

2014

Anglo-American Reflections original reproductions

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Lord Bingham. (2014) 'Anglo-American Reflections original reproductions', Plymouth Law and Criminal Justice Review, 6. Available at: <https://pearl.plymouth.ac.uk/handle/10026.1/9002>
<http://hdl.handle.net/10026.1/9002>

The Plymouth Law & Criminal Justice Review
University of Plymouth

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Anglo-American Reflections

May I begin by thanking you for asking me to give the inaugural Pilgrim Fathers Lecture? I regard it as a very great privilege and honour. And it has given us the great pleasure of visiting Plymouth. I think I have visited Plymouth, Massachusetts; I have certainly, and very recently, visited Plymouth, Michigan; but I must shamefacedly confess that I have never before visited the father and mother of all Plymouths.

Your invitation has also prompted me to enquire a little into the Pilgrim Fathers themselves. Of those who set sail from here on 6 September 1620 in the Mayflower, it appears that 66 came from London and Southampton. The core of 35 came from Leyden in the Netherlands. They belonged to Independent or Congregational churches originally established in Nottingham and Lincolnshire, who had in 1608 emigrated to Amsterdam to escape Anglican oppression. After a short time there they moved to Leyden. But, as the DNB entry on William Bradford puts it, in terms which would earn applause at a Tory party conference, "actuated by a desire to live as Englishmen under English rule, they resolved to emigrate to some English colony ..." There was some debate about which, but in the end the vote went for the royal plantation in Virginia. So the party left from Leyden, picking up the additional recruits already mentioned. From Southampton the passengers travelled in two vessels, Mayflower and Speedwell. Unhappily, as maritime practitioners know only too well, vessels with names like Speedwell fail to live up to them.

So it was with Speedwell. After the voyage from Southampton to Plymouth she was judged to be irreparably unseaworthy and her passengers were transferred to join those already aboard the Mayflower. There the passengers must have endured a degree of sensory deprivation exceeding even that to be experienced in the economy cabin of a cut-price jumbo.

The level of satisfaction aboard the Mayflower cannot have been raised when weather conditions prevented the vessel making her landfall in Virginia and drove her to the rather less hospitable shores of Massachusetts. At this stage some of the London recruits, described at the time as "an undesirable lot", boasted that they were not under the jurisdiction of the Virginia Company which had granted the Leyden Separatists a patent for a private plantation and "would use their own libertie". To establish some form of government in this unwelcome situation, the Pilgrim leaders drew up one of the earliest and one of the most remarkable of American constitutional documents. Not intended as a constitution of the new colony, it served as such until 1691. The document, dated 11 November 1620, became known as The Mayflower Compact. I hope you will feel it merits quotation:

"In the Name of God, Amen. We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord King James, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith etc. Having undertaken for the Glory of God, and Advancement of the Christian faith, and the Honour

of our King and Country, a voyage to plant the first colony in the northern parts of Virginia; Do by these Presents, solemnly and mutually in the Presence of God and one another, covenant and combine ourselves into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the End aforesaid; And by Virtue hereof do enact, constitute, and frame such just and equal Laws, Ordinances, Acts, Constitutions, and Offices, from time to time, as shall be most meet and convenient for the general Good of the Colony; unto which we promise all due submission and Obedience ..."

And then follow 40 signatures, almost all of them very familiar English surnames like Clark and White and Fletcher and Fuller.

From this celebrated text I would draw three points, all of them - as I hope - of some importance and interest. The first is this. Later in the century and thereafter, political philosophers were to advance theories of government based on the hypothesis of a social contract, of men living in a state of nature and becoming, by agreement, members of an ordered civic society. This is what the Pilgrim Fathers, embarking on an attempt to live in what was almost literally a state of nature - and hostile nature at that - appear actually to have done. Only a minority of the Mayflower's passengers, it is true, appear to have signed the compact. But for them at least the basis of citizenship was explicitly contractual.

The second point worthy of note is that the signatories of the compact chose to put their faith in a written constitution. Perhaps this does not seem surprising: every club, association or trade union, after all, has its rules. But the Pilgrim Fathers had been bred in a country in which no one had ever attempted to put on paper the rules by which the country was governed. They clearly regarded a written statement of constitutional principle, skeletal though it was, as some guarantee of peace and order.

