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Limits of Legislation as a Source of Law: An Historical and Comparative Analysis

Jonathan Mark Horton QC

PhD (Law)

The University of Edinburgh

2015

Abstract

We are habituated to an hyperactive legislature and the proliferation of legislation. The legislature hurtles along, causing Anglo-American legal systems to degenerate into massive, and often meaningless, contradictory or trivial blocks of rules and norms, and ones which are beyond the ordinary citizen or corporation to know and fully to meet.

Legislation's demands are ever-increasing: it grows in volume, in ambition, and it seems to recognise no end to its capacity and entitlement to regulate the most detailed, most banal or most technical of affairs. It has lost any means by which to prioritise those matters with which it ought concern itself.

The situation has been brought about by conflating an authority which Parliament acquired in the 17th and 18th Centuries with the legislation it produces. I seek to separate the two and show that there is no justification for attributing to legislation such legitimacy and authority as Parliament as an institution acquired historically. But because legislation-making has been based upon this assumption, there is a loss when Parliament legislates hyperactively because there exist normative reasons why Parliament should perhaps not act in such an unrestrained manner, but ones which, partly owing to the underlying assumptions about the authority of legislation, remain unaddressed.

For so long as those who would claim for Parliament an entitlement ambitiously to legislate and without restraint fail to confront these considerations, there remains a normative loss when Parliament legislates in the manner they would advocate.

I seek to diagnose a presently less than fully justified conferral upon legislation of authority and an accompanying incompleteness in the arguments of those who would seek to justify an activist and ambitious role for Parliament via legislation. This is not to say that there is no justification for Parliament's current disposition, but that the foundation upon which Parliament's hyperactivity in legislation has been built is attended with a failure of those who advance such a position to confront and to meet arguments which run counter to that claim.

Lay Summary

Much of the law now made is legislation. Other sources of law – or rules by which we live – are Court decisions and even customary ways of doing things.

The amount of law making through legislation is a fairly new occurrence. Historically, the making of rules was an activity that was shared by different bodies, and it occurred in a much more diverse way.

The amount and type of legislation means that Parliament has become hyperactive and that there is too much legislation. This can be problematic. There has come to be a massive body of rules. Not all of those rules have real and practical meaning, and they can be contradictory or even try to deal with topics that are trivial, or that citizens think are no business of government.

Ordinary people often have trouble knowing all the rules that govern their life, their business, and their dealings with others. This is a problem if we are presumed to know what the law is and are to be held responsible as if we actually had that knowledge.

One of the troubles with legislation in current times is that we lack any way of knowing when and when not to legislate. I show that to be the case here, and also that we need to begin thinking about what limits exist or should be put in place to keep legislation limited to the kinds of activities that it must deal with and that it can handle well.

I do this by looking to:

- 1) how, historically, we came to tolerate such reliance upon legislation;*
- 2) the relatively few limits that we presently recognise as limiting legislation;*
- 3) what practical limits exist on legislation and how the Parliament itself has limitations;*
- 4) how other sources of law (particularly the Common Law and customary law) can also do (and do well) some of what legislation tries to do;*
- 5) understanding why, given the way we have looked at these matters historically, we think that legislation is an appropriate way to handle so many topics.*

I suggest that the scholars who favour unrestrained legislative activity have not fully justified the approach that they advocate because they have not answered some of the limits and weaknesses of popular assemblies and of legislation.

Declaration

This thesis has been composed by me and is my own work. None of the work within it has been submitted for any other degree or professional qualification, with the exception of Chapter 4. Many of the ideas were the subject of a dissertation I submitted in 2011 for an LLM in the Philosophy and History of Law from Edinburgh University. That Chapter, in the form in which it appears in this work, is different in substance from my LLM dissertation. It was not, in that earlier form, tied to the wider arguments I have sought to advance as part of my PhD studies. Much of the text is different, as is the emphasis and overall object.

A handwritten signature in black ink, appearing to read 'J M Horton'. The signature is written in a cursive style with a large, sweeping initial 'J'.

Signed, J M Horton
9 June 2015

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Introduction

Legislation is pervasive in modern law. There is virtually no subject matter to which it will decline to extend, no audience to whom it will refuse to address itself, and few means it will not employ to achieve its objects. It is a situation to which we have been habituated. The Legislature regulates hyperactively,¹ with detailed commands, across the whole spectrum of human activity and fully cognizant of its supremacy over other sources of law.

The proliferation of legislation, and therefore its complexity and volume, are not the only features of this state of affairs which are worthy of interest. Legislation seems content to change its commands with increasing regularity, to regard itself as needing less and less to be informed by history and by wider legal principle, to rival rather than to complement other sources of law and, in a general sense, to regard itself as wholly unconstrained by any force other than the need for those who dominate its making (governments) to retain the support of the majority of the electorate. The attitude that everything can be '*well fixt by a good law*'² has come to predominate, no matter what problem it is sought to remedy and no matter what disruption or imposition this might cause for those commanded to comply. Almost inevitably now, every perceived community problem, some failure of the private sector or the market, or some miscarriage of public administration, is met with legislative action. The legislative response is often defaulted to unthinkingly, as if it were an assured, and the only possible, cure.

¹ The term is Lord Bingham's: see T H Bingham, 'The Rule of Law' (2007) 66 CLJ 67 at 70.

² L A Harper, *The English Navigation Acts* (1939) 381.

Each legislative solution regularly entails an organisational apparatus: a regulatory or like body to enforce the statute or administer its implementation and operation; a register to record licences, permits and other rights which the scheme recognises or creates; public officials to process applications and peruse or produce reports, to receive imposts and distribute subsidies and incentives. In turn, there are demands for better management and scrutiny of the activities of the burgeoning Executive, it having become too gargantuan for even the most diligent of Permanent Secretaries or Ministers to oversee. And so yet more bodies are created: in England, for example, there is a Parliamentary and Health Service Ombudsman, a Comptroller and Auditor-General, an Information Commissioner, an Electoral Commissioner, Civil Service Commissioners, a Committee on Standards in Public Life, a Public Appointments Commissioner, a Business Appointments Committee, a House of Lords Appointments Committee, the UK Statistics Authority, an Audit Commission, Standards for England, and a Parliamentary Standards Commissioner.³ In Scotland alone between 1999 and 2007, eleven completely new bodies were created to carry out scrutiny previously performed by other organisations.⁴ Almost invariably, legislation is the means by which even these regimes are created, adjusted and maintained.⁵

It is not enough for legislation simply to establish new regimes. Unless that regime is one which imposes obligations or confers rights upon private parties and unless those rights are ones which private citizens and entities have some real

³ Established, in part, owing to a lack of a clear legal definition separating Officers of the House, as independent constitutional watchdogs, from employees of the House.

⁴ *Report of the Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland* ('Crerar Review') (2007) para 6.2.

⁵ See, for example, Constitutional Reform and Governance Act 2010 (UK), ch 1.

personal motive to assert (including to expose themselves to the risk of litigation) it seems often to be considered necessary, lest the statute's irrelevance be revealed by its disuse (or perceived under-use) that there be a state body with the function of deploying its provisions. We see particularly clear examples of this in fair trading⁶ and consumer protection bodies, which are characteristically vested with enforcing and administering vast numbers of statutes, including ones that define what constitute unfair contractual terms.

Other – blunter – means for encouraging compliance with statutory commands include imposing criminal sanctions for contravention (prosecution being, of course, another state-centred activity) and having as a consequence of contravention, the forfeiture of permits, licences or other privileges often derived from statutory schemes. That in turn justifies a state agency acting as the repository for registering and enforcing penalties, and, in some cases, yet more legislation to support those functions.⁷

The manifestations of legislation's assertiveness lie, for example, in its articulation of formulae for the price at which essential services and commodities can be sold to consumers, contriving scarcity to create markets in which legislatively-created and defined rights and privileges might be traded,⁸ imposing standards for the construction of buildings, for food and fire safety, for workplace health and

⁶ The UK Office of Fair Trading closed on 31 March 2014 and its responsibilities passed to organisations including the Competition and Markets Authority and the Financial Conduct Authority.

⁷ See, for example: in Australia, the New South Wales Debt Recovery Office, in Queensland the State Penalties Enforcement Registry; in New Zealand, the Collections Unit; in the UK, HM Courts & Tribunals Service; in Canada, the Environmental Enforcement Act; in the United States, the Central Violations Bureau (a division of the Administrative Office of the United States Courts).

⁸ Examples include water rights, rights to install and operate electronic gaming machines and to conduct a taxi service. A more recent example is carbon trading schemes.

safety and for taste in building appearance and streetscape. In other fields, legislation enacts ethics and codes of conduct.⁹ Where legislation itself lacks the expertise to make these rules, it engages technical standards and codes of practice to do its detail work, and by making non-compliance with these often minutely-detailed regimes a breach also of the statute, or at least presumptive evidence of such. Legislation shows no reluctance in addressing specialised audiences on topics within their particular expertise.¹⁰ It experiences no embarrassment by requiring its citizens to comply with standards, prescriptive in the extreme, that are not freely available and have to be acquired, at some considerable expense, from non-government standards bodies, such as the International Organization for Standardization (ISO).

Legislative proliferation accompanies not only the continuous increase in state functions but also the constant (and rapid) refinement and consolidation of rules, and then the modification of them.¹¹

We acquiesce in this system, despite the impossibility, whether we are legally trained or not, to know more than a relatively small proportion of the legislated rules, and despite knowing that the body of rules will change – and grow – rapidly. We are content to do so despite the knowledge that, regardless of the reasonableness of our ignorance of a particular rule, we can nevertheless be held to account for a failure to adhere to it (ignorance of the law being no excuse).

Acquiescence is not necessarily, of course, an endorsement of legislation's dominance or even its desirability. People (including lawyers) frequently complain

⁹ See, for example, the Civil Service Code (made under the Constitutional Reform and Governance Act 2010 (UK)).

¹⁰ D A Farber, 'The Inevitability of Practical Reason: Statutes, Formalism and the Rule of Law' (1992) 45 Vand L R 533 at 552-553.

¹¹ O Höffe, *Democracy in an Age of Globalisation* (2007) 75.

about legislative rules, about their bluntness, about their proliferation and about their lack of common sense. Sceptical scholarly views have also been expressed. For instance, after A V Dicey published his *Law and Public Opinion* in 1905, Christopher Columbus Langdell in his review of it, commented that the work was not a law book at all, the term ‘law’ commonly being used by lawyers to mean ‘law as administered by the courts of justice in suits between litigating parties’ whereas Dicey had used the term to describe legislation.¹² In more recent times, Guido Calabresi has suggested we are ‘choking on statutes’.¹³ Hayek differentiated between law (as something not invented and conceived of independently of human will) and the relatively recent newcomer, legislation.¹⁴

There are also very stark practical consequences. The disparity between the Western appetite for the regulation of wages, of workplace safety, of manufacturing and environmental standards and a reluctance to regulate in this manner in less-developed nations is marked. One consequence of it is the movement to those less regulated economies from Western economies, of manufacturing and other activities which Western nations seek so closely to control, but which in those other nations run freer. Economists take a special interest in regulation – the forms it takes, the incentives it provides and its impact upon economic growth. Regulation which assumes a legislative form (as so much of it does) is a common object of their attention, owing to its greater incidence, its more agile character and its greater tendency than the Common Law more comprehensively to govern stated affairs.

¹² C C Langdell, *Dominant Opinions in England During the Nineteenth Century* (1906) 151.

¹³ G Calabresi, *A Common Law for the Age of Statutes* (1982). The title of his Chapter 1 is ‘Choking on Statutes’.

¹⁴ F A Hayek, *Law, Liberty and Legislation* (1982) vol 1 72-73.

An outsider (a person not habituated as we are to legislative proliferation) would be justified in being curious as to how this all came about and why there exists such apparent acquiescence or acceptance. There would be many explanations to offer. Legislation has had, after all, considerable and undeniable successes: workplaces are safer; food is more hygienic, large structures are more secure and less prone to fire; cities, despite being large, are sanitary and relatively clean; the air we breathe and the water we drink is (generally speaking) conducive to good human health, despite the growing scale of industry and of all the infrastructure required to serve our insatiable appetite to consume: '*getting and spending*'. Society is, in general, safe and prosperous. We are comfortable, and we see the state playing such an active role in providing our comforts.

Legislation can claim more than just having contributed to these practical successes. Its author, Parliament, carries kudos. It was the body (with the Common Law's assistance) which wrested rule-making power from absolutist Stuart monarchs. Its representative nature (especially in view of the events of the late 18th century and later expansion of the franchise) clothes Parliament with a real or perceived legitimacy. It took Parliament, after only a relatively short time of acquiring its power, to come to enact law at least as willingly and intrusively as had the Crown as monarch.

There is a strong tendency to attribute to Parliament (and therefore to legislation) a range of virtues well beyond what is warranted, because of the role that Parliament played in those Constitutional upheavals, when in those struggles legislation had played no great role and when the whole reason for its intervention was to prevent the very thing that Parliament has come to embody: the unrestrained

deployment of imposed or enacted law. To attribute prestige for this historical reason is unjustified. It is a problematic approach because it conflates the authority of Parliament with the desirability of legislation. Not only is it wrong to conflate those two considerations in a conceptual sense, but the bases for their conflation (the historical role and achievements of Parliament) are no foundation at all to do so.

Legislation dominates today despite an agenda of legislative reform (let alone an activist or ambitious one) being something which until recently was considered not to be a necessary part of a Government being a good and diligent one.¹⁵ This transition entailed legislation finding new and more confident rationales for its deployment, and displacing an historical disposition against routine or unthinking reliance upon it.

Another explanation for our having acquiesced in legislation's rise and possible overreach is that many in common law countries (including legal scholars and teachers) have not woken up to the fact that legislation has assumed this dominant role in our systems. Calls are often made, in order to remedy this ignorance, that law students be better trained to deal with enacted law.¹⁶ These calls may amount to the acceptance of legislative dominance, rather than an appeal to appraise the merits of that system. The better starting point is not to strive to learn to live with enacted law, but to first come to grips with what it means for the system as a whole to be so dominated, and whether legislation's claims to behave so monopolistically and jealously are ones which ought be supported.

¹⁵ S Walpole, *Life of Lord John Russell*, 2nd edn (1889) ii, 96; S A Walkland, *The Legislative Process in Great Britain* (1968) 12.

¹⁶ See, for example, F Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (2001) 180; M A Glendon, 'Comment' in A Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997) 95-114 (Ed. Amy Gutmann).

Jeremy Waldron in particular has attempted that task. Much of his work, however, is an *apologia* for legislation and legislatures. His disclosed object is to restore (or assert) legislation's good name. Waldron has lamented the attitude so deeply embedded in common law countries of distaste for legislation. In his *Dignity of Legislation* (1999) and *Law and Disagreement* (1999), he sets out to rectify the 'bad name' which he says legislatures have in legal and political philosophy and to recover and highlight ways of thinking about legislation that present it as a dignified mode of governance and a respectable source of law.¹⁷ His work stands not merely as the work of one author, but as representing a wider proposition: that the multitude has a wisdom all of its own and is more likely to reach the right result than, for example, the lone judge, or indeed a small group of people arranging their own affairs. Much of the argument Waldron makes is heavily predicated upon the deliberative qualities of popular assemblies and the firmly conscious nature of those deliberations.

Why was Waldron's project necessary? If legislation has achieved dominance, why does it still have, somewhere in common consciousness, such a bad name? Does Waldron's work expose our ignorance, or is it an indication of deep, residual or intuitive scepticism about the desirability of legislation having assumed the position it does?

Any appraisal of the dominance of legislation brings us to conundrums which are not merely practical: they are well recognised as going deep into national life,¹⁸

¹⁷ J Waldron, *The Dignity of Legislation* (1999) 1, 2.

¹⁸ C Ilbert, *Legislative Methods and Forms* (1901) 1, 3 and 124.

into common consciousness and historical (mostly British) ideas.¹⁹ It calls upon us to ask to what extent we are content for legislation as a source of law to displace custom; what trust we have that popular assemblies and their members will control responsibly that larger portion of the body of laws; whether the modern legislative process is one that is indeed democratic and reflective of popular will; whether modern legislatures are equipped to make ‘good’ law; and the extent to which we are willing to permit intrusions into our liberty for the benefits, real or perceived, which legislation promises; and to ask when legislation solves some problem, what problems it creates; and, in a more general sense, the extent to which we might be content with the more interventionist, reformist and in many ways unforgiving, role which Parliament has acquired. Underlying these is an even deeper influence, being whether and to what extent we would regard the cosmic or underlying order as immanent and therefore how far we would justify our entitlement to adjust or interfere with it.

This brings me to the second of my objectives. Once history disentangles for us the kudos we attach to Parliament and the authority we confer on legislation, we might explore, once freed of the assumption of legislation’s authority that I have identified, what considerations operate against those to which Waldron gives expression. To do so is to search for principles that might mark the boundaries beyond which legislation ought not be allowed to pass and also to show that the factors upon which Waldron would rely as lending support to legislation to do not obtain.

¹⁹ J G A Pocock, *The Ancient Constitution and the Feudal Law: English Historical Thought in the Seventeenth Century* (1957) 55.

Doctrinally speaking, there are few limits on legislation. Having been freed from most of the historical limitations on its making, legislation has now reached the point that, leaving aside any written constitutional limitations placed upon it, its validity may not be the subject of Court challenge, even if its enactment was affected by fraud or misrepresentation.²⁰ Courts are precluded from going behind what has been initiated by the legislature and questioning whether the Act arose out of incorrect information or even actual deception.²¹ That absolutist view is the natural extrapolation of A V Dicey's influential formulation of the doctrine of Parliamentary Supremacy:²²

Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts.

Courts, although they retain the function of interpreting and applying the law, nevertheless seek to give effect to Parliamentary will as expressed in legislation. There have even been statutory inroads into that function, through the various Acts that prescribe the rules for the interpretation of statutes. Nevertheless, within that interpretative function does lie some capacity to limit legislation. Although the rules of statutory interpretation largely re-assert the Courts' subjection to the legislature's will, there nevertheless remains recourse to common law principle, which, on occasion, operates to restrain both legislatures and legislation. Regrettably, however, the Courts from time-to-time sacrifice this rare slice of autonomy, lured by the kudos of popular assemblies and the legitimacy which statutory words are thought to

²⁰ *British Railways Board v Pickin* [1974] AC 765; *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710; 8 ER 279.

²¹ *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 at 322-323; *Labrador Co v R* [1893] AC 104 at 123 per Lord Hannen.

²² A V Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn (1915) (Liberty Classics reprint, ed R E Michener, 1982) 4.

confer, by framing their decisions not as applications of common law reasoning, but as the mere giving effect to statutory language.

It is one thing to acknowledge the relatively small degree to which doctrine might limit legislation. It is another positively to assert that additional or different limits exist or ought be recognised. My task here, having deployed history to disentangle Parliament and legislation in terms of the kudos might attach to the latter by reason of an historical view of the former, is not to say that legislation ought not be granted the kudos it presently attracts. It is a more modest task, namely to identify the pervasive confusion which comes with conflating the prestige of parliament and looking at legislation by reference only to how it is formed (ie of the characteristics of its author) and showing that to do so is to overlook many of the problems in relying on legislation to the extent we do, problems which in many cases go unanswered by the prevailing theory justifying legislative proliferation.

The loss then, in the end, from not disentangling Parliament's prestige and legislation, is not just that potential problems (including normative ones) are overlooked or assumed away, but there is a normative loss in a substantive sense because those who would advocate an ambitious role for legislation have addressed neither possible alternatives to that state of affairs nor many of the problems with it. So my claim is not that legislation ought not have the authority which we presently attach to it, but that there is a normative loss when popular assemblies legislate as hyperactively as they do, because the premise of their doing so is seriously incomplete. All this takes place in circumstances in which the burden lies upon those who advocate such an ambitious role for Parliament (Waldron included) first to

meet these gaps. Waldron's approach, therefore, is an incomplete normative justification for the result which it advocates.

The loss which I identify can be traced, when one looks to the societal conditions accompanying the changes experienced by Parliament in the 17th and 18th Centuries, to distastes, evident before legislation rose to the dominant position it later assumed, for despotism, for absolutism and for what were seen as unnecessary or undue intrusions by the imposition of new and changing norms.

The normative tensions, therefore, which underlie the wider question of what authority ought legislation properly possess have gone largely unaddressed notwithstanding legislation having acquired dominance. On the one hand there is Bentham's (18th century) notion of an '*omnicompetent*' legislature and on the other is legislation's proper province being the control and regulation of government. Government as a '*deliberate contrivance*',²³ beyond its simplest and most primitive forms, was something which required distinct rules to determine its structure, aims and functions. Hayek saw these as being quite different from rules which establish or articulate rules of good conduct. And those rules, Hayek points out, arose independently and before those having the quality of organisation.²⁴ Maitland too pointed out that much of 19th century statute law had been concerned with public law: remodelling the governing authority in the state; altering the constitution of the Courts and the forms of procedure.²⁵ Legislation now of course seeks both to

²³ Hayek (n 14) 124.

²⁴ Hayek (n 14) 124-126.

²⁵ F W Maitland, *A Sketch of English Legal History* (1915) 161-163.

organise and to establish and modify rules of just conduct: *'[s]ince it possesses the authority to arrange everything, it cannot refuse responsibility for anything'*.²⁶

My project entails five principal inquiries:

- 1) first (in Chapter 1) there is the historical aspect: how Parliament came to exercise law making power, the circumstances in which it did so, and the process by which legislative power came to be freed of the limits which had historically (but often implicitly) attended it. An inquiry of this kind challenges our attitudes to Parliament and legislation and shows some of them to be unwarranted or historically inaccurate. The Chapter seeks to wake us up to the reality and consequences of a system so dominated by legislation by contrasting it to the more restrained role that enacted law once had and also to disentangle the kudos properly attaching to Parliament from that we (implicitly) attach to legislation. It is the point from which we ought to look at legislation afresh and as conceptually separate from the merits or otherwise of its author;
- 2) secondly (in Chapter 2) I consider the way in which doctrinal law conceives of limits on legislation, the principal features being the rules by which statutes are interpreted and given effect, the division of labour between the various sources of law, constitutional rules, the operation of common law principle and some explicit statutory controls. The purpose of my doing so is to expose the extent to which doctrine at least seems to reflect a conflation of the authority of Parliament and legislation;

²⁶ Hayek (n 14) 143.

- 3) thirdly (in Chapter 3) I deal with practical and institutional limits: the problem of legislation continuing to command obedience and the need for it to remain intelligible and within the grasp of those who are the subject of its commands and the very real and observable impediments to popular assemblies and the legislative process being the true expression of unadulterated public will. It is here that I introduce Waldron's advocacy of legislation's dignity. Exploring limitations of a practical and institutional kind reveals an incompleteness in the advocacy of an ambitious role for legislation. It shows that Waldron's thesis overlooks some practical and institutional weaknesses of popular assemblies and legislation, and that even if Waldron's thesis be correct, it is no justification for legislation of the volume and of the intrusiveness that characterises our current experience of it;
- 4) fourthly (in Chapter 4) I look to custom as a source of law. I explain (following Lon Fuller) the impossibility of understanding made law without first obtaining an understanding of customary law, our neglect of custom and, as a consequence, having done damage to our thinking about law generally by being unable, it seems, to imagine social order as coming from a source other than '*from above*' and only after having received the imprimatur of the state. An examination of custom reveals further losses in the approach of those who favour a legislative omniscience: of them having overlooked alternatives to a world in which Parliament legislates so prolifically and intrusively; of means different from deliberative assemblies by which public will might be

formed and take expression as norms; and, ultimately, it helps uncover an undeclared preference in the Waldron thesis that the order in which we live is not something that is to be considered immanent, and instead is something which we ought to feel no restraint in changing and controlling;

- 5) fifthly (in Chapter 5) I investigate some of the causes of the extent and degree of our reliance upon legislation and its proliferation: how our current approach came about. Doing so contributes to an understanding of the influences upon our modern disposition to favour legislation and what that disposition overlooks or ignores and the alternatives it precludes us from imagining and expressing. Doing so adds to my diagnosis of a problem, being the loss – an intellectual incompleteness – when Parliament legislates so regularly and intrusively because Waldron’s thesis does not seek to meet these factors as possible causes and say why, despite them, the reliance on popular assemblies and legislation ought obtain.

Along the way, one of the quandaries I seek to explore is how, in Anglo-American or common law systems (upon which my project focuses) legislation came to monopolise so much of rule-making activity. A feature of those systems was, historically at least, the primacy afforded to judicial decisions, and in particular those of appellate judges, as sources of law.²⁷ Those systems valued adherence to precedent: the ‘*gradual accretion from case to case*’²⁸ and the movement from

²⁷ J Beatson, ‘Has the Common Law a Future? (1997) 56 CLJ 291 at 295.

²⁸ J Beatson (n 27) at 295.

specific instances to more general rules – a search for principle.²⁹ Complex (and as yet unresolved) tensions exist between modern legislation and these tenets of the Common Law.³⁰

The matters I have set out above are the principal ones which provoked my interest in this project. They show there to be both a largely unscrutinised rise in the scope and incidence of legislation and an accompanying loss of any conception of where, beyond express constitutional limits and democracy itself, legislation's limits lie. Moreover, there is a need to reconsider where, within traditional conceptions of the Common Law system, legislative proliferation fits, and the extent to which it compromises fundamental values of British (in particular) legal culture.

It is necessary to state what are the parameters of my project, so that the extent and context of it may be understood at the outset. My focus, as I have said, is legislation in Anglo-American legal systems, united by their common ancestor, the Westminster Parliament. There are of course not insignificant differences between the nature and operation of the Parliaments of the United Kingdom and each of its former colonies. Many (Canada, the United States and Australia) operate within a Federal structure, something which, until Scottish and Welsh devolution at least, was foreign to the British system. Many are republics, substituting a President, and presidential-style system of election, for a monarch. These differences, however, do not substantially affect my project or call for separate or special treatment. The

²⁹ Lord Goff, 'The Search for Principle' (1983) 59 *Proceedings of the British Academy* 169 at 179-182.

³⁰ See, for example, P Atiyah, 'Common Law and Statute Law' (1985) 48 *MLR* 1; J Beatson (n 27); A Burrows, 'The Relationship Between Common Law and Statute in the Law of Obligations' (2012) 128 *LQR* 232.

trends which have attracted my interest are evident in each and, constitutional rules aside, the same basic approach to legislation obtains.

So too, legislation tends to possess the same basic characteristics within each. At its most basic, legislation is the product of law-making popular assemblies and the rules at which those bodies arrive.³¹ The term includes delegated legislation: statutory rules and regulations, being rule-making over which, under Constitutional orthodoxy, popular assemblies retain a form of supervision and control. Many of the other features of legislation which distinguish it from other sources of law and from consensual arrangements are dealt with later, and especially in looking to those limits which, doctrinally speaking, emerge from the division of labour between them.

By focussing upon the enactments of assemblies, I would exclude what is, on occasion,³² referred to as judicial legislation: law making by Judges. The Common Law, as a source of law, has entirely different characteristics from enactments.

My ultimate concern is to not seek to portray legislation as inferior for all purposes to the Common Law or to advance a merely libertarian thesis as part of which any legislative intrusion is opposed. To do so would be to ignore legislation's demonstrable successes. But we have been better, I suggest, at identifying legislation's strengths than we have been at confronting its weaknesses, and, worse still, at recalling the relative strengths of other sources of law: especially common law and custom. We seem to have become convinced that there is an inherent

³¹ B Akzin, 'Legislation, Nature and Functions' in *International Encyclopedia of Social Sciences* (1968) vol 9 222; D Miers & A Page, *Legislation*, 2nd edn (1990) 2.

³² See, for example, Miers & Page (n 31) 1; G Williams, *Salmond on Jurisprudence*, 11th edn (1957) 143.

benefit in more laws, as if the righteousness of a country planted thick with laws were not a poetic flourish but a legal truism.

My central claims are that: there has been a loss, in advancing or acquiescing in legislation assuming a dominant and virtually unlimited role, both in understanding the kudos we attach to Parliament and (wrongly) attaching it to legislation; that those who advocate such a role for legislation (predominantly Waldron) have failed to address many of the counter-arguments against legislation having such a role and have failed also to consider alternative possible roles for Parliament and legislation; and that there exists a conceptual error in equating any wisdom of the multitude (if it exists) with a positive case for legislative proliferation. My project, therefore, seeks to diagnose and prove this loss, and at the same time, present some of the problems – and the alternative possibilities – as a way of going some way to fill what would appear to be a void in the modern jurisprudential vocabulary so far as limiting the proliferation of legislation and our reliance upon it is concerned.

Legislation has made its own, unsuccessful, attempts to control itself. At present, attempts are made both *ex ante* and *ex post* to ascertain whether legislation should be, or should have been, enacted. *Ex ante* approaches exist in the form of regulatory impact assessments. They require legislators to turn their minds to the benefits of regulation versus the impact of placing an additional burden on, in particular, business. *Ex post* approaches are very much in vogue, usually in the form of ‘*red tape*’ reduction programmes, or, in the case of regulation in environmental fields, ‘*green tape*’ reduction. They target bureaucratic rules and practices as well as legislative provisions. But for all that such programmes are promoted as the means

by which overly burdensome regulation might be pruned and made less interfering, the problem they seek to mitigate has proven pervasive and intractable. One reason for this, I suggest, is a lack of any principled approach to the task. Such programmes articulate aspirations of simplification, and for the better assessment and calculation of the costs of regulation, but they have been wholly uninformed by any conceptual guidance as what ought and ought not be the subject of state regulatory attention, and alternative forms of social ordering.

I would hope that, along the way to making good the claims I have set for myself, perspectives emerge by which to reconsider legislative limits, ones that are realistic about popular assemblies and the legislative method, ones which weigh the benefits and drawbacks of legislation against other sources of law, and ones which are capable of taking into account the normative considerations that bear upon such questions. At the heart of this debate are two strands of argument: the first is that deliberating multitudes are better at reaching the right result and are more efficient at getting there; the second is a more autonomous approach, that the will of the people ought prevail, not through an organised assembly consciously conducting thought-experiments, but through an enlightened pursuit of self-interest achieved by less contrived or constructed means.

Chapter 1

Parliament's Rise and Reputation

In this Chapter I seek to destabilise certain assumptions we tend to make about Parliament and legislation: that Parliament is and has always been the natural repository of law-making power; that the role of the Courts has always been limited to adjudication; that the Common Law and legislation have always been clear between themselves about that delineation (albeit, perhaps, as one of '*oil and water*'¹) and that reposing in Parliament the power to make and change law need be limited by nothing more than politics and democracy itself and some limitations of a Constitutional kind, whether they be written or customary.

Parliament commands an increasing hegemony, almost a monopoly, over the state's law-making power. Its English form evolved from an institution which in the 16th century was largely subservient to its Tudor masters, to one which, in the 19th and subsequent centuries, had the confidence and capacity to pursue far more autonomous and ambitious objectives.

Parliament's almost plenary law-making power is, therefore, relatively recently acquired, and acquired at the expense of the Monarch, and with popular backing in order to control what was tending to become absolutist power in those hands. Parliament's law-making power (once a small part only of its functions) has come to dominate most of its attention. That power which, in the hands of the Monarch it was thought necessary to control, has been freed of all but what

¹ J Beatson, 'Has the Common Law a Future?' (1997) 56 CLJ 291 at 308.

are (I will suggest) the most basic of limits: there has developed a Parliamentary despotism of sorts.

The exceptions to Parliament's near monopoly on law-making power are small indeed: the Common Law may change the law gradually and on a case-by-case basis, as Courts are called upon to determine specific rules. But they are changes which, if the Courts be bold enough to make them, Parliament may, in an instant, abrogate. And the Executive's ability to make subordinate legislation remains subject always to Parliament's disallowance of it.

Without some knowledge of the events by which Parliament acquired this power, and the role played by the other legal and political institutions in those events, we are prone to certain assumptions, ones that are wrong and no basis to regard legislation in the way we do. Destabilising these assumptions informs a point I later wish to make: that the proliferation and intrusiveness of legislation grates with the societal and historical circumstances in which Parliament became clothed with power to act as it now does. Doing so helps to disentangle the assumptions we have made about Parliament and the authority we tend unthinkingly to confer upon legislation.

Historical context demonstrates the ways in which an unlimited law-making power has the potential to provoke an adverse public reaction, how Parliament acquired kudos as an institution likely to maintain liberty and constitute a counterbalance to absolute law-making power, but also how Parliament, despite being virtually unlimited as it has come to be, may not meet the ideals now widely imputed to it.

The historical perspective, in the sense in which I employ it here, offers means to retrace our steps and see whether what we appear to have drawn from those developments stands up to analysis. My use of history is to help identify and resolve a current entanglement that is also practically and conceptually problematic.

The view which I offer here is that these historical events are better understood as demonstrating the answer to the then-immediate need of quelling public distaste for the Monarch's absolute capacity to make law and in order to place, in the hands of those who complained of the abuses, some of the power that the Monarch possessed. As matters have evolved, however, that power has been freed of many of the controls which attended it when it was in the Monarch's hands.

Unless these matters are properly understood, we wrongly impute to Parliament an unswerving democratic motivation and regard as illegitimate any attempt to inquire whether its activities are motivated by such a force, or the legitimacy of particular legislation. We have come to fuse, as Luc Wintgens has shown,² questions of the validity and legitimacy of legislation and to subsume entirely the latter within the former.

I approach my topic in this Chapter in two parts:

- 1) the events and circumstances in the 17th century which saw Parliament come to hold the power it does;

² L J Wintgens 'The Rational Legislator Revisited: Bounded Rationality and Legisprudence', in L J Wintgens & A D Oliver-Lalana (eds) *The Rationality and Justification of Legislation: Essays in Legisprudence* (2013) 2.

- 2) how, in the 18th century, there was recognition of the problems which uncontrolled power might provoke. That new-found power was first sought to be controlled by a legislative science, but was ultimately freed of almost all its external restraining influences;

Later (in Chapter 5) I take up again the theme of how restraints on the legislature have, over time been relaxed or removed, not only those that bear directly upon it, but also some of more general application to human activity. What Brian Tamanaha describes in this sense as the loss of '*higher laws*' is important in understanding some of the causes of legislation's rise to dominance.

I Parliament's rise 1603-1714: from King's head Court to King-maker

England's 16th century Parliament, although not wholly subservient to the Monarch, rarely sought to assert itself beyond the role of an experienced advisory Council. It was the forces and events of the 17th century which caused it to become more assertive and to acquire an independent identity and function. Gaining some understanding of this historical backdrop, and of the forces and events which took place, provides a starting point from which to assess some assumptions which now seem to underpin our current attitude and approach to popular assemblies and to legislation, namely: that Parliament is the natural repository of law making power; that Parliament, by its institutional characteristics, provides most of the restraints on law-making power as might reasonably be required; and, that there is an historically-settled position as to the respective roles of the Common Law and legislation. The assumptions appear to be both sociological – a widespread tacit acceptance of Parliament conducting

itself in the way it does – and also to have imbued the scholarly treatment of the topic, which, for the most part as I show later, largely takes the *status quo* for granted.

Parliament's role in 16th century England was influenced heavily by the dominating Tudor monarchy and by the Reformation and the upheavals it produced. Tudor influence was a popular despotism, one which stood in contrast to Louis XIV's continental aristocracy but which co-existed with the English medieval distaste for temporal absolutism.³ Even Tudor royal power had its serious competitors: in feudal structures; the formidable and centralised (particularly pre-reformation) Church juggernaut; and myriad other specialist institutions: for example abbeys, universities, colleges, schools, town corporations, craft guilds, and the Inns of Court. What has been referred to as '*legalised and regulated anarchy*'⁴ helps place the Tudor monarchy, as dominating as it may have been, in the wider (and more complicated) context of competing spheres of power.

The Tudor period saw Parliament become better equipped and qualified to be a critic of the Crown and even to rival it.⁵ Country gentry and the commercial classes were elevated to political importance and had steadily improved their

³ G M Trevelyan, 'Some Points of Contrast Between Medieval and Modern Civilisation' (1926) 41(xi) *History* 1 at 10.

⁴ Trevelyan (n 3) at 4. In its 18th century form, David Lieberman describes this same, but later, feature of English Constitutional Government as the '*supposition that public liberty was best served by institutional complexity*': 'The Mixed Constitution and the Common Law' in M Goldie & R Wokler (eds) *Cambridge History of Eighteenth Century Political Thought* (2002) 318.

⁵ J R Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* (1928) 7.

position.⁶ Those classes had benefitted from the spoils of the disbanded monasteries and profited from the improved trade with the New World at Spain's expense.⁷ Parliament's power had been employed in the meantime to effect the sweeping changes for which the Reformation had called, reforms which might, theoretically at least, have been effected by Royal injunction⁸ but which Henry VIII chose to effect through his willing Parliament.

The use of Parliament to effect much of the Reformation agenda helped to secure recognition of its capacity to marshal and crystallise public sentiment, an attribute recognised by Henry VIII's choice of it as the vehicle for those sweeping changes. Those reforms also had the consequence that the composition of Parliament itself changed: Abbots and Priors no longer attended the House of Lords, and although Bishops remained, the Lords Temporal now, and for the first time, held the majority there.

These factors helped set the scene for the century which was to follow, first by equipping Parliament to act more competently, second by persons having been enlisted and resourced who were more likely than previously to have views which were to some extent independent of the Crown and, finally, by giving Parliament a practical demonstration of the power that it could itself wield, and partly by reason of its greater capacity to be the repository of, and give expression to, popular will.

It was the next monarchical dynasty which was to confront the difficulties to which these factors gave rise. They did not manifest themselves so long as the

⁶ Tanner (n 5) 6.

⁷ Tanner (n 5) 6.

⁸ Tanner (n 5) 6.

Tudors' popularity and political genius subsisted and before serious divisions were to emerge within the Church.

The Scottish parliament was in a rather different position from the English, albeit that it, by other means, acquired in the 17th century greater means for the exercise of an independent voice. For a little over half of the 16th century, the Scottish Crown was held by a minor,⁹ with the consequence that, as MacIntosh and Tanner have remarked:¹⁰

The absence of strong personal kingship and the resultant factionalism, recurrent features of government during minorities, saw parliaments summoned frequently to provide political direction. Parliamentary authority, therefore, was enhanced, strengthening the estates' role in legitimising action taken for or against the crown.

...
For much of the first half of the sixteenth century, parliament was either a tool in the hands of whatever regent or faction happened to have control of government, or it was sidelined when the monarch assumed personal authority.

As with the English Reformation agenda, the equivalent agenda's implementation in Scotland also served to underline the political importance of that Parliament.¹¹ And, like the English Parliament, the fact that it was the means by which these unprecedented reforms took place says much about its significance.¹²

At the outset of the 17th century, the Stuarts were met with an institution capable of self-assertion and initiative, but which, under Tudor management, had

⁹ ie James V in minority 1513-23; Mary in minority 1542-54 and James VI in minority 1567-78.

¹⁰ G H MacIntosh & R J Tanner, 'Balancing Acts: The Crown and Parliament' in K M Brown & A R MacDonald (eds) *The History of the Scottish Parliament*, Vol 3, Parliament in Context, 1235-1707 (2010) 12 and 14.

¹¹ MacIntosh & Tanner (n 10) 14.

¹² MacIntosh & Tanner (n 10) 14-15.

been controlled.¹³ It is from the turn of that century, coinciding with the accession of James VI to the English throne, that a marked change can be observed in the relationship between the Monarch and Parliament. By the end of that century, the English Parliament had come to act as a major restriction upon absolute and despotic royal power. It is difficult to know the extent to which this was the result of a change in public sentiment or a response to new or more striking abuses of that power. It may have been both.¹⁴ Stuart absolutism was certainly a contributing factor.¹⁵ It is nonetheless interesting that it took longer in other parts of Europe for despotism to face any serious threat. Foreign as it is to modern attitudes, despotism was, Trevelyan once ventured, not something which has always been uniformly challenged or condemned:¹⁶

Despotism ... was the secret of efficiency; freedom was a luxury to be enjoyed by small communities like the Cantons of Switzerland and the seven provinces of Holland.

In 1603, with accession of Scottish King James VI to the English throne and the Union of the Crowns, came, inevitably, enhanced royal power.¹⁷ James gained in the Westminster Parliament an alternative and additional source of funds. He was absent often. Parliament met less frequently. The Stuart dynasty (1603-1688) (which commenced in England with James VI/I) saw relative harmony between England and Scotland. That followed naturally from James holding both Crowns, having succeeded to his mother's Scottish throne in 1567. Unity

¹³ Tanner (n 5) 7.

¹⁴ C R L Fletcher, *An Introductory History of England From Henry VII to the Restoration* (1912) 237.

¹⁵ See, for example, Tanner (n 5) 19.

¹⁶ G M Trevelyan, *History of England*, 3rd edn (1945) 376.

¹⁷ MacIntosh & Tanner (n 10) 18.

of the Crowns did not mean unity in the religious outlook of his people, being beliefs which had nationalist identities. The English reformation had been influenced principally by Luther. The (slightly later) Scottish reformation was one in which the views of the more fundamentalist John Calvin dominated. There were divisions then, not just between the Roman Catholic Church and those who sought an alternative communion, but among branches of that protesting group. This problem of fragmentation within Protestantism in the 17th century presented new and difficult problems for the Stuart Monarchy, problems which the Tudors had to some extent escaped or avoided.

The principal demonstrations of absolute Stuart power were attempted incursions into the Protestant faith, the governmental models for which it called, the greater Stuart need for funds and the Stuart mode of governing in general. An understanding of these, and the response of the Parliament and the Common Law to them, is a basis upon which to understand the prestige which Parliament came to attract and what it was that provoked such a sustained and successful reaction.

From the outset of his British reign, James I/VI refused to permit within the ecclesiastical establishment, any aspect of the puritan movement. His decision to do so was not the product of his own religious convictions: he was a Calvinist. His desire was to avoid the political consequences which such a relaxation might provoke,¹⁸ knowing from his experience of Scotland (in which he was raised and over which he had already reigned for some 36 years) the risk

¹⁸ Trevelyan (n 16) 384.

this might pose to him. The Scottish Presbytery was, ultimately, at odds with a monarch of the Stuart kind.

Each of James's Parliaments was dominated by a Puritan majority. His 1604 decision, in response to the so-called '*Millenary Petition*'¹⁹ to reject entirely what was sought, set him immediately at odds with Parliament.²⁰ That petition sought, among other things, the discontinuance of the making of the sign of the cross in baptism and adjustment of the service to make more room for sermons.

James's difficulties with Parliament did not stop at religious ones. He had a need for funds, due in part to his lesser capacity (shared by all the Stuarts) to control his spending.²¹ This gave rise to a vicious circle:²² the need to summon Parliament frequently to seek subsidies (and therefore to break with the convention that Parliament meet rarely and on great occasions only); frequent Parliaments meant greater opportunities for Parliamentary criticism and the airing of ecclesiastical grievances; redress of these matters could be used as leverage to refuse supply; the Crown thus came under pressure to maximise sources of revenue which did not depend upon Parliament (even though doing so involved the imposition upon subjects through forced billets and loans); in turn giving rise to fresh grievances for Parliament to redress.

Many of these conflicts arose from James VI/I having had familiarity with the Scottish Parliament only, and his successor, Charles I, the English

¹⁹ Known as such because the Petition was claimed to be supported by one thousand conformist puritan clergy.

²⁰ G M Trevelyan, *England Under the Stuarts* (1946) 68.

²¹ Fletcher (n 14) 241.

²² Tanner (n 5) 8-9.

Parliament only, reflecting the countries in which they, respectively, had spent their early lives²³ and the important differences between them. James is said to have tended to treat the English Parliament as obedient to the Privy Council, just as Charles treated the Scottish Church as subservient to royal command.²⁴

James, in 1610, was faced with an opinion of Sir Edward Coke as the Chief Justice of Common Pleas (Judges then acted also as the Crown's advisors) which defined the limits of the effectiveness of Royal Proclamations. The Commons complained that Proclamations had sought to establish offences not known to the law, and sought to bring them before tribunals who lacked the lawful authority to try them. James answered the petition by referring the question to his judges. Their reply (which is that of Coke) is part of the radical but peculiarly early English penchant for the rule of law as opposed to rule by law:²⁵

... the King hath no prerogative but that which the law of the land allows him. ...

Perhaps there is no clearer illustration of James's absolutist view of his monarchy and of the subordinate role of the Parliament than his *True Laws of Free Monarchies* (1598), published under a pseudonym, in which he referred to Parliament as '*nothing else but the head courte of the king, and his vassals*', and as an institution without independent legislative authority because it could pass no statute unless the King, by touching the Act with his sceptre, indicated his consent to it. This statement, although perhaps more an assertion of James's

²³ Trevelyan (n 16) 397.

²⁴ Trevelyan (n 16) 397.

²⁵ (1610) 12 Co Rep 74 at 75; 77 ER 1352 at 135.

desire than fact,²⁶ nevertheless shows how opposed were the contrary positions of the Crown and Parliament. It shows too how the notion of a legislature was, perhaps until at least the mid-17th century, simply a name for representative assemblies directing or controlling government rather than giving expression to any real separation of powers.²⁷

In 1625, when James VI/I died and his son Charles I succeeded, the failures of the King's prohibitively expensive wars against France and Spain became even clearer. Those failures tarnished monarchical prestige. The vicious circle was thus perpetuated: these ambitious yet unsuccessful ventures necessitated seeking from Parliament the means of funding them. The consequence was the need for Charles I to submit himself to Parliament in the form of the *Petition of Right* of 1628, and, along with it, to cement his need to have Parliamentary approval for the raising of any funds:²⁸

... no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament.

The Commons became the King's opposition. Charles governed without the English Parliament for the eleven years between 1629 and 1640. In so doing, and by dismissing those judges who would not interpret laws in his favour,²⁹ Charles sought to exclude Constitutional checks upon his actions.

²⁶ MacIntosh & Tanner (n 10) 23.

²⁷ F A Hayek (n 14) 129.

²⁸ E Foster, 'Petitions and the Petition of Right' (1973) 13 J Brit Stud 22.

²⁹ Fletcher (n 14) 243; eg Chief Justice Crew: Tanner (n 5) 60.

With Parliament under threat, the Common Law again mobilised. Coke again features. He served first as Chief Justice of Common Pleas (1606-1613). Despite attempts to render him less influential (and against which he protested)³⁰ he was later Chief Justice of King's Bench (1613-1616). His was one of the main roles in deploying the Common Law both to protect Parliament and at the same time secure the loss to the Crown of the law-making function which had been reposed historically in the Monarch (along with other powers we now recognise as distinct) but which collectively have been known as the royal prerogative.

That the Common Law *could* be so mobilised, that there was a perceived *need* for it to be mobilised and that the *purpose* of doing so was to further Parliament's interests, reveals much about underlying social use of law making power at the time. First, it suggests that it was considered desirable to wrest law making power from the Crown, and that the transition of that power from the Crown to the Parliament was by then, if not incomplete, not secure. Secondly, it shows the struggle to have been one motivated by more than merely Parliamentary forces. Thirdly, and in a related sense, it demonstrates the widespread support for limiting otherwise absolute power. Fourthly, it shows the relationship between Parliament and the Common Law to have been one in which there was not an entirely clear delineation of roles, but a relationship in which there is no evident rivalry or deep-seated antagonism.

What can be drawn from this is that the control of monarchical law making power was a response to abuses of it, more than the product of a desire to have a

³⁰ Trevelyan (n 20) 106.

representative assembly vested with such power. And no part of that move in any way suggested that Parliament ought exercise its power any more regularly or confidently than had the Monarch.

The skilful mobilisation of the Common Law took several forms. Coke wrote the *Petition of Right* 1628, the Parliamentary petition which reinforced what Coke himself had said in his 1610 *Case of Proclamations*: that the King's proclamations were ineffective to change any part of the Common Law or create any offence without Parliament.³¹ The Petition protested against the imposition of tax without Parliamentary approval (apparently still then controversial); detention of individuals in prison without cause shown; and against forced billets.

That the King in 1610 had considered it necessary (or had no choice but) to refer to his judges the question of the lawfulness of proclamations, shows what room there must have been for debate about whether Stuart Kings were so constrained. Coke too recognised it as a question of great importance: one which concerned '*the answer of the being to the body, viz, to the Commons of the House of Parliament*'.

Returning for a moment to the 1610 opinion, it offers an insight into the way in which the Common Law was employed to support Parliament as the proper repository of law making power. The questions Coke was asked are not ones whose Constitutional significance is immediately apparent: can the King by proclamation prohibit new buildings in and about London? Can he prohibit the

³¹ W S Holdsworth, *A History of English Law* (1903-1966) vol IV 296-297; vol IX 281.

making of starch from wheat? Coke however, sees the consequence of these matters for the extent of the King's law making power, and in doing so addresses the crucial Constitutional question of the day.

The tension between the competing sides is discernible: the Lord Chancellor urges the Judges *'to maintain the power and prerogative of the King'*; but, in any event, because there is no authority and precedent, to *'leave it to the King to order in it, according to his wisdom, and for the good of his subjects'*. There probably was, in fact, no precedent. Tudor Judges had been subservient to the Crown, and their decisions were adverse to Constitutional freedoms.³² Coke turns the absence of precedent to his advantage: *'every precedent ought to have a commencement'*, he says, and before establishing *'any'* thing of novelty, great consideration is required. This, then, Coke uses to justify the making of the rule:

... the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm...; infra: also the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not...

The decision itself identifies proclamations which are *'utterly against law and reason'*, suggesting of course, this decision did set a precedent and that Coke's decision was more one of *'reason'* (and perhaps political reason) than the application of settled legal principle. Dicey referred to Coke's reasoning in other (related) decisions of the time as *'artificial'* and *'unhistorical'*, but as surpassing any stroke of enlightened statesmanship in enforcing a rule (in that instance, that

³² Fletcher (n 14) 242 – 243.

the King could not withdraw cases from the Courts for his personal determination) so essential to the existence of the Constitution.³³

In these events, we see not only the Common Law's co-operation with Parliament's desire to overcome or limit arbitrary and excessive power, but also its mobilisation to protect Parliament at a time when that body was most threatened. The joining of these forces occurred amidst countervailing attempts to displace all forms of control on royal power. It shows how there had by then developed the firm conviction of a monarch with limited powers: a view that certain powers, once within the Monarch's traditional reach, were now held by organs which, although they might be formal emanations of his office, were now beyond his direction.

Knowledge of this helps us to comprehend the place which the Common Law occupies in English legal culture, as a stabilising force and as a protection against absolutism, and all the more so because these important events took place in the periods in which both stability and balance were so seriously under threat. It is also part of the English preference for common law over legislation, which is something that Jeremy Waldron³⁴ and R C van Caenegem³⁵ have both observed, albeit from different perspectives.

There is something confusing on first analysis between the deep-seated English preference for the Common Law and what I advance as an explanation for our contemporary willingness to tolerate a parliament virtually unlimited in

³³ A V Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn (1915) (Liberty Classics reprint, ed R E Michener, 1982) cxxxvii; see also Tanner (n 5) 36.

³⁴ J Waldron, *The Dignity of Legislation* (1999).

³⁵ R C van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History, Goodhart Lectures 1984 – 1985* (1987).

its law making power. How can the consequence of historical events I have set out above found a preference – deep in the national consciousness – for common law, and at the same time a modern tendency to ascribe to Parliament great kudos for it having acquired and thereby limited, royal law-making power? And how can a preference for common law and a view of legislation as inferior to this rival source be reconciled with a respect for Parliament having succeeded in its great struggle?

I would explain these apparent tensions in this way: 1) the Common Law had demonstrated its capacity to establish and enforce Constitutional Government; 2) Parliament had stood firm in its opposition to the King; 3) there was a popular desire that the King not have law making power (having abused it, and especially in financial matters); 4) nowhere, however, had legislation played any particular role in these events; and, 5) these historical events show that the completion of the transfer of law making to Parliament was not the product of any *desire for* some Parliamentary agenda, but that a *royal* legislative agenda was to be avoided. The whole push had been for *freedom from* intrusion by royal power, and that power being vested in or remaining with Parliament, not for the creation of some new order, which would have required the support of legislation, but because of the relief from absolutism which that afforded.³⁶

³⁶ This is a theme of Paolo Grossi's *A History of European Law* (2007). Grossi shows how in medieval times law was regarded as not being written in the commandments of a prince but in an order inscribed in things (especially the natural world) which could be read by the eyes of the humble and translated into rules for living: see, eg, 2, 3. One of his principal arguments is that, over time, and with the emergence of the nation-state, law has become not only the expression of a centralized and centralizing will, but the product of a 'totalizing and all-encompassing' mentality: 2, 3.

Stuart absolutism was not directed towards Parliament only: the Common Law too faced threats from the Stuart establishment and it mobilised its protectors. Coke was one of the protectors, but for that reason also a target of the Monarch, and hence his ‘*demotion*’ from Common Pleas to Kings Bench. The prerogative courts (Star Chamber and the Court of High Commission in particular) adopted canon law rather than common law procedures. The continued use of the former in Stuart times reaffirmed a widely-held view that the Stuart establishment was one more fitting of Rome than something home-grown. It was Parliament (Charles I’s Long Parliament) which abolished the Star Chamber.³⁷ And it did so in the name of the Common Law.³⁸

Revolt came. And it came from the North. The Scottish revolt against Charles I expressed itself as the National Covenant; in part religious, but also political by its exclusion of any necessary involvement of the King in church and religious affairs: ‘*God and His Kirk*’.³⁹ Covenant ideology, expressed perhaps most prominently by Samuel Rutherford in his *Lex, Rex*, sought to turn Stuart absolutism on its head, for example:⁴⁰

If the estates create the king, and make this man king, not that man, (as is clear from Deut. xvii. 18, and 2 Chron. v. 1-4,) they give to him the power of the sword, and the power of war, and the militia; and I shall judge it strange and reasonless, that the power given to the king, by the parliament or estates of a free kingdom, (such as Scotland is acknowledged by all to be,) should create, regulate, limit, abridge, yea, and annul that power that created itself. Hath God ordained a parliamentary power to create a royal power of the sword and war, to be placed in the king, the parliament's creature, for the safety of parliament and kingdom, which yet is destructive of itself? Dr Ferne saith that "the king summoneth a parliament, and giveth

³⁷ F W Maitland, *A Sketch of English Legal History* (1915) 118.

