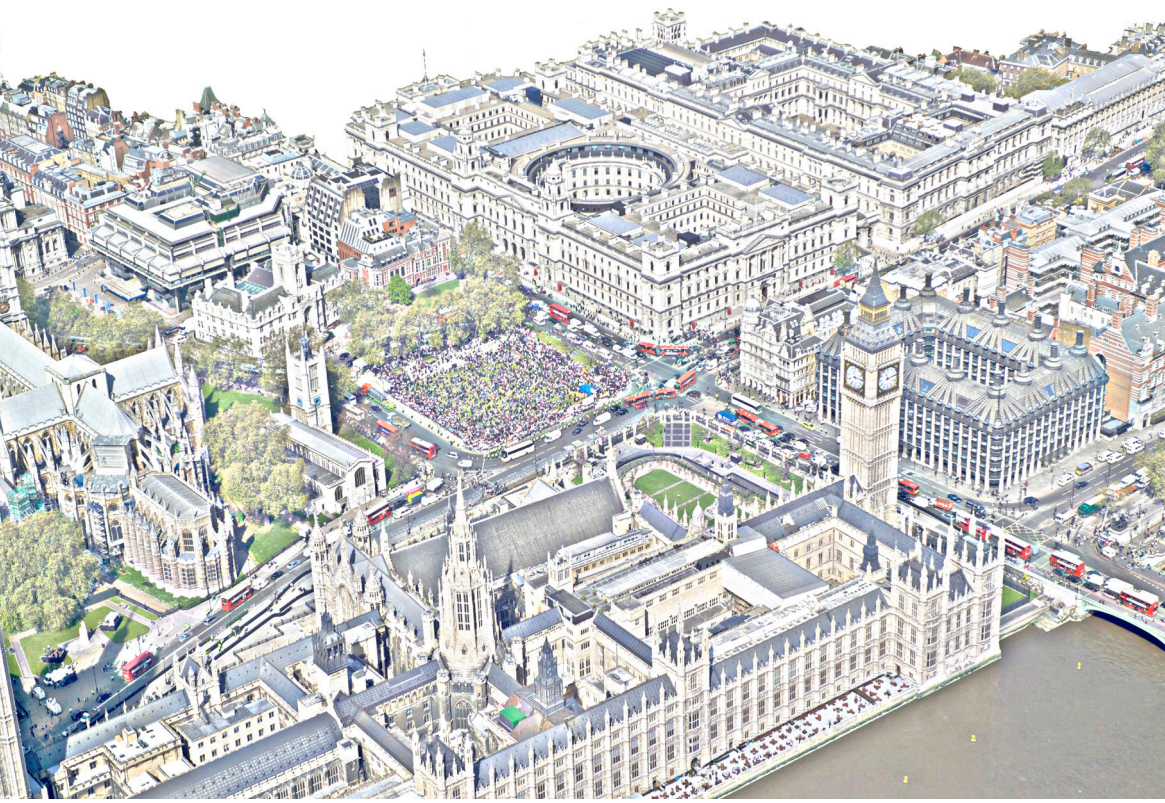


# Judicial Power and the Balance of Our Constitution



Two lectures by John Finnis

Foreword by the Lord Chief Justice of England and Wales



Front cover: The Supreme Court of the United Kingdom appears immediately above the tower of St Margaret's Church and overlooks a crowded Parliament Square. Downing Street and the Privy Council Office are at the top on the right, above the Foreign and Commonwealth Office and the Treasury Main Building. Image created from photograph by Kevin Allen.

# Judicial Power and the Balance of Our Constitution

Two lectures by John Finnis

Edited by Richard Ekins

With comments from:

Justice Brown, Canadian Supreme Court

Sir Patrick Elias QC, formerly Court of Appeal, England and Wales

Justice Glazebrook, New Zealand Supreme Court

Dyson Heydon AC QC, formerly High Court of Australia

Baroness O'Neill of Bengarve, House of Lords

Foreword by the Lord Chief Justice of England and Wales



**Policy Exchange** is the UK's leading think tank. We are an independent, non-partisan educational charity whose mission is to develop and promote new policy ideas that will deliver better public services, a stronger society and a more dynamic economy.

Policy Exchange is committed to an evidence-based approach to policy development and retains copyright and full editorial control over all its written research. We work in partnership with academics and other experts and commission major studies involving thorough empirical research of alternative policy outcomes. We believe that the policy experience of other countries offers important lessons for government in the UK. We also believe that government has much to learn from business and the voluntary sector.

Registered charity no: 1096300.

### **Trustees**

Diana Berry, Andrew Feldman, Candida Gertler, Greta Jones, Edward Lee, Charlotte Metcalf, Roger Orf, Krishna Rao, Andrew Roberts, George Robinson, Robert Rosenkranz, Peter Wall.

© Policy Exchange 2018

### **Published by**

Policy Exchange, 8 – 10 Great George Street, Westminster, London SW1P 3AE  
[www.policyexchange.org.uk](http://www.policyexchange.org.uk)

ISBN: 978-1-910812-43-3

Printed by Heron, Dawson and Sawyer

---

# Contents

<b>Foreword</b> Lord Burnett of Maldon	8
<b>Introduction</b> Richard Ekins	10
<b>I The Gray's Inn Lecture</b>	25
<b>Judicial Power: Past, Present and Future</b> John Finnis	26
<b>Comment</b> Justice Brown	62
<b>Comment</b> Sir Patrick Elias QC	67
<b>Comment: Mired in the past or making the future?</b> Justice Glazebrook	79
<b>Comment</b> John Dyson Heydon AC QC	92
<b>Comment: Varieties of Judgement</b> Baroness O'Neill of Bengarve	105
<b>Rejoinder</b> John Finnis	111
<b>Appendix: "Guardians of the Constitution"</b>	129
<b>II The Lincoln's Inn Lecture</b>	133
<b><i>Brexit</i> and the Balance of Our Constitution</b> John Finnis	134
<b>Postscript</b> John Finnis	157

## 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.

**[www.judicialpowerproject.org.uk](http://www.judicialpowerproject.org.uk)**

## Acknowledgements

Thanks are due to Samuel Burke OP, Dominic Burbidge, Rebecca Lowe and Christopher White for their assistance in preparing the manuscript for publication, and to Graham Gee, Dean Godson and Julia Mizen for valuable advice and support throughout.

Policy Exchange would also like to thank the Jeremy Isaacs Charitable Trust for their generous support of our work.

## About the Contributors

### **Hon. Justice Brown**

Russell Brown is a Justice of the Supreme Court of Canada. He was admitted to the Bar of British Columbia in 1995 before successive judicial appointments from 2013. He was appointed to the Supreme Court of Canada in 2015. Justice Brown was previously Professor of Law at the University of Alberta.

### **Rt. Hon. Lord Burnett of Maldon PC**

Ian Burnett is the Lord Chief Justice of England and Wales. He was called to the bar at Middle Temple in 1980, took Silk in 1998, became a Bencher in 2001, and was later head of Temple Garden Chambers. He was appointed to the High Court in 2008 and the Court of Appeal in 2014, serving as Vice Chairman of the Judicial Appointments Commission from 2015-2017.

### **Professor Richard Ekins**

Richard Ekins is Associate Professor of Law in the University of Oxford and a Fellow of St John's College, Oxford. He leads Policy Exchange's Judicial Power Project. His published work includes *The Nature of Legislative Intent*, as well as the edited volumes *Modern Challenges to the Rule of Law* and *Lord Sumption and the Limits of the Law*.

### **Sir Patrick Elias PC QC**

Patrick Elias is a former Lord Justice of Appeal. Sir Patrick was a Fellow of Pembroke College, Cambridge, and a university lecturer. He was called to the Bar (Inner Temple) in 1973, took Silk in 1990 and was elected a Bencher in 1995. Sir Patrick was appointed to the High Court in 1999 and the Court of Appeal in 2009, retiring in 2017.

### **Professor John Finnis FBA QC (Hon)**

John Finnis is Professor Emeritus of Law & Legal Philosophy in the University of Oxford and Biolchini Family Professor of Law at the University of Notre Dame. Between 1972 and 1989 he was Rhodes Reader in the Laws of the British Commonwealth and the United States in the University of Oxford. In 2011, Oxford University Press published five volumes of his collected essay and a second edition of his magnum opus *Natural Law and Natural Rights*, and in 2013 a major Festschrift in his honour. Finnis was appointed Queen's Counsel (honoris causa) in 2017.



**Hon. Justice Glazebrook, DNZM**

Susan Glazebrook is a Justice of the Supreme Court of New Zealand. She received a DPhil from the University of Oxford in French legal history. In legal practice, she was a partner in the firm Simpson Grierson. Justice Glazebrook was appointed to the High Court in 2000, the Court of Appeal in 2002, and to the Supreme Court in 2012.

**Hon. John Dyson Heydon AC QC**

Dyson Heydon was a Justice of the High Court of Australia from 2003 to 2013. He was University Medallist in History in the University of Sydney, Rhodes Scholar, the Vinerian Scholar, and then a Tutorial Fellow in Law at Keble College, Oxford, before being appointed Professor of Law, and later Dean, at the University of Sydney Law School. Before being raised to the High Court of Australia he was from 2000 a Justice of Appeal in New South Wales.

**Baroness O'Neill of Bengarve, CH CBE FRS FBA**

Onora O'Neill, a Crossbench member House of Lords, was Professor of Philosophy at the University of Cambridge and Principal of Newnham College. Baroness O'Neill gave the Reith Lectures in 2002 and was President of the British Academy from 2005–2009 and Chair of the Equality and Human Rights Commission until 2016. In 2017, she was awarded the Holberg Prize and the Berggruen Prize.

## Foreword

Lord Burnett of Maldon

Lord Chief Justice of England and Wales

John Finnis is one of the most distinguished legal philosophers of our age, who has spent more than half a century thinking and writing about the concept of judicial power.

In October 2015 Professor Finnis delivered his powerful lecture, “Judicial Power, Past Present and Future”, which was the genesis of this fascinating collection of essays. He concluded that judicial independence secured as part of the constitutional settlement of the Glorious Revolution brought with it an acknowledgement of the supremacy of the Crown in Parliament, but that in modern times there is “drift everywhere to the subjection of legislative power, directly, or indirectly, to judicial power”. His conclusion is that at least some judges do not respect the differing institutional competencies of the legislature, executive and judicial arms of the state. Five eminent common-law thinkers from around the world were invited to respond to Professor Finnis’s lecture and have contributed thought-provoking essays which, to various extents, disagree with aspects of his reasoning and conclusions. As if we were being treated to a series of submissions in court, Professor Finnis has replied in his rejoinder. I am happy to say that it is not for me to provide a resolution to the conflicting views.

This is academic discussion at its best, with robust but courteous disagreement.

Professor Ekins has brought the collection together and added The Sir Thomas More lecture given by Professor Finnis entitled “Brexit and the Balance of our Constitution” which, it should be emphasised has nothing to say about the merits of British membership of the European Union but concerns the Miller litigation. He has contributed his own penetrating introduction.

The collection represents a serious and important series of reflections on the common-law tradition of adjudication which illuminates important questions. All judges called upon to decide cases that occupy the intersection between judicial power and that of Parliament and the executive must work out for themselves where in the spectrum of judicial activism they lie. That such a spectrum exists cannot seriously be doubted. One need look no further than the nine judge decision of the

Supreme Court in *Nicklinson* on assisted dying, discussed by Sir Patrick Elias in his contribution, to see its manifestation.

Reading this collection of essays is likely to clarify, perhaps lead to the evolution of, the views the reader started with.

## Introduction

Richard Ekins

The scope of judicial authority is a matter of the utmost public importance. The common law tradition of adjudication has long understood that authority to be limited and disciplined: the courts have not enjoyed any general power to change the law, or to depart from Parliament's lawmaking choices or to overrule the executive's policy choices. These limits have come under some pressure in recent years. Judges throughout the common law world have been invited to exercise, or have assumed, powers and responsibilities that depart from our historical separation of powers. In the United Kingdom, senior judges have noted the change, sometimes (but not always) with approval. And others in public life have also started to notice and to consider the implications for the balance of our constitution, and its capacity to realise self-government and the rule of law.

The point of this collection is to reflect on the place of judicial power in the common law constitutional tradition and thus to contribute to a public conversation about the constitution. The collection brings together two lectures by John Finnis, as well as a series of comments on the first lecture, to which Finnis replies in turn. The lectures, commentary, and rejoinder aim to illuminate the past, present and future of judicial power's exercise in the common law world, especially in the United Kingdom, to outline the balance that has long characterised the Westminster constitution, and to consider the extent to which the changing scope of judicial power puts that balance in doubt. The collection's ambition is to help recall our historical constitutional tradition, to outline and evaluate contemporary judicial practice, and to inform reflection about its future development.

### The Gray's Inn lecture

The first of the two lectures, held in Gray's Inn, London, on 20 October 2015, was convened by Policy Exchange's Judicial Power Project and introduced by the Rt Hon Michael Gove MP, then Lord Chancellor. Entitled "Judicial Power: Past, Present and Future", the lecture traces some fundamentals of our constitutional tradition, extending Finnis's long engagement, across an extraordinary academic career, with

accounts of the separation of powers in jurisprudence and in constitutional practice and history. Finnis begins by recounting the High Court of Australia's partial subversion of constitutional law, in which a bare majority of the Court introduced a doctrine whereby federal judicial power cannot be exercised by bodies other than the federal courts. The lesson is bracing: courts, even apparently conservative courts, may unsettle fundamental constitutional law and may do so in the name of the principles of the separation of powers and the rule of law.

The lecture is grounded on an account of the separation of powers — or the separation of what Finnis tellingly terms “responsibilities”. The court applies to the parties the legal commitments that the community should be judged to have made at the time in the past that the parties acted. The legislature acts to amend or revise the legal commitments that are to hold in the future. The executive carries out and upholds those commitments and takes action within their scope in the way it thinks is here and now warranted. These distinctions ground the argument and are amplified, developed, and qualified throughout the lecture, in the later rejoinder and in different ways in the second lecture. The whole discussion implicitly recalls and relies on Finnis's work in legal philosophy, which makes clear that the moral point of law is to secure the common good and reciprocity between persons by bringing order to social life in systemically good forms and ways.<sup>1</sup> The law's distinctive method or mode of operation is to let some past act of authority settle what now is to be done, a method which entails a principle of continuity whereby we have reason now to take past legal settlement to persist, to govern how past (and indeed present) actions are now to be judged.<sup>2</sup>

Judicial responsibility is illuminated, Finnis argues, partly by thinking about the moral of the “fairly tale” that the common law is declared rather than made.<sup>3</sup> The declaratory theory should not be understood to be a dubious assertion about history but rather as a way of articulating the sound judicial responsibility to uphold what should have been judged to be the law in the past. This responsibility requires and permits courts to correct some long-standing errors — but only when they are out of line with what should be judged now (and should have been then) to be the

1 See especially *Natural Law and Natural Rights* (2nd edn, Oxford: Oxford University Press, 2011), chapter X, and *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), chapter VIII.

2 John Finnis, “Revolutions and Continuity of Law”, essay 21 in *Collected Essays of John Finnis: Volume IV* (2011, Oxford, Oxford University Press); see also Richard Ekins, “Constitutional Principle in the Laws of the Commonwealth” in Robert George and John Keown (eds.), *Reason, Morality and Law: The Jurisprudence of John Finnis* (Oxford: Oxford University Press, 2013) 396–412, 397–398.

3 Cf. Lord Reid, “The Judge as Law Maker”, (1972) 12 *Journal of the Society of Public Teachers of Law* 22–29.

proposition that best coheres with other parts of the law. This discussion, carried out by way of analysis of the *Kleinwort Benson* judgment,<sup>4</sup> helps explain the artificial reason of the common law. The distinctions are fine and the discipline demanding. The complexities are taken up elsewhere in Finnis's work,<sup>5</sup> including in his exchanges with Sir Patrick Elias, in this volume, and with Mrs Justice Laing on the Judicial Power Project website.<sup>6</sup>

Judicial attempts at law reform are liable to go badly wrong, even in relation to the common law, as the saga of the "impossible attempts" cases helps demonstrate.<sup>7</sup> Finnis argues that the succession of judgments confirms that even very able judges are vulnerable to being led into error by artful slogans deployed by clever counsel, by the tangles of precedent, by recurring blind spots in legal learning, and by virtue of the procedural context of (appellate) litigation. The inaptness of litigation as an occasion for lawmaking is made clear — a point that arises repeatedly in the lecture and indeed throughout the whole collection, as does the need for Parliament, from time to time, to rescue the courts from error. The standing risk of judges making bad law in the course of adjudication should warrant humility and circumspection. The risk of adjudication being distorted by concessions of counsel is also striking. The *Belmarsh* case,<sup>8</sup> widely lauded but in truth misconceived, makes the point vivid. As Finnis shows, the House of Lords did not consider a highly relevant argument, which the Human Rights Act 1998 required them to consider, partly because of undue haste but also with the help of concession by the lawyers arguing the case.

More generally, the lecture argues that lawmaking is taking responsibility for the future, which is a responsibility much better discharged by legislatures than by appellate courts. The adversarial character of litigation makes it an inept means of lawmaking, Finnis contends, for the relationship between parties and court does not provide for a clear-eyed choice to be made about what is to be done, a choice that should be made by persons who, quite unlike judges, are and can be held responsible for that choice. No better, indeed even worse, is the situation when

4 *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349

5 John Finnis, "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR" in Nick Barber, Richard Ekins and Paul Yowell (eds.), *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016), 73-120, 74-80.

6 John Finnis, "Two Too Many?" (24 November 2016), replying to Dame Elisabeth Laing, "Two Cheers for Judicial Activism" (22 November 2016) (see: <https://judicialpowerproject.org.uk/category/debates/alba-papers-on-judicial-activism/>); the latter paper was subsequently published as Mrs Justice Laing, "Judicial Activism: Reigning in the Judges" [2016] *Judicial Review* 276-284.

7 The cases concerned whether one can be guilty of an attempt to commit a crime if, unbeknownst to the would-be offender, it is in fact impossible for the full crime to be committed.

8 The *Belmarsh* case, which concerned detention of foreign terror suspects, is more formally known as *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

litigation is initiated in order to invite lawmaking — for here there is often an inequality of arms. Legal changes, especially far-reaching ones, ought to be introduced by representative legislatures with the capacity to think widely and the processes to deliberate and choose fairly, rather than misrepresented as somehow already part of the community’s commitments. Lawmaking under the guise of adjudication is incompetent and unfair. Finnis rejects Ronald Dworkin’s influential claims that courts are the main forum of rights and principle, charged with protecting minorities, whereas legislatures act for interests or welfare, and discharge majority will. Enthusiasm for litigation rather than legislation, including amongst many in the legal academy, relies on these claims, which ought to be abandoned as unsound and fanciful accounts of institutional responsibility.<sup>9</sup>

The constitutional division of authority is itself a matter of positive law. The lecture makes this fundamental point in clear and powerful terms, teasing out its implications. Likewise, Finnis makes clear that judges did not establish the constitution: the rule of law is not the rule of judges, and judicial power is not power to remake the constitution. The risk of confusion about all this is made clear in a series of recent leading judgments, from *Purdy* to *Evans* (and now *Miller*).<sup>10</sup>

Much of the lecture considers the historical foundations of our constitution and the features of lawmaking and adjudication in general, quite apart from the context of contemporary human rights law. However, the enactment of the Human Rights Act 1998 undeniably changes the constitutional position of our judges, inviting and requiring them to engage with Strasbourg jurisprudence, to consider the proportionality of legislation and executive action, as well as to interpret legislation consistently with convention rights or, alternatively, to declare legislation incompatible with rights. The rise of proportionality analysis introduces arbitrary lawmaking into constitutional adjudication. This arbitrariness Finnis explores by way of prisoner voting case law, in which the Strasbourg Court made choices about our future without responsibility (or accountability). Similarly problematic, he continues, is that Court’s disposition, echoed in domestic jurisprudence, to interpret an authoritative legal measure (a treaty, a statute) as a “living instrument”, to update its meaning over time. This is an intellectually bankrupt technique, which empowers judges to substitute for settled law their own lawmaking choices, which

<sup>9</sup> See also Grégoire Webber, Paul Yowell et al, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge: Cambridge University Press, 2018, forthcoming).

<sup>10</sup> *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45; [2010] 1 AC 345, *Evans v Attorney General* [2015] UKSC 21; [2015] AC 1787, and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583.

are passed off as choices to which the community is already committed and from which it cannot easily escape. The lecture develops its critique in a striking context, viz. the Strasbourg Court's explosion of the Refugee Convention.

The lecture does not comment on proposals for human rights law reform. It has nothing to say about the Court of Justice of the EU in particular. But it does articulate with striking force how the common law constitutional tradition conceives of the limited but indispensable contribution that judicial power makes to the rule of law and constitutional government. It speculates briefly on why this tradition has come under pressure, noting the loss of understanding of the historic constitution, the rise of dubious theories (like Dworkin's) about what courts and legislatures are for, theories that resonate with the legal academy's easy cynicism about the political process (and public). Finnis reasons that many in the academy, and some on the bench, disdain the commitment of a people to rule themselves by way of joint deliberation and choice, preferring instead a global, juridical discourse which disarms and disables those outside a narrow caste. The lecture's robust conclusion, which animates the Judicial Power Project, is that some pushback may be in order.

### Five comments and one rejoinder

The Gray's Inn lecture was published on the Judicial Power Project's website, itself launched on the day of the lecture. The lecture has since been widely discussed. It is a target of Conor Gearty's ire in his polemic *Fantasy Island*,<sup>11</sup> as Lord Sumption acidly notes in his review of that book,<sup>12</sup> and has been considered by many other academics. In this collection are to be found comments on the lecture from four judge-jurists, drawn from across the common law world, and one philosopher-legislator.

I  
The first comment, by Justice Brown, is a sympathetic treatment of how Finnis's understanding of the separation of powers does and does not extend to the Canadian constitutional context. Brown notes that the classic separation of powers is increasingly blurred in practice, as delegation of lawmaking powers to the executive may confirm. More importantly still, in Canada, the supremacy of the Constitution strips the legislature of its final responsibility for lawmaking, insofar as its

<sup>11</sup> Conor Gearty, *Fantasy Island: Britain, Europe and Human Rights* (Oxford: Oxford University Press, 2016).

<sup>12</sup> Jonathan Sumption (2017) 133 *Law Quarterly Review* 338-340.



lawmaking choices are subject to the test of consistency with the Canadian Charter of Rights and Freedoms. Nonetheless, there are good reasons, Brown suggests, for courts to defer to the legislature. The tricky question is how much courts ought to defer. *Pace* Finnis, total deference is not legally open in Canada. In any case, Brown suggests that Finnis may be overlooking the important role judicial review plays at times in correcting injustices. He agrees with Finnis about the technical deficiencies of litigation as a vehicle for legal change, discussing some recent Canadian examples. Interestingly, Brown notes that while Canadians might well agree with Finnis that legislatures are not inherently antithetical to rights, the stress in Canadian jurisprudence on “autonomy” may encourage, or enable, constant challenge to legislation. Brown concludes that Canadian law will have to grapple with this standing invitation, and its potential to destabilise and distort law and adjudication. These features of Canadian constitutional practice and culture seem to me to confirm the extent to which Canada has chosen to depart from the common law tradition Finnis outlines, and to indicate some of the consequences of this departure.

## II

Lord Justice Elias, as he then was, delivered a generous vote of thanks at the conclusion of the Gray’s Inn lecture. Here, in the second comment on the lecture, Sir Patrick develops a partly sympathetic and partly critical reflection on Finnis’s argument. There is much agreement to be had. Parliament is better placed than the courts to make law: it has greater expertise, better access to information, and can take into account a wider range of relevant interests and perspectives. Making law by way of the adjudicative process may have significant impacts on unrepresented parties. Limited judicial perspective is a basic problem, not answered by allowing ever more parties to join the litigation. Still, Elias continues, the same analysis does not hold in relation to the courts’ relationship to the executive. And while Finnis is right to take Lord Steyn to task for his scepticism about parliamentary sovereignty,<sup>13</sup> it bears noting that Parliament can at times undermine the constitution too. Elias concludes that many, perhaps most, judges would agree with Finnis’s theoretical framework. Where they might disagree is whether Finnis has adduced evidence of widespread abuse.

<sup>13</sup> In *Jackson v Attorney-General* [2005] UKHL 56; [2006] 1 AC 262, Lord Steyn and Lord Hope argue that parliamentary sovereignty has been qualified and that it is open to courts to assert further limits on Parliament’s authority. For criticism see Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010), 196 and Richard Ekins, “Legislative Freedom in the United Kingdom” (2017) 133 *Law Quarterly Review* 582-605.

The balance of Elias's comment considers three distinct modes of judicial action: the development of the common law, interpretation of statutes, and execution of human rights law. He notes how fine the difference may be between justified correction of error and illicit common law lawmaking. He outlines a different perspective on *Kleinwort Benson* and the impossible attempts cases, suggesting that the Lords in those cases were probably wrong but were not reckless. Judges are not usurping the legislative role in developing the common law, Elias concludes. However, his striking caveat to this conclusion concerns the principles of judicial review of executive action, where the courts are at risk of illegitimately expanding their powers, most notably by virtually introducing proportionality as a general ground of review. Elias's concern for charitable reading of judgments is well taken, which makes all the more remarkable his own assessment of the drift in recent judicial review.

Turning to the interpretation of statutes, Elias notes that judicial practice has changed a little in recent years, with strong statements of the principle of legality. He shares the concern about the statutory interpretation in play in *Evans*, speculating that one may see here the indirect effect of the new habits of mind introduced by the Human Rights Act. However, Elias takes issue with Finnis on *Belmarsh*, doubting that the interpretive argument he raises would have succeeded and maintaining in any case that the court's avoidance of it was proper in view of the concession of counsel. In relation to the Human Rights Act more generally, Elias agrees that it invites and requires radical action on the part of courts: proportionality cannot be squared with the nature of judicial power, but then courts have no legal alternative save to deploy the technique. However, old ideas about the separation of powers persist in the new regime, with different judges being more or less willing to respect other institutions or to prefer their own policy choices. The problems that can arise are to be seen, Elias states, in the *Nicklinson* case,<sup>14</sup> where a majority of the Supreme Court came close to imposing its own views on the controversy about assisted suicide, which should clearly be for Parliament to settle. Overall, Elias argues, judges are not developing the common law or interpreting statutes improperly, but that there are reasons for concern in relation to human rights law. There is no easy solution, he says: the Strasbourg Court overreaches at times, but withdrawal from the Convention would be very costly. Politicisation of the courts is a risk.

<sup>14</sup> *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2014] 3 WLR 200.

### III

The third comment, by Justice Glazebrook, takes issue with the Gray's Inn lecture in some important ways. Glazebrook notes that courts are one of the guardians of the constitution. She agrees in part with Finnis's case for caution in judicial development of the law, adding a further reason for restraint, namely that judicial decisions are retrospective. However, this case applies with less force, Glazebrook maintains, in relation to constitutional matters, where courts may simply need to change the practice when justice requires. The institutional differences between courts and legislature of course matter, equipping courts relatively better for incremental change. Glazebrook reflects on the accountability of judges and MPs, gently suggesting that the former may be more responsible, and the latter rather less so, than the lecture claims.

The Human Rights Act was based on the New Zealand Bill of Rights Act 1990 and Glazebrook considers the judicial role under that Act. Particular cases invite disagreement, but this does not amount to a constitutional crisis. It is not problematic, Glazebrook continues, for Parliament to uphold legislation that the courts think inconsistent with rights, provided the institutions engage with respect and the court's contribution is duly considered. (I note that this perspective, while developed in the New Zealand context, has its counterpart in British legal thought. But in the UK context that perspective comes under considerable pressure from appeals to the international rule of law, to alleged conventions requiring legislative conformity to declarations and to the *realpolitik* threat of adverse findings in the Strasbourg Court.) Interestingly, and plausibly, Glazebrook notes that quite apart from the 1990 Act, courts would strive to uphold New Zealand's human rights obligations in international law, both by interpreting legislation consistently with those obligations and by requiring the executive to consider them in its action. This is important and signals another parting of the ways in the common law tradition, with New Zealand having adopted a more robust presumption of conformity with international law than other jurisdictions.<sup>15</sup>

Glazebrook takes a different line from Finnis in relation to ambulatory interpretation. The rule of law makes the contemporary understanding of statutory language decisive, she maintains, and in New Zealand this is reinforced by the

<sup>15</sup> Dan Meagher, "The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)" [2012] *New Zealand Law Review* 465.

statutory injunction to treat enactments as “always speaking”.<sup>16</sup> The disagreement is sharper still, in tone and substance, in relation to the Strasbourg Court’s interpretation of the ECHR, and thence the Refugee Convention, in *Hirsi Jamaa*.<sup>17</sup> Does not Finnis’s position, Glazebrook asks, amount to condoning torture in some cases? She contrasts New Zealand legislation which requires protection of persons exposed to torture and forbids deportation if a risk of torture arises. The contrast to which Glazebrook refers is thought-provoking, for of course the Strasbourg Court does not (or should not) stand to Europe as Parliament stands to New Zealand and, for now, it is only Europe that faces a migration crisis. Like Brown’s exploration of the Canadian context, Glazebrook’s articulation of a different common law perspective is valuable. Her concluding remark is well taken and warrants further thought: the scope of powers of particular institutions falls to be considered in relation to the state’s constitutional arrangements and, especially, its constitutional culture and values.

### IV

In his comment, Dyson Heydon develops further our understanding of the exercise of judicial power by taking up a point arising out of Finnis’s critique of the vagaries of litigation. The premise of adjudication in an adversarial context is undercut by an inequality of arms, Heydon notes with agreement, but also, he adds, by incapacity because of ignorance, when the parties are surprised by points that arise for the first time in final judgment. Australian law provides some examples of this practice, which Heydon argues is fundamentally unfair. It is unfair not only on the losing party in litigation, but also on the winning party, the judgment in whose favour is then vulnerable on appeal. Moreover, this is a mode of adjudication that tends to produce bad law.

Heydon develops a discussion of the dangers “in enunciating propositions without argument” by way of the Supreme Court’s judgment in *Horncastle*.<sup>18</sup> The context was the English courts (in the end successful) attempt to push back hard against Strasbourg case law which held that by allowing hearsay evidence English law resulted in unfair trials. The aim of the Supreme Court’s judgment was to make clear the robustness of English trials, to stress the safeguards against abuse. Heydon has nothing but sympathy for the English judges and commends their success in

<sup>16</sup> Cf. Richard Ekins, “Updating the Meaning of Violence” (2013) 129 *Law Quarterly Review* 17-21.

<sup>17</sup> *Hirsi Jamaa v Italy* (27765/09) 23 February 2012 (GC).

<sup>18</sup> *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373.

fending off the Strasbourg Court. However, the episode has a dark side, viz. that the Strasbourg Court was led to accept that in English courts anonymous hearsay is inadmissible. This was an idea introduced in the Supreme Court judgment, but neither properly grounded in close analysis of relevant legislation nor argued by counsel. The Supreme Court's remarks were relied on in at least some of the cases that followed, with unfortunate consequences. This was not, Heydon makes clear, a deliberate error on the Court's part. It stumbled into error by way of the imperative of mollifying, or repelling, the Strasbourg Court, and especially by not putting the point to the parties. The episode was understandable but problematic, Heydon concludes, and helps confirm Finnis's incisive reflections into the rightful limits of common law adjudication.

