Lord Sumption and the Limits of the Law

EDITED BY

NW Barber, Richard Ekins and Paul Yowell

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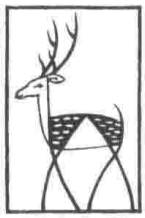

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LORD SUMPTION AND THE LIMITS OF THE LAW

In *Lord Sumption and the Limits of the Law*, leading public law scholars reflect on the nature and limits of the judicial role, and its implications for human rights protection and democracy. The starting point for this reflection is Lord Sumption's lecture, 'The Limits of the Law', and, spurred on by this, the contributors discuss questions including the scope and legitimacy of judicial law-making, the interpretation of the European Convention on Human Rights, and the continuing significance and legitimacy, or otherwise, of the European Court of Human Rights. Lord Sumption ends the volume with a substantial chapter engaging with the responses to his lecture.

A Note on the Cover

'Fashion before ease; or, a good constitution sacrificed for a fantastic form'

By James Gillray, 1793.

The print shows an unhappy Britannia being laced into a corset by Thomas Paine. Paine was the author of, amongst other books, *The Rights of Man*—and the title of this volume can be seen on the measuring tap, which dangles from his pocket next to his tailor's shears. *The Rights of Man*, published a couple of years before Gillray's print, called for the introduction of a written constitution for the United Kingdom, the recognition that natural rights constrain the state, and a rejection of the aristocratic structuring of society. Paine's intellectual rival, Edmund Burke, would have sympathised with the manner in which Gillray has chosen to depict the scene. For Burke, the British state was an organic entity, one that had developed over time, intertwined with the community of which it was a part. The rationalist attempt to draw up a set of rights that limited the state was bound to create discomfort: the protection of liberties is a function of a well-formed state, and not something that can be imposed on it from outside.

Foreword: Beyond the Limits

TIMOTHY ENDICOTT

There is—as the last sentence of Lord Sumption's lecture[1] will remind you—no law of nature that things are going to get better in a political community. But things have undoubtedly got better in our constitutional order. In the youth of King Richard II, the Lords Appellant used the appearances of law to take over the government of the country, bringing proceedings in the High Court of Parliament against the King's councilors and against his judges. The charges were for treason in the policies that they had pursued and for treason in exercising undue influence over the King. There was no certainty as to what counted as a crime and no established authority for the process. The process included asking the Mayor and aldermen of London whether one of the defendants was guilty, and executing him when they prevaricated.[2]

Law has always captivated the English political imagination. Over many centuries, judicial process has offered an alluring alternative to other processes of governance. You can see that allure in legalistic abuses and also in the most intelligent steps toward the rule of law. Both involve rule by judges.

In the seventeenth century, Sir Edward Coke asserted three English constitutional fundamentals: the independence of judges, the peculiar preeminence of the judges in determining the content of the common law, and the jurisdiction of the judges to control the exercise of discretionary power by other servants of the King. 'Discretion', said Sir Edward, 'is a science of understanding, to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their men's will and private affections.'[3] He imposed the rule of law on the will of other servants of the Crown; he subjected the country to the will of the judges.

Lord Sumption points out that people have expectations of the law today that they did not have in Coke's time, or some 60 years ago when British lawyers and politicians participated in the drafting of the European Convention on Human Rights. It is true, as he says, that: 'Popular expectations of law are by historical standards exceptionally high.'[4] Yet high and unrealistic expectations of law are an old English tradition. Already by the fourteenth century, in staging a coup d'etat,

[1] 'The Limits of Law', 27th Azlan Shah Lecture, Kuala Lumpur, 20 November 2013.

[2] *Oxford Dictionary of National Biography* (Oxford, Oxford University Press 2004–14), s.v. 'Lords appellant'.

[3] *Rooke v Withers* (1597) 77 ER 209, 210.

[4] See n 1 above.

the preferred way was under the guise of legal proceedings. And already by the seventeenth century, Sir Edward Coke was regulating the discretions of other public servants by claiming a massively important discretion for the judges. Coke's own maxim applies to that discretion: the judges are not to exercise it according to their men's and women's will and private affections, but they alone have jurisdiction to determine what would count as doing so.

