
Book Section:

Gearty, Conor ORCID: 0000-0002-3885-2650 (2020) Courting trouble. The role of the courts in contemporary democracy. In: Bogg, Alan, Rowbottom, Jacob and Young, Alison L., (eds.) The Constitution of Social Democracy: Essays in Honour of Keith Ewing. Hart Enterprises, Oxford, UK. ISBN 9781509916573

2

Courting Trouble. The Role of the Courts in Contemporary Democracy

Conor Gearty

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

[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 Holnbrook, '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).

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 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

---

[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.

[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.

> 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 mandate[18] 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, 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

---

[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.

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

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

[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.

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 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 Rights[33] 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]

---

[29] Ibid, 164.

[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].

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 said[40]). The case was warmly applauded by judicial activists[41] 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

---

[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.

[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://2bquk8cdew6192tsu41lay8t-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.

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 ether[46] – 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 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

---

[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 reneging 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).

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?

II. The Constitution of Social Democracy

The British Constitution was very well adapted to the growth of social democracy in Europe in the decades after World War Two. The electorate had already delivered a large majority for a radical Labour Government to reshape relations between the individual and the state, through the securing of a 'welfare' (as opposed to 'warfare') state.[47] The accountability of executive power to the voters via the legislative branch had been stunningly displayed by the removal by the electorate of a war-time Prime Minister at the very height of his powers. The team led by Clement Attlee that replaced Winston Churchill did not revolutionise the society that elected it. Rather it set about smoothing out the hard edges of the capitalism that had so divided society in the 1930s[48] and so preventing (or so it was assumed and hoped) the plunge into Communism that was a far more credible threat after the war than it had been when the Special Branch had been harassing the likes of the aged Thomas Mann for his visits to Moscow a decade or so before.[49] The UK was an early social democratic space in a Western Europe that increasingly took on this character as the decades went by. Equality was the goal

[47] The term appears to have been coined by Archbishop William Temple, during the Second World War: see CA Gearty, *Liberty and Security* (Cambridge, Polity, 2013) 22.

[48] See generally KD Ewing and CA Gearty, *The Struggle for Civil Liberties* (Oxford, Oxford University Press, 2000) chs 5 and 6.

[49] Ibid, 254.

but modified capitalism was to be the means. The resurrected polities of NATO-protected Western Europe sought (whatever their governing parties called themselves) to deliver social gain via democratic systems that were specifically designed to prevent moves to the Right or (far more to the point) Left.

It was never thought necessary in victorious, Butskellite[50] Britain to deploy courts of any sort as the guardians of this social democratic consensus. The only Bill of Rights thought to be worth having was that through which Parliament had asserted its power against the Crown in 1688,[51] and the newly established judicial mechanism for the enforcement of human rights to be found in the European Convention on Human Rights likewise passed the UK by – it was not until 1966 that individuals could take the UK to the Convention's Strasbourg-based Court and even after this, no ruling of that body could possibly impugn the authority of any Act of the sovereign legislature.[52] The European Social Charter in 1961, policed by Strasbourg's Committee of Social Rights, marked the embracing of regional oversight of democratic choices in the field of social rights as well as the civil and political rights of the Convention,[53] but the UK chose not to engage in its collective complaints procedure when it became available.[54] And the same was, of course, the case with the Common Market which had as early as the late 1960s already embraced a strong judicial invigilation of state practice in the name of fundamental rights.[55] Even when the country joined what by then had become the European Economic Community, in 1973, it did so concerned about the possible intrusion into its sovereignty that this entailed, and in the decades that followed the more this Europeanisation took the shape of rights-assertion, the more the British authorities didn't like it, opting out if they could and downplaying and resisting if they could not.[56]

---

[50] The short-hand term given to the convergence of the names of two leading Labour (Hugh Gaitskell, Labour leader, 1955–1963) and Conservative ('Rab' Butler, holder of many important Cabinet positions under successive Conservative prime ministers from the 1940s through to 1964) whose views broadly converged on the need for social protection and the public interest in growing equality.

[51] Usefully set out at www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction.

