

Judicial Power: Past, Present and Future

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About John Finnis

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About the Judicial Power Project

This project examines the role of judicial power within the constitution. There is rising concern that judicial overreach has the potential to undermine the rule of law and to impair effective, democratic government. The project considers the ways in which the judiciary's place in the constitution has been changing, and might change in the future. If we are to maintain the separation of judicial and political authority, we must restate, in the context of modern times and modern problems, the nature and limits of judicial power within our constitutional tradition and the related scope of proper legislative and executive authority.

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Introduction

As we came into the Inn and crossed its South Square to reach the Benchers' Entrance, we all passed the statue of Francis Bacon, truly outstanding among this country's scholars, and lawyers. One of the most well-known of his *Essays* is on Judicature, or as my title puts it Judicial Power, and I will return to it. When I first came to Gray's Inn, as a student member, and started "keeping terms" by eating dinners here in this Hall -- in late 1962, soon after my arrival in Oxford from Australia to write a doctoral thesis on The Idea of Judicial Power -- I did not know it was Bacon's statue; being a student not a bencher, I came in at the other end and I don't remember going over to the statue to take a closer look. Bacon enrolled here at the age of 15 and took up residence here as a student member at the age of 18, was called to the Bar three years later and was a Bencher (one of the Inn's governing, high table members) by the age of 25 in 1586 – something scarcely possible today even if like him you've been educated at Trinity College Cambridge by the Master himself. (1 Gray's Inn Square, the address of my first chambers, through the northern wall of the Hall there, became a residence of his for the rest of his life.)

In 1594, amongst many other activities in public and semi-public life, Bacon was much involved in directing the exceptional Christmastide revels culminating, in the New Year, with his "device", a set of mainly political and philosophical declamations to bring closure to the rule of "errors and confusions" proclaimed (by the revels' mock-King) to have arisen on and after the feast of the Holy Innocents, 28 December 1594, when right here, in a Hall looking essentially the same then as it does tonight (when it is 450 not just 40 years old), students, barristers and their lady friends watched what will have been the first performance of Shakespeare's helter skelter *tour de force*, full of lawyers' talk, *The Comedy of Errors*. There's much in the play, especially its opening and closing scenes,¹ suggesting that Shakespeare intended it to enact a joyful reconciliation between the two great parties in an English nation (not to mention a Gray's Inn)² lethally divided by religion, and within that vision imagines and enacts a transformation of inexplicably rigorous penal law by an act of entirely gratuitous executive mercy (precisely the transformation we see again in *A Midsummer Night's Dream* and, slightly differently, in *As You Like It*, not to mention *All's Well that Ends Well* and *Measure for Measure*).

Earlier in 1594 Bacon had been made a Queen's counsel, perhaps as consolation for once again being passed over in favour of Edward Coke, who in 1592 has been preferred to him as Solicitor General and now was preferred as Attorney General. The two men were

¹ And in the circumstances of the second of its known performances, which was exactly 10 years later to the day, at the court of the new King, 28 December 1604.

² Bacon, probably (I would argue) involved in the commissioning of Shakespeare for this occasion, had been on the commission *oyer et terminer* which on 26 August 1588, a week after the official celebration of the victory over the Armada on 29 July, resulted in the death sentence on Hugh Moore, another member of this Inn, hanged two days later in Lincoln's Inn Fields, for (in the words of an official certificate) "being reconciled to the See of Rome by one Thomas Stevenson a Jesuit" (papers of Sir John Puckering, Harleian MSS 6846, p. 353; 6996 f. 659; see J.H. Pollen, *Unpublished Documents relating to the English Martyrs*, (CRS 5, 1908), 158).

rivals for, and in, the highest legal and judicial offices for 30 years.³ In 1613 Bacon as (at last) Attorney General secured Coke's wholly unwilling transfer from the office of Chief Justice of the Common Pleas to the less well remunerated and less professionally prestigious though higher office of Chief Justice of the King's Bench (which could hear appeals "in error" from Common Pleas), and in 1616 Attorney General Bacon secured Coke's removal from judicial office altogether for (as Bacon advised the King) "his perpetual turbulent carriage towards the liberties of the church and state ecclesiastical, towards his [Majesty's] prerogative royal and the branches thereof, and likewise towards all the settled jurisdictions of [the King's] courts." Then, in turn, it was Coke, now once again an MP, who led the committee organizing Bacon's impeachment and dismissal by the King and Lords from all his public offices, notably as Lord Chancellor and Chief Judge in Chancery, for extensive (and abjectly admitted) receipt of extremely substantial money gifts during his three years in that office (actually a judge of efficient, expeditious thoroughness and, it can be argued, of uncorrupted fairness).⁴

By 1621, the year of his fall, these turbulent men – each having exercised the highest judicial power, and each of commanding intelligence, learning and application -- had laid foundations, Bacon for the explosive rise of experimental natural science and Coke for some defining features of the British constitution and indeed of any choice-worthy constitution: Coke's judgment in 1607 in *Prohibitions del Roy* was foundational for the separation of executive from judicial power, and his leading part in the advisory opinion of the four senior judges in *The Case of Proclamations* in 1610 was foundational for the separation of executive from legislative power. The problems about the nature and reach of judicial power, about which Bacon and Coke disagreed, are with us today in forms much shifted in occasion and location but still recognizably the same: permanent problems, capable it seems of only provisional rather than permanent solutions.

I did not get to the bottom of those problems in my thesis. It followed the ways in which political philosophers and jurists from Aristotle through Locke, Montesquieu, Bentham, Kelsen and others thought and argued about the distinctions between types of governmental power: legislative, executive and judicial, and then the ways those categories were used to structure the constitutions of the newly independent American colonies or states, the earnest deliberations of the draftsmen of the United States Constitution in adopting the same grand division, and then the much more fully reported and elaborate debates that drafted the Australian Constitution eventually approved by the people of each of the six Australian colonies and enacted in 1900. The thesis then examined each of the many decisions of Australia's highest court interpreting that constitution's division and, as the Court held, separation of powers, in particular of judicial power – a power assigned to a specified judiciary and denied to any and all other constitutional or statutory authorities. Many able judges, over more than 60 years, made intense efforts to say just what judicial power is. These efforts seemed to me to come down to two distinct but interlocked features: final resolution of disputes between parties -- by application of pre-existing law to established facts.

³ And for the hand of the wealthy widow, Lady Hatton, who became Coke's second wife, after determined suit for her hand by Bacon.

⁴ He spent the remaining five years of his life (down to its last week) living in some obscurity in his chambers at No. 1 Gray's Inn Square, working hard and effectively on his great philosophical, scientific, historical, theological and literary projects..

The Australian judges' efforts also yielded a paradox: the body of legal doctrine – that is, of constitutional law – resulting from their interpretation of the Constitution's phrase "judicial power of the Commonwealth" could not truly be said to have been an application of pre-existing law. Rather, in some startling respects, it was a doctrine imposed on the Constitution by a three to two majority of the High Court, followed thereafter, on the basis of precedent, by virtually every judge over 45 years and eventually here in London by a conforming Judicial Committee of the Privy Council probably unaware of the doctrine's originating circumstances.

These bear, I hope, retelling. We're talking about the origins of the doctrine that the Australian Constitution of 1900 *implies* that judicial powers are the monopoly of the federal judiciary provided for by the document's chapter III, and cannot be exercised by any legislative or executive body. That was a doctrine asserted in the drafting Convention by two radical young lawyers, Isaac Isaacs and Henry Higgins, in opposition to the Convention's eventual decision to devote chapter IV of the Constitution to an Interstate Commission specifically given powers of adjudication on matters of interstate trade. The Isaacs/Higgins position was *rejected* in vote after vote by large majorities. But these able young lawyer politicians, a decade later, acquired judicial power as judges on the High Court of Australia, and in March 1915, a month before the Gallipoli landings, as soon as they could persuade one of their colleagues to make a majority with them, they declared that the Constitution's shape, with one chapter each for legislative, executive and judicial powers respectively, established *by implication* a separation of powers inconsistent with permitting Parliament to confer judicial powers on the Interstate Commission pursuant to the Constitution's mandate to Parliament to establish it with powers to adjudicate on certain matters. The Commission, written into the Constitution only 17 years earlier with overwhelming support, thereupon collapsed and is hardly a memory in Australia, just as there is even less memory that that 1915 decision in the *Wheat Case* was a judicial *mini-coup d'état* rendering paradoxical its own claim that judicial power is a matter of applying pre-existing law. Five years later, as it happens, the same two justices went on to give the most famous and influential of all Australian constitutional judgments, in the *Engineers' Case*, ruling that the Constitution must be interpreted entirely without implications that might restrict any powers conferred expressly by the document. For me it was a formative experience to discover in the Oxford libraries these rotten foundations of the judicial doctrine of separation of powers, so magisterially insisted upon by the Chief Justice of Australia during the years of my Australian legal education.

The title of this lecture summarises an understanding I don't think I adequately grasped after three years' doctoral study in Oxford. "Past, present and future" captures a good deal of the truth, I think, about the distinctions between judicial, executive and legislative powers – "powers" that are each to be understood, moreover, as fundamentally *responsibilities* of office, *officia*. Focussing on the judicial component of the triad, I will set out my understanding of the issues in ten theses, trying to illustrate each of them just a little: a copy of the Lecture, without the abbreviations that our time and your patience require will be available to anyone who would like one at the doors as we leave the Hall this evening.

1. The judicial responsibility is to adjudicate between parties who are in dispute about their legal rights and obligations by applying -- to facts agreed between them or found by the court after trial – the law that defined those rights and obligations at

that time past when the matter of their dispute (the cause in action) arose. The court's judgment identifies and applies the legal commitments the community should be judged to *have made* to each of the parties now before the court, *by the time* they came into conflict with each other about the content or applicability of those commitments: past. The legislature's responsibility is to make new or amended public commitments about private rights (and public powers) for the future. The executive's is to carry out those commitments both as defined by the legislature and as adjudged enforceable by the courts, and, respectful of that constitutional and legal framework, to do what is here and now, in the present, required to protect the community's common good so far as that depends on measures that cannot reasonably be provided for by legislation or await or ever be reasonably submitted to adjudication. Past, future, present.

