

**Law and Politics: A Reply to Reith**  
**Dame Frances Patterson Memorial Lecture 2019**  
**Lady Hale, President of the UK Supreme Court**  
**8 October 2019**

It is a real pleasure, as well as an honour, to have been asked to give this lecture in memory of Frances Patterson, a truly memorable woman who was taken from us far too young. I first met Frances when she joined Norman Glidewell's Chambers in Manchester in about 1977. Norman – universally known as CNG - was a former local government lawyer who set up the Chambers to specialise in town and country planning, about which he was rightly convinced that he knew far more than any of the barristers practising in Manchester at the time. It grew to contain some very notable planning lawyers - not least of course his son Iain Glidewell, who went on to be a very fine judge – as one wit put it, there was Glidewell and Glidbetter. Following them came such luminaries as Nigel Macleod, John Hoggett and Andrew Gilbert and many more, including Frances Patterson herself.

Of course, she wasn't always a planner. In those days everyone who started at the provincial common law bar did something of everything. HHJ Lesley Newton remembers their doing the full diet of crime, civil and even family when they started out, trekking round the local magistrates and county courts. But Frances managed to establish herself in planning work. This was a magnificent achievement when there were no women in that field on the northern circuit, and hardly any in London. On the whole women have found it harder to establish themselves in specialist areas than in general common law practice.

Not only was Frances encountering the prejudice which undoubtedly women faced at the Bar in those days, but also the formidable logistical difficulties of combining a career which inevitably required a good deal of travelling and staying away from home, with three small children and a husband who was commuting to York every day to run one of the best museums in the country. It makes me feel very small, because I gave up the Bar for academic life, principally in order to make it easier to have a family.

But she was formidably good at it. I am told that one experienced expert witness was heard to warn a rather less experienced expert witness that 'Being cross-examined by Frances is like being

eviscerated by a high-class butcher, and you can tell when she is about to make her first incision when she starts to roll up her sleeves'. Rolling up her sleeves was her hall-mark – both literally and metaphorically. Of course, planners are not always popular. I live in the beautiful parish of Easby, near Richmond in North Yorkshire. The owner of a local farm in the Swale valley wanted to turn it into a leisure complex. Frances acted for him, which did not make her popular with my neighbours. Somehow I had the impression that she was not unhappy when the development was turned down. But that will not have been for any want of skill and effort on her part. And she became a most effective Head of King's Chambers, displaying all the business-like qualities she was later to show at the Law Commission and on the bench, but also taking immense care to empathise with colleagues when they were in trouble. She went from there to be a Law Commissioner, heading the Commission's work in Public Law, and she was very effective at that too. The Chief Executive when she arrived was Mark Ormerod, who is now the Chief Executive of the Supreme Court. He said this:

'I knew she was a planning expert when she arrived at the Law Commission, but I didn't realise how that would extend to her own way of working. She was not one of those grinding planners, who delight in the plan as a work of beauty in itself, but she used the discipline to ensure she kept her eyes firmly on the wood and not just the trees. She had the confidence to make clear strategic decisions as a result – bringing some work firmly to a close, advancing others, keeping the big picture in mind of what the project was seeking to achieve. She was brave in the work she took on . . . and her confidence and clear-sightedness allowed her to stride over obstacles that would have worried others.'

The work she brought firmly but politely to a close was most of the project on *Administrative Redress: Public Bodies and the Citizen*.<sup>1</sup> The work which she inherited and brought forward to a successful conclusion, always with an eye to the bigger picture, was adult social care.<sup>2</sup> This culminated in both the Care Act 2014 and, because this is an area devolved to Wales, the Social Services and Wellbeing (Wales) Act 2014. Her team did most of the donkey work for the Commission's successful project on level crossings.<sup>3</sup> And during her time the Commission took

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<sup>1</sup> Law Com No 322, 2010.

<sup>2</sup> Law Com No 326, 2011.

