



BENTHAM ASSOCIATION

PRESIDENTIAL ADDRESS 2014

Are the judges too powerful?

The Rt Hon Lord Dyson, Master of the Rolls

Mr Bentham

It is a huge honour for me to be here tonight. As many of you know, UCL occupies a special place in my heart. I have attended more Bentham Presidential lectures than I care to think about. My first one was in 1986 and I have missed very few since then. Last year I received an honorary LLD from this wonderful institution and now it is my turn to give this prestigious lecture. Conscious of the glittering roll call of past presidents, I am faced with a daunting task.

As I said, I have been coming here for many years. So too has my dear friend Edwin Glasgow QC. He has been chairman of the Bentham Association and its predecessor for 15 years. He has chaired these annual events with consummate elegance and wit. He is a brilliant advocate. I owe a great debt to him for his irresistible advocacy which as long ago as 1986 persuaded me to move and become head of his chambers. This was a career move from which I benefited greatly.

The departure of Edwin is a big loss to Bentham. But the arrival of another good friend, Nigel Pleming QC, is a great coup. He is one of the outstanding public law barristers of his generation. Bentham is lucky to have him.

Mr Bentham was no great admirer of the judiciary. He once said “the same fungus, which when green, is made into Bar, is it not, when dry, made into Bench?” He distrusted the judges. When drafting a “New Plan for the organisation of the Judicial Establishment in France” in the 1820s, he was adamant that judges should not be permitted to legislate: “Appointed for the express purpose of enforcing obedience to the laws, their duty is to be foremost in obedience. Any attempt on the part of the judge to frustrate or unnecessarily to retard the efficacy of what he understands to have been the decided meaning of the legislature, shall be punished with forfeiture of his office.”

The proper role of the judge in a democratic society continues to excite much interest and to provoke differences of opinion. Lord Sumption contributed to the debate in his recent Sultan Azkan Shah lecture delivered in Kuala Lumpur. He asked: what kinds of decisions should properly be taken by the judges and the courts, as opposed to other agencies of social control? He suggested that there is or may be an excess of judicial lawmaking. In this lecture, I intend

to consider two distinct questions. The first is whether, on the purely domestic front, our courts are trespassing into areas which should not be their preserve. The second is whether the European Court of Human Rights is overstepping the mark in imposing political and social values on the UK for which it has no democratic mandate. Both questions raise big issues on which many have expressed views in recent years.

I start with the domestic scene. The topic has become of more interest to the general public in recent times because of the rise of judicial review. But before we come to judicial review, we should not lose sight of the fact that the general problem of the boundary separating the legitimate development of the law from legislation is not new. In *Omychund v Barker* 26 Eng Rep 14 (1744), the question before the court was whether the testimony of a witness who refused to swear a Christian oath could be admitted in evidence in an English trial. Several witnesses who are called by the plaintiff swore an oath in the manner of their Gentoo (ie Hindu) religion. You may know that Mr Bentham wanted to get rid of all religious oaths. There was no binding authority on whether this kind of oath was sufficient. Counsel for the plaintiff was William Murray (later the great Chief Justice Lord Mansfield). He submitted to the judge, Lord Chancellor Hardwicke, “the only question is whether upon principles of reason, justice and convenience, this witness ought to be admitted”. He explained the key role of the courts in making law, because the legislature cannot predict all the eventualities that may occur after it enacts a statute: “all occasions do not arise at once; now a particular species of Indians appears; hereafter another species of Indians may arise; a statute very seldom can take in all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament”. The Lord Chancellor admitted the testimony of the witnesses who had sworn according to their religion.

Now it is true that the Lord Chancellor did not explicitly accept the full floridity of counsel’s submissions. It may also be said that the control over the court’s processes is classic judicial territory. Nevertheless, it is a striking early example of the court grappling with the legitimate scope of judicial power.

But over the centuries, judges have developed the common law, sometimes in dramatic ways. In *Woolwich Building Society v Inland Revenue Commissioners* [1993] AC 70, the House of Lords had to decide whether to overturn a longstanding rule that there was no right of recovery of money paid under a mistake of law in response to an ultra vires demand by a public authority.

One argument against the recognition of a right of recovery was that it would overstep the boundary which separates legitimate development of the law from legislation. As to this objection, Lord Goff said:

“I feel bound however to say that, although I am well aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case. Indeed, if it were to be as firmly and clearly drawn as some of our mentors would wish, I cannot help feeling that a number of leading cases in your Lordships’ House would never have been decided the way they were.”

