The rule of justice

Timothy Endicott*

Law can secure some aspects of justice in a political community. Yet the law should not generally prohibit injustices by private persons or give recourse against them. That would be tyranny. It may seem that the law should, by contrast, prohibit all injustices in the conduct of government, and give recourse against them. In this article I argue against that seemingly attractive idea. I do so by reference to three kinds of public injustice: in voting, in legislation, and in adjudication. I claim that those kinds of public injustice are not generally matters for the law. Preventing or repairing injustice is not enough to justify legal prohibitions or legal recourse against wrongs. The justification of legal measures depends on a political principle: that the law ought to make the political community a good one.

1. Introduction

Should the law prohibit all injustices and give recourse against them? I will use "the rule of justice" as a term for the imaginary state of affairs in which it does so. In private matters, the rule of justice would be tyrannical. It would fail to respect the autonomy of persons. But it may seem that the rule of justice is an ideal to be sought after in public affairs, because public agencies ought to act justly, and have no right to autonomy. I aim to refute that argument for the rule of justice in public affairs.

In Section 2, I will explain why the rule of justice is not an ideal for state regulation of private matters. In Section 3, I will set out the argument that in public affairs, by contrast, a political community ought to pursue the rule of justice. I aim to refute that argument in Sections 4, 5, and 6, by arguing that the law should not generally seek to remedy injustices in voting, in legislation, and in judicial decision. Those three sections are offered to support my claim that the purpose of law in regulating both private and public matters ought to be shaped by the same "political principle": that the purpose of law is not generally to right injustices. It is to make the political community a good one.

2. The rule of justice in private matters

* Vinerian Professor of English Law, University of Oxford, Oxford, United Kingdom. Email: timothy.endicott@law.ox.ac.uk. I am grateful to participants in: an Oxford–Madrid conference, *What Aspects of Justice Are Not the Law's Business*, 2 July 2016, Universidad Carlos III; a doctoral seminar at Università Magna Graecia, 19 November 2018; and the Analytical Legal Philosophy Conference, organized by Professor Matthew Kramer, online, 18 September 2020. I also benefited from helpful comments and criticism from Annalise Acorn, Gema María Marcilla Córdoba, and Derek Matravers.

The law should only interfere with private persons to oppose particular kinds of injustice: for example, injustices that involve violence against other persons and that disrupt public order, and injustices that are prohibited through the legal protection of property rights, and through legal frameworks for commerce in well-ordered markets, and through the imposition of positive legal duties on those who care for children and for vulnerable adults. There are private injustices that the law of the community should not prohibit or remedy. There is no reason for the law to interfere with hurtful lies and unfair insults in general, with betrayal and cheating and backstabbing, with ingratitude, with undeserved contempt and scorn in general. And the harm principle[1] is not the reason for the law to abstain from interfering to oppose such wrongs: some instances of those injustices are more seriously harmful than some of the torts and crimes and other unlawful acts that are rightly prohibited by law. If, for example, you are abandoned by your best friend when you need her because she has decided that it will damage her prestige to be associated with you, you may have suffered a harmful injustice. But the law of your country has not let you down by giving you no remedy.

Let's use "the rule of justice" as a term for the state of affairs in which the law stands against all injustices in a community, prohibiting them and offering legal recourse against them. The rule of justice in private matters would be tyrannical and impossible. It is not an ideal to be pursued. Injustice is not *generally* the law's business. Your friend's conduct in abandoning you is not even prima facie something that ought to be a tort or a crime. The injustice of a form of conduct is not in itself a reason for the law to prohibit it, to remedy it, or to punish it.

Which injustices *are* the law's business? The purposes that the law ought to pursue are open-ended, by which I mean that there is no precise boundary that ought in general to be drawn. But those purposes are not open-ended enough to support the view that the rule of justice is an ideal. I propose the following political principle:

> The justification of legal measures depends on their success in attaining their primary purpose, which is to make the political community a good one.

I call it "the political principle" because it relates the use of legal measures to the good of the political community. That public good—the public interest—is the good that law ought to serve directly. Law is impersonal. Its ways of benefiting particular persons should be mediated by its primary, political role of establishing a political community and making it a good one. And then law

---

[1] "That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." JOHN STUART MILL, ON LIBERTY 68 (Gertrude Himmelfarb ed., Penguin Classics 1985) (1859).

benefits persons incidentally in its application (when legal measures taken for public purposes benefit an individual) and consequentially (insofar as it is good for an individual to belong to a good community). Injustices become the business of the law when the institutions of the community can make the community a better community by taking legal measures against them.

I should emphasize that I am not proposing the political principle as a solution to the problem of the proper limits of law (that is, as a theory of what injustices are the proper concern of the law); instead, to assert the political principle is to point out the task that such a solution would have to fulfill. The solution would include an explanation of how the legal measures in question would be good for the community. Proponents of the rule of justice might endorse the political principle, if they are prepared to add that legal measures against injustice necessarily make the community a better community; I will argue that such measures may or may not do so, and that there is no ground for a presumption that they will do so.

The political principle may be satisfied because the wrong in question harms the community. Then, legal measures against the wrong may make the community a better one. That is why treason is a crime. The political principle may also be satisfied when the wrong in question affects the victim in a way that a good political community must stand against, so that the wrong becomes a matter between the community and the perpetrator. That is why rape is a crime. The assailant may do all he can to make it a private matter; the community must make it a public matter—a matter for the institutions of the community. The community must use the distinctively legal techniques of rule-governed, systematic regulation by agencies established on its behalf to stand against violence. And rape is a tort not simply because it is a harmful wrong, but because the nature of the wrong concerns the state's political responsibility for freedom from violence—for peace—in the community.

But the betrayal of a friend should not in general be a tort or a crime. The state cannot make the community a better community by taking legal measures against it.[2] In the private law of tort, a good community does not provide remedies for wrongs in general, but for wrongs that concern the community because they are, as lawyers say, "civil" wrongs. While the community should not

---

[2] Compare Antony Duff's account of criminal wrongs as "wrongs in which 'the public,' the community as a whole, is properly interested" because "the community as a whole can and should take a stand" against them. R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 61 (2000). Duff rightly implies that the wrongfulness of an action is not in itself a reason for criminalization; I am proposing that his account of the role of the community in criminal law provides elements in an account of a good community.

ordinarily punish them, it ought to provide redress at the suit of those who have been wronged because of the public interest in civil justice, which is justice in respect of property, commerce, and some related aspects of privacy and personal security, and so on. The categories of civil justice are open-ended. If their boundaries vary significantly between two jurisdictions, it does not necessarily follow that either jurisdiction is drawing them wrongly. But there is no jurisdiction in which those categories encompass all injustices.

The political principle explains the difficulty of borderline questions for the law of tort and crime, such as the question of whether malicious infliction of pure economic loss should be a tort,[3] or the question of what the law should do to protect persons from emotional and psychological abuse and oppression in personal relations. The political principle explains the difficulties that pervade family law, as to which wrongs within a family ought to be matters of law. Those matters of legal ordering are difficult because they turn on difficult questions as to whether the institutions of the political community must stand against the wrong, in order to carry out their responsibility to make the community a better community. That public responsibility brings upon the state and its law a responsibility for doing justice between individuals that is limited, although the limits are unclear and contestable.