The third point is that this constitutional declaration was a highly democratic one. It so happened that the first signatory of the compact, John Carver, was chosen as the first governor of the new colony, and when he died 6 months later he was succeeded by the second signatory, who was elected annually to serve as governor until 1656, just before his death, except for 2 periods of respectively 3 and 2 years when he stood down at his own request. So of course the new colony had its leaders. But these leaders were elected by the citizens, and compared with any society the Pilgrim Fathers can ever have known there was a notable absence of hierarchy.

Nothing, of course, is quite new. From the time of Edward the Confessor, it had been the practice of English kings to confirm to their subjects the rights and liberties they would allow them to enjoy. After the Conquest the practice continued, with references (however unhistorical) to the good old times of the Confessor. It was in particular the practice for new monarchs to make such declarations on accession, as a sort of non-election

manifesto. The Great Charter of June 1215 formed part of this series. It was not of course a statute, for there was no Parliament. Nor was it in any way voluntary on the King's part. But it did include a number of terms traditionally included in such declarations, and it may not be fanciful to see such charters as a form of bargain or compact between the ruler and the ruled. Magna Carta itself, of course, was valid only for 3 months in the summer of 1215, was never fully executed and was annulled by a bull of Pope Innocent in August 1215. Such is the fate of some compacts. Happily, Magna Carta enjoyed an after-life more vigorous than most. By the time of the Pilgrim Fathers it had come to be seen as a cornerstone of the English constitution, and to that extent at least the English constitution was written. The democracy which the Pilgrim Fathers imported into the government of their new colony was, again, only novel up to a point. It found no reflection in the political life of England; but it reflected very fully the manner in which the Independent Congregations had ordered their church.

From these small beginnings have grown what are, I think, enduring differences between the United States and the United Kingdom. The notion of a compact endured. The Declaration of Independence proclaimed that to secure the rights of Life, Liberty and the pursuit of happiness "Governments are instituted among Men, deriving their just powers from the consent of the governed." The Constitution of the United States was adopted in the name of "We the People of the United States". The enduring faith in a written constitution was enshrined not only in that

constitution but in the constitutions of the ever-increasing number of constituent states. It was to become a republic of laws: in no country before or since have the law and lawyers occupied so central a place - and despite all the jokes about lawyers the law itself seems to continue to command respect and loyalty. And the Constitution itself was, and has remained, a remarkably democratic document, designed to ensure that the will of the majority shall prevail. Even in the appointment of federal judges the voices of the people, through the Senate, is to be heard: since 1787 about 30 out of 142 presidential nominees for appointment to the Supreme Court have been rejected.

de Tocqueville, visiting the United States in 1831-32, made pertinent observations, consistent with what I have suggested:

"However irksome an enactment may be, the citizen of the United States complies with it, not only because it is the work of the majority, but because it is his own, and he regards it as a contract to which he is himself a party.

In the United States, then, that numerous and turbulent multitude does not exist, who, regarding the law as their natural enemy look upon it with fear and distrust. It is impossible, on the contrary, not to perceive that all classes display the utmost reliance upon the legislation of their country, and are attached to it by a kind of parental affection."

The contrast with the United Kingdom is not absolute. We would justly claim that our system of government is democratic, and we are well aware that the government of the day draws its authority from the votes of the people cast at general elections. But I do not think we have the same vivid sense of "Us the People" as the average American citizen, nor the same sense (save at times of high public protest) of governments deriving their just powers from the consent of the governed. To some extent tradition, and the role of the monarch as head of both church and state, may cloud our vision. It could also be said that our system of parliamentary representation, whatever its other virtues, is a somewhat imperfect instrument for reflecting minority opinion. Certainly we have in general shown no urge for a written constitution. This is not to say that much of our constitution is not written. Large sections of what would appear in a written constitution if we had one are to be found scattered through numerous Acts of Parliament: one could instance the succession to the Crown, the powers of the House of Lords, the union with Scotland, the government of Northern Ireland, the right of representation in Parliament, the conduct of local government, the powers of the courts, the tenure of judges, etc etc. The true distinction between the American constitutional settlement and our own is not, I would suggest, that theirs is written and ours is not but that theirs is entrenched and ours is not. Theirs enjoys a special status, unamendable save by a cumbersome and highly consensual procedure. Ours enjoys no special, entrenched status. It is in theory amendable by a simple parliamentary majority. The contrast is obvious. Under the US

Constitution a senator, once elected to the US Senate, ordinarily serves for 6 years. That term cannot be altered without constitutional amendment. Here, a Parliament ordinarily sits for a maximum of 5 years. But in both world wars this period was extended. However improbable, it would be open to Parliament to extend the period even in peacetime.