The British lawyers and politicians who committed the UK to the Convention presumably thought that they were assuring, for the future of a continent, rights that had long been secure and uncontroversial in the UK. They presumably did *not* think that they were engineering the shift that Lord Sumption outlines towards governance of the UK by judges. Along with their responsibility for controlling other public authorities, the Strasbourg judges have incurred a correlative responsibility (which no one thought of at the time) to control themselves in their own use of public power. The rule of law imposes that same responsibility on UK judges exercising their authority under the Human Rights Act: not only to control the use of public power by other authorities, but also to control themselves and to use their power with humility.

The European Convention provides a salient and, now, politically contentious field for working out how a community is to be governed, and it forms a focus for much of the work in this volume. I think it is important to put that field of issues in the context of Lord Sumption's discussion of the *Witham* case.[5] On the proper effects of the European Convention, there is a wide and notorious diversity of opinions. But among English lawyers and judges, there is something very much like a consensus, or orthodoxy, that judges ought to use the common law 'principle of legality' to control governmental decisions over fees for access to the courts. So, in *Witham*, the Court of Appeal held that by increasing the cost of issuing a writ, the Lord Chancellor had unlawfully denied a constitutional right of access to the courts, which could only lawfully be denied by express legislation.[6]

The decision in *Witham* is part of a pattern of direct judicial control of the cost of litigation. The courts will not require claimants to give security for costs when they bring speculative claims for judicial review against public authorities.[7] In fact, the courts will make 'protective costs orders' to assure such claimants that they will not be faced with the ordinary order to pay the defendant's costs if they lose. The judges have done this even in cases that patently have no prospect of success.[8] These judicial innovations establish public subsidies for litigation. Lord Sumption says that 'the real question' in such cases concerns 'the relative importance of doing

[5] *R v Lord Chancellor ex p Witham* [1998] QB 575.

[6] ibid 586. The fee for issuing a writ where no monetary limit was specified became £500, and the new regulations repealed a provision that had allowed litigants in receipt of income support to issue a writ without a fee.

[7] See, eg, *R (Plantagenet Alliance) v Secretary of State for Justice* [2013] EWHC 3164.

[8] The first such reported case was *R v The Prime Minister ex p Campaign for Nuclear Disarmament* [2002] EWHC 2712. Perhaps the *Plantagenet Alliance* case is another example, although the judge who gave permission to seek judicial review thought that there was some prospect of success; the Divisional Court that heard the claim for judicial review disagreed.

so, relative, that is, to other possible uses of the money'.[9] He suggests that by treating access to the courts as a right at common law, the judges are imposing costs on a government that might legitimately have different spending priorities. In his challenge to the orthodoxy over judicial governance of access to the courts, Lord Sumption puts the debates over the European Convention on Human Rights in a new light: at every point, those debates concern not only the content of the Convention rights, but also the form of governance that can best respect the interests protected by the rights, and best reconicle them with other interests.

I am glad that the editors of this volume organised the discussion in the University of Oxford. During the Hundred Years' War, the University had not fully attained its potential, which is to put people in the predicament of defending views that they consider to be obviously true, in the face of the arguments of others who consider the contrary views to be obviously true. The University has still not fully attained that potential. But the colloquium on Lord Sumption's lecture was a step forward. I congratulate the editors on creating such an opportunity for the participants to experience the freedom of debate in the University and for publishing the conversation in this volume.

[9] See n 1 above.

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This volume arises out of a conference held by the Programme for the Foundations of Law and Constitutional Government in Oxford in October 2014. The Faculty of Law, St John's College and Trinity College provided valuable help with the logistical arrangements. We thank the participants in the workshop for stimulating questions and comments, our colleagues who chaired the panels, and Timothy Endicott for his thoughtful remarks to open the proceedings. We are especially grateful to the contributors to this volume and to Lord Sumption for giving generously of their time and for their patience with the editorial process. Mikolaj Barczentewicz and Ewan Smith provided editorial assistance in the preparation of the text of the papers for publication, for which we are much obliged. Finally, we owe a special debt of gratitude to Mr Graham Child for providing the funding that made this project possible.