[52] *James v United Kingdom* (1986) 8 EHRR 123.

[53] See www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035.

[54] KD Ewing and S Weir, 'The European Social Charter Turns 50 Today, but Britain doesn't belong at the Party' (*Open DemocracyUK*, 18 October 2011) www.opendemocracy.net/ourkingdom/stuart-weir-keith-ewing/european-social-charter-turns-50-today-but-britain-doesnt-belong-.

[55] A O'Neill, *EU Law for UK Lawyers*, 2nd edn (Oxford, Hart Publishing, 2011) ch 6.

[56] D Gowland, *Britain and the European Union* (Abingdon, Routledge, 2017) is a good generalist account.

From the start the less secure democracies on the Continent had taken a different tack, initially insulating their political space from rupture by means of oversight by both national constitutional courts and the European authorities (Commission and Court) set up under the European Convention and then driving forward with exactly those various mechanisms of European oversight with which the British would have no truck. Michael Mandel's fine extended essay in the *Israel Law Review* in 1998, detailing the impact of the embracing of constitutional rights in Europe at this time, showed clearly how as he put it in the long title 'we changed everything so that everything would remain the same'.[57] The Strasbourg Court also did its part in this erection of a European democratic fortress. Communists found themselves starved of political space, and fascists too did not have everything their own way.[58] This European story was always different from the one that in books and articles Keith Ewing told about the UK. His confidence in the essential health of the democratic process made sense of his strictures against the Europeanisation of our judicial involvement in politics. While the right of individual application to Strasbourg under the European Convention was just about acceptable, it was neither necessary nor desirable to translate this into the domestic arena, especially given the historically poor performance of the British judges as guardians of civil liberties.[59]

The high point of this critique was the juristocracy chapter in 1994, though even then it was undeniable that – whatever the occasional winds of change in the case-law[60] – the reality of political change in Britain had been beginning to have its effect, eventually (I would tentatively suggest) calling into question certain assumptions about the democratic process that underpinned that critique. I am not thinking here so much of 'the constitution is broken' movement that emerged at the end of the Thatcher period and which manifested itself in the shape of Charter 88 and other similar organisations calling for radical change in the structure of government. The prescription offered by these groups struck Ewing as often worse than

---

[57] M Mandel, 'A Brief History of the New Constitutionalism, or "How We Changed Everything so that Everything Would Remain the Same"' (1998) 32 *Israel Law Review* 250. It was, perhaps unsurprisingly, Keith Ewing who first drew my attention to this article.

[58] *Communist Party of Germany v Germany* app 250/57. Cf *Vogt v Germany* (1996) 21 EHRR 205. On right-wing controls see *Kosiek v Germany* app no 9704/82 (28 August 1986).

[59] KD Ewing and CA Gearty, *Democracy or a Bill of Rights* (London, Society of Labour Lawyers, 1991).

[60] See text at nn 32–35 above.

the disease, or at best like 'treating a heart attack with a used Band-aid'.[61] The underlying problem, of which Thatcherite excess in the field of civil liberties was an offshoot, lay in the deployment of executive power via the legislature to destroy the Butskellite consensus, replacing it with various policies that went under many names (monetarism; privatisation; trickle-down; etc) but which had a singular effect: the removal of guarantees of social protection and the growth of inequality. Started under the cautious leadership of Mrs Thatcher, this became the dominant theme of her successor John Major's five years in office, and was eventually embraced as well by a 'New' Labour opposition that had come close to despair at the prospect of never returning to office. When it eventually did win power, in 1997, it initially did nothing (quite explicitly) to challenge the policies of the preceding decades while however embarking on a noisy round of constitutionalisation to fill a space in governance that would otherwise have been empty, the Human Rights Act included among the initiatives taken at that time. Mrs Thatcher and Mr Major, and afterwards Mr Blair, all enjoyed strong legislative support for their policies, and they exercised power only because of the victories their respective Parties had achieved at successive general elections. If we recall Ewing's three basic principles of democratic self-government each was clearly being met: pretty well everybody could vote, the resulting government was (broadly) representative, and the MPs who kept these governmental shows on the road were always accountable to those who elected them, with the threat of defeat in the next election never far from many of their minds. To recall my earlier allusion to a potential fourth principle, not explicitly present in Ewing's 1994 formulation, the executive was also in constitutional terms answerable to the people's representatives in the Commons, though of course there were lively discussions about how realistic this was, with the Party system then operating very strongly to ensure disciplined support in the Commons for the government of the day.[62]

