

The judiciary
has freedom
from political,
legislative and
executive
control.

It is only when the judiciary
enjoys such freedom can
the judiciary be said to be
independent.

HRH Sultan Azlan Shah

Checks and Balances in a Constitutional Democracy

Harvard Club of Malaysia

19 September 1987, Kuala Lumpur



ROYAL ADDRESS

His Royal Highness Raja Nazrin Shah

Regent of Perak Darul Ridzuan

27th Sultan Azlan Shah

Law Lecture

The Right Honourable Lord Sumption and Lady Sumption,

His Royal Highness Sultan Azlan Shah was particularly looking forward to this lecture to be delivered by the Right Honourable Lord Sumption, but on the advice of his personal physicians, His Royal Highness is unable to grace us with his presence this evening.

HRH Sultan Azlan Shah and HRH Tuanku Bainun have asked me to convey their personal greetings to you both, and to extend their deep regrets for not being able to grace this evening's event.

My wife and I wish you both a very warm welcome to Malaysia. On behalf of the Sultan Azlan Shah Foundation and the University of Malaya, I thank you, Lord Sumption, for the honour you bestow on us by being the Speaker for this evening's Lecture.



Ladies and Gentlemen,

The Right Honourable Lord Sumption needs very little introduction. Your overwhelming presence here this evening is clear recognition of his eminence.

Lord Sumption is one of the most outstanding jurists in the United Kingdom, if not in the Commonwealth. His elevation directly from the English Bar to the highest court in the United Kingdom, the Supreme Court, the first barrister in over 60 years to do so, is a clear testimony of his brilliance.

During the relatively short period during which Lord Sumption has sat on the Supreme Court, he has already made a significant mark by delivering some of the leading judgments of the Court.

Only recently, in an important decision of the Supreme Court, Lord Sumption held that school authorities could not delegate their duty of care towards school children to a third party so as to absolve it from an action in negligence brought against the school. In that case, it was held that the school was still liable in negligence when a student suffered serious brain injuries during a swimming lesson in the school swimming pool, even though the school did not conduct the lessons itself.

In another case decided earlier this year, Lord Sumption elucidated with clarity the century-old principle of company law, the doctrine of piercing or lifting of the corporate veil, and how it may intersect with a matrimonial case.

In that case, seven properties, five of which were in London, were held by two offshore companies, and not in the name of the husband. The question



before the Supreme Court was whether the court had power to order the transfer of these seven properties to the wife given that they legally belonged not to the husband but to his companies. It was held that as the husband, and not the two companies had provided the funds to purchase the properties, and as he had control over the two companies, the properties were held on trust for the husband, and therefore formed part of the matrimonial assets which the wife was entitled to.

This decision has been hailed as a landmark decision in both company law and family law.

One fact that many of you may not be aware of is that Lord Sumption, even before studying law, studied at Eton and then studied history at Magdalen College, Oxford where he obtained a First. Subsequently, as a Fellow at Magdalene College, he taught history for five years. It may come as a surprise to some of you that Lord Sumption is quoted to have said, “I don’t love law but I enjoy practising it. I do love history.”

His first book on pilgrimage in the Middle Ages was published in 1974, followed by *The Albigensian Crusade* in 1978.

Since the late 1990s he has been engaged on a vast narrative history of the Hundred Years War. Three volumes (*Divided Houses*, *Trial by Battle*, and *Trial by Fire*) have been published to critical acclaim. I understand that there will be another two: the fourth being scheduled to appear in 2015 to coincide with the 600th anniversary of the English victory at Agincourt. His work on the Hundred Years War has also been aptly described as a “magisterial account”, and “one of the great historical works of our time”.



Only after his stint as an academician did Lord Sumption pursue a career in law. To quote: “Eventually law seemed to offer the best opportunity for an intellectually stimulating occupation with the opportunity to make a reasonable living”. The rest is “history” as they say.

Today, besides being a brilliant jurist and a well-regarded historian, Lord Sumption is a Governor of the Royal Academy of Music; he plays the piano and has a keen interest in the opera.

He is truly an amazing and inspirational figure to all of us who have not pursued a legal career as yet, and are harbouring an ambition to do so.

Ladies and Gentlemen, it now gives me great pleasure to invite The Right Honourable Lord Sumption to deliver the Twenty-Seventh Sultan Azlan Shah Law Lecture.

The Right Honourable Lord Sumption.



I am not going to suggest
that the fabric of society
will break down because
judges make law
for which there is no
democratic mandate.

The process by which democracies decline
is more subtle than that. They are rarely
destroyed by a sudden external shock or
unpopular decisions. The process is usually
more mundane and insidious.

What happens is that they are slowly drained
of what makes them democratic,
by a gradual process of internal decay
and mounting indifference, until one suddenly
notices that they have become something different,
like the republican constitutions of Athens
or Rome or the Italian city-states
of the Renaissance.

Lord Sumption

The Limits of Law

27th Sultan Azlan Shah Law Lecture, 2013

“Your Royal Highness, ladies and gentlemen, it is a great honour as well as a personal pleasure for me to be giving the Sultan Azlan Shah Law Lecture.

This is the twenty-seventh lecture in this distinguished series, and I am conscious that I am following in the footsteps of some of the outstanding jurists of the common law world.”

