

Constitutional Change: Unfinished Business
University College London
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The Rt Hon. Lord Judge

1. There is a broad title to this lecture, but as you all know it is linked to the project on the Politics of Judicial Independence in Britain's changing Constitution. Of course, if I were to address all the challenges now facing our constitution, you would be here until midnight. Instead I shall examine some broad themes to put in context developing constitutional arrangements which impact directly or indirectly on the judiciary.
2. I have said before that in a democratic country, all power, however exercised in the community, and whatever the individual features of the electoral system, must be founded on law. Each and every stage of the system which bestows political power has to be accounted for to the electorate at the ballot box, as and when elections take place, but the exercise of these powers must at all times be answerable to the rule of law. Independent professions protect it. Independent press and media protect it. Independent police officers protect it. Ultimately, however, it is the judges who are the guardians of the rule of law. They have a particular responsibility to protect the constitutional rights of each citizen, as well as the integrity of the constitution by which those rights exist. Without judicial independence and without respect for judicial independence these elementary facets of our civilised community are threatened.
3. Let me, however, emphasise that although the rule of law must be an overarching principle in any civilised state, I am not asserting that the judiciary has any such overarching power. In this jurisdiction, Parliament is sovereign. I shall return to this important issue, underlining that no individual, or group of individuals, nor even any judge, nor any minister, nor Parliament itself, enjoys any suspending or dispensing power. On this question, the Bill of Rights of 1689, as close as anything in our half written constitution to what can be described as a fundamental document of the constitution, asserts an irrebuttable principle. On the other hand, given the constitutional primacy of Parliament, it is a further consequence of our constitutional arrangements that matters affecting our judicial system may, and have, by statute, bestowed authority on judicial bodies in Europe. I shall return to this issue at the end.
4. With that background, let me begin with a strong assertion. In my entire 25 years as a full time judge, and some years before that as a part time Recorder, no one, in particular, no politician or civil servant or special advisor, ever once sought to indicate to me what my decision should be, or that a particular outcome might be appropriate or advisable. No one has written to me as Lord Jowitt LC wrote to Lord Goddard CJ in 1947:

“I do sincerely hope that the judges will not be lenient to these bandits (who) carry arms (to shoot at the police) ... you know I do take the view, which I think you share, that we have got rather soft and woolly when dealing with really serious crime”.

5. If any other judge, from the most senior to the most junior had been offered this kind of “advice”, I should have heard of it. I am confident that in my time it has never happened. In that sense judicial independence in the course of judicial decision making is untarnished.
6. Such an event will not happen in my life time, not least because if it were to happen, the outcry would be shattering, and at least one ministerial career would be destroyed. The public may be very critical of judicial decisions, but there is a deep understanding in the community that the fact that the decision, right or wrong, is made by an independent judge, independent in particular of the Government and ministers, is acknowledged to be an asset of unquantifiable value.
7. The independence of judicial decision making is an integral structure of the constitution, but it takes life and authority and protection from the institutional independence of the judiciary. Without institutional independence the critical environment on which the independence of judicial making depends would gradually wither. I must therefore go on to examine the constitutional context in which we embrace or purport to embrace the separation of powers – the executive, the legislature, and the judiciary and which indeed, following years of criticism of, taking one particular feature of our arrangements as an example, the role of the Lord Chancellor as a member of the judiciary, the executive and the legislature, was the declared justification for the constitutional changes first promulgated in 2003, and enacted in the Constitutional Reform Act 2005. In passing, however, let us not fool ourselves. In our constitutional arrangements, we do not have separation of powers, at any rate in the sense that it is understood elsewhere.
8. The executive and the legislature are not and never have been separate. Today every member of the Cabinet sits in our legislature: so do virtually all members of the Shadow Cabinet. So, with a very rare occasional exception, does every single minister outside the Cabinet. Queen Elizabeth I, for all her many qualities was hardly enamoured of the democratic process, and the early Stuart kings, who believed in Divine Right, recognised the obvious good sense of having ministers in Parliament, and in this respect at least, they would have been entirely at ease with the continuing influence of the legislature by the executive. It would have come as no surprise then to them to be told that between 2001 and mid 2012, during some 2500 divisions in the House of Commons, the government of the day was only defeated on six occasions. The fact that the legislature and the executive are effectively inseparable was brought home to me only a few days ago when last week, watching the television in the morning, I heard the BBC announcer say that “the Government will amend the Banking Reform Bill”, to control the cost of pay day loans. I am not being critical of the BBC. We hear remarks like this every day by politicians. I have little doubt that this information was supplied to the BBC by special advisors. But can we be clear. In our constitutional arrangements the Government neither creates, nor amends the law. It proposes changes, but the only source of power is Parliament. The problem with the shorthand form of reporting is that it tacitly accepts the control of the executive over the legislature. In constitutional theory that is an absurdity. In