Bacon's essay "Of Judicature" or the office and responsibility of a judge,⁵ published in 1612, written like most of his essays after he became Solicitor General in 1607, and intended like the others to be fruit of experience not book-learning, begins and almost ends by calling upon judges to abstain from law making or from disturbing the established boundaries of rights and properties, the landmarks; and to be content with their high responsibility, right or prerogative of interpreting and applying the laws, not novelties. But far from being against novelties, he himself urged, over two decades, that extensive law reform and ambitious rationalization of England's chaotic common and statutory law be undertaken -- only not in the exercise of judicial power.

2. To state (like Bacon and countless much longer-serving judges) **that the common law is declared rather than made is no mere "fairy-tale" unless the statement is mistakenly asserted or heard as a description of the history of the common law. It is not a description or prediction**, fictionalising that history by overlooking the many changes made by the courts, **but a statement of judicial responsibility:** to identify the rights of the contending parties now by identifying what were, in law, the rights and wrongs, or validity or invalidity, of their actions and transactions when entered upon and done. There are cases when a court, especially one that is hierarchically supreme and thus not bound to follow the rulings of higher courts, can judge it has the duty now to depart from an interpretation or view of the part of our law in dispute between the parties because, though that interpretation or view has been judicially approved and is what legal advisers would now and previously convey to their clients, it is nonetheless out of line with principles, policies and standards acknowledged (now, and when the dispute arose) in comparable parts of our law – so out of line that it ought now to be declared to have been a mistaken view, and set aside in favour of a rule that, though new in relation to the subject-matter and area of law directly in issue between the parties, is nevertheless not a novelty or act of legislation (taking our law as a whole), and can fairly be applied to the parties and dispute before the court.

Of course, reasonable lawyers and judges can disagree about whether and when these conditions are fulfilled; the criteria and distinctions in play in this distinction

⁵ The title of his c. 1625 (? c. 1612) Latin version of the essay is *De officio Judicis* (first published 1638) (essay 54, in the 1625 English ed. no. 56). On the chronological and other relations between the English and Latin versions of the *Essays*, see the fine introduction by Dana Sutton to his online edition of the latter: <http://www.philological.bham.ac.uk/essays/intro.html>. On Bacon as jurist, see above all Daniel R. Coquillette, *Francis Bacon* (Jurists: Profiles in Legal Theory) (Edinburgh, 1992).

between judicial development of the law and judicial legislation are subtle and elusive. Some of my work explores them in relation to a particularly complex, multi-faceted case involving the sequential abrogation of two professionally settled understandings of the law, the rights of surprised parties to restitution, and the question whether the new understanding – the “new rule” – should or should not incorporate a reference to professional understanding of the law: *Kleinwort Benson v Lincoln City Council* (1998), in which Lord Hoffmann and Lord Goff seem to me to have best preserved the judicial responsibilities at stake. I retrace this in the first part of an essay on law-making by judges to appear soon in the book around Lord Sumption’s lecture “The Limits of Law”, edited by Nick Barber, Richard Ekins and Paul Yowell.

The rule abrogated and judicially replaced in *Kleinwort Benson* was deep within the area of legal learning, the “artificial reason” of the law that Coke CJ spoke of when telling the angry King that he was not qualified by his powerful natural intelligence and qualities of rational judgment to exercise judicial power in his own English courts: it was the 200-year-old rule that while you are entitled to get back moneys you paid under a mistake of fact, you are not where your mistake was one of law – a distinction that the Law Lords all agreed was in Lord Hoffmann’s word a “heresy” even when first declared or laid down by judges in 1802. Setting right a mistake, an anomaly, an excrescence within the body of law developed by judicial precedent – that is, by the judicial discipline of conformity with other judges’ decisions in similar cases – is distinguishable from legislating, law-making. Sometimes, even often, the distinction is only subtle, or arguable; it is between two great categories that, like night and day, are separated by a region of vagueness.

But it is real and important because it is at bottom a distinction between, *on the one hand*, (1) *looking back* at the relations and inter-dependencies between the parties at the time their dispute’s *causes* were taking place, at the similar patterns of inter-relationships between similar parties and the principles and rules used by one’s predecessors in the exercise of judicial power to resolve their dispute justly, according to law, and at not so similar but still comparable rules of compensation in distinct but related areas of law about say contracts, trusts or torts, so as assess judiciously the coherence and fairness of the rule hitherto professionally accepted – its *legal* soundness or unsoundness by criteria going wide and deep in our law – and, *on the other hand* (2) looking forwards to assess whether a better pattern of inter-relationships between parties could be recognized or encouraged by introducing a new rule or set of rules, applicable in future adjudications and promoting somewhat altered just and more fruitful and/or less exploitative interrelationships. Instituting change in relationships by change in the law will have effects good (and intended or hoped for) and bad (side-effects, neither hoped for nor intended), and these need to be held in view, compared and assessed for the fairness or unfairness, overall and all things considered, of causing them (by this contemplated change in the law) in all the currently foreseeable future circumstances of one’s community and its members’ various conditions of life.

This is called by Lord Hoffmann in *Kleinwort Benson* a “utilitarian assessment” of what rule, adopted now for the future, “would, on balance, do less harm than good”. I agree with his conclusion that all future-estimating selection of a new rule differs importantly from the abrogation of the judge-made rule refusing restitution for mistakes “of law rather than fact”, though I think that utilitarianism as a theory about one’s responsibilities for the future, whether as an individual or a legislature, is mistaken in supposing it possible rationally to net off people, the different elements of their wellbeing,

and scale, the kind and the probability of consequences. But we do have to assess likely consequences of our choices, and are not helplessly adrift in face of these incommensurabilities and imponderables. We confront them with the criteria of fairness that I mentioned, and willingness to make new commitments and adjustments, often complex and indirect in their causalities. And this is the good reason underlying the great complexity of modern legislative adjustments of our law. This Bacon was in outline aware of, in his proposals for commissions preparatory to legislative overhaul of centuries of mostly judge-declared law. And so we find Lord Hoffmann saying, in a case six weeks after *Kleinwort Benson*, that although then recent decisions of the Law Lords restricting common law compensation for psychiatric injuries were a departure from principle, a wrong turning, "it is [already!] too late to go back on" them; "until there is legislative change, the courts must live with them".⁶

3. "Hard cases make bad law" means "Hard cases [tend to] make bad law" *qua* law for the future. Judicial efforts to reform even the common law are often unproductive or counter-productive. "The law is an ass" is sometimes a *consequence* of judges' thinking their predecessors' law an ass.

Here is a paradigm, a model case, of the Baconian conception of the relation between judicial and legislative power, in practice. In 1975, a powerful panel of five Law Lords decided unanimously that judges had for a century been wrongly convicting people of the common-law offence of attempting (by actions more than merely preparatory) to commit an offence (whether common-law or statutory) which in the circumstances *could not* have been successfully committed: for example, convicting people of attempting to steal when the pockets they were picking were in fact empty (to their surprise and disappointment). No one can be guilty for attempting the impossible; to punish such attempts is to punish people not for their acts but for their mere intentions. Convicting pickpockets for picking empty pockets with intent to steal means that if a man comes across his enemy's corpse, thinks he's asleep, and stabs him in the heart, he can be convicted of attempted murder. "The law," said the Law Lords' intellectual leader Lord Reid, "may sometimes be an ass but it cannot be so asinine at that."⁷ Three years later, another powerful panel of the Law Lords reaffirmed that liberal reform, and extended it to the law of conspiracy: according to the common law as meant to be purified by the 1975 decision, you cannot be guilty of conspiracy to produce the prohibited drug cocaine if, unknown to you all, the powders you agree to process could never yield cocaine. The 1975 Lords' decision's doctrine that you are to be judged according to the facts as they happen to be, not according to the facts as you believed and intended them to be, was ringingly reaffirmed by Lord Scarman for the whole panel, even though a statute had already come into force, since the trial of the convicted conspirators, to ensure that, in future, conspiracies would be tried on the facts as believed and intended by the conspirators to be. Lord Reid's claim that adopting the would-be criminal's point of view in assessing his actions would make the law an ass was quoted with approval, even though (as Lord Scarman and his fellow judges knew) Parliament had already adopted, in relation to future conspiracies, a position which fairly obviously implies that it was the Law Lords in 1975 who were making the law an ass.

⁶ *White [or Frost] v. Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 500.

⁷ *Haughton v Smith* [1975] AC 476 at 500 (also known as *R v Smith (Roger)*).

The Law Lords having thus doubled down in 1978, Parliament acted again, in 1981 – and once again after extensive scholarly discussion (not least by HLA Hart, the supervisor of my doctoral efforts on judicial power)⁸ and, more especially, a report and draft Bill from the Law Commission responsible for advising Parliament about desirable law reforms. Both the 1977 statute about conspiracy and the 1981 statute about attempts are a bit complex and even redundant in their wording,⁹ but their clear intent and effect is summarised in cl. 50(1) of the draft Criminal Code proposed by the Law Commission in 1989: ““A person may be guilty of... conspiracy or attempt to commit an offence although the commission of the offence is impossible, if it would be possible in the circumstances *which he believes or hopes exist or will exist at the relevant time.*”¹⁰

Astonishingly, in 1985 another panel of the Law Lords (with at least one dissenting voice) read the new statute so that it would not support convicting you of attempt to handle stolen goods if you bought a consumer durable very cheap, fully believing it to have been stolen.¹¹ The majority were once again swayed by Lord Reid's 1975 rhetoric: the law would be an ass if it convicted you of attempted murder for stabbing your enemy through the heart, believing him alive and well and hoping and intending and doing all you can to kill him. After all, stabbing dead people is no crime at all, whatever your beliefs or intentions! Indeed, said the majority Law Lords, it is an *objectively innocent act*. In their ears were the words written about the statute and their case itself by Professor Brian Hogan, who taught me criminal law in Adelaide: to convict this appellant purchaser of non-stolen goods of attempting to steal them would “contravene the principle of legality”!¹² But all these arguments were both viciously circular and lacking in common sense, as was admitted (I hasten to say) by the Law Lords exactly a year and 6 days later,¹³ bringing an end to this judicial debacle, all concurring in the repentant judgment authored by the Law Lord who had given one of the judgements concurred in by four out of five Law Lords in 1985.