## V

The final comment, by Baroness O'Neill, is different in kind from the other four insofar as O'Neill is a distinguished philosopher-legislator rather than judge-jurist. Her reflection aims to discern the different acts of judgement that are in play in judicial action. The temporal perspective that anchors the Gray's Inn lecture is illuminating, O'Neill says, but also incomplete. Lawmaking rightly looks to past and present as well as future. And judicial action must at least sometimes look to the future. Following Kant, O'Neill aims to outline three types of judgement, a distinction which chimes with parts of Finnis's analysis but challenges it in other respects. She contrasts determinant judgement, in which one applies a universal to a particular case, reflective judgement, in which there is a case to hand but one has to select or find a universal, and practical judgement, where there is no case yet to hand but one nonetheless has to frame the future. The tricky question, O'Neill argues, is whether judges should be making reflective judgements, especially by way of proportionality.

The need to resolve indeterminacy invites and requires judgement. It is not plausible for judges never to exercise reflective judgement, O'Neill insists, for interpretation is necessary. True, authority is especially important in legal interpretation (as in other domains too), but it is difficult, O'Neill reasons, to limit reflective judgement to cases where authority is incomplete, for the facts may be open to many interpretations and there may be many laws given. Proportionality is controversial, O'Neill concludes, in part because it assumes not just that courts must balance considerations in this case but that the balance now struck should settle other like cases in future. She concludes that the merits of the technique of proportionality should be evaluated with this in mind.

## VI

The Gray's Inn lecture was framed around 10 theses. The rejoinder poses and answers ten questions arising out of the commentary, clarifying and elaborating the lecture's argument. Finnis welcomes Elias's charitable reflection on the impossible attempts cases and makes clear that his concern is not only with judicial usurpation, but also with the risks of courts simply going wrong in attempting to make law by way of adjudication. He also welcomes Glazebrook's recognition that judges are not the guardians of the constitution, and recalls some rather less careful judicial utterances in recent times. The rejoinder returns to the merits of allowing judges to declare legislation rights-incompatible, outlining reasons for concern about the constitutional dynamic that this will introduce. The analysis focuses on New Zealand's prisoner voting litigation but is informed by Brown's observations about the use of "autonomy" in Canadian constitutional law.

In conversation with his commentators, Finnis elaborates the temporal account of the separation of powers (noting that legislatures indeed must consider past and present as well as future) and tackles the alleged necessity of courts sometimes having to develop (improve) the law. With Heydon, he stresses the particular dangers for courts in seeking to develop the law without the aid of arguments from counsel. The rejoinder resists the alleged inevitability of courts deploying international human rights in domestic law and defends the lecture's theses about "living instrument" interpretation and its domestic analogues. In response to Glazebrook, Finnis denies that his criticism of the Strasbourg Court and House of Lords condones torture and maintains that his analysis is grounded in the facts and legal materials. Academic and judicial reticence and subterfuge have disarmed clear-eyed analysis, Finnis argues, which is unwise. The rejoinder also considers whether courts are bound by concessions, taking Elias's perspective as a valuable report on the self-understanding of our highest courts but preferring the analysis of its merits by Heydon. Finally, Finnis considers O'Neill's argument from Kant and disavows the claim that questions of right have no place in legal thought or decision-making. Better to say, Finnis continues, that moral reflection is vital but supports rather than dissolves the constitutional allocation of authority.

## The Lincoln's Inn lecture

The second lecture which makes up this collection is the Sir Thomas More Lecture, which John Finnis delivered in Lincoln's Inn on 1 December 2016, almost a month after the Divisional Court judgment in *Miller* and a few days before the Supreme Court appeal was to be heard. The lecture was preceded by two short papers published by the Judicial Power Project,<sup>19</sup> papers which attracted much scholarly attention and transformed the Government's presentation of its case. The Judicial Power Project published the text of the Lincoln's Inn lecture on 2 December and the Government relied extensively on it across three days of the four-day hearing.<sup>20</sup> The lecture is a study of the constitution in action, explaining the UK's traditional separation of powers, recovering the history and complexity of our constitutional arrangements and defending their intelligibility. The lecture illuminates the background against which Parliament and Government acted in 1972, in taking the United Kingdom into the European Union, explaining the constitutional distribution of authority and responsibility between those two institutions, and teasing out the implications for the *Miller* case.

Joining the European Union was plainly a major change in our public life: so too leaving. But, the lecture argues, the UK's entry into the Union (at the time, the European Economic Community) was realised by deliberately familiar means. Finnis traces the shape and spread of Westminster constitutional principle, exploring the legislative craft involved in the making of the Constitution of the Bahamas and identifying the constitutional principle involved in the making and unmaking of treaties by prerogative. This forms the groundwork for the lecture's approach to the European Communities Act 1972, elucidating Parliament's intent in that Act by articulating the model of executive-legislative interaction on which it relied and which it maintained in subsequent legislation. Behind this model lay another: the scheme for entering into, giving domestic legal effect to, and exiting from, double-tax treaties. The aptness of this model, made out in Finnis's earlier Judicial Power Project papers, had been attacked by a number of scholars, attempted rebuttals of which the lecture contests in turn. The assumption that the EU treaties are simply different in kind, being of fundamental constitutional significance, was unfounded,

<sup>19</sup> John Finnis, *Terminating Treaty-based UK Rights* (26 October 2016) and *Terminating Treaty-based UK Rights: A Supplementary Note* (2 November 2016).

<sup>20</sup> The lecture recalls, and is usefully read with, another Judicial Power Project lecture delivered the previous day by Timothy Endicott, also relied on before the Supreme Court, and subsequently published in revised form as *The Stubborn Stain Theory of Executive Power: From Magna Carta to Miller* (Policy Exchange, 2017).

Finnis argued, because it wrongly adopted the EU's legal self-understanding, ignoring the historic common law constitution by which EU law had been given domestic legal effect. Likewise, assertions about that constitution's openness to abuse, which were leveraged into demands for judicial intervention, ignored or downplayed vital political-constitutional restraints.

The Lincoln's Inn lecture complements the Gray's Inn lecture. It explores in close detail the separation of powers that has long characterised Westminster government, especially in the United Kingdom, showing how it has been an intelligent, workable scheme for self-government. The intervention that the *Miller* litigation sought was intended to, and succeeded in, unsettling that scheme, inserting the courts into the relationship between House of Parliament and Government. There is muddle as well as usurpation in our constitutional practice. The courts were invited to assume a responsibility for parliamentary control of treaty unmaking, a responsibility they ought to have disavowed (and might have, had it been put squarely to them) but were led into adopting by the inequality of arms in litigation and shaky grasp of constitutional history. Not for the first time either: there is a parallel here with the judicial confusion, only arrested by bare majority in the House of Lords, about the Crown's power to legislate in ceded or conquered colonies.<sup>21</sup> In *Miller*, even more than in *Bancoult*,<sup>22</sup> the litigation received much encouragement from a political-legal culture that looked for adventurous adjudication to limit government action. Finnis adds to the Lincoln's Inn lecture a postscript reflecting on the Supreme Court's *Miller* judgment. The compliment that judgment pays to the common law constitutional tradition is to frame its mishandling of the legal materials, its misreading of the 1972 Act, as necessitated by fundamental legal principle. In truth, the judgment wrongly adopts (inconsistently) the EU's legal self-understanding and trades on an arbitrary, novel proposition, viz. that important change cannot be realised without primary legislation.

---

John Finnis's two lectures, the comments by his five interlocutors, his rejoinder and postscript jointly constitute a compelling tour of the common law constitutional tradition, in its historic shape and foundation and in its present state of development

<sup>21</sup> Richard Ekins, "Constitutional Principle in the Laws of the Commonwealth" in George and Keown (eds.), *Reason, Morality and Law: The Jurisprudence of John Finnis* (2013) 396, 401-406.

<sup>22</sup> *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2008] UKHL 61; [2009] 1 AC 453.



and divergence. This collection should serve as an invitation to lawyers, judges and scholars to reflect on that tradition, to sharpen their craft, and to parliamentarians and others in public life to recall that tradition and to choose with open eyes whether and when to change it or whether to tolerate its compromise or dilution.



# I The Gray's Inn Lecture

## Judicial Power: Past, Present and Future

John Finnis

### 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,<sup>1</sup> 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)<sup>2</sup> 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 rivals for, and in, the highest legal and judicial offices for 30 years.<sup>3</sup> 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 organising 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).<sup>4</sup>

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).

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.

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 recognisably 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.

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*. Focusing 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.

**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,<sup>5</sup> 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 rationalisation 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

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: Edinburgh University Press, 1992).



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 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 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 to 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 recognised 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”.<sup>6</sup>

**3. ‘Hard cases make bad law’ means ‘Hard cases [tend to] make bad law’ *quod* 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.”<sup>7</sup> 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

<sup>6</sup> *White [or Frost] v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 500.  
<sup>7</sup> *Haughton v Smith* [1975] AC 476 at 500 (also known as *R v Smith (Roger)*).

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.

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)<sup>8</sup> and, more especially, a report and draft bill from the Law Commission responsible for advising Parliament about desirable lawreforms.

Both the 1977 statute about conspiracy and the 1981 statute about attempts are a bit complex and even redundant in their wording,<sup>9</sup> 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".<sup>10</sup>

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 an attempt to handle stolen goods if you bought a consumer durable very cheaply, fully believing it to have been stolen.<sup>11</sup> 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

8 "The House of Lords on Impossible Attempts", in Colin Tapper (ed.), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworth, 1981); reprinted as essay 17 in H.L.A. Hart, *Essays on Jurisprudence and Philosophy* (Oxford: Oxford University Press, 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. 1 app. A, p.

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.

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”!<sup>12</sup> 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 six days later,<sup>13</sup> bringing an end to this judicial debacle, all concurring in the repentant judgment authored by the Law Lord who had given one of the judgments concurred on 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 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 acts<sup>14</sup> — 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

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

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

<sup>14</sup> 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.

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 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 of 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.<sup>15</sup> 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.<sup>16</sup>

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

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

16 *Lewis v AG Jamaica* [2001] AC 50.



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.**

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 authorisation of the Director of Public Prosecutions as precondition for prosecuting any of the offences created by that statute.<sup>17</sup> 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".<sup>18</sup> 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)<sup>19</sup>, 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 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

<sup>17</sup> John Finnis, "Invoking the Principle of Legality against the Rule of Law" [2010] *New Zealand Law Review* 601-616 (and in Richard Ekins (ed.), *Modern Challenges to the Rule of Law* (Wellington: LexisNexis, 2010) 129-42).

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

<sup>19</sup> [2002] 1 AC 800.

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 recognised 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.<sup>20</sup> The second, which controls the first, is never quoted in any judgment, never discussed in the reported argument of counsel, 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

<sup>20</sup> “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 point of law which wholly or partly relates to an international agreement, or a practical consideration.

(2) The provisions mentioned in subsection (1) are — paragraph 16 of Schedule 2 to the Immigration Act 1971 (c. 77) (detention of persons liable to examination or removal), and paragraph 2 of Schedule 3 to that Act (detention *pending deportation*).” (emphases added)

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 authorised 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.<sup>21</sup> 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

<sup>21</sup> See n22 below.

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.

Shortest version of the case. Section 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;<sup>22</sup> 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, adeptly,<sup>23</sup> hadn't asked for): a ruling that they could not be detained unless SIAC found, every three

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 ATCS Act] 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: *Al-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.

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,<sup>24</sup> 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, authorises “the detention ... of persons in connection with deportation” subject to an attached provision called 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.

<sup>24</sup> John Finnis, “Nationality, Alienage and Constitutional Principle” (2007) 123 *Law Quarterly Review* 417-45.

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 deporting 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 concession<sup>25</sup> 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 the appellant detainees as, in Lady Hale’s

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 authorised detention pending deportation. And that a statute is in fact not the Government’s, but the Parliament’s. Section 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.

words, “foreigners [who] are only being detained because they *cannot be deported*. They are just like a British national who *cannot be deported*”.<sup>26</sup> (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.<sup>27</sup> 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”.<sup>28</sup> 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

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, in my “Nationality, Alienage and Constitutional Principle”, (2007) 123 *Law Quarterly Review* 417-45 text at fnn. 63-72.

28 In *Chahal v United Kingdom* (1996) 23 EHRR 413, 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.



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 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*<sup>29</sup> 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

29 [2014] UKSC 38; 2015 AC 657 (25 June 2014). See John Finnis, "A British 'Convention Right' to Assistance in Suicide?" (2015) 113 *Law Quarterly Review* 1-8

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 Attorney General* 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 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.<sup>30</sup> 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" (Maccabaeen Lecture in Jurisprudence) (1985) 71 *Proceedings of the British Academy* 303–31; reprinted as essay 1 in *Collected Essays of John Finnis: Volume III* (Oxford: Oxford University Press, 2011), (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”.<sup>31</sup> 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

31 *Hirst v UK (No 2)* [2005] ECHR 681; 6 October 2005 (Grand Chamber).

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 eight per cent — the eight per cent 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 *Scoppola v Italy* upheld Italy’s blanket legislatively not judicially selected ban on voting by convicts sentenced to more than five 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 Heydon<sup>32</sup> (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.<sup>33</sup> 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.<sup>34</sup>

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

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 "Threats to Judicial Independence – The Enemy 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. [https://d17g388r7gqnd8.cloudfront.net/2017/08/lecture\\_dyson.pdf](https://d17g388r7gqnd8.cloudfront.net/2017/08/lecture_dyson.pdf).

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

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 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 courts 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)<sup>35</sup> 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 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”.<sup>36</sup> For example, in 1981, the Court outlawed the

<sup>35</sup> 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”.

<sup>36</sup> 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](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.

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 recent 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 Jamaa*, an important cause (among complex causes) of today's migration crisis.<sup>37</sup> 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 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

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> [reprinted in N.W. Barber, Richard Ekins and Paul Yowell (eds.) *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016)].

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

to exclude from the Refugee Convention anything that might prevent them closing their borders to mass migration from any country.<sup>38</sup>

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

38 As Lord Bingham says in *Belmarsh* ([69]), "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 John Finnis, "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR" in Barber, Ekins and Yowell (eds.), *Lord Sumption and the Limits of the Law* (2016).

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

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 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.”

## Comment

Justice Brown

Professor Finnis' paper *Judicial Power: Past, Present and Future* describes developments in the United Kingdom which have led to what he sees as a legal quagmire, and advocates a push back towards judicial deference to legislative policy preferences, based upon respect for the proper separation of powers, and a measure of judicial humility sufficient to recognise the judiciary's lack of expertise (relative to legislators) in matters of policy-making. The merits of this solution in the UK context to which his paper is principally addressed are beyond my ken. My comment is restricted to considering the applicability of Professor Finnis' solution to the Canadian legal order, which order has been profoundly shaped by three decades of jurisprudence since the enshrinement into the Canadian Constitution of the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> Rather than providing my thoughts on each of ten propositions he advances, I will attempt here to offer my thoughts on what seems to me to be the fundamental theme of the paper — the proper distinction between the judicial and legislative roles — while highlighting the limits to its application to the Canadian constitutional order, and also considering how it might nonetheless have salutary influence upon Canadian jurisprudence and legal thought.

Professor Finnis argues that the judicial responsibility is to adjudicate legal rights and obligations by applying, to facts agreed between them or as found by the trial court, the law that defines those rights at the time the dispute arose. This is, of course, the classic articulation of the judicial role, based on a neat understanding of the separation of powers: legislatures make law, executives implement it, and courts apply it. But these compartments are decreasingly watertight. Legislatures often delegate law-making powers to the executive *via* the various functional and

<sup>1</sup> Canada Act 1982 (UK), c 11, Sched B, Pt 1.



---

adjudicative bodies that comprise the modern administrative state. In the Canadian context, moreover, the Constitution of Canada further disrupts this neat division of powers. While Professor Finnis insists that it is “the legislature’s responsibility ... to make new or amended commitments about private rights (and public powers) for the future”, our Constitution Act 1982 strips from legislatures final authority on delimiting public powers, binding them and subordinating their enactments to a supreme law which grants public rights to persons, enforceable by courts *against* the state.<sup>2</sup>

This is not to say that Professor Finnis’ description of the judicial role is altogether inapplicable in a constitutional democracy. The Constitution binds legislatures, but Canadian courts do not possess a monopoly on defining the public rights conferred by the Charter. And, where legislatures do so, their superior expertise in policy-making should prompt a cautious — the currently favoured term seems to be ‘deferential’— judicial response. This consideration is particularly relevant where courts are called upon, in determining whether a rights violation is justified as a reasonable limit, to engage in ‘proportionality’ reasoning which, as the Supreme Court of Canada recently acknowledged,<sup>3</sup> “entails difficult value judgments” — that is, subjective weighing of incommensurables.

While Canadian observers would see all this as leaving open the question of the *degree* to which courts ought to defer to legislators’ policy preferences, Professor Finnis advocates drawing a bright line such that courts should *always* defer, since to do otherwise usurps democratic legitimacy by making policy choices for the community’s future under the guise of shaping legal doctrine. The case for a bright line is not difficult to understand. The problem with judicial policy choices is that they may not actually represent the community’s values and policy preferences. A judicial policy choice favouring liberal ideas about dignity and individual autonomy may not, for example, accord with the community’s preferred way of resolving difficult moral problems. Yet, by constitutionalising that policy preference, other policy outcomes are foreclosed, without any public recourse.

A bright line is, however, simply not a legally available response where the constitutional order precludes it — as the Canadian constitutional order does. Canada’s democratically elected national parliament and provincial legislatures chose to adopt the Charter, knowing full well that this would extinguish any bright line.

<sup>2</sup> Constitution Act 1982, *ibid.*, ss. 24, 52.

<sup>3</sup> *R. v K.R.J.*, 2016 SCC 31 at [79]. See also [160] (dissenting, but not on this question).

Hard and fast rules about unreviewable legislative action fall away quickly when such an order is promulgated, and questions of degree become unavoidable. This is not, I concede, a complete answer to objections to the scope of judicial review powers exercised under the *Charter*; the Supreme Court of Canada, for example, famously expanded that scope under section 7 of the *Charter* beyond that which was contemplated by those democratic bodies.<sup>4</sup> That aside, however, Professor Finnis' arguments about democratic legitimacy and about courts making unaccountable decisions for the community are, as a matter of the positive constitutional law of Canada, arguments for deference and restraint, not for the absence of judicial review for constitutionality altogether.

Professor Finnis might also wish to account more fully for the necessity of judicial review — whether in a legal order constrained by a constitutional rights document such as Canada's or not — to correct injustice. He cites judicial review as a remedy but, when the meaning of a constitutional document (as opposed to an ordinary statute) is being discerned and applied to a dispute, the exercise of judicial review still risks running afoul of his thesis. The judicially discerned meaning will — especially where injustice is being remedied — typically carry unavoidably open-ended consequences governing future disputes, because that meaning will, as Professor Finnis puts it, be “open-ended to views about the future”. While I do not see this as undermining his overall thesis, I might have thought that the better position would be to acknowledge the subsisting necessity of judicial review (including judicial review for constitutionality) to correct injustice, while at the same time employing his thesis to minimise the risk of creating further injustice (by accounting for concerns for deference and restraint in light of relative policy-making institutional competencies as between courts and legislatures).

Such concern for institutional competencies and relative degrees of policy-making expertise seems to me key to making the case for Professor Finnis' thesis, even within a constitutional order such as Canada's which contemplates that which he rejects — judicial review of legislative action for constitutionality. On this point, Professor Finnis' arguments about the unsuitability of the litigation process as a vehicle for social reform are compelling. Faced with *Charter* claims, a single trial judge will make findings of fact based on the testimony of whatever experts the plaintiffs see fit to call — often, after years of preparation. Respondent attorneys general (whether federal/national or provincial) may not have the resources or the

<sup>4</sup> *Re BC Motor Vehicle Act* [1985] 2 SCR 486.

capacity to prepare a significant evidentiary record in response, or may be defending litigation which was the product not of empiricism, but of incomplete knowledge regarding, for example, social problems.<sup>5</sup> The resulting findings of fact can make all the difference. (For example, in *Canada (Attorney General) v Bedford*<sup>6</sup> and *Carter v Canada (Attorney General)*,<sup>7</sup> deference to the trial judge's findings on the safety of prostitutes profoundly influenced the Charter section 7 analyses.) This raises questions — which I do not purport to answer here, but which are nonetheless important ones to consider — about the suitability of the litigation process for working through complex and difficult policy choices, where that process is often characterised by an evidentiary record that is the product of the litigants themselves, who will understandably not be interested in representing that difficulty and complexity.

The inevitably selective evidentiary record takes even greater significance where it might persuade a court to depart from binding precedent (the reasoning being that the “richer” evidentiary record “fundamentally shifts the parameters of the debate”).<sup>8</sup> The concern about precedent relates to an intriguing and perhaps insoluble dilemma identified by Professor Finnis, being the way in which judicial decisions made on policy grounds may be perpetuated due to divisions between so-called ‘reforming’ and ‘conservative’ judges. His point is that, after a divided decision in which the former camp hold a narrow majority over the loud protests of the latter camp, the latter — out of what is assumed to be a conservative tendency to respect *stare decisis* — will continue to apply the earlier reformist decision for the sake of stability in the law, thereby perpetuating and entrenching a (*ex hypothesi*) poor judicial decision.

The ‘reformist’ camp might argue, of course, that the answer cannot be to abandon reform and slavishly adhere to *stare decisis*. If, after all, all judges are ‘conservative’ and simply apply existing principles to the cases before them, how can the law evolve? While this criticism has the potential to be nuanced (since the common law’s perpetuation of discriminatory principles is an often undetectable undercurrent in even the most banal and seemingly objective legal reasoning), such nuance is not what one typically sees from those who advance this counterpoint. Rather, the current tendency broad legal reform is sought, sweeping out the old

<sup>5</sup> As my court has recognised, “social claims are not always amenable to proof by empirical evidence”: *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3, at [144].

<sup>6</sup> 2013 SCC 72.

<sup>7</sup> 2015 SCC 5.

<sup>8</sup> *Bedford*, at [41]-[42].

(and sometimes discriminatory) principles in favour of new laws which conform to contemporary understandings of 'social justice'. This touches upon one of Professor Finnis' related arguments, being that the judicial efforts to reform the law are often counterproductive, since a judge's conclusion that "the law is an ass" (or their predecessors' law is an ass) is sometimes misguided. In any event, as Professor Finnis points out, there is a better author for such change: "the modern legislature, fortified by its own committees and their hearings, and by the investigative, discursive and reflective work of law reform commissions".

Again, bearing in mind that a bright line shielding legislative policy-making from judicial review for constitutionality is precluded by the Canadian legal order (such questions now being channelled into discussions of deference and restraint), Professor Finnis' argument that legislatures are as concerned as courts are with legal and moral rights, and have a role in defining them and protecting them, remains apposite and furnishes a useful concluding point. I would expect that this argument would likely receive, at least at first glance, wide acceptance amongst Canadian jurists. Legislatures are not typically seen as designed to be rights-infringing machines, although they occasionally have that effect. Professor Finnis' argument is, however, in profound tension with much of our contemporary constitutional jurisprudence that privileges individual autonomy. Some legislation will always be 'overbroad' in a constitutional rights-limitation sense, because it is based on analyses — sometimes statistical or otherwise empirical, and sometimes merely reasoned — designed to protect most effectively the rights of all (in the sense of a community of persons), even if it leaves some persons exposed to risk. An emphasis on the individual, however, and a concomitant disregard for legislative choices and trade-offs between competing rights, plausibly leaves open to constitutional challenge almost any legislation that negatively affects someone's life,<sup>9</sup> notwithstanding the degree of protection or benefit such legislation affords to the community. At some point, our courts will have to grapple with this reality.

<sup>9</sup> See, on this point, Lauwers JA's reasons in *R v. Michaud*, 2015 ONCA 585 at [79], [148]-[150] (leave to appeal to SCC refused).

## Comment

Sir Patrick Elias QC

What is the proper function of the judge? And what, in a democratic society, are the proper boundaries between the judicial, executive and legislative arms of the state? This is a perennial debate about which opinions differ. Professor Finnis, in a characteristically trenchant and thoughtful paper, provides a powerful critique of the judicial role and suggests that the judges are too often straying from their legitimate sphere and improperly trespassing into the legislative and executive fields.

Drawing upon the writings of Francis Bacon, the distinguished seventeenth century lawyer, Professor Finnis encapsulates the role of the judge as being “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.” This is not a statement of what they do; it is a statement of what they ought to do, of their judicial responsibility, and Professor Finnis contends that they are too often departing from it. It is not their function, and not their responsibility, to develop law with the purpose of seeking to make rules for the future, but this is what they do too frequently.

In a typically provocative observation, he says that the declaratory theory of law, i.e. the notion that the common law is ever the same and judicial decisions are simply evidence of what the law is and always was, whilst not an accurate description of the history of the common law, is no mere fairy tale, as judges and commentators have often claimed. Professor Finnis asserts that it captures the essential truth about the nature of judicial responsibility, namely the obligation to declare what the relevant law was at some point in the past.

This might suggest that legal rules are fixed or ossified but Professor Finnis denies that he is taking so stringent a line. The judge is entitled to develop the law, but should do so with considerable caution.

It seems to me that Professor Finnis sees the ideal judge as an essentially conservative figure, amending and developing the common law but only where there is obvious and clear justification. It is only where the legal rule is so out of line with principles and standards developed in analogous areas that the judge can be

confident that the established law is wrong and should be changed. It is not enough that the judges might think that the law would be better served in the future if established principles were altered. Whilst any amendment to the common law will necessarily affect future transactions, that is an incidental consequence of the judge's decision. It is not, or at least ought not to be, a matter of judicial concern.<sup>1</sup>

An obvious difficulty with this analysis is that the distinction between legitimate dispute resolution and illegitimate rule making for the future — legislating — may be extremely difficult to draw in any particular case. There is often room for a difference of opinion as to whether judges have stepped out with their proper sphere or not. Professor Finnis does not deny that and yet he contends that the distinction is nonetheless fundamental. There is, he says, a chasm between the two, even if there may be disagreement about on which side of the chasm a judge has planted his flag in any particular case.

I would agree that there are both institutional and constitutional reasons why the courts should be cautious when developing the law. As to the former, Parliament has access to information and expertise not available to the court. Moreover, the adversarial nature of litigation is wholly unsuited to law making save in an incremental way, from case to case. Various parties who are unrepresented in the judicial process may be significantly affected by the outcome. An obvious example is where cuts in public expenditure are held to be unlawful. The almost inevitable consequence is that savings have to be made elsewhere to the detriment of another group or groups. Whilst this does not mean that judges can never strike down such decisions for good public law reasons, I do not dissent from the proposition that judges must be particularly sensitive to the charge of undermining policies made by the elected representatives. I would add that these difficulties are not solved by allowing representation by interested parties because they often have a particular axe to grind and may reinforce the limited perspective under which the court labours.

These institutional limitations do not, however, preclude judicial control of the executive by appropriate principles of judicial review. The theory is that their essential purpose is to ensure that the executive keeps within the bounds allocated to it by Parliament, which is ultimately sovereign. (This cannot, however, be the basis of judicial control of the prerogative itself.)

<sup>1</sup> There is an interesting question, not discussed in the paper, whether the concept of prospective overruling might ever be justified to protect the expectations of those who have conducted their affairs on the basis of established legal principles which, contrary to general legal understanding, the court now declares to have been erroneous.

---

Consistently with his view of the limited role for judges, Professor Finnis affirms the principle of Parliamentary sovereignty and rejects as heterodox the view occasionally floated by judges, for example by Lord Steyn in *Jackson v Attorney General*,<sup>2</sup> the hunting ban case, that the principle of Parliamentary sovereignty is simply a common law rule which the courts are entitled to amend like any other rule. In general, I too would reject the view that the courts could lawfully refuse to give effect to an Act of Parliament. A failure to do so would amount to a constitutional revolution (possibly justified in highly exceptional circumstances, but a revolution nonetheless) rather than the exercise of a legitimate constitutional power. But I think it arguable that Parliament, no more than the courts, could seek to undermine the fundamental features of the constitution itself which have evolved through our constitutional history. In particular, I have in mind legislation which purports to remove altogether the ability of the courts to review the exercise of governmental power conferred by Parliament (as the Blair government were at one time minded to do with respect to certain immigration decisions).

I do not doubt that many, perhaps most, judges would accept the thrust of Professor Finnis' theoretical framework although some would no doubt argue that even within that framework judges have more legitimate scope for moulding the common law than he would allow. Where I suspect they would disagree is whether he provides convincing evidence of any widespread abuse of judicial power.

In analysing that question, I think it is helpful to distinguish between three different aspects of the judicial function. The first is the judges' role in developing the common law. A particular aspect of this, bearing directly upon the relationship between the courts and the executive, is the principles of judicial review. The second is the judicial role in the interpretation of legislation. The third is the role conferred upon the judges by the Human Rights Act to protect individual human rights. In my view this last area is qualitatively different from the other two and raises different and distinct concerns.

Professor Finnis questions whether it is properly a judicial function to carry out the proportionality requirement which underpins many Convention rights. As I explain below, I have considerable sympathy for that view, particularly given the way in which the proportionality principles have been developed. The problem, however, is that judges have no option other than to exercise that function because

Parliament has told them they must; and moreover, whatever the defects in the developing jurisprudence of the European Court of Human Rights — and again Professor Finnis is right to say that the Strasbourg court has extended the principles of human rights in ways which would astound the Founding Fathers — Parliament has told the courts by section 2 of the Human Rights Act that they must take into account that jurisprudence too. Much as Professor Finnis might wish it were otherwise, the courts cannot ignore that injunction; and it could hardly be a proper interpretation of it, or be in compliance with the rule of law, for the courts to adopt a policy of giving no weight to Strasbourg decisions, however suspect the rulings of that court may be. Indeed, since the purpose of the HRA was to “bring rights home” and to provide remedies in the domestic courts which were formerly only available in Strasbourg, in the normal run of things one would expect the rulings of the Strasbourg court to be followed otherwise the purpose would not be achieved.

### Common law developments

Let me turn to the three areas I have outlined. First, the development of the common law. Courts are regularly faced with the question whether they can properly develop the common law or whether the decision is one better suited to Parliament.

As Professor Finnis recognises, the arguments are often finely balanced. This is partly because even where the court can be confident that a particular rule is out of line with established common law principles, and is perhaps anomalous or even irrational, there may nonetheless be good reasons why the court might consider that it would be more appropriate for any amendment to be left to Parliament. Lord Goff was very much alive to these reasons in the decision of the House of Lords in *Kleinwort Benson Ltd v Lincoln C.C.*<sup>3</sup> where, as part of the bare majority in the House of Lords, he nonetheless thought it appropriate to alter the rule that there could be no recovery of payments made ultra vires where there had been a mistake of law. Professor Finnis approves of the majority judgment in that case. But there were in fact powerful arguments, again both institutional and constitutional, for leaving the matter to Parliament. Some of these considerations swayed Lord Browne Wilkinson and Lord Lloyd, the minority in *Kleinwort*. They agreed that the rule was indefensible and should be changed but considered that the task should be one for Parliament given in particular the difficulties which arose from the application of the limitation

3 [1999] 2 AC 349.



period. They considered that the court should indicate to Parliament that this was an area which needed to be addressed, and appropriate rules could then be drafted by Parliament perhaps with the assistance of the Law Commission. In cases of this kind there is always room for genuine and legitimate disagreement about whether the circumstances are such that the courts should defer to the expertise of Parliament. The temptation is to think that the judges have got it right when one agrees with them, but have trespassed onto the domain of Parliament when one disagrees!

The tensions arising in these cases are illuminated in a typically thoughtful paper on this topic by Lord Robert Walker. He analysed a number of authorities where the House of Lords, or latterly the Supreme Court, has had cause to consider whether or not to alter established principles of the common law or to leave the matter to Parliament.<sup>4</sup> It is not unusual for the court to be divided on this question. As Lord Walker suggests, there may well be a legitimate concern that the judges act more from intuition than clear principle when resolving this dilemma, perhaps because it is too difficult to define the proper boundary in the abstract. But it would be unjust, in my view, to suggest that judges are not acutely aware, in this context at least, of the proper limits of the judicial function.