constitutional practice, as the headline indicates, it has become very close to the reality, and no less important the perception of the reality. And that is very troublesome not only for the judiciary, but for all the different independencies which contribute to our free society, like the press and media, and the police and the professions.

9. I have lost count of the number of times in which I have given judgments in court or spoken in lectures about the sovereignty or supremacy of Parliament. But I have never ever spoken about the supremacy of the Government, only and exclusively about the sovereignty or supremacy of Parliament. This supremacy is confined to the legislative process which culminates in an Act of Parliament. Resolutions or motions before one House or the other, or even both, however heavily supported, have no legislative authority. They cannot create new law or amend old law. Today's Parliament cannot bind tomorrow's Parliament, even if the attempt to bind the later Parliament is enshrined in an Act of Parliament
10. The House of Commons is elected, through our democratic processes. At present, the House of Lords is not, but save as a revising or advisory part of the constitution, it has no power. If the House of Lords advises or makes suggestions with which the House of Commons disagrees, and insists on its legislation, the House of Commons must win: so that imposes a huge responsibility on our elected representatives in the legislature.
11. On the rare, very rare indeed, occasions when the Government loses a vote in the House of Commons, the media falls enthusiastically on it using the language of "humiliation", and speaking of the dissentients as "rebels", with its war like connotations, and learned commentators identifying the dangers of a "party split". The media never minds reporting what it considers to be a confrontation. Perhaps because it is so very rare indeed for the Government to lose a vote in the House of Commons, the occasion is truly newsworthy. I wish it were not so reported, but we have a free media, and they must report as they wish, and perhaps, as I have said, because it is so rare that such an occasion is newsworthy. But why?
12. An occasional vote against the Government by members of its own party is a triumph – perhaps a manifestation – that we are living in a democracy. The executive is not always right. Neither the party of government nor the party of opposition enjoys a total monopoly of wisdom. The government should not always have its way. Our history is littered with examples of noble dissent. Without dissent, publicly expressed in the House of Commons itself by members of the governing party led by Leo Amery when defeat stared us in the face, and compromise and surrender was in the air, Winston Churchill would not have become Prime Minister in 1940: to inestimable consequences for our freedoms. And at a different level, judges give dissenting judgments, disagreeing with their colleagues, to the long term health of our legal system. We do not accept the view of judges from a different tradition, that the authority of the court is weakened by dissent. To us it underlines the independence of each judge.