³⁸ Maitland (n 37) 119.

³⁹ From the text of the Covenant, 1638.

⁴⁰ *Lex, Rex: the Law and the Prince* (1644) 329.

them power to be a parliament, and to advise and counsel him;" and, in the meantime, Scripture saith (Deut. xvii. 18-20; 1 Sam. x. 20-25; 2 Sam. v. 1-4) that the parliament createth the king. Here is admirable reciprocation of creation in policy! Shall God make the mother to destroy the daughter? The parliamentary power that giveth crown, militia, sword, and all to the king, must give power to the king to use sword and war for the destruction of the kingdom, and to annul all the power of parliaments, to make, unmake parliaments, and all parliamentary power, what more absurd?

While in England it was the Crown and Parliament who were at odds, in Scotland the quarrel was between the King and the Kirk. But in many ways the centre of both disputes was a common core.

Charles I's failure to obtain money from the Short Parliament to fight the Scots and their Covenant, along with the success which the Long Parliament had achieved in assuming the government of the country⁴¹ are critical to an understanding of Parliament's rise and reputation. The Long Parliament found its strength, in part, in the deep experience of many of its members, their associations in committee with Sir John Eliot (1592-1632) (a key Parliamentary figure of his time and gifted rhetorician) and Sir Edward Coke⁴² and the absence of reticence in employing physical force to attain power: a willingness to grasp the power of the sword.⁴³

Cromwell believed in the necessity of Parliamentary rule⁴⁴ and was an ardent Parliamentarian,⁴⁵ so Parliament had no real quarrel with the Commonwealth, itself a state of affairs which the English Parliament had helped bring about.

⁴¹ Trevelyan (n 16) 402.

⁴² Trevelyan (n 16) 402.

⁴³ Tanner (n 5) 106.

⁴⁴ Trevelyan (n 16) 429.

⁴⁵ Trevelyan (n 16) 430.

It is in the Restoration of the Monarchy (with Charles II's accession to throne)⁴⁶ that important pro-Parliamentary themes merged. Britain had been without a monarchy and had experimented with truly Parliamentary government. Yet in that form too, absolute power had proved intolerable.

Parliament (particularly the Scottish Parliament) had a role in facilitating the Restoration. Charles II, in the Declaration of Breda, which issued on 4 April 1660, proclaimed his pardon for crimes committed during the Civil War and the Interregnum for all who recognised him as the right and lawful King, and promised also, religious toleration. The Declaration comprises several letters addressed to, among others, Parliament. That Declaration, however, was no spontaneous act. Viscount Stair (among others), who had refused to take the oath of allegiance to the Commonwealth, had been involved in its negotiation and had travelled to Breda for that purpose as one of the Scottish Parliament's Breda Commissioners.⁴⁷ The Scottish Parliament had proclaimed Charles II the successor of Charles I upon his execution. The Scots, with a Covenant mentality, sought from Charles II a commitment about the fundamentals of the way in which he would exercise his royal power. Initial negotiations took place at the Hague in 1649, but were not successful. Further negotiations took place between Charles II and a delegation of Scottish Commissioners (Stair included) commencing on 25 March 1650. They communicated the demands of the Scottish Parliament, including that Charles would sign the Covenant and promise to impose it on all in his three Kingdoms, that he and his household would adopt

⁴⁶ Charles II was crowned King of Scotland in 1651 at Scone, some 9 years before being crowned as King of England and Ireland also in 1661 (in London).

⁴⁷ J D Ford, 'Dalrymple, James, first Viscount Stair (1619–1695)' *Oxford Dictionary of National Biography* (2004) online edn, Oct 2009.

the Presbyterian faith, that Catholicism would not be tolerated and the King would recognise the Scottish Parliament and confirm all Acts it had passed since 1641.

Charles agreed to take the oath of the Covenant and signed the Breda Treaty (the precursor to the Declaration) on 1 May 1650.

Much later, a secret message was sent by George Monck (then, in effect, in control of England) prompting the Declaration's making. Parliament passed a resolution declaring that Government ought to be by the King and Parliament, inviting Charles to take the throne.

The Parliament which effected the Restoration was not summoned by the King as had been previous ones. It was therefore no Parliament at all, but a Convention. This Parliament, having constituted itself as it did, virtually anointed a King, and on terms. It enjoyed not only an *a priori* superiority over the Monarch; it had effectively swapped places with Royalty which, until now, had possessed that metaphysical quality of having subsisted – uninterrupted – since time immemorial.

It was Parliament that resolved to restore Charles II to the throne,⁴⁸ such that, as Holdsworth observed, this can be seen as a watershed in Parliament's rise.⁴⁹

It is clear that Parliament has attained a position in the state which it never possessed under the Tudors or the first two Stuart kings. It was no longer a body to be called in occasionally to assist the king's government

⁴⁸ Albeit on the terms of the Breda Declaration, which nevertheless left principles to be applied by Parliament: Holdsworth (n 31) vol VI 148, 162 and 165.

⁴⁹ Holdsworth vol VI (n 31) 162.

by sanctioning the new legislation, or by voting the supplies which that government considered to be necessary.

Restored as Charles II might have been, he did not enjoy the position of either his father or grandfather.

The succession of Charles II's brother James VII/II in 1685 coincided with Louis XIV's revocation of the Edict of Nantes, visiting cruelty on Protestants in France and renewing in England a hatred of Popery and a fear of the new King, whose disposition was always Catholic.⁵⁰ Fears of this kind united groups within Protestantism who had in many ways been rivals.

James VII's suspension of the laws against Roman Catholics and dissenters, and the admission of Catholics to civil and military posts in 1688, confirmed the worst fears of English Protestants. The Glorious Revolution followed, as did another Convention Parliament.

Here, on the eve of the 18th century, occurred two connected events by which Parliament confirmed the position to which it had risen: James VII/II fled his realms; and Parliament filled the throne. The new (joint) Monarchs were William and Mary, both of whom had some birthright, but not such as would, without Parliament's intervention, have trumped that of the departing James.

The way in which the Revolutionary Settlement was effected says much about how far Parliament had travelled. Rather than establish a regency in James's name (something Tories advocated) or appointing Mary only (as having

⁵⁰ MacIntosh & Tanner (n 10) 26.

the closer right), Parliamentary will prevailed. J G A Pocock spoke of the fall of James from the English throne and the consequence that the manner in which that had been effected had for the concept of the ‘*ancient constitution*’.⁵¹ The view he expresses is as follows:⁵²

To this, then, the ancient constitution had come: a conservative and legalist version of the contract, a sanction ... by which the doctrines of election and deposition might be justified.

The ancient constitution was not of itself necessarily anti-monarchical. Once James VII/II claimed too absolute a power, and at least tacitly, that all customs and privileges derived from his will, the ancient constitution could be employed to disprove that assertion, as divorcing, as it would, the role of custom.⁵³ By this means, the ancient constitution became incompatible with the sovereignty of the King, at least in the form in which James had asserted it. But the ancient constitution also had revolutionary possibilities:⁵⁴

The idea that it belonged to parliament to define the content of the ancient constitution, and that all actions undertaken in its defence were legitimate, obviously led to the revolutionary sovereignty of that body; yet it is paradoxically significant that parliament should have clung as long as it could to the doctrine that its acts were justified by fundamental law – by a body of ancient custom which it repudiated all claim to have made.

There are, of course, many nuances associated with the events I have surveyed above. Pocock’s observations, however, coming as they do with the benefit of the wider lens which his historiographical perspective affords, shows how these events merged in the 18th century notion of the ancient constitution. That notion,

⁵¹ J G A Pocock, *The Ancient Constitution and the Feudal Law: English Historical Thought in the Seventeenth Century* (1957), ch IX.

⁵² Pocock (n 51) 231.

⁵³ Pocock (n 51) 233-234.

⁵⁴ Pocock (n 51) 234.

understood as Pocock authoritatively suggests it must be, shows the dominating idea to have been that of immemoriality or ancient custom, something which entailed a clear preference for what was immanent and a rejection of that which was willed. This had significance of course for the Crown, because the ancient constitution subjected its sovereignty to the need to respect those ancient customs and to deny to the Monarch the ability to exercise his or her prerogative to will law into existence. The significance for Parliament was to be recognised as better able to respect the ancient constitution, and be more restrained in the extent to which it would exercise its will (albeit a collective will). This restraint, which came as a necessary part of its newly-acquired power over the Crown (as the very basis upon which the Parliament came to be seen as the preferable repository of law-making power) was something which, over the next century or so, it was to shed.

The Settlement, the Bill of Rights which accompanied it, and William and Mary's willingness to submit themselves to it, almost complete my overview of Parliament's rise: it had secured law-making power from the Crown, and in doing so saved the populace from the absolutist exercise of that power by the Monarch. Parliament was once again to assert its king-maker role when, only shortly afterwards, statute, the *Act of Settlement* 1701, took effect in 1714 upon the death of Queen Anne to anoint the (Protestant) House of Hanover as the English royal line.

These arrangements, so fundamental as to be Constitutional in nature, came to imbue English law and Government, such that there emerged a ‘*supreme law*’, of which Holdsworth speaks in these terms:⁵⁵

In England alone the monarch’s powers had been limited and subjected to the rule of law. The result was that England had acquired a form of government and a system of law which were unique, because both in the government and the law of England medieval and modern elements had met and blended. From this blend there had emerged a constitution in which the two Houses of Parliament had the predominating influence, and in which all the members of the state, except the King, and all the institutions of government, including the Prerogative itself, were subject to a supreme law.

Of these events, Parliamentary supremacy is said to have been the greatest political outcome of this period, and to have been a ‘*conspicuous change*’ in the law making process including by the dramatic expansion in the number of statutes.⁵⁶

This account of some of the more important stepping stones to Parliament’s rise in the 17th century offers an insight into its role and status at the commencement of the 18th. Parliament had played its role not only in maintaining relative stability in government through the Commonwealth, the Restoration, the Glorious Revolution and the Hanoverian genesis, but also in providing some check on otherwise absolute and often despotic royal power. But that role was, for the most part, not one exercised via legislation. Whereas the

⁵⁵ Holdsworth (n 31) vol XI 274; see also J I Israel, *Enlightenment Contested: Philosophy, Modernity and the Emancipation of Man 1670-1752* (2006) 8-9. Israel distinguishes the Glorious Revolution from earlier like events for its creation of a ‘*fundamentally new type of parliamentary monarchy*’, 8.

⁵⁶ J-L Halperin, *Five Legal Revolutions Since the 17th Century* (2014) 12. The ‘Bloody Code’, he points out, testifies to the presence of far greater legislative activity in the penal sphere.

exercise of the Common Law (already by then a long-standing institution) had played a part in confirming the loss to the King of his absolute power, in no sense could Parliament's role be said to be one which had been expressed in its legislative agenda. It was, instead, the insistence by Parliament of its *capacity* to legislate (ie its monopoly on law-making) rather than its *actually* doing so, by which it asserted itself in the 17th century. This power, however, was attended with restraints, and ones derived from an expectation of it being more likely that Parliament would respect custom (and thereby being restrained in the exercise of legislative power) than would the Monarch.

The account offers also a point from which to understand the depth and strength of the place in English legal culture of the Common Law, and the role it played as an ally of Parliament in maintaining an insistence upon freedom from the exercise of power in which subjects had no say. If, as van Caenegem suggests, legal history is part of political history and that the different political development of the various European nations was largely responsible for the respective importance of the judiciary, the legislature and the law faculties in shaping the law,⁵⁷ we have a basis better to understand from that comparative history the Common Law's force, if not its imaginative power. It also offers us an explanation why, in the English system in recent centuries, questions about what limits there ought to be on legislative reach seem to have been held more as unstated assumptions than fleshed out through considered and systematic philosophical analyses.

⁵⁷ van Caenegem (n 35) 108.

One way by which limits of legislation might be identified is to look back to a time when legislation operated within narrower boundaries than now and investigate the causes of the different attitudes to it. It is a potential source of understanding, even if not of the nature of the limits themselves, of the culture of the Common Law. It is therefore one means by which better to understand the peculiarly British attitude to legislation and the legislature.

At a more abstract level, having some understanding of the prestige which had accrued to Parliament by the commencement of the 18th century and the basis upon which it acquired its late 17th century ascendancy takes us also to a period in which Parliament found a group of powerful, practical philosophers who, although often critical of the way in which its legislative power was being deployed, gave expression to the systematic (*'scientific'*, as that era saw it) and confident exercise of that newly-acquired power. The events of the 17th century, and the emergence of Parliament as a force in its own right, set the stage for the 18th century's search for the science of a power which, now unlocked from royal control, offered new possibilities, both dangerous and promising.

II 18th Century Legislative Science

By the turn of the 18th century, Parliament was a fully functioning body, with autonomous objects and functions clearly differentiated from those of the Monarch. That century saw also an explosion in public thought about approaches to law and legislation, one which accompanied the Enlightenment's self-conscious study of humankind, man's sentiments and perceptions, and the conditions under which we might prosper and be happy. In that period, and in

this sequence, Lord Kames (Adam Smith's mentor) advocated the '*judicial route*' to legal improvement,⁵⁸ Smith himself developed his sophisticated natural jurisprudence, and Bentham devised and advanced his theory of utility as the basis for a confident, omniscient legislature.

Attempts to understand the origins and development of the intellectual endeavours of the 18th century and its lasting effects are numerous and the project⁵⁹ as a whole is incomplete.⁶⁰ But such attempts *do* explain much about the Common Law's place in British legal culture, a place made even more important if, as many have claimed, it is by reason of those events that Britain avoided the upheavals which France experienced at the end of the 18th century.⁶¹ It is the period in which influential theorists began both to articulate a discipline for legislative action and also to lay the foundations for the relatively recently-empowered Parliament to be justified in the confident deployment of its legislation.

The immediate historical context of the 18th century developments was the Enlightenment. But there were as well, as we have seen, events which touched Parliament specifically and directly: ones which prepared the ground for a more confident and active role for Parliament. The principal practical catalyst was the need to control the Stuart monarchy, but it was the era too of a new-found

⁵⁸ D Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (1989) 144.

⁵⁹ The term 'Enlightenment Project' is one that Alasdair MacIntyre made prominent in 1981 in his work *After Virtue* as an attempt to provide '*an independent rational justification of morality*' (which, he claimed, had failed).

⁶⁰ Demonstrated by Jonathan Israel's recent three volume *magnum opus* on the Enlightenment: see J I Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* (2001); Israel (2006) (n 55); and *Democratic Enlightenment: Philosophy, Revolution and Human Rights 1750-1790* (2011).

⁶¹ eg Lieberman (n 58) 319.

confidence in human reason, which brought with it the susceptibility of long-standing institutions being exposed to new forms of scrutiny and analysis.

The 18th century science of legislation was a systematic inquiry into how legislative power might better be employed. To some, the aim of the exercise was to cleanse the statute book, to others it was employing legislative power to fulfil the function of ‘*cognoscibility*’⁶² of law by, among other things, its codification. Such approaches, even of the latter kind, were still less than absolutely formulated. Bentham, while by no means reluctant when it came to employing legislative power, nevertheless operated with clear (but implicit) limitations on the exercise of that power in mind. Even that most vigorous and persistent advocate of the potential of legislative power would not release it from all its restraints. A development of that kind would take those who came later to advocate.

The Christian philanthropists of the 19th century mobilised legislative power and showed that the limits within which legislative power had until that time operated were ones from which it could – and ought – free itself.

My focus here is on three legislative scientists of the 18th century who, together, offer an understanding of boundaries (both express and implied) within which legislative power at that time operated. They are part also of the transition which can be seen in this century from a cautious disposition towards legislation to a much more confident one.

⁶² A term of Bentham’s: see, for example, J Bentham, *Letter to the President of the United States of America* (1811); J Bentham, *The Works of Jeremy Bentham, published under the Superintendence of his Executor, John Bowring* (1838-1843) Vol 3 243, 260.

Henry Home (1696-1782) was to Adam Smith a mentor⁶³ (as he was to many)⁶⁴ and an intellectual precursor to Jeremy Bentham. Home became a Scottish Judge, and upon that appointment became known as Lord Kames. He was a tireless worker,⁶⁵ lived to the age of 86 and epitomised the Scottish intellectualism of his day.

In his *Principles of Equity*, Kames advocated change to the Common Law of Scotland, informed by what Lieberman describes as ‘*equitable correction*’:⁶⁶

... law, in this simple form, cannot long continue stationery: for in the social state ... law ripens gradually with the human faculties ... [and] many duties formerly neglected are found binding in conscience. Such duties can no longer be neglected by courts of justice; and as they made no part of the common law, they naturally come under the jurisdiction of a court of equity.

One of the principles upon which those reforms were to be based was utility:⁶⁷

All the variety of matter hitherto mentioned is regulated by the principle of justice solely ... But, upon more narrow inspection, we find a number of law cases into which justice enters not, but only the principle of utility. Expediency requires that these be brought under the cognizance of a court; and the court of equity gaining daily more weight and authority, takes naturally such matter under its jurisdiction.

Kames’s approach, although his desire for change was directed to the equity court and never explicitly stated to apply to Parliament,⁶⁸ is a philosophy which

⁶³ I S Ross, *Lord Kames and the Scotland of His Day* (1972) 91; P Stein, ‘Law and Society in Scottish Thought’ in N T Phillipson and R Mitchison (eds) *Scotland in the Age of Improvement: Essays in Scottish History in the Eighteenth Century* (1970) 159.

⁶⁴ Ross (n 63) 97.

⁶⁵ Stein (n 63) 156; A J Durie & S Handley, ‘Home, Henry, Lord Kames (1696–1782)’, *Oxford Dictionary of National Biography* (2004).

⁶⁶ Lieberman (n 58) 167.

⁶⁷ Lieberman (n 58) 168 (quoting Kames’s *Principles of Equity* (1760) 44).

⁶⁸ Lieberman (n 58) 171.

Lieberman says can be more than superficially compared to legislation.⁶⁹

Lieberman places Kames in historical context to illustrate how his reforms might have a source other than statute:⁷⁰

... to encounter in eighteenth-century legal theory the articulation of a distinctly utilitarian jurisprudence deployed on behalf of a program of law reform may, in one sense, occasion little surprise. However, we have become so accustomed to identifying this intellectual development with the utilitarianism and legal positivism of Jeremy Bentham that Kames's Principles of Equity provides a crucial historical corrective. For Kames, no less than for Bentham, utility featured as a critical principle of legal modernization. Kames reminds us how in this period a commitment to the methods and institutions of customary law need not be taken to indicate any lack of commitment to law reform. Indeed, for Kames as for so many of his English contemporaries, the most important and recently confirmed lessons of English law was the clear superiority of the courts over the legislature in orchestrating legal development.

Kames's approach was no doubt a function in large part of the shifts which took place in the period in which he lived and which had taken place in what to him was recent history, even living memory. Parliament may have risen to check the absolutism which public sensibility of the time so despised, but it had not yet utilised its legislative powers to demonstrate its competence to discharge its law-changing power. The Common Law, on the other hand, had shown its strength and its competence, and also that it could be trusted to maintain a steady hand in troublous times, and to deploy itself responsively to achieve popular change.

Kames's approach, although it took a somewhat traditional view that judge-made law was preferable in method to legislation, nevertheless formulated a jurisprudence which justified change.

⁶⁹ Lieberman (n 58) 171.

⁷⁰ Lieberman (n 58) 174-175.

The law thus became not an unchanging line of precedent, but a means by which order and justice could be attained in a changing society and to meet such ends as human desires and needs dictated: to ‘*refine gradually as human nature refines*’.⁷¹

David Lieberman devotes his *Province of Legislation Determined* to establishing a link between Blackstone and Bentham, who, although within the same century, represent opposite ends of the spectrum in their thinking about legislative and common law methods. There are, however, between them, some common intellectual themes. That link, for Lieberman, is the Scottish enlightenment and in particular, Lord Kames, ‘*anticipat[ing] Bentham on utilitarianism*’.⁷²

Kames employed utility to justify *judicial activity*, whereas Bentham advocated its use by the *legislature*. Kames advocated the introduction of the principle of utility into (Scottish) equity jurisprudence, and addressed his principle to ‘*enlightened Judges and not scientific legislators*’.⁷³ The claim, then, that Kames anticipated Bentham might be true so far as promoting utility and as a basis for change to the law, but it says less of the mobilisation of *legislation* to achieve this, which is such a key feature of Benthamism.

Kames, nevertheless, provides a link between the structure of Blackstone and Lord Mansfield (never allied with the reformist school of thought),⁷⁴ and ‘*the*

⁷¹ H Home, *Principles of Equity* (1760) 147.

⁷² J Oldham, ‘From Blackstone to Bentham: Common Law Versus Legislation in Eighteenth Century Britain’ (1990-1991) 89 Mich L Rev 1637 at 1657.

⁷³ Lieberman (n 58) 175.

⁷⁴ Oldham (n 72).

radically different views advanced by Bentham'.⁷⁵ Kames, unlike Blackstone, judged the Common Law to require major improvement.⁷⁶ The mechanism by which that was to be achieved was judge-made law:⁷⁷

Matters of law are ripened in the best manner by warmth of debate at the bar and coolness of judgment on the bench.

Adam Smith (1723-1790) too participated in the concerted intellectual enterprise of the age to uncover and articulate a science of legislation namely:⁷⁸

[t]he principles by which those with the power to do so ought to cause changes to law, to enlighten the policy of actual legislators and encourage them to see what sort of legislative improvements the general interests of the community recommend.

Smith's science remains less than completely known to us. He completed his *Wealth of Nations* before his *General Jurisprudence* (promised by him for decades to be imminent). Political economy (the more famous of his pursuits), Smith himself said, was one important 'branch' of the science of the statesman or legislator.⁷⁹ His *General Jurisprudence*, which we might expect to have more fully exposed his legislative science, was destroyed on his death at his

⁷⁵ Oldham (n 72).

⁷⁶ Lieberman (n 58) 159.

⁷⁷ Lieberman (n 58) 165.

⁷⁸ See N Phillipson, *Adam Smith: An enlightened Life* (2010) at 216 quoting Dugald Stewart, 'An Account of the Life and Writings of Adam Smith, LLD, ed I S Ross in W P D Wightman, J C Bryce and I S Ross (eds) *Essays on Philosophical Subjects* (1980) 309-310.

⁷⁹ A Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, (R H Campbell & A S Skinner (eds), vol 2 of the Glasgow Edition of Smith's works, 1981, Liberty Fund Edition) IV.intro ('*Wealth of Nations*')

instruction.⁸⁰ There remain, however, student notes of his lectures⁸¹ and from them we gain some insight into his wider thinking.

Smith's work is of interest also because he identifies principles of human motion (independent of what the state might seek to impose), and shows how they are capable of producing their own order and of being afforded respect by law-makers. These forces, depending upon the weight one gives to them, are reasons to limit legislative intervention. If, as did Smith, one sees those forces as a *natural* state and values that ought not be stifled, then they are limits on legal innovation. His approach to law was part of his more general disposition to view the historical world of human experience as something waiting to be studied scientifically (ie without *a priori* assumption dictated by reason).⁸²

Smith's approach started from the premise of principles in man's nature being inherent and unavoidable.⁸³ In sympathy (our fellow-feeling with passion of others),⁸⁴ we find pleasure in mutuality⁸⁵ (its coincidence with the feelings of others). The spectator is capable of gaining a correspondence of sentiments (never, of course, perfectly or as intensely) with the sufferer, and this concord affects the way the spectator acts, refraining from or selfishly indulging our

⁸⁰ D Winch, 'Smith, Adam (*bap.* 1723, *d.* 1790)', *Oxford Dictionary of National Biography* (2004) online edn, Oct 2007.

⁸¹ Discovered only in the 1890s and 1950s, and published as R L Meek, DD Raphael & P G Stein *Lectures on Jurisprudence*, Glasgow Edition of the Works of Adam Smith, vol 5 (1978).

⁸² Stein (n 63) 160.

⁸³ A Smith, *Theory of Moral Sentiments* (1790) (D D Raphael & A L Macfie (eds) (1982) being the first Volume of the Glasgow Edition of Smith's works, Liberty Fund Edition) I.i.i.1 ('*Theory of Moral Sentiments*').

⁸⁴ *Theory of Moral Sentiments* I.i.i.5.

⁸⁵ *Theory of Moral Sentiments* I.i.2.1.

benevolent affections.⁸⁶ Smith equates his natural theory to a biblical aphorism:⁸⁷

As to love our neighbour as we love ourselves is the great law of Christianity, so it is the great precept of nature to love ourselves only as we love our neighbour, or what comes to the same thing, as our neighbour is capable of loving us.

These principles govern also the spectator's behaviour. We view our own conduct '*with the eyes of other people*', or as others are likely to view it.⁸⁸ The judgments we form about our intended conduct are always to some degree influenced by how others are likely to view that behaviour. The division we are able to achieve between the judge and the person '*judged of*'⁸⁹ is the key to understanding the way in which these strong natural forces govern the way in which we act, our desire to be loved, '*be lovely*' and be the natural and proper object of love, and at the same time, to dread being blamed and being blameworthy.⁹⁰ It is by judging our conduct by these measures that we emulate the perception of the '*impartial spectator*' of our own character and conduct.⁹¹

Smith thus constructs from desires endowed by nature '*when she formed man for society*',⁹² a theory of jurisprudence (and therefore natural jurisprudence) by which natural forces gain an entitlement to direct the course of legal developments. Smith takes the influence of the natural sentiments a step further: we desire approval, but only for what ought to be approved of, informed by what

⁸⁶ *Theory of Moral Sentiments* I.i.5.5.

⁸⁷ *Theory of Moral Sentiments* I.i.i.1.

⁸⁸ *Theory of Moral Sentiments* III.I.2.

⁸⁹ *Theory of Moral Sentiments* III.I.6.

⁹⁰ *Theory of Moral Sentiments* III.2.1.

⁹¹ *Theory of Moral Sentiments* III.2.3.

⁹² *Theory of Moral Sentiments* III.2.6.

we would approve of in others.⁹³ It is by this means we have a real love of virtue and a real abhorrence of vice.

In doing so, we have a basis not only for confident human-centred action, but a means by which we might know what is right and wrong:⁹⁴

The all-wise Author of Nature has, in this manner, taught man to respect the sentiments and judgments of his brethren; to be more or less pleased when they approve of his conduct, and to be more or less hurt when they disapprove of it. He has made man, if I may say so, the immediate judge of mankind; and has, in this respect, as in many others, created him after his own image, and appointed him his viceregent upon earth, to superintend and the behaviour of his brethren. They are taught by nature, to acknowledge that power and jurisdiction which has thus been conferred upon him, to be more or less humbled and mortified when they have incurred his censure, and to be more or less elated when they have obtained his applause.

From these influences are derived laws, just as the general rules which bodies observe in their communication of motion (then so recently articulated by Sir Isaac Newton) were designated laws of motion.⁹⁵ They show, Smith might have said, a natural source, and one which there is no occasion to upset or avoid, for doing so contradicts the whole edifice of the natural order.

I have diverged from a purely historical account of Smith's legislative science because these concepts so thoroughly imbue his approach that they must be understood. They are concepts which inevitably favour judicial over legislative rule-making: the judge more clearly resembles the impartial spectator; the judge (like Smith) is a lone-thinker; the task of giving effect to these forces

⁹³ *Theory of Moral Sentiments* III.2.7.

⁹⁴ *Theory of Moral Sentiments* III.2.31.

⁹⁵ *Theory of Moral Sentiments* III.5.7.

was a work-in-progress, so much more suited to incremental decision-making than wider scale [ie, legislative] reform; and the judicial method was better equipped, especially before legislatures acquired the professionalism and the professional assistance they developed only later, to ascertain and to take account of the kinds of considerations which occupied Smith and governed his natural jurisprudence. Moreover, Smith had, not only in Kames, but also in Lord Mansfield (of Scottish birth too and a contemporary of Smith)⁹⁶ living, breathing, examples of very similar sentiments being given expression in judicial decisions.

Smith, despite his method favouring judicial decision-making (or perhaps *because* it did), directed much of his jurisprudence to those with the power to enact '*law*'. The strength of that theme is reflected in Knud Haakonssen's title to his 1981 book on David Hume and Adam Smith, *The Science of the Legislator*. The terminology derives in part from a passage in Smith's *Wealth of Nations* in which he distinguishes the hypothetical '*legislator*' from a mere politician, the first being principled and considered, and the politician being susceptible to improper influence and a lack of principled behaviour. Smith's contrast was in these terms:⁹⁷

... a legislator, whose deliberations ought to be governed by general principles which are always the same ...

and

... that insidious and crafty animal, vulgarly called a statesman or politician.

⁹⁶ J Oldham, 'Murray, William, first earl of Mansfield (1705–1793)', *Oxford Dictionary of National Biography* (2004) online edn, Oct 2008.

⁹⁷ *Wealth of Nations* IV.ii.39.

Parliament had by this time become, although neither *omnipotent* nor *omnicompetent*, a law-making organ without clear or formal external restraints (with some limited exceptions). It depended almost entirely on unarticulated boundaries and the political process to guide its activities. That latent power, in the hands of the vulgar politician, is one which had led not only to complexity and a lack of clarity in the statute book, but also a whole range of unnecessary and unscientific attempts to alter the natural motion of society and individuals, such as the grant of exclusive privileges to those who stood to gain and had the means to procure the exercise of authority in their favour.

The science which Smith saw in the legislator's task involved more than simply acting in accordance with principles. It involved cultivating a natural jurisprudence. From natural jurisprudence emerges those all-important principles which are the subject of the science and the legislator's beacon:⁹⁸

[These principles] are the subject of a particular science, of all sciences by far the most important, but hitherto, perhaps, the least cultivated, that of natural jurisprudence ...

Natural jurisprudence, as I have explained, entails respect for inherent qualities, circumstances or relationships; respect which demands that positive law not unduly disturb that natural state is something upon which no imposed order could improve. Smith was not alone in that sentiment. Many Scottish theorists at the time derived their natural jurisprudence from an understanding of the

⁹⁸ *Theory of Moral Sentiments* VI.ii.intro.I.

passions and sentiments which influenced moral psychology and human motivations.⁹⁹

These influential tenets of Smith's approach are bases to limit legislative intervention by requiring the legislator to know and respect these principles of motion, being ones to which Smith's philosophy attached significant value. The notions of sympathy and self-interest, as powerful innate forces, are ones which Smith utilised both for his justification of leaving them to function without interference and as the basis for some assurance that doing so could nonetheless produce an agreeable and functioning society.

Natural jurisprudence provided another kind of limitation on the rulers' capacity to make rules. While ethics (which Smith distinguished from justice) concerned delineation of the virtues, justice concerned the elaboration of rules for the direction of conduct consistent with those virtues in a way that was precise.¹⁰⁰ This brings, once again, its own limits. Rules must be directed to achievement of the virtues. Those virtues, if they be accepted to be the result of some human sentiments (ie forces naturally within us), then the resulting rules are ones which, to a large extent, seek to assist a natural propensity rather than to achieve aims independent of this natural course of human motion.

Within the idea of Smith's *Wealth of Nations* and his *Theory of Moral Sentiments* exposing part of the science of the legislator are several component concepts. *First*, the whole notion of there being a '*science*' (ie a discipline and

⁹⁹ J Moore, 'Natural Rights in the Scottish Enlightenment', in M Goldie & R Wokler (eds) *Cambridge History of Eighteenth Century Political Thought* (2002) 292.

¹⁰⁰ Moore (n 99) 308.

natural forces to be discovered and understood) to the legislator's proper role; *secondly*, circumstances which necessitated the education of the legislature (including the prevalence of privileges secured by special pleading); *thirdly*, that the legislator was to facilitate a state of being which existed by force of man's inherent qualities, and not something purely constructed or imposed; and, *fourthly*, the connection Smith saw between political economy and law, ie law as protecting the objects of political economy.

The facts both of the monumental success of the *Wealth of Nations*, and that Smith's *General Jurisprudence* never survived to publication (and perhaps completion) have left the unfortunate lasting impression that Smith was concerned only with economic prosperity. It was no doubt one aspect of his approach that the legislator ought to seek to achieve a prosperous society. In Book IV of the *Wealth of Nations* he says:¹⁰¹

Political economy, constructed as a branch of the science of a statesman or legislator, proposes two distinct objects; first, to provide a plentiful revenue or subsistence for the people, or more properly to enable them to provide such a revenue or subsistence for themselves; and secondly, to supply the state or commonwealth with a revenue sufficient for the publick services. It proposes to enrich both the people and the sovereign.

We ought not then demote Smith in importance in the current exercise because of the prominence he achieved in the field of political economy. That was only one field of his endeavour, and his general jurisprudence ought to be regarded as going well beyond the topic with which *Wealth of Nations* deals.

¹⁰¹ *Wealth of Nations* IV.intro.

So why, it might be asked, was Smith's work addressed to the legislator? And what prompted him to do so when the era was one in which it was novel to conceive of legislation being mobilised to achieve particular ends, other than the most immediate?

The answer to these questions lies as much in what law then did as what it was capable of doing, and Smith saw many of the existing statutes as positively detracting from a successful and prosperous society. Moreover, he saw the politician as lost and as susceptible to self-interested lobbying to impose protectionist and monopolistic laws, but the legislator as less so. Smith also saw the legislator as the proper audience for his work not only because that was the source of many of the abuses he identified but also in recognition of a capacity (then incompletely expressed and only beginning to be realised) for a legislator to do better than the politician in making rules which constituted a general improvement. The 18th century legislator simply had neither precedent nor principle to focus and guide his law making function. The 18th century Judge, however, did. We can see in the distinction that Smith recognises, a differentiation effected by one primary state of affairs: the legislator being interested in and imbued with the science of legislation and the discipline that affords versus the politician being wholly so unconcerned. It is a theme to which I return much later, but we can see in this approach a basis for legislation, if not to be divorced from the political, to be informed by principles in no way arising from political considerations.

It was no small step from Smith's science to Jeremy Bentham's advocacy of an unlimited role for the legislature at the expense of the Courts. Bentham is credited with being the first to assert the omnicompetence of the legislature.¹⁰² His legislative science identified '*imperfections*' in legislation, but ones which, through Bentham's neglect of history, Holdsworth says, caused his diagnosis of the causes of them to be superficial, overlooking the real cause being the excessive individuality of statutes passed by the legislature,¹⁰³ being what really prevented coordination between statutes, either in form or substance.

Bentham too proclaimed legislation to be a science. His science, however, was not merely a criticism of the existing body of statute law, but a basis for confident legislator-driven reform, guided by the principle of utility. Nor was his science one which possessed any of the preferences that his near contemporaries Kames and Smith had found in the Common Law's antiquity, its relative freedom from distraction from political and religious objectives and the vulnerability of legislation to '*special pleading*' from self-interested parties.

Bentham's approach, although offering utility as a justification to legislate, in many ways ignored the limitations which others had identified in legislative conduct. His apparent disregard for general principles and his imperviousness to authority, led Jolowicz to observe that, over time, Bentham became other than a lawyer.¹⁰⁴ Lawyers, Jolowicz explained, have an interest in legal technique and recognise some form of legal authority. To Bentham there were only *laws*, made

¹⁰² by Maitland (n 37) 105.

¹⁰³ Holdsworth (n 31) vol XI 375-376.

¹⁰⁴ H F Jolowicz, 'Was Bentham a Lawyer?', in G W Keeton & G Schwarzenberger (eds), *Jeremy Bentham and the Law: A symposium* (1948) 5-7; see also 8 and 12.

by legislators; an approach which left no room for general principles.¹⁰⁵ In these criticisms of Bentham we see yet again the desire to identify a legislative science quite autonomous from politics.

The principle which Bentham championed – utility¹⁰⁶ – was not one which had about it the recognition of any form of legal authority. It carried with it the idea that law reform should seek to secure the greatest happiness for the greatest number. It is based upon a conviction that the end of human existence is happiness and also that legislation's science is the achievement of laws promoting (aggregate) human happiness.¹⁰⁷ These combined convictions, which Dicey articulated as being essential to Benthamism, are justifications for legislative intervention, and perhaps heavy and frequent intervention. But they overlook, without a deeper understanding of what Bentham's happiness entails, important aspects of his approach which helped map the limits of such intervention, or which at least guided thinking about bases upon which legislative restraint ought be exercised.

Dicey considered '*practically the most vital part*'¹⁰⁸ of Bentham's legislative science to have been *laissez faire*. This, he thought, could be seen both in his desire to see removed the unnecessary restraints placed upon individuals by ancient laws (as altered by haphazard legislation) and also those restraints imposed by positive laws which encroached upon happiness by restricting individual activity. Embedded within Benthamism was a notion of

¹⁰⁵ Jolowicz (n 103) 10.

¹⁰⁶ F Rosen, 'Bentham, Jeremy (1748–1832)', *Oxford Dictionary of National Biography* (2004) online edn, May 2014.

¹⁰⁷ A V Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, 2nd edn (1920) 142.

¹⁰⁸ Dicey (n 107) 147.

legislative restraint. That notion was not articulated but implicit only. It took others, such as Dicey, to expose that part of Bentham's approach. It was one based upon each individual being the best judge of his or her own interest, of contractual freedom and all within an historical context (then perhaps not appreciated as fully as we now can with the distance of time) of legislative power less than fully and confidently exercised.

The correctness of these views might be tested by looking to legislation enacted in pursuance of Bentham's legislative philosophy. Benthamism came to be embraced by law reformers both in and outside of the legislature. Dicey saw Benthamism as answering exactly the immediate want of the 19th century, at which time there existed a feeling that the country's institutions required thorough-going amendment.¹⁰⁹ Bentham's approach avoided reliance upon any notion of natural rights (he famously decried them) and also avoided social contract theory, which had been a thrust of the (then recently thwarted) Jacobites.

Yet a paradox has been noted between Bentham's reformist activities strengthening legislative machinery in order to achieve equality of status and opportunity (but which the state then failed to provide) and this leading to the positive state controlling and regulating the social life of the community.¹¹⁰ There are other problems with characterising Benthamism as advocating legislative and regulatory restraint. Those problems warrant close attention at this point, exposing, as they do, one point at which the much more confident and

¹⁰⁹ Dicey (n 107) 171.

¹¹⁰ W Friedman, 'Bentham and Modern Legal Thought' in Keeton & Schwarzenberger (eds) (n 104) 237 (quoting Dicey (n 106)).

unrestrained deployment of legislative power was advanced, and also some of the principal reasons for that occurring.

Dicey has been criticised for having, in his *Law and Opinion in England*, essentially advanced a view which suited his own political disposition, to oppose collectivism in favour of individualism.¹¹¹ He did so, it has been suggested, by summarising less than accurately, legislation in the middle decades of the 19th century and his division of that century into periods.¹¹²

Dicey, as others, struggled to identify the transition from a Parliament which was legislatively ‘*quiescent*’ to one that became more and more willing to legislate in favour of general public welfare.¹¹³

Different perspectives exist. Each points, I suggest, to Benthamism being an important catalyst for legislative intervention in every area of life, and to the growth and disposition of the public service being an important factor, and one left largely out of account in Dicey’s treatment, and, for that matter, many others.

An alternative account of Benthamism and its influence is offered by Elie Halevy in his *Growth of Philosophic Radicalism*.¹¹⁴ He saw a contradiction in Bentham’s treatment of economic and trade affairs versus other human affairs. In the former, it was assumed that state intervention would be harmful and that the players in the market, producers, distributors and consumers alike, ought to

¹¹¹ J B Brebner, ‘Laissez-faire and State Intervention in Nineteenth Century-Britain’ (1948) J Econ Hist, supplement, viii.

¹¹² One must, however, bear in mind Dicey’s own disclaimer in *Law and Opinion in England*, that his was ‘*a work of inference or reflection*’ rather than work of research: Dicey (n 107) viii.

¹¹³ H Parris, *Constitutional Bureaucracy: The Development of British Central Administration Since the Eighteenth Century* (1969) 263-264.

¹¹⁴ The English edition of which was published in 1928.

be left to pursue their interests, from which an harmonious pattern would result. But in social affairs, Halevy detected Benthamism's displeasure of the result of unrestricted pursuit of individual ends as likely to result in something less than the greatest happiness of the greatest number.

The explanation Halevy offers for this apparent difference is a distinction between the natural and the artificial identity of interests. The first urged against legislation: the second favoured it. Ultimately, Halevy says, the former triumphed, but his is an analysis which ceases in 1852. He might have revised that view had he been able to know how much legislative intervention was to come in the 1850s and 1860s.

Another perspective is that of MacDonagh. His focus is upon administrative matters as having played an important role in the growth of state intervention. He considered that administrative changes in the mid-19th century amounted to a revolution in government comparable in importance to the Industrial Revolution: one in which the momentum of government itself was decisive. This factor, he thought, to have been both vital and neglected.¹¹⁵ MacDonagh's approach, although not expressly critical of Dicey's view, is opposed to it. MacDonagh's focus was on administrative matters, upon which opinion had no influence. He showed how the overwhelming majority of civil servants had been unaffected by Benthamism and by opinion.¹¹⁶ There would seem to be some force in this view. Much mid-to-late 19th century legislation

¹¹⁵ O MacDonagh, 'The Nineteenth-Century Revolution in Government: A Reappraisal' (1958) 1 *The Historical Journal* 52 at 52-53; O MacDonagh, *Pattern of Government Growth* (1961) 322-323.

¹¹⁶ MacDonagh, (1958) (n 115) 65.

was concerned with the protection of those less able to protect themselves, rather than with measures designed to promote general happiness. But if the motivator was not Benthamism, it remains to understand what moved the civil servants: what prompted the ‘*administrative matters*’?

Others have given consideration to the time at which the transition from a *laissez-faire* mentality to one of state intervention took place and the forces which caused it. Some, such as Carr, have been puzzled by the natural addiction of Benthamists to *laissez-faire* and its apparent inconsistency with the Benthamite theory of law.¹¹⁷ Others have noted the distinctions between Benthamite theory and the actual course of events which followed: ‘*State intervention*’, Prouty, for example, said, ‘*may not have been policy, but it was the growing reality*’.¹¹⁸

It can be seen that Benthamism was taken strongly to legitimise legislative activity. It offered a simpler and more resilient guiding principle than had Adam Smith. Smith’s influential advocacy of *laissez-faire* had seemingly been restricted, in his *Wealth of Nations*, to primarily commercial affairs. And with the religious verve of the Christian philanthropists, conditions were ripe for a whole range of interventions in the social sphere. MacDonagh’s point is that what has been left out of account is the influence of administration and the momentum of government itself. Theorists have looked for some external source of influence on legislative intervention, but overlooked that the push might have come from those who would acquire the task of regulating, and who therefore

¹¹⁷ C Carr, *Concerning English Administrative Law* (1941) 8-9.

¹¹⁸ R Prouty, *Transformation of the Board of Trade, 1830-1855* (1957) 1.

stood to gain influence from such a development. The interests of the non-political Executive in doing so is something to which I will return in later Chapters as one of the important forces that such propelled legislative proliferation and intrusion. It served not only to expand the bureaucracy, and therefore to build that empire, but it also gave bureaucrats control over whole new fields of activity

In considering, however, the effect of Benthamism on the willingness of the legislature to intervene in favour of the general public welfare, regard must also be had to some particular developments in Victorian legislation. It was the religious humanitarians that prompted, for example, the factory movement and prison reform. It was they, and, most prominently, Lord Shaftesbury, who articulated the need for state intervention for the protection of the class of persons unable to protect themselves.¹¹⁹ It was only under the principles which the Christian philanthropists advanced that the 10 hour Bill could have been introduced in 1850. Was this, as Dicey thought, Benthamism's '*earliest and severest defeat*'¹²⁰ or was it, in fact, something perfectly consistent with the Benthamite disposition?

Precision seems elusive in the search for the time at which the transition occurred, or the factors which caused it. It is difficult to exclude Benthamism as a major contributor: it immediately preceded the change; it was such an influential philosophy; one of its main focuses was legislation; and it did not explicitly advocate any *laissez-faire* restraint. But nor either can the influence of

¹¹⁹ Dicey (n 107) 230.

¹²⁰ Dicey (n 107) 237.

the Christian humanitarians be excluded. Many of them, we know especially in their opposition to the slave trade and slavery itself, placed their own positions and (in some cases fortunes) in jeopardy,¹²¹ and spent their personal and professional lives dedicated to the difficult task of persuading others and the legislature of the force of their arguments.

The cause of this move from Benthamism (with its embedded *laissez-faire* restraint) was not limited to the impetus from the Christian humanitarians. Modern commerce too, paradoxically, had an important influence. Railways, for example, necessitated legislative privileges.¹²²

By the late 19th century, *laissez-faire* had declined as even a tacit influence upon legislative decision making, such that it eventually disappeared as one of the principles by which legislative (in)action ought to be guided.¹²³ In its place stood a belief of a different kind, and one opposed to that which it had replaced: a belief that governmental action *ought* to occur, and to secure the rights and entitlements of those less well-placed to protect themselves from harm and exploitation, and even if to do so impinged not only upon contractual freedoms, but upon those who, under a Benthamist regime, would have remained free to benefit from such exploitation.

Protectionism is the form in which post-Benthamist philosophy first presents itself. It directs itself to sections of society less well-placed than others to protect their own affairs. It later assumes a broader role by safeguarding all

¹²¹ For example, Wilberforce and his Clapham Sect: S Tomkins, *The Clapham Sect: How Wilberforce's Circle Transformed Britain* (2010).

¹²² As Dicey has shown: (n 107) 245-248.

¹²³ Dicey (n 107) 259.

citizens against mistakes to which all are susceptible, but which require constant vigilance and often great cost to avoid or guard against. Later still, protectionism led to compulsory standards, of which perhaps the clearest example is a move from the terms to be implied by the Sale of Goods Acts, capable as they were of being contracted out of, to those entrenched consumer protection provisions, which impose an inescapable overlay on every such dealing.

Numerous factors underpin the connected events of abandoning *laissez-faire* and embracing compulsory state intervention. I touch here on a few only of the major ones.

First, there is the principle of utility articulated as part of Bentham's approach but, as we have seen, far from exhaustive of it. It was, as Dicey put it:¹²⁴

... a principle big with revolution; it involved the abolition of every office or institution which could not be defended on the ground of incalculable benefit to the public.

It became, without some restraint, or without the rationale of its unstated restraints being made known, the force not of individual freedom, but of state intervention.

Secondly, there was the realisation that between utility and *laissez-faire* there was no necessary connection. If utility was the force which impelled or justified reform, then *laissez-faire* was the force which urged restraint.

¹²⁴ Dicey (n 107) 305.

Thirdly, Parliament in the meantime had become more representative (ultimately, of all householders). With that, those for whose benefit Parliament's power was mobilised was not restricted to a particular class, conferring upon it far greater representative capacity and, from that, legitimacy as the common caucus within which to debate and then to choose between ambitious legislative options.

This last feature, of a much increased franchise, was opposed by Dicey. The ['Great'] Reform Act of 1832 had the effect, by broadening the property qualification for voting and creating a uniform franchise in the boroughs, of increasing the English electorate (male only) by some 50 per cent: from some 440,000 to about 650,000 in England and Wales.¹²⁵ In addition to this expansion (which was no small step if the test required for legislative intervention were to be utility) the reforms went some way to quashing what we would now recognise to be improper influences by large landholders over county constituencies and the disparity between the voting influence of small boroughs. The Act, in short, made Parliament more representative in more than one respect. Its passage is of great significance: many historians identify it as marking the commencement of modern democracy in Britain. It also marks the point, Sir Erskine May observed, after which Parliament became more liberal and progressive and '*more vigorous and active; more susceptible to the influence of public opinion; and more secure in the confidence of the people*'.¹²⁶ Butler¹²⁷ said that it was this Act which:

¹²⁵ E J Evans, *The Great Reform Act of 1832*, 2nd edn (2012), App 2, 74.

¹²⁶ *The Constitutional History of England Since the Accession of George the Third: 1760–1860* (1897) vol I 431. See also E J Evans, *The Forging of the Modern State: Early Industrial Britain, 1783–1870*, 2nd edn (1996) 229, who identifies the 1832 Act as more important than later such reforms in bringing representative democracy to Britain and

... showed that the fortress could be stormed, and which marked out the line of assault. ... it established a precedent of permanent force for enfranchising all classes when they should reach the stage of political consciousness and social power. It determined that those who have power outside Parliament should have power inside it, and sanctioned a readjustment of the constitution for this purpose, even at the price of ancient forms and individual interests.

There is no doubt, however, that the *Reform Act* set the path for the state of gradual non-violent change, quite different from the events which had been witnessed in the living memory of those voting on its passage in France and in America.¹²⁸ It witnessed, if not the end of aristocratic government, the beginning of its end.

The reform of the electoral system which the 1832 Act initiated in a formal sense further subjected Parliament to popular control. It did so with knowledge of the pressure for change which had been witnessed on the Continent and provided the means by which that desire could be channelled.

Courtenay Ilbert regarded the *Reform Act* as a catalyst for one of the three ‘*great constructive periods*’ of English legislation, so great an influence, he said, that it was almost impossible to emphasise too strongly the enormous change which that Act introduced into the character of legislation, or the complete contrast between the legislation which preceded it and the legislation that followed it.¹²⁹ He contrasts the legislation of the 18th century and the 19th: the

suggests that this marked the true beginning of the development of a recognisably modern political system.

¹²⁷ J R M Butler, *The Passing of the Great Reform Bill* (1914) 426.

¹²⁸ Evans (2012) (n 125) 67.

¹²⁹ C Ilbert, *Legislative Methods and Forms* (1901) 201, 211.

former as largely ephemeral and creating no new institutions;¹³⁰ and the latter as giving rise to new authorities with new duties, powers and areas;¹³¹ and the:¹³²

... building up piecemeal of an administrative machine of great complexity, which stands in constant need of repair, renewal, reconstruction and adaptation to new requirements as the plant of a modern factory.

The new enactments, he says, belonged to the sphere of administrative law: ‘*[f]or lawyers’ law*’, Ilbert said, ‘*Parliament has neither time nor taste*’.¹³³ And so the theme returns of a legislative method and principles to be distinguished from political actions.

Since Ilbert wrote at the commencement of the 20th century, legislation has entered yet further periods. Some features of modern legislation are considered in more detail in later Chapters. But no longer is its only focus the administrative machinery of the state: it has regulatory objectives also. But to administrative historians, the *Reform Act* marks a change deep in the psyche of public administration. Parliament ceased attempting to *govern* by legislation (through detailed prescriptions about road widening and the enclosure of commons and the like) and turned instead to general matters, entrusting their working and implementation to officials.¹³⁴ But there was a larger shift also. Before 1830, legislation was, for the most part, initiated by individual peers or members of the House of Commons.¹³⁵ The Government did not regard itself as

¹³⁰ Ilbert (n 129) 211.

¹³¹ Ilbert (n 129) 212.

¹³² Ilbert (n 129) 212-213.

¹³³ Ilbert (n 129) 213.

¹³⁴ Parris (n 113) 162.

¹³⁵ Parris (n 113) 167.

the natural initiator of legislation.¹³⁶ It is the reason why so many statutes preceding the *Reform Act* are known by the names of their proposers. A transition is evident from the mid-19th century: from Parliament as administrator to Parliament as carrying out the reform mandate of the electorate. Lord John Russell, in 1848, summed up the former:¹³⁷

There have been in the course of the last thirty years very great changes in the mode of conducting the business of the House ... When I first entered parliament it was not usual for government to undertake generally all subjects of legislation ... [However] since the passing of the Reform Act it has been thought convenient, on every subject on which an alteration of the law is required, that the government should undertake the responsibility of proposing it to parliament.

Later in the same session, Lord Russell revisited the question in these terms:¹³⁸

I must remind the ... House that the supposed duty of the members of a government to introduce a great number of measures to parliament and to carry those measures through parliament in a session, is a duty which is new to the government of this country. Let me call the attention of the House to the fact that the Ministers of the Crown are chiefly appointed to administer the affairs of the Empire.

By the time of the third Earl Grey (1858), a different attitude had taken hold:¹³⁹

Those to whom the executive authority is entrusted, have also the duty of recommending to the legislature the measures it should adopt, and must retire if their advice is not generally followed. ... This is a duty which has been imposed upon the advisers of the Crown only by degrees, and chiefly since the passage of the Reform Acts of 1832. Formerly ministers took little charge of the proceedings of parliament on all matters not immediately connected with their executive duties. ... A different system has of late grown up, and the ministers of the Crown are now justly regarded as responsible for bringing forward such measures as are

¹³⁶ D R Miers & A C Page, *Legislation*, 2nd edn (1990) 5; S A Walkland, *The Legislative Process in Great Britain* (1968) 12.

¹³⁷ HC Deb 24 March 1848, vol xcvi, 969.