Lord Sumption

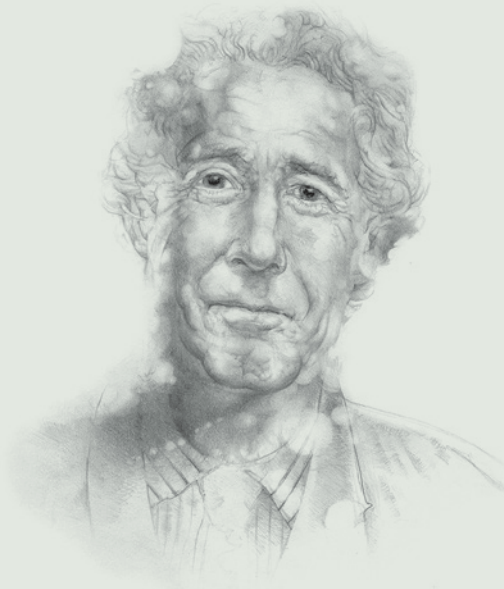
The Limits of Law

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The Right Honourable Lord Sumption

The Limits of Law



Jonathan Sumption
(b. 9 December 1948)

Lord Jonathan Sumption, OBE was born on 9 December 1948. He was educated at Eton College and then Magdalen College, Oxford University, where he graduated with first-class honours in history in 1970.

Lord Sumption taught history at Magdalen College for five years prior to becoming a barrister. He was called to the Bar by the Honourable Society of the Inner Temple in 1975, became a Queen's Counsel in 1986 and a Bencher of the Inner Temple in 1991.

In May 2011, Lord Sumption was appointed to the United Kingdom Supreme Court (previously the Appellate Committee of the House of Lords), the United Kingdom's highest court. He was the first barrister in



more than 60 years to be appointed to the United Kingdom's apex court directly from the Bar.

Prior to his appointment as a judge of the Supreme Court, Lord Sumption had been a recorder and Deputy High Court Judge, and a judge of both the Court of Appeal of Jersey and the Guernsey Court of Appeal. He was also a commissioner of the Judicial Appointments Commission, the body which takes responsibility for appointing judges in England and Wales.

While at the Bar, Lord Sumption was one of England's most sought-after barristers, and has been described as the "cleverest man in Britain". He received universal acclaim from legal directories in the United Kingdom, where he was, among other things, said to be "the best barrister in the country bar none"; "the Rolls-Royce of the commercial Bar"; and "the best of his and quite likely any other generation".

Lord Sumption appeared in numerous landmark decisions of the English courts, including many well-known House of Lords decisions such as *Moore Stephens v Stone & Rolls Ltd* [2009] UKHL 39, *Three Rivers District Council v Bank of England* [2004] UKHL 48, *Dubai Aluminium v Salaam* [2002] UKHL 48, *Equitable Life Assurance v Hyman* [2000] UKHL 39; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] UKHL 12. He was also regularly instructed to appear in other leading common law jurisdictions such as Australia and Hong Kong.

In his last trial conducted as a barrister before being sworn in as a justice of the United Kingdom Supreme Court, Lord Sumption acted for Roman Abramovich, the owner of Chelsea Football Club, in his successful defence against



a £3.2 billion lawsuit brought by the late Boris Berezovsky, a case which was described in the media as the biggest private court case in British legal history.

Lord Sumption has delivered judgment in numerous landmark decisions of the UK Supreme Court since his appointment in 2011.

In *Woodland v Essex County Council* [2013] UKSC 66, Lord Sumption delivered the judgment of the Supreme Court holding that school authorities could not delegate their duty of care towards school children to a third party so as to absolve itself from an action in negligence brought against the school. In that case, it was held that the school was still liable in negligence when a student suffered serious brain injuries during a swimming lesson in the school swimming pool, even though the school did not conduct the lessons itself.

Lord Sumption delivered the leading judgment in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, wherein Lord Sumption provided an authoritative restatement of the century-old principle of company law, the doctrine of piercing or lifting of the corporate veil, and how it may intersect with a matrimonial case. This decision has been hailed as a landmark decision in both company law and family law.

In *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, Lord Sumption delivered the leading judgment of the Supreme Court which held that the UK Treasury had acted unlawfully in directing sanctions to be imposed restricting the appellant Iranian commercial bank from accessing the UK financial markets. The decision was based on the grounds that the Treasury's direction was irrational, disproportionate and discriminatory, and that the Treasury, in breach of the rules of natural justice, had failed to give the bank an opportunity to make representations before the direction was made.



Lord Sumption also gave judgment in the decision of the UK Supreme Court in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, a case of great public interest where an enlarged panel of nine Supreme Court justices had to determine whether the present state of the law of England and Wales relating to assisting suicide infringed the European Convention on Human Rights, and whether the code published by the Director of Public Prosecutions relating to prosecutions of those who are alleged to have assisted suicide was lawful.

Outside of the law, Lord Sumption is also an accomplished medieval historian, owning in excess of 7,000 history books. His critically-acclaimed work on the Hundred Years War—with three volumes entitled *Trial By Battle* (1990), *Trial by Fire* (1999) and *Divided Houses* (2009) published to date—has been described as “magisterial” and as a work that continues “to redefine our understanding of the Hundred Years’ War”. Lord Sumption once observed of war: “war has been the chief collective enterprise of mankind until quite recently. War is destructive and inhumane. Yet it has shaped human institutions. It has stretched human experience and human capabilities.”