<sup>3</sup> Law Com No 339, 2013.

on projects on the regulation of the health and social care professions; the regulation of taxis and private hire vehicles – a very controversial subject; the management of wildlife; data sharing between public authorities; and on the rules governing the administration of elections. All of these made substantial progress during her leadership before she left for her inevitable and richly deserved appointment to the High Court bench.

So what to talk about to honour such a distinguished and effective public lawyer? It obviously had to be a public law subject and what more topical than the subject-matter of this year's Reith lectures, delivered by my colleague Lord Sumption, *Law and Politics*, or as he entitled the published version, *The Trials of the State – Law and the Decline of Politics*.<sup>4</sup> I should stress that this evening I am only concerned with the debate provoked by Lord Sumption's lectures. I am not concerned with more recent events which might be thought to have some connection with his title. I should also stress that Lord Sumption was for six years a deeply respected colleague on the Supreme Court: my object is to engage with his arguments and not with him personally.

Lord Sumption's thesis is that law – by which he means the courts - has been getting more powerful while politics – by which he mainly means Parliament – has been getting less powerful and that this is a bad thing. It is bad because in law the solutions are binary – yes or no – and there is little or no room for compromise, whereas politics is a means of managing disagreement and reaching a reasonable accommodation between opposing points of view, which is more likely to be accepted by all (that is, incidentally, why he is opposed to referenda, because of their binary and unaccommodating nature, but that is another story). He sums it up thus:

‘A nation cannot hope to accommodate divisions among its people unless its citizens participate in the process of finding political solutions to common problems. Law has its own competing claim to legitimacy, but it is no substitute for politics.’ (p 90)

He acknowledges that judges have always made law. To decide disputes, they have to fill gaps, where answers cannot be found in existing legal sources; they also have to change existing judge-

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<sup>4</sup> Profile Books, 2019.

made rules if they are ‘mistaken, redundant or outdated’. Common law remains a major source of law. But even within the traditional field of resolving disputes, he thinks that the courts have sometimes gone too far. He singles out the case of Charlie Gard<sup>5</sup> as an example of ‘law’s expanding empire’.

Charlie Gard, you will recall, was a baby who was born with a rare and fatal genetic disease which put him in a coma with no chance of improvement. The hospital wanted to bring to an end the life support upon which he depended. The parents resisted this and obtained crowd-funding to take him to the United States for experimental treatment. The High Court, after hearing all the evidence, and indeed reconvening for further evidence, authorized the withdrawal of treatment.

Lord Sumption makes two interesting and perhaps contradictory comments. The first is that a generation ago the doctors would probably have been willing to take the decision themselves rather than take it to court – that they were not so willing is an illustration of a general trend he identifies of an increased unwillingness to take risks. If the hospital had done so, of course, the outcome would have been the same unless the parents took the case to court, as they might well have done.

His second comment is that the court’s approach is an illustration of another trend that he identifies, a general tendency of the law to limit the scope for autonomous decision-making by individuals, cutting down the scope for citizens to take personal responsibility for their decisions. What is new, in his view, is the growing tendency of the law to regulate human choices even in cases where they do no harm to others and there is no consensus about their morality (pp 11-12).

But the Charlie Gard case, agonizing though it was for all concerned, was a perfectly standard case of the application of a clear legal rule to a justiciable dispute between individuals. The clear legal rule is that in all decisions about the care and upbringing of children their welfare is the paramount consideration (section 1, Children Act 1989). The judge made clear findings of fact that it was not in Charlie’s best interests to be taken to the United States and given further highly experimental treatment there – indeed that to do so was likely to cause him significant harm.

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<sup>5</sup> *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates* [2017] EWCA Civ 410, [2018] 4 WLR 5.

The same applied in the later case of Alfie Evans.<sup>6</sup> However, last week a High Court judge reached a different conclusion in the case of Tafida Raqeeb.<sup>7</sup> The evidence about Tafida's prognosis and awareness was more equivocal than in the earlier cases, so what was in her medical best interests was less clear cut. But, as the Judge pointed out, a child's best interests – or welfare – is a wider concept than her medical best interests. It takes into account the wishes and feelings of the child herself – who had been a happy and active five-year-old until catastrophe struck. It takes into account the views of the parents, who know and love their child better than anyone else can. And it takes into account the religious and cultural context in which the case arises. (These considerations are all present in the 'checklist' in section 1(3) of the Children Act 1989.) Taking Tafida to Italy for treatment would not do her any harm and would buy her time to see whether any improvement could be achieved by the skilled team there, although they did not hold out unrealistic hopes. The hospital will not appeal.