At exactly the same time, however, and far from disappearing with the passing of time, Europe's anxiety about the fragility of democratic governance was becoming if anything more pronounced than it had been in the immediate post-war decades. The issue has increasingly taken centre-stage in the years since 1994. Turkey's semi-engagement with Europe has led to its submission to the oversight of the Strasbourg Court and this has in turn produced a series of dramatic interventions by that tribunal in huge national debates about the

---

[61] KD Ewing and CA Gearty *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford, Oxford University Press, 1990) 275.

[62] See Ewing and Gearty, *Struggle for Civil Liberties* (n 48) ch 1 for a discussion of this aspect of accountability.

legitimacy of certain kinds of democratic political activity. The main left wing Parties had won major victories in Strasbourg against government efforts to exclude them from the electoral process in 1998,[63] but in the *Refah Partisi* case three years later the European Court of Human Rights found that an Islamic-inspired Party then in government in Turkey and with a 22 per cent share of the vote could nevertheless be dissolved compatibly with human rights principles. [64] The Court came to this conclusion because it judged that an outright win for the Party at the next election (a real possibility) would have brought about a breach of fundamental democratic principle, and that democracy could not be allowed to eat itself in this way, even in situations where it appeared the electors' choice to do so.[65] The *Refah Partisi* decision was of course hugely controversial, but it set the Court's parameters for engagement with the governments of many of its new members in the years that followed. At the same time the attacks of 11 September 2001 in New York and Washington have generated in their wake a new atmosphere of tolerance for executive crackdown on dissent, while also bringing to the surface of public discourse a move back to national partisanship – wholly unexpected in the heady days of post-1989 globalisation – that had been slowly growing in the 1990s and to which the events of that day have given a large boost.

In that first decade of the 2000s, political leaders began to emerge who were happy to mine the democratic systems they had inherited for opportunities to grow much stronger individual powers out of them, with the invariable route to success being both a strong emphasis on threats posed to the very existence of the state by external enemies of various sorts and also at the same time a similar focus on enemies within, immigrants, terrorists and so on but also, in time, 'elites' whose behind-the-scenes manipulation of democracy ruined the life chances of the 'ordinary people'. The economic crises of the mid 2000s led to a dramatic reduction in life-chances for many, thus playing into this emerging feeling of anger. Democracy continued but often as a camouflage for real power rather than a constraint upon its exercise.[66] This was not by any means a European phenomenon exclusively – one of its

---

[63] *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121; *Socialist Party of Turkey v Turkey* (1998) 27 EHRR 51.

[64] (2003) 35 EHRR 3. Cf *Herri Batasuna and Batasuna v Spain* app nos 25803/04 and 25817/04, 30 June 2009; *Vona v Hungary* app no 35943/10 9 July 2013.

[65] See Sajó (n 39).

[66] Gearty, *Liberty and Security* (n 47).

first and most effective exponents was Israeli Prime Minister Benjamin Netanyahu[67] – but it found a ready home in post-Soviet societies whose economic decline created a political nostalgia for a people's strongman. In recent years, therefore, it has not been surprising to see the Strasbourg Court drawn into ever-deeper appraisals of the democratic health of its Member States.[68] More recently but to potentially great effect the European Court of Justice has found itself being asked fundamental questions about the democratic health of EU states, 'fundamental' because if the score-card marks a failure then the continued membership of the Union can be put in severe doubt,[69] a power of escalation that is not so directly accessible in the Strasbourg system.

