

Three Wrong Turns in Lord Sumption's Conception of Law and Democracy

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IN THIS SHORT chapter, I object to three rather central claims in Lord Sumption's speech 'The Limits of Law'¹: on the legitimacy of judicial interpretation in public law; about his conception of democracy and the role of judicial review therein; and on the utility of the concept of polycentricity as a guide to justiciability.

I. LAW, POLITICS AND JUDICIAL LAW-MAKING

Lord Sumption's task in this speech, when read in conjunction with his FA Mann lecture 'Judicial and Political Decision-Making: The Uncertain Boundary',² is to assert that there is a workable border between legal and political decisions, and that judges applying British and European public law frequently transgress it. He illustrates the claim in the English law of judicial review by reference to cases that he claims were wrongly decided, namely *Ex p Witham* and, as indicated in the FA Mann lecture, *Ex p World Development Movement* and *Ex p Joint Council on the Welfare of Immigrants*.³ I think that Lord Sumption's position on *Witham* and *Joint Council on the Welfare of Immigrants* is incompatible with his claim in the FA Mann lecture that he supports the *Simms* principle of legality, which is that Parliament must use clear language when it exercises its undoubted power to infringe human rights. *Ex p Witham* was about restricting access to justice by statutory instrument, without explicit parliamentary authority. *Ex p Joint Council on the Welfare of Immigrants* was about barring public authorities from offering

¹ Lord Sumption, 'The Limits of Law', 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013, available at: <http://supremecourt.uk/news/speeches.html>.

² Lord Sumption, 'Judicial and Political Decision-Making: The Uncertain Boundary' (2011) 16 *Judicial Review* 301.

³ *R v Lord Chancellor ex p Witham* [1997] 2 All ER 779 (CA); *R v Secretary of State for Social Security ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 (CA); *R v Secretary of State Foreign and Commonwealth Affairs ex p World Development Movement* [1995] 1 WLR 386 (QB).

financial support to late-claiming asylum seekers, making them destitute and unable to work legally, again without explicit parliamentary authorisation. I am not sure whether Lord Sumption is aware that in the case of *Ex p Limbuela*, a substantially similar policy scheme embodied in legislation was found by all UK judges who considered the question (including a unanimous Appellate Committee of the House of Lords) to be incompatible in spirit with Article 3 of the European Convention on Human Rights.⁴ Perhaps they too were unaware of the distinction between politics and law.

The *World Development Movement* case is in my view often misrepresented not only by Lord Sumption but also previously by Lord Irvine.⁵ Both of these accounts claim that the High Court was principally concerned with assessing whether the Pergau Dam in Malaysia was economically efficient. But that was not the key issue in the case. Rather, it was whether a manifestly uneconomic project was a project 'for the purposes of promoting the development or maintaining the economy of any foreign country' within the meaning of section 1 of the Overseas Development and Co-operation Act. It was common ground in the case that the project was uneconomic, because the Minister's own Permanent Secretary (Tim Lankester) had advised him so and there was no evidence rebutting this view, and there was also evidence that the decision was taken to further wider British diplomatic and of course economic interests.⁶ This case essentially concerned a minister using funds earmarked by the government for certain statutorily defined purposes to support projects that were not for those purposes. The fact that Parliament voted separate funds for the project after the case not only does not prove Lord Sumption's point, but rather it vindicates the outcome of the judgment. If the government wanted to give Malaysia some £316 million for reasons pertaining to British interests, it can ask (tell) the Commons to vote that supply separately. The judgment left the £316 million in the development budget, where it belonged.

⁴ *R v Secretary of State for the Home Department ex p Limbuela* [2005] UKHL 66.

⁵ D Irvine, *Human Rights, Constitutional Law and the Development of the English Legal System* (Oxford, Hart Publishing, 2003) at 164–65: '[After explaining the statute, he continues] The court held that, properly understood, this meant "sound development", and concluded that the decision to make the grant was unlawful because, in the view of the court, the grant was economically unsound. By reading an additional requirement into the statute in this way, the court took away from the executive a considerable degree of autonomy. It is this type of judicial activism which begins to blur the boundary between appeal and review, thereby undermining the constitutional foundations on which the courts' supervisory jurisdiction rests.'