One of the arguments advanced against changing the law was that it was accepted that some limits (in addition to the usual 6 year time bar) had to be set to such claims and that the selection of such limits, being essentially a matter of policy, was one which the legislature alone was equipped to make. But Lord Goff did not accept that this was persuasive enough to deter him from recognising in law the force of the justice underlying the claim. He gave a

number of reasons. These included that the opportunity to change the law would never come again; and however compelling the principle of justice might be, it would never be sufficient to persuade a government to propose its legislative recognition by Parliament. Lord Goff was not prepared to leave it to Parliament to change the law.

The subject matter of the *Woolwich* case was far removed from court processes and the administration of justice. It was firmly in the area of substantive law. But the law of unjust enrichment or restitution was itself a creature of the judges. So why should the judges not sweep away a restriction on the right of recovery which could now be seen to be unjust?

But it was a controversial decision. Lord Keith dissented saying that what was proposed amounted to “a very far reaching exercise of judicial legislation” and that the rule that money paid under a mistake of law was not recoverable was “too deeply embedded in English jurisprudence to be uprooted judicially”. He added: “formulation of the precise grounds upon which overpayments of tax ought to be recoverable and of any exceptions to the right of recovery, may involve nice consideration of policy which are properly the province of Parliament and are not suitable for consideration by the courts.”

The law was changed by a majority of 3:2.

In *National Westminster Bank v Spectrum Plus* [2005] AC 680, Lord Nicholls said at para 32:

“The common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. That is still the position. Continuing but limited development of the common law in this fashion is an integral part of the constitutional function of the judiciary. Had the judges not discharged this responsibility, the common law would be the same now as it was in the reign of King Henry II. It is because of this that the common law is a living instrument of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live”.

The development of the common law is often said to be incremental. But some of the increments have been bold and of major significance. For example, a view long held was that there could be no liability in tort for negligent misstatements. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] AC 465, Lord Reid accepted that the law should treat negligent words differently from negligent acts. The law ought so far as possible to reflect the standards of the reasonable man and that is what the House of Lords had set out to do in *Donoghue v Stevenson* [1932] AC 562. Lord Reid set out the relevant differences between acts and words and said that there was “good sense” behind the then existing law that in general an innocent but negligent misrepresentation gave no cause of action. Something more was required than mere misstatement. He then said in a celebrated passage that what was required was a relationship where it was plain that the person seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required and where the other knew or ought to have known that the inquirer was relying on him. So here we can see the law (as the embodiment of the reasonable man) being developed in a detailed and creative manner.

My next example is from the field of marital rape. It had long been part of our common law that a husband could not be guilty of the rape of his wife: see Sir Mathew Hale *History of the Pleas of the Crown* (1736) Vol 1 ch 58 p 629. Lord Keith in the House of Lords said that the common law was capable of evolving in the light of changing social, economic and cultural developments. Hale’s proposition reflected the state of affairs at the time it was enunciated. Since then, the status of women, and in particular married women, had changed out of all

recognition in various ways. In modern times, marriage is regarded as a partnership of equals. Any reasonable person must regard as quite unacceptable the proposition that by marriage a woman gives her irrevocable consent to sexual intercourse with her husband in all circumstances. Lord Keith also said, perhaps imaginatively, that the decision would not involve the creation of a new offence, but the removal of a common law fiction which had become anachronistic and offensive. This is another example of the court developing the common law by reference to what it conceives to be the view of the reasonable person in contemporary circumstances.

But there were those who, although delighted with the decision, felt that it was a matter for Parliament. Jo Richardson, Labour spokeswoman on women's affairs said: "it's fine and very welcome to have caselaw like this. But it still leaves it to the whim of the court and the whim of the judges. We need to make women feel secure and know that if they take a case they have got a reasonable chance of getting through with it" (Times 24 October 1991). Lord Denning made a similar point: "the law was ripe for change, but it was not for the Law Lords to do it". That was perhaps a surprisingly conservative thing for Lord Denning to say, but he was very old and long since retired.

This change did not require any difficult policy choices to be made. It was uncontroversial, widely welcomed and long overdue. Ms Richardson's unkind reference to judicial whimsy seems ungracious. It is and was inconceivable that Parliament would reverse this decision. Parliament had had plenty of opportunity to legislate for an amendment of the law. It seems that the political call for change was not sufficiently compelling. The judges were surely right to step in.

