

Courting Trouble. The Role of the Courts in Contemporary Democracy

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I. The Spectre of Juristocracy

Was Keith Ewing the first scholar to come up with this devastating term, ‘Juristocracy’, to describe the way democratic societies can be crushed by unelected judges under cover of ostensible principles like ‘the rule of law’ and ‘the protection of human rights’?¹ Certainly Ran Hirschl uses it in the title for his well-known work, but this was published ten years later.² Now it turns up regularly. The sub-editors of a Rod Liddle article deployed it for a piece he wrote for the *Spectator* in July 2012, using Hirschl as a route in to critiquing judges but from the perspective of the populist right.³ Jon Holbrook has the term in his attack on a recent Supreme Court case on abortion which, he says, ‘should worry democrats’.⁴ There are pages and pages on it in Google, much of it Hirschl-related or Hirschl-inspired – but no Keith Ewing. Adam Tomkins, who was Ewing’s colleague at the time the chapter that seems to have coined the term appeared, acknowledges Ewing’s parentage in his *Our Republican Constitution*⁵ but Hirschl himself fails to do so, despite citing the chapter where it appears – even going so far as to truncate the title of that chapter in his footnote so as to excise the reference to juristocracy that appears there.⁶ To paraphrase a man whom I know Ewing greatly admired, E P Thompson, it is time ‘to rescue’ the origins of this powerful word from the ‘enormous [silence] of posterity’.⁷

The chapter where as I say so far as I know it first appeared was part of a collection for Paul O’Higgins which Ewing, the late Professor Bob Hepple and I co-edited in 1994.⁸ In it, Ewing laid out the ‘central dilemma’ he wanted to address in the form of a question: ‘how can we reconcile with the first principles of democratic self-government the transfer of sovereign power from an elected legislature to an unelected judiciary?’⁹ In Ewing’s view, three fundamental points must underpin any answer to this question. First there is ‘the principle of equal participation; that is to say, the right of us

¹ KD Ewing, ‘The Bill of Rights Debate: Democracy or Juristocracy in Britain?’ in KD Ewing, CA Gearty and BA Hepple (eds), *Human Rights and Labour Law. Essays for Paul O’Higgins* (London, Mansell, 1994) 147–187.

² R Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass., Harvard University Press, 2004).

³ R Liddle, ‘Rise of the juristocracy. Why have we handed unelected judges so much power?’ *Spectator* (London, 7 July 2012)

⁴ J Holbrook, ‘Another step towards juristocracy’ (*Spiked*, 11 June 2018) www.spiked-online.com/newsite/article/another-step-towards-juristocracy/21487#.W3uxY9VKjIU.

⁵ A Tomkins, *Our Republican Constitution* (Oxford, Hart Publishing, 2005) 7 (fn 25).

⁶ Hirschl (n 2) 256 (fn 41).

⁷ EP Thompson, *The Making of the English Working Class* (London, Victor Gollancz, 1963) preface.

⁸ Ewing, ‘The Bill of Rights Debate’ (n 1).

⁹ *Ibid*, 147–148.

all to participate as equals in the policy-making institutions of government'.¹⁰ Since it is obvious that 'the sheer size of contemporary society' makes it impossible 'for us all to participate in the making of decisions'¹¹ (more on this later), we are forced 'as a practical necessity' to embrace representative government, and so the second core principle 'is simply that in [such] a system ... the representatives must be selected by the community they claim to represent.'¹² And thirdly, flowing also from the first two propositions, 'those who hold representative positions must in some sense be accountable to the people they represent for the decisions they purport to take on their behalf'.¹³ The rest of Ewing's chapter is a magnificent exposure of quite the extent to which judges fail the democratic test on all these scores and should as a result most certainly not be empowered to exercise sovereign power either in general or (in particular) through enactment of any kind of entrenched Bill of Rights. Writing at a time when 'New Labour' was slowly emerging, and after its leader John Smith had made an important speech on constitutional change in March 1993,¹⁴ Ewing concludes that any change of this sort in the UK;

would represent a monumental historic retreat, a step backwards from democracy to the creation of what could only be regarded as a juristocracy, a system of government predominantly by lawyers and judges, from participation in which the great bulk of the people would be permanently and irrevocably excluded.¹⁵