Lord Sumption is the Deputy Chairman of the Governing Body of the British Royal Academy of Music. Between 2002 and 2011, he was a regular book reviewer for *The Spectator*. He was honoured as an Officer of the Most Excellent Order of the British Empire (OBE) in 1998.

Lord Sumption is married to Teresa Sumption, née Whelan and has three children.



“ Of course, a sovereign Parliament may transfer part of its legislative power to other bodies which are not answerable even indirectly to the people of the United Kingdom.

But it would be odd to deny that this undermines the democratic process, simply because Parliament has done it.

A democratic Parliament may abolish elections or exclude the opposition or appoint a dictator.

But that would not make it democratic.”

Lord Sumption

The Limits of Law

27th Sultan Azlan Shah Law Lecture, 2013



Parliament is
sovereign and
has the sole
prerogative
of legislating.
Ministers are
answerable to
the courts for
the lawfulness
of their acts.

But they are accountable
exclusively to Parliament
for their policies and for the
efficiency with which they
carried them out, and of
these things Parliament was
the sole judge. This is neat.
It is elegant. And it is
perfectly useless, because
it begs all the difficult
questions.

27

The Limits of Law

Lord Sumption
Justice of the Supreme Court of the United Kingdom

Your Royal Highness, ladies and gentlemen, it is a great honour as well as a personal pleasure for me to be giving the Sultan Azlan Shah Law Lecture. This is the twenty-seventh lecture in this distinguished series, and I am conscious that I am following in the footsteps of some of the outstanding jurists of the common law world. I am also conscious, as I suspect all of us are, that I am doing so in the absence of His Royal Highness Sultan Azlan Shah, for whom these lectures have been a source of justifiable pride. I am sure that I reflect the feeling of all of us in wishing him a swift return to good health.

The title of my lecture is not, I am afraid, calculated to tell you much about its contents. It is in part inspired by a well-known essay published in 1978 called “The Forms and Limits of Adjudication” by Lon Fuller, the distinguished legal philosopher who held the chair of law at Harvard for many years. Professor Fuller took as his starting point the

Text of the Twenty-Seventh Sultan Azlan Shah Law Lecture delivered on 20 November 2013 in the presence of HRH Raja Nazrin Shah, Crown Prince of Perak, and HRH Tuanku Zara Salim.

In a precedent-based system,
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concealed in the
luxuriant undergrowth
of ancient principle
and scattered
legal decisions,
as the great eighteenth century
jurist Blackstone supposed
and generations of common
lawyers pretended.

¹ [2005] 2 AC 680 at [32]. |

fact that the system of adjudication by courts of law was what he called “a form of social ordering”. It was part of the complex mechanism by which the relations between people are governed and regulated. It operates side by side with other means of social control, such as legislation, administrative action, professional self-regulation, and more or less powerful social or cultural conventions. The question which he asked himself was this: what kinds of social tasks can properly be assigned to judges and courts, as opposed to these other agencies of social control?

It is a much-debated question, and there are two features of our legal culture that make it a particularly important and difficult one.

The first is that in the common law world there are unquestionably some areas in which judges necessarily make law. In a precedent-based system, they lay down general statements of principle which then stand as authority in future cases. They do not merely discover legal principles concealed in the luxuriant undergrowth of ancient principle and scattered legal decisions, as the great eighteenth century jurist Blackstone supposed and generations of common lawyers pretended. They make law within broad limits determined by statute and legal policy. In recent years, appellate courts in the United Kingdom have been increasingly open about this. In 2005, in *Re Spectrum Plus Ltd*,¹ Lord Nicholls of Birkenhead put the point in this way:

“Laws J, one of the most thoughtful constitutional lawyers to have sat on the English bench in recent times, considered that access to justice at an affordable price was not just another government service. It was a constitutional right, which could only be restricted with specific statutory authority. Since Britain does not have a written constitution, Laws J was exercising a purely judicial authority when he declared this constitutional right to exist.”

Judges have a legitimate law-making function. It is a function they have long exercised. In common law countries much of the basic law is still the common law. The common law is judge-made law. For centuries, judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations.

Just as common law judges make law, so also they unmake it. They overrule past decisions, even those of the highest appellate courts. The declaratory theory of law holds that in that case the earlier decisions must always have been wrong. It was just that the courts had taken a long time to realise it. As Lord Reid put it in *West Midland Baptist Association Inc v Birmingham Corporation*,²

We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that [the existing rule] is wrong, we must decide that it always has been wrong.

But this is now overtly recognised as the fiction it always has been. The courts of the United States, India, Ireland and the European Union have all asserted the right in certain categories of case to overrule a decision only with prospective effect, a function previously regarded as the special domain of the legislature. In the *Spectrum Plus* case, the House of Lords held that in a suitable case it would do so too. So judges can now not only say that the law was one thing yesterday and another tomorrow. They can actually admit that they are doing it. It is a very significant power.

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It is not a power that would be recognised in all legal cultures. Article 5 of the French Civil Code, which has been part of the Code from its inception at the beginning of the 19th century, provides that “judges are not permitted to adjudicate on cases before them by way of statement of general principle or statutory construction.” This means that judges may only formulate principles applicable to the particular facts before them. They may not purport to lay down general rules which would apply in any other case. That would be classified as an essentially legislative function. In keeping with that principle, there is with limited exceptions no doctrine of precedent in French law. This is one reason why the social and political implications of judicial decisions are usually more limited in civil law jurisdictions than they are in the world of the common law.

