Journal of Philosophy, Inc.

Judicial Supremacy
Author(s): Donald Clark Hodges
Source: *The Journal of Philosophy*, Vol. 55, No. 3 (Jan. 30, 1958), pp. 101-111
Published by: Journal of Philosophy, Inc.
Stable URL: https://www.jstor.org/stable/2022252
Accessed: 19-03-2020 05:31 UTC

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at https://about.jstor.org/terms

Journal of Philosophy, Inc. is collaborating with JSTOR to digitize, preserve and extend access to *The Journal of Philosophy*

This content downloaded from 197.250.225.8 on Thu, 19 Mar 2020 05:31:34 UTC
All use subject to https://about.jstor.org/terms

nally related qualities. That is, qualities become externally related when they are used to specify spatial indeterminacy. More exactly, externally related qualities are qualities used as mutual specifications of spatial indeterminacy. Thus used, they are mutually environmental and are felt as further analyzable *separably* through appropriate focus.

According to this view, knowledge of objects as metaphysically other is nothing more than analysis, by selective focus, of an environmentally specified object. There is, accordingly, no need for assuming an inaccessible *Ding-an-sich* behind what is known of the objective world. Further knowledge or hypothesis is further analysis, or further possible analysis. Yet it is plausible that the ultimate causal analysis must resolve the object into subjectivity, not altogether unlike—with aspects of similarity and difference—the subjective process we find as ourselves.

MILDRED B. BAKAN

JUDICIAL SUPREMACY

PERHAPS the most neglected theory of sovereignty is the doctrine of judicial supremacy. Like other theories of sovereignty it makes elaborate claims to authority on behalf of a particular power but, unlike most of them, it gives precedence to the claims of the judicial body. The doctrine of judicial supremacy, simply stated, is that qualified judges are the supreme sovereign in the community because they alone possess the character, intelligence, and training requisite to judge what is just or unjust. By definition, an unjust judge is a contradiction in terms, so that those persons most qualified to govern are the direct representatives, not of the people, but of the sovereign principle of justice.

This theory is not a popular one and has fallen into general disregard. The judicative power was hardly mentioned in political treatises until the time of Montesquieu, who was the first to fully develop the doctrine of separation of powers. The idea of an independent judiciary is absent not only from the works of Hobbes, Locke, and Rousseau. Even Aristotle, although he assigned to government legislative, executive, and judicial powers, conceived of the judicial power not as a body of judges, but as limited to lay or popular courts.[1] One has to go back to Plato's doctrine of the philosopher king to discover a body of theory which fully

[1] *The Politics of Aristotle,* tr. by Ernest Barker (Oxford University Press, 1948), Bk. IV, ch. xiv, note.

This content downloaded from 197.250.225.8 on Thu, 19 Mar 2020 05:31:34 UTC
All use subject to https://about.jstor.org/terms

dignifies the temporal and spiritual powers of the judicial authority.

The medieval doctrine of the two swords, first clearly formulated by Pope Gelasius I (492–6), and brought to perfection by St. Thomas in the thirteenth century, also contains arguments for an independent judiciary.[2] Yet, the authority of the judicial power, as represented by the clergy, was limited to moral and educational matters. Although the final power of judging mankind was identified with the spiritual authority of the Church, it was not regarded by St. Thomas as supreme over temporal affairs. But from Pope Gregory VII to Pope Boniface VIII (or, roughly, from 1150–1300), the tendency of the medieval church was to carry the logic of judicial power to its ultimate conclusion by asserting the supreme authority of the spiritual as judge also of the terrene power. The Bull *Unam Sanctam Ecclesiam* of 1302 condemned the Gelasian doctrine of the two swords as a variant of Manicheism, on the ground that it upheld the power of the world as equal to that of the Church. In the tradition of Plato's *Republic,* Pope Boniface VIII sought to bring all human life under the authority of the judicial power, as represented by the Papacy, acting under counsel and by means of an array of ecclesiastical courts and institutions.[3]

The argument in support of judicial supremacy is that the best government is a just government, of which only qualified judges are competent to judge. That the best government is a just government is an assumption underlying most philosophies of government, although there is considerable disagreement concerning the meaning of justice. The question is who is most competent to determine, among the several different meanings of justice, which should serve as the supreme principle of government. As it would be unphilosophical to canvass a community for its version of the meaning of justice, so it would also be unphilosophical to canvass its duly elected representatives. A knowledge of justice is not to be had by counting heads. Granted that the best government is a just government, the only persons fit to rule are those qualified judges competent to decide what constitutes a reasonable conception of justice.

