade Disputes Act 1906 setting in train a legal framework that persists to this day.[2] But rather than giving trade unions fundamental rights to organise, to bargain, and to strike, the legislation simply gave limited protections against the common law rights of the employer that had been established by the judges. Trade unions thus had a licence rather than a freedom or a right — a licence that was subject increasingly to restrictions and conditions, as the courts continued to develop new

[1] Griffith, JAG, *The Politics of the Judiciary*, 5th ed, 2010, ch. 3.
[2] Saville, J, 'The Trade Disputes Act of 1906', 1996, 1 *Historical Studies in Industrial Relations*, 1.

forms of common law liability, and engaged in a process of restrictive statutory interpretation to frustrate parliament's clear intention.[3]

These judicial restraints prohibiting certain forms of trade union activity from judge-made law were to form the basis of the Thatcher onslaught on trade unions, which started in 1980 and continued relentlessly until the fall of the Major government in 1997. The Thatcher legislation retained the structure of the 1906 Act and its progeny, but imposed tighter licence conditions before the union could be entitled to rely on the (now limited) protections. The latter confined the purposes for which strike action could be taken, imposed excessive procedural requirements before industrial action could occur, restricted the right of peaceful picketing, banned trade unions from taking action in support of other workers in dispute, and restored the 'corporate' liability of the trade union, which could again be restrained by injunction and sued in damages.[4]

The problem for labour law is thus a legal culture in which the courts have developed default rules which provide virtually unconstrained liberty to the employer (whether in contract or tort), and have responded in a hostile manner to attempts by legislation to dilute the effect of these common law rules. Since 1980, the legislation has swum with the common law tide. In this regard, the position in the United Kingdom contrasts sharply with other European countries, in many of which labour rights are laid out in the constitution.[5] The constitutional provisions will vary, but it is not unusual for constitutions drafted in the post-Second-World-War era to include both the right to bargain collectively and the right to strike.

These rights are also recognised in a number of international treaties to which the United Kingdom is a party, including ILO Conventions 87 and 98, and the European Social Charter of 1961 (as expressly provided by Article 6, which has direct effect in some Council of Europe states). There is, however, no express recognition of labour rights in the European Convention on Human Rights, save only that in guaranteeing the right to freedom of association, Article 11(1) provides that everyone has the right to form and join a trade union "for the protection of his interests", subject to the usual wide qualifications in Article 11(2), and the unusual provision in the second sentence of Article 11(2), excluding those engaged in the administration of the State.

Although embedded in a very different legal culture, the initial response of the European Court of Human Rights was to resist requests to expand the scope of Article 11. Thus, the court appeared to take the view that labour rights were a matter

[3] Lord Wedderburn, 'Industrial Relations and the Courts', 1980, 9 ILJ 65.
[4] Full details will be found in any good labour law textbook.
[5] See the Italian Constitution, Art 1; 'Italy is a Republic founded on labour'. No one told Berlusconi.

for its sibling, the Social Charter (despite the fact that there were no effective ways of enforcing the Charter). So, in a trilogy of cases in the 1970s, the court held that Article 11 could not be read to include a right of trade unions to be consulted, to bargain collectively, or to strike. In some respects, this was perfectly understandable given the origins of the complaints in these cases: neither Belgium nor Sweden at the time could be said to be countries that did not fully respect trade union rights.[6]

But from a position of neutrality in relation to labour rights, the court moved to a position in which it turned the Convention against trade unions, attacking closed shop arrangements under which trade unions and employers agreed that all employees must be members of a trade union as a condition of employment. In the *British Rail* case in 1981, this was found to breach Article 11,[7] a decision all the more provocative for the fact that Article 11 did not expressly protect the right of workers not to join a trade union. Indeed, this had been deliberately omitted from the Convention because of the existence of closed shop arrangements operating in the United Kingdom and elsewhere, which the authors of the treaty did not wish to disrupt.

At this point, British trade unions were being knocked around at home by the Conservative government (*GCHQ*, the miners' strike, anti-trade union legislation) and were now being offered nothing from the European Court of Human Rights other than further attacks. The court appeared to be simply an extension of the judicial processes in London, which were even more hostile and unresponsive. Further dismay was caused by the *GCHQ* case, in which a number of workers employed at the government's listening station were dismissed for refusing to give up their trade union membership. Although this seemed to be an obvious breach of Article 11(1), the complaint was ruled in admissible because the civil servants were engaged in the administration of the state.

The experience of British trade unions in Strasbourg was thus an unhappy one. Attacked on one flank and unprotected on the other: workers who refused to join a trade union were protected (*British Rail*), whereas those who joined a trade union were not (*GCHQ*). The *British Rail* case was nevertheless a game changer for other reasons, perhaps not appreciated at the time. True, it represented an attack on an important source of trade union power (which was being dismantled anyway by the Tory government). But it also liberalised judicial reasoning, for — unlike the labour cases in the 1970s where the court insisted on applying the original intent of the authors of the treaty — in the *British Rail* case, the court now insisted that the treaty was to be treated as a 'living instrument'.

[6] See Forde, M, 'The European Convention on Human Rights and Labour Law', 1983, 31 *American Journal of Comparative* Law, 301.
[7] See Forde, M, 'The Closed Shop Case', 1982, 11 ILJ 1.

Such an approach, of course, greatly expands judicial power, though it must be said the living instrument approach was subsequently developed in a benign way. From the early years of the twenty-first century, it was possible to detect a new approach of the European Court of Human Rights to labour rights, the court having moved from a position of (i) non–engagement, to one of (ii) further restraining labour rights, to one of (iii) labour protection. The beginning of this progressive phase was marked by *Wilson and Palmer v United Kingdom*, where the court upheld an Article 11 claim following discrimination against a trade union activist, which the House of Lords had upheld as lawful. This set the scene for the hugely important decision of the court in *Demir and Baycara v Turkey* in 2008, which elevated labour rights to new heights.[8]

In the latter decision, the grand chamber unanimously reversed the decisions of the 1970s, and held that the living instrument approach to construction could be turned in a progressive direction. This was reinforced by the court's new 'integrated' approach,[9] whereby account is taken of other international and national instruments. It was held in *Demir and Baycara* that Article 11 was now to be read to include the right to bargain collectively, in accordance with the standards set out in ILO Convention 98 and the European Social Charters of 1961 and 1996. The reasoning applied with equal force to the right to strike, and within a few months the court also held — relying on ILO Convention 87 — that the right to strike was protected by Article 11. This was a hugely significant development.[10]

The Strasbourg Court's position on the right to strike has been reaffirmed since in a number of cases from a diverse range of Council of Europe member states (including Turkey, Russia, Ukraine, and Croatia), with obvious implications for the United Kingdom, particularly in view of Tony Blair's famous promise on the eve of the general election in 1997. In an interview with the Murdoch press, Blair committed New Labour to ensuring that British trade union laws would remain the most restrictive in the western world.[11] The Strasbourg Court now provided an opportunity to raise the standard by challenging the Thatcher legacy, and, more importantly, challenging the common law foundations on which British labour law is based.

The promise of the Human Rights Act 1998 was that Convention rights could be enforced in the domestic courts. Legislation such as that restricting trade union freedom is to be construed consistently with Convention rights. Where such a

[8] (2008) 48 EHRR 54. See Ewing, KD, and Hendy, J, 'The Dramatic Implications of *Demir and Baycara*', 2010, 39 ILJ 2
[9] Mantouvalou, V, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation', 2013, 13 HRLR 529.
[10] All the more so for the subordination of the right to strike by the European Court of Justice in the *Viking* and *Laval* decisions in December 2007.
[11] See the Guardian, 27 April 1997, for an account.

construction is not possible, the courts may declare the legislation in question incompatible with Convention rights, inviting a parliamentary response. But the hopes built up by the Human Rights Act were soon dashed. The domestic courts refused to engage with the *Demir and Baycara* line of authority. Despite having raised the argument on many occasions in the High Court and the Court of Appeal, those courts have declined to give way, whether in cases dealing with the right to bargain collectively or the right to strike.[12]

With the domestic courts blocking the application of Convention rights, British trade unions turned their attention to Strasbourg, expecting the same indulgence by the court as their counterparts in other member states. It is nevertheless extraordinary that not a single one of the six British trade union cases decided by Strasbourg since *Demir and Baycara* has been successful. In contrast, as we have seen, there have been many Article 11 cases from other jurisdictions, very few of which have failed, and those which have failed have been on marginal issues. The British cases did not raise marginal issues, being concerned with blacklisting of trade union activists, the abolition of collective bargaining, and the disciplining of strikers — all core questions of fundamental importance.[13]

They also dealt with the ban on the right to strike in the prison service (and the lack of any satisfactory compensating alternative as international law demands), and the total ban on all forms of solidarity action by trade unions (recognised by the European Court of Human Rights as being at the extreme end of national law within the Council of Europe). It is a remarkable feature of all of these cases that they were declared inadmissible, as being "manifestly ill-founded". They never made it past first base, despite the seriousness of the issues raised. In the only decision that was fully reasoned, the court held against the wide restrictions on the right to strike on the ground that Article 11 gave respondent States a wide discretion (a 'wide margin of appreciation').

Despite the inflation of Article 11 by means of adjudication, it has thus had no impact on the United Kingdom. The obvious contrast in the treatment by the European Court of the British and other cases clearly calls for an explanation, having produced what we have suggested elsewhere is an invisible Article 11(3) created by the European judges with the effect of dis-applying Article 11(1) from the United Kingdom.[14] As a result, the ECHR and the Human Rights Act have failed to challenge the legal foundations of the right to strike in the United Kingdom, and failed to modernise the law, which clings like a limpet to its foundations in the industrial

[12] See *Metrobus Ltd v Unite the Union* [2008] EWCA Civ 829.
[13] For a full account, see Ewing, K.D, and Hendy, J, 'Article 11(3) of the European Convention on Human Rights' [2017] EHRLR (in press, forthcoming). Also Bogg, A, and Ewing, KD, 'The Implications of the *RMT* Case', 2014, 43 ILJ 221.
[14] Ibid.

revolution to serve the interests of business. There is no recognition of countervailing rights and no recognition of the need for countervailing power.

For the left, it is business as usual — the optimism that the legal protection of human rights might offer some respite having been cruelly misplaced. The reason for this lies in the politics of law, which can never be overcome. All law, of course, is the product of a political process (whether it be common law, statutory law, or international law). In the case of the common law, the values of which remain intact as the human rights principles have failed to ignite, it is a political process in the sense that it is a process by which rules of general application are made by political actors called judges to serve the social, economic, and political interests of classes of people appearing before them.

But in the case of human rights law, there are different politics at work — yes, the politics of class, though not only the politics of serving interests that we see in the common law, but also the politics of interference and influence that we see in the British government's meddling with the independence of the Strasbourg Court, as reflected in the emergence of what we have called Article 11(3). The British government's hostility to the court in the wake of the prisoners' voting, deportation, and other decisions has been well publicised. So has its demand for a greater margin of discretion, and its threats of a 'Brexit II', which would see the United Kingdom pull out of the ECHR and replace it with a bill of rights, homespun by the British bulldog.

We challenge anyone to provide an explanation for the emergence of the de facto Article 11(3) and the timidity of the court exclusively in British cases, which is unrelated to this overt political pressure from the British government. To lose some cases at a time of expanding jurisprudence would be bad luck. To lose all suggests strongly that there are other forces at work. For the left, dalliance with the Convention was an opportunity to provide a twenty-first-century veneer to the nineteenth-century foundations with which we started this piece. That opportunity appears now to have gone, with renewed questions being asked about whose interests the Convention serves. But with this legal distraction now behind us, it is time again to focus on other political venues.[15]

The ambition must be the radical one not of carving out exceptions to the common law, but in excluding it altogether (not only from the interface between labour and capital), along with its pre-democratic origins, the heavy political baggage that it carries, and the deeply undemocratic processes by which it is made.

[15] See Institute of Employment Rights, *A Manifesto for Labour Law — Towards a Comprehensive Revision of Workers' Rights*, 2016.

7
The Left's Journey from Politics to Law

Chris Bickerton

The political foundation of law

In his great work, *The Twenty Year's Crisis,*[1] originally published in 1939 on the eve of the Second World War, E.H. Carr discussed at length the relationship between law and politics. His purpose was to explain why conflicts in international relations were less prone to being dealt with through legal channels than conflicts at the national level. Carr argued that political disputes could only be judicialised if there was a strong 'common feeling' binding the two parties, allowing them to accept the decision of a third party even if the decision was against their interests.[2]

In this discussion of the limits of international law, Carr provides us with a very useful insight into the nature of domestic legal disputes. In his account, law inevitably depoliticises: it takes an issue out of the political realm and locates it within the judicial realm, where both parties accept that a third party can decide on the dispute on their behalf. The conflict is taken out of society proper and put before the judge, on the presumption that everyone will be given a fair hearing. This can only occur if both sides trust the legal system and believe that a felicitous combination of common sense and impartiality can lead to a resolution of the conflict.

Carr was very clear that for some issues — such as disputes around the need for conscription, abolishing means testing, the legal status of trade unions, and the nationalisation of strategic industries — impartiality was impossible. Such disagreements were inherently political, and could only be decided by electoral victories or through the use of extra-parliamentary force.[3] In other words, for Carr, law and politics were functional equivalents, both fields dealing with the resolution of conflicts, but their manner of dealing with them quite different. This is still the

[1] Carr, E.H, *The Twenty Years Crisis 1919-1939*, London, Macmillan, 1995 (orig.1939).
[2] Ibid.,1995, 200.
[3] Ibid.,1995, 187.

case today. Law treats a dispute as a technical matter to be resolved by the legal reasoning of the judge after hearing the point of view of both litigants. Political disputes instead reflect fundamentally different worldviews; any attempt to judicialise them must involve some convergence in order to remove the critical points of disagreement. To return to Carr once more, "judicial procedure cannot operate without accepted political postulates".[4] The foundation of all law is political consensus.[5] What marks the growing interest in and acceptance of judicial power on the left is thus an erosion of the ideological conflicts that historically have pitted the political left against both the law and the capitalist state.

