**Dicastocracy and supranationalism**

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**by John Laughland[[1]](#footnote-2)**

The debate about the right balance between the judiciary, the legislature and the executive turns on an understanding of what the role of the judge should be in a state of law. This understanding has been corrupted in recent decades, especially by international courts.

Reflection on the rule of law is as old as political philosophy itself. Aristotle is only one of the first of a long line of philosophers to say that, ‘The rule of law is preferable to that of any individual.'[[2]](#footnote-3) Those who govern, he wrote, ‘must be appointed as guardians of the laws and in subordination to them.’[[3]](#footnote-4) This subjection to the law applies, crucially, as much as to judges as to rulers: ‘Well-drawn laws should themselves define all the points they possibly can and leave as few as may be to the decision of the judges … In general, the judge should be allowed to decide as few things as possible.’[[4]](#footnote-5) Cicero agreed that the judge must ‘say’ the law as it is (the vocabulary of judicial activity contains numerous metaphors of speech: sentence, verdict, jurisdiction etc.) *vereque dici potest magistrate lege esse loquentem*[[5]](#footnote-6) (‘We can say that the magistrate is speaking law,’ or ‘the mouthpiece of the law.’) When in the modern period, John Locke insisted on the need for states to be governed by ‘promulgated, standing laws’ or ‘declared laws’[[6]](#footnote-7) , or else men would be back in the anarchy of the state of nature, he was also insisting that judges must not make new law in their rulings.

In his famous article, *Hard Cases*, the 20th century liberal legal philosopher, Ronald Dworkin, insisted that judges could ‘make law’, i.e. rule on cases for which statute law had not made explicit provision, only by discerning either principles or intentions in statute or precedent. Of course jurists could disagree about the value of certain precedents or statutes, about whether or not they establish a rule relevant to the case under consideration, and indeed about what that rule is, but they do not disagree that precedent and statute have what Dworkin calls ‘a gravitational force,’ i.e. that the new decision must be based on them in some way or another: ‘(A judge) will always try to connect the justification he provides for an original decision with decisions that other judges or officials have taken in the past.’[[7]](#footnote-8) Dworkin argued in favour of this in the same way as Locke had done: 'The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.’ In other words, the normative value of precedent and statute is part of the very definition of lawfulness itself: anything else would be arbitrary because it would be to change the rules without due process. Dworkin concludes his treatise with an appeal for judges to decide hard cases ‘with humility’ for the simple reason they may well be wrong in their political judgments.

This well-established theory has come under sustained attack by politically active jurists since at least the 1870s. These jurists have been active principally in international law and, in the latter part of the 20th century, in international organisations including courts. Moved by the conviction that states were the source of neither peace nor justice, and that the state-based international system had to be overcome,through a universal system of supranational law based not on statute or precedent but instead on ill-defined ‘conscience’, these judicial activists confused law with morality and sought to subsume the former in the latter. They wanted the power to make new law and thus to be themselves the source of that law.

The movement began with the creation of the Institute of International Law in 1873. This Institute, despite its name, was in reality a political lobby group determined to create supranational international law by judicial activism. Its members were convinced that international law did not derive from states (i.e. that it was not the creation of treaties) but that instead its source lay in ‘the legal conscience of the civilised world’[[8]](#footnote-9) or ‘the collective opinion of enlightened men.’[[9]](#footnote-10) None of the men involved in this had any background in the grand tradition of European public law[[10]](#footnote-11); indeed, they were essentially politicians, the Institut’s founder, Gustave Rolin-Jaequemyns serving as interior minister of Belgium and member of the High Council of the Belgian Congo. These men dismissed diplomacy and its fruits (treaties) precisely because they wanted to create a supra-national order to overcome the actions of states. They were committed imperialists because they believed that their actions would bring civilisation to backward parts of the world and indeed to Europe itself. Such liberal ‘conscience’ might well form the basis for a political campaign but it is both constitutionally dangerous if it arrogates state power to judges without accountability, and also ‘offensive’ (Dworkin) as a source of law. It begs one of the oldest questions in political philosophy: ‘Who guards the guardians themselves?’[[11]](#footnote-12)