13. Currently the Government loses more votes in the House of Lords than in the House of Commons, but that is as it should be. Dare I say it? That is healthy, not least because of the volume of legislation which has been badly drafted, and indeed on many occasions not even considered by the House of Commons. Membership reflecting party balance, related in some way to the proportion of votes cast in any particular General Election, increases the influence of the Government, and ultimately will serve to produce a controlling influence by the Government over the House of Lords. Yet, as Baroness Hayman, speaking in the House of Lords on 24 October 2013 pointed out, the function of the House of Lords is to pressure test legislation and when appropriate “to ask the Commons to think again”. With the authority of a former Lord Speaker she reminded us that “democratic power, accountability and legitimacy lie with the Commons”. Of course: so does it really do any harm for the government of the day to lose a division? Whatever the reason for this proposal which will simultaneously add to the extraordinary bulk of the second legislative assembly, the long-term effect, if carried through to its logical conclusion by successive governments, even if unintended, will be to increase the control of the legislature by the executive. Of course the executive is bound by the law and must obey it, but it is troublesome that it is gradually achieving increasing control over the body responsible for making the law. And therefore, concerns are raised that our constitutional arrangements may be falling out of balanced kilter. The remedy must be for Parliament itself, the pre-eminently the House of Commons.
14. For me to return to the 2003 announcement of the abolition of the office of the Lord Chancellor and the changes eventually encompassed in the Constitutional Reform Act 2005 may appear to be old hat, looking at water that has already passed through the mill. The harsh unavoidable reality, not sufficiently noted, was that the institutional power of the judiciary, notwithstanding all the repeated assertions of the importance of its position as the third arm of the state, was inadequate to ensure that it was consulted about changes to the constitutional arrangements of direct application to it. The “stealth”, and I use the word deliberately, was explained by Jonathan Powell in his account of events in “The New Machiavelli – How to Wield Power in the Modern World”. This broad account has been effectively confirmed in evidence to the House of Lords Select Committee on the Constitution from Lord Turnbull and Lord Irvine as well as the then Prime Minister, Mr Blair.
15. Mr Powell was, it will be remembered, Chief of Staff to Mr Blair at the time with which we are concerned. From his account of events at page 153 it emerges that a decision was deliberately taken to hide the proposals from the judiciary. As he explains, in 2001 it was proposed “to put the courts into the Home Office”. The absurdity of this idea was perhaps too obvious for me to explain it now, but just in case anyone may be in doubt, one example will suffice. If implemented, rather than being the fabled lions under the throne, the judiciary would have been relegated, in the unforgettable phrase used by Stable J in 1944 following the decision of the House of Lords in *Liversidge v Anderson*, to the role of mice squeaking under the Home Secretary’s chair.

16. This was a major constitutional change, and in a constitution which provides for and is based on at least the theory of the separation of powers, how could this be? This is not just a matter of courtesy to the Lord Chief Justice and the judiciary, although that is not unimportant. Nor is it a question whether the changes were right or wrong, desirable or unwise. The real question which arises for consideration today is whether we have a separation of powers at all. We have a separation of powers which manifest itself in a separation of decision making responsibilities by the judiciary which is independent of the executive and the legislature, but it is hardly a manifestation of the institutional independence of the judiciary for them to be side lined on matters of direct immediate concern to them. In the end, as I accept, the final decision would have to be for Parliament, but the possibility that the Prime Minister and the Government might change their mind about how to approach these issues after discussion with the judiciary was apparently obviated because on the earlier occasion the judiciary had successfully persuaded the Government that it was a daft idea to put the courts into the Home Office: as indeed it was, and subsequent events undoubtedly proved.
17. The clamour for the separation of powers led the Law Lords, now transferred into the Supreme Court, and the Lord Chief Justice to be deprived of their long standing right to speak in debates in the House of Lords. The single method of communication now available to the Lord Chief Justice is a letter to Parliament, but he cannot stand up and speak in our sovereign Parliament, even on issues which directly affect the administration of justice. Although the change was based on lip service to the separation of powers, as I have already described, Government ministers continue to enjoy rights of audience in the House of Commons and the House of Lords of which the Lord Chief Justice was and remains deprived.
18. In the Concordat subsequently published in early 2004, the “Overview the overall aim of these reforms is to put the relationship between the executive, legislature and judiciary on a modern footing, respecting the separation of powers between the three”. Nevertheless, when the decision was taken to remove responsibilities from the prisons from the Home Office into the Ministry of Justice. I first read about this proposal, which was enacted in 2008, in a ministerial article written in a Sunday newspaper. I doubt if we shall ever know, and by the time we do know, if we do, it will not matter, whether this was part of the original plan put together in Downing Street in 2003, equally concealed, so that the project was implemented in two stages rather than one, or whether the second stage reflected some further thinking, equally concealed, quite unconnected with the original proposal to bring the areas of responsibility for the Home Office closer to the judicial system. At the time I was one of the Heads of Division, the Division most closely affected by the proposal, and was totally unaware of it until after the article had been published. The then Lord Chief Justice was equally left in the dark.
19. These proposals, both directly impacting on our constitutional arrangements and of immense importance to the judiciary and now implemented, have had their own combined effect on the position of the judiciary. Although its impact has been overlooked, the second change, that is the expansion of the

