Parliamentary Democracy and Parliamentary Dictatorship[1]

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A commonly-advanced justification for increasing the powers of an elected parliament or other legislature is that giving power to a democratically elected Parliament cannot be anti-democratic. Governments whose wills have been too often frustrated by judges or by other checks upon their power argue that the more power an elected Parliament has, the more democratic the state must be.

The fundamental fallacy in this proposition is that it fails to understand that the *demos* – the people – whose rights are respected in a Parliamentary democracy, are not restricted to those people who formed the majority at the last general election.

If the present incumbent majority in an elected legislature (which therefore forms the Executive) has absolute power to make any changes of the law that it wants, including changes designed to entrench its position, that becomes a Parliamentary dictatorship. It may thereafter choose to preserve the legislature as a continued pretence to mask its authoritarianism, or it may use its new powers to cast the legislature aside as an irrelevance; but in either case it has ceased to be a Parliamentary democracy in any meaningful sense.

Parliamentary democracy is about protecting the rights of minorities: the rights of all those people with whom the majority disagree. Their rights to act in ways

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[2] Editor, *Craies on Legislation*, Thomson Reuters, 2020. I have various professional and academic positions and associations. This paper is written in a purely private capacity.

repugnant to the majority will often be restricted in the public interest and in accordance with due legislative or other process: but always in ways that respect their rights to differ from the majority where there is no repugnance or inconsistency; and always in ways that preserve the possibility of the tides of policy reversing as and when the will of the electorate changes.

The constitution of the United Kingdom is replete with checks and balances designed to ensure that the majority in the elected House of the legislature at any one time do not have untrammelled power.

Starting with the most basic constitutional point, when the King leaves the ceremony of the State Opening of Parliament, He bows three times: first, to His Majesty's Ministers on the government benches, as if to congratulate them on their electoral victory, and to wish them a successful five years or so in power; then He bows to the opposition benches, as if to remind them that their full title is His Majesty's Loyal Opposition, whose role in providing checks on the power of the government and holding it to account is as much part of the state constitution, as is the right of the elected party to implement the manifesto on which it was elected[3]; and finally, he bows to a group that are in Parliament on that occasion only, the judges of the prerogative-based High Court[4], to remind them that they are the ultimate umpires of this delicate balance to be played out between government and opposition between one election and the next.

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3 This was the fundamental finding of the Supreme Court in *R (Miller) v The Prime Minister* [2019] UKSC 41 (the second "*Brexit case*").

4 It is of fundamental importance to the United Kingdom constitution that while all other courts are creations of statute and can be abolished or changed by Parliament at will, the High Court is as much an emanation of the Crown's prerogative as Parliament itself; the Senior Courts Act 1981 states the jurisdiction of the High Court in terms that expressly affirm that its jurisdiction includes ancient non-statutory prerogative, and the old common law mechanisms of writs of habeas corpus and wardship of court are deployed every day by the judges in their control of the Executive and other public bodies.

In a country without a single written constitution, it is Parliamentary conventions, some articulated in Standing Orders of either House, that control and protect the practical day-to-day operation of this balance.

For example, Opposition days in the House of Commons ensure that there is protected time during which the Opposition can control the business agenda. Where the Government has an absolute majority this will be of use primarily in protecting time for exposing weaknesses in Government policy and increasing public pressure on the Government in ways that can be highly effective. In times when the Government has a majority but not an absolute one, being the largest single party but not having more than 50% of the votes, Opposition days are opportunities for real defeats to be inflicted on the Government where the smaller parties can combine to exercise a majority on a particular issue. So the Government's right to have its business transacted is preserved by its control over the Order Paper on most days, while the importance of preserving real influence of minorities in a Parliamentary democracy is recognised by putting the Order Paper at the Opposition's disposal on certain days.[5] There are other ways in which the Opposition has formal powers to hold the Government to account, notably the power of the Speaker to grant an Urgent Question, summoning a Minister to explain the Government's position publicly in response to an Opposition Question. The Opposition's abilities to talk parliamentary bills out[6], or to insist upon certain amendments as the price for getting a bill enacted before the end of a Session or a Parliament, are additional and important ways of ensuring that while the Government can get its business done it cannot ignore the demands and opinions of significant minority voices. Those latter Parliamentary mechanisms by which the Opposition can leverage concessions have been significantly diminished in recent decades, notably with

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5 See *House of Commons Standing Order 14* – in addition to Opposition Days, a small number of days are placed at the disposal of the second largest opposition party; and in recent years a certain amount of time in the Chamber and in Westminster Hall (for debate only) is deployed at the orders of a Backbench Business Committee, potentially giving an active voice to minority views not espoused by any of the parliamentary parties.