Many common law developments raise what can properly be described as policy choices. The question whether advocates should be liable in negligence is a good example. The immunity previously enjoyed at common law was based on grounds of public policy: see *Rondel v Worsley* [1969] 1 AC 191 and *Saif Ali v Sydney Mitchell & Co* [1980] AC 198. In *Jones v Kaney* [2011] 2 AC 398, the court had to decide whether to abolish the common law rule that an expert witness could not be sued in negligence by his client. The immunity was based on policy considerations. The majority of the Supreme Court held that the immunity could no longer be justified, particularly in view of the abolition of the immunity of the immunity of advocates. They held that the immunity could not be justified in the public interest. They were not persuaded that, if experts were liable to be sued for breach of duty, they would be discouraged from providing their services at all; or that immunity was necessary to ensure that expert witnesses give full and frank evidence to the court; or that any of the other undesirable consequences would occur that it was said were likely to occur if the immunity were removed. The dissentients disagreed for a variety of reasons. These included that there was uncertainty as to what the effects of the change would be. It was not self-evident that the policy considerations in favour of introducing the change were so strong that the court should depart from previous authority to make it. The change should not be made on an "experimental" basis. The topic was more suitable for consideration by the Law Commission and reform, if thought appropriate, by Parliament than by the court.

My final example is *R (Prudential plc) v Special Commissioner of Income Tax* [2013] 2 AC 185. The main issue here was whether the legal advice privilege afforded to advice given by members of the legal profession should be extended to legal advice given by someone who is not a member of the legal profession, for example an accountant. By a majority of 3 to 2, the Supreme Court decided that it should not be extended. The majority gave a number of reasons for this. Perhaps foremost of these was that the issue raised a number of policy

issues. It was better to leave it to Parliament to decide what, if anything to do about them. The minority view was that legal advice privilege was a judge-made creature of the common law. No question arose of social or economic or other issue of macro-policy which are classically the domain of Parliament. There was no reason in principle why legal advice privilege should not be accorded to legal advice given by non-lawyers.

It can be seen from these few examples how judges take opposing positions on what is for them and what is for Parliament. The law reports are replete with examples of important judicial law-making in diverse areas affecting many aspects of our national life. Some of the decisions have been bold and creative and have involved difficult policy choices. My few (inevitably highly selective) examples may give an impression of randomness which suggests that the Labour spokeswoman was right after all. But she was not. It is true that, in deciding whether to develop the common law or to leave any change to Parliament, the courts do not apply some overarching principle. That is not how our unwritten constitution works. But there is nothing whimsical about this.

In his essay *The Judge as Lawmaker: and English perspective in the Struggle for Simplicity in Law: Essays for Lord Cooke of Thoroton* (1997), Lord Bingham identified a number of situations in which most judges would shrink from making new law. These were (i) where reasonable and right-minded citizens have legitimately ordered their affairs on the basis of a certain understanding of the law; (ii) where, although a rule of law is seen to be defective, its amendment calls for a detailed legislative code, with qualifications, exceptions and safeguards which cannot feasibly be introduced by judicial decisions, not least because wise and effective reform of the law calls for research and consultation of a kind which no court of law is fitted to undertake; (iii) where the question involves an issue of current social policy on which there is no consensus within the community; (iv) where an issue is the subject of current legislative activity; and (v) where the issue arises in a field far removed from ordinary judicial experience. This is not an exhaustive list.

This is a characteristically perceptive distillation of some of the relevant caselaw. But I do not believe that judges consciously apply these principles as if they are applying something akin to statutory guidance. My few examples demonstrate well that some judges are more cautious than their colleagues; others are more adventurous. But despite these differences, the common law continues to evolve. What is clear is that the judges have great power in shaping the common law and, therefore, influencing the lives of all of us. The existence of this power is, of course, always subject to Parliament. If Parliament wishes to change the common law, it can do so. But, despite some notable exceptions (for example, the change to the law on causation in asbestos-related disease cases), Parliament rarely shows any appetite for changing the common law. So far as I am aware, the manner in which the judges develop the common law has not excited much political comment or given rise to a demand to clip the wings of the judges. I would like to think that this is because, on the whole, the judges have done a good job in this area and no-one has suggested a fundamentally different way of doing things that would command popular support.