¹³⁸ S Walpole, *Life of Lord John Russell*, 2nd edn (1889), ii, 96.

¹³⁹ Earl Grey, *Parliamentary Government* (1858) 16-17 and 19-20.

required, and for opposing any objectionable proposals from other quarters.

And so we see the *Reform Act*, or the sentiment which motivated it, as having a marked effect on relationship between law (particularly legislation) and administration. The effect was both to motivate Executive government as a proposer of reform and to employ legislation to do so. All of a sudden, reforming influences (forces for change) and legislation had attached themselves to those persons with the power to give them life.

Parliament had by this time secured its supremacy. The emergence of reforming legislation as a function of government was not accompanied by any reassessment of the doctrine of parliamentary sovereignty. Nor did that occur later, when the party system took hold and became stronger. Parliament, it continued to be insisted, despite these profound changes to the forces that operated upon it, could legislate about anything it wished.

Perhaps these points were ones at which the absolutist notion of Parliamentary sovereignty ought to have been reconsidered. Its continuation meant that Parliamentary sovereignty, acquired in one set of circumstances, and in response to particular societal concerns, came to be exercised in quite another.

Chapter 2

Doctrinal Limits

I Introduction

I explained in the previous Chapter many of the historical steps to our regarding popular assemblies as carrying considerable prestige, to legislation (wrongly) being likewise regarded, and some of the forces which propelled an activist role for legislation at the expense of those which urged a more restrained or scientific approach. I suggested in the preceding Chapter that we ought to disentangle the prestige we might properly attach to popular assemblies from that which we have (unthinkingly) attached to legislation.

In this Chapter I take that theme a little further, by arguing that the limits that we would recognise as attending legislation from a doctrinal point of view are relatively few. This is something which, I suggest, shows how, in current times, the view has prevailed that popular assemblies ought be free to pursue unbounded legislative activities and almost free from limitations on the frequency with which they do so and the subject matter with which they might concern themselves.

The Chapter provides a basis from which to consider the claim (of which Jeremy Waldron stands as the principal contemporary proponent) that legislation

and its author (popular assemblies) possess the authority and legitimacy to justify the omniscient and energetic deployment of legislation.

I am concerned in this Chapter with limits on legislation which Anglo-American systems recognise or impose, be that by the system's rules or its arrangement. Such limits are found not only in express Constitutional restrictions, but also in less obvious places: the division of labour between legislatures and the Courts (being, respectively, the issuing of commands and the giving of effect to them); the Court's function of interpretation; and a clever innovation of the Courts to attract for the benefit of some of its own decisions, the entrenchment which Constitutional provisions enjoy.

II Sources of doctrinal limits

Doctrinal limits might be categorised according to one of the two stages at which they take primary effect: there are limits which operate on legislation's making; and those at the stage at which legislation is given effect. There are limits also which operate at both these stages by reason of the deep-seated structural arrangements and the division of labour which Anglo-American systems of law have developed.

There is very little in the modern vocabulary of legislative jurisprudence that deals with limits. The dominant discourse is one of Parliamentary sovereignty, a doctrine which A V Dicey did more to articulate in the 19th century than other legal scholar, and in a way that seems to have captured all the

explanatory power which that doctrine could command, and, perhaps, somewhat more:¹

Parliament can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation. There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament.

Dicey's classic description of the doctrine (whose name alone belies its absolutist nature) was as follows:²

The principle ... of parliamentary sovereignty means neither more nor less than this, namely, that "Parliament" has "the right to make or unmake any law whatever, and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament" ...

...
A law may, for our present purpose, be defined as "any rule which will be enforced by the Courts."

This relatively absolutist formulation might be contrasted to the position in the 18th and earlier Centuries outlined in Chapter 1.

For Dicey, the limits (a word he never uses in this connection) on legislative power were those which Parliament itself decided: there are laws that, he said, '... *Parliament never would and (to speak plainly) never could pass*'.³ But if Parliament is sovereign and might make or unmake any law whatever, there is no means by which, if Parliament were minded to pass an obnoxious law, it could be restrained from doing so or by which that law might later be declared

¹ A V Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn (1915) (Liberty Classics reprint, ed R E Michener, 1982) 24.

² Dicey (n 1) xxxvi (intro) and 4.

³ Dicey (n 1) 26.

of no effect, whether by judicial or other forms of review. Parliament was, to Dicey, self-limited.

Dicey did more than any other 19th century legal scholar to articulate, to weave into English legal imagination, and to advance, this doctrine. The degree, however, to which it reflects the practical reality of the structure and workings of English Constitutional arrangements is, I suggest, open to question. Even if it could be said that Dicey's doctrine accurately states the formality of that system, it fails to incorporate either the limits which written Constitutions impose and those which are offered by the (Constitutionally-sanctioned) division of labour between the sources of law in particular. Dicey's decision not to countenance the limits offered by written Constitutions is understandable (they are not, after all, a home-grown English innovation), but it only heightens an interest in the extent and nature of those limits and how they might cause to be re-assessed, Dicey's classic articulation of so important a doctrine.

Dicey's approach is the one that articulates the most supreme role for Parliament. Austin's, for example, was more restrained, shown particularly in his notion of public trust reposing in Parliament:⁴

Adopting the language of some of the writers who have treated of the British constitution, I commonly suppose that the present parliament, or the parliament for the time being, is possessed of the sovereignty: or I commonly suppose that the King and the Lords, with the members of the Commons' house, form a tripartite body which is sovereign or supreme. But, speaking accurately, the members of the Commons' house are merely trustees for the body by which they are elected and appointed: and, consequently, the sovereignty always resides in the King and the Peers, with the electoral body of the Commons. That a trust is imposed by the

⁴ J Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, 4th edn (1971) (ed. H L A Hart), i. 252, 253.

party delegating, and that the party representing engages to discharge the trust, seems to be imported by the correlative expressions delegation and representation. It [would be] absurd to suppose that the delegating empowers the representative party to defeat or abandon any of the purposes for which the latter is appointed: to suppose, for example, that the Commons empower their representatives in parliament to relinquish their share in the sovereignty to the King and the Lords. [my emphasis]

Austin's language seems to find little or no support, however, in doctrine. As Dicey pointed out, no English judge ever conceded, or, under the English Constitution, *could* concede, that Parliament is in any legal sense a 'trustee'.⁵ Dicey was, perhaps, correct. But within Austin's formulation seems to be a recognition of restraints of a less formal or precise kind on Parliament's power.

Whether limits be found in the trust-like quality of which Austin spoke, or whether they be embedded in the structure and arrangement of the various sources of law, such limits *do*, I suggest, exist. I begin by considering those limits, and how they operate at the stage at which legislation is made. I turn later to those limits which operate when legislation is given effect.

III Limits on the making of legislation

Constitutionalism: 'England will perish'

British Courts never, historically, sought to review enactments of the legislature. In the wider Anglo-American world, judicial review of legislation is commonplace, following, in particular: *Marbury v Madison*;⁶ the establishment of written constitutions; and the development of a sophisticated system of

⁵ Dicey (n 1) 29.

⁶ 5 US 137 (1803).

judicial review in the 20th century, by which delegated legislation became subjected to scrutiny by the Courts.

The British situation remains a special case in this respect, even compared to other Anglo-American systems. European considerations aside, Britain's Constitution remains customary and unwritten⁷ and therefore, explicitly at least, susceptible to deliberate, enacted alteration to it.

Thomas Paine was outspoken in his opposition to this aspect of the English Constitution.⁸ He pointed in particular to Parliament's alteration of the succession as an illustration of the capacity and willingness of Parliament to alter fundamental Constitutional arrangements.⁹ Royal tyranny had, he said, been replaced with Parliamentary absolutism. Where before 1688 (in particular), there had existed a '*rivalship of despotism*' between the Parliament, the Monarch and the Church (in addition to feudal despotism) there now existed, in Paine's view, a singular despotic body.¹⁰

Rivalship in the form of divided power we know to be one effective means of controlling power, whether it be in the division of functions between the Legislature, the Executive and the Judiciary; between provincial and central governments in federations; between commands and adjudication in legal structure; or, as I suggest later, in the foils that strong forms of alternative sources of law might constitute, such as customary and judge-made law.

⁷ Another perspective is that the Constitution is the collective expression of the various important texts, supplemented, no doubt, by the relevant customs. I give consideration to this perspective later in this Chapter.

⁸ T Paine, *The Rights of Man* (1791) 69.

⁹ Paine (n 8) 61.

¹⁰ Paine (n 8) 14.

Besides just a very few limitations on Parliament's legislative power (such as preservation of the Prerogative, Parliament being prevented from binding its successors and a prohibition on the abrogation of its authority) there are no formal constitutional limits on what Westminster may do. The law of the United Kingdom, for the most part, today recognises and protects Parliamentary supremacy in the Diceyan manner. Statutes remain inviolable to judicial challenge. For example, in *Labrador Co v R*¹¹ Lord Hannon said:

Even if it could be proved that the legislature was deceived, it would not be competent for a court of law to disregard its enactments. If a mistake has been made, the legislature alone can correct it. The Act of Parliament has declared [a state of affairs] The courts of law cannot sit in judgment on the legislature but must obey and give effect to its determination.

In *British Railways Board v Pickin*,¹² Lord Reid said, in a similar vein:

The function of the court is to construe and apply the enactments of Parliament. The court has no concern with the manner in which Parliament or its officers carrying out its Standing Orders perform these functions. Any attempt to prove that they were misled by fraud or otherwise would necessarily involve an inquiry into the manner in which they had performed their functions in dealing with the Bill ...

and Lord Morris said:¹³

It must surely be for Parliament to lay down the procedures which are to be followed before a Bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and construe its Standing Orders and further to decide whether they have been obeyed: it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or

¹¹ [1893] AC 104 at 123.

¹² [1974] AC 765 at 787.

¹³ [1974] AC 765 at 790.

effectiveness of the internal procedures in the High Court of Parliament or any inquiry whether in any particular case those procedures were effectively followed.

Some scholars now question the strength and correctness of the propositions I have set out since the United Kingdom's joining the European Union and Westminster's enactment of section 2 of the European Communities Act 1972, to the effect that domestic statutes shall be construed and shall have effect subject to the incorporation of European Law.

Nicholas Barber¹⁴ and Jeffrey Goldsworthy¹⁵ point to the House of Lords' decision in *R v Secretary of State for Transport; ex parte Factortame Ltd (No 2)*¹⁶ as changing the orthodox understanding of parliamentary sovereignty: its 'quiet death' as Barber says.¹⁷ What section 2 of the European Communities Act prescribed was, they suggest, contrary to parliamentary sovereignty in the traditional sense. Take as an example this possibility: a later statute is in conflict with an earlier one. The earlier one would, on orthodox principles of parliamentary sovereignty, be repealed *pro tanto*. But if the earlier statute were one incorporating European Law into English Law, then no such rule could apply, if section 2 were to be given full effect.

The conflict in *Factortame* was between a provision of the Merchant Shipping Act 1988 (to the effect that fishing boats could only be registered as British vessels if they were owned three-quarters by British companies and three-quarters of the company directors were British citizens) and duties arising from

¹⁴ N W Barber 'The Afterlife of Parliamentary Sovereignty' (2011) 9 ICON 144.

¹⁵ J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (2010) 106 ff.

¹⁶ [1991] 1 AC 603.

¹⁷ Barber (n 14) 149.

European law not to discriminate on grounds of nationality. *Factortame*, in its ultimate form, involved the House of Lords deciding that a ruling by the European Court of Justice that a national court was obliged to set aside any national rule that restricted its capacity to grant interim relief (relief which the House of Lords had earlier declined to give) meant that interim relief ought be granted suspending the statute's operation.

Various explanations and justifications have been offered for this important decision. Some have sought to explain it as being the result of a non-legal Constitutional rule, said to have emerged for the purpose of requiring that the United Kingdom Parliament not legislate in conflict with Community law.¹⁸ Some have reasoned that the limitations it applied to Parliament came from the European Communities Act and that it amounted to a '*conduit*' through which European Law flowed into the English legal system. If that were so, then the repeal of that Act would close this conduit.¹⁹ Other views are that the Common Law recognized the European Communities Act as being a statute of a special kind, a '*constitutional statute*', and one not subject to the normal rules of implied repeal.²⁰

It matters not for my purposes which of these alternative possible explanations is ultimately correct. The point of this discussion is that Westminster has, by the passage of the European Communities Act, subjected

¹⁸ As has been suggested by M Elliott, *Parliamentary Sovereignty and the New Constitutional Order* (2002) 22 LS 340 at 371; N W Barber, 'Laws and Constitutional Conventions', (2009) 125 LQR 294.

¹⁹ N Bamforth, 'Courts in a Multi-Layered Constitution', in N Bamforth & P Leyland (eds) (2003) *Public Law in a Multi-Layered Constitution* 279–281 and N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999), ch 6, 'A Very British Revolution?' 88.

²⁰ See Lord Justice Laws in *Thoburn v Sunderland City Council* [2002] 3 WLR 247.

itself to European regulations and institutions such that it is no longer true to say of Westminster's enactments they, once passed, they are unchallengeably 'law'. Thus, Barber says, it is no longer the case that '*whatever the Queen-in-Parliament enacts as a statute is law*': the Courts can sometimes set aside statutes which have been passed by Parliament.²¹

A limit this may be, but it is a self-initiated one (Westminster, after all, passed the European Communities Act) which voluntarily incorporates EU law. It is a limitation, however, that ought not be confused with Constitutional limitations as experienced today by the former English colonies. In their cases, the limitations are to be drawn from a single (albeit, perhaps amended) iconic Constitutional document, and one very much the product of national processes and sentiments. The power to amend (rarely utilised in most cases) vests in the people. Westminster's position is very different: no written Constitution of its own²² and subject to what laws the European Parliament might from time to time enact.

The limits on Parliament's powers, in recent history, tend to have been found in the separation of that power from others (especially interpretive and adjudicative), the existence of rival sources of law, the fact that legislative power is vested in those who are also to be subject to the laws which are made (through the Commons, or Lower House as it is known in the Parliaments derived from Westminster) and the selection of proper candidates (its representative and democratic nature). Limits these might be, but they rarely receive treatment as

²¹ Barber (n 14) 151.

²² Subject to what I have said immediately above on this point.

such and the whole tendency has been to overlook them as having any such effect.

A consequence of neglecting these limiting features of the architecture of the legal system and its component parts is to leave room for abuses and excesses by the legislative arm. Is it recognised, for example, the extent of the trust which is reposed in those elected to Parliament (something to which Austin sought to give expression)? The problem is one to which Blackstone alluded (drawing on Coke) in these terms:²³

So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apothegm of the great lord treasurer Burleigh, "that England could never be ruined but by a Parliament": and, as Sir Matthew Hale observes, this being the highest and greatest court over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy. To the same purpose the president Montesquieu, though I trust, too hastily, presages; that as Rome, Sparta, and Carthage have lost their liberty and perished, so the constitution of England will in time lose it's liberty, will perish: it will perish, whenever the legislative power shall become more corrupt than the executive.

If that truly be the state of affairs which the English system brings about, an observer might enquire whether it is safe to place such reliance on Parliament and its representatives not becoming corrupted, and, for that reason, to do nothing to nurture those (perhaps few) limits on their activities which can be identified.

²³ 1 Bl Comm 161.

Constitutionalism in British-derived systems

What I have set out above is the British situation only. Entirely different arrangements exist in the major Anglo-American common law systems. In those newer systems (all, of course, fashioned in the post-revolutionary world) the arrangements to which I refer are, very definitely, written and enacted.

Immediately, of course, there is an irony in the solution to any perceived over-reliance on trusting Parliament to enact legislation well and properly.

Constitutions too are the acts of assemblies. They too invoke the Parliamentary and legislative processes. They too invoke text.

I wish to look more closely at these systems to demonstrate that, although written constitutions *do* have the effect of placing limits on what assemblies may do, they are also capable of being a charter for legislative *intervention* rather than restraint. Perhaps it was never the object of those measures to achieve legislative restraint as such, but to establish, following from the events in France and America in the late 18th century in particular, the approach which legislation would take on certain subject matter, and especially to protect or advance rights. But in any event, cutting across any influence of restraint, however, as I will show, Constitutionalism has revived judge-made innovations, providing as it does a means by which the Court might exploit three facets: their (Judges') capacity to interpret law (including the Constitution); the declaratory nature of judicial decisions and Parliament's lack of capacity to '*supervise*' or abrogate those decisions, because of the entrenched nature of the Constitution in the major Anglo-American systems.

What might be described as the major three such systems: the United States, Canada and Australia, are all federal in structure. Each of these has, therefore, an immediate and peculiar requirement that there be a written Constitution for the purpose, if for no other, of dividing power between the provinces and the central government, and providing mechanisms for the resolution of such conflicts.

The drafters of the constitutions of those democracies took the opportunity to enshrine certain fundamental rights which ordinary Parliamentary legislation alone could not displace. Amendments in many cases have sought to do likewise.

Australia

Leaving aside its Federal component, the Australian situation is the simplest, and the one which most closely follows the British. Its Constitution contains few provisions directed to the protection of rights. It has stood largely unaltered since its enactment in 1901. The very few express protections which exist concern a right to trial by jury, the requirement that any acquisition of private property be on '*just terms*', freedom of trade and secularity of government. There do not exist in the Australian Constitution positive rights anywhere approaching the number and extent of those in the Canadian and American systems.

The developments in the Australian system which for present purposes are of interest are those which have occurred at the level of its highest appellate court, which is also its Constitutional Court. In a series of decisions since 1980,

the High Court has found in the Constitution, several implied protections: the guarantee of a system of representative democracy; the necessity of each of the State and Federal Governments remaining as effective polities regulating their own affairs; and a freedom of political communication.²⁴ These so-called implied freedoms were given expression in cases which came before the Court. Because their source is identified as the Commonwealth Constitution, Parliament is not itself at liberty to abrogate them, at least not without first complying with the high threshold for changing the Constitution itself: a majority of voters in a majority of States.²⁵ Only eight proposals for alteration to the Commonwealth Constitution have succeeded in its 110 year history, which is a very small proportion of the 44 proposals for change which have been presented to the people.

The implication in a written Constitution of rights or doctrines involves nuanced (some say impermissible) judicial tactics. The principles articulated by the Courts are not ones identified as arising from customary or common law. Although those sources may inform the principle, the Court gives primacy to the written Constitution and purports to follow its implied commands. But, having found that the rule identified is implied in that *text* or structure of the *written document* (the text only vaguely identified and the structure a matter of linguistic architecture) then the effect of the Constitution, from that time, carries with it that (judicially-identified) rule. This last feature is only possible by reason of the

²⁴ See, principally: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth (No 2)* (1992) 177 CLR 106.

²⁵ Australian Constitution s 128.

declaratory nature of common law decisions; the notion that when judges declare the law, they give expression to something which has always existed, and merely lay waiting to be found by them.

This judicial approach is, I suggest, partly a response to the Courts being presented with a mass of written enacted law and the apparent deference now afforded to it over common law methods and reasoning. Perhaps written text offers a simplicity which trawling through a mass of judicial decisions does not; perhaps reliance upon the written iconic text is thought to confer upon the relevant judicial decision the authority which the Constitution itself crystallised; or perhaps Courts themselves have run out of ideas and see their role as giving life and experience to written words.

Canada

The North American Constitutional approach is more rights-based than any other Anglo-American system.

The Canadian Constitution has included, since 1982, the Charter of Rights and Freedoms, in the form of the Constitution Act 1982. Preceding it was the Bill of Rights 1960. The Charter contains a range of express restrictions on legislative (and other) action, including by protecting from interference, rights such as freedom of conscience, freedom of religion, freedom of expression, democratic rights, and legal rights such as the right to life, liberty and security.

The Constitution (as the Supreme Law of Canada),²⁶ which includes the Charter, has the effect of invalidating any law which is inconsistent with it. The Courts may therefore strike down laws that violate the Charter.²⁷ Other remedies are also available.²⁸

Canada too has developed an implied rights jurisprudence based upon, principally, the preamble to the British North America Act 1867:

Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom ...

This jurisprudence did not emerge in authoritative form until the *Remuneration Reference* in 1997.²⁹ That case held that political institutions were fundamental to the basic structure of the Constitution, and that governments (legislatures and the Executive) could not undermine the mechanisms of political accountability which gives those institutions definition, direction and legitimacy.³⁰ The *Secession Reference*,³¹ which followed only shortly after the *Remuneration Reference*, adopted language which suggested a life that Constitutional principles and their ‘*powerful normative force*’ might assume in Court decisions and which would result in the invalidating of legislation on grounds other than those expressly articulated in the Constitution itself. But, as Grant Huscroft has

²⁶ Constitution Act 1982 s 52.

²⁷ *Schachter v Canada* [1992] 2 SCR 679.

²⁸ *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624.

²⁹ *Ref re Remuneration of Judges of the Province of PEI; Ref re Independence and Impartiality of Judges of the Province of PEI* [1997] SCR 3.

³⁰ In doing so, the Court endorsed earlier (pre-Charter) observations about implied rights which had never until then been regarded as authoritative.

³¹ *Reference re Secession of Quebec* [1998] 2 SCR 217.

observed³² the *Secession Reference* has not lived up to the grandiose expectations of it, and underlying constitutional principles have not been invoked to invalidate legislation. Perhaps the reason why the Canadian Supreme Court has not found it necessary to invalidate legislation on the grounds of implied rights in the Constitution is the greater number and breadth of rights expressly stated there compared to all other major Anglo-American systems and culture of rights-based legislators.

The United States

Constitutional interpretation in the United States too has included a doctrine of implied rights. The Ninth Amendment leaves open (in an express sense), the existence of other rights:

The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.

The United States, principally through its three Charters of Freedoms, recognises certain individual rights. They are well known: freedom of religion (ie prohibiting Congress from establishing a religion and protecting the right to the free exercise of religion); freedom of speech, freedom of the press, freedom of assembly and so forth.

Many implied rights have been interpreted by Courts as arising under the United States Constitution, including: freedom of association;³³ a right to

³² G Huscroft, 'Romance, Realism, and the Legitimacy of Implied Rights' (2011) 30 UQLJ at 41.

³³ *Olmstead v United States* 277 US 438 (1928).

privacy;³⁴ the right to travel;³⁵ and the right to educate children according to parental wishes.³⁶ The due process clause in the 14th Amendment continues to protect any freedom relating to ‘*fundamental principles of ordered liberty and justice*’.³⁷

The Canadian and US Constitutions are, consistent with the Australian experience, difficult to change.³⁸ Judicially-recognised (but not express) facets of Constitutions are a means by which the Common Law achieves some ascendancy (but by a sidewind) over legislation. It is here that we find a fundamental division between constitutionality in the Anglo-American ‘*colonies*’ and that of Britain itself. Britain’s is a common law bill of rights, one which, as Thomas Paine complained, was principle perhaps, but no real impediment to the erosion of fundamental rights. In each of the major Anglo-American systems, not only have certain matters been placed beyond the reach of the legislature, but it has provided a means by which the Courts might achieve a common law bill of rights to supplement those parts which are written, and to enjoy for those doctrines, the entrenchment which expressly articulated provisions enjoy.

Written constitutions would seem, on one view, to be forces for legislative restraint. But we do not see in Canada, America, or Australia for that matter any readily identifiable model for greater legislative restraint than in, for example,

³⁴ *Griswold v Connecticut* 391 US 145 (1965).

³⁵ *Crandall v Nevada* 73 US 35 (1867).

³⁶ *Pierce v Society of Sisters* 268 US 510 (1925).

³⁷ *Palko v Connecticut* 302 US 319 (1937).

³⁸ In Canada, before 1982, Constitutional Amendment was by Acts of the Parliament of the United Kingdom. Sections 38 to 49 of the Constitution Act 1982 now prescribe the procedure for doing so. There have been ten (relatively minor) amendments to the Constitution since 1982. A number have failed, including the two major proposals for reform (The Lake Meech and Charlottetown Accords). The US Constitution also has special procedures for amendment (set out in Article V). It too has been amended relatively infrequently.

Britain. If anything, the opposite is discernible. While rights might operate as restraints on legislative action (by preventing the legislature enacting legislation or because, if such legislation is passed, Courts strike it down) even those rights require legislative intervention for their definition and elaborate bureaucratic and other processes to support them.

Consequences for legislation of Constitutionalism

There are two other aspects of Constitutionalism which bear upon its more general effect in terms of legislation.

First, there is the status and respect afforded to written Constitutions as iconic texts. We repose in a text and the process preceding its framing, a trust of the most fundamental kind. The belief is that the document will perpetuate orderly and democratic government, that it will strike the right balance between the organs of government, that it will prescribe pre-requisites for its alteration which are sufficiently stringent, yet not unachievable when change ought occur. We place trust in its articulation of rights: not too prescriptive, yet not unrealistically unambitious. We often place trust in it to articulate the national character and define its qualities. If we are prepared to do all those things for a written Constitution, it says something also, I suggest, about the respect we might be willing to afford lesser texts, but texts all the same. It is also indicative of the respect which we have for the *processes* by which texts are framed. Constitutional processes might be more special than regular legislative activities, but there is a connection between the respect for the capacity of a ‘*big meeting*’ adequately enough to reflect the wishes of the people at the Constitutional level,

just as there is for the big meeting (ie Parliament) to do so when it comes to more mundane matters.

Secondly, like all written texts, there is a tendency to regard subject matter with which it does *not* deal as lacking authority, as if the decision to not enact a particular rule has consigned it to oblivion. This argument, against which implied rights doctrines have to some extent been a reaction, is perhaps the product of the superficial attractiveness of the simplicity of a statute: there is one source to which recourse need be had; the document has an orderly structure; it is (hopefully) clear in its expression and when I communicate with others about it or the commands it makes, I can limit with safety my knowledge of the subject matter to what that document contains.

I am suggesting that text-based rules play to our inherent laziness or desire for order, and appeal to our wish (distinctly modern) to believe that such documents are capable of containing exhaustive statements of the relevant considerations. Proof of this lies in the fact that it was considered necessary in the United States Constitution, to include the 9th Amendment because, as James Madison said:³⁹

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the Central Government, and were consequently unsecure.

³⁹ Speech Introducing the Bill of Rights, 8 June 1789 in *The Writings of James Madison, Comprising his Public Papers and his Private Correspondence* (ed G Hunt) (1900), vol 5 394.

To return to my theme: despite looking very much like fetters on law-making power, the positive rights in the American and Canadian Constitutions seem to have proved to be a charter for the *exercise* of law making power as much perhaps as for the restraint of it. They provide a justification for legislating so as to provide the rights sought to be secured and so as to remove impediments to them. For example, the right to mobility justifies imposing standards of construction on private dwellings, commercial buildings and public infrastructure and transport, and the right to security justifies police powers and health and safety standards. Similarly, anti-discrimination and equal opportunity legislation furthered Constitutional objectives of fair and equal treatment.

Although many laws are invalidated by the Courts for contravening one or more of these constitutional restrictions, and no doubt many more are never or only momentarily contemplated because of them, many laws are passed in furtherance of the objectives they articulate. That follows in part also from the nature of such aspirations. Many are positive rights. So the achievement of them naturally encourages legislation.

We can see, therefore, that Constitutional protections have a dual effect: on the one hand they have only lately reinvigorated the Common Law, which has sought to take advantage of the entrenched nature of those protections; on the other, they have provided a justification for legislative intervention to give effect to such entitlements and to establish the administrative arrangements for their pursuit.

IV Limits on giving effect to legislation

So far we have looked at internal limits which operate at the stage at which legislation is made, or immediately afterwards. Constitutional restrictions might limit the legislature's power to pass legislation on a particular topic or limit it having a particular effect. But the enactment of a statute does not bring to an end the countervailing forces which might operate against it. Maitland was aware of an excessive tendency to focus, when looking at legislation, on the processes leading up to its enactment, and to neglect the important stage in which it actually takes effect:⁴⁰

Some people seem to think that a Bill loses all its importance at the very moment when it becomes law, that it ceases to be a subject for constitutional history, or indeed history of any kind, when the last division has been taken.

Administrative historians are much more alert to the importance of the way in which legislation is given effect: the obedience it commands, the bureaucracy's implementation of it, and the way in which the Courts, in practice, apply it. Henry Parris, for example, in his work *Constitutional Bureaucracy*, identified this as the 'Mikado effect', citing Gilbert and Sullivan:⁴¹

That's the pathetic part of it. Unfortunately, the fool of an Act says "compassing the death of the Heir Apparent". There's not a word about a mistake, or not knowing, or having no notion, or not being there. There should be, of course, but there isn't. That's the slovenly way in which these Acts are always drawn. However, cheer up, it'll be right. I'll have it altered next session.

⁴⁰ F W Maitland, *Constitutional History of England* (1908) 537.

⁴¹ H Parris, *Constitutional Bureaucracy: The Development of British Central Administration since the Eighteenth Century* (1969) 179; W S Gilbert, *The Mikado*.

Attention to legislation in its post-enactment life is justified on grounds which go beyond alleged deficiencies in its drafting. The purpose of any statute is to have its commands obeyed, so looking to its formation and its culmination in an enactment seems to assume that the process of the statute's application is a matter, if not of mechanics, unworthy of serious attention.

Francis Bennion⁴² and Lord Denning⁴³ have both noted the very large number of cases which involve statutory interpretation, perhaps the result of the increasing volume of statute law. Even with sophisticated techniques of statutory drafting, and all the rules of statutory construction, there remains room for genuine contests about how a statute ought be applied.

The post-enactment life of legislation is, however, one of the stages in which we might expect to find doctrinal limitations. The statute has yet to prove capable of implementation, of being applied and enforced by the Courts and by the Administration, and, I will suggest, of showing the extent to which it is capable of withstanding the forces of the Common Law.

From the discussion which follows, there are notable omissions for which I make no apology. I do not consider the rules of statutory construction in any detail, or the various presumptions which accompany them. These have ceased, in my view, to constitute any real form of restraint upon legislation for two principal reasons. *First*, so far as the rules of statutory interpretation exist in the form of presumptions against, for example, the legislature's interference with the

⁴² F Bennion, *Statutory Interpretation: A Code*, 2nd edn (1992) 564; F Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (2001) 8, 9.

⁴³ A T Denning, *The Discipline of Law* (1979) 9.

liberty of the subject, or with property, or vested, rights, they are presumptions only, and can be displaced by express statutory language, by manifest intention or ‘*necessary intendment*’. *Secondly*, the nature and content of many of these rules have, quite ironically, been neutralised by statute, in the form of the various Acts prescribing the rules for the interpretation of statutes.⁴⁴ Legislation of that kind directs the Courts in the principles to be applied and the ones which are to be preferred over others. It would be interesting to know, but it is not within the scope of my exercise here, and to trace, how and why the Courts were generally uncritical or passive in response to this incursion into their function, and why it was thought desirable to have the legislature demolish the long-maintained division between judicial and legislative functions by reaching its hand in to manipulate the rules by which the Courts interpret and give effect to its commands. One answer might be that if the Courts are to obey statutes, there is no reason why Parliament ought not lay down the rules of a more general kind by which all its commands ought to be construed. It might also be noted, for completeness, that the Courts too, on occasion, confess the unhelpfulness of such rules with modern drafting practices. Lord Justice Rose, for example, in *R (Crown Prosecution Service) v South East Surrey Youth Court*,⁴⁵ after referring to the provisions of the relevant Act being ‘*deeply confusing*’, said:

We find little comfort or assistance in the historic canons of construction for determining the will of Parliament which were fashioned in a more leisurely age and at a time when clarity of thought and language were to be found in legislation as a matter of course rather than exception.

⁴⁴ See, in the United Kingdom: Interpretation Act 1978.

⁴⁵ [2006] 1 WLR 2543 at [14].

We would, for these reasons, be wasting time were we to look in that direction for real limits on legislation.

The topics which, on the other hand, return our investment in their consideration are the division of labour between command-issuing and interpreting, and applying commands, and the different methods each adopts.

Division of labour

Legislatures, because they are assemblies, express themselves only through a singular text which purports to encapsulate, so far as there is one, the rule which all its members, or at least a majority of them, are content to adopt. Such a system *'presupposes an intelligible method of making known to the organs of administration, courts or otherwise, its [the legislature's] desires and hopes'*.⁴⁶

But those collective law-givers, with one important exception, lose, at the point they agree upon the framing of the rule, any real control over how the rule is interpreted and given effect in particular cases. The exceptions are the rules of statutory construction which, although entirely a matter for the Courts, have in the last several decades, become *'statutised'* – hijacked I suggested above – by the legislature in the form of Acts Interpretation statutes better to secure what Parliament intended. The second exception is of course Parliament's ability, upon seeing how its rules are being applied, to, if its processes permit, amend the command so as better to express either what the majority is thought to have intended in the first place, or to adjust the command to take account of something

⁴⁶ J Landis, 'A Note on Statutory Interpretation' (1929-1930) 43 Harv L Rev 886 at 886.

which, in its practical operation, emerged as an unintended effect or matter which ought to have received treatment but did not.

Statute law we regard as written law, yet judicial decisions we regard as unwritten, despite the latter being every bit as documentary as the former. The difference, of course, lies not only in how the bodies are constituted (Courts mostly comprise a single Judge for trial and a very small number, and rarely more than 9, on appellate benches), but also in very fundamental ways in what they seek to achieve and how they go about doing so. This is a theme upon which I wish to expand.

Assemblies must state such rules as they wish to enact by way of command, and ordinarily prospectively. When they do so, they know that there will be no opportunity to revisit those commands before the practical effects of them are manifest. For that reason, and because the Assembly will play no active part in any contest about the commands' meaning and application, at the next stage of the process, those commands must be as clear as possible in stating what they require. The whole purpose of issuing textual commands is that they remain unmodified until the receipt of them by the subject.

The rules which an Assembly enacts need have no prior existence or be supported by any historical or philosophical considerations. It is enough that the Assembly issued its command by following the set process for doing so. The commands it issues draw their legitimacy and coercive force from the mere fact that a majority of the Assembly had endorsed them and that they received such royal or Presidential assent (ordinarily a perfunctory act anyway). The question

of the statute's legitimacy is fused with the question whether it is valid.⁴⁷ The reason for us approaching legislation in this manner is the product of several very deep-seated philosophical and historical perspectives. I confront them in Chapter 5. For now, however, I would simply observe that to subsume questions of legitimacy within that of validity is something that we can see to be generally consistent with two factors that I have already discussed. *First*, doing so taps deep into the forces which assisted Parliament's rise in the 17th century and which I surveyed in Chapter 1, namely, respecting the place which Parliament has come to assume as the supreme law-maker. *Secondly*, it has an elegant symmetry with Dicey's absolutist doctrine of Parliamentary sovereignty.

These elements of collective commanding self-sufficiency characterise, at a fundamental level, the legislative act. The limitations of them, although perhaps not immediately apparent, become a little clearer when the legislative circumstance is compared to that of Judges.

The Common Law is one of two means by which legislation might be given effect (if we leave aside people's own willingness simply to obey it) the other being the bureaucracy. That is a separate (and largely unexplored) topic all of its own. By '*giving effect*', I mean both interpreting and applying commands to specific instances.

Giving effect to legislation is not, however, the Common Law's only, or even its principal, function. It also has a function of expressing law, an

⁴⁷ L J Wintgens 'The Rational Legislator Revisited: Bounded Rationality and Legisprudence', in L J Wintgens & A D Oliver-Lalana (eds) *The Rationality and Justification of Legislation: Essays in Legisprudence* (2013).

expression which need bear no connection to that adopted by an Assembly. Care of course is required when stating what the Common Law does when it comes to this aspect of its functions. Orthodoxy would have common law judges finding or revealing those rules, whereas more modern realist doctrines would have them making those rules, albeit mostly within the bounds of common law reason.

For so long as the idea that judges find and not make law persists, there exists a need for judges to articulate reasons for their decisions which evidences their having searched for the rule and not merely having, as Landis might cynically have said, made law according to their own views.

The method of judicial reasoning is one which appellate courts expect and, in turn, exhibit themselves. That method is one which, historically in particular, gave considerable respect to custom⁴⁸ which deferred to the views of other judges, past and present, especially if more senior in the judicial hierarchy.⁴⁹ That, however, does not exhaust its characteristics, because it has also exhibited a practical reason of its own, a way of making sense of the often abstract legal rules (statutory or not) in the particular circumstances which comprise the cases which come before the Courts.

There are at least three limiting features which a separation of the legislative (commanding) and adjudicative (ie interpreting and applying) functions bring. *First*, those separate institutions, with their different

⁴⁸ J W Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (2000) 188, 194.

⁴⁹ Even though the system of precedent might be stronger and more formal now than it was historically, including because of the improvements in law reporting since the early 19th century: see generally Tubbs (n 48) 180-183.

composition, location and histories, will inevitably develop their own procedures and self-awareness. *Secondly*, the Common Law operates at the level of the specific case and in doing so engages with narrative in a way which legislation's greater aloofness and generality do not permit.⁵⁰ *Thirdly*, the separation between the Courts and the legislature means that there is a place within which Judges, when interpreting legislation, might adopt their own informed view of matters, and in doing so, to justify their approach by claiming it to be no more than what the legislature (itself unable by that stage to supplement or clarify its earlier command) intended. It is the notion of intent and how the Courts make use of it upon which I now turn to focus.

The Legislature's Intent

The particular way in which the Court might conduct itself when giving effect to legislation in a particular case will depend very much on the nature of the legislation in issue and the circumstances in which it comes to be applied. At the simplest level, the Court might be called upon to apply relatively clear statutory language to facts as found by it. There might be complexity in the fact-finding process (and, indeed, some room to find such facts as suit a particular statutory result),⁵¹ but the stage of applying a legislative command to those facts as found might be a straightforward task. In the broadest sense only, this basic task involves interpretation.

⁵⁰ See, for example, I D F Callinan, 'The Narrative Compels the Result' (2005) 12 Tex Wesleyan L Rev 319.

⁵¹ An interesting perspective on the factual exercise conducted by Courts has been adopted by J D Heydon, in which he distinguishes between legislative and adjudicative facts: 'Developing the Common Law' in *Constituting Law: Legal Argument and Social Values* (2011) at 95-122.

Alternatively, the Court's function might be exercising a discretion which has been expressly left to it by the legislature. It might entail exercising that discretion directly (ie making such orders as in its discretion it considers just); it might be an appeal *de novo* from a decision of a public official; or it might be a form of judicial review of such decisions, and calling, in that context, for wide yet structured discretions to be exercised. I mean to exclude from my analysis this kind of decision-making by Courts. It involves little if any of the sense of limitation on legislation I would wish to consider. In these instances, the legislature has devolved or delegated to the Courts activities of this kind, or left that field free, so there is little sense of the legislature itself being curtailed in its function. (I might mention, however, the jealous way in which the Courts have protected their role of administrative review, by construing as narrowly as possibly any privative clause, and, in cases of fundamental or jurisdictional error, precluding entirely Parliament's ability to restrict or prohibit review by the Courts of administrative decisions which are so tainted.)⁵²

Below these levels we begin to touch upon the kinds of interpretive activities in which there might be found limits, albeit that in doing so, the Courts, superficially at least, seek to give effect to the legislature's intention. The kinds of interpretive functions I have in mind are: deciding between two or more competing meanings to be given to words used by Parliament; striving to find some meaning in circumstances in which the text itself seems not to have contemplated a particular consequence, although purporting to deal with the

⁵² *Anisminic Ltd v Foreign Compensation Commission* [1969] AC 147. For the application of the same doctrine in Australia, see: *Kirk v Industrial Relations Commission* (2010) 239 CLR 531.

topic generally; and sometimes departing from the literal textual command to give effect to a purpose which must have motivated the legislature. There are numerous examples of Courts finding a meaning in legislation which is different from that which a literal reading of the words used by the legislature convey.⁵³

The possibility which lies in the truly interpretive functions of Courts limiting legislation's reach (beyond the fact of their separation and its consequences, with which I dealt above), is that Courts, when doing so, might exercise autonomy in ascribing meaning. Historically, this autonomy manifests itself in the Courts refusing to give effect to legislative provisions which were contrary to right and reason.⁵⁴ This is a direct example of common law assuming a position of rivalry with legislation.

Examples in modern times of the exercise of autonomy will not be as unashamed perhaps, but that does not mean there is no purpose in searching for them, including in places in which they might be obscured. The examples for which we might search are instances in which, from a range of possible meanings, the Court prefers one which appeals to it, but which differs from that which the legislature wished to impose. We know that Parliament, on occasion, abrogates the effect of a judicial decision giving effect to legislation. Each of these must at one level be an example of the exercise of judicial autonomy. It is

⁵³ Some very clear examples of this are given by J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (2010) 234-235.

⁵⁴ My reference is to Sir Edward Coke's words in *Dr Bonham's case: Thomas Bonham v College of Physicians* (1610) 8 Co Rep 113b; 77 ER 646 '... in many cases the common law will control acts of parliament and sometime adjudge them to be utterly void: for when an act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an Act to be void'. See also *Thomas v Sorrell* (1674) Vaughan 330 at 337; 124 ER 1098 at 1102: '... a law which a man cannot obey, nor act according to it, is void, and no law: and it is impossible to obey contradictions, or act according to them'.

overly simplistic to say in response that the Courts, in making that decision, simply mis-divined what the intent of the legislature was. In such cases, especially where the statutory abrogation comes shortly after the passage of the legislation (so there is more likely to be the same minds having the same intent) there is a manifest disagreement by the very body whose intention the judicial decision claimed to be given effect, and that could only be understood as the Courts having acted contrary to Parliament's intention.

Nor is it an answer, I suggest, to say that all the Courts do when fulfilling their interpretive function is to do what Parliament might have done, had it adverted to the particular circumstances with which a particular Court was presented or because legislation must, however comprehensive and detailed it might appear, necessarily remain incomplete.⁵⁵ This does not preclude, as I suggest occurs, the Courts having a distinct role in limiting legislation, albeit proceeding always under a test of divining and giving effect to Parliament's intention.

Much turns then, on the extent to which the Courts in truth fulfil their interpretive function by reference to what Parliament intended and what part of that function has autonomous features. The exercise is a difficult one and that, I suggest, is part of its brilliance. A task fulfilled by one body, but which purports to be acting on what the commander intended to say, but which is taken to speak definitively on that topic, and in circumstances in which no appeal can be made to the commander itself, is accompanied by a large degree of autonomy. I will develop my argument in three parts:

⁵⁵ F Bennion, *Bennion on Statutory Interpretation*, 5th edn (2008) 5.

- 1) exposing the unsatisfactory nature of the legislature's intent as the basis for the Court's interpretive function;
- 2) elucidating some current approaches of the Courts to the relationship between common law and legislation at the highest appellate levels;
- 3) understanding something of the debate about the relationship between common law and legislation.

My ultimate proposition is that the Courts have found a safe harbour in legislative intent as the basis for their interpretative function. There are signs (some theorists and judges aside) that the Courts increasingly resort to it and attempt to fit their own historical jurisprudence within statutory words. But to do so is, I suggest, expedient and a convenient cover for what judges really do. There is, nonetheless, a place for it. Not only does it provide the necessarily wide boundaries within which Judges might exercise their structured common law discretion, but it safely legitimises the task they conduct by bringing their function within the modern doctrine of Parliamentary supremacy. Intent as the basis for Judges' interpretive function is, in short, a convenient cover for what judges should (and actually) do. That approach is an acceptable one, at least until there emerges some alternative theory capable of achieving both these objects at least as well as does the present doctrine.

The Legislature's Intention: a problematic device

One could read most recent decisions of final and intermediate appellate courts in the Anglo-American world and divine little of the serious reservations and limitations about it which academic commentary (even from those who champion it as a basis for the interpretive function) reveals. The lines of authority I identify below as part of demonstrating some current trends are just one illustration of the subtleties which might exist in the stated juridical bases for statutory interpretation.

The whole notion of a popularly elected body making laws, and Courts giving effect to the people's commands in individual cases is elegant. No truly realistic or informed analysis, however, could consider it so straightforward.

By exposing the problematic nature of legislative intent in its employment by Courts in their interpretive function, I wish to show that it cannot, in a disciplined and realistic sense, offer a sufficient explanation for all that Courts do. If my thesis be correct – that legislative intent is a convenient cover for a much wider discretionary exercise – we will not find any revelation of that in judicial decisions. Judges will be doing their best to maintain all appearances of orthodoxy.

Instead, I propose look to the idea itself and examine just what basis it might be capable of offering for the range of interpretive tasks which Judges undertake. Radin considered the intent of the legislature to be undiscoverable

and, if discoverable, irrelevant.⁵⁶ If that is right, or even partially, then what possible role might that doctrine fulfil?

Parliament has neither a single mind nor even a single institutional composition. In almost every instance it comprises a lower and an upper house⁵⁷ (both with different motivations, geographic electorates and methods of election) and some form of royal or like assent. When it (and by this it must be understood its myriad component parts)⁵⁸ votes on legislation, it has before it, in almost every case, text prepared by, and on the instructions of, the Executive.

In any modern Parliament, there is a huge volume of legislation. Few elected Members have legal training. They might have the benefit of advice about, and summaries of, the legislation, but it is simply fanciful to think that, for the most part, the majority of Members of popular assemblies are able to give other than the most cursory attention to a particular Bill.

There are limited responses which might be made to these very real problems. Parliament might be compared to a corporation, which we often recognise as capable of having a purpose, objects or an intention. Not every Member of Parliament or Congress need consider a Bill in detail for the decision as a whole to be an informed one. Although Bills are drafted by unelected officials, the methods and forms of drafting are well established and have a science of their own. All these explanations do provide substantial responses to

⁵⁶ M Radin, 'Statutory Interpretation' (1929-1930) 43 Harvard L Rev 863.

⁵⁷ The exceptions to bicameral legislatures include the Canadian Provinces, Nebraska, New Zealand, and, in Australia, the State legislature of Queensland and Australia's two Territory Governments.

⁵⁸ See Landis (n 46) at 888.

the criticisms made of the existence of, and ability to find, a reliable legislative intention. Many have tried, and I will not therefore attempt to resolve, these competing positions. What I would wish to identify however, is that even the most strident supporters of the legislature's intent being the touchstone for the interpretation of legislation recognise to some extent what we might call the mystical nature of that pursuit. That exercise is one undertaken by a specialist elite (ie judges) with their own traditions and methods (and perhaps their own or institutional purposes). It therefore stands very much on its own two feet as an autonomous legal method.

The discretion which the pursuit allows is reflected to some extent in the rules about the material to which a judge might have regard in finding or deciding the relevant intention. Until only relatively recently in the United Kingdom,⁵⁹ and only a little earlier in Australia⁶⁰ and New Zealand, Courts considered unhelpful, records of proceedings of legislative assemblies. The basis for excluding material concerning the Parliamentary history of amendments was, ultimately, the burden such a rule would place upon 'users' (and perhaps not just litigants) of statutes.⁶¹

... the interpretative advantages which it might bring in the marginal case would be outweighed by the burden, which would be imposed on users of statutes in general, of obtaining copies of the amendments made or proposed and of elucidating their significance.

The contrary view (and the one which prevails today) is that:⁶²

⁵⁹ *Pepper v Hart* [1993] AC 593.

⁶⁰ Acts Interpretation Act 1901 (Cth) (Australia).

⁶¹ The Law Commission and the Scottish Law Commission, *The Interpretation of Statutes* (1968) (Law Com No 21; Scot Law Com No 11) at para 62. See also Committee on the Preparation of Legislation (Renton Committee) (Cmnd 6053, 1975).

⁶² Landis (n 46) at 888 (footnotes omitted).

The records of legislative assemblies once opened and read with a knowledge of legislative procedure often reveal the richest kind of evidence [of the meaning which the assembly attached to the words used]. To insist that each individual legislator besides his aye vote must also have expressed the meaning he attaches to the bill as a condition precedent to predicating an intent on the part of the legislature, is to disregard the realities of legislative procedure. Through the committee report, the explanation of the committee chairman, and otherwise, a mere expression of assent becomes in reality a concurrence in the views of another. A particular determinate thus becomes the common possession of the majority of the Legislature, and as such a real discoverable intent.

One of Landis's concerns was that:⁶³

Strong judges prefer to override the intention of the legislature in order to make law according to their own views.

Perhaps some judges do have that purpose. We cannot impute to them a desire to act in bad faith or to give effect to wild prejudices. The views they hold will be ones which their training and experience might provoke or which the narrative to which they have been more directly exposed than the legislature might compel.⁶⁴ But that view can be given effect more subtly, in some cases at least, by appealing to a legislative intention which corresponds with it.

The language of judges in many cases belies, I suggest, this very occurrence. When we see, for example, statements about a result which Parliament could not have intended, we might see it as a judge's (not uninformed) view in a particular instance, and having had the benefit of those facts, being one which is translated into legislative intention so that it might be transposed back as authority for the particular way in which the Judge seeks to give effect to the statute.

⁶³ Landis (n 46) at 890.

⁶⁴ Callinan (n 50).

The present doctrinal position which the English Courts adopt is to deny any attempt to find any *subjective* intent on the part of Parliament, and to search instead, using the words of the statute (and such extrinsic material as it is permitted) to do so, for its *objective* intention.⁶⁵ But if that be the actual exercise, then it leaves the task at risk of being self-fulfilling: the intent of Parliament is what the Courts say the words of the legislation mean. The wider the sources to which the Courts might have regard, the more flexibility there might be in the Courts deciding what was Parliament's intention. For example, if a statute regulates conduct in a particular way, but the extrinsic material articulates the mischief which is to be targeted and the result sought to be achieved, the Courts would have flexibility in how to construe the regulation of the intervening conduct and to be more malleable with the statute's treatment of that subject matter.

So far, I have limited my consideration to judicial interpretation of ordinary statutes. Written constitutions, however, as statutes of a special kind, require separate attention. Questions of interpretation and the drafters' intention with respect to them, as long-enduring iconic documents, have been no less controversial than ordinary legislation.⁶⁶ There are differences of course between a written constitution and an ordinary statute. Although both are enactments of popular assemblies, the range and strength of approaches to their construction differs. Constitutions are special. Their terms are usually broad and general, dealing, as they must, with matters of high policy and governmental

⁶⁵ *Secretary of State for the Environment, Transport and the Regions; Ex parte Spath Holme Ltd* [2001] 2 AC 349 at 396.

⁶⁶ Z Bankowski & D N MacCormick 'Statutory Interpretation in the United Kingdom', ch 10 in MacCormick & Summers (eds) *Interpreting Statutes* (1991) 398-399.

arrangements. This calls, on one view, for some flexibility in their application to the varying conditions which society's development involves.⁶⁷

On one side of the debate are true originalists, who would interpret the Constitution according to what the framers intended, and having regard to the meaning of those things at the moment of Constitutional creation. There are also originalists who would give primacy to the framers' intention, but on the basis that the words used be given the meaning they would assume as society and legal thinking have evolved. Non-originalists, however, would give no primacy to intent and rely instead on the words as they stand to be interpreted at the time of decision and overlay, in doing so, what contemporary circumstances might be thought to justify.

In the United States in particular, these debates have assumed considerable prominence. Ought the words be applied only in circumstances which the framers contemplated? Might words and old Constitutional principles be applied to new circumstances? Or, as those who do not take any originalist view might suggest, might the Constitution change, even so that what it once prohibited it now permits and that which it once allowed it now prohibits?⁶⁸ And even if interpretation *were* to come down to an assessment of intention, could that intention be determined objectively, and from the Constitutional provisions themselves, rather than from a more subjective intention of either its framers or its makers?

⁶⁷ *McCulloch v Maryland* 17 US 159 (1819) at 200 per Marshall CJ (in construing the US Constitution courts should never forget that it is a Constitution that they are expounding); *Jumbunna Coalmine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J.

⁶⁸ A Scalia, 'The Role of a Constitutional Court in a Democratic Society' (1995) 2 *The Judicial Review* 141 at 142.

Although intent, whether it be in the context of a statute or a Constitution, might involve a fictitious element, it does serve to focus the Judge on an important task, that is, what use might be made of the past and how might the written document interact with the future. This is the purpose which Popkin saw for the pursuit of intention, and it is one with which I wholeheartedly agree:⁶⁹

The simple act of thinking about the meaning of statutory language in this broader context – which the judge must do – requires judgment about how the text should interact with its past and future. That is why, despite its being an obvious fiction, the judge when engaged in statutory interpretation is unable to do without the concept of legislative intent. Intent is matched with text as an essential aspect of statutory meaning, not because the judge has any confidence that legislative intent is knowable, but because 'intent' (or 'will') captures the idea that choices must be made in order to apply a text to facts. Legislative intent is a useful judicial construct because the judge is required to make the choices that best express the statutory text's meaning.

There is much to suggest that the search for intent masks an inquiry of a different kind. The search for meaning, in a case where the meaning of particular words is not clear or uncontested, is for the Judge. He or she might have a view about the particular result which the case in their mind justifies. Or he or she might, by reason of a jurisprudential disposition (eg originalism), favour one of the possible approaches mentioned above. In that case, the Judge finds the result by having a preferred approach to construction.

On any traditional approach, the latter is to be preferred to the former. In the former, the Judge is capricious, deciding each case on his or her prejudices and resistant to guidance from the range of established permissible methods of construction. Even though making a selection from the range of possible

⁶⁹ W D Popkin, *Statutes in Court - The History and Theory of Statutory Interpretation* (1999) 211.

approaches to interpretation itself entails a prejudice of sorts, it is one which, being at least one step removed from seeking a particular result in specific cases, is not without judicial integrity.