To judge well, according to Aristotle, presupposes the possession of practical wisdom—the capacity of knowing what is just or reasonable for man, and of correctly deliberating concerning the means of achieving it.[4] A judge acts reasonably by treating similar

[2] Barker, Ernest, *Principles of Social and Political Theory* (Oxford University Press, 1951), Bk. I, §4.

[3] *Ibid.*

[4] *The Ethics of Aristotle,* tr. by J.A.K. Thomson (London: George Allen & Unwin Ltd., 1953), Bk. VI, chs. xii-xiii.

This content downloaded from 197.250.225.8 on Thu, 19 Mar 2020 05:31:34 UTC
All use subject to https://about.jstor.org/terms

cases similarly, and dissimilar cases dissimilarly, according to the nature, properties, and special circumstances of each. The just man acts for the good of the community as a whole, rather than in the interests of particular groups, and adjusts differences between private citizens by considering the just interests of each. The calculus of justice has given rise to a separate science of jurisprudence, so that it is only the judge who is competent to administer it. The justice or injustice of particular actions is beyond the competence of laymen; for they are inexpert in the science of law, and partisan in their own conceptions of justice.

The rule of judges is distinct from theocracy, in being founded upon the sovereignty of human reason; and it is unlike government by experts, in presupposing in its rulers a just character. Unlike the expert, the judge must be able to deliberate impartially about matters which affect his own life and well-being. He must possess the qualifications of the statesman as well as the philosopher: the social conscience of the former supported by the sagacity and discernment of the latter. Because he is not only a philosopher, he has much to lose if his judgments should violate established interests, and is called upon to make much greater sacrifices in the cause of truth. A man is not qualified to judge who lacks the strength of will to face squarely controversial issues. Selections of data that lead to safe, but irrelevant or partial, generalizations are evidence of injustice. As a judge is a respecter of the whole truth, to judge with partiality is not to judge at all.

The doctrine of judicial supremacy asserts that judges are the supreme governors of the community, but not necessarily the sole governors. Although judges are, alone, qualified to exercise supreme power, they are not omniscient, and require the intelligent coöperation of the citizens in order to govern wisely. The judge will not seek to rule alone, but will wish to consult those over whom he exercises power. Self-government is an indispensable means of moral and political education, so that to deny it to the citizen-body is to fail in the fulfillment of the principal purpose of human law, which is the education of the citizens. It is only the more extreme versions of the theory, such as the doctrine of a supreme guardian or philosopher king, which would exclude the citizen-body from the privileges and responsibilities of participating in public life. An assembly of judges is also incapable of acting as the sole judge of mankind, as to do so would mean that a few can do better the work of many.

Judicial functions must be shared if the judges or guardians are to legislate in the best interests of each. As Aristotle observed, there are a number of arts in which the creative artist is not the

This content downloaded from 197.250.225.8 on Thu, 19 Mar 2020 05:31:34 UTC
All use subject to https://about.jstor.org/terms

only judge of excellence. The value of a house can be assessed by the user as well as by the builder, and the diner rather than the cook will be the best judge of a feast.[5] The average citizen knows, even better than the guardian or ruler, "where the shoe pinches." Like the shoemaker, the guardian is able to perform his function justly only by consultation, which requires a consensus of opinion in order to determine the particular consequences of applying a general principle to a concrete situation. It is not an assembly of judges that discovers the needs of a people, but the people who stand in relation to one another and think out together the problems which they share in common.[6]

Due to the prudential and provisional character of practical judgments, popular discussion and deliberation are required to aid and correct the decisions of the guardians. The application of justice to particular circumstances is conditional upon the state of human relations at a given time and place; and the opinion of those who stand in a particular relation to others is needed to determine the specific changes in social relations which render old rules inapplicable and make the formulation of new rules necessary. The franchise and the plebiscite are required as gauges of social thought. As a knowledge of human materials is a necessary condition of just government, the guardians are able to judge the amount of just coercion the citizens can bear only by means of the organs of public expression and deliberation.