The left and the law

For these reasons given by Carr, it is unsurprising that there is a long tradition on the left of scepticism towards the law, courts, and to judicial power in general. Embedded within a national state apparatus, the legal system represents the state and state power, making it difficult to reconcile with ideas of impartiality and neutrality. A critique of legal forms, as well as an interest in the contradictions present within different regimes of legal rights, was central to many of Marx's early writings (see Coletti,[6] for a collection of these writings on law; see also Ewing and Gearty).[7] The legacy of this has lived on in a libertarian tradition on the whose hostility to the law reflects a deeper scepticism about state power in general (see Thompson,[8] and Griffith);[9] it also persisted in some of the work on law done by Frankfurt school theorists, especially Franz Neuman.[10] Other strands of thought on the left have tried more explicitly to derive law and the legal system from commodity exchange and capitalist social relations.[11]

This critical attitude towards the law on the left has deep theoretical and empirical roots. The left's conversion to judicial power thus has complex origins, and the account given below is merely illustrative of some of these origins. Two turning points in particular are discussed. The first involves a reconciliation with the national state after a long period of commitment to internationalism. The second is more directly about law itself, and the emergence on the left of the view that the law can operate as a substitute for politics and as an instrument of social reform in

[4] Ibid.,1995, 181.
[5] Ibid., 1995, 166.
[6] Colletti, L, *Early Writings Marx, introduced by Lucio Colletti*, London, Penguin/New Left Review, 1975.
[7] Ewing, KD, and Gearty, C. A, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945*, Oxford, Oxford University Press, 2000.
[8] Thompson, EP, *Whigs and Hunters: The Origin of the Black Act*, London: Allen Lane, 1975.
[9] Griffith, JAG, *The Politics of the Judiciary*, London, Fontana, 1977.
[10] Neumann, F, *The Democratic and The Authoritarian State: Essays in Political and Legal Theory*, Glencoe, Illinois, The Free Press, 1957, 22-68.
[11] e.g. Pashukannis, EB, *Law and Marxism: A General Theory*, London, Pluto, 1983.

its own right. This later development remains a point of contention, as much evidence suggests that, in practice, law is a poor substitute for politics in this regard (see the chapter by Harlow in this volume). However, a positive attitude towards judicial power remains the rule today on the left, and a critique of it the exception.[12]

The end of internationalism

A key transition for the left was its abandonment of the internationalist characteristic of the late nineteenth and early twentieth century and its retreat behind national barriers. Decisive in this regard was the national form taken by the Russian Revolution after the emergence of Stalinism. In the rest of Europe, the contrast between the political consequences of the First and the Second World Wars is instructive.[13] The 1914-1918 conflict left the labour movement radicalised and class conflict reached an apogee immediately after the war. The British left is a case in point, where such politicisation severely tested the unity of the workers' movement. Some of the leaders of the Labour Party were hostile to the 1926 general strike out of fear that it would empower the more radical elements of the labour movement and push the country towards social revolution. The Trade Union Congress called for the strike but limited it to specific sectors, also fearing the consequences of an all-out strike. Whilst a test for the left in many ways, the general strike was a highpoint in labour mobilisation and led to the longest period during which emergency powers were in force, a sign of the fear it elicited amongst the ruling classes.[14] In time, the radicalism of the post-1918 moment failed to carry itself through and in some places — such as Germany — the whiff of socialist revolution did not hang for very long in the air, giving way to the heady but short-lived prosperity of the 'Roaring Twenties'. The Second World War was different: the labour movement committed itself to the national war goals in a way that laid the basis for the post-war class compromise that was so important for the economic boom of the 1950s and 1960s.[15] Political moderation, not radicalism, was the consequence of the 1939-45 war and the left's relationship with the national state

[12] e.g. Zizek, S, 'Against Human Rights', New Left Review, 34, July-August, 2005; Douzinas, C, (2000) *The end of human rights*, Oxford, Hart, 2000; and Campbell, T, Ewing, KD., and Tomkins, A, (eds.), 2001. *Sceptical Essays on Human Rights*, Oxford, Oxford University Press.

[13] Maier, CS, *In Search of Stability: Explorations in Historical Political Economy*, Cambridge, Cambridge University Press, 1987, 153-184.

[14] Ewing, KD. and Gearty, C. A, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945*, Oxford, Oxford University Press, 2000, 155.

[15] In Charles Maier's words, "Between 1918 and 1921 the European working classes had first surged into spontaneous demonstrations, had then wages long, disciplined mass strikes, and had finally retrenched in frustration and divided [...] The Second World War imposed some of the same ordeals within the factory, but the German occupation made the factory a less central source of oppression. The heirs of the working class leadership that had come to oppose the first war by 1917 urged active resistance to the Germans after June 1941, so that the Second World War was less an alien upper class cause than an arduous wait for liberation", Maier, 1987, 158-9.

was cemented and the basis for the expansion of civil, political, and social rights after the war.[16]

From popular sovereignty to shared sovereignty

Reconciliation with the national framework of politics did not mean the end of transformative social programmes for the left; just that the scale of the change was national rather than international. The distant and often hostile relationship to judicial power continued, as the law often functioned as an obstacle to radical change, giving life to E.H. Carr's distinction between political and legal disagreements. The left may have abandoned some of its internationalist aspirations, but its commitment to popular sovereignty — and to using the state power to build a more equal society — remained strong.

What was more decisive in finally pushing the left towards a reconciliation with judicial power was the crisis in the belief in the state as an agent for social transformation. This was a crisis in the very ideas of socialism and — more moderately — of social democracy, and a sign that the left's close relationship with the principles of popular sovereignty was beginning to unravel. This crisis came in the 1970s, when the post-war era of growth ended. Tellingly, during this decade, serious efforts were made to resolve the problems of price and wage inflation through constructing supranational monetary frameworks, where inflation-prone economies such as France would 'import' German monetary discipline by tying its currency to the German Deutschmark. A reliance on rules external to national politics — that is the sharing or the pooling of sovereignty — became a hallmark of European political economy, and this became a way in which labour unrest was contained and managed. This was only a shallow form of judicialisation, given the limited legal stature of European monetary cooperation at the time, but it was a step towards it. A third party able to arbitrate in disputes had been identified and its name was 'Europe'; not everyone accepted its legitimacy to do so at the start but over time they did — the left and the labour movement in particular.

The French case here is particularly illustrative.[17] When France elected its first ever Fifth Republic socialist president in 1981, François Mitterrand quickly set about to realise his promise of 'Keynesianism in one country'. This programme ran aground in 1983, when pressure mounted on the French franc, forcing Mitterrand to decide whether or not he should take France out of the European monetary system. Mitterrand hesitated for some time, aware that the issue here was both the

[16] Marshall, TH, *Citizenship and Social Class*, Cambridge, Cambridge University Press, 1950; Bellamy, R, *Citizenship: A Very Short Introduction*, Oxford, Oxford University Press, 2008.
[17] For more details, see Bickerton, C, *European Integration: From Nation-States to Member States*, Oxford, Oxford University Press, 2012, 125-131.

autonomy of national macro-economic policy and a shift in the balance of political priorities, where the burden of adaptation was to be placed on wages and prices rather than managed through currency depreciation.[18] The decision to keep the franc in, which Mitterrand made in 1984, was crucial as it created the political consensus across Europe needed for the relaunching of European integration. The Single European Act of 1986 was a body of law introduced to facilitate economic exchange across the European economic space. The political consensus for this legal framework was the scaling back of transformative projects on the part of national left parties, with France taking the lead. This consensus also made it possible for hitherto fundamentally political disputes to be sent up to the European Court of Justice and resolved as technical matters of compliance with European treaty law.[19]

From collective to individual rights

This growing alignment of the European left with judicial power was driven partly by external pressures: the internationalisation of economic life, and the ability of capital to move making Keynesian economic programmes more difficult to implement, especially within a European single market. But there was also an ideological change taking place. Richard Tuck has identified the roots of this: a left seeking the "shelter of continental-style structures".[20] This is most striking in the British case, where the tradition of parliamentary sovereignty has meant that constitutional impediments to radical social change were relatively weak. What mattered instead was building political majorities able to direct such change through parliament. Elsewhere in Europe, such impediments were readily available at the national level, but this did not stop the search for a pan-European model, eventually found with the European Court of Justice and the European Charter of Fundamental Rights, and, much more broadly, with an embrace by the left of human rights and international human rights law.

A recent example serves to bring out this change. The response to the British government's White Paper on the rights of EU nationals in the UK post-Brexit has been largely negative as many have felt that the rights outlined in the paper fall short of what the EU currently offers via its own legal framework. In some specific instances, this is true. However, the thrust of the criticism has been that the UK government provides no guarantees of the rights that will be held. Moreover, the only guarantor of whatever rights are given to EU nationals living in the UK post-Brexit will be British courts, as the ECJ will no longer have jurisdiction. This last

[18] France depreciated its currency three times after 1945: in 1948, 1958, and 1969. De Gaulle's efforts at internal adjustment had failed and ushered in the labour unrest of 1968. A later attempt by Prime Minister Raymond Barre to introduce what we today would call an 'austerity plan', in 1976, also failed.
[19] Scharpf, F, 1999, *Governing in Europe: Effective and Democratic?*, Oxford, Oxford University Press, 1999.
[20] Tuck, R, 'The Left case for Brexit', Dissent, June 2016.

point is crucial and opposition to it is telling. In short, the message of the critics is that they do not trust the British courts to uphold their rights; they would prefer the security they associate with the European Court of Justice. The reason for this is the 'politicised' nature of the British legal system, originating in the doctrine of parliamentary sovereignty. It is thought that this doctrine opens up the possibility of rights being taken away or whittled away in the future, this in spite of the fact that the doctrine has co-existed for centuries with a "remarkably tolerant and liberal social order", [21] and that many countries with more EU-style constitutional arrangements have experienced prolonged periods of democratic collapse.

The pessimism of the left

What lies behind the left's growing acceptance of judicial power is a broadening pessimism about using the instruments of politics for significant and lasting social change. This is odd not least because historically speaking, and most strikingly in the British case, progressive social change has come principally through parliament and through political struggles, and only occasionally through the courts. An acceptance of constitutional rules was more readily found in the continental European left owing to different legal traditions, but we see here a similar flight from the national to the supranational in search of legal frameworks that can 'lock-in' progressive legislation and insulate it from the dangers of political reaction at home. This tells us that the left has given democracy up to its opponents, preferring to strike a bargain with judicial powers. However, as Carr argued, the legal framework always rests upon a political foundation. This foundation is today defined by a commitment to individual rights and to markets. It is far removed from the commitment to social transformation and a transcendence of market society that was once was a hallmark of the political left.

[21] Ibid.

8
Returning to Democracy: The British Left and the Constitutional Temptation of the European Union

Helen Thompson

For a long time, many on the left were democratically suspicious of the European Economic Community (EEC), and its successor, the European Community (EC). As the primary organised expression of the left, the post-war Labour Party was dominated by those who wanted to realise a national project won at the ballot box to a very different end from realising a technocratic economic and political union with other European countries. Of course, this Euroscepticism was far from uniform, and the second Wilson government made an application to join the EEC. Nonetheless, the Labour Party that Clement Attlee's leadership forged largely accepted the primacy of the nation state as the decisive site of political power and the strengths of the British constitutional tradition as a democratic framework within which that power could be exercised. For the most part, post-war Labour politicians were also comfortable professing a faith in the capacity of the British people to play their part in national representative democracy. By the mid-1990s, however, little remained within the party of that Eurosceptic tradition. Even though the New Labour governments did insist on national sovereignty over monetary policy, its members still appeared ill at ease with political discourses that accepted the place of a national people as the basis of democratic political community or claimed any merit for the singularity of Britain's constitutional tradition. As a consequence of the repudiation of this Eurosceptic heritage, Labour has been left to confront the wreckage of Britain's membership of the EU without any political language that it can claim as its own in the democratic political space that Brexit has opened, even as Jeremy Corbyn has accepted the referendum result and positioned Labour as a pro-Brexit party.

The left's path to this political lacuna began with the Labour party's wholehearted embrace of EC membership in the aftermath of Jacques Delors' speech

in 1988 to the Trade Union Congress. At a time when the Labour party still did not have a clear electoral strategy for returning to power, Delors effectively told the left that inside the EC it could protect what remained of its post-1945 political victories by insulating them in a 'social European' sphere away from the reach of a Conservative government. Within a few years of Delors' speech, virtually all meaningful debate within the Labour party over the EC ended, even though very few in the party had any interest in pursuing Delors' general vision of a European political union built around monetary union.

In seeing the EC as a restriction on the Conservatives' freedom of action, Labour in effect disavowed its own previous commitment to democratic politics practiced within the British constitutional tradition. Representative democracy requires those who lose to accept the result of periodic elections to determine who exercises power. From its eighteenth-century origins, representative democracy tied that stipulation to nationhood, whereby a national people defines a political community in which winning and losing at politics can safely occur above all by allowing losers to accept the outcome as legitimate. After Delors, the British left effectively saw in EC law a means of diluting the consequences of electoral loss. This desire to evade the full force of democratic politics demarcated it from other European left-wing parties whose leaders were willing to shift power away from the nation state to the supranational sphere when they thought their substantive ends could be easier realised in a European context and hoped to democratise that new site of power. The Labour Party, by contrast, remained wed to the national sovereignty part of the nation state whilst wishing to constrain the exercise of that sovereignty in relation to elections. If, under this reckoning, there were laws to which no British parliament had consented, it did not matter as long as those laws stopped the left's adversaries from action they might otherwise have taken. Put differently, for the sake of constraining the right and not to further any end of the left, Labour effectively treated the European Union (EU) as a *de facto* constitutional order replacing the British constitutional tradition based on parliament.