Today it is credible to say of the political developments just described that they are examples of 'populism' in action.[70] The European courts are being drawn into disputes because their founding documents assume a thicker version of democracy than that which regards as enough the election of accountable representatives on a universal suffrage. Putting it like this makes clear that the European vision of democracy goes beyond Ewing's three principles to include principles of the rule of law, separation of powers, respect for diversity and human rights etc. The result of this is that impeccably elected, accountable parliamentarians producing a government which can then do whatever it wants (including destroy the system under which it secured power) is not guaranteed to be seen as democratic by these unelected guardians of European democracy. We are back in the territory of Ely and the *Jackson* case, and (so far as Strasbourg is concerned) a jurisdiction greatly expanded from the days when it covered only Communists and fascists. When one surveys the organised shift to presidential styles of government in certain European states, deliberately using a power – sanctioned it is true by the people – to destroy inhibitors on the deployment of executive power (legal and political) and so as a result to centralise power more and more in the hands of a small group (or even in some cases a single individual and his or her family), then it is surely hard to say of the Strasbourg Court's attempts to stop or delay this that these

---

[67] A Pfeffer, *Bibi: The Turbulent Life and Times of Benjamin Netanyahu* (London, C Hurst & Co, 2018) reviewed by A Shatz, 'The Sea is the Same Sea' (2018) 40 *London Review of Books* 24.

[68] See generally I Motoc and I Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge, Cambridge University Press, 2016).

[69] A Sikora, 'The CJEU and the rule of law in Poland: Note on the Polish Supreme Court Preliminary Ruling Request of 2 August 2018' (*EU Law Analysis*, 4 August 2018) http://eulawanalysis.blogspot.com/2018/08/the-cjeu-and-rule-of-law-in-poland-note.html.

[70] M Anselmi, *Populism. An Introduction* (London, Routledge, 2018); C Mudde and R Kaltwasser, *Populism. A Very Short Introduction* (Oxford, Oxford University Press, 2017).

are the actions of a juristocracy? True perhaps, but remembering that Ewing's 1994 piece had Britain mainly in mind it is a valid question certainly to ask what, if anything, this has to do with us?

III. Brexit

The answer to the question with which we ended the last section flows from closer scrutiny of what 'populism' means. Of course, this is not the same as 'popular': much of what Mrs Thatcher did, and after her that other charismatic politician Tony Blair, was popular (council house sales; anti-social control orders; terrorism laws; etc). There is an important distinction here between process and substance. 'Popular' politics use the procedures available to achieve the substantive desired outcomes, those pushing this or that specific goal believing that it will be well-liked and make them, or continue to make them, the sort of person people will (continue to) vote for. Described like this, all democratic politics is 'popular'. Rather than focusing on specific substantive outcomes, 'populist' politics, in contrast, attacks the pre-existing procedures of representative government. There is a vagueness on vision but a highly refined understanding of what makes that vision (vague though it is) impossible to realise: it is the democratic process itself (and perhaps other societal phenomena as well) that act as impediments to the realisation of the people's will. Old fashioned democratic government as such rather than its embodiment in this or that policy is the enemy of the people.

> In addition to being anti-elitist, populists are always antipluralist; populists claim that they, *and only they*, represent the people. Other political competitors are just part of the immoral, corrupt elite, or so populists say, while not having power themselves; when in government, they will not recognise anything like a legitimate opposition.[71]

The people are those who agree with them; the rest – judges; civil servants; politicians; voters not on their side – are 'enemies of the people' in their pursuit of a 'singular common good' that 'the people can discern and will' and that 'a politician or a party (or, less plausibly, a movement) can [then] unambiguously implement .. as policy.'[72]

To use a sporting analogy, populism is going for the player rather than the ball. Of course, there has always been something like this in British (as in all democratic) politics but

---

[71] J Müller, *What is Populism?* (London, Penguin, 2017) 20 (emphasis in the original; footnote omitted).