It may have been noticed that, so far, I have steered clear of judicial review. All my examples (except the rape case) have been taken from the field of private law.

I must now turn to judicial review. The Government says that it acknowledges the importance of judicial review. In its Consultation Paper dated December 2012, the Secretary of State for Justice said: “Judicial Review is a critical check on the power of the State, providing an effective mechanism for challenging decisions of public bodies to ensure that

they are lawful” (para 1.2). As I said in *R (Cart) v Upper Tribunal* [2012] 1 AC 663 at para 122: “Authority is not needed (although much exists) to show that there is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review”. It is the courts that are the guardians of the rule of law.

I do not believe that any of this is now controversial. But whereas judicial development of private law seems to have gone largely unnoticed except by lawyers, the same cannot be said for judicial review. In his FA Mann Lecture (2011), Lord Sumption expressed a concern that judges are tending to intervene in decisions of public authorities which they should leave well alone. He revisited the issue in his recent Kuala Lumpur lecture. He referred to the statement by Lord Diplock in *R v Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Businesses* [1982] AC 617 that Parliament is sovereign and has the sole prerogative of legislating; officers or departments of central government are accountable to Parliament for what they do as regards efficiency and policy and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge. Lord Sumption said that this statement, though neat and elegant, is “perfectly useless” because it begs all the difficult questions, in particular: what is a question of law and what is a question of policy? Lord Diplock would not have been amused.

Lord Sumption illustrated the inadequacy of Lord Diplock’s analysis by a detailed consideration of the decision in *R v Lord Chancellor ex p Witham* [1998] QB 575. Section 130 of the Supreme Court Act 1981 empowered the Lord Chancellor to fix the level of court fees in the most general language: “The Lord Chancellor may by order under this section prescribe the fees to be taken...”. In 1997, the Lord Chancellor introduced new regulations providing for an increase in the court fees, but omitting provisions in the previous regulations which had exempted people on income support. They had to pay the court fee like everyone else. Mr Witham was a man on income support. He wanted to bring a libel claim but could not afford the fee. So he applied for judicial review of the new regulations.

The application came before the Divisional Court which quashed the regulations. Laws J delivered the leading judgment. He said that access to justice at an affordable price was a constitutional right. It was a basic or fundamental right which could not be abrogated unless specifically permitted by Parliament. The general words of section 130 of the 1981 Act were not sufficiently specific to authorise the Lord Chancellor to make the new regulations.

In my view, the analysis of Laws J was entirely orthodox and should not have caused great surprise. Indeed, Lord Sumption himself referred in his earlier FA Mann lecture to the statement by Lord Hoffmann in *R v Home Secretary ex p Simms* [2000] 2 AC 115 that fundamental rights cannot be overridden by general or ambiguous statutory words or, usually, without explicit provision. As Lord Sumption said, this principle had been applied in both private and public law cases for many years before Lord Hoffmann articulated it. He added that he doubted whether anyone would seriously quarrel with it. It did beg the question what rights and principles are to be regarded as so fundamental that a power to depart from them cannot be conferred by general words; but, he said, access to justice would probably figure in anyone’s list of fundamental rights.

He criticised the reasoning in the *Witham* case. He said that Laws J was “exercising a purely judicial authority when he declared this constitutional right [of access to justice at an affordable price] to exist”. That is, of course, true. But he was merely following well

trodden ground. And surely if (as Lord Sumption appeared to accept) there is a fundamental right of access to justice, that right is breached if the state imposes a charge on access to the court which the would-be litigant cannot afford to pay so that he cannot get his case before a court and the right cannot be overridden by general or ambiguous words. The right of access to the court is useless if it cannot be exercised whether on grounds of cost or for any other reason. I confess that I have difficulty in seeing what was wrong with the decision of the Divisional Court, still less how it illustrates the inadequacy of Lord Diplock's statement. There could be no doubt as to the question of law that the Divisional Court had to resolve. It was whether the new regulations were permitted or empowered by section 130 of the 1981 Act. This was a question of statutory interpretation. It was undoubtedly a question of law and one which under our constitution only a court could determine. The court decided it by applying conventional principles. I do not regard this as evidence that judges are exercising too much power. Who else should decide the meaning of statutes and other issues of interpretation of documents?