In making this move, the left isolated itself from the constitutional complexity that from the onset bedevilled Britain's membership of the EU. Britain's accession to the EC in 1973 was a constitutional fudge precisely because those who drafted the European Communities Act of 1972 understood just what a monumental political step openly acquiescing to a new European constitutional order would have been. In practice, EC law did have primacy over British law. But Britain joined the EC without the British parliament accepting the principle, asserted by the European Court of Justice in 1962, that the EC treaties created their own legal system existing independently of any legislation passed by the legislatures of EC member states. As

Lord Reed's dissent in *Miller v Secretary of State for Exiting the European Union* illuminated,[1] parliament gave effect to EU law in Britain in a way that was "inherently conditional" on the application of the EU treaties in Britain and, consequently, "no fundamental rule governing the recognition of sources of law [...] resulted from membership of the EU". Although the majority in the Miller case insisted that this position could not have been what parliament intended, it almost certainly was, not least because for the Heath government to have pushed legislation that formally proclaimed "a fundamental change in the constitutional arrangements" of Britain would have doomed the legislation.[2]

In retrospectively conjuring an implicit fundamental constitutional disjuncture in 1973, the post-Delors Labour party ran roughshod over political capital it had held in British democratic politics since the 1940s. The Labour leadership in the early 1970s stood as the guardian of the place the British constitution gave to parliament to pass all laws and to the British people to stand as the ultimate source of the authority that parliament exercised. In a speech in the House of Commons in October 1972, Harold Wilson described the 1972 Act as "an outrage against all the constitutional doctrines and practices of our democracy",[3] and proclaimed that the motive of the bill was to "destroy the power of this Parliament". He promised that a Labour government would subject membership of the Community "to the British people for final acceptance or rejection". For Wilson, it was the Conservatives who wanted to use the EC to cheat in national democratic politics. Heath, he charged, "claimed to represent the British people" but actually was "content, even enthusiastic, at the prospect of a European authority imposing on the British people by force of law measures he would not wish to put himself before Parliament".[4]

Post-Delors Labour disavowed this political discourse in which British citizens possess by virtue of their membership of a historical political community 'ancient liberties' and 'ancient rights', including the right to choose freely their own parliament to decide upon the laws to which they are subject and by which their lives can be changed for the better. It also sacrificed a once politically potent story for the left arising from this narrative in which citizens had the potential through elections to make power responsive to their beliefs and interests, and in which the purpose of the Labour Party was to give them the chance to exercise that potential. For example, the 1945 Labour manifesto proclaimed that the people had "lost the peace" after the First World War to 'the "hard-faced men" and their political friends'

[1] UK Supreme Court, *Miller and another v Secretary of State for exiting the European Union*, Hillary Term, UKSC5, 2017, para. 182, available at: https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf.
[2] Ibid., para. 178.
[3] Hansard, 'European Economic Community (summit meeting)', 17 October 1972, cols 39, 52, available at: http://hansard.millbanksystems.com/commons/1972/oct/17/european-economic-community-summit
[4] Ibid., col.45.

and that 'Britain's coming election' would "be the greatest test in our history of the judgement and common sense of our people". In a similar vein, Hugh Gaitskell, in his 1962 conference speech opposing EEC membership, attacked Macmillan for telling the country that "the British people [we]re not capable of understanding this issue", and proclaimed that "we did not win the political battles of the nineteenth and twentieth centuries to have this reactionary nonsense thrust upon us again".[5] In sum, by turning to European constitutionalism, Labour disowned an older faith of the left in the capacity of ordinary people to be part of democracy.

As a result, the Labour Party also eventually denied itself political agency. In his attack on Heath in October 1972, Wilson showed that he understood that under any new constitutional order based around European treaty law, there was no meaningful discretionary power for the executive to act according to its own political purposes and present legislation it chose for itself to parliament to advance the interests of its electoral base. Quoting the government's own Lord Chancellor, he declared "we do not treat treaties as scraps of paper; but we have always in practice had the power to do so, since power is a question of fact and power is the reality of sovereignty".[6] By forsaking that power, Labour deprived itself of opportunities to act as the political agent protecting working-class economic interests in distributional class conflicts. Nowhere did this become clearer than on the matter of the European Single Market. On the surface, the turn to support the Single Market in the late 1980s returned Labour to the strong commitment to free trade that had characterised the party from its origins to the Second World War. Yet Labour's historical commitment to free trade had been shaped first and foremost by a strong belief that working-class interests were served by cheap food. Indeed, Labour won office for the first time in 1924 precisely because it was able to deploy this argument in the general election Stanley Baldwin called to seek a mandate for tariff reform. By contrast, by the time Labour returned to office in 1997, the Maastricht treaty had tied the Single Market to EU citizenship. In this European version of internationalism, domestic distributional matters were subordinated to supranational constitutional rights guaranteed by a European court. When the accession of the A8 states to the EU in 2004 made it necessary for the Labour government to choose whether it should accept the primacy of constitutional rules, which in this case there was an open invitation to suspend for a period of time, there was simply no-one in the upper echelons of the party who publically made

[5] Labour Party, *Britain and the Common Market: Texts of speeches made at the 1962 Labour Party Conference by the Rt. Hon Hugh Gaitskell M.P. and the Rt. Hon. George Brown M.P. together with the policy statement accepted by Conference*, London, Labour Party, 1962, 40, 3-23. Available at: http://www.cvce.eu/content/publication/1999/1/1/05f2996b-000b-4576-8b42-8069033a16f9/publishable_en.pdf.

[6] Hansard, 'European Economic Community (summit meeting)', 17 October 1972, col.44. Available at: http://hansard.millbanksystems.com/commons/1972/oct/17/european-economic-community-summit.

any case at all that Labour should be electorally alert to the distributional class consequences of a rise in semi- and un-skilled immigration.

The legacy of that decision by the Blair government to eschew transition arrangements ultimately played a significant part in dooming Britain's membership of the EU, not least in turning many working-class Labour voters against it. As membership became increasingly contested, Labour found itself with little to say on a central issue of British politics, reduced, as Ed Miliband was in opposing David Cameron's promise in January 2013 to holding an in/out referendum, to complaining that giving the British people the chance to decide how they were governed was a matter of Conservative 'party interest' and not the 'national interest'.[7] Whilst some on the left urged Labour to respond similarly to the referendum by deeming the outcome the irrational product of voters foolishly led by their nefarious supposed betters, the Labour leadership has chosen to return to the democratic political path in the face of the overwhelming electoral imperative to do so and reaped some reward for doing so at the general election. Nonetheless, the task of rhetorical reinvention for the British left remains a large one. In dispensing for the best part of three decades with discourses within the party that engaged with the EU as general democratic problem and a particular constitutional one for Britain, without at any time committing to the requirements of democratic European federalism, Labour left itself without a coherent narrative about the value and place of democratic politics.

[7] Quoted in Watt, N, 'Ed Miliband rules out support for in-or-out EU referendum', 23 January, 2013. Available at: https://www.theguardian.com/politics/2013/jan/23/ed-miliband-in-out-eu-referendum.

9
Constitutional Restraints and Radical Politics

Richard Tuck[1]

In the months after the US election last November, I often found myself arguing against people in America who thought that Trump and Brexit were the same phenomenon. On my view, Brexit was in fact an innoculation *against* Trump and the politics of the radical right. The reason I thought this was a conviction that leaving the EU would kill the kind of right-wing politics in England that Ukip represented, since it was largely driven by a sense of powerlessness. The feeling — and it need be no more than that — that the political process could, after all, be responsive to what people wanted, even on fundamental matters, would immediately remove the emotional force from the radical right's message, and that duly seems to have happened. Compare Ukip's performance in the election with Trump's, or with Marine Le Pen's, or the radical right's performance in almost any Western country today. As in the 1930s, Britain may have dodged the bullet of a kind of fascism, and largely because its political structures once again *permit* rather than *constrain* radical politics. This is a lesson that needs to be learned more widely: the more one attempts to use constitutional or cultural power (these being largely the same thing) to suppress dangerous and distasteful political movements, the stronger they grow, for the members of the movements now possess a justifiable case against their rulers.

Related to this is what I think is a widespread misunderstanding about the role immigration from the EU played. The general right of EU citizens to come to Britain is a very clear example of powerlessness on the part of the British authorities. There are many other examples, as we shall see, which to a liberal on immigration like myself are more important, but it is perhaps the most visible and concrete case, and we have carefully and responsibly to distinguish between a general hostility to

[1] This is a revised extract from a lecture entitled *Brexit: A Prize in Reach for the Left* delivered by Professor Tuck at Policy Exchange on 17 July 2017.

immigrants and the desire to have an immigration policy. It is, I believe, quite strictly parallel to the hostility to illegal immigration in the US; there, it is (at least to my mind) anxiety about its *illegality*, and the fact that certain kinds of liberals do not seem to care about this, which angers many people, since it, too, is an example of the ordinary political processes ceasing to have any effect. I do not see in the US any serious desire, for example, to repeal the 1965 Immigration Act — which removed racial quotas from the US immigration system — which one might expect if there was a revival there of pre-1965 racism in immigration; one should not forget that the same voters who voted for Trump had, in many cases, four years earlier voted for a black President. In this respect, I think that both Jeremy Corbyn and Boris Johnson, who want a generous immigration policy after Brexit, may have a better instinct about British public opinion than the people who simply accuse the British voters of racism — though one can see why that accusation is a very useful one to make for opponents of Leave.

However, the weeks after the general election have seen signs of a retreat from the clarity offered by the Brexit vote. Remainers, particularly of a familiar world-weary sort, say that this is because the clarity was an illusion, and the full implications of Brexit are only now dawning; but to think this is essentially to make the same mistake which British politicians, and to some degree the whole of British society, have always made about the character of the EU. It is to confuse what one might call *policy* with *constitutional principle*. The vote in the referendum was a vote on a constitutional issue, and questions of policy have now to be decided within this new framework — though the framework allows a very wide range of options. Indeed, the striking and unusual fact about the vote is that it was a vote to put in place a *less* restrictive constitutional framework than has been the case since 1973.

The British have always shied away from considerations of constitutional structures, apart from a familiar type of crank with over-detailed schemes for electoral reform, etc; but the EU *has* to be thought about in these terms. To adapt Trotsky's thought on the dialectic, you may not be interested in constitutions, but constitutions are interested in you. This is something that it is easier for Britons to see if they think about the USA. They are used to understanding American politics against the background of the constitution, partly because Americans famously keep emphasising that themselves, with oaths of loyalty to it and so on, and they are familiar with the idea that a critical issue in a Presidential election is the ability to determine political outcomes for a generation via the appointment of justices to the Supreme Court. But close to seven hundred years of a very different kind of political system (I say seven hundred years, since the essential principles of parliamentary legislation and taxation were largely the creation of Edward III in order to fight the

Hundred Years' War with public support) have left the British with very different instincts about their own politics.

So deeply imbued have we been with the idea that parliament, and therefore general elections, can, in principle, change any features of our common life, that the argument about the EU has almost entirely been an argument about what kind of policies we want to pursue at the moment. The most striking feature of the referendum debate itself was that it was to a great extent conducted as if it was a normal British general election, in which matters of policy were to be decided for the next five years or so. The argument about levels of immigration, which came to dominate the debate, at least in some quarters, exemplified this: it was largely concerned with the desirability or otherwise of specific numbers or types of immigrant, as if what was at stake was the British government's immigration policy over the next few years. I was even told explicitly by a number of anti-Brexit friends that what mattered was preventing a Tory victory in the referendum, and that the issues in debate could be sorted out later. This approach was reassuring, in a way, since it showed that at an instinctive level, the British still thought of politics as something that was open to change at the ballot box; but in this particular setting, the old instincts proved to be an impediment to clear thinking about the issues.

For some years before the referendum I had been trying to get clear in my own mind how to theorise the US constitution, and I came to think that Britain's relationship with the EU made sense, rather surprisingly, in the same terms. I tried to explain the approach in lectures delivered at Cambridge in 2012, which subsequently appeared as my *The Sleeping Sovereign* in 2016;[2] I didn't discuss the EU directly in the lectures, but it was already at the back of my mind, and my Dissent piece[3] drew on the thoughts I had had four years earlier.[4] Briefly, what I argued was that we should take seriously the distinction that some major seventeenth- and eighteenth-century political theorists drew between sovereignty and government. For hundreds of years it had been assumed that democracy of the ancient kind was impossible in a modern state, since the population could not meet to deliberate in a nation the size of France or England. All that might be possible was a system of representation (hailed as the great modern — i.e. medieval — invention by eighteenth-century historians), but that was not democracy in the ancient or the natural sense of the term, in which the people legislate: Aristotle, for example, had described election as an aristocratic principle, since it picked out a limited set of legislators.

[2] Tuck, R, *The Sleeping Sovereign*, Cambridge University Press, 2016.
[3] Tuck, R, 'The Left case for Brexit', Dissent, June 2016.
[4] Tuck, R, *The Sleeping Sovereign*, Cambridge University Press, 2016.

What eighteenth-century theorists realised — above all Rousseau, but many of the American founders as well — was that popular legislation on fundamental matters was not impeded by the size or character of a modern state. Government, to use their term, had to be conducted by small groups or even a single person, able to deliberate and devote all their time to the issues; but sovereignty could be expressed in the occasional creation or amendment of fundamental laws that would form a constitution. The referendum naturally followed as a means of occasional popular legislation on constitutional matters, the very first in the world being in Massachusetts in 1778 when the new constitution of the independent state was put to the vote of all the citizens. Other American states followed suit, and even the Federal Constitution, though not put to a referendum, was designed to be ratified in a series of popular assemblies. Revolutionary France then embarked on the most extensive experiment with constitutional referendums, and though they fell into abeyance after the Revolution, interest in constitutional referendums revived in the late nineteenth century and again after the Second World War, until they became the norm in almost all European countries and in all but one of the states of the USA.

Once the distinction between acts of sovereignty and acts of government was in place, it would be possible to assign the role of constitutional legislator to non-democratic institutions as well — indeed, the two earliest theorists of the distinction, Hobbes and Bodin, assigned it to monarchs; but the distinction was always more relevant to democracy than to any other system of fundamental legislation, for the obvious reason that a monarch or an aristocratic board was not impeded in exercising acts of government as well as acts of sovereignty, and both Bodin and Hobbes seem, surprisingly, to have understood this.

Historically, Britain had kept out of this story, retaining its medieval representative institution and treating what elsewhere would be constitutional laws, passed in a special way, as merely ordinary statutes. (Incidentally, it is often said that Britain has an unwritten constitution and the US a written one. This is not really true: there are many constitutional conventions in the US, as there would have to be, and there are written laws which are patently constitutional in the UK, such as the Act of Settlement, the Act of Union, and the European Communities Act. The difference is not whether the rules are written or unwritten, but who does the writing, and whether they are a different and more democratic body than the one that writes the ordinary legislation of the country). But accession to the EU changed this.

The right way to theorise the EU, I argue, is as in effect a coordinated set of constitutional structures for each of the member countries. The EU is not a ‘superstate’, nor can it easily become one, juridically: it has always been maintained by the highest legal authorities in each country that, at least at the moment, the

countries are sovereign entities, able in the last resort to decide their own futures. This is not empty rhetoric since, among other things, it is the justification for the continued representation of each EU country separately at the UN — something they are extremely unlikely ever to renounce. For this reason, much of the use of the term 'sovereignty' in the referendum debate was indeed as unhelpful as its critics complained. Moreover, the fact that the EU is not a state is the source of many of the problems it itself faces, as well as the problems conventional states face dealing with it; the thousands of deaths in the Mediterranean are testimony to the dangers of its current anomalous character and the fact that it is stuck in a half-way house, neither able to be a state with its own borders, nor an alliance of states that control their own. It is also why negotiating with it is not like negotiating with a normal state, but more in some ways (though one should not push this analogy too far) like negotiating with a Supreme Court — the picture Varoufakis paints in his gripping memoirs of his dealings with the EU institutions illustrates their strange character, and the mistake we make if we treat the EU either like a unitary state or an ordinary international grouping.[5]

The key feature of the EU is that the sovereign authority in each state has enacted a certain rather curious kind of constitutional order for each of them, in which a set of principles and institutions are entrenched in a position beyond the reach of conventional, 'governmental', legislation. These principles and institutions are supranational in character, of course, and that is why the states took this course of action, but seem, from within each state, that the supranational character is not, in a way, their key feature: the key feature is rather that they are entrenched within the legal system of each country (this is what makes them different from the other supranational arrangements with which they are often compared, such as NATO or — even — the UN, at least in great part). The curious feature of these constitutional orders, however, is that they cannot be amended by the same process by which they were imposed: a UK Act of Parliament by itself straightforwardly entrenched the EU institutions in UK law, but no UK Act of Parliament by itself can amend them. Only a process of intergovernmental negotiation, issuing in changes that no one country can impose upon itself, can alter the essential character of the EU's constitutional structure. The only thing an individual state can do is to repudiate the whole structure — as we are finding out.