The causes of the debacle were fourfold, I think. *First*, the seductive impact of slogans held out by able counsel (the same leading counsel was successful both in 1975 and 1985): “rational principle: no punishment for thoughts”; “objectively innocent acts”; “the principle of legality”, and so forth. *Second*, the force of precedent: even so dramatically mistaken and widely denounced a decision as the first in the series, in 1975, exercised

⁸ “The House of Lords on Impossible Attempts”, in *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*, ed. Colin Tapper (Butterworth, 1981); reprinted as essay 17 in H.L.A. Hart, *Essays on Jurisprudence and Philosophy* (Oxford: OUP, 1983).

⁹ Criminal Attempts Act 1981 Act s. 1(1): If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

(3) In any case where - (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but (b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.

¹⁰ Law Commission, *A Criminal Code for England and Wales*, Law Com. No. 177 (17 April 1989), vol. I app. A, p. 65. The four Commissioners included the future Lords Justices Beldam and Buxton LJJ, and the future Lady Hale SJC.

¹¹ *Anderton v Ryan* [1985] AC 560, decided 9 May 1985.

¹² See [1985] AC at 571 (Lord Edmund Davies, dissenting) and 567 (Hytner, counsel for the accused).

¹³ *R v Shivpuri* [1987] AC 1, decided 15 May 1986.

precedential or inertial force only amplified because rendered by particularly strong judges using over-bearing rhetoric about what is and is not "asinine", and calling for adherence to "common law principle": no punishment for wrongful intentions, only for unlawful acts¹⁴ – even though in all these cases the accused had done a wealth of acts more than merely preparatory to doing what they knew would be unlawful if accomplished. The acts they had done, and the agreements they had made and done much or everything they could to perform, were acts and agreements which, even though by chance impossible of successful accomplishment, were plainly and publicly defined in advance as unlawful -- defined both by the historic common law overruled in 1975 and by Parliament's restoration of that law and more important of common sense in 1977 and again in 1981.

Thirdly, blind spots in legal learning – here we saw yet again the centuries-old and still persisting weakness of counsel and common law judges alike in reaching any refined let alone accurate understanding of the role of intention in identifying *action*. Members of a Law Commission can have more leisure and discursive opportunity to repair such gaps than even the highest appellate judges under the stress of their always diverse and overloaded docket of briefs to be read, arguments to be heard and judgments to be written. *Fourthly*, the procedural context of litigation and appellate advocacy induced a complexification by side issues, capable of determining the outcome but irrelevant to the point at stake in the proposed change in the law or the proposed rejection or interpretative transformation of Parliament's attempted change in the law. And equally it led to distortions, oversights and mistaken emphases, both in the collective effort to understand the established law as a potentially coherent whole, and in the assessment of the decision's impact on the community's future common good, a common good that includes not only the rights of alleged offenders to lawful procedures and the rights of their potential victims, but also the effects on potentially everyone of changed expectations, surveillance and other precautions and costs of many kinds.

4. But the problem about exercising judicial power with a view to reforming the law, or to assessing the merits of legislative reforms, is not merely the built-in risk of making poor judgments, but rather **a problem of principle. Making law is taking responsibility for the future, a responsibility of persons answerable for the new laws to their subjects. For discharging this responsibility, the institutional design of serious legislatures is broadly superior to the institutional design and procedures of even sophisticated appellate courts** -- not least *because* bearers of judicial power are rightly made immune from any requirement to answer for their judgments, and from almost any liability for them.

One among the features of courts that make them inapt to reform or to promote any particular measure for reforming the law is the structure of its adversarial character as a dispute about the legal rights *of* the parties and *as* those rights stood – acquired rights -- at the time past when the cause of action arose or the proceedings were initiated. At least one if not each of the parties is likely to be interested only in vindicating or defending just those rights, not in establishing just law for others or for the future. This party's strategic and tactical focus throughout the proceedings may be to leave uncontested the claims made by

¹⁴ Thus *DPP v Nock* [1978] AC 979 at 983 per Lord Scarman, recalling and developing dicta of Lord Reid in *Haughton v Smith* [1975] AC 475 at 500.

other parties who seek to advance some reformative cause, which by definition will affect indefinitely many parties in the future.

This asymmetry of aims is often accompanied by inequality of arms. As I have recorded and discussed elsewhere, in jurisdictions where statute law or even constitutional law can be reshaped by the courts, it often happens that movements for broad social reform – in relation to drugs, sex, or death – mount judicial proceedings after years of preparation of arguments and evidence, and confront in court state Solicitor-General's department lawyers who have first come to the issues only a few weeks before, and whose hearts may in any case not be in contesting the claims, claims which have been defeated again and again after open debate in the legislature. The cases may come before a single judge for trial and findings of fact, on matters on which the factual disputes largely concern the scarcely knowable future consequences of changes proposed. In the present structures of legal education and practice, there is a much better than even chance that the trial judge will be a longtime supporter of the social reform -- perhaps perfectly properly as a matter of political judgment as elector or politically accountable legislator: as a trial judge, not properly at all. If *amici curiae* or interveners are permitted at trial or on appeal, they remain in the position of persons with no right to be heard, of secondary status in the attentions of the court. Either of the parties' counsel may concede some issue of great public importance so as to enhance the chance of prevailing on some other ground. In all these ways (and there are more) judicial trial shows itself again and again to be, even with the best will in the world and much professional skill and dedication, still an incompetent method of reforming law more than incrementally, and one that is likely to deny some or many of those affected a fair chance of making their voice heard in society's deliberation about its and their future.

Another asymmetry occurs when courts at the highest or high levels introduce a reform with division between reforming and conservative judges. Even when the reform is spectacularly mismanaged by the judicial majority, and so comes back to court, perhaps very soon, perhaps after years or decades, the reforming judges will regard themselves as fully free to reiterate the reform, but judges conservative about the issue itself are likely also to be conservative about judicial power itself, and more or less reluctant to overrule a perhaps recent decision of the highest court lest this reversal undermine the court's practice itself and/or the court's perceived status in the political community, as an organ for declaring legal rights, not creating them.

Well known and "classic" examples of this from the United States can be dispassionately considered in the light of our own, different way of resolving the same social question, the same question of justice – whether rightly or wrongly resolving is not the issue in this reflection on methods of introducing change. In 1973 a liberal majority of the US Supreme Court nullified the laws of all the states about medically unneeded termination of pregnancy. The Court's opinion was so ill reasoned that even the many constitutional law scholars, including the most eminent, who strongly favoured a wholly permissive legal regime, regarded the decision as *constitutionally* disreputable, legally indefensible, and even as showing no sense of an obligation to be constitutionally sound in adjudication. But when the case finally came up again in the Supreme Court squarely in 1992, some main elements of the reform were upheld and continued in force by a narrow majority 5: 4 with three of the five expressly relying heavily on the doctrine of respect for *judicial* precedent, and also on the need to uphold the institutional reputation of the court, as grounds for retaining a judicially declared right notwithstanding its assumed

unsoundness as constitutional law and notwithstanding also its possible opposition to moral rights and aspects of the common good.¹⁵ Whether or not they were rightly treated as decisive in relation to a proposed *restoration* of the historic legislative position on *that* subject-matter, these were sound general reflections, and were appealed to fittingly by Lord Hoffmann dissenting in the Judicial Committee of the Privy Council when in 2000 it engaged in some non-restorative law-making for the Caribbean about judicialising the executive prerogative of mercy.¹⁶

Now legislatures of course need to be attentive to the interests and legitimate expectations created by legislation that they regard as unsatisfactory and consider repealing. But they can remain focused on all those interests and the competing interests of subjects who will be benefited or protected by repeal of the existing legislation. They do not have to worry, as courts do and the US Supreme Court did in 1992, about letting half-baked judicially introduced reforms stay on indefinitely because changing them back would affect the judiciary's institutional reputation, the reputation it needs if it is to perform fearlessly the essential functions of applying the law to heavily contested facts disputed between persons or entities of great and/or disparate power. Let me be clear: the reforms initiated by the Supreme Court of the United States in 1973 were preceded by Parliamentary legislation of very similar scope and effect in this country, just as was to be the case half a century later with same-sex marriage. Whatever one's views about the justice or injustice of these reforms, it matters that the method by which they were introduced was rationally greatly superior in this country. The majority opinion in the 2015 Supreme Court decision on the latter issue is rightly regarded by professionals and scholars, even those many strongly in favour of the resultant new law, as so defective in legal argumentation as to be almost unreadable by professionals.

No society is entitled to expect to escape serious long-term bad consequences when judicial power is so misemployed. Such a method of law reform is simply incompetent as a procedure for introducing substantial legal change, let alone a vast shift such as this in the polity's and society's self-determining, self-shaping commitments. And it is a method that is, as I just suggested, unfair to all who have not been represented even notionally in this remaking of our future under the claim – worse, the spurious claim -- to be interpreting the commitments we or our forebears made in the past. For such changes we have another, better method, the modern legislature, fortified by its own committees and their hearings, and by the investigative, discursive and reflective work of law reform commissions, and the ever present voices of constituents. The characteristic disdain of law schools and their alumni for legislatures and legislation is, I think, shallowly informed and uncritical, a *déformation professionnelle* which more even-handed self-criticism could help straighten out.

5. In any event, the constitutional division of authority is a matter of law, part of the law the judge has a duty to apply even when it establishes that a certain matter is not subject to adjudication, or that parties of certain kinds have legal rights that the judge thinks they should not have had, or has obligations the judge thinks they should not have.

¹⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992)

¹⁶ *Lewis v AG Jamaica* [2001] AC 50.