There is a more substantial point to be made. I have already described the US Constitution as a document in which great pains were taken to ensure that the will of the majority should prevail. It was a highly majoritarian settlement. But even at the time when the Constitution was adopted there were fears about the position of minorities. It was all very well making sure that the will of the majority prevailed, but what if the power of the majority is used to oppress a minority? This was not a theoretical problem: the Pilgrim Fathers may themselves have been refugees from oppression, but they made quite effective oppressors themselves when they had the chance. The solution adopted to this problem was to agree that there should, almost at once, be amendments to the Constitution designed for the protection of minorities. It is there, in these first ten amendments, that one finds the famous clauses protecting religion, free speech, peaceable assembly and due process and forbidding, among other things, the inflicting of cruel and unusual punishments.

In prohibiting cruel and unusual punishments, the American Bill of Rights - as these amendments are usually called - of

course borrowed a provision enacted, in exactly the same terms, in the English Bill of Rights 1689. But there is this difference. So long as this amendment remains a part of the US Constitution, an American court will be not only entitled but bound to override any state or federal statute properly held to be inconsistent with it. de Tocqueville wrote that "the power vested in the American courts of justice, of pronouncing a statute to be unconstitutional, forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies." A British judge is in a different position. If Parliament were clearly and unambiguously to enact, however improbably, that a defendant convicted of a prescribed crime should suffer mutilation, or branding, or exposure in the public pillory there would be very little a judge could do about it - except resign. He would be duty-bound to give effect to a later, specific statute in preference to an earlier, general statute. There would be no higher, entrenched, fundamental law to which he could appeal. Even if he concluded that the defendant could probably mount a successful challenge to the provision in the European Court of Human Rights in Strasbourg he would not be able to place direct reliance on the text of the Convention.

In many areas these differences of constitutional principle perhaps make little difference in practice. For all his lack of constitutional guarantees one would rather have been James Sommerset in England than Dred Scott in the United States. There was not very much difference between the treatment meted out to German aliens in this country in 1940 and that enjoyed by

Japanese aliens in California in 1941. In both countries the present mood seems to be one of unusual, perhaps even unprecedented, vengefulness, regarding no punishment as too severe for the serious convicted prisoner: but in the United States sentences of death are routinely carried out which British courts would hold, and have held, to be cruel and unusual.

Sometimes, too, it may fairly be said that the two countries arrive at very much the same decision by different routes. The fifth amendment to the US Constitution provides (in part):

"... nor shall any person be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The English provenance of this provision is very clear. Article 39 of Magna Carta provided:

"No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."

But in seeking to protect British citizens against unfairness and abuse of power, British judges have not relied on this principle, even in the later re-enactments of Magna Carta. They have instead relied on the so-called rules of natural justice, so-called because there is nothing natural about justice; on a series of maxims, many of them derived from Roman law; on doctrines of

vires and authority; and, particularly in recent times, on self-made rules of procedural propriety and fairness. In the result, I would question how much difference there is.

But in one field the difference is stark. It arises from the absence in this country of anything equivalent to the first amendment prohibition on abridgement of freedom of speech and of the press. The difference is at once apparent in three areas: the very limited protection against defamation enjoyed by an American public figure; the general unwillingness of American courts to restrain forthcoming publications not yet shown to be unlawful; and the remarkable freedom of parties to litigation, whether prosecutors or defendants, plaintiffs or criminal defendants, to make statements directly bearing on the issues in a future trial. The publicity surround the trial of Mr O J Simpson is an extreme, but by no means unprecedented, example. There is, I think, no doubt about the general attachment of American citizens to this principle, although minority groups are beginning to complain that it deprives them of a protection they ought to have. But the courts appear determined to uphold the principle, to the extent of striking down statutes making it an offence to burn the Stars and Stripes, an act regarded as sacrilegious and unbearably offensive by the great mass of American citizens.