Most states on the continent already had constitutional structures of some sort before the EU was formed, and their politicians were used to operating inside them, just as American politicians are. But the idea that a constitution could not be amended was new to them also — though, and this may be significant, not to

[5] Varoufakis, Y, *Adults in the Room: My battle with Europe's deep establishment*, Penguin, 2017.

German politicians. The German constitution is a legal oddity: the West German constitution, the Grundgesetz, was technically authorised by three of the four powers in the Allied military government, and included the provision that in the event of reunification a new constitution would have to be ratified by the German people. After the dissolution of the military government in 1991, the provinces of East Germany simply acceded to the Western state and its Grundgesetz, so the German constitution has never actually been ratified properly; moreover, a tradition has developed within German constitutional jurisprudence of supposing that certain fundamental moral principles are enshrined in constitutional law without the need for positive enactment. It is easy to see how a domestic structure of this kind renders the structures of the EU far less problematic for Germany than they are for the UK — or indeed for France, with its long history of popular constitutional legislation.

Britain, by virtue of its desire to join what was then the Common Market, thus found itself forced unwittingly into the default shape of a modern state, with a constitution that lay beyond the power of the government to change. And, as an almost instinctive recognition of this, the Wilson administration, as we all know, decided to use for the first time the default institution of constitutional legislation in a modern state, the referendum, in order to legitimate it. Though constitutional referendums had occasionally been proposed in the UK, notably to deal with Irish — and indeed Scottish — home rule, this was the first time that such a thing had seemed clearly necessary in Britain — about two hundred years after it seemed equally clearly necessary to the English settlers in Massachusetts. Since that time, as we also all know, the constitutional referendum has become a familiar feature of British political life. Characteristically, this has happened without a formal or legal acknowledgment of their fundamental role, and technically they are merely consultative; but the idea that they could be disregarded seems to most people about as fanciful as the idea that the Queen could actually use the power, still technically in her hands, to veto a parliamentary statute. Even in the aftermath of the Brexit vote, few people have advocated simply ignoring the result; the popular anti-Brexit response has been instead to call for a second vote, and that seems to me to be testimony to the obviousness of the change that has come over British politics. The EU and the referendum as an institution in the UK are wrapped in one another's arms.

I might add at this point that the dangers and disadvantages of these kinds of structures tend to be far less obvious to people who are politically engaged or have some kind of public role. I mix in America with people who are regularly dealing with the Supreme Court, are leading figures in the political parties, or are writing for the press and trying to influence the political agenda. For them, it is easier to think that they will have some effect on politics through these processes than

through the old-fashioned process of elections, and it is natural for them to think that their personal experience is something like an objective fact. One of the critical comments on my Brexit piece concluded with something like "perhaps we have had too much democracy"; it struck me reading it that "we" would not have to worry about less democracy if "we" were people like you and me, but for most people the vote is the one way they possess of altering their political circumstances. As a result, I think the general population has always been able to think more clearly about the EU than the political elites, since they have much more to lose.

To repeat: you may not be interested in constitutions, but constitutions are interested in you. They are not neutral, benign forces, however much the lawyers charged with maintaining them pretend that this is so; again, you only have to think about the history of American constitutional jurisprudence (much more familiar to us than continental constitutional jurisprudence, for obvious reasons) to see this. Think about the way the Commerce Clause has been used to extend federal power; think about the *Dred Scott* judgment and its endorsement of slavery;[6] think about the *Korematsu* case on the internment of Japanese Americans;[7] think about *Citizens' United*.[8] Put against them, of course, *Brown v the Board of Education*[9] or *Roe v Wade*;[10] but we will be choosing according to our political preferences. Certain kinds of political programmes are simply impossible in certain kinds of constitutional orders.

My favourite example of this, and something of great relevance to the general theme of this chapter, is the creation of the National Health Service in Britain. It required a very unusual constitutional order, since its most distinctive feature — and the thing which still sharply differentiates it from the single payer systems found in most developed countries (and even, in many respects, in the USA) — was the fact that it involved a mass expropriation of private property, in the form of the so-called 'voluntary' hospitals, some of which, like Barts, had been independent institutions for over eight hundred years. This was the issue that was most fiercely debated within the Attlee cabinet, and the result of Nye Bevan's victory was one of the most far-reaching examples of nationalisation from those years, and the only one that has survived more or less intact. It is often asked by opponents of the NHS, "If it's so good, why don't other countries copy it?". But in this respect it would be extremely difficult for other countries to copy it, since in most modern states expropriation of private property without compensation would be legally impossible without a far-reaching constitutional amendment, which might be very hard to pass. In Britain in

[6] *Dred Scott v. Sandford*, 60 U.S. 393, (1857).
[7] *Korematsu v. U.S.*, 323 U.S. 214, (1944).
[8] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[9] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[10] Roe v. Wade, 410 U.S. 113 (1973).

1946, all that was needed was a single sentence in an Act of Parliament: "there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital [...]".[11] What this illustrates is that the achievements of the Attlee government, still the touchstone for left-wing measures in this country, required the kind of ancient omnicompetence that parliament still possessed in the 1940s.

The fact that every schoolchild is taught (or are they still?) that the British labour movement was intensely parliamentary and non-revolutionary, was not the consequence of some magic trait of the British which enabled them to avoid the turmoils of the revolutionary years on the continent, and indeed in America (for what else was the Civil War but a vast revolutionary moment?). Marx and Engels observed from their vantage point in Victorian England that the bourgeoisie had taken different routes in France and England to hamper the industrial working class from gaining power. In France, they had conceded universal male suffrage — first in 1792, and again and permanently in 1848 — but they had bound the legislature with a constitution which secured things such as private property (broadly defined) against legislative encroachment. In England, there were no such constraints on the legislature, and therefore the proletariat had to be denied the vote — which in this country, we should remember, was finally extended to the entire adult male population only in 1918, the same year that the first women received it (or rather recovered it — women lost the vote in 1832). So Marx and Engels concluded that the only thing necessary to bring about socialism in England was the extension of the parliamentary franchise, whereas in France it required revolutionary and extra-constitutional action. Exactly the same logic activated the early leaders of the Labour Party in Britain: they had every confidence that the parliamentary route to power was the right one, since they would then have available to them any measures to promote socialism which they thought fit, and which they could persuade a simple majority of their country (by definition, largely the working class) to support.

In the case of the EU, the overall character of the constitutional order pushes consistently in what we might call a neo-liberal direction. This is the point that Wolfgang Streeck has repeatedly insisted on, and has documented in convincing detail; he thinks that it is largely because of the influence on the institutions of German capital, and that is clearly true to an extent, but I would also argue that the institutions to some degree have a life of their own. Put in place a constitutional order that specifies certain economic freedoms — for the EU, the now notorious four freedoms, the free movement of goods, capital, services, and labour, to which

[11] The National Health Service Act 1946 (c 81), para. 6.1.

we should also add the lesser-known but very important freedom of establishment; let a group of modern jurists loose on them; and the result will almost inevitably be a series of rules that are tilted towards the market. Constitutional orders are a combination of rules and the people interpreting them (as Hobbes, in particular, understood very well), and the people inevitably develop a certain kind of internal culture, which is usually proudly immune to outside political pressures. The American founders realised this, and were very interested in ways in which the judicial process could be made responsive to the citizens, including, in some states the election of judges, and the elaborate process of nomination and confirmation for federal judges. The worst of all worlds is to have a strong constitutional order and an independent judiciary — something I sometimes fear Britain is drifting towards even outside the EU.

But the ancient institution of parliament is pretty tough, and left to its own devices, it is unlikely once again to permit the kind of constraints on what it can do which the EU represented. The safety valve that democratic institutions constitute will be back in place, and we have no reason to suppose that — for example — even a liberal immigration policy will be met by the kind of political protest that Ukip represented, once it is clear that the policy has been decided through a transparent set of procedures, and, crucially, that it can be altered. Despite what many people particularly in the universities and the media believe, the best course for people in the UK who want liberal policies in a variety of areas is to support and not to oppose Brexit, for reasons that would have been perfectly obvious to any British politician on the left until the late twentieth century: the only secure basis for any liberal or left-wing programme is that it has been enacted through a democratic process, and there is no point in hoping that magically it can be enforced on an unwilling population through constitutional subterfuge.

10
Protecting Privilege: The Historic Role of the U.S. Supreme Court and the Great Progressive Misunderstanding

Gerald N. Rosenberg

Introduction

What role can courts play in furthering progressive social change? In the view of many lawyers, human rights activists, and left-leaning political activists, courts offer a golden pathway to justice and equality. In their view, courts can uphold rights where other institutions can't or won't. This is largely because courts are free from electoral constraints and institutional arrangements that stymie change. Neither beholden to interest groups, political elites, or democratic majorities, nor stymied by ossified and recalcitrant bureaucracies, judges can cut through opposition and make change. Elected and appointed officials, fearful of political repercussions, are seldom willing to fight for unpopular causes and protect the rights of disliked minorities. Furthermore, ordinary citizens have access to courts. Access and influence are not dependent on economic and political resources. The kind of professional lobbying that is required to be effective in influencing bureaucracies or enacting legislation is not necessary for winning court cases. Groups lacking key resources can use courts not only directly to change the law but also indirectly to strengthen their voices within the other branches of government and authoritatively present their positions. As an environmental lawyer in the U.S. once put it, "all it takes is one person with a good legal argument that can convince a judge and that's that".[1]

Perhaps nowhere has more progressive hope been placed in courts than in the United States. Starting in the mid-twentieth century, many political activists, progressives, legal academics, and law students came to view courts as powerful

[1] Quoted in McCann, MM, *Taking Reform Seriously*, Ithaca, NY, Cornell University Press, 1986, 208.

producers of progressive social change. Starting with the civil rights cases of the mid-twentieth century, and spreading to issues raised by women's groups, environmental groups, political reformers, gay rights supporters, and others, progressive forces in the United States have increasingly turned to courts to produce the changes they seek. And, in many cases, they have won. American courts seemingly have become important producers of political and social change. Cases such as *Brown* [2] (school desegregation), *Roe* [3] (abortion), and *Obergefell* [4] (marriage equality), to name just three, are heralded as having produced major progressive change. Interestingly, such litigation has often occurred when the other branches of government have failed to act. This suggests that courts can produce progressive change even when the other branches of government are inactive or opposed. Litigation holds out the possibility of protecting minorities and defending liberty in the face of opposition from the democratically elected branches. [5]

If only. As powerful as the belief in the progressive potential of courts to help the relatively disadvantaged may be, it is an historically odd idea. Traditionally, courts in the U.S. have protected privilege. Throughout U.S. history, until the second half of the twentieth century, progressives, for the most part, understood this and avoided litigation when possible. They understood that judges, and the courts in which they served, were dedicated to preserving the status quo, unequal, distribution of power, wealth, and privilege. They understood that progressive social change could only come from legislation and social movements. However, since roughly the mid-twentieth century, particularly during the Warren (1953-1969) and Burger (1969-1986) courts, this was forgotten. Progressives increasingly turned to litigation, and pointed to great victories in cases such as *Brown* as proof that the role of the courts in the U.S. political system had changed. They were wrong.

Lawyers are problematic allies for progressive movements. Part of the problem is that, through upbringing and education, many lawyers credit their success solely to meritocracy and hard work, not class privilege. They believe that the political and economic system, and the institutions that support them, are fundamentally fair and only need minor tweaks to empower more people. This means that lawyers are dedicated to working within the legal system. Their training disinclines them to see the need for systematic and institutional change. More importantly, lawyers are taught that all problems have legal solutions. A lawyer's natural inclination is to identify a problem and then draft a law to 'correct' it. However, the more socially

[2] 347 U.S. 483 (1954).
[3] 410 U.S. 113 (1973).
[4] 576 U.S. (2015).
[5] I develop this belief in more detail in Rosenberg, GN, *The Hollow Hope: Can Courts Bring About Social Change?*, Chicago, University of Chicago Press, 1991, 2nd ed. 2008, particularly in the introductory chapter.

and culturally embedded the problematic practice is, the less likely it is that simply writing 'better' laws will overcome it. It is only through social movements and political victories that change will occur and lawyers are trained not to see this. Writing about lawyers in the U.S. in volume 1 of *Democracy in America*, but applicable more broadly, Tocqueville summarises the world view of many Anglo-American lawyers:

> Some of the tastes and the habits of the aristocracy may consequently be discovered in the characters of lawyers. They participate in the same instinctive love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people [...][6]

In the pages that follow, I sketch out two arguments. First, I review the court's historical record as a defender of privilege. Second, I show that the great legal victories to which progressives point as proof of the efficacy of litigation either didn't, for the most part, produce the change they wanted, or did little more than reflect change that had already largely occurred. To make matters worse, such litigation mobilised opponents, creating additional obstacles for change. I conclude by suggesting that, forgetting the lessons of history, in the mid-twentieth century, the progressive agenda was hijacked by a group of elite, well-educated, and comparatively wealthy lawyers who uncritically believed that rights trump politics and that successfully arguing before judges is equivalent to building and sustaining political movements. I conclude that progressives have failed to understand the limits of litigation when they have litigated; have forgotten the historic role of the judiciary as a defender of the status quo, unequal, distribution of power, wealth, and privilege; and ignored the need for robust social movements. The political left's flirtation with litigation is fundamentally flawed.

The Supreme Court's historic mission to preserve the status quo, unequal, distribution of power, wealth, and privilege

The U.S. Constitution contains many guarantees of individual rights. The First Amendment protects free speech. The Fifth and Fourteenth Amendments guarantee that neither the federal nor the state governments can take away life, liberty, or property without 'due process of law'. The Fourteenth Amendment also guarantees equal protection, stating that no state shall "deny to any person within its jurisdiction the equal protection of the laws". Yet, despite these majestic words,

[6] Tocqueville, A, *Democracy in America*, ed. Mayer, J.P, trans. Lawrence, G, Garden City, NY, Anchor, 1969, 264.

lawyers and judges have largely turned them from protections of individual liberty, non-discrimination, and equality, into tools that support the suppression of dissident views, protect corporate largess, and strengthen inequality. I illustrate this point briefly with three examples: political dissent, economic regulation, and civil rights.

