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Direct Democracy is a group of 38 Conservative MPs, MEPs, MSPs and activists dedicated to the principles of localism and the devolution of power. The Localist Papers are an examination of how these principles might apply to specific fields of policy. They are not manifestoes, and not all our supporters endorse them in full. Rather, they explore some possible ways in which power could be shifted from the bureaucracy of the central state to local communities and individual citizens.

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Contents

"Rights-based judicial review taken to its extreme becomes an anti-democratic power, wielded by courts to alter the fundamental character of a nation's constitution without significant popular participation or even public awareness. Judicial supremacy, in other words, is overtaking constitutional supremacy."

Christopher Manfredi

"To the liberalism they profess, I prefer the liberties we enjoy; to the Rights of Man, the rights of Englishmen."

Benjamin Disraeli

"Liberties are not given, they are taken."

Aldous Huxley

The Localist Papers

Send for the Sheriff

1 Summary

The framing and execution of the law has become remote from the people who live under it. Judges, police chiefs and, increasingly, international accords lay down the application of criminal justice, often in such a way as to frustrate the decisions of elected representatives.

This paper proposes a radical decentralisation and democratisation of justice. It suggests passing powers from global human rights quangoes and from judges to elected national parliamentarians, and to elected local Sheriffs.

- International treaties should come before Parliament for annual readoption, lapsing if they fail to secure a majority.
- Senior judges should be appointed following open parliamentary hearings.
- The deployment of police resources, the prioritisation of offences and the control of budgets should be the responsibility of Sheriffs, elected on a county or city basis.
- Sheriffs should also take over the functions of the Crown Prosecution Service, acquiring the right to set local sentencing guidelines (although not to interfere in individual cases).
- Parliamentary supremacy over foreign law codes and domestic courts should be guaranteed in a Reserve Powers Act .

2 Introduction

Criminal justice represents the supreme power that a government exercises over the citizen. A state may be defined as a territory whose inhabitants are bound by a common set of laws. Who, though, is to make those laws?

The attempts to answer that question are the chapters that make up the history of modern democracy. Over the past three centuries, European societies have, by and large, adopted the idea that laws ought to be fashioned by representatives of the people; that law-makers, in other words, should be accountable, not *upwards* to ecclesiastical or monarchical powers, but *downwards* to the people expected to live under their rules.

This observation may seem obvious. But, in recent years, there has been a trend away from the supremacy of elected legislatures. Laws are increasingly made and enforced by organs of the state that are not accountable to the rest of the populace: the judiciary, autonomous government agencies and, not least, the police.

Elected governments also find themselves constrained by a growing body of international law. At home, the decisions of elected ministers are frequently overturned by judicial review. Laws, both international and domestic, are stretched, as shall be seen, by activist courts, which interpret them in a way that their framers could not possibly have envisaged.

As the *interpretation* of laws has begun to drift away from the orbit of elected politics, so has their *enforcement*. In their prioritisation of offences and their deployment of resources, the police often make decisions that impact far more tangibly on the lives of local people than do the statutes passed by their parliamentarians. Yet the police, too, are beyond any direct democratic control.

Both judges and chief constables sometimes talk with startling frankness of their "duty" to rise above popular prejudice. Yes, say senior judges (when speaking extra-judicially), voters may well want murderers to be banged up for life; but it is up to us to ensure that vote-grabbing Home Secretaries do not pander to tabloid campaigns. Yes, say ambitious chief constables, the punters might want us to concentrate on protecting property and cracking down on street crime, but we need to make sure that we are also defending the rights of minorities.

These motives are unexceptionable. The trouble is that the officials concerned are not subjected to any democratic oversight. High Court judges are effectively unsackable: they can be removed only by a joint address by both Houses of Parliament. Chief Constables, although answerable to the Home Secretary, are not accountable to their local communities in any meaningful sense. The only voice that locally elected representatives have is as a minority on their Police Authority – a minority that is then further subdivided among the different parties.

However far judges drift from public opinion when it comes to, say, sentencing policy; however far police chiefs do so when it comes to, say, speed cameras, there is no mechanism to bring them back into line. We are, in short, reverting to the pre-modern concept that law-makers should be accountable to the Crown, to their own consciences or to God – not to the people affected by their decisions.

This paper sets out to drag justice and home affairs back into the orbital pull of public opinion. There will always be a separation of powers; there will always be a measure of discretion for local officials. But with only a slight recalibration, the balance can be tilted from the executive and judicial branches of government back to the elected legislature. We can, in short, help to restore the principle of representative government that was Britain's greatest contribution to the happiness of mankind.

3 The rise of judicial activism

Judicial activism – that is, the tendency of judges to rule on the basis of what they think the law ought to say, rather than what it says – is not new. On the contrary, it can hardly fail to exist, in some measure, in any legal system.

In 1717, in a sermon preached before his king, Bishop Hoadly of Winchester observed: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, and not the person who first wrote or spake them." This is true by definition.

Of course, the border between flexibility in interpretation and judicial activism is disputed. Most laws allow a degree of discretion to the courts, correctly recognising that there may otherwise be unintended consequences. Where there are ambiguities or grey areas, judges quite properly apply their common sense.