Mention here ought be made of two recent analyses on the topic of legislative intent: that of Neil Duxbury in his *Elements of Legislation* (2013) and of Richard Ekins in *The Nature of Legislative Intent* (2012). Both recognise that the idea of legislative intent plays a constraining role, and both defend it. Duxbury shows how judges may discover a previously unearthed dimension to the actual statutory language⁷⁰, which accords with the view I expressed above that legislative intent is in some cases a means by which judges have a greater say in what effect legislation has than might at first appear. Ekins however stops short of an analysis that touches in any direct way upon the point I would seek to make. His is an account of legislative intent as the exercise of the legislature's 'rational agency'⁷¹ more than the way in which Courts have interested themselves in it.

Dworkin, like Popkin perhaps, recognises the legitimacy of the *process* upon which the search for intent sends the inquirer:⁷²

[C]onstitutional interpretation must begin in what the framers said, and, just as our judgment about what friends and strangers say relies on specific information about them and the context in which they speak, so does our understanding of what the framers said. History is therefore plainly relevant. But only in a particular way. We turn to history to answer the question of what they intended to say, not the different question of what other intentions they had. We have no need to decide what they expected to happen, or hoped would happen, in consequence of their having said what they did, for example; their purpose, in that sense, is not part of our study. That is a crucial distinction.

⁷⁰ N Duxbury, *Elements of Legislation* (2013) 110, 117.

⁷¹ R Ekins, *The Nature of Legislative Intent* (2012) 243.

⁷² R Dworkin, *Freedom's Law* (1996) 10.

The reason for this brief detour about intent in its Constitutional context is to illustrate the possibility of that inquiry prompting, especially in that rather unique context, a task of a more general epistemic kind, and far more nuanced than a mere search for what the framers might, subjectively speaking, have meant.

In recent times, Courts at the highest appellate levels in the United Kingdom and Australia have tended to approach their task of statutory interpretation by giving close attention to statutory language. There are instances of these Courts, however, striving more assiduously than might be explained by the ordinary approaches, to seek to attach to the Common Law, the authority or kudos which attaches to Parliament and legislation. I offer below one such example, selected as a clear illustration of a recent attempt by the highest Court of the United Kingdom to search for and apply legislative authority to rules which at common law already enjoyed an authority of their own. The example I give occurred in the United Kingdom Supreme Court, but all the observations I make apply also to the Australian High Court (that country's highest Court) which adopted the same course.⁷³

Current trends

The Crown has occasion, from time to time, to take land from private holders of it for purposes which are considered to be public ones. There are early examples of it in the time of Charles II, who acquired land following the Great Fire of

⁷³ In *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259.

London for what we might now classify as fire safety and town planning purposes.

Often the acquisitions were provoked by the promotion by a private entrepreneur of a particular scheme. In order to implement the scheme, if land were needed to achieve it, statute would be required to effect takings. Before 1845, the relevant Act would not only confer the power to take land, but also prescribe a procedure by which to do so, including, in almost all cases, coming to suitable arrangements with the landowner to compensate him or her for its acquisition. Those procedures became the subject of the *Land Clauses Consolidation Act 1845* which ‘enacted a standard code which would apply except in so far as varied by a particular Act’.⁷⁴ That Act did not state the basis upon which compensation was to be assessed, instead making this general statement (in s 63):

... regard shall be had ... not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also the damage, if any, to be sustained by the owner of the land by reason of ...

Value, especially when it comes to land, can be assessed in many different ways, for example: according to the various assumptions to be made about the market at the relevant time; by having regard to the value (or cost) of improvements made to or upon it; and by making (or not making) allowance for (if any) the scheme for which the acquisition was effected, which scheme might increase or decrease the market value of the land.

⁷⁴ *West Midland Baptist Association v Birmingham Corporation* [1970] AC 874 at 892F-G per Lord Reid.

It has always been accepted that value in this context meant value to the owner, as Lord Reid explained in *West Midland Baptist Association v Birmingham Corporation*.⁷⁵

It has always been recognised that the value of the land means the value to the owner and does not mean its value to the promoters of its value in the open market. If the owner is in occupation the value of the land to him may far exceed its value in the open market. If he wishes to continue his activities he will not only have to obtain other premises but he will have to pay costs of removal and if he is carrying on business the move may cause loss of profits and other loss. He will not be fully compensated unless this is taken into account.

The consequence of this was that even where a statute was silent on the question of value (as was the case in *Melwood Units Pty Ltd v Commissioner of Main Roads*)⁷⁶ the Common Law would provide the answer because, it was said:

... it is a part of the common law deriving as a matter of principle from the nature of compensation for resumption or compulsory acquisition, that neither relevantly attributable appreciation nor depreciation in value is to be regarded in the assessment of land compensation.

Until very recently, Courts treated this issue as one of common law principle and upon which the Common Law insisted as a necessary accompaniment to the deprivation of a landowner of his or her private property for public purposes. The Court referred to it as ‘*principle*’, and to the basis for it being the need to give ‘*full*’ compensation to the landowner. Nowhere in the judgments is this principle expressed as one which may be abrogated, and there is no authoritative statement in any appellate English Court, until very recent years, which would seek to cast the rule in any other light.

⁷⁵ [1970] AC 874 at 893.

⁷⁶ [1979] AC 426.

It may be that the principle was, in reality, always vulnerable to express statutory abrogation, but it was never cast or explained in those terms and the way in which the Courts gave expression to it suggested, rightly or wrongly, that the rule was so fundamental as to be something which the legislature was both correct to leave alone and which it could never be so bold as to seek to abrogate or curtail.

The Supreme Court of the United Kingdom, has, however, recently revisited how it regards the relationship between these common law attitudes and statutory provisions which touch the same topic. In *Transport for London v Spireerose Limited*,⁷⁷ at issue was a principle which took its name from the case in which it was most prominently articulated: *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands*.⁷⁸

In *Pointe Gourde*, land in Trinidad had been compulsorily acquired so that it could be leased by the United States as a naval base. The land had on it, a limestone quarry. The owner claimed that its value should reflect the special need of the United States of the stone for the building of the naval base.

The claim to take account of the special value of the quarry was rejected because:⁷⁹

It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.

⁷⁷ [2009] 4 All ER 810.

⁷⁸ [1947] AC 565.

⁷⁹ [1947] AC 565 at 572.

By ‘*well settled*’, the Judicial Committee could only have meant by common law principle. Legislation never stated the requirement, and the reasoning may well have been a matter of common sense or ordinary fairness, but those things were given expression in judicial decisions and by that means took effect.

We can see, however, a distinct trend to re-characterise those common law principles as ones which have a primarily legislative life. Some examples from the reasons of Lords Walker and Lord Collins in *Spirerose* demonstrate the point. Lord Walker considered the *Pointe Gourde* principle to be in the nature of a rebuttable presumption ‘*adopted by the court in the interpretation of statutes concerned with compensation for the compulsory acquisition of land*’.⁸⁰ His Lordship went on to say that the principle is simply part of the notion of ‘*value*’ being ‘*value to the owner*’.

Lord Collins framed the question for determination to be the juridical basis for the *Pointe Gourde* principle.⁸¹ His Lordship traced the English decisions of high authority and concluded that the principle had been given express statutory expression. His Lordship referred to the decision of the House of Lords in *Waters v Welsh Development Agency*⁸² and said that, on one view there had been a significant extension of the principle. His Lordship made reference to the following passage from the speech of Lord Nicholls of Birkenhead:⁸³

The courts ... found themselves driven to conclude that the statutory code is not exhaustive and that the Pointe Gourde principle still applies. This

⁸⁰ [2009] UKHL 44; 4 All ER 810 at [11].

⁸¹ [2009] UKHL 44; 4 All ER 810 at [120].

⁸² [2004] UKHL 19; 2 All ER 915.

⁸³ [2009] UKHL 44; 4 All ER 810 at [54].

conclusion is open to the criticism that in many instances this makes the statutory provisions otiose. This is so, but this is less repugnant as an interpretation of the Act than the alternative.

The juridical basis of the *Pointe Gourde* principle was considered by Lord Collins to be in the terms Lord Nicholls expressed in *Waters v Welsh Development Agency*,⁸⁴ namely ‘no more than the name given to one aspect of the long established “value to the owner” principle’ and to be a principle of statutory interpretation, ‘mainly designed and used to explain and amplify the expression “value”’.⁸⁵ It had, his Lordship accepted, ‘sometimes’ been referred to as a common law principle.⁸⁶ His Lordship went on to say:⁸⁷

*In Rugby Joint Water Board v Shaw-Fox*⁸⁸ Lord Pearson reviewed the authorities and concluded that although the *Pointe Gourde* principle had been described as a ‘common law principle’, it could not be such a principle ‘because compulsory acquisition and compensation for it are entirely creations of statute’.⁸⁹ He went on: ‘The *Pointe Gourde* principle in my opinion involves an interpretation of the word “value” in those statutory provisions which require the compensation for compulsory acquisition to include the value of the lands taken’.⁹⁰ I am satisfied that this is the right approach and that there is nothing in Lord Nicholls’s speech in *Waters v Welsh Development Agency* which is inconsistent with this view.

What flows from the juridical basis for the principle being statute and not the Common Law and what significance arises from the Court’s apparent re-classification of it as such?

⁸⁴ [2004] UKHL 19; 2 All ER 915 at [42].

⁸⁵ [2009] UKHL 44; 4 All ER 810 at [128].

⁸⁶ in, for example, *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [2000] 2 AC 307 at 315 per Lord Hope of Craighead; *Waters v Welsh Development Agency* [2004] UKHL 19; 2 All ER 915 at [142] per Lord Brown of Eaton-under-Heywood.

⁸⁷ [2009] UKHL 44; 4 All ER 810 at [128]. The emphasis appears in the reported version of the case, but the emphasised word ‘is’ was not in the reasons as initially published.

⁸⁸ [1973] AC 202 at 213-215.

⁸⁹ [1973] AC 202 at 214.

⁹⁰ [1973] AC 202 at 214-215.

An analysis of the kind I have just attempted is often justified by the Courts on the basis that close attention is being given to statutory language. It is an odd appeal to make. It assumes an attentiveness and precision in Parliamentary text-making which is unrealistic. It is one thing to seek to give effect to legislation based upon an intention which can be imputed to the legislature. It is quite another, however, to impute to Parliament (or at least its elected members as distinct from the draftspeople it retains) as close a consideration of statutory text as judges might be likely to give to it. It also assumes also that recourse to text is a valid inquiry by which to resolve the particular issue, when all that such an inquiry might be capable of offering is the comfort of *a* (and not necessarily *the best*) pre-determined solution to the issue. There are many good reasons why a Judge might use legislation in this manner, and the argument runs like this: Parliament expresses itself through text; Courts decide the meaning of text; in deciding what the text means, the Court is only ascertaining what the elected representatives said or meant to say; so the Court's decision is not only the exercise of the Court's heuristic function, it is the expression of Parliamentary (and therefore democratic) will.

On the one hand, then, we see the Courts giving common law reasoning some statutory character and attracting for it some of the legitimating force of democratic will. But by doing so, the rules become ones which the legislature might curtail or even abrogate. And by deferring in such a way to the legislature, some of the Common Law's autonomy and strength dissipates.

The Courts have been opportunistic (but perhaps short-sighted) in taking this approach and must have made a careful judgment about the opposing merits of these two aspects of their approach. On the one hand, greater legitimacy might be thought to attach to common law processes, but on the other, it tends rather to suggest that the Common Law requires the imprimatur of statute to acquire full force. The first consideration is of great benefit. The Common Law, by this device, now draws its strength as the product of traditional reasoning by independent persons (Judges) *in addition to* a statutory-style legitimacy. When in the future the Courts further develop the notion of ‘*value*’, the accretion will be to a body of principle which cannot be impugned owing to its statutory basis (as distinct from innovations of unelected judges). For Courts to take this approach sacrifices very little: already Parliament may affect fundamental common law rights by clear language or manifest intention. The device I have identified does little more than make that position a little firmer. At the same time, however, it does suggest a lack of self-confidence in judicial decisions, reasoning and the system of precedent.

The attitude which I have identified above as being manifested in the Court’s attitude to common law and ‘ordinary’ legislation stands in contrast with the higher Courts’ approach to Constitutional interpretation. Courts have tended, in recent times, to strive to give effect to statutory language. But, as I have said, they have been far more willing to find implied in written Constitutions, implications of very fundamental kinds.⁹¹ And it is not entirely clear that there is any valid point of distinction between the two forms of enactment such as would

⁹¹ A brief survey of these is set out earlier in this Chapter.

satisfactorily explain their different treatment. Constitutions, as I indicated above, are clearly special. The manner of their interpretation, however, and whether the Courts ought to have flexibility in applying their terms to the varying conditions which society's development involves, is a different matter altogether. Whether the reasons be the more general nature of written Constitutions, their (ordinarily) long-standing status and infrequent alteration, or the entrenchment which they enjoy, it is hard to see, in recent history at least, any of these being well-established or uncontentious bases for treating Constitutions as susceptible to implications by the Courts, and at the same time Courts being strictly obedient to the express words of ordinary statutes.

So far I have treated Constitutions as if they are of two entirely separate kinds: customary (unwritten) and enacted (written). To have done so proceeds along traditional, but perhaps overly simplistic, lines. The United Kingdom's Constitution, although on no view encapsulated within any one iconic document, does gain expression in various historic and contemporary instruments. We know of the influence of Magna Carta and of the Bill of Rights. But often left out of account are those instruments which serve, albeit in a piecemeal and fragmentary way, very much the same purposes as Constitutional requirements. For present purposes, we might focus upon the Treaty of Union (1707) and the Scottish devolution arrangements more recently established. Both, I suggest, are constitutional in character and their existence and effect challenges the notion of both Diceyan Parliamentary sovereignty and of a clear dichotomy between written and unwritten constitutions.

MacCormick v Lord Advocate,⁹² a case decided by the Scottish Inner House, offers an insight into the different views within the United Kingdom itself as to what might be regarded as Constitutional sources and their effect.

MacCormick's case concerned a challenge by Scottish petitioners to the style of the reigning Monarch '*Elizabeth II of the United Kingdom of Great Britain*' (being the first Elizabeth to reign in Scotland). The objection was based upon the effect of the Treaty of Union and legislation enacted as a consequence of it. The challenge failed, but the case has significance nonetheless for the use which the Courts might make of these constitutional fragments.

The Lord President said:⁹³

The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his Law of the Constitution. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions.

⁹² 1953 SC 396.

⁹³ 1953 SC 396 at 411.

The Lord President considered it an impediment to the Petitioners' succeeding that any Court in the United Kingdom had jurisdiction to determine whether a governmental act of the kind challenged conformed to the provisions of a treaty. But the interest of the decision for present purposes is the Lord President's (obiter) rejection of Dicey's (and others') '*popularised*' view of parliamentary sovereignty in Scotland: that the principle of the unlimited sovereignty of Parliament was a distinctively English principle, having no counterpart in the constitutional law of Scotland; and that the united Parliament established by the Treaty of Union did not have unlimited sovereignty in the alteration of provisions of it.

If this be so, then Westminster is not unlimited in the enactments it might make. There exists a Constitutional-style restriction in, at the very least, the Treaty of Union. Such limitations, however, on the authority of *MacCormick*, are not policed through the Courts via judicial review. This leaves the possibility, then, of limits which are more political than legal in character. The Lord President was alive to this issue, observing, as he did: '*...it is of little avail to ask whether the Parliament of Great Britain "can" do this thing or that, without going on to inquire who can stop them if they do.*' The Lord President thought there to be only two answers:

- 1) that Parliament would not normally act beyond such limits (ie that it would be 'rash' as Dicey said,⁹⁴ for the Imperial Parliament to abolish the '*Scotch law Courts*', and assimilate the law of Scotland to that of England); and,

⁹⁴ Dicey (n 1) 33.

- 2) there may be room for the invocation of an ‘advisory opinion’ from the International Court of Justice.

The first of these is not, in the true sense, a limit. No force external to Parliament (except, perhaps, the electorate) would prevent Parliament from acting in that manner. The second has little more force. It too depends upon Parliament itself respecting, and agreeing to recognise, despite their often contentious character, such limits, and limits articulated by a body likely to have a very different approach to questions of English and Scottish Constitutional law and their intersection and which, to date, has no experience of them.

MacCormick’s case shows, nonetheless, the different themes which lie beneath the surface of too simplistic or absolutist a notion of Parliamentary supremacy.

Common law as a rival to legislation?

The last of the means by which I seek to advance my argument that limits exist in the Court’s function of giving effect to legislation is the relationship which common law and legislation have and how that relationship is regarded and takes form.

Some have noted that legislation has a rival in the Common Law and characterise the relationship as being as one of ‘*oil and water*’, in which the two flow next to each other, but in separate streams.⁹⁵ A rivalrous relationship is one which must produce limitations in the points at which the two sources of law compete for primacy: one operating as a foil for the other. Dicey cast that interaction as boosting rather than diminishing the influence of legislation, by

⁹⁵ See, for example, J Beatson, ‘Has the Common Law Future?’ (1997) 56 CLJ 291 at 300.

characterising common law legislation (ie law making by judges) as being derived from legislation: ‘... *subordinate legislation, carried on with the assent and subject to the supervision of Parliament*’.⁹⁶

We know that ‘judicial legislation’ exists, but views differ on the extent to which judges should, and to which they actually do, change the law. But this aspect of their functions, be it actively or conservatively exercised (a debate which for present purposes I need not resolve), requires no assent from Parliament. It is, as I have shown in Chapter 1, a function which was being exercised long before Parliament assumed a form which approximates its modern existence. Even without an ability to review legislation, or perhaps because of that, English Courts *did* employ approaches to construction which tended to bring legislation in its practical application closer to basic common law principle. Courtenay Ilbert noted this tendency, over one hundred years ago:⁹⁷

There has been a tendency on the part of judges to place a narrow construction on enactments which appeared to them to conflict with what they have regarded as fundamental principles of common law, to round off their angles, to adapt them to their environment by means of ingenious and sometimes far-fetched glosses, and the process has occasionally been carried to such an unwarrantable extent as to justify the expression of driving a coach and four through Acts of Parliament.

Whether judicial legislation is subject to Parliament’s supervision is a different matter. We know that Parliament may expressly abrogate a judicial decision, and that, no matter how recent is a judicial decision or a line of them, and no matter how senior be the Court or judges, Parliament is free to change judge-made law. All this looks very much like supervision, and a supervision very

⁹⁶ Dicey (n 1) 18.

⁹⁷ C Ilbert, *Legislative Methods and Forms* (1901) 6-7.

much more powerful than that possessed by the Stuart kings – absolute as they claimed to be. Whereas the Common Law had capacity in the 17th century to limit and influence the legislative functions of the then supreme legislator (the King) illustrated by, for example, the *Case of Proclamations*, that the Common Law might so operate today is unthinkable.

I take no objection to the Courts employing legislative intent in the way they do: it is a useful way of maintaining an activity which, on current Constitutional theory, is otherwise impossible. The task is an absolutely necessary one. Courts have been doing it for a very long time. My principal point, however, is that under cover of a notion which would deny the exercise of any great discretion in the interpretation of legislation lies, nevertheless, just that reality and, with it, some very real (albeit bounded) limits on legislation.

V Legislative self-restraint?

Legislation, recognising some of its limitations, has established some few measures of its own to guard against the response to every problem being a statutory one. I mention this additional doctrinal attempt at restraint because it demonstrates not only a perceived need for limits on legislation, but also an approach to that problem which miscarries, because it involves legislation limiting itself. It is a mark of just how much confidence is placed in legislation that even the task of limitation is one of which legislation is itself thought to be capable. Moreover, how Parliaments perceive the problems which legislation might bring about, and the preventative measures it offers for avoiding or

minimising them, offer insights of an insider's kind into how far legislation admits of its own shortcomings and what those shortcomings might be.

Ex-ante evaluation, or regulatory impact assessment, is something which many Anglo-American legal systems require be undertaken before legislation is enacted. It is widely accepted as being desirable, including by the Organisation for Economic Co-operation and Development (OECD), which promotes such assessments as '*an important tool to encourage the consideration of alternatives early in the policy chain*'.⁹⁸ Some jurisdictions have made the carrying out of a regulatory impact assessment a statutory requirement.⁹⁹

In its UK context, regulatory impact assessment is '*... a tool to help policy makers understand the consequences of possible Government regulation*'.¹⁰⁰ The detached observer might rightly ask '*has your government really been enacting legislation without understanding the possible consequences of it?*'. The desire that such an assessment be made seems to be linked with, at least, an implicit concern that that has in fact been occurring, and that the desire to regulate by legislation often overshadows factors which might weigh against doing so.

The 2001 report of the UK Comptroller and Auditor-General 'Better Regulation' recorded:¹⁰¹

⁹⁸ R Van Gestel & M-C Menting, 'Ex Ante Evaluation and Alternatives to Legislation: Going Dutch' (2011) 32 Stat L R 209.

⁹⁹ S Argument, (2011) 32 Stat L R 116. The Australian scheme at the national level is non-statutory.

¹⁰⁰ National Audit Office, *Evaluation of Regulatory Impact Assessments 2006-07* (HC 606, 11 July 2007), Report by the Comptroller and Auditor General, at 4 para 1 (executive summary), available at http://www.nao.org.uk/publications/0607/regulatory_impact_assessments.aspx.

¹⁰¹ National Audit Office, Report by the Comptroller and Auditor General, *Better Regulation: Making Good Use of Regulatory Impact Assessments* (HC 329, 15 November 2001), Report by the Comptroller and Auditor General, at 1 para 3 (executive summary),

It is Government policy that regulation, where it is needed, should have a light touch with the right balance struck between under-regulating (so failing to protect the public) and over-regulating (so creating excessive bureaucracy). To this end, policy makers in departments and agencies are required to undertake a regulatory impact assessment (RIA) before taking action which has a regulatory impact on business.

The inquiry is put in terms of the need to strike a balance between regulation and ‘failing to protect the public’. Stating the problem in this way does little to solve it. It prompts me to recall Hayek’s criticism that the legislature cannot [ie is unwilling to] refuse responsibility for anything and that there is no particular grievance that it is not regarded as capable of removing.¹⁰² Nowhere is there an attempt to articulate or frame principles by which the balance can be assessed. Moreover, the assessment is undertaken by those who will, by necessity, have a less than fulsome understanding of the likely burdens of the proposed regulation and their significance because the assessors are people removed from those activities by reason of being within the professional public service. And even when the assessment *is* undertaken, and even when it *does* accurately state the likely ramifications for those who will be subject to it, the tendency will always be for the regulator to decide that the ‘*balance*’ (uninformed by any stated principles) is in favour of regulation, the burdens being outweighed by the need to ‘*protect the public*’. If the choice is to be cast as being between regulating and failing to protect the public (a false dichotomy) it is no wonder that legislation and regulation have proliferated.

available at

http://www.nao.org.uk/publications/0102/better_regulation_making_good.aspx.

¹⁰² F A Hayek, *Law, Legislation and Liberty* (1982) vol 1 143.

It is perhaps not surprising then that *ex-ante* evaluation has been unsuccessful in preventing legislation from being enacted which adopts a heavy touch. The legislators themselves are the assessors and it is they who weigh up the options of not legislating. They have demonstrated a firm propensity to regulate. There has been an obvious and massive expansion in the volume and scope of legislation. *Ex ante* evaluation has not resulted in the development of principled guidance about the weighing it seeks to achieve, and thereby to define limits on the legislative function.

Regulatory impact assessments are one way of requiring legislation-makers to turn their minds to consequences and to change their focus from the abstract to the practical effects of the rules they propose to make. It is something which, whether so formalised or not, they ought to have been doing in any event. But it has proved impotent on that front also: it has not altered the way regulators think about legislation according to the UK National Audit Office.¹⁰³ For there to have been a need to re-assert the desirability of such an assessment illustrates how regulators – Parliament and bureaucrats alike – have lost the means for restraint on their activities, means which have always existed but been demoted or expunged.

This concludes my survey of the doctrinal limits on legislation. I have tried to show the extent and nature of the doctrinal limits on the making of, and giving effect to, legislation. In some cases, those limits do offer some real limiting effect, but some others of them are either weak or ineffective.

¹⁰³ The UK National Audit Office (n 100) 4, para 2, said, in 2007, that:
Last year we concluded that the standard was disappointing and RIAs had not yet altered the way that Government thinks about regulation

Chapter 3

Limitations: Practical and Institutional

I Introduction

In Chapter 1, I urged the disentanglement from the prestige that history would justify being attached to popular assemblies and how we might properly regard legislation. In the Chapter 2, I sought to illustrate the relatively few restraints and limits that doctrine recognises in Anglo-American systems, and to show how those approaches which urge the frequent, ambitious, energetic and unbounded deployment of legislation have prevailed.

I confront in this Chapter the principal modern proponent of such an approach. Jeremy Waldron advocates for the wider recognition of legislation's dignity as a justification for its energetic deployment. That argument is one heavily premised upon the deliberative qualities of popular assemblies; that the multitude in this configuration is more likely to reach the right result. His is an argument that is built upon the deliberative characteristics that legislatures possess. I would seek to meet that claim, but not by seeking positively to disprove it. My claim is that the approach which Waldron represents is one that is partial only in its treatment of the problems with popular assemblies legislating in a relatively unrestrained way. This poses a great difficulty, because it is for those who advocate an omnicompetent role for legislation and its energetic

deployment to meet each of the major problems that confront such an argument. The even greater difficulty – and the loss I identify as the principal claim of this project – is that when popular assemblies act upon this approach, they do so upon a foundation which is intellectually incomplete. That loss, it follows, is of a normative kind.

In this Chapter, after considering the Waldron view, I turn my focus to the limitations which legislatures and legislation possess. They fall into two (related) categories: those which are practical in nature and those which might be attributed to the very nature or structure of the institution of the representative assembly as it has evolved to its present form.

I conclude by suggesting that Waldron's argument gives incomplete treatment only to the problems which accompany the multitude having the relatively unbounded legislative capacity for which he argues.

II Popular assemblies: wise, dignified and more likely to get it right?

Waldron's *Dignity of Legislation* is an exercise in seeking to restore legislation's good name. His work identifies an underlying Anglo-American preference for judicial decisions over legislation. He then advances a defence of legislation and the technique of popular assemblies.

Waldron's thesis is of interest here for several reasons. *First*, his is the primary modern defence of legislation and legislatures. *Secondly*, the fact that such a defence was considered necessary says something, I suggest, about

present perceptions of the comparative strengths of the Common Law and legislation in Anglo-American systems. *Thirdly*, Waldron's thesis in my view overlooks or assumes away the kinds of practical and institutional limitations that legislatures possess which I discuss later in this Chapter. This brings into question whether popular assemblies can properly claim to be uncontaminated conduits for the expression of public will and to be forums in which the multitude's numerous views and desires can be debated, made known, and reduced to sensible commands in the form of legislation.

Waldron's central thesis

Waldron advocates the confident use of Parliamentary power. His arguments, if accepted, would justify clear preference being afforded to legislative over common law activity.

But first to Waldron's self-declared purpose. He seeks to restore legislation's '*good name*' in political theory by emphasising the positive features of democracy and representative assemblies.¹ His impetus for doing so is that legislation and legislatures have a '*bad name*' and one which stands in sharp contrast to the position of judicial decision making:² a disreputable picture of legislating versus an idealised picture of judging.³

Waldron attempts to '*recover and highlight ways of thinking about legislation that present it as a dignified mode of governance and as a reputable source of law*'. It is upon the democratic quality of popular assemblies that

¹ J Waldron, *The Dignity of Legislation* (1999) i.

² Waldron (n 1) 1.

³ Waldron (n 1) 2

Waldron focuses, but in a way that openly acknowledges and respects (rather than conceals, he says) differences of opinion among the people.⁴

Waldron begins by identifying prominent historical figures who, although advocating legislation to effect change, conveyed some distaste for a capitalist state continually engaged in doing so: Seeley; Maine; Bagehot and Blackstone are his main examples. Waldron sees the same attitude in present times, given expression in views such as that of Guido Calabresi's that we are '*choking on statutes*',⁵ and Langdell's suggestion (to which I referred in the Introduction) that legislation is not law.⁶ He supplements these with his own characterisations of the way in which those figures must have viewed legislation:⁷

While the Common Law has been evolving for centuries, 'working itself pure' in Lord Mansfield's phrase – so that each precedent or each doctrine, however much we dislike it in itself, has something in its lineage that elicits our respect – a statute thrusts itself before us as a low-bred parvenu, all surface and no depth, all power and no heritage, as arbitrary in its provenance as the temporary coalescence of a parliamentary or congressional majority. I suspect that it is on account of this pedigree – or lack of pedigree – that statutes are considered unworthy by jurists like Langdell of the appellation 'law' with all that that implies.

Heritage, Waldron emphasises, is particularly important in comparing the legislative and common law methods. On the one hand, there is common law's respect for lineage, and on the other there is legislation's '*brazen*' approach to change.⁸ Surprising then, is Waldron's revelation that legislation is not at the centre of the positivist tradition in jurisprudence, but is instead a '*contingent and*

⁴ Waldron (n 1) 2.

⁵ Waldron (n 1) 9.

⁶ Waldron (n 1) 10.

⁷ Waldron (n 1) 10-11 (footnotes omitted).

⁸ Waldron (n 1) 12, 26.

philosophical peripheral aspect of law'⁹ and that a greater sense of comfort exists with judicial law-making.

It is here that Waldron uncovers a theme of particular relevance to my wider exercise, namely:¹⁰

... embarrassment about legislation as an instance of a more general nervousness about the role of deliberate intellectualization in politics.

Is there, then, a source of knowledge which deliberate intellectualisation cannot access, about which we are intuitively and correctly sceptical, and on which positivism (legal or not) is lost? Waldron paraphrases the English philosopher Oakeshott when he says:¹¹

We have lost faith ... in the emergence and evolution of social frameworks. We see the business of law as technical problem-solving in society, and we are reluctant to regard anything as a solution, or as standing in place of a solution, which we have not deliberately set up as such.

Waldron associates Oakeshott with Hayek, the latter being '*the other main theoretical critic of rationalism and the prominence of legislation in modern government*'.¹² Hayek's criticism is more explicit than Oakeshott's. Hayek advocated government by general laws and that their change be gradual and spontaneous, not planned and orchestrated by a legislator.¹³ His main concern however, was to see that society was free from management by social legislation,

⁹ Waldron (n 1) 16.

¹⁰ Waldron (n 1) 17.

¹¹ Waldron (n 1) 17.

¹² Waldron (n 1) 21.

¹³ F A Hayek, *Law, Legislation and Liberty* (1982).

thereby affecting liberty, and, as he said, constitutionalism and the rule of law.¹⁴ Hayek's approach necessarily challenges Bentham's. Hayek considered Benthamites to be labouring under one major and fundamental error: that it is possible at any one time to know all the facts necessary deliberately to change the way society operates. This he referred to as the 'synoptic delusion'.

Waldron shows, however, that Oakeshott and Hayek are at one with legal positivists who also distance themselves from jurisprudence centred on deliberate and self-conscious law making and are fixated on the courts and judicial reasoning – on organic and spontaneous systems. The concern of Oakeshott and Hayek, Waldron points out, is a political but not a philosophical problem. Waldron suggests the problem is not so much one of constructivism (to which Hayek is directly opposed) but the susceptibility of legislation to politics versus the apparent neutrality of the Common Law: law-making bodies which deny they make law convey their own impression of being more neutral and less the product of dateable individual decisions than a system which maintains a public face (at least) of restraint in law making.¹⁵

Whether the Common Law is truly so neutral is of course contestable, but legislation does not even make the pretence. In the end, Waldron seeks to bolster the claim that can be made on behalf of legislation by reason of it being the product of a popular assembly and therefore a respectable source of law,¹⁶ and

¹⁴ Waldron (n 1) 23.

¹⁵ Waldron (n 1) 25.

¹⁶ Waldron (n 1) 160-162.

the need for legislation and deference to majoritarianism as a decision procedure.¹⁷

These claims are associated with Waldron's view of the sources of legislation's authority. He argues that it is derived from practical reasoning performed under particular conditions: that bigger groups are more likely to arrive at the best result. This view is based upon his '*doctrine of wisdom of the multitude*', meaning, in effect, that people, acting as a body, are capable of making better decisions by pooling their knowledge, experience and insight than any individual member of the body, however excellent, is capable of making on his or her own.

Waldron's general themes can be seen in other of his works. One example is his Chapter 16 of the *Blackwell Guide to the Philosophy of Law and Legal Theory*. There, he characterises legislatures as dedicated explicitly to law-making and contrasts that to courts which are not set up in a way calculated to make law-making legitimate. The claim of legislatures to the legitimacy of the new law they make is on democratic grounds, a democracy in which there is free and public debate in the elected assembly resulting in a dignity which comes from the support for that final decision from a majority in that assembly. His *Law and Disagreement* (1999) immediately preceded Waldron's *Dignity of Legislation*, but it too pursued his central agenda of presenting legislation as a dignified mode of governance and a respectable source of law. *Law and Disagreement* focuses less than does his *Dignity of Legislation* on particular theorists and proceeds more by way of argument and reflection.

¹⁷ Waldron (n 1) 163.

Points of contention

There are two main aspects to Waldron's defence of legislation with which I take issue here:

- 1) the first is that Waldron considered it necessary to advocate the recognition or restoration of legislation's dignity and the democratic attributes of popular assemblies. In doing so, he acknowledges a general view which favours judge-made law over legislation. Legislation has had a long time to prove itself. It has become the dominant mode of law-making. It is difficult to say that those who take a different view of legislation from Waldron are unaware of the attributes of legislation. They are aware no doubt also of its drawbacks. The very need, therefore, for Waldron's project, shows in part his object to be a futile one;
- 2) the second aspect is how Waldron comes to terms with the kinds of practical limitations which attend popular assemblies that I discuss below. Despite advancing a view that the multitude is more likely than smaller groups to arrive at '*correct answers*'¹⁸ (drawing on Condorcet), Waldron never grapples with how it can be said that popular assemblies can truly be said to be a forum in which the range of views which comprise the multitude can be aired, as distinct from sectional and vested interests, or the positions of highly disciplined political parties. This constitutes a gap in his argument, and one which necessarily assumes that assemblies are places in which the

¹⁸ Waldron (n 1) 32.

multitude comes together, not highly structured and managed, but through free and fierce debate. Before Waldron can succeed in his attempt to recover and highlight ways of thinking about legislation which present it as being dignified, he must first show how, despite the realities of modern legislatures, the assumptions he makes hold good.

III Practical Limitations

My starting point is to focus, for the moment, upon practical matters, to put aside so far as possible considerations of history and theory, and to identify the limits to which legislation is subject at the level of its making and actual operation. The factors relevant to this are particular aspects of how legislation is made, some characteristics of its author (the various Parliaments and other popular assemblies), the response of society to legislation and some impediments to Parliament ascertaining and giving effect to public will.

My discussion of this topic takes place in this isolated way (that is, without a substantial historical or philosophical overlay) so as to take legislation and popular assemblies in the form in which they currently present themselves. Many of the points I cover are, however, closely entwined with normative considerations. For example, views about what is and is not practical, necessarily hinge upon what purpose or object is sought to be achieved. Moreover, history explains and informs Parliament's modern manner of giving effect to public will.

The topics I have selected for consideration are those which most prominently present themselves as part of the modern experience of legislation:

- 1) the volume and complexity of legislation;
- 2) the extent to which elected officials draft legislation and truly scrutinise its terms and consider its likely effect before enactment;
- 3) the role and influence of the non-political Executive in the drafting of legislation and setting the legislative agenda;
- 4) the extent to which Parliament is a forum in which free public deliberation takes place, including by reason of the discipline and influence which political parties exert and the susceptibility of public opinion to manipulation and misrepresentation.

Legislation galore

There is, in every Anglo-American jurisdiction, very much legislation, and legislation which has not limited itself to general commands, but descended to the most prescriptive of detail. Elaborate regimes exist, for example, in the field of income tax, for the obtaining of mining tenements, for environmental approvals before major development can commence, and for electricity generation and water supply and the pricing of them. Increasingly, legislation engages criminal sanctions in order to encourage compliance with it. One recent estimate is that in the decade 1997 to 2007, more than 3,000 new criminal or

regulatory offences were added to the United Kingdom's statute book.¹⁹ And the quality of the supporting legislation can be poor. The provisions of the *Criminal Justice Act 2003* (UK) were described by Lord Justice Rose as '*labyrinthine*' and '*astonishingly complex*'.²⁰

A comparison between the legislation of today's assemblies and those of the early 20th century reveals a marked difference in style, in the level of detail to which legislation is willing to descend, and in the extent to which it seems willing to impose on those who will be subject to it, a regime which legislation has devised, rather than by taking the world more or less as it finds it. This is of course a generalisation, but it is one which finds support, for example, in Parliament's detailed competition law, in its imposition of town planning requirements, and its regimes for the licensing and regulation of so many occupations, from lawyers and doctors to scrap metal dealers²¹ and driving instructors.²²

One prominent feature of modern legislation, and not just in these limited fields, is the growth in its volume and complexity. That growth has been exponential since Victorian times in particular. Regularly we see statistics said to evidence how fast legislation is formulated, the widening topics with which it

¹⁹ Lord Sumption, *The Limits of Law*, 27th Sultan Azlan Shah Lecture, 20 November 2013 available at <http://www.supremecourt.gov.uk/docs/speech-131120.pdf>.

²⁰ *R v Lang* [2006] 1 WLR 2509 at [16] and [153]. Other like observations, about the same Act, were made also by Rose LJ in *R (Crown Prosecution Service) v South East Surrey Youth Court* [2006] 1 WLR 2543 at [14].

²¹ Scrap Metal Dealers Act 2013 (UK).

²² Road Traffic Act 1988 (UK); Driving Instruction (Suspension and Exemption Powers) Act 2009 (UK).

is prepared to deal, and, within various legislative topics, how large and detailed particular enactments have become.²³

The legislature would seem now to regard no topic as too small or too ambitious for its attention: ‘*there shall be an anti-slavery day*’, commands the UK legislature,²⁴ and despite its purpose being obvious, the legislature goes on, lest there be any doubt, to tell us that it is to acknowledge that millions of men, women and children continue to be victims of slavery, depriving them of basic human dignity and freedom.²⁵ The day is not a public holiday and there is no apparent need for coercive power in requiring a day to be so described. The legislature, nevertheless, considers it worthy of an Act and worthwhile to have mobilised the legislative machine to do nothing more than identify a day as one to acknowledge this state of affairs.

Legislation is often engaged to articulate aspirational (and often ill-defined) social objectives. Take as an example the ‘fuel poverty’ provisions of the *Energy Act 2010* (UK). The Act seeks to reduce it, but it nowhere tells the reader what fuel poverty is. Having aspired to that aim, the legislation authorises the closer regulation of the energy sector including requiring the giving of certain financial benefits in a particular way.²⁶ The scheme is a wealth-redistribution

²³ One recent study is that undertaken by the Social and General Statistics Section of the House of Commons Library. It shows that the number of Acts passed since 1950 has decreased, but there to have been a steady increase in the number of Statutory Instruments: Acts and Statutory Instruments: the volume of UK legislation 1950 to 2012, House of Commons Library, Standard Note SN/SG/2911 (2012) available at www.parliament.uk/briefing-papers/SN02911.pdf. Another example is the Sixth Sir David Williams Lecture delivered by Lord Bingham of Cornhill: see T H Bingham, ‘The Rule of Law’ (2007) 66 CLJ 67 at 70.

²⁴ Anti Slavery Day Act 2010 (UK).

²⁵ Anti Slavery Day Act 2010 (UK) s 1(2)(a).

²⁶ Anti Slavery Day Act 2010 (UK) s 9(7).

mechanism: whether the support schemes are funded by the state or by the industry, they necessarily entail making adjustments which favour those living in the (perhaps ambiguous) state of fuel poverty to the detriment of those perceived not to suffer from that condition.

The Sustainable Communities Act 2007 (UK) commands the Secretary of State to invite local authorities to make proposals which they consider would contribute to promoting the sustainability of local communities.²⁷ The Secretary is commanded also to make regulations about the *procedure* to be followed in him or her doing so.²⁸ All this might have been achieved, were the Secretary and local authorities to see merit in doing so, through the Secretary merely making such a request and the local authority responding (or not responding) to it. Even an exchange of this kind is treated as worthy of Parliamentary attention.

I am not seeking to challenge these laws on any individual basis by saying there did not exist reason or justification to pass them. But these examples – all very recent ones and selected with ease more or less at random – might leave the citizen wondering whether there exists a relevance threshold before which Parliament's attention might justifiably be engaged, or some (any) weighing of competing priorities in deciding what new laws Parliament ought to make.

I suggest here that no such analysis in any structured sense takes place, and that there exists no juridical or other means by which Parliament might know when it ought *decline* to legislate. Instead, the legislative agenda is decided in large part not by the electorate but by political parties, by the non-political

²⁷ Anti Slavery Day Act 2010 (UK) s 2(1).

²⁸ Sustainable Communities Act 2007 (UK) s 5.

Executive and by what has become a mantra of ‘public will’, but which, by the time it comes to be expressed in Parliament, is open to have been so manipulated and aggregated that it is unsafe in truth to think of it as such. Yet the incantation of public will, even in that mutilated form, seems to excuse a whole range of prescriptive, oppressive, mundane and intrusive legislation.

Having briefly introduced some of the bases for the practical and institutional limits of Parliament, I consider now a practical modern example (by no means isolated) of some of these problems. This provides the discipline of maintaining a practical focus, and is also a way of understanding, in a very concrete manner, the kinds of problems which legislative proliferation throws up.

Case study: external scrutiny of government bodies in Scotland

The Crerar *Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland*²⁹ found Scotland’s integrity laws for external scrutiny of government action to be unduly complex, the arrangement of them to have lacked rigorous assessment and that, when new measures had been introduced, for there to have been no real prioritisation against existing requirements and any assessment of how those new measures should fit into an already cluttered landscape.³⁰

The Crerar Review’s conclusions, although expressed in the context of a particular subject matter which legislation, along with other governmental action, had brought about, could be applied equally to a range of legislated subject

²⁹ L D Crerar, ‘Report of the Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland’ (2007) (‘**Crerar Review**’).

³⁰ Crerar Review (n 29) III (Foreword).

matter. This Review exposed many of the practical problems which legislative proliferation tends to present. The report is a considered analysis of the practical effects which the volume and complexity of legislation might have. It focuses, for my purposes, on a relevant target, because external scrutiny arrangements are almost entirely a product of statute or subordinate legislation.

The Crerar Review found legislative external scrutiny arrangements to have evolved to suit government intentions at particular points in time. Those arrangements had become complex³¹ and costly.³² Eleven completely new bodies had been created between 1999 and 2007 (when the review was completed).³³ The result was found to be a disproportionate approach to scrutiny that was considered to be unsustainable.³⁴ The regime, as it had grown up, placed a disproportionate burden on bodies subject to it, and it distracted resources from front-line delivery and outweighed the benefits of it.³⁵ There was duplication³⁶ and what was referred to as a ‘*crowded scrutiny landscape*’, resulting in very many bodies serving a scrutiny role over local authorities.³⁷ One local authority listed 15 organisations as regulating or inspecting the services it provided.³⁸

The Crerar Report observed also that this crowded regulatory landscape constrained joint working between agencies because of its prescriptive nature

³¹ Crerar Review (n 29) 55.

³² Crerar Review (n 29) 55, 56.

³³ Crerar Review (n 29) 38.

³⁴ Crerar Review (n 29) 39.

³⁵ Crerar Review (n 29) 40.

³⁶ Crerar Review (n 29) 40.

³⁷ Crerar Review (n 29) 41.

³⁸ Crerar Review (n 29) 41.

about what functions were permissible,³⁹ that the cost of the proliferation of agencies and their activities could not be estimated with precision⁴⁰ and that the benefits of external scrutiny were difficult to assess, but with service providers expressing the view that the added value of external scrutiny did not justify the cost of compliance.⁴¹ Of concern also was that, while there existed a risk of corrupt or improper behaviour on the part of public officials, and there was a need for external scrutiny, there had not been consistent consideration whether the scale of the regime which had grown up was proportionate to the risk with which it was established to deal.⁴²

I would say finally, lest the case study I have chosen be regarded as an isolated example of problems having resulted from legislative proliferation, that almost identical problems were experienced recently in Australia.⁴³ Indeed, the same sentiments as informed the Crerar review inform the objectives of red tape (and green tape) reduction which is a contemporary pursuit of many governments around the world.⁴⁴

³⁹ Crerar Review (n 29) 46.

⁴⁰ Crerar Review (n 29) 47.

⁴¹ Crerar Review (n 29) 48.

⁴² Crerar Review (n 29) 51.

⁴³ I D F Callinan & N Aroney, *Review of the Crime and Misconduct Act and Related Matters* (2013), available at <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2013/5413T2447.pdf>.

⁴⁴ Including, at the time of writing: the Government of Canada (<http://actionplan.gc.ca/en/initiative/reducing-red-tape> accessed 2 November 2013); Queensland (an Australian State) (see <http://www.treasury.qld.gov.au/office/services/regulatory-reform/reducing-the-regulatory-burden.shtml> accessed 2 November 2013) which plans to reduce red tape by 20 per cent by 2018; UK (Red Tape Reduction Challenge (<http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/> accessed 2 November 2013).

Cognoscibility?

We need not have recourse to statistics to know that there is an enormous volume of legislation, and such a volume that even the most knowledgeable and experienced practitioner could not be expected to know in detail more than a handful of enactments in the field of his or her practice. The knowledge of practitioners, however, need not be a primary concern. They are accustomed (and usually paid) to undertake research of this kind. Specialists inevitably emerge whose focus is a particular field and who can reasonably be expected to know or have the means to find out, the rules which bear upon their subject.

There are more pressing concerns. For those who must obey the law, there is the problem of knowing what the law is. For the private citizen, there are obvious difficulties if the law changes rapidly or there are detailed legislative requirements to learn. Corporations too face the same challenges. Some of them (the larger corporations and the wealthier individuals) will have the means to engage specialists to monitor their legal obligations and compliance with them. ‘Compliance’ has, for this reason, become an industry all of its own. Government agencies find they need more money and higher staff numbers to maintain those regimes, cater for the instances of contact with government for which they provide and for themselves to remain apprised of the rules and their legal consequences.

These factors suggest two principal problems:

- 1) at a practical level, the capacity of citizens (corporate and individual) to know what is expected of them, and the costs which are imposed in their acquiring that knowledge;
- 2) at a more theoretical level, the threat which it poses to a liberal democracy by putting those subject to the law in a position where they cannot, utilising their own knowledge and resources, know all the law with which they are, often under exposure to criminal penalty, obliged to comply.

Returning to the practical problem of too much, and unduly complex, legislation and the demands it places on the time and resources of those subject to its commands, the capacity of individuals to know the law has its limits. People have limited time, perhaps limited interest and, in many cases, limited inclination. And it might be questioned, in any event, what claim law justifiably has to occupy an ever-greater part of the lives of the ordinary (non-legal) person.

These realities govern, in turn, the extent to which citizens will be able to know their rights and obligations in an increasingly legislated world. The more ambitious the legislative agenda, the more the citizen must know or sift through to arrive at a state of satisfaction about the legislated position. If ignorance be no excuse for a breach of the law, the law's knowability (or 'cognoscibility', to use Bentham's term)⁴⁵ must be at least a practical prerequisite.

⁴⁵ J Bentham, *Letter to the President of the United States of America* (1811); J Bentham, *The Works of Jeremy Bentham, published under the Superintendence of his Executor, John Bowring* (1838-1843) Vol 3 243, 260.

There are, however, factors which operate against legislative proliferation having less unsatisfactory effects than it otherwise would. Not every legislative change affects the ordinary citizen, and some legislation enshrines or builds upon what people already know, by long experience and custom, already to be the law. As human affairs become more complex, and technological capacity grows, it is not unreasonable to require those who participate in those spheres to come to know the rules by which that engagement is to occur. Moreover, law has been expected to replace other restraints on the autonomy and self-interest of humankind, such as religion and social convention as those forces have receded.⁴⁶

Nevertheless, there must be a point at which legislation, by reason of its volume and complexity, has or will cause the system to collapse under its own weight: by those who are subjected to it being unable in a practical sense to come to grips with those parts that concern them; giving up attempts to do so; or simply deciding not to undertake those activities which would require them to expend effort to learn the legislated rules. Having a proliferation of legislated rules tends to favour the larger corporations, better resourced individuals and those who have already established themselves in an enterprise. These ‘barriers to entry’, as they are called, are something upon which (legislated) competition law frowns,⁴⁷ but without any apparent realisation that it is legislation itself that often gives rise to such obstacles. A well-off individual, a large corporation

⁴⁶ Lord Sumption (n 19) at 3. I give some attention in Chapter 5 to the relationship between the dwindling influence of faith and our greater reliance upon legislation.

⁴⁷ Competition Act 1998 (UK); Treaty on the Functioning of the European Union, art 101 and 102 (formerly art 81 and 82 of the EC Treaty); see also Guidelines published by the Office of Fair Trading as general advice and information about the application and enforcement by that office of Articles 81 and 82 of the EC Treaty and prohibitions in ch I and II of the Competition Act 1998.

already deriving reasonable profits, and an incumbent enterprise which has already mastered the existing rules and made allowances for them in its operations will be better placed to learn and adjust to new and additional legislated rules than will those that face the task anew. One practical problem, therefore, to which legislative proliferation gives rise, is the assistance it offers to the established elite. The same problems, it might be noted, do not arise to anywhere near the same extent in the Common Law's method of legal development. It moves incrementally and, more importantly for present purposes, along customary lines, always with one eye on practicality, the individual case and the effect on real players of any new or adjusted rule.

Parliamentarians spread too thin

Another point at which to test the point of maximal legislative volume and complexity for practical purposes is when the assemblies that we expect to prepare and properly to consider legislation find it impossible in practice and despite diligence, to do so. That point has in my view been reached.

Various figures are suggested from time to time about the volume and complexity of legislation presented to Parliament each year.⁴⁸ It is beyond question that the volume and complexity of it, whatever those statistics, place a very heavy burden on those charged with scrutiny of it.

The legislature itself, we know from the time which its members have available and the expertise they possess, must have passed the point beyond which, without placing considerable reliance upon the Executive, it can ascertain

⁴⁸ See above (n 23).

with certainty the subsisting position to which new legislation is to adjust or with which it must cohere.

Parliamentarians are burdened with responsibilities. By the time they have attended to their electorate business, their considerable administrative commitments, their party responsibilities, their public engagements and participated in ordinary Parliamentary business, there is precious little time remaining for the scrutiny (let alone the drafting) of legislation.

Parliamentarians are not, of course, unassisted. They have their own staff, they have a party machine which provides some assistance, they have access to researchers and library staff, and members of the public might assist by making submissions, sending petitions and making their views known in interviews and otherwise.

The Committee system is another way in which greater attention than might otherwise be the case can be given to proposed legislation. Committees are generally assisted by research and administrative staff. But Committee functions too consume the time of Parliamentarians.

It is unrealistic, however, even once these countervailing factors are taken into account, to think that Parliamentarians (often not lawyers) have a proper opportunity themselves to scrutinise legislation, and not merely on a standalone basis, but in terms also of its relationship to the wider body of statute and common law.

The Executive

One very important practical consideration which stems from the discussion immediately above is the extent to which legislation has become not an activity of the legislature, but the preserve of the non-political Executive. Once we recognise a heavy reliance by elected officials on the bureaucratic Executive in the legislative process, it calls into question whether, when that occurs, legislating is truly an act which only elected members discharge.

On the one hand, we see a large non-political Executive drafting legislation for Parliamentary consideration, and on the other we have a relatively small number (and no less busy) of elected representatives with the function of satisfying themselves about the merits of that legislation. Inevitably, there has been a shift in responsibility, by reason of time constraints alone, from Parliament to the Executive. It is remarkable, however, that this transition is often sanctioned and encouraged rather than identified as what it is: mission creep by the non-political Executive.

Walkland, for example, in his *Legislative Process in Great Britain*, characterised the growing Executive role in legislation (and not just with subordinate legislation) as being part of the [legitimate] legislative process.⁴⁹ Part of the justification he gave for an increased role for the non-political Executive is the growing technical complexity of legislation,⁵⁰ and that technical specialization calls for different and perhaps more specific skills than the

⁴⁹ S A Walkland, *The Legislative Process in Great Britain* (1968) 25. As to the UK legislature seldom considering any Bill that the Executive does not propose, see Waldron (n 1) 29.

⁵⁰ See, for example, Walkland (n 49) 25.

ordinary legislator possesses.⁵¹ Miers and Page estimated in 1990 that the great majority of Bills (between 81 and 75 per cent) originated within Government departments.⁵²

I take a less sanguine approach than did Walkland to the increasingly heavy involvement of the non-political Executive in the legislative process. It is by no means accidental that assemblies have become burdened with a great volume of legislation. The greater the pressure of legislation presented to Parliament, the smaller the available time to consider it all. To this, the legislature has two alternative courses open to it: resist the pressure and refuse to pass legislation which it has not had an opportunity properly to consider; or resign itself to the insurmountable wave of work which faces it, commit itself only to the most cursory scrutiny and place trust in the non-political Executive to have prepared and presented legislation which is soundly-based and well drafted. The tendency has been, as recent history has shown, that Parliament has given way to the latter course. It is an approach which induces elected representatives to welcome, and rely heavily upon, the Executive. The non-political Executive must know, however, that the less time Parliament has to scrutinise, the less likely it is that there will be substantial change to what the bureaucracy has offered as the legislative text and approach.