Professor Finnis suggests that the decision of the House of Lords in *Haughton v Smith*<sup>5</sup> is a paradigm case of an erroneous and wholly misguided modification of the law. In that case their Lordships held that there could not be a conviction for an attempted crime if in the particular circumstances, and unbeknown to the defendant, it was in fact impossible for the defendant to have committed the full crime. He suggests that the principle enunciated by the House of Lords was contrary to common sense and plainly misguided, as the subsequent decision of the House of Lords in *Shivpuri* demonstrated.<sup>6</sup> I am not sure that it did since it was interpreting the Criminal Attempts Act, passed in response to the *Haughton* decision. But leaving that aside, in my view it is difficult to say that their Lordships in *Haughton* were recklessly stepping into the legislative arena where they had no right to be. They had to determine the point of law raised before them: did this defendant have a lawful defence or not? They could not dodge the question and there was no binding authority. Lord Reid, whose judgment in *Haughton* comes in for particular criticism from Professor Finnis, carefully considered the authorities, including some

<sup>4</sup> Lord Walker, "How far should judges develop the common law?" (2014) 3 *Cambridge Journal of International and Comparative Law* 124–135.

<sup>5</sup> [1975] AC 476.

<sup>6</sup> [1986] UKHL 2.

nineteenth century cases (one of which he chose not to follow for the perfectly proper reason that it was devoid of reasoning!). Lord Reid thought that the answer he gave was consistent with established principle and with common sense. He was also keen to emphasise that his judgment was focusing solely on the facts of that case and no further.

Professor Finnis asserts that common sense required the opposite conclusion. But that itself is a controversial statement. The issue before the House had stimulated heated and trenchant academic discussion. There is much force in Professor Finnis' view that the decision was mistaken and that the common law took a wrong turning in concluding that no offence could be committed. Indeed, I am personally inclined to agree with him. But it would not be just to say that the five Law Lords who took that decision were cavalier in their approach to the judicial function. Moreover, I would not myself describe the decision, as Professor Finnis does, as a 'liberal' one any more than the judgment in *Shipvuri* could fairly be characterised as 'conservative' or 'reactionary'. The task of the court was to reach a solution which was most compatible with underlying common law principle and policy. This was not a 'liberal' solution in the same politically charged sense that one can justifiably describe many of the social policy decisions taken by the US Supreme Court. I entirely agree with Professor Finnis that a strong ideological commitment to a particular result often drives and distorts the reasoning of the individual judges in that Court. But in my view it would be a travesty to describe the approach of any of the judges in *Haughton* in those terms. Even if their conclusion was horribly wrong, as Professor Finnis asserts, it does not demonstrate any improper exercise of judicial power, merely a deficient one.

The Professor suggests that the judges in *Haughton* may have paid too much attention to what he characterises as "seductive slogans" advanced by counsel. That, with respect, does less than justice to the quality and integrity of the judges in question. They may have been wrongly influenced by the arguments advanced, possibly they may even have thought that these "slogans" pithily encapsulated the correct underlying principles. But that does not justify an inference that the judges were seeking to act like legislators or failed to approach the legal issue before them with the appropriate rigour.

I am not persuaded that the judges can fairly be criticised for usurping the legislative role in the development of the common law.

Where I think a case can be made for asserting that the courts are at least at risk of expanding their power illegitimately is in the development of the common law principles of judicial review. In part as a consequence of the impact of Convention jurisprudence, the courts have virtually adopted the concept of proportionality as a principle of the common law which might possibly be engaged even where no

human rights are engaged.<sup>7</sup> This is part of a general trend to expand the circumstances in which the courts are willing to review the substantive merits of the decision of a public body, with the degree of scrutiny depending upon the nature of the decision in question. To the extent that the principle of proportionality, at least as developed by the courts, is itself an inappropriate tool for judges to employ in the Convention context, its incorporation as a general doctrine of the common law would likewise risk improper interference with executive and legislative decisions.

### Statutory interpretation

The second area to consider is statutory interpretation. Is there evidence that judges are distorting the proper construction of constitutional statutes in a way which can fairly be said to undermine Parliament's obvious intention? There has undoubtedly been a shift in the principles which the courts adopt when construing constitutional legislation. Even before the Human Rights Act came into force, the court adopted what is (somewhat oddly) termed the common law principle of legality. As Lord Hoffmann described it in the *Simms*<sup>8</sup> case, this means that the courts will assume that Parliament does not intend by general or ambiguous words to interfere with fundamental rights and will only sanction such an interference where the statutory language brooks no other possible construction. The principle at least pays lip service to Parliamentary sovereignty. It is not in itself a novel principle even though it departs from the conventional theory that the courts should give effect to the meaning of a statute as objectively determined from the language used. But the important question is what the courts will treat as fundamental rights. In practice, this principle has barely figured in judicial reasoning since the passing of the HRA because by section 3 of that Act Parliament has conferred upon judges an even wider power to remedy defective statutory language where human rights are engaged. But the common law doctrine stands in the shadows ready to be employed should the HRA be repealed.

Professor Finnis cites two examples of cases where in his view the courts have improperly construed legislation. One is the recent Supreme Court decision in *Evans v Attorney General* [2015] UKSC 21 concerning the question whether, under section 53 of the Freedom of Information Act 2000, it was lawful for the Attorney General to

<sup>7</sup> See *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591 and *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] AC 455.

<sup>8</sup> *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33; [2000] 2 AC 115.

prevent the disclosure of certain letters sent by the Prince of Wales to government ministers by issuing an appropriate certificate. There can be no doubt that on the most natural construction of the words used by Parliament the Attorney General, as the appropriate minister, did have the power to issue a certificate which had the effect of overriding the decision of the Information Commissioner (or, on appeal, of a tribunal) that disclosure should be withheld. The condition for the exercise of that power is that he should have reasonable grounds for reaching his conclusion. A majority of the court held that the certificate was not valid in the particular circumstances, relying upon a concept of the rule of law which, for three judges at least, was taken to mean that the executive could not frustrate a judicial decision absent very clear language to the contrary. It was not enough that the Attorney General simply disagreed with the public policy assessment of the Commissioner or the Tribunal.

I will not consider the different strands in the reasoning of the judges which have been very well analysed by Richard Ekins and Christopher Forsyth in their paper *Judging the Public Interest*<sup>9</sup>. Suffice it to say that these authors provide in my view powerful arguments to support the conclusion that the dissenting minority (Lords Wilson and Hughes) were correct. As Lord Hughes pithily remarked: "...it is an integral part of the rule of law that courts give effect to Parliamentary intention. The rule of law is not the same as a rule that courts must always prevail, no matter what the statute says". Importantly, this was not a case where the court could claim to be more attuned to the public interest than the minister, and it is difficult to see how the statutory language could have been clearer. It is, I think, an interesting question whether the impact of the Human Rights Act, although not directly in issue in this case, has subconsciously encouraged judges to take a more activist line than might otherwise have been the case.

### **The Belmarsh decision**

Another case relied upon as an example of a defective analysis of a statute was the decision of the House of Lords in the *Belmarsh* case.<sup>10</sup> Professor Finnis makes this a central plank of his paper. The case concerned the detention of non-nationals believed to be a security risk under section 23(1) of the Anti-terrorism, Crime and Detention Act 2001. Professor Finnis believes that the case went badly wrong

<sup>9</sup> Richard Ekins and Christopher Forsyth, *Judging the Public Interest: The rule of law vs. the rule of courts* (Policy Exchange, 2015).  
<sup>10</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

---

because of a concession erroneously made by counsel acting for the government that the detention was contrary to article 5(1)(f) of the Convention, even though that provision says that any detention which is “pending deportation” is not unlawful. The government sought to justify the detention on the grounds that it had lawfully derogated from article 5(1)(f) in time of emergency as permitted by article 15. Professor Finnis argues that the case ought not to have been seen in those terms at all. The natural meaning of section 23 of the 2001 Act was that indefinite suspension would be “pending deportation” provided the government was taking genuine and active steps to bring about deportation, even if its attempts were being frustrated. The government lawyers should never have conceded the point, and the judges were equally culpable in allowing them to do so.

I would accept that this was an argument which the government lawyers could have pursued (somewhat bizarrely, they chose formally to reserve the point). But I am far less optimistic than the Professor that it would have succeeded. The issue, it seems to me, is whether the House of Lords would have accepted that someone can still be said to be detained “pending deportation” within the meaning of article 5(1)(f) when there is no reasonable prospect of securing deportation in the reasonably foreseeable future. The position adopted in domestic law, following the decision in *Hardial Singh*,<sup>11</sup> was that it could not then be said that the detention was pending deportation, and although section 23 was obviously framed to override that principle in the national security context, that would not assist the government if the court were to hold that the *Hardial* principles were also reflected in Convention law itself. Lord Bingham seemed to think that they were having regard in particular to the *Chahal* case<sup>12</sup>: see paragraphs 8-9 of his judgment.

It is true that Lord Bingham did not hear argument on the point, and I would accept that the possibility cannot be discounted that their Lordships, or at least a majority of them, may have been persuaded that there was no breach of article 5(1)(f), although I personally doubt whether they would have been. However, even if the government ought to have argued the point, I do not think that the House can be criticised for accepting the concession. If, as seems to have been Lord Bingham’s position, the court’s provisional view at least was that the concession was properly made, it would hardly be appropriate to encourage the government to argue a point which the court thought it would be likely to lose. Second, and in any event, it is

11 *R (on the application of Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB).

12 *Chahal v UK* [1996] ECHR 54.

not unreasonable for the judges to assume that there is good reason for the making of the concession without investigating why it was made. Indeed, if any encouragement to run the point is over-zealous, it risks allegations of judicial bias. I would accept that it would not have been improper for the court to have raised with government lawyers the question whether they were sure that they wished to concede the point, particularly in a case of such constitutional importance. But even then, if the government was not willing to withdraw the concession, the court could hardly take and resolve the issue of its own motion.

### European convention

The third principal area of judicial activity is the role conferred upon judges by the Human Rights Act. Although the courts cannot formally strike down legislation, the Act has transformed the relationship not only between the courts and Parliament but also between the courts and the Executive. The doctrine of proportionality has a central role to play in the application of many of the key Convention rights. Ever since the seminal judgment of Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, the courts have been required to strike the proportionality balance for themselves and not merely to exercise a reviewing function.

The power which this confers upon the court is reinforced by the way in which the proportionality test has been formulated. It was initially seen as a least intrusive principle - any interference with a human right should be rationally related to a legitimate objective and be no more intrusive than is required to achieve that objective: see *De Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 AC 69. Even then, the Supreme Court has sensibly held that there must be a realistic approach to the least intrusive principle because it will almost always be possible to think of a less intrusive interference: see the judgment of Lord Reed in *HMS Treasury v Bank Mellat* [2013] UKSC 39 para.75.

But there is an additional aspect of the principle which Lord Bingham adopted in *Huang*, namely that the objective should be sufficiently important to justify interfering with the right. If that simply means that the objective manifestly is too trivial to justify the interference, it might have some validity. But it is not being applied in that limited *Wednesbury* sense. Moreover the exercise involves comparing values which are not truly commensurable — apples and pears. It confers

upon the judges a potentially very wide power to interfere with decisions of the executive. How far they will choose to exercise that power will vary from judge to judge. It depends on a number of factors, not least the judge's perception of the judicial role and its place in democracy and, it has to be admitted, his or her ideological leanings.<sup>13</sup>

Whatever the formal power conferred upon the courts by the Human Rights Act, no legislation can alter the fundamental institutional limitations of the adjudicative process or its weakness compared with the advantages enjoyed by the legislature. Moreover, judges must exercise a certain humility and be acutely sensitive to the dangers of making decisions which are better left to those who are politically accountable. In particular, in my judgment the courts should be particularly reluctant to make decisions which interfere with the government assessment of national security, or which relate to issues of macro-economic policy, or contentious principles of social policy.

They do not always do so. Professor Finnis, in my view justifiably, criticises the majority decision in *Nicklinson*<sup>14</sup> for failing to respect the proper boundaries between the courts and Parliament. The issue was whether or not the law which forbids assisting someone to die should be a criminal offence. The majority came close to granting a declaration of incompatibility on the grounds that the particular provision in question, section 2 of the Suicide Act, infringed article 8, and Lady Hale and Lord Kerr would have done so. This was notwithstanding the fact that the issue had been debated on a number of occasions in Parliament who have been unwilling to repeal the section. Many people consider, rightly or wrongly, that society will be less cohesive and individuals subjected to undue pressure to end their lives, if this is permitted. They are alive and sympathetic to the genuinely desperate circumstances in which individuals can find themselves. They may be right or they may be wrong, but what gives judges any special insight to say that they are wrong? I would accept that the purpose of human rights law is sometimes to protect minorities from abuse of majority power. But where a highly sensitive ethical issue has been the subject of heated and controversial political discussion, the courts must be particularly wary of resolving the debate and taking it out of the hands of the representatives of the people.

<sup>13</sup> Lord Justice Elias, "Are Judges Becoming Too Political?" (2014) 1 *Cambridge Journal of International and Comparative Law* 1-26, 19.

<sup>14</sup> *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657.

## Conclusion

I do not think that there is convincing evidence that the courts are stepping beyond their legitimate boundaries in the general development of the common law or in the field of statutory interpretation. But I do accept that there is legitimate cause for concern that the weapon of human rights may be too readily wielded by the judges so as to undermine decisions of the executive and the legislature.

Professor Finnis starts from a position of hostility to the Strasbourg court and the incorporation of Convention rights into domestic law. I do not share his opposition to the principle that human rights should have an important constitutional status; and I think that it would send the wrong signals internationally if the UK were to cease to be a party to the Convention on Human Rights, notwithstanding that I accept that a strong case can be made for saying that the court is too intrusive and has in certain areas expanded human rights in unacceptable ways. I agree with Professor Finnis that their ruling over prisoners' voting rights provides a striking example.<sup>15</sup> The HRA has in turn increased the power of unelected judges but it should not lead to government by judges. The question is whether in the exercise of those powers the judges have a sufficiently clear grasp of the limitations of the judicial process and of the importance of political accountability. Inevitably different judges will have different views about how they should approach human rights cases. An analysis of Supreme Court cases demonstrates that some are much more willing to use human rights arguments as a justification for attacking government power than others. My concern is that if the judges are perceived to be entering into the political arena, this will inevitably lead to a growing chorus for judges to be subject to political scrutiny before appointment. That could end in judges being appointed because of their political views, as in the USA. That would transform the very nature of the courts and even the judicial process itself. It is not a development I would wish to see.

<sup>15</sup> *Hirst v UK* (No 2) [2005] ECHR 681; [2014] 3 WLR 200.



## Comment: Mired in the past or making the future?

Justice Glazebrook<sup>1</sup>

One of Professor Finnis' major themes is that the courts are concerned with the past, while Parliament looks to the future and the Executive attends to the present. I agree with Professor Finnis that the primary role of the courts, including final courts of appeal, is to decide the cases that come before them in accordance with the law. This must provide the starting point for any discussion of the limits of the judicial role. But there are other aspects of this role.

All courts, and in particular final courts of appeal, have an important role as one of the guardians of the constitution,<sup>2</sup> even in systems like in New Zealand where there is no formal supreme written constitution and no power to strike down legislation.<sup>3</sup> In this regard, I use the term constitution in its broadest sense as relating to everything that concerns the relationship between the state and those coming within its jurisdiction. The responsibility of deciding whether the Executive has acted in accordance with the law gives a remedy in the particular case to those affected by past encroachments but also ensures future compliance with the law and protects against abuse of power: past, present and future.

The open justice principle and the requirement for courts to give reasons are both designed to assure the public that cases are decided in accordance with the law. This highlights the courts' role in upholding the rule of law both now and in the future by ensuring public respect for the rule of law.

<sup>1</sup> Thanks to my clerk, Josie Beverwijk, for her assistance with this paper.

<sup>2</sup> I am not suggesting that the courts are the only guardians of the constitution or even that they are the most important.

<sup>3</sup> Some in New Zealand have suggested a potential limit on Parliamentary sovereignty: see, for example, *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398 per Cooke J; and *Shaw v CIR* [1999] 3 NZLR 154 at 158 (CA). This always strikes me as an arid debate. A Parliament which is prepared to go so far outside constitutional norms as might justify the exercise of any such power (if it exists) would by definition be a Parliament that would ignore any judicial attempt to curb it and the judiciary would have no means of forcing compliance.

The doctrine of precedent means that lower courts are bound by the decisions of courts higher in the hierarchy. This necessarily means that decisions of higher courts will affect future cases throughout the legal system. Indeed, all court decisions form part of the law that is applied by lawyers in advising their clients, by government officials in performing their roles and, either directly or through intermediaries like the press and lawyers, by the general public in deciding how to conduct themselves in accordance with the law. Even court decisions that merely apply the existing law serve to illustrate how the law operates and therefore provide guidance to those in similar circumstances in the future.

In my no doubt incomplete survey of the other aspects of the role performed by the judicial branch of government, I would also mention specialist courts, such as therapeutic drug courts.<sup>4</sup> These fulfil a restorative role and some would argue this should be more widespread throughout the court system.<sup>5</sup> This concept of justice is necessarily looking to the future well-being of the particular parties but also to the future well-being of society.

Adjudicating on the particular dispute that comes before them does, as Professor Finnis says, involve an assessment of past actions but all the other aspects of this role I have outlined above affect the future. The past, present, future classification of the roles of the three branches of government postulated by Professor Finnis is therefore in my view too simplistic.<sup>6</sup>

Professor Finnis' second point is that the courts should see themselves as responsible for finding and not for making law. Again I think the position is more complicated than he suggests. His discussion relates to changing the law. But sometimes the very reason a case has come before a court is because there is no settled law that applies to the facts as found by the court or as agreed between the parties. Sometimes in such cases it is a matter of assessing which of two lines of authority best apply to the facts. Sometimes, however, it is necessary to develop the law in order to decide the case.

4 In the New Zealand context see Lisa Gregg and Alison Chetwin, "Formative Evaluation for the Alcohol and other Drug Treatment Court Pilot" (Ministry of Justice, March 2014) available at [www.justice.govt.nz](http://www.justice.govt.nz).

5 For more on restorative justice, see Tony Foley, *Developing Restorative Justice Jurisprudence: Rethinking Responses to Criminal Wrongdoing* (Surrey: Ashgate, 2014); and Gabrielle Maxwell and James J Liu (eds), *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (Wellington: Institute of Policy Studies, 2007).

6 The position with regard to the Executive and the Legislature is also more nuanced. Professor Finnis' characterisation of the role of the Executive as being concerned with the present ignores the role of the Executive in the legislative process and its general policy making functions. As to Parliament, it must consider the past when making decisions about the future. It also can and does legislate with retrospective effect (albeit in limited circumstances).

I agree with Professor Finnis that any development should be grounded in doing justice between the parties, having regard to the state of the law when the dispute arose. But, given the nature of precedent and the other forward-looking roles of the judiciary, any development must also have regard to the future. This is why parties so often use hypothetical future scenarios to steer the courts towards or away from a particular possible development of the law.<sup>7</sup>

In my view any development of the law should be undertaken in accordance with the common law method of incremental development based on past precedent,<sup>8</sup> taking into account the importance of the coherence and stability of the legal system. Any development should fit within the legal system as a whole, including any statutory overlay.<sup>9</sup> And it should also take into account what I would term institutional judicial competencies (discussed further below) and the fact that the context of the consideration is a particular case argued from the point of view of the particular parties.<sup>10</sup> All of the above point to any development being no more than is necessary to decide the particular case, but such development must also work in the future as well as in the past and the present.

When it comes to changing the law, the above restrictions will still apply but there are added factors. I agree with Professor Finnis that any change to the law should only be made if the previous view of the law was inapt at the time the dispute arose. But I think there is an important added consideration, which Professor Finnis touches on but which in my view deserves explicit attention. This is the fact that court decisions are retrospective.<sup>11</sup>

People will have ordered their affairs on the basis of existing law. So any change in established law, whether the court involved is bound by past decisions or not, will affect what has already occurred. This means (at the least) great and added caution must be exercised when changing the law. But it should not always mean

7 In fact it is my experience that counsel usually overuse such arguments.

8 As Lord Bingham said "the law scores its runs in singles: no boundaries, let alone sixes": Tom Bingham, "The Way We Live Now: Human Rights in the New Millennium" (1999) 1 Web JCLI.

9 This is especially so in New Zealand where statute law "overwhelms the common law": Ross Carter, *Burrows and Carter Statute Law in New Zealand* (5th ed, Wellington: LexisNexis, 2015) at 551. One example of this can be found in four statutes (the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979 and the Contracts (Privity) Act 1982) which largely replaced the general common law applicable to contracts.

10 For more on this, see Cass Sunstein, *One Case at a Time: judicial minimalism on the Supreme Court* (Cambridge, Mass.: Harvard University Press, 1999).

11 Leaving aside the controversial issue of prospective overruling, Lord Devlin in *The Judge* (Oxford: Oxford University Press, 1979) at 12 said that the ability to overrule prospectively is "the Rubicon that divides the judicial and legislative powers". For commentary in support of prospective overruling, see for example Jesse Wall, "Prospective overruling – it's about time" (2009) 12 *Otago Law Review* 131.

keeping in place a view of the law that is no longer fit for purpose and that was not fit for purpose at the time of the transaction or conduct in question. The difficulty will be in deciding when caution should be overcome and a change in law made.<sup>12</sup> It seems to me that this will necessarily require some forward-looking consideration of the difficulties that will be caused by the continuation of the law as it was understood in the past. In the criminal field there is an added issue as any change in the law risks criminalising conduct that a person, based on past court decisions, had reason to think lawful.<sup>13</sup>

One area where the desire for stability in the law can never be controlling, however, is in constitutional matters.<sup>14</sup> In their capacity as guardians of constitutional principles, the courts (and particularly final courts) must be prepared to disturb established practice if it does not accord with fundamental values of the law. An example of this in the New Zealand context is a case where the Supreme Court held that, contrary to existing practice, there should be consecutive interpretation in criminal trials.<sup>15</sup> Fair trial rights cannot be compromised and the Court's duty was to uphold them, even if it required a change to trial practice.

It follows from what I have said already that I agree with Professor Finnis' fourth point, that there are what might be called institutional and structural differences between the courts and Parliament. In my view these differences, and in particular the fact that the courts are considering the law in relation to a particular case, means that the courts are the better institutions to deal with incremental changes to the common law, as has been their traditional role.<sup>16</sup> I agree that institutional judicial competencies mean that courts are not, however, the appropriate institutions for dealing with wide ranging reform. I also agree, at least in jurisdictions where there is no supreme law, that there are constitutional dimensions in delineating the proper role of the courts as opposed to Parliament.<sup>17</sup>

12 In *R v Chilton* [2006] 2 NZLR 341 (CA), the Court of Appeal set out the circumstances in which it might revisit earlier decisions: at [83]–[91]. The Court said that its approach to departing from its earlier decisions would be cautious because of the need for certainty and stability in the law: at [83]. See also comments made in *Couch v Attorney-General (No 2)* [2010] NZSC 27; [2010] 3 NZLR 149 at [104] per Tipping J.

13 As an example, there has been criticism of both the House of Lords and the European Court of Human Rights with regard to the abolition of spousal immunity for rape in the cases of *R v R* [1992] 1 AC 599 (HL); and *SW v United Kingdom* (1995) 21 EHRR 363 (ECHR). See PR Ghandhi and JA James, "Marital Rape and retrospectivity – the human rights dimensions at Strasbourg (1997) 9 *Child and Family Law Quarterly* 17 and Marianne Giles, "Judicial law-making in the criminal courts: the case of marital rape" [1992] *Criminal Law Review* 407.

14 And again I use this term in the widest sense.

15 *Abdula v R* [2011] NZSC 130; [2012] 1 NZLR 534. Another example might be *Booth v R* [2016] NZSC 127; [2017] 1 NZLR 223.

16 Parliament rightly usually has other priorities than such incremental reform.

17 In New Zealand at least, this is made explicit by way of s. 3 of the Senior Courts Act 2016, which provides that nothing in the Act "affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."

On the other hand, any unwarranted encroachment can be rectified as Parliament is always free to legislate to overturn a decision it considers inappropriate.<sup>18</sup>

In jurisdictions where there is a supreme written constitution, it is the role of the courts to ensure the constitution is complied with, including by the legislature.<sup>19</sup> The institutional and structural constraints noted above would still apply. And in such jurisdictions, if statutes do not contravene the constitution, it is the duty of courts to interpret and apply such statutes and not to rewrite them.<sup>20</sup> Where courts overstep (or the interpretation does not in fact accord with Parliament's understanding), decisions by the courts in areas other than laws conflicting with the constitution can be overturned by legislation. Further, even written constitutions can be changed, albeit with difficulty.

To recognise that there are institutional limitations for the judicial branch is not to say that the advantages that the legislative branch of government have are not sometimes squandered. Examples abound of legislation that is poorly drafted (particularly older legislation).<sup>21</sup> There are also examples of legislation underpinned by bad policy decisions<sup>22</sup> or by policies that are out of line with other statutes or with the remainder of the legal system.<sup>23</sup> Legislation that appeared robust in theory may be shown not to work in practice or it may apply in an arbitrary manner in circumstances that were not anticipated at the time it was passed. One of the ways flaws in legislation can be highlighted is through the cases that come before the courts. Cases may also highlight areas that need legislative attention more generally. The courts can thus fulfil an important role in the legislative process.<sup>24</sup>

18 This should not be done to take away the fruits of the court victory for the particular party, as is made clear by the Legislation Design and Advisory Committee *LAC Guidelines* (Wellington: October 2014) at 44. In my view any legislative overturning should also normally follow proper processes, including (but not limited to) full public participation through the Select Committee process in order to ensure that all the advantages of Parliamentary law-making over that of the courts is obtained.

19 Whether self-proclaimed (see for example *Marbury v Madison* 5 U.S. 137 (1803)) or as explicitly provided for by the constitution (such as by article 167 of the Constitution of the Republic of South Africa 1996).

20 Just as it is in jurisdictions with no supreme written constitution.

21 For more on this, see Law Commission, *A New Interpretation Act: To Avoid 'Prolixity and Tautology'* (NZLC R17, 1990); Law Commission *The Format of Legislation* (NZLC R27, 1993); and Law Commission, *Legislation Manual Structure and Style* (NZLC R35, 1996).

22 This can be for a variety of reasons. Politicians may have been badly advised by the Executive. They may have been captured by particular interest groups. They may have had their eye on the short term future to the next election rather than thinking about future generations (in New Zealand there is a relatively short electoral cycle of three years: Constitution Act 1986, s.17).

23 Sometimes there can be contradictory policies and provisions within the one statute. See, for example *New Zealand Fire Service Commission v Insurance Brokers of New Zealand Association* [2015] NZSC 59; [2015] 1 NZLR 672; and *Jennings Roadfreight Ltd (in liq) v Commissioner of Inland Revenue* [2014] NZSC 160; [2015] 1 NZLR 573.

24 Although there are problems with the metaphor, this fits with the concept of dialogue between the branches of government, albeit in a wider sense than the constitutional one where this phrase is usually used: see for example Peter Hogg, Allison

In suggesting restraint in lawmaking for courts, Professor Finnis does not directly espouse the view that judges are not accountable for their judgments whereas politicians are but it is implied in his fourth and ninth points. Of course politicians are accountable at the ballot box but it is for their performance or non-performance overall rather than for particular decisions. Judges are accountable for their decisions on appeal to courts higher in the hierarchy. The open justice principle makes their decisions open for review by the parties, the legal profession, academics, their colleagues and the wider public. And there is the personal responsibility felt by all judges in the importance of their task.

To illustrate his thesis that the courts in the United Kingdom have gone outside their proper role, Professor Finnis discusses a number of what can be broadly characterised as human rights cases. I do not comment on the specific cases. Nor do I want to enter into a discussion of prerogative power or indeed of the so-called third source of power.<sup>25</sup> I will, however, make some comments on the human rights framework in New Zealand and the New Zealand Bill of Rights Act 1990 (Bill of Rights). The Bill of Rights is not entrenched and contains no power to override legislation. In fact, there is not even a specific power in our Bill of Rights for courts to make declarations of inconsistency.<sup>26</sup>

The long title of the Bill of Rights sets out the Act's purpose as to affirm, protect, and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR).<sup>27</sup> It therefore does not purport to grant new rights.<sup>28</sup> Typically bills of rights are couched in general language and ours is no exception. It was recognised however, in the drafting process of our Bill of Rights that "rights cannot be absolute" and must instead be balanced against other rights and freedoms,

Thornton and Wade Knight, "Charter Dialogue Revised – or 'Much Ado about Metaphors'" (2007) 45 *Osgoode Hall Law Journal* 1-65.

<sup>25</sup> The Supreme Court, in a recent case, made no comment on this "third-source": *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27; [2016] 1 NZLR at [112] (per McGrath, Glazebrook and Arnold JJ).

<sup>26</sup> A declaration of inconsistency was made for the first time by the High Court in *Taylor v Attorney-General* [2015] NZHC 1706; [2015] 3 NZLR 791 relating to prisoner voting restrictions. An appeal has been heard by the Court of Appeal last year and a judgment is pending. For more, see Claudia Geiringer, "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 *Victoria University of Wellington Law Review* 613. The Human Rights Review Tribunal does, however, have the power under s. 92J of the Human Rights Act 1993 to make a declaration that an enactment is inconsistent with the right to be free from discrimination guaranteed by s. 19 of the Bill of Rights.

<sup>27</sup> International Covenant on Civil and Political Rights 19 December 1996, 999 UNTS 171, which New Zealand ratified on 28 March 1978. The Bill of Rights includes many but not all of the rights contained in the ICCPR.

<sup>28</sup> I note also that the European Convention on Human Rights was entered into by way of an Executive decision on the assumption that it reflected existing rights in the United Kingdom. For more, see A W B Simpson, *Human Rights and the End of Empire* (Oxford: Oxford University Press, 2004).

as well as the “general welfare of the community”.<sup>29</sup> Our Bill of Rights therefore acknowledges that there can be restrictions on rights but provides that these must be able to be “demonstrably justified in a free and democratic society”.<sup>30</sup>

In accordance with their primary role of deciding the cases that come before them according to law, the New Zealand courts are obliged to interpret our Bill of Rights if it is relevant to a case. The courts are also obliged to consider how other legislation is to be interpreted in light of the Bill of Rights itself, which mandates that legislation is, if possible, to be given an interpretation consistent with the Bill of Rights.<sup>31</sup> Before any possible rights consistent interpretation is assessed, the courts must decide whether the relevant guaranteed rights are in fact affected and therefore must first assess whether any restrictions are such as may be justified in a free and democratic society.<sup>32</sup> Even if the restrictions are not justifiable, if a rights consistent interpretation is not possible, inconsistent legislation must be applied by the courts.<sup>33</sup>

The analysis by the courts under ss 4, 5 and 6 of our Bill of Rights does not challenge Parliamentary sovereignty. It accords with it, by following the process Parliament has chosen to lay down. It is significant too that our Bill of Rights explicitly binds all three branches of government.<sup>34</sup>

There is room for a range of views on how the general language of our Bill of Rights should be applied to specific situations, as well as on what is required in a free and democratic society. Commentators may legitimately consider that the courts have construed obligations too widely or too narrowly. A court may indeed have got

29 Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6 at 6.

30 Bill of Rights, s. 5. Professor Finnis expresses concern about the use of a proportionality test in making a similar assessment. I make no comment on this as the question may in the future come before the Supreme Court. I do note that the High Court of Australia has used a proportionality analysis in constitutional and administrative law decisions: see for example *Monis v The Queen* [2013] HCA 4; and *McCloy v New South Wales* [2015] HCA 34. See also the comments of Sir Anthony Mason, “Proportionality and its use in Australian Constitutional Law” (Sir Anthony Mason Honorary Lecture, University of Melbourne, 6 August 2015).