The problem arises when, in pursuit of what they see as a just settlement, judges deliberately set aside what the statute says. They do so, no doubt, from the highest of motives, seeking to uphold the liberal and humane values of Western society. And there has been a huge growth in the volume of laws generally, and bad laws in particular. But to disregard the will of Parliament creates a greater wrong than bad law.

What constitutes a breach of the border? At what point does a judge's sense of duty violate the proper relationship between legislature and judiciary? When, in short, do judges become, in Bishop Hoadly's phrase, lawgivers?

Consider a handful of recent cases where a ministerial decision has been struck down by the courts. They serve to indicate how far that border has shifted, how much legislative territory has been annexed by the judiciary.

"So draconian that they must be held *ultra vires*"

In 1996, Michael Howard MP, as Home Secretary, addressed the problem of illicit entrants to the UK who, often after residing in the country for several years, suddenly claimed to be victims of political persecution when found by the authorities and threatened with deportation. The Social Security (Persons from Abroad) Miscellaneous Amendments Regulations (1996) required asylum seekers to submit their claims as soon as reasonably practicable after arrival in the UK. If they did not do so, but submitted applications only when contesting their repatriation, they would forfeit their entitlement to income support and housing benefit.

The law was immediately challenged by the Joint Council for the Welfare of Immigrants on grounds that it constituted a breach of fundamental human rights.[1] Mr Howard had grounds to be confident: the claimants concerned were not refugees, and therefore were not covered by any of the conventions habitually cited by the courts to overrule him. And, indeed, Simon Brown LJ, in making his ruling acknowledged the problem, although he did not allow it to detain him:

> "True, no obligation arises under article 24 of the 1951 convention until asylum seekers are recognised as refugees. But that is not to say that up to that point their fundamental needs can be properly ignored. I do not accept that they can."

On what grounds, then, could he strike down a measure that so obviously made him uncomfortable? Why, the very fact that the rules were too harsh:

> "For the purposes of this appeal, however, it suffices to say that I, for my part, regard the 1996 regulations now in force as so uncompromisingly draconian in effect that they must indeed be held *ultra vires*".

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1 *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants; R v Secretary of State for Social Security ex parte B*, 1996.

This seems a remarkable ground on which to overturn Parliament. The judge may have been right that the rules went too far: he is certainly as entitled as anyone else to an opinion. But, feeling as he did, the correct procedure would have been to leave the Bench, stand for election, persuade a majority of his countrymen to support him and amend the rules.

"Lord Woolf has argued that judges have not only the right but the obligation to strike down "bad" laws. Who, though, is to decide what constitutes a bad law?"

"Until this court decided otherwise"

Then again, why go to all that trouble when you can simply change the law from the Bench? Consider, as an example, Mohammed Fayed's demand for an explanation when his application for British citizenship was turned down.[2]

The case did not involve Mr Fayed's bid for naturalisation, which had previously been refused, along with his brother's. Again, the Home Secretary had every reason to believe that the law was on his side. British nationality is not an automatic entitlement, but a privilege to be bestowed in exceptionally meritorious cases. There is no automatic assumption that it will be granted, so it would be strange indeed to oblige the Home Secretary to explain his reasons when he chose to withhold it.

This is not simply an interpretation of the law: it is spelt out in the most unequivocal terms by the pertinent statute, the 1981 British Nationality Act, which states: "The Home Secretary's decision shall not be subject to review in or challenge by any court whatever".

This sounds pretty final and, indeed, Lord Woolf, in delivering his judgment, accepted that "the Home Secretary was not obliged to give reasons for refusing an application for British citizenship". He then went on, however, to argue that the Home Secretary ought to behave fairly and that, in his opinion, this meant giving the applicant sufficient information to make representations. He rounded off his judgment with a statement that ought to alarm anyone who believes in the separation of powers:

> "This decision does not involve any criticism of the Secretary of State or his department. *Until this court decided otherwise*, it was perfectly reasonable to take a different view." [emphasis added].

Lord Woolf, significantly, has argued extra-judicially that judges have not only the *right* but the *obligation* to strike down "bad" laws. Who, though, is to decide what constitutes a bad law? We all have our assumptions and prejudices, judges just as much as politicians. The difference is that, if the rest of us disagree with what the politicians have decided, we can remove them.

Other examples

Again and again, courts have overturned the will of Parliament, as set out in the plainest possible language, on the basis of a basis of a more or less arbitrary interpretation of what constitutes "fairness". The phenomenon is at work in every corner of the judiciary. In 2005, Martin Mears, the first person to be directly elected as President of the Law Society, published a devastating critique of the structural bias against husbands and fathers in the Family Courts.[3]

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2 *R v Secretary of State for the Home Department, ex parte Fayed and another*, 1996.

3 M Mears, *Institutional Injustice: the Family Courts at work,* Civitas, 2005.

The most high profile cases, however, usually turn on human rights, the status of minorities and immigration. It is here that jurists seem to feel the strongest obligation to take a stand against what they see as the unconscionable populism of elected politicians.