This contrast has recently been highlighted in a high-profile case proceeding in Canada, in a place some few miles from the border with the United States. In Canada the law governing comment on forthcoming proceedings is, as I understand, not

unlike our own. So the Canadian newspapers are obliged to be very reticent in their comment on the case. The American newspapers are not similarly inhibited, and the case interests the public on the American side of the border as much as that on the Canadian. So one has the anomalous result that material freely available in one place is suppressed in another place only a few miles away.

I think that most British citizens not professionally involved in the media would incline to think that on the whole we have perhaps got closer to the right answer on this matter than the Americans. We would expect our political leaders, having voluntarily entered the arena, to endure the ordinary rough and tumble of political controversy. But we would not, I think, wish to deny them legal protection against false and seriously defamatory publications. We would incline, I think, on the whole to allow material to be published, even though it is alleged to be defamatory, on the basis that if the complaint is made good the publisher will pay for his wrong. But if, on an application made before the date of publication, the prospective publisher is unable to show any arguable case that the material is true and cannot assert an intention to justify, I do not think most of us find it offensive that he is enjoined from publishing at all: what's said is said, and even the payment of damages cannot unsay it. On the issue of contempt, most of us would, I think, feel that judges could be relied on to ignore anything they have read in the newspaper or seen on television; but most of us would probably feel it desirable that jurors, particularly in high-

profile criminal cases such as those involving the killers of James Bulger, or the Bishopsgate bombing, or the Maxwell brothers, should enter the jury box with their minds as free as possible of preconceived notions about the facts or the guilt of the accused.

Even if we regard this latter principle as in general salutary, however, we may nonetheless feel unease about its operation in practice. In a recent case police officers accused of serious malpractice in an IRA case were discharged because the judge held that the surrounding publicity made a fair trial impossible. I do not criticise that decision. I accept it as correct. But there is, despite the existing law, much publicity surrounding some cases. Those I have mentioned are examples. I very much doubt whether, in the modern world, such publicity can be prevented. Must we not put our faith in the capacity of jurors, once they have entered the jury box, to abide by the oath they have taken and the direction they are given to decide the case according to the evidence they hear in court? I do not myself regard that as an extravagant or naive thing to do. Most of us with any experience of criminal juries are, I think, impressed by the serious, sober and conscientious way in which jurors with rare exceptions set about their momentous task.

I do not on the whole think that the lack of a constitutional guarantee of free speech in this country leads to an objectionable abridgement of the British citizen's freedom to say and write what he likes. But I do think that on occasion the

absence of anything comparable with the first amendment has unfortunate results, because the British judge is inclined to regard free speech as one right to be balanced against other competing rights and not as a right which must be protected and upheld save in the most compelling circumstances.

When I speak of unfortunate results, I have two fairly recent decisions in mind, neither of them in my view among the finest flowers of modern English jurisprudence.

The first is Home Office v Harman [1983] 1AC 280. Miss Harman, it will be recalled, had conducted a case for a prisoner who complained of his treatment while in prison. A large number of documents had been disclosed by the Home Office on discovery. These documents, it was accepted, were read out loud in full in open court. Miss Harman supplied copies of some of these documents to a journalist who made use of them in an article. Miss Harman was held to have been in contempt and fined. The House of Lords by a majority upheld this finding. Now there was a case against Miss Harman. Discovery involves an invasion of privacy, judged to be necessary in the interests of justice. Every lawyer knows, or certainly should know, that documents disclosed on discovery are to be used for the purpose of the action in which they are disclosed and no other purpose. So the majority in the House of Lords, as one would expect, had a reasoned basis for their decision. But they could never, surely, have reached that decision had free speech been regarded not as one right among many but as a right demanding everything short

of absolute judicial protection. These were, after all, documents which had been read in a public forum. Any reporter with the energy and the technical skill could have made a note of every word. Anyone with the necessary inclination and the necessary means could have bought a transcript. How, if free speech is in truth a right which we respect in deed as in word, could it have been judged right to hold Miss Harman liable? That question cannot in my view be answered, as Lord Diplock at the outset of his speech attempted to do, by saying that the case was "not about freedom of speech, freedom of the press, openness of justice or documents coming into 'the public domain'". It is not perhaps surprising that when Miss Harman appealed to the Court of Human Rights in Strasbourg, Her Majesty's Government found itself constrained to compromise: because, of course, the Convention of Human Rights does give certain rights, including free speech, a special status and permits only limited derogations.