31 As required by s. 4 of the Bill of Rights. Some suggest that the equivalent Human Rights Act 1998 (UK), s. 3 is stronger, as it provides that an interpretation of an enactment must be read “So far as it is possible to do so” to give effect to the guaranteed rights. Some say that the United Kingdom courts have taken a more robust approach than in New Zealand. For example, Lord Neuberger has expressed the view that the United Kingdom Supreme Court has interpreted statutes under s. 3 “in a way which some may say amounts not so much to construction as to demolition and reconstruction”: David Neuberger, “The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience” (speech given at the Supreme Court of Victoria, 8 August 2014).

32 The relationship between ss. 4, 5 and 6 of our Bill of Rights was outlined in *R v Hansen* [2007] 3 NZLR 1 (SC). See also Claudia Geiringer “The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*” (2008) 6 *New Zealand Journal of Public & International Law* 59.

33 Section 6 of the Bill of Rights provides that “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning”.

34 Section 3(a) of the Bill of Rights provides that the Bill of Rights applies to acts done “by the legislative, executive, or judicial branches of the Government of New Zealand”.

it wrong in a particular case. This, however, seems to me a function of how the legislation was drafted in the first place and is a difference of opinion rather than a constitutional crisis.

I do not consider it risks weakening either institution that Parliament may decide to maintain legislation courts have said is inconsistent with our Bill of Rights or that Parliament may decide to override a court decision for the future, as long as mutual respect is maintained and the courts' contribution is taken into account in any decision.<sup>35</sup> Debate and dissent is embedded in both democracy and in common law courts because they usually serve to improve decisions taken and thus enhance rather than diminish respect for the institutions of government.<sup>36</sup>

It is significant that, even if the Bill of Rights in New Zealand did not exist, courts would still be required to decide whether internationally recognised human rights have been breached, which necessarily includes consideration of the extent of such rights. There is a principle of interpretation of legislation that, unless this is made explicit, Parliament did not intend to legislate contrary to international obligations, including human rights obligations.<sup>37</sup> Closely related to this is the principle that a wide discretion conferred on the Executive should be exercised consistently with such obligations.<sup>38</sup> Rights are also protected in New Zealand through the principle of legality.<sup>39</sup> In addition, international human rights obligations have been used by the courts to develop the common law.<sup>40</sup> Presumptions relating to the interpretation of legislation are not new, although their focus may have changed from the protection of property rights to a broader focus. I

35 This can be seen as an example of what Daniel Kahneman terms "adversarial collaboration" in his book *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011) at 729. See also Barbara Mellers, Ralph Hertwig and Daniel Kahneman, "Do Frequency Representations Eliminate Conjunction Effects? An Exercise in Adversarial Collaboration" (2001) 12 *Psychological Science* 269.

36 See for example the comments of Iacobucci J in *Vriend v Alberta* [1998] 1 SCR 493 at [139].

37 The high point of this presumption is *Sellars v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA).

38 See *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA). I have never had a particular issue with this principle. It is after all the Executive that entered into such obligations. It does not seem unreasonable to expect it to abide by them – see Susan Glazebrook, "Filling the Gaps" in Rick Bigwood (ed), *The Statute: Making and Meaning* (Lexis Nexis, Wellington, 2004) 153 at 159–161. See also A W B Simpson, above n. 28.

39 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffman: "In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual". This was endorsed by the Supreme Court of New Zealand in *Cropp v Judicial Committee* [2008] NZSC 46; [2008] 3 NZLR 774 at [28].

40 As an example, the decision of the New Zealand Court of Appeal in *Hosking v Runting* [2005] 1 NZLR 1 (CA) recognised the tort of privacy in New Zealand (per Gault P, Blanchard and Tipping JJ, Anderson J and Keith J dissenting). In that case Gault P and Blanchard J said that there is increasing recognition that the common law should develop consistently with international treaties to which New Zealand is a party (at [3]–[6]) and that this is an international trend (at [6]).



refer, for example, to the long-standing presumptions that revenue and penal statutes are construed narrowly.<sup>41</sup>

Finally on this topic, it would be remiss in a survey of human rights in the New Zealand context not to acknowledge the role of the Treaty of Waitangi,<sup>42</sup> of indigenous collective rights<sup>43</sup> and of tikanga (Maori customary law), the latter forming part of the values of the common law in New Zealand.<sup>44</sup>

Professor Finnis in his 10th point discusses the interpretation of old legislation in modern conditions and the tendency of courts in the United Kingdom and Europe to become what he calls “roving law commissions”. I will comment first on that proposition generally and then discuss the main example he gives.

In New Zealand the ambulatory approach to the interpretation of legislation is required by s.6 of the Interpretation Act 1999, which provides that enactments apply to circumstances as they arise. This applies to all statutes, including our Bill of Rights. I have difficulty in understanding how or why this exhortation of Parliament on how to interpret statutes should encompass changed physical circumstances but not changes in societal values, such as changed attitudes to the place of women and minorities or, at a more mundane level, modern attitudes to drink driving.

Of course there will be limits. Any interpretation must accord with the words of the statute read in light of its purpose.<sup>45</sup> But to interpret the words as they might have been understood at the time the legislation was passed, as opposed to consideration of what the words would mean to a modern audience (who after all are those bound by the statute), would seem to me unjustified in a society operating under the rule of law.<sup>46</sup> Even a thin concept of the rule of law requires law to be

41 These presumptions are now defunct in New Zealand: see Carter, above n. 9, at 233–236.

42 Reference to the principles of the Treaty of Waitangi are included in a growing number of statutes. For example, the State Owned Enterprise Act 1986 provides that the Crown is not permitted to act inconsistently with the principles of the Treaty of Waitangi: s. 9. This has been described as a “constitutional guarantee” (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 659 per Cooke P). See also *New Zealand Maori Council v Attorney-General* [2013] NZSC; [2013] 3 NZLR 321 at [59].

43 New Zealand has adopted the United Nations Declaration on the Rights of Indigenous People GA Res 61/295, A/Res/61/295 (2007). The Declaration affirms that indigenous peoples have the right to effective remedies for “all infringements of their individual and collective rights”: art. 40.

44 *Takamore v Clarke* [2012] NZSC 116; [2013] 2 NZLR 733 at [94] (Elias CJ). See also *Takamore v Clarke* [2011] NZCA 587 at [15] and [254]. Aspects of Māori customary law are also explicitly referenced in a growing number of statutes, such as s. 7 of the Resource Management Act 1991, which requires consideration of kaitiakitanga (the concept of guardianship).

45 Interpretation Act 1999, s. 5(1). The purpose of a statute would primarily be discerned from the words used (including any purpose provisions), read in the light of publicly available background material such as Law Commission reports and Parliamentary debates. For more on the purposive approach, see Carter, above n. 9, at ch 8.

46 I discuss the role of statutes as public words in Susan Glazebrook, “Do they say what they mean and mean what they say? Some issues in statutory interpretation in the 21st century” (2015) 14 *Otago Law Review* 61 at 62. See also Lord Hoffmann’s comment (albeit in another context) in *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 AC 715 at [73] where he said “a public document like a statute is addressed to the public at large.”

clear and accessible.<sup>47</sup> There will also be areas with major policy implications where Parliament will be the most appropriate institution to decide on the appropriate response to modern conditions.<sup>48</sup>

My main point in answer to that made by Professor Finnis, however, is that, in light of s. 6 of the Interpretation Act, New Zealand courts are not constituting themselves roving law commissions when using an ambulatory approach to interpretation. They are respecting Parliamentary sovereignty by applying a principle of interpretation laid down by Parliament.

Professor Finnis uses the case of *Hirsi Jamaa*<sup>49</sup> as his main example of courts becoming “roving law commissions” and of what he sees as the dangers of a “living instrument” interpretation.<sup>50</sup> He is of course entitled to criticise the decision but in an academic context I would have expected his criticism to be put forward without exaggerated rhetoric. Professor Finnis maintains that the case is an important cause of what he calls the migration crisis. He surely cannot be suggesting, for example, that the decision is responsible for people fleeing war in Syria.<sup>51</sup> I assume his point is that, had the Grand Chamber interpreted the Convention responsibilities differently, refugees from Syria and other states may have been discouraged from trying to reach Europe and thus that any refugee crisis may have been the problem of some other state.<sup>52</sup>

I do not want to discuss Professor Finnis’ criticism of the decision in detail but just make a few comments.<sup>53</sup> Professor Finnis says that the drafting history of the

47 See for example Joseph Raz, “The Rule of Law and its Virtue” in *The Authority of Law: Essays on Law and Morality* (Reprint ed, Oxford: Oxford University Press, 2002) 210 at 213–216.

48 For example in New Zealand unions of same sex couples was provided for by Parliament: first by the introduction of civil unions which included same sex couples (by way of the Civil Union Act 2004, which came into force 26 April 2005) and then by amending the definition of marriage under the Marriage Act 1955 to mean the “union of 2 people, regardless of their sex, sexual orientation, or gender identity” (by way of the Marriage (Definition of Marriage) Amendment Act 2013, which came into force 19 August 2013. The Court of Appeal had earlier decided that it was not possible to construe the wording of the Marriage Act 1955 as encompassing the marriage of same sex couples: *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

49 *Hirsi Jamaa v Italy* 23 February 2012 (27765/09). Art 1 of the European Convention of Human Rights provides that parties to the Convention “shall secure to everyone within their jurisdiction” the rights and freedoms guaranteed in the Convention. The Grand Chamber was satisfied that the actions of the Italian Customs and Coastguard were a case of extraterritorial exercise of jurisdiction by Italy capable of engaging its responsibilities under the Convention: at 25–26.

50 In fact the “living instrument” interpretation of the Convention was not mentioned in relation to art. 3, the main aspect of the decision criticised by Professor Finnis, but only in relation to a complaint under art. 4 of Protocol number 4, which prohibits the “[c]ollective expulsion of aliens”: at 46 of the judgment.

51 His reference to Ebola and other plagues also seems to me unnecessary scaremongering and not part of the facts the Grand Chamber was considering in the particular case. The same applies to his reference to “uncountable numbers of terrorists”.

52 I note, however, the recognition in the New York Declaration on Refugees and Migrants (*New York Declaration for Refugees and Migrants* GA Res 71/1 A/Res/71/1 (2016)) that there is a need for a coordinated global response to the current situation: at [7].

53 I comment only on the elements of the decision that Professor Finnis discusses. I accept that other aspects of the judgment may be controversial, such as the extraterritorial jurisdiction finding mentioned at n. 49 above.

Refugee Convention<sup>54</sup> shows that the state parties intended to exclude mass arrivals from its ambit. The fact remains, however, that, despite requests,<sup>55</sup> such an exclusion was not explicitly included in the convention as drafted.<sup>56</sup> It has been suggested that the term *refoulement* was chosen to ensure that the traditional civil law understanding of the term (which did not govern in situations of mass influx) would be recognised.<sup>57</sup> As a result it is said that derogation from the principle would be justified in the case of mass arrivals “only where it is the sole realistic option for a state that might otherwise be overwhelmed and unable to protect its most basic national interests”.<sup>58</sup> If this is right, issues would remain as to the definition of mass influx, when the threshold of threat to the interests of the state is met and whether such a threat can realistically be managed by means other than by *refoulement*.

Professor Finnis also points out that art. 33(2) of the Refugee Convention does not include the *refoulement* of a refugee to torture where the requirements of that article are met in relation to that particular refugee.<sup>59</sup> The article in issue in *Hirsi Jamaa* did not, however, concern refugees but torture. There is no similar exclusion from the non-*refoulement* obligation in the Torture Convention to that contained in art. 33(2) of the Refugee Convention.<sup>60</sup>

54 In this term I refer collectively to the Convention relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951 and entered into force 22 April 1954) and also the Refugee Protocol (Protocol relating to the Status of Refugees 606 UNTS 267 (opened for signature January 31 1967 and entered into force October 4 1967)).

55 During the drafting process and Conference of Plenipotentiaries, representatives from countries including Switzerland and the Netherlands expressed concern that the duty of non-*refoulement* would extend to situations of mass influx and intimated that it should not do so. At the Conference, the Netherlands representative had it placed on record by the President that the Conference was in agreement that “the possibility of mass migration was not covered by article 33”: Dr Paul Weis, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary* (1990) at 240.

56 It must be remembered that the Convention was being drafted against the background of mass displacements after the Second World War.

57 James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005) at 358. But note the comments at n. 60 below of the 1979 Working Group on the Torture Convention.

58 At 360.

59 The article does not, however, appear to me to contemplate *refoulement* to torture of a refugee who does not him or herself meet the test in art 33(2) but who may arrive alongside those who may possibly constitute a risk to the security of a state.

60 Article 3(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984 and entered into force 26 June 1987) [Convention against Torture] provides that “No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” This Convention is not mentioned by Professor Finnis. The report of the Working Group of 1979 notes that the introduction of the concept of non-*refoulement* “gave rise to considerable discussion.” One of the concerns was that this might require a State to accept a mass influx of persons when it was not in a position to do so. It was proposed that the term be deleted or a specific provision be made in the Convention for States to reserve their acceptance of the Article: *Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* E/CN.4/L.1470 (1979) at 8–9. However by the time of the 1980 Working Group the article was accepted with “*refouler*” included: *Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* E/CN.4/1367 (1980) at 4.

It seems to me that, despite Professor Finnis saying he believes there are moral absolutes, despite the absolute nature of the prohibition on torture<sup>61</sup> and despite the non-refoulement obligations under the Torture Convention, he is effectively condoning torture as long as States did not themselves indulge in the practice but were instead acting to protect their own citizens from a possible risk, rather than with the positive intention that others would indulge in torture.<sup>62</sup>

Professor Finnis' views of international obligations relating to torture and refugees are not shared by the New Zealand Parliament. Under the Immigration Act 2009, a person must be recognised as a protected person if there are substantial grounds for believing that he or she would be in danger of torture if deported.<sup>63</sup> Such a person may only be deported to a place where there is no such risk.<sup>64</sup> Further, there is no exception for mass arrivals to the above provisions. Nor is there a mass arrivals exception to the provision providing that a refugee or someone claiming recognition as a refugee cannot be deported unless art. 32(1) or art. 33 of the Refugee Convention allows the deportation of the person.<sup>65</sup> There are provisions in the Act that do deal with mass arrival groups.<sup>66</sup> There is an ability to apply for a warrant of commitment for such groups of not more than six months in certain circumstances, including if such a warrant is necessary to manage any threat or risk to security or to the public arising from one or more members of the mass arrival group.<sup>67</sup>

61 It seems to be accepted that the prohibition against torture is *jus cogens*. See, for example *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (20 July 2012) [2012] ICJ Rep 422 at 455.

62 Professor Finnis' thesis on this and *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 (more commonly referred to as the *Belmarsh* case) appears to rest to an extent on an assumption that non-citizens have no rights. For a contrary view, see Rayner Thwaites, *The liberty of non-citizens: indefinite detention in Commonwealth countries* (Oxford: Hart Publishing, 2014).

63 Section 130 of the Immigration Act 2009. The Act applies the Torture Convention definition of torture as any act by a public official or a person acting in an official capacity (or by someone with consent or acquiescence of such persons) which intentionally inflicts severe mental or physical pain or suffering for the purpose of obtaining information, punishment, intimidation or discrimination. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. It was also accepted by the Crown that a person could not be deported to a risk of torture under the former legislation, which did not include a protected persons regime: see *Zaoui v Attorney-General (No 2)* [2005] NZSC 38; [2006] 1 NZLR 289.

64 Section 164(4)(a). Nor can a person be deported, under s.164(4)(b), if there are substantial grounds for believing the person would be in danger of arbitrary deprivation of life or cruel treatment (as defined in s.131(6) to mean "cruel, inhuman, or degrading treatment or punishment"). The New Zealand Bill of Rights also guarantees the right not to be deprived of life (s 8) and the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment: s. 9.

65 Section 164(3).

66 Defined in s. 9A of the Act as a group of more than 30 people without visas or visa waivers, who arrive in New Zealand on board the same craft, the same group of craft at the same time, or on board the same group of craft and within such a time period or in such circumstances that each person arrived, or intended to arrive, in New Zealand as part of the group.

67 Section 317(A)(a)(ii). The warrant cannot include a person under 18 years of age unless that person has a parent, guardian, or relative who is a member of the mass arrival group: s. 317A(6). The introduction of mass arrival group warrants was met with some controversy. For a summary of the opposition see Christopher Foulkes, "The Shafts of Strife and War: A Critical Analysis of the Immigration (Mass Arrivals) Amendment Bill" (2012) 43 *Victoria University of Wellington Law Review* 547.

To conclude, I make three more general points on Professor Finnis' lecture. First, I do not think it is possible to discuss the limits of judicial power without also discussing the role of and the limits, constraints and controls on all three branches of government. So Professor Finnis' lecture and the commentaries on that lecture can only be seen as the first step.

Secondly, it seems to me that it is an inevitable consequence of a healthy state that there will be tensions at times at the edges between the branches of government. The challenge is ensuring the tension strengthens the state, rather than rising to the point of damaging any of its institutions. This requires a three way respect for, and understanding of, roles between the branches of government and it also requires a public (and media) educated in civics.

Finally, the answers to questions about the role of, and the limitations on the role of, each of the branches of government will depend on the constitutional arrangements of each jurisdiction and, more importantly, the constitutional culture and values of that state. There is no single solution and any comparisons must be made on a holistic basis. Something that can seem surprising or incongruous viewed in isolation can make perfect sense when viewed in its constitutional and cultural context.

## Comment

John Dyson Heydon AC QC

John Finnis has made many trenchant points in *Judicial Power: Past, Present and Future*. The following seeks to highlight what can flow from two of them. One is the danger arising from what he calls “inequality of arms”. This takes place, he argues, where the proponents of a movement “for broad social reform ... mount judicial proceedings after years of preparation of arguments and evidence”, and confront in court government lawyers who are fresh to the issue and whose hearts may not be in the case. The other is that judges must act “in fidelity to real law applied to proven or admitted facts”. That implies a debate framed by reference to a concrete controversy arising out of those facts. It also implies a duty on the court to adhere to the parameters of the controversy as marked out by the parties and their legal representatives. That duty can only be put aside if the court gives notice of a possible view that that controversy has been ill-defined and that further potentially decisive arguments need to be considered.

The curial resolution of conflicts between competing points of view can only take place in a just way if there is a rough parity in the ability — the talent, the experience, the preparation, the proper forensic zeal — of the competing advocates to deal with the issues arising out of an actual controversy. But what is even more fundamentally undesirable than inequality is incapacity to deal with the crucial point because both sides are in complete ignorance of it until it eventually comes to the parties’ notice for the first time, to their surprise, in the court’s judgment. Here there is not so much “inequality of arms” as mutual disarmament through excusable ignorance.

The Court of Appeal of the Supreme Court of New South Wales has revealed, if not a disposition towards, at least examples of, decisions which turned on points of

law never debated between the parties and never raised by the court with the parties.<sup>1</sup> Indeed even more august tribunals have been guilty of this fault.<sup>2</sup> It is obviously an unsatisfactory judicial technique for parties, particularly the losing party, to have had no opportunity to deal with the basis on which the case was lost.<sup>3</sup> It is a fundamental breach of natural justice. It is quite unfair to the loser. And it is equally unfair to the winner. For when the loser appeals, the winner will be deprived of the fruits of its unsatisfactory victory. And the winner will be exposed to the wasted time and squandered costs involved in that successful appeal by the loser to correct an error which was not the winner's fault, but the court's. Further, law propounded without notice to or assistance from the parties is not likely to be sound law. Even ultimate appellate courts are extremely busy. Cases rush up. The legal content of some of them is arcane. The legal content of others may be outside fields with which members of the court are familiar. The court is not well placed to work out the law for itself without full assistance from counsel. Counsel can sharpen the definition of issues. They can refine analysis. They can present a representative range of arguments and authorities. Not least, they can point out the undesirable consequences of taking particular courses, whether those consequences are practical difficulties or inconsistency with related doctrines. The adversary posture of the legal representatives is an essential check against curial leaping into the dark — an adventurous but dangerous activity. It is by good disputation that the law should be well known, not just solitary research and personal inspiration unguided by adversary argument.

On these considerations, three fundamental rules of precedent rest. One is that no binding precedent is created when a court follows the practice of “assuming for the purpose of disposing of the particular case, and without any other further consideration on their own part, that the proposition of law relevant to the issue of fact in dispute between the parties had been formulated correctly by counsel by both parties in agreement with each other”.<sup>4</sup> Secondly, even a proposition of law forming part of the ratio decidendi is not binding on later courts where the particular court

1 See the decisions which led to the successful appeals in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 and *Friend v Brooker* (2009) 239 CLR 129.

2 The reliance by the High Court of Australia on a point disclaimed by one party in *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* (1978) 139 CLR 231 led to the reversal of that decision by the Privy Council: *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* [1980] 3 All ER 257 at 260 and 262.

3 *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 398, 404 and 410.

4 *Baker v R* [1975] AC 774 at 787 per Lords Diplock, Simon of Glaisdale, Cross of Chelsea and Sir Thaddeus McCarthy. See also at 788.

merely assumed its correctness without argument.<sup>5</sup> The third is that a decision per incuriam is not binding. Relying on this third principle, of course, is not a palatable course for a court facing a “precedent” made by an earlier court higher in the curial hierarchy which is apparently binding but was in fact reached per incuriam.

The dangers in enunciating legal propositions without argument are illustrated by a relatively recent Supreme Court decision — *R v Horncastle*. One element of the Court’s reasoning rested on the proposition that anonymous evidence is never admissible in English law. Perhaps that proposition was not a decisive element in the reasoning, for there were many other reasons for the Court’s conclusion. But the proposition was a key element. It was never argued by the winning side in the Supreme Court. It was never identified as a relevant issue. The Court never requested assistance about it from counsel for the losing parties (defendants in criminal proceedings challenging their convictions). It is actually incorrect. And it created potential difficulties for later trial judges and panels of the Court of Appeal.

For some time before *R v Horncastle* was decided in 2009, there had been tension between the English courts and the European Court of Human Rights (the “European Court”). One point of tension concerned whether the English rules of hearsay evidence complied with Article 6 of the European Convention of Human Rights (the “Convention”). The relevant parts of Article 6 are as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing...

...

3. Everyone charged with a criminal offence has the following minimum rights:...

(d) to examine or have examined witnesses against him...

*R v Horncastle* involved two appeals by defendants who contended that their rights to a fair trial had been infringed because hearsay evidence had been the “sole or

<sup>5</sup> *R v Warner* (1685) 1 Keb 66 at 67; 83 ER 814 at 815 (“an hundred presidents sub silentio, are not material”); *National Enterprises Ltd v Racal Communications Ltd* [1975] Ch 397 at 405-406, 407 and 408; *Barrs v Bethell* [1982] Ch 294 at 308; *Re Heatherington (decd)* [1990] Ch 1 at 10; *Archer v Howell* (1992) 7 WAR 33 at 46; *R (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955 at [20]-[25] and [33]-[39]; *Markisic v Commonwealth* (2007) 59 NSWLR 737 at [56]; *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13].



decisive” evidence against them. The “sole or decisive” test had grown up in decisions of the European Court. In 2009 the latest of those decisions was *Al-Khawaja v United Kingdom*.<sup>6</sup> Rightly or wrongly, most think that the English law on hearsay evidence is now solely statutory, the principal general statute being the Criminal Justice Act 2003 (“the 2003 Act”). In one of the appeals hearsay had been admitted under s.116(1) and (2)(a) of the 2003 Act. Those provisions permit the reception of evidence emanating originally from an identified deceased declarant. In the other appeal hearsay had been admitted under s.116(1) and (2)(e). Those provisions permit evidence emanating originally from an identified declarant who did not give direct oral evidence through fear. Thus the facts in the *R v Horncastle* cases did not raise any direct question about anonymous hearsay.

Professional opinion saw *R v Horncastle* as offering an opportunity for the English courts to resolve the conflict between themselves and the European Court. Resolution of conflict can come from capitulation, compromise or resistance. The Court of Appeal and the Supreme Court in *R v Horncastle* did not capitulate. They did not compromise. They opted for spirited resistance. Their language exhibits a strong determination both to show that the defendants’ trials had not been “unfair” in a Convention sense and, more generally, that a trial could be fair even though the sole or decisive evidence in favour of a conviction was hearsay. Their language also reveals a desire to blur and soften the more dramatic and radical aspects of the 2003 Act in an attempt to avoid shocking the European Court and to increase the chance of the 2003 Act being held compatible with Article 6(3)(d). Thus the courts strongly stressed many “counterbalancing measures” and safeguards in various aspects of the common law, in s.78 of the Police and Criminal Evidence Act 1984 and in the 2003 Act.

Both the Court of Appeal and the Supreme Court concluded that there had been no unfair trial.

Most reasonable observers who are neither English nor European must have enormous sympathy for the English courts in view of the predicament in which they found themselves. Certainly the present writer does. There are several reasons for sympathy. In the first place, some have doubted the merits of the Convention, or at least its merits as construed over time by the European Court. No one has ever formulated the reasons for experiencing those doubts better than John Finnis.

<sup>6</sup> (2009) 49 EHRR 1. The line of authority began in *Doorson v Netherlands* (1996) 22 EHRR 330.

Secondly, it is highly questionable to conclude that Article 6(3)(d), which refers to “witnesses against him”, deals with hearsay evidence of non-witnesses rather than conferring a right to cross-examine persons who are witnesses testifying on oath or affirmation. Thirdly, without undue disrespect to the European Court, it must be hard for modern English judges administering the legal system devised by prior judges and legislatures over lengthy periods in which there was no totalitarian rule in England meekly to accept its pronouncements. That is because its judicial membership pool is made up of persons almost all of whom come from countries which have suffered totalitarian rule within living memory, some as recently as 1989. But for present purposes, let us accept the features of the world which underlie the first three reasons, as, for practical purposes, the English courts had to. The fourth reason is harder to accept.

The English law of evidence has had its critics over the centuries. But few areas of the law have been surveyed periodically by abler minds more intensively than that body of law. Bentham, the mid-nineteenth-century reformers, Stephen, Cross, and Glanville Williams are examples. It is not necessary to believe that the 2003 Act is perfect in order to accept that the relevant issues were subjected to intense thought for long periods in the twentieth century. The mode by which a polity conducts its trials is integrally bound up in its entire legal system. It is a sign and a symbol of the satisfactoriness or unsatisfactoriness of that system. To conclude that the English rules of evidence create unfair trials is a very damaging criticism. The field is inherently one in which English opinions ought to be allowed considerable weight over European views. The accusation by outsiders that the English hearsay position leads to unfair methods of trial is one which the English courts, not surprisingly, worked hard to refute. Most of the reasoning in *R v Homcastle* is convincing and effective from that point of view, even though overall the picture painted may be a trifle over roseate.

The reference of *Al-Khawaja and Tahery v United Kingdom* to the Grand Chamber of the European Court had been adjourned pending the outcome of the Supreme Court hearing in *R v Homcastle*. After *R v Homcastle*, the hearing in *Al-Khawaja and Tahery v United Kingdom* took place. The Grand Chamber modified its “sole or decisive” rule.<sup>7</sup> It held that the mere fact that a particular piece of hearsay evidence was the sole or decisive evidence against the accused did not automatically lead to an unfair trial in England, providing the “counterbalancing measures” and safeguards in *R v Homcastle* were

rigorously applied. This represented no small success for the strenuous efforts of the Court of Appeal and the Supreme Court in *R v Horncastle*. For present purposes, however, it is necessary to note a darker phenomenon. On the strength of what the English courts had said in *R v Horncastle*, the Grand Chamber positively asserted that anonymous hearsay was inadmissible in English law: “the admission of statements of a witness who is not only absent but anonymous is not admissible”.<sup>8</sup> In that respect the Grand Chamber had been led into error.

The structure of the Supreme Court’s reasons for judgment in *R v Horncastle* is as follows. Lord Phillips of Worth Matravers PSC wrote what may be called the primary judgment. It was unanimous. It rested in considerable measure on the Court of Appeal’s judgment, delivered by Thomas LJ. To the Supreme Court’s primary judgment there were four “Annexes”. Each of these Annexes dealt with particular aspects of hearsay. Like the primary judgment, they seem to have been joined in by all judges. Annex 4 was prepared by Lord Judge CJ. One function of that Annex was to demonstrate that had the hearsay cases in the European Court which found a violation of the Convention been English prosecutions, there would have been an acquittal. Another function of the Annex was to demonstrate that in some cases English law gave better protection than the Convention. Some of the European cases had centred on the reception of anonymous hearsay. That was a matter of considerable sensitivity to the European Court, and not without reason. Against that background Lord Judge CJ discussed eighteen European Court cases. The second of them concerned the reception of statements by anonymous out-of-court declarants. It was *Kostovski v Netherlands*,<sup>9</sup> where the statements were made to the police and to examining magistrates, but the makers did not testify at trial. Lord Judge CJ said in the key paragraph of Annex 4 that the case would not have come to trial in England, and if it had, it would have been stopped. He said that evidence of that kind was “inadmissible”.<sup>10</sup> What Lord Judge said in that paragraph was referred to seven times later in the Annex in support of the view that had numerous other particular European Court cases turning on anonymous hearsay been tried in England the evidence would have been inadmissible.<sup>11</sup> And what Lord Judge CJ said in that paragraph was specifically adopted in the judgment of Lord Phillips to support the idea that the English rules of admissibility provided protection at least equal to that

8 (2011) 54 EHRR 23 at [148].

9 (1989) 12 EHRR 434 at [43]-[44].

10 *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373, Annex 4 [13].

11 See *R v Horncastle* [2010] 2 AC 373, Annex 4, [24], [38], [54], [73], [80], [89] and [96].

of the European Court.<sup>12</sup> Lord Phillips did this in the light of the following perception: “the justification for the sole or decisive test would appear to be that the risk of an unsafe conviction based solely or decisively on anonymous or hearsay evidence is so great that such a conviction can never be permitted”.<sup>13</sup>

The view that anonymous hearsay is inadmissible in English law had been asserted by Thomas LJ in the Court of Appeal. He said: “The [2003 Act] is concerned with identified but absent witnesses. It does not permit the admission of the evidence of anonymous witnesses”.<sup>14</sup> By “anonymous witnesses” his Lordship did not mean “persons before the court giving testimony under oath or affirmation who wish to remain anonymous”. Instead he meant “hearsay declarants”, for that is what the 2003 Act is concerned with. And Lord Phillips of Worth Matravers PSC, too, said more than once that anonymous hearsay was admissible. Thus he said:

the statutory exceptions to calling a witness in the [2003 Act] did not permit the adducing of a statement by any witness whose name and identity [were] not disclosed to the defendant and ... the safeguards provided by that Act would be denied to a defendant who did not know the identity of the witness.<sup>15</sup>

Again “statement by any witness” meant statement by a hearsay declarant. Actually the only safeguard lost because of the anonymity of hearsay is that created by s.124(2), permitting the reception of evidence on credibility. If one does not know who the hearsay declarant is, it is hard to attack the personal credibility of the declarant as distinct from pointing to the effect on reliability of the circumstances in which the person is said to have spoken or written.

Neither in the Court of Appeal or in the Supreme Court was any authority cited for the proposition that anonymous hearsay is inadmissible under the 2003 Act. In neither court was any analysis of the Act conducted from that point of view.

In this respect, there were two flaws in the approach of the Court of Appeal and the House of Lords.

One was that some reliance was placed on a line of cases concerned with the Criminal Evidence (Witness Anonymity) Act 2008 (“the 2008 Act”). But that 2008 Act was not concerned with the anonymous hearsay of non-witnesses (i.e. evidence

<sup>12</sup> [2010] 2 AC 373 at [93].