The bureaucracy, as a consequence, has greater control over the legislative agenda, legislative content and volume than would be revealed by an analysis, however detailed, of the doctrinal rules regarding the respective formal roles of

⁵¹ Walkland (n 49) 26.

⁵² D R Miers & A C Page, *Legislation*, 2nd edn (1990) 19. See also 20 and note 7 and accompanying text.

those arms of government. The non-political Executive's attainment of this position has been very gradual, assisted initially by the existence of competent, permanent statutory draftspeople and the development of an office of Parliamentary Counsel.

Parliament as a forum for discussion and deliberation: parties and the manipulation of public opinion

Carl Schmitt, a 20th century leading legal scholar of the Weimar Republic, forcefully criticised the workings of the modern Parliament. He considered the deficiency to be so potent as to have reduced Parliamentary debate to an '*empty ritual*'. He considered Parliament's underpinnings to have been historical-intellectual, in its having overcome and replaced the secret practices of absolutism. That basis is something which we might see also from the attention I gave to the historical developments in Parliament's rise in Chapter 1.

Schmitt refined even further, however, the fundamental basis of Parliament, by stating its 'intellectual centre' to be '*public deliberation of argument and counterargument, public debate and public discussion*'.⁵³ His most focussed exposition of this topic was in his *Crisis of Parliamentary Democracy* (1923).⁵⁴ That premise may be criticised (as it was at the time by Richard Thoma). For present purposes, however, of interest to me are Schmitt's factual observations about the functioning of Parliament and the respects in which debate within it falls short of the notional ideal (whether it be the 'intellectual centre' or not) of being free and fulsome.

⁵³ Carl Schmitt, *The Crisis of Parliamentary Democracy* (1923) (Trans. Ellen Kennedy 1988) 34.

⁵⁴ A second edition was published in 1926, in response to criticisms which had been made by Richard Thoma.

Schmitt saw the central characteristic of all representative institutions to be that laws arise out of a conflict of *opinions*, and not a struggle of *interests*. By this he meant, it seems, that members of an assembly ought to remain capable of being persuaded by discussion and debate and seek to discover what is ‘rationally correct’. This, necessarily, Schmitt says repeatedly, entails each member being free from selfish interests and from party ties.⁵⁵ It also, he says, brings with it some assumption that there will be a genuine attempt to communicate what the constituents wish to be articulated.

One of Schmitt’s targets as having contributed to Parliament’s having become an empty ritual and a place in which real public debate and discussion no longer took place was the party system.

We might conceive of the nexus between Parliament and public will in various ways, but one orthodox notion of that intersection is that Parliament is the conduit through which public will is expressed in an untainted form and, ultimately, finds expression in legislation. In that simple sense, Parliament is a vessel waiting to be filled by the desires of the citizens.

One of the weaknesses, as I have said, to which Schmitt referred was ‘party organizations’, as a means by which public opinion might be controlled and public will ‘constructed’ (ie manipulated).⁵⁶

⁵⁵ Schmitt (n 53) 5, 6.

⁵⁶ Schmitt (n 53) 29.

The reality would seem to involve very much more than the public, through their elected representatives, communicating their desires and opinions through those big meetings.

Pressure or lobby groups are another means by which elected representatives (and indeed the public itself) might be persuaded to give priority to some matter, or to change their views on a subject. The function of such groups is to further specific interests and views.⁵⁷ They are a way by which groups of citizens try to exercise influence, recognising that making their views known more disparately and perhaps less prominently and in a less directed manner might be unlikely to achieve near the same influence.

Political parties

Each of the major Anglo-American political systems is characterised by the dominance of popular assemblies by political parties. The overwhelming majority of elected representatives are members of, ordinarily, no more than one or two and perhaps three parties. In the United States, the division is principally between two parties: the Democrats and Republicans; in England until recently it has been between the Tories and the Labour party, in Canada federally, the Conservatives and the New Democrats dominate, and in Australia the Liberal and Labor parties share the field, with a smaller (mostly rural-based) National party.

The question of the extent to which an assembly that remains truly representative can be comprised of individual members who adhere to a form of

⁵⁷ Miers & Page (n 52) 22.

party discipline but yet who purport to represent the people, is a live one. Within this inquiry is the immediate and practical question whether assembly members who are also members of political parties can truly be said to represent their constituents.

Two prominent examples of commentators critical of the effect political parties have on the representative quality of assemblies are Schmitt (of whom I have already made brief mention), and Strom, Muller and Bergman.⁵⁸ Schmitt, as I have said, supported the Weimar Constitution but criticised what he saw as inconsistencies and some flawed premises of representative democracy. One of the weaknesses to which he referred was ‘party organizations’, as a means by which public opinion might be controlled for the ‘construction’ (ie manipulation) of public will.⁵⁹ Parties employ, Schmitt said, methods and techniques to create ‘*electoral propaganda, persuade the masses, and dominate public opinion*’.⁶⁰ In doing so, and in his more direct identification of political parties as impeding the true translation of public will through Parliament, Schmitt gave expression to a well-established body of criticism already then in existence.

Hilaire Belloc and Cecil Chesterton, for example, in their 1911 definition of the party system, exposed the potential dangers of it:⁶¹

... that method of government in which the representatives of the people are divided into two camps which are supposed to represent certain broad divergences of opinion. Between these two the choice of election lies, and the side which secures the largest measure of support forms a Government, the minority undertaking the work of opposition.

⁵⁸ K Strom et al, *Delegation and Accountability in Parliamentary Democracies* (2003).

⁵⁹ Schmitt (n 53) 29.

⁶⁰ Schmitt (n 53) 20.

⁶¹ H Belloc & C Chesterton, *The Party System* (1911) 27-28.

They, even then, discerned growing dissatisfaction with the party system.⁶²

... there is a section of the public, not perhaps large, but certainly increasing, which is beginning to be uneasy about the Party System. It is natural to men to wish to have voice in the government of their native land, and many are beginning to feel that they have no such effective voice today. Laws which they detest are passed, passed easily by the consent of both parties, and they are powerless or defeat or even to protest against them. Measures which they ardently desire and which they know that most of their neighbours ardently desire are never mentioned.

Modern political parties ordinarily demand adherence by their parliamentary members to the party platform, which would dictate in almost every case the position in voting which each member must take on proposed legislation. Most Parliamentary contests about legislation, unless the statute concerns matters so routine as to be uncontroversial, or one of the smaller Parties hold the balance of power in the lower house, is resolved on party lines. Since 1832 and the *Reform Act* at least, only proposed laws which elicit a favourable response from the party commanding the government stand any real chance of reaching the statute book.⁶³ Much is done behind the scenes and well away from the public forum of the assembly. Topics for legislation, Miers and Page observe, are typically identified by political Parties when in opposition and a party's election manifesto constitutes the most important initial source of inspiration for legislation when elected.⁶⁴ With that said, those authors point out that the proportion of legislation attributable to the party element in Government tends to decline over the life of a parliament, although they do warn that the part played by Parties

⁶² Belloc & Chesterton (n 61) 30.

⁶³ Miers & Page (n 52) 19.

⁶⁴ Miers & Page (n 52) 19.

(and government departments) cannot be measured solely by reference to the origins of legislative proposals.⁶⁵

The tendency of Parties to exercise strong control over elected members is less pronounced, it has been found,⁶⁶ in assemblies such as the British House of Commons. Some have argued that political Parties contrive a ‘legislative cartel’ which focuses efforts on securing control of the legislative agenda and governing the structure of legislation.⁶⁷

True it is, almost by definition, that the party which commands loyalty from the largest number of elected representatives has had its policy platform endorsed in general elections by the majority of voters, in what is now often referred to as the Government’s ‘mandate’. It is common for the respective major parties to present quite detailed policies during an election campaign as to the way in which they propose to exercise legislative power and the ends (often ideological) which they will seek to achieve.

But, even so, it would be mythical to think of Parliament as guided by as many free-thinking agents as there are elected representatives. The reality is that, on most occasions on which legislation is scrutinised, the party

⁶⁵ Miers & Page (n 52) 20.

⁶⁶ See, for example, C J Kam, *Party Discipline and Parliamentary Politics* (2009) esp 3, 5, 7 and 8. Kam suggests party cohesion comes about for three main reasons: MPs wishing to advance their careers, MPs can be disciplined if they do not cohere; and there exist internalised norms of party loyalty and solidarity. J E Owens, in ‘Explaining Party Cohesion and Discipline in Democratic Legislatures: Purposiveness and Contexts’ (2003) 9 JLS 12, explains the factors which ought to be considered in any study of the degree of party cohesion.

⁶⁷ G W Cox & M C McCubbins, *Legislative Leviathan: Party Government in the House*, 2nd edn (2007).

commanding the majority in the relevant Assembly will decide the fate – and shape – of the law to be enacted.

To Dicey, a system of party discipline contravened the very fundamentals of democracy. Systematic party discipline, he said:⁶⁸

... violates the essential principles of Democracy, for it very much limits the control over their Government exercised by the people, and it sacrifices the public service to purely individual interests.

The ‘evil’, he said, ‘is very apparent in England’ and it will, he accurately prophesied, ‘become more so’.⁶⁹

The point of this is to show that popular assemblies, far from being a melting pot of numerous individuals’ views, each carrying the concerns and views of his or her electorate into the big meeting for debate and to persuade those who might have a contrary view, comprise in truth far fewer competing positions. Perhaps those more numerous views have a life before Parliamentary debate takes place, for example in the framing of party platforms and as part of voters deciding which party ought to take government. But so far as Parliament being a big meeting is concerned, it is far less a forum for competing viewpoints than it is often promoted as being.

Strom et al, although generally adopting a more favourable view of political parties and, in particular, the role they fulfil in ‘*reducing agency costs*

⁶⁸ See A V Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edn (1915) (Liberty Classics reprint, ed R E Michener, 1982) xv (Foreword), quoting from Dicey’s diary regarding the 1870 Democratic Convention at Rochester.

⁶⁹ Dicey (n 68).

by bringing together voters and candidates with similar policy preferences',⁷⁰ express concern about the extent to which Parties that are actually on offer are willing and reliable vehicles of popular representation.⁷¹ Those authors identify as likely problems in this field, Parties which are primarily protest movements with no serious intention of making policy, and those without the organisational capacity to make policy cohesively and effectively. This tends to overlook Belloc and Chesterton's concern of what seems to amount almost to collusion or a self-interested co-existence in which the Parties and not the electorate control the policy and legislative agendas. It also overlooks the potential (at least) for Parties to corral public opinion into pre-determined ideological streams, and polarise electors on issues which they may, absent those streams, have taken differing attitudes to.

Securing obedience

Finally, I wish to mention the difficulty which legislation meets in commanding compliance, a problem which stems in part from legislative proliferation.

Dicey criticised the constant addition to statute law (especially in the criminal law)⁷² of acts which the government considered to be anti-social but which citizens did not consider immoral. This, he said, offered an insight into the importance of political morality and meant '*a decline in reverence for the rule of law*'.⁷³

⁷⁰ Strom et al (n 58) 653.

⁷¹ Strom et al (n 58) 655.

⁷² A theme which Lord Sumption recently emphasised (n 19).

⁷³ Dicey (n 68) lv ff.

The sources of the problem were, for Dicey, the legislation which had been passed.⁷⁴ He considered that there had developed a distrust of judges and of courts, and that there had recently ‘*grown up ... a new doctrine as to lawlessness*’,⁷⁵ namely ‘*respectable persons*’ believing that it is allowable (even praiseworthy) to break the law if the law-breaker is pursuing some end which to him or to her seems to be just and desirable.

I wish to focus for a moment on Dicey’s arguments about the core features of a democracy and some of the limitations it presents.

Dicey’s view was that, under a democratic government, any law is unjust which is opposed to the real or deliberate conviction of a large number of citizens.⁷⁶ Such a conviction, he said, would cause persons who considered a law to be unjust (wrong in his view though it was, to oppose that law by the use of force). The consequence, he thought, was that it ought to be accepted that such deference to public opinion could not co-exist with the amount and coercive nature of government.

The problem Dicey raises is not of course one which brings into question the validity of legislation. It is a far more practical problem. It raises squarely the conundrum that seeking to regulate more and more fields of human activity and doing so in more intrusive ways and by the imposition of harsher consequences (including by the deployment of the criminal law) will heighten the likelihood of more than just the odd disgruntled citizen taking issue with the

⁷⁴ (upon which I will not dwell because the criticisms he advances are not ones I would adopt).

⁷⁵ Dicey (n 68) lix.

⁷⁶ Dicey (n 68) lx.

legal rule and deliberately disobeying it. One response to this (the legislative one) is to punish the objector and to continue on unaffected. An alternative would be to institute a form of prioritisation, in which the legislative object sought to be achieved could be assessed against the extent to which the rule would cause a departure from ‘*a real or deliberate conviction of a large number of citizens*’. This could only mean customary behaviour, albeit not unreasoned or time-out-of-mind. I take up that theme in Chapter 4 in comparing the features of made and unmade law.

We are constantly being desensitised to legislation’s intrusions. Its march is relentless. We only have to look back to the remarks of Dicey to see how, a century ago, real complaints were being levelled at legislative proliferation and intrusion, and how legislation has, despite this, been permitted to continue on its path.

I have dealt above with the major practical problems that modern legislatures pose. It is not possible entirely to separate the practical problems from what might be described as institutional limitations and those which emerge from normative considerations. My intent, however, in dealing separately with the most practical aspects, has been to give some perspective to the challenges which modern legislatures face, to question the idealistic and simplistic view of popular assemblies being a forum for free debate of a multitude of viewpoints, and to introduce some of the concepts which emerge in more complex forms in my consideration of institutional limitations and in better understanding the historical and philosophical forces that contributed to our current attitude to

legislation. Without such viewpoints, we lack any broader understanding of what it is we would wish Parliament to achieve and why, how it might go about doing so, and what might be the causes of the trusting or unquestioning disposition we presently have towards legislation and legislatures. The tendency is, without such a perspective, that we know the route which Parliament has historically taken, but lack all means to understand why, or to know now whether, Parliament conforms even to those demands which history and philosophy might reveal to be necessary.

IV Institutional Limitations

Another of the reference points I offer in testing the adequacy of doctrinal limits is the institutional limitations which popular assemblies possess. Some of them are practical matters also, and they have been discussed in the preceding part of this Chapter. Here I focus upon those aspects of legislatures which have featured most prominently in the debates about the institutional characteristics of popular assemblies and how we ought to regard the capacity of them to make good decisions. I do so because ascertaining what limits legislation has must involve an appraisal of the capacities of its author to meet standards by which the law it makes is to be judged.

I consider two perspectives, being the points upon which the major debates in this field turn:

- 1) the relevance of inputs to, and outputs from, popular assemblies in terms of appraising their operation (following Fritz Scharpf's input and output legitimacy);

- 2) what might direct democracy (on one view *more* democracy), or its deliberate absence, reveal about our own underlying attitudes to the institutional limitations of popular assemblies?

Legitimacy: inputs and outputs

Fritz Scharpf⁷⁷ has explained democratic legitimacy as importing two dimensions: the inputs and the outputs of a political system. Scharpf equates his two dimensions to the expression in the Gettysburg Address, ‘*Government by the people, for the people*’.⁷⁸

The input aspect involves *mechanisms or procedures* that connect political decisions with voters’ preferences. Mechanisms of that kind are found in the choice of members via regular elections. Democracy, however, Scharpf argues, would be an ‘empty ritual’ (hearkening to Schmitt) were democratic processes not to produce outcomes which might be regarded as satisfactory.⁷⁹ He frames the unsatisfactory outcomes as not ‘*achieving the goals that citizens collectively care about*’.⁸⁰

The first of these notions concerns itself with the input side of the equation: the mechanisms that translate the ‘*will of the people*’ into political decisions. If the electors judge those mechanisms to be ‘democratic’ or ‘good’, then there is input legitimacy. Elections are the primary means by which electors influence policy-making.

⁷⁷ F Scharpf, *Governing in Europe: Effective and Democratic?* (1999) see esp ch 1;
F Scharpf, ‘Economic Integration, Democracy and the Welfare State’ (1997) 4 JEPP 18.

⁷⁸ Scharpf (1999) (n 77) 6.

⁷⁹ Scharpf (1997) (n 77) 19.

⁸⁰ Scharpf (1997) (n 77) 19

The second of Scharpf's notions focusses upon 'output' or 'epistemic' legitimacy. This notion of legitimacy turns upon the extent to which government *performance* is effective, that is, the extent to which what the assembly does achieves the basic functions of government. Difficulty, however, is encountered in ascertaining what are the '*basic functions of government*' (or what they ought to be). Scharpf's notion of these refers to the extent to which democratic procedures are able effectively to promote the constituency's common welfare⁸¹ as well as, once again, '*achieving the goals citizens collectively care about*'.⁸² These objective and subjective components both possess a utilitarian character.

The objective component is directed to ascertaining if policy outcomes succeed in solving social problems effectively. The literature on this topic often makes mention of the direct participation of citizens and other stakeholders in the policy-making process as producing better and 'more intelligent' outcomes.⁸³ This assumption is based on the idea (which we must attribute to Hayek in his criticism of constructivism and what he called the 'synoptic delusion') that '*no single actor, public or private, has all knowledge and information required to solve complex, dynamic and diversified problems*'.⁸⁴ By ensuring citizens participate in the policy arena, the argument runs, the expertise and information that citizens offer can be used by administrators to solve complex social issues. In a democracy, this happens through the process of elections and the representations of electors, via constituencies, in the relevant assembly.

⁸¹ Scharpf (1999) (n 77) 6

⁸² Scharpf (1997) (n 77) 19

⁸³ See, for example, J Kooiman (ed) *Modern governance, New government- society interactions* (1993), M Barnes, 'Researching public participation', (1999) 25 LGS 60.

⁸⁴ J Kooiman (ed) (n 83) 4.

The 'subjective' component of output legitimacy is directed to the extent to which citizens are satisfied with the *content* of government policy. It is more likely that people will be satisfied if they have participated in the policy and law-making process by reaching their own goals and recognising their preferences in political decisions. Interactive processes, it is hoped, bring the content of policy more into line with citizens' preferences and this increases the likelihood that citizens will judge positively the content of the policy (and, perhaps, comply with it).

Both types of legitimacy are closely related and are not by any means mutually exclusive. Output legitimacy derives from the effectiveness of government policy. However, effectiveness has content only if we can know citizens' preferences. If effective results are to be achieved, procedures or mechanisms are needed to ascertain those preferences and in order to translate them into political decisions.

Direct democracy as a reality check

We might test just how far the thread of representative democracy can be stretched in order to expose some of the underlying assumptions we make about it by giving some consideration to direct democracy. Scharpf's dimensions of democracy in particular give cause to consider whether some form of direct or interactive democracy might not improve and make even more democratic the systems as they operate in most Anglo-American systems.

Direct democracy involves citizens indicating their approval or disapproval of specific proposals between general elections. It offers a notional alternative

by which we might test whether greater involvement by citizens is something which fits with our views of how the present system might operate or by which it might be improved. Its limited adoption in Anglo-American systems also offers, I suggest, an insight into the limitations of our mechanisms to ascertain and give effect to popular expressions of public will, something to which I gave consideration earlier in this Chapter.

In part, the idea of direct democracy arises because of new technological possibilities. It would now, theoretically at least, be possible for citizens to vote directly by electronic means⁸⁵ upon specific policy options which an elected government might pursue. Switzerland has one of the most developed forms of direct democracy.

The Swiss electorate has a right of veto on all proposed federal laws. If 50,000 citizens demand a referendum, one must be held within 3 months.⁸⁶ It is only necessary for a federal law to pass, that a majority of the national *electorate* vote in favour of it (not a majority of cantons).⁸⁷

A system of popular initiative also exists. If 100,000 citizens (about 2.5 per cent of the electorate) demand a change of the Constitution, federal parliament must discuss the initiative, may recommend it or reject it or may propose an alternative.⁸⁸ Whatever the decision made by Parliament, all citizens have the opportunity to decide in a referendum whether to accept it, to adopt an

⁸⁵ via what has been described, variously, as Electronic Direct Democracy, Direct Digital Democracy, open source governance and collaborative governance. Each utilises telecommunications to facilitate public participation.

⁸⁶ Swiss Federal Constitution, Title 4, ch 2, art 141.

⁸⁷ Swiss Federal Constitution, Title 4, ch 2, art 142.

⁸⁸ Swiss Federal Constitution, Title 4, ch 2, art 138 and 139.

alternate proposal or to have no change at all.

Advocates of direct or ‘interactive’ democracy argue that electoral institutions are insufficient instruments of democracy, as they fail to provide real opportunities for citizens effectively to influence policy-making.⁸⁹ Social choice theorists⁹⁰ argue that electoral outcomes do not necessarily reflect ‘the popular will’, as they are merely ‘artefacts’ of the procedures by which votes are counted.⁹¹ Some theorists of that persuasion also argue that there exists no single voting procedure that can claim to produce outcomes that represent fully the will of the people.⁹²

Direct democracy therefore focusses upon deliberation as the central mechanism by which to link political decisions with citizens’ preferences. It is an approach that focuses most closely upon input legitimacy.

Those who advocate direct democracy traditionally advance several arguments in support of their claim that deliberation is an important source for input-oriented legitimacy:

- 1) representative institutions do not, and cannot, live up to the expectations that we have of them in terms of ‘democratic

⁸⁹ I Budge, *The New Challenge of Direct Democracy* (1996).

⁹⁰ Such as William Riker: See *Liberalism against Populism, a Confrontation Between the Theory of Democracy and the Theory of Social Choice* (1982).

⁹¹ J Knight & J Johnson ‘Aggregation and deliberation: on the possibility of democratic legitimacy’ (1994) 22 *Pol Theory* 277 at 279.

⁹² W H Riker (n 90); G B Powell *Elections as instruments of Democracy; Majoritarian and proportional visions* (2000).

citizenship’;⁹³

- 2) they take a populist idea of democracy and look for how citizen involvement might be expanded so that the democratic system might look more like the Athenian ideal;
- 3) they conceive of a strong democracy as self-government *by* citizens rather than representative government *in the name of* citizens. They say that it is only through this means that popular sovereignty and political equality can prevail;⁹⁴
- 4) they also say that the direct participation of citizens leads to a cohesive society in which social exclusion is reduced.⁹⁵

Other arguments made in favour of direct democracy include that citizens, when they participate in a deliberative process between legislators and other citizens, learn from doing so. They validate their own preferences when they confront their perceptions with those of others.⁹⁶

This assists us then to expose what might be the strengths of representative versus direct democracy.

Schmitt saw the possibility (then – in the 1920s – hypothetical) that:⁹⁷

⁹³ C Pateman, *Participation and Democratic Theory* (1970); B R Barber, *Strong democracy: Participatory politics for a new age* (1984); Budge (n 89).

⁹⁴ Barber (n 93).

⁹⁵ M Barnes (n 83); M Barnes, ‘Bringing difference into deliberation? Disabled people, survivors and local governance’ (2002) 30 *Pol’y & Pol* 319.

⁹⁶ See, for example, J Fishkin, *Democracy and Deliberation, New Directions for Democratic Reform* (1991).

⁹⁷ Schmitt, *Constitutional Theory* (trans and ed J Seitzer, 2008) 274.

... every single person, without leaving his apartment, could continuously express his opinions on political questions through an apparatus and that all these opinions would automatically be registered by a central office, where one would only need to read them off.

Schmitt's difficulty with this however, was that it would result '*only in a sum of private opinions*', and that no common will would arise, only a mass of individual ones.⁹⁸

'Indirect democracy' is premised upon there being some advantage to there being (notionally) present in the assembly, representatives rather than citizens themselves. In part that premise might be thought to be practical: it is impossible to have all citizens engaged directly in even the most important and major of legislative and other public decisions which are to be made. But there do seem to be other reasons also why a representative model evolved and continues to exist. Representative democracy, of the kind which Madison endorsed in the *Federalist No 10*, for example, does offer a more dispassionate reflection of the common good than would a more direct (or 'pure' as Madison says) form of democracy. Representative democracy, he argued, operates:⁹⁹

... to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice pronounced by the representatives of the people will be consonant to the public good than if pronounced by the people themselves convened for the purpose.

It would also, he said, bring within the compass of government a greater number of citizens and wider extent of territory, thus making it less probable that a majority would have a common motive to invade the rights of other citizens.

⁹⁸ Schmitt (n 97).

⁹⁹ Reproduced in J McClellan, *Liberty, Order and Justice: An Introduction to the Constitutional Principles of American Government*, 3rd edn (2000), app A 362.

That is because it would require a larger body to comprise the majority, and they would be less proximate to each other, rendering majoritarian domination less practicable.

We might pause here also to reflect upon Madison's reference to the protection representative democracy afforded against sacrificing the '*true interest of [the] country*' to temporary or partial considerations. The idea seems to be that the chosen representatives will not be motivated in precisely the same way as citizens themselves and will, on occasion, act as a brake upon what pure democracy might demand.

The employment of interactive governance might be seen as a reaction to social developments. Some say that traditional representative institutions have not coped with the social changes which increased diversity in the society has brought.¹⁰⁰ This, it might be thought, justified new institutional arrangements to address a perceived shortcoming. In an immediate sense, direct democracy would assist in overcoming this by enhancing input-oriented legitimacy by stimulating citizens' involvement in the making of public policy. Moreover, there exists greater complexity in social problems. There are new ideas about policy-making, ones in which hierarchical structures are replaced by more horizontal modes of cooperation between governmental and social actors.¹⁰¹

The possibilities of a more pure form of democracy which technology has made a reality poses a threat to representative democracy. That is, the realisation that technology now permits to be overcome some at least of the practical

¹⁰⁰ H Klingemann & D Fuchs, *Citizens and the State* (1995).

¹⁰¹ See, for example, J Kooiman (ed) (n 84).

reasons why direct democracy might not have been favoured earlier than now, begs the question why direct democracy ought not be embraced. And, as I point out later in Chapter 5, it is a distinctly modern disposition to consider that, because something is *possible*, it *ought* be done.

No longer could it be said (as Madison suggested) that the only practicable ‘pure’ form of democracy (ie one in which each citizen himself or herself assembles) could exist in small societies. Provided the act of assembling could be satisfied via an electronic medium, a society might be very large, but permit the notional meeting of citizens by the on-line registration of their preferences.

What is left unsolved by even the most advanced form of electronic media for mass citizen direct participation is the physical act of meeting, of debating and doing so through the refining and perhaps restraining influence of the elected representative. It is one thing for a system to permit voting preferences to be expressed *en masse*, but it is quite another for there to be a public face-to-face meeting at which the options are debated, weighed and voted upon (as occurs in assembly processes). These elements of representative democracy seem to be unanswered by the mere employment of technology.

Proponents of interactive governance argue that interaction between various actors is an important source of legitimacy. On the one hand, direct participation by citizens in political decision-making could be seen as a mechanism to link political decisions with citizens’ preferences. The involvement of citizens might generate better or more effective political

outcomes. Interactive governance, they say, improves legitimacy on the input, as well as the output, side.

Dicey advocated the use of referenda as a people's veto of proposed legislation after initial opposition to the referendum as '*one of the most dubious devices of Swiss democracy*'.¹⁰² He came round, however, to a different view as the House of Lords, in his view, gradually lost its legitimacy and with it, the traditional check on the power of the Commons.¹⁰³ This, he said, was a problem made worse by the erosion of informal restraints on Parliament, ones which prevented it from exceeding its mandate. His ultimate proposal was for a referendum which would act as a people's veto to preclude '*the passing of any important Act which does not command the sanction of the electors*'.¹⁰⁴ This he intended to be the check on party tyranny while preserving the system of representative government. There is no little irony in the fact that the man who did so much to cement the absolutist notion of Parliamentary supremacy in the consciousness of the Anglo-American world, would also himself recognise so perspicaciously the problem of an unrestrained Parliament.

I will not delve into the factors that provoked Dicey to change his view (one was the establishment of Irish Home Rule). But his views are an illustration of a crisis of confidence in representative democracy and an indication of Parliament's capacity and willingness to act in a manner contrary to the will of the electors.

¹⁰² Quoted in R S Rait, *Memorials of Albert Venn Dicey* (1925) 122.

¹⁰³ M Qvortrup, *A Comparative Study of Referendums*, 2nd edn (2005) 47.

¹⁰⁴ Letter from A V Dicey to James Bryce 23 March 1911 in Dicey (n 68) cix.

The points to be drawn from this consideration of direct democracy for present purposes are three-fold:

- 1) most legislatures in Anglo-American systems operate firmly on a system of representative and not 'pure' democracy;
- 2) the representative component of those systems adds a refinement and provides a buffer between raw constituent enthusiasm and majoritarian domination to which direct democracy is more vulnerable;
- 3) technological advances do not overcome some at least of the primary reasons why representative democracy is in these systems almost uniformly preferred over more direct means.

If we accept these points as holding true for almost all Anglo-American assemblies, we must also accept that those assemblies cannot purport to act as mere conduits for public will, popularly expressed. Instead, they seek to refine it, and to introduce into the expression of public will, the influence of officials, thought to be less susceptible to temporary or partial considerations and better able to pronounce the public voice in a way that promotes the public good than the citizens themselves doing so without such mediating forces.

The claim that popular assemblies might be mere conduits for the expression of public will and the translation of it into legislative form is, accordingly, fraught. Other forces intervene. It is something which Waldron's advocacy of popular assemblies as dignified and as being the means for the

expression of the ‘wisdom of the multitude’ seems not to meet.

V Concluding remarks

I set out in this Chapter to introduce the principal modern defence of popular assemblies embracing legislative hyperactivity and to show how it is incomplete in its treatment of the principal practical and institutional limitations of popular assemblies and the laws they make. Much of the support for popular assemblies is premised upon them being no more than conduits for the expression of public will. Questions of the extent to which they are necessarily so, import considerations of how and to what extent we expect assemblies merely to convey the expressed wishes of their electors.

It is at this point, however, that the matters I have raised take us deep into the domain of theory and value judgments. For that reason I turn, later, in Chapter 5, to seek to understand the intellectual influences that have given rise to our modern overreliance upon legislation, or at least our having allowed legislation to proliferate in the manner and to the extent that it has.

Before doing so, however, I contrast the characteristics of legislation and custom (made and unmade law) as offering another way in which the wisdom of the multitude might find expression, and one far more organic and less deliberately intellectualised than popular assemblies and the processes that accompanying their legislative activities. This I do in the next Chapter.

Chapter 4

Unmade Law and the Wisdom of the Multitude

Legislation involves rule-making by the most posited of means. It is created by deliberate act, and one which involves a highly formalised process of enactment, with specific mechanisms to be followed. The prominence of legislation in current times has tended to eclipse in our legal imagination the possibility of other forms of rule-making with the exception, perhaps, of judge-made law. Even judge-made law, as we saw in Chapter 3, has come under attack from those who favour legislatures and legislation (most latterly, Jeremy Waldron) and who would seek to characterise them as being dignified and more likely to reach the right result.

This overshadowing of other possible forms of rule-finding, and rule-making, has left little room for us to conceive of a system of law in which rules are other than enacted by a popular assembly, as if this were the only possible form of proper rule-making, and legislation the only means through which the wisdom of the multitude might be expressed.

In one sense there is a tension between the view to which Waldron gives expression (that we tend to have a dim view of legislation) and our apparent overreliance upon it. The apparent disconformity is explicable on one or more of several grounds. We seem to acquiesce in system of legislation dominance rather than positively to endorse it. One of the features of that regime is that it tends to overwhelm citizens, by keeping them constantly on the move in keeping

up with its hyperactivity, suggesting reform is necessary and urgent. Any resistance to this state of affairs can be met with the retort that the hyperactivity – if it be that – is something that the public wills, being the mode of operation of the popular assembly. There is an underlying risk, however: that the force at work is far more sinister. On one view, there is a diminished level of trust in the electorate to make choices and in people’s capacity to organise their own affairs. If this were so, it would constitute the legislature treating its own constituents with disdain. But it would also explain why citizens might regard legislation less well. After all, if legislation is not the product of their will (despite its claim to be) they are entitled to regard it cynically.

There are other possible reasons for legislation being regarded so poorly. One is that there is an unthinking acceptance of its dominance. This state of affairs, I suggest in the next Chapter, is more attributable to us having lost the ability to conceive of a system any differently from the one which predominates, something which subsists in part because we have, in recent times, consciously theorised little about legislation, legislatures, the legislative method, and are less and less inclined to recall or conceive of alternative possibilities to the one to which we are subject. One object of this Chapter is to recall a source of law which is one alternative to legislation (and the expression of the wisdom of the multitude by that means).

I Why consider custom?

Here I compare characteristics of customary law with legislation, as a further major means (ie other than legislation and case law) by which rules might be

devised and adhered to. In doing so, I suggest that there exists a viable alternative to enacted law which, although not by any means a complete substitute for it, is an avenue of rule-finding, and rule-making that offers benefits over legislation in some circumstances. One of the central arguments I advance is that it is impossible to ascertain fully the characteristics which made law ought possess (especially in order to maintain its majesty and continue to command respect) without first obtaining some understanding of customary law. Moreover, customary law is a means by which the wisdom of the multitude (if it exists) finds expression. It offers a point from which to test Waldron's assertion that popular assemblies, having *deliberative* characteristics, are better placed than other forms of law-making to get it right.

I do not suggest that customary law is entirely separate from judge-made law or from legislation. The connection between judge-made law and custom is well-known and it is a topic I have touched upon in earlier Chapters. So too legislation might draw upon either for inspiration or more directly, the rules to which the populace adheres by customary practice. I give an example below of just that happening.

The influence of custom on modern law has tended to be categorised as either a stage in the development of civilisations towards a more sophisticated or 'made' system of law, and, in common law systems, as the origin, probably now distant, of many of the rules which comprise it. Contrary to this, custom does, I suggest, offer a useful benchmark by which to assess the characteristics of other forms of law-making, and especially that which stands as its opposite on the

scale of deliberateness in rule-making: legislation. Custom possesses qualities which legislation does *not* in its practicality and in-built mechanisms of efficiency and prioritisation.

To illustrate this, I draw upon two related features of the English Common Law: its restraint in regulating the affairs of merchants (leaving those affairs to be governed by custom) and then, from the mid-18th century, deliberately and deferentially receiving those customs as rules of the Common Law.

The neglect of custom as a means of social ordering is part of the increasing tendency for modern made law to lack certain qualities which custom possesses. I have already noted the tendency for made law to be overly ambitious in what it attempts. This is a pitfall which custom (whatever be its other weaknesses), by its nature, avoids.

I adopt the terminology ‘made’ and ‘unmade’ as the basis for my discussion in distinguishing between custom and legislation. We might also understand that distinction in terms of posited and more organic forms of law, as law-making in a centralised versus more devolved manner, or as conscious rule-making as against more spontaneous forms of ordering. There is a spectrum of these forms. At one end is legislation which is the purest form of made law: centralised in representative assemblies; and the product of conscious, highly process-driven rule-making activities. At the other end is custom: so decentralised as to have undetectable specific individual or group originators; and only spontaneously or incidentally bringing rules into existence. Somewhere between those two, lies the Common Law: centralised to an extent, but generally

conditionally so (due to the right of appeal and its susceptibility to legislative countermand); ‘made’ in the sense that the judge is requested to, and applies, a rule as between the parties, but limited too in that respect by it being, primarily at least, a process by which rules are applied more than made and because, historically perhaps more than now, of its conscious reliance upon custom. In describing, then, custom as ‘unmade’ law, I am seeking to contrast it, in particular, to that which lies at the opposite end of the spectrum in relevant respects – legislation as ‘made’ law. Beneath these distinctions, and indeed beneath many of the theories about legislation I have referred to above, is a belief about the immanence or otherwise of the underlying order in the world. Those who urge against legislative overreach may come to the debate with a belief in an immanent order, and order which, whether it be God-given or inherent and detectable by the natural sciences or moral theories, ought not be fundamentally interfered with (following Adam Smith, Hayek, Fuller and Lord Kames). Those (like Waldron) who favour legislative omnicompetence seem to be motivated by a belief (undeclared) that such order as there is, whatever be its source, is open to adjustment, radical or otherwise, better suit our needs as humans and that we have the ability, after deliberation and reflection, to make such judgments. The belief itself, one way or the other, is not something that is readily challenged. Paolo Grossi has demonstrated with clarity the movement from the medieval respect for the order inscribed in the natural world in particular and its incompleteness in political power to the modern ‘totalizing and all-encompassing’ mentality of which the nation state is a part.¹ In the former, the

¹ P Grossi, *A History of European Private Law* (2007) 2-4.

bottom-up generation of law affords respect for that natural order. In the latter, law is the expression of superior will, descending from the top down, and bringing with it a capacity to do violence to objective reality in its arbitrariness and artifice. My complaint, however, with Waldron's approach is that underlying motivation for it goes undeclared, which constitutes a further incompleteness in his advocacy for legislative activity. This incompleteness is one which emerges most clearly from comparing custom and legislation, for a theorist who truly has respect for the wisdom of the multitude would respect custom as well as legislation. But a preference for legislation over custom is one which uncovers a preference for a constructed order and a rejection of the immanent and spontaneous.

II Custom in modern scholarship

Custom has tended, in modern legal scholarship, to be characterised as being of historical relevance only: a primitive form of regulation comprising convention and habit,² produced by an unsophisticated mind-set which could not conceive of humankind's manipulating norms for its own benefit and merely requiring compliance by all with the immemorial ways and means of interacting

² Aristotle recognised a distinction between two elemental notions of habit (*ethos*) and convention (*nomos*): J B Murphy, 'Habit and Convention at the Foundation of Custom' in A Perreau-Saussine & J B Murphy (eds) *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (2007) 59-65.

and living. Belief in law as custom has waned,³ and it has been neglected as an area of study.⁴

This view of custom as having historical relevance may have been a consequence, at least in part, of the influential writings of Sir Henry Sumner Maine⁵ and Sir John Seeley.⁶ Maine, in his anthropological and historical analysis of ‘ancient law’, characterised legal systems as developing in stages and in a fixed order. He saw custom pervading two of his six ‘stages’. First came ‘habit’, which simply subsisted. Neither law nor judgments on disputes were thought of as more than declarations of the way things were:⁷

It is certain that, in the infancy of mankind, no sort of legislature, nor even a distinct author of law, is contemplated or conceived of. Law has scarcely reached the footing of custom; it is rather a habit. It is, to use a French phrase “in the air”. The only authoritative statement of right and wrong is a judicial sentence after the facts, not one presupposing a law which has been violated.

Maine’s second stage was customary law.⁸ It differs from the earlier stage only in that, by this time, there has developed a mode of conduct which, having become a practice or custom, is the *reason* for others following that same course. This brings with it recognition that there is more than one way of achieving a desired result, but that the course taken by others and comprising custom is *the*

³ M Loughlin, *Sword and Scales: The Relationship Between Law and Politics* (2000) 11.

⁴ A Perreau-Saussine & J B Murphy, Preamble I, and ‘The Character of Customary Law: An Introduction’ 1, in A Perreau-Saussine & J B Murphy (eds) (n 2).

⁵ Most notably in H S Maine’s *Ancient Law: Its Connection With the Early History of Society and its Relation to Modern Ideas*, first published in 1861. The references to that work here are to the 1930 edition, which includes introduction and notes by Sir Frederick Pollock. As to its influence, G W Carey, for example, notes that it has frequently been compared to Darwin’s *Origin of Species*: ‘Introduction’ 16 in H S Maine, *Popular Government* (1883) (Liberty Fund Edition, 1976)).

⁶ Sir J R Seeley, *Introduction to Political Science* (1919).

⁷ Maine (1861) (n 5) 7.

⁸ See Maine (1861) (n 5) 11-13.

one which should be observed. Lon Fuller summarised Maine's principal point in this way:⁹

In instances where there is an element of choice in [peoples'] conformity, they may follow custom because of a perception of the need for shared and accepted rules of conduct and a realization that a departure from established rules would act disruptively.

After these stages, Maine describes law as being embodied in Codes, then there emerged legal fictions (a rudimentary form of legislation), followed by reform of the law permitted by these fictions and, finally, legislation.

Maine's account assumes that all legal systems developed linearly, progressing through set stages. In this set order, customary forms of law lie at the primitive end and legislation is the sophisticated terminus. The narrative is one of legal systems moving from organic, unmade norms to more sophisticated, designed and enacted rules: that is, 'made' law. Maine's approach in particular was one which was premised upon the movement of society towards some more sophisticated state: in his case an almost entirely made system of law.

Both the linear nature of Maine's stages, and apparent assumption of their universal presence in developing legal systems, have been criticised for being too conjectural about prehistoric times,¹⁰ too simplistic about societies being the same,¹¹ for viewing custom in its origin as essentially non-litigious¹² and being ignorant (quite understandably) of matters which subsequently came to light.¹³

⁹ L Fuller, *Anatomy of Law* (1968) 50.

¹⁰ Fuller (n 9) 49.

¹¹ Fuller (n 9) 49.

¹² H F Jolowicz, *Lectures on Jurisprudence* (J A Jolowicz ed) (1963) 197.

¹³ Fuller (n 9) 49 eg, ancient codes.

Maine set out to link early ideas with modern thought.¹⁴ This was an approach tended to promote a view of sophisticated legal systems as one in which enacted law, and especially statute, was employed confidently and beneficially for society's ends. It is not far from that point to Bentham's absolutist¹⁵ notions of the legislative method. Maine saw Bentham's attitude to legislation and law reform as more unique to modernity than even Bentham himself had perceived. Maine says, for example, of Bentham's '*historical theory*', that societies have not always modified their laws on the grounds of what is utilitarian and expedient. The '*impulse which prompts modification*', Maine seems to suggest,¹⁶ was less likely to arise in ancient times, and Bentham had underrated the power of tradition and custom in those societies.

These illustrations serve to show what probably needs no further explanation: that late 19th century thought tended to view a system by which law was modified by positive means in the interests of utilitarianism and expediency as more sophisticated and modern and therefore better than one governed more powerfully by tradition and custom. But, as Lon Fuller pointed out, that custom might have operated as the basis of norms and perhaps operated to resist modification of them in a primitive system, or that it regulated primitive forms of interaction, are not sufficient bases to characterise customary law as '*primitive*'.¹⁷ Nor is it a sufficient basis to conclude that custom has no relevance to questions which arise about the shape and nature of modern forms of law or

¹⁴ See the full title to the work itself: ie, *Ancient law: Its Connection with the early History of Society and its Relation to Modern Ideas*.

¹⁵ A term used by, among others, J Cairns 'Adam Smith and the Role of the Courts in Serving Justice and Liberty' in R P Malloy & J Evensky (eds), *Adam Smith and The Philosophy of Law and Economics* (1994) 32.

¹⁶ Maine (1861) (n 5) 135. See also Sir Fredrick Pollock's notes on this point, 183-184.

¹⁷ See Fuller (n 9) 117.

that an understanding of custom has little or nothing to add to our understanding of made law.

Nineteenth century (and later) accounts tended to place made law at the peak of the developmental scale, influenced no doubt by the movement in philosophical thinking away from natural law and conceptions of law's derivation from something '*outside and bigger than [man] himself*',¹⁸ and towards a humanist rationality: trends predicated upon the evolution of society from the organic and unmade (at least by conscious human activity) to the designed and reasoned. The 18th century belief in reason, Jolowicz says, as the only justifiable basis for law, leads to a low opinion of custom.¹⁹

It follows, on this approach, that if legal systems moved from the customary to the positive, then enacted law might know no bounds in terms of what it might legitimately achieve, at the expense of the unmade primitive law, and, by analogy, at the expense of common law, itself possessing decidedly customary qualities.

Another sense in which modern scholarship treats custom is its role in the development of the Common Law. Common law is thought to have a close and necessary connection with custom in two respects. First, it adopted rules which were customary in character as its own rules. Secondly, its *method* has a customary flavour: incremental, careful, and forged in real and specific factual contexts.

¹⁸ Fuller (n 9) 56-57.

¹⁹ Jolowicz (n 12) 202.

Common law is, to many theorists, customary law itself, rationally applied and developed. For example, the historian J G A Pocock discerned a close bond:²⁰

... all common law was assumed to be custom, elaborated, summarised and enforced by statute; and all custom was assumed to be immemorial, in the sense that any declaration or even change of custom – uttered by a judge from his bench, recorded by a court in a precedent, or registered by king-in-parliament as a statute – presupposed a custom already ancient and not necessarily recorded at the time of the writing.

Many of the influential common law commentators prominently proclaimed the common law's customary qualities. Blackstone's common law, for example, was the '*ancient collection of unwritten maxims and customs*'²¹ which drew their force from '*general reception and usage*'. To Sir Matthew Hale, the Common Law and its custom were '*the great substratum of the law*'²² and the Common Law, the means for *receiving* and approving the law. To Glanvill, the common law comprised '*laws and customs of the realm*'.²³

These themes remain, albeit less prominently, in modern scholarship.

Brian Tamanaha and Gerald Postema, for example, characterise the Common Law as essentially customary, and as:²⁴

the lived ways of the community, their collective wisdom recognized and reformed into law – “the expression of commonly shared values and conceptions of reasonableness and the common good”.

²⁰ J G A Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (1957) 261.

²¹ 1 BI Comm 17.

²² M Hale, *History of the Common Law of England*, 4th edn, (xxxx) 68.

²³ Glanvill, G D G Hall (ed), *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (1993) 1-3.

²⁴ B Tamanaha, *Law as a Means to an End* (2006) 13, quoting G Postema, *Bentham and the Common Law Tradition* (1986) 4.

There are differences, nevertheless, between commentators, both now and then, about the extent to which the Common Law can properly be seen as consisting of the custom of the realm and the extent to which the two can be considered separate. The difficulties with interpreting the works of the English commentators have been well noted, owing to a lack of organisation in some cases, inconsistent use of terminology and imprecise language in distinguishing between the Common Law, local usages and general custom.²⁵ There is also a lack of certainty whether, in some cases, the term ‘common law’ is used to describe custom in some posited form, or something entirely separate from it. For example, Coke’s perspective was that common law *included* custom of the realm, if it be the general custom of the realm (as distinct from local usages).²⁶ Coke’s view seems to regard the Common Law as including more than just rules derived from custom. The lexicographic problems which are inherent in any attempt to understand the precise distinctions between habit, convention, usage, custom (local and more general), practices which fall within established patterns and written law have been well documented.²⁷ What these studies also do, however, show, is that the body of laws in pre-modern times included, in some guise or another, custom as a source of law, albeit alongside and not always completely distinct from, written law.

²⁵ See, for example, J W Tubbs *The Common Law Mind: Medieval and Early Conceptions* (2000) 189.

²⁶ Co Inst I:115b.

²⁷ See, for example, J G H Hudson ‘Introduction: Customs, Laws and the Interpretation of Medieval Law’ in P Andersen and M Munster-Swendsen (eds), *Custom: The Development and Use of a Legal Concept in the Middle Ages* (Proceedings of the Fifth Carlsberg Academy Conference on Medieval Legal History, 2008) (2009) 1-5; Tubbs (n 25) 189; Jolowicz (n 12) 201.

The Common Law may not have been uniformly customary in character,²⁸ but to the extent it was not, its *method* was customary, the *custom of the courts*.²⁹ If there be a division between the commentators, it is between an orientation of the Common Law as having a customary basis (a view firmly held by Blackstone) and those (Bacon and Selden included) whose approach has been described as more humanistic and ‘scholarly’.³⁰ J W Tubbs, for example, concludes in his study ‘*The Common Law Mind*’:³¹

... it is possible to identify two broad orientations toward the common law. Coke, Davies and Hedley are representative of the more traditional of the two orientations: in important passages, if not consistently, they emphasize the antiquity of the common law and identify it with custom. Bacon, Dodderidge, Finch, and Selden are representative of those lawyers who brought either their educations in philosophy, logic, and other legal systems or their training in the methods of humanistic scholarship to bear on their consideration of the common law; hence, they are less prone to limit their discussions to traditional formulas.

It is easy to see how these differences quickly distil into preferences or beliefs about the respect which might be afforded to tradition, to spontaneous collective human interaction. These facets of human existence, although superficially opposed, share a quality of transcending the immediate and the rational. Against them can be juxtaposed an immediate capacity, collective or otherwise, consciously to construct a desirable social order, a method more familiar to made law. Each is informed in some way by an underlying belief about the immanence of the underlying order and the extent to which we as humans ought

²⁸ See, for example, Tubbs (n 25) esp 195.

²⁹ D Bederman, *Custom as a Source of Law* (2010) 30.

³⁰ This division is Tubbs’: (n 25) esp 195.

³¹ Tubbs (n 25) 194-195.

interfere with it, and indeed, the extent to which we are intellectually and morally equipped to do so.

Common law, even as early as the 14th and 15th Centuries, gave custom authority by force of ‘reason’, but reason in this sense seems only to have been a prerequisite to the law being *binding*, not the primary or proximate cause of its *status* as such.³² Nevertheless, it is the thrust of a recent thorough analysis of this topic by Tubbs, that, with few exceptions from the late 12th century on, common lawyers *recognised custom as an authoritative source of law*, albeit that *not all English law was customary in nature*.³³

It is not my purpose here to assert that the Common Law was influenced by custom to the extent that Blackstone and others seem in their times to consider it to have been. I seek only to record the views of these influential writers that the Common Law’s relationship with custom is, historically at least, a very close one.

As a postscript on this point, modern legal thinking tends to epitomise custom as an unthinking attitude to, or acceptance of, the practices of the past, an anachronism, a time-out-of-mind adoption of what has tacitly gone before and as an unwelcome restraint on the willingness to enact made law. Learned Hand, for example, took just that view:³⁴

The respect all men feel in some measure for customary law lies deep in their nature; we accept the verdict of the past until the need for change

³² Tubbs (n 25) esp 188.

³³ Tubbs (n 25) 188.

³⁴ L Hand, ‘The Contribution of an Independent Judiciary to Civilisation’, in Winters (ed), *Handbook for Judges* (1975) 43 at 44.

cries out loudly enough to force upon us a choice between the comforts of further inertia and the irksomeness of action.

These views implicitly express faith in our ability to legislate anew in a manner more wise and less imperfect than mere custom. The theme is reminiscent of Maine: the impulse to modify in ancient times was stifled by custom and tradition.

There is perceptible in recent times a revival, faint perhaps, of the study of custom and its role in law, both historical and theoretical.³⁵ To some extent, this revival is the result of a renewed interest and relevance of a European *ius commune*, custom as a basis of international law and a perceived imperative from some quarters for international uniformity in commercial law. Beneath these more practical imperatives are deeper and more complex questions whether, and to what extent, the revival might have been influenced by the perfection of the state's near hegemony over law-making and by the postmodern dislike for that absolute structure and a desire for more pluralist alternatives. Custom tends to invert current conceptions of the sources of law: bottom-up rather than top-down.

The question of what is custom and customary law is accompanied by problems of definition and boundaries. The same, of course, could be said of law itself. Fuller's '*language of interaction*' or Parsons and Shils' '*complementary expectations*'³⁶ seem to be the best way of describing an amorphous topic –

³⁵ See Bederman (n 29); Perreau-Sassine & Murphy (eds), (n 2); Andersen & Munster-Swendsen (eds) (n 27); L. Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (1999).

³⁶ T Parsons & E Shils, *Toward a General Theory of Action* (1951).

interaction between members of society in some recognisable pattern, such as to allow the actions of others to be reasonably accurately anticipated or predicted. For present purposes, it is enough to articulate custom in this way and acknowledge its connection in that guise to the spontaneous ways in which humans interact and, at least sometimes and perhaps often, achieve social order.

III The Law Merchant: custom embraced

Custom, nonetheless, has vitality. It has infiltrated modern law and filled lacunae created by reliance upon made law. One example is the Common Law's most recent major engagement with custom and its deferential treatment of it: that of the Law Merchant. My purpose here is not to suggest that the modern legal system ought operate as the Law Merchant did before its reception. For one thing, the Law Merchant governed a topic well suited to convenient spontaneous law-making in a customary manner by merchants, who can here be appropriately styled the 'participant class'. I adopt that terminology because it is a theme upon which I draw in identifying attributes of the custom from which legislation might learn. It is a notion too that can be seen in Blackstone's treatment of custom, in speaking of '*a particular system of customs used only among one set of the king's subjects, called the custom of merchants or lex mercatoria*'.³⁷ The '*one set*' of subjects is the basis of my '*participant class*', a group among whom frequency and reciprocity of like dealings give rise to special significance.

³⁷ 3 Bl Comm 75.

For present purposes, a study of the Law Merchant offers not only an understanding of the manner in which state-made law might recognise and defer to such customs, but also insights into the features of custom which made it such an attractive target for transformation into made law.

The Law Merchant

Between 1756 and 1788, and in his capacity as Chief Justice of England, Lord Mansfield executed a programme by which customary rules between merchants were ‘found’ and applied. As a consequence, purely customary matters, as proved and found by a jury comprised of those within the class ‘bound’ by the customs, came to have all the features of formal legal rules.

The phenomena, both of English law leaving to commercial people the regulation of their own affairs according to their usages and practices, and the law’s reception of them (a treatment both pragmatic and deferential to those customs) assist in understanding custom, its features, and its relationship to modern law. The relevance of these features comes both from their being the most recent considered and programmatic interaction of law and custom, combined with the sustained attention given to the task by one of the finest judges of the era.