My second example also is a majority decision of the House of Lords, this time the decision reached on 30 July 1987 in the course of the protracted Spycatcher litigation: [1987] 1 WLR 1248. The issue was whether certain newspapers should be restrained from publishing material taken from Peter Wright's book. By this time the book had gone on sale in the United States. Now I held no brief for Peter Wright, the author of the book. He was wrong to act as he did, however badly he felt the Secret Intelligence Service had treated him. And I have no reason to believe that the scorn poured on his allegations by official

sources was other than justified. But how, if freedom of speech and of the press are seriously valued in our society, can it be right to restrain publication of material freely available elsewhere and obtainable by anyone here who cared to take the trouble? In this instance again, I would suggest, the decision was one which could not have been reached had free speech been regarded not as one right among many but as a right demanding almost absolute judicial protection.

In some ways, however, the absence of entrenched constitutional guarantees may prove a blessing. In this country, as all lawyers know, it was the general practice until the Administration of Justice Acts of 1920 and 1933 to try common law civil actions with a jury. Thus in a claim for damages for tort or breach of contract the judge directed the jury on the law and the jury brought in a verdict on liability and damages. In 1920 and (after a brief restoration of the old law) 1933 the law was changed. Henceforward there were to be juries as of right in actions based on defamation, malicious prosecution, false imprisonment, seduction, and breach of promise. But although a discretion remained to order jury trial in other actions, such as claims for damages for personal injuries, the discretion was in effect snuffed out by the Court of Appeal's decision in Ward v James [1966] 1 QB 273.

I do not think I have ever met anyone in this country who mourned the demise of the civil jury. There are those, probably including all lawyers and members of the public other than those

who are or act for libel plaintiffs, who feel that the sometimes irresponsible generosity of libel juries brings the law into disrepute and that trials would be better conducted in this field as in others by a judge alone. I am not myself aware of any body of opinion hankering for a return to civil jury trial across the board. This seems to be a reform easily and beneficially effected.

In the United States such an effortless reform would not have been possible. The seventh amendment to the Constitution provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

We should not be very surprised at the American affection for juries, since it is (in relation to criminal juries) fully shared by the British people. When the Roskill Committee proposed that there should be no juries in serious fraud trials, the proposal proved unacceptable to public and parliamentary opinion. When the Runciman Royal Commission suggested restrictions on a defendant's existing right to demand jury trial, there were howls of protest. At least where guilt and innocence are concerned, most people would rather entrust their fortunes to the good-sense of their fellow citizens than to the narrow judgment of a professional lawyer. It is not therefore surprising that those who framed the

American Bill of Rights insisted on trial by civil jury as a protection of the citizen's rights and freedom. But in the late twentieth century the scene looks rather different. The awards made in tort claims in the United States have become a national scandal, with ever vaster awards being made for ever more trivial and questionable injuries. There can be no doubt that the level of awards has an inhibiting effect on business and professional life. At the heart of the problem lies the American civil jury, making hugely inflated awards to try and ensure that after the lawyers have taken their rich pickings there is still something left for the injured plaintiff. The British option, of quietly phasing out the civil jury, is not open. The constitutional guarantee of one century may become the constitutional millstone of the next. The second amendment guarantee of the right to keep and bear arms provides another persuasive example of a guarantee one is happy to do without.

I have so far concentrated on what seem to me significant differences between the American constitutional and legal settlement and our own. I would like, in closing, to suggest two respects in which we are perhaps moving together.

I have drawn a contrast between our own doctrine of parliamentary sovereignty - the unchallengeable power of Parliament to do everything except make a woman a man or a man a woman, as Dicey put it - and the American doctrine of ultimate judicial supremacy. But Parliament is looking a little less sovereign than it did. The doctrine of unlimited parliamentary