Active participation in public affairs is also necessary if the citizens are to act justly and develop into just persons. Justice is a matter of doing and sharing in public responsibility, so that to deny the citizens a share in government is to arrest their possibility of moral and intellectual growth. The purpose of education is to make people just, so that the guardians are responsible for training and educating the citizens to participate in the government of the community. The guardians are in somewhat the same role as the responsible parent, who will allow some measure of self-government to his children, reserving for himself the ultimate power to check any actions that may be harmful to them. According to Mill, the responsibility of legislating for others is both a practical and intellectual discipline necessary to the development of human character. It encourages men to rise above private partialities, and to develop their sense of justice in awareness of their responsibility.[7]

[5] *The Politics of Aristotle*, tr. by Barker, Bk. III, ch. xi, §14.

[6] Barker, *Principles of Social and Political Theory*, Bk. V, §3.

[7] Mill, John Stuart, "Considerations on Representative Government," *Utilitarianism, Liberty and Representative Government* (New York: E. P. Dutton & Co., 1950), ch. 2.

This content downloaded from 197.250.225.8 on Thu, 19 Mar 2020 05:31:34 UTC
All use subject to https://about.jstor.org/terms

The citizen-body is more than a mere advisory group. Although the scope of affairs over which it should be sovereign is limited by what people can best do in combination, this includes electing the better sort of citizens to office and calling them to account when their term expires. As individuals, the greater number of citizens are incapable of ruling justly; but collectively they are able to determine "how and where the shoe pinches" and to pass judgment on the behavior of those who do hold office. Mistakes may be made in electing a man to office, but the right of holding him to account at the end of his tenure should help prevent repetition. There are other errors of judgment that could be obviated by reducing the power of the citizen-body to the right of consultation, but to do so would unduly limit the ordinary citizen's sense of responsibility.

For the guardians to legislate in the just interests of the people, they must delegate responsibility to professional groups capable of representing the public interest—an office which the guardians are unprepared to exercise. The interests of the people are best expressed through the medium of political parties, which possess the technical knowledge required to implement them, and are organized for that special purpose. Although political parties are the expression of vested interests, and incapable by themselves of legislating justly, the most important contribution of the party is its capacity to express the needs of particular groups.

Although no single party is an impartial representative of the people, that system of government is most representative in which there is multi-party rule and each has a share in proposing legislation. According to Rousseau, it is not the "general will" but particular interests that are represented by the party system.[8] As each political party is representative of a different vested interest, "it is best to have as many as possible and to prevent them from being unequal. . . ."[9] Otherwise, the so-called delegates of the people will not represent the body of the people, but only a part of it. Under a one or two party system it is meaningless to assert that the people are obeyed when their delegates are obeyed, because delegates are not representative of the people but of special interests, and it is the dominant interests which are represented. Factions are injurious to the public when the more powerful parties ignore the claims of minorities and seek to suppress rival interests. But, they are absolutely necessary to judicial rule, as without them

[8] Rousseau, Jean Jacques, "The Social Contract," in *The Social Contract and Discourses*, tr. by G. D. H. Cole (New York: E. P. Dutton & Co., 1950), Bk. II, ch. iii.

[9] *Ibid.*

This content downloaded from 197.250.225.8 on Thu, 19 Mar 2020 05:31:34 UTC
All use subject to https://about.jstor.org/terms

the judges cannot be correctly informed of the different and competing concerns of the people.