As Bacon's essay on Judicature implies, and his several speeches as Lord Chancellor addressing newly appointed judges state explicitly, *it is part of the law* that there exist the so-called prerogative powers of the executive, powers understood right down to modern times as not subject to review as to the content of their exercise, though not capable of imposing any legal obligation, or cancelling any legal right, of a citizen within the realm. Bacon's point was that for a judge to appeal to the political idea or ideal or value of the Rule of Law (the ideal first argued for philosophically by Aristotle) so as to subject the exercise of the prerogative to scrutiny for its lawfulness would be to depart from the Rule of Law, given the content of our constitutional law.

Water cascaded under the bridge in the century after 1612, carrying into the hands of Parliament much that in Bacon's time was still regarded as an entailment or part of the sovereignty of the monarch and his ministers. The Bill of Rights 1689 put an end to royal prerogatives, real or pretended, such as of suspending statutes or dispensing from their obligations, or of imposing taxes or charges without explicit parliamentary authority. But it remains to this day that there are some domains of executive responsibility, especially but not only in international affairs, that are reserved *by our law* for the responsibility, discretion, and political accountability of the executive government. Judges who appeal to the Rule of Law to treat this legal truth about our constitution as a dead or empty letter are setting aside the Rule of Law, as well as trenching on responsibilities which judicial power is ill fitted to discharge. There are sufficient reasons of institutional competence to reinforce the already sufficient reasons of precedent and basic constitutionality that establish the rules recognising some judicially unreviewable executive discretionary power (and analogously establish the constitutional rule of parliamentary privilege judicially unreviewable for the content of its exercise).

The very last decision of the Law Lords, a few months after Lord Hoffmann's retirement from their ranks, was (so I have argued elsewhere) an essentially unconstitutional invasion of an executive power conferred or confirmed by our law, specifically by the Suicide Act 1961 s. 2(4), requiring the authorization of Director of Public Prosecutions as precondition for prosecuting any of the offences created by that statute.¹⁷ The premise of the Lords' judgments in *Purdy v DPP* (2009) was that, to conform to the European Convention on Human Rights, our law must enable a law-abiding citizen to "foresee the consequences of his actions so that he can regulate his conduct *without breaking the law*."¹⁸ Grant the premise. Their conclusion and order was in substance that the DPP must give guidance to citizens contemplating breaking the law about suicide so that they can foresee the consequences *of their law-breaking*. So, as the courts below saw, this was not only declaring a Human Rights Act "Convention right" unhinged from the Convention and from the decisions of its judicial organ in Strasbourg, *R (Pretty) v DPP* (2001)¹⁹, but also was trying to square the constitutional circle – to make judicial power, exercised without warrant of law, supreme over an executive power fully warranted by statute. The *Purdy* judgments about the DPP's duty conceive of themselves as resting on the principle of legality, or the Rule of Law. So too do the Supreme Court majority in *Evans* this year, setting aside the clear statutory effect of the Attorney General's certificate about

¹⁷ Finnis, "Invoking the Principle of Legality against the Rule of Law", [2010] New Zealand L. Rev. 601-616 (and in Richard Ekins (ed.), *Modern Challenges to the Rule of Law* (Wellington: Lexis Nexis, 2010) 129-42.

¹⁸ *Purdy v DPP* [2009] UKHL 45, [2010] 1 AC 345 at [40], Lord Hope.

¹⁹ [2002] 1 AC 800.

the Prince of Wales's correspondence. But in each case the court's treatment of the real constitutional or enacted rules is so implausible, so extravagantly Procrustean, that the persons given clear statutory responsibility, and more importantly the Parliament that conferred it and the interested informed public, all are right to take these as decisions that confuse the rule of law and legality with the rule of judges.

Purdy should have been challenged and overruled in the next Supreme Court case about assisting suicide, *Nicklinson* (2014). But counsel and the interveners doubtless for strategic reasons chose not to do so. And that is one manifestation of a somewhat wider institutional problem, which extends beyond judicial change or development of the law and bedevils even judicial application of straightforward and uncontested legal obligations, including obligations imposed specifically on the courts themselves. I mean the problem of concessions by counsel, whether long meditated and made in the briefs or skeleton arguments, or made in the face of the court.

Many illustrations of the problem could be given. I choose one, *A v Home Secretary* (2005), the famous *Belmarsh Prisoners' Case*, because it was, in my respectful opinion, a juridical debacle at least the equal of the Lords' impossible attempt cases in fallacious reasoning and manifest error, and because these have gone almost unnoticed by a commentariat that applauds the apparently but, as I shall show, only apparently liberal result. It involved an Appellate Committee of almost unparalleled strength, nine in all, including Lord Hoffmann – but he took a lonely road that has weathered well, denying a premise that all eight others accepted, and so did not tread the quagmire of fallacy into which the rest (including the lone dissenter) volubly disappeared. Until this grand and almost universally applauded decision is recognized as the error it was, little in our constitutional practice will cohere.

- Because it is the flagship case of today's British human-rights-law movement, and given some prominence in the book *The Rule of Law* by Lord Bingham, who presided in it, a book that applicants to read law in Cambridge and Oxford all read, I have set it out, and argued my critique over two or more pages in the copy of this Lecture available at the door. Here is the short of it.

Belmarsh: short version

At the end of over 200 paragraphs of judgments, the House of Lords declared that s. 23 of the post 9/11 Anti-Terrorism, Crime and Security Act 2001 was incompatible with the rights to liberty and equality guaranteed in the European Convention on Human Rights. Sec. 23 is very short, and consists of two subsections.²⁰ The second, which controls the first, is never quoted in any judgment, never discussed in the reported argument of counsel,

²⁰ "23 (1) A suspected international terrorist may be detained *under a provision specified in subsection (2)* despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by –

- (a) a point of law which wholly or partly relates to an international agreement, or
- (b) a practical consideration.

(2) The provisions mentioned in subsection (1) are –

- (a) paragraph 16 of Schedule 2 to the Immigration Act 1971 (c. 77) (detention of persons liable to examination or removal), and
- (b) paragraph 2 of Schedule 3 to that Act (detention *pending deportation*).” (emphases added)

and has the effect – surely uncontroversial among administrative law practitioners and scholars – of providing that the detention authorized by s. 23 is only “pending deportation”. That means (as was confirmed, if confirmation were needed by a very high profile decision of the High Court of Australia decided two months earlier than the argument and four months earlier than the decision in *Belmarsh*, but never mentioned by anyone in *Belmarsh*) that at the outset of detention, and every three months thereafter, the extension of the High Court called the Special Immigration and Appeals Tribunal (SIAC) would have to be satisfied not only that the appellants’ detention was justified by the reasonableness of the suspicion that they were terrorists and by the reasonableness of the assessment that their presence in the UK was still a threat to national security *but also* by demonstration that the Government was trying to deport them and taking good faith measures to overcome the legal and practical obstacles to deporting them. In the absence of such a demonstration of ongoing real efforts to deport, the detention would be unlawful under s. 23(2). But as far as one can tell from the official report of arguments and judgments, s. 23(2)’s obvious meaning, implications and legal effect were never discussed or even noticed in the House of Lords proceedings. Nor is there the slightest mention of the possible applicability to it of s. 3 of the Human Rights Act, which imposes on the courts a duty not to declare any statutory provision to be incompatible with Convention rights without first interpreting that provision so far as possible to be compatible – an interpretative exercise which the courts routinely perform with enthusiasm and sometimes with plausibility. The Lords declared s. 23 incompatible without for a minute considering their s. 3 duty or the *obvious* possibility of reading s. 23 compatibly with the liberty and equality Convention rights, in the way I did a moment ago. They denounced the section as unlawful on the premise that it authorized detention of foreigners if their deportation was *impossible*, just as deportation of British nationals is impossible; as they then ruled, it is irrational and discriminatory to lock up foreign terrorists you cannot deport while leaving free home-grown terrorists you cannot deport. But s. 23 – with or without the compulsory but forgotten s. 3 interpretative exercise -- *meant* that detention of foreign terrorists is lawful only so long as their deportation, though temporarily or indefinitely prevented, is a possibility being actively and in good faith pursued.

How could all this happen? Well, in part because of inept concessions and oversights by counsel for the Government.²¹ Yes, true, the concessions were made by the Attorney General in the Government that promoted this legislation. But how could that be reason for the Law Lords not to look behind the concessions to the terms of the two Acts of Parliament in front of them? This is not the Tudor world in which the Government is taken to make and unmake law by proclamation. Government ministers had no authority whatever to change the meaning of s. 23 by concession, let alone by silent, unacknowledged concession (or omission to defend), and no authority whatever to licence the Court to leave s.3 of the Human Rights Act unmentioned. Nor could any ministerial concession make it fitting for the judgments to leave Parliament and the country in ignorance that the Appellate Committee had simply not done what *being seen to do justice according to law* required of it, namely perform its s. 3 duty of *seeking* to read s. 23 compatibly with the Convention before declaring it incompatible.

²¹ See n22 below.

Shortest version of the case. Sec. 23, authorizing these detentions, was supported by two braces – the terms *Parliament* had included as subsection (2) of s. 23 itself, and the imperative to interpret compatibly if possible put in place by *Parliament* as s. 3 of the Human Rights Act. The *Government* had decided to add a new-fangled belt of its own, a ministerial order derogating from the freedom-from-detention article of the European Convention and Human Rights Act. (The belt *itself said* that it was functional only IF support was otherwise lacking.) The Attorney General came to the Lords and argued that s.23 was nicely held up by the belt. He did not mention the braces;²² and was not asked about them. The Law Lords said, No, this belt is not functional, can't hold anything up (and we quash it). They then declared s. 23 to be legally unsupported and a violation of Convention rights, without pausing even for an instant to say anything about *either* of the pair of statutory braces -- perfectly sound, well attached braces.

So this flagship case is a ghost-ship, in reality a shipwreck – as an application of law to facts, a total loss. So far from the result being truly liberal, the applicants were not even given what they were legally entitled to (though adeptly²³ hadn't asked for): a ruling that they could not be detained unless SIAC found, every three-months, that their deportation was still a possibility being actively pursued (as in fact it was!). My full argument about all this, in the decorous pages and language of the Law Quarterly Review in 2007,²⁴ has gone quite unanswered, so far as I know. That matters nothing, but the constitutional irregularity of this very high-level exercise of judicial power, in which the constitutional irregularity (deviation from the rule of law) was all on the judicial side, and not at all on the legislative or executive, is deeply troubling.