In 1997, for example, an illegal immigrant overturned his deportation order on the grounds that he would not receive the same medical treatment in his home country as was available in the UK. The court cited Article Three of the European Convention on Human Rights, which reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." It seems fair to say that such an interpretation would not have been in the minds of those who drafted the Convention.

In 2002, another illegal entrant overturned the suspension of her social security payments on grounds that she had not been formally notified that her asylum application had been rejected (she was able to maintain this situation by repeatedly failing to attend the interview).

In 2004, the Law Lords ruled that the government had no right to intern terror suspects in a "three-walled prison" in Belmarsh (so called because the detainees were foreign nationals, and were free to return to their countries of origin). Shortly before the Tube bombings, Lord Hoffman declared that the threat to the life of our nation came, not from terrorism, "but from laws such as these".

Throughout these years, lower-profile deportation orders were routinely overturned, despite the best efforts of successive ministers. Four Home Secretaries struggled to repatriate the Afghan hijackers who arrived in Britain by diverting a flight to Stansted. Each removal order was quashed by the courts, despite the crime the hijackers committed in coming, and despite the fact that Britain had expended a good deal of blood and treasure ridding Afghanistan of the Taliban regime from which they claimed to be fleeing.

Indeed, to find a converse example from recent years – an example, that is, of the courts stepping in to *order* a deportation – we have to look at the 1998 Law Lords judgment on Augusto Pinochet. General Pinochet had been detained in Britain on a Spanish warrant in connection with charges relating to human rights abuses in Chile. (The erosion of territorial jurisdiction, and the growing readiness of states to try offences allegedly committed elsewhere, is a phenomenon considered later.)

Whatever the rights and wrongs of the warrant, it seemed clear that General Pinochet, as a head of state at the time of the alleged offences, was covered by the doctrine of sovereign immunity. That doctrine is not only affirmed by international convention; it is also written into British statute, as Lord Bingham noted when ordering General Pinochet's release.

"Shortly before the Tube bombings, Lord Hoffman declared that the threat to the life of our nation came, not from terrorism, "but from laws such as these"."

Lord Bingham's judgment was, however, overruled by the Law Lords, by a vote of three to two, because (according to Lords Steyn and Hoffman) sovereign immunity did not bestow protection from charges relating to human rights abuses, since these did not relate to the proper functions of a head of state. Again, it is hard to avoid the suspicion that the judges were acting according to what they felt the law ought to have said rather than what it said. Lord Hoffman, in particular, was later in trouble for failing to declare his links to Amnesty International, which had long campaigned to bring General Pinochet to trial.

"A genteel coup d'état"

Two features are apparent. First, the skewing of the plain wording of the law always seems to happen in the same political direction. Second, creative interpretation has been enormously exacerbated by the growth of a body of international human rights law.

Robert Bork, whose nomination to the US Supreme Court was blocked by the Senate in 1987, has studied the ballooning of international jurisprudence since the early 1990s, and concluded that it amounts to a sustained attempt to impose on states from above laws and values that would never have passed through their national parliaments. As he has observed:[4]

> "What judges have wrought is a coup d'état, slow-moving and genteel, but a coup d'état nonetheless."

His book is a study of judicial activism in three states: the US, Canada and Israel. But the British reader is left feeling that the phenomenon is far more advanced in the UK than in any of the countries cited by Judge Bork.

The outrage provoked whenever a Home Secretary rules that a high profile murderer ought not to be eligible for parole is familiar. Politicians, chorus a line-up of retired judges, ought not to interfere in the judicial process. Yet nothing was said when, in a blatant interference in the judicial process, the Home Secretary ordered that dozens of convicted terrorists be released early from their sentences under the terms of the 1998 Belfast Agreement.

Similarly, the attempt by Parliament to set minimum tariffs for certain offences is inevitably decried by the courts as a monstrous assault on judicial independence and a threat to the separation of powers. Yet the setting by Parliament of *maximum* tariffs seems to raise no constitutional questions whatever.

The phenomenon can be seen at international level, too. Writs are now routinely served, not only against dictators such as Pinochet, but against Ariel Sharon, Donald Rumsfeld and other controversial conservatives. Oddly, no one has tried to indict Yasser Arafat, Fidel Castro or Robert Mugabe.

4 The internationalisation of law

The internationalisation of criminal justice has been one of the main drivers of judicial activism within states. When judges can find no domestic statute to justify the rulings they would like to make, they reach instead for the European Convention or one of many UN accords.

The notion of international law is not new. It has existed in something like its present form since the end of the Second World War. Prior to that, the phrase "international law" referred simply to the mediation of relations among states, not to their domestic behaviour. William Blackstone defined offences against international law as the violation of safe conduct passes, the mistreatment of ambassadors and piracy.

The foundation of the United Nations and the Nuremberg trials substantially widened the definition of international jurisdiction. But the real revolution has come since, and largely as a consequence of, the end of the Cold War. This revolution has fundamentally altered the relationship between national legislatures and their judiciaries. As Henry Kissinger observed in 2001:[5]

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4 R Bork, *Coercing Virtue: The Worldwide Rule of Judges,* AEI, 2006.