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Introduction

NW BARBER, RICHARD EKINS AND PAUL YOWELL

THIS IS A book about the nature and limits of the judicial role. It examines the proper constitutional role of the judge by considering questions about relative institutional competence, the nature of law-making and legal reasoning in general, and rights adjudication in particular. These are questions that engage core constitutional principles, including the rule of law, parliamentary democracy and the separation of powers. All of these are matters of enduring scholarly and public interest. They are of particular importance in evaluating the exercise of judicial responsibilities under the Human Rights Act 1998 and the impact of the European Convention on Human Rights within the UK. Debates about the merits of that Act and the terms of the UK's continuing membership of the Convention are in large part debates about the powers that judges—British or European—ought to enjoy in our legal order.

The public conversation about the nature and limits of judicial power has long been enriched by the extra-judicial reflections of our leading judges. This book is framed around one such contribution, Lord Sumption's 2013 lecture, 'The Limits of Law'.[1] The lecture takes its place in a long tradition in which commitment to self-government by way of a sovereign Parliament has been shared by people who otherwise have a wide range of political views. Lord Sumption's lecture restates some central elements in this familiar understanding of fundamental principle, elucidating them from the distinctive perspective of a sitting judge and in relation to the latest developments in our constitutional law. With a view to exploring further the shape and implications of the argument, we invited nine leading scholars to reflect on Lord Sumption's lecture, in dialogue with him, at a conference held in Oxford in October 2014. This volume captures that conversation, opening with Lord Sumption's lecture, which is presented here in a format close to its original text, continuing through nine scholarly reflections and responses, and concluding with a reply from Lord Sumption.

[1] Lord Sumption, 'The Limits of Law', 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013.

Following Lon Fuller,[2] the lecture takes as its framing question how best to separate responsibilities between judges and other officials, in particular, legislators. While noting that judicial law-making is widespread in the common law world, Lord Sumption discerns a growing tendency to characterise political questions as questions apt for judicial resolution, a tendency he sees in ordinary judicial review of executive action (the main focus of his FA Mann lecture in 2011,[3] a lecture to which a number of contributors refer), in American constitutional practice, and in the law and practice of the European Court of Human Rights. In particular, the Strasbourg Court's adoption of the 'living instrument' technique of interpretation has made possible the extension and modification of the content of the Convention beyond the text that was agreed by its signatories. The 'living instrument' doctrine, sometimes called the 'living tree' approach, provides that the judge may depart from the original meaning of the legal instrument, developing and extending the legal meaning over time. For its supporters, the 'living instrument' doctrine is a sensible way for courts to keep bills of rights up to date in line with changing needs and social mores. Lord Sumption takes a different view: he regrets the expansion of judicial power that this interpretive methodology has enabled. The problems with this mode of judicial action, he argues, are that it compromises the rule of law, departing from the disciplined legal technique that ought to govern a court's engagement with written legal instruments, and that it undermines democracy. These two claims, about proper legal technique and the rule of law, and about the relationship between judicial law-making and democracy, are in one way or another considered closely in every chapter in this book.

Judicial law-making may often involve a democratic deficit, Lord Sumption argues, but the deficit is at its most significant in relation to fundamental rights, which constrain the democratic process. The text of the Convention, he maintains, is wholly admirable: there was good sense in the decision to adopt the Convention and hence affirm some basic limits on state action, the breach of which clearly constituted oppression. However, when one sets these clear cases of real oppression aside, and when courts start to remake and extend the Convention, the democratic objection is, for Lord Sumption, compelling. He illustrates this point by way of the prisoner voting saga. In *Hirst v UK (No 2)*,[4] the European Court of Human Rights ruled that the UK's decision not to give prisoners the right to vote ran contrary to the Convention. The UK Parliament has yet to change the law in response to this ruling. The Strasbourg Court, Lord Sumption argues, ruled against the UK on the grounds of democratic legitimacy, grounding its decision in the obligation on the parties to hold free elections,[5] but in doing so demonstrated its lack of real

[2] L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

[3] J Sumption, 'Judicial and Political Decision-Making: The Uncertain Boundary' (2011) 16 *Judicial Review* 301.