sovereignty had no counterpart in the law of Scotland before the Act of Union in 1707, and while in that Act there were certain articles which the post-Union parliament was expressly authorised to modify there were others which were stated to be fundamental and unalterable. Since the Act of Union was in effect a treaty made between two parties, the Scots Parliament and the English Parliament, which immediately thereafter ceased to exist on establishment of the British (Scots and English) Parliament, it is hard to see how the bargain could ever be modified. It is also noteworthy that in Article XVIII of the Act it is provided "that no alteration be made in Laws which concern private Right, except for evident utility of the subjects within Scotland." It is in my view highly questionable whether these are provisions which a parliamentary majority at Westminster could lawfully repeal. There have been several attempts since the Second World War to put the matter to the test. In the first case an injunction was sought to restrain the use by the Queen in Scotland of the title Queen Elizabeth II, the argument being that she was the only Queen Elizabeth Scotland had ever had. The second case challenged European Community restraints on Scottish fishermen: the relevant Regulations, it was said, were not for the evident utility of the subjects within Scotland. Since then there have been challenges to the poll tax, which was again argued with some plausibility to be not for the evident utility of the subjects within Scotland. In none of these cases so far has it been necessary for the Court of Session to resolve the underlying constitutional issue concerning the possible limitation of parliamentary

sovereignty in relation to Scotland. But it seems perhaps unlikely that the subject will remain dormant for ever.

If one turns one's gaze away from Edinburgh and towards Luxembourg, an even more striking infringement of parliamentary sovereignty is immediately apparent. To many this truth only became clear on the decision in the case of the Spanish fishing boats, R v Secretary of State for Transport ex parte Factortame [1991] 1 AC 604 and [1992] AC 85. This was the case, it will be recalled, in which the European Court decision inspired the British press to new levels of verbal ingenuity. "EC fishes in troubled waters" said The Independent. "Old Spanish Customs" commented The Times. "The legal bones and the stink over fish" wrote The Guardian. "Court ruling fails to make a splash" opined The Financial Times. "Brussels rules the waves" trumpeted the Daily Mail. "Britannia waives the rules" replied The Times. But behind all the journalistic cleverness lay a serious point, not new to any lawyer but apparently new to wide swathes of public and political opinion: that a British statute inconsistent with Community law was to that extent unlawful and void. Not since medieval times had judges, at least in England, been obliged to ask themselves a question unimaginable to Dicey: "Well, that may be what the statute says and means, but is it good law?" Now they were not only entitled but bound in appropriate circumstances to ask themselves that question. So they took a large step closer to the position of their American brethren, even though - in answering the question - they have the benefit, which American judges do not have, of a reference library in Luxembourg.

For my second point of rapprochement I again turn to de Tocqueville. In Democracy in America he wrote

"Scarcely any political question arises in the United States which is not resolved, sooner or later, into a judicial question."

The truth of that statement remains as obvious today as 150 years ago, probably more so. The battle for civil rights took place not in Congress but in the courts. The argument about abortion has become primarily a legal question. Hence the forum of debate has been different. The protections accorded to women and ethnic minorities in this country, for instance, have been the result of legislation in Parliament and in the European Community. Controversy about abortion has been focused in Parliament, not in the courts.

But there are, perhaps, signs of change. To an extent which would have surprised even our recent forbears issues now come before the courts raising for judicial decision questions of high political content. One need not delve far into the past to find examples: the legality of the treaty negotiated at Maastricht; the ordination of women to the Anglican priesthood; the amenability of a minister to the contempt jurisdiction of the court; the extent, if any, to which a minister must have regard to the effect of statutory provisions not yet brought into effect; the prerogative power to grant a free pardon; the executive power to review life sentences and parole; the Lord Chancellor's decisions affecting fees and legal aid; the ban on live broadcasting of Sinn Fein spokesmen; the decision to close

Bart's Hospital casualty department; pension arrangements for part-timer workers; the export of the Three Graces; and so on and so on. Now most of these challenges have failed. And there is of course no question of judges setting themselves up as self-appointed political pundits. Their role is, and is only, to review the lawfulness of acts and omissions brought before them. But the concept of lawfulness is widening, and to an extent unknown in our history the citizen is resorting to the courts to seek what is, in a sense, political redress. In this country, as in the United States, political questions are increasingly being transmuted into judicial questions.

The Pilgrim Fathers might not be altogether surprised, or dismayed. They put their trust in God, but also in "just and equal Laws, Ordinances, Acts, Constitutions, and Offices ... as shall be most meet and convenient form the general Good of the Colony." They would not have wished the courts to usurp the rights of the sovereign people, but they would have wished the courts to support and protect these rights. That is perhaps the challenge which continues to face all of us engaged, in any capacity, in the legal process, as much in the land from which the Pilgrim Fathers sailed as in that to which they sailed.