5 H. Kissinger, "The Pitfalls of Universal Jurisdiction: risking judicial tyranny, *Foreign Affairs,* July/August, 2001.

> "In less than a decade, an unprecedented concept has emerged to submit international politics to judicial procedures. It has spread with extraordinary speed and has not been subject to systematic debate, partly because of the intimidating passion of its advocates… The danger is that it is being pushed to extremes which risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts."

Dr Kissinger is right. There has been a huge growth in international criminal law since the end of the Cold War. The process started in 1990, when President George Bush Senior proclaimed "a new world order" on 11 September 1990. What he meant was that United Nations Security Council Resolutions could be enforced by means of military force, since the East-West division in Europe and the hostility between the US and the USSR had been overcome and the deadlock in the Security Council lifted. The United Nations would henceforth be able to call on its members to fight wars on its behalf, thereby giving international law a coercive quality which it had never had before.

The phrase, "new world order," did not originate with the Americans, however. It had been reintroduced into political discourse by the outgoing Soviet president, Mikhail Gorbachev, who rekindled the old Trotskyite dream of world government by calling for global governance and a unification of the world economy. Soon, the left-wing and globalist origins of the "new world order" project became clear: institutions proliferated at international level, transferring ever more power away from ordinary people into obscure and unaccountable international institutions.

The change was put well by a prosecutor at the Yugoslav War Crimes tribunal, Louise Arbour, who said in 1999:

> "We have passed from an era of co-operation between states into an era in which states can be constrained."

The sentiment may be noble but it immediately prompts the question: "Who is to check the powers of the person doing the constraining?"

"Since 1990, institutions have proliferated at international level, transferring ever more power away from ordinary people into obscure and unaccountable international institutions."

Prior to the proclamation of the "new world order", international law consisted essentially of treaties between states. States were free agents which concluded contracts between one another. Occasionally, they created large institutions like the United Nations to oversee the terms of their agreements, and occasionally the terms of the treaties were based on appeals to universal values like the Conventions on Genocide or Torture. But none of these treaties gave rise to systems of coercive law comparable to the national law of a state, enforced by the police and the courts. Any penalties imposed for treaty violations were accepted voluntarily by the states which had signed them.

Moreover, to the extent that international treaties created obligations, those obligations concerned only states, not individuals. The Genocide and Torture Conventions, for instance, require *national* bodies to pursue persons suspected of these crimes.

The European Union

The exception to this general rule was the European Union. The EU differs from all treaty organisations in that its law penetrates

into the fabric of national life by imposing obligations on individuals. This is why the EU's power is so awesome. Once the new world order was proclaimed, however, the EU model was copied by other international bodies, and soon a host of international organisations had cropped up which claimed the right to regulate the most intimate details of people's lives from on high.

The main vehicle for this internationalisation of law has been the doctrine of "universal human rights". In the name of statements of desirable general principles, international organisations have been created which claim the right to interpret and even to enforce those principles according to how they see fit. People often react favourably when they hear that a new body has been created to protect human rights. What they perhaps do not realise is that ordinary people do not get any new rights as a result. Instead, it is the people working in the new institution who get the right to say what ordinary people's rights are.

The EU has been trying to gain control over "human rights" for years. The European heads of state and government signed the Charter for Fundamental Rights at the Nice summit in 2000. For the time being it has no legal force. It would have become legally binding if the European Constitution had been adopted, since the Charter formed an integral part of it, but the Constitution was rejected in referendums in France and the Netherlands in 2005. In spite of this, in March, the EU created an Agency for Fundamental Rights anyway, based in Vienna. This is an example of how the EU puts in place institutions even when it has been explicitly denied the legal right to do so by voters.

The new Agency has only an advisory role for the time being. But its remit is huge: the Charter of Fundamental Rights, on which the Agency's so-called "mandate" is based, contains rules on everything – on the right to life, on liberty, on the right to a fair trial and on the right to a family. There are rules on data protection, consumer protection, environmental protection, freedom of thought, freedom of religion. There is "the freedom of the arts" and "the right to education". Asylum policy, multiculturalism, social security, health care, the right to vote –the EU has a policy on all these issues. Once the Constitution and the Charter are adopted, as they no doubt will be, EU judges and officials will have the right to issue rulings saying what our rights are in these areas. There is even a "right to good administration" – which is pretty rich, coming from Brussels.

In addition to this, in February 2007, the European Commission put forward a proposal which would allow Brussels to send people to prison for polluting the environment. No doubt pollution is a bad thing, but should the power of imprisonment be granted to the same organisation which for 50 years has run the corrupt and wasteful Common Agricultural Policy?

Other supranational courts

The EU is only one international body which claims the right to make and enforce laws. The Council of Europe, a pan-European organisation which includes Russia, Ukraine and other former Soviet republics, is home to the European Court of Human Rights (ECHR) in Strasbourg. Although separate from the EU, this organisation has become the *de facto* Supreme Court for the whole of Europe. People with a grievance can pursue cases against their own national courts and national legislatures and obtain rulings from the ECHR made by judges who have nothing to do with this country; who do not have to bear the consequences of their own decisions; and who, in some cases, worked for the judiciary under Communism.