The matters over which the representative body should be sovereign are limited to the clarification and implementation of the interests of the citizen-body in the form of counsels of proposed legislation. Although the representative power is, to some extent, independent of the people, it has to possess discretionary powers if it is to govern effectively in the interests of those it represents. The legislative assembly should function as a conciliary or advisory body, proposing but not disposing. Because its proposals will, in many cases, represent a configuration of power interests, they cannot become law unless ratified by a higher authority. As an unjust law is no law at all, many such proposals will have to be remanded to the legislative council for reconsideration. Although the function of deputies is to propose legislation that reflects the interests of all, their proposals cannot become law unless they are also congruent with the requirements of justice.[10]

The representatives of the people are sometimes mistaken in their sense of justice, but they are not altogether incapable of proposing just legislation. The power of proposing legislation enables them to share in government and, as a result of constantly having their proposals remanded to them for reconsideration, to develop their sense of responsibility to the best interests of the citizen-body. Since, for there to be any legislation representative of the interests and needs of the citizens, they must propose it, the representatives of the people are obliged to develop themselves as moral agents in order to carry on the business of the community. The responsibility of proposing legislation, like the responsibility of electing just representatives, may be attended with many mistakes; but it is ultimately justified as a means of developing the general sense of justice and moral character of the people.

Besides the legislative council and the electorate, a third power of assistance to the guardians, in their task of governing justly, is the executive or auxiliary branch of government. According to Locke, the reason for separating the legislative and executive powers is to prevent the former from exempting itself from obedience to its own laws, so as to suit the law to its own advantage.[11]

[10] Although Rousseau limited the role of deputies to that of councilmen rather than legislators, he was mistaken in believing that the "general will," or impartial concern for the common interest, resides in the people, instead of guardians whose special function is to govern impartially. Cf. *ibid.*, Bk. III, ch. xv.

[11] Locke, John, "An Essay Concerning the True Original, Extent & End of Civil Government," *Two Treatises of Civil Government,* based on the 6th ed., London, 1764 (New York: E. P. Dutton & Co., 1940), ch. xii, §143.

This content downloaded from 197.250.225.8 on Thu, 19 Mar 2020 05:31:34 UTC
All use subject to https://about.jstor.org/terms

Such a separation of powers is insufficient, however, to compel the legislature to pass laws in the public interest; it is sufficient only to compel the legislators to obey laws of their own making. For the purpose of just government, the separation of powers is necessary for a different reason. The legislative council is a representative body, whose purpose is to advise the guardians of the interests and needs of the people. The executive power is an auxiliary body, whose only purpose is to execute the law. The knowledge required to execute the law effectively requires the specialized and professional training of civil servants, and is different in kind from the knowledge of local problems and special interests required of the representatives of the people. The strongest reason for separating the legislative and executive branches of government is their distinct and separate functions; as each is qualified to perform a different service, and neither is qualified to perform both functions well.

The executive power, as Rousseau pointed out, is only a force to give the law effect. Although it possesses a discretionary power of its own, it operates only by particular acts.[12] The judicial and legislative councils are concerned with general measures. The execution of a criminal is a particular act, so that it cannot be the function of either body; it is a right the guardians may confer, but neither they nor the representatives of the people are prepared to exercise it. The business of seeing that the law is properly enforced is the work of administrators rather than statesmen; and specialized knowledge is required which is different from that required for legislation.

As the executive or administrative branch of government is only an auxiliary power, it is not a representative body like the legislature. The latter is representative only if the members are elected and called to account by the citizen-body. But, as it is not the business of the executive to represent special interests but to enforce justice in the community, its capacity to govern justly is not contingent upon its members' election to office. There are other and better means of selecting administrators and reviewing their work, such as trial assignments and competitive examinations. The executive branch of government and the civil service are one and the same; and the supreme executive should be selected on the same basis as other administrators.

For a reasonable account of the just powers of executives and their method of selection one may turn to Plato's *Republic*. There the executive power is conceived as an auxiliary body for managing the bureaucratic machinery of state, and for applying and

[12] Rousseau, Jacques, "The Social Contract," *op. cit.*, Bk. III, ch. xvi.

This content downloaded from 197.250.225.8 on Thu, 19 Mar 2020 05:31:34 UTC
All use subject to https://about.jstor.org/terms

enforcing the laws in particular situations. It is not subordinate to the citizen-body or its representatives, but to that higher power which alone is capable of determining what is or is not lawful for the community. The more popular view is that the supreme power of government is the representative body, and the executive is subordinate to it. But, if the representatives of the people have power only to propose and not to ratify legislation, the executive should be directly subordinated not to it, but to a body of judges having supervisory powers. The executive is inferior to the judicial and legislative bodies because it is an auxiliary organ which does not share in the powers of legislation. For the same reason it is also inferior to the citizen-body, whose main function is to select councilmen capable of representing it in the legislative assembly.