This notion of civilisational superiority, with its clearly elitist assumptions, and this determination that jurists should change the law instead of agreeing to be bound by it, paved the way for what I have called ‘the punishment ethic in international relations’[[12]](#footnote-13) which caused and aggravated the First World War and led, through the Treaty of Versailles, to the Second. It also severely undermined the fundamental legal principles with which this paper started. In place of a properly jurisprudential approach, a radically revolutionary and anti-legal mentality has come to dominate especially human rights and international law.

Many of the special prerogatives of EU law (direct effect, primacy) derive, for instance, from rulings by the European Court of Justice which were specifically intended to undermine existing law, including existing national constitutional law, and to break new judicial ground.[[13]](#footnote-14) The European Court of Human Rights, since at least 1978, operates on the basis that the Conventions ‘a living instrument’[[14]](#footnote-15) which means that judges are not supposed to base their rulings on any supposed intentions of the authors of the Convention, and still less on precedent, but instead on ever-evolving ‘present-day conditions’ and therefore on their own opinions. This is the opposite of law.

What this has meant, concretely, is that the ECHR, like other human rights jurisdictions, gives a latitude of action to judges which is incompatible with the rule of law. Men and women can be and are appointed to the Strasbourg bench with no previous judicial training: they see themselves as political activists and this is how they behave. This has quickly led to corruption: many ECHR judges are former employees of NGOs financed by George Soros who continue to sit as judges hearing cases brought by their former employers, or represented by them, without recusing themselves.[[15]](#footnote-16) Such tendencies are the inevitable result of a judicial system which has forgotten what the rule of law is and which has replaced the rule of law with the rule of lawyers.

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2. Aristotle, *Politics*, Book III, part 16, 1287a [↑](#footnote-ref-3)
3. Aristotle, *Politics* 1287a [↑](#footnote-ref-4)
4. Aristotle, *Rhetoric*, Book I, part i. [↑](#footnote-ref-5)
5. Cicero, *De Legibus*, Book III, i, 2 [↑](#footnote-ref-6)
6. John LOCKE, *An Essay Concerning the True, Original Extent and End of Civil Government* (« *Second Treatise of Government »*), Chapter XI, par 136. [↑](#footnote-ref-7)
7. Ronald DWORKIN, *Hard Cases,* Harvard Law Review, Vol. 8, No. 6 (1975), p. 1090. [↑](#footnote-ref-8)
8. Statute of the *Institut du droit international*, Article I. [↑](#footnote-ref-9)
9. Gustave ROLIN-JAEQUEMYNS, *De l’étude de la législation comparée et de droit international,* Revue de droit international et de législation comparée, Tome I, 1869, p. 228 [↑](#footnote-ref-10)
10. Martti KOSKENNIEMI, *The Gentle Civilizer of Nations, The Rise and Fall of International Law, 1870-1960* (Cambridge University Press, 1960) [↑](#footnote-ref-11)
11. Juvenal, *Satire VI*, lines 347–348 [↑](#footnote-ref-12)
12. John LAUGHLAND*, A History of Political Trials from Charles I to Charles Taylor*, 2nd edition, (Oxford: Peter Lang, 2016), Chapter 20. [↑](#footnote-ref-13)
13. Antoine VAUCHEZ, *L’Union par le droit, L’invention d’un programme institutionnel pour l’Europe* (Paris: Presses de la Fondation Nationale des Sciences Politiques, 2013) [↑](#footnote-ref-14)
14. *Case of Tyrer v. The United Kingdom*, Judgment, 25 April 1978, par. 31 [↑](#footnote-ref-15)
15. European Centre for Law and Justice, *NGOs and the Judges of the ECHR 2009 - 2019*, Strasbourg, February 2020: <https://eclj.org/ngos-and-the-judges-of-the-echr> [↑](#footnote-ref-16)