responsibilities of the Lord Chancellor has been detrimental to institutional independence. It is not a tidal wave, but rather the consistent steady drip. The entire change is symbolised in the note paper. The once great office of Lord Chancellor has been relegated to second place behind the new ministerial office of the Secretary of State for Justice. That presumably was another deliberate decision. As a matter of symbolism, if nothing else, the Lord Chancellor has become an after thought to the Secretary of State. What's in a name? Well, this particular rose does not smell as sweet as once it did. The judiciary is no longer represented at the Cabinet table by an individual holding an ancient office whose only personal ministerial responsibility – his specific role and sole focus – was to represent and protect the independence of the judiciary and to ensure that the needs of the administration of justice were clearly understood both by the Government and by Parliament. I have heard from a number of different sources, former Cabinet ministers on both sides of the political spectrum, that this specific role was understood by the Lord Chancellor's colleagues to be distinct from their own. The additional responsibilities now attaching to the department mean that the judiciary, and the administration of justice, have ceased to be his weightiest responsibility. The role of the Lord Chancellor has been diminished.

20. As Lord Chief Justice for five years, I had dealings with three separate Lord Chancellors, one in the previous government, and two in the present government. My observations are not critical of any of them personally. Perhaps indeed I should say that in my dealings with Jack Straw, Ken Clarke, and now Chris Grayling, first, that we could agree or disagree, and that on occasions each of them was persuaded to the view that I was advocating. Second, that I believe that each sought to reflect the views of the judiciary to his Cabinet colleagues as I had relayed them, if and when any such questions arose. But however sympathetic and supportive the Lord Chancellor might be, focussing exclusively on his responsibility for the judiciary, his clout has been reduced. On these issues the office cannot carry the weight it once did.
21. Faced with this situation, I asked for and I acknowledge that no difficulty was presented for arrangements to be made (and I imagine this too was a further step in our developing constitutional arrangements) for the Lord Chief Justice to see the Prime Minister on a more or less regular basis about twice annually to speak to him about matters of concern to the judiciary. The content of the meetings is confidential, but it would not be a breach of confidence to suggest that this was not without its value to his understanding of our position. But this is a substitution, and speaking for myself as the substitute, I can say a pretty poor substitute. The substitute must and cannot be a politician, and cannot and must not have a seat at the Cabinet table, and cannot perform the previous function of the Lord Chancellor. The Lord Chief Justice is therefore a very different Head of the Judiciary.
22. For many years now it has been the convention that judges do not comment on matters of political controversy. The principle is very sound. Even on the most superficial basis, judges have to make controversial decisions in the cases before them, which is probably quite enough controversy for anyone. But obviously the reasons go deeper, and are well understood. As Lord Chief

Justice I adhered to that principle. I am no longer bound by it, although, obviously, I cannot breach confidences or discuss matters which were entrusted to me when I was in office. What my successor would do if faced with any repetition of the public announcement of major proposals for constitutional change affecting the administration of justice without any prior consultation with him will, of course, be a matter for the Lord Chief Justice. Those of you who have listened so far will recognise my hope, indeed my expectation, that there will be no repetition, never again.