The judiciary is the final tribunal ratifying proposed legislation presented to it by duly elected representatives of the people. The power to ratify proposed legislation suggests the correlative power to veto those proposals which fall short of the requirements of justice in any given case. The judges should also possess the emergency power of recommending to the representative council the kind of legislation that should qualify for immediate ratification. For the legislative or representative council to carry on its business in a crisis it cannot have its own proposed legislation constantly remanded to it for reconsideration. But, if there can be no law without ratification by the judiciary, neither can there be any law which is not proposed by the legislative assembly. Self-government is a necessary, although not a sufficient condition of just government; and it is the executive, not the legislative or citizen-body, that is a mere auxiliary of the judicial power. The powers of the judges are justly limited, checked, and balanced by the lower assembly. Such a limitation would have been inconceivable in Plato's republic.

If the supreme judge is conceived on the model of a judicial council, there is no need to assume the infallibility or divinity of a single judge. The supreme court or council may, on the other hand, appropriate to itself such powers of legislation as to leave none to the citizen-body. Plato's guardians are legislators as well as supreme judges of the law; as a result, the auxiliaries and producers are left the task of applying and obeying it. In ruling without the active participation of the citizen-body, the guardians fail in their responsibility of training and educating the citizens in the performance of higher tasks. Only if the powers of the guardians are limited to ratifying proposed legislation, deliberated upon and submitted to them by a legislative council elected by the people,

This content downloaded from 197.250.225.8 on Thu, 19 Mar 2020 05:31:34 UTC
All use subject to https://about.jstor.org/terms

and to making recommendations to the council, are the guardians able to exercise their just prerogative.

Government by guardians, dedicated to ruling justly with the consent and coöperation of the citizens, would seem to satisfy our highest practical aspirations. But, is it a possible form of government? Is the doctrine of judicial supremacy compatible with human limitations and capable of practical implementation? One of the classic arguments against judicial supremacy is that the union of temporal and spiritual powers in a single body is self-defeating. Judges, whether clerical or lay, cannot historically acquire temporal power without becoming corrupted by it, thus ceasing to exercise their proper function as critics or judges of the powers that be. The argument against theocracy can be expanded into an argument against political utopianism in general. Every revolution is, in a sense, a revolution betrayed, as the very acquisition of power transforms radicals into conservatives or defenders of the status-quo. The possession of political power is a burdensome responsibility, full of temptations to those who, unprepared for special privileges, suddenly find themselves with the power of enjoying them. The only way of preserving the integrity of judges, it has been argued, is to prohibit them from ever exercising temporal authority. In criticism of Boniface's doctrine of judicial supremacy, Dante appealed to the words of Christ before Pilate, who renounced this kind of government by saying: "My kingdom is not of this world. If my kingdom were of this world, my servants would certainly strive that I should not be delivered to the Jews; but now my kingdom is not from hence." [13]

That it is difficult for judges not to become corrupted by the enjoyment of temporal power is true enough. There was much wisdom in Christ's having renounced the principle of judicial supremacy in temporal affairs. His adherents were politically unprepared for its exercise, and it was wiser of them to withdraw from the corruptions of the world, and to criticize society from afar, than to risk their judicial function in the struggle for power. As human nature has not changed appreciably in the last two millennia, every radical and revolutionary movement may be suspected of inconstancy. In spite of progress in the affairs of men, as long as judges are unprepared for the exercise of power, for them to enjoy temporal power is to face the risk of tyranny.

The theory of judicial supremacy, however, does not sanction the sovereignty of judges unless they are well-qualified to assume

[13] Dante, *On World-Government or De Monarchia*, tr. by Herbert W. Schneider (New York: The Liberal Arts Press, 1950), Bk. III, ch. 15. The quotation is from the Gospel According to St. John, 18: 36.