The very existence of international courts like the ECHR violates the principle of territorial jurisdiction. According to this ancient principle, on which the rule of law is based, the rulings of judges are themselves embedded in the overall institutions of a state. They are governed by carefully drafted laws, and the national legislature and local authorities

monitor the effect of these laws on society. So if a law gives rise to a judicial ruling whose effects are deemed unnecessarily expensive to society and its taxpayers, or detrimental in any other way, then the law can be changed. However, once international courts and international conventions become involved, this key link between national policy, the law-making process and law-enforcement is broken. When ruling on asylum applications, for instance, judges in this country are now obliged to take into account the United Nations Convention on Refugees and the European Convention on Human Rights. The abuses of our generous asylum system are a direct consequence of the alienation of national law-making power to international bodies.

Similarly, after the end of the Cold War, the previously moribund Conference on Security and Co-operation in Europe was revived, strengthened and re-named as the Organisation for Security and Co-operation in Europe (OSCE). The OSCE has become the vehicle for a decade and a half of unaccountable interference in the democratic process, especially in Eastern European states. Its rulings are now discredited. For instance, it applauded the grossly unfair 2004 presidential elections in Georgia. The OSCE has also picked on countries for alleged abuses of human rights when it has been politically expedient to do so, and turned a blind eye to real abuses when it has been inconvenient to mention them. So for instance the liberal and free-market Czech Republic (whose Prime Minister at the time was the resolutely Eurosceptic Václav Klaus) was repeatedly attacked during the 1990s for its supposed unfriendliness to its gypsy population, while countries which unfailingly toe the EU line, such as Latvia or Estonia, are hailed as models even though they have erected war memorials to the Nazi SS, and even though their policy towards their substantial ethnic Russian minority is a disgrace.

The 1990s also saw the birth of the doctrine of military interventionism. Like the doctrine of universal human rights on which it is based, humanitarian interventionism is a doctrine with superficial appeal but which unfortunately is wide open to abuse. Interdependence was shown to be a grim reality when intervention over Kosovo in 1999 caused huge numbers of Albanian asylum seekers to arrive in this country. On the backs of the doctrine of interventionism, two international criminal tribunals were created, one for Yugoslavia and the other for Rwanda. Now a third court, the International Criminal Court (ICC), has been created. It will have the power to prosecute national leaders, including national leaders in this country, and this is a power which will inevitably be politically abused. It is precisely for this reason that the Americans have sensibly not signed the ICC Charter.

"The OSCE has also picked on countries for alleged abuses of human rights when it has been politically expedient to do so, and turned a blind eye to real abuses when it has been inconvenient to mention them."

Many people think it is right and proper that unscrupulous heads of state should end up in the dock if they have committed crimes. But who is to prosecute them? If the argument is that leaders should be democratically accountable for their acts, then it is their national courts which should bring any such prosecutions. There is nothing democratic about taking away the rights of states to prosecute their own leaders and investing them in unaccountable international tribunals.

The problem, in all such cases is the problem expressed by the oldest question in political philosophy, *Quis custodiet ipsos custodies?* If the principle of democratic accountability is to

mean anything, then the link must be re-established between the people who make laws, on the one hand, and the people who are governed by them and who pay for their implementation, on the other. In other words, the internationalisation of law should cease. Law-making and law-enforcement powers should be returned to national courts and national authorities.

"Conventional policing is unable to address the problem of antisocial behaviour. This sort of crime is not, a rational, if immoral, professional endeavour, which can be reduced by rational professional action by the authorities to alter the balance of risk and reward. Rather, the prevalence of low-level disorder and random violence is an inchoate, angry, irrational expression of social collapse."

5 Crime and punishment

The failure of local authorities – above all the police – to deliver the desired outcomes is, suggest the opinion polls, of great concern to voters today. People feel that police forces have become decoupled from their concerns: that their paperwork, their obsession with how to treat minorities, and their removal from the streets have divorced them from the communities in which they were once rooted.

It is another aspect of the same problem: lawgivers are remote from those who must live by their laws. The solution, too, is the same: to make decisions as closely as possible to the people they affect. Just as we should seek to repatriate power from international human rights lawyers, so we should seek to disperse it at home to accountable office-holders.

The political discussion about crime is often a numbingly boring argument about statistics. Overall crime recorded by the police seems to have risen (so the Opposition uses this statistic) while crime reported by the public seems, until very recently, to have fallen (so the Government relies on that). As far as we can tell, certain classes of crime have fallen, notably burglary and car crime, while others have risen, notably violence and antisocial behaviour.

The truth is that "overall crime" (rather like overall GDP) is an irrelevance. What matters to people is local crime (or their own wealth). And here, the national trends are worrying. For while everyone must welcome the fall in acquisitive crime against homes and cars (a fall, by the way, which has been achieved more because of private investment in alarm technology rather than because of better policing), it is violence and antisocial behaviour which bothers people most.