23. One of the major consequences of the constitutional changes related to the method for funding the court system. Its importance to the issue of independence was described by Lord Browne Wilkinson during his Francis Mann lecture:

“If Parliament and the minister between them control a provisional and allocation of funds, how can the administration of justice be independent of the legislature and executive? He who pays the piper calls the tune.”

24. Writing when he did, he was speaking of a rich country without any “real conflict as to the provision and allocation of funds”. That has changed. We have been going through a national financial crisis. The cost of the administration of justice is but one of a number of demands on public funding, and it is for Parliament and the Government to identify the priorities, and then for the expenditure of public funds on the judicial system to be explained and accounted for to Parliament. There is now an annual budget exercise for HMCTS. The Concordat arrangement, in very brief summary, left the Lord Chief Justice with three options when considering the proposed annual budget: to agree it; to neither agree nor dissent from it; finally, to reject it, explaining why in writing to Parliament. On every occasion bar one, after taking advice of my colleagues, I agreed the proposed budget. On one occasion I neither agreed nor disagreed, but as it turned out, my pessimism was misplaced and the funding proved adequate, just, but there is no fat or flab left, and when the national emergency is over, we must anticipate improved facilities.

25. In the mean time, I became increasingly dissatisfied with these new arrangements. They needed reconsideration. The proposed reforms of Her Majesty’s Court and Tribunal Service (HMCTS) attracted headlines which suggested that the court system was about to be privatised. The headline, as often the case with headlines, was inaccurate.

26. My concerns were varied, but they included the way in which the funding of the Prison Service – demand led, as it is – inevitably tends to take priority in the allocation of the financial resources of the Department, the equally inevitable overall reduction required of the Department by the Treasury, the consequent absence of capital investment at a time when both the estate, and perhaps more important to the modernisation project, IT, required significant investment, all in an overall process which was worked on the basis of an annual assessment, and hoped for agreement between the Lord Chancellor and

the Lord Chief Justice of the day. These, and other flaws, needed closer examination, and reform.

27. No breach of confidence is involved in suggesting that in the context of a basic principle that it is for the State to provide the funding for an effective judicial system, accountable to Parliament, the proposed creation of a new funding system will inevitably give rise to a number of different points of view which will not necessarily be consistent. It would also be surprising if the views of different bodies with a justified interest in any new arrangements will always coincide. There is the minister, and the Government, his department, the Treasury, HMCTS itself, and last but certainly not least the judiciary.
28. We must all wish the discussions well. If, however, there is one absolute principle to be underlined in the context of the issues we are now addressing, it is that the solution should not be imposed on the judiciary, and that any changes should only take place with the concurrence of the Lord Chief Justice. It is not enough for him to be consulted. Consultation can sometimes be no more than a fig leaf and this leads me to the further suggestion that stems from the new responsibility of the Lord Chief Justice as Head of the Judiciary of England and Wales. In short, although he is in charge not of a department of state, he is responsible for an arm of the state. And if the separation of powers is to mean anything at all, the concurrence of the Lord Chief Justice is required, and that his concurrence to any change affecting the administration of justice should, from now on, automatically be built into any proposals for further change. This, it seems to me, is an essential minimum requirement and the logical response to the constitutional changes to which I have referred. The same would of course apply to the Heads of the Judiciary in Scotland and Northern Ireland.
29. So, for example, I was delighted when the Lord Chancellor accepted my strongly held view that in relation to televising of the court system, With the expertise of the judiciary generally, the Lord Chief Justice is in a far better position to make an objective judgment about the impact of televising court trials on the administration of justice generally, and the witnesses and victims, and the process, than a minister, particularly given that the Lord Chancellor no longer has to be a lawyer, and that in any event, in his capacity as a minister, there will be political imperatives for him to consider. This underlines that the concurrence of the judiciary must now become a significant feature of our constitutional process.
30. To that I must just add one short, but nevertheless important footnote: of course in the unlikely event that the concurrence of the Lord Chief Justice to any measures requiring his concurrence is unreasonably withheld, as we all know, it would be open to the Minister to go to Parliament and seek the enactment of legislation to implement changes to which the Lord Chief Justice was opposed. But there would then, at least, be a full debate and argument on the issue. As I accept, the legislature will always win. Such a process, however, would ensure that the country at large would appreciate the full importance of the issues.