⁶ Rose LJ: 'Whatever the Secretary of State's intention or purpose may have been, it is, as it seems to me, a matter for the courts and not for the Secretary of State to determine whether, on the evidence before the court, the particular conduct was, or was not, within the statutory purpose ... A political purpose can taint a decision with impropriety.' Sir Tim Lankester's minute [ie, the Permanent Secretary] stated: 'The project was an abuse of the aid programme in the terms that this is an uneconomic project. [This was not contradicted.] Accordingly, where, as here, the contemplated development is, on the evidence, so economically unsound that there is no economic argument in favour of the case, it is not, in my judgment, possible to draw any material distinction between questions of propriety and regularity on the one hand, and questions of economy and efficiency of public expenditure on the other.' On the link between the aid and arms sales, see Foreign Affairs Committee, *Public Expenditure: The Pergau Hydro-Electric Project, Malaysia, The Aid and Trade Provision and Related Matters*, 13 July 1994, HC 271-1 (1994–95) at [88]

Let me turn to 'living tree' interpretation, which is the major target in Lord Sumption's speech.⁷ The charge in his speech is that the Convention was originally intended as a charter against despotism and totalitarianism, *and* this implies a degree of minimalism to which present judges must adhere. This seems a perhaps incompletely stated version of originalism and, in particular, of the 'original meaning' version associated with Justice Antonin Scalia of the US Supreme Court.⁸ I respectfully disagree on the helpfulness of this idea for interpreting the European Convention, both because it is an unsound approach to interpretation and because the evolutive approach has been democratically ratified on a number of occasions.

On the substance of the originalist argument, I should be clear that I agree with Lord Sumption that the original intentions and scheme of a convention's drafters should always be important and given weight. That much is merely purposive statutory interpretation. But 'original meaning' originalism holds that we must interpret the words in the legal instrument as those words were widely understood at the time the instrument was adopted. In the debate between Ronald Dworkin and Antonin Scalia on the merits of originalism, I think Dworkin's most convincing argument is that there is no strong evidence that the drafters of the US Constitution intended to enact their own particular understandings of what the text meant.⁹ They intended to lay down general principles, not their own expectations of how those principles would be understood and applied. I want to argue here that this is exactly what legislators and drafters ought to do with certain vague statutory language and the types of norms found in international conventions (if perhaps not bilateral treaties).

When law-makers enact abstract language, even in a criminal law, they intend to give legislative force to normative standards and they thereby empower *both* the executive and the judiciary with interpretive authority. They intentionally employ vague language in order to preserve the flexibility of a legislative scheme. If this at first sounds strange, then the contrary proposition is upon consideration much stranger. When the authors of the Napoleonic Code created a sweeping set of civil rights and obligations for the private sphere, is it remotely reasonable to think that concepts like person, private, offer, delict, and good faith are to be understood as they were in nineteenth-century France? And when we enacted a general obligation in Britain not to dismiss employees unfairly, are we to read the term as a general normative standard, subject to evolving understandings, or as the words 'unfair dismissal' were understood when the Industrial Relations Act of 1971 was

⁷ Lord Sumption (n 1) 7ff. Lord Sumption uses the phrase 'living instrument'. On this point, see Martin Loughlin's contribution in ch 3 of this volume.

⁸ A Scalia and A Gutmann (eds), *A Matter of Interpretation: Federal Courts and the Law* (Princeton, Princeton University Press, 1997). For an excellent defence of living tree interpretation from non-Dworkinian starting points, see A Kavanagh, 'The Idea of a Living Constitution' (2003) 16 *Canadian Journal of Law and Jurisprudence* 55.