[4] *Hirst v UK (No 2)* [2005] ECHR 681.

[5] Protocol 1, art 3.

interest in democratic principle. Democracy, he says, has a straightforward meaning: it is 'a constitutional mechanism for arriving at decisions for which there is a popular mandate'. The Strasbourg Court, however, 'uses the word in a completely different sense, as a generalised term of approval for a set of legal values which may or may not correspond to those which a democracy would in fact choose for itself'. For Lord Sumption, Strasbourg's rejection of Parliament's decision to deny prisoners the vote was itself undemocratic: an unjustified restriction on the authority of Parliament. That the Convention's force in the domestic law of the UK is realised by way of Parliament's decision to enact the Human Rights Act does not remove the democratic deficit. Not every decision made by a democratic assembly is consistent with the maintenance of democracy: incorporating the case law of the Strasbourg Court, and the living instrument approach to interpretation, in effect transferred legislative power to a foreign court, which is remote from and uncontrolled by citizens of the UK.

Behind the expanding reach and significance of judicial law-making, of which European human rights law is just one example, Lord Sumption discerns a widespread disdain for democracy—for the political process—and a corresponding enthusiasm for the law—for the judicial process. He argues that neither the disdain nor the enthusiasm is warranted. There are very real advantages to according primacy to legislatures, to law-making by way of democratic means, both in terms of acting fairly in circumstances of disagreement *and* in terms of making substantively sound decisions. Arriving at a stable, peaceful decision about what is to be done in answer to the political questions that are the subject of so much rights adjudication is a task, he argues forcefully, for which the political process is much better suited than the judicial process. Echoing Fuller again, Lord Sumption argues that the problems in question are polycentric, with multiple consequences for parties not before the court. The institutional form of the court focuses the judge's attention on the parties before him or her, which entails the exclusion of much that is relevant to law-making in the context of polycentricity. The structure of the legislature, in contrast, permits a wider range of interests and arguments to be aired and considered before the decision is made. For this reason, the legislature is better placed than the court to decide what should be done, to make good law.

Lord Sumption is also concerned that shifting authority from the legislature to the courts imperils the capacity of the political process to facilitate compromise between groups of citizens. He argues that many public law questions which are presented to courts as issues between the state and an individual are really issues between different groups of citizens: these are questions on which people hold strong and divergent opinions, including matters of morality and social policy. 'The essential function of politics in a democracy', he argues, 'is to reconcile inconsistent interests and opinions, by producing a result which it may be that few people would have chosen as their preferred option, but which the majority can live with.' The political process, he acknowledges, might be characterised by opacity, fudge and even irrationality. But even though its results are 'intellectually impure', he defends them as in the public interest. Whilst the courts may appear to

be 'animated by a combination of abstract reasoning and moral value-judgment, which at first sight appears to embody a higher model of decision-making than the messy compromises required to build a political consensus in a Parliamentary system', the price of these judicial virtues, he argues, is steep. Having courts attempt to resolve major policy issues deprives us of a mechanism through which compromises can be mediated. Lord Sumption concludes that without limitations on judicial law-making, without some minimally adequate separation of judicial from political authority, societies will be drained of what makes them democratic 'by a gradual process of internal decay and mounting indifference'.

The politics of the judicial role are at the core of Martin Loughlin's contribution to this volume. Loughlin seeks to locate Lord Sumption's theory of the judicial role within a wider account of the changing understanding of the place of the courts in the constitution. In company with Lord Sumption, Loughlin charts the emergence of the 'political court', as doctrinal barriers to review of political questions have fallen away, and more time and resources are expended promoting social reform through court decisions. As Loughlin notes, debates over the legitimacy of these developments—both whether it is appropriate for courts to engage in these tasks and the further question of how, if at all, this role should be undertaken—have been a staple of American constitutional scholarship for many years. Loughlin draws a link between Lord Sumption's preferred approach to interpretation and the American originalists: both call for a return to, and fidelity towards, the text of the law.