Far from judicial over-reach, these cases seem to me to illustrate well just how the law should work – resolving disputes according to clear legal standards in the light of all the available evidence. Nor indeed does Lord Sumption say that the Charlie Gard case was wrongly decided. He seems instead to lament that it was decided at all. But of course in disputed situations, not to decide is in itself a decision. Feminists have long complained, for example, that the law's reluctance to intervene in the 'enclosed domain of the home' in reality and in law legitimated the power of a dominant abuser. It was for the same reason that the law began to intervene to protect the interests of children. I have a feeling that Lord Sumption was applying public law principles to the decisions of parents in what was essentially a private law situation about the rights and welfare of an individual child.

But it is on the development of public law principles and practice that Lord Sumption concentrates most of his fire. He comments that judges have traditionally developed the law 'within an existing framework of legal principle and without trespassing on the functions of Parliament and the executive' (p 34). He identifies a change in 'judicial mood' in last three decades (but might it not go further back than that?). The judges have developed a broader concept of the rule of law which greatly enlarges their role; they have claimed wider supervisory

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<sup>6</sup> *Alder Hey Children's NHS Foundation Trust* [2018] EWCA Civ 984, [2018] Med LR 309.

<sup>7</sup> *Tafida Raqeeb v Barts NHS Foundation trust and Shalina Begum and Muhhamed Raqeeb; Barts NHS Foundation trust v Shalina Begum and Muhhamed Raqeeb and Tafida Raqeeb* [2019] EWHC 2531 (Admin) and [2019] EWHC 2530 (Fam).

authority over other organs of the state; they have inched their way towards a notion of fundamental law overriding the ordinary processes of political decision making. He puts this down to the use of the principle of legality which he calls legitimacy. He gives two illustrations.

The first is the case brought by the trade union, UNISON, challenging the Order in Council imposing fees for bringing claims in employment tribunals.<sup>8</sup> The Supreme Court held that the general words in the empowering Act were not clear enough to authorize such an interference with the fundamental right of access to justice. The Supreme Court had the benefit of evidence about its impact which had not been available in the lower courts. Lord Sumption thinks that the decision was ‘perfectly orthodox:’

‘MPs looking at the words of the Bill would not have suspected that the power to charge fees could be used to stifle the rights of employees under other statutes.’

(p 37)

Sir Stephen Laws, retired first Parliamentary Counsel, would not agree.<sup>9</sup> But I think that most would agree with Lord Sumption that this was a perfectly orthodox application of the classic principle of legality, applied to the fundamental right of access to justice: Parliament can legislate to remove or restrict fundamental rights but it has to do so in clear and express words so that Parliamentarians can understand what they are doing and be prepared to take political responsibility for doing it.<sup>10</sup>

The second example, on the other hand, was the *Evans* case about the Prince of Wales’ letters.<sup>11</sup> Mr Evans was a Guardian journalist who applied under the Freedom of Information Act to see the correspondence passing between the Prince of Wales and several government departments over a period of months in 2004 to 2005. The Information Tribunal, chaired by a High Court Judge, heard evidence over several days, including the evidence of two Professors of Constitutional Law about the Conventions governing the relationship between the heir to the throne and the government. In a lengthy and carefully reasoned judgment, it concluded that the

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<sup>8</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

<sup>9</sup> *Second Guessing Policy Choices: the rule of law after the Supreme Court’s UNISON judgment*, Policy Exchange, 14 March 2018.

<sup>10</sup> *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, per Lord Hoffmann at p 131.

