

# Judiciary-Elected Branch Power Relations and The Search for Truth

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*Abstract: This article treats of the search for truth through the medium of the lawcourts in a democratic political context, from the perspective of a political scientist doing research at the intersection between law and politics. It argues that inter-branch power relations may be typologised and that comparative evaluation of each type of power relations leads to the conclusion that one type best serves the search for truth, not only in the courtroom but even in the chambers of parliament and elsewhere.*

The search for truth is part and parcel of the delivery of justice and an essential undertaking in the resolution of legal cases – of overriding importance to any legal process to adjudicate the guilt or innocence of persons in jeopardy of life or limb. As it constitutes so much of what courts do day in and day out, its effects must also spill over into the *power relations* between the judiciary and the democratically elected government. The formal conception of truth relied-on herein and its role in collective decision-making is first discussed. This is followed by an exposition of the judiciary-elected branches power relations typology, followed by an analysis of its consequences for the search for truth in an institutional setting where the life, liberty, property and pursuit of happiness of individuals is at stake.

## 1. The political form of truth and its relationship to collective decision-making

Truth is conceived herein as the end-product of a dialectical social process. Perhaps the most widely known and approachable such process is the Socratic method. Socrates sought truth in dialogue with others, not on his own. The search for *unanimity* or universal common ground is an integral aspect of this mode of proceeding. In all of Plato's *Dialogues* Socrates is never seen to 'agree to disagree' with his interlocutors. Faced with dialogic deadlock, instead of quarrelling or walking away Socrates hunts some other, deeper level of analysis at which to reset the debate. Truth in the Socratic sense is measured by universality of assent between independently reasoning agents. This embodiment of truth might be called its *political* form, in the sense in which Aristotle said, '[M]an is by nature a political animal'.<sup>2</sup> The search for truth is thus also a collective decisional process.<sup>3</sup>

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<sup>2</sup> Aristotle, *Politics*, translated by Benjamin Jowett, < <http://classics.mit.edu/Aristotle/politics.html>>, accessed 20 June 2010.

<sup>3</sup> Because people have different self-interests, collective decision-making is difficult to achieve on the basis of self-interest alone, as self-interests are so prone to come into conflict; but all can agree on universal truths which do not implicate self-interest. Bruce, Ackerman (1989). "Why Dialogue?" *The Journal of Philosophy* 86(1): 5-22; James P. Zappen (1996). "Bakhtin's Socrates" *Rhetoric Review* 15(1): 66-83.

Ideally, all collective decisions would be taken unanimously for the sake of perfect social harmony and the assurance of rightness. Unanimity best reflects the universality of truth and avoids the discontent caused by coerced submission.<sup>4</sup> But the vices of human nature and, above all, the *scarcity of time* render unanimity prohibitively costly and in most circumstances of life practically impossible.<sup>5</sup> In modern times, however – that is, going back at least to the Enlightenment, – one class of decisions has been considered to impinge on the dignity of the individual so gravely as to call for unanimity no matter the cost (within reason). These are decisions such as may entail the worst consequences for the individual confronted with State power. Persons put in jeopardy by the accusation of the State stand in urgent need of reliably truthful verdicts to decide their fate: only the innocent may continue to enjoy life, liberty, property and the pursuit of happiness; those found guilty lose everything that makes life worth living. This class of decisions is felt to demand unanimity. This is particularly so of the common law tradition.<sup>6</sup>

By contrast, in most other domains collective decisions are taken by hierarchical command or majoritarianism, processes falling short of unanimity. Hierarchical command predominated in ancient forms of government.<sup>7</sup> Hierarchical command has proved successful throughout history by virtue of reaching decisions in good time, for even second-best decisions are better, if timely, than best decisions reached too late.<sup>8</sup> Command is especially advantageous in situations of competition where the slightest delay or indecision may prove fatal to the practical vindication of one's claims. Hierarchical command is not designed to find truth but to reach decisions that need only be good enough. Majoritarianism is a compromise between command and unanimity, in that decisions are reached through a process of discussion that brings in various and sundry opinions, but brings timely closure to the debate without waiting until all have one opinion, on the grounds that time is too short. Majoritarian processes may trample down the truth, too, yet behave inasmuch as they greatly reduce the coercion required to implement decisions. Both of these collective decisional modes are unreliable at finding the truth.