And because a good community is one in which persons can live their own lives, its law secures the aspects of freedom that are compatible with its limited responsibility for justice. So, the rule of justice in private matters would, ironically, involve an unjust interference with liberty (one that John Stuart Mill never addressed). Here is a principle of political justice: a political community must provide freedom from the forms of tyranny that would be involved if the state tried to prevent all injustices.[4] The rule of justice, at least in relations between individuals, would be an incoherent ideal. And an incoherent ideal is not an ideal. It is not something to be sought after.

3. The rule of justice in public affairs

Now consider the following argument for the rule of justice in public affairs:

---

[3] For example, when I open a shop next to your shop for the purpose of putting you out of business, just because I don't like you. *See Tuttle* v. Buck, 119 N.W. 946 (1909) (in which the Supreme Court of Minnesota held that that could be a tort); contrast ROBERT STEVENS, TORTS AND RIGHTS 23–4 (2009) (arguing that it is not a tort in English law). *Cf.* NICK MCBRIDE, THE HUMANITY OF PRIVATE LAW 137 (2018).

[4] I am grateful to Andrea Romeo for pointing this out to me.

> By contrast with the unjust actions of private persons, all unjust governmental conduct should, prima facie, be prohibited by law, and all the resulting injustices should, prima facie, be remedied. Through unjust public action, the organized community itself goes wrong, and there is reason for its law to provide recourse against the wrong. Because the conduct of government is the action of the community, legal measures against injustice in the conduct of government make the community a better community. The law can remedy injustices that public officials perpetrate in their public capacity without disrespect for their autonomy as persons. A more just community is, by definition, a better community. Therefore, all injustices on the part of government are the law's business.

I aim to refute the argument for the rule of justice in public affairs.

I do not suppose that anyone has made the argument in this form.[5] But I think that it is worth articulating the argument, and worth refuting it. The impulse to treat the rule of justice as an ideal in public affairs is reflected in various forms of twenty-first-century juridical idealism, which is a yearning for law to solve all that is wrong in politics. The salient examples of this complex tendency arise in approaches to human rights law that move inexorably from the premise that a form of state conduct is unjust to the conclusion that it is a violation of human rights, and from the premise that it is a violation of human rights to the conclusion that the law (not only domestic but also international) must provide recourse against it.[6] You can see the same tendency in the resistance of

---

[5] Although some have advocated something similar under the same name: a striking example is Justice Rosalie Silberman Abella's forthright call for the Rule of Justice: "[W]hy are we out there internationally promoting a euphemism like the Rule of Law instead of what we really mean: the promotion of the universalism of democratic values, the instruments of justice that emerged triumphant from World War II? We need the Rule of Justice, not just the Rule of Law." Rosalie Silberman Abella, *International Law and Human Rights: The Power and the Pity*, 55 McGILL LAW JOURNAL 871, 877–8 (2010). *See also* Chaim Perelman, *Equity and the Rule of Justice*, *in* CHAIM PERELMAN, JUSTICE, LAW, AND ARGUMENT 35, 35–7 (1980) (writing of "the Rule of Justice" as a requirement of "equal treatment of beings who are essentially alike"). But perhaps Perelman was presupposing that the requirement pertains to aspects of the life of a community that are properly of concern to the law.

[6] Consider this suggestion from Mattias Kumm: "Even though contingent features and limitations of any particular human rights instrument may present obstacles in specific instances, we should generally expect to be able to reframe any claim that injustice has been

some theorists[7] and judges[8] to the doctrine of a margin of appreciation in the jurisprudence of the European Court of Human Rights, and in the related idea that there ought to be a general international court of human rights giving rights claimants the same sort of processes and remedies that domestic constitutional courts give.[9] And you can see the same impulse in other areas of constitutional law and scholarship: for example, in the vogue for arguing that constituent power is inherently legally limited,[10] or that the substance of constitutional amendments ought to be controlled by law (or that it is inherently controlled by law).[11] You can see the impulse in theoretical arguments that all public power is fiduciary, so that public duties are generally juridical in nature.[12]

---

done to someone as a claim that human rights have been violated." Mattias Kumm, *Is the Structure of Human Rights Practice Defensible?*, *in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 51, 57 (Vicki C. Jackson & Mark Tushnet eds., 2017). I am grateful to Damian Cueni for pointing this out to me.

[7] GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 81 (2007) ("under a certain understanding of the moral character of human rights and of the role of judicial review, the use of the doctrine [of a margin of appreciation] is altogether unjustified.").

[8] *See, e.g.*, Z. v. Finland, App. no. 22009/93, ¶ 3 (De Meyer, J. partly dissenting) (Feb. 25, 1997), https://hudoc.echr.coe.int/rus?i=001-58033 ("I believe that it is high time for the Court to banish that concept [the margin of appreciation] from its reasoning. . . . [W]here human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not.").

[9] *See* Kai Möller, *From Constitutional to Human Rights: On the Moral Structure of International Human Rights*, 3 GLOBAL CONST. 373 (2014).

[10] *See, e.g.,* Mattias Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, 14 INT'L J. CONST. L. 697 (2016). For a critical assessment, see George Duke, *Inherent Constraints on Constituent Power*, 40 OXFORD J. LEGAL STUD. 795 (2020).

[11] *See* JACOB WEINRIB, DIMENSIONS OF DIGNITY: THE THEORY AND PRACTICE OF MODERN CONSTITUTIONAL LAW ch. 6 (2016). On the remarkable Indian Supreme Court jurisprudence on judicial review of the substance of constitutional amendments, see SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA (2009).

[12] *See* EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE esp. 28 (2011); FIDUCIARY GOVERNMENT (Evan J. Criddle, Evan Fox-Decent, Andrew S. Gold, Sung Hui Kim & Paul B.

You can see it in *R (Miller) v. Prime Minister*,[13] the case of the century in the UK Supreme Court, in which eleven judges unanimously held that because it is a matter of constitutional principle that Parliament must meet when appropriate, the law protects Parliament's timetable against the Prime Minister's decisions.[14]

I hope you will agree, in the end, that the argument against the rule of justice in government is incontrovertible. This exercise in defending the incontrovertible has two interconnected purposes. The first is to point out the gap between identifying an injustice and supporting a conclusion that the law ought to do something in response to it. An argument in favor of extending legal protection for human rights, or in favor of any of the other new twenty-first-century forms of legalism in governance, needs more than the premise that the proposed measures are measures against injustice.

The second, related, purpose is to offer a new approach to articulating the limits of the rule of law. I will try to do so by explaining the role of the political principle. I hope that this study of aspects of injustice in government that are not the law's proper concern will give a clearer picture of the purpose of law, and of the particular grounds on which the law *should* stand against injustice.

I will discuss three kinds of injustice in public affairs and explain why they are not generally matters that the law should aim to put right. You may be thinking at this point that I will be offering exceptional considerations that override the value of legal measures against public wrongs; I hope to persuade you, instead, that the wrongfulness of the conduct in question does not even count in favor of legal measures to prohibit the conduct or to remedy the wrongs.

Let me add at the outset that I think that you can agree with my argument even if we do not altogether agree on what counts as injustice, and even if we do not agree at all on a theory of justice. I take justice to be the virtue of treating persons in the way that is due to them,[15] so that all claims of right are claims of justice, and violations of right are injustices. There are narrower

---

Miller eds., 2018). For a critical assessment of those arguments, see Timothy Endicott, *The Public Trust*, *in* FIDUCIARY GOVERNMENT, *supra*, at 306.