⁹ *ibid* 119ff.

adopted (or do we rather go with the understandings in the consolidating amendments of 1974, 1978 and 1996)? It seems there is little doubt that the advantage of purposive, updating interpretations is so clear that we would need some special interpretive statement in a legal instrument saying otherwise.

Similarly with constitutions and international conventions, drafters realise that most such documents are meant to have a longevity unlike any other legal instrument.¹⁰ Cass Sunstein calls these incompletely theorised agreements,¹¹ but, also, any public lawyer knows that the so-called ‘dead hand of the past’ problem is perhaps the largest single issue grappled with in constitutional theory. Purposive and living tree or evolutive interpretation, like purposive statutory interpretation, were very often meant to accommodate the changing nature of the state and societal mores. Constitutions do not just empower claimants, but they disable defendant public authorities, and evolutive interpretation can also protect public authorities. An originalist understanding of the US Constitution would devastate the regulatory capacity of the US federal government,¹² and it nearly did destroy Obamacare,¹³ as well as doing enormous damage to its regulation of election financing.¹⁴ It is no accident that originalists in the US strike down far more legislation than their liberal colleagues,¹⁵ under the absurd theory that they are being more democratic and less activist when they do so. Let me offer a hypothetical example closer to home. Suppose a public employee is dismissed on account of using racist language and racially offensive reasoning in emails at work. He complains that his free expression is abridged under Article 10 ECHR, and the issue in litigation is whether the Equality Act’s duty to promote racial equality is justifiable as a restriction of his expression rights under Article 10. If we read Article 10(2) as originalists would have it, we could not suppose that public morals would condemn racist speech or reasoning, because it was pervasive at the time across the political spectrum. But there is no doubt, one would hope, that both public morals and the rights of others now, properly understood, would justify legislation abridging expression rights in this type of context.

The more mundane reason why Lord Sumption’s assault on living tree interpretation is unpersuasive is that the Strasbourg Court’s approach has been ratified democratically on several occasions. Unlike Lord Sumption, I am not an historian

¹⁰ There may be a different approach to traditional bilateral treaties than for conventions. Public international law recognises evolutive interpretation at times, but not nearly as the dominant mode of interpretation: see J Crawford, *Brownlie’s Principles of Public International Law*, 8th edn (Oxford, Oxford University Press, 2012) 379–80. *cf* R Bernhardt, ‘Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights’ (1999) 42 *German Yearbook of International Law* 11.

¹¹ C Sunstein, ‘Incompletely Theorised Agreements’ (1995) 102 *Harvard Law Review* 1733; see also his *Legal Reasoning and Political Conflict* (New York, Oxford University Press, 1996).

¹² Just such an argument is made in RA Barnett, ‘The Original Meaning of the Commerce Clause’ (2001) 8 *University of Chicago Law Review* 101, also supporting findings by Justice Clarence Thomas on the same issue.

¹³ *NFIB v Sebelius* 567 US __ (2012); *King v Burwell* 576 US __ (2015).

¹⁴ *Citizens United v FEC* 558 US 310 (2010).

¹⁵ A Liptack, ‘How Activist is the Supreme Court?’ *New York Times* (13 October 2013) SR4.

and do not want to express a strong view on the intentions of the states that adopted the original Convention. But it seems that the text of the Convention was always capable of regulating domestic policy as it has done, and this is indeed also the understanding of Ed Bates, who has written the most authoritative exploration of the subject.¹⁶ Provisions regarding the right to marry, translation services for the criminally accused, the detailed nature of Articles 5 and 6 and the restrictive nature of Article 14, together with the right of individual petition to the Commission, all suggest that it was known that the Convention would certainly address domestic policy. Above all, the detailed limitation provisions, and the emergency powers provision in Article 15, would hardly make sense if the Convention were regarded as a reference point during times of democratic collapse only.