In modern times these three decisional modes – hierarchical command, majoritarianism and unanimity – have been personified by four archetypal political theorists: Hobbes, Locke and

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<sup>4</sup> Susan Mohammed and Erica Ringseis (2001). "Cognitive Diversity and Consensus in Group Decision Making: The Role of Inputs, Processes, and Outcomes" *Organizational Behavior and Human Decision Processes* 85(2): 310-335.

<sup>5</sup> John C. Calhoun (1953). *A disquisition on government: and selections from the Discourse*. New York, Liberal Arts Press; Gary J. Jacobsohn (1977). "Unanimous Verdict Politics and the Jury Trial" *Wash. U. L. Q.* 40; Alvin K. Klevorick and Michael Rothschild (1979). "A Model of the Jury Decision Process" *The Journal of Legal Studies* 8(1): 141-164.

<sup>6</sup> William Blackstone, *Commentaries on the Laws of England* (1765-69), Book 3, Chapter 23, <<http://www.lonang.com/exlibris/blackstone/>> accessed 12 June 2011. For a more particular reference to Blackstone's observations on unanimity see: <http://volokh.com/2010/09/09/unanimity-as-a-requirement-of-the-trial-by-jury-from-1765-to-1833/>, accessed 10 March 2012.

<sup>7</sup> Alexander Pope (1902) *The Iliad of Homer*, translated by Alexander Pope, London: Grant Richards.

<sup>8</sup> Aristotle, *Politics* book 1, chap. 1; Stephen E Humphrey, John R. Hollenbeck, Christopher J. Meyer and Daniel R. Ilgen (2002). "Hierarchical Team Decision Making" *Research in Personnel and Human Resources Management* 21: 175-213.

Rousseau/Montesquieu. Hobbes advocated the rights of hierarchical command. In his *Leviathan* he argued for the unity and absoluteness of the State without separation of powers. Only this would bring security and peace.<sup>9</sup> Locke was the great advocate of the consent of the governed, of the practice of majority rule, and of Parliamentary supremacy over the monarch. This liberal tradition arose in reaction to Hobbes. In his *Treatise on Government*, Locke defends the rights of the individual, which he argues can coexist with security and peace.<sup>10</sup>

Rousseau's General Will implies unanimity, and is considered by him as the sole basis for the legitimacy of a democratic polity. Yet the General Will is for practical purposes too mystical an ideal, like the Holy Grail, and Rousseau gives no clue how it is determined, except that he says a Genius is necessary -- with the implication that no one else can discover or reveal it. The archetypal such Genius might be Moses, whom the whole of Israel followed voluntarily because he showed them a vision of the Promised Land that all spontaneously gloried in. Because such epiphanies are so rare, however, Rousseau's concept is not practicable. It fell to Montesquieu to philosophise the role of unanimity in modern government.<sup>11</sup>

By contrast, Montesquieu studied existing governments and their several organs, discovering that these may have arisen as governmental organs performing special and distinct functions.<sup>12</sup> Moreover, in some cases these distinct organs were informally exerting limits and constraints on each others' operations. Generalising from these cases he invented the concept of mutual checks and balances between the various departments of government. What Montesquieu discovered but perhaps only partly theorised is an expedient reflecting a felt need for 'institutional unanimity' over a particular class of collective decisions involving many or all of the government's organs, departments or branches. This happens most often in situations where the rights of the State<sup>13</sup> (e.g. to punish) clash with the rights of the individual. A parallel expedient hit upon under the same pressures in the same class of decisions was the jury, whose verdicts also were required to be unanimous.

## 2. A judiciary –elected branch typology

The judiciary is an important part of a government of separated powers, the forum wherein is finalised the decision whether State power shall be brought directly to bear on the individual and his own. Here the seeking and finding of the truth is most critical, as so much is at stake for the individual defendant. The decision finalised by the judiciary, however, originated with the political branches outside of it. It happens that the search for truth, which is the search for unanimity, does involve relations of power subsisting between the judiciary and the so-called

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<sup>9</sup> Thomas Hobbes (1651). *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil*. London, Green Dragon, St. Paul's Churchyard.

<sup>10</sup> John Locke (1689). *The Two Treatises of Civil Government*. London, A. Millar et al.

<sup>11</sup> Jean Jacques Rousseau (1762) *The Social Contract or Principle of Political Right*, translated by G. D. H. Cole, < <http://www.constitution.org/jjr/socon.htm> >, accessed 10 May 2009.