[13] R (on the application of Miller) v. Prime Minister [2019] UKSC 41.

[14] *See* Timothy Endicott, *Making Constitutional Principles into Laws*, 136 LAW Q. REV. 175 (2020), arguing that there was no justification in Miller's case for the judges to transform the principle of political morality into a legal rule.

[15] CICERO, DE NATURA DEORUM bk. 3, sec. 38 (Andrew R. Dyck ed., Cambridge University Press 2003) (45 BC): "iustitia, quae suum cuique distribuit" ("justice, which gives to each what is his or hers").

conceptions of the sphere of justice, such as John Gardner's—in which justice is distinctively a feature of allocations.[16] But that does not matter for the purpose of the argument against the rule of justice. The principle that injustices in the conduct of government are not generally the law's business is instanced by such a vast, diverse array of injustices, that it can tolerate a wide diversity in views of what counts as an injustice. If your view of what counts as an injustice is—like Gardner's—narrower than mine, it will still include injustices in governmental action that ought to be no concern of the law. The rule of justice in government would be the enemy of good government on the widest range of theories of justice—including John Rawls's theory, and libertarian theories and communitarian theories. You should agree that the rule of justice would be a mistake even if you adopt John Stuart Mill's theory of justice, which is *not* a theory of justice, but an assertion of the principle of utility adorned with a debunking explanation of the words "just" and "unjust" as techniques for expressing a popular sentiment that some disutilities are special.[17]

In respect of each of the three kinds of injustice that I will address, I will be claiming that injustices in the sphere of public affairs in question should *not generally* be prohibited by law. I will not be claiming that they should *generally not* be prohibited by law. There can be no general presumption either way. In each sphere of public action, I will point out ways in which the law should stand against injustice. But when that is the case, it depends on something other than injustice in governmental conduct. It depends on the political principle that legal measures ought to make the political community a good one.

The three injustices, addressed in Sections 4, 5, and 6, are as follows:

(i) A voter votes for an unjust purpose in an election or referendum

(ii) A legislature fails to make just provision for social security

(iii) A court makes an unjust decision.

---

[16] For example, Gardner argued that torture is, in itself, "not unjust but inhumane," because "the subject-matter of justice is allocation." Perhaps Gardner's approach finds support in the classical understanding of justice (notice the term "distribuit" in Cicero's formulation: above n 15). But I think that an act of torture is an injustice to the victim, regardless of any matter of allocation (except, of course, that torture has been allocated to the victim). *See* John Gardner, *Legal Justice and Ludic Fairness*, 11 JURISPRUDENCE 468 (2020); John Gardner, *Finnis on Justice*, *in* REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 151 (John Keown & Robert P. George eds., 2013).

[17] JOHN STUART MILL, UTILITARIANISM ch. 5 (Roger Crisp ed., Oxford University Press 1998) (1861); ROGER CRISP, MILL ON UTILITARIANISM 155 (1997).

Voting and legislating and judicial decision making are all exercises of governmental power that are instituted by law, and they should all be regulated by law. Yet there should be no general legal prohibition of the three kinds of injustice, or legal recourse against them. I am sure that no legal system has ever provided legal recourse against these injustices generally. That is not because every legal system falls short of perfection. Instead, these facts about all legal systems reflect the fact that while justice is "the first virtue of social institutions,"[18] and injustice is a vice in all public action, the rule of justice—the use of legal measures to stand against injustice in general—is not an ideal. The law should not generally seek to remedy any of the three injustices.

4. A voter votes for an unjust purpose in an election or referendum

Voting in an election or a referendum is an exercise of governmental power, and a particular vote can be an unjust act of governance; yet the law should not prescribe how you or I should vote.

It is not hard to imagine a person voting for a purpose that is racist or otherwise abusive, to procure a government that will act in some way that is unjust (of course, the voter may not consider it to be unjust). It is not hard to imagine a voter—or many millions of voters—voting in a referendum for a measure that would violate the duties of the state. Voting in such ways is a form of injustice that the law should not generally prohibit. Legal recourse against it would vitiate the good democratic purpose—the distribution of political power—of the institution of a vote.

Perhaps some people would agree that the law should not prescribe how I should vote, but do not think of a vote as a governmental act. It is common to think of a vote as an act *of the governed*, who are blessed in a democracy with the opportunity to advance their own preferences against the state, and to promote their own personal interests. The use of secret ballots may encourage the mistake of thinking that the act of voting is *private*! John Stuart Mill was concerned that the secret ballot would lead the voter to think "that the suffrage is given to him for himself—for his particular use and benefit, and not as a trust for the public."[19] He put the public duty of a voter strongly and, I think, truly:

---

[18] JOHN RAWLS, A THEORY OF JUSTICE 3 (rev'd ed. 1999).

[19] JOHN STUART MILL, ON LIBERTY AND CONSIDERATIONS ON RESPONSIBLE GOVERNMENT 231 (R. B. McCallum ed., Blackwell 1948) (1861). These views were set out in an argument against the secret ballot, and in favor of public voting. That argument, it seems to me, is a failure. It does not fail because voters owe no duties of justice, but because Mill—ironically—miscalculated the consequences of secrecy and of openness for the operation of

> [T]he voter is under an absolute moral obligation to consider the interest of the public, not his private advantage, and give his vote, to the best of his judgment, exactly as he would be bound to do if he were the sole voter, and the election depended upon him alone.[20]

The blessing of democracy is not that it protects the voters against political authority, but that it gives voters political authority—that is, power to govern (in some limited ways, mostly by electing representatives). The citizens of a good democracy will share this attitude with the ancient Athenians: that citizenship is eligibility for public office, and voting on public matters (in a legislature, on a jury, in an election, in a referendum . . .) is the exercise of a public office.

This Athenian picture of voting is, of course, controversial. Here is why I raise it: even if you accept (as I do) that voting involves duties of justice, you should agree that the law must not generally prevent the voters from exercising the vote unjustly. For example, the law must not proscribe a political party, must not interfere with free expression of political views in a campaign, must not prohibit a person from standing for election or voting, purely to stand against injustice (in a candidate's or a party's or a voter's proposed conduct, or in a policy platform . . .). This principle is an element in the definition of democracy. An election is not a free election, and therefore it *is not* an election, insofar as the constitution or the law gives to an institution of government the authority to pass judgment on the justice of the exercise by voters of the power that the election gives them. So, the law of elections should not impose the rule of justice.

It would not be impossible for the law to seek to do so. Imagine that a concerned citizen could bring a claim for judicial review of an election, on the ground of an injustice in the electors' choice. Or suppose that an election commission had legal authority to refuse to register a person as a candidate, on the ground that his or her election would involve an injustice. Or suppose that a court could disqualify a voter from voting on the ground of injustice in his or her purposes, or on the ground that his or her vote was or would be unjust. Such forms of legal control of elections would

---

elections. On the political contingencies that shaped Mill's adverse assessment of the secret ballot, see Bruce L. Kinzer, *J. S. Mill and the Secret Ballot*, 5 HIST. REFLECTIONS 19 (1978). <PI>Please note that I do not mean to endorse Mill's utilitarian understanding of the public interest; on the contrary, I think that it should be rejected. A political community is a good one only if it acts with justice toward its own people, toward other communities, and toward outsiders. The political principle is not a utilitarian principle. But Mill was right to say that a vote ought to be used to promote the public good.