Conventional policing – based on evidence and detection – is unable to address the problem of antisocial behaviour. This sort of crime is not, like acquisitive crime, a rational, if immoral, professional endeavour, which can be reduced by rational professional action by the authorities to alter the balance of risk and reward. The prevalence of low-level disorder and random violence is an inchoate, angry, irrational expression of social collapse.

This collapse is happening both "internally" and "externally". The "internal" collapse is the decline of healthy families and communities, the informal social networks which sustain decent behaviour among individuals. The "external" collapse is the decline in the effective enforcement of the law by the agency responsible for it: the police. The two are linked, of course: families

and communities suffer when the police don't do their job, and the police's job is made harder when families and communities are not strong.

This essential link was once the founding principle of the police force. "Police, at all times, should maintain a relationship with the public that gives reality to the historic tradition that the police are the public and the public are the police", said Sir Robert Peel in his statement of principles with which he established the Metropolitan Police Force in 1829.

Today, there is increasing lip-service paid to this principle – and decreasing actual implementation of it. "Working together for a safer London", proclaims the Met's new and expensive logo at Scotland Yard. Yet behind the building's blank facade sit thousands of police officers doing precisely the opposite of "working together" with the community. They are busy devising new processes to "connect" with the public, but which in fact alienate them further.

There is no more illustrative example of the modern culture of British policing than the proposal in the Macpherson report – since implemented by this Government – that officers should fill in a form every time they stop a member of the public in the street. The pointless bureaucracy involved in this requirement is bad enough: it takes up seven minutes of an officer's time per person stopped, and thereby discourages him or her from engaging with the public or stopping suspicious individuals. More fundamental, though, is the assumption behind the requirement: that the police's relations with the community need to be monitored from above; and that every contact between a police officer and a citizen must be mediated by an official process, so that the police's relations with society can be assessed on the basis of statistical returns. The form already contains a question on the individual's racial group, and it has recently been suggested that the individual's religion might be noted down too. Thus does an initiative intended to improve the police's relations with the London public – particularly ethnic minorities – end up in an intrusive and deeply illiberal attempt by the state to monitor the behaviour of its agents and peer into the personal circumstances of British citizens. The police and the public have never been more remote from each other.

The centralisation of power

The attempt to ensure that the police and the public "work together" has been enacted from precisely the wrong direction: from above. Local Strategic Partnerships, Crime and Disorder Reduction Partnerships and Community Safety Plans are just a few of the initiatives designed in Whitehall, implemented locally, to "connect" the police with other "stakeholders" in the community.

Police Authorities are supposed to represent the community in the supervision of the police. They are one of the three pillars in the "tripartite" structure implemented in 1964, the others being the Home Secretary and the Chief Constable. Over the years, and especially since 1997, the Police Authority has become by far the weakest of the pillars. Chief Constables are accountable in practice not to the representatives of the community but to the Home Office in Whitehall, which works to ensure – through targets, central funding streams, and bureaucratic audit and inspections – that local forces implement national policies designed to bring down national crime figures. The Home Office has imposed *de facto* national control of police forces.

If one reason for the impotence of Police Authorities is the encroaching power of the Home Office, another is their own lack of moral authority. Police Authorities are appointed bodies, comprising local councillors (on a party proportional basis), Home Office-appointed "independent" members, and local magistrates. They are anonymous quangoes made up of local worthies who, albeit with the best of intentions, generally see it as their job to support "their" Chief Constable against

attacks on his or her performance. It is widely understood that one of the key roles of a Chief Constable is to "manage" the local Police Authority; that is, to ensure that no complaint or trouble comes from that quarter.

The 1964 tripartite system has therefore failed to create effective local accountability. Chief Constables obey the Home Office, not the community. Few people know Police Authorities exist – even fewer know who sits on them; they are no longer effective (if they ever were) in establishing local policing priorities. People are right to feel alienated from their local police forces.

A brief look at the other aspects of the criminal justice system reveals the problem of remote accountability and poor performance. There is clear evidence that the Crown Prosecution Service (CPS) is proving ineffective. 7% of cases each year are abandoned "in error". By 2000, the CPS was bringing 65% fewer prosecutions against offenders aged 14 to 18 than had been prosecuted in 1984, the year before the CPS was established, despite a significant increase in juvenile crime in the intervening years. Whereas the CPS was established to prevent the dishonesty with evidence which sometimes occurred when the police were the prosecutors, today the opposite problem is occurring. There is a failure of communication, and a culture of blame-passing, between the police and prosecutors, with the result that too many criminals fall between the cracks and victims are denied justice.