There is a second reason why we need to think seriously about the proper role of judges in the ordering of society. We live in an age of unbounded confidence in the value and efficacy of law as an engine of social and moral improvement. The spread of Parliamentary democracy across most of the world has invariably been followed by rising public expectations of the state, of which the courts are a part. The state has become the provider of basic standards of public amenity, the guarantor of minimum levels of security and, increasingly, the regulator of economic activity and the protector against misfortune of every kind. The public expects nothing less. Yet protection at this level calls for a general scheme of rights and a more intrusive role for law. In Europe, we regulate almost every

“The power to extrapolate
or extend by analogy the scope
of a written instrument
so as to enlarge its subject-matter
is not always easy to reconcile
with the rule of law.

It is a power which
no national judge
could claim to exercise
in relation to a
domestic statute, even in
a common law system.

It is potentially
subjective, unpredictable
and unclear.”

aspect of employment practice and commercial life, at any rate so far as it impinges upon consumers. We design codes of safety regulation designed to eliminate risk in all of the infinite variety of human activities. New criminal offences appear like mushrooms after every rainstorm. It has been estimated that in the decade from 1997 to 2007, more than 3,000 new criminal or regulatory offences were added to the statute-book of the United Kingdom. Turning from statute to common law, a wide range of acts which a century ago would have been regarded as casual misfortunes or as governed only by principles of courtesy, are now actionable torts.

This expansion of the empire of law has not been gratuitous. It is a response to a real problem. At its most fundamental level, the problem is that the technical and intellectual capacities of mankind have grown faster than its moral sensibilities or its co-operative instincts. At the same time other restraints on the autonomy and self-interest of men, such as religion and social convention, have lost much of their former force, at any rate in the West. The role of social and religious sentiment, which was once so critical in the life of our societies, has been largely taken over by law. So when Lord Nicholls spoke in *Spectrum Plus* of the judiciary's duty to keep the law abreast of current social conditions and expectations, he was making a wider claim for the policy-making role of judges than he realised. Popular expectations of law are by historical standards exceptionally high.



“The moment that
one moves beyond cases
of real oppression
and beyond
the truly fundamental,
one leaves the realm
of consensus behind
and enters that of
legitimate political debate
where issues ought
to be resolved
politically.”

These changes bring into sharper focus the question which I posed at the outset of this lecture: what sort of social reordering can properly be assigned to judges and courts, as opposed to other agencies of social control such as administrators or legislators? In theory, English law has a coherent answer to this question. It was given by Lord Diplock in his speech in the House of Lords in *R v Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Businesses*.³ Parliament is sovereign and has the sole prerogative of legislating. Ministers are answerable to the courts for the lawfulness of their acts. But they are accountable exclusively to Parliament for their policies and for the efficiency with which they carried them out, and of these things Parliament was the sole judge. This is neat. It is elegant. And it is perfectly useless, because it begs all the difficult questions. What is a question of law? What is a question of policy? The Diplock test will yield a different answer depending on how you define the issue.

Let me illustrate this point with an example, not particularly important in itself, but revealing nonetheless. In England, the administration and jurisdiction of the higher courts is governed by the Senior Courts Act 1981. Section 130 of that Act, which remained in force until 2003, is not normally regarded as a great engine of social policy. It empowered the Lord Chancellor to fix the level of court fees. In 1997, the Lord Chancellor introduced new regulations. Their effect was to increase the court fees, while at the same time omitting provisions in the previous regulations which had exempted people on income support. They now had to

Lack of democratic
legitimacy is a potential
problem about all
judge-made law.

In a common law system
it has to be accepted
within limits.

But it is a potentially
a rather serious problem
in the case of judicial decisions
about supposedly
fundamental rights.

pay the court fee just like anyone else. The object was to reduce the net cost to the state of funding the court system, but the effect was necessarily to make access to the courts more expensive for the poorest section of society.

Mr Witham was a man on income support who wanted to bring an action for libel but could not afford the court fee. So he applied for judicial review of the new regulations.⁴ Now there are at least three different approaches that one might take to a problem like this one. The first is to say that a service such as the administration of justice should be viewed in the same way as any other service provided by the state. It is simply one of a number of competing claims on a limited pot of money. All public services have an opportunity cost. The money that is spent on one service is not available to spend on another which might be equally beneficial. Who is to say whether it is more important that the poor should have affordable access to the courts or that they should have affordable access to hospitals, schools, or any of the other publicly provided services of the state? This is precisely the kind of policy decision which on any orthodox view of English public law is not for judges. It is an inescapably political question.

But there is a second approach. One could say that affordable access to justice was so fundamental a right that the state was under an absolute legal duty to provide it. From this it would follow that access to justice trumped all other calls on the state's budget. Put like that, the question ceases to be a political issue and becomes a legal one.

“Democracy is a constitutional mechanism for arriving at decisions for which there is a popular mandate. But the Convention and the Strasbourg court use the word in a completely different sense, as a generalised term of approval for a set of legal values which may or may not correspond to those which a democracy would in fact choose for itself.”

A third approach is to recognise the absolute character of the duty to provide affordable access to the courts to the poor, while doing it in some other way. For example, one might make legal aid available on a more generous basis or increase income support payments so that the higher court fees became affordable. That approach raises yet further questions. The practical effect of providing legal aid is to increase the resources available to citizens provided that they spend it on litigation. Yet is litigation such a valuable part of our social culture that we should privilege it in this way? If Mr. Witham's income support payments had been increased by enough to pay the court fee, he might have preferred to spend the money on a holiday than on suing his detractor. Is this a choice that should be denied to him? These are not straightforward questions. But more important than their inherent difficulty is that they are not legal questions. We are back in the realms of politics.