Civil liberties and dissident speech

Despite the majestic language of the First Amendment, the Supreme Court has seldom protected political dissent. Only in those rare instances when dissidents were supported by large segments of the elite has the legal system provided any protection. U.S. history is full of examples of the repression of political dissidents, from the Alien and Sedition Acts of the late eighteenth century to the Civil War to the repression of the First World War and the subsequent decades of silencing of labour and left-wing activists, to the Cold War. Governments at all levels repeatedly and consistently silenced speech critical of their actions with the approval of the legal system including the Supreme Court. Indeed, during the Cold War, the Supreme Court's lack of protection for critical speech was unique in the Western world. For example, in 1951, the Supreme Court upheld conspiracy convictions of the national leadership of the American Communist Party in the *Dennis* case.[7] The evidence supporting their convictions was their teaching of the classic works of Marxism, many of which are assigned readings at colleges and universities across the country. The U.S. treatment of political dissent in the Cold War years stands out among western democratic nations, being characterised by the democratic theorist Robert Dahl as a "deviant case",[8] and, more bluntly by Martin Shapiro, as "pathological".[9]

In the 1960s and 1970s, the Court became somewhat more protective of political dissent. However, the level of protection must not be overstated. Government at all levels took steps to harass civil rights and anti-Vietnam war activists. The federal government engaged in massive surveillance of the lawful political actions of countless Americans who criticised the war in Vietnam. The Supreme Court dismissed a challenge to the program in 1972 in *Laird v. Tatum*.[10] And, thanks to Edward Snowden, we have learned of the extraordinary depth and breath of U.S. surveillance of the Internet and the phone system. One must remember that it was not until 1965, 174 years after the ratification of the First Amendment, that the Supreme Court first invalidated a congressional act on First Amendment free

[7] *Dennis v. United States*, 341 U.S. 494 (1951).
[8] Dahl, RA, 'Epilogue', in Dahl, R.A, ed. *Political Oppositions in Western Democracies*, New Haven, Yale U P, 1966, 391.
[9] Shapiro, M, *Freedom of Speech: The Supreme Court and Judicial Review*, Englewood Cliffs, New Jersey, Prentice-Hall, 1966, 109.
[10] *Laird v. Tatum*, 408 U.S. 1 (1972).

speech grounds.[11] And, of course, historically, the First Amendment was entirely useless in protecting the speech rights of African-Americans.

To make matters worse, in 2010, in the *Citizens United* case,[12] the Supreme Court read the First Amendment as offering protection for corporations to spend unlimited funds secretly on elections. In the hands of lawyers and judges, the First Amendment has been rendered an ineffective protection of political dissent and a robust protection of corporate wealth.

Economic regulation

Throughout virtually all of U.S. history, the courts have been no friends of working people. Until the Supreme Court's capitulation in 1937 to democratic forces, it pretty much steadfastly sided with capital against labor, employers against employees, and the wealthy against everyone else. At the end of the nineteenth century in particular, it accepted the conservative call to read the constitution to limit the power of government to regulate the economy. Largely through a constricted reading of the Commerce Clause, and an expansive reading of the Due Process Clause of the Fourteenth Amendment (which the court was unwilling to do to protect African-Americans), the court stymied progressive change for nearly half a century. For example, the Supreme Court invalidated the federal income tax in the *Pollock* case in 1895.[13] It twice prohibited Congress from outlawing child labour — in 1918 and again in 1922.[14] It denied both Congress and the states the power to regulate working hours or provide for a minimum wage in a host of cases.[15] It prohibited Congress from requiring railroads to provide pensions,[16] and disallowed both Congress and the states from outlawing 'yellow dog' contracts (contracts prohibiting union membership as condition of employment).[17] As a newspaper commentator in the early twentieth century put it: "Were the Constitution & its Amendments written this way? Or has some one inserted a 'joker' clause which favors privilege?"[18] The 'joker' clause is called 'lawyers and judges'. It took the Great Depression and the threat of President Franklin Delano Roosevelt's court-packing plan, backed by enormous Democratic majorities in the Congress, to break the court's single-minded protection of wealth from governmental regulation.

[11] *Lamont v. Postmaster General*, 381 U.S. 301 (1965).
[12] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[13] *Pollock v. Farmers= Loan and Trust Co*., 157 U.S. 429 (1895).
[14] *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).
[15] Classic examples are *Lochner v. New York*, 198 U.S. 45 (1905), and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)
[16] *Railroad Retirement Board v. Alton Railroad Co*., 295 U.S. 330 (1935).
[17] *Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915).
[18] Jesse Orton quoted in Friedman, B, *The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, New York, Farar, Strauss, and Giroux, 2009, 189.

Civil rights

For most of U.S. history, the Supreme Court has supported and reinforced racial discrimination against non-whites. This is an unpleasant fact that most citizens don't know and most lawyers ignore. While the cases are legion, four stand out: *Dred Scott v. Sandford* (1857),[19] the *Civil Rights Cases* (1883),[20] *Plessy v. Ferguson* (1897),[21] and *Korematsu v. U.S.* (1944).[22]

The *Dred Scott* case dealt with the citizenship status of a slave under federal law. Writing for the court, Chief Justice Roger Brooke Taney held that African-Americans were not intended to be 'citizens' in the constitution. They were not "part of the people", Taney wrote, and "had no rights which the white man was bound to respect". As a matter of constitutional law, African-Americans were simply "ordinary article[s] of merchandise".[23]

While *Dred Scott* was overturned by the adoption of the Fourteenth Amendment, at the hands of the Supreme Court the amendment did little to protect African-Americans. Despite the Fourteenth Amendment's guarantee of equal protection, intended to protect the rights of the newly freed slaves, the Supreme Court eviscerated it to allow the creation of a full-blown system of racial apartheid. In the *Civil Rights Cases* of 1883, for example, the court invalidated the Civil Rights Act of 1875, which banned race-based discrimination in public places such as hotels, restaurants, theaters, etc. Despite the Civil War and the adoption of three constitutional amendments designed to protect the rights of the former slaves, the Supreme Court struck down the Act by a vote of 8-1. In gutting the Civil War Amendments, the court went out of its way to express its annoyance with African-Americans for seeking guarantees of non-discrimination:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws [...] [24]

Although the case was decided less than two decades after the abolition of slavery, and a mere fifteen years after the adoption of the Fourteenth Amendment, the Supreme Court made it clear that it would preserve white privilege and condemn African-Americans to second-class status.

[19] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).
[20] *The Civil Rights Cases*, 109 US 3 (1883).
[21] *Plessy v. Ferguson*, 163 US 537 (1896).
[22] *Korematsu v. U.S.*, 323 U.S. 214 (1944).
[23] 60 U.S. 393, 404, 407 (1857).
[24] 109 US 3, 25 (1883).

Supreme Court support for racial discrimination was further strengthened in *Plessy v. Ferguson* in 1896. At issue in *Plessy* was the constitutionality of a Louisiana law requiring railroads to segregate passengers by race. By a vote of 7-1, the court upheld the law. The court's rationale was that the Fourteenth Amendment guaranteed political as opposed to social equality, writing that the amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality". Then, in disingenuous language, the court claimed that laws requiring racial segregation "do not necessarily imply the inferiority of either race to the other".[25] With a wink and a nod, the court wrote that the white politicians who enacted the apartheid law were not trying to treat African-Americans differently than whites:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[26]

Note that one year later, in 1897, the Supreme Court rejected the Louisiana legislature's attempt to regulate contracts in the *Allgeyer* case.[27] Adopting a double standard, the court held that state attempts to regulate the economy would be strictly scrutinised. But, despite the Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments, state laws discriminating against African-Americans would receive only the loosest scrutiny. The result was that while little state legislation regulating business was constitutionally acceptable, practically every law creating racial apartheid was fine! By siding with corporations and racists, the court enhanced its power and prestige. As New York University Law Professor Barry Friedman put it, "By abandoning blacks and embracing corporations, the Court rose to the pinnacle of power."[28]

Korematsu v. U.S. (1944) dealt with the imprisonment of people of Japanese descent during World War II. At issue was a 1942 military order requiring all people of Japanese ancestry on the West coast of the United States, regardless of citizenship, to leave their homes and belongings and gather at designated Civilian Control Stations. From these stations they were shipped to what were euphemistically called 'Relocation Centers' where they spent the duration of the war.

[25] 163 US 537, 544 (1896).
[26] 163 US 537, 551 (1896).
[27] *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).
[28] Friedman *supra*, note 18, 138.

Eugene Rostow, a Vietnam War hawk in the Johnson administration, and a right-wing critic of President Reagan's Soviet arms negotiations, described the 'Relocation Centers' this way in the *Yale Law Journal* in 1945:

> the camps were in fact concentration camps, where the humiliation of evacuation was compounded by a regime which ignored citizens' rights [...][29]

What was the evidence for sending over 100,000 people of Japanese ancestry, including 70,000 U.S. citizens born in the United States, to the camps? There was none. There were no charges brought against any of these individuals, and no trials were held. People were forced to leave their homes, their possessions, and their businesses, which were sold at fireside prices to local white people. And, by the time of the decision to send American citizens of Japanese descent to the camps, not one person of Japanese ancestry had been convicted, or even accused of espionage or sabotage. It is hard to imagine a more blatant denial of the most fundamental democratic and constitutional rights.

Before describing the Supreme Court's decision in *Korematsu*, it is worth noting how the United Kingdom (UK) dealt with the presence of approximately 74,000 German and Austrian aliens living in the UK when World War II started. The UK, of course, lacked a written constitution, a bill of rights, and courts with the power of judicial review — the power to invalidate government acts on the ground that they violate the constitution. And starting in September 1940, London suffered enormous damage from the German Blitz. Yet the British government gave every suspected person an individual hearing over a six-month period. As a result, of the 74,000 German and Austrian aliens present in the UK at the start of the war, only 1,847 were detained. By the end of 1942, that number had decreased to 486 detainees. And only 11 people were detained by the end of the war.

In glaring contrast, in 1944, in a decision that remains good law today, the U.S. Supreme Court upheld the imprisonment of over 100,000 people of Japanese descent. In a 6-3 decision, the court held that the government's actions were a 'military imperative'.[30] Two thirds of the justices of the U.S. Supreme Court didn't think the government was required to follow even the most basic and fundamental rights of a democracy — the rights to due process of law before being incarcerated. It is hard to imagine a more blatant denial of fundamental rights.

[29] Rostow, E.V., 'The Japanese American Cases – A Disaster', 54 *Yale L.J., 1945*, 489, 522.
[30] 323 U.S. 214, 219 (1944).

In sum, in these three areas, dissident speech and civil liberties, economic regulation, and civil rights, the U.S. Supreme Court steadfastly protected privilege. Progressives understood this, and avoided litigation other than for defensive purposes. They crusaded against the courts, correctly understanding them as an instrument of oppression.

The illusion of progress

An obvious response to this discussion of the historic role of the U.S. Supreme Court as a protector of privilege is that history is not destiny. Indeed, many people believe that the role of the court fundamentally changed in the post-World War II era. The court, many claim, became a great defender of the relatively disadvantaged. As I shall demonstrate, however, court decisions have not made much difference. While history may not have determined the future role of the court, the structural constraints that all courts share limit it.

A major reason why courts are unable — absent unusual conditions — to bring about progressive change is that courts lack the power to implement their decisions. Nobody asserts that everything the President or the Prime Minister orders is implemented. Nobody claims the same for Congress, parliament, or executive agencies. But somehow, many human rights activists and lawyers act as if the implementation of judicial decisions is unproblematic. In general, this makes no sense. In particular, courts are structured so as to lack the power of implementation. Writing of the U.S. Supreme Court in *Federalist Paper* 78, Alexander Hamilton famously underscored the Court's lack of power:

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

In other words, if political leaders don't support a judicial decision, and don't work to implement it, then the decision will be so many words. The institutional weakness of the judiciary makes litigation unlikely to bring about change. When progressive forces win judicial victories, either their victories won't produce change

or they will simply reflect change that has already occurred.[31] I illustrate this point with brief discussion of three well-known U.S. Supreme Court decisions.

The victory that wasn't: *Brown v. Board of Education*

The 1954 *Brown* case may be the most well-known and widely celebrated case in Supreme Court history. In *Brown*, the court unanimously held that racial segregation of children in public elementary and secondary schools denied African-American children the equal protection of the law as guaranteed in the Fourteenth Amendment. The question for progressives is whether *Brown* made a difference in ending race-based segregation in public schools in particular, and racial discrimination more broadly. The answer is no. Segregated public schools remained segregated after *Brown*. A decade after the decision, virtually nothing had changed for African-Americans students living in the eleven states of the former Confederacy that required race-based school segregation by law. In the 1963-1964 school year, barely 1 in 100 (1.2 per cent) of these African-American children were in a non-segregated school. Change did come to the South years later, but that occurred only after the Congress acted — providing monetary incentives for desegregation, and threatening the loss of federal funds for maintaining segregation.

More subtly, there is little or no evidence that supports the claims that *Brown* gave civil rights salience, pressed political elites to act, pricked the consciences of whites, legitimated the grievances of blacks, or inspired the activists of the civil rights movement. What *Brown* did do was to energise civil rights opponents and channel resources away from building the civil rights movement. In the wake of *Brown*, resistance to ending segregation increased in all areas, not merely in education but also in voting, transportation, and public places. *Brown* "unleashed a wave of racism that reached hysterical proportions."[32] By stiffening resistance to civil rights and raising fears before the activist phase of the civil rights movement was in place, *Brown* may actually have delayed the achievement of civil rights.

And *Brown* was the high point of judicial victories in school desegregation. Just a couple of decades after *Brown*, the court backed away from the fight against racially segregated schools. In a series of cases starting in 1974 in *Milliken v. Bradley*,[33] the court allowed suburban white schools to wall themselves off from African-American school children. Later, the Supreme Court found no constitutional limitations on the re-creation of segregated schools, as long as such segregation was not explicitly

[31] I develop this claim in detail in *The Hollow Hope*, 2008, *infra*, note 5.
[32] Fairclough, A, *To Redeem the Soul of America*, Athens, GA, University of Georgia Press, 1987, 21.
[33] 418 U.S. 717 (1974).

required by state laws. Unsurprisingly, the result has been the resegregation of public schools.