<sup>12</sup> Montesquieu, C., de Secondat Baron de (1777). *The Spirit of the Laws*, Crowder, Wark, and Payne.

<sup>13</sup> The idea that the State has rights is embedded in the older common law tradition that one finds in Blackstone's *Commentaries*. The King had personal rights to punish evildoers, which were transferred to the state later on.

political branches of government. It will be shown that of the several types of power relation each may be expected differentially to impact the search for truth when the rights of the State and the rights of the individual clash. Three types of judiciary-elected branch power relations are possible and will be examined in turn: subordination, co-equality, and super-ordination or supremacy.

### *Judicial Subordination*

At its worst subordination is seen in totalitarian regimes where the judiciary is nothing but a tool of the Party-state. Nobody inhibits the Party bosses to practice ‘telephone justice’ whereby the verdict of guilt or innocence is dictated to the judge over the telephone so as to evade leaving any written record. Within such power relations the search for truth is annihilated by Leninist ‘morality’. A far milder judicial subordination – (one might even call it part-subordination) – is found in classical parliamentary democracies, such as that of France and Britain before the advent of the EU<sup>14</sup>, where Christian morality still exerts an influence. Here the Crown or Parliament have classically been sovereign and thus supreme over the judiciary.<sup>15</sup> The judiciary are traditionally servants of the Crown in the United Kingdom, and the Human Rights Act adopted in 1998 has not yet altered this power relation.<sup>16</sup> The courts still ‘conclusively presume’ the will of the Monarch ‘sitting in Parliament’ to be right. In other words judges do not question the truth or justice of the Crown’s/Parliament’s fundamental decisions prospectively finding guilty named persons and/or classes of unnamed persons. The search for truth in court is narrowed down to whether it is true or false that the defendant has in fact violated the command of Parliament or the Crown. For example, if Parliament legislates the one should not publish anything defamatory of persons in high office, the narrow question of truth that comes up in court is whether the defendant has in fact defamed an official. Courts do not reach a decision on the larger question of whether or not such behaviour ought to be prohibited.

On the other hand, the same judges who are but Crown servants are notably less subordinate about confronting how the *other ministers* of the Crown have behaved themselves in carrying out the sovereign will. In this more contested arena the judiciary is frequently quite effective at moderating the rigour and zeal of Executive ministers, who may have applied the law to a far broader class of persons than is warranted, or tried severely to punish *de minimis* breaches of the law. Particularly protective of individual liberty are judicial distinctions that narrow the scope of applicability of legislation, notwithstanding it embodies the sovereign will.

### *Judicial Super-ordination or Supremacy*

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<sup>14</sup> Alec Stone Sweet (2000) *Governing with Judges*, Oxford: Oxford University Press.

<sup>15</sup> Robert Stevens (2001). ‘A Loss of Innocence’ in Peter H. Russell and David M. O’Brien (eds). *Judicial Independence in the Age of Democracy. Critical Perspectives from Around the World*. Charlottesville and London: University Press of Virginia.

<sup>16</sup>Richard Bellamy (2011). "Political Constitutionalism and The Human Rights Act" *I-Con* <http://ssrn.com/abstract=1754941>, accessed 9 January 2011; Vernon Bogdanor (2009). *The New British Constitution*, Oxford: Hart.

Here the judges themselves lay claim to powers effectively sovereign, usually by exploiting the common weakness of democracy. Democratic theory bestows sovereignty on ‘the people’ without being able to instantiate its immediacy in any conceivable institution. Democrats then try to compensate by elaborating constitutions which purport to divide the agents and trustees of the people’s abstract sovereignty, pitting them against each other in hopes of mutual self-discipline (thus, ‘checks and balances’). Sometimes, however, the judges discover that their institutional attributes implicate advantages over the other, elected agents and trustees, who may lack the occasion or leisure time to meditate on constitutional interpretation. Judges may rush into this relative vacuum, setting themselves up as a constitution’s exclusive custodians. The Israeli Supreme Court is probably the most extreme contemporary instance of judicial supremacy, followed by the US Supreme Court and the European Court of Human Rights.<sup>17</sup> Such judiciaries create and limitlessly expand their own jurisdiction, rather like the mediaeval kings whose ‘writs’ formed the basis of common law until Parliament legislated a limit to the expansion of royal jurisdiction. Judges base their jurisdictional autonomy and supremacy on the constitution, a law that supersedes Parliament. This cunning move renders the judiciary *de facto* sovereign not only over the polity but over the very constitution; its interpretations are not to be debated but worshipped as Truth.