[20] MILL, *supra* note 19, at 231–2.

hold out a potential for recourse against injustice. But they would obviously be in tension with the value of democracy.

Let's probe the implications of that tension by reference to the striking argument that Terry Smith offered, in his book *Whitelash*, for legal remedies against racial injustice in voting in the United States.[21] The title of the book refers to a complex practice of opposition to racial equality; Smith ascribed "voter whitelash" to some white American voters.[22] The practice, he said, includes "racially polarized voting—that is, the effective denial of electoral opportunity to racial minorities by a consistently cohesive white majority."[23]

Smith took the Athenian view of voting—as an exercise of governmental power. He expressed it eloquently, and I agree: "When citizens vote in a general election, they are performing a public function; they are the 'state,' as surely as a city council, a state legislature, or Congress is."[24] It follows, in Smith's view, that the guarantee of equal benefit of the law in the United States Constitution[25] forbids voting for a purpose of racial oppression. Racially polarized voting is "a democratic defect that can be corrected by the courts."[26]

If that argument can work anywhere, it can work in the United States, a hi-tech laboratory for legal regulation of democracy. Many countries have histories of racial oppression and of struggles against racism; the United States combines such a history with sophisticated and innovative forms of legalism. Smith's resourceful argument leveraged the US constitutional heritage and the dynamic energy of the US courts in creating new judicial remedies. Yet the resulting argument supports only limited and very indirect legal remedies against *particular effects* of racial injustice in voting. He argued that courts could require states to take steps toward proportional representation in the US Senate, and to take steps toward the alignment of voting in the Electoral College (currently "an instrument of voter whitelash"[27]) with the national popular vote. He argued that courts could use the Fourteenth Amendment to attack partisan gerrymanders (which, he

---

[21] TERRY SMITH, WHITELASH: UNMASKING WHITE GRIEVANCE AT THE BALLOT BOX (2020).

[22] *Id*. at 156.

[23] *Id.* at 165.

[24] *Id*.

[25] *See* U.S. CONST. amend. XIV (providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws").

[26] WHITELASH, above *supra* note 21, at 165.

[27] *Id*. at 175.

argued, support racialized voting), and to institute judicial supervision of the states' control over voter eligibility and over voting systems.[28]

If the courts adopted those dramatic proposals for judicial reform of the operation of American democracy, Smith concluded that some effects of racist voting might be mitigated as a consequence. But if the US Constitution imposes a duty on voters not to use the vote for racial oppression, why not give their duty legal effect? Shouldn't the courts hold that an election was unlawful, if the successful candidate was elected because of racist voting? Smith was attracted to the idea; he wrote that "[i]n an ideal world, Congress would pass a law outlawing racial discrimination in voting pursuant to its enforcement powers under the Fourteenth and Fifteenth Amendments, and the law would impose penalties for its violation."[29] But penalties for racist voting and judicial invalidation of elections on the basis of racial discrimination would be "impractical" because of the secrecy of the ballot and because of the protection for political freedom in the First Amendment to the US Constitution.[30]

Perhaps by an ideal world, Smith meant a world with the rule of justice. But this world is not ideal in that sense. Smith wrote:

> Remember: unlike employers, voters as a rule may discriminate between candidates (and their supporters) based on race because in a free society one cannot be told for whom to vote. This does not mean, however, that white voters can impose the discriminatory effects of their misconduct on citizens of color. The Equal Protection Clause forbids this. The tension between the First Amendment and the Equal Protection Clause means that courts must rely on forward-looking deterrents . . . rather than election invalidation, as remedies for voter whitelash.[31]

In Smith's argument, the law can and should seek to alleviate effects of racist voting but should not even try to enforce the voters' duty of justice. This conclusion means that Smith only advocated improvements to democratic process. He did not advocate the rule of justice.

The proposition that US law cannot properly remedy racial injustice in voting by invalidating racist votes or elections is enough to make the case against the rule of justice. Those things cannot be done because the voters cannot be told for whom to vote in a free society. I think that Terry

---

[28] *Id*. at 168–70.

[29] *Id.* at 155.

[30] *Id*. at 155, 168. *See* US CONST. amend I (providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[31] WHITELASH, above *supra* note 21, at 168.

Smith was right to connect the value of democracy to the value of freedom. Injustices by voters do not necessarily vitiate the value of the political freedom of a democracy (even though that great value is limited, and even though not everything ought to be decided democratically). If you accept Smith's assessment of the injustice of a great deal of voting in the United States, you have no reason to think that the abolition or even the dilution of democracy would be a good technique for securing the just conduct of American government. Indeed, Smith's proposals focus on making the allocation of power to voters more just, and not on preventing the voters from exercising their power unjustly. The law would have abandoned its proper purpose, if it were to prescribe how a voter should vote in an election, or who ought to be elected.

Yet the law may well need to regulate the governmental act of voting and the framework within which the vote is exercised, to prevent *some* injustices. This role for the law is not only the result of Smith's innovative arguments; it informs the existing legal framework for the operation of every democracy (although it varies considerably among democracies). Any good scheme of elections or referenda will need laws against the injustices of voting fraud, and bribery of voters, and corruption in the counting of the ballots. And a just and effective scheme of elections or referenda will include laws preventing the unjust influence of wealth over the campaign process, wherever economic and political conditions make such influences damaging to the public good. What's more, it is not necessarily wrong for a political party to be proscribed as a criminal organization. When I say that an election is not an election if an institution of government can pass judgment on the justice of the vote, I do not mean that proscription of political parties necessarily vitiates the vote. Do countries formerly ruled by fascist parties have genuine elections, if fascist parties are now proscribed? In such a country, the law deprives the voters of a choice. Whether they have a genuine election depends on whether they have a genuine choice. And they may have a genuine choice without having the choice of voting for a fascist party. It may well be the state's urgent duty of justice to prohibit the offering of that choice to the electorate.

Such a form of regulation may itself pose a risk of abuse of power by the agency that passes judgment. But it is not necessarily illegitimate for an agency to have that power, and it is not necessarily antidemocratic to regulate political parties and to ban candidates on grounds of criminality; it may be a crucial protection for democracy. There is no general principle that the law cannot legitimately prevent a person or a party from contesting an election on the ground of their criminal actions or policies, or even their self-descriptions. In the United Kingdom, for example, there is no injustice in the fact that the law makes it impossible to stand for an election as a

candidate of a party that is a proscribed organization under the Terrorism Act 2000.[32] And some racist injustices in elections, in the United States and elsewhere, may legitimately be subject to legal measures disqualifying organizations from acting as political parties, or individuals from standing for election, on the ground of criminality.

But not all political injustices are criminal; to think otherwise would be totalitarian. It is not the law's business to stand against injustices in elections and referenda in general, because the freedom of the voter is good for the community. Public law would have abandoned its purpose, if it were to prohibit you or me from voting unjustly in an election. It may seem paradoxical to say that the law should allow the unjust exercise of governmental power, and give it conclusive legal effect, but it is not paradoxical, and it is true. There are deep and stringent limits to the law's legitimate role in securing justice in government.