It is time to move away from the *Witham* case and widen the scope of the discussion. A theme that is present in both of Lord Sumption's lectures is that Parliamentary scrutiny is generally perfectly adequate for the purpose of protecting the public interest in the area of policy-making. It is the only way of doing so which carries any democratic legitimacy. For those who are concerned with the proper functioning of our democratic institutions, the judicial resolution of inherently political issues is difficult to defend. It has no legitimate basis in public consent, because judges are quite rightly not accountable to the public for their decisions.

I accept that it is not always easy to draw the line between a policy's lawfulness and an assessment of its merits. But as Lord Goff said in the *Woolwich* case, the boundary between what is and what is not legitimate for the development of the common law in the context of private law is not always easy to find either. In some respects, it is easier to find in judicial review. If a regulation or policy is not authorised by the statute under which it is purportedly made, then it is unlawful. As Lord Diplock said, this is a matter for the courts and for them alone to determine. The courts are all too conscious of the need for restraint when faced with a judicial review challenge which seeks to impugn what may loosely be called the "merits" of an executive policy or decision. Lord Sumption acknowledges that the courts do not examine the merits of decisions on foreign affairs and national security and they seek to avoid imposing on the executive duties which have significant budgetary implications. I am sure that he would accept that there is an extensive body of judicial authority which recognises the inadmissibility of adjudication on political issues. The more purely political a question is, the greater the likelihood is that the courts will say that it is a matter for political resolution and the less likely it is to be appropriate for judicial decision.

So what is all the fuss about as regards judicial review in our domestic law? I am not aware of a widespread sense of unease that judges are routinely overstepping the mark and impermissibly quashing executive decisions. In its two consultation papers proposing reform of judicial reform, the Ministry of Justice did not suggest that judicial review is being granted inappropriately by the courts. The main thrust of the papers was that the judicial process is too slow and that time and money is being wasted in dealing with unmeritorious cases which may be brought by applicants simply in order to generate publicity or to delay implementation of a decision that was properly made.

And yet Lord Sumption states in his Kuala Lumpur lecture that "judicial resolution of major policy issues undermines our ability to live together in harmony by depriving us of a method

of mediating compromises between ourselves. Politics is a method of mediating compromises in which we can all participate, albeit indirectly, and which we are therefore more likely to recognise as legitimate”. If the European Convention on Human rights is disregarded, I am unaware of any major policy issue whose merits which have been resolved judicially. The only example given by Lord Sumption is the *Witham* case. Most successful challenges succeed on the grounds that there has been some important procedural flaw in the decision-making process. Successful challenges to major decisions on the grounds of irrationality are very rare in my experience. Judges are only too aware of the need for judicial restraint in this area.

I am conscious that, so far, I have given a wide berth to Europe. This has become a toxic and highly political subject. I regret that judges have descended into the arena. An impression has been created that the entire judiciary is critical of the European Court of Human Rights. I believe that this impression has been created by a small number of lectures given by a few senior judges. They have not claimed to speak on behalf of their colleagues or, so far as I am aware, anyone else. I believe that, as one would expect, there is a wide range of judicial views on this subject.

I propose to say very little about EU law and the power of the CJEU in Luxembourg. It is, however, striking that so much of the criticism of European decisions that is made by the media and the Government is directed to the decisions of Strasbourg rather than Luxembourg. It is true that our Parliament remains sovereign. But it has given EU law supremacy in increasing areas of our national life. I note that in his lecture *Constitutional Change: Unfinished Business* (4 December 2013), Lord Judge downplayed the significance of the rulings of the Luxembourg court (which we are bound to observe) when he said that it is a court “giving rulings about the workings of a common market” in relation to “economic matters”. We should be under no illusions: the jurisdiction of the Luxembourg court covers far more than economic matters. It affects many parts of our national life. The EU Charter of Fundamental Rights covers much of the same ground as the European Convention on Human Rights.

Much has been said about the relationship between our courts and Strasbourg. Even the most vociferous critics of the Strasbourg court agree that the text of the Convention is admirable. The human rights enshrined in it are important and need to be protected. Two principal complaints are levelled at Strasbourg. First, in the course of interpreting the text of the Convention, the court has considerably extended its scope. This it has done in the light of what it perceives to be evolving social conceptions common to the democracies of Europe so as to keep it up to date. This is analogous to the evolution of the common law by our judges to which I have earlier referred. The second complaint is that the court’s approach to judicial law-making is anti-democratic. This is a particular problem given the inherently political character of many of the issues that the court decides. A number of the most important human rights recognised by the Convention are qualified by express exceptions for cases where what is complained of is “necessary in a democratic society”. The Strasbourg case-law provides guidance as to how these qualifications are to be applied. The court must decide whether the measure being challenged is necessary; whether it has a “legitimate aim”; and whether the measure is proportionate to that aim. I entirely accept that these questions raise policy issues. Sometimes, they raise issues which are acutely controversial and on which passions run high. Two current such examples are the question whether the blanket ban on prisoners’ voting rights is lawful and whether it is lawful to pass a whole life sentence of imprisonment. I should say at once that I have no intention of expressing my view on either of these topics.