This content downloaded from 197.250.225.8 on Thu, 19 Mar 2020 05:31:34 UTC
All use subject to https://about.jstor.org/terms

leadership. It is not enough for men to be saints in order to govern wisely. In addition to the requirements of the philosopher there are those of the king or statesman. If it be objected that the goal of judicial supremacy is impractical, or unrealizable in the present stage of mankind, one can reply that it is only a model, and that few such models can ever be fully realized in fact. The function of the political philosopher is to restore reason to political thinking, even if he should fail to make practical politicians any more reasonable.

To argue that there is nothing to prevent the abuse of privilege by a power that is self-perpetuating is to confuse, moreover, the manner in which judges are selected with the conditions of their selection and the requirements for holding office. The mode of selecting judges is certainly undemocratic, as they do not run for office but are appointed. The proper judge of who will make a good judge is himself a judge, so that the judicial power is self-perpetuating. However, an authority that is not derived from the citizen-body or its elected representatives need not be unrepresentative nor end in tyranny. If the powers of the rulers are justly checked and balanced by a legislative assembly elected by the people, they may be prevented from suiting judgment to their own interests. The conditions of selection may also be made sufficiently rigorous to preclude the likelihood of eventual corruption.

Although the civil service is also selected on the basis of rigorous examinations, trial or merit plays a much larger role in the selection of the guardians. According to Plato, candidates should be subject to ordeals of toil and pain and to the temptations of pleasure in order to determine their moral fiber.[14] Intelligence tests and competitive examinations may be sufficient to select members of the executive, but they are insufficient to qualify a man in the possession of wisdom and justice. Young men make good executives, but it is only the man of years and experience who is qualified to judge others. One of the conditions of a good judge is that he should judge for its own sake without expectation of reward. To this end, Plato deprived his guardians of the possibility of gain in their profession: the guardians, in his republic, are forbidden to own any property; they are required to live in barracks, to eat at common tables, and to forgo the pleasure of raising a family.[15] Members of religious orders hold office on a similar basis. Bishops and cardinals, as judges of the community, are able to fulfill their responsibilities only after the manner of

[14] *The Republic of Plato,* tr. by F. M. Cornford (Oxford University Press, 1945), III, 414.

[15] *Ibid.,* III, 416–419.

This content downloaded from 197.250.225.8 on Thu, 19 Mar 2020 05:31:34 UTC
All use subject to https://about.jstor.org/terms

Plato's guardians. The corruption of guardians is possible if the standards governing their selection and maintenance in office are relaxed—as a result of the interference of an over-powerful executive or legislative body intent on reducing their power. But, it is unlikely that these standards will be relaxed from within, as judges are trained to judge in the ideal interests of all.

DONALD CLARK HODGES

UNIVERSITY OF MISSOURI

EMOTIVISM, EXPRESSION, AND SYMBOLIC MEANING

MANY recent discussions of art as expression and as symbolic meaning have been conducted within a framework which presupposes an emotivistic interpretation of aesthetic experience. Yet it has seemed to me that they have at many points tended to ignore and often to do violence to what I would have supposed an emotivist would regard as basic requirements of his theory. I should like in the present paper to try briefly to explicate some of these requirements to the end of noticing their bearing on some questions about expression and about symbolic function of art. I shall not be so much concerned to argue the truth of emotionalist aesthetics as to set forth some of the implications of what I believe is typical formulation of this sort of theory.

The essentials of such a theory may be given in the following definitions:

1. An aesthetic object is an aesthetic datum; i.e., whatever entity or set of entities, concrete or abstract, is given to aesthetic attention.

2. An aesthetic experience is the experience of a percipient who is attending aesthetically to an object; i.e., who is simply and exclusively concerned with the features of the object as they "feel" to him. By "feel" is meant emotional feel and not tactual feel or kinaesthetic feel or any metaphorical extensions of these.

3. An art object is one devised by a person to be such that, in his own aesthetic experience of it at least, it will have the feel he intended it to have.

The theory, as thus skeletally formulated, does not, I think, depart radically from many statements of emotivist aesthetics familiar to us. I shall attempt to fill in the skeleton with interpretations which seem to me to give cogency to the theory. I shall begin by inquiring how an emotivist aesthetics, constructed on these

This content downloaded from 197.250.225.8 on Thu, 19 Mar 2020 05:31:34 UTC
All use subject to https://about.jstor.org/terms