Belmarsh: longer version

The problem, stated without complexities introduced by the bewitchment of successful counsel for the prisoners and the concessions unwisely made (or allowed to be inferred from his argumentative strategy) by the Attorney General, was simple. Foreigners whose presence appears to the Home Secretary to be a threat ("not conducive") to the public good can in general be deported: that originally prerogative but now statutory power was not in dispute. A main provision of the Immigration Act 1971, still in force, authorizes "the detention ... of persons *in connection with deportation*" subject to an attached provision called

²² All he said in argument was: "Since the Secretary of State would wish to deport the appellants when he can do so compatibly with the United Kingdom's obligations under article 3 of the European Convention..., he reserves his position that their detention is in any event compatible with article 5(1)(f) and derogation under article 15 is unnecessary." [2005] 2 A.C. at 84. But the Government's Printed Case in the Lords had said, at the relevant point: "If [the derogation [from Article 5(1)(f) HRA] was not [a valid derogation under Article 15 HRA], *the Appellants will succeed in their claim for a declaration of incompatibility* between [s.23 ATCSAct] and the (unmodified) right in Article 5(1)...." (emphasis added). That is concession, and explicable only by oversight of each of the braces (and of the Australian decision pretty squarely on point: *Kateb v Godwin* [2004] HCA 37, (2004) 219 C.L.R. 562 (6 August 2004)). The Lords treated it as exempting them from any need to consider the relevant parts of s. 23 and the Human Rights Act 1998 – the parts an examination of which was a necessary condition to responsibly (let alone correctly) exercising their power to make a declaration of incompatibility.

²³ All concerned were, one senses, at least as interested in having the Government denounced and reined in as a human rights abuser in need of intrusive judicial control as in winning the release of these terrorist suspects.

²⁴ Finnis, "Nationality, Alienage and Constitutional Principle", Law Quarterly Review 123 (2007) 417-45.

Schedule 3. The operative part of Schedule 3 says a person subject to a deportation order "may be detained ... *pending his removal* or departure from the United Kingdom". And the European Convention on Human Rights by art. 5(1)(f) expressly authorizes detention *while "action is being taken with a view to deportation"*. Well, after the 9/11 atrocities in 2001 Parliament passed a statute defining international terrorism and authorizing the deportation of foreigners suspected of involvement in it, provided the Home Secretary certified that their continued presence in the UK would endanger national security, and could satisfy the Special Immigration Appeals Tribunal [SIAC] of the reasonableness of these suspicions and opinions. The 2001 statute added, in s. 23, that foreigners so certified and under lawful deportation order could be detained *under Schedule 3* of the Immigration Act even if their deportation was temporarily or indefinitely prevented by legal or practical problems, with again a right to have the lawfulness of their continued detention reviewed every three months by SIAC (an arm in effect of the High Court). The appellants in this great case were foreigners reasonably suspected (as SIAC found) and detained in Belmarsh Prison under these provisions. They persuaded seven or eight judges in the House of Lords that their detention was unlawful. How so?

The legal problem that s. 23 of the 2001 statute envisaged as temporarily or indefinitely preventing deportation was one to which I will return later. The Strasbourg Court has held that art 3 of the ECHR, forbidding torture and inhuman or degrading treatment, precludes deportation of non-nationals to any country where there is a real risk of their being so treated. These Belmarsh prisoners were nationals of a country where, at the time of the proceedings, they would be at such risk if deported back to there. So they could not be deported unless another country could be found willing to take them, or until the UK could obtain from their home country treaty-like assurances capable of persuading SIAC that there was no real risk of their being ill-treated on return. At the time of the proceedings the Government was in fact negotiating to secure such assurances, but it chose not to disclose this to the Lords.

Indeed, the Attorney General chose not to argue, at all, that the detention was authorized and lawful under Schedule 3 *because* it was *only "pending deportation"*, and lawful under art. 5 of the Convention as *"action ... being taken with a view to deportation"*. Moreover, he did not to put before the Lords the two-month old decision of the Australian High Court that indefinite detention pending deportation is lawful if and only if, and while, steps are actively being taken to make the deportation possible (by finding a country made safe enough, if need be by credible agreements with the departing Government). Instead, he chose to concede that the detention was contrary to art. 5 of the Convention, reserving his right to withdraw the concession in another place (presumably the Strasbourg Court, assuming he won in the House of Lords!).

This strange concession²⁵ allowed counsel for the several groups of detainees and for intervening NGOs to represent s. 23 of the 2001 statute as simply authorizing indefinite detention of foreigners while leaving undetained all the UK nationals equally suspect of terrorism and threatening to national security; so the detention was both irrationally pointless and discriminatory. Counsel, followed by each of the seven-strong majority, treated

²⁵ If someone objects that perhaps the Government wished to go for broke and win judicial approval of indefinite detention without intent to deport, the response must be that "its own" statute, s. 23, with its own cross-reference – explicitly repeating the words "pending deportation" -- to Sched. 3 of the Immigration Act, only ever authorized detention pending deportation. And that a statute is in fact not the Government's, but the Parliament's. Sec. 23 should not have been declared incompatible but declared binding on the Home Secretary so that her current intent and effort to deport was and remained a condition precedent to lawfully detaining and retaining in detention.

the appellant detainees as, in Lady Hale's words, "foreigners [who] are only being detained because they *cannot be deported*". They are just like a British national who *cannot be deported*".²⁶ (Deportation of nationals was excluded by our law long ago.) On this basis, that majority issued a declaration under s. 4 of the Human Rights Act 1998 that s. 23 of the 2001 Act was incompatible with the ECHR's articles about liberty and non-discrimination.

Now s. 3 of the Human Rights Act commands judges not to issue such a s. 4 declaration of incompatibility without first *interpreting* the allegedly incompatible statutory provision "in a way which is *compatible* with the Convention rights so far as it is possible to do so". Was such a reading of s. 23 possible? Indeed it was! Was it attempted? No. Was s. 3's command to the judges mentioned in the case? Not at all, it appears. This further silent concession by the Attorney General should not of course, in my opinion, have deflected the House of Lords from attending to s. 3's command, as they very frequently and sometimes surprisingly energetically do in other cases.²⁷ Yes, it is the Attorney-General making concessions about legislation promoted by his own Government, but these are not Tudor proclamations, and we live under a constitution shaped by the *Case of Proclamations* and the Glorious Revolution: Parliament not Her Majesty's Government makes the laws and it is they not any of her ministers who define the law that it is the duty of the Court to apply.

The reading of s. 23 that makes it compatible with the Convention is the reading suggested (I would say compelled) by its own reference to Schedule 3 of the Immigration Act: the detention must be "pending deportation". In a part of s. 23 (a short section) somehow never quoted anywhere in the reported arguments or any judgment, s. 23 itself says that the Schedule 3 detention to which it refers is detention "pending deportation"! So s. 23 is about detention that, in art. 5(1)(f) words must be and remain "with a view to deportation".²⁸ So the Lords should simply have declared that in every three monthly hearing under the 2001 Act, the Home Secretary would have to satisfy SIAC that he was *still taking steps* to deport these men, was in good faith negotiating with their home government and/or with other governments. There must be no question of indefinitely detaining them because they are foreigners, unlike their fellow terrorist suspects who happen to be UK citizens. By the terms of the 2001 statute itself even before you get to HRA s. 3's interpretative command, the detention must be *because their deportation is possible*, not because (in the words of all the Law Lords bewitched by counsel) it is *impossible*.

No trace of any of this line of thought appears in the hundreds of pages of argument and judgment. The magisterial judgment of Lord Bingham is, like the six agreeing with it, as misconceived as the judgments of Lord Reid in the 1975 attempts case, of Lord Scarman in its

²⁶ *A v Home Secretary* [2004] UKHL 54, [2005] 2 A.C. 68, [235] (Hale); see also [222] and [228] (Hale); the simplification is also explicit in [9] and [13] (Bingham), [84] (Nicholls), [126] (Hope), [162] and [188] (Rodger), and [210] (Walker).

²⁷ Instead, the leading judgment of the presiding Law Lord, Lord Bingham, when retracing the argument on a minor issue about which the Court of Appeal *had* fleetingly alluded to s. 3 (as indeed, I am informed, counsel for the Government did briefly in the Lords), seems to go out of his way to avoid any mention whatever of s. 3, replacing the Court of Appeal's allusion to it with a classic common law case about reading down statutory provisions. See para [33] of his judgment and my commentary on this and on all aspects of s. 3's ghostly presence, Finnis,

"Nationality, Alienage and Constitutional Principle", *Law Quarterly Review* 123 (2007) 417-45 text at fnn. 63-72.
²⁸ In *Chahal v. United Kingdom* (1996), the ECtHR had held that, if action is being taken with due diligence [113] with a view to deportation, art. 5(1)(f) does *not* require that the detention be considered necessary, "for example to prevent his committing an offence or fleeing" [112]. It held, moreover, that the proceedings for Chahal's deportation had been conducted with such diligence that four (indeed, over six) years' detention of the alien deportee was compatible with art. 5(1)(f). Lord Bingham's judgment discusses the relevant paragraph of *Chahal* ([113]) while leaving all this completely unmentioned.

1978 successor, and of Lord Bridge in 1985, until he and all accepted in 1986 that it was all a complete mistake – as everyone has agreed ever since. Even more than in those cases, the *Belmarsh Prisoners* miscarriage is a triumph of skillful but at bottom sophistical advocacy, aided in this case (*unlike* those) by misconceived strategies and concessions by the Government. The solitariness of the respondent team, unreinforced by any intervener NGOs, might have suggested to the Court some duty to look behind their concessions, even if it were not the case that s. 3 of the Human Rights Act speaks directly to the Court. But it did not – another manifestation of built-in problems with the exercise of judicial power on complex issue going wide in their constitutional, political and human implications.