[72] Ibid, 25, footnote omitted.

it has been kept very much to the margins. Tony Blair occasionally spiced up his pursuit of popularity with recognisably populist ingredients, inveighing against the public sector ('I bear the scars on my back after two years in government and heaven knows what it will be like after a bit longer'[73]) and the Human Rights Act (as on one occasion when (or so Blair claimed) probation staff had 'been so "distracted" by the prisoner's human-rights claims that they [had] lost sight of their duty to protect the public'[74]). The Conservative Party has of course also flirted with such policies in the past, one good example being its tendency to inveigh against the bureaucratic constraints on British enterprise, vowing to liberate the people from the 'Nanny State'.[75] The dislike of prisoner voting was driven much more by hostility to the body that wanted it, in this case the European Court of Human Rights,[76] than by any particular engagement with the issue itself, an example of a populist talent for reverse-engineering a policy out of a culture of animosity towards a particular institution. The attack on the Strasbourg Court which was mounted off the back of the prisoner votes controversy was an early taste of the dislike of that other Europe, the European Union, that was to become the signature tune of British populists towards the end of the 2000s, eventually producing the referendum of 2016 under which the people 'took back control' of their destiny by voting for Brexit.[77]

A referendum is the perfect vehicle for populists, especially when it combines a proposed change that is very vague with an apparent opportunity to give 'elites' a kicking by voting for it (albeit without really knowing what 'it' is). It calls into question Ewing's assumption that we have to have representative government because of the 'sheer size of contemporary society:'[78] the people can speak directly now and indeed technology does allow us (if we are so inclined) to consult them far more frequently, turning Parliament from a law-making assembly into an executive body, charged with doing the people's will: there

---

[73] J Hyland, 'Blair denounces public sector workers to an audience of venture capitalists' (*World Socialist Website*, 12 July 1999) www.wsws.org/en/articles/1999/07/blai-j12.html.

[74] N Temko and J Doward, 'Revealed: Blair Attack on Human Rights Law' *The Observer* (London, 14 May 2006).

[75] David Cameron called bureaucratic necessities 'the enemies of enterprise' in a speech to a Party conference shortly after becoming Prime Minister: M Kite, 'David Cameron launches new war on red tape' *The Telegraph* (London, 6 March 2011).

[76] *Hirst v United Kingdom (No. 2)* (2005) 42 EHRR 849.

[77] My speech to the Canadian Institute for Advanced Legal Studies in Cambridge on 1 July 2019 covers the same ground from a UK perspective: 'She's Dead of Course! Brexit, the British Constitution and Human Rights' (copy of talk with the author).

[78] Ewing 'The Bill of Rights Debate' (n 1) 149.

has been much talk along those lines by enthusiasts for the Brexit referendum result. The invariable challenge for successful populists is how to govern; on the one hand they are driven to accumulate power by destroying the 'elite' buffers that lie between themselves and total control; on the other, they are not at all sure how to exercise the power they are thereby accumulating. Brexit is a perfect case in point. The enemy is everywhere but the means of realising the fact of 'taking back control' are proving harder to pin down than had seemed to be the case in the excitement of the campaign. The vision remains vague while the elites etc who stand in its way are clearly visible to all. The inevitable result is the accumulation of power so as to be able to do whatever is necessary to achieve the vision, but without being at all sure what that necessity actually entails.

The result in the context of Brexit is the extraordinary European Union Withdrawal Act 2018 with its vast empowerment of the executive to make regulations to deal with 'deficiencies arising from withdrawal' from the EU[79] and – in advance of departure and assuming an orderly one rooted in agreement – to do whatever 'the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day'.[80] Both provisions expressly allow ministers to 'make any provision that could be made by an Act of Parliament'[81] with, however, the important caveat that certain areas are specifically declared to be outwith this legislative power.[82] Does this huge empowerment of the executive – the Minister doing what he or she thinks *appropriate* – take us close to the *Jackson* threshold in terms of potential judicial oversight? Close I would say, but not over the bar. For this we have Parliament to thank. As introduced, clause 9(2) envisaged the regulatory power under that section being used to amend the EU (Withdrawal) Act itself: 'Regulations under this section may make any provision that could be made by an Act of Parliament' as has been enacted and then the vital addition: '(including modifying this Act)'. So the no-go areas in the Act, the arrangements on devolved matters, the parliamentary oversight and so on, could have been changed by the Minister if he or she thought this 'appropriate' for the purposes of the withdrawal agreement. Could such a power survive the expunging of the parenthetic clarifier? Probably not: section 20 (2)-(5) sets out various provisions where it is desired by

[79] European Union Withdrawal Act 2018, s 8.