How does Ewing's essay read today? His 'central dilemma' rests on an assumption about the transfer of 'sovereign power ... to an unelected judiciary'¹⁶ from which all else flows. Of course as we all know the Human Rights Act 1998 enacted by Parliament in the first term of Tony Blair's Labour Government did not transfer power in this way, in fact (not least because of the powerful case against made at the time by Keith Ewing) explicitly preserved parliamentary sovereignty.¹⁷ The lively British debate ever since has been about the breadth of the legislation's interpretive mandate¹⁸ and the extent to which the non-obligatory declarations of incompatibility in section 4 are or are not mandatory as a matter of political reality.¹⁹ Of course it is putting it mildly to say that Ewing is no fan of this rights instrument: his *Bonfire of the Liberties. New Labour, Human Rights and the Rule of Law*, published in 2010, does not hold back, being particularly critical of how the interpretive power in the Act can be used to wreak policy havoc by escaping the legislative intention in specific cases.²⁰ In his 1994 essay,

¹⁰ Ibid, 149.

¹¹ Ibid, 149.

¹² Ibid, 150.

¹³ Ibid.

¹⁴ For the background see D Erdos, 'Charter 88 and the Constitutional Reform Movement: A Retrospective' (2009) 62 *Parliamentary Affairs* 537–551.

¹⁵ Ewing 'The Bill of Rights Debate' (n 1) 182.

¹⁶ Ibid, 147–148. (Emphasis added). The problem of course remains a highly topical one. Cf R Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy* (Cambridge, Cambridge University Press, 2007); and (more recently but very much in the Ewing spirit) G Webber et al, *Legislated Rights. Securing Human Rights Through Legislation* (Cambridge, Cambridge University Press, 2018). The issues have also been given a re-airing in Lord Sumption's Reith lectures for 2019: www.bbc.co.uk/programmes/m0005f05.

¹⁷ HRA 1998, ss 3(2)(b), 6(2).

¹⁸ HRA 1998, s 3(1).

¹⁹ HRA 1998, s 4: see *R (Nicklinson) v Ministry of Justice*; *R (AM and AP) v Director of Public Prosecutions* [2014] UKSC 38, [2015] AC 657.

²⁰ KD Ewing, *Bonfire of the Liberties. New Labour, Human Rights and the Rule of Law* (Oxford, Oxford University Press, 2010). CA Gearty, *On Fantasy Island. Britain, Strasbourg and Human Rights* (Oxford, Oxford University Press, 2016) offers a different perspective.

however, Ewing was a little less sceptical about such an approach, at least in (what of course was then) theory:

The problems, admittedly, would be much less acute if the Bill of Rights (or an incorporated European Convention) were to be limited in its scope by operating simply as a guide to the interpretation of statutes and as a means of regulating executive discretion, but not also as a device for limiting the sovereign power of Parliament.²¹

One's perspective here probably depends on the line one takes about the character of the declarations, and how much one is willing as well to see the hand of a de facto sovereign legislature in the judges' statutory mandate to do what is 'possible' to ensure that primary legislation is 'read and given effect in a way which is compatible with Convention rights' by giving (for example) the test of proportionality a far greater reach than the old pre-rights criteria for judicial review would have achieved.²²

One line that was unequivocal in Ewing's chapter is his castigation of judicial review as an exercise in sovereign power under cover of supposedly seeking to maintain a society's fundamental values. Here the target is Alexander Bickel whose early book *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*²³ was very influential in promoting acceptance in the US of the exercise of wide-ranging substantive power by the Warren and Burger supreme courts from the mid-1950s through to the 1970s. The exposure to criticism of the judges here is as to the inevitability of their having to choose which values and principles to prioritise or (as in the US, if there is already a document to hand) how to interpret its 'inevitably open-textured' nature.²⁴ Because values are themselves political, giving the judges a definitive say on their content is indeed plausibly to set them up as juristocrats gazing down on rather than being part of the democratic struggle below. Ewing is very persuasive on the impact such reasoning has had on the US and Canadian frameworks of democratic decision-making.²⁵ An academic perspective from the US, published a decade or so after Bickel, the 'noble attempt to reconcile the practice of judicial review with the principles of democratic government' that 'is to be found in the work of John Hart Ely', was also the subject of withering critique from Ewing in his 1994 essay.²⁶ Eschewing Bickel's overt value-laden approach, Ely argued in favour of 'a participation-oriented, representation-reinforcing approach to judicial review'²⁷ which would permit strike-downs of legislation 'only where the democratic process itself is malfunctioning'.²⁸ But as with Bickel, this 'representation-reinforcing function' inevitably 'requires the courts to confront hard questions about the very system of democracy itself'.²⁹ Which voting system is the 'right' one? Does campaign election expenditure legitimately amplify certain voices or

²¹ Ewing 'The Bill of Rights Debate' (n 1) 181–182.