The course of the Law Merchant’s development has been fully traced by, predominantly, Wyndham Bewes,³⁸ early 20th century legal historian and barrister, Sir William Holdsworth and by Clive Schmitthoff and his French

³⁸ W Bewes, *The Romance of the Law Merchant* (1923).

counterpart Berthold Goldman.³⁹ Schmitthoff and Goldman in particular promoted and revived, in the mid-20th century, the study of mercantile law and gave it modern relevance.

This body of work demonstrates several points which are of importance for present purposes: that the Law Merchant was an incarnation of custom; that its precepts had a supra-national quality; that it maintained a life separate from English general law until the mid-18th century; and, that it was received into the general law itself, initially by transformation into common law rules, and later, into statute.

Three lives are evident in the Law Merchant's development:

- 1) its early life, as practices between merchants, and administered by specialist merchant 'courts', known variously in England as the courts of Pie Powder, Staple and Tolsey, and (more so internationally) as Fair Courts;
- 2) its incorporation into the Common Law under Lord Mansfield's supervision and, later still, into the general law through a range of codification statutes including the Sale of Goods Act;
- 3) its contemporary emanations.

³⁹ Goldman was Romanian-born, and became Professor of Law at the University of Dijon. Schmitthoff was born in Germany and had a successful appellate practice there. Fleeing the Nazi regime, he practised as a barrister in England and became, upon retirement, Professor Emeritus of the City of London Polytechnic. He was also Visiting Professor of Law at the University of Kent at Canterbury, among other things: Chia-Jui Chen (ed) *Clive M Schmitthoff's Select Essays on International Trade Law* (1988) XIII – XV. Both produced a huge volume of written work.

Early life

As with other ancient fields of law, it is impossible reliably to identify the genesis of the rules by which merchants engaged with each other in trade. Some speculate that its origins lie (at least predominantly) in arrangements between Italian merchants.⁴⁰ Others point to possible Arab or Phoenician origins.⁴¹ What is not in doubt is that the source of these rules lies in the practices and usages of merchants; the customs which arose between them.⁴²

Those customs supervened local usages and were, at least to an extent, supra-national. Blackstone considered the international character of mercantile affairs to have rendered municipal law inadequate for the task of regulating this field both on the grounds of complexity of the subject matter and jurisdictional reach.⁴³ This was a consequence of the trade which gave rise to these customs having occurred both along the 'Silk Road', principally; the East-West trade route stretching from Western Europe to China and in international fairs. That trade 'relay',⁴⁴ as it is perhaps more accurately described, intersected Mecca. It included the Mediterranean shipping trade.⁴⁵

Malynes' *Consuetudo vel Lex Mercatoria* (1622) highlights the separation of the Law Merchant from the Common Law of his day in saying that the customs of which he wrote were unknown to him and 'legally impossible' in

⁴⁰ See Bewes (n 38) 1; H C Gutteridge, *Comparative Law* (1949) 14; K Berger, *The Creeping Codification of the New Lex Mercatoria*, 2nd edn (2010) 8.

⁴¹ Bewes (n 38) 2-11.

⁴² L Trakman, *The Law Merchant: The Evolution of Commercial Law* (1983) 7-8; Bewes (n 38) 9.

⁴³ 1 Bl Comm 273 '... whereas no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandise; neither can they have proper authority for this purpose ...'

⁴⁴ G Blainey, *Short History of the World* (2000) 160-161.

⁴⁵ Bewes (n 38) 2.

the Common Law. But Malynes saw the Law Merchant, notwithstanding its customary nature and its separateness from the Common Law, as a system permitted to operate or to be acquiesced in by what might loosely be styled the state:⁴⁶

I have intituled the Booke according to the ancient name of Lex Mercatoria and not Ius Mercatorum because it is customary Law approve by the authorities of all Kingdoms and Commonweales, and not a Law established by the Soveraignte of any Prince.

The Courts in which the Law Merchant was administered and disputes determined were not courts in which the state had any direct involvement or over which it had sought to exercise control.

What is known of the merchant courts suggests they were highly practical bodies, administering commercial custom pragmatically and with an eye to those rules being facilitative of commerce. The courts dispensed justice in a summary way, more or less as a court of conscience, acting speedily.⁴⁷

Crucially for present purposes, the rules these courts administered were not, by any positive or explicit process at least, state-sanctioned. In the medieval period's '*dislike of absolutism in the temporal sphere*', its '*elaborate distribution of power*' and '*its sense of corporate life*',⁴⁸ the Merchant Guilds, as associations of traders, contributed not only to the management of trade, but to the formulation of rules.

⁴⁶ G Malynes, *Consuetudo vel Lex Mercatoria*, 1622 'Introduction to the Law Merchant'.

⁴⁷ In some cases, they were required to give judgment 'before the third tide': see, for example, W Stubbs (ed), *Select Charters and other Illustrations of English Constitutional History: from the earliest times to the reign of Edward the first* (1874) 112.

⁴⁸ G M Trevelyan, 'Some Points of Contrast Between Medieval and Modern Civilisation' (1926) 41 *History* 1-14, esp 10, 12.

Mainstream incorporation

The rules of merchants were administered outside the ever-developing common law system until as late as the mid-18th century. At that time, a conscious programme was initiated which was to continue for some three decades, by which the customs which governed the dealings of merchants came to receive the imprimatur of law, and thus to be applied by the Common Law. That is not to say that there was an entirely clear division between the Law Merchant and the Common Law up until its formal reception. Holdsworth notes that the relationship between the Common Law and Law Merchant was 'close'.⁴⁹ For example, there were attempts in the 17th century to bring the Law Merchant within the purview of the Common Law, as the Common Law courts '*sought absolute domination over the English system of law*'.⁵⁰

The incorporation of the Law Merchant into the 'mainstream' body of legal principles administered by the central common law courts occurred in two main phases: first through a deliberate programme of its reception into the Common Law; and, second, through codification of elements of it.

The 'Mansfield era'

No one person in modern times is more responsible for the development of the Law Merchant than Lord Mansfield (William Murray, 1705-1793). He was born in Scotland to Scottish parents, and moved to London at the age of thirteen. He later studied at Oxford University, was called to the Bar in 1730 and developed a successful practice. He entered politics in 1742, becoming Attorney

⁴⁹ W S Holdsworth, *A History of English Law* (1938) vol 12 537-544.

⁵⁰ Trakman (n 42) 26.

General. He was a legal historian and was influenced (heavily it seems) by Roman law.⁵¹ His Scottish background⁵² and his interest in Grotius, Pufendorf and Justinian are possible causes of Lord Mansfield's willingness to search for underlying legal principle.⁵³

Lord Mansfield's lengthy period of service as Chief Justice, combined with his obvious skill and practicality, meant his influence on English common law, and especially commercial law, was considerable.

At the time Lord Mansfield assumed the position of Chief Justice, the commercial law of England lagged behind that of other parts of Europe, and Parliament had not responded to the needs of a growing merchant class.⁵⁴ England was later to dominate manufacturing and commerce. In the second half of the 17th century, there had been widespread dissatisfaction by merchants with the Common Law in England.⁵⁵ Dissatisfaction too has been shown by Lieberman to have existed with the haphazard system of legislation.⁵⁶ There was a tense relationship between the Law Merchant and the Common Law, partly owing to the unsatisfactory state of law reporting and partly because of the

⁵¹ Holdsworth, among others, noted the influence of Civilian writers on Lord Mansfield: Holdsworth (n 49) vol 12, 467. See also D Coquillette, 'Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law' (1987) 67 B U L Rev 877 at 949-62 and J Oldham, *English Common Law in the Age of Mansfield* (2004) 367. Evidence of this influence can be seen, for example, in *Goss v Withers* (1758) 2 Burr 683 and *Pelly v Royal Exchange Assurance Co* (1760) 1 Burr 341.

⁵² To this might be added his father's (Viscount Stormont's) Jacobitism, that his native language was Scots, and the influence upon him of Alexander Pope. Each probably fuelled his independence of mind.

⁵³ W S Holdsworth, *Sources and Literature of English Law* (1952) 249. See also Oldham (n 51) 367.

⁵⁴ T Lowry, 'Lord Mansfield and the Law Merchant: Law and Economics in the Eighteenth Century' (1973) 7 *Journal of Economic Issues* 605 at 605.

⁵⁵ See, as examples, Josiah Child, *A Discourse About Trade* (1689); J Marius *Advice Concerning Bills of Exchange* (1651); John D Cary *An Essay on the State of England in Relation to its Trade* (1695).

⁵⁶ D Lieberman, *The Province of Legislation Determined: Legal Theory in eighteenth century Britain* (1989) 1-28, 99.

personality of judges at the time, and especially Chief Justice Holt (1689-1709) who is regarded as having kept commercial men at a distance from legal developments.⁵⁷

Lord Mansfield's genius was his use of a procedure endorsed in a 1645 decision of the King's Bench by which special juries⁵⁸ were empanelled in commercial law cases who were, or became, experts in such law. In that case, the Court granted a motion to empanel such a jury in deciding a commercial dispute. Lilly's *Practice* says of that innovation:⁵⁹

It was conceived they [the jurymen] might have better knowledge of the matters in difference ... than others ... who were not of that profession.

Mansfield was not the first to seek to incorporate mercantile practices as common law rules, although he was the first to do so programmatically. Nor was he the first to use special juries for that purpose.

Lord Mansfield's jurymen decided what commercial practice, in particular cases, required. Other matters were referred to commercial arbitration, often with the same people as comprised the special juries being Arbitrators. The so-called 'Mansfield jurymen'⁶⁰ were 'thus reared' under Mansfield himself at

⁵⁷ C H S Fifoot, *Lord Mansfield* (1936) 17-21.

⁵⁸ Special juries were abolished by the Juries Act 1949, but preserved them in cases entered in the commercial list of the High Court (see s 19). They first received statutory recognition in 1730: see J Oldham, 'Origins of the Special Jury' (1983) 50 U Chi L Rev 137 at 137.

⁵⁹ Reg ii, 154, cited by Fifoot (n 57) 104.

⁶⁰ Lord Birkenhead recalled that there was no greater source of pride at the time than to become one of 'Lord Mansfield's jurymen': The Earl of Birkenhead *Fourteen English Judges* (1926) 186.

Guildhall.⁶¹ He clearly had the confidence to do more than guide the jury to the proper result, as Mansfield's own notes show:⁶²

... he was prepared, on occasion, to coax jurors into reaching the desired conclusion. But jurors might still refuse to bow to judicial pressure, even when the matter was put to them more than once. He was less inclined than his contemporary, Buller J, to draw sharp lines between questions of law and fact, thereby removing questions from jurors and restricting the scope of their decision making powers.

So close was the relationship between Mansfield and his jurymen that he invited them to dine with him frequently.⁶³ By this and other means, Mansfield '*trained a corps of jurors as a permanent liaison between law and commerce*'.⁶⁴

Lord Mansfield's judgments give a clear understanding of his method and purpose. *First*, he was prepared to have regard to sources of law, including foreign mercantile codes, in cases where the issue was not one to which the English law provided a clear answer.⁶⁵ *Second*, he regarded the jurymen as advisors as much as fact finders.⁶⁶ *Third*, his desire was that commercial law be universally applied, albeit with an overlay of protections afforded by common sense and reason. In *Pelly v Royal Exchange Assurance Company*, he said:⁶⁷

⁶¹ Lord Campbell, *Lives of the Chief Justices* (1874) vol 4, ch XXXIV 120.

⁶² W Swain, 'Lord Mansfield and Lord Denning: Some Pitfalls and Possibilities Presented by the Great Judge's Approach to Legal History and the Law of Contract', Paper presented to the British Legal History Conference 'Judges and Judging', Oxford (2007) (footnotes omitted) available at http://www.law.harvard.edu/programs/ames_foundation/BLHC07/Swain%20BLHC20071_FINAL.pdf.

⁶³ Birkenhead (n 60) 186.

⁶⁴ Fifoot (n 57) 105.

⁶⁵ *Luke v Lyde* (1759) 2 Burr 882; 97 ER 614. See also B Murphy, *Luke v Lyde: An Analysis* [2003] Auckland U L Rev 2.

⁶⁶ Oldham (n 51) at 26.

⁶⁷ (1757) 1 Burr 341 at 347; 97 ER 342 at 346.

The mercantile law, in this respect, is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same.

Underlying Lord Mansfield's method was a desire to bring within the knowledge of the Court, and thereby transform, a merely practical usage into a legal rule to govern like future affairs.⁶⁸ Once so transformed, those practices ceased to have status as fact and could not be challenged as such in later cases.⁶⁹ In *Edie v East India Company*⁷⁰ Lord Mansfield said that once a point of commercial law was 'solemnly settled, no particular usage shall be admitted to weigh against it: this would send every thing to sea again'. He is recorded as saying, in the same case but a different report of it⁷¹ '... I ought not to have admitted any evidence of the particular usage of merchants in such a case. Of this, I say, I am now satisfied: for the law is already settled'.

Lord Mansfield's test for distinguishing between law and fact was:⁷²

If the reasonableness of the time &c depends on the particular circumstances of any case, this is a matter of fact, for the consideration of the jury; but if it depends on what may happen in a variety of like cases, it is a matter of law.

Fifoot saw the programme in less dichotomous terms; and one over which

Mansfield retained overall control:⁷³

The jury found a usage, the judge accepted or rejected it as furthering or impeding the convenience of trade. The jury solved a particular problem, the judge rationalized the solution for future use. The jury revealed a fresh

⁶⁸ Jolowicz (n 12) 207.

⁶⁹ Lord Irvine, 'The Law: An Engine for Trade' (2001) 64 MLR 333 at 334-335.

⁷⁰ (1761) 1 W Black 295 at 298; 96 ER 166 at 167.

⁷¹ (1761) 2 Burr 1216 at 1222; 97 ER 797 at 800.

⁷² Gibbs MMS, Cases in King's Bench, Mich 1782-Hil, 1782, fols. 91, 92, Middle Temple Library, London cited in Oldham (n 51) 74 and see his note 286 (emphasis in Oldham's quote).

⁷³ Fifoot (n 57) 114-115.

facet of human experience, the judge framed it in the general policy of the law. By insisting upon these complementary functions, Lord Mansfield maintained an equilibrium between stability and expansion, and determined the axis about which the mercantile world could revolve.

Special juries were not the only way in which Lord Mansfield educated himself on commercial practice. He also consulted with underwriters⁷⁴ and other persons concerned with particular types of insurance contract.⁷⁵

Perhaps owing to his Scottish origins,⁷⁶ or perhaps his understanding of Roman law, or even perhaps his mere clarity of purpose, Lord Mansfield has been attributed with re-establishing the connection between English law and the mercantile law of the continent.⁷⁷ The Law Merchant, up until now the customs of merchants in various parts of the world, and spasmodically enforced by trade guilds, local courts in sea towns and by the Court of Admiralty, was, almost singlehandedly by Lord Mansfield's efforts, recognised and enforced by common law courts and as rules in the modern, orthodox sense. The real genius of Lord Mansfield, as Lieberman has observed, was his ability to mould individual cases into a system of commercial jurisprudence.⁷⁸

Deeper forces are implicit in Lord Mansfield's programme. It is part of the means by which the state came to have its near-hegemony over rule-making and the imposition of sanctions. That power, in this case, was appropriated from the

⁷⁴ References to Lord Mansfield having done so appear in *Glover v Black* (1763) 3 Burr 1394, *Camden v Cowley* (1763) 1 W Bla 417 and *Wilson v Smith* (1764) 3 Burr 1550 at 1556. Sometimes the underwriters were members of a special jury: see for eg *Vallejo v Wheeler* (1774) 1 Cowp 143 at 150.

⁷⁵ *Salvador v Hopkins* (1765) 3 Burr 1707 at 1714.

⁷⁶ Scotland, during the 18th century, had a large number of lawyers who had trained on the continent and were thus influenced by continental thought: J Cairns, 'Legal Theory' in *The Cambridge Companion to the Scottish Enlightenment* (A Broadie ed) (2003) 226-227.

⁷⁷ H C Gutteridge (ed), *Smith's Mercantile Law*, 13th edn, (1931) (Introduction) ccxxvi.

⁷⁸ Lieberman (n 56) 116.

Guilds and the merchants themselves, not unwillingly for the most part. Lord Mansfield's programme seems to have been a response in part to dissatisfaction with the state of commercial law. Its management in his capable hands perhaps played a role in garnering the support of merchants for that undertaking.

So too, no doubt, did his skilful employment of the jury in his programme. Juries in Mansfield's day were not as passive as they are now.⁷⁹ They were, nevertheless, a crucial mechanism to ensure that the customary quality of the relevant rule was preserved in its reception. This was not a programme by which the Court itself found the custom, or adjusted common practice to suit what it perceived to be the demands of the day. Employing a jury of skilled commercial people ensured that the usage which applied to the conduct under consideration was not only custom in the true sense, but that it would be received as such. The choice of medium may have assured the outcome.

At work in Lord Mansfield's programme can be seen a critical juncture in legal terms. Permitting the affairs of a class of people to be governed by their own practices and usages is one thing. It is another for those practices to receive the imprimatur of law and thereby to be received into the more structured and conscious system of legal rules. It is one way in which the line which divides unmade from made law is emphasised. It demonstrates the apparent importance of there being a sanctioning not only before the unmade can pass as posited law, but also before being considered worthy of being enforced as such.

⁷⁹ Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (1992), vol 1 138.

In the end, Lord Mansfield's programme says as much about custom as it does about the legal system: a system which, in this case at least, can be seen as drawing its legitimacy from the communicative power of public opinion, here expressed as the usages of those who will be subject to the custom enshrined as law.

These perspectives offer something by way of explanation of the gulf, real or contrived, between the conventions which govern human interaction on the one hand and legal norms on the other. From a practical perspective, however, the metamorphosis of these practices into legal rules seems to have changed very little their substance. Although remedies became available (they were absent in the mercantile courts), it was the effect which the rules would have as precedent in later cases (having been rationalised for future use) which seems to have constituted the major change.

This programme, which a critical spectator might see in terms of a due diligence or sanitisation of practices, is one necessary only to maintain the magisterialism of made law and to emphasise its special place juxtaposed to custom. Such cynicism is not entirely justified. Lord Mansfield's view seemed to be that commercial activity would benefit from its rules being brought within the Common Law fold. Having the remedies which a state court offered, and overcoming jurisdictional complexities arising from the need to seek adjudication of entitlements from different institutions are both very real improvements.

In effecting these improvements, Lord Mansfield recognised the supra-national source of the customs, distinguishing in one case between ‘*our Municipal laws*’, ‘*particular and local law*’ and ‘*general law*’.⁸⁰ And Foster J, in *Edie and Laird v The East India Company*⁸¹ was clear that the Law Merchant was general custom, not a special local custom.

The programme over which Mansfield presided was one which conferred the necessary state sanction, but on norms which were, already, operating much as legal rules and which were ripe for reception as such. In affording such deference to custom, Lord Mansfield recognised it as bringing benefits which purely ‘made’ law lacked. But the programme he implemented, and especially his use of the jury, provided the necessary checks for which the transition from facts to norms⁸² called.

Statutory life

The late Victorian era saw statutory enactments on various mercantile topics: the Bills of Exchange Act 1882; the Partnership Act 1890; the Sale of Goods Act 1893; the Marine Insurance Act 1906, and the Companies Act 1862. Sir Mackenzie Chalmers was the drafter of three of these. He adopted a practical approach, the manifestation of which is the extent to which his statutes avoided protracted disputes about their terms. Chalmers himself described the approach he had taken as uninventive:⁸³

⁸⁰ *Goss v Withers* (1758) 2 Burrow 683 at 689.

⁸¹ (1760) 1 W Black 295 at 298-299.

⁸² Jürgen Habermas spoke of law as a social mediation between facts and norms. His theory is one which supports a need for law to retain ‘*communicative reason*’: J Habermas, *Contributions to a Discourse Theory of Law and Democracy* (1996).

⁸³ M Chalmers, ‘Codification of Mercantile Law’ (1903) 19 LQR 10. See also A Rodger, ‘The Codification of Commercial Law in Victorian Britain’ (1992) 109 LQR 570.

A practical and working code cannot spring from the head of the draftsman, as Pallas Athene is fabled to have sprung, fully equipped, from the head of her father, Zeus. In legislation, as in other sciences, the a priori road is a dangerous one to tread. When the principles of the law are well settled, and when the decided cases that accumulate are in the main mere illustrations of accepted general rules, then the law is ripe for codification ... The province of a code, I venture to think, is to set out in concise language and logical form, those principles of the law which have already stood the test of time. It co-ordinates and methodises, but does not invent, principles.

This was codification, but of a common law kind. It was not informed by any general or theoretical analysis of principle. As Chalmers himself indicated, his role was not to invent, but to co-ordinate and methodise. The approach taken by the English Courts was similarly restrained. Only cautiously and gradually did they become receptive to codification. Lord Herschell however (who had been involved in the drafting process along with Chalmers)⁸⁴ was an early adherent. His observations in *Bank of England v Vagliano Brothers*⁸⁵ were to some extent an admonition of contrary approaches (which must then not have been uncommon):

The purpose of a statute [intended to embody in a code a particular field of the law] was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was.

Lord Herschell sought to set down canons for construction of a codifying Act:⁸⁶

I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it

⁸⁴ Lord Herschell had, for example, settled Mackenzie Chalmers' first draft of the Sale of Goods Act.

⁸⁵ [1891] AC 107 at 145.

⁸⁶ [1891] AC 107 at 144.

was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

The codifications were highly successful, by any measure. The fact that they were adopted in more or less the same form in numerous other jurisdictions speaks for itself. The success of the Codes accelerated the momentum of adoption. Once adopted by some few other jurisdictions, there was a gravitational pull upon other jurisdictions who had not done so, if for no other reason than to enjoy one benefit which had led Lord Mansfield to act in the late 18th century: to achieve so far as possible, consistency for mercantile dealings between nations.

Strangely, however, both its incorporation by this means into the Common Law and its later codification represented the loss to the Law Merchant of its supra-national character. While the law retained its similarity to other jurisdictions, it also acquired more local peculiarities. This manifests the Law Merchant's metamorphosis from a truly international phenomenon to a nationalist system of law, albeit sharing common origins and some of its content with other national legal systems. These rules, for so long distinctly un-parochial, now derived, by virtue perhaps of their success, their force from national legislatures.⁸⁷ The story of these rules, in more recent times, is to some extent one of the Law Merchant attempting to break free of these nationalist bounds, and restore itself, by various means, to a supra-national operation. It is this centripetal feature which most prominently characterises mercantile law's contemporary status.

⁸⁷ The downside of which was, according to Schmitthoff, an intellectual isolationism: Chia-Jui Chen (ed) (n 39) 26.

Contemporary life

In its most forthright form, the contemporary life of mercantile law is the basis upon which an autonomous international commercial law will evolve.⁸⁸ Even in less forthright guises, the trend is still all one way.

The *Vienna Convention on Contracts for the International Sale of Goods* was concluded in 1980.⁸⁹ Its effect was to reconcile to some extent the conflicting traditions of the Civil and Common Law. More recent are the *UNIDROIT Principles of International Commercial Contracts*, the aim of which is ‘*progressive codification of the law of international trade*’.⁹⁰

The *TransLex* principles comprise, at present, 128 principles and rules of the ‘*new Law Merchant*’.⁹¹ Its purpose is to allow the application of the rules and principles in practice, by offering the actual text online, well supported by comparative law references. The *Principles of European Contract Law* were published in 1995 and prepared under the supervision of Professor Ole Lando. The so-called *Lando Principles* seek to contribute to the evolution of a new European *ius commune* and operate when parties agree that their bargain is to be governed by the *lex mercatoria*. There are two main differences between the *Lando* and UNIDROIT principles: the latter aims for global application whereas *Lando* is limited to member states of the European Union; and UNIDROIT seeks

⁸⁸ This was the end which Schmitthoff advocated: C Schmitthoff (ed), *The Sources of the Law of International Trade* (1964) 3, 5.

⁸⁹ Ratified by every major trading nation except India, Brazil, South Africa and, perhaps surprisingly, the United Kingdom.

⁹⁰ As the title to the Report of the UNIDROIT Secretariat suggests: *Progressive Codification of the law of International Trade* in United Nations Commission on International Trade Law, Yearbook I (1968-70) 285 ff.

⁹¹ Available at www.trans-lex.org

to apply in business-to-business transactions. *Lando* applies in business-to-consumer transactions.

The Draft Common Frame of Reference is an attempt to achieve a European private law by publishing a text which serves as a source of inspiration for law making and law teaching at all levels and which is offered (at least by those involved in the project)⁹² as a point of reference for European and national legislators and the European and national courts as to what is a commonly acceptable solution to a given problem,⁹³ as a text which might be adopted voluntarily by contracting parties, and as a basis for teaching students of European universities.

All these approaches, while perhaps craving for more, adopt an approach of ‘*creeping codification*’, an approach alive to the *realpolitik*, and also to the historical means by which the Law Merchant achieved its initial success: by adoption, in transactions between ‘ordinary’ participants, and not adoption by national legal systems.

These more recent permutations of the Law Merchant are acknowledgements of its resilience and adaptability to changing legal structures. But they also show one most fundamental change: from a body of rules devised spontaneously and unconsciously, and subsequently by trial and error, and proven utility by merchants and uniquely adapted to their purposes, to a body of rules which departs somewhat from that grass-roots source. Both draft codes are

⁹² and recognising that the text of the Common Frame of Reference is less ambitious.
⁹³ C von Bar, ‘A Common Frame of Reference for European Private Law – Academic Efforts and Political Realities’ (May 2008) 12.1 EJCL, available at <http://www.ejcl.org/121/art121-27.pdf>.

the product of international agencies, with little input from local legislatures and, perhaps more importantly, any merchant source. But they do retain an organic quality because they were devised outside ordinary national legislative processes, which is a phenomenon observed by Berger:⁹⁴

Law-making no longer appears 'in the splendid garment' of the statute. Instead, it occurs 'bottom up' in a number of informal methods which create pragmatic, practice-made rules. These rules are said to be economically more efficient than state legislation.

What characterised the 'old' Law Merchant was its sensitivity to the practices and requirements of merchants, the formulation by them and their own trade associations of the rules, and, later, the careful formalising of those rules by, once again, drawing upon the practicality of merchants (as special juries) and, finally, the codification of those rules, but in an uninventive way, thereby preserving their practicality.

So the modern life of the Law Merchant has now to some extent come full circle, as Schmitthoff observed (himself somewhat of a prophet and pioneer of modern international trade law)⁹⁵, in the return to attempts to re-internationalise it and free it from the idiosyncrasies of national law.⁹⁶ There can be no doubt, however, that the New Law Merchant has a centripetal quality, with its promise of more uniform regulation of trade and commerce, and, possibly, as a basis in the future for codification and possibly of contract⁹⁷ and even private law. One such view, promoted for example by those who developed the *TransLex*

⁹⁴ Berger (n 40) 43 (footnote omitted).

⁹⁵ See, for example, J Honnold, *Review of Clive M Schmitthoff's Select Essays on International Trade Law* (1991) 85 AJIL 247; Chia-Jui Chen (ed) (n 39).

⁹⁶ Chia-Jui Chen (ed) (n 39) 27.

⁹⁷ See, for example, A M L Rodriguez, *Lex Mercatoria and Harmonization of Contract Law in the EU* (2003).

principles, is that the New Law Merchant ought to be codified in a creeping manner, by offering an instrument to apply transnational commercial law in daily legal practice and also by '*lead[ing] the New Law Merchant out of the codification dilemma in which it has been trapped over the past fifty years*' by, it seems, offering flexibility and openness.⁹⁸

IV Custom's characteristics

What are the features of custom which rendered it a valuable source of law in the ways mentioned above? What is it about custom which impelled 18th century courts to embrace it and for modern law to resile somewhat from it? These questions call for closer attention to custom's characteristics.

Custom is practice

Custom, by definition, accords with practice. The frequency of action which lies at its core means that there is no difference, as with other laws, between what is and what ought to be. Custom has no pretence to call adherents to a code beyond that which practice dictates. This is a product of its objects. It seeks convenience, utility, and practicality and as such seduces adherents.

There are debates about just *whose* practices constitute custom. Is it the whole of the people acting in the particular field, or those of lawyers, or of some other group of insiders? The debate is one which focuses more on custom *as*

⁹⁸ Berger (n 40) 12-13.

received by the Common Law, than custom itself. For example, Ibbetson has suggested that, in the context of the English Common Law:⁹⁹

At a very basic level, no doubt, the values espoused by the common law would have been generally recognised by people in England, but the detailed working out of the rules derived from these values would certainly not have had any such populist grounding. This was all the work of lawyers, customary in the sense that the communis opinio doctorum might have been.

The author has fallen into a positivist trap. The lack of any representative quality in custom *as received* is a criticism of the Common Law, not custom as such. It does not mean, for example, that the custom from which the rules were derived were those of an elite who, through self-interest, adopted practices which were ultimately received as law. That is quite a different thing from saying, as must be the case, that the practices developed only amongst those whose concern it was to engage regularly in the relevant field of activity, for example, shipping and mercantile affairs: participant classes.

In the case of the Law Merchant's reception, this dilemma was avoided entirely. It was a jury of the merchants who found the custom, thereby keeping the rules firmly founded in grass-roots sources.

Custom as 'higher law'

Custom has, to some, the status of a '*higher law*'; one in which no sovereign or legislature has played any part in devising and one which, for that reason, stands beyond the immediate control of 'made' law. Its antiquity or immemoriality confers reverence, something which Bentham lamented: '*[w]e inherited*

⁹⁹ D Ibbetson, 'Custom in Medieval Law' in Perreau-Saussine & Murphy (eds) (n 2) 165 (footnote omitted).

*[customary law] from our fathers, and, maugre all its inconveniences, are likely, I doubt, to transmit it to our children’.*¹⁰⁰

Brian Tamanaha links the demise of custom with the erosion of the rule of law and its loss as part of the collapse of higher laws from which law itself drew autonomy. It is topic that I take up in the next Chapter in the context more generally of the historical and philosophical developments that I there consider.

Custom as common sense

Custom is the product of what is often described as ‘*common sense*’: a species of practical reason. The idea of there being some simple and collective intuition about what is right and practical finds diminishing acceptance in legal thinking. But the notion of such a sense is more than a vague homespun hypothesis. A source of knowledge common to humankind has been recognised which produces truths not capable of proof by reason.¹⁰¹ The source is one which must have an intuitive quality and which is not derived from reason or other source of applied thought. James Beattie, a philosopher of that Scottish school, described common sense as:¹⁰²

... that power of the mind which perceives truth, or commands belief, not by progressive argumentation, but by an instantaneous, instinctive, and irresistible impulse; derived neither from education nor from habit, but from nature; acting independently on our will, whenever its object is presented, according to an established law, and therefore properly called Sense; and acting in a similar manner upon all, or at least upon a great majority of mankind and therefore properly called Common Sense ...

¹⁰⁰ J Bentham, *A Fragment on Government*, ch IV, art 38.

¹⁰¹ G Campbell, *Philosophy of Rhetoric* (1776), ch V part III.

¹⁰² G Beattie, *An Essay on the Nature and Immutability of Truth* (1770) extracted in G A Johnson (ed) *Selections from Scottish Philosophy of Common Sense* (1915) 222-223. Thomas Reid described common sense as ‘the foundation of all reasoning and science’: W Hamilton (ed), *Essays on the Intellectual Powers* (1855) vol. 1, 230A-B

At the heart of this view is the ability of man to perceive, without recourse to reason or religion explicitly, not only a way of conducting ourselves in a way which is well adapted to achieve tasks necessary for human existence (ie, practical), but also to act in a way which is morally acceptable. If there be some innate ability to know what is good from bad, right from wrong, or workable from unworkable whether it be Aristotle's *phronesis*, practical wisdom, the Enlightenment notion of moral sense,¹⁰³ moral sentiments, the '*the voice of God within us*',¹⁰⁴ or Adam Smith's theory of natural morality, custom must possess some of its benefits, being that which has been demonstrated to have offered a workable way of achieving a particular result. Thomas Jefferson succinctly captured this idea when he said in the Preamble to the original draft of the Virginia Statute of Religious Freedom:¹⁰⁵

Well aware that the opinions and beliefs of men depend not upon their own will, but follow involuntarily the evidence proposed to their minds ...

Custom, in this sense and many others, has strong similarities to language, itself a form of collective and spontaneous social order. An illustration of common sense in operation is afforded by the transition undergone by the English language during the period in which it was displaced by Latin and French, after the Norman Invasion and up until, roughly speaking, the Peasants' Revolt. In this period, despite having no real life in state business or amongst the ruling class, the English language was simplified by, for example, the stripping away of

¹⁰³ Home (Lord Kames) *Essays in the Principles of Morality and Natural Religion* Essay II (1779 edn) esp ch I.

¹⁰⁴ Home (n 103) esp 44.

¹⁰⁵ J P Boyd, *The Papers of Thomas Jefferson*, (1955), vol II 545 cited in L Fuller, *Morality of Law* (1976) 79 footnote 34.

its genders, and by becoming better adapted to the needs of its users. Trevelyan describes, almost poetically, that course of events:¹⁰⁶

One outcome of the Norman Conquest was the making of the English language. As a result of Hastings, the Anglo-Saxon tongue, the speech of Alfred and Bede, was exiled from hall and bower, from court and cloister, and was despised as a peasants' jargon, the talk of ignorant serfs. It ceased almost, though not quite, to be a written language. The learned and the pedantic lost all interest in its forms, for the clergy talked Latin and the gentry talked French. Now when a language is seldom written and is not an object of interest to scholars, it quickly adapts itself in the mouths of plain people to the needs and uses of life. This may be good or evil according to the circumstances. If the grammar is clumsy and ungraceful, it can be altered much more easily when there are no grammarians to protest. And so it fell out in England. During the three centuries when our native language was a peasants' dialect, it lost its clumsy inflections and elaborate genders, and acquired the grace, suppleness and adaptability which are among its chief merits. ...

Analogies have been drawn, by Fuller among others,¹⁰⁷ between customary law as a 'language of interaction' and language itself. Both are constantly shaped by standards that do not enter into our thought,¹⁰⁸ both are a process of meaningful interaction in which the participants must move within some generally predictable pattern¹⁰⁹ and we become aware of both only when the rules are broken, in which case that breach leads us to articulate the rules upon which we had previously proceeded without knowing it.¹¹⁰

If there be such a thing as common sense, it is something which would be perhaps within the capability of a judge to utilise, but rarely within the legislator's. Such a sense could only be based upon standards shaped by

¹⁰⁶ G M Trevelyan, *History of England*, 3rd edn (1945) 131-132.

¹⁰⁷ Including Habermas (n 82).

¹⁰⁸ K I Wilson (ed), *The Principles of Social Order: Selected Essays of Lon L Fuller* (1981) 220.

¹⁰⁹ Wilson (ed) (n 108) 213.

¹¹⁰ Wilson (ed) (n 108) 220.

ordinary interaction and common experience. So, the more removed the decision-maker from these forces and the more process-oriented and structured that function, the more detached those decision makers become from these organic sentiments. Moreover, the legislator loses any collective quality in his or her actions because theirs is a more artificial activity than one by which decisions are made in cases impelled by the necessity of determining a dispute. For these reasons, that there exists a legislators' common sense has never been suggested, persuasively or otherwise.

Custom as democratic: an expression of public will

This organic sense of custom, spontaneous and not constructed or reasoned, is another of its characteristics. It confers a democratic quality.¹¹¹ It is certainly no less democratic than legislation: both are expressions of '*the will of the group*'.¹¹² In the case of custom, the group is the participant class, and the totality of the people who are bound by the usages. In the case of legislation, in theory at least, statutes are the expression of the will of the majority of all the people of a democracy. In practice, as I have shown in Chapter 3 in particular, the extent to which drafting legislation remains an activity of the legislature as distinct from the bureaucracy may be questioned, just as its enactment might be considered no less a product of party politics than the expression of the democratically articulated will of the electors.

¹¹¹ Tamanaha (n 24).

¹¹² Henri Lévy-Bruhl, *Sociologie du droit* (1961) at 39-40, 55, 57; Jolowicz (n 12) at 199-200 citing Julian (D.1.3.32.I) '*... what does it matter whether the people declares its wishes by vote or by its actual conduct.*'

Less resistance to change

Custom may suffer less from statute's and the Common Law's in-built resistance to change. Both forms of made law need to have mobilised the necessary forces to initiate reform. Those forces need to overcome the Common Law's essentially incremental attitude to development and change. Precedent, as Salmond said, '*cannot retrace a course once taken*'.¹¹³

Legislation has very formal barriers to change, and what amounts to an effective presumption against it, because statutes do not, officially at least, cease to operate through disuse. Where custom is concerned, rules which are inefficient or no longer suitable for those affected by them are abandoned. Moreover, legislators are notoriously resistant to amendments and repeals.

The Law Merchant is an example of a system refining itself into rules well suited to the peculiar interests of its masters. A number of legal innovations were adopted, according to Benson, '*because they promoted speed and informality in commerce and reduced transactions cost*'.¹¹⁴ This state of affairs stands in contrast with the Common Law, in which developments are made incrementally, with attention to the way in which the change affects each specific case.

Legislation, especially in its most formal state as a Code, has a tendency to ossify the law and make it resistant to adaptation and changing circumstances.

¹¹³ J L Parker, *Salmond on Jurisprudence*, 9th edn (1937) 214.

¹¹⁴ B L Benson, 'The Spontaneous Evolution of Commercial Law' (1989) 55 *Southern Economic Journal* 644 at 650.

Obedience

Custom which is at its core consensual, secures automatically, to borrow Austin's famous phrase, habitual obedience. But obedience is by the participant class. These individuals have what might be described as 'ownership' of the practical effect of the custom, and therefore the rule itself. Obedience becomes an expectation of members of that class, a feature observed by Hayek:¹¹⁵

The significance of customs here is that they give rise to expectations that guide people's actions, and what will be regarded as binding will therefore be those practices that everybody counts on being observed and which thereby condition the success of most activities.

Customs, consequently, take hold as such, beyond mere habit, and owing to the expectations to which they give rise. A habit of obedience is more than habitual conduct. It also connotes the expectation held by others that the person, in the relevant circumstance, will conduct himself or herself in a particular way. In short, custom more strongly assures compliance. It is less likely than positive law, for that reason, to require adjudication and enforcement.

The consensual nature of the mode of enforcement of custom immediately provokes concern whether, without state force, the alternative means of resolution is effective. Benson has explained a phenomenon long known to exist in other fields of commercial endeavour, and especially stock exchanges: the power of isolation or ostracism in a participant class. He uses, as an example, the lack of any real enforcement mechanism held by the mercantile courts:¹¹⁶

¹¹⁵ Hayek, *Law, Legislation and Liberty*, vol 1 97.

¹¹⁶ Benson (n 114) 649 citing W C Wooldridge, *Uncle Sam, the Monopoly Man* (1970) 96. This is a theme developed further by Benson in the *Journal of Libertarian Studies* – see 'Customary Law with Private Means of Resolving Disputes and Dispensing Justice: A Description of a Modern System of Law and Order without State Coercion' (1990) vol 9

These courts' decisions were accepted by winners and losers alike because they were backed by the threat of ostracism by the merchant community at large - a very effective boycott sanction. A merchant who broke an agreement or refused to accept a court ruling would not be a merchant for long because his fellow merchants ultimately controlled his goods. The threat of a boycott of all future trade "proved, if anything, more effective than physical coercion".

But the effectiveness of such a system has its limits. While it might well produce the desired effect for a relatively small group of merchants accustomed to dealing with one another to ostracise the errant member, or for a group to which it is necessary to obtain membership before undertaking the particular activity (such as a stock exchange), it seems that ostracism or exclusion would not have the necessary effect where there are other options for undertaking the same activity or where the relevant group is so wide and disparate that a boycott imposed by some would nevertheless leave a viable field in which the individual could continue to operate. The lack of any formal enforcement of decisions of the mercantile courts seems not to have affected the Law Merchant's efficacy, but perhaps because it operated in one of those areas where the threat of boycott was one which was likely to have real force. After all, there are few other social dealings which possess commerce's near perfect reciprocity, the strong self-interest of its participants to remain regarded as worthy trading partners by reason of their propensity to adhere to common expectations, and such a frequency of like dealings.

25 and 'Enforcement of Private Property Rights in Primitive Societies: Law Without Government' (1989) vol 9 1.

Other features

Questions remain about the extent to which a social order can arise spontaneously and remain just without the intervention of positive law and about the extent to which evolution of the law in this spontaneous way is capable of achieving 'justice'. Such concerns seek to understand the extent to which the notion of justice itself is evolutionary and is to be found within the social practices of man. It is perhaps no surprise then that custom has found itself at the centre of the major debates between positivist and natural law theorists, a debate which seems to have at its core a difference in views about how law ought to be defined, but beneath which may not be much more than *beliefs* about whether there exists beyond humankind a source of wisdom with which we might have been imbued or which we might have some capacity to acquire and utilise. At least one natural law theorist has been alive to this underlying tension:¹¹⁷

... many of the disputes of legal philosophy hinge upon an undeclared preference between made law and implicit law.

That preference may also be based not only upon the circumstances in which custom might operate as a just and effective source of norms, but also upon a view of the capacity of social practices spontaneously to produce norms which accord with notions of justice. It strikes deep into legal positivism:¹¹⁸ custom exists as a source of norms, but is not positive law; it is spontaneous not conscious, and this product of human effort has a teleology of its own, but it has become unfashionable to speak of it. Custom is often discussed not in terms of

¹¹⁷ Fuller (n 9) 44.

¹¹⁸ See also Fuller (n 9) 114-115.

the rules it offers, but in terms of whether it ought to be regarded as law at all.¹¹⁹

At the core of this trend is a view that custom has nothing new to offer, leading

Fuller to suggest:¹²⁰

The prevailing tendency to regard social order as imposed from above has led to a general neglect of the phenomenon of customary law in modern legal scholarship.

V Consequences of the neglect of custom

The waning of a belief in custom as law has led to a lack of understanding of principles which assist in discerning the proper boundaries of legislation. The result is a lack of what might be described, in 18th century terms, as any science of, in particular, legislation. In modern terms it manifests itself in a lack of willingness, because of positive law's perceived pre-eminence, to investigate either what might constitute natural constraints upon it or the character which positive law ought to assume in order to be regarded, if not as 'law', 'good law'. The neglect of custom and how the study of it might better inform the bounds of made law is part the lack of jurisprudence applicable to legislation (legisprudence) that I discuss in the next Chapter.

There is a link between the neglect of custom and what it reveals about the conditions for social order, human behaviour, interaction with deficiencies in made law and, more deeply, about beliefs and preferences we might have about

¹¹⁹ Wilson (ed) (n 108) 212.

¹²⁰ Wilson (ed) (n 108) 177.

the immanence of the underlying order. Some of these consequences are better recognised than others.

Lon Fuller in his essay, *Human Interaction and the Law*, suggested the impossibility of understanding made law without first obtaining an understanding of customary law. That essay first noted, as I have done here, the neglect of customary law. That neglect Fuller saw as having done great damage to our thinking about law generally¹²¹ and to have been caused by a prevailing tendency to regard all social order as imposed from above, perhaps informed by a '*linguistic tendency*' to regard law as standards which have received the imprimatur of the state.¹²² If this is indeed a linguistic tendency, then the tendency is exposed as founded upon a belief that social order is the preserve of the authors of made law, and not of spontaneous and collective self-ordering. It also exposes positivism to have been less than candid; in seeking to redefine what is meant by law, rather than seek to articulate reasons why we ought to limit the notion of law in the way that positivists would.

The basis for Fuller's concern about the neglect is the loss of a fundamental understanding of law's nature: what ought to be its forms of expression, what ambitions ought it set for itself, what guiding principles must it recognise to be successful and, perhaps most critically, are its proper objects the achievement of ends external to law, or are there internal principles which ought to guide its course? Many of these themes feature prominently in contemporary

¹²¹ Wilson (ed) (n 108) 213.

¹²² Wilson (ed) (n 108) 177.

discourse about law, but many have life as standalone complaints which are never sought to be traced to more fundamental solutions or endemic problems.

Fuller points to numerous features of customary law which are informative. Custom teaches us that repetitive dealings tend to create standardised expectations;¹²³ custom reveals a strong consensual element;¹²⁴ custom organises and facilitates interaction; and society, through custom, silently directs people in the way it tells them is just and proper.¹²⁵

I would, however, go further than these examples. Custom has much to explain about the basis for habits of obedience, about the discipline which inheres in rules being fashioned by those very same people who are to be bound by them and about its lack of ambition in calling society to act in accordance with some external standard.

The contrasts between made law and custom will be obvious to the reader, even if there is not full agreement with my premise. The ambition to which made law aspires is state-sanction. Its authors are specialists in that field. They prescribe laws *for others*. There is none of the natural discipline that we see in custom, evident in made law, of keeping rules within the boundaries of what people will tolerate and in a way which will ensure continued meaningful interaction between citizens and yet which leaves room to move in the way in which that interaction might recommend.

¹²³ Wilson (ed) (n 108) 176.

¹²⁴ Wilson (ed) (n 108) 177.

¹²⁵ Wilson (ed) (n 108) 216.

Customary rules arise only between those who are to be bound by them. Several powerful results follow. The first is economy. There is no stronger impulse to keep rules clear and limited to those matters requiring treatment. The force is, of course, not only not conscious, but it follows inevitably from the way in which custom works. Only widespread, ubiquitous practices create the relevant expectations, so only interactions which actually work in a practical sense come to comprise rules.

The mode of bringing made law into existence separates the function of making it from those it is to bind. The only link is through elected representatives. But that link is, as I suggested in Chapter 3, not necessarily a direct one.

This comparison illustrates two somewhat extreme positions: one (custom) whose desire is that there be rules which govern existing practices all of which, by definition, have some pragmatic end; and the other (legislation) whose motivation is more ambitious. Elected assemblies are intended to mediate that extreme. This occurs both by the discipline of representatives being required to seek, at regular intervals, the endorsement of their constituents, and also by them controlling the legislation which passes into law. In modern times, it assumes that the legislature will assert itself towards the bureaucracy. There is no other real external discipline on the Executive: no other means of keeping the bureaucracy within the strictures of economy and discipline in its formulation of statutes. If, as Waldron suggests, legislation's dignity is derived from its

democratic quality,¹²⁶ then at the point there ceases to be a real and meaningful link between legislation and democracy, then the way we regard legislation ought be revised.

More importantly, made law assumes that existing standardized interactions can be substituted for an endless set of alternatives, and indeed, set and re-set, with no real limitation on the ways in which people will adapt or the number of times they might be willing or able to do so.

There is one other important feature of custom relevant to the present discussion which distinguishes it from legislation. It too is a feature of law which has slipped into obscurity with the neglect of custom. Reciprocity is one of the influences which produces the force of habit. The reason is the way in which it appeals to that sense within us that if dealings are repetitive and reciprocal, then the rule upon which we engage with others is one we know will recur, this time perhaps with us filling the role held by our counterparty in the last such dealing.

Reciprocity appeals to deep forces, and thus has a way of bringing home to people the practical rationale of conventions and their self-interest in maintaining them. After all, that person can readily place themselves in the role of the other party and have what Adam Smith might have described as sympathy for their counterparty if they too can conceive of themselves as being likely to occupy that position in future dealings. Reciprocity is likely to be stronger between members of a participant class, among whom repetition of similar dealings will be most

¹²⁶ J Waldron, *The Dignity of Legislation* (1999), for example, 2; J Waldron, 'Legislation' in M P Golding & W A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2004), ch 16.

likely and who are more likely than otherwise unconnected parties to share common beliefs and worldviews and to feel more intensely the bonds to which reciprocity gives rise.

The (incomplete) science of legislation

In the late 18th century, a critical juncture was reached. Before this time, legislation had not enjoyed the attention of sustained systematic and impartial thought. The 18th century was characterised by Sir William Holdsworth (and endorsed more recently by Lieberman) as a period in which there were few ‘*legislative interferences*’, giving the courts freedom to ‘...*consolidate and settle the principles of the modern law*’ and as a period which saw the legislative process as stagnant and lacking comprehensiveness.¹²⁷

Adam Smith considered the science of natural jurisprudence to be the most important, but also the least cultivated of all. From his natural jurisprudence he devised, albeit incompletely, a *science of legislation*. His science was more than an unthinking pre-commitment to the state not intruding into commercial and personal affairs. Smith’s considered view was that legislation had a limited province, a product in part of rule-formulation in that context being removed, unlike the Common Law, from specific cases,¹²⁸ coupled with a firm conviction that concrete cases as opposed to abstract thinking was a preferable way in which to formulate rules;¹²⁹ the abuse which he had witnessed of legislative power in

¹²⁷ See J Oldham, ‘From Blackstone to Bentham: Common Law Versus Legislation in Eighteenth Century Britain’ (1990-1991) 89 Mich Law Rev 1637 at 1638.

¹²⁸ Cairns (n 76) 222. The preference is noted by Cairns (n 15) 32; K Haakonssen, *The Science of the Legislator: The Natural Jurisprudence of David Hume and Adam Smith* (1981) 151-152.

¹²⁹ Haakonssen (n 128) 152, citing Smith’s *Lectures on Rhetoric and Belles Lettres* (vol 4 of the Glasgow Edition of his works) 169.

the form of exclusive privileges, the success and competence with which the English common law was being administered (and reformed)¹³⁰ in the 18th century, especially under the guidance of Lord Mansfield, and the structural resistance of the Common Law to pleading by a self-interested groups.

Many of these themes involve testing legislation as a law-making method against the availability of the alternative common law, with its incrementalism, its divided power (among numerous judges), its application, precedent aside, to only the specific case, the availability of appeal and the greater commitment of Common Law to reason. Legislation, in contrast, is capable of conferring at once, privileges unobtainable elsewhere and it has the capacity to act with blunt force.

Bentham's absolutism was one which fervently desired law reform, guided by his utilitarian principles, albeit as I pointed out in Chapter 1, that '*practically the most vital part*' of his legislative doctrine was *laissez-faire*.¹³¹ His was an approach which did not seek to attempt to come to grips with what, if anything, custom added to an understanding of law and its definition:¹³²

... the laws in question may subsist either in the form of statute, or in that of customary law.

As to the difference between these two branches ... it cannot properly be made appear till some progress has been made in the definition of a law.

Bentham's utilitarian absolutism subsequently came under pressure, first from evangelical philanthropy and collectivist currents in the 19th century and later, on

¹³⁰ See, for example, A V Dicey, *Lectures on the Relation Between Law and Public Opinion in England*, 2nd edn (1914) 166; Lieberman (n 56) 121.

¹³¹ Dicey (n 130) 147.

¹³² J Bentham, *Principles of Morals and Legislation* (1843) XIX.xxviii (page 150).

the basis of its incompleteness as a guide to law-making for its lack, in particular, of any discourse of rights.¹³³ The force which gave legislation a real boost was the sociological school, which demanded of law no more than it be a means to an end: an instrumental view of law against which Brian Tamanaha has recently spoken.

The theoretical debate therefore has gone further than recording the differences about made law's directed and ambitious character and case law's reactivity in '*working itself pure*'. It cannot seriously be doubted that some form of ambition in made law is desirable and that legislation has about it a dignity which justifies its considerable intervention. The science of legislation, if there be one, however, must include a set of principles which govern the circumstances in which it is desirable to employ made law, or, in reverse, the occasions when there ought to be legislative restraint. At present, there is little by way of legisprudence in this important field.

There are a number of features of made law (which I have, to varying degrees, touched upon above and in earlier Chapters) which evidence a lack of understanding of custom:

- 1) legislation's low regard for existing practices and usages;
- 2) legislation's loss of autonomous objects;
- 3) the increasing domination of legislative drafting by the Executive and the Executive having its own legislative agenda.

¹³³ See, for example, J J C Smart & B Williams, *Utilitarianism: For and Against* (1998).

Low regard for existing practices and usages

No force compels made law to be sensitive to existing practices beyond the link which exists between it and the democratic process. In its regulation of human activity, legislation adopts a top-down approach, strengthened by Executive arrangements and intervention, and expanded remedies and modes of enforcement.

Unlike custom, made law has no necessary connection with existing practices and usages. The manner in which legislation is created provides only the weakest of links between the daily affairs of people and the rules which it prescribes. That link, in democracies, is elected representatives. The notion of them as interested and active legislators ought not to be unthinkingly assumed, principally owing to the specialisation of that field, and, more importantly, the volume of legislation. We have, as I suggested in Chapter 3, reached a stage where elected representatives themselves have ceased considering in any real detail, let alone reading, the bulk of legislation. So, although Waldron asserts that legislation derives a dignity from its democratic quality,¹³⁴ there are real questions as to the extent to which the processes of initiating, drafting and passing legislation remain *in actual fact* ones in which elected representatives involve themselves meaningfully.

Loss of autonomous objects

With the diminution of this, the main mechanism by which electors bring to bear their will on the content of legislation, the nature of made law in that form has become the preserve of those with a less direct connection to everyday practices:

¹³⁴ J Waldron (1999) (n 126).

the Executive. As the understanding is lost, because of a disregard for custom, of the principles of social order, so too is any need to have regard to existing practices and usages. And by this means, law is employed to achieve ends which are not ones directed by public will and which tend to stray beyond those fields which history might define as the proper province of made law.