[80] Ibid, s 9(1).

[81] Ibid, s 8(5); s 9(2)

[82] Ibid, s 8(7); s 9(3).

regulation to change one part of the main body of the Act, that related to specifying exactly when 'exit day' is. By allowing it in this specific instance, but only through the provision of direct statutory authority, it is surely strongly arguable that parliament has made clear its disinclination to allow such executive amending for any other parts of this parent Act. So far as the exercise of these Henry VIII clauses affects other pieces of primary legislation, schedule 7 now contains a framework for parliamentary scrutiny vastly more intensive and complicated than had appeared in the original Bill. We can agree with an expert legal commentary that 'given the scale of the delegated legislative exercise likely to be necessary to make retained EU law work, judicial review may have an important role.' [83] In the circumstances Parliament may be thought to have done a fair job of holding the executive to account, even though – of course – vast power has been gathered to the centre. (Indeed, as Tom Poole has perceptively argued, the effect of many contemporary arguments against judicial power along Ewing's lines from 1994 has been to facilitate the extension of executive rather than legislative power.[84])

IV. Conclusion

Parliament did its work with the EU Withdrawal Act 2018, just as it has done with other controversial legislation in the past when large-scale executive powers were sought to deal with this or that emergency.[85] But it was a fairly close-run thing – might clause 9 (2) as introduced have attracted the attention of today's judicial disciples of Lord Steyn had it been the focus of litigation, particularly if the proceedings involved some dramatic reworking of the 2018 Act via a regulation that (because of the precise wording of clause 9(2)) could not be credibly described as *ultra vires*? We shall never know. But the populist impulse remains strong across Europe and, as the Brexit phenomenon shows us, Britain is not immune. What will be next? Repeal of the Human Rights Act? A Westminster-led forced realignment of devolved powers, in the name of some kind of English-inspired populist animosity towards

[83] See J Segan, 'The European Union (Withdrawal) Act 2018: Ten Key Implications for UK Law and Lawyers' (*Blackstone Chambers*, 19 July 2018) www.blackstonechambers.com/news/european-union-withdrawal-act-2018-ten-key-implications-uk-law-and-lawyers/.

[84] T Poole, 'The Executive Power Project' (*LRB Blog*, 2 April 2019) www.lrb.co.uk/blog/author/thomas-poole.

[85] The Anti-terrorism, Crime and Security Act 2001 was sown with the seeds of its own collapse (so far as indefinite detention was concerned) during its passage through Parliament: see ss 122 and 123. Likewise the control order regime that followed the ending of that detention was greatly modified in Parliament: Prevention of Terrorism Act 2005.

the Scots? The abolition of judicial review to avoid 'elite judges' calling into question execution of the people's will? The final shredding of the welfare state in the name of 'international competitiveness'? Political leaders capable of leading the UK out of the EU to foster their own careers are capable of anything. And the Trump presidency acts as an inspiration to this sort of politician, as one of their number (at the time of writing about to be Prime Minister) has frankly admitted.[86] If the Westminster system of parliamentary sovereignty were used to transfer power indefinitely to the executive, under cover perhaps of an ongoing post-Brexit emergency (or some sort of terrorist atrocity), what then? To adapt Ewing's own 'central dilemma' in his 1994 chapter, 'how can we reconcile with the first principles of democratic self-government the transfer of sovereign power from an elected legislature to a [indirectly elected/presidential] executive'? Does the passivity of the courts extend to giving safe passage to this sort of move to what might reasonably quickly end up at least an authoritarian and perhaps also a fascist state? A hypothetical question certainly, but not as hypothetical as it once was.

[86] See Y Salam, 'Boris Johnson defends "Admiring" Donald Trump' (*Politico*, 26 June 2018) www.politico.eu/article/boris-johnson-defends-admiring-donald-trump-leaked-comments/.