²² HRA 1998, s 3(1). See A Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford, Hart Publishing, 2008); and also the same author's *Democratic Dialogue and the Constitution* (Oxford, Oxford University Press, 2017).

²³ A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York, Bobbs-Merrill, 1962).

²⁴ Ewing 'The Bill of Rights Debate' (n 1) 160.

²⁵ *Ibid*, 159–163.

²⁶ *Ibid*, 163, with JH Ely's *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass., Harvard University Press, 1980) mainly in mind.

²⁷ Cited by Ewing, Ely (n 26) 87.

²⁸ Ewing 'The Bill of Rights Debate' (n 1) 163.

²⁹ *Ibid*, 164.

disproportionately favour the already economically powerful?³⁰ Once again, there is no escaping important value judgments by recasting them as (merely) procedural.³¹ So for Ewing, Ely falls at the same fence as Bickel, just in a way that is less easy for the passing reader to detect.

In 1994, it seemed unthinkable that the courts could ever assert an approach of any of these sorts in Britain, without even a Bill of Rights scaffold on which to hang it. True there had been drifts in the direction of constitutional rights of a sort, sometimes rooted in the common law,³² sometimes drawing inspiration from the European Convention on Human Rights³³ and mainstream judicial review was certainly developing an increased robustness,³⁴ but all of this felt as though it fell well short of the sort of judicial engagement at which Ewing was taking aim. Then, a little more than ten years after Ewing's chapter appeared, against all expectations, the UK House of Lords threw a Bickel-shaped cat among the democratic pigeons, in *R (Jackson) v Attorney General*.³⁵ In that well-known case, a challenge to the use of the Parliament Acts to achieve a ban on hunting foxes with dogs, Lord Steyn asserted that parliamentary sovereignty was a common law construct, and that what the judges gave the judges could take away:

it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.³⁶

Lord Hope agreed that 'the courts have a part to play in defining the limits of Parliament's legislative sovereignty'.³⁷ Baroness Hale considered that 'the courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny'.³⁸ Rather more dramatically albeit with greater circumspection, Lord Carswell wondered about the legitimacy of a law proposing 'a fundamental disturbance of the building blocks of the constitution'.³⁹

Now all of this is pretty strong stuff for democrats, outrageous even to those who give credit to Ewing's fundamental democratic principles and how far such interventions would undermine them (yet to materialise in the UK post-*Jackson*, it has to be said⁴⁰). The case was warmly applauded by

³⁰ J Rowbottom, *Democracy Distorted. Wealth, Influence and Democratic Politics* (Cambridge, Cambridge University Press, 2010).

³¹ Ewing, 'The Bill of Rights Debate' (n 1) 163–167.

³² *Derbyshire County Council v Times Newspapers Ltd* [1993] UKHL 18, [1993] AC 534.

³³ A line of cases that had begun as early as the 1970s: see, eg, *R (Bhajan Singh) v Secretary of State for the Home Department* [1976] QB 198.

³⁴ *R (Fire Brigades Union) v Secretary of State for the Home Department* [1995] UKHL 3, [1995] 2 AC 513.

³⁵ *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

³⁶ *Ibid* [102].

³⁷ *Ibid* [107].

³⁸ *Ibid* [159].

³⁹ *Ibid* [178]. A theory that allows liberal democracy to fight back against its own destruction has Continental admirers: see A Sajó, *Militant Democracy* (Utrecht, Eleven International Publishing, 2004).

⁴⁰ But see *R (Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22, [2019] 2 WLR 1219.

judicial activists⁴¹ but certainly much criticised at the time as well, particularly by those who take a ‘Ewing’ line on the restriction of judicial power.⁴² Looking back on *Jackson* from the vantage point of the present, does the depth of the outrage expressed then depend on the relative health of the democratic process being put under (to coin a phrase) ‘anxious scrutiny’⁴³ in this way? Reflect again on Lord Steyn’s Ely-esque assumption that judges’ would intervene to protect principle only in situations where the impugned executive excess had been made possible by the inaction of a ‘complaisant’ Commons. This is to turn the judicial oversight away from substance (Lady Hale’s ‘rights of the individual’; Lord Carswell’s ‘building blocks’) and towards process: how active/complaisant have the elected representatives been? If the former there is no role for the courts; if the latter, there is.