Mr Witham's case came before a Divisional Court of the Queen's Bench division, which quashed the regulations. Laws J, one of the most thoughtful constitutional lawyers to have sat on the English bench in recent times, delivered the leading judgment. He considered that access to justice at an affordable price was not just another government service. It was a constitutional right, which could only be restricted with specific statutory authority. Since Britain does not have a written constitution, Laws J was exercising a purely judicial authority when he declared this constitutional right to exist. What he did not do was consider the implications of the question for the distribution of the government's

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resources or the appropriate method of helping the poor. Indeed, he seems to have thought that the question did not arise. This was because in his view reduced court fees were not a state subsidy supported by taxpayers' money.⁵ He thought that in this respect they were different from legal aid, which the executive would be at liberty to regulate at its discretion.

Now, I am not saying that the result of this case was necessarily wrong, and in any event it was subsequently given statutory force. But it cannot possibly be justified on these grounds. Since the cost of running the courts greatly exceeds the revenue derived from court fees, reducing court fees inevitably involves a large measure of public subsidy, just as legal aid does. The real question was not about the importance of keeping down court fees, but about the *relative* importance of doing so, relative, that is, to other possible uses of the money or other possible ways of helping the poor. What the Divisional Court did was reduce the question before it to a binary question: Was it fundamental to the legal order that the poor should be able to afford court fees—Yes or No? By classifying the question in that narrow way, the court turned it into a question of law. Had it confronted the real issue, it might have concluded that it wasn't a justiciable issue at all.

I cite this minor corner of English public law because it perfectly illustrates the problems associated with the judicial resolution of questions with wider policy implications. But this is not a problem peculiar to English law. There has been

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a notable tendency in other common law jurisdictions to characterise as questions of law issues which do not really lend themselves to a legal solution. The tendency has been particularly marked in the United States, where it was first noticed by the great French political scientist Alexis de Tocqueville as early as the 1830s. “Scarcely any political question arises in the United States,” de Tocqueville wrote, “that is not resolved sooner or later into a judicial question.”

In Europe, much the most notable monument of this tendency to convert political questions into legal ones is the European Convention for the Protection of Human Rights and Fundamental Freedoms. This is such an important feature of the current British and European legal scene that it is worth dwelling on it for a while.

The Convention is a treaty initially made between the non-communist countries of Europe in 1950, in the aftermath of the Second World War. It reflected the concern of European nations to ensure that the extremes and despotism and persecution characteristic of the German Third Reich were never repeated, as well as a growing fear of the new totalitarianism then coming into being in the Soviet-dominated communist block.

In all countries of the Council of Europe, the Convention now has the force of law: that is to say that it is not just an international obligation of the signatory states, but is part of their domestic legal order. In the United Kingdom, effect has been given to it since 2000 by

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the Human Rights Act 1998. Alone of the many national and international declarations of human rights, the European Convention provides for its enforcement by an international court, the European Court of Human Rights at Strasbourg, with the right to hear individual petitions and to make decisions which the contracting states bind themselves to put into effect. In the United Kingdom, this is achieved by conferring on all public authorities, including the courts, a statutory duty to give effect to the Convention so far as statute permits. Where statute does not permit, the courts may make a declaration of incompatibility. The understanding is that Parliament will then amend the law so as to remove the inconsistency. The Act provides that in applying the Convention, the courts are bound to have regard to the decisions of the Strasbourg court.

The text of the Convention is wholly admirable. It secures rights which would almost universally be regarded as the foundation of any functioning civil society: a right to life and limb and liberty, access to justice administered by an independent judiciary, freedom of thought and expression, security of property, absence of arbitrary discrimination, and so on. Nothing that I have to say this evening is intended to belittle any of these truly fundamental rights.

But the European Court of Human Rights in Strasbourg stands for more than these. It has become the international flag-bearer for judge-made fundamental law extending well beyond the text which it is charged with applying. It has over many years declared itself entitled to

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treat the Convention as what it calls a “living instrument”. The way that the Strasbourg court expresses this is that it interprets the Convention in the light of the evolving social conceptions common to the democracies of Europe, so as to keep it up to date.

Put like that, it sounds innocuous, indeed desirable. But what it means in practice is that the Strasbourg court develops the Convention by a process of extrapolation or analogy, so as to reflect its own view of what rights are required in a modern democracy. This approach has transformed the Convention from the safeguard against despotism, which was intended by its draftsmen, into a template for many aspects of the domestic legal order. It has involved the recognition of a large number of new rights which are not expressly to be found in the language of the treaty.

A good example is the steady expansion of the scope of Article 8. The text of Article 8 protects private and family life, the privacy of the home and of personal correspondence. This perfectly straightforward provision was originally devised as a protection against the surveillance state by totalitarian governments. But in the hands of the Strasbourg court it has been extended to cover the legal status of illegitimate children, immigration and deportation, extradition, aspects of criminal sentencing, abortion, homosexuality, assisted suicide, child abduction, the law of landlord and tenant, and a great deal else besides. None of these extensions are warranted by the express

“Rights can never
be wholly
unqualified.