<sup>11</sup> *R (Evans) v Attorney-General* [2015] UKSC 21, [2015] AC 1787.

public interest in disclosure of many of the letters outweighed the various reasons given in the Act for refusing it. The Tribunal had, of course, read the letters.

The Act contains a power for Ministers to override the decision of the Tribunals and to veto disclosure if ‘on reasonable grounds’ they consider it not to be in the public interest.<sup>12</sup> Rather than exercising the right to appeal against the Tribunal’s decision, the Attorney General exercised the override power. Mr Evans then brought judicial review proceedings to challenge the decision of the Attorney-General. He failed in the Divisional Court but succeeded in the Court of Appeal and, by a majority of five to two, in the Supreme Court. None of the judges hearing the judicial review proceedings had seen the letters. They were simply ruling on the lawfulness of the Attorney General’s decision.

Lord Sumption is critical. He agrees with the dissenting Justice who said that ‘the rule of law is not the same as the rule that courts must always prevail no matter what the statute says’. I agree entirely with that. However, I would draw a distinction between saying that the government’s power to override the judicial decisions of the Information Tribunal is such a bad idea that Parliament cannot have meant it (as Lord Sumption characterizes the reasoning of three of the majority) and saying that the Minister can only validly exercise the power if he gives good enough reasons for disagreeing with the Information Tribunal (as two of the majority did). But the really difficult question is whether the balance of public interest for and against disclosure is indeed a political question which ought to be resolved by a Minister responsible to Parliament or whether it is a legal question which ought to be resolved by the Tribunal and a Minister responsible not only to Parliament but also to the courts. There is no obviously right answer to that question in the context of a right to information for which Parliament has legislated.

In fact, the principle of legality is only one of several canons of statutory interpretation which may put considerable power in the hands of the judges. As Professor Andrew Burrows has pointed out,<sup>13</sup> the notion that statutory interpretation is an exercise in ascertaining the intention of the legislator is as much a fiction as the now exploded ‘fairy tale’ that the judges simply ‘discovered’ the common law. And the reason for the fiction was the same – to disguise the very real power that the judges were exercising.

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<sup>12</sup> Freedom of Information Act 2000, s 53.

<sup>13</sup> ‘Form and substance: fictions and judicial power’.

The principle of legality (and other canons of construction) may lead to developments in the law – just as the classic cases like *Ridge v Baldwin*,<sup>14</sup> *Padfield v Ministry of Agriculture*,<sup>15</sup> *Anisminic v Foreign Compensation Commission*,<sup>16</sup> developed the principles of judicial review. But these developments were essentially negative – expanding the principles under which the courts would restrain the unlawful actions of the executive – rather than developing positive rights for individual people. That has come later, partly through European Union law and partly through the European Convention on Human Rights.

Lord Sumption is deeply sceptical about fundamental rights – especially those which have not been decided by political processes and which political processes cannot contradict (except with great difficulty). He does accept that there are some fundamental rights which are or ought to be universally acknowledged. He puts these into two categories: first, those which are essential to social existence - freedom from arbitrary detention, physical injury or death, equality before the law, access to impartial and independent courts; and second, those which are essential to democratic political processes - freedom of thought and expression, assembly and association, participation in elections.

But the European Convention on Human Rights is what he calls a ‘dynamic’ treaty – with a supranational court which has decided that it is a ‘living instrument’ and developed it in ways which the drafters did not envisage. He cites as examples of the ‘vast range of issues’ which the Strasbourg court has held to be covered by article 8,

‘the legal status of illegitimate children, immigration and deportation, extradition, criminal sentencing, the recording of crime, abortion, artificial insemination, homosexuality and same sex unions, child abduction, the policing of public demonstrations, employment and social security rights, legal aid, planning and environmental law, noise abatement, eviction for non-payment of rent, and much else besides.’ (pp 57-8)

He says that none of these is a natural implication from the right to respect for private and family life, home and correspondence. I’m not sure that I agree about all of these. A person’s sex

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<sup>14</sup> [1964] AC 40.

<sup>15</sup> [1968] AC 997.