Reflection on the American experience also reveals some of the tensions that lie behind Lord Sumption's argument. Loughlin challenges the idea that democracy simply means majority rule. Potentially, democracy is a far richer idea that includes a commitment to the inclusion of groups within the decision-making processes of the state. Indeed, Lord Sumption acknowledges that not all decisions reached by an elected body are 'democratic' and that minorities may need protection from oppression. But if it is democracy that is at the core of Sumption's case for a more limited judicial role and if a richer account of democracy is embraced, this may warrant, Loughlin argues, a richer, not more limited, role for the judge. Whilst Loughlin agrees with Sumption that courts are now being asked to address issues that, 50 years ago, would have been regarded as 'political' and beyond their jurisdiction, he notes that the decision about the boundaries of the judicial role is itself a 'political' one. One's conception of the proper judicial role is grounded in evaluative judgments about what democracy—and other constitutional principles—requires and there is no 'neutral' position from which the limits of the law can be gauged. For Loughlin, then, Lord Sumption's apparent reluctance to detail the normative underpinnings of his argument or the ideological underpinnings of the British constitution limits his capacity to propose remedies for the ills he has identified.

The merits of fidelity to legal text are taken up directly by Sandra Fredman, who argues that theories of legal interpretation that purport to prevent judges from making decisions based on their personal values inevitably fail. More specifically,

Fredman argues that originalism and textualism do not deliver on their promise. Taking originalism to involve a search for original intentions, she contends that it fails to constrain judges because the intention of the founders is often impossible to ascertain. Sometimes this is a matter of evidence—there just is not a record of what the original authors intended, apart, that is, from the document they agreed. But sometimes the problem is deeper still: the authors of the document may not have had a collective view of how it should apply in a particular situation or even, perhaps, may have intended that the meaning of the document should develop over time. For example, she disputes Lord Sumption's originalist interpretation of Article 8 of the Convention, the right to a private and family life, which—she argues—is not supported by available evidence of what the states-parties intended when they agreed that text. Similar conceptual and practical problems mar textualism.

The alternative, Fredman says, is that judges should be open about all the values that are at play in adjudication: this is both more honest and more democratic. The 'living tree' or 'living instrument' approach, a theory of interpretation that contrasts sharply with originalism, is not only inevitable, once we realise that the constraints of originalism are illusory—it is also, she argues, to be welcomed and cherished. The advantage of the approach is that it allows the Strasbourg Court to respond to new challenges in a way that is open and persuasive, which in turn helps secure the legitimacy of the Court and the Convention.

Questions about interpretive theory, and the similarities and differences between the Convention and other legal documents, continue in Lord Hoffmann's chapter, which reinforces Lord Sumption's concerns about Strasbourg jurisprudence while developing its own parallel critique. Lord Hoffmann situates the 'living instrument' doctrine within a general theory of legal interpretation. He maintains that meaning turns not just on semantics or syntax, but crucially also on the *background* to the particular language used. In law, the document is usually drafted to make it possible for the reader to discern a clear meaning from the wording alone, but nonetheless recourse to the background is sometimes necessary. Lord Hoffmann takes the Vienna Convention to be a succinct statement of the usual approach to interpreting legal instruments, but cautions that there are no special rules for the interpretation of treaties in contrast to any other document. He states that he is an originalist because he considers the alternative to be unconstitutional amendment of the authoritative text under the guise of interpretation. But he contends that the authority of original meaning is consistent with the truth in the 'living instrument' idea and its domestic analogue of the 'always speaking' statute. Working through English and Privy Council authority, he distinguishes applying the concept in a statute to new facts—which is unremarkable—and replacing this concept with a new concept—which he rejects.

Noting the force of Lord Sumption's argument that the 'living instrument' doctrine wrongly transfers political questions to the courts, Lord Hoffmann considers the differences between rights adjudication under a domestic constitution and under an international human rights treaty. The challenge facing the international