5. A legislature fails to make just provision for social security

The Universal Declaration of Human Rights guarantees "the right to social security and …the economic, social and cultural rights indispensable for [everyone's] dignity."[33] But the European Convention on Human Rights (ECHR) does not guarantee those rights, or the rest of the profusion of social and economic rights proclaimed in the Universal Declaration.[34] The justification for not including them in the ECHR is that through the mechanism of the Strasbourg Court, there is legally binding recourse against violations of the ECHR rights. The ECHR imposes justiciable duties on state parties not to engage in torture or murder, and to respect certain freedoms, and to respect privacy,

---

[32] Terrorism Act 2000 c. 11. The Act makes it an offence to belong to a proscribed organization. Even carrying the flag of a proscribed organization is a strict liability offence (*id.* s. 13(1)); *see also* Rahman Pwr v. DPP [2020] EWHC 798 (Admin).

[33] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 22 (Dec. 10, 1948).

[34] European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. The Universal Declaration of Human Rights, unlike the ECHR, proclaims the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment (*id.* art. 23); the right to rest and leisure, including periodic holidays with pay (*id.* art. 24); the right to a standard of living adequate for health and well-being and to food, clothing, housing, and medical care and necessary social services, and to security in the event of unemployment, sickness, disability, widowhood, and old age (*id.* art. 25).

and to provide fair judicial proceedings in criminal and civil matters. But the law of the ECHR does not and should not impose duties on government to provide just social welfare.

Some might say that this is because there is no human right to such provision. But I think that the social and economic rights proclaimed in the Universal Declaration are just as truly human rights as many of the rights that are protected by the law of the ECHR. Like many ECHR rights, they can only be described as "*human* rights" under a radical conditionality. There is no unconditional human right to social security; the right depends (among other things) on whether a particular human being needs it, and on whether a particular actor (such as a state) has the capacity to provide it, and whether that particular actor has responsibility (since it may be legitimate for that actor to expect some other actor to meet the need). But if a political community has the capacity to provide support that others cannot legitimately be expected to provide, destitute members of the community have a right to welfare. You might want to say that it is not a human right because not all humans have it; but then you should say that the right to vote under article 3 of the first Protocol to the ECHR is not a human right either.[35] And if you do not call the right to welfare a "human right," you may still agree that it is a requirement of justice that a state should relieve destitution. So, the ECHR deliberately refrained from giving effect to one element in the rule of justice. The ECHR was designed *not* to give legal effect to the requirements of economic and social justice.

That is not a defect in the ECHR. On the contrary, it reflects a just decision of its framers. It reflects the difference between the ECHR and the Universal Declaration. It also reflects the difference between the ECHR and the European Social Charter, which does proclaim rights to housing, health, full employment, and social security.[36] That Charter, like the Universal Declaration, lacks the judicial mechanism of the ECHR. The Charter's techniques involve reporting by state parties, with monitoring of the reports by a committee, and an optional system of complaints by approved non-governmental organizations (NGOs);[37] there is nothing like the binding legal

---

[35] Protocol to the European Convention on Human Rights, March 20, 1952, 213 U.N.T.S. 262.

[36] Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163.

[37] The UN followed a similar pattern in the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. A state party "undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures" (*id.* art 2). The ICESCR provides for reporting by states, and monitoring by a UN committee.

recourse—designed to do justice according to law—that is available in the Strasbourg Court for violations of the ECHR. Many have thought that the ECHR, in itself or through the "evolutive" interpretations of the Strasbourg Court, has gone too far in attempting to institute the rule of justice. But it has not remotely gone all the way: the legal framework of the Council of Europe and the ECHR and the Social Charter do not give general legal recourse against injustices in social security.

As the English Court of Appeal put it in a leading decision, "the Court of Human Rights has always drawn back" from imposing duties on states to give just social security benefits.[38] The Strasbourg Court and the British courts have largely resisted calls by creative advocates to turn the right to respect for private and family life in article 8 of the ECHR into a justiciable right to welfare. I say "largely" because the English High Court has held that people entitled to local authority support under section 21 of the National Assistance Act of 1948 (because their age, illness, disability, or other circumstances call for special care) "are a particularly vulnerable group. Positive measures have to be taken (by way of community care facilities) to enable them to enjoy, so far as possible, a normal private and family life."[39] In this and other ways (concerning fair procedures, and non-discrimination), the judges have used the ECHR creatively around the edges of the field of social security. But they have not taken over the field.

Imagine that a wealthy country respects all the rights enshrined in the ECHR but leaves the destitute to starve in the streets. It would not be showing better respect for human rights than the authoritarian countries that have provided sustenance to the hungry while systematically denying the political freedoms that the ECHR proclaims. Social and economic rights are not less important than civil and political rights. So, is the law in Europe falling short of its proper role?

Consider Jeff King's powerful argument in favor of a judicial role in the promotion of social and economic rights.[40] It is a balanced argument. He argues that "one good way among others to protect our social rights" is to enshrine "abstract social rights to housing, education, health care, and social security" in a constitution, with broad judicial powers to interpret and to enforce those rights, "including by striking down legislation."[41] Although he discounts some of the arguments that have been made against such a role for judges, he sees strength in other arguments, and very carefully

---

[38] Anufrijeva v. Southwark LBC [2003] EWCA Civ 1406 [19]; *cf*. Harrow LBC v. Qazi [2003] UKHL 43.

[39] R (Bernard) v. Enfield LBC [2002] EWHC 2282 [32].

[40] JEFF KING, JUDGING SOCIAL RIGHTS (2012).

[41] *Id*. at i.

accounts for those strengths through "a theory of judicial restraint structured around four principles: democratic legitimacy, polycentricity, expertise, and flexibility."[42] Each of those four principles stands *against* the proposition that the law should give a remedy against all failures of a legislature to secure social justice in a community. So even Jeff King is not in favor of the rule of justice. His four principles are principles for the separation of powers. The separation of powers between courts and the legislature is an element in a good constitution, and it provides a reason not to give judges unrestricted power to impose on the legislature their view as to what just social welfare provision demands.

Another element in a good constitution is the separation of powers between constitution makers and the legislature. King's principles of expertise and flexibility are reasons for constitution makers not to try to entrench just social welfare. So is the principle of democratic legitimacy, because of the effects of time on democracy. To act legitimately, even constitution makers with democratic credentials (even the people as voters in approving a constitution) should not try to impose the rule of justice. They need to leave a great deal of governmental authority to democratic legislative institutions, so that the state will continue to be democratic. Because their responsibility is to construct a framework of government for a future that they cannot fully envisage, constitution makers are not in the position of a legislature, which can assess the evolving social and economic conditions that need to be understood in order for the state to make good decisions about social welfare provision. Constitution makers can justly give legal power to a legislature to determine social welfare entitlements, even though it is a power that may be used unjustly.[43]

---

[42] *Id.* at 1.

[43] Imagine that a constitution includes an entrenched right to minimum standards of social welfare (leaving it up to the legislature to do better than the minimum, should it see fit). That might make the law more just, depending on social and economic and political conditions (I am grateful to Matt Matravers for pointing this out to me), and I do not mean to argue against such a measure. But either the entrenched minimum would be unjustly low for people in need (and then there would be no constitutional guarantee of the rule of justice in social welfare), or else the constitution makers would have attempted to do the job of the legislature (and that arrangement would fail to accord with the requirements of the separation of powers, for the reasons discussed above). I do not think that a constitution is necessarily unjust if (like the UK Constitution) it leaves social welfare decision making entirely to the legislature with no entrenched legal right to minimum provision.