<sup>16</sup> [1969] 2 AC 147.

life is surely a paradigm example of a private life; the relationship between parent and child lies at the heart of family life; and eviction must be an interference with the right to respect for the home; however justified in each case that interference might be.

His point is that these developments – like developments in the interpretation of written Constitutions – are not the product of political processes. However, Strasbourg did not invent the ‘living instrument’ doctrine. It has been around in constitutional interpretation for a long time – think of the case of *Edwards v Attorney General of Canada*<sup>17</sup> in 1929, in which the Judicial Committee of the Privy Council described the Constitution of Canada as a ‘Living tree capable of growth and development within its natural limits’ (thus enabling them to interpret the word ‘persons’ in the British North America Act of 1857 to include women). More importantly, when Parliament passed the Human Rights Act 1998, it was well aware of the ‘living instrument’ doctrine and most of the developments under article 8 of which he complains. Politics made the decision with its eyes wide open.

His other objection is that the qualified rights require courts to make judgments about what is ‘necessary in a democratic society’ and where the ‘fair balance’ lies between the interests of the individual and the interests of society. These, he says, are political questions which ought to be solved by political processes.

Again he discusses two examples, the *Nicklinson* case about assisted suicide<sup>18</sup> and the *Northern Ireland Human Rights Commission* case about abortion.<sup>19</sup> Mr Nicklinson had suffered a catastrophic stroke which left him almost completely paralysed, unable to speak or carry out any physical functions on his own except limited movements of his eyes and head, but he was not dependent on life support. He communicated through the use of an eye-blink computer. He could only eat soft mashed food and was virtually housebound. He was in regular physical and mental pain and discomfort. After some years he decided that enough was enough and wished to end his life. But he did not wish to inflict upon his family the pain and suffering involved in watching him starve himself to death. He wanted ‘a more humane and dignified exit from the world’. At first he wanted physician assisted dying by means of a lethal injection and argued that this would be justified under the common law defence of necessity or duress of circumstances. Then it

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<sup>17</sup> [1930] AC 124.

<sup>18</sup> *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.

<sup>19</sup> *Re Northern Ireland Human Rights Commission’s application for Judicial Review* [2018] UKSC 27, [2019] 1 All ER 173.

emerged that an Australian doctor had invented a machine which could be digitally activated to deliver a lethal drug by means of the eye-blink computer, so the claim was expanded to include assisting him to commit suicide in this way. By the time the case got to the Supreme Court, the defence of necessity had (sensibly) been abandoned and the argument concentrated on whether the ban on assisting suicide was incompatible with Mr Nicklinson's article 8 rights.

In *Haas*,<sup>20</sup> *Koch*<sup>21</sup> and *Gross*,<sup>22</sup> the European Court of Human Rights stated that:

‘an individual's right to decide by what means and at what point his or her life will end, provided she or he is capable of freely reaching a decision on this question and acting in consequence, is one of the aspects of the right to respect for private life within the meaning of article 8 of the Convention.’

In *Pretty v United Kingdom*, however, the court had also taken the view that a universal ban on assisting suicide, especially when coupled with a flexible prosecution policy,<sup>23</sup> was justified in order to protect vulnerable people. As a supra-national court, they could fall back upon the wide margin of appreciation accorded to Member States in an area where there is as yet no European consensus in favour of permitting assisted suicide – quite the reverse.

When the Strasbourg court accords a wide margin of appreciation to Member States, it is left to their own constitutional arrangements to decide what to do. So should the Supreme Court leave the question entirely to Parliament? In other words, is Parliament the sole arbiter of what is and is not compatible with the Convention rights in United Kingdom law? Or should the Supreme Court address the issues in proceedings brought under the Human Rights Act and reach conclusions on them, deferring as appropriate to the considered views of the legislature, and conscious always that it cannot overturn Acts of the UK Parliament? There is no particular reason to assign Parliament the sole decision-making role, as long as the law-making role is left to them.

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<sup>20</sup> *Haas v Switzerland* (2011) 53 EHRR 33.

<sup>21</sup> *Koch v Germany* (2013) 56 EHRR 6.