What clearly was radically different at the outset was the role of the Strasbourg institutions in protecting the Convention's scheme. They were weak and inaccessible at the outset, and their interpretive assertiveness, admittedly, was not foreseen or welcome at first, nor can it be said that this role was part of the scheme that the drafters intended to set up.¹⁷ But that is beside the point, because the Court's interpretive jurisdiction has been accepted by separate accession of states party, at a time when Sir Humphrey Waldock was advocating the vision of the Convention as a European Bill of Rights.¹⁸

Evolutionary interpretation was announced by the Court in 1978 in the *Tyrer v UK* case,¹⁹ and the UK has affirmatively renewed its commitment to the Court's jurisdiction three additional times since its acceptance of the Court's jurisdiction in 1966.²⁰ Most remarkably, the Human Rights Act 1998 was adopted in the same year as Protocol 11 to the Convention, which abolished the European Commission on Human Rights and made the Court the central interpretive organ. I can quote, as well, from the White Paper *Rights Brought Home*, which the Labour government laid before Parliament in 1997:

- 2.5 The Convention is often described as a 'living instrument' because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention.²¹

¹⁶ E Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford, Oxford University Press, 2010). Bates also confirms that the Convention, as Lord Sumption maintains, was initially understood as a 'pact against totalitarianism' though he explains how that conception evolved politically as well as juridically. See generally ch 4.

¹⁷ *ibid* 89ff.

¹⁸ *ibid* 366ff.

¹⁹ *Tyrer v UK* [1978] ECHR 2. For another defence of evolutionary interpretation at the Strasbourg Court in particular, see G Letsas, 'The ECHR as a Living Instrument: its Meaning and Legitimacy' in G Ulfstein, A Follesdal and B Peters (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge, Cambridge University Press, 2013).

²⁰ Ed Bates, 'What was the Point of the ECHR?', <http://ukhumanrightsblog.com/2011/03/21/what-was-the-point-of-the-european-convention-on-human-rights-dr-ed-bates>.

²¹ *Rights Brought Home: The Human Rights Bill* (CM 3782) (1997).

This exact feature of Strasbourg jurisprudence was also debated in Parliament at the time of the Human Rights Bill.²² The issue was live and the choice was clear. So the assault on the legitimacy of evolutive interpretation is an assault on that very democratic choice.

II. THE CONCEPT OF DEMOCRACY²³

So far as I can tell, there is no clear conception of democracy to be found in this speech, though there are a few comments indicating what it might consist in. The most direct claim in the speech is that: ‘Democracy is a constitutional mechanism for arriving at decisions for which there is a popular mandate.’ But neither Hitler, nor Mao, nor even Vladimir Putin can be regarded as democratic leaders, despite having had popular mandates. And Napoleon loved plebiscites too. The procedurally minimalist conception of democracy as formal voting equality, that it is, to quote Joseph Schumpeter, ‘that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for people’s vote’²⁴ has long been distinguished as wholly unconvincing.²⁵ And of course Lord Sumption’s statement is incompatible with his own claim on the very same page—which I agree with—that we should not confuse popular sovereignty with democracy.

It is absolutely right that, in a democracy, the output of legislative decision-making must be defended as democratic. Democracy is more than tallying voting inputs.²⁶ The best defences of legislation against judicial review have focused on the claim that legislative decision-making is a better way of respecting the value

²² See, eg, HL Deb 3 November 1997, vol 582, cols 1227–312 at col 1266 (Lord McCluskey).

²³ On this point, see Martin Loughlin in ch3 of this volume.

²⁴ J Schumpeter, *Capitalism, Socialism and Democracy* (London, Routledge 1976 [1943]) 241.