One reason for not making social rights justiciable is that legislatures are better equipped to give them determinate effect, and to impose correlative legal duties on particular agencies.[44] A legislature is a potentially legitimate state institution, and the law should no more require a legislature to vote for the right scheme of social welfare, than it should require voters to vote for the right political party.

Legislatures can construct the large-scale bureaucratic programs, institutions, and processes that are necessary to deliver social security. This capacity is reflected in King's principles of polycentricity and expertise. And as King insists, legislatures have the democratic legitimacy that is required for large-scale funding decisions and have access to the expertise that is needed for crucial macroeconomic judgments as to the affordability of welfare provision and its impact on the economy. A legislature might act unjustly in making these judgments; that possibility does not support the conclusion that its failings should be remedied by another agency. And those failings should not be remedied by an agency that cannot legitimately make remedial decisions.

But democratic processes, you might say, are structurally biased against good provision of social welfare, since they are controlled disproportionately by the wealthy and the powerful, who will have to pay for it, and who do not need it. Given that structural bias, the legislative process has done surprisingly well over the past century, in a surprising number of countries, in allocating resources to the relief of deprivation through social security, public housing, public education, and public health care provision. It would be very complex, difficult, and controversial to make a full assessment of the relevant impact on human dignity of the ECHR and of social welfare provision. Yet the only reasonable conclusion of such an assessment would be as follows: since the adoption of the European Convention of Human Rights in 1950, the improvement in respect for human dignity across Europe through legislative improvements in social security, education, health care, and public housing has been immeasurably greater than through all the combined effects of the ECHR. As King says, "all countries that provide the best current legislative protection of social rights did so without constitutional bills of social rights, and a few of them, including Britain, Sweden, the Netherlands, and France, did so in legal environments that were distinctly hostile to judicial review of any legislation."[45] I do not think that those countries would be better governed, if judges had a general

---

[44] For a comprehensive argument that the legislature has a crucial role in giving legal specification to the requirements of human rights, see GRÉGOIRE WEBBER, PAUL YOWELL, RICHARD EKINS, MARIS KÖPCKE, BRADLEY W. MILLER & FRANCISCO J. URBINA, LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION (2018).

[45] KING, *supra* note 40, at 2.

jurisdiction to overturn unjust legislative decisions on social welfare. But if you agree with King's advocacy of such a role for judges, you should also agree with the qualifications that prevent him from advocating the rule of justice.

Likewise, Cécile Fabre, in her powerful argument for justiciable constitutional social rights, offered a convincing rationale for the conclusion that it is impossible for judges to right all wrongs in social security. In her view, they can do so "within limits";[46] the limits result from the structure of public law litigation, in which the court decides a claim brought by an individual or a group against the government, and in which it is impossible for the court to make decisions that are informed by an understanding of the needs of people generally. It would not be in the interests of justice for them to try to do so.[47] You will find similar caveats elsewhere in the vast literature advocating new domestic and international legal measures to secure economic and social rights.[48]

Here, too, we should consider a potential objection to this refutation of the argument for the rule of justice: the law has played an utterly essential role in the improvements in social welfare in Europe since 1950. Specifying social welfare *in the form of legal entitlements* is crucial to giving effect to the human right to welfare. In respect of the potential for injustice, a system of welfare involving legally unregulated benefits handed out by state officials would not be very much better than a system of taxation involving legally unregulated takings by state officials. And the implementation of legal entitlements to social security benefits demands judicial enforcement—and also judicial control of a multitude of discretionary decisions in particular cases (as to good ways of supporting a person with a disability, as to whether a person needs housing, as to the appropriateness of the provision of some particular home for a particular person or family, as to the form and content of public education and as to its institutional arrangements, etc.).

Those legal aspects of good social provision of education, housing, health services, and welfare are requirements of the rule of law. But they differ radically from the rule of justice. The law of social welfare need not allow judicial review of legislative decisions on the ground that the legislature has not made just provision for social welfare. And in judicial review of the multitude of

---

[46] CÉCILE FABRE, SOCIAL RIGHTS UNDER THE CONSTITUTION 152 (2000).

[47] *Id*. at176–8. Note that this obstacle to the rule of justice involves the same considerations as Jeff King's principle of polycentricity.

[48] For a review, see ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS HUMAN RIGHTS (Olivier de Schutter ed., 2013) and, in particular, the essays on justiciability in Part III. *See also* GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed., 2008).

discretionary executive decisions as to the implementation of legal rights to social security, courts ought to defer, to some considerable extent, to executive agencies on account of their expertise, and their techniques of assessment of particular needs, and their understanding of the implications of limited resources and of the needs of persons other than a particular claimant. This conclusion follows from Jeff King's requirements of respect for polycentricity and expertise in social welfare delivery.

I am sure that there is no country in which the law of social welfare even approximates to the rule of justice. If there were such a country, it would simply have assigned the legislative and executive authority over social security to its courts.

And then, its social welfare system would be subject to injustices of the third kind: by the courts.

6. A court decides unjustly

Like the law of elections and the law of social security, the law regulating judicial decision making does not give effect to the rule of justice.

Every legal system has a highest court, with no legal recourse against its final decisions. But the highest court can make a mistake as to the law.[49] Given the matters they decide, such mistakes will very commonly inflict injustices: unjust awards or denials of compensation, unjust child custody arrangements, and, of course, unjust criminal convictions. The rule of justice would demand a legal remedy against all such injustices. But no legal system gives such legal recourse. The argument for the rule of justice refutes itself by landing in an absurd infinite regress of redress:

1. In case decision D_1 is unjust, there ought to be a legal process providing recourse against D_1 through decision D_2.

[49] Here I will discuss injustices that arise from judicial decisions that do not conform to law. In a sense, every legal system prohibits such injustices by requiring every court to decide in accordance with the law. So, my argument in this section is that a legal system must not (and cannot) provide recourse against all unjust failures to resolve disputes according to law. The rule of justice would actually demand something further of justice in adjudication: perfect equity (i.e., that the law must never itself be unjust, and that it must never be applied in circumstances in which it would be unjust to apply it). I will not discuss that demand of the rule of justice. I do not think that any legal system meets it or ought to meet it by conferring general jurisdiction on courts to administer equity (even though some courts ought to have equitable jurisdiction to depart from certain aspects of the law on particular grounds).

2. In case D_2 is unjust, there ought to be a legal process providing recourse against D_2 through D_3.

. . .

n. For all *n*, there ought to be a legal process providing recourse against D_n through D_{n+1}.

This regress of redress would not require an infinite number of appellate courts; all it would take is two courts with jurisdiction to reverse each other's decisions, or a single court with an unrestricted jurisdiction to overturn its own decisions. So, it would not be impossible for a system to offer redress against every injustice in judicial decision.

But the regress of redress would result in a catastrophe for the rule of law: the loss of finality. And the implication of this regress is that the rule of justice is a self-defeating, incoherent ideal. The strategy of pursuing the rule of justice would deprive the law of its capacity to *rule*—to give a binding determination of what is to be done.