<sup>22</sup> *Gross v Switzerland* (2014) 58 EHRR 7.

<sup>23</sup> An issue to which the House of Lords returned in *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345, and also in *Nicklinson*.

In *Nicklinson*, the Justices all, I think, took the view that there were occasions when the courts could decide upon the United Kingdom's solution to an issue which Strasbourg would leave to the Member State. The House of Lords did this with Northern Ireland's ban on joint adoptions by unmarried couples.<sup>24</sup>

Four of the Justices, including Lord Sumption, thought that the whole issue should be left to Parliament and the court should not even express a view on what the answer was. Five of the Justices thought that it was open to the court to decide whether there was a breach of article 8 and if so to make a declaration of incompatibility. But three of those Justices thought that the time was not yet ripe to do so.<sup>25</sup> I have great sympathy with them. The case had started on quite a different footing and so the evidence was not addressed to the issue of assisted suicide. The Supreme Court was not invited to examine the available evidence relating to the risks entailed and the efficacy of possible safeguards, but to rely upon the conclusions of a number of expert bodies who had examined the issue and reached remarkably similar conclusions. As Lord Mance put it, this was 'an invitation to short cut potentially sensitive and difficult issues of fact and expertise, by relying on secondary material'.<sup>26</sup>

He was, of course, right about that. But my own view, shared by Lord Kerr, was that it was a matter of principle rather than evidence. It could confidently be concluded that the ban was over-broad. Experience with comparable decisions showed that a procedure could be devised for identifying those people who should, exceptionally, be allowed help to end their own lives: the essential requirements would be that the applicant had the capacity to make the decision for herself; that she had reached that decision freely and without undue influence of any sort; that she had done so in full knowledge of her situation, the options available and the consequences of the decision; and that she was unable, because of physical incapacity or frailty, to put that decision into effect.<sup>27</sup> It would even be possible to posit a higher test of capacity than that applicable to lesser, reversible decisions, although the standard test is applied to all the many other end-of-life decisions, and so applying a higher test to this one might be difficult to justify.

Lord Sumption's second example is the case brought by the Northern Ireland Human Rights Commission challenging three aspects of abortion law in Northern Ireland as incompatible with

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<sup>24</sup> *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] AC 173.

<sup>25</sup> Shades of FM Cornford, *Microcosmographia Academica* (Cambridge, Bowes and Bowes, 1908)?

<sup>26</sup> Para 177.

<sup>27</sup> Para 114.

the prohibition of inhuman or degrading treatment in article 3 of the Convention or the right to respect for private and family life protected by article 8. He suggests that I said that ‘no weight at all should be given to the democratic judgement of the Northern Ireland Assembly’ (p 66). I did not say that. I did say that this was ‘not a matter on which the democratic legislature enjoys a unique competence. It is a matter of fundamental human rights on which, difficult though it is, the courts are as well qualified to judge as is the legislature’.<sup>28</sup> Indeed, in some respects the courts might be thought better qualified, precisely because of their dispassionate evaluation of evidence and argument, and the requirement that they actually make a decision. But it is important to understand that this was not in the context of whether Northern Ireland abortion law was or was not compatible with the Convention rights. That had already been decided. It was in the context of whether, having decided that the law was incompatible, the court should make a declaration of incompatibility under the Human Rights Act.

Of course, the premise of all constitutionally entrenched human rights is that ultimately the courts have to be the arbiters - that is what Lord Sumption objects to. He also says that most of rights which Strasbourg has added are quite unsuitable for inclusion in a human rights instrument. He can’t mean all of them: one of his fundamental rights – access to the courts – had to be developed by Strasbourg by implication from the right to a fair trial. But he says that Strasbourg has ‘transformed the Convention from an expression of noble values, almost universally shared, into something meaner’ (p 59). This, he says, devalues whole notion of universal human rights. This is strong stuff indeed.

But his solution is that the courts should change their approach rather than that the UK should withdraw from the Convention and the Council of Europe and substitute its own Bill of Rights.