### *Co-equality*

As the least know type for an European audience, co-equality is worthy lengthier treatment. Co-equality characterised the American judiciary up to the Civil War (1861-1865), meaning that no branch of government was permanently supreme over any other, but each alternated with other in supremacy and subordination.<sup>18</sup> None of the departments of government are conclusively presumed always right and never wrong, neither Parliament and/or the Crown nor the judiciary. Sometimes their decisions are truthful and just but sometimes not. In particular, a judicial interpretation of the constitution may be contested as unjust, as with the case of *Dred Scott v. Sandford* where the US Supreme Court declared in 1857 that the black man ‘had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery’.<sup>19</sup> Abraham Lincoln *inter alias* denounced this ruling and vowed to overturn it. The idea that the Supreme Court had the last word on what the Constitution meant had not as yet been taken for granted; rather, the judiciary is to be obeyed in some circumstances but not in all.

Co-equality was considered by the US Founding Fathers to be the ‘essential precaution in favor of liberty’.<sup>20</sup> A co-equal power relation between the judiciary and the elected branches

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<sup>17</sup> Ran Hirschl (2004) *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, Mass.; London: Harvard University Press; Keith E. Whittington (2007). *Political Foundations of Judicial Supremacy*, Princeton and London: Princeton University Press.

<sup>18</sup> James Madison (1788). "The Federalist No. 47. The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts", [http://avalon.law.yale.edu/18th\\_century/fed47.asp](http://avalon.law.yale.edu/18th_century/fed47.asp), accessed 10 March 2009; Whittington (2007) *Political Foundations*.

<sup>19</sup> 60 U.S. 393, 407.

<sup>20</sup> James Madison (1788). "The Federalist No. 48. These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other", [http://avalon.law.yale.edu/18th\\_century/fed48.asp](http://avalon.law.yale.edu/18th_century/fed48.asp), accessed 10 March 2009.

prioritises individual liberty, in that it builds into the working of government a structural bias in favour of liberty, by giving persons in jeopardy multiple chances of being found innocent by at least one of the divisions of State power, be it the judiciary or the other branches. This entails that all three branches must unanimously concur if they are to find the defendant *guilty*.<sup>21</sup> A Parliament that enacts prohibitive legislation has prospectively found a person or (more likely) a class of persons guilty, that is, persons who disobey the prohibition. Thereby it asserts as true and just that such persons deserve punishment. But if Parliament declines to legislate, this may not under co-equality (in contrast with judicial supremacy) be construed by judges as some kind of negligence that bestows jurisdiction on courts to ‘make up’ for it, intervening with a judicial solution. Parliamentary inaction is a significant political and legal fact, the meaning of which is not for courts to second-guess. It implies that the class of persons who might have become prospectively guilty for conduct deemed ill, have instead been found *conclusively* innocent; dis-authorising the Executive and the judiciary to sanction such persons for conduct Parliament has demurred to prohibit. Parliamentary ‘failure to act’ is *always* to be construed under co-equality not as failure but as choice; a significant inaction by which it performs the State act of setting prospective defendants at liberty ‘with prejudice’ – whether other branches or parties in interest or political factions like it or not

By the same token, under co-equality the Executive, too, may choose to enforce an act of the Parliament or decline to enforce it, either by pardon or by exercise of prosecutorial discretion. An Executive which prosecutes is thereby rendering its own ‘verdict’ of guilty. Even in civil cases, where in English common law prior jurisdiction arises from the royal legislation of the 12<sup>th</sup> century, other branches are nonetheless contemporaneously involved in the enforcement of court judgements, and in a co-equality regime are not obligated to obey the court blindly.

The judges and their adjudications are typically last in the queue (as it were). They decide at a minimum whether or not this defendant has violated the law. Their own, independent finding or ‘verdict’ constitutes the defendant’s last chance to be found innocent. In America at least, both the jury and the judge have traditionally wielded the power to nullify legislation, even an act of Congress, by finding it unconstitutional or even just immoral by juries, as in the trial of John Peter Zenger in 1735 when a jury – *sua sponte*, without a judge’s instruction – nullified the law of libel insofar as it held truthful statements harmful.<sup>22</sup>