<sup>13</sup> [2010] 2 AC 373 at [92].

<sup>14</sup> [2010] 2 AC 373 at [48]. See also [51].

<sup>15</sup> [2010] 2 AC 373 at [53]. See also [92]-[93].

reported to the court in reliance on what an absent declarant said). The 2008 Act concerned evidence from persons testifying before the court on oath or affirmation, but who wanted to give their evidence anonymously. That is not hearsay evidence. Some of the authorities before and after the 2008 Act had said that the 2003 Act did not permit the reception of anonymous hearsay.<sup>16</sup> Those dicta were not correct. And they, too, did not proceed from any close analysis of the 2003 Act.

The other flaw was that closer analysis of the 2003 Act would have revealed several methods by which anonymous hearsay may be received. Counsel interested in achieving the result reached by the Court of Appeal and the Supreme Court — compatibility with the Convention — would have been attracted by the idea that the 2003 Act did not make anonymous hearsay admissible, just as the courts were. If true, that idea would have reinforced the benign character of English law and its compatibility with the European Court’s distaste for anonymous hearsay. But so far as can be gleaned from the reports of the argument in the Supreme Court, that idea did not occur to counsel. If it occurred to them, they did not pursue it. For they do not seem to have been recorded as having advocated it. Nor, despite the prominent role the idea played in the Supreme Court’s reasoning, did the Supreme Court raise it with counsel for the parties who lost on this issue — the convicted defendants.

The statements in *R v Homcastle* about anonymous hearsay were followed in *R v Ford*.<sup>17</sup> A police officer arrived at a scene where, for the second time, there had been a shooting through the front windows of the house. A woman handed him a piece of paper bearing a car registration number and a note that she had “heard gun shots and saw them getting into this car but I didn’t want to get involved”. She then left. She was never traced. This was evidence of a type which the Court of Appeal in *R v Homcastle*<sup>18</sup> viewed as sincere and often reliable. The Court of Appeal in *R v Ford*, for its part, said that “if the trial judge had power to let in this evidence there were very strong reasons for her to do so”.<sup>19</sup> There was nothing to suggest that the declarant had any motive to lie, or any connection with the wrongdoers. The statement was in writing. It was handed to the police. It came very soon after the events in issue. The police officer could have testified about the woman’s sobriety and manner. The car

<sup>16</sup> For example, *R v Davis* [2008] UKHL 36; [2008] 1 AC 1128 at [20]; *R v Mayers* [2008] EWCA Crim 2989; [2009] 1 WLR 1915 at [113].

<sup>17</sup> [2010] EWCA Crim 2250; ably discussed by David Ormerod at [2011] *Criminal Law Review* 475 at 477. See also *R v Fox* [2010] EWCA Crim 1280.

<sup>18</sup> [2010] 2 AC 373 at [62].

<sup>19</sup> *R v Ford* [2010] EWCA Crim 2250 at [16].

number stated on the piece of paper was the number of a car later shown to have been occupied by four persons connected with the shooting. Yet the piece of paper was held inadmissible.

Counsel for the defence cited *R v Mayers* and passages from *R v Horncastle*. The Court of Appeal said, in an *ex tempore* judgment: “hearsay evidence is of course admissible under the 2003 Act, but if anonymous evidence, whether hearsay or not, is to be admitted that can only be done by reference to the provisions of the [2008 Act].”<sup>20</sup> The Court of Appeal declined to draw a distinction between a person giving direct evidence on oath or affirmation whose identity was being withheld and an out-of-court declarant whose identity is not known at all. This repeats the errors about the 2003 Act stated in cases concerning the 2008 Act which the Supreme Court followed in *R v Horncastle*.

What, then, is wrong with what the Court of Appeal and the Supreme Court in *R v Horncastle* said about anonymous hearsay?

The first weakness is the reliance by the Supreme Court on s.116(1)(b) of the 2003 Act. That provides that an out of court declarant must be identified if a statement of that declarant is to be admitted under s.116. But that requirement applies only to evidence tendered under s.116. It is not a general requirement for the admissibility of hearsay under the 2003 Act.

The other and related weaknesses is that there are several areas through which anonymous hearsay can be admitted despite s.116(1)(b).

The first avenue of admissibility is s.114(1)(d). It provides that hearsay evidence may be admitted if the court is satisfied that it is in the interests of justice. It is true that one of the factors listed in s.114(2) as going to the interests of justice is the apparent reliability of the maker of the statement: s.114(2)(e). It is also true that another relevant factor is the amount of difficulty involved in challenging the statement: s.114(2)(h). Obviously it can be difficult to challenge the statement of an anonymous declarant, or assess the reliability of an anonymous declarant, save by reference to the circumstances in which the statement was said to have been heard by the witness. But possible unreliability and difficulties in challenge are only to which regard may be had. They are not strict criteria barring the reception of anonymous hearsay. And there is no factor listed in s.114(2) equivalent to s.116(1)(b). For what it is worth, the Law Commission considered that under its proposal for a s.114(1)(d) inclusionary gateway, the “declarant need not ... be

20 [2010] EWCA Crim 2250 at [17].

identified”.<sup>21</sup> A tender by an accused person of a hearsay statement could be in the interests of justice (because, for example, it might assist that accused person to raise a reasonable doubt). It would be strange if the tender, otherwise in the interests of justice, were to fail on the ground that it was anonymous. And since s.114(1)(d) applies to prosecution tenders as well as defence tenders, anonymity cannot be an objection in relation to prosecution tenders either. There was in fact Court of Appeal authority, neither cited to nor dealt with by the Supreme Court, holding that anonymous hearsay was admissible under s.114(1)(d).<sup>22</sup>

A second avenue of admissibility for anonymous hearsay is s.117. Section 117 relates to business records. Section 117 requires that where the statement tendered was prepared for criminal proceedings, the conditions of s.116(2) have to be satisfied. But it does not require satisfaction of s.116(1)(b). And it does not require satisfaction of any equivalent to s.116(1)(b). Section 117(2)(c) reveals that s.117 contemplates the reception of multiple hearsay. The experience of businesses often is that the original makers of statements in records may leave their employment a long time before it is desired to prove those statements in litigation, and also that after their departure, and indeed before it, they may no longer be identifiable. Further, some business records are likely to be contributed to by many people, in circumstances where it is quite unclear which parts were created by which particular employees. Some business records are copied several times after their initial creation. Consider *Myers v Director of Public Prosecutions*.<sup>23</sup> That was the case which led to the widening of exceptions to the hearsay rule in criminal cases. Employees not

21 Evidence in Criminal Proceedings: Hearsay and Related Topics (Law Com No 245, 1997) [8.143].

22 *R v Isichei* (2006) 170 JP 753; [2006] EWCA Crim 1815 at [41]. This perfectly satisfactory case received what is known as rougher than usual handling in *R v Mayers* [2008] EWCA Crim 2989; [2009] 1 WLR 1915 at [105]. But it was unconvincing handling. In *R v Mayers* the Court of Appeal (Lord Judge CJ, Leveson LJ, Forbes, Openshaw and Burnett JJ) said that prosecution counsel, in arguing for the admissibility of anonymous hearsay evidence under the 2003 Act, “relied somewhat half-heartedly on the slender, indeed flimsy, foundation provided by *R v Isichei* ... which touches transiently on the point, at para [15] ... The attention of the court was however not there focussed on the admissibility of anonymous hearsay”. It is true that the court was not focused on the admissibility on anonymous hearsay in para [15], because para [15] had nothing to do with the point. Paragraphs [38] and [41], however, did. The question was whether two “girls” (university students) could give evidence that a white man with whom they were traveling in a taxi said that he had rung someone called Marvin, and had then suggested that they go to the Press Club. “Marvin” was the accused’s name. The “girls” later went to the Press Club. They testified that the accused let them into the Press Club, and, after they left it, robbed them. That anonymous hearsay was involved was made plain in [38], for it is there said that “the white man who had allegedly made the reference to Marvin has not been traced” and thus what he said was an anonymous hearsay declaration of the fact that he had spoken to Marvin. The Court of Appeal (Auld LJ, Gibbs J and Sir Michael Wright), after discussing an argument based on s. 115, which it ended up not deciding, said: “whatever the position, it seems to us that the evidence about that was clearly admissible in the interests of justice under s. 114(1)(d) as part of the story of a common sense series of events, the one leading from the other” (at [41]). In this respect the Court of Appeal agreed with the trial judge. The accused’s appeal based on the reception of the anonymous hearsay was dismissed.

23 [1965] AC 1001.

called as witnesses created records of the numbers stamped on car engines. The House of Lords held the records inadmissible at common law. That result was almost universally seen as unpalatable. It has always been assumed that the Criminal Evidence Act 1965, the lineal descendant of which is s.117 of the 2003 Act, effectively reversed *Myers v Director of Public Prosecutions* and made the evidence admissible. Yet it was anonymous hearsay. It would be strange if after all these years the outcome in *Myers v Director of Public Prosecutions* were to have revived.

Incidentally, the document rejected in *R v Ford*<sup>24</sup> could have satisfied s.117, though this avenue of admissibility appears not to have been argued before or dealt with by the Court of Appeal in that case. The document was received in the course of an occupation (that of a police officer): s.117(2)(a). It may reasonably be supposed that the declarant had personal knowledge: s.117(2)(b). It is true that the document was created for a criminal investigation, so that one of the five conditions listed in s.116(2) would have had to have been satisfied: s.117(4)(a) and (5)(a). But s.116(2)(d) was satisfied: the declarant could not be found. The declarant appeared to have “capability” under s.123(2). Section 117(6)-(7) permitted the Court to exclude the statement for unreliability. But for reasons given earlier there were significant factors pointing to reliability.

Despite the statements excluding anonymous hearsay in *R v Homcastle*, in *R v Twist Hughes LJ* said: “there may be some forms of anonymous hearsay which are nevertheless admissible, such as business records”.<sup>25</sup> With respect, his Lordship was perfectly correct to say that. He did not endeavour to reconcile what he said with *R v Homcastle*. That was a tactful course, though not an entirely satisfactory one.

A third avenue of admissibility for anonymous hearsay concerns some of the “rules of law” which are “preserved” by s.118(1). One renders admissible published works dealing with matters of a public nature — paragraph 1(a) of s.118(1). Another renders admissible public documents — paragraph 1(b) of s.118(1). Another renders admissible certain types of reputation referred to in paragraphs 2 and 3 of s.118(1), for the opinions of anonymous persons can be an ingredient in reputation. Yet others are the *res gestae* categories described in paragraph 4 of s.118(1). Since the widening of the exception for spontaneous statements in *Andrews v R*<sup>26</sup> the statements of various unidentifiable declarants which were not admissible in earlier times may now be admissible pursuant to paragraph

24 [2010] EWCA Crim 2250; [2011] Crim LR 475.

25 [2011] 2 Cr App R 17 at [22].

26 [1987] AC 281.



4(a).<sup>27</sup> Another rule of law preserved by s.118(1) which may permit the admissibility of anonymous hearsay relates to the admissions of agents: paragraph 6. Thus in *R v Twist*<sup>28</sup> Hughes LJ also said: “there may be some forms of anonymous hearsay which are nevertheless admissible, such as ... the statement of an unidentified agent of the defendant”. Again, with respect, this was correct, tactful, but irreconcilable with what was said in *R v Homcastle*.

A further avenue for the reception of anonymous hearsay is agreement pursuant to s. 114(1)(c). As a matter of practice it is difficult to imagine that the accused would often agree to a prosecution tender of anonymous hearsay, but it is possible. And the prosecution might well agree, for its own purposes and indeed possibly out of fairness, to a defence tender of anonymous hearsay.

Yet another possible avenue for the reception of what the common law regarded as anonymous hearsay arises in relation to unintended implied assertions. At common law, according to *R v Kearley*, statements of anonymous callers and visitors suggestive of drug dealing were inadmissible.<sup>29</sup> The construction of s.114 of the 2003 Act adopted in dicta in *R v Singh*<sup>30</sup> is that the common law ban on unintended implied assertions no longer exists. Hence, according to *R v Singh*, what was traditionally thought of as hearsay is admissible, despite the anonymous character of the source.

Would the result in *R v Homcastle* have been different if the error about anonymous hearsay not been made? The error was not an insignificant part of the reasoning, but there were many other grounds for the result which were impeccable. And would the result in *Al-Khawaja and Tahery v United Kingdom* have been different if that error had not been adopted? That is a hard question. For correction of the error takes away one of the countervailing measures a somewhat suspicious and grudging European Court relied on.

The erroneous statements about the inadmissibility of anonymous hearsay in *R v Homcastle* in strictness create difficulties for later trial courts and for the Court of Appeal. It has been seen that in *R v Ford* the Court of Appeal followed those statements. But it has also been seen that in *R v Twist* there was concentration on construing the legislation rather than being limited to what the Supreme Court said.

27 For example, *R v Gibson* (1887) 18 QBD 537 and *Teper v R* [1952] AC 480.

28 [2011] 2 Cr App R 17 at [22].

29 [1992] 2 AC 228.

30 [2006] 2 Cr App Rep 12 at [14]-[15]: an unconvincing construction for various reasons, but widely supported by commentators.

An example of anonymous hearsay actually being received — as *res gestae* — under the 2003 Act is *R v Collis*.<sup>31</sup> The accused was charged with hitting someone on the head with a bottle outside a pub. A woman ran into the pub and said: “That guy has just bottled him and he hadn’t done anything. Look at me, I’ve got glass all over me”. The woman was unidentifiable and untraceable. The Court of Appeal held that the evidence was admissible as part of the *res gestae*. There is an argument that anonymous hearsay should not be received automatically as *res gestae*, but only received under s.114(1)(d), and after close analysis of its reliability in the light of the s.114(2) factors. However, whether desirably or not, the 2003 Act does permit reception independently of s.114(1)(d).<sup>32</sup>

For many reasons, it is obvious that the error in *R v Horncastle* was not deliberate. How, then, did it arise? Partly by following mistakes in earlier authorities, partly by a want of close analysis, partly from *velleity* and partly from so strong a desire to repel the Strasbourg invasion that all available geese were seen as swans. The apparent goal in *R v Horncastle* was to soften the extent to which hearsay was admissible in English law and make its reception seem both uncommon and benign. Thus the language of Lord Phillips of Worth Matravers PSC is soothing.<sup>33</sup> Hearsay is “not made generally admissible”. It makes “specific provisions for a limited number” of exceptions. Section 114(1)(d) creates only “a limited residual power”. So the legal error about anonymous hearsay marches in step with the fundamental aim of calming the European Court with these emollient words. But the fundamental source of the error was that the issue had not been debated by adversary parties. It had not been raised by those parties. And the Supreme Court had not raised it with them. In all the circumstances — the length of the judgments, the importance of the need to defend the English position, the subtlety of the point overlooked, the complexity and technicality of the legislation — what happened was understandable. But the case illustrates how extreme vigilance has to be employed to prevent slipping into the danger of deciding a case against a party on an issue not raised with it by its opponent or by the court.

The opportunity to offer these thoughts arising out of John Finnis’s remarkable lecture is valuable. For all his professional life he has displayed, without peer, the fundamental qualities which that lecture reveals: probity, rigour, tenacity, and what has been an at times lonely integrity.

31 [2012] EWCA Crim 1682.

32 See generally *Barnaby v Director of Public Prosecutions* [2015] 2 Cr App R 4.

33 [2010] 2 AC 373 at [31]-[32] (emphasis added).

---

## Comment: Varieties of Judgement

Baroness O'Neill of Bengarve

### Past, Present and Future

John Finnis contrasts the *temporal* perspectives of legislatures, executives, and the judiciaries. As he sees it, *legislatures* look forward as they seek to work out how a framework of law might be improved; *executives* address current situations, assuming a framework of enacted laws; *judiciaries* look backwards at what has been done, again assuming a framework of enacted laws. These temporal contrasts are basic to his comments on the proper limits of judicial action, including (at least in part) his criticisms of judicial appeals to proportionality.

As it seems to me, Finnis' temporal distinctions describe the overall perspectives of the three arms of government, but tell us only a limited amount about the tasks and the action of legislatures, executives, and judiciaries. In the first place, lawmaking has to do more than look forward. Typically legislating is a matter of enacting or repealing specific laws in order — it is hoped! — to secure some improvement. To do this adequately it is first necessary to identify the mischief to be remedied, and then to judge whether changing existing law in specific ways would (help to) remove or mitigate this mischief, and whether it would lead to further problems.<sup>1</sup> In legislating it is therefore important to look back to what has happened and 'sideways' at what is now happening, in order to identify which changes may be needed and useful. Even more clearly the discursive character of democratic lawmaking, which Finnis emphasises, requires legislators to look to the past and to the present as well as to the future.

<sup>1</sup> Legislatures often do not judge these matters particularly well. See my "Making Laws Better or Making Better Laws?" (2012) 3 *Jurisprudence* 1–12.

Secondly, some judicial decisions look forward rather than backwards. In judging a particular case within a framework of existing law, judges apply that law to what has been done, or to the account of what has been done established by the court. But when judges pass sentence or make an award in civil litigation, they make a practical judgement that is forward rather than backward looking. Since these practical judgements also lie within a framework of enacted law, it seems to me that Finnis can allow for forward-looking judgement of these sorts by the judiciary. In *reaching a verdict*, an actual case and the relevant law are both given, and judges indeed look back to what has been done in applying the law to the case. But in *passing sentence* their judgements are not intended to *apply* to anything that has actually been done, but rather to *shape* an aspect of what will be done in the future. So the differences between legislative, executive and judicial action depend on more than their respective focus on future, present and past. As I see matters, it is therefore important to say rather more about different types of acts of judgement.

### Judgement and Indeterminacy

The generic difficulty for any account of judgement is that rules, laws or principles always underdetermine judgement. There are no algorithms for judgement.<sup>2</sup> However, the implications of underdetermination differ with the type of judgement being made. To understand this, it can be useful to think about some distinctions between types of judgement that have been developed for wider purposes. Here I shall set out Kant's distinctions between three types of judgement, and suggest that they partly chime with, but also in some respects challenge, Finnis' temporal perspective on judgement.

Kant's account of judging focuses not on the temporal perspective taken in acts of judging, but on the types of action that different sorts of judging require, and their respective presuppositions. His central distinction is between *determining* and *reflective* judging of actual cases:

The power of judgement in general is the faculty for thinking of the particular as contained under the universal. If the universal (the rule, the principle, the law) is given, then the power of

2 Cf. "An algorithm is a finite procedure, written in a fixed symbolic vocabulary, governed by precise instructions, moving in discrete steps ... whose execution requires no insight, cleverness, intuition, intelligence or perspicuity, and that sooner or later comes to an end", David Berlinski, *The Advent of the Algorithm: The Idea that Rules the World* (New York: Harcourt Inc., 2000), xviii. One might add that where there are algorithms, judges and judgement are displaced or redundant.

judgment, which subsumes the particular under it ... is *determining*. If, however, only the particular is given, for which the universal is to be found, then the power of judgment is merely *reflecting*.<sup>3</sup>

Kant characterises *subsumptive* or *determinant* (also *determining*) judging as done by *applying* a given “universal” (a rule, law or principle) to an actual case (not necessarily a legal case, but a *particular*). This type of judgement is ubiquitous in daily as in institutional life, and in much judicial action. Subsumptive or determinant judgements are common coin: in making an empirical judgement we ask whether some “universal” (rule, law or principle) *applies* to some particular case. All of us make determinant judgements whenever we make empirical claims, as do judges in applying enacted law to a case and reaching a verdict. Secondly, Kant discusses *reflective* (or *reflecting*) judgements, where an actual case is to hand, but no (obvious) “universal” (rule, law or principle) is *given* and so one has to be “found” or selected. As I understand him, Finnis thinks that the judiciary should be very restrained in making judgements of this type. Thirdly, Kant discusses *practical* judgement,<sup>4</sup> in which a “universal” (rule, law or principle) is not applied to an actual case, since no actual case exists at the time of judgement. Here judgement is used to shape or enact what will be done: practical judgement, including practical judgement by the judiciary, is future oriented.

As it seems to me, the judiciary unavoidably make both *determinant* and *practical* judgements. However the controversial issue is whether and when they may make *reflective* (or *interpretive*) judgements, and specifically whether they may appeal to proportionality in doing so.

## Resolving Indeterminacy

Indeterminacy is fundamental to judicial (and other) judgements, and has to be resolved in making any judgement. Even in the case of determinant judging, where both an actual case and the relevant “universal” (rule, law or principle) are given, it can be hard to resolve indeterminacy. The application of a “universal” in such cases can be difficult and may be contested because there are often *borderline cases*: is a

<sup>3</sup> Immanuel Kant, *Critique of Judgement*, 5:180; cf. *First Introduction to the Critique of Judgement* 20:211 Some translations have *determinant* for *determining*, or *reflective* for *reflecting*; the latter judgments are also often seen as *interpretive*.

<sup>4</sup> The most extensive and interesting discussions are to be found in Kant's later works, including *Metaphysics of Morals*, *Theory and Practice* and his political and theological writings of the 1790s, which contain numerous comments on judicial judgement.

colour sample red or purple? Is a person tall or average in height? Is a duckbilled platypus a mammal or not? Was a case of driving off in somebody else's car a case of theft, of borrowing, or of twocking? Indeterminacy can also be hard to resolve in making practical judgements, where a "universal" (principle, rule, law) is given and relevant, but could be enacted in a range of ways. Determinant and practical judgement are both essential for judicial practice, and while each may be challenging they may not be more problematic for the judiciary than they are for those making judgements in other domains of life.

However, reflective judging, where the relevant "universal" (principle, rule, law) is not given but to be "found" or selected, seemingly places fewer constraints on judgement, and may therefore be more controversial in judicial decision-making than in some other areas of life. However, reflective judgement raises questions in many other contexts in which interpretation is needed. How much discretion is acceptable in matters of interpretation? How are we to distinguish better from worse judgment — or better from worse interpretation — where an actual case is given, but there is no given "universal" (rule, law or principle) or no agreement on which "universal" is relevant?

Much of the literature on reflective judging or interpretation in recent decades has focused on literary and aesthetic judgement, and some writers have argued (perhaps hoped) that a wide degree of latitude is acceptable in these areas. This seemingly cannot be the case with judicial judgements: hermeneutic playfulness may be exciting (or tedious?) in aesthetics or literary criticism, but it is surely out of bounds in judicial reasoning. But can we conclude that the judiciary should *never* make reflective judgements? That surely would also be implausible: judges are standardly taken to interpret as well as to apply the law. Finnis points to the importance of judicial interpretation in *declaring* the law where a "hiatus" or "excrecence" has arisen, but argues that such interpretations should be tightly constrained in order to ensure that they do not introduce or become a form of judge-made law.<sup>5</sup>

One evident difference between judicial and aesthetic judgment is that the former may and should appeal to *authority* (in this case enacted law) but the latter need not, and on many accounts should not. However, judicial decisions are not the only judgements where appeals to authority are often seen as decisive. For example, many discussions of scriptural interpretation comment on the role that appeals to

5 Cf. John Finnis, "Judicial Power: Past, Present and Future", this volume, 29-30.

authority may or should play, and distinguish between authorised and unauthorised interpretations. Here, of course, the authority invoked is ecclesiastical, rather than enacted law.<sup>6</sup>

However an assumption that judicial judgements should appeal only to the authority of enacted law would be incomplete, for two reasons. The first is that the facts of a case may be open to many interpretations. The second is that it is common for many laws to be “given”, and judges have to determine the “weight” that each is to have. Judges have to deal both with a plurality of facts and with a plurality of “universals” (rules, laws or principles). This is the terrain on which questions about balancing and about proportionality arise.<sup>7</sup> Both terms are physical metaphors, but there is no metric for their use in judicial practice. Yet something must be said about each type of interpretation.

Although the metaphor of balancing may suggest that there must be some metric for balancing the various facts of a case to hand — which there is not — balancing facts that are established is unavoidable, sometimes very difficult, and amounts to a form of interpretation. It cannot be seen either as determinant or as practical judgement, and seeks to take an overall view of a plurality of features of actual cases. The “balance” reached in two cases in which similar types of facts are established may, however, rightly differ. I do not see that this sort of a balancing is avoidable, and it is not a form of judicial lawmaking. Any complex legal case will raise issues not just about subsuming given facts under a range of laws, but about the weight (another mathematical metaphor!) to be given to particular facts. Judges, like others, have to take account of a plurality of facts.

The second case arises when judges consider a plurality of “universals” (rules, laws or principles), and decide to constrain some and give priority to others. Such cases range from decisions that certain human rights may or must be qualified in specific ways in order to secure an adequate interpretation of other human rights, to decisions that specific laws must be qualified and adjusted in specific ways in order to respect other laws. This is the source of what Finnis sees as evidence of a “drift ...

<sup>6</sup> Kant explored the parallels between judicial and scriptural judgment at some length in his late work and reached a position similar to Finnis' on judicial interpretation. See, for example: “The jurist, as an authority on the text, (*der Schriftgelehrte Jurist*) does not look to his reason for the laws that secure Mine and Thine, but to the code of laws that has been publicly promulgated and sanctioned by the highest authority ... [and must] straightway dismiss as nonsense the further question whether the decrees themselves are right” (Immanuel Kant, *The Conflict of the Faculties*, 7:24-5).

<sup>7</sup> I take it that they differ. See the papers in Grant Huscroft, Bradley W. Miller and Grégoire Webber (eds.), *Proportionality and the Rule of Law; Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014), including especially Frederick Schauer “Proportionality and the Question of Weight”, 173-185.

towards the subjection of legislative power, directly or indirectly, to judicial power ... in which judges [assume] the role of constitution makers and legislators”.<sup>8</sup>

However, where such approaches are expanded into claims that a specific way of qualifying one law by another has authority for *other cases* a further assumption is in play. Such appeals to proportionality not merely take a view of the way to qualify certain “universals” in a *particular case*, but also assume that that view should determine what is *proportional*, and thereby also authoritative, for other like (or perhaps not so like) cases.<sup>9</sup> Judicial determination of the relative weight of principles that may conflict, and of the appropriate qualification of one law by another in a *given case*, is surely unavoidable. But it does not follow that the determination reached in a given case is or should be generalisable across like cases, or should be treated as determining what is proportionate or as setting a precedent for future cases. Nevertheless, precedents are widely taken to have some weight in judicial reasoning. This, I suggest, is the terrain on which the limits of acceptable appeals to proportionality need to be addressed.

<sup>8</sup> John Finnis, “Judicial Power: Past, Present and Future”, this volume, 57.

<sup>9</sup> Again see many of the papers in Huscroft, Miller and Webber (eds.), *Proportionality and The Rule of Law; Rights, Justification, Reasoning*.



---

## Rejoinder

John Finnis

The foregoing responses — one by a scholar-participant in the deliberations of the Upper House of Britain's Parliament, and four by distinguished judges in the common-law *constitutional tradition* — all share the Lecture's aim: to evoke that tradition (initially in its formative English crystallization and then in some recent manifestations or, as I think, misadventures); and to engage, restate, and in part rebalance that tradition. (Severally and cumulatively, they also remind us that along with the similarities between the common law tradition in New Zealand, Australia, Canada and the United Kingdom, there are significant variations, and a variety of experiences to inform our reflections.) And in generous measure the responses pursue the aims of the Lecture in ways complementary to it. Accepting that extensive complementarity and enhancement gratefully, I shall focus these concluding reflections on the responses' main objections to the Lecture; most though not all of them are to be found in Justice Glazebrook's challenging essay; and each can conveniently be framed as a doubt or interrogatory.

### **Is the lecture about judicial overreach?**

Some parts of it are, and almost all its 10 theses touch on the contours of judicial responsibility. But it is in relation to thesis 3 that Sir Patrick Elias's response says:

it is difficult to say that their Lordships in Haughton were recklessly stepping into the legislative arena where they had no right to be...

and that

it would not be just to say that the five Law Lords who took that decision were cavalier in their approach to the judicial

function... [or] seeking to act like legislators... or usurping the legislative role.

Those comments are, I think, entirely right. The Lecture's discussion of *Haughton*, and of the related cases about attempts and conspiracies to do the impossible, was not in order to lay a charge of judicial trespass, overreach or usurpation, but to explore some typical, structural causes why courts, even the best, can and do go wrong even when they are working entirely on their own most familiar turf: common law (civil or criminal) in a field not yet regulated or fully regulated by statute. The thesis being illustrated was:

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.

And the Lecture's discussion of the previous thesis<sup>1</sup> accepted that judicial efforts to reform the common law may well be perfectly legitimate:

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),*

<sup>1</sup> "2. To state...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...but a statement of judicial responsibility."

and can fairly be applied to the parties and dispute before the court.

So, as Sir Patrick Elias notes, the Lecture firmly approved of the Law Lords' decision in *Kleinwort Benson* to depart from, alter, abrogate what had for 200 years been regarded as a rule of common law. For present purposes it does not matter that he and I read the architecture of the decision differently.<sup>2</sup>

### Are the Courts the guardians of the constitution?<sup>3</sup>

Justice Glazebrook writes:

All courts, and in particular final courts of appeal, have an important role as one of the guardians of the constitution, even in systems like in New Zealand where there is no formal supreme written constitution and no power to strike down legislation.

She immediately adds, in a footnote: "I am not suggesting that the courts are the only guardians of the constitution or even that they are the most important." This addition, too rarely made by those who repeat the phrase without her cautionary "one of", is important and welcome.<sup>4</sup>

<sup>2</sup> In his view, it was only a "bare majority in the House of Lords" who thought it appropriate for the *court* to "alter the rule that there could be no recovery of payments made ultra vires where there had been a mistake of law"; the dissenting minority thought the task of changing the rule should be left to Parliament. On my reading of the case, adopted in the Lecture, all five Law Lords were agreed that the rule should be judicially declared and treated as defunct – changed. The minority considered, however, that the newly adopted rule – there can be recovery of moneys paid under mistake of law – did not extend to circumstances where the parties had proceeded in line with a view of the law regarded (at that time) by the legal profession as a correct view. As Lord Browne-Wilkinson (dissenting) put it:

The main effect of your Lordships' decision in the present case is to abolish the rule that money paid under a mistake of law cannot be recovered, which rule was based on the artificial assumption that a man is presumed to know the law. It would be unfortunate to introduce into the amended law a new artificiality, viz., that a man is making a mistake at the date of payment when he acts on the basis of the law as it is then established.

In my reading, the two dissenters *shared* in "your Lordships' decision in the present case...to abolish the rule". What the majority did not share was the dissenters' view expressed in the second sentence just quoted: that someone does not make a mistake when "he acts on the basis of the law as it is then established", even though a court, subsequent to the relevant act, authoritatively declares that the "established" (view of the) law was entirely mistaken and the act a nullity. See my case note "The Fairy Tale's Moral" (1999) 115 *Law Quarterly Review* 170-75, reprinted as essay 20, "Adjudication and Legal Change", in *Collected Essays of John Finnis: Volume IV* (Oxford: Oxford University Press, 2011). As the Lecture says, "reasonable lawyers and judges can disagree about whether and when these conditions [for judicial reform of common law] are fulfilled; the criteria and distinctions in play in this distinction between judicial development of the law and judicial legislation are subtle and elusive."

<sup>3</sup> An Appendix to this rejoinder reviews the main uses of the term "guardian(s) of the Constitution" in UK-related courts, identifying those that seem fallacious.

<sup>4</sup> I look at some of the historical discussion of this by American statesmen, judges and legal scholars, a discussion too little known outside the United States, on pp. 7-11 of my 2015 paper, "The Nature of a Free Society", <http://ssrn.com/abstract=2896114>.