This sort of constitutionally dubious exercise of judicial power nearly happened again last year, in *Nicklinson v DPP*²⁹ when the Supreme Court, again nine-strong for the occasion, got close to declaring the Suicide Act 1961-2009 partly incompatible with the European Convention right to private life, omitting to note anywhere in the many long judgments that the Suicide Act is wholly compatible with Convention rights (and the UK's Convention obligations) as they have been authoritatively declared by the highest organ of the Convention, the Strasbourg Court – with the result that a certificate or declaration of incompatibility would be misleading unless on its face it carefully informed Parliament that the certified incompatibility was *not* with Convention rights, meaning rights under or by virtue of the Convention, but only with rights which the Human Rights Act somehow allows our judiciary to discover and then label "Convention rights". Moreover, I respectfully think the leading judgment, in establishing a framework for analysis accepted or left unchallenged in all the eight other judgments, was simply erroneous in taking the Strasbourg judgment as ruling simply or primarily that the Suicide Act is within the member States' margin of appreciation (their zone of discretion, so to speak). In truth, the Strasbourg Court, though mentioning the margin of appreciation, squarely followed the unanimous House of Lords in finding that the Suicide Act, even in its application to cases identical to those in *Nicklinson*, is compatible with the Convention rights to life and to private life – compatible by reason of the rights of all the vulnerable who would be put at risk were the law to allow the exceptions sought by the applicants.

These reflections on several decisions by our highest courts help illustrate other theses I want to propose tonight. Here is a set of negative theses.

6. The content of our constitution was not and is not established by the judges, though it could not and cannot be established without their ratification. Lord Steyn's dictum in *Jackson v AG* that the judges created the supremacy of Parliament ["the supremacy of Parliament is still the general principle of our constitution. The judges created this principle"] should be simply rejected, along with its suggested corollary that what they created they can abolish. What Coke was doing in *The Case of Proclamations* did not become part of the constitution until it was adopted by the polity, by a process that includes the *Petition of Right* he drew up for his fellow MPs to present to the King in 1628, the civil war Parliament and then the Glorious Revolution enforced by the Dutch navy and armed forces helping install a partly Dutch royal house and the constitutional settlement of

²⁹ [2014] UKSC 38. 25 June 2014. See Finnis, "A British 'Convention Right' to Assistance in Suicide?", (2015) 113 Law Quarterly Review 1.

the Bill of Rights 1689 and the Act of Succession 1701 securing a Hanoverian monarchy and judicial security of tenure. Judicial adoption of these rules has been essentially, and reasonably, retrospective. It is only a necessary not a sufficient condition for their inclusion in our constitution.

Just as the Rule of Law is not the rule of judges but includes the judicial power to adjudicate according to law, so too judicial power is not a power to remake the constitution.

7. It is not true that the courts are *the* forum of rights and principle, and the legislature the forum of interests or welfare.

8. It is not the case that the legislature is to promote the will of the majority and the courts to protect minorities.

Each of that pair of thoughts, much promoted by my old colleague Ronald Dworkin, misapprehends both sides of the contrast. Legislatures ought to be constantly concerned with both the legal and the moral rights of all within the protection and obligation of their enactments. Courts ought to be constantly concerned to uphold the legal rights of the parties before them, whether there stands behind one or other of them vast numbers of others in like case, or very few.

Majority rule prevails in legislative assemblies, but only rather imperfectly in elections, and even within legislatures free from all tactical voting, whipping, corrupt dealing, and intimidation – the prevalence of which is presumed and greatly exaggerated in law school talk -- it is a plain and mathematically demonstrable fact that the majority can perfectly fairly be in the minority on a majority of divisions. (That is equally possible in an appellate court of more than four judges.) Normally, majority rule is quite unlike the rule of some monolithic block such as a racial majority united in steady determination to rule without due regard to a racial minority. Likewise in the wider community. Thus, talk such as Dworkin's (or among his followers among American judges and counsel) about majorities and their *interests and policies* opposed to minorities with their *rights* is usually a mask for ignoring the *reasons* for the view favoured – after all, one person at a time – by the majority, reasons which may be as concerned with rights, dignity and fairness as this or that minorities.³⁰ And very often, as in modern discrimination and other human rights law cases, the responsibility of the legislature and of the court is to identify which interest of which minority is entitled to prevail over which competing minority interest and thus be recognized as truly a right not merely an interest. Often, and to an extent not yet adequately acknowledged, I think, this identification should end not in a straight trumping but in an accommodation of the competing minority interests/rights. Mostly this is appropriately a matter for accountable legislative decision. And here the overarching review functions assigned to or appropriated by judicial tribunals are assigned or assumed inappropriately, for the backward-looking structure of judicial proceedings and action leaves it largely unfitted for intelligently envisaging upon new vistas and acting upon them without unfairness to the parties. I say a bit more about that soon, when offering a few

³⁰ On these issues, and indeed most of the issues in this lecture, see Finnis, "A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence" (Maccabaeian Lecture in Jurisprudence), Proceedings of the British Academy 71: 303–31; reprinted in *Human Rights and Common Good, Collected Essays of John Finnis* (Oxford University Press, 2011), vol III, essay 1 (majority-minority paradox, p. 22).

thoughts about "proportionality", now the main engine of human rights law and constitutional rights adjudication.

And, more basically: as the good-hearted old judge Escalus says more than once in *Measure for Measure* (though in somewhat different words), when you're about to be robbed or worse, you're not then, when it matters, in a majority – but a minority of one. Everybody knows this, but Bacon thought it worth reminding judges of this most basic responsibility of theirs, all the same.

9. In maturely self-determined polities with a discursively deliberative legislature, it is not wise to require or permit judges to exercise the essentially non-judicial responsibility of overriding or even of condemning legislation for its not being "necessary", or for its "disproportionality", relative to open-ended rights and the needs of a democratic society.

That is the responsibility that became a subject of judicial power when the ECHR's enforcement was made a matter no longer for dealings between its member states, but primarily for the Convention's court in Strasbourg. And the responsibility was conferred on the courts in this country when the Human Rights Act 1998 made most of the Convention's provisions justiciable directly in our law. Ineptly, the Convention's text, having announced broad and vague "rights" such as "to private life", proceeds to declare that they can rightly be "interfered with" or "restricted" in their "exercise" only when that is "necessary" in "a democratic society", "in the interests of" for example "national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". Not only is it (1) inept to say that the right is interfered with when the restrictions are justified – an ineptitude insufficiently repaired by saying that then the right is "engaged"; for in truth, one's *interest* in such a good (or domain) as private life is *only properly a right* in those areas, matters and actions left free from the proper measures for preventing crime, protecting health and so on. One has *no* right of speaking incitement to murder or of private car-bomb construction. But moreover (2), the Convention's demand that these right-defining restrictions be "necessary" is absurdly excessive. We can always imagine getting by without any restriction (and just submitting to accepting the loss and damage), or think up some restriction different from the one under challenge and apt for the same purpose. So no particular restrictive rule is itself necessary. To escape this built-in absurdity, courts responsible for applying the Convention have plucked from some rather shady areas of German theology and law the idea of *proportionate* (and therefore justified) interferences.

"Proportionate" suggests a far more rigorous algorithm of criteria than is in fact or law available. The very considerable imprecision is manifested by the fact that after operating for about a decade with a three-step process of assessment, our courts have in the last few years suddenly taken to deploying four steps, and visibly treat the new, fourth step as in practice the most important of them all (despite its novelty!). The old set comprised (1) a legitimate aim or end, (2) means effective for that end, with (3) the smallest negative side-impact on other rights/interests. The recent addition is of (4) "proportionality in the strict sense", meaning that "all things considered" the pursuit of this aim (by these means) is reasonable, having regard not only to the harm done by the measure's side-effects but also to the harm that would be done by not pursuing the aim at all, or at any rate by these or comparable means.

All these criteria, and most obviously the suddenly popular fourth one, involve matters of fact (including counter-factuals) and evaluative opinion in which legal learning is of little assistance and forensically ascertainable evidence is unavailable. Though judicial competence can be deployed in applying a proportionality test to some classes of executive decision within the context of a dense web of legal rules (whether legislative or common law in origin) and culturally and conventionally established expectations, there is little or nothing judicial – nothing *law applying* -- about assessments of proportionality in relation to rights such as those in the ECHR, when these assessments are made by courts coming fresh to them in the context of general legislative or legislatively approved arrangements for social life.

The resultant arbitrariness is well illustrated by the Strasbourg Court's proportionality assessments of the law disenfranchising *convicted prisoners while in prison*. This law was declared in *Hirst No. 2* to be a disproportionate interference with the individual's right to vote which the Court read into the Convention provision that member states shall hold "free elections".³¹ The Court, over the protests of a strong dissenting minority, claimed to accept the legitimacy of the English rule's twin aims: promotion of civic responsibility by linking exercise of social rights with acceptance of social duties; and enhancement of the essential retributive rationale of punishment by accompanying the retributive deprivation of liberty with pro rata punitive deprivation of the right to have a say in making rules of the kind violated by the convicted prisoner. But when purporting to assess the proportionality of disenfranchisement as a means, the Court paid the ends (these aims) no attention whatever. It silently substituted its own end or aim: the protection of democratic society against activities intended to destroy the rights or freedoms set forth in the Convention ... by an individual who has seriously *abused a public position* or whose conduct threatened to *undermine the rule of law or democratic foundations*. The judgment could then effortlessly hold that disenfranchising imprisoned burglars, muggers, rapists and non-terrorist murderers is quite disproportionate to the end it had dreamed up in place of the statutory ends it had pretended to accept. Along the way, the judgment made two other moves familiar from the patterns of judicial reasoning in the impossible-attempt cases: it helped itself to its conclusion by assuming it as a premise, treating as an axiom that a sentence of imprisonment involves forfeiture of no other right besides liberty. And it anaesthetized itself with rhetoric about a "blanket ban", disproportionate simply because "general, automatic, and indiscriminate". But every legal rule covers like a blanket the range of persons, acts and matters that it its terms pick out and deal with. The British disenfranchisement is in its character or type no more blanket, general or automatic than a rule disqualifying all persons sentenced to 10 years or more for homicide. And so far from being indiscriminate in character, our law in its operation selects among persons convicted of crime only 8% -- the 8% sentenced to *imprisonment*.