And there is a yet more basic objection to unrestricted rights of appeal, which the absurd regress incidentally points out: justice does not demand *any* form of redress against *any* decision, merely because it is possible that the decision was unjust. Even the first step in the regress of redress is false. There has to be a prospect of a better decision, in order to justify redress against a judicial decision, and the disappointed party has to assert a ground of appeal (or a ground of some other process for review of the initial decision) that is tailored to that potential.

There is very good reason for an appeal system that (i) provides oversight of the procedural fairness of the first-instance courts and (ii) provides for the view of the law taken by judges of the highest authority (who can incidentally harmonize decisions across a system of many courts) to be imposed in an appeal from a lower court, and (iii) allows development of the law by those leading judges. But the possibility of a miscarriage of justice—strange as it may seem to say it—does not by itself justify an appeal. That proposition follows from the absurdity of the regress of redress. The justification for an appeal process requires the prospect of a better decision by the appellate body. Without that, the mere replacement of one body's decision with the decision of another body would be arbitrary.

Because of the requirement of the prospect of a better decision, legal rights of appeal do not generally allow for a rehearing of all issues that were decided in the initial decision. Decisions as to the facts by a judge or a jury are typically subject to reversal only on very restricted grounds. That is as it should be, since the judges in the appeal court did not see the witnesses. Yet a complete rehearing would be necessary, in order for all potential injustices in the initial decision to be put right on appeal. There is no justification for the unrestricted rights of rehearing at the request of a disappointed party that would be necessary if a system were committed to the rule of justice.

Here, too, we should consider an ostensible objection to this refutation of the argument for the rule of justice. Let's pause, as we had to pause concerning elections, and again concerning social welfare, to recognize how important the law's techniques are for regulating some aspects of judicial decision making, and for remedying some injustices that may arise from its defects—including unjust decisions by the highest court.

First of all, as suggested above, the law really should provide for appeals where doing so is in the interests of justice.

Second, although there is not and should not be a right to appeal from the highest court, a legal system ought to provide direct remedies against *some* injustices in the highest court, such as bias or corruption. In the famous *Pinochet* case in 1999, the UK House of Lords invented a process, in the exercise of its "inherent jurisdiction,"[50] for reversing its own decision on grounds of an appearance of bias. Lord Browne-Wilkinson wrote that "[i]n principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House."[51] That sounds like a commitment to the rule of justice! But Lord Browne-Wilkinson immediately qualified his broad statement:

> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.[52]

That is, in fact, a principled rejection of the rule of justice.

Third, even if there was nothing wrong with the initial decision at the time it was made, I think that throughout the period of a person's imprisonment for a criminal offence—and perhaps even after release—justice may demand a legal process for reopening a criminal conviction on the ground of new, cogent evidence that was unavailable at trial.

Fourth, the highest court ought to take responsibility for remedying some injustices in the precedential effect of its decisions, through its capacity to depart from its own decisions. In 1966 the UK House of Lords announced in a Practice Statement that it would be prepared to do so, because "too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict

---

[50] R v. Bow Street Metropolitan Stipendiary Magistrate, *ex p.* Pinochet Ugarte (No. 2) [2000] 1 AC 119, 132.

[51] *Id*.

[52] *Id*.

the proper development of the law."[53] That was an advance in the capacity of the law to do justice. Even that useful reform, however, was not a step toward the rule of justice. We should remember—and the judges in the highest court in every country should remember—that the power to depart from previous decisions itself gives the highest court the power to do a legally unreviewable injustice.

Finally, in reminding ourselves of the law's techniques for securing justice in adjudication, we should remember the crucial accountability technique: the giving of reasons. It provides some protection against injustice in judicial decision making. Purported reasons can be a sham, and the giving of reasons is no use if no one sees them or reads them. But the predicament of having to give reasons undoubtedly puts judges on their mettle and must very regularly shape the way they think through a case before they give decision.

Of the forces that can support justice in adjudication, the first is an open hearing, with the giving of judgment in open court. The second is good advocacy, the third is judicial independence, and the fourth is the complex combination of circumstances of judicial craft: good education, good training, appointments, and promotions based on merit, and a professional culture in which judges are well motivated to excel at their job, and not to be inept or crooked. In such a culture, even the self-regard of the profession and an exaggerated awe of legal expertise may work to the public good. If those complex circumstances of judicial craft subsist, the giving of reasons for judgment (and their content and even their style) will play a crucial and central role in securing decent judicial decision making.

The lack of further forms of judicial accountability is quite striking and very important. It can seem like a failure of the system, when the consequences of judicial decision are disastrous. Ellie Butler was a five-year-old girl who had been living with her grandparents because her father had been convicted of assaulting her. When her father's conviction was overturned, the English High Court ordered her to be returned to her father and mother. Ellie's father killed her. After he was convicted of her murder, Ellie's grandfather called for a public inquiry to be held, "to find out why the judiciary didn't do their job correctly."[54] You can see why the child's grandfather might want to

---

[53] Practice Statement [1966] 3 All ER 77. The statement was merely an announcement by the judges, but it has been given effect in several important cases since, and undoubtedly represents English law.

[54] *Ellie Butler's Grandfather Calls for Public Inquiry into Death*, DAILY MAIL (June 22, 2016), www.dailymail.co.uk/wires/pa/article-3654074/Ellie-Butlers-grandfather-calls-public-inquiry-death.html.

see that happen: like any public inquiry, it would put officials in the predicament of having to face up to lessons from the past that might prevent a similar disaster from befalling another small child. It would be a form of recourse against unintended injustices in judicial decision making.

The judge herself did not reply to the call for an inquiry, or to suggestions in the media that she had committed an injustice (allegedly, by exonerating the father in a way that made it difficult for social services to take action to protect his daughter). The judge's silence is the result of another aspect of the unaccountability of judges: their conventional refusal to respond to public criticism, or to explain (i.e., to account for) a decision other than through their reasons for judgment in the case itself.

Meanwhile, the local social services authority commissioned an independent "serious case review"; the review panel asked the Family Court, along with the social care agencies, to submit an "independent management review," explaining the actions taken in Ellie's case.[55] But the President of the Family Court declined, saying that "[f]or constitutional reasons it would not be appropriate for the judiciary to produce an Individual Management Review."[56]

Judges have as much to learn from experience as social workers and the managers of social services. And if a rationale is to be found for their not being answerable to inquiries and management reviews and other forms of review in other for a, it had better not be that they are VIPs who have impunity because of their high status.

But there is a better rationale, in the constitutional reasons that the President of the Family Court had in mind. As the *Guardian* newspaper editorialized concerning the call by Ellie Butler's grandfather for the judge to be accountable to an inquiry, "[h]is bitter anger is entirely understandable, but his call for a judge to answer to another tribunal is wrong."[57] Let's hope that judges, like any of us, learn from their mistakes. But the law should not regulate the lessons that they learn.[58] The rule of justice would demand that, and more: it would demand legal recourse against the decisions of a court.

---

[55] MARION DAVIS, CHILD D: A SERIOUS CASE REVIEW OVERVIEW REPORT (2016).

[56] *Id*., 3-4.

[57] Editorial, *The Guardian View on Ellie Butler's Murder: Human Fallibility?*, GUARDIAN (June 22, 2016), www.theguardian.com/commentisfree/2016/jun/22/the-guardian-view-on-ellie-butlers-murder-human-fallibility.