31. Would it, however, be totally inconsistent with our nebulous concept of the separation of powers for the Lord Chief Justice to be permitted to address the House of Lords in such an event? How ever much weight is attached to a paper or written submission, in our traditions the value attached to orality has not been diminished. And, in accordance with our traditions, we tend not to make judgments without giving an equal opportunity to both sides to be heard. How much better for these processes to take place within our existing constitutional arrangements rather than for the Lord Chief Justice of the day to, in effect, call a press conference in his court in the Law Courts, to argue his point of view? It takes very little imagination to envisage the potential dangers of using such a method of negotiation: rather than encouraging a solution, it would foster division.
32. In my view therefore the prohibition, at any rate as it affects the Lord Chief Justice, in relation to matters affecting the administration of justice, and in particular any issue which in his view affects the constitutional position and institutional independence of the judiciary, should be reconsidered. Notice, however, my continuing acceptance and underlining of the principle of ultimate parliamentary sovereignty.
33. Unlike the United States of America our judiciary, even the judiciary in the Supreme Court of the United Kingdom, does not provide a check or balance against the supremacy of Parliament. The Founding Fathers of the United States made express provision for this form of check and balance just because they were deeply suspicious of Parliament. Properly enactment Acts of Parliament triggered off the events which culminated in the Declaration of Independence. Nowadays, in very brief summary, in the United States legislation must not contravene the constitution, the written constitution, and the Supreme Court of the United States has supreme authority over the interpretation of the constitution. This cannot simply be amended by the will of a bare majority of both Houses. The end result is that on an issue of profound moral, social and personal importance, like termination of pregnancy, the final decision is made by nine Justices, and indeed it can be the final decision by five of them. In our constitution, an Act of Parliament was required. What is more, by contrast, if Parliament disagrees with the law as enunciated by our Supreme Court it can and sometimes does immediately overrule it by fresh legislation. That is one side of the coin. The other side is too frequently overlooked.
34. The consequence of the sovereignty of Parliament is that whether they like it or not, judges are bound to apply an Act of Parliament even where that Act provides for the application of judicial authority from a foreign court. This was the result of the European Communities Act 1972. The position of the judiciary is frequently misunderstood. Judges have no choice. They are bound by British law to follow the rulings of the Court of Justice of the European Union in Luxemburg. Our judiciary cannot set aside the law enacted by Parliament, nor suspend it nor dispense with it. To do so would contravene the Bill of Rights. Exactly the same principle applies to the enactment of the Human Rights Act 1998. The courts are required by

domestic legislation to implement the European Convention of Human Rights just because the Human Rights Act is legislation enacted by Parliament.