This outstandingly confused application of proportionality doctrine was in fact abandoned in 2010 in favour of a much tougher ruling against all disenfranchisement of convicts save one-by-one, by a judge, for offences against elections or democracy: *Frodl v Austria*. So leading counsel for one of the successfully intervening NGOs in *Belmarsh* wrote in the *Times* on election day 2010, this is an unlawful General Election since virtually all our 80,000 convicted prisoners are entitled under the Convention to vote. But in 2012 the Strasbourg Court (Grand Chamber again as in *Hirst*) set aside the *Frodl* doctrine and in

³¹ 6 October 2005 (Grand Chamber).

Scoppola v Italy upheld Italy’s blanket legislatively not judicially selected ban on voting by convicts sentenced to more than 5 years – indeed a lifetime ban, subject to judicial review. Asked by the UK to accordingly reverse its *Hirst* decision, the Court refused, largely on the grounds that it should not go back on its own decisions, even if it had substantially gone back on all the reasoning.

Proportionality doctrine is inherently incapable of justifying judicial declarations that there is a legally and therefore judicially discernible line between a blanket ban like Italy’s and a blanket ban like England’s. Each has the same rational basis, and only an exercise of legislative power can make a choice between such rationally and legally acceptable alternatives. If a court is given the power to declare such a line, it is being given a power that is inherently legislative, not judicial. This was shown with scrupulous care in 2011, by Justice Heydon³² (bencher of this Inn and alumnus of University College Oxford), in a dissenting judgment in the High Court of Australia’s first appeal involving the State of Victoria’s Charter of Rights. I pause to say that his judgments characteristically show, to my mind, the exercise of judicial power in authentic, admirable form, requiring of the judge meticulous, unremitting attention to the facts as properly pleaded or established; to the procedural architecture; to the arguments the parties made and sometimes those that might well have made by them and can now be considered without unfairness or surprise; to the applicable rules of law in their detail, nuance, and clarifying relation to principle; and to our law’s principles themselves, though with prudent caution against the seductions of premature or sophistical simplicities and rhetoric; along with independence of mind, strong against lazy groupthink inside the court and the pressures of power and opinion outside it.³³ And despite all I have said tonight, these virtues are of course in evidence in many courts, and are a foundation of that workmanlike Rule of Law which has underpinned the markets of an entrepreneurial society and has made “English law” and by implication English courts, and judges and counsel as arbitrators, the favoured choice of law and jurisdiction in contracts all over the world. But to go back to proportionality: this 2011 judgment of Justice Heydon shows in detail how Victoria’s Charter (modeled on statutes like our Human Rights Act) requires the court to assess legislation’s proportionality by rights-related criteria so many, vague, diverse if not conflicting, and so open-ended to views about the future that the judge can only be exercising a parallel or overriding *legislative*, and *not* judicial power.³⁴

I would add only that what is wrong with conferring that power, even in the watered down form of a declaration leaving a statute in force until repealed, is that when the court draws the legislative line, its constitutional status and jurisdiction obliges it to claim or imply that it is simply *echoing* and transmitting the voice of *the law* – our law as it was laid down in the past. In fact it (or some earlier judicial decision on the same point) is

³² Dyson Heydon was of the three Oxford law dons (of Keble, Balliol and Univ) who in 1970 sat the last ever of the old, course-free Bar finals; he did best; we both were called to the Bar in Gray’s Inn Hall that autumn 45 years ago.

³³ In a lecture on “Judicial Independence, the Threat from Within” in the Inner Temple in January 2012, Justice Heydon said: “...judges need a form of independence; the independence to work out and say what they think is right irrespective of what advocates may agree on, what academic lawyers may urge, what pressure groups desire, what media groups demand, what their colleagues seem to think, or what their colleagues want them to say...” It should be said that Heydon speaks there of Lord Bingham as an outstanding judge. And also with admiration of Lord Reid. http://www.innertemple.org.uk/downloads/members/lectures_2012/lecture_dyson.pdf

³⁴ *Momcilovic v R* [2011] HCA 34, Heydon J. (diss.) at [428]-[432]. See also Francisco Urbina, “A Critique of Proportionality”, *American J. Jurisprudence* 57 (2012) 49-80; Finnis, “Response to Harel, Hope and Schwartz”, *Jerusalem Rev. Legal Studies* 8 (2013) 147-66 at 150-52 esp. nn. 7, 12.

making a choice for the whole community’s future, but without responsibility for that future or answerability for the choice. The claim or implication that it is choosing *by applying* our law is make-believe, as is the claim to be better equipped than the legislature to make such a choice. The true legislators are then forced either to go along with this make-believe and accept the humiliating status of violators setting right their violations of human rights, or to reject the judicial finding and be taken by the people to be claiming to know the law better than the judges. This is corrupting of constitutional understanding all round.

Australia, which has as a federal nation done entirely without constitutionally stated rights for 115 years, made the choice not to entrust this inappropriate kind of power to judges, but to trust themselves and the legislatures they elect. (Victoria and one small federal territory are the only exceptions and very novel ones.) Australia I would say has done easily as well as countries under judicially enforceable or even judicially declarable human rights, and has kept its legislative and judicial discourse authentic, largely uncluttered with this sort of make-believe and confusion of roles, responsibilities and competences.

Leaving aside the results, anyone who reads those of the opinions in our Supreme Court in *Nicklinson* that question the proportionality of the Suicide Act’s prohibition of assisting suicide (and in two cases try to draft or sketch an alternative), and who then reads the debates on the same matter in the House of Lords and the House of Commons subsequent to *Nicklinson*, should and I think will conclude that, although few if any of the legislators had attended to or read and gained from the *Nicklinson* judgments, the overall quality of the legislators’ engagement with the issues truly at stake, one way and the other, was, in each of the Houses, hugely superior. The learning deployed in the judgments is simply not well adapted to getting to the issues the resolution of which will affect the community’s whole life in the ways that either retaining or amending that law does.

10. In maturely self-determined polities with a discursively deliberative legislature, **it is not wise to allow court to constitute themselves roving law reform commissions like the ECHR, the ECJ, SCOTUS and SCC, and increasingly the UKSC.** That doctrine that these courts articulate to explain and justify doing so is that the Constitution or Convention or other instrument that they are responsible for applying is a living tree (the Canadian phrase)³⁵ or living instrument (the ECHR phrase).

For judges to apply **old** (as in “year-old” or “century-old”) statutes, constitutions or treaty-conventions to **new situations** and conditions is right, provided the new situation or condition falls within the categories picked out by the propositions expressed in the statute or other instrument, even if the new instances of those categories were not envisaged at the time of enactment. But it is wrong, I believe, for judges to apply newly current “values” (ideas about good and bad, right(s) and wrong(s)) to ensure that an **old situation** -- “old” because the instrument’s original makers intended their instrument to deal with that kind of situation (whether by inclusion or exclusion) in a certain way -- will now be dealt with **in a way that is new** and incompatibly different. And the latter (*new* answer to *old* kind of situation) is what is meant or connoted by “living instrument”, even though the verbal explanation of that phrase usually given represents it as the former (*new*

³⁵ But latterly adopted here: in *Brown v Stott* [2003] 1 AC 681, 703, Lord Bingham described the ECHR as a “living tree capable of growth and expansion within its natural limits”.

kind of situation/conditions). The constant (though not quite invariable) lack of candour or transparency in stating what is meant by "living instrument" is confirmation of my belief that the one is appropriate, the other not.

The Strasbourg Court began using the phrase to account for its rulings in April 1978, but it began giving rulings of this novel kind in February 1975: *Golder v UK*. There the three dissenting judges, especially Sir Gerald Fitzmaurice, elaborately demonstrated that the contracting states certainly intended that the Convention's art. 6 guarantee of a right to fair methods of trial would *not* guarantee a Convention right of access to a court, the right declared by the majority in *Golder*. This was the first of many such decisions, finding in the Convention rights which, as both Lord Sumption and Lady Hale have put it in learned lectures, we know from the negotiation documents the signatory states "definitely did not intend to grant" or "positively intended not to grant".³⁶ For example, in 1981 the Court outlawed the key parts of UK "closed shop" union law, although it is utterly clear, and not denied by the Court, that the Convention was carefully drafted so as to leave those provisions intact. In the voting cases culminating in *Hirst*, the Court appealed to the negotiating documents to establish that the Convention intended an individually enforceable right to vote, but ignored the negotiating documents that establish even more clearly that the Convention deliberately did not guarantee universal suffrage.

The great monument to living instrument interpretation is the Strasbourg Court's creation of a huge body of rights of asylum law, in the context of a Convention quite certainly intended to contain no right to asylum. This body of law has been created by way of living-instrument interpretation of art. 3's prohibition of torture and inhuman or degrading treatment. In my contribution to the soon to appear book I mentioned, I trace in detail both the origins and meaning of the living instrument doctrine, and the cases transforming art. 3 into a right not to be returned to a country where the returnee might be ill-treated in any of those three ways. It all culminates in the remarkable 2011 case *Hirsi Ali*, an important cause (among complex causes) of today's migration crisis.³⁷ There the Grand Chamber unanimously outlawed all and any policies like Italy's policy, agreed with Libya, of "pushing back" migrant boats with their occupants to the country of departure. If such boats might contain among the hundreds aboard even a handful of persons, or one person, who might be at real risk, if returned to Libya, of being sent from Libya to some country where he might be at real risk of degrading or other ill-treatment from the Government or, actually, from anyone, then all boat's passengers must be allowed to land in Italy. And this, the Court insists in its usual bland, inexplicit way, is an exceptionless rule, an absolute, from which there can be no derogation even if the life of the nation were to be certainly imperilled by the importation of ebola or other plague, or of uncountable

³⁶ See Baroness Hale of Richmond, "'What are the limits of the evolutive interpretation of the Convention?'," http://echr.coe.int/Documents/Dialogue_2011_ENG.pdf 11-18 at 18:

What are the natural limits to the growth of the living tree? They are not set by the literal meaning of the words used. They are not set by the intentions of the drafters, whether actual or presumed. *They are not even set by what the drafters definitely did not intend* [n. 49]. But there must be some limits.