Executive domination

There are several features of made law, and particularly its modern form, which render it susceptible to Executive domination. I set out in Chapter 3 the ways in which this occurs and some of the forces at play. Made law regards as all-important, the state's sanction of it. That is the point at which, in modern times, we have come to accept that rules either succeed as law or pass into the abyss. That terminus, as the focus of made law's ambitions, diverts its attention away from that to which custom aspires: utility and practicality. But it is well-intentioned: only those laws which have the sanction of the state have the sanction of democracy. I have been careful here to use the word '*state*' rather than elected assembly because I have already suggested in Chapter 3 that sanction by elected assemblies has become, over time, less real, the result of which is that those who advise upon, draft and implement legislation have become the *de facto* sanctioners of it.

Moreover, law of any kind which attempts too much by either ignoring existing practice or seeking to effect significant reforms runs into difficulty commanding compliance. The problem emerges from the bare fact that behaviour or interaction which is not aligned with the way in which people

behave in the environment into which the law is to reach, lacks not only a habit of obedience, but, often, a readily apparent rationale.

The problem of legislative failure, is not, as some have suggested,¹³⁵ one caused by restraints placed upon legislatures. The problem is lack of restraint. Legislation rarely asks itself what it might, in reality, achieve. That there is a loss of restraint is shown by legislation now emanating not from those elected officials who complain about its volume and complexity, but from the Executive. The Executive, unlike Parliament, is far less directly mindful of the need for economy and of seeking to achieve only what it realistically can. The absence, in particular, of the discipline of having to answer regularly and directly to electors is critical.

The problem perpetuates itself. The more legislation acts without regard to these principles, the more it needs to compel compliance in ways beyond merely issuing commands. It is not enough to expand remedies and the means by which rules may be enforced. As the ambition of legislation ascends, the interest of people in enforcing it to vindicate their rights diminishes, partly because the rules which have been legislated are beyond the self-interest of people to enforce. This is part of the trend towards public law expanding to subsume areas traditionally filled by private law. And so there has emerged the regulatory bureaucracy, a branch of the Executive whose task it is to see implemented the legislation which the Executive itself has sponsored through over-burdened

¹³⁵ D P Burrows, 'Legislative Failure and Reform' (1917) 5 Cal L Rev 129.

elected assemblies. Having sponsored the legislative regime, it becomes the desire of the bureaucracy not only to see the regime enforced, but to see it expanded.

Large and expanding bureaucracies are therefore inevitable once legislators cease to insist upon maintenance of those principles, informed by a study of custom and of history, which characterise law.

VI Concluding remarks

Customary law, like legislation, is a way in which the will of the multitude finds expression. It takes expression, however, far more directly than does legislation, which necessitates the overlay of a popular assembly and the processes and formalities which accompany its activities. Two families of argument follow these different means. Waldron's argument favours the *deliberating* multitude, who, through their representative nature are more likely to reach the right result. The other family of argument can be found in the work of the communitarian scholars such as Charles Taylor and Alasdair MacIntyre who would favour the more organic and community-based means through which norms are created and given expression. Hayek too would favour this approach. It is not deliberately intellectualised and does not involve the participants trying to get it right. Yet by each pursuing his or her own self-interest, in this enlightened way, there emerges a wisdom of sorts.

There is in custom, however, weaknesses that affect its capacity to survive as a basis for law. For one thing, it collapses when pushed. It has nothing to

protect itself from the outside. The Common Law, although having a respect for it, adjusts it (albeit sensitively). But it has been powerless to resist the inroads that legislation has made. In part this may be because deliberative actions, whether it be judging or legislating, have come to be regarded as rightly displacing time-out-of-mind habit. Another reason might be that custom has a tendency to be communitarian: alienating the community to which it applies from the rest of the world, by becoming fragmented and local. On the other hand, communitarian scholars (Taylor and MacIntyre especially) see custom as offering the anchor without which we are lost. On this approach, the religion, traditions and practices of rationality of some smaller community are the external reference point necessary to ground moral judgments. Martin Krygier, in a similar vein, has suggested that the traditionality of law is inescapable, and argued that it is necessary to supplement the ‘time free’ conceptual staples of modern jurisprudence with an understanding of the nature and behaviour of traditions in social life.¹³⁶

The wisdom of the multitude is capable of being formed in different ways. The preference for one over the other involves, as well as other things, a philosophical choice about the extent to which the process of its formation requires or benefits from the injection of some deliberate thought. There are good arguments why a case-by-case analysis is superior in the aggregate to non-concrete ‘*thought experiments*’, and why it avoids many of the motivations which prompt legislation into existence, some of which, as I said in Chapter 3, are undesirable.

¹³⁶ M Krygier, ‘Law as Tradition’ (1986) 5 *Law & Phil* 237, 239-240.

The Common Law approach is somewhat of an escape route between these two approaches. It sits relatively comfortably between the deliberateness of a popular assembly and the customary rules and practices of the people. It involves both the deliberate intellectualisation of the question what ought to be the rule (through argument in Court and the Judge's reasoning), and yet it is rooted in the concrete case. Whether, in the end, our minds, collective or individual, can reach as far as Waldron would believe (and Hayek would deny) is a question of underlying philosophy. Underpinning it must also be a belief (perhaps implicit) in the end, about the immanency of the order within which we operate. I return to this theme in the next Chapter. For now, however, it is sufficient to note that the current disposition permitting legislative hyperactivity involves favouring pervasive and frequent intervention in the order. Uncovering that preference answers to some extent how we came to the point that we have.

Chapter 5

Causes of Proliferation and Reliance

I Introduction

In this Chapter, I explore causes of legislation's proliferation and our marked modern tendency to place such reliance upon it. It is impossible to be exhaustive in doing so. The forces that have brought us to the point and which have led us actively to favour, or at least to acquiesce in, a system in which legislation predominates, are numerous. And not all are susceptible to revelation, either in terms of their existence or their true degree of influence in forging our attitude to legislation.

The purpose of the exercise is to delve beneath the family of argument for which Waldron stands to see what intellectual and philosophical forces might bear upon the marked modern reliance upon legislation in preference to other sources of law and norms. The deeper causes of our approach are, I suggest, ones which Waldron's argument does not meet. The failure of that strand of argument to address them leaves us with a loss, because when popular assemblies legislate as energetically as they do, their basis for acting has never confronted the major counterforces that call for a more disciplined approach.

What I set out below are not the only causes of our present approach to legislatures and legislation. I have already mentioned some of the more straightforward of them: a bureaucracy that has the self-interest to engage in

mission-creep and empire-building and to keep the elected representatives busy and distracted by an overwhelming volume of potential legislation; the resulting burgeoning of the bureaucracy that more, and more intrusive, legislation necessitates; a greatly expanded electoral franchise, conferring on popular assemblies far greater legitimacy than previously; and a weakening of legislation's foils, especially the Common Law and customary law. The factors upon which I focus here are abstract in nature, and many of them are properly characterised as being an exercise in the nature of the history or descent of ideas.

An important part of my argument is that whatever the causes may have been, they seem to have deprived us of the means to conceive of a system that is alternative to one in which a strong state near-monopolises rule-making power and does so frenetically. Because of that, and because diagnosis is a necessary part of the cure,¹ I wish to delve a little also into the historical and intellectual forces that seem in recent and current times to impel us to regard the state's legislative capacity in the largely unquestioning way we do.

The course I take below is first to identify the marked lack of legal philosophy directed specifically to legislation. It is one means by which to understand that the regime of legislative dominance is one to which we have been habituated, rather than it being one at which we have arrived in any recent sense by conscious thought and reflection. I then consider several aspects that come within what might broadly be described as the history of ideas. I conclude by turning to other, related, analyses of the causes of the overreliance we place

¹ I do not, as Guido Calabresi does, think that '*The reasons for statutorification are too profound to be reversed ...*': G Calabresi, *A Common Law for Age of Statutes* (1982) 163.

upon legislation and its proliferation including the failure, in some respects, of judge-made law, and the loss, through many of the events and circumstances I have already described, and continue to do so here, of '*higher laws*' as forces restraining legislation.

In proceeding, three primary factors emerge, which I summarise now, so that they might be borne in mind as I traverse the various routes to their identification:

- 1) legislation, being the product of a democratic (as distinct from monarchical) process, is regarded, automatically and unthinkingly, as satisfying all criteria of authority and legitimacy (something, I venture, is a product of the Waldron family of argument) when the fact of its having been brought into existence in accordance with accepted democratic processes gives no necessary assurance of the matters that have, by this means, been assumed away;
- 2) the period of legislation's rise has seen a loss of what Charles Taylor describes as meaning from society. It has resulted in the almost complete extirpation of almost every vestige of every force and aspiration outside humankind. It has meant both greater reliance upon legislation as the principal source of social ordering and control, and, indeed, given rise to a greater need for such ordering, as other kinds have receded or been dismantled. It brings with it a belief that the order is not immanent and ought therefore yield to deliberate alterations to it;

- 3) our current attitude is one of considerable confidence in sources of knowledge that are constructed, ie the product of humans' own conscious and systematic effort, and therefore of legislation as a source of law in preference to other possible sources.

II Theorising legislation: the need for legisprudence

Theories of legislation since the 18th century are few. In Chapter 1, we left the Enlightenment with different, but by no means unsophisticated, theories of what legislation might justifiably seek to achieve and some touchstones for its deployment.

The next century saw legislation used, as we have seen, for what Dicey criticised as collectivist purposes, but which might also be understood as a transition from *laissez-faire* to a greater willingness to intervene to protect those less able to protect their own interests: a more protective state.

The 20th century saw the emergence of the regulatory state. The two world wars saw the state accrue and exercise emergency powers, which seems to have shown the possibility of an even greater role for the legislator.

There can be seen in these generalisations about legislation over the past three or so centuries very different approaches, whether consciously articulated or not. We might theorise about legislation by having regard to how the legislator behaves in practice, the manner in which it legislates, and the subject

matter with which it is willing to interfere, and to what extent. We can also turn to conscious theorising about the proper province of legislation, justifications for it and considerations of the source and nature of its legitimacy by reference to considerations external to the legislator.

Exercises of these kinds inform what might be done to redress legislation having progressed beyond its limits, not just by helping to define what those limits are, but by exposing and understanding the intellectual forces – many sub-lunar² – that have contributed to legislation having been allowed, perhaps encouraged, to take the course it has and rise to the position of dominance it has assumed.

An interesting feature of these developments is that, although we may have been heavily influenced by such forces, few theories of legislation have emerged. And so, in a period in which there has been the most profound growth in legislation, we find a real dearth of theories directed specifically to it, and only a very few which have articulated a case contrary to the prevailing trend of more – and more intrusive – legislation (Smith, Kames, Hayek, Fuller, Calabresi, and perhaps Dicey, being among the few to have done so).

The point becomes even more stark if we contrast the number of theories of adjudication and judicial activity over the same period. The 20th century saw much attention given to this topic. Very many theorists studied and explained the work of judges and defined, in their different ways, the merits and manner of proper exercise of those activities.

² A term used by D R Kelley, see *The Descent of Ideas: The History of Intellectual History* (2002) 1 and 314.

There is a marked contrast when it comes to legislation. I explain below why and to what extent this is so. Doing so may help understand one subconscious attitude to legislation: a desire not to dignify it by subjecting it to theoretical analysis, or considering it unworthy of such treatment, as the ultimate pragmatic act of commands which are, at best, the product of majority opinion. It emphasises also that the reliance that we place upon legislation is something that has not come about consciously, raising questions about the extent to which our attitude is, when subjected to considered reflection, justified.

Luc Wintgens in particular has exposed to scrutiny dominant contemporary thinking about legislation.³ Current legal theory, he says, is premised upon the judge having a central role, something which has left the legislator largely ignored.⁴ The tendency has been to treat legislation, up to its enactment, as a political process, and one in which legal theory and law ought not interest themselves in any systematic way.

We do seem reticent about the deliberate intellectualization of politics⁵ and, it follows, to theorise to any great degree about legislation at that stage of its development.

The relative theoretical inattention afforded to legislation is a sign of our having reduced the legislative process – in our imagination at least – to a matter

³ L J Wintgens ‘The Rational Legislator Revisited: Bounded Rationality and Jurisprudence’, in L J Wintgens & A D Oliver-Lalana (eds), *The Rationality and Justification of Legislation: Essays in Legisprudence* (2013) 1; L J Wintgens, *Legisprudence: Practical Reason in Legislation* (2012); L J Wintgens, ‘Legitimacy and Legitimation from the Legisprudential Perspective’ in L J Wintgens (ed) *Legislation in Context: Essays in Legisprudence* (2007).

⁴ Wintgens (2012) (n 3) 1 (Introduction).

⁵ Jeremy Waldron, for example, suggests that we are ‘nervous’ about deliberate intellectualisation in politics: J Waldron, *The Dignity of Legislation* (1999) 17.

of politics and mere satisfaction of Parliamentary processes. On this view, there remains nothing to theorise about. It matters not how legislation comes about. All that matters is whether the few procedural requirements for its validity have been met, and it is pointless to speak of how things might be done differently.

This becomes even clearer when it is understood through the lens of what Wintgens has described as the '*familiar view*' of legislation. It shows just how restricted our outlook has become. By '*familiar view*', Wintgens seeks to evoke the prevailing modern attitude to legislation, but also to show it to be deeply – but unthinkingly – held.⁶ This is an important point to which I will return later, but I introduce it here as an illustration of just how profound is our incapacity or unwillingness critically to assess legislation and the legislative process.

The doctrine of parliamentary supremacy, as it came to be accepted in the late 19th century and into the 20th century, treats Courts as wholly subordinate to the legislature and cements the notion that legally valid norms are unquestionably legitimate. That doctrine is associated with the Courts' inability to declare certain laws beyond the power of Parliament to pass. We have already seen how, once the doctrine of Parliamentary supremacy was articulated in its relatively absolute terms, the doctrinal law would refuse to invalidate even statutes procured by fraud, so uncompromising is the doctrine.

Owing to this separation of legislation's political and legal lives, we treat as inseparable, questions of legality and legitimacy. Laws are passed, and they are either valid or invalid, and those that are valid must be obeyed. There is no

⁶ Wintgens (2013) (n 3).

room in this approach for questions whether the statutory commands are efficacious, reasonably required, coherent with the body of existing norms, or otherwise undesirable.

The result, both of the theoretical focus on adjudication (to the exclusion of legislation) and on upon the legality of legislation (to the exclusion of considerations of its legitimacy) has been to neglect legislation as a field of study and, consequently, for it to have been, ‘*under-theorised*’.⁷

Perhaps lawyers have come to see legal science as describing, systematizing and explaining the law as it is,⁸ rather than as offering a basis to see what the law could or should be. Perhaps it is part of an attempt by the lawyer to remain objective and therefore scientific and systematic. Perhaps too, it follows from the imperative of the practitioner-lawyer having to remain focused upon realities and to give advice and argue cases in a manner that Judges are likely to accept based upon their understanding of doctrinal law. It may also be part of the greater focus by universities in recent times on training lawyers for primarily vocational objects and neglecting, in doing so, historical and philosophical aspects of law and its development.⁹

Wintgens’s familiar view exists against the background that legality is thought to derive from conformity with higher norms.¹⁰ If there be conformity,

⁷ Wintgens (2012) (n 3) 1 (Introduction). See also Waldron (n 5) 8 and his reference there to Unger’s assertion that legislation has been marginalized and also 21, 27-29.

⁸ Wintgens (2013) (n 3) 1.

⁹ The decline in the tertiary study of legal history in Australia has been shown by W Prest, ‘New Frontiers of Legal History’ in J T Gleeson & R C Higgins (eds), *Constituting Law: Legal Argument and Social Values* (2011) 82-85. Brian Tamanaha has identified problems with legal education in the US Law Schools: B Z Tamanaha, *Failing Law Schools* (2012).

¹⁰ Wintgens (2013) (n 3) 2.

then it follows there must be legitimacy, in that the norms in question have been legitimated by compliance with the processes the system has imposed. The trouble, as Wintgens identifies, is that there is a self-serving circularity to this, and it assumes away so many important matters.¹¹ One of them is that legislation has no limit – or limitations – and that the inquiry about its merits ought begin and end with an assessment of its legality. The premise is that legislation has been passed with the political process having taken care of all the considerations informing an assessment of legitimacy. Another premise is the assumption (rather than even the mere *presumption*) that the legislator is rational.¹² Yet another is whether and to what extent particular enactments give expression to public will and have done so accurately via the textual form which has been chosen.¹³

If there is to be an inquiry beyond legality, what might a legisprudential approach look like, and how might an elucidation of it cause us to reconsider the familiar view of legislation and open up ways of identifying some of its limits, as currently practiced and enacted? If Wintgens is correct, much happens ‘*behind the veil of legality*’ in which we ought to have interested ourselves.

We need to theorise about legislation, and free of the stifling and unsatisfactory fusion of the legality and legitimacy of it, and when we do so, candidly to recognise how Parliament actually functions and the reality of how legislation is conceived of, drafted, promoted and, ultimately, passed. I do this having, in Chapter 3, sought to expose many of the features of legislatures and

¹¹ Wintgens (2013) (n 3) 6.

¹² Wintgens (2013) (n 3) 5-10.

¹³ Wintgens (2013) (n 3) 10-11.

legislation which call for a re-appraisal of, in particular, Waldron's call for the dignity of legislation to be better and more widely accepted.

One reason why, I venture here, we have tended not to permit ourselves to inquire into legislation's legitimacy goes deep into the core of democratic belief and our hopes for legislation. The legitimating effect of democracy in post-18th century England cannot be overlooked. As the franchise widened in more recent times, one can understand why the processes by which legislation came to be enacted were thought – consciously or not – as doing away with the need to inquire into the legislator's motives and rationales.

As pragmatic and simplistic as it may be to fuse the questions of legality and legitimacy, it is unsatisfying to say the least to so believe in democracy and the impartiality and competence of legislators such that there are no grounds to bring legislation – post enactment – into question, or indeed to treat it differently depending upon factors which might reasonably be thought to inform its legitimacy. Such an approach seems also to have enervated our desire to debate the merits of legislation or to seek to identify the points at which legislation reaches its limits.

This Chapter is an attempt to explore some of the ways through the familiar view and to discover (or recover) ways of thinking about legislation which make pertinent questions about the merits and capacities of legislation rather than permitting them to be trumped by a mere assessment of legality. Part of that exercise involves uncovering what might be modern modes or patterns of thought that have led us to hold the familiar view or cause us to maintain it. If

‘*emotions have a history*’,¹⁴ then so too might our present attitudes and underlying disposition towards legislatures and legislation, despite emotional history being something that exists in common consciousness, rather than individual experience. In some ways, we might see the history or descent of ideas as a common emotional history of sorts, an attempt to understand how ideas have had a life in the sub-lunar sphere.

III Descent of ideas

In Chapter 1, I sketched historical developments since the 17th century that led, in England in particular, to a legislature that, in the 20th century, had become confident in its omnicompetence. Woven between those developments, and no doubt influencing them and vice versa, are powerful ideological and philosophical forces that repay exploration as a means of understanding not only their strength, but also critically to assess the justification for that influence. These forces or influences are more than what language, interpretation, communication and cultural construction might reveal.

I mean, following Donald Kelley’s treatment of this topic, to turn partly towards the spiritual world of ideas,¹⁵ bearing in mind the pitfalls he identifies in such an approach, but by which ‘*ideas descend from the heights of philosophical*

¹⁴ M C Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2001) 175. Nussbaum points out that the Stoics omitted the past as a temporal category and they made no place for emotions directed at past events: 177. Her point is that they failed to give prominence to the way in which past events influence present emotions (albeit at the level of the individual).

¹⁵ Kelley (n 2) 7

reflection to the heuristic and interpretative level of intellectual and cultural history.¹⁶

I consider below several ideas and very briefly seek to explain a little of their descent and the way in which they appear to influence our approach to legislatures and legislation in current times.

Democracy and the revolutionary shift

The history with which I dealt in Chapter 1 was largely institutional in character: how Parliament evolved and become the successor to the Monarch as the repository of law-making power between the 17th and 19th Centuries.

Intertwined with that history is a meta-narrative of sorts, following much the same period of the gradual advance and development of ideas, but especially from and since the late 18th century.

The basic principles which that line of thought and sentiment propelled are: democracy; equality; liberty of lifestyle; freedom of thought and expression; eradication of religious authority from the legislative process and education; and the separation of Church and state.¹⁷ All of these – some more than others – bear upon how legislators and legislation are to be regarded and the trust which might be placed in them in preference to a monarch, a religious leader, or traditional practices. It repays consideration merely to reflect on the strength of those ideas, and to see them not merely as historically influential, but still embedded within,

¹⁶ Kelley (n 2) 8.

¹⁷ J I Israel, *A Revolution of the Mind: Radical Enlightenment and the Intellectual Origins of Modern Democracy* (2010) vii-viii.

and informing, the way in which we regard popular assemblies, the work they do, and the trust which they ought command.

I have referred to the ‘*Enlightenment*’, but, as recent scholarship in particular has shown¹⁸ there existed different strains of this current of thought: radical in the revolutionary period in France and America in particular, but always more moderate in England and Scotland. Moreover, although the Enlightenment took expression in different nations in different ways, looking to nationalist enlightenments may miss the shared attributes of different strains of the Enlightenment at a European level.¹⁹ The radical element is seen by many (Israel included)²⁰ as having played the primary role in grounding the egalitarian and democratic core values and ideals of the modern world.

It is well accepted in Scotland and England that the more moderate current of the Enlightenment prevailed. We have not, in any recent period in the Anglo-American world, witnessed the physical conflict and upheaval with which the radical Enlightenment was associated in the revolutionary period. But in some ways, the influence of that strain may be concealed to some extent by just that fact. There is much about the way in which Anglo-American legislative systems operate today that seems much more informed by the ideas and approach underpinning the radical strain of the Enlightenment than the moderate strain.

¹⁸ J I Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* (2001); J I Israel, *Enlightenment Contested: Philosophy, Modernity and the Emancipation of Man 1670-1752* (2006) and J I Israel, *Democratic Enlightenment: Philosophy, Revolution and Human Rights 1750-1790* (2011).

¹⁹ Israel (2006) (n 18) 27.

²⁰ Israel (2010) (n 17) i.

Israel himself claims that there is a close fit between current liberal values and the radical wing of the Enlightenment.²¹

He explains the differences between the radical and moderate strains of the Enlightenment as follows:²²

... the difference between reason alone and reason combined with faith and tradition was a ubiquitous and absolute difference. Philosophically, 'modernity' conceived as an abstract package of basic values – toleration, personal freedom, democracy, equality racial and sexual, freedom of expression, sexual emancipation, and the universal right to knowledge and 'enlightenment' – derives, as we have seen, from just one of these two, namely the Radical Enlightenment; historically however, 'modernity' is the richly nuanced brew which arose as a result of the ongoing conflict not just between these two enlightenments but also (or still more) between both enlightenments ...

Glimpses of what might be attributed to the ongoing influence of the radical strain can be seen in the state's having become almost entirely secular, its focus being upon on promoting the worldly happiness of the majority of its citizens and preventing the minority from gaining control of the legislative process.²³ Few would cavil now with the radical Enlightenment's insistence upon each individual having the same needs and being entitled to the fulfilment of them. Universality brings with it an entitlement for each individual to be free to pursue happiness in his or her own way, and to express himself or herself freely.²⁴ The desire for an 'authentic' experience, and the state's facilitation of that pursuit, we shall see shortly, is a feature of modern existence.

²¹ Israel (2011) (n 18) 951; Israel (n 17) 241.

²² Israel (2006) (n 18) 11.

²³ Israel (2010) (n 17) viii.

²⁴ Israel (2010) (n 17) viii.

It is not possible to identify just how and to what extent these ideas associated with the radical strain continue to influence our thinking. That does not mean, however, that we ought not seek to identify and critically to assess the factors which impel us to have, even by acquiescence, such a favourable view of popular assemblies and their capacity for rule-making.

The history of the development of these concepts that were prominent in the Enlightenment remains ‘*little studied or known*’.²⁵ This has tended to give rise to a misconception that the Enlightenment discourse was entirely new, and as if emerging spontaneously without any real intellectual provenance or precursors.²⁶ That, in turn, contributed to the ideological endorsement being afforded to notions such as democracy and equality without any appreciation of their being historically-rooted ideas.²⁷ Ignorance of this kind risks us lacking an appreciation of how those ideas might require revisiting and confronting as they take shape in lived experience, and failing to understand the extent to which those ideas continue to influence our approach and attitude to the work of popular assemblies. These were, after all, *intellectual* changes rather than upheavals to social circumstances²⁸ and, as such, are not necessarily tied to the circumstances of any particular time or place.

One way in which these ideas confront challenges in lived experience is that overreliance on legislation leads to its proliferation, and proliferation threatens democratic ideals: that the ordinary (perhaps poorly resourced) citizen

²⁵ Israel (2010) (n 17) ix.

²⁶ Israel (2010) (n 17) ix.

²⁷ Israel (2010) (n 17) x; R Bourke, ‘Enlightenment, Revolution and Democracy’ (2008) 15 Constellations 10 at 11.

²⁸ Israel (2006) (n 18) 5.

ought reasonably to be able to know the law as it might apply to them and their activities. Otfried Höffe has made stark this threat.²⁹ The constant and rapid refinement and consolidation of rules, and the modification of them would tend to place beyond the resources of the ordinary citizen the means to comprehend how the law, at any one point in time, is likely to affect him or her. The same problem is commonly expressed as one of accessibility.³⁰

The purpose of this brief excursion into the intellectual aspects associated with the institutional history with which I began this project in Chapter 1 is to recall the influence of these powerful ideas not only on the evolution of the system to its present state, and also to acknowledge the likelihood of their having a real influence today. Exposing their likely influence is one way by which we might understand our marked preference in current times for those sources of law and social ordering that demote in importance, tradition and custom, and that give prominence to those which are constructed and have received the imprimatur of popular assemblies.

A Modern Malaise?

We might also approach more directly ideas whose history and descent it might repay time to consider from the viewpoint of their apparent influence on present dispositions and attitudes. A leader on this topic is Charles Taylor. Adopting the approach he takes exposes deeply-rooted undeclared and often subconscious preferences that bear upon our attitudes to legislation and popular assemblies.

²⁹ O Höffe, *Democracy in an Age of Globalisation* (2007) 75.

³⁰ T H Bingham, 'The Rule of Law' (2007) 66 CLJ 67 70.

His is a viewpoint, although far from controversial,³¹ that offers a perspective on the modern disposition informed predominantly by intellectual history.

Taylor's overarching exercise is to explore how there came to be a possibility of not believing in God, and where such belief is just one possibility among others. His point of contrast is five centuries ago, a time when, he says, it was virtually impossible *not* to believe in God.³² In doing so, he explores one sense of secular society, and, in particular, how alternatives to belief in God became thinkable. Questions about the changes in belief and possibilities of belief are relevant to my exercise, at least in the way in which Taylor explores this topic. He observes among many other things:

- 1) a change in respect for, and treatment of, tradition (something which tends to favour legislation over the Common Law);
- 2) the pride which has resulted from modern advances in technology, in human achievement and the contrast often made to historical practices and methods, '*of having won through to ... invulnerability out of an earlier state of captivity in an enchanted world*'³³ coupled with what Hayek says is a naïve and incomplete view of what science offers, and which he identifies as '*scientism*'.³⁴ These show, Taylor

³¹ His approach has been criticised, for example, for being 'communitarian' philosophy, by denying shared conventions beyond different communities and thereby denying a role for global justice: see, for example, A Pagden *The Enlightenment: and Why it Still Matters* (2014).

³² C Taylor, *A Secular Age* (2007) 3.

³³ C Taylor (n 32) 301.

³⁴ F A Hayek, *Law, Legislation and Liberty* (1982), vol 1 15

says, that we are restless and at the barriers of the human sphere.³⁵

(Again, this tendency, if it exists, would favour legislation over the Common Law);

- 3) a modern desire for order (something of which legislation is often thought more capable, especially for its systematisation, than judicial decision and precedent);
- 4) notions of their being some cosmic order (such as those which underlay traditional monarchies) which maintain themselves have been replaced by a providential social order which is meant to be established by human action and which offers a blueprint for constructive action.³⁶

Each of these factors we might see, I note in passing, as having contributed to the ‘*constructivism*’ of which Hayek is so critical,³⁷ namely the fatal conceit of an excessive faith in reason, premised upon the misconception that we can construct what we must know.

The fundamental change in outlook that Taylor says we have experienced is of interest here. For one thing, the period over which that change took place is the same as that I identified in Chapter 1 as being of primary interest in understanding the rise of legislation and the kudos that came to attach to it and its author. Moreover, it touches very directly some of those factors I have identified

³⁵ C Taylor (n 32) 726.

³⁶ Taylor (n 32) 541; see also P Grossi, *A History of European Law* (2007), xii-4.

³⁷ Hayek (n 34) see, for eg, 22, 34.

as being ones that contributed to our apparent change in disposition towards legislation: legislation relies less on tradition than does the Common Law and customary law; it has the appearance (at least) of being more ordered than other sources of law (and as being an instrument through which order can better be imposed or achieved); it is a direct product of human effort and, as such, appeals as constructivist activity that stands as tangible proof of our own accomplishments; and it substitutes for a cosmic order, a humanly-constructed one.

I say something here of those factors and how the growth of legislation and the gradual weakening and disappearance of limits upon it can be seen as part of the trends – perhaps malaises – of modernity. In doing so, I would seek to link the modern reliance upon legislation, as influenced by forces which are decidedly modern and far from being, in any objective sense, preferable to other approaches. On the view I present, the modern disposition toward legislation is the symptom of malaises and temporary perspective, one which, although dominant, is philosophically fragile. It forms part in this sense of Taylor's '*unquiet frontiers of modernity*'.³⁸

Individualism, a basic value of the Enlightenment, entails people having the right to choose for themselves their own pattern of life. They decide the views they espouse and they determine the shape of their lives in so many ways that their ancestors could not. The arrangements that permit this find expression in legal systems. In doing so, law (primarily legislation) dispels the impediments which once prevented such unrestrained authentic expressions. The malaise that

³⁸ Taylor (n 32), ch 19.

Taylor identifies is not so much that we have not relished our individual freedoms, but what we might have foregone or left behind in getting there.

'Modern freedom' Taylor says, *'was won by our breaking loose from older moral horizons'*. We once saw ourselves as part of a larger order: cosmic perhaps, but in which we took our place along with angels, heavenly bodies, and our fellow humans. This order was reflected in the hierarchies of society through various orders, orders that modern freedom has discredited in securing its prominence.

These orders gave meaning: things were more than just potential raw materials to be exploited for our projects. They drew significance from their place in the wider *'chain of being'*.

The change then, has been greater freedom, but disenchantment has come with it. And with disenchantment, perhaps, has come as loss of an heroic dimension to life. We seek only *'petty and vulgar pleasures'*, our aspiration tends to become getting and spending to fulfil our own immediate desires, all our true needs having been met. By doing so, we narrow our outlook; we *'flatten'* our lives and make them poorer in meaning. We become less concerned with others and with society.

Stripped of wider meaning, we give primacy to instrumental reasoning by focusing upon the most economical application of means to a given end. This approach, so familiar to us in modern economics and accounting, of maximal efficiency and productivity (often ciphers for utility) seems so often to be the sole or dominant measure for success. Suddenly it seems that everything is *'up*

for grabs'. All that need be done is to re-design the purpose of the inputs as being individual happiness and well-being. As Taylor says:³⁹

... once the creatures that surround us lose the significance that accrued to their place in the chain of being, they are open to being treated as raw materials or instruments for our projects.

These changes have been liberating, but they have also been the opposite: economic considerations seem to trump other considerations, the need for economic growth is used to justify unequal distributions of wealth and income, and those demands engender in us an insensitive attitude to limited resources available to us. And so too we are almost obsessed by technology, almost as if, because we have been so clever as to think of various technological means and devices, that technology ought be put to use: we ought because we can.

These pursuits, however, despite appearing otherwise, are not mere choices, or at least, do not remain so for long. Taylor shows how powerful mechanisms of social life press us in that direction, how, for example, a bureaucrat, in spite of his or her personal insight, may be forced by the rules under which he operates to make a decision he knows to be against humanity and good sense.

Individualism and instrumental reason give rise to the institutions and structures of industrial-technological society. Once they emerge, our choices are severely restricted. They entrench instrumental reason by forcing weight to be given to it even in cases in which, in serious moral deliberation, we would never do. And as the structures of individualism and instrumentalism are built up

³⁹ C Taylor, *The Ethics of Authenticity* (1991) 5.

around us, it becomes very difficult practically to do other than join. Taylor gives the clear example that a person in a city designed so as to make it difficult to function without a car, will make a different lifestyle hard to maintain.

And then there is the enervation of which Alexis de Tocqueville spoke (and to which Taylor refers) and about which more will be said presently.

Participation in society and government will decline as individuals become enclosed in their own hearts, pursuing the satisfactions of private life (as long as the government of the day produces the means to these satisfactions and distributes them widely).

The individual citizen is, in the end, left alone in the vast bureaucratic state and feels powerless. He or she becomes enervated and so a kind of soft despotism arises.

These malaises can be seen to foster, although Taylor himself does not make the link, both legislative reliance and a hyperactive legislature. Working backwards, the vast bureaucratic state requires legislative machinery to function, to maintain itself, and to effect the revenue-gathering and spending for which vastness calls. The comforts and satisfactions which it is to offer its citizens require more than just funds: for example, town planning standards are a necessary part of amenity, working conditions must not become overly burdensome and wages must be maintained. Furthermore, an instrumental view of the world requires not just that citizens be restrained from open-slayer exploitation of resources and raw materials, but that rules be put in place for the maximal efficiency of their deployment. And as formerly powerful means of

restraint on individuals which found expression in modes of social order other than legislation disintegrate or weaken with the march of individualism, it becomes necessary to re-impose, this time by posited means, the kinds of values that the connectedness brought with it. Hence we see more frequently the express code of conduct given statutory force, if not statutory form.

These malaises, therefore, manifest themselves in several ways, but premised always upon our willingness for popular assemblies to have such unrestrained and versatile law making power and for that forum to be the one by which the characteristics of modernity that Taylor identifies are furthered.

Such an outlook accords with our sense of power and capacity to order the world ourselves⁴⁰ (ie to construct) through a wholly people-centred institution. Acting in this way re-enforces the advances we perceive ourselves to have made in reason and science, and in knowledge and understanding. The invulnerability which comes from setting all the rules, structuring society and relations within it, and setting the ground rules for business, and for the prices they might charge, and requiring a whole range of ordinary human activities to be licenced by the state, as if it were a privilege to act in such a manner, all feed our desire to put some distance between age-old fears and current anthropocentric demands and to show it is no longer necessary to draw on the power of God.⁴¹

All this in turn seems to feed our need for satisfaction with our accomplishments, our superiority over earlier, unenlightened people⁴² and

⁴⁰ Taylor (n 32) 300.

⁴¹ Taylor (n 32) 301.

⁴² The '*enormous condescension of posterity*' as Edward Thompson said (see Taylor (n 32) 807).

confirmation of having won through to invulnerability or an earlier state of captivity in an enchanted world.⁴³ Taylor explains his thesis also by what he refers to as the ‘*nova effect*’: a spawning of ever-widening moral and spiritual options across the sphere of the thinkable and even beyond.⁴⁴ I would add to that, not inconsistently with what Taylor has said, an active desire for the new and a concerted wish to depart from what has been the orthodoxy of the past.⁴⁵

The loss of meaning Taylor identifies is, in a sense, a loss of restraining or higher law, of the kind I have mentioned in passing in earlier Chapters, but to which I turn in more detail below. As meanings or moral codes once offered by faith or religious teaching weaken or recede, greater reliance is placed upon constructed rules and boundaries. Saying this cuts deeps into the debate whether moral precepts exist by reason of natural sentiment, or as a result of being ordained.⁴⁶ The debate matters for present purposes, because on the former view, each will behave morally because we are hard-wired to do so. We wish, as Smith said, to be loved and to be lovely, and not to be blamed and be blameworthy. On the other hand, if the source of morality is a deity, faith or religious teaching, then only those instructed, those who fear God, or those who believe would, it follows, adhere to those precepts (albeit imperfectly).

⁴³ Taylor (n 32) 301.

⁴⁴ Taylor (n 32) 299.

⁴⁵ A topic about which G K Chesterton has written: see *Heretics* (2007). See especially 15 where he speaks of ‘*progress*’ and the disagreement about which direction we ought to take despite this being a ‘*progressive*’ age, which he says, is meaningless without the previous definition of a moral doctrine.

⁴⁶ See, for example, Alasdair MacIntyre’s *After Virtue* (1981), in which he asserted that the ‘*Enlightenment Project*’, ie the attempt at an independent rational justification of morality (ie to construct a science of morals without drawing on religion), had failed.

Now is not the time to attempt a resolution of that debate. I would, however, approach the problem it throws up from the opposite direction. Much legislation and the administrative arrangements that attend it, assume that citizens, institutions and those in public roles are prone to act dishonestly and reprehensibly. Elaborate regimes exist, for example, in the United Kingdom and Australia for the scrutiny of public bodies.⁴⁷ More and more obligations, once private in nature, have attached to them criminal sanctions for non-adherence, something designed to encourage compliance with the associated rules. Obligations and responsibilities once considered necessarily to be imported by the nature of employment and other relationships find expression now in a seemingly endless proliferation of codes of conduct, codes of practice and regulations. The overwhelming tendency is to regard it as necessary to record in statutory or like form, those responsibilities which have been regarded for some time as necessarily accompanying the relevant activity or role. Unless this is a product of a general trend towards a posited expression of customary or equitable rules, it can only be a result of a perception, or a reality that people are becoming more likely to behave badly. It cannot be an answer to say that the need for such codes is because standards are now higher than before.

The collapse, then, of higher law, and Tamanaha's treatment of that phenomenon can therefore be seen as a contribution to legislative reliance and one reason for its intensification.

One aspect of the decline in religious adherence and institutions is, however, perhaps more quantifiable. What might loosely be characterised as

⁴⁷ Such an example featured in the case study I gave in Chapter 3.

church institutions have traditionally offered health, education, nursing, and other care services. It is easy to forget now, common in the age of the rich all-embracing and a gargantuan Western state, how throughout much of history, these organisations offered services which, but for them, would have been entirely absent. Another development has been the rise of the state in terms of its size, the range of activities it seeks to accomplish or control, and the near-hegemony it has come to assert over rule-making.

The State as Great Benefactor

If we continue to be influenced – subconsciously or otherwise – by 18th century Enlightenment thought, it might be questioned whether the desired ends have been achieved or are in sight. The state has accrued to itself a hegemony of law-making that it never had under a monarch. The pervasiveness and detail of its rule-making is unprecedented. The managerial legislature seems to accept responsibility to solve every problem.⁴⁸

The modern state faces fewer of the competitors for law making power than it has in the past few hundred years. The Church is a much-diminished form of its medieval and later character. There is no Holy Roman Emperor to contend with. So too, universities, the Inns of Court and guilds have fallen within the general umbrella of state control.

We are left, then, with a state whose virtual hegemony over rule making has few foils, and has grown – in theory and in practice – to recognise almost no boundaries. I have mentioned practice, because modern experience is of a state

⁴⁸ Hayek (n 34) 143.

that has continuously and exponentially expanded its functions. This ought to come as no surprise, for once we recognise the huge range and volume of legislation and the apparent lack of any filter for what ought properly to attract Parliament's attention, we expose a hyperactive and unfocussed author (the state).

There are many indicators of the state's desire ever to expand its reach and be the '*benefactor of society*'.⁴⁹ Justifications offered for its regulation of various activities seem self-perpetuating: the regulation of tobacco packaging is said to be justified because the state expends so much on health care. Its regulation of workplace health and safety is justified for similar reasons.

In extending its reach, the state has adapted to maximise the field over which it can exercise control. These adaptations often have the appearance of de-regulation but are, in truth, no less an exercise of state power than traditional forms. Traditionally, state institutions ran postal services, water supply activities, the construction and maintenance of roads, hospitals and law enforcement. Recent decades have seen the state privatise many of these institutions and services including via corporatised entities, government owned corporations and the like. But behind this institutional difference there is often no less regulation. A Minister may have the ability to direct some affairs of a government-owned corporation, and he or she might be bound to take into account or act in accordance with government policy. And even though these bodies might have a corporate character, the state often takes the opportunity to regulate – often heavily – the prices these bodies can charge, the activities in which they can

⁴⁹ Höffe (n 29) 105.

engage (by, for example, licence conditions) and other requirements such as the place at which a head office must be located or areas within which assets must be retained.

The state offers, and citizens demand, seemingly endless services.⁵⁰ The state asserts control over, or responsibility for, employment levels, the economy and the health and well-being of citizens. The range and nature of these is such that no state can ever fully achieve its task.⁵¹ It attempts everything, but in doing so must make sacrifices and compromises. Inevitably too, there arise conflicts between the various ends it seeks to achieve. This is just one of what has been described by Höffe as the '*inevitable side-effects of the expansion of state responsibilities [activities]*'.⁵² Some others are, with my own (not-so-minor) alterations:

- 1) the number of tasks requiring coordination can exceed the capacities of the state effectively to organise;
- 2) decision making slows;
- 3) it feeds, or does nothing to restrain or manage, the insatiable greed of citizens (and politicians), that their expectations of education, health, work and welfare will be met and their (selfish) claim on the public purse in doing so;

⁵⁰ Höffe (n 29) 111.

⁵¹ Höffe (n 29) 111.

⁵² Höffe (n 29) 111.

- 4) the state assumes, or is taken to have assumed, responsibility for aspects of society which are, in truth, beyond its control;
- 5) citizens develop a tendency to take for granted that which is provided by the state. We treat as an entitlement the goods that come automatically to us.

One side effect that is often overlooked (but not by Höffe)⁵³ is that the only way the state ever becomes the benefactor of society is by the prior appropriation of the resources it needs to do so, resources which, as Höffe points out, ‘*up to that point are owned by the citizens*’.

Such an appropriation has been more colourfully styled ‘*the grabbing hand*’ by Andrei Shleifer.⁵⁴ His intention is to conjure up the opposite of the invisible or helping hand. His model focuses on politics and politicians as fundamentally self-interested and motivated by a desire, for example, to keep themselves in office rather than to promote the welfare of their electors and asserts that politicians pursue models very different from social welfare.⁵⁵ This model Shleifer prefers to the invisible hand because it offers a theory of government which he says the invisible hand lacks. It does so, he says, by formulating practical advice that recognises the limitations of government⁵⁶ and

⁵³ Höffe (n 29) 105.

⁵⁴ See A Shleifer & R W Vishny, *The Grabbing Hand: Government Pathologies and their cures* (1999).

⁵⁵ Shleifer & Vishny (n 54) 4.

⁵⁶ Shleifer & Vishny (n 54) 5.

this helps design institutions that insulate economic aspects from political attempts to prey on them.

That view is a very cynical one of politics and politicians in particular. I would incline more to the view of the state's '*grabbing*' being for the purposes of fulfilling its role of largesse or as benefactor and more in the manner that Höffe contemplates. Shleifer, nevertheless, identifies the blunt instrument of state appropriation and control, and the need to feed its '*pathology*'⁵⁷ of its own lack of recognised limitations. The state, as benefactor, is necessarily one that must be ambitious in its legislative activities. Appropriation, be it taxation, regulation or control, ordinarily requires legislative sanction, and the re-ordering or reform of social and business affairs. The state can achieve, through statutory means, a form of control that, were it to involve itself directly in that activity, entails far greater risk, cost and effort. Its decision to legislate is one way of spreading itself thin.

We might pause here to consider one important cross-current to the strong and monopolistic (nation)-state. The demise of the individual state is something that the increase in intensification of worldwide relations (globalisation) might provoke. Many of the activities considered necessary for human wellbeing stretch beyond state borders, yet are traditionally based upon statehood. Institutions and corporations are increasingly large and multi-national.⁵⁸ The nation-state therefore, having taken on more and more responsibilities, and become so powerful a result, now faces the possibility of a reverse.

⁵⁷ Shleifer & Vishny (n 54) 4.

⁵⁸ Höffe (n 29) 1.

Whether what has occurred and is continuing to take place might be characterised as a forfeiture of sovereignty, as a compromising of its ability to govern as a product of its having become inefficient, or as it having lost its legitimacy,⁵⁹ the nation-state faces, perhaps, the greatest threat to its majesty that it has for some hundreds of years.

None of these developments, however, has curtailed the volume and reach of legislation. Only the source from which it emanates has changed. Greater worldwide relations have required more and more complex tax legislation, rules for the service of documents and for the regulation, for example, of banking and finance, stock exchanges and for the foreign ownership of media organisations and land. There are, at the supra-national level, very many bodies, some of whom carry norm-making power, most notably, perhaps, the European Parliament. And although much of what is done internationally is done by voluntary instrument (principally treaties and conventions) they too possess some qualities not dissimilar to legislation, dealing as they do with matters of wide application, being difficult to retreat from and adopting often proscriptive or prescriptive language. And many require or result in domestic legislation to give effect to those supra-national norms in municipal law.

My point, then, is that threats to the nation-state posed by globalisation do not seem to translate into the reduction of legislation or the topics to which it might extend, whether that be municipal or international in character.

⁵⁹ Höffe (n 29) 103.

Before leaving the sub-topic, I say something of the pressures to legislate that have originated from the regulator, being, principally ‘*public agencies*’⁶⁰ that is, bureaucrats and legislators.

Many modern works on regulation and regulatory theory give close attention to the ‘*regulatory agenda*’⁶¹ and to reasons *to regulate*.⁶² By comparison, the questions of why not, and when not, to regulate are neglected. ‘*Regulatory failure*’ is often considered not as part of asking whether regulation was desirable or preferable to other forms of social-ordering, but a failure to achieve a pre-determined result, all of which assumes a need for greater regulation rather than more effective – or indeed less – regulation. The problem is all too commonly cast as undesirable behaviour, going undetected and response and intervention tools failing to deal with errant behaviour and better enforcement.⁶³ It is also often explained as the regulator having insufficient resources.⁶⁴

The problem of regulatory failure is often traced to under-regulation.⁶⁵ Over-regulation is characterised as being a problem because it can lead to under-regulation⁶⁶ because if the prescription is too precise, it will be difficult to apply on the ground. It is curious too, that regulators are often concerned to maintain their ‘*reputation*’⁶⁷ as if they had some obligation to be thought of well by those

⁶⁰ R Baldwin et al, *Understanding Regulation: Theory, Strategy, and Practice* (2012) 2-3.

⁶¹ Baldwin et al (n 60) 411.

⁶² Baldwin et al (n 60), ch 2.

⁶³ Baldwin et al (n 60) 69.

⁶⁴ Baldwin et al (n 60) 72.

⁶⁵ Baldwin et al (n 60) 69-70.

⁶⁶ Baldwin et al (n 60) 71.

⁶⁷ Baldwin et al (n 60) 71.

they seek to protect, and, presumably, to be perceived as menacing by those they seek to target and bring to compliance.

And all too often, when regulation is approached in the context of democracy, problems of rule-making and regulation are identified as '*challenges in effectively developing and enforcing rules in both parent laws and delegated regulations because of a number of policy and mandate conflicts, gaps and weaknesses*'.⁶⁸ Again, the language has a tendency to portray the problem as one of too little, not too much, regulation, or that regulation is poorly directed or beyond the capacities of the regulator.

Doern et al's recent study of the Canadian regulatory landscape and illustrations of the main types of '*unruliness*', as they describe it, identify problems of colliding rules, rivalry between regulators and complexity.⁶⁹ But the thrust of the solutions offered is not to investigate ways to prioritise rule-making, or to make decisions about fields of activity that ought not attract regulatory intervention. Instead, for example, the problem is said to be '*the inability to get policies established or agreed upon, policy mandate conflicts*' and conflicts between appointed regulators and elected Ministers.⁷⁰ Such analyses, while not ignoring the problem of regulatory proliferation, rarely or less prominently urge regulatory restraint, and seem never to offer a principled basis to guide such restraint.

⁶⁸ G B Doern et al, *Rules and Unruliness: Canadian Regulatory Democracy, Governance, Capitalism and Welfarism* (2014) 4, see also 46-47.

⁶⁹ Doern et al (n 68) 47.

⁷⁰ Doern et al (n 68) 306.

It is less common and prominently expressed to see, however, regulatory activity being declined or criticised by reason of it being beyond the knowledge, skill or competence of the regulator, or as a field of activity properly to be left to other forms of ordering.

This completes the picture of a regulatory mind-set which has lost the vocabulary of limits and boundaries and the knowledge of when it is appropriate not to intervene.

What are the forces that have led us to have such confidence in the state that we permit or tolerate its ever-increasing functions and responsibilities? One powerful factor is our desire for comfort over most other things. Successful liberal democracies face the prophetic warning issued by de Tocqueville:⁷¹

I see an innumerable crowd of like and equal men who revolve on themselves without repose, procuring the small and vulgar pleasures with which they fill their souls.

...

Over these is elevated an immense, tutelary power, which takes sole charge of assuring their enjoyment and of watching over their fate. It is absolute, attentive to detail, regular, provident, and gentle. It would resemble the paternal power if, like that power, it had as its object to prepare men for manhood, but it seeks, to the contrary, to keep them irrevocably fixed in childhood ... it provides for their security, foresees and supplies their needs, guides them in their principal affairs ...

The sovereign extends its arms about the society as a whole; it covers its surface with a network of petty regulations – complicated, minute and uniform – though which even the most original minds and the most vigorous souls know not how to make their way ... it does not break wills; it softens them, bends them, directs them; rarely does it force one to act, but it constantly opposes itself to one's acting on one's own ... it does not tryannize, it gets in the way: it curtails, it enervates, it extinguishes, it stupefies, and finally reduces each nation to being nothing more than a

⁷¹ A de Tocqueville, *Democracy in America: Historical-Critical Edition* (1835) vol II, bk 4, ch 6.

herd of timid and industrious animals, of which the government is the shepherd.

The modern state seems keen to provide for all our comforts, but not with the end in mind that one day we might outgrow the need for the things it offers. It is almost as if the state sees its importance and existence as fundamentally derived from providing the pleasurable things we all demand as part of our being comfortable. If we as citizens were to become self-supporting, the great fear of the state seems to be that it would be left, like a scorned over-indulgent parent, without a purpose.

A state that provides comforts is a popular one, and one that can justify the heavy appropriation of the resources necessary to make such provision from its citizens and from its firms. But doing so risks enervating its citizens and engaging in a soft despotism. By seeking to be the provider of all, it extirpates the intermediary institutions which Tocqueville considered necessary to liberty.⁷² And that is precisely what we can see has happened historically. We might observe the coincidence between the rise of the state as Tocqueville foreshadowed and the decline of intermediary institutions. The Church is much reduced, Guilds and Unions struggle to maintain relevance, universities are very much state-sanctioned and regulated and we see fewer and fewer functioning private and community organisations and associations.⁷³

⁷² de Tocqueville (n 71). See, for example, vol 1 122 (the Courts as intermediary), 231 and note z; vol 4 1209-1215.

⁷³ There are many examples: the work of friendly societies and cooperatives has in many ways been subsumed by state regulatory bodies, or, consistent generally with the trend I have identified, become corporate activities; church-provided health and education is either diminishing or coming under more (and closer) state control and subject to state funding.

The state, on the theory advanced above, would wish to be the sole provider of health care, utilities, welfare, education and even pastoral care. When it finds it impossible to do so, whether because others have got there before it and is precluded from excluding those providers, or because it simply lacks the capacity to do so, it engages its regulatory powers to decide how others ought provide those services, and, very often, the prices at which they might do so, as if the state were better placed to make judgments about these matters. But there is the suggestion too of the state regulating for the sake of appearances, for an unregulated industry is not one in respect of which the state might claim any kudos from the provision of the beneficial things that industry provides, and it is not one from which the state might distance itself in the event of bad behaviour by industry participants, by pointing to the regulation it had put in place to guard against it.

And so, it can be seen, whichever of these options the state employs (ie itself providing services or regulating the provision by others of them) the effect is to stifle institutions, whether they be the Church (historically a huge provider of such services and at times before the state did so), and universities and charitable institutions (as both come under closer state control). For example, there are strong current suggestions of the state's jealousy of the tax status of charities despite its 400 year old history being likely to see the revisiting of what it means to be a '*not for profit*' organisation.⁷⁴ A 2006 statute in the UK⁷⁵ and

⁷⁴ See, in the UK, House of Commons, Public Administration Select Committee, 'The Role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006', 6 June 2013, available at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpublicadm/76/76.pdf>. See, for eg, para 163 '*Parliament must legislate to clarify the flawed legislation on the question of charities and public benefit*'. See also the Government Response to Lord Hodgson's

2012 legislation in Australia⁷⁶ shows the trend to be towards the closer regulation of these bodies. Had the state been less jealous of the activities of these bodies (offering, as they do, a model of benefaction without state involvement) one might have expected a very different approach.

An example of the state's vested interests in the maintenance of its near hegemony over rule-making is the surprise it exhibits when real challenges arise to it. One very clear current example is Uber,⁷⁷ the application for mobile phones that permit private cars to be shared to give 'lifts' (for payment) to those seeking a ride. Uber has been characterised as part of the 'sharing' economy,⁷⁸ involving, as it does, increased person-to-person transactions,⁷⁹ and without any necessary state involvement.

Uber cuts across state regulation of the taxi industry and deeply-entrenched interests. Characteristically, the state has licenced taxi drivers and regulated the prices that might be charged for taxi journeys and even the branding used on cabs.⁸⁰ It derives considerable revenue from limiting the number of licences and forcing taxi operators to bid for them. Innovations such as this might, on the one hand, be welcomed as an opportunity for the maximisation of resources, as a way in which to reduce vehicle emissions, and as expanding exponentially the

report September 2103, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/237077/Response-charities-legal-framework.pdf.