[58] Continuing judicial education is potentially useful, and there is nothing wrong in principle with making it mandatory. But its legitimacy depends on its not being designed to induce judges to give the decisions that the educators wish them to give.

The reason that judges should not be held to account for injustices through inquiries into disasters, or through management reviews of their performance, lies in the fact that their task is to do justice between parties. The judge must be free to consider claims of right by one party against another, attending to the arguments of each side, without being subject to the forms of scrutiny in another forum that, we might well hope, can improve executive and legislative decision making in child protection and in other crucial functions of government. The next time a court hears a claim for return of a child to her parents, it is in the interests of justice that the judge should consider the arguments made by each side without being required by other officials of the state to give effect to lessons learned from past disasters.

7. Conclusion: The political principle in private and public matters

The great Habeas Corpus Act 1816 provided as follows: "[I]t shall be lawful for the justice or baron . . . to proceed to examine into the truth of the facts set forth in such return . . . and to do therein as to justice shall appertain."[59] That is a legal authorization of the rule of justice in a specific, restricted context: executive detention. It was a great advance for justice and the rule of law, reforming the law of *habeas corpus* by authorizing judges to ask whether the executive had good reasons for a detention.

But now suppose that the UK Parliament were to provide, instead, that in any complaint by any person against a public decision, it should be lawful for the judge before whom the complaint was brought to do therein as to justice shall appertain. That would be a leap toward the rule of justice in government in general. It would be a recipe for chaos and for an oligarchy of judges.

A political community should not even to try to use its law to secure all aspects of justice in governmental action. Consider the values that are at stake: the value of democracy (which would be lost if we pursued the rule of justice in voting), the value of separation of powers (which would be lost if we tried to protect social justice in welfare provision against legislative failures), and the value of finality in public decision making (which would be lost if we tried to pursue the rule of justice in respect of judicial decisions). The impact of the rule of justice on those values is not a side effect to be balanced against the value of pursuing justice; those values are essential to the legitimacy of a constitution, and the rule of justice would negate them.

Many unjust exercises of governmental power—as strange as it may seem to say it–ought to be given conclusive legal effect. We have seen that this is the case in respect of voting and welfare

---

[59] Habeas Corpus Act, 1816 c. 100 56 Geo 3, 1816, s. 3. *See* R v. Home Secretary, *ex p*. Khawaja [1984] AC 74, 110 (Lord Scarman) (calling the Habeas Corpus Act "great").

legislation and adjudication. Very many other examples could be drawn from the department of the blindingly obvious, to illustrate the limits:

- Tax law does not and should not regulate the justice of the legislature's tax decisions (the argument for this claim would be a counterpart of the argument concerning social security legislation in section 4, above).
- There is no general legal recourse, and there should be none, against unjust assessments of the abilities of applicants for jobs in the public sector.
- There is no general legal recourse against unjust commercial choices in the public procurement of goods and services.[60]
- Injustice is not a general ground of judicial review of administrative action.[61]
- It may be legitimate for a legislature to have control over its own proceedings, with no legal recourse against the unjust exercise of that power.[62]
- If some of the requirements of a constitution are imposed by convention and not by law, that is not necessarily a defect in the constitution.

A just society is an ideal to be pursued. All governmental action ought to be just. The law itself ought to be just. But justice does not demand that the law secure all aspects of justice in public affairs. There may be no failure in the law, when it gives legal effect to unjust elections, to unjust legislation, and to unjust judicial decisions.

What more does it take for a public injustice to be the business of the law? In respect of private affairs, I proposed that the answer is given by the political principle: that injustices become the business of the law when the institutions of the community must take legal measures against them in order to make the community a better community.

The very same political principle also explains what it takes to justify legal measures against an injustice in public affairs. You may think that the political principle is always satisfied in respect of public wrongs, because every unjust governmental action is an injustice perpetrated on behalf of the

---

[60] For a comprehensive account of creative ways in which the law has been used or could be used to achieve *certain aspects* of justice in procurement, see CHRISTOPHER MCCRUDDEN, BUYING SOCIAL JUSTICE (2007).

[61] For a discussion in relation to English administrative law, see TIMOTHY ENDICOTT, ADMINISTRATIVE LAW 284 (5th ed. 2021).

[62] *See* Bradlaugh v. Gossett (1884) 12 QBD 271, 277 (Lord Coleridge) (concluding, concerning a decision of the UK House of Commons preventing an MP from taking his seat: "If injustice has been done, it is injustice for which the Courts of law afford no remedy.").

organized community. But it does not follow that legal measures against a public wrong will always make the community a better community. The political principle is not simply that there should be some public aspect to a wrong before it becomes the business of the law. The political principle is that the law ought to prohibit a wrong, or give recourse against it, only when such measures will make the political community a good one. The question is not: "is the wrong sufficiently public?" But: "is there a public need to use legal measures to deal with the wrong?"

It can, in fact, be misleading to draw the dichotomy that I drew at the beginning between the law regulating private persons, and the law regulating public agencies. I suggested that in relations between individuals, there are distinctive reasons (arising from the good of the autonomy of human beings) for the law not to try to secure all aspects of justice. That is true; those distinctive reasons do not arise in the governance by law of public institutions, and of public officials.

But private law and public law are elements in a unity that is, in a crucial respect, entirely public.[63] The diverse techniques and forms of private and of public law serve one complex purpose, which is to make the community a good community. That means securing the conditions in which the people of the community can get along with each other, and the conditions in which their community can subsist and can thrive. To secure those conditions, the law must protect people from each other in respects that concern the community, and must enable them to cooperate for the common good, and to act justly as a community in relation with persons who are not members of the community, and in relation with other communities.

The ineluctably public aspect of all law (including private law) is that its justification must include an explanation as to why a claim of right is one that the institutions of a community should treat as a matter for the community. So, there is an underlying unity to the reasons why the rule of

---

[63] I do not mean to object in any way to the notion of private law. The form of law that is distinctively public (so that it can be contrasted with private law) is law that authorizes and requires people to act in the public interest. Private law empowers and requires people to act in ways that serve private interests. But the reasons for the law to require someone to act in a way that serves a private interest are, across all of private law, reasons of the good of the community, so that the political principle justifies the existence of contract law, tort law, the law of private property, and so on. The twelfth-century compilation attributed to Bracton offered a similar idea: "Private law is that which pertains primarily to the welfare of individuals and secondarily to the *res publica*. . . . And so conversely, that which is primarily public looks secondarily to the welfare of individuals." 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 26 (Samuel E. Thorne, trans., Harvard University Press 1968) (1256).

justice would be a misguided pursuit both in private law, and in public law. The underlying unity concerns the limited value of the rule of law.

Unlike the rule of justice, the rule of law is a genuine political ideal. But that is because when we speak of "the rule of law," we are all using the phrase as a shorthand for a state of affairs in which *certain aspects* of the life of the community are ruled by law. The rule of law would not be an ideal, if it were the state of affairs in which the totality of private and public actions (or even, all governmental decision making) is prescribed by law. It would not be worth pursuing.

The argument against the rule of justice is part of an account of what the law must do and must be, instead, if a community is to attain the ideal of the rule of law. So, the political principle is a requirement of the rule of law: we attain the rule of law when our law regulates what it must regulate, in order for our political community to be a good one.