It is undoubtedly true that, because some provisions of the Convention are expressed in rather unspecific terms, it was inevitable that the Strasbourg court would fill in the interstices by case-law. The fact that it did this can have caused no surprise. The precise interpretation of the law has followed processes analogous to those employed by our judges in developing the common law. But the big difference is that, because of the range of application of Convention rights and the standards that they impose, they cover far wider areas of public policy and demand a more intrusive review of administrative and legislative action than our common law courts adopted before the incorporation of the Convention by the Human Rights Act 1998. Even if the Strasbourg court had adopted a less expansionist approach to the interpretation of the Convention, it is inevitable that it would have been drawn into adjudication on policy issues. That is what the signatories to the Convention must have intended. Their vision was that the values of the Convention should be adopted by all contracting states in the Council of Europe and that the court should apply a pan-European human rights law.

It must have been obvious that the court would not be able to engage in a process of dialogue with the legislatures of all these states, which will adopt different policy positions reflecting the interests and demands of very disparate national populations. Recognising this difficulty, the court sets out common ground rules of acceptable political practice. Sometimes (particularly in relation to requirements of equal treatment of women, racial groups and homosexuals) the rules have a strong substantive content, but more usually they allow a significant margin of appreciation to contracting states.

The margin of appreciation is an inherent part of the balancing framework deployed by the Strasbourg court. There are, however, limits to the margin of appreciation. Some risk of affecting the political culture of contracting states is inherent in having an enforceable human rights instrument in place. Nevertheless, the margin of appreciation is an important mechanism by which the court provides for the accommodation of democratic ideology. The flexibility inherent in the doctrine of the margin of appreciation allows the court to adjust the intensity of its supervision by reference to common European standards articulated by the court, depending on its perception of the value of the individual rights at stake and the importance of uniform enforcement of such standards. The current position is well summarised by Philip Sales in his article *Law and Democracy in a Human Rights Framework*:

“But [the margin of appreciation] has also assumed far greater prominence in the case law of the ECtHR as well, reflecting the court’s increasing engagement with the detailed constitutional position within states as it examines the precise facts of particular cases before it in order to arrive at an acceptable balance of individual and public interests. The margin of appreciation will generally be found to be wider where the court is examining a choice made by a democratically elected legislature in relation to a topic which is the subject of public debate and one on which opinions may reasonably differ in a democracy. Similarly, where compliance with a Convention right depends on a balance being struck by the national authorities by reference to some consideration of the public interest, the ECtHR will often give particular weight to their view because they are best placed to assess and respond to the needs of society.”

It is well known that there have been calls from some of the media and some Government ministers for the UK to withdraw from the Convention. This has usually been in response to a particular decision of the Strasbourg court with which its critics disagree. In a spirited response to these attacks, Sir Nicolas Bratza, then President of the court, pointed out that the court’s judgments are replete “with statements that customs, policies and practices vary

considerably between Contracting States and that we should not attempt to impose uniformity or detailed and specific requirements on domestic authorities, which are best positioned to reach a decision as to what is required in the particular area.” The court is acutely aware that it is not a representative or democratically accountable body. That is why it recognises the importance of according a margin of appreciation to the Contracting States. But as Lord Mance has recently pointed out (*Destruction or Metamorphosis of the Legal Order*, 14 December 2013) the potential for good in fundamental rights provisions at a European level should not be ignored. Nor should we make the mistake of thinking that the UK is alone in being critical of some of the Strasbourg jurisprudence. But Strasbourg has led the way in a number of important areas. For example, it has led to the removal of sentencing discretion from the executive; the lifting of the ban on homosexuals in the armed forces; the ending of detention without trial of aliens suspected of terrorist activity; and the prevention of deportation of aliens who, if deported, would face a real risk of torture or inhuman treatment. The changes to our domestic law which resulted from these decisions of the Strasbourg court have been accepted and, I believe, are now regarded by many people in this country as welcome. The court emphasises in its case law that the Convention is intended to promote a pluralist, tolerant and broadminded society. As a general statement, it is surely difficult to quarrel with this. It is in the application of this general approach in particular cases that the court sometimes makes decisions which are controversial and which the Contracting States find objectionable. But the court is aware that it is not democratically accountable. In interpreting and applying the Convention, it seeks to give effect to its fundamental principles in a way which respects the views of the Contracting States without undermining the very essence of those principles.