As for sentencing, judges and magistrates have responded in recent years to the clear public demand for stiffer sentences by sending criminals to prison earlier in their criminal career and for longer stretches. This is welcome, for it has significantly reduced potential crime through the incapacitation of criminals. And yet if prison works at this most fundamental purpose, it is failing in its secondary, but vital, role of rehabilitation. Over half of all prisoners are reconvicted within two years of their release, including 75% of young offenders under 21 and nearly 90% of those under 18. Prisons are managed by the new National Offender Management Service (NOMS), comprising the former Prison and Probation Services, under a chief executive accountable to the Home Secretary. This new system has yet to be tested. However, it is again an upwardly-accountable system. It is likely that NOMS will be a top-heavy, top-down structure which will further estrange local communities from the public servants supposed to be protecting them against crime.

What voters think

It is worth briefly noting public attitudes to crime and punishment. In 2004 the Conservative Party conducted a series of focus groups on this subject. It was clear that, in the words of the report, "Crime is the overriding priority… In response to the question 'if there is one thing you could change, what would it be?', the instant and overwhelming response in all groups was 'crime'. [There was a] total consensus that crime has got worse, noticeably deteriorated in the last five years". What worried people most, naturally enough, was antisocial behaviour, the "yob culture", the sense of feeling "intimidated by gangs of kids with no respect and no discipline".

The groups thought that "the police are useless – but they try their best… they can't do anything about crime". Asked to choose three words to describe the police, replies included "unreliable", "a joke", "inept", "ineffective", "not in control". 95% agreed that "the police are doing their best but for one reason or another are failing". They wondered "why do the police have so much paperwork? Why is there so much political correctness stopping the police from doing their job?"

The groups' proposed remedy for the problem was simple: local accountability. There was "strong support for 'have your say about how your area is policed' – but only at a very local level".

Send for the Sheriff

Britain could certainly do with "more police". New York's celebrated fall in crime in the 1990s – down 60% in ten years – was achieved by a considerably increased police force. Yet the real key to success in New York was not police numbers. It was change to the structures and systems of policing to get the police on the streets and proactively working to reduce crime.

Police Authorities should be scrapped. Instead a simple, effective and transparent system of local accountability should be introduced: directly elected individual Sheriffs. Initially, there would be one for each of the 43 police forces in England and Wales; in time, however, it would make sense to bring these forces in line with local government boundaries, thus giving voters a clearer idea of where responsibility lay. Chief Constables would retain operational independence but they would answer to the Sheriff for their performance – and the Commissioner would answer to the public.

Where there was a directly elected Mayor whose jurisdiction was congruent with a police force area (currently only London) the Mayor would exercise the functions of the Sheriff.

Sheriffs would appoint and dismiss Chief Constables. They would set their own targets for the force, make their own Policing Plans, and, crucially, control their own budgets. Each Sheriff would be allocated his or her funding as a block allocation, rather than as a series of micro-managed grants for specific purposes, and would be accountable to local voters for how effectively he or she spent the money in the fight against crime.

Restoring public confidence in the criminal justice system is not simply a question of making those responsible for pursuing criminals through the streets (i.e. the police) more democratically accountable. It is also about making those responsible for pursuing suspects through the courts answerable for their effectiveness in securing convictions, and making those responsible for supervising punishment accountable for their success in protecting the public by reducing re-offending.

"The Crown Prosecution Service should be reconstituted as a set of local Crown Prosecution Offices, answerable to the local Sheriff for their success in securing convictions."

The CPS should be reconstituted as a set of local Crown Prosecution Offices, answerable to the local Sheriff for their success in securing convictions. As in the US, the Sheriff should not be entitled to order a prosecution, but may order one to be dropped. In order to avoid miscarriages of justice the police and the public prosecution authority should remain distinct and separate entities. However, making them accountable to the same authority would ensure there is greater scope for co-ordination between the two institutions at the sharp end in the fight against crime.

The Sheriff should also be responsible for supervising sentenced criminals. NOMS is welcome insofar as it unites the two arms of the penal system. However, the accountability to the Home Secretary and the regional structure (there will be ten Regional Offender Management Services or "ROMS") should be abolished.

Rather than amalgamating upwards, we should amalgamate downwards, and abolish the regional structure of the new system. Rather than ROMS, there should be LOMS: Local Offender Management Services accountable to the elected Sheriffs. There should be a local purchaser-provider split. Each LOMS – acting on the instructions of

the Sheriff – should have responsibility for purchasing space in prisons and other "disposals" (probation and community punishment capacity), with regard to local wishes. Criminals should serve their sentences – whether in prison or not – under the authority (i.e. as the "guest") of the Sheriff in the area they committed their crime.

Finally, the Sheriff should have the power to set local sentencing guidelines. While granting an elected official the right to intervene in individual cases would plainly be at odds with the separation of powers, there is no reason why local voters should not have some say over which *categories* of crime to prioritise. This may well lead to disparities: shop-lifting might lead to incarceration in Kent, but not in Surrey. So be it, if that is what the electorates of those counties decide. The Sheriff's discretionary power over prosecutions will lead to similar incongruities. Different parts of the country might end up with different guidelines on how far a homeowner could go in attacking intruders. It should be noted, however, that discrepancies already exist today: some Chief Constables, for example, decline to treat the possession of cannabis as an offence. The difference is that Chief Constables are not answerable to anybody.