35. With great respect it is no good in our Parliamentary democracy for anyone to believe, or suggest that resolutions of one or other or both Houses of Parliament, or public declarations of the wishes of the Prime Minister and his ministers, can alter the constitutional obligation of the judiciary to apply the Human Rights Act, and therefore the European Convention.
36. I suspect that I was not the only judge, and I suspect that it was not only judges who were astounded to read the observation of the Home Secretary at the recent Conservative Party Conference that “some judges chose to ignore Parliament and go on putting the law on the side of foreign criminals instead of the public”.
37. This was yet one more reaction by successive Home Secretaries which underlines how right the judges were, when they were provided with the opportunity to do so, to fight the proposal in 2001 that the Home Secretary should become the Minister responsible for the administration of justice. It is, of course, for the other political parties who were said to “value the rights of terrorists and criminals more than the rights of the rest of us” to make their own case. I confidently assert that there is not a single judge in the jurisdiction who would seek to put the interests of a foreign criminal ahead of those of a victim of crime, or the public generally. But, a judge cannot ignore an Act of Parliament, and a resolution of the House of Commons has no sufficient legal force to suspend or dispense with legislation. Judges must apply statute, no more, but no less, and if the consequence of legislation properly enacted, as it worked out in practice, is unacceptable to Parliament, the remedy is in Parliament’s hands.
38. What I have described as the statutory bestowal of judicial authority from Europe has been and remains highly problematic. Undoubtedly it represented constitutional change, and addressing the consequences will itself represent further constitutional change. The issues merit a lecture on their own, but there is no doubt that, whatever the political implications, the consequent constitutional issues will have to be addressed.
39. In the context of an economic community of nations, it seems clear that one court must interpret the relevant treaty and its consequences and effect. In simple terms, each nation joining the community has to accept that all the nations in the community are in it together. If each country decided that it could ignore the decisions of the Luxemburg Court in relation to economic matters with which they disagreed, and adopt those which were regarded favourably, the community itself would disintegrate. But, as I have emphasised, this is a court giving rulings about the workings of a common market.
40. My major concern arises from the impact on our domestic arrangements of the role of the European Court of Human Rights in Strasbourg. This is not a jurisdiction directed to the running of a common market. And unlike the

USA, Europe is not a federal state. It is not a state at all. The Court is a judicial body, in which a group of independent nations is each represented by one judge. Each nation is sovereign within its own territory, each has its own constitutional arrangements, and each enjoys its own traditions. There has been a considerable difference of views between judges in this jurisdiction, both in judgments and in public lectures, about the Human Rights Act and the particular wording of four words in s.2(1) of the Human Rights Act. This provides that our courts “must take into account” the decisions of the court in Strasbourg. The obligation is mandatory. But what does it actually mean?

41. The different arguments are superbly addressed by Sir John Laws in his very recent Hamlyn lecture, and indeed when I read it, as I did on Monday, I reduced many of the things I was going to say on this issue. Personally, I have never doubted, and have spoken publicly to the effect that the words mean what they say. To take account of the decisions of the European Court does not mean that you are required to apply or follow them. If that was the statutory intention, that would be the language used in the statute. The principles of stare decisis, that is, the principle that superior courts bind inferior courts, principles which govern the way in which our domestic courts work, has been erroneously applied to the decisions of the Strasbourg Court, in effect, with a few limited exceptions, the suggestion is that our courts, if not bound to do so, should follow the Strasbourg court.
42. In my view, the Strasbourg Court is not superior to our Supreme Court. It is not, and it is important to emphasise, that it has never been granted the kind of authority granted to the Supreme Court in the United States of America, authority, let it be emphasised, which is well established in the constitutional arrangements of that country. Nevertheless, although not in any sense a Supreme Court of Europe, which, I repeat, does not consist of a federation of states as the United States of America does, by using the concept of a “living instrument”, the Court appears to be assuming, or seeking to assume the same mantle.
43. Thomas Jefferson would have forecast that this assertion of judicial power was inevitable. He wrote in 1820, following the decision in *Marbury v Madison*, “It is a very dangerous doctrine to consider the judges as the ultimate arbiters of all constitutional questions”. He was worried that the Constitution would become “a mere thing of wax in the hands of the judiciary”. Addressing those issues in Europe today, he would have applied them to the Convention. This is not a lecture about the constitutional affairs of the USA, but it was this process that ultimately led to the supremacy of the Supreme Court on issues like abortion.
44. Let us now consider a very recent decision, *Del Rio Prada v Spain*, a decision of the Grand Chamber given on 21 October 2013, where the Court referred to the “progressive development of the criminal law through judicial law-making” as a well entrenched and necessary part of the legal tradition in the convention states in a way which suggested that the Court itself was vested with the power progressively to develop the criminal law throughout Europe. Later in the judgment, addressing Article 46 of the Convention, the Grand