**Is it constitutionally sound to allow Courts to declare Acts of Parliament incompatible with human rights on condition that Parliament may ignore or override such declarations?**

The question as I have phrased it assumes what Justice Brown's response at one point may seem to deny: that a *constitutional democracy* can exist without judicial power to declare procedurally authentic statutes invalid and of no effect. My question also leaves to one side those political communities which have open-eyed empowered the courts to simply invalidate Acts of Parliament judged to violate constitutionally defined rights, as Justice Brown quite rightly recalls is the situation since 1982 in Canada.<sup>5</sup>

Justice Glazebrook writes:

I do not consider it risks weakening either institution that Parliament may decide to maintain legislation courts have said is inconsistent with our Bill of Rights or that Parliament may decide to override a court decision for the future, as long as mutual respect is maintained and the courts' contribution is taken into account in any decision.

Very many will agree with her (though in the UK many will want to add that it is illegitimate, albeit lawful, for Parliament to do so). After all, her assessment of the risks is one that is shared both by those who enacted the Human Rights Act 1998 (UK) and by those who propose that the 1998 Act (and the ECHR underlying it) be replaced by a British Bill of Rights Act.

Against this weight of opinion, or numbers, I continue to think the assessment mistaken, and indeed very implausible. How can it be at all probable that mutual respect between legislature and courts, or public respect for both, will remain unimpaired if the courts are from time to time solemnly declaring that legislation violates our fundamental law and is inconsistent with Human Rights but the legislature, having considered such opinions, always or sometimes rejects them?

I note with interest Justice Glazebrook's report that — 25 years after the Bill of Rights Act 1990 (NZ) — “A declaration of inconsistency was made for the first time by the High Court in *Taylor v Attorney-General* [2015] NZHC 1706; [2015] 3 NZLR

5 On some aspects of the backstory to Canada's fundamental constitutional change effected by the Canada Act 1982 (UK, c. 11), with some incidental evidence relevant to the question just how “full well” the character of that change was understood in advance, see John Finnis, “Patriation and Patrimony: The Path to the Charter”, (2015) 28 *Canadian Journal of Law and Jurisprudence* 1-25.

791”, and that it was about prisoner voting restrictions. That case was not included in my 2015 survey and critique<sup>6</sup> of the prisoner-voting judicial decisions which, around the world, have set the judges against their legislatures. And it seems to me a judgment and decision just as unpersuasive a usurpation of legislative function as the others — in its reasoning just as radically inferior to the reasoning on display in typical legislative deliberations about where and why to draw the line in the disenfranchisement of serious criminals. In these cases it is the courts that deprive themselves of the respect of very many reasonable citizens and elected representatives. But in wounding themselves, the courts surely also wound the legislatures that they solemnly (and without reasonable justification) accuse of violating human rights (and our own law).

A more subtle and penetrating response to Justice Glazebrook’s point about mutual respect between courts and legislature being unthreatened by judicial declarations and court overrides may be found in thinking through the implications of Justice Brown’s particularly important concluding reflections. There he points to the fact that, as Canadian Charter adjudication makes clear, the courts tend to be willing to override even serious legislative attempts to uphold whole complexes of partly competing rights, setting such attempts aside in favour of upholding some single individual right, especially an autonomy right, that has been presented forcefully to the courts by a (class of) litigant(s).

### **Don’t courts rightly consider consequences, and don’t legislatures rightly consider both the past and the present?**

Baroness O’Neill focuses intently on the “past, present, future” meme that I correlated with the division of government powers and responsibilities. Justice Glazebrook, too, considers that the Lecture oversimplifies:

Professor Finnis’ characterisation of the role of the Executive as being concerned with the present ignores the role of the Executive in the legislative process and its general policy making functions. As to Parliament, it must consider the past when

6 “Prisoners’ Voting and Judges’ Powers” (2015) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2687247](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687247). The same critique is made more summarily in Finnis, “Judicial Law-making and the ‘Living’ Instrumentalisation of the ECHR” in NW Barber, Richard Ekins and Paul Yowell (eds.), *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016), 73-120 at 73-74, 94-102. In *A-G v Taylor* [2017] NZCA 215 (26 May 2017), the Attorney-General offered no justification for the legislation, and the Court of Appeal (NZ) had no difficulty in concluding, summarily and mistakenly, that the limitation on voting by convicted prisoners in prison violates prisoners’ rights by being “undiscriminating” [185].

making decisions about the future. It also can and does legislate with retrospective effect (albeit in limited circumstances).

These calls for nuance are quite justified. I took the meme from the lecture title proposed to me by the Gray's Inn Lecture's organisers (who, I suppose, were picking up from the title of a well-known and notable expression of the imperial judiciary's self-interpretation, a 2007 lecture<sup>7</sup> by the ECtHR's then President, Judge Wildhaber). As the Lecture puts it in introducing the meme: "'Past, present and future' captures a good deal of the truth, I think, about the distinctions between judicial, executive and legislative powers..." — a good deal but by far not all.

In differentiating the responsibilities of legislators from those of judges, the Lecture says that legislators "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..." (emphases adjusted). It goes without saying that legislators should be aware of the established legal position and established legal rights they propose to amend or replace. And it is often appropriate for judges to give some consideration to immediate and longer-term impacts of their decisions on the parties presently before them, on other parties presently in like case, and on all who in the future will be affected by their decision.

### **Isn't it sometimes, or often, *necessary* for the courts to develop the law?**

Justice Glazebrook states the standard view. Cases can arise for judicial decision where "there is no settled law that applies to the facts":

Sometimes in such cases it is a matter of assessing which of two lines of authority best apply to the facts. Sometimes, however, it is necessary to develop the law in order to decide the case.

The point is so standard that no argumentation or example is supplied to illustrate it, and few readers are likely to have felt in need of any. But, come to think of it, how may one exemplify circumstances where there is no applicable settled law? How often, if ever, is it truly *necessary* to "develop" the law in order to decide the case? True, the application of the "undeveloped" law to the case before the court

7 Luzius Wildhaber, "The European Court of Human Rights: The Past, The Present, The Future" (2007) 22 *American University International Law Review* 521-538.

may be unattractive or even in some respects unjust. But that fact — though obviously an argument in favour of development -- does not render the case undecidable, or necessitate development, i.e. not merely interpretative clarification but change in the law, by the court. Our law's well-known tie-breaking presumptions and doctrinal devices only seem to fail — only seem to create a gap necessitating legal change — in cases of sheer contradiction between statutory provisions (or between the *rationes decidendi* of decisions of equal precedential authority).

A reader who agrees with this last point may notice that Justice Glazebrook, a few pages later (when illustrating her undeniable and not too distantly related point that legislatures can and do squander their presumptive institutional superiority over courts as agents of legal change) has adduced an example of sheer contradiction between statutory provisions:

Sometimes there can be contradictory policies and provisions within the one statute. See, for example, *New Zealand Fire Service Commission v Insurance Brokers of New Zealand Association* [2015] NZSC 59.

But finding contradictory provisions is harder than might be supposed. The *New Zealand Fire Service* case falls, I suggest, well short of exemplifying statutory contradiction. The five judges of the Supreme Court of New Zealand (including Justice Glazebrook) rejected the interpretation of the inter-relationship of two sub-clauses of a single section in a single statute<sup>8</sup> that had been adopted by the three judges of the Court of Appeal<sup>9</sup> and the High Court judge<sup>10</sup> below. There is much to be said for each of the competing ways of reconciling the two sub-clauses, but neither of the ways could be said to be logically necessary and, more important for present purposes, neither set of judges contended, or should have contended, that the other set's reading was self-contradictory or incoherent or left "contradictory provisions within the one statute". All eight appellate judges agreed that the statutory section needed legislative amendment — to avoid (I would say) not contradiction but tensions and ineptitudes falling well short of logical contradiction. And those tensions also fell short of "contradiction between policy and provision",

<sup>8</sup> Fire Service Act 1975 (NZ), s. 48, especially s. 48(6) and (7).

<sup>9</sup> [2014] NZCA 179; [2014] 3 NZLR 541.

<sup>10</sup> [2012] NZHC 3437.

i.e. between end and legal means. Indeed, even that looser sort of contradiction can rarely be convincingly demonstrated, once it is recognized that provisions usually serve more than one policy — serve a set of social ends rather than just one end, and respect or set in place side-constraints as well as social ends; and that it is utterly normal for a coherent and reasonable person's ends and policies to be partly in tension with each other.

Dyson Heydon's illuminating account of the *Horncastle* litigation illustrates the danger the courts incur as soon as they seek to expound the law beyond the bright circle of light shone by the arguments of opposing counsel in strongly contested litigation. The danger is yet greater when the judicial effort is not simply to expound it but to pursue some other purpose besides applying it, for example the purpose (as Heydon's account makes clear) of persuasion, or again the purpose of developing the law so as to answer old questions in a new way.

### **Aren't the courts, even absent a Bill or Charter of Rights, bound to have regard to internationally recognised rights?**

Justice Glazebrook's response says —

...even if the Bill of Rights in New Zealand did not exist, courts would still be required to decide whether internationally recognised human rights have been breached, which necessarily includes consideration of the extent of such rights. There is a principle of interpretation of legislation that, unless this is made explicit, Parliament did not intend to legislate contrary to international obligations, including human rights obligations [footnote omitted]. Closely related to this is the principle that a wide discretion conferred on the Executive should be exercised consistently with such obligations. Rights are also protected in New Zealand through the principle of legality [fn: ... It is after all the Executive that entered into such obligations. It does not seem unreasonable to expect it to abide by them...]. In addition, international human rights obligations have been used by the courts to develop the common law [the fn here refers to NZ authority stating that ... there is increasing recognition that the common law should develop consistently with international treaties to which New Zealand is a party ... and ... this is an international trend...].



The first sentence of this passage seems to me open to question. For why should we think that, absent human rights legislation, “courts would still be required to decide” in line with international law? As Justice Glazebrook elsewhere accepts,<sup>11</sup> surely rightly, the requirements and currently accepted rules set out in the rest of the passage just quoted have been introduced, or given a new force and edge, by the courts themselves, during the last twenty or thirty years. These developments are *prima facie* of precisely the kind that the Lecture seeks to put in question. Are they not perhaps, in whole or part, manifestations of judicial overreach? And does not the generalised subjection of New Zealand law to “international obligations” confer on the executive an unconstitutional power to change citizens’ rights by prerogative without parliamentary authorisation? Is this progress or decadence? If judges can just change what was settled law in 1981, why shouldn’t judges in 2018 just as thoughtfully change back to the position in 1981? The Lecture begins to make the case that they should consider doing so.<sup>12</sup>

### Isn’t “living instrument/tree” interpretation just “ambulatory” application as always practised by courts and often authorised by legislatures?

Justice Glazebrook’s response argues:

In New Zealand the ambulatory approach to the interpretation of legislation is required by s.6 of the Interpretation Act 1999, which provides that enactments apply to circumstances as they arise. This applies to all statutes, including our Bill of Rights. I have difficulty in understanding how or why this exhortation of Parliament on how to interpret statutes should encompass changed physical circumstances but not changes in societal values, such as changed attitudes to the place of women and minorities or, at a more mundane level, modern attitudes to

<sup>11</sup> In her excellent 2015 paper “Statutory Interpretation in the Supreme Court [of NZ]”, <https://www.courtsofnz.govt.nz/speechpapers/HJG3.pdf>, Justice Glazebrook records at fn 74:

On the traditional view, a *prima facie* ambiguity was required to trigger the presumption [scil. of compliance with international obligations]. Thus the New Zealand Court of Appeal originally held that an open-ended administrative discretionary power could not be confined by implied limits derived from international law: see *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 229 per Richardson J. **This is no longer the case** and the courts have read open-ended administrative discretionary powers as being subject to the limits of international law: see for example *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA). ...

What she is recording here (and in her Otago Law Review article cited in her response to the Lecture) is the quite recent adoption of (one fragment of) a set of judicial attitudes (in substance political) of precisely the kind that the Lecture was concerned to criticize.

<sup>12</sup> Readers should bear in mind that Justice Glazebrook is constrained by her judicial role from defending, in her response, the controversial legal rules and developments she helpfully records.

drink driving. .... in light of s.6 ..., New Zealand courts are not constituting themselves roving law commissions when using an ambulatory approach to interpretation. They are respecting Parliamentary sovereignty by applying a principle of interpretation laid down by Parliament.

This is an important and interesting challenge. I think it can be met. The provision she cites, Interpretation Act 1999 (NZ), s. 6 (“An enactment applies to circumstances as they arise”), is related, as a note on the authorised print suggests, to the Acts Interpretation Act 1924 (NZ), s.5(d):

(d) [i] The law shall be considered as always speaking, and [ii] whenever any matter or thing is expressed in the present tense the same shall be applied to the circumstances as they arise, so that [iii] effect may be given to each Act and every part thereof according to its spirit, true intent, and meaning.

(The bracketed numbers are mine.) That 1924 provision in turn goes back, via an Act of 1908, to New Zealand’s impressive Interpretation Act 1888 (No. 15), s. 5(3), which was in identical terms.<sup>13</sup> The fragment surviving into the 1999 Act, on which Justice Glazebrook’s challenge is based, is in element [ii]. Now, whatever the reach of elements [i] and [iii] considered in the abstract or in their place in s. 5(3) 1888 or s. 5(d) 1924,<sup>14</sup> it is clear that element [ii] concerned a limited, technical issue: the statutory present tense includes the future (imperative and quasi-imperative) tense. And notice that it says, in 1999 as in 1888, “applies to”, not

13 1888 is the year in which Lord Esher rearticulated, in *Sharpe v Wakefield* (1888) 22 QBD 239 (CA), the old and well established principle that a statute’s meaning is the meaning it had the day after it was enacted. An orthodox refinement of this has distinguished *connotation* (sense, meaning) (which is settled as at that day) from *denotation* (reference), which shifts as persons and circumstances change, inventions *eiusdem generis* are made, etc. A useful survey (with a largely Australian focus) is Christopher Birch, “The Connotation/Denotation Distinction in Constitutional Interpretation”, 5 *Journal of Appellate Practice & Process* 445 (2003): <http://lawrepository.ualr.edu/appellatepracticeprocess/vol5/iss2/10>. Birch doubts the utility of the distinction. But along the way he remarks:

Surprisingly, it has been suggested in some cases that statutes should be interpreted in accordance with the current meaning that would be attributed to their terms even if that would not be the meaning they had when they were enacted. This method even has a label, the “always speaking approach.” ... [But] it is difficult to see why the new or altered meaning picked up by the terms used in a statute as a result of linguistic drift should be given effect. It is hard to imagine a justification of the always speaking approach that would satisfy the principles [of justification in interpretation] discussed in the last section of this Article.

14 Much in the discussion of living instrument interpretation in Justice Susan Glazebrook’s analytical survey, “Do they say what they mean and mean what they say? Some issues in statutory interpretation in the 21st century,” (2015) 14 *Otago Law Review* 61-89 at 87-88 (“VI. Must statute law stagnate, while the common law develops?”), seems to treat the Interpretation Act 1999 (NZ) as if (somehow in or besides s. 6) it included elements [i] and [iii].

“in”, “the circumstances”, not merely “circumstances” — it plainly means and refers, I suggest, to facts and events of the kind that the rule in question is to regulate, or that are conditions upon the application of that regulation. This provision for ambulatory meaning and application of statutes is, I suggest, remote indeed from any notion that Parliament is here directing interpreters to look beyond (or orthogonally from) changing facts, events and conditions to changing attitudes, values and views about the suitability of the rule and regulation in question. I venture to think that, no more than in 1999 was Parliament in 1888 calling on New Zealand judges to adopt “living tree” interpretation of the ECtHR kind that in effect reads in whole clauses that the framers voted to keep out, and reads them in because we now judge the framers misguided in having so decided, or because we now judge that framers with more up-to-date attitudes to values would include them.

Of course, if some provision in a statute, constitution or convention calls for judgments of value and disvalue to be made, e.g. because it directs that findings be made about what is “reasonable”, fair”, “cruel”..., then judges or juries are being invited and indeed required, by that provision (and its author) itself, to make those value judgments. Then an *observer* will say that these judges and juries, in so judging, are revealing and acting upon their attitudes, and may note that these are different from attitudes say 30 years earlier. But the judges and juries themselves are being invited to consult, not their own attitudes as facts about themselves, but the criteria of reasonableness, fairness, cruelty ... the criteria that they judge right.

**Do the Lecture’s criticisms of *Chahal*, *Hirsi Jamaa* and/or *Belmarsh Prisoners* condone torture, presuppose that non-citizens have no rights, and/or indulge in rhetoric foreign both to the facts of those cases and to academic discourse in general?**

Many readers, I imagine, will feel that Justice Glazebrook is speaking for them when she writes:

It seems to me that, despite Professor Finnis saying he believes there are moral absolutes, despite the absolute nature of the prohibition on torture and despite the non-refoulement obligations under the Torture Convention, he is effectively condoning torture as long as States did not themselves indulge in the practice but were instead acting to protect their own citizens from a possible risk, rather than with the positive intention that others would indulge in torture. [fn. Professor Finnis’ thesis on this and [...*Belmarsh*] appears to rest to an extent on an assumption that non-citizens have no rights.]

And again:

He is of course entitled to criticise the decision [in *Hirsi Jamaa*] but in an academic context I would have expected his criticism to be put forward without exaggerated rhetoric. He surely cannot be suggesting, for example, that the decision is responsible for people fleeing war in Syria. [fn. His reference to Ebola and other plagues also seems to me unnecessary scaremongering and not part of the facts the Grand Chamber was considering in the particular case. The same applies to his reference to “uncountable numbers of terrorists”.]

I will take these criticisms in reverse order. The passage which has elicited Justice Glazebrook’s allusions to rhetoric and scaremongering foreign to academic discourse is this:

It [the ECtHR’s living instrument doctrine] all culminates in the remarkable 2011 case *Hirsi Jamaa*, an important cause (among complex causes) of today’s migration crisis. 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 boats’ 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 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.

This passage includes no rhetoric or scaremongering. What it does include is something too rare in today’s conventional academic discourse: a concern that words and propositions be taken seriously and tested for their true sustainability as grounds for condemning and unravelling the decisions of democratically

accountable legislatures and governments. The cumulative ECtHR decisions culminating<sup>15</sup> in *Hirsi Jamaa* have precisely the import and implications noted in the passage. And the evocative phrase “the life of the nation” is taken from art. 15 ECHR, an article which these and related decisions hold is overridden by the absoluteness that these decisions insistently ascribe to art. 3 (and illogically<sup>16</sup> treat as widening rather than narrowing art. 3’s scope). To an astounding degree, academic and judicial commentary on these ECtHR doctrines abstains not only from exploring their fragile foundations but also from facing up to their reach and potential real-world implications for the people of the states party to the ECHR. Academic discussion about these matters is almost all prudish, timorous and evasive, just as the ECtHR is itself “bland and inexplicit” in its articulation of doctrines that if spelled out in their implications would rightly arouse grave misgivings among many to whom they are indirectly addressed.

I can see no justification for holding that criticism of *Hirsi Jamaa* should confine its testing of the ECtHR’s remorselessly expansive absolute “to the facts the Grand Chamber was considering in the particular case”. If judges are appropriately “making the future”, as Justice Glazebrook’s whole response (by its title) proposes, we bystanders are entitled to consider, openly, what the future they are making may well hold for us. Is there no real risk of ebola or similar plagues? Does not the forbidding of maritime interdiction enhance the risk of terrorist infiltration and, in the longer term, of such a replacement of peoples and cultures as will negate our constitutional order, not to mention the ECHR? Why are these matters so little discussed in public and in scholarly and judicial discourse about the ECHR? Of course, one answer to that question is that like Cassandra in face of the “Trojan” (Greek) Horse, you will be said to be scaremongering if you raise them, even when the topic of discussion is precisely a doctrine about the absolute *exceptionlessness* of the prohibition on effective counter-measures against such threats whenever such measures have a side-effect of creating a “real risk” that someone may somewhere be subjected to torture or inhuman or degrading treatment.<sup>17</sup>

Justice Glazebrook’s response keeps its spotlight on torture. But art. 3’s exceptionlessness, one main leg of *Hirsi Jamaa*, extends beyond torture to “inhuman

15 See Finnis, “Absolute Rights: Some Problems Illustrated”, (2016) 61 *American Journal of Jurisprudence* 195-215 at 201-10.

16 *Ibid.* at 196-214.

17 The fact, noted by Justice Glazebrook, that the NZ Parliament has taken a different view leaves my point intact. The Lecture proceeds on the basis that it is for legislatures, not courts reliant on illogical or logically optional extensions of enacted norms, to commit their societies and fellow-citizens to open-ended risks.

or degrading treatment”, and that includes, as the ECtHR has held, conditions which are in fact instantiated by some prisons in the developed world and *a fortiori* by countless prisons, hospitals, and areas in the vast disadvantaged parts of the world. If the doctrine relied upon in *Hirsi Jamaa* has even minimal intellectual integrity and coherence, it extends to *entire* tens, hundreds or thousands of millions of people to art. 3-based compulsory admission and asylum in Europe, as they choose.<sup>18</sup>

And the migration-to-wealthy-Europe crisis is indeed a reality distinct from, though partly over-lapping with, the refugee crisis caused by the cruel civil war in Syria. That distinction is well known and needs no elaboration here; I take it up further elsewhere.

Is it “condoning torture” to point out the realistically potential real-world implications of the ECtHR’s inflationary absolutist living-interpretation of art.3 ECHR, and call for a more authentic and restricted understanding and application of that Article? I believe it is not -- any more than the legislators were condoning perjury when in 1898 (in the UK) they abrogated the old rule of the judges that a defendant cannot testify on oath; or than a vulnerable person who (perhaps ungenerously? or with some vice of cowardice?) refuses to open her door to a burly, armed and audibly frightened stranger condones his murder by his pursuers. Nor was the ECtHR condoning torture or inhuman or degrading treatment when, in decisions it continues to fail to try to reconcile with the *Chahal-Hirsi Jamaa* line of decisions, it (rightly or wrongly) has held and holds that persons unlawfully present may be deported even though doing so will have the side-effect of depriving them of life-saving medical treatment for their lethal illnesses, and will certainly (or did) result in their miserable deaths.<sup>19</sup>

18 See now the remarkable Opinion (Conclusions) of 7 February 2017 of Advocate-General Mengozzi in *X, X v Belgium* (C-638/16) (CJEU), an Opinion fended off by the Grand Chamber on narrow grounds not challenging (or endorsing) his non-refoulement argument (based on art. 4 EU Charter of Rights = art. 3 ECHR): *X and X v Belgium* (Case C-638/16 PPU), 7 March 2017, CJEU GC. Of art. 4 and art 3, the Advocate-General’s Opinion (in French) says (paras. 134 ff) that their prohibition of acts and “equally” of omissions (or refusals to act) that give rise to real risk of torture or subjection to inhuman or degrading treatment applies even in the most difficult circumstances of terrorism, organized crime, and growing influx of migrants and of persons in search of international protection into member-states suffering from economic crisis. Among the forbidden acts or omissions, it concludes, is refusal to grant an entry visa, even when the application is made, on the territory of a safe non-member state, to a member-state with which the applicant (as in the *X, X* case) has no connection whatever. *19 N v United Kingdom* (Grand Chamber, 27 May 2008), 47 EHRR 39. The discussion of this case in “Absolute Rights...”, n. 15 above concludes:

In short, art. 3 is not an absolute. Except when it is. The ECtHR’s premier venture in legislation – its art. 3 law of asylum and immigrant protection – is incoherent. This is the self-contradiction that the logic moral absolutes makes inevitable .... It is not a sound interpretation<sup>19</sup> of the ECHR. It is a violation of the rule of law. It could not be made coherent without returning to the true principle of art. 3: the outlawing of all conduct (acts or omissions, whether one’s own or others’) *intended* (whether as a means or an end) to torture, degrade or subject to inhuman treatment. Equivalents of *intending* include *planning, trying, doing or omitting something in order to, with a goal* of... and others. Replacing intention by *substitutes* such as *causing, directly bringing about, foreseeably resulting*

Nor, finally, do the Lecture's arguments against expansionist interpretations of art. 3 to generate entitlement to indefinite stay entail a presupposition that "non-citizens have no rights". My first exploration of this field, in the *Law Quarterly Review* paper "Nationality, Alienage and Constitutional Principle,"<sup>20</sup> devotes several pages to establishing firmly that "presence within the realm entitles foreigners to the protections of subjects": non-citizens not only have rights, they have *all the rights* of citizens, save the right to vote and the right not to be expelled (though they do have the right not to be arbitrarily or otherwise unlawfully expelled, or expelled for wrongful purposes such as complicity in torture). Contrary to a common misreading of that paper, it holds that non-citizens have the very same rights as citizens not to be subjected to detention (let alone indefinite detention) *other than* detention for the genuine purpose of facilitating their (lawful) removal and expulsion — a purpose that for nearly two centuries has had little or no applicability to citizens.

### **Are judges bound by the concessions made by counsel?**

Sir Patrick Elias suggests they are, at least if counsel persists when invited to withdraw them. He has exceptional experience in the upper reaches of the judiciary; what he says surely reflects the practice and thinking of our judges. The Lecture ventures to question its constitutional soundness. Where statute directs the court to adopt a certain approach to the law's interpretation and application, as s. 3 Human Rights Act 1998 does, it seems to me that, when the possibility of complying (or failing to comply) with that provision becomes visible to the court, it should firmly invite counsel who *sub silentio* or openly is "conceding" (accepting, asserting, assuming) its inapplicability to present an argument to support that inapplicability, and if that invitation is declined should invite counsel for the other side to present

*promptly and inevitably in, responsible for* — all of them far from the meaning of "intended to" — makes incoherence and arbitrariness in the application of art. 3 inevitable.

A final word about the dissent in *N v UK*. These three judges were willing to treat art. 3 as imposing limitless obligations on states of providing expensive medical care to anyone indigent from an indigent country who can "set foot in a Convention state". They seem tacitly to acknowledge the rational fragility of their own position -- and thus of art. 3 case-law as a whole, with its supposedly exceptionless imposition of liability for side effects as much as for intended effects. For they intimate, implausibly, that there is no likelihood that more than rather few will ever claim these rights, and that the burden on states is only "budgetary". We get a better sense of the potential burden when we reflect that after *Hirsi Jamaa*, art. 3 includes a right (available to the great numbers of people from or setting out from failed states) to be *permitted to set foot* in the state, and thus to enter (often illegally but always under art. 3 protection) to stay and obtain such medical treatment without fear of being removed.

20 (2007) 123 *Law Quarterly Review* 417-45, reprinted (minus the detail of its critique of *Belmarsh Prisoners*) as "Nationality and Alienage", essay 9 in *Collected Essays of John Finnis: Volume III* (Oxford: Oxford University Press, 2011) 133-49.

such an argument. It may be that counsel's vacation time research in *Belmarsh Prisoners* failed to discover the Australian High Court's treatment<sup>21</sup> of essentially the very issue decisive for *Belmarsh*, and that therefore (over two months later) counsel and (a further two months later) Law Lords alike remained unalerted and unalert to the possibility of reading the impugned provisions compatibly with the Human Rights Act. If so, so be it. I remain disturbed by the signs<sup>22</sup> that the Law Lords did envisage the possibility and averted their eyes from it, contrary to their constitutional and statutory duty, and therefore neglected to probe the Attorney-General's concession (a concession that on its face made no reference to s. 3 HRA but that entailed conceding, quite wrongly, that that provision had no applicability in the case).

I can see no judicial obligation of constraint here, other than the obligation of fairness (non-surprise) stated and illuminated by Dyson Heydon in his response.

### **Does the Lecture propose that judges should ignore questions of justice in interpreting statutes or common law?**

Onora O'Neill suggests it does. Immanuel Kant's late writings, she says—

reached a position similar to Finnis's on judicial interpretation. See for example "The jurist, as an authority on the text, (*der Schriftgelehrte Jurist*) does not look to his reason for the laws that secure Mine and Thine, but to the code of laws that has been publicly promulgated and sanctioned by the highest authority ... [and must] straightway dismiss as nonsense the further question whether the decrees themselves are right". (Immanuel Kant, *The Conflict of the Faculties*, 7:24-5).

But that thesis of Kant's is foreign to my thinking both about development of common law doctrine and about the judicial interpretation of statutes. The moral rightness of their own actions, and therefore of laws directing those actions, is rightly of concern to all who hold authority in the political community (like other groups), including the judges. Judges should presume defeasibly that other office-holders such as electors and legislators intend to act rightly, and should interpret common law and statutes accordingly, so far as is consistent with their legal duties to respect binding judicial precedent and the constitutional hierarchy of clear

<sup>21</sup> *Al-Kateb v Godwin* [2004] HCA 37; see the Lecture, this volume n22.

<sup>22</sup> See n27 of the Lecture, this volume, and (2007) 123 *Law Quarterly Review* 417, nn. 71-75.



---

legislative enactment. It is (for example) a severe blot on the history of the common law that it was so slow to align itself with the moral distinctions between intention and foresight, and so willing to persist with strict liability of the “felony-murder” kind (or again with the equiparation of actual and constructive foresight in *DPP v Smith*<sup>23</sup>).

Nor do I object to the notion that morally grounded “common law fundamental rights” would subsist even if the Human Rights Act 1998 were repealed (and the ECHR were no longer applicable to the UK).<sup>24</sup> But judicial enforcement of such rights by way, e.g., of strenuous interpretative presumptions, would be constitutionally and morally sound only if the courts (a) took into account, more fully than they tend to do in their present mode of interpreting the HRA, that the legislature too (and in its domain the executive also) has moral responsibility and authority to make and give legal effect to moral judgments about the rights of persons in the jurisdiction to protection; and if the courts (b) avoided the present tendency of courts and writers<sup>25</sup> (aided by the structure and drafting of the ECHR and other such documents) to set up or assume an unwarranted contrast between individual rights and “state” or “public” “interests” — a tendency also vividly manifested, unfortunately, in standard formulations and applications of “proportionality” tests.<sup>26</sup> The preceding sentence links up, I believe, with the concern raised by Justice Brown in his final paragraph (already mentioned in Q. 3 above). That concern, incidentally, suggests that there may be some tension within public doctrine or assumptions in Canada. For, as he says, Canadians do not think of their legislatures as “rights-infringing machines”; yet a reader of his final comments may wonder whether their courts do not in substance tend, with some regularity, to treat those legislatures very much as if they were.

---

I am most grateful to every one of the five eminent participants in public life who generously accepted the invitation to articulate reflections on the Lecture, and at

23 [1961] AC 290, rightly supplanted by Criminal Justice Act 1967, s. 8.

24 See e.g. Eirik Bjorge, “Common law rights: balancing domestic and international exigencies”, (2016) 75 *Cambridge Law Journal* 220-243. These rights are often but not aptly referred to by the attractive phrase “principle of legality”.

25 See e.g. Bjorge, *op. cit.* at 223-226 and *passim*.

26 See the final argumentative part of the Appendix to this rejoinder.

least as generously agreed that I might add the further reflections and responses which I here bring to a close.

## Appendix: “Guardians of the Constitution”

Here are the main uses of “guardian(s) of the Constitution” in UK-related courts. I asterisk sentences that seem to me fallacious.

1 In *Akar v AG Sierra Leone* [1970] AC 853 at 872, Lord Guest, dissenting, said:

Although the courts are the guardians of the Constitution, I believe that in interpreting the Constitution the ground has to be trod warily and with great circumspection....873...If the courts are precluded from inquiry into the justifiability of executive acts [on grounds such as reasonableness, policy, sense or other grounds apart from vires and good faith] a fortiori it appears to me that the court cannot inquire into the validity of an Act of Parliament which *ex facie* appears to be within the Constitution.