⁷⁵ Charities Act 2006 (UK).

⁷⁶ Australian Charities and Not-For-Profits Commission Act 2012 (Cth).

⁷⁷ There are many such apps, with various names, such as Lyft and Sidecar.

⁷⁸ See, for example, S Ranchordás, 'Does Sharing Mean Caring?: Regulating Innovation in the Sharing Economy' (2015) 16 *Minn J Law, Sc & Tech* 1.

⁷⁹ D D Desai, 'The New Steam: On Digitization, Decentralisation, and Disruption', (2013-2014) 65 *Hastings L J* 1469 at 1478.

⁸⁰ See, for example, Taxi Regulation Act 2003 (UK) and Taxi Regulation Act 2003 (Taxi Branding) Regulations 2012, SI 535/2012.

competition in that market and the likely reduction in prices. The state, one might think, ought welcome the benefits this brings to its citizens.

But Uber also deals the state out of its traditional regulatory activity. Private cars need not ordinarily be specially licensed. The drivers of private cars need not subject themselves to the same licensing regime as commercial cab drivers and the prices they might charge are not dictated by legislation.

The established taxi industry around the world has been vocal in its opposition to Uber and like innovations. But the calls by that industry are not for it to be freed from the regulatory restrictions in order to be better placed to compete with Uber. Taxi operators seem to *like* the existing regime. They prefer the monopoly that the state system provides, the cosy relationship which that fosters and the price regulation from which they benefit. No doubt they do so in part because they have borne costs in establishing and maintaining their operations that Uber participants have not. Taxi companies have paid expensive licensing fees and subjected their drivers to the requirements that the regulatory regime requires. For them there is no going back.

The form of state regulation directed at taxis differs between cities and countries. Some target the use of a meter (London) others, the regularity with which cars must return to their base. The response of the state, generally

speaking, has been unfavourable to Uber.⁸¹ The few examples of favourable state responses are London and California and Colorado.⁸²

No doubt there are concerns that attend the sharing by citizens of private cars: the parties are unknown to each other, there is no guarantee that the car will be of a suitable standard, or that the driver possesses the relevant knowledge of the locality, or, indeed, has satisfactory driving skills. Concerns of quality and safety therefore arise.

The response by those states who would seek to prohibit Uber's operation reveals much about the modern state. *First*, it shows the extent to which vested private interests (taxi companies) can become entrenched and preclude the state from acting in the interests of citizens generally. *Secondly*, it shows the state's heavy reliance upon the funds it exacts from the monopolies it artificially creates in privileges such as taxi licences. *Thirdly*, the overwhelming success of innovations such as Uber, necessarily in preference to the established state-sanctioned and regulated regimes, shows that the state approach has entirely failed. That is, a large portion of its citizens, when presented with an alternative to the state-sanctioned model, decide readily to abandon the mode which must have the benefit of familiarity. It shows that the standard of service that the state regime has brought, considered along with the price it sets, is a choice that those citizens do not wish to take up.

⁸¹ For example, in Belgium, Uber's activities have been ruled illegal (by a Court): Ranchordás (n 78) 58. In Pennsylvania, the state issued cease and desist orders in Pittsburgh: Ranchordás (n 78) 48.

⁸² Ranchordás (n 78) 7, 59.

So, Uber exposes state regulation for what it is: self-interested; on occasion, contrary to the interests of efficiency; paternalistic and ultimately a failure because it brings about a service of a kind that many, when given the opportunity, readily forego.

These points might be met with arguments that citizens might yet not have appreciated the increased risks they face when using the unregulated service, that Uber participants are free-riders in seeking to avoid a ride price which factors in the cost of a licence and associated regulatory and compliance imposts, and that those people ought, for these reasons, to be precluded by the state from doing other than using the incumbent arrangements.

Such arguments have limited merit. It is fanciful to think that the Uber ride-seeker would not be alive to the absence of state-sanction of participating drivers and cars. For a citizen deliberately to turn away from the incumbent offering brings with it the necessary inference that they have made their choice in an informed way. And although part of Uber's attraction is the lower price at which services can be offered due in part to the lower regulatory and licensing imposts, it must be questioned whether such costs are truly justified. If a citizen decides that the price of the incumbent service is too high, given the quality and nature of the service they are likely to receive, and being well experienced in those matters from years of prior use, then it can hardly be said that the citizen is merely seeking to free-ride.

Innovations such as Uber will, no doubt, continue to challenge the manner in which the state approaches its regulatory functions and the assumption we

make about its entitlement to act paternalistically. State responses to Uber tend to suggest that the state considers its role to be to preclude citizens from making their own judgments about risk, and jealously to guard its role as the sole determiner of what mix of risk, quality and price its citizens ought tolerate.

We have been led to believe that the state is the only safe and reliable provider of a whole range of services. This has occurred by a number of means. *First*, for decades now, history has been less well or comprehensively taught than was historically the case. The effect has been to exclude from people's knowledge the possibility – and historical reality – of institutions and persons other than the state offering care and comfort. There are very many such examples: mutual funds, co-operatives, friendly-societies, and terminating building societies. Each provided welfare and social services, often organised on the basis of some commonality of interest between those people, such as their religious or political disposition, or their or trade affiliations.

Secondly, the state has been engaged in a concerted campaign of persuading citizens of its role as the natural provider of such services: it advertises its achievements on road signs, on radio and television and by other means; it is quick to point to the shortcomings of its competitor institutions in their provision of such services, despite its own demonstrable shortcomings. The state suggests, by its constituent organisations, that it is vested with comprehensive responsibility for various fields of activity: for example legislation gives to the state greater and more aspirational goals, so aspirational

as to be unachievable.⁸³ *Thirdly*, the state has, deliberately or otherwise, sought to fill the role of God, or at the least, to provide the meaning that, as Taylor has shown, has evaporated from society. I take up an important aspect of this sub-topic below in dealing with sovereignty. But for present, the point I would make is that the state's role as benefactor both fills the gap left in a disenchanted world and feeds our need for an '*authentic*' expression.

Sovereignty

Part of the topic I have just been discussing – the state as benefactor – might be explained by the history of ideas associated with the notion of sovereignty. What I wish to show is that the state has come to fill – or portray itself as filling – a role we once saw as the preserve first of God and later the Monarch; a kind of wise, timeless parent to whom we were, for a time at least, willing to forego our own judgment and independence and defer to their greater capacity to assess of our wellbeing.

Such an understanding explains not only a reason why the state might find it necessary to be a benefactor without limits, but also how, in doing so, it fills for us the some deep-seated need for a protector.

My starting point is the link made by Luc Wintgens between legalism (ie that all norms that have the form of rules are legitimate) as a metaphysical concept and late mediaeval theology.⁸⁴ Legalism's concern is principally with rules rather than where they come from. Nominalism, he says, is one of the basic

⁸³ As was said to be the case in respect of the Charities Act 2006 (UK): see the Government Response to Lord Hodgson's report September 2103 (n 74) para 22, page 48.

⁸⁴ Wintgens (2012) (n 3) 9.

roots of legalism.⁸⁵ One critical aspect is the interpretation of God's omnipotence from the 13th century onwards.⁸⁶ The culmination of this argument is that nominalism would see the nature of '*the good*' as claiming that something is good because God created something *because* it is good.⁸⁷ The distinction between the two may come down to questions of God's omnipotence: nominalists claim the realist position unduly limits God's plenary power. The conceptual move between realism and nominalism is, Wintgens says, the erasing of the *lex aeterna*; the plan according to which God created the world.⁸⁸ God's will is indifferent because it is no longer informed by his intellect.⁸⁹ The good does not exist independently of his will since it is his will that makes something good.⁹⁰

This outline, despite its brevity, does nevertheless show the basis for Wintgens' ultimate assertion that the faithful need not know what really must be done as a matter of '*good*' found '*out there*': all he or she need do is obey the Commandments of God as they are revealed.⁹¹ Following norms imposed by God is all that man need do. Legalism is, therefore, Wintgens says, related to the specific metaphysics of nominalism. And, in turn, it holds that moral conduct is a matter of rule-following and moral relationships consisting of duties and rights

⁸⁵ Wintgens (2012) (n 3) 10.

⁸⁶ Wintgens (2012) (n 3) 11.

⁸⁷ Wintgens (2012) (n 3) 29.

⁸⁸ Wintgens (2012) (n 3) 29-30.

⁸⁹ Wintgens (2012) (n 3) 32.

⁹⁰ Wintgens (2012) (n 3) 33.

⁹¹ Wintgens (2012) (n 3) 34.

determined by rules.⁹² So, just as human creatures must follow the norms commanded by God, so to must we follow the law as a commandment.

Even when one turns to those theorists who would consider that the construction of the state necessitates a social contract (Hobbes, Pufendorf and Kant) that too is the product of rule-following behaviour because the laws of nature are from God and following them brings about the social contract.⁹³

Strong forms of legalism Wintgens shows to imbue our approach to legislation: law is sought to be separated from politics;⁹⁴ a framework is offered for the application of rules and principles, but not for their construction,⁹⁵ and this gives rise to a limited focus on their (legislative) creation.⁹⁶ The judge's function as the applier of rules calls for justification, whereas the enactment of legal rules by the legislator is exempted from justification because it does not (like the judge's function) rely on a closed set of rules.⁹⁷

An understanding of nominalism, as Wintgens outlines it, is crucial to an understanding of the emergence of the concept of the state.⁹⁸ It triggered Protestantism and an autonomous political philosophy based on will. Protestantism articulates a personal relationship with God, mediated to far less an extent by the Church than in the Catholic model.⁹⁹ Conscience dictates the will, and, because the relationship is personal, the conscience of the faithful should be

⁹² Wintgens (2012) (n 3) 57.

⁹³ Wintgens (2012) (n 3) 57.

⁹⁴ Wintgens (2012) (n 3) 143; see also J Hasnas, 'The Depoliticization of Law' (2008) 9 *Theo Inq L* 529.

⁹⁵ Wintgens (2012) (n 3) 139

⁹⁶ Wintgens (2012) (n 3) 139

⁹⁷ Wintgens (2012) (n 3) 140.

⁹⁸ Wintgens (2012) (n 3) 166.

⁹⁹ Wintgens (2012) (n 3) 166

free. And so the churches too ought be voluntary associations and, it follows, so ought the state (following Locke).

Ecclesiastical power was threatened because man was to be judged not by Church authorities but by his or his works and faith. But the state was to be obeyed.¹⁰⁰ So, Wintgens says, the conjugation of Calvinistic Protestantism and nominalism gave rise to the state as we know it.

It is not a big step then, applying Hobbes, that God and the state focus on the same essential work (the laws of nature). The state is the only means to activate the laws of nature and it '*turns out to be*' the only source of binding laws.¹⁰¹ There is no law beyond the state and all law finds its origin there because the social contract, in its majoritarian desire and laws, find their expression in the state (Rousseau).

This is merely a selection of (albeit influential) views. But they serve to show some of many possible illustrations of how the state came to be regarded as the proper repository of rule-making power and to be sovereign (ie ultimate and unchallengeable) in doing so.

The notion of sovereignty and its attachment to the state involves some other powerful factors. I want to conclude this consideration of sovereignty and the role it plays in our attitude to legislation by exposing something of the absolutism and imaginative power which that notion holds. Again, my primary reference point is Wintgens because of the clarity with which he establishes

¹⁰⁰ Wintgens (2012) (n 3) 167.

¹⁰¹ Wintgens (2012) (n 3) 169.

sovereignty as the major operator between our understanding of legislation validly passed and legitimate also.

Carl Schmitt saw concepts of political philosophy as secularised theological concepts.¹⁰² More sinister, however but perhaps no less true, is Blumenberg's thesis that such secularisation is a legal process of dispossession or expropriation of the sacred.¹⁰³ Wintgens regards this as a side-effect of nominalism.¹⁰⁴

It follows that the secularised view of sovereignty locates the political sovereign as the ultimate source of any law, as God was. It follows, too, that the sovereign's power is just as unlimited.¹⁰⁵

And just as God owes nothing to his subjects (despite of course his covenant of ultimate love and salvation) so too the political sovereign owes no justification to its citizens, Wintgens' argument runs.¹⁰⁶ The comparison is not entirely convincing, of course, because God owes us nothing but we might safely rely on him as the ultimate, to act in our best interests, whereas the political sovereign we know to be less omniscient in reality and vulnerable always to making wrong decisions, or ones that benefit others more than us in unfair ways. Nevertheless, I want to retain the underlying force of this comparison because it does serve to illustrate the equivalence that seems to have been afforded to sovereignty.

¹⁰² Wintgens (2012) (n 3) 212 citing C Schmitt, *Politische Theologie, Vier Kapitel zur Lehre der Souveränität*, 2nd edn (1934) 49.

¹⁰³ H Blumenberg, *The Legitimacy of the Modern Age* (trans. R M Wallace) (1983) 19 ff.

¹⁰⁴ Wintgens (2012) (n 3) 212.

¹⁰⁵ Wintgens (2012) (n 3) 212; see also J Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, 4th edn (1971) (ed. H L A Hart) 254 ff.

¹⁰⁶ Wintgens (2012) (n 3) 213.

The consequences of the comparison might be taken further: the sovereign need not give any justification for his or her rulings;¹⁰⁷ the ultimate source of power is unfathomable¹⁰⁸ and citizens cannot complain because they created the sovereign and promised submission (Hobbes); they created it and are part of it (Rousseau); or they had (according to Kant) a moral duty to enter into a state, so cannot contest the duties that fall, as a result, on their shoulders.¹⁰⁹

This leaves, then, what Wintgens powerfully describes as the ‘*black box*’ in the chain of legitimation of legislation. The concept is one that is so often overlooked in critiques of legislation and it explains much about how and why we have occluded from our consideration of legislation, and never permitted ourselves to inquire into, how we might conceive of legislation which is good or bad. About his back box, Wintgens says:¹¹⁰

Once sovereignty has been built into political space, it operates as a black box. ... As a matter of logic, the magic of the black box prevents anyone questioning the outputs in any of its aspects. ...

Sovereignty on this view can be called upon to justify both a monarch by divine right and a totalitarian state. The monarch by divine right is the representative of God on earth, and Hobbes’s sovereign is after all not far from that. Although the subjects have created him, he is called upon to implement the laws of nature that are the laws of God. Under a monarchy of divine right, the monarch is exercising the divine prerogatives that are included in, and which constitute, sovereignty. On this view, the sovereign does not have the power to violate the laws of God. As a matter of logic, he has no permission to do so, although he has the power to define their content according to Hobbes.

...

¹⁰⁷ Wintgens (2012) (n 3) 213.

¹⁰⁸ I Kant, ‘Metaphysical First Principles of the Doctrine of Right’ in *The Metaphysics of Morals* (1996) (trans M Gregor) 95 and following.

¹⁰⁹ Kant (n 108), s 44.

¹¹⁰ Wintgens (2012) (n 3) 213-214.

Taking sovereignty as a black box, we enter into the realm of absolute power that, by its very nature, cannot be legally limited, as Austin has argued. ... Absolute power is disconnected from anything [ab-solutus]. If it is a source, it must at the same time be the origin, that is, a self-referential beginning.

The problem, of course, as Wintgens himself identifies, is that sovereignty and the view of legitimation it underpins, can be called upon to justify both rule by divine right and a totalitarian state. It calls upon us to accept the perfect rationality of the ruler's commands. It explains why we have fused, with legislation only, concerns of validity and legitimacy. We treat all valid legislation as legitimate and we do so for reasons that include an unstated conception of the legislature (ie the state) as sovereign.

And we see, because of the way in which we regard sovereignty, that no matter how its centre might shift, from the Monarch, to the Parliament, or the state, or indeed the people,¹¹¹ it still justifies the deployment of an untrammelled power to legislate.

How well this fits with Nils Jansen's analysis of legal authority as having typically focused on officially-sanctioned rules issued by legally recognised bodies.¹¹² These state-centred concepts of law and legal authority follow almost inexorably from an approach of the kind I have just set out.

¹¹¹ In Australia, for example, the 1980s saw legal theory revised such that the sovereign base for the Australian Constitution was considered to have shifted from the Imperial Legislature (the Constitution was an act of that Parliament) to the people: see *Australia Act Cth* (1986); *Australian Capital Television Pty Ltd v The Commonwealth (No 2)* (1992) 177 CLR 106 at 138 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140 at 230 (McHugh J); *Sue v Hill* (1999) 199 CLR 462 Contrast: Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 LQR 590 at 600.

¹¹² N Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (2010).

IV When Judges Fail

I have offered, by reference to the historical development of Parliament since the 17th century, a reason – or perhaps more a change in psyche – for the increasing trust we place in popular assemblies and, because of it, our greater willingness to permit those bodies to fulfil an omnicompetent role.

The rise of regulation has attracted the attention of law and public administration scholars. Andrei Shleifer has attempted a general theory to explain how rise fits with both empirical evidence and history.¹¹³ He identifies shortcomings in the Common Law as leading to the rise in regulation and in the proliferation of legislation. In doing so, he asks why legislation and not the Courts became the primary means by which to control business behaviour.

His argument is that dispute resolution in Courts is costly, unpredictable and fails to deal with modern problems. The consequence, he says, is that legislative regulation (imperfect though it is) emerges as the alternative strategy for promoting desirable business behaviour and controlling such behaviour as ought to be discouraged. Regulators rise where judges fail, he says.

Shleifer's principal criticism is directed to judicial discretion, which, he claims, judges tend to exercise, particularly with respect to facts, so that the facts fit their own biased (by this he means pre-judged) view of how the matter ought to be disposed of. A judge might do this also to avoid an appellate court

¹¹³ A Schleifer, *The Failure of Judges and the Rise of Regulators* (2012).

overturning the first instance decision, something which is more difficult if the trial judge has made certain findings of fact.

The shortcomings in the exercise by judges of their common law functions is something that Shleifer regrets. He sees legislative regulation as imperfect, principally, it seems, because businesses take (costly) precautions against it, even when there is no benefit to them in doing so.

I need not dwell too long on Shleifer's thesis. As an economist, he focuses on business behaviour. And he may not have the same understanding as do lawyers of the nuances of factual analysis, the proper role of judicial discretion and the structural limitations on common law decision-making possesses when rapid developments are called for. On this latter point, the Courts, deciding as they do, disputes between parties, are less well placed than legislatures to ascertain the likely effects of various possible rules and to know to the extent that legislatures might, all the possible ramifications of instituting a particular rule, especially where new circumstances are concerned.

Shleifer's views, nevertheless, coming as they do from outside the field of law, do offer some insight into the competing merits of legislation and the Common Law. And they confirm, to some extent, a broader theme of my project: have we come to accept too unquestioningly what popular assemblies do.

V Bounded Rationality: a doctrinal solution

Luc Wintgens's '*bounded rationality*' offers a doctrinal solution to the problem of legislative hyperactivity, via an expanded function for judicial review. His starting point is the assumption made by courts when construing legislation that the legislator was acting rationally. He would urge a change: that such an assumption ought be displaced where there is cause to believe to the contrary. He would prefer an approach in which the legislator was not judged to be rational where there exists an empirically justified account of the legislator having violated normative standards.¹¹⁴ It is an ordinary rule of construction that we exercise '*charity*' towards the speaker, that is, that we assume his or her words ought not be construed as contradictory or absurd.¹¹⁵ So, while we might be charitable towards legislators, and accept that they might *strive* for rationality, we know that they may well fail to do so, or fail in a limited way.¹¹⁶ There are all manner of bases, many of which I have catalogued in one way or another in earlier Chapters, why, given the motivates that cause legislators to act, that the resulting product (the statute) lacks rationality in the way Wintgens suggests ought enliven his doctrine of bounded rationality.

This is the first limb of Wintgens' argument. The second is that legal validity need not focus – to the exclusion of all other considerations – upon

¹¹⁴ Wintgens (2013) (n 3) 12.

¹¹⁵ Wintgens (2013) (n 3) 10.

¹¹⁶ H A Simon, *Administrative Behaviour: A Study of Decision-Making Processes in Administrative Organizations*, 4th edn (1997) 88.

compliance with legal processes.¹¹⁷ Legal validity is a multifaceted concept, he points out, that does not itself warrant such a limitation.¹¹⁸

Wintgens's notion of '*bounded rationality*' as '*legisprudence*' presents a viable alternative to the fusion of legality and legitimacy.¹¹⁹ His is a notion which challenges the presumption of rationality of the legislator and replaces it with a '*level theory of coherence*'. It entails:

- 1) *the principle of coherence* - that norms make sense as a whole, including through legislators giving reasons for why norms are changed or not changed (thus instilling coherence over time);
- 2) *the principle of alternativity* –intrusions upon freedom are legitimate only in cases in which social interaction is failing;
- 3) *the principle of temporality* – the requirement that norms be justified over time, and not just at the time they are imposed and then assumed to have a continuing, constant, justification;
- 4) *the principle of the necessity of normative density* – rules ought not be accompanied by strong sanctions. Preference ought be given to less severe possibilities.

Wintgens's approach would see these approaches brought within judicial review ('*rationality review*', he styles it)¹²⁰ of legislation by the Courts. It

¹¹⁷ Wintgens (2013) (n 3) 23-26.

¹¹⁸ Wintgens (2012) (n 3) 139-140.

¹¹⁹ The main sources are at (n 3).

¹²⁰ Wintgens (2013) (n 3) 26.

permits the ‘*marginal control*’ of the rationality of legislation¹²¹ and leaves in place the legislator’s discretionary power to make choices.

Wintgens draws upon a sample of cases of the German *Bundesverfassungsgericht* (BGV) decided under art 20, 3 of the Constitution, which states that ‘*[t]he legislature shall be bound by the constitutional order, the executive order and judiciary by law and justice*’. That provision has been interpreted as requiring the legislator to pay attention to cleaning up or modernising obsolete norms.¹²² Norms can become unconstitutional over time, or move in that direction. The legislature is given time to adapt a norm before its being declared unconstitutional.¹²³ What Wintgens’s approach would offer to Anglo-American system is new and expanded grounds for the judicial review of legislation, based upon the expectation we all might reasonable hold of legislators acting within the bounds of rationality.

The whole notion of insisting upon legislators to demonstrate their having strived for rationality is founded upon a view that we are entitled to expect of them that they have sought to make sense of the world, and to show how they have done so.¹²⁴ It recognises and takes account of the pressures of limited time, imperfect skills and scarce resources that affect legislators.¹²⁵ The demand is not that legislators act perfectly, or make the choice that a particular judge might prefer, but that they act rationally by keeping track of their norms. It is up to the legislator, the argument runs, to show how it has proceeded in fact finding, how

¹²¹ Wintgens (2013) (n 3) 27.

¹²² Wintgens (2013) (n 3) 28.

¹²³ Wintgens (2013) (n 3) 28.

¹²⁴ Wintgens (2013) (n 3) 16.

¹²⁵ Wintgens (2013) (n 3) 15.

its choices have been made and how it has effectuated the prognosis of changing circumstances as well as the effect of its norms.¹²⁶

Wintgens's approach has much to commend it. It recognises the reality of modern legislatures and is unwilling naïvely to assume away the very real shortcomings in their motivations and operations. It is an approach which would compel legislators to account for their rule-making beyond doing so merely in a political sense. Moreover, it offers a much more persuasive account than does the doctrine of Parliamentary supremacy for the kinds of boundaries to which legislation is, of its nature and the characteristics of its author, specially exposed.

VI The collapse of Higher Laws

A further perspective on the events and developments I have been describing in this Chapter and the historical evolution I set out in Chapter 1, is that of Brian Tamanaha who has argued that there has been a collapse in '*higher laws*' that were essential to law's autonomy. He explains his point in these terms:¹²⁷

A few centuries ago ... [l]aw was thought to consist of rules or principles immanent within the custom or culture of the society, or of God-given principles disclosed by revelation or discoverable through the application of reason, or of principles dictated by human nature, or of the logically necessary requirements of objective legal concepts.

Since then, Tamanaha says, those rules or principles have collapsed with the consequence that law has lost some of its autonomy, an autonomy so

¹²⁶ Wintgens (2013) (n 3) 26-27.

¹²⁷ B Z Tamanaha, *Law as a Means to an End: The Threat to the Rule of Law* (2006) 1.

fundamental as to be considered to be part of the rule of law.¹²⁸ Tamanaha's principal theme is that, through higher laws, an ideal existed by which there were fundamental principles that even the sovereign law-maker was bound to obey.¹²⁹ Those restraints have, he says, collapsed over the last several centuries.

For Tamanaha, an instrumental view of law has come to prevail, in which law is consciously viewed as a tool or means with which to achieve ends.¹³⁰ He contrasts this to law having more autonomous objectives and being more immune to seizure and co-option by particular interests in society.¹³¹

How does Tamanaha characterise these higher laws: how does he see them having operated as restraints?

First and foremost is their immanence: their subsisting nature, and the process of their 'making' being discovery rather than construction.¹³² The concept of divine law brought with it both the notion of law's creation being the province of a superior non-earthly being and the sense of it being necessary to search for those pre-determined rules rather than embark on some man-centred exercise of ascertaining from the start what would, in our interests, be the best rule to adopt. The process of law making was more a task of discovery, an external exercise, and one in which faith played a major role.¹³³

¹²⁸ See also B Z Tamanaha, *On the Rule of Law* (2004).

¹²⁹ Tamanaha (n 127) 215.

¹³⁰ B Z Tamanaha (n 127) 6; see also C Michelon, 'The Public Nature of Private Law?' in Michelon et al (eds), *The Public in Law* (2012) 199 ('... it is an undeniable fact that factions of particular societies often hijack the law in order to favour their own interests in detriment of the common good.')

¹³¹ Tamanaha (n 127), ch 1.

¹³² Tamanaha (n 127) 11.

¹³³ Tamanaha (n 127) 11 (citing W Ullmann, *A History of Political Thought: The Middle Ages* (1965)).

Custom was also a major component. It took expression in many ways. It was afforded deep respect as part of the pre-modern commitment (mostly unconscious) to things continuing as they always have; the lack of any real distinction between things as they are and things as they should be. These views are characteristic of custom, and are reminiscent (albeit more nostalgically so) of Sir Henry Sumner Maine's historical approach and recall the considerations I set out in the preceding Chapter.

The next ingredient of these higher laws was the Common Law. It was peculiarly adapted to drawing on custom and giving it life. The historian J G A Pocock explained common law thinking in this respect as follows:¹³⁴

In the first place, it is asserted that 'the ancient constitution' was an 'immemorial' constitution, and that belief in it was built up in the following way. The relations of government and governed in England were assumed to be regulated by law; the law in force in England was assumed to be the common law; all common law was assumed to be custom, elaborated, summarized and enforced by statute; and all custom was assumed to be immemorial, in the sense that any declaration or even change of custom – uttered by a judge from his bench, recorded by a court in a precedent, or registered by king-in-parliament as a statute – presupposed a custom already ancient and not necessarily recorded at the time of the writing.

Although the extent to which all judges might have been governed in their decisions by custom differed, and theorists have perceived different tendencies and preferences with common law, there is no doubt of the Common Law's greater direct reliance on custom than legislation.¹³⁵

¹³⁴ *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century – A Reissue with a Retrospect* (1987) 261.

¹³⁵ J W Tubbs, *The Common Law Mind: Medieval and Early Conceptions* (2000). Tubbs explains the difficulties with interpreting the works of the English commentators, owing to a lack of organisation in some cases, inconsistent use of terminology and imprecise

Tamanaha shows another element of the higher laws to have been the science of legislation. The 18th century (through Kames and Smith in particular) saw expression given to the way in which law could be restrained or governed by a scientific approach:¹³⁶

Like other sciences, [law] is supposed to have first or fundamental principles, never modified, and the immovable basis on which the whole structure reposes; and also a series of dependent principles and rules, modified and subordinated by reason and circumstances, extending outward in unbroken connection to the remotest applications of law.

These higher limits operated also on legislation. Tamanaha gives examples in American law of charters which acknowledge expressly the limits of legislative authority¹³⁷ and of Courts recognising and giving effect to ‘*non-constitutional limits to legislative power which put fundamental common-law dogmas beyond the reach of statutes*’.¹³⁸

There can be little doubt that many of these notions are now gone, or are now less potent, with the legislature having been freed from many of them. As I have pointed out in earlier Chapters, Constitutional restraints remain, in many Anglo-American systems, in the form of written charters, and far less potently, in presumptions (presumptions only) of statutory construction.

The reason why positivist restraints are less influential or fundamental according to Tamanaha is that these limits are products of the law-maker’s will,

language in distinguishing between the Common Law, local usages and general custom: esp 189-195.

¹³⁶ Tamanaha (n 127) 15, quoting an unattributed essay published in 1851 ‘Nature and Method of Legal Studies’ 3 US Monthly Law Magazine 381-382.

¹³⁷ Tamanaha (n 127) 216.

¹³⁸ Tamanaha (n 127) 217, quoting Pound.

so cannot be characterised as immanent principles of right and absolute prohibition.¹³⁹ What legislatures can make they can unmake.

I have already shown how, in the 18th century, scientific studies were undertaken with the purpose, whether through natural jurisprudence or otherwise, to identify and articulate the principles which ought to govern both common law and legislation. The scientific approach, combined with the Enlightenment concern with man as the centre of all things, necessarily involved a study being made of man and society. By doing so, and in other than the most unrestrained of the theories (Bentham's) there was a recognition nevertheless of something external to law: something natural – as being a 'given' and as dictating in some way the content of law.

While Enlightenment science initially provided additional foundations for restraint in the making of law in the longer term, it undermined the more traditional restraints, in the form of both divine law and custom.¹⁴⁰ The critical scrutiny of received tradition which was so characteristic of the Enlightenment had the consequence that restraints or features of law that could not then be explained or justified by reason were seen as blind fetters.¹⁴¹

These factors, combined with the science of the legislator ultimately deferring to the most unrestrained version of it (Benthamism), which expressly at

¹³⁹ Tamanaha (n 127) 217-218.

¹⁴⁰ Tamanaha (n 127) 21.

¹⁴¹ Tamanaha (n 127) 21. Albeit that some Enlightenment scholars (Adam Smith included) distrusted the reason of fashionable philosophers and preferred instead to employ science to understand the historical world of human experience free from *a priori* assumptions dictated by reason: P Stein, 'Law and Society in Scottish Thought' in N T Phillipson & R Mitchison (eds) *Scotland in the Age of Improvement: Essays in Scottish History in the Eighteenth Century* (1970) 160. The difference is perhaps the stage of the thought process at which reasoning ought to be engaged.

least recognised no principle which ought restrain the legislator, served to free the law of its longstanding restraints. This occurred much more potently for legislation than it did for the Common Law. Judge-made law retained its system of precedent, its appeal structure and its reticence for innovation by other than the most incremental of means. Parliament, on the other hand, embarked upon a trajectory in which it threw off all restraints other than those of a political and Constitutional kind, and some weak rules about how legislation is to be construed.

One of the reasons for the 18th century science of legislation not leaving any strong restraining influences on the legislature (besides Constitutional ones) may be that its quest to formulate objective principles of law and society were not as successful as first hoped.¹⁴² What was lost was any belief in there being one or a dominant moral system. Human sentiments proved less capable of guiding us to the proper ends which ought to be pursued than previously thought.¹⁴³ And utility, while it has proven successful in every practical sense is, beyond what Tamanaha identifies as its '*hedonistic*'¹⁴⁴ objectives, unable to distinguish between pleasures. There is no objective happiness and therefore no basis to deprive the populace of whatever, in aggregate, it desires. It places a burden on the minority to permit the majority their happiness, without any means of assessing the appropriateness and fairness of that sacrifice. Utility, on its own, never offered any basis for restraint beyond its simplistic formula of happiness for the majority.

¹⁴² Kelley (n 2) 305, where reference is made to the failure of the Enlightenment's project of rational and moral progress.

¹⁴³ Tamanaha (n 127) 22.

¹⁴⁴ Tamanaha (n 127) 23.

We take comfort in these difficult questions being weighed, debated and decided by the democratic body which is Parliament. Whether that trust is well-placed is something which I would urge must be considered against the background of how well Parliament, in reality, meets the hopes we have for it.

The upshot of Tamanaha's theory is that law is now used for instrumental purposes (ie self-interested objectives of those who can control its exercise) and that Parliament is inherently unsuited to, and incapable of, making good choices without higher principles to guide it. Tamanaha suggests, ultimately, that with the loss of these principles, law has lost also its in-built restraints and become an *'empty vessel'*.¹⁴⁵

Custom deserves particular treatment in the context of Tamanaha's wider thesis.

Custom has many characteristics of Tamanaha's higher laws. It is a source of rules which no sovereign or legislature has played any part in devising and one which, for that reason, stands beyond the immediate control of made law. Its antiquity or immemoriality confers reverence, something that Bentham lamented: *'[w]e inherited [customary law] from our fathers, and, maugre all its inconveniences, are likely, I doubt, to transmit it to our children'*.¹⁴⁶

Brian Tamanaha links the demise of custom with the erosion of the rule of law. This is a characterisation of custom as offering principles which even the sovereign law-maker is bound to obey¹⁴⁷ and hearkens to a time when custom

¹⁴⁵ Tamanaha (n 127) 215.

¹⁴⁶ J Bentham, *A Fragment on Government* (1776) ch IV, art 38.

¹⁴⁷ Tamanaha (n 127) 215.

was, itself, an authoritative source of law.¹⁴⁸ The collapse Tamanaha identifies stems from law ceasing to be seen as representing the common good or public welfare, from it ceasing to have the quality of being ‘*of and for*’ the community and for that reason alone deserving of obedience by citizens.¹⁴⁹ Tamanaha makes the point that ‘*the central role and function formerly played by these classical ideas and the critical vacuum left by their demise*’ results in integral parts being lost from what once was an organic whole of interconnected ideas about law.¹⁵⁰ Custom, not as the source of any individual’s own will, but as a spontaneous and collective phenomenon, brought with it a different approach to its treatment:¹⁵¹

... the process of explicitly articulating and applying the law was a matter of discovering and declaring the unwritten law that was already manifested or immanent in human life.

Custom, if it were to be seen in this light, would have consequences for judicial method. A judge or other arbiter who sets out to find the law as manifest in human life is undertaking a much more objective task than one following the traditional role of finding the law in the contemporary sense. For one thing, in the case of customary law, what is manifested in human life must be known to all, not just those vested with authority to arbitrate disputes. The modern judicial role of finding the law is of course a more technical and specialist one, and one which leaves no room for the layman to contribute (as did the special jury). Customary law involved less elitism. Moreover, unmade law gives to no individual authority to create law or affect legal relations on a large scale. This

¹⁴⁸ Tubbs (n 135) 186.

¹⁴⁹ Tamanaha (n 127) 215.

¹⁵⁰ Tamanaha (n 127) 215.

¹⁵¹ Tamanaha (n 127) 11.

might be contrasted with made law, which, taken to its unrestrained but logical end point, runs the real risk of becoming that of an authoritarian elite. Made law, in the form of legislation, is uniquely subject to pressure and influence, as we saw in Chapter 3. Knud Haakonssen has observed this distinction, in the context of the abuses evident in the statutes to which Adam Smith directed his famous criticism in the *Wealth of Nations*:¹⁵²

Law which is made by some authority other than a judge of concrete cases is liable to be guided by political and religious objectives, whereas judge-made law based on precedent has a better chance of approaching the principles of natural justice.

Tamanaha's view of custom, then, is as an abiding source of 'natural' legal principles, loss of which erodes the rule of law by freeing the legislator from restraints imposed by time and experience. The position is reminiscent of Hayek's criticism of constructivist rationalism which he sees as directing positivist thinking:¹⁵³

The characteristic of the constructivist rationalists ... is that they tend to base their argument on what has been called the synoptic delusion, that is, on the fiction that all the relevant facts are known to some one mind, and that it is possible to construct from this knowledge of the particulars a desirable social order.

It is possible to detect in the constructivist rationalist approach a view with Marxist overtones, one which reveals a particular belief about what benefit the past might offer in making decisions today about social affairs.

We can see in Tamanaha's work a way of looking at the last 300 or so years as involving a move from a law restrained by higher or unalterable forces

¹⁵² K Haakonssen, *The Science of the Legislator: The Natural Jurisprudence of David Hume and Adam Smith* (1981) 151-152.

¹⁵³ Hayek (n 34), vol 1, 14.

to law which is free of all but the most positivist of limits and some of the consequences which follow.

Tamanaha's approach is a largely historical way of seeing how limits which once operated on legislation came to be removed. There are, as well, numerous other approaches to divining limits which are more philosophical than historical.

VII Closing of the imagination

So strong are the forces I have identified that we seem to have lost the capacity to conceive of the state in any alternative form to the one it presently assumes. It has led to a kind of Freudian (flawed) motivation to kill the father¹⁵⁴ – for whom the lawgiver might be substituted here – a desire overcome the things that occurred before and establish a new order: to ourselves be the father and lawgiver.¹⁵⁵ Freud would hold that identifying with the father, gives rise to a super-ego, and inner moral authority and one that overcomes the irrational fear of castration.

There are other ways to see the phenomenon of humankind striving to eliminate or overcome the limitations placed upon us. We might see it by analogy to the force that compelled the construction of the Tower of Babel: man's revolt against God. We might draw on Michael Oakeshott's essays of that same title¹⁵⁶ to understand the single-mindedness with which we might be

¹⁵⁴ *Moses and Monotheism* (1939).

¹⁵⁵ ie 'You wanted to kill your father in order to be your father yourself. Now you are a father, but a dead father'.

¹⁵⁶ M Oakeshott, *On History* (1999); (1948) 2 *The Camb J* 67.

capable of pursuing that goal. We might see it as a weakness, again via Oakeshott's view, that we human beings are prone perennially to misunderstanding ourselves, and our limits when we succumb to the temptation to erect structures we hope will bring us to a final perfection in a suppositious promised land.¹⁵⁷ Or we might see Nietzsche's pronouncement '*God is dead!*' as evidencing the pitiful state of trying all the time to escape from our own inevitable weaknesses by defying those who might be the source of such boundaries.

Thus I raise for consideration whether we have become locked in a secular and self-confirming pattern: legislation that is valid is legitimate; what the state can validly do it ought do because democracy leads to good results; and secularity is good too because it is the opposite of the religious or spiritual. So too the opposite holds good: we distrust things that we have not consciously created, because what is traditional and the product of evolution is to be regarded as unenlightened, because we are not enlightened. But ultimately we must face the distortions which our own approach brings, of a less than adequate understanding of our own motivations and emotions.

And if de Tocqueville is right about the soft despotism that the state administers, then that too has contributed to our lack of resistance to its intrusions, simply because they appear so benign.

These themes resonate somewhat with a view expressed by Jürgen Habermas in his *An Awareness of What is Missing*. He has powerfully defended

¹⁵⁷ Oakeshott (1999) (n 156) xii (Foreword by Timothy Fuller).

Enlightenment rationality, something that has come under attack by both postmodernism (which denies formal reason's claims of internal coherence and neutrality) and by fundamentalist approaches, which would place reason beneath religious imperatives. At the same time, he recognizes the need, in a post-secular society, for a discourse of sorts between religious and secular viewpoints. The post-secular society is one that has an acceptance that it cannot stand alone and must interact to some extent with religion:¹⁵⁸

Among the modern societies, only those that are able to introduce into the secular domain the essential contents of their religious traditions which point beyond the merely human realm will also be able to rescue the substance of the human.

His thesis is that secular reason lacks self-awareness, a problem which will cause it to 'spin out of control':¹⁵⁹ it has within itself no mechanism for questioning the products and conclusions of its formal, procedural entailments and experiments. It is a conclusion that finds support in the circularity in our approach to legislation. He then goes on to reveal something which says much about our energetic and apparently directionless approach to legislation, albeit that he view is expressed about science. Science, he says, continues inventing and proliferating technological marvels endlessly without having the slightest idea why.¹⁶⁰ Habermas criticizes us for having 'naïve faith',¹⁶¹ in science's

¹⁵⁸ J Habermas, *Politik, Kunst, Religion: Essays zeitgenössische Philosophen* (1978) 142 cited by M Reder & J Schmidt 'Habermas and Religion' in Habermas et al *An Awareness of What is Missing: Faith and Reason in a Post-Secular Age* (trans Ciaran Cronin, 2010) 5.

¹⁵⁹ J Habermas, 'An Awareness of What is Missing' in J Habermas et al, *An Awareness of What is Missing: Faith and Reason in a Post-Secular Age* (trans Ciaran Cronin, 2010) 18. Habermas (n 159) 18.

¹⁶¹ Habermas (n 159) 22.

ability to provide reasons, aside from the reason of its own keeping on going, for doing what it does.

So too perhaps with legislation: we have developed a naïve faith in the state and in popular assemblies. So great is that faith, that despite the fact that they might do anything, they can make good choices for why they act as they do and not in other ways, and why taking a particular course is good. Granted that the position with respect to science may be more stark than for legislation. Legislation, after all, is accompanied by the possibility at least of open debate and for investigations to be made into the desirability of the various courses which might be adopted.

Hayek offers a link between Habermas's thesis and the trust that we place in legislation for its constructivist character. Habermas himself also draws the connection for us between science and state action. The modern liberal state is, he shows, the counterpart of science. That state is one that maintains '*neutrality ... towards world views*', including religious visions of what life means, where it is going and what we ought do to achieve to help it get there.¹⁶² But the state, holding itself as it does above this and other viewpoints, has no means for judging the outcomes. The whole problem, however, is that such viewpoints import real long-term goals that act as a check and reference point for momentary desires. They give those who adhere to them reasons that are more than merely prudential or strategic for acting in one way rather than another.

¹⁶² Habermas (n 159) 20.

A state that lacks such means to check its goals will inevitably act without judicious selection: it has *'lost its grip on the images, preserved by religion, of the moral whole'* and cannot come up with *'collectively binding ideas'*.¹⁶³ The citizen possesses rights – rights that the state protects – including the right to choose. The direction that the citizen might choose is a matter of indifference to the state, because it seeks only to guarantee the right to go there, as it does for each other citizen. There is no morally guided, or collective, action because Enlightenment rational morality offers no impulse towards it.

As a consequence, decoupled as we have become from worldviews, it becomes impossible to awaken in the minds of secular subjects, *'an awareness of the violations of solidarity throughout the world, an awareness of what is missing, of what cries out to heaven'*.¹⁶⁴ Religion therefore might provide some rectification. Habermas proposes that:¹⁶⁵

... the religious side ... accept the authority of 'natural' reason as the fallible results of the institutionalized sciences and the basic principles of universalistic egalitarianism in law and morality. Conversely, secular reason may not set itself up as the judge concerning truths of faith, even though in the end it can accept as reasonable only what it can translate into its own, in principle universally accessible, discourses.

Habermas' approach, Norbert Briekskorn says, places demands on religion (ie giving up the spheres of law, government, morality and knowledge) but it makes no demands in the opposite direction, other than requiring of reason that it respect religion.¹⁶⁶ Michael Reder has observed that Habermas's approach would be to instrumentalise religion, to capture it for secular purposes, ie to *'to*

¹⁶³ Habermas (n 159) 19.

¹⁶⁴ Habermas (n 159) 19.

¹⁶⁵ Habermas (n 159) 16.

¹⁶⁶ Habermas (n 159) 25, 32-33 and 35.

help to prevent or to overcome social disruptions ...'.¹⁶⁷ But having been so deployed, his argument runs, religion becomes sidelined again and the uncomfortable demands it makes can be once again ignored.

I offer Habermas's view as both tending to confirm the circularity of reasoning in which we engage when speaking of the state and legislation, and to illustrate a cause of that to be the loss to us of any external touchstone by which to check our goals and the means by which they are sought to be achieved.

¹⁶⁷ M Reder, 'How Far can Faith and Reason be Distinguished?' in Habermas et al, *An Awareness of What is Missing: Faith and Reason in a Post-Secular Age* (trans Ciaran Cronin, 2010) 39.

Conclusion

I set out on this project identifying a proliferation of legislation and showing modern legislation to be confident to legislate on virtually any topic, and regularly so. That ‘*hyperactivity*’ (as Lord Sumption described it) lacks any real notion of limits, its proper province or a discernible prioritisation of focus. The result is a huge volume of legislation, governing almost every aspect of human affairs, and rapid and often radical change to the norms it contains.

The practical problems of such proliferation are not difficult to identify, and nor is their existence the subject of particular controversy. They place beyond the resources of the ordinary citizen the means to comprehend how the law is likely to affect him or her; it puts ‘*cognoscibility*’ at risk; it renders it more difficult for citizens to arrange their affairs and have certainty and predictability in doing so; it tends to cause the content of those norms to depart from established sociable behaviour and, more generally, risks the law degenerating into massive and possibly meaningless, contradictory (or even trivial) blocks of rules and norms; and ones susceptible to having been devised and sponsored not by the public or those who represent them in popular assemblies, but by instrumental forces desirous of achieving their own particular self-serving ends, and ends that might serve some useful purpose, but not ones which public will would itself have brought about. Waldron’s argument (the principal modern defence of the approach which leads to this state of affairs) does not see or meet problems that confront it.

With so many problems attending the work of the prolific and unfocused legislature, we look to some justification for a more or less unbounded deployment

of legislation. We find in Jeremy Waldron that proponent. He, albeit one commentator, stands for the family of like arguments. The proposition that popular assemblies are wise, dignified and more likely to get it right argues for there being a wisdom in the multitude, one that is operative through the representative assembly and the debate, disagreement and deliberation said to take place in it. These are viewpoints which, when we reflect upon our actual experience of legislation in current times, can be seen to have triumphed.

It is, however, a seriously incomplete and unsatisfactory justification. One purpose of the preceding Chapters has been to explore these factors and to show that, because of them, when popular assemblies legislate with the verve they do, there is a loss, and a loss of a normative kind because the foundations for the deployment of legislation in that manner have not been laid in any complete manner. It is as well however, to collect here a summary of the ways in which that incompleteness arises. There are three primary problems:

- 1) a misplaced attribution to legislation of a prestige properly attaching to popular assemblies;
- 2) a conceptual weakness in seeking to justify the prolific and intrusive deployment of legislation because its author (popular assemblies) might enjoy kudos as the safer repositories of power than a despotic monarch: that is, despotism in either hands remains undesirable;
- 3) Waldron's approach does not seek to answer (or indeed recognise) some practical and institutional weaknesses that attend popular assemblies and

legislation or some likely underlying causes of the contemporary approach to legislation, and nor does it declare the preference on which it must be founded of the underlying order being one which there are no limits to our capacity or entitlement to change, and revolutionise.

Parliament was instrumental in the transition from a monarch exercising despotic, relatively unconstrained power, to a heavily curtailed monarchical power and the exercise by Parliament itself of formerly royal powers. So monumental was that achievement, in an era of abuse of monarchical power, that Parliament was recognised as having obtained the liberty of the people and brought under control an often self-interested tyrant. In this transition, however, legislation played no prominent role. Yet legislation, as one of the most noticeable products of Parliamentary activity, has been afforded the benefit too of that prestige.

The entanglement of prestige properly attaching to Parliament, but unjustifiably extended to legislation can thus be resolved by an historical analysis of the circumstances in which that kudos first came to accrue. It is resolved also by a further factor, which is as much historical as it is a sociological observation. The concerns which led to Parliament assuming the role it did, were the curtailment of relatively unrestrained power (albeit in the hands of a Monarch) and the centralisation of that power and its susceptibility in that form to abuse and undue intrusiveness. The societal concern which led to the establishment of the modern Parliament, therefore, would tell against that body acting, through relatively unrestrained legislative activity, in much the same way as a despotic monarch.

Once the kudos that attaches to Parliament is detached from legislation (an entanglement that history rectifies) a conceptual problem is revealed in the Waldron approach. The fact that popular assemblies are afforded prestige is no basis for them to make legislation in the prolific manner and with the intrusive effects that our actual experience of legislation confirms to be the case. The institution might command respect as being wise, dignified and more likely than alternatives to get it right, but no part of doing so would justify a particularly prolific deployment of legislation. The attributes of its author are conceptually separate from the merits of the heavy use of one of that body's powers. And that is only strengthened if the kudos of Parliament is firmly located in the freedom it brought from the despotic and intrusive powers, which, for those reasons, it should not lightly be taken to authorise in the discharge of its own functions.

From this there emerges an incompleteness. The Waldron approach overlooks many of the practical and institutional limitations of popular assemblies and legislation that I discussed in Chapter 3. They are not, in reality, forums for free and open debate. Instead, elected representatives might be so bound by party cohesion that the differing viewpoints might be far less diverse than the number of representatives would suggest. Public will (itself a problematic concept) is susceptible to manipulation and misrepresentation, and bureaucrats seem to keep the assembly in a state of such activity (assisted by an acquiescence of the representatives themselves) that proper consideration and debate of most legislation becomes impossible.

These factors suggest popular assemblies do not possess attributes to the extent that the Waldron approach assumes. The incompleteness, however, runs deeper.

Those who would contend for there being merit in the prolific deployment of legislation bear the onus of having offered a more-or-less complete justification for that. If that justification is complete or partial, then where popular assemblies legislate in such a manner, there is a loss, and the loss is one which is of a normative kind because the stance those assemblies adopt is one for which there is no, or no adequate, theoretical basis.

The incompleteness here is not just a failure to meet practical and institutional limitations. It is also a failure to articulate why other means for the expression of public will are not to be preferred. An example of this is customary law, to which I gave consideration in Chapter 4. It is another means by which public will finds expression, but through widespread practices. It enjoys the mediating influence of common law adjudication in Courts by which more habit is subjected to the scrutiny of practical reason. If, as Waldron would have it, there is a wisdom in the multitude, then that approach does not make entirely clear why its expression via popular assemblies rather than through custom is to enjoy such a strong preference. There would seem to be embedded within that choice a preference – undeclared – for a view that underlying order is one that is not immanent and which we should feel unrestrained to change, adjust and fashion as we see fit, that it is only through a deliberate process, or conscious intellectual effort that the correct or preferable order may be arrived at. The alternative is to accept the order as more or less immanent, and open to adjustment but less intrusively and radically, with such adjustments as are warranted to be discerned by human behaviour, albeit subject to oversight by the rational judge. The selection of the former over the latter goes undeclared by the Waldron approach.

There are other deep-seated influences which the Waldron approach overlooks or bypasses. These are powerful forces that are likely to have contributed to the proliferation of legislation and the great and frequent reliance we place upon it. Legislation is, unlike other sources of law, under-theorised, and is therefore less well understood in its jurisprudential strengths and weaknesses. There seems to be a modern approach to democracy more akin to the approach inherent in the radical Enlightenment than the moderate strain which for some time had prominence in Britain, such that there is a prospect of a greater trust reposed in democratic concepts that has until recently been the case. There are questions too of motivations for our greater reliance upon legislation or perception of our place in the larger order, our relationship with the divine, and those forces larger outside ourselves. Have we, for example, been motivated more by an egotistical desire to decide for ourselves the order to which we ought be subject? The larger possible influences are also ones which the Waldron's approach does not meet. An onus lies on those who would advance it because they are factors which, even if we might not expect to see them dismissed are possible influences, ought to have been regarded in the balance as possibly causing a favouring of popular assemblies and legislation, or as carrying some underlying bias in their favour.

Underlying the arguments I have advanced in Chapter 5 in particular lies a theme: that there is good reason to suspect that legislatures and legislation have considerable limitations, and that there exists a gap – a gulf in fact – between those limitations and what doctrinal law recognises. We leave it largely to politics to be the force that restrains legislatures and legislation and guides them to avoid activities and modes that would cause these boundaries to be crossed.

There are a number of problems with entrusting such important matters to the political process. *First*, we are entitled to be sceptical at the very least whether the political system is equipped in theory or in practice to recognise such limitations and to ensure that they are either avoided or the effect of them mitigated. *Secondly*, one of my central arguments has been that we have lost the capacity to imagine a system different from one in which the state monopolises rule-making so absolutely and in which legislation has come to dominate. Such lack of awareness means that the political system (indeed any system) will not act to remedy it. *Thirdly*, the political process is, in some ways at least, a contributor to the problem just described, because it has come about in part from the way we regard democracy and popular assemblies, a regard which, I have argued, is somewhat naïve, and harkens more to what such assemblies achieved historically than the way in which they operate in contemporary times. *Fourthly*, the system we have in which we entrust to politics the necessary controls, is the very same one that has led to legislation proliferating in the way that it has, lacking any real or sufficient prioritisation of focus, and being considered (unthinkingly perhaps) to be a solution to every problem, however small and technical. *Finally* one aspiration we might reasonably have for legislation is that it be removed from day-to-day politics, or at least to enjoy a separation to some degree from those tumultuous, unscientific and changeable forces.

This is not the occasion to venture ways to counter the prevailing tendency. I have not sought to do more than to identify and diagnose a problem and a serious incompleteness in the major arguments that would appear to underpin the present approach to legislation. I have not here, most importantly, sought to be exhaustive in my treatment of the normative considerations that necessarily underpin a choice of

that kind. I offered, in doing so, alternatives to the pervasive modern disposition to legislatures and legislation. I do not, however, offer my project as showing the present approach to be one that is definitely wrong or not to be preferred. I do hope, however, that it has contributed to seeing that there are alternatives to the existing approach.

For now, however, I would identify the loss I have diagnosed as a serious one, and as exposing legislative hyperactivity to be a reality rather than an approach which can claim superiority over other possible alternatives. If there is a contribution which I would wish this project to have made to the discourse on this topic with which it deals, it is that.

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