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<sup>21</sup> Legal scholars may object to a broad use of the terms ‘guilty’ and ‘innocent’ on the grounds that these categories only pertain to criminal law. ‘Guilt’ and ‘innocence’ are herein used in a broader, sociological sense encompassing similar decisional processes about essentially the same matters, whether we deal with criminal law, civil law, or administrative law. The several types of court in these several departments of law may find the defendant variously ‘guilty’ or ‘liable’ or ‘responsible’, while yet following commonalities in the disposition of cases, especially the similar consequences and common risk to the individual of losing some or all of the good things of life. The condemnation of a convict or person found responsible, or a prospective defendant identified only as a generic person in an act of parliament forbidding certain specified behaviour, all involve closely resembling decisional processes. Hence ‘guilt’ and ‘innocence’ are used herein as catch-all terms to cover all the variations on the same essence.

<sup>22</sup> Douglas O. Linder (2008). "The Trial of John Peter Zenger. Birth of freedom of the press" <http://www.america.gov/st/educ-english/2008/April/20080422131918eafas0.6481439.html>, accessed 2 February 2012.

It is inferred that co-equality requires the organs of a divided government independently and unanimously to concur in finding a defendant guilty; failing which the process ends there and the defendant is released with his life, liberty and property whole or never prosecuted in the first place. This implies that any one branch of government (if any) which finds the defendant *innocent* has the ‘final word’ in saying what the law means, even constitutional law insofar as implicated. This concatenation of government proceedings may be called *ground due process*.<sup>23</sup> It is a constitutional configuration intended to bias due process of law toward liberty by making it structurally easier to reach a ‘verdict’ of innocence than of guilt. Ground due process includes the procedures administered by judges and adhered-to inside the courtroom, but goes beyond to encompass the other branches, so that ‘institutional unanimity’ should warrant that guilt or innocence has been truthfully determined. Multiple chances both inside *and outside* the courtroom for being found innocent allow the partiality of one branch ‘sitting in judgment’ to be countervailed by another.

In brief, co-equality between the judiciary and ‘political’ branches, like the rule of decision of juries, imposes a search for truth as unanimity: *the overriding end of separation of powers*. A divided government is disabled to act unless the divisions act unanimously; the condemnation that would warrant depriving persons of life’s goods must be founded on truth resulting from unanimity. This means of course that truth is not always vindicated; when unanimity is not to be found, truly guilty defendants may ‘get away with it’. On the other hand, it will be rare for innocents to be unjustly punished, and the State will have avoided adding evil to evil. What singles out co-equality is that liberty always results when truth-as-unanimity is unattainable.

It follows that ‘divided government’ is a deliberate sacrifice of State sovereignty in hopes that higher values like justice or liberty may thrive. Liberty is in the interests of the individual. A system of decisional procedures biased in its favour must sometimes fail to cure social evils. Ground due process is equivalent to the presumption of innocence except that it constitutes an objective procedural device instead of a mere subjective aspiration. It may be said to embody the presumption of innocence; the whole system of separation of powers (and mutual checks and balances) is structured so as to operationalise this presumption.

Concrete examples from US legal history illustrate how co-equality works. The classical case is President Jefferson’s 1801 nullification of the Alien and Sedition Acts enacted by Congress in 1798, on grounds of unconstitutionality. President John Adams and the Supreme Court of Chief Justice John Marshall (who wrote *Madison v. Marbury*) had previously concurred with Congress in accepting these statutes as constitutional, and had actually used them to identify, prosecute and punish defendants. Jefferson quashed this whole chain of proceedings with the Presidential Pardon, applying it so as to nullify all four Acts retrospectively and prospectively by implication the Alien Enemies Acts, which had not expired. Thus he had the final word on the meaning of the US Constitution. The latter Act was abused by President Roosevelt as the unconstitutional pretext for interning Japanese-American citizens during World War Two.

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<sup>23</sup> J. Bains (forthcoming).

In Europe a general pardon is known as amnesty. The crucial difference between Europe and (Old) America is that in Europe even amnesties are regarded as ‘acts of charity’ or mercy,<sup>24</sup> while under a co-equality regime they are proper checks and balances on both other branches. Jefferson nullified not only the Acts of Congress but also the judgment of the Supreme Court which had found the Acts constitutional. Such a Presidential act poses no danger to liberty, as a pardon sets at liberty those who were or would have been deprived of it. The US President may indeed pardon select individuals for charitable motives, but may also pardon all comers with intent to nullify the statute itself on the basis of its unconstitutionality. Such a pardon is concerned for a higher law than statutory enactment – just like judicial review.