These specific proposals, however, matter less than the philosophy that underlies them. People feel, and with reason, that the legal system no longer functions as the majority would like. John Locke's original compact has been broken: having contracted out our right to personal defence and enforcement, we find that the state no longer fulfils its part of the bargain. The legal system gives the appearance of reflecting the prejudices of an unrepresentative clique of experts in Whitehall, on the Bench and, not least, abroad.

The surest way to address that concern is to bring justice and policing under local democratic control.

6 Power to the people

Three apparently separate problems in this paper have been identified: judicial activism, the internationalisation of law, and the remoteness of police from their communities. In fact, of course, all three are aspects of the same problem. Power has shifted, at all levels, away from people and their elected representatives and towards unaccountable functionaries.

The remedy follows naturally from the diagnosis. Decisions should be made as closely as possible to the people they affect. Where practicable, this means the individual citizen. Failing that, local decision-making should be preferred to national decision-making; and only where absolutely necessary should we bestow powers on international secretariats. In any event, at all levels, there must be mechanisms to make decision-makers accountable.

At international level, this leads to the conclusion that Britain should withdraw from such codes and conventions as are being used to distort the exercise of democratic government. The ECHR, for example, is being interpreted in ways that could not have been foreseen by its drafters to frustrate parliamentary decisions. A number of UN conventions, too, are being creatively interpreted to force on Britain a domestic policy that would never be passed at the ballot box.

Rather than drawing up a list of accords for abrogation, a new general principle should be introduced: that Parliament ought to ratify international conventions only on a temporary and contingent basis. Foreign accords should come before Parliament for annual readoption, allowing MPs to decline to support them if they are seen to be having effects not intended at the time of their ratification.

Within Britain, too, there should be a dispersal of jurisdiction. There is no definitive solution to expansionist courts; but the problem can be

mitigated by the decentralisation of power. American conservatives have been wrestling with the problem of judicial activism for longer, and with more angst, than we have – even though the US, by any definition, has less of a problem than the UK. The only remedy they have found is to allow different states to apply the law differently, in accordance with the wishes of their own populations. This reduces the likelihood of unintended consequences, narrows the gap between judges and people and makes isolated instances of judicial activism more obvious, precisely because they do not set a precedent for the entire Union.

Britain is not the US, of course, and the American system cannot simply be grafted on to our institutions. In particular, it is hard to reconcile the US practice of electing members of the judiciary with Britain's tradition of parliamentary supremacy. Two reforms would, however, serve to bolster the proper status of our legislature. First, Parliament should adopt a Reserve Powers Act, guaranteeing its supremacy in a number of defined areas. This would serve as a defence, not only against domestic judicial activism, but against the encroachment of foreign legal systems.

Second, senior judges should be appointed following open parliamentary hearings. The previous system of judicial appointments – where power was concentrated in the hands of the Lord Chancellor – was indefensible in theory but, perhaps for that reason, moderate in practice. Precisely because they could see how anomalous their powers were, successive Lord Chancellors generally did their best to exercise them fairly and impartially. The same cannot be said of the successor system, whereby appointments are made by a quango. Judges, as noted above, have been dragged irreversibly into making political decisions. Their personal assumptions and prejudices are therefore a mater of legitimate public interest.

Finally, and as part of the overall localist dispensation outlined in this series of papers, a measure of control over criminal justice should pass to locally elected officials. County police forces should be placed under locally elected Sheriffs – a policy toward which the Conservative Party may be moving slowly. A vital component of localism, however, is to give elected Sheriffs the right to apply local sentencing guidelines (although not to interfere in specific cases). This alone would go a long way towards soothing the public's sense that their legal system is biased in favour of rogues and chancers who know how to exploit human rights rules.

The specific policy recommendations made here matter less, however, than the philosophy that underpins them. People feel, with reason, that their legal apparatus has become divorced form their concerns. John Locke's original compact has been broken. The citizen has contracted out his rights of self-defence and vengeance to the state; but the state is failing to deliver its side of the bargain.

The way to address that concern is by ensuring a closer approximation of the criminal justice system to public opinion. And the way to achieve such approximation is through the devolution of power and the direct election of decision-makers. In matters of justice and policing, as in most fields of government activity, the experts have had their day. It is time to trust the people.

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The framing and execution of the law has become remote from the people who live under it. Judges, police chiefs and, increasingly, international accords lay down the application of criminal justice, often in such a way as to frustrate the decisions of elected representatives.

This paper proposes a radical decentralisation and democratisation of justice. It suggests passing powers from global human rights quangoes to elected national parliamentarians, and from judges and to elected local Sheriffs.

- International treaties should come before Parliament for annual readoption, lapsing if they fail to secure a majority.
- Senior judges should be appointed following open parliamentary hearings.
- The deployment of police resources, the prioritisation of offences and the control of budgets should be the responsibility of Sheriffs, elected on a county or city basis.
- Sheriffs should also take over the functions of the Crown Prosecution Service, acquiring the right to set local sentencing guidelines (although not to interfere in individual cases).
- Parliamentary supremacy over foreign law codes and domestic courts should be guaranteed in a Reserve Powers Act .

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