Their existence and extent
must be constrained
to a greater or lesser
extent by the rights
of others,
as well as by some legitimate
collective interests.”

language of the Convention, nor in most cases are they necessary implications. They are commonly extensions of the text which rest on the sole authority of the judges of the court. The effect of this kind of judicial lawmaking is in constitutional terms rather remarkable. It is to take many contentious issues which would previously have been regarded as questions for political debate, administrative discretion or social convention and transform them into questions of law to be resolved by an international judicial tribunal.

There appear to me to be a number of potential issues about this way of making law.

In the first place, it is not consistent with the ordinary principles on which written law is traditionally elucidated by judges. A system of customary law like the common law may within broad limits be updated and reformulated by the courts which made it in the first place. But very different considerations apply to a written instrument like the Convention, which records not just an agreement between states but the limits of that agreement. The function of a court dealing with such an instrument is essentially interpretative and not creative. The Vienna Convention of 1969 on the Law of Treaties requires every treaty to be interpreted in accordance with the ordinary meaning to be given to its terms, having regard to its object and purpose. While every one will have his own take on particular decisions, there are undoubtedly some cases in which the approach of the Strasbourg court to the Human

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judicial apparatus of
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no democratic mandate.

It is a constraint on
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Rights Convention goes well beyond interpretation, and well beyond the language, object or purpose of the instrument. In practice, it seeks to give effect to the kind of Convention that the court conceives that the parties might have agreed today. This process necessarily involves the recognition by the court of some rights which the signatories do not appear to have granted, and some which we know from the negotiation documents that they positively intended not to grant.

Secondly, the power to extrapolate or extend by analogy the scope of a written instrument so as to enlarge its subject-matter is not always easy to reconcile with the rule of law. It is a power which no national judge could claim to exercise in relation to a domestic statute, even in a common law system. It is potentially subjective, unpredictable and unclear. Beyond a very limited point, the reformulation of a written instrument so as to satisfy changed values since it was made is not necessarily an appropriate judicial function. Let me suggest an analogy drawn from recent English case law.

In *Norris v United States of America*,⁶ a bold attempt was made by a Divisional Court in England to rewrite the elements of the common law offence of conspiracy to defraud, so as to cover economic cartels which, although unlawful, had never hitherto been regarded as criminal. The Divisional Court's decision would have been perfectly acceptable by Strasbourg standards. It was a response to changing attitudes to economic manipulation. Cartels

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are less acceptable today than they were a hundred years ago when the law in this area was made. But in the view of the House of Lords, which unanimously overturned the Divisional Court's decision, this was not an acceptable way for judges to change the law. Once a principle of law is established, Lord Bingham observed,⁷ "the requirement of certainty is not met by asserting that at some undefined later time a different view would have been taken." There are of course particular reasons for insisting on the requirement of certainty in the criminal law. But, albeit within broader limits, the same principle must surely apply to all law.

Third, the Strasbourg court's approach to judicial lawmaking gives rise, as it seems to me, to a significant democratic deficit in some important areas of social policy. This is a particular problem given the inherently political character of many of the issues which it decides. Most of the human rights recognised by the Convention are qualified by express exceptions for cases where the national law or action complained of was "necessary in a democratic society" (or some equivalent phrase). The case law of the Strasbourg court provides a good deal of guidance about how these qualifications are to be applied. The court must ask itself a number of questions: Is the measure being challenged necessary? Does it have a legitimate purpose? Does it conform to current practice among other signatories to the Convention? Does it pursue its purpose in a satisfactory way? What alternative and possibly less intrusive measures would have been enough? These questions have only to be stated for it to be obvious that they are questions of policy. Most

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people would regard them as inherently political questions. But their inclusion in the Convention to a considerable extent removes them from the arena of legitimate political debate, by transforming them into questions of law for judges.

Lack of democratic legitimacy is a potential problem about all judge-made law. In a common law system it has to be accepted within limits. But it is a potentially a rather serious problem in the case of judicial decisions about supposedly fundamental rights. It is important to bear in mind that in a Parliamentary democracy the legislature can selectively enact into law whatever parts of the Convention or the case law of the European Court of Human Rights it pleases. We do not need the Convention in order to introduce changes for which there is a democratic mandate. The Convention and its judicial apparatus of enforcement are only necessary in order to impose changes for which there is no democratic mandate. It is a constraint on the democratic process. I think that most people would recognise that there must be some constraints on the democratic process in the interests of protecting politically vulnerable minorities from oppression and entrenching a limited number of rights that the consensus of our societies recognises as truly fundamental. Almost all written constitutions do this. But the moment that one moves beyond cases of real oppression and beyond the truly fundamental, one leaves the realm of consensus behind and enters that of legitimate political debate where issues ought to be resolved politically.

“The United Kingdom has shown a remarkable ability to adapt peaceably to changing realities. Some of these changes have radically disturbed existing expectations and vested interests. Yet the law has adapted itself to them in a way which has generally been accepted by a broad consensus among its citizens. This process of compromise and adaptation in the face of disruptive social change owes almost everything to politics. Courts of law could not have done it. It is not their job.”

⁸ [2005] ECHR 681.

⁹ [2012] ECHR 868.