I think that he ignores the subtlety of the Human Rights Act model which tries hard to accommodate these difficulties. The courts have to operate the Human Rights Act – they are only doing what Parliament has told them to do. This inevitably involves making these sorts of judgments in real cases involving real people. The courts would not be doing right by those people if they failed to adjudicate upon their cases. We all find this uncomfortable in some contexts – especially welfare benefits – and a proper degree of restraint when dealing with government policy decisions is indeed appropriate. But if Parliament does not like what the courts have decided, in this or any other context, it can always overturn it. Parliament did not

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<sup>28</sup> Para 38.

like what the House of Lords decided in *Barker v Corus UK Ltd*,<sup>29</sup> apportioning damages payable for mesothelioma among the employers whose breach of duty might but could not be proved to have caused it. So it legislated quickly to overturn the decision. Similarly, the Scottish Parliament did not like what the House of Lords decided in *Rothwell v Chemical and Insulating Co Ltd*,<sup>30</sup> that symptomless pleural plaques were not actionable damage, and legislated to overturn it.

Secondly, while Parliament can overturn the courts, the courts cannot overturn Parliament. If a provision in an Act of Parliament is incompatible with the Convention rights, and cannot be interpreted compatibly, the most we can do is make a declaration of incompatibility. Parliament then has three choices: pass an Act of Parliament to reverse it; adopt the fast track remedial mechanism in section 10 of the Human Rights Act; or do nothing and wait to see what happens. What does the fact that Parliament almost always does take action to put it right tell us? And what does the saga of prisoners' voting tell us? If Parliament sticks out long enough and some minor administrative changes are brought in, the Council of Europe will accept it to keep us on board. In other words, consistently with our most fundamental constitutional principles, Parliament is in charge.

But there is no doubt that the largely judge-made developments in judicial review and Parliament's enactment of the Human Rights Act have expanded the role of the courts in determining the lawfulness of executive action. Ordinary judicial review is not a merits review but a legality review. But human rights adjudication undoubtedly is a merits review, however much the court respects the constitutional position and expertise of the primary decision maker. This does entail value judgments. But I question whether it is just the value judgments of the individual judges. There is the bedrock of liberal democratic values enshrined in the succession of international instruments since the United Nations Charter and the Universal Declaration of Human Rights of 1948; they are also enshrined in many modern written Constitutions, at least those on Westminster model, and have been adopted in Commonwealth countries such as Canada and New Zealand, which gained independence before the second World War. I understand the point that such entrenched provisions could just as well serve quite different values – oppressive or discriminatory ones – but the fact is that ours don't. And I don't understand any better way of ensuring that those values are respected in real decisions about real people.

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<sup>29</sup> [2006] UKHL 20, [2006] 2 AC 572.

<sup>30</sup> [2007] UKHL 39, [2008] 1 AC 281.

We can all agree that there are many big picture decisions for which political processes are much more suitable than judicial ones. But, like the late and much lamented Lord Bingham,<sup>31</sup> I reject the suggestion that judicial processes are not also democratic processes. They are a necessary part of the checks and balances in any democratic Constitution. And it is also necessary to point out that the history of many countries teaches us that political processes, just as much as judicial ones, can be used to promote quite different values – oppressive or discriminatory ones. The task of any modern Constitution is to keep these processes in balance. But in our Constitution the fundamental principle is Parliamentary sovereignty, which both the executive and the courts must respect. We in the courts will always ultimately do Parliament’s bidding. Forgive me if I don’t quite understand what the problem is with that.

Is there a moral for judges in all of this? The courts have to go on doing their job – the job which Parliament has given them or which the common law has expected of them for centuries. They have, I hope, to be conscious of their own limitations – both personal and constitutional - and thoughtful about their role. But I take comfort in the fact that in the Supreme Court we are not alone – there are always at least five Justices sitting on a case and we work collectively together to reach the right result. There is safety in numbers.

But I wonder where Frances would have stood in the great debate? As I see her smiling down on me from the walls of Middle Temple hall, I hope that she would have approved.

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<sup>31</sup> *R (A) v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, para 42.