2 In *Khan v Trinidad & Tobago* [2003] UKPC 79, [2005] AC 374 Lord Steyn, dissenting in the Judicial Committee, said:

In *Hunter v Southam Inc* [1984] 2 SCR 145, 155 Dickson CJ of the Canadian Supreme Court explained:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties.

Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.\* The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

In the Privy Council in *Edwards v Attorney General for Canada* [1930] AC 124, 136, Lord Sankey LC expressed the same idea by saying that a Constitution should be approached as “a living tree capable of growth and expansion within its natural limits”.

3 In *Mathew v Trinidad & Tobago* [2004] UKPC 33; [2005] 1 AC 433, Lord Nicholl, dissenting, at [72] repeated the dictum of Dickson CJ without the truncation made by Lord Steyn:

.... A constitution, by contrast [with statute], is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly\* when he admonished the American courts “not to read the provisions of the Constitution like a last will and testament lest it become one”.

4 In *SB (India) v Home Secretary* [2016] EWCA Civ 451; [2016] 4 W.L.R. 103, at [73], Gloster LJ for the Court of Appeal quoted (without approval or disapproval) the Upper Tribunal quoting an Indian Supreme Court judgment in 2013:

...Justice KS Radhakrishnan in his judgment in *NLSA* said this: ‘119. The role of the court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of the society, is a living

organism.\* It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. Sometimes, a change in the law is the result in the social reality. ... It is the denial of social justice which in turn has the effect of denying political and economic justice ... 122. It is now very well recognized that the Constitution is a living character; its interpretation must be dynamic.\* It must be understood in a way that intricate [sic] and advances modern reality.\* The judiciary is the guardian of the Constitution and by ensuring to grant legitimate right that is due to TGs ['transgender' persons], we are simply protecting the Constitution\* and the democracy inasmuch as judicial protection and democracy in general and of human rights in particular\* is a characteristic of our vibrant democracy.

5 To these, add by way of explanatory supplement, the oft-repeated dictum of the Judicial Committee in *Attorney General of Trinidad and Tobago v Whiteman* [1991] 2 AC 240, 247:

The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true\* of those provisions which are concerned with the protection of human rights.

But, against the asterisked sentences: How can the fact that the framers and the people have deliberately made their Constitution harder to amend than statutes be justification for the judicial/academic conclusion that therefore the Constitution must be more easily revisable by judges than statutes and common law rules are? And why should rights be interpreted generously and expansively when doing so entails that duties, constraints and/or harms are expansively imposed on other persons? Why should there be a bias towards change and enumerated rights rather than stability, respect for expectations, and upholding of other enumerated or unenumerated liberties and vital interests? Why not an over-arching principle of even-handedness and fidelity to law in adjudication?



II

# The Lincoln's Inn Lecture

## Brexit and the Balance of our Constitution

John Finnis

The Lord Chief Justice, the Master of the Rolls, and Lord Justice Sales have ruled that the Crown's prerogative of conducting international relations and making and unmaking treaties does not authorise our Government to notify the European Council, pursuant to Art. 50 of the Treaty of European Union, of the United Kingdom's decision and intent to withdraw from the European Union.<sup>1</sup> When inviting me to give this Sir Thomas More Lecture, the Inn suggested I might be willing to reflect on those issues. It is a privilege to have the opportunity to do so in this Honourable Society and this distinguished series of lectures under a name of such far-reaching significance.

### The Divisional Court Judgment in *Miller*

The primary basis of the Divisional Court's powerfully written and surprising judgment ("the Judgment") is that in enacting the European Communities Act 1972, Parliament "intended to legislate by that Act so as to introduce EU law into domestic law...in such a way that this could not be undone by exercise of Crown prerogative power" [92].

The essential "background constitutional principle", says the Judgment [84], is "that, unless Parliament legislates to the contrary, the Crown should not have power to vary the law of the land by the exercise of its prerogative powers". This principle "is the product of an especially strong constitutional tradition in the United Kingdom (and the democracies which follow that tradition...). It evolved through the long struggle...to assert parliamentary sovereignty and constrain the Crown's prerogative powers." [86] And again [87]: "Parliament having taken the major step

1 R (*Miller*) v *The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); [2017] 1 All ER 158.



of switching on the direct effect of EU law in the national legal systems by passing the ECA 1972 as primary legislation, it is not plausible to suppose that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again.” “By making and unmaking treaties the Crown creates legal effects on the plane of international law, but in doing so it does not and cannot change domestic law. It cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights.”[32]

In giving warrant for the principles of our constitutional tradition which it thus recalls, the Judgment gives pride of place [27] to what Chief Justice Coke and the senior judges said to the King and Councillors in *The Case of Proclamations* (1610): “The King has no prerogative but that which the law of the land allows him, [and] by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm”.

### The Case of Proclamations (1610)

The low-water mark of the Government’s written argument in the Supreme Court appeal is its treatment of the *Case of Proclamations*. It says that the case stands only “for the uncontroversial proposition that the Government cannot purport to countermand laws passed by Parliament”, and cites with approval the remark that Coke’s statements were wider than necessary. Well, they were. But even so, they should be accepted as genuine principles of our Constitution. As I shall suggest, they are entirely compatible with the real case for the Government in this appeal. And it is mistaken to say that the *Case of Proclamations* rules only that the executive cannot countermand statutes. Neither of the Proclamations about which James I asked Coke CJ’s opinion involved any countermanding of statute; they each purported to override common law rights of subjects, in one instance the right to erect new buildings in London, in the other the right to make starch out of wheat. Coke and his fellow senior judges declared such proclamations — or any other prerogative acts — incapable of changing common law, statutes or even the customs of the realm (understood, where these customs conferred or defined legal rights of subjects). He rested that declaration— which was correct then and is just as correct now — on four historic authorities, of which I shall mention only the two most important, the Statute of Proclamations 1539 (from which we get the term ‘Henry VIII clause’), and the great treatise on the merits of the constitutional laws of England by one of Lincoln’s Inn’s most distinguished members (if I may say so), Sir John Fortescue, Chief Justice of King’s Bench for 18 years under Henry VI.

Fortescue died in 1479, the year before Thomas More was born. He wrote the treatise cited by Coke, *De Laudibus Legum Angliae* (On the Merits of England’s Laws),

early in the last decade of his life, though it first saw print only in 1543, eight years after More's execution. It says on its first page that its leading categories come from Thomas Aquinas, who 200 years earlier had distinguished *regal* and *political* as the two leading types of limited, non-despotic governance, 'political' being governance specifically limited by more or less specific laws — as we should now say, constitutional government within the frame of constitutional law. The chapter cited by Coke says (again citing Aquinas) that because our constitution is 'political', the Crown cannot "make any change or alteration in the laws of the realm without the consent of the subject", that is, without the consent of Parliament. Later in the treatise (c. 34), Fortescue introduces the novel category "regal political government" to capture the special characteristic of English governance. We might say this characteristic is its special *balance*; he prefers the old word which Aquinas took from Greco-Roman predecessors, 'mixed'. In discussing the benefits of that mixed character, Fortescue again teaches that the Crown "cannot alter the laws, or make new ones, without the express consent of the whole kingdom in Parliament assembled". The treatise's only reference to foreign affairs is glancing, no more than the reminder that we need a strong Crown — we might say, a strong executive, the Queen and her ministers — to protect us against the emergencies of invasion from *abroad* (or violence from within).

Coke's other leading authority was the Statute (or: Act) of Proclamations 1539, which has since been mythologised to give us the modern parliamentary and legal term 'Henry VIII clause', signifying a statutory provision (a clause in an Act of Parliament) authorising the Government to repeal or amend provisions of that statute or indeed, sometimes, of other statutes. The mythology is that the Statute of 1539 ascribed to royal proclamations in general the force of statutes. And indeed the statement that proclamations "shall be obeyed, observed, and kept *as though they were made by Act of Parliament*" does occur in sec. 1. But that is all subject to a premise and a proviso.

The *premise*, earlier in the same clause, is that the proclamations in question are made not by the Crown's prerogative — that is, by an inherent constitutional authority, not based on statute — but "by authority of this Act", this statute. The *proviso* is what gives Coke the constitutional principle. As Lord Judge, lately Lord Chief Justice, demonstrated last month in an illuminating Oxford Law Faculty lecture on Henry VIII clauses, the force that the 1539 Act gives to proclamations does *not* (says the proviso) authorise them to infringe, break, or subvert "any Acts, common laws standing at this present time in strength and force, nor yet any lawful or laudable customs of this realm", so that "every [subject]... shall stand and be in the same state and condition, to every respect and purpose, as if this Act... had never been... made ..., except such persons which shall offend any proclamation to be

made by the king... concerning any kind of heresies ...” As Lord Judge highlighted, a modern Henry VIII clause gives much more authority to Her Majesty’s ministers than Henry VIII’s supposedly tame Parliament either attributed to or conferred on him or them in the Statute of Proclamations, leaving aside royal power to repress heresy, an exception which lapsed with the Statute’s repeal in 1547.

Having been nine years Queen Elizabeth’s Attorney-General, Chief Justice Coke knew how far her governance had departed from the principle that proclamations cannot change the law of the land or, without statutory authority, affect the legal rights of subjects. So, relatively early in the reign of the half-foreign King James (whose published writings celebrated *absolute, regal, non-mixed Crown governance subject only to God and not to the law*), Coke summoned up the courage to restore the position asserted by, it seems,<sup>2</sup> both Lords and Commons 70 years earlier when they amended Cromwell’s Bill for the Act of Proclamations. The position was at least implicit in Fortescue’s exposition of the pre-Tudor constitution, and throughout the *De Laudibus* Fortescue’s alter ego keeps reminding his princely young interlocutor that monarchs are always pushing against the legal limitations imposed on them by this constitution — the constitution which in its legal essentials is ours. It took a civil war, partly about what is heresy and partly about what is Crown authority, to vindicate the principles which the Judgment rightly warrants by quotations from the *Case of Proclamations* (which stands a little before that civil war’s beginning) and from the Bill of Rights 1689 (which states the war’s conclusory outcome and settlement: no royal or executive suspension of or dispensation from the law “without consent of Parliament”).

### History and Empire: Replicating our Constitutional Principles

But there are wider horizons. Book One of Thomas More’s *Utopia* (first published exactly 500 years ago) tells us in its opening line that Henry VIII sent More to Antwerp to negotiate a trade treaty with the envoys of Charles V sovereign ruler of the Low countries and soon to be ruler of the two great European empires. Still on the first page, the negotiations pause while Charles’s envoys go back to base for instructions: base for them is of course Brussels (*plus ça change...*). Coming out of mass in St Mary’s Antwerp cathedral, More meets up by chance with (and right here begins his great fiction) the old seaman Raphael Hythloday (who is going to tell him

2 See G.R. Elton, “Henry VIII’s Act of Proclamations”, (1960) 75 *English Historical Review* 208-22.

and us all about the New Island of Utopia). This Hythloday has been on three of the four voyages of the real Americus Vesputius (Amerigo Vespuccio), about which the English and European public knew from the best seller *Mundus Novus* of 1502-3 and from the *Four Voyages of Amerigo Vespucci* (1507). America, made known to us Europeans in 1592 (two years after this Old Hall's construction and two years before More began studying law right here in this room), is now made known to be not Asia (as Columbus supposed) but *novus mundus*, the new world. More makes his creation, Raphael Hythloday, tell how he persuaded Vespucci to leave him as far from Europe as he could, since "the way to heaven is the same from all places" and he would happily leave his bones far from home, since "heaven shelters those who have no grave". But in the event, he says, he came back, circuitously, via Ceylon and south India. For the next 450 years and more, this new opening of European and English aspirations to live both here and out there in the vast world overseas, the opening imagined by More, will help shape many of the actual realities of our political, legislative, executive and judicial actions.

One of its monuments is the Judicial Committee of the Privy Council, which now sits in one of the Supreme Court building's three courtrooms on Parliament Square. Its origin may be traced to the system of appeals to the Privy Council from the Channel Islands, regularised in the middle of Elizabeth's reign. The Long Parliament in July 1641 passed an Act which abolished the Privy Council tribunal known as the Star Chamber and (by s. 2) all similar executive Courts "within this realm of England and dominion of Wales", and then in s. 3 extended the doctrine of the *Case of Proclamations* (and its antecedents) by enacting that "neither His Majesty, nor his Privy Council, have or ought to have any jurisdiction, power or authority...to examine, draw into question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any of the subjects of this Kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of the law." But, by "the ordinary course of the law", the Privy Council had for generations judicially heard and disposed of appeals from the courts of the Channel Islands, whose people are subjects of our monarch but not of the realm of England or even of the United Kingdom. So that jurisdiction survived Star Chamber's abolition and the republican Commonwealth or Interregnum. By the 1680s, the King's Privy Council's prerogative judicial powers were accepted as constitutionally applicable to all the overseas territories in which the Crown acquired jurisdiction. Regulated partly by statute of 1833, this prerogative jurisdiction survives to this day, and you can see it being exercised (mainly by our Supreme Court Justices), sometimes under that very description, prerogative, in the Judicial Committee's online videos.

Judgments of the Judicial Committee (Privy Council, for short) can and do illuminate our constitution. Those who went out to settle in the Crown's overseas territories carried with them, as principles, our mixed constitution and its constitutional balance. These principles, almost all of them, have been written down in the Constitutions adopted by the people of these territories before or as they became wholly self-governing and independent countries, in some instances retaining our royal sovereign as theirs. More Constitutions have been written within two miles of these Inns than in any other city in the world, all of them seeking to articulate that balance, popularly known as a Westminster form of governance. Spelled out in these written Constitutions, as binding constitutional rules, are various fundamentals which here in England are still scattered about in ordinary statutes, rules of parliamentary procedure, or conventions. And which of these provisions of the written Constitution are justiciable in and enforceable by the courts and which are not is also spelled out.

### **An example: the Constitution of The Bahamas 1973**

Take the Bahamas, "rediscovered" (as its Constitution recites) in 1492 and first settled by people directly or indirectly from our country about a dozen years after the *Case of Proclamations*. The independence Constitution of The Bahamas (still in force) was agreed on the Strand near here, in Marlborough House, a few weeks after the enactment of the European Communities Act 1972, and was enacted by an Order in Council (SI 1973/1080) made in connection with but not under our Parliament's Bahamas Independence Act of July 1973.<sup>3</sup> The Constitution is enacted by and scheduled to an Order in Council. It sets out familiar principles. The legislative power of the Bahamas is vested in its Parliament. The executive power is vested in Her Majesty, exercisable by the Governor-General and for the most part also by ministers appointed on the advice of the Prime Minister, the person appointed as the one most likely, in the Governor-General's judgment, to command the support of a majority of the lower House. The judicial power is vested in the courts of the Bahamas, with final appeal to the Judicial Committee of the Privy Council sitting in London but under Bahamian law and as a court of the Bahamas, not of the United Kingdom. All state moneys and revenues must be paid into one Consolidated Fund,

3 The Constitution is scheduled to the Bahamas Independence Order 1973, SI 1973/1080, made "by virtue and in exercise of the powers vested in Her by section 1 of the Bahamas Islands (Constitution) Act 1963 and of all other powers enabling Her in that behalf" – that is, under both statutory and prerogative powers.

and nothing can be paid out of it save on a minister's warrant, being money authorised for that purpose by an Act of the Bahamian Parliament. There can be no Parliamentary proceedings about charging the Consolidated Fund for any purpose without Cabinet's recommendation. And in all save eight special cases such as appointment of a Prime Minister, the Governor General must act only on ministerial advice, but the question what advice he acted on, like his action in those special cases, cannot be examined by any court.

### Treaty making and unmaking by prerogative: a background constitutional principle

One important element in this dualist system was so well understood that it was not written down in any of the scores of constitutions settled in London between 1963 and today, and so has occasionally had to be articulated judicially by the Privy Council. I say "well understood" because there is something that it is important to have in mind when considering what those who drafted and voted for the European Communities Act 1972 intended (and knew they were doing). The Empire being dismantled in the decade before and the decade after 1972 had been governed from end to end, both here and in the territories overseas, with scrupulous attention to what could be done (whether here or abroad) under the prerogative, as distinct from what could only be done under authority of Parliament or a local legislature.

Anyway, here's what was said in a Bahamas appeal, *Roberts v Minister of Justice* [2007] UKPC 56, by a strong Judicial Committee (Lords Bingham, Hope, Rogers and Brown and Lady Hale), speaking by Lord Hope:

[Counsel for the appellant] submitted that, as legislation was necessary to enable effect to be given to a treaty in domestic law, Parliament had to pass an enabling statute before [the extradition treaty between the Bahamas and the United States] was ratified. He maintained that the Treaty was null and void because... it... had not been incorporated in the schedule of any [Parliamentary] enactment. Even if the minister had power to ratify it, the Treaty had not been approved either before or after the event by Parliament....

The argument that approval by Parliament was necessary before the Treaty was ratified is misconceived. The right to enter into treaties is one of the prerogative powers of the Crown. No-one other than the Queen can conclude a treaty. In practice, in the case of The Bahamas, this prerogative power is exercisable ... by

a Minister acting under the Governor-General's authority. The [Minister] does not require the advice or consent of the legislature to authorize the signature to or ratification of a treaty. ... The signature and ratification by the Minister was all that was needed to give effect to the Treaty in international law. The procedures ... [do] not require participation at any stage in the process by the legislature.

An international treaty does not, of course, by itself form part of domestic law. This is a necessary consequence of the unqualified treaty-making power which resides entirely with the executive. Treaties do not form part of the law of The Bahamas unless and until they have been enacted by the legislature. The assent of Parliament must be obtained before a domestic court can give effect to them. The way in which this is to be done is for Parliament itself to determine...

This statement of principle needs little or no elaboration as principle. To understand its depth and worth, one can read it in the light of the masterly lecture<sup>4</sup> given in London by Timothy Endicott, Oxford's leading constitutional-legal theorist, about a constitutional reality answering to a standing need, a reality and need hitherto insufficiently articulated by the diet of treatises and cases which our judges read as students and practitioners. The need is for an efficient and unified executive power, democratically responsible in governing 365 days a year while legally constrained from exercising legislative and judicial power. The lecture speaks, too, of the Divisional Court Judgment's failure to acknowledge our constitution's settled ways of meeting this standing requirement of the public good. John Locke, in his *Second Treatise of Civil Government*, called this central, pre-eminent aspect of executive power "federative", a term that has not stuck though what it referred to is as important as ever. Locke chose the term because, though the power or authority deals with many other matters of war and peace, public order and emergency, it is a power manifested day-to-day, and in a model way, in the making, variation, and

<sup>4</sup> "Parliament and the Prerogative: From the *Case of Proclamations to Miller*" (Policy Exchange, 30 November 2016) [since published in revised form as *The Stubborn Stain Theory of Executive Power: From Magna Carta to Miller* (Policy Exchange, September 2017)].

unmaking of *foedera*, Ciceronian Latin for what Lord Hope's explanation of principle in *Roberts* was about: alliances and treaties.

### How to read the European Communities Act 1972

So, now, at last, we are getting into a position to see that the Judgment misreads the European Communities Act 1972, and misconstrues the legal sovereignty of Parliament; and thus fails as an effort to uphold the rule of law and principle of legality.

We should start where Parliament started, with the Act's long title. In the Judgment, this heads the list of evidence for its interpretation of Parliament's intent in 1972. The parties supporting the Judgment in the Supreme Court do likewise. The Government replies, unpersuasively, that long titles are no reliable guide [App. Para. 5(1)]. In my view that is an own goal. The 1972 Act's long title is reliable and extremely strong evidence that the Act does not have the meaning attributed to it by the Divisional Court and its supporters, and does have the meaning and effect argued for (and in many other respects persuasively and well) by the Government. For it is entitled: "An Act to make provision in *connection with* the enlargement of the European Communities to include the United Kingdom..." Contrast that with the long title of the Bahamas Independence Act 1973, or the Barbados Independence Act 1966, or the Fiji Independence Act 1970: "An Act to make provision *for, and in connection with*, the attainment by the Bahamas [or Barbados, or Fiji] of fully responsible status..."

How do the Acts of 1966, 1970 and 1973 (and there are many others before and since) make provision *for*, as well as *in connection with*, the new status? It is almost all done in these Acts' first section:

1(1) On and after 10th July 1973 (in this Act referred to as the appointed day) Her Majesty's Government in the United Kingdom shall have no responsibility for the government of the Bahamas. (2) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend...to the Bahamas as part of their law...

So here is perhaps my main point. The entire Judgment, like the whole written argumentation of those supporting it in the Supreme Court, presumes to treat the European Communities Act 1972 as if its long title read: "An Act to make provision *for, and in connection with*, the enlargement of the European Communities to include the United Kingdom...", and as if its first section read:



1(1) On and after the 1st January 1973 (in this Act referred to as the appointed day) the United Kingdom shall [and here I adopt the language of article 1 of the Treaty of Accession] become a member of the European [Communities] and Party to the Treaties establishing these Communities as amended or supplemented.

But no such clause appears first, second, or anywhere in the 1972 Act or in any Act of the United Kingdom.

Our sovereign Parliament has rigorously abstained from enacting that we are to be or are members of the European Communities or Union or parties to their Treaties. It has from first to last deployed the resources of our constitutional balance with its two interlocking dualisms: of international law and domestic law, and of executive power and legislative power. Treaties are made and unmade exclusively by the executive power: that is a principle of our constitution. Treaties can have no effect in or on domestic law beyond what Parliament in the exercise of its supreme legislative power *authorises*. Whether that authorised effect *continues* — in relation to a particular treaty provision, or in relation to the whole treaty — depends (unless the treaty’s provisions have been written into a statute) on the continuance of that treaty provision or of the whole treaty. That continuance is a matter for foreign governments and entities, or for our executive Government in its conduct of our foreign affairs. If Parliament wishes (as in rare cases it does) to make an exception to that straightforward universal, default position, it does so explicitly, as we shall see.

The 1972 Act contains no such exception. From the first words of its long title onwards, it treats the enlargement of the European entities by inclusion of the United Kingdom as something partly accomplished already by the signing of the Accession Treaty, and to be accomplished fully by that Treaty’s ratification, both signing and ratification having been or to be acts of the Crown, of Her Majesty’s Government, actions which the 1972 Act in no way whatsoever purports to authorise or permit.

According to the Judgment ([66] with [42]), it is “highly formalistic” and “divorced from reality” to say that the Act does not authorise the ratification of the Accession Treaty, or to say that it is that ratification of that set of Treaties, not the Act, that confers EU rights on British citizens in France. But I suggest that, precisely “as a practical matter”, the formalities which Parliament chose to deploy and preserve make quite plain to an alerted legal-constitutional eye that Parliament intended to work strictly within the confines of a well-established dualistic model, a constitutional and legal reality and truth of our law.

It is with respect quite wrong, both as law and as a statement of the constitutional and political realities of 1972, for the Judgment to say [66] that “Parliament intended to bring into effect, and did bring into effect” the rights of British citizens under EU law, or that it was “switching on the direct effect of EU law in the national legal system by passing the ECA 1972...” [87]. It intended, rather, to enable the United Kingdom to comply with its international, European obligations to the citizens of Britain and other member states (and thus secure the rights of those citizens correlative to those obligations) if *and when* those obligations and rights arose as the effect of our Government’s choice to ratify the Treaty of Accession whereby the United Kingdom joined the European Treaties and Communities. In the event, given the preconditions and authorisations established by Parliament in the 1972 Act, that ratification — not statutorily authorised, but under the Crown’s prerogative — switched on the European, international-law Treaty rights *and* their double, the statutorily authorised UK legal rights, as from 1 January 1973, the date provided for by the Accession Treaty (not by the Act).

### Parliament’s legal intent

The Judgment says it is interpreting the intent of Parliament in the light of background constitutional principles. But read in the light of background principles and practices — those highlighted by the Judgment and those left by it in shadow — Parliament’s intent can, as a practical matter, be quite sufficiently gathered from precisely what it said, read as those who drafted, promoted, and voted for it meant it to be read. They knew the difference between making provision for and making provision in connection with, a difference they had many times seen sharply drawn in their instruments, their constitutionally significant Acts. (They also knew, as we shall see, what it is to revoke a treaty, which element in our constitution has the authority to revoke, and what may be done to subject such revocation, exceptionally, to preconditions.)

Accordingly, we find that the 1972 Act’s real s. 1 is nothing like my imaginary s. 1 (making provision for accession), a provision which those who support the Judgment evidently wish Parliament had included and in effect deem it to have included, though nothing like that is to be found. The real s. 1 simply describes the meaning of the word “Treaty” and “Treaties” in the Act. For *everything* in Part I of the Act is going to be about the domestic effect (the “legal effect... in the United Kingdom”) of treaties — made without any parliamentary authority — if they are ratified. Of course, only ratified treaties that have the approval of each House or of an Act, and so are in the original or revised list in s. 1, will achieve that domestic effect. But, to repeat, nothing in the Act either commits or authorises the Government to ratify the Treaties and make the UK a member. The only relevant date in the Act is

22 January 1972, when the Government signed the Accession Treaty; there is no commencement date given for the Act, just the date of royal assent (17 October 1972). There is no reference to 1 January 1973, the date fixed by the Accession Treaty for our membership if the Crown should ratify the Treaty, which it chose to do on 18 October 1972. And then the real s. 2 sets out the Act's main business:

General implementation of Treaties

2(1) All such rights [etc.] from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given effect or used in the United Kingdom, shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.

So all Community rights about which the claimants and the Judgment speak — whether they be UK legal rights or legal rights of UK citizens in France — are defined as rights arising by or under treaties as they stand, if they stand, from time to time.

Subsections (2) and (3) provide machinery for giving effect by Orders in Council or ministerial regulations etc. to "Community obligations" (as just defined in subsec. (1)). Subsec. (4) provides that such ministerial enactments may include "any such provision (of any such extent) as might be made by Act of Parliament" (shades of "Henry VIII"). Then it famously adds "and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section" — a sentence in which the word "enactment" now includes not only Orders in Council and ministerial orders but also Acts of Parliament present and future. It is this — and as far as Parliament's intention went, only this — that entitles us to call the 1972 Act a statute of constitutional significance.

For, to make s. 2 workable, s. 2(4) must be read, and was certainly intended to be read, as meaning that if in future Parliament intends a new statutory provision (a later Act) to prevail over the European Community rights and obligations given effect here by s. 2(1), Parliament must make its intention to do so plain. Thus the so-called doctrine of implied repeal, the constitutional principle that provisions of later statutes inconsistent with an earlier provision impliedly override it, must be set

aside or strongly modified where the earlier provision is something in or given effect by this part of the 1972 Act.

So the 1972 Act was intended to be read and applied not as a statute to make Britain a part of Europe, but as a statute to arrange for the appropriate legal effects of being taken into Europe by a treaty made and ratified not by or under statute but by Her Majesty's Government acting under the prerogative of making and unmaking treaties. In the exercise of its sovereign power, Parliament could easily have acted otherwise, with no more effort than it took me to transpose s. 1 of a contemporaneous Independence Act into my imaginary s. 1 of the European Communities Act that was never passed, never put before Parliament.

### The model followed in ECA 1972 and subsequently

In choosing to put our law on the thoroughly compartmentalised dualistic basis that it did, Parliament was acting according to a well-trying model. I will recall the features of that model, which (as I have shown elsewhere) were misunderstood and misstated by counsel in the Divisional Court and by those judges who spoke about the matter during oral argument — so much so that the Judgment itself ignores the whole matter, thus consolidating its misreading of parliamentary sovereignty and of the texts and sovereign intent of the Parliament of 1972, and thus also the Parliaments of 1978, 2008, 2010, 2011 and 2015.

The shaping of Parliament's intent in 1972, and of its treaty-applying technique, begins in 1870, I would say, with the Extradition Act 1870. An extradition treaty provides that the Crown's agents may arrest anyone in the realm and convey them abroad in order that they can be tried and punished by some foreign power: a drastic impact on the rights of subjects or friendly resident aliens. Between 1174 and the making of the first UK—US extradition treaty in 1794 England made only five extradition treaties,<sup>5</sup> and between then and 1870 only three more. The pre-1870 technique can be exemplified by the Extradition Act 1862, "An Act for giving effect to a Convention between Her Majesty and the King of Denmark for the mutual surrender of criminals".<sup>6</sup> The statute recites that the Convention, the treaty with Denmark set out in full in the Act's schedule, *has been signed and ratified* and "it is expedient that provision should be made for carrying [it] into effect", that is, effect in the UK, its law and its courts. On the requisition of the Danish Ambassador,

<sup>5</sup> House of Lords Select Committee on Extradition Law, *Second Report*, 25 February 2015, chap. 1 fn. 9. 6 25 & 26 Vic. c. 70.

persons here can be arrested and brought before one of our courts; if our courts are satisfied that the person is accused or convicted of an offence specified in the treaty, and that there is sworn evidence against him that would justify committing him for trial here if he had done the alleged acts here in this country, he may be extradited, delivered up to the Danish authorities. If the proceedings take more than two months, the Act grants the detainee the right to apply to a judge for release. The Act's last section simply says "7. This Act shall continue in force during the continuance of the said [treaty]." The treaty itself provides that either state can terminate it by simply giving the other state six months' notice. In other words, it is Parliament's intent that its statute's provisions can, like the Convention, be deprived of force by simple prerogative executive act, without any notice to, let alone pre-authorisation, by Parliament.

In 1870 a new statutory framework was introduced, still in force in 1972. The essentials are in s. 2 of the Extradition Act 1870, an Act meant to apply in an ambulatory way, that is to any extradition treaty arrangements entered into, modified, or revoked in the future:

Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state. ... Every such Order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement. Every such Order shall be laid before both Houses of Parliament within six weeks... and ...be published in the London Gazette.

There is thus no requirement that either the treaty arrangements or the Order in Council have any pre-authorisation or subsequent approval by Parliament or either House. Still less is there any requirement of authorisation of the termination of the treaty arrangements by the Government, a termination which extinguishes the force of the Order and the effect of the statute in relation to that foreign state. Scores of treaties, all impacting severely on the rights of some of our citizens, were made effective in our law by s. 2 of the 1870 Act, some of them still in force.

### **The prime model: double-tax treaty arrangements**

Extradition treaties are concerned not with conferring rights but with taking them away (subject to some procedural safeguards and rights). More interesting for our purposes is the class of treaties that began to be made in 1946 — by 1972 there were

many scores and now there are over 120 — treaties each of which directly or indirectly confers on individuals or companies some 60 or 70 valuable substantive rights, as the House of Commons' leading public lawyer, Sir John Foster QC, reminded the Commons a week before the unveiling and introduction of the European Communities Bill in January 1972. These are double tax agreements. Our governments used not to favour them, but at the end of the Second War they changed policy. These are treaties that are worth nothing at all unless they operate to create rights, immunities of individuals, and obligations and disabilities for tax authorities, in our realm and in our law. These legal effects were first provided for by the Finance (No. 2) Act 1945, s. 51(1), replaced by the Income Tax Act 1952, s. 347(1), replaced in turn by the Income and Corporation Taxes Act 1970 [ICTA] s. 497(1). Nowadays it's s. 2 of the Taxation (International and Other Provisions) Act 2010 [TIOPA], but I shall stay with the provisions in force at the time Sir John Foster was speaking, and the Government was busy drafting the 1972 Act. The compartmentalised statutory and prerogative framework is essentially unchanged since 1945. So, ICTA 1970:

497. (1) If Her Majesty by Order in Council declares that arrangements specified in the Order have been made with the government of any territory outside the United Kingdom with a view to affording relief from double taxation ... and that it is expedient that those arrangements should have effect, then, ... the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax in so far as they provide ... for relief from income tax and corporation tax... [and so forth].

and

(2) The provisions of [ss. 500-511] shall apply where [such] arrangements ... have effect... [and so forth].

(7) Any Order in Council made under this section may be revoked by a subsequent Order in Council, and any such revoking Order may contain such transitional provisions as appear to Her Majesty to be necessary or expedient.