Perhaps there are no real limits. Perhaps the Convention is a magic beanstalk rather than a living tree.

Lord Sumption, "The Limits of Law", Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013, p. 8. <https://www.supremecourt.uk/docs/speech-131120.pdf>

³⁷ *Hirsi jamaa v Italy* 23 February 2012 (27765/09) (GC, under the presidency of Judge Bratza (UK)).

numbers of terrorists, or others, intent on overthrowing by force, or numbers, the state and the Convention.

The Court's living interpretation of art. 3 jams the door open. Yet the records of the drafting of the Refugee Convention just after the completion of the European Convention on Human Rights, by essentially the same founding states, make it as clear as could possibly be that all the states which indicated their intentions intended to exclude from the Refugee Convention anything that might prevent them closing their borders to mass migration from any country.³⁸

It is certain that art. 3 was intended, surely rightly, to exclude from the conduct of its member states and their agents, absolutely and exceptionlessly -- even if the nation and its life were in peril -- every subjection of anyone to torture or to inhuman or degrading treatment. But it is also certain that if you think that what an exceptionless moral norm prohibits should extend beyond what the acting person or group *intends*, and so you try to make the norm exceptionlessly prohibit *also* whatever that person or group foresees as a side-effect of their acts, you will make the norm self-contradictory. For if one decides to comply with the norm and not engage in the norm-specified conduct, because engaging in it might or would cause (as a side-effect) harm or risk of forbidden harm, one's decision may equally foreseeably cause (as a side-effect) precisely the same or worse kind of harm or risk of harm. One can control what one *intends* in a way one cannot control the *side-effects* of what one chooses, especially if the side effects involve the choices of other persons. This is well-known to philosophers, whether like me they accept that there are some moral absolutes or like utilitarians and sceptics they deny that there are any true moral absolutes. But the Strasbourg Court, incredibly, has used the absoluteness of art. 3 as a ground, not for narrowing its application to acts intending the forbidden, so as to avoid self-contradiction, but rather as a ground for extending its *exceptionless* obligations from negative to affirmative and then almost without limit, forcing states to make extremely risky decisions to allow entry (or to permit staying after entry) lest a wholly unintended risk be created by their action. The risk creation forbidden by the Court is to the applicant; the risk thereby created by the Court (and any state compliant with it) is to the State's citizens, visible to the Court, if at all, only as an undifferentiated mass – despite their one-by-one fate if and when the Court-imposed risk materialises.

But the point tonight is only that this is all judicial legislation, an abuse (as the oft-dissenting British judge Fitzmaurice demonstrated time and again) even when the stakes are nothing like as high. The crisis that European countries are beginning to live is one for which the Strasbourg Court, as is rarely recalled, has a substantial responsibility. Its errors are no comedy, but a kind of nemesis. From this no court of error or appeal, nor any other means of liberation, has been made available or even specifically proposed as yet. It is not a nemesis that my argument relies upon, but it should not be passed over in silence, easier though that would be for us all, here and now.

Conclusion

³⁸ As Lord Bingham says in *Belmarsh* [69(2)], "It is, however, permissible under art. 33(2) of the Refugee Convention to return to his home country a refugee at risk of torture or inhuman treatment in that country....". The extensive *travaux préparatoires* on this, and on the issue of mass migration and "refoulement" are reviewed in Finnis, "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR" in Barber, Ekins and Yowell, *Lord Sumption and the Limits of Law* (Hart Publishing, 2016).

So I am reaching the end without entering at all into any of the concrete questions currently up for deliberation and argument, about changing our arrangements in relation to the important courts, treaties and statutes I have mentioned. The modern features of the exercise of judicial responsibility go wider, and it's good to reflect on and discuss them frankly.

Thinking about the future of judicial power, on the basis primarily of the social capital of our own legal, civil and political culture (main elements of which are mirrored for us, far and wide in the world), there is much that might be said and I make only one or two inter-related remarks at this late stage. The judicial independence that was so imperilled from outside in the days of Coke and Bacon was, a century later in 1701, made secure against executive power, in return for an implicit acknowledgement of three things: (1) The supremacy of Parliament's legislative power over, directly, both the executive and the existing law – and thus, indirectly, over the responsible bearers of judicial power. The famous concluding phrases of Bacon's essay on judicature are to apply in an adjusted way: judges are to be "lions under the throne" with "the throne" now understood in line with the now settled, complex, balanced resolution of the seventeenth century's constitutional conflicts: the *Crown in Parliament*. (2) The constitutional struggles were won by those who contested the power of the King, of his ministers and of his judges, just to the extent that those royal executive and judicial powers threatened the *historic* constitution that Coke (and his fifteenth century master the scholar-judge John Fortescue) traced back to Magna Carta. The constitutional settlement made changes, but they were sincerely in the name of restoration and of the *historic* rights of English men and women (which become the rights of the whole people of the realm, and were carried with them when they formed settlements abroad). (3) *This* people, unlike many others, thus resolved that in its constitution that supreme power which inevitably carries with it the risk that it may be exercised unwisely or unjustly would for all purposes, and unambiguously, be located in the Crown in Parliament. (3) Within that framework – respect for historic rights is entrusted to Parliamentary authority, and under that authority to the judges – the newly independent judges are to be lions: fearless upholders of law in face of every private or public blandishment or pressure. That complex, balanced constitutional settlement was hard won. Its merits are confirmed, I suggest, by continued experience, including not only some that I have recalled this evening, home-grown or nearby, but also some at a distance - - of alternatives such as the American or now the Canadian, where the constitutional power and self-confidence of supreme courts noticeably and it seems increasingly outruns their competence and care. The merits of our basic constitutional settlement are decreasingly accepted, and decreasingly well understood, certainly in the legal academy, and I think at the bar, and (I sense and sometimes see) on the bench. While there is healthy talk of differing institutional competences, it needs to be accompanied by assessments of the judicial competence and responsibility that are really balanced, and attentive to the fundamental constitution-shaping political, normative fact that everyone, each of us living our lives across time, is a minority in need of justice and representation.

Why, then, is the drift everywhere towards the subjection of legislative power, directly or indirectly, to judicial power? Why do many judges in many jurisdictions ever more confidently give judgments assuming the roles of constitution makers and legislators? Answers must remain speculative; the causes are various. One cause is hidden in that word "jurisdiction" I used just then when I meant countries, political and civic communities of households, families, people. Discourse in law schools and courts increasingly locates its

participants in a universe of standards of correct thought and decision, and of the incorrect and unacceptable, which are generated and shared among persons who speak as if they were nowhere in particular. And they can carry on this discourse, and make, commend or recommend the corresponding judicial decisions for whole countries and sets of countries with amazingly little pushback by those whom our constitutions still firmly designate as the makers of the law that shapes its people's future. Why is some pushback in order? Why was and is that historic constitutional distribution of responsibilities sound?

One way of putting a sound answer is this. Pushback, seeking to adaptively restore that constitutional distribution, is timely and fitting because the members of a properly functioning legislature, chosen by persons who (with their families) will be affected, have to *look each other in the eye*, even while they are deciding, with no pretence that their decision is anything other than what it is: their personal choice of one kind of future, in preference to all others, for themselves, their fellow legislators, and the people they represent and live among. They do not (and cannot) make the claim that bearers of judicial power must at least profess: that this decision of ours *about the law* merely or essentially conveys (transmits into the present and the future) positions that have *already been settled by our law* and are found in it by a learned art (Coke's "artificial reason") called interpretation, applying commitments made (at least in principle) *back in the past*. Or interpreting and applying commitments made (it is professed) *over there* in a haze of "global law", made how or by whom no-one really can say, but identifiable and professable as rights and standards even by scholars and judges who in another conversation, eye to eye, might well admit their doubt or denial that there is really any moral right or wrong. – their belief that no value judgments are *true*: all are "subjective".

That discourse community – or academic, NGO, judicial echo chamber – treats as strangers the legislators in merely local assemblies such as national Parliaments, and the politicians taken to be persons who are unskilled in *that* learned discourse's latest tropes and precepts, and who fail to measure themselves against the standards of esteem or disesteem that prevail in a given decade in *that* community or echo chamber. There is urgent need for legislators who have retained or regained their sense of constitutional place and legitimacy, and who are aware that this whole style and movement of global juridical discourse and judicial reformism is -- like judicial process even at its best – a defective, inferior way for a historically constitutionally minded people to take responsibility for its own future.

Legislators, and scholars and commentators who understand the lessons of our history, should also be aware – as I have outlined some of the evidence for holding -- that contemporary expansionist adjudication constantly results in judgments which by legal learning's own standards are shipwrecks, not because novel in their results but because, by those very standards of legal (including constitutional) learning, they are *fallacious*. Legislators and commentators need to be aware, and scholars (despite their rather monochrome political preferences) need more frankly to admit, that judicial judgments about legislative proportionality or programmatic rights are bound to be flawed, and often very deeply flawed, even – or perhaps especially -- when they are reconceived, not so much as final judgments resolving disputes between parties, but as would-be contributions to an ongoing legislative conversation or "dialogue".

Finally, we all, lawyers and non-lawyers alike, should be aware how much work we indispensably need the courts and their judges to do, as (I said) they have long done, so that in fidelity to real law applied to proven or admitted facts, they even-handedly restrain

those individuals and groups who wield any of the many, many kinds of private or public *power* – including the power of media pressure, groupthink and ostracism – to keep them within the specific bounds and measures of our genuinely established law's settled commitments, and to compensate those who have been unlawfully wronged. Until the slow fever of judicial expansionism is cooled, doing justice according to law will call *in a special way* for something else, which Dyson Heydon's Inner Temple lecture on judicial independence put in words of Lord Bingham: "Judicial independence involves independence from one's colleagues."