The decision that didn't: *Roe v. Wade*

In 1973, in *Roe v. Wade*, the Supreme Court invalidated state laws that prohibited women for terminating unwanted pregnancies. The number of legal abortions increased in the years following *Roe*. On its face, *Roe* appears to have succeeded where *Brown* did not. Looking deeper, however, tells a different story. The number of legal abortions increased after *Roe* because there was public support for legal access to abortion, and demand for the service. In the years before *Roe*, a national abortion repeal movement was flourishing with widespread support among relevant professional elites and rapidly growing public support. By the eve of the court's decision eighteen states had reformed their restrictive abortion laws to some degree. Indeed, in 1972, the year before the decision, there were nearly 600,000 *legal* abortions performed in the U.S. To the extent that *Roe* increased women's access to legal abortion it did so because a grass-roots political movement had won many legislative victories and had dramatically influenced both elite and public opinion.

In addition, *Roe*, like *Brown*, appears to have strengthened the losers in the case — anti-abortion forces — and weakened the winners. The fledgling anti-abortion movement grew enormously after *Roe*, and the pro-choice movement, celebrating its judicial victory, collapsed. As a result, there was little pressure on local institutions to provide abortion services, and increasing pressure from an active, albeit small, anti-abortion movement, not to do so. The result has been that legal abortions are unevenly available across the United States. In sum, the finding of a constitutional right to terminate a pregnancy has not guaranteed access to legal abortion for women. It derailed the pro-choice movement and energised its opponents. As the executive director of a Missoula, Montana abortion clinic destroyed by arson in 1993 put it, "It does no good to have the [abortion] procedure be legal if women can't get it".[34]

Catching up with progress: *Obergefell v. Hodges*

In 2015, in *Obergefell v. Hodges*, the U.S. Supreme Court invalidated state laws that limited marriage to heterosexual couples. Heralded as a major victory for progressive forces, the decision was late in coming. American society was supportive of marriage equality years before the court acted. On virtually every conceivable

[34] Quoted in Rosenberg, GN, 'The Real World of Constitutional Rights: The Supreme Court and the Implementation of the Abortion Decisions', in *Contemplating Courts*, ed. Epstein, L, Washington, D.C. Congressional Quarterly Press, 1995, 417.

measure, from public opinion to workplace benefits to anti-discrimination policies to social acceptance to mass culture to elite support, there was a sea change in attitudes towards gays and lesbians that pre-dated judicial action. By the time the court acted, majorities in virtually every state, as well as the U.S. Senate, were supportive of marriage equality. While it is the case that the decision extended the right to marriage across all states, the court was able to do so because of the widespread support the gay and lesbian rights movement had created. Even so, the U.S. was a laggard in the western world, being only the twenty-second democratic country to require marriage equality.

When will they ever learn? Returning to past understandings

If space allowed, I could continue to describe other examples, such as criminal law, where, despite the 'criminal rights revolution' of the Warren court, poor criminal defendants, particularly those of color, continue to be denied basic rights. As we have learned so powerfully and sadly over the last few years with the use of cell phone videos, at least some police still treat black males as if they were slaves, killing them virtually indiscriminately. The history of progressive litigation painfully demonstrates that without political support the Supreme Court will eviscerate progressive rights and create obstacles to legislative attempts to introduce new rights. And, in those few instances where progressive forces win Supreme Court cases, without powerful political and social movements to enforce them they will remain empty, symbolic victories.

Litigation substitutes symbols for substance. The danger of celebrating symbols is that it can lead to a sense of self-satisfaction. Seen in this light, the great Supreme Court progressive victories are "little more than an ornament, or golden cupola, built upon the roof of a structure found rotting and infested, assuring the gentlefolk who only pass by without entering that all is well inside".[1] Celebrating legal symbols encourages us to look to legal solutions for political and cultural problems. Without political support, court decisions will not produce social change. Celebrating lawyers and courts encourages reformers to litigate for social change. But if political support is lacking, the effect of this vision is to limit change by deflecting progressive claims away from substantive political battles, where success is possible, to harmless legal ones where it is not. In this way, courts play a deeply conservative ideological function in defense of the status quo. When social reformers succumb to the 'lure of litigation', they forget that deep-seated social conflicts can't be resolved through litigation.

[35] Tigar, ME, 'Foreword B Waiver of Constitutional Rights: Disquiet in the Citadel', 84 *Harv. L. Rev.* 1, 1970, 7. Tigar wrote these words specifically about the Warren Court's criminal rights decisions, but they are more generally applicable.

First and foremost, successful progressive change requires building social movements. For close to 75 years now in the U.S., the progressive agenda has been hijacked by a group of elite, well-educated and comparatively wealthy lawyers who uncritically believe that rights trump politics and that successfully arguing before judges is equivalent to building and sustaining political movements. It isn't. Litigation is an elite, class-based strategy for change. It is premised on the notion that it is easier to persuade similarly educated and wealthy lawyers, who happen to be judges, of certain progressive principles than it is to organise everyday citizens. While that might be true, it is also true that without broad citizen support, change will not occur.

None of this means that law is irrelevant, or that courts can never further the goals of the relatively disadvantaged. Judicial victories can sometimes buy time, keep movements alive, and keep activists out of prison. But they can only do so where there are active political movements supporting change.

As progressives look to the future, they must understand that courts are not all-powerful institutions. They were designed with severe limitations, and placed in a political system of divided powers. To rely on litigation rather than political mobilisation, as difficult as the latter may be, misunderstands both the limits of courts and the lessons of history. It substitutes symbols for substance and clouds our vision with a naive and romantic belief in the triumph of rights over politics. And, while romance and even naivety have their charms, they are not best exhibited in courtrooms.

11
Progressive Politics and the Courts: Lessons from the United States

Chye-Ching Huang and Brian Highsmith[1]

US Supreme Court Justice Hugo Black characterised courts as "havens of refuge for those who might otherwise suffer because they are helpless, weak, [or] outnumbered …".[2] This appealing view of the judiciary — as a reliable guardian of minority rights, and an institutional check on social and economic power — can make giving judges more power over policy decisions a tempting proposition for the left. This essay contributes to the UK debate a survey of recent US developments that are that are causing deep concern among many US progressives, and that are inconsistent with Justice Black's depiction of the judiciary. This perspective may temper enthusiasm on the UK left for ceding more policymaking power to the courts.

In recent years, contested political issues in the US have been subject to strategic judicial challenges that attempt to reopen political debates on a more favorable battleground. For example, twice in the four years after Congress and President Obama enacted health reform, legal challenges subjected this progressive achievement to a final veto point: the consent of an ideologically fractured Supreme Court. Conservatives attempted to achieve through the courts — citing novel legal doctrines — a policy goal of enormous consequence, which they could not achieve through the legislature. Party actors used the judiciary as an institutional veto for the political process; a final means to block a policy change that American progressives had for generations fought to secure. Conservatives made similar legal challenges to nearly all of President Obama's major initiatives, in policy areas including oversight of the financial system, environmental regulation, and immigration.

[1] The authors are writing in a personal capacity.
[2] *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

Further, recent Supreme Court decisions — particularly the decision securing nationwide marriage equality — may give the appearance that the US left has done well before the courts on 'social' issues, but that success may be overstated. And the perception may prove all the more illusory if we are entering an era in which economic policy issues dominate, or if the courts allow economic rights and powers, decided more in line with conservative values, to trump social ones.

The stakes are even higher than particular, monumental policy decisions. Over time, delegating policymaking power to the courts could cause the mechanisms of healthy public participation in democratic decision-making to atrophy. The recent US experience is that the courts are erratic defenders of pillars of democratic participation, such as voting rights and measures against political corruption. Judicial power may also enervate citizens' knowledge of and participation in far-reaching policy decisions. Judicial policymaking also distorts electoral politics because it increases the stakes of judicial appointments. These possibilities should concern anyone who values strong citizen participation in public life and a healthy democracy. The left should be especially troubled: when democratic engagement falters and policymaking constricts to litigation, progressive aims may be most hurt.

Progressive enthusiasm for social versus economic policymaking through the courts

There is a common perception that the US left is doing better on social issues in the courts than economic issues — and American progressives therefore tend to be more enthusiastic about judges making 'social' policy than 'economic' policy as they adjudicate disputes. This coincides with recent high-profile successes in advancing progressive social values through constitutional litigation — in particular, the 2015 decision securing nationwide marriage equality.[3] And it is a natural response to failures to secure or protect progressive economic aims through the courts. Indeed, the Roberts court is the most likely of any since the Second World War to rule in favor of business interests,[4] and some see the seeds of a new *Lochner* era in the court's economic cases.[5]

The contrast is a challenge for progressives who seek a coherent view of the appropriate scope of judicial power. Furthermore, a closer look at this disjuncture gives the left several reasons to be uneasy about ceding both social and economic policymaking to judges, even if one evaluates judicial power purely for its instrumental value in securing progressive policy aims.

[3] *Obergefell v.* Hodges, 576 U.S. (2015).
[4] Posner, RA, Epstein, L, and Landes, WM, 'How Business Fares in the Supreme Court', 97 Minnesota Law Review 1431, 2013.
[5] Purdy, J, 'The Roberts Court Versus America', Democracy Journal, Winter 2012, No. 23.

First, the left's success on social issues in the courts may be overstated. Despite marriage equality, other recent lower-profile decisions have thwarted progressive social policies.[6] It may be true that *relative* to the fairly dismal track record on 'economic' issues, the left has recently done better on social issues in the courts. But that does not mean the courts are, overall, a more favorable playing field for progressives than the political arena. Second, even if the left currently has and retains a relative advantage in the courts on social issues, while conservatives do relatively better on economic issues, this is an uneven trade if the US (along with other high-income democratic nations) is entering a phase in which 'culture wars'' social issues recede in contentiousness and importance relative to policy responses to economic trends such as growing inequality.[7] Third, the perception that judges tend to give vulnerable and marginalised populations — whose causes are championed by progressives — a relative upper hand in the social sphere is simplistic and illusory if, over time, the courts rule in ways that allow economic rights to systematically trump the social rights that judges or the legislature have otherwise affirmed.

That dynamic may be emerging in the US. For example, progressive groups have warned that the rise of binding arbitration and its enforcement by the courts has effectively eliminated swaths of social rights litigation (e.g. in sex discrimination in employment). Recent Supreme Court decisions that curtail employers' and consumers' access to court have suppressed meritorious claims and significantly thwarted the enforcement of statutory 'social' rights, yet garnered relatively little public attention.[8] In effect, courts have allowed 'economic' contract and regulatory issues to constrain workers' and consumers' access to 'social' rights.[9] Another example is the longstanding concern of the left in many countries that international 'economic' obligations allow domestic and international courts to impinge on domestic 'social' regulatory decisions in areas such as public health and environmental protection.

Eroding and distorting democratic participation

When we cede policymaking power to the judiciary, we should be concerned not only about how judges will rule on particular policies, but also how delegating that power to judges may debilitate informed and energetic citizen participation in democratic policy debates.

[6] See Robinson, RK, 'Unequal Protection', 68 Stan. L. Rev. 151, 2016; Aron, N, and Barry, KC, 'The Case Against the Roberts Court', The Nation, September 23, 2015.
[7] Sitaraman, G, 'America's Post-Crash Constitution', Politico, October 5, 2014.
[8] Silver-Greenberg, R, and Gebeloff, R, *Arbitration Everywhere, Stacking the Deck of Justice*, New York Times, Oct. 31, 2015.
[9] See Eisenbray, R, 'What Gretchen Carlson and Immigrant Janitors have in Common: Forced Arbitration', Economic Policy Institute, July 11, 2016. With respect to consumers, see *DIRECTV, Inc. v. Imburgia*, 577 U.S. (2015).

One reason is that judges may be unreliable protectors of the key mechanisms of democratic participation. US progressives have derided recent Supreme Court decisions allowing money to play a greater role in elections,[10] and weakening the federal supervision of elections to address entrenched racial discrimination,[11] but applauded a decision that may restrict racially motivated gerrymandering.[12] This mixed record should concern anyone who values citizen democratic engagement. It should also particularly worry the left, which often pursues policies that, in its view, help to advance the interests of those struggling for economic and political power. Indeed, mechanisms of voter suppression have for some US conservatives become a favored — and sometimes explicitly stated — tool for winning elections and advancing policy aims.[13]

Additionally, the fact of ceding policymaking power to judges — regardless of how they decide particular issues — may dampen public democratic activity. Recent US health policy debates illustrate that judicial power over policy decisions may enfeeble citizen engagement in key policy issues, and, over time, erode the infrastructure for healthy democratic participation.