An interesting illustration has recently been provided by a highly charged issue about the right of convicted prisoners in the United Kingdom to vote in elections. This rule has been part of the statute law of the United Kingdom since the inception of our democracy in the 19th century and has been regularly reviewed and re-enacted since. It has considerable public support. It may or may not be a good rule, but it has nothing to do with the oppression of vulnerable minorities. Yet in two cases, *Hirst v United Kingdom*⁸ and *Scoppola v Italy*,⁹ the European Court of Human Rights has held that the automatic disenfranchisement of convicted prisoners is contrary to the Convention.

In both cases, the court's reasoning revealed its limited interest in the democratic credentials of such policies. In the first, they declined to accept the argument based on democratic legitimacy on the ground that Parliament cannot have devoted enough thought to the penal policy involved. In the second, they disregarded it even more summarily on the ground that the issue was a matter of law for the court, and implicitly, therefore, not a matter for democratic determination at all.

But of course to say that it is a question of law is simply to point out the problem. The Strasbourg court directed the United Kingdom to bring forward legislative proposals intended to amend the relevant statute. The government has brought forward legislative proposals, but the United Kingdom Parliament has declined to approve them. The resultant collision between an irresistible force

“ The social and political implications of judicial decisions are usually more limited in civil law jurisdictions than they are in the world of the common law.”

and an immoveable object was considered a month ago by the Supreme Court in *R (on the application of Chester) v Secretary of State for Justice*,¹⁰ in which we held that we were bound to follow the law repeatedly declared by the Strasbourg court, although we declined to grant a remedy as a matter of discretion.

The case law of the European Court of Human Rights, which is largely based on the court's view of what is appropriate to a democratic society, is an interesting example of the ambiguity of political vocabulary. Properly speaking, democracy is a constitutional mechanism for arriving at decisions for which there is a popular mandate. But the Convention and the Strasbourg court use the word in a completely different sense, as a generalised term of approval for a set of legal values which may or may not correspond to those which a democracy would in fact choose for itself.

In his famous essay, "Politics and the English language", written in 1946, George Orwell observed that "if thought corrupts language, language can also corrupt thought". "Democracy" was prominent in the catalogue of words that he singled out as having become largely meaningless in consequence. To give the force of law to values for which there is no popular mandate is democratic only in the sense that the old German Democratic Republic was democratic. Personally, if I may be allowed to speak as a citizen, I think that most of the values which underlie judicial decisions on human rights, both at Strasbourg and in the domestic courts of the United Kingdom, are wholly

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It is a response
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At its most fundamental level,
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admirable. But it does not follow that I am at liberty to impose them on a majority of my fellow-citizens without any democratic process.

The answer which is normally put forward to defend of the democratic credentials of this kind of judge-made law is that Parliament has implicitly authorised it, by not reversing the decisions which it disapproved, or in the case of decisions under the Human Rights Convention, by passing the Human Rights Act 1998. I would suggest that the reality, however, is somewhat more complicated.

The treatment of the Convention by the European Court of Human Rights as a “living instrument” allows it to make new law in respects which are not foreshadowed by the language of the Convention and which Parliament would not necessarily have anticipated when it passed the Act. It is in practice incapable of being reversed by legislation, short of withdrawing from the Convention altogether. In reality, therefore, the Human Rights Act involves the transfer of part of an essentially legislative power to another body. The suggestion that this is democratic simply confuses popular sovereignty with democracy. Of course, a sovereign Parliament may transfer part of its legislative power to other bodies which are not answerable even indirectly to the people of the United Kingdom. But it would be odd to deny that this undermines the democratic process, simply because Parliament has done it. A democratic Parliament may abolish elections or exclude the opposition or appoint a dictator. But that would not make it democratic.

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I have spoken mainly of these questions in a British context because that is where my own experience lies. But the frame of mind underlying the case law of the European Court of Human Rights is symptomatic of a much wider phenomenon, namely the resort to fundamental rights, declared by judges, as a prime instrument of social control and entitlement. The main casualty of that approach is the political process, which is no longer decisive over a wide spectrum of social policy.

In many countries, including the United Kingdom, there is widespread disdain for the political process and some articulate support for an approach to lawmaking that takes the politics out of it. This reflects the contempt felt by many intelligent commentators for what they regard as the illogicality, intellectual dishonesty and the irrational prejudice characteristic of party politics. The American philosophers John Rawls and Ronald Dworkin have been perhaps the most articulate modern spokesmen for this point of view.

I think that their attitude, which is shared by some judges, overlooks some fundamental features of the political process. Democracy requires a minimum degree of social cohesion and tolerance of internal differences in order to function properly. But provided that these conditions exist, I would like to suggest to you that politics is quite simply a better way of resolving questions of social policy than judge-made law.

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The public law questions which come before the courts are commonly presented as issues between the state and the individual. But most of them are in reality issues between different groups of citizens. This applies particularly to major social or moral issues, and more generally to issues on which people hold strong and divergent positions. The essential function of politics in a democracy is to reconcile inconsistent interests and opinions by producing a result which it may be that few people would have chosen as their preferred option, but which the majority can live with.

Political parties are rarely monolithic. Although generally sharing a common outlook, they are unruly coalitions between shifting factions, united only by a common desire to win elections. They, therefore, mutate in response to changes in public sentiment, in the interest of winning or retaining power. In this way, they can often be a highly effective means of mediating between those in power and the public from which they derive their legitimacy. They are instruments of compromise between a sufficiently wide range of opinions to enable a programme to be laid before the electorate with some prospect of being accepted. The larger a democracy is, and the more remote its political class from the population at large, the more vital this process of mediation is.