6 i.e. to prolong debate until the allotted time is exhausted and the debate lapses.

the introduction of routine programming of timetables for bills passing through the House of Commons and the possibility of carrying over a bill from one parliamentary Session; but though diluted, they remain and continue to have, or at least to be capable of having, significant practical effect.

The United Kingdom has an additional constitutional safeguard for minority and other non-government voices in the shape of the House of Lords. Although the House of Lords no longer has a permanent veto over bills, since the enactment of the Parliament Act 1911, it does retain a constitutionally-entrenched ability to delay controversial measures for more than a year (except where they solely concern taxing or spending measures); and the practical politics of amendments between the two Houses give the Lords enormously significant day-to-day power in toning down extreme government measures and extracting important practical concessions. While the power is exercised with caution, and subject to the statutory limitations of the 1911 Act and to certain other conventional limitations[7], successive governments of different parties have found the House of Lords a very real and effective check upon their otherwise untrammelled powers.

As to the role of the judiciary, long before the independence of the judiciary was written into the United Kingdom's constitutional statute book in the Constitutional Reform Act 2005[8], the balance of power between the Legislature, the Executive and the Judiciary has been preserved by a number of complementary conventions and laws. In particular, Parliament has exercised a self-denying ordinance against interference with the judicial process in the form of the *sub judice* rule[9]; while the courts have complied with the constraints of Article IX of the Bill of Rights that prohibit them from so much as questioning

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7 Notably the *Salisbury Convention* allowing the Government of the day to get its manifesto business through the upper House.

8 s. 3 – *Guarantee of continued judicial independence*.

9 See most recently the House of Commons Resolution on Matters Sub Judice of 15 November 2001.

things said in or done by Parliament (an inhibition not limited to compliance with or implementation of enacted legislation).

And as to the balance between Judiciary and Government, the development of the judicial review jurisdiction in the mid-20th century, matching the expansion of the use by the Executive of subordinate legislation made by Ministers and not enacted by Parliament, exemplifies the flexibility and effectiveness with which the conventions and processes of an unwritten constitution can expand and adapt to meet the changing demands of governmental ambition. And the protection of fundamental rights has been the business of the judiciary for centuries[10], long before it was given specific legislative expression in the duty of the judges to quash subordinate legislation that is incompatible with the European Convention on Human Rights in accordance with section 6 of the Human Rights Act 1998 and to adapt, or report for amendment by Government, incompatible primary legislation under sections 3 and 4.

Looked at from above, the way in which a Parliamentary democracy functions is as a pendulum swinging from one side of the political debate to the other. Party A wins the general election and has a few years to pursue its legislative and executive program until the country grows disillusioned, and then votes the other way and lets in Party B. Between the two elections, Party B has enough power to keep it alive and to preserve it as a potential challenger to Party A, as well as encouraging it to function as a useful check on the ambitions of Party A.

In this way Parliamentary democracy is a competitive sport that goes on throughout the life of each Parliament. The government lobs balls over the net in the form of proposals for primary legislation, or in the form of actual or proposed subordinate legislation; and the opposition do what they may, and the judiciary do what they must, to send back those balls which they have power or duty to oppose. The net gets a bit saggy in the middle sometimes, and different

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10 See *Craies on Legislation*, Chapter 11, Section 3, and Chapter 19.

governments enjoy having a tweak at the height of the net on the pretence of straightening it. That may change the balance of power within the game, but the game continues. Once the government chooses to use its majority in parliament to erect a one-way portal through which balls can pass but cannot be returned – even if the portal has some limitations – the game is not so much changed as ended.

The system works over the decades and the centuries, provided the party in government never succumbs to the temptation to use its temporary parliamentary majority to alter electoral systems, judicial powers, or other fundamental constitutional arrangements in such a way as to ensure that it will never lose an election again. If it does that, Parliamentary democracy has given way to Parliamentary dictatorship; and when that happens in any country, as it does from time to time over the years, the ultimate losers are always the *demos* – the entire people – whose holistic interests a Parliamentary democracy is designed to protect.