The health sector is nearly one-fifth of the US economy and it affects every US resident. Under the Affordable Care Act ('ACA'), the share of Americans without health insurance — the primary way that Americans access health care — fell from 13.3 per cent to 9.1 per cent between 2013 and 2015, with particularly dramatic results for people in or near poverty.[14] The legislation received no Republican votes, despite the drafters' efforts to make policy accommodations to garner bipartisan support.[15] The Republican-controlled House of Representatives voted to repeal or undermine the statute more than fifty times,[16] and, in 2013, refused to approve funding for several of the law's functions, causing a prolonged government shutdown. Conservative groups also mounted a series of judicial challenges in an effort to force the judicial branch to enact a policy outcome. In 2012, in *NFIB v. Sebelius*,[17] the court upheld the bulk of the law, but undermined a key aspect of the reform by making optional for states a provision that would have expanded and improved health coverage for low-income households nationwide. Some states' subsequent failure to take advantage of this option has left more than two million

[10] *Citizens United v. Federal Election Commission* 558 U.S. 310 (2010).
[11] *Shelby County v. Holder*, 570 U.S. 2 (2013).
[12] *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. (2017).
[13] Wines, M, 'Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain', New York Times, September 15, 2016, A15.
[14] Broaddus, M, and Park, E, 'The Affordable Care Act has Produced Historic Gains in Health Coverage', Center on Budget and Policy Priorities, 15 December 2016.
[15] See, e.g., Ornstein, N, 'The Real Story of Obamacare's Birth', The Atlantic, 6 July 2015.
[16] Baker, S, 'House Votes to Repeal Obamacare, Again', Nat. J, 3 February 2015.
[17] *National Federation of Independent Business v. Sebelius*, 567 U.S. 1 (2012), 183 L. Ed. 2d 450, 132 S.Ct. 2566 ('*NFIB v. Sebelius*').

low-income people currently without the health coverage that they would have had if the provision had taken effect nationwide as Congress intended.[18]

When Republicans won the Presidency along with both Houses of Congress last November, ACA repeal was high on their agenda. One conservative writer observed, "[e]ver since President Obama signed his overhaul of the US health care system into law […] the elusive goal of repealing the legislation has been the driving force behind Republican politics".[19] The House, however, failed at its first attempt, in part owing to a groundswell of public engagement with the law leading up to the House's failed attempt to vote to repeal it, including flooding congressional offices with calls and letters, and local and national protests.[20] Favourable views of the ACA, as measured by tracking polls, increased substantially.[21] Prior polling had shown the public liked most significant aspects of the law, but not the ACA as a whole, suggesting some lack of basic knowledge about its contents — including that the ACA is the same as what Republicans had termed 'Obamacare'.[22] A health policy expert commented when the House's first attempt at a vote failed, "This is the sweetest because people did it. [We d]idn't have to depend on a court. All over the country people spoke up and were heard".[23] The House passed an ACA repeal bill on its second attempt, and repeal then failed in the Senate. Challenges to the ACA in the SCOTUS did not appear to generate similar levels of public engagement or substantially shift public opinion.[24]

That's unsurprising because challenges to 'economic' policies, such as the ACA, often focus, at least superficially, on arid legal issues rather than on the law's policy merits and demerits — indeed, courts generally state that such policy considerations are reserved for the legislature and properly beyond their purview. Social movements and other extrajudicial considerations may influence judges, but judicial opinions are justified through citations to legal authority, logical reasoning, and the like. The resulting legalese is often technical, abstruse, and uninspiring — and may be disconnected from the concerns that animated the antecedent political debates. Most citizens may have little to say, for example, about whether a federal law requiring citizens either to have health coverage or pay a penalty is a 'tax' under the

[18] Garfield, R, and Damico, A, 'The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid', Kaiser Family Foundation, October 19, 2016.
[19] Klein, P, 'Overcoming Obamacare: Three Approaches to Reversing the Government Takeover of Health Care', 2015
[20] See, e.g., DeBonis, M, and Weigel, D, 'Activist Muscle Gives Obamacare a Lift', Washington Post, February 25, 2017.
[21] Kirzinger, A, DiJulio, B, Sugarman, E, and Brodie, M, 'Kaiser Health Tracking Poll — Late April 2017: The Future of the ACA and Health Care & the Budget', Kaiser Family Foundation, 26 April, 2017.
[22] 'After the Election, the Public Remains Sharply Divided on Future of the Affordable Care Act', Kaiser Family Foundation, 1 December, 2016: Dropp, K, and Nyhan, B, 'One Third Don't Know Obamacare and the Affordable Care Act Are the Same', New York Times, 7 February 2017.
[23] Solomon, J, 24 March 2017: https://twitter.com/JudyCBPP/status/845366588102578180
[24] See, e.g., Hamel, L, Firth, J, and Brodie, M, 'Kaiser Health Tracking Poll: Late June 2015 — A Special Focus On The Supreme Court Decision', Kaiser Family Foundation, 1 July 2015.

constitution (a key issue in *NFIB v. Sebelius*). By contrast, during recent congressional consideration of the ACA, many citizens had lots to say about (and personal experience of) the merits of access to affordable health insurance and care, the costs and benefits of citizens being insured and helping to fund health care, protections against discrimination in health insurance markets, and so on. Legislative debates tend to focus directly on such costs, benefits, and values. Judicial decisions may be just as consequential as legislative lawmaking, but a poor focal point for engaging and informing citizens about policy.

If judicial power over policy systematically crowds out democratic activity, certain muscles of citizen engagement in policymaking may weaken. Delegating policymaking to the courts may reduce incentives for citizens to build and use democratic infrastructure to form opinions on policy and to communicate those views to elected and appointed officials, and other citizens. This could deplete: 1) the mechanisms citizens use to get timely, reliable, and sufficient information on pending policy debates; 2) their knowledge of how to make views heard (including knowing who their elected representatives are and how to contact them); and 3) the depth and strength of civil society — including whether civil society is oriented to engaging and activating citizens or to forming and mounting litigation strategies.

If the potential for judicial power to dampen and distort citizen engagement in policy debates is not reason enough for the left to eschew it, there are reasons to believe progressive aims may be hurt the most. If the channels for broad public participation deteriorate, interest groups with funding and greater ability to coordinate may have more relative access to and influence on legislators. The right may also be better at shaping policy through the courts for reasons including the resources needed to mount complex litigation. For example, partisan and conservative civil society political backing for challenges to the ACA helped move various legal claims behind the challenges from being 'off-the-wall' to fair game for courts.[25] Republican State Attorneys General coordinated to file claims and craft arguments and strategy, and conservative civil society groups funded and mounted a number of the main challenges.

Recent US experience starkly illustrates another way judicial power can distort democratic politics. Ceding policymaking to judges threatens to change fundamentally the role of the judiciary, which will tend to function — and be treated by political actors — as a new institutional veto point for the political process. As Ferejohn has observed, "[w]hen courts can make politically consequential and more-or-less final decisions […] those interested in judicial

[25] See Balkin, JM, 'From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream', The Atlantic, June 4, 2012.

decisions have reason to seek to influence and, if possible, to control appointments to the courts and other legal institutions".[26] The standoff over the recent Supreme Court vacancy following the death last year of Justice Antonin Scalia then illustrated how this could raise the stakes of judicial appointments and changes the emphasis of democratic politics.

When Justice Scalia died in February 2016, congressional Republicans broke with precedent and refused to consider President Obama's nomination of Merrick Garland until after the November 2016 elections. Republican former House Speaker John Boehner noted ahead of the election: "The legislative process, the political process, is at a standstill and will be regardless of who wins. The only thing that really matters over the next four years or eight years is who is going to appoint the next Supreme Court nominees […] because more and more issues [that] can't be dealt with legislatively are going to end up in the court system".[27] Donald Trump's ability to appoint a long-serving justice who would presumably rule in line with conservative preferences presumably gave some conservatives a reason to support his candidacy and presidency, despite his extreme policy positions that often conflict not only with conservative intellectual traditions but also the rule of law. Upon President Trump's election, Republicans eliminated another longstanding precedent — the legislative filibuster — to confirm his nominee, Neil Gorsuch, to the long-vacant seat. During all this, the New York Times observed that the Supreme Court is devolving into a "nakedly partisan tool".[28]

The policy stakes are enormous. Every progressive legislative achievement for the next generation may now be subject to an additional veto point of a deeply conservative, unaccountable Supreme Court majority. Ambitious progressive economic policy goals — a system that moves closer to universal public healthcare, mandated paid leave, a carbon tax, fixing money in politics, stronger anti-trust enforcement, strengthening unions, and worker representation on boards and more — may all be subjected to future legal challenge, and face the possibility of being struck down under this new court.

Again, the disregard for democratic norms and the potential distortion of electoral politics should concern anyone who has a stake in the strength of the democracy. And again, the left has more reasons to worry. It is possible that progressives are just as apt as conservatives to maneuver partisan politics and roll over norms to secure favored judicial appointments. But even if progressives can imagine stacking the highest courts with long-tenured, left-leaning justices, the gain

[26] Ferejohn, J, 'Judicializing Politics, Politicizing Law', Law & Contemporary Problems, Vol. 65, No. 3: Summer 2002, 42, 63.
[27] Giaritelli, A, 'Former Speaker John Boehner Is Standing By Trump for This One Reason', Washington Examiner, 12 Oct 2016.

may be asymmetric. Part of the nature of being 'progressive' may mean that judges with long terms and reasonably consistent preferences may, over time, begin to lag behind what is considered by the political left to *be* progressive. That is, courts may be structurally conservative in ways legislatures are not, so court stacking may not deliver the same policy gains to the left as to the right.

Conclusion

The UK left may be attracted to constitutional arrangements that give the judiciary greater policymaking power through frustrations with political processes and court decisions on policy issues that advance progressive aims. But a view from the US — a mature system, in which judges already have much policymaking power — should temper that attraction. Recent US developments suggest that judicial policymaking does not reliably secure progressive goals, and, in the long run, could enfeeble democratic participation and debate in ways detrimental to democracy as a whole and progressive aims in particular.

12
The Crisis of Legitimacy in International Investment Agreements and Investor-State Dispute Settlement

Jane Kelsey

In the thirty years since the World Trade Organisation (WTO) was established, international economic agreements have intruded ever deeper into states' regulatory and judicial domain, to the point that they now face a multi-faceted backlash. The popular discontent that has erupted in the United States and Europe is a response to the socio-economic fractures of the financialised capitalism and neoliberal agenda of which these agreements are part, and a profound sense of disempowerment from decisions that affect people's daily lives.

Challenges to the legitimacy of these agreements are often more fully articulated under the rubric of a 'democratic deficit'. This deficit comprises four elements: the secrecy of negotiations, sometimes extending beyond the publication of the final text;[1] constraints on future governments' ability to regulate in areas that include taxes, food, health, financial services, and property rights; mandatory presumptions and procedures that governments at all levels must follow when they regulate; and enforcement of these rules by foreign states and foreign investors through extra-territorial arbitral tribunals, which have power to impose economic or financial penalties on sovereign governments. The degree of the backlash against each element varies. Secrecy attracts the most broad-based condemnation, including from legislators whose future authority is being constrained without their knowledge or consent.[2] Investor-state dispute settlement (ISDS) comes a close second for the diverse reasons discussed below.

Views from the left generally overlay these concerns with a political economy perspective. The new generation of mega-regional agreements, such as the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP),

[1] Parties to the Trans-Pacific Partnership Agreement agreed not to release negotiating documents for four years after the agreement comes into force: https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/TPP-letter.pdf.

[2] 'Legislators from Seven Countries Call for Release of the TPP Text', 11 February 2014: https://canadians.org/blog/legislators-seven-countries-call-release-trans-pacific-partnership-text.

have become the favoured means to advance an insatiable and unstable form of transnational financialised capitalism and the associated neoliberal regime. The rules themselves are the problem — not just the processes to adopt, implement, and enforce them. Moves to reform the process elements, such as the controversial system of ISDS, fail to address the systemic bias of the agreement in favour of capital and the minimalist state. The mega-agreements are particularly potent, seeking to bind future governments to an extreme version of these rules at a time when the morbid symptoms that are erupting in many countries show it is unsustainable.

There is, of course, no single 'left' perspective. Internationalists who are sceptical of the state, which they see as an instrument for capital tend to seek alliances that can strengthen their voice regionally or globally to constrain the nation state and the state-finance nexus. Internationalists in Latin America, for example, have built successful alliances to resist mega-agreements they see as a common threat, such as the Free Trade Area of the Americas in 2005,[3] and campaign against ISDS in the wake of crippling damages awards to foreign corporations in countries like Bolivia and Ecuador. The embrace of the European Union by many on the left in Europe is often puzzling to those who view economic integration and supranational governance as less benign. Yet the protests in post-crisis Greece shows that embrace is far from universal. Democratic socialists and social democrats have a more ambivalent view of the state as a contested zone where the socially destructive tendencies of capital can be restrained. They, too, have combined within Europe, and across TPP countries, to oppose the new mega-agreements.

Many critiques from the left also have a geopolitical dimension, especially from the global South. The process and substance of pacts like the Central American Free Trade Agreement (CAFTA) or the European Union's Economic Partnership Agreements (EPAs) with African, Caribbean, and Pacific countries are riven with power asymmetries that mirror the imperialism they notionally replace.

As this brief survey indicates, positions on the left tend to converge in opposition to the investor rights and enforcement provisions in these agreements. This essay begins by describing the rapid growth of international investment agreements (IIAs), before setting out the broad-church criticisms of ISDS that have provoked a crisis of legitimacy in the investment arbitration regime.[4] This is overlaid by rejections from the left of moves to re-legitimise the investment regime through adjustments to investor protection rules and the dispute process, but which fail to address the imbalance that is intrinsic to their role as instruments of international capital.

[3] 'The defeat of the FTAA. The emergence of the Bolivarian Alliance for the Peoples of Our America', 22 October, 2015.
[4] UNCTAD (2015), *World Investment Report 2015. Reforming International Investor Governance*, UNCTAD, 128.

The rise of international investment agreements

There are three kinds of international investment agreements: bilateral investment treaties (BITs), investment chapters in broader free trade and investment agreements (FTIAs), and sector specific agreements, notably the Energy Charter Treaty. Some investment contracts may also be enforced through IIAs, under what are known as 'umbrella clauses'.

There are currently over 3000 IIAs.[5] The majority are BITs that date back to the 1980s and 1990s, when governments signed them with little understanding of their implications. In those days, disputes were rare. More recently, investment chapters have been incorporated within broader FTIAs; the rapid rise in disputes since the late 1990s has made their negotiations much more controversial, even though the bulk of disputes are under old BITs.

These investment agreements allow investors to enforce their protections directly against governments. Disputes are typically heard by ad hoc arbitral panels established under the auspices of the World Bank's International Centre on the Settlement of Investment Disputes (ICSID), or under the United Nations Commission on International Trade Law (UNCITRAL) rules. Occasionally, they may be entirely ad hoc.

The total number of disputes brought by investors against governments is unknown, as most old agreements do not require disclosure of information, including the existence of a dispute or the outcome. The United Nations Conference on Trade and Development (UNCTAD) has the most reliable depository. It records only 767 known disputes. However, that number has grown exponentially from a handful in the 1990s to 62 known cases initiated in 2016; that was slightly down from 74 in 2015, but above the average of 49 over the previous decade.[6] The rapid growth in cases is linked to the rise of entrepreneurial lawyers advising clients to bring disputes they would never have conceived of a decade ago.[7] The emergence of third-party funders, who underwrite the costs in exchange for a share of any final award, also creates financial incentives to bring disputes.[8] The vast majority of disputes have involved services; relatively few relate to traditional investment in agriculture or manufacturing.

A total of 109 countries are known to have been sued, although the number is probably higher. Historically, developing countries were the targets. By 2015,

[5] UNCTAD (2017), *World Investment Report 2017. Investment and the Digital Economy*, UNCTAD, 111.
[6] UNCTAD (2017), 'Investor-State Dispute Settlement: Review of Developments in 2016, IIA Issues Note, Issue 1, May 2017, 1.
[7] OECD (2012), *Investor-State Dispute Settlement. Public Consultation: 16 May-23 July 2012*, OECD, Paris, 5.
[8] Eberhardt, P, and Olivet, C, 2012, *Profiting from Injustice. How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, CEI/TNI, Brussels/Amsterdam:*www.tni.org/profitingfrominjustice.pdf*.

affluent countries were respondents in 45 per cent of disputes, falling back to 29 per cent in 2016.[9] Inter-EU disputes accounted for one quarter of the total in 2016. The amounts claimed ranged from $10 million to $16.5 billion (a mining dispute against Colombia),[10] but the sums claimed were only made public for half of the known cases.[11] The highest proportion of disputes use US and Netherlands treaties. Large transnationals that are sufficiently aware (for example in the mining industry) may structure themselves to benefit from agreements or do so when they see storm clouds gathering.