Chamber unequivocally stated that its effect was that when the Court finds a violation of the Convention, the state against whom the finding is made is under a “legal obligation” not only to pay the sums awarded by way of just satisfaction, but to take individual or, if appropriate, “general measures in its domestic legal order to put an end to the violation found by the Court and to redress its effects”. Notice, this is not a recommendation. Although the judgment then acknowledges the freedom of the state to choose the means by which the “legal obligation” will be discharged, it is left with no alternative, and the Court may order the particular measures required to remedy the violation. All this is said to arise from a Convention obligation. This is no longer a question of the meaning of statutory construction of s2(1). If this observation of the Grand Chamber means what it says, the court in a foreign jurisdiction is asserting an unappealable right to impose legal obligations with which this country, and ultimately every country in Europe, must comply.

45. Let us return to our own constitutional position. In relation to the Convention, the Supreme Court cannot dispense with a clear statutory provision. At best, it can make a declaration that a statutory provision is inconsistent with it. That leaves the remedy to Parliament. It cannot order “general measures” to be taken, and if it did, Parliament could simply ignore the Court, or immediately take legislative steps to disapply the ruling.
46. Where do we go from here? It would, I believe, make sense for s2(1) of the 1998 Act to be amended, to express (a) that the obligation to take account of the decisions of the Strasbourg Court did not mean that our Supreme Court was required to follow or apply those decisions, and (b) that in this jurisdiction the Supreme Court is, at the very least, a court of equal standing with the Strasbourg Court. Attention could then be directed to Article 46.1, that the parties to the Convention “undertake to abide by the final judgment of the court in any case to which they are parties”. This was not part of the Human Rights Act itself. In theory, it applies only to cases to which the United Kingdom was a party. But that merely means that the application of the legal obligation to remedy the fault found by Strasbourg would be delayed until a British case raising the same point reached the court. If Article 46 means what the Strasbourg Court has said it means, the disputes about the meaning of “must take account” will become increasingly academic.
47. My profound concern about the long-term impact of these issues on our constitutional affairs is the democratic deficit. As I emphasised at the outset, in our constitutional arrangements Parliament is sovereign. It can overrule, through the legislative process, any decision of our Supreme Court. In relation to the Strasbourg Court, and the Convention, is this principle negated by our accession to the treaty obligation contained in Article 46? Do we, can we, accept the obligation recently announced in *Del Rio Prada* that when a UK case arises, our Parliament must take “general measures in its domestic legal order to put an end” to the violations found by the European Court? Can that possibly be required if Parliament disagrees? For me the answer is, of course not. But these observations clearly indicate the intended route, and the future is long as well as short.

48. These issues are of huge importance not only to the citizens of this country, but to the sovereign states of Europe as a whole. They are not confined to the United Kingdom. Are we, are they, prepared to contemplate the gradual emergence of a court with the equivalent jurisdiction throughout Europe of that enjoyed by the Supreme Court in the United States of America? Thomas Jefferson would have strongly advised us against it. This is not a pro or anti European stance. It is a constitutional issue which has never had to be faced in our jurisdiction, partly because the constitution is largely unwritten, and partly because we have always accepted that ultimate authority was vested in legislation enacted by Parliament, so much so, that again under the Bill of Rights the processes in Parliament cannot be questioned. You can argue for and against prisoner voting rights. You can argue for and against the whole life tariff. Reasonable people will take different views. My personal belief is that parliamentary sovereignty on these issues should not be exported, and we should beware of the danger of even an indirect importation of the slightest obligation on Parliament to comply with the orders and directions of any court, let alone a foreign court. Ultimately, this is a political, not a judicial, question. In the meantime, the House of Commons is answerable to the electorate, and our judiciary will continue to apply properly enacted legislation.