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Unfortunately, few people recognise this. They expect their politicians to be not just useful but attractive. They demand principle, transparency and consistency from them. And when they do not get these things, they are inclined to turn to courts of law instead. The attraction of judge-made law is that it appears to have many of the virtues which the political process inevitably lacks. It is transparent. It is public. Above all, it is animated by a combination of abstract reasoning and moral value-judgment, which at first sight appears to embody a higher model of decision-making than the messy compromises required to build a political consensus in a Parliamentary system. There is, however, a price to be paid for these virtues. The judicial resolution of major policy issues undermines our ability to live together in harmony by depriving us of a method of mediating compromises among ourselves. Politics is a method of mediating compromises in which we can all participate, albeit indirectly, and which we are therefore more likely to recognise as legitimate.

During the 1960s, the United Kingdom Parliament enacted a number of measures designed to liberalise long-standing features of our law. Two notable monuments of this period were the decriminalisation of homosexuality and the authorisation in certain circumstances of abortion. These measures were highly controversial, and were strongly

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opposed by significant sections of the public. In both cases, the parliamentary debates squarely addressed the moral issues, and represented the whole spectrum of contemporary opinion. The legislation which emerged contained carefully framed limitations and exceptions meeting some, although by no means all of the objections. By and large the results of these enactments have been accepted, and the principles underlying them have become largely uncontroversial. This is the paradigm case of how the political process ought to work. It also suggests that it is perfectly capable of successfully addressing major moral issues which would today be characterised as engaging human rights.

I venture to suggest that if similar reforms had been imposed judicially, they would not have been so readily accepted. The continuing controversy in the United States about the decision of the US Supreme Court in *Roe v Wade*¹¹ to recognise judicially the almost unrestricted constitutional right of a woman to an abortion certainly suggests that that is so. Like other ancient nations, the United Kingdom has shown a remarkable ability to adapt peaceably to changing realities. Some of these changes have radically disturbed existing expectations and vested interests. Yet the law has adapted itself to them in a way which has generally been accepted by a broad consensus among its citizens. This process of compromise and adaptation in the face of disruptive social change owes almost everything to politics. Courts of law could not have done it. It is not their job.

I have already mentioned Professor Ronald Dworkin, whose death last year deprived us of one of the most

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formidable defenders of rights-based law defined by judges. He defended it against those who would leave this to the legislature by arguing that judges were more likely to get the answer right. "I cannot imagine", he wrote, "what argument might be thought to show that legislative decisions about rights are inherently more likely to be right than judicial decisions." The problem is that this assumes a definition of "rightness" which is hard to justify in a political community. How do we decide what is the "right" answer to a question about which people strongly disagree, without resorting to a political process to mediate that disagreement? Rights are claims against the claimant's own community. In a democracy, they depend for their legitimacy on a measure of recognition by that community. To be effective, they require a large measure of public acceptance through an active civil society. This is something which no purely judicial decision-making process can deliver.

But I would go further than this. Unlike Professor Dworkin, I *can* imagine why legislative decisions about rights are more likely to be correct than judicial ones, even if what one is looking for is the intellectually or morally ideal outcome. The reason, as it seems to me, is that rights can never be wholly unqualified. Their existence and extent must be constrained to a greater or lesser extent by the rights of others, as well as by some legitimate collective interests.

In deciding where the balance lies between individual rights and collective interests, the relevant considerations will often be far wider than anything that a court can

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comprehend simply on the basis of argument between the parties before it. Litigants are only concerned with their own position. Single-interest pressure groups, who stand behind a great deal of public law litigation in the United Kingdom and the United States, have no interest in policy areas other than their own. The court, being dependent in the generality of cases on the material and arguments put before it by the parties, is likely to have no special understanding of other areas.

Lon Fuller famously described these as “polycentric” problems. What he meant was that any decision about them was likely to have multiple consequences, each with its own complex repercussions for many other people. “We may visualise this kind of situation by thinking of a spider’s web”, he wrote; “a pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole”. In such a case, he suggested, it was simply impossible to afford a hearing to every interest affected. One of three consequences follows, and sometimes all three at once.

First, the judge may produce a result which because of its unexpected repercussions is unworkable or ineffective or obstructive of other legitimate activities. Secondly, the judge may end up by acting unjudicially. He may consult third parties, or make guesses about facts of which he has no sufficient knowledge and cannot properly take judicial notice. Thirdly, he may reformulate the issue so as to make it a one-dimensional question of law in which the only relevant interests appear to be those of the parties before

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the court, which is what the Divisional Court did in Mr Witham's case. Decisions made in this way are necessarily made on an excessively simplified and highly inefficient basis.

Now, I would be the first to acknowledge that some degree of judicial lawmaking is unavoidable, especially in an uncodified common law system. It is a question of degree how far this can go consistently with the separation of powers. Even in a case where the limits have been exceeded, I am not going to suggest that the fabric of society will break down because judges, whether sitting in London, Strasbourg, Washington or anywhere else, make law for which there is no democratic mandate. The process by which democracies decline is more subtle than that. They are rarely destroyed by a sudden external shock or unpopular decisions. The process is usually more mundane and insidious. What happens is that they are slowly drained of what makes them democratic, by a gradual process of internal decay and mounting indifference, until one suddenly notices that they have become something different, like the republican constitutions of Athens or Rome or the Italian city-states of the Renaissance. 