But active/complaisant with regard to what? It must be in relation to the holding of elected representatives to account, the third of Ewing’s three fundamental principles, applied now not to the accountability of all MPs to their constituents but rather to that sub-set of MPs who (with colleagues from the House of Lords) make up the executive branch of government, and are answerable not to the electors as such so much as to their colleague MPs (those not in government) in the lower House. Now without doubt in (by the standards we have grown accustomed to) normal constitutional times judgments about how proper parliamentary action/inaction has been is very much in the eye of the beholder: passive acquiescence to a savagely wrong intervention in the minds of some is necessary and responsible, supportive decision-making to others.⁴⁴ Thus while we may well have thought that times in which *Jackson* appeared to have been abnormal – there was the post 11 September 2001 attacks indefinite detention power in the Anti-Terrorism Crime and Security Act 2001 that had just been declared a breach of rights by the House of Lords,⁴⁵ and various proposals for the empowering of the executive and the restriction of judicial review in the immigration context were swirling in the political ether⁴⁶ – they look from the perspective of today’s Brexit-induced constitutional chaos to have been a model of calm. This fluidity in our perception of the import of any given moment surely tends to confirm the Ewing-esque scruples we might already have about the judges getting stuck in too quickly and too much. The Labour administration of the day may have had views about various matters that were controversial, extending beyond hunting with dogs into more sensitive matters related to national security and judicial review in specific arenas for sure, but (with hindsight, admittedly) it would be hard to see any of what was then proposed/defeated/enacted as beyond the pale of entirely proper vigorous democratic debate. The ‘building blocks’ of the constitution were

⁴¹ See the Symposium on ‘The Changing Landscape of British Constitutionalism’ (2011) 9 *International Journal of Constitutional Law* 79–273, esp T Allan, ‘Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism’ *Ibid* 155–162.

⁴² Including by myself: CA Gearty, ‘Are Judges Now Out of Their Depth?’ (The JUSTICE Tom Sargant Memorial Annual Lecture 2007) [2007] *Justice Journal* 8: <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/02/JUSTICE-Journal-2007-vol4-no2.pdf>.

⁴³ *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514.

⁴⁴ Michael Heseltine’s removal of the Mace from its place in the Commons Chamber on 27 May 1976, and his advancing towards the government benches with it menacingly in his hands, will be remembered by some. The *casus belli* was the renegeing of a pairing agreement made by the government on a crucial matter related to the then controversial Aircraft and Shipbuilding Bill, but so far as I know no one thought for a moment that the relevant clause in the law subsequently enacted could be challenged in court.

⁴⁵ *R (A) v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

⁴⁶ Clause 14 of the Asylum and Immigration Bill 2004 had proposed the ouster of court oversight of asylum and immigration claims but it was modified by the government after sharp criticism: see J Rozenberg, ‘Labour U-Turn on Asylum Bill’ *The Telegraph* (London, 16 March 2004).

hardly being challenged; rather parliamentary battles were being fought to achieve change on the margins.

How deep should such judicial self-denial go? Can anything at all push the courts into legitimate, protective action? So far in this chapter I (and Ewing in 1994) have been assuming a system that is operating with reasonably effective accountability to the legislature for the executive branch, and with a rule of law independent enough to prevent not executive activism (something well outside the judges' constitutional job description) but rather – to put it crudely – administrative unlawfulness, criminal actions by the executive even. Now of course I appreciate that hypotheticals have long been the bane of democrats: suppose this, suppose that and then, off the back of a never-to-materialise catastrophe, the proponents of judicial sovereign power secure what they want (a reordering of the basis of democratic decision-making away from elected representatives and towards courts), a normative reshaping which can then be deployed into the future in multiple sub-catastrophic situations. This is why the Ewings of this world are rightly sceptical of conceding anything on the basis of a doomsday they know will never come. Judicial sceptics are essentially upbeat about the corrective capacity of the democratic process, its ability to stop that doomsday before it happens rather than rely on courts to undo it afterwards. Is this optimism still warranted?