Only 41 of the 57 known substantive decisions delivered in 2016 are in the public domain. The total known outcomes show an interesting pattern. Of the 495 known cases concluded by the end of 2016, one third were decided in favour of the state, one quarter awarded damages to the investor, one quarter were settled (meaning a partial win for the investor) and the rest were discontinued or made no monetary award.[12] Over half of those won by the state were for lack of jurisdiction, which, in the eyes of one seasoned arbitration lawyer, shows many should never have been brought.[13] The investor wins the majority of cases on the merits, which is unsurprising given the pro-investor rules and perceived bias of the panels.[14] There is no appeal. The ICSID provides for annulment on specific grounds; of the eight publicly known proceedings in 2016, two partially succeeded, in favour of the investor.[15]

Investment tribunals comprise three arbitrators, one appointed by each side who in turn appoint the chair. They are paid by the hour. A small number of boutique international law firms dominate as counsel and arbitrators, playing multiple roles within the system. An investigation of the industry in 2012 observed that it 'has become normal for investment arbitrators to constantly switch hats: one minute acting as counsel, the next framing the issue as an academic, or influencing policy as a government representative or expert witness'.[16] There are minimal to no conflict of interest rules. The TPP text promised to develop a code,[17] but it was not in the agreement itself. It is extremely difficult for one side, usually the state, to secure removal of an arbitrator for a conflict of interest. As of 2012, just fifteen arbitrators,

[9] UNCTAD (2017) *IIA Issues Note*, 2.
[10] *Cosigo Resources Ltd v Republic of Colombia*, UNCITRAL, Notice of Intent lodged 5 August 2015.
[11] UNCTAD (2017) *IIA Issues Note*, 4.
[12] Ibid., 5.
[13] George Kahale III, Speech to the Eighth Annual Juris Investment Treaty Arbitration Conference, Washington DC, 28 March 2014.
[14] Ibid., 17.
[15] UNCTAD (2017) *IIA Issues Note*, 4, 23-25.
[16] Eberhardt and Olivet, 2012, 43.
[17] TPPA, Article 9.22.6.

nearly all from Europe, the U.S., or Canada, had decided 55 per cent of all known investment treaty disputes.[18]

A growing legitimacy crisis for ISDS

The UNCTAD's 2012 *World Investment Report* attributed mounting questions about the usefulness and legitimacy of ISDS to 'deficiencies in the system (eg. the expansive or contradictory interpretations of key IIA provisions by arbitration tribunals, inadequate enforcement and annulment procedures, concerns regarding the qualification of arbitrators, the lack of transparency and high costs of the proceeding, and the relationship between ISDS and State–State proceedings)'.[19]

Speaking in a similar vein, as an insider, investment lawyer George Kahale has catalogued ten troubling aspects of ISDS: bad old treaties that are open to abuse; a process developed for commercial disputes in which arbitrators are not appointed for their training and are beholden to appointing parties for ongoing work; substantive concepts that are open to abuse, notably 'fair and equitable treatment' and the most-favoured-nation clause; a premium on speed and finality rather the proper administration of justice, with an absence of appeals to correct manifest errors of law; massive claims that exceed the GDP of many nations and awards that are arbitrary and compound the interest; the high bar for disqualifying arbitrators; outcomes that are predictable as soon as the arbitrators are known; claimants' exaggerated claims; the rise of third-party funders of disputes; and the perceived bias against states. [20]

Judges have objected to investment tribunals overriding their jurisdiction. An open letter from more than 100 legal professionals, including former judges, parliamentary officers, senior politicians, and academics expressed dismay at the potential incursions of the TPP's investor-state dispute process on nations' domestic judicial systems.[21] Legislators have objected to handcuffs on their right to regulate in TPP and TTIP.[22]

Legal scholars have identified risks of regulatory chill from a threatened or actual dispute, for instance on tobacco policies.[23] As the OECD has noted, compensation claims of hundreds of millions, or sometimes billions of dollars 'can seriously affect a respondent country's fiscal position'.[24] Empirical research by van Harten and Scott

[18] Eberhardt and Olivet, 2012, 38.
[19] UNCTAD *World Investment Report 2012. Towards a New Generation of Investment Policies*, UNCTAD, Geneva, 2012 p.xxi.
[20] Kahale, 2014.
[21] 'An open letter from lawyers to the negotiators of the Trans-Pacific Partnership urging the rejection of investor-state dispute settlement', 8 May, 2012: http://tpplegal.wordpress.com/open-letter/.
[22] 'Democrats urge officials to leave investor-state dispute provisions out of trade deals', The Hill, 18 December, 2014.
[23] Schneiderman, D, 2014, 'How to Govern Differently: neo-liberalism, new constitutionalism, and international investment law', in Gill, S, and Cutler, C (eds), *New Constitutionalism and World Order*, Cambridge University Press, 165-78, 173-8.
[24] OECD (2012), p.5.

shows a more systemic effect, as government ministries changed their approach to decision-making to account for concerns about ISDS.[25]

These are mainstream actors. The legitimacy crisis facing investment agreements has deeper political origins on the left. Disputes over water privatisations in Bolivia and against Argentina following its financial crisis in 2001 became *causes celebre* that brought ISDS to attention of the left. The 59 known disputes under North American Free Trade Agreement (NAFTA) did the same in the US, Canada, and Mexico.[26] The prospect of greater exposure to US corporate claims under the pro-investor rules in TPP and TTIP heightened opposition to both.

Re-legitimation strategies

The legitimacy deficit has prompted a series of responses. Institutionally, UNCTAD has taken the lead. In 2013, UNCTAD identified five paths for reform: promoting alternative dispute resolution; tailoring the existing system through IIAs; limiting investor access to ISDS; introducing an appeals facility; and creating a standing international investment court.[27] By 2015, UNCTAD's World Investment Report described the IIA regime as going through a period of 'reflection, revision and review'. The report promulgated eleven principles to guide policy making,[28] and identified a number of policy options ranging from 'mainstream' (reformist) to 'more idiosyncratic' (rejectionist).[29] The 'roadmap' identified two stages: first, reform through new generation treaties; and second, fixing the old generation BITs.[30]

In relation to stage one of the roadmap, UNCTAD observed that new IIAs contain some reform-oriented elements, but also impose more far-reaching obligations on states, such as broader definitions of investment or new investor-protections.[31] Legal scholars writing on the TPP observed that it did not address some major concerns about the investment rules and enforcement.[32] 'Left' critiques were especially critical of the expansive definitions of investment and the vaguely worded investor protections that gave arbitrators abundant scope for pro-investor interpretations.[33]

[25] van Harten, G and Scott, D.N, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada', *Journal of International Dispute Settlement*, 7(1), 2016, 92-116.
[26] UNCTAD (2017) *WIR*, p.116.
[27] UNCTAD, 'Reform of Investor-State Dispute Settlement: In search of a roadmap', *IIA Issues Note no.2*, June 2013
[28] 1. Investment for sustainable development; 2. Policy coherence; 3. Public governance and institutions; 4. Dynamic policymaking; 5. Balanced rights and obligations; 6. Right to regulate; 7. Openness to investment; 8. Investment protection and treatment; 9. Investment promotion and facilitation; 10. Corporate governance and responsibility; 11. International cooperation; Table IV.1, p129.
[29] UNCTAD (2015), 120.
[30] UNCTAD (2017) *WIR*, 131, Table III.5.
[31] UNCTAD (2017), *WIR*, 127.
[32] e.g. Kawharu, A, 'TPPA Chapter 9 on Investment', Expert Paper 2, December 2015.
[33] Wallach, L, 'Secret TPP Investment Chapter Unveiled: It's Worse Than We Thought', Public Citizen, Washington DC, 2016.

There is equal scepticism about collective attempts of major capital-exporting countries to re-legitimise the investment treaty regime. The G20 agreed a list of non-binding principles for global investment policymaking in 2016. The principles mirror the current regime, with some vague wording about the right to regulate. Significantly, they bring the major Southern countries under the umbrella of those principles, including India and South Africa, that have been withdrawing from their agreements.[34]

In a more concrete move, the EU and Canada incorporated a standing investment tribunal and appellate mechanism into their bilateral agreement in 2016, and committed to promote the establishment of a multilateral investment tribunal.[35] The EU has made the investment court a standard requirement for its FTAs. The initiative addresses some procedural concerns about investment tribunals, but leaves the systemic bias of the rules they enforce intact. Even the moderate European Trade Union Federation concluded that CETA's investment chapter 'failed to meet the mark' because 'investors will still be granted special rights over other groups in society to sue governments for policies that threaten their profits or business interests'.[36]

Reject and reform

The most consistent position from the left, sometimes shared by other lawyers, legislators, and academics, has been to omit investment chapters, or at least ISDS, from new agreements. Some countries, such as Australia, have adopted a 'case-by-case' approach.[37] Other countries have taken a broader rejectionist approach since around 2007, and have renounced some or all their BITs and/or have withdrawn from international instruments linked to arbitral facilities. The UNCTAD reports that 212 BITs were terminated as of March 2017: 19 jointly and 59 unilaterally, while the majority were replaced by a new treaty (which may still be pro-investor).

Terminations were usually responses to bad experiences in investment arbitrations. The early momentum came from left governments in Latin America: in 2007, Bolivia notified withdrawal from the ICSID Convention and its intention to

[34] *G20 Guiding Principles for Global Investment Policymaking*, endorsed by G20 leaders at Hangzhou, China, September 2016.
[35] EU-Canada Comprehensive Economic and Trade Agreement (CETA), signed October 2016, chapter 8, Section F, esp Article 8.27, 8.28 and 8.29. However, the European Court of Justice has determined that the investment chapter requires ratification by Member States as well as the European Parliament; it is unclear when, or if, that will be achieved. Opinion 2/15 of the European Court of Justice, 16 May 2017, ECLI:EU:C:2017:376.
[36] 'Common Concerns from European Trade Union Federations': joint briefing for the EP plenary vote on CETA, 15 February 2017, p.2.
[37] ISDS was excluded from Australia's FTAs with the US (2005) and Japan (2015), but included in the Korea FTA (2014).

revise 24 BITs;[38] Ecuador followed suit on ICSID in July 2009,[39] and later terminated twelve investment treaties.[40]

Other countries took a reject and reform approach to rebalancing investors' rights and the national interest. Their solutions were country specific. The South African government terminated nine BITs and replaced them with domestic legislation. The Protection of Investment Act 2015 puts the constitution at the centre as it seeks to balance the rights of all investors, foreign and local, with other domestic priorities.[41] Investor rights are enforced through the domestic courts unless both parties consent to arbitration. That approach now permeates regional approaches in Southern Africa.

Prior to 2015, Brazil had no investment agreements in force, because the legislature had refused to ratify them. In 2013, the government developed a new Cooperation and Investment Facilitation Agreement,[42] which Brazil has promoted regionally and in the WTO.[43] Brazil's model emphasises prevention of disputes, followed by mediation, with vague provision for arbitration. It retains some, but not all, of the problematic investment rules in old BITs; obligations on foreign investors are comparatively weak.

In 2016, India notified more than 50 treaty partners with whom BITs had expired that it would not renew them. A model BIT was adopted in December 2016, which promotes exhaustion of domestic remedies with a short window to initiate subsequent arbitration. India's model is more protective of the state's regulatory autonomy and imposes some social obligations on foreign investors, although many of the social protections in the earlier consultation draft were omitted. Again, many of the problematic investor protections remain intact.[44]

The legitimation crisis facing IIAs is entering a new phase. Capital exporting states have regrouped to defend an investment regime that serves their corporate interests. Large developing countries are promoting alternatives that offer a new balance between their offensive and defensive interests. Governments in rich and poor countries continue to face potentially crippling investment disputes that are often designed to intimidate their regulatory decisions. Boutique law firms and third-party funders are intent on defending a lucrative source of income.

[38] 'Bolivia Notifies World Bank of Withdrawal from ICSID', International Institute for Sustainable Development, *Investment Treaty News*, 9 May 2007.
[39] Executive Order No. 1823.
[40] UNCTAD (2017), *WIF*, 143.
[41] Kelsey, J, 'Towards a New International Investment Regime? Taking the BRICS Seriously', New Zealand Business Law Quarterly, vol 21, (2016) 328-350, 339-344.
[42] Kelsey (2016), 336-339.
[43] General Council, 'Communication from Argentina and Brazil: Possible Elements of a WTO Instrument on Investment Facilitation', JOB/GC/124, 26 April 2017.
[44] Kelsey (2016), 344-349.

As the turbulence in the global economy and backlash against neoliberalism continues, opposition to the international investment regime and ISDS from the left seems destined to grow. A system in which rules that privilege capital are enforced through a biased extra-territorial dispute process cannot be fixed. The South African remedy that brings the disputes back into the domestic jurisdiction may be the best of the current alternatives. For many on the left, however, that would presage a return to the more traditional contest over the authority of the legislative and judicial branches of the state in relation to capital.

In *Judicial Power and the Left: Notes on a Sceptical Tradition* leading political and legal thinkers reflect on the Left's traditional scepticism towards expansive judicial power. This collection covers the historical, political, social, and academic lineages of the left's tradition of resisting expansive judicial power, and offers important insights into the causes and consequences of the waning of that tradition. Constitutional issues—including vital questions about the proper role of and limits on the courts—will continue to occupy centre-stage in the years ahead. This collection makes vital reading for those on the left who are keen to make sense of the judicial role in the post-Brexit constitution.

"This excellent collection of essays explains the Left's historic antagonism to judicial power, but how from the 1970s many were converted to a belief that, especially at a regional level in Europe, it could be a vehicle for securing social and economic rights. While there have been successes in some areas such as gender equality, the point remains that judicial power has never had (quite apart from anything else) the institutional capacity to advance equality. Particularly concerning, and touched on in some of the contributions, is that intellectual firepower and human resources have been diverted from the less glamorous and often mundane task of shoring up democratic politics. The editors are to be congratulated on identifying the topic as a significant issue, especially at a time when the Left needs a coherent response (including the role of judicial power, if any) to widespread public disillusionment, political instability and national challenge."

Sir Ross Cranston, former High Court Judge, Solicitor-General and Labour MP

£15.00
ISBN: 978-1-910812-37-2

Policy Exchange

JUDICIAL POWER PROJECT

Policy Exchange
8 – 10 Great George Street
Westminster
London SW1P 3AE

www.policyexchange.org.uk