(8) Before any Order proposed to be made under this section is submitted to Her Majesty in Council, a draft thereof shall be laid before the House of Commons, and the Order shall not be so

submitted unless an Address is presented to Her Majesty by that House praying that the Order be made.

Here we have, full-grown, the prime model for ss. 1 and 2 of the European Communities Act of two years later. Like s. 1 of the 1972 Act, an Order in Council identifying a particular double tax treaty does not bring the treaty into effect internationally and is not the source of its effect in domestic law, our law. The source of the treaty's effect in our law is the statute and its effect-giving provision, in 1972, s. 2(1) ECA; in 1970 s. 497(1) ICTA. Sec. 497(1) gives effect, quite explicitly, not to the Order in Council but to the treaty (the "arrangements with the government of a [foreign] territory"), and then also to a number of valuable rights for taxpayers under ss. 500-511, rights contingent on those treaty arrangements beginning and continuing to apply to those taxpayers.

A look at any of the relevant Orders in Council (each of them country-specific) confirms that — like s. 1 of the 1972 Act and any Orders in Council (or later Acts) that from time to time add to its list of treaties — these double-tax treaty Orders do not pretend either to enact or to bring into force anything. Each is purely declaratory, making the declaration foreshadowed in s. 497(1), that double tax arrangements have been made with such and such a foreign government and that it is expedient that they have effect.

Just when, if ever, such an Order does begin to have effect depends first on the terms of the treaty and then on the unpredictable post-signature conduct of the foreign government; if that government's ratification (its notification that its internal procedures have been completed<sup>7</sup>) is later than the Order in Council, neither s. 497(1) nor the Order in Council bring the arrangement into effect until that second ratification is given and the treaty arrangements become operative in international law by virtue of their own terms. The treaties always state the date they will begin taking effect in our domestic law: standardly they stipulate the April 6th or April 1st next following the treaty's commencement — this can be what turned out, with the UK-Russia treaty, to be more than two years after the Order in Council, because of Russia's delays. And the treaty (not Parliament) will provide that after five years either state party can terminate it on six months' notice, and that such termination takes effect in UK law on the 1 April following the termination. The making of the treaty, like the making of a replacement treaty, is notified to the

<sup>7</sup> See Constitutional Reform and Governance Act 2010, s. 25(3), (4).

House of Commons (but not to the House of Lords) by the draft Order in Council, and the House's approval by resolution is needed before the Order can be made, without which the UK cannot give the notification of completion of internal procedures (notification which counts as ratification<sup>8</sup>). But the unmaking of the treaty without replacement — like the unmaking of an extradition treaty — need not even be notified to the House of Commons, let alone authorised.

And that unmaking will terminate the scores of statutory rights under UK law, not to mention many valuable rights of UK persons and entities under the reciprocal treaty-based law of the foreign state. The pillar of the Judgment is, as you remember, that “By making and unmaking treaties the Crown.... cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights.” Very well, but that “intervention of Parliament” may well be through Parliament's one-off initial construction of an *ambulatory* scheme like the three we have been considering — schemes for giving domestic (and ancillary international) effect to treaties and international provisions not yet made or applicable to the UK, if, when and for so long as they become and remain applicable. In that way, Parliament “intervenes” by choosing to establish that individual domestic legal rights defined by such treaties and international provisions can come into existence, and cease to exist, without any further Parliamentary interventions.

### Attempted rebuttals

About all this, the Written Case for the second respondent,<sup>9</sup> says four things. First: that the Order in Council would “continue to grant relief under the arrangements it incorporates even if those arrangements, on the international plane, have been amended or revoked”. But this contention flies in the face of the statute which — not the Order in Council — gives relief to arrangements with a foreign government, not to former arrangements no longer in existence; arrangements which, moreover, always provide for the cessation of their UK effect a short defined period after their revocation. Sec. 2(1) of the European Communities Act 1972 is even clearer about the issue, since it gives domestic legal effect only to the Treaties as they are in force “from time to time”, that is, only as long as they are in force. This compensates for and renders irrelevant the inexplicitness of art. 50 of the Treaty of European Union,

<sup>8</sup> Ibid.

<sup>9</sup> Written Case for Second Claimant Dos Santos, para. 30(4), which actually concerns the 2010 successor (TIOPA) to the more relevant 1970 provisions.



which makes provision for the cessation of the Treaties in relation to a member state without trying to specify when that cessation would take effect in that member's domestic law.

Secondly, this Written Case says Parliament provides a statutory mechanism for, and authorising, the revocation of double tax treaties, involving a new Order in Council approved by the Commons. But that too is mistaken. No statutory provision is made for revocation without replacement, because none is required. There is statutory provision for revocation of one Order in Council by another. But this will be needed only if there is need for new arrangements to take effect in place of the old.

Thirdly, conceding in advance that its first two points may be wrong, the Written Case says that, if such treaties create any rights at all, the Executive cannot lawfully withdraw from the treaty without "Parliamentary approval". By an Act of Parliament? Nothing in this whole s. 497 scheme involves more than a resolution of the House of Commons. In any event, there is no reason whatever to accept this third claim, even though the treaties do of course create rights, very specific, numerous, and valuable, and result in others under provisions such as ss. 500-511 of the 1970 Act. The Written Case for the other (first) respondent steps in at this juncture to say that such withdrawals (revocations without replacement) are "very rare indeed".<sup>10</sup> But of course, as both Written Cases say in other contexts, one instance is enough. Indeed, it is enough that they are possible, and apparently at least two have occurred, one in 1971 (in relation to the Virgin Islands) and the other in 1988 (unilateral UK revocation of the double tax treaty with the Netherlands in relation to the Dutch Antilles, a treaty approved by the House of Commons in 1970).

Fourthly and finally, the Written Case for the second respondent rather plaintively says: "there are almost certainly more [arguments], as is apparent from the slew of academic articles and blogs which have been published rebutting Professor Finnis' argument" — that would be the slew from which the Written Case took the best, insufficient though they are.

### **Summary on Parliament's intent in 1972**

So are we left with the main facts. Parliament chose not to make provision "for" the UK to become or be a member the Communities or Union. It chose to let the Crown,

<sup>10</sup> Written Case for Lead Claimant Miller, para. 29(5).

the executive government, make the UK a member by treaty acceding to existing treaties. What Parliament did was make consequential provision “in connection with” membership, namely provision for the importation of the laws and rights etc. created in, by and under the European Treaties — those ones that Parliament listed in sec. 1 from time to time and by s. 2(1) gave domestic effect to just to the extent that they exist as a matter of European law from time to time. That provision strictly followed the dualist model, in which treaties and all other international arrangements are made and unmade by the executive alone, under the Crown’s prerogative, without need for prior approval, authorisation or permission.

Thus the intent which the Judgment ascribes to Parliament, that withdrawal from the Treaties be invalid unless previously authorised by Act of Parliament, is simply, even starkly, fictitious. It is a fiction imposed upon Parliament without due attention to the evidence of the 1972 Act’s real intent, an intent that is reliably gathered from its wording, its content, and its antecedents in the business of giving ambulatory domestic effect to treaties, effects that are intended to walk in the footsteps of treaties and of the international (EU) provisions made in and under them. The effects are meant to, and do, vary domestically as the treaties come into being, alter, and cease to apply to the United Kingdom internationally.

Section 2(1) can indeed be thought of as a conduit through which EC now EU law flows from many taps on the international level, through myriad pipes within (so to speak) the one conduit, into our law. But the metaphor is imperfect because when one or another tap is turned off, or if all taps were turned off at once, by transactions on the international level, not only does the water cease to flow in; the water already arrived on the domestic level ceases to exist (as if it were electricity switched off) unless it has been changed into domestic law by some statute which enacts it specifically, and not simply generically and contingently as s. 2(1) does like its double-tax treaty analogue (in 1970 s. 497(1)).

### **Parliament starts making specific exceptions to the default model**

Early on, in 1978, Parliament got a bit cautious about the implications of this open-ended model. It started to pick out limited kinds of international transaction that it would not allow the Government even to ratify without first getting Parliament’s approval. 1978, *re-enacted* in 2002: “No treaty which provides for any increase in the powers of the European Parliament shall be ratified by the UK unless it has been approved by Act of Parliament.” 2008, in the Act approving the treaty containing art. 50: requirement of approval by Act of Parliament before ratifying any amendment to the founding treaties by the ordinary revision procedure; requirement of approval by resolution of each House before a minister of the Crown can support any decision under a range of EU treaty provisions, elaborately specified. Nothing about

preconditions for action under art. 50. 2011, the European Union Act: a raft of new limitations on the exercise of the prerogative of international affairs and treaty-making in relation to the European Union, imposing Parliamentary controls on a number of kinds of ministerial actions which would — speaking broadly — increase the rights of European citizens (and thus of UK citizens under s. 2(1) of the 1972 Act), but — again speaking summarily — no controls on weakening or removing any or all such rights.

Parliament's position throughout is plain. The prerogative power of treaty making, treaty operation, treaty adaptation and amendment, and treaty withdrawal remains what it has always been — plenary authority on the international plane, with whatever effects on the domestic plane are entailed by the way that Parliament, in the exercise of its sovereignty, chose to give domestic effect to the treaty. Where that domestic effect has been made by Parliament to be contingent upon the existence of international provisions and rights, and correlated with them one-to-one — as in the double tax agreements model in force in 1972, the extradition treaties model, and the European Communities Act itself — then it is, under our law (background principles and all), in that manner contingent and correlated, by authentic sovereign intent and enactment of Parliament.

### Consistency with background constitutional principles

All this is wholly consistent with the letter and spirit of the *Case of Proclamations*. Action under the Crown's prerogative on the international plane, including revocation of treaties and the supposedly irrevocable triggering of Art. 50 to exit from the European Treaties, does not and cannot “change any part of the common law, or statute law, or the customs of the realm”, or (in the Divisional Court's words) “vary the law of the land” by prerogative. It is all action which “the law of the land allows” — the principle of our constitution recalled in *Roberts v Minister of Justice* — allows as legitimate prerogative authority to the Queen and her ministers. Such action on the international plane can of course affect the domestic legal rights of citizens, including their rights under statutes such as the Income Tax Acts or the European Communities Act, and affect them drastically. But it has that effect only and entirely because of the way that Parliament has chosen, when it does, to create those rights.

Parliament does this, as we have seen, mainly by defining those as simply the domestic double of rights existing on the international plane “from time to time”, that is, as “statutory rights” *because and while* they are rights on the international plane. Secondarily it has created statutory rights that have no precise international counterpart, yet are wholly contingent on the existence of international arrangements brought about by the Crown's international actions — such as the

statutory rights (in ss. 500-511 of the 1970 Act)<sup>11</sup> contingent on *there being* a relevant double tax agreement; or the statutory rights created in 1978 and 2002 to vote in elections for members of the European Parliament elections at such times if any as such an election of UK members is possible under EU law.

By choosing in 1972 and ever after to abstain from saying that the UK is to be a member, and to abstain from saying that the UK is to participate in European Treaties, Parliament has chosen *not* to do what it chose to do when it set up a compensation scheme for injured firemen, or a licensing scheme for civil aviation. Those statutes ousted the prerogative *pro tanto*. The European Communities Act is a scheme elegantly designed not to oust the prerogative but to replicate a historic and wholly functional element in our constitution's balance. It is a (logically not visually) beautiful deployment of our constitution's double or triple dualism between executive and legislature, prerogative and statute, international and domestic. The Judgment implicitly regards the scheme's explicit shape as regrettable and vulnerable, and seeks to impose on it an implication which is simply foreign to its careful and precise, wholly deliberate design. The Judgment is vulnerable and regrettable, I respectfully suggest, because (as the effect of a genuinely judicial but legally mistaken analysis) it imposes on *Parliament* an alternative, judicial design.

### But what if...?

But what if the referendum had passed by only one vote? Or, as the Oxford and London academics put it when they first published the argument adopted by the Judgment, what if the Prime Minister just woke up one morning, no Parliamentary debate or referendum anywhere on the horizon, and fired off an art. 50 notification?

The idea that art. 50 notifications are irrevocable and hit the target of withdrawal like a bullet that cannot be recalled after being fired is, I believe, fanciful. One must speculate that the Government goes along with it lest contesting it result in reference of the question to a Court whose "perceived" foreignness, to say no more, was wind in many Leavers' sails. But let's accept the fancy, as I have been accepting it all along. Let's also forget, here, that there was no art. 50 in 1972, or in 1975 when Parliament first staged a referendum on leaving. The general point is that our entire mixed and balanced constitution is intended to prevent outlandish outcomes (and does sufficiently prevent them). It does so not by judicial construction of suddenly discovered "implications of law" to cut off in advance all possibility of such

<sup>11</sup> Now much more extensive in ss. 18-134 of TIOPA 2010.

outcomes materialising (or rather, lawfully materialising), but instead by Parliamentary control of Government through the ordinary mechanisms. Prime Ministers and the ministers they recommend to the Queen must enjoy the confidence of the House of Commons and will be dismissed whenever it is apparent to her that they have forfeited it to others, and the Commons can quite promptly turn off the payments out of the Consolidated Fund without which ministers cannot govern. (Professor Endicott's lecture explores all this, much more searchingly and revealingly.) In any of the imagined eventualities, the ministry would be replaced and the notification withdrawn (and its fancied irrevocability exposed, one way or another, as the bugaboo it is).

And the present situation is utterly remote from any of those imaginary scenarios. Parliament by majorities of five or six to one in each House legislated to set up a referendum which ministers had assured each House, explicitly, would enable the question of Remaining or Leaving to be settled by the people *and not by Parliament or either House*.

The "What if...?" argumentation, as Judge Sir Gerald Fitzmaurice said in the European Court of Human Rights in 1975,<sup>12</sup> is "the cry of the judicial legislator all down the ages". Parliament's "failure" to include art. 50 in its list of treaty provisions about which it has restrained the Crown's prerogative is imagined to expose us to risk of untoward, even outlandish consequences, consequences that the judges now — when no such consequences are even faintly in prospect — must step in to prevent by putting art. 50 on that list, on their own. As I have suggested tonight, that is not applying the law, but inventing a new field of litigation and of unheard-of judicial action to change, in quite unpredictable ways, both a settled principle of our constitution and the conduct of our foreign affairs, a field almost (but not quite) uniquely unsuited to judicial intervention.

The principle of legality would, I fear, be damaged if the Supreme Court, having been presented much more clearly and fully than the Divisional Court was with the evidence of Parliament's steady though discriminating respect for the principle of constitutional dualism at the intersection of international affairs with domestic law, were to reject that, like the Divisional Court, as mere formalism, and were to appeal to a realism which people can accurately sense corresponds neither to our real situation nor to the real political choice long embodied in our constitution,

<sup>12</sup> *Golder v UK* [1975] ECHR 1, 21 February 1975, plenary ECHR; separate judgment para. 37(c).

like now so few other democratic constitutions — the choice to govern ourselves through a Parliament that is sovereign over written and justiciable law.

## Postscript

John Finnis

### Brief observations on the final *Miller* judgment<sup>1</sup>

My first thought about *Miller*<sup>2</sup>: We are leaving the EU just in time; our Supreme Court is going native — reading statutes like courts in European jurisdictions characteristically do, subordinating deliberate wording and clear legislative intent to a “fundamental principle” — indeed, one which as stated and applied had never before been heard of (and is undeservedly graced by the majority with the adjective “longstanding”).<sup>3</sup>

But then my second thought: No, our own courts do this sort of thing from time to time. *Miller*, more Parliament-minded than Parliament itself, is no more radically flawed than *Liversidge v Anderson*,<sup>4</sup> more executive-minded than the Executive. The majority in *Liversidge*, like all the judges below, refused to read reg 18B of the Defence (General) Regulations 1939 as it was written, on the ground that doing so would not be realistic in wartime conditions,<sup>5</sup> even though His Majesty in Council (enacting that regulation under the Emergency Powers (Defence) Act 1939, s. 1) wrote it in and for wartime conditions and could effortlessly have written a regulation of the kind the majority Law Lords thought realistic in wartime, by defining the precondition for the Home Secretary’s power of detention in terms

<sup>1</sup> Based on notes for remarks prepared for the Administrative Law Bar Association seminar, Gray’s Inn, 23 February 2017. See also John Finnis “The *Miller* Majority: Reliant on European Perspectives and Counsel’s Failings” (Judicial Power Project, 25 January 2017).

<sup>2</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583 (24 January 2017).

<sup>3</sup> *Miller* at [81]: “It would be inconsistent with long-standing and fundamental principle for such a far reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone. All the more so when the source in question was brought into existence by Parliament through primary legislation, which gave that source an overriding supremacy in the hierarchy of domestic law sources.”

<sup>4</sup> [1942] AC 206.

<sup>5</sup> This summarises the premises and reasoning employed by Lord Macmillan at 252-54, Lord Wright at 266-67, and Lord Romer at 280-81.

such as “if he believes” or “is satisfied” or “believes he has reasonable cause” instead of what it did put: “has reasonable cause to believe”. So too, Parliament in 1972 could effortlessly have written the ECA so as to have the meaning and effect claimed for it by the majority. But Parliament plainly intended not to do so, and intended instead to leave in place our constitutional law in all its parts. Parliament could have written s. 1 ECA so as to *authorize* the Crown to ratify the Treaties, but — conspicuously to the trained eye at the time — chose not to do so.

The Miller majority says:

60. The status and character of the 1972 Act

Many statutes give effect to treaties by prescribing the content of domestic law in the areas covered by them. The 1972 Act does this, but it does considerably more as well. It authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but *actually takes precedence over all domestic sources of UK law, including statutes*. ... in constitutional terms the effect of the 1972 Act was unprecedented.

Not so — not unprecedented: counsel for the Secretary of State could have read out the Income & Corporation Taxes Act 1970, s. 497(1):

If Her Majesty in Council declares that arrangements specified in the Order have been made with the government of any territory outside the UK with a view to affording relief from double taxation and that it is expedient that those arrangements should have effect, then, ...the arrangements shall, *notwithstanding anything in any enactment*, have effect in relation to income and corporation tax...<sup>6</sup>

<sup>6</sup> Now, more or less identically, Taxation (International and other Provisions) Act 2010 s. 2. Of course, it would have been said against him that s. 2(4) ECA extends to future enactments. But that is a difference only in degree, not in kind, since in future enactments Parliament could choose whether to override s. 2(4) (by making its intent to do so sufficiently apparent), as the majority in *Miller* implicitly concede is possible in [60]:

Of course, consistently with the principle of Parliamentary sovereignty, this unprecedented state of affairs will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute.



The Miller majority continue, (still at [60]):

Indeed, it is fair to say that the legal consequences of the United Kingdom’s accession to the EEC were not fully appreciated by many lawyers until the *Factortame* litigation in the 1990s — see the House of Lords decisions in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603 and (No 5) [2000] 1 AC 524.

This claim — that the meaning or force of s. 2(4) ECA was not appreciated until *Factortame (No.2)* — was earlier floated by Lord Mance in *HS2 (2014)*.<sup>7</sup> It is, with respect, unsustainable. Indeed, it was repudiated in *Factortame (No. 2)* itself, in a passage of Lord Bridge’s at 659, quoted by Lord Reed in para 226 of his admirable (though at key points regrettably terse) dissenting judgment in *Miller*:

Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.

That this had indeed “always been clear”, and that *Factortame (No 2)* did not represent a significant development (but rather a first occasion for applying a proposition of law introduced into our law by Parliament with open eyes in 1972), is confirmed by the Commons debates in June 1972 about whether or not to make express provision in the European Communities Bill to authorize Parliament (perhaps by some formula) to protect one or some of its future enactments, whether generally or in a specific instance, from s. 2(4)’s intended effect of making UK law, present and future, subject to EU law. That debate was resolved in favour of the view that it would be *impolitic* to give the public impression that the UK was preparing

Moreover, it should not be conceded that the absence of express reference to future enactments in s. 497(1) and its successors precludes its potential to carve out an exception to future statutory provisions not plainly intended to override it or have effect notwithstanding it.

<sup>7</sup> *R (HS2 Action Alliance) v Secretary of State for Transport* [2014] UKSC 3 at [206], per Lord Mance: “Under the European Communities Act 1972, United Kingdom courts have also acknowledged that European law requires them to treat domestic statutes, whether passed before or after the 1972 Act, as invalid if and to the extent that they cannot be interpreted consistently with European law. *R v Secretary of State, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603. That was a significant development, recognising the special status of the 1972 Act and of European law and the importance attaching to the United Kingdom and its courts fulfilling the commitment to give loyal effect to European law.”

to override its Treaty obligations (EU law).<sup>8</sup> But all those who participated were clear both that s. 2(4) had that effect and that — with or without the help or precondition of specified formula — a future Parliament could override s. 2(4) either generally or in a specific case, by enacting legislation clearly intended to do so. (The Merchant Shipping legislation declared inoperative in the *Factortame* litigation was clearly intended not to override EU law — was intended rather to test the ECJ's interpretation of EU law — and no party to the litigation, least of all the Government, ever contended or admitted otherwise.) The idea that the *Factortame* litigation significantly developed our law is a sad misreading both of the enactment of the 1972 Act and of *Factortame* (1) and (2), fostered by excitable academics such as Sir William Wade. It should never have been adopted by our judiciary.<sup>9</sup>

To continue with para. [60] of Miller:

Of course, consistently with the principle of Parliamentary sovereignty, this unprecedented state of affairs will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute. For that reason, we would not accept that the so-called fundamental rule of recognition (ie the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal.

This proposition about the rule of recognition is in tension with the majority's major premise that the ECA made a *fundamental constitutional change*. And it is more nearly true than that premise is, for Parliament's intent in the ECA was to make changes of great political and economic significance without making any changes to the constitution's controlling rules and principles. So when the majority judgment says (at [78]):

There is a vital difference between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes in domestic law resulting from withdrawal by the United Kingdom from the European Union. The former

<sup>8</sup> See e.g. the speech of the Solicitor-General, *Parliamentary Debates (House of Commons)* 13 June 1972 cols. 1320-21.

<sup>9</sup> See Richard Ekins, "Legislative Freedom in the United Kingdom", (2017) 133 *Law Quarterly Review* 582-605 at 585-90; and my "Reflections and Responses" in Robert George and John Keown (eds), *Reason, Morality and Law: The Philosophy of John Finnis* (Oxford: Oxford University Press, 2013), 559.

involves changes in EU law, which are then brought into domestic law through section 2 of the 1972 Act. The latter involves a unilateral action by the relevant constitutional bodies which effects a fundamental change in the constitutional arrangements of the United Kingdom.

one must reply: No, Parliament carefully set up the ECA precisely so that neither its ongoing importation of EU law nor the cessation of that importation by withdrawal would effect fundamental change in the UK's constitutional arrangements; for it carefully both employed and left intact the constitution's controlling rules and principles. Parliament did so by adapting the long-established mechanisms for importing treaty provisions on an ambulatory, ongoing, from-time-to-time basis without having Parliament enact them itself<sup>10</sup> — a kind of mechanism one can call a statutory conduit.

The erroneous argument developed by the Miller majority in [60] and [78] is repeated, in substance, in [61], [62], [80] and [81].<sup>11</sup> What it overlooks is all the lawyerly work of Parliament in 1972. The whole point of the structuring of the ECA so as not to mirror an Independence Act was to show that while Parliament intended

10 The Miller majority judgment erroneously says in [98] that double-tax agreements require approval "by Parliament". On the contrary: they need only a resolution of the House of Commons. See John Finnis, Terminating Treaty-based UK Rights (Judicial Power Project, 26 October 2016) and Terminating Treaty-based UK Rights: A Supplementary Note (Judicial Power Project, 2 November 2016).

11 Miller at [61]:

... it is *unrealistic* to deny that, so long as that [1972] Act remains in force, the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice are *direct sources* of UK law.

At [62]:

The 1972 Act did two things which are relevant to these appeals. First, it provided that rights, duties and rules derived from EU law should apply in the United Kingdom as part of its domestic law. Secondly, it provided for a *new constitutional process for making law* in the United Kingdom. These things are closely related, but they are legally and conceptually distinct. The *content* of the rights, duties and rules introduced into our domestic law as a result of the 1972 Act is *exclusively a question of EU law*. However, the *constitutional processes by which the law of the United Kingdom is made* is [sic] *exclusively a question of domestic law*.

At [80]:

One of the most fundamental functions of the constitution of any state is to identify the sources of its law. And, as explained in paras 61 to 66 above, the 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning. This proposition is indeed inherent in the Secretary of State's metaphor of the 1972 Act as a conduit pipe by which EU law is brought into the domestic UK law.

At [81]:

...the main difficulty with the Secretary of State's argument is that it does not answer the objection based on the constitutional implications of withdrawal from the EU. As we have said, withdrawal is fundamentally different from variations in the content of EU law arising from further EU Treaties or legislation. A complete withdrawal represents a change which is different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from EU law. It will constitute as significant a constitutional change as that which occurred when EU law was first incorporated in domestic law by the 1972 Act. And, if Notice is given, this change will occur irrespective of whether Parliament repeals the 1972 Act. It would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone. All the more so when the source in question was brought into existence by Parliament through primary legislation, which gave that source an overriding supremacy in the hierarchy of domestic law sources.

that, if we acceded to the Treaties, there would be changes in our arrangements for law-making and law enforcing, changes that might appropriately be called constitutional, but no change — let alone “far-reaching change” — in our fundamental constitutional arrangements, in the constitution’s controlling rules and principles. EU law with its self-interpretation as supreme over even constitutional national law was to be left outside — foreign — outside except insofar as our machinery imported it on the well-trying basis of treaty law dependent for its domestic application on the continuing fulfilment of two necessary conditions: 1. that Parliament has stipulated that the treaty as it exists from time to time, if at all, shall have domestic legal effect; and 2. that the Crown has brought the treaty into being and chooses to remain party to it.

And here is the decisive point. Removal of either of those necessary conditions terminates the domestic legal effect. That was and is routine constitutional, dualist-system doctrine, well understood in 1972 and carefully aimed for by the following features of the ECA’s drafting:

- A. Long title: not “to make provision for and in connection with the inclusion of the UK in the EEC”, as in all contemporaneous Independence Acts, but just “in connection with”.<sup>12</sup>
- B. No reference anywhere to EU law, but only to rights and obligations arising by or under Treaties -- in conformity with the general intention of excluding the ECJ’s self-interpretation of EU law (including the Treaties) as independent and overriding of its own force.
- C. No provision to the effect that the UK shall join, or that accession is authorized<sup>13</sup> or in any way provided for except as treaty obligations the fulfilling of which in our domestic law is made possible by s. 2(1) with 2(4) and 3(1). No date of entry. Everything left to the Crown,

12 The very first argument given in the blog post that set the litigation going misquoted the long title, inserting one word (“for”) and omitting others (“in connection with”), with the effect of making the ECA seem like an Independence Act in which Parliament both *authorizes* and also makes consequential provisions in connection with the grant of independence from a day to be specified by the executive: see Nick Barber, Tom Hickman and Jeff King, “Pulling the Article 50 ‘Trigger’: Parliament’s Indispensable Role” (*UK Constitutional Law Association Blog*, 27 June 2016):

First, the European Communities Act 1972 is, as its long title states, an Act “to make provision for the enlargement of the European Communities to include the United Kingdom”. The long title of the Act is a permissible aid to interpreting the terms, and object and purpose of the Act.

Indeed.

13 The majority obscure this with the equivocal language here italicised:

77. ...we consider that, by the 1972 Act, Parliament *endorsed and gave effect* to the United Kingdom’s membership of what is now the European Union under the EU Treaties in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties.

82. by the 1972 Act, Parliament *endorsed and gave effect* to the UK’s future membership of the European Union, and this became a fixed domestic starting point.

which could legitimately decide not to accede, and could (after joining) agree with other members to abrogate the Treaties in part or in whole.<sup>14</sup>

- D. Section 1(3) leaves to the Crown the designation of what is and is not an EU Treaty beyond the list in s. 1(1) and Schedule 1.
- E. Rigorous avoidance of anything that would even seem to fetter the Crown's prerogative of treaty-making and unmaking — of anything analogous to the statutory schemes (for compensation or for licensing) enacted by Parliament itself that were at stake in the executive action that was sought to be founded on the prerogative and was held ineffective to do so in, respectively, *De Keyser* (compensation), *Laker Airways* (licensing), and *Fire Brigades Union* (compensation).<sup>15</sup>

## Conclusion

It is impossible to avoid the conclusion that those legislators and their draftsmen who constructed the ECA and saw it through Parliament had a grasp of our historic and living constitution and its rules that was richer, more subtle and more precise than the majority of our top judges 45 years later. It is a constitution in which the balance between legislative, judicial and executive power is beautifully adapted to the needs of a free people cooperating as a self-governing nation-state fit for acting, surviving and prospering in world history. Its executive is free to act on its own responsibility and initiative in dealings with the world outside our borders, answerable always to the legislature, the confidence of whose elected house it must always retain. It can introduce nothing into our law, whether by internal proclamation or external agreements, without the sufficiently expressed assent of Parliament. That assent may on occasion envisage and provide that legal rules and arrangements so introduced may be eliminated by executive agreement with foreign entities. The ECA certainly so provided in 1972, very recognizably using well-tryed

<sup>14</sup> Lord Reed at [177] [his summary]: "the effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK's membership of the EU. *The Act imposes no requirement, and manifests no intention, in respect of the UK's membership of the EU.* It does not, therefore, affect the Crown's exercise of prerogative powers in respect of UK membership." It would have been clearer to say: ECA manifests a conditional intention that the UK accede — if and to the extent the Crown may choose. But his formulation is much better than the majority's in [77] and [82] (n. 13 above).

<sup>15</sup> For the reasons given by the minority Law Lords, *R v Home Secretary, ex p. Fire Brigades Union* [1995] 2 AC 513 (though distinguishable) ought in *Miller* to have been argued to have been wrongly decided. The *Miller* decision obviously tends to cement *Fire Brigades'* officious extravagance into our law, though of course the failure to challenge it leaves the Supreme Court the more free to reconsider it in future.

models developed over the preceding century. Showing little sign indeed of appreciating either this overall balance and its subtlety, or what was really going on in the constructing of the ECA, the majority in *Miller* has arrogated to the judges an unheard-of, needless power to invalidate that cooperation of executive and legislature in foreign affairs whenever litigants can persuade the courts that it makes too “fundamental” a “change” to be allowed without special legislation.



This collection reflects on the place of judicial power in the common law constitutional tradition. It is framed around two lectures by John Finnis. The first, delivered in Gray's Inn in October 2015, considers the idea of judicial power in historical and philosophical perspective, outlining the balance that has long characterised the Westminster constitution, and considering the extent to which that balance is now in doubt.

Four eminent judge-jurists and one outstanding philosopher-legislator comment on the lecture, exploring the nature of judicial power and its changing character over time and across the common law world; a rejoinder by Finnis completes the exchange.

The second lecture, delivered in Lincoln's Inn in December 2016, considers the separation of powers – the constitutional balance – in relation to the UK's entry into, and withdrawal from, the EU. The lecture was delivered immediately before, and was much discussed in, the Supreme Court's hearing of *Miller* (the Brexit case). It is supplemented here by a postscript critically evaluating the Supreme Court's judgment in *Miller*.

With a foreword from Lord Burnett, the Lord Chief Justice of England and Wales, and an introduction by Richard Ekins, the collection is an important contribution to the public conversation about the constitution. It aims to help recall our historical constitutional tradition, and its balance of powers, to outline and evaluate contemporary judicial practice, and to inform reflection about its future development.

£15.00  
ISBN: 978-1-910812-43-3



Policy Exchange  
8 - 10 Great George Street  
Westminster  
London SW1P 3AE

[www.policyexchange.org.uk](http://www.policyexchange.org.uk)