Finally, I must briefly look at the way in which the Convention has been incorporated into our domestic law and the role that our own courts are required to perform. Section 2(1) of the Human Rights Act 1998 provides that a court determining a question in connection with a Convention right “must take into account” any judgment of the Strasbourg court. Section 3 provides that legislation must be read and given effect so far as possible in a way which is compatible with the Convention rights. Section 4(2) provides that, if a provision is incompatible with a Convention rights, the court may grant a declaration of incompatibility. Section 6(1) provides that it is unlawful for a public authority (which includes a court) to act in a way which is incompatible with a Convention right.

There has been much debate in the literature and case law as to what is meant by the requirement to “take into account” any judgment of the Strasbourg court. But what is more important for present purposes is that the effect of these provisions is to require our judges to apply the Convention and to decide Convention issues for themselves. There is no doubt that many of these involve policy questions of a kind which, before the enactment of the 1998 Act, judges would not have been called upon to make. This is the inevitable consequence of the decision of Parliament in 1998 to bring Convention rights home. Lord Sumption in his Kuala Lumpur lecture says that the development of the Convention by the Strasbourg court was not foreshadowed by the language of the Convention and could not have been anticipated by Parliament when it passed the Act. But many of the developments of the Convention pre-date 1998. Parliament knew that Strasbourg regarded the Convention as a “living instrument” when it passed the Act. It is wholly unrealistic to suppose that Parliament believed that the Convention would remain immutable as at 1998. It follows that a political choice was made to give judges a power which they had not previously enjoyed and to impose an obligation on them to take into account decisions of the Strasbourg court. This was no grab for power by the judges. The whole point of the 1998 Act was to bring Convention rights home and to reduce the need for litigants to go to Strasbourg for a vindication of those rights. Just as

Parliament gave the courts this power, so it can take it away. No-one denies that. I would merely say that, as the Strasbourg court seeks to make up for its democratic deficit by liberal recourse to the margin of appreciation which it accords to the institutions of the Contracting States, so too (for similar reasons) do our judges accord to domestic policy-makers an area of discretionary judgment in relation to the making of their decisions.

To conclude. I have tried to explain why I do not consider that judges are too powerful in the purely domestic sphere. They continue to perform their vital historic role of developing the common law responsibly, making changes incrementally only where these are considered to be necessary to respond to changing social conditions, values and ideas. Judges shrink from altering the law in certain areas for a variety of reasons which are now well understood and some of which I have summarised. They do not apply a single overarching principle. But they do apply a number of well-established norms and the system works tolerably well. Only occasionally do judges disagree on the question whether they should move the common law in a certain direction or whether it is more appropriate to leave it to Parliament. Even if it were possible or desirable to devise a single overarching principle, it is inevitable that judges would not always agree as to how it should be applied. I have also tried to explain that our judges exercise their judicial review power in a careful and measured way. They are mindful of the existence of territory into which they should not enter. In exercising this power, they seek to uphold the decisions of the legislature and to secure the sovereignty of Parliament and the rule of law.

The position with regard to the Convention on Human Rights is different. The effect of the Human Rights Act is that Parliament has given judges a power that they did not previously possess. It requires them to make value judgments which are different from those which, as custodians of the common law, they have been accustomed to making. My own view is that they are exercising this power responsibly and carefully. It can, of course, be removed by Parliament taking away what it gave by the 1998 Act. That, however, is a matter for politicians, not judges. It is a striking fact that, in the debate about the Convention, it seems that the real complaint of those who wish to sever our links with Europe is not that our judges are too powerful. Their objections are directed at Strasbourg, not at our judiciary. That is why they would like to see a UK Bill of Rights interpreted by our judges. The oft-heard cry “let our Supreme Court be supreme” is a ringing vote of confidence in our judges.