The standard practice in the US today under the supremacist judicial ideology that has arisen since the Civil War is for the Federal judges to unilaterally find defendants before the Federal power, especially States (subsidiary governments), guilty without input from Congress or the President; using the Fourteenth Amendment (one of the Civil War amendments) as pretext in much the same way the European Court of Human Rights invokes the Convention to legislate norms nowhere mentioned therein. Under co-equality no such unilateral power to find guilty exists, Amendment/Convention or no Amendment/Convention. States of the Union and states parties to the European Convention on Human Rights are not free to ignore the precepts of their respective confederations, merely that those individuals or subsidiary states subordinate to a federal regime of co-equality have a *right* to the multiple chances of being found innocent (or harmless) that separation affords, and a correlative *right* not to be deprived of liberty without the unanimous concurrence of the several departments of the federal structure in question.

To continue the example of the European Convention on Human Rights (ECHR), the current configuration of which typifies judicial supremacy, it would operate very differently under co-equality. Taking for example the recent controversy over voting rights for prisoners, in *Hirst v. United Kingdom* (2005) the European Court of Human Rights (ECtHR) ruled that the UK’s ban on prisoners’ voting breached the ECHR’s principle of universal suffrage, Art 3, Protocol 1.<sup>25</sup> The UK Parliament, voting to uphold the ban, defied the ECtHR on the grounds that the court had exceeded its power, reading into the Convention what the states parties had never intended.<sup>26</sup> A similar case is *Lautsi v. Italy*, where the Court’s Chamber of the Second Section declared that a law requiring crucifixes to be displayed in the classrooms of Italian state schools violates the ECHR.<sup>27</sup> Following the uproar in Italy and support from many

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<sup>24</sup> Author’s interviews with judicial and political elites in Romania, Moldova, Croatia and the Czech Republic, 2009-2011.

<sup>25</sup> [2005] ECHR 681, [2006] 42 EHHR 41.

<sup>26</sup> BBC News (2011). "MPs Reject Prisoner Votes Plan", <http://www.bbc.co.uk/news/uk-politics-12409426>, accessed 12 March, 2011. It is true that the ECtHR in effect found the prisoners ‘innocent’, but as the Court has no direct jurisdiction of the prisoners, they can only find the UK ‘guilty’ of finding its prisoner’s ‘guilty’ (if they try to vote). In the CoE ‘federal’ system this infringes the subsidiarity principle; moreover, such decisions have consequences for third parties, whose rights may be affected. One of the objections against prisoners voting is that lawbreakers, if they could vote, might tip the balance of close elections, ousting the governments that dared bring them to justice – to the consequent detriment of future crime victims, and of society as a whole.

<sup>27</sup> European Court of Human Rights (2008). *Lautsi v. Italy*. Strasbourg, European Court of Human Rights, <[www.echr.coe.int/echr/resources/.../lautsi\\_and\\_others\\_v\\_italy.pdf](http://www.echr.coe.int/echr/resources/.../lautsi_and_others_v_italy.pdf)>, accessed 12 November 2011.

states parties, the case was overturned by the Grand Chamber.<sup>28</sup> Both cases illustrate judicial supremacist behaviour; the ECtHR improvised its own reasons for finding the UK and Italy ‘guilty’ of the Convention unilaterally.

Under co-equality the Parliamentary Assembly of the Council of Europe would have been expected and required to ‘legislate’ first that the Convention meant that prisoners have voting rights, or that the display of religious symbols in public schools violates freedom of religion. The Committee of Ministers of the Council of Europe too would have to agree independently. Contrarily, the Committee of Ministers could also have pardoned or vetoed or nullified the Parliamentary Assembly’s determinations of ‘guilt’. Finally, the ECtHR must have concurred before the UK or Italy could have been found in violation. From the standpoint of liberty, this arrangement would be superior to the present one, not only more compatible with democracy and the rule of law, but also less susceptible to the prejudices and factional agenda of a single body of elite men.

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<sup>28</sup> European Court of Human Rights (2011). *Lautsi v. Italy*. Strasbourg, European Court of Human Rights, <[http://www.echr.coe.int/echr/resources/hudoc/lautsi\\_and\\_others\\_v\\_italy.pdf](http://www.echr.coe.int/echr/resources/hudoc/lautsi_and_others_v_italy.pdf)>, accessed 10 January 2012.