²⁵ Lord Sumption confirmed in the seminar discussion that in his view this Schumpeter’s statement that I reproduced here is precisely the right definition of democracy. Schumpeter’s conception more generally is known as the ‘elitist theory’ of democracy. The theory advocates a role for governing elites that rejects any ongoing role for the views, preferences and wishes of the people as a guide to how elites should govern. As Gerry Mackie explains, Schumpeter was a ‘reactionary monarchist’ who ‘did not welcome socialism, but even less did he welcome popular democracy.’ G Mackie, ‘Schumpeter’s Leadership Democracy’ (2009) 37 *Political Theory* 128, 128. Furthermore, Schumpeter disclaimed any need for an egalitarian conception of the franchise. See RA Dahl, *Democracy and its Critics* (New Haven, Yale University Press, 1989) 121–22 (showing that Schumpeter’s conception led to absurdities such as that the exclusion of black Americans from voting in the American south, or the rule of the Bolshevik party in the Soviet Union, were not in principle undemocratic because we must simply accept each community’s own definition of its demos). For these and other reasons, Amy Gutman refers to it only in passing in her discussion of democracy as ‘one of the least inclusive, least inspiring conceptions of democracy that have gained currency in contemporary political theory.’ A Gutman, ‘Democracy’ in RE Goodin, P Pettit and T Pogge (eds), *A Companion to Contemporary Political Philosophy* 2nd edn (Cambridge, Blackwell Press, 2007).

²⁶ R Dworkin, ‘Introduction: The Moral Reading and the Majoritarian Premise’ in *Freedom’s Law: The Moral Reading of the American Institution* (Cambridge, MA, Harvard University Press, 1996).

of political equality.²⁷ And in my view the best theories of democracy tend to have the goal of securing political equality as their ultimate normative aim and thus this is the standard they must be judged by.²⁸ Democracy is about securing a mode of decision-making in which we strive to achieve equal potential influence on political decisions taken for the community. Formal voting equality is a logical starting point for giving effect to that view, but it is not the end point.

Lord Sumption's comments about the role of compromise and liberalism's rejection of it provide more clues to his understanding of democracy. I agree with the basic idea that political compromise is an important and legitimate aspect of politics, and a feature that has been marginalised in modern liberalism, especially, one might add, under Ronald Dworkin's notion of integrity as a distinct political virtue.²⁹ But why is compromise a good thing? The apparent answer to this question in Lord Sumption's analysis is inclusion. It goes against winner-takes-all politics and towards consensus decision-making where possible. But inclusion is not always good. The hyper-proportionality of party representation in the Weimar-era German Reichstag is widely seen as a key reason for its ineffectiveness and subsequent fall. Inclusion is *ordinarily* good for a further reason that we have already seen: it tends to respect the value of political equality and tries to give other groups a slice of the pie, some representation in the overall governing scheme. In corporatist political and economic systems³⁰ and some Christian doctrine,³¹ compromise is seen as good because it facilitates social peace and thus the common good. But obviously in politics and corporatist systems of all types, one only compromises with those who have some power. Powerful groups normally compromise when

²⁷ J Waldron, *Law and Disagreement* (Oxford, Clarendon Press, 1999); J Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1347. For a more wide-ranging and challenging critique, see R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge, Cambridge University Press, 2007).

²⁸ See RA Dahl, *On Democracy* (New Haven, Yale University Press, 1998) chs 5 and 6 for a readable introduction; and RA Dahl, *Democracy and its Critics* (New Haven, Yale University Press, 1989) ch 6; CR Beitz, *On Political Equality: An Essay in Democratic Theory* (Princeton, Princeton University Press, 1990); T Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (Oxford, Oxford University Press, 2008); A Gutman and D Thompson, *Democracy and Disagreement* (Cambridge, MA, Belknap Press, 1996) 26 ('Democracy ... is a conception of government that accords equal respect to the moral claims of each citizen').

²⁹ R Dworkin, *Law's Empire* (Cambridge, MA, Belknap Press, 1986) chs 6–7. There is a debate to be had about whether the theories of Rawls and Dworkin could quite easily make space for compromise. This debate and discussion more generally is not new: JR Pennock and JW Chapman, *Nomos XXI: Compromise in Ethics, Law, and Politics* (New York, New York University Press, 1979); D Braybrooke, 'The Possibilities of Compromise' (1982) 93 *Ethics* 139–50 (reviewing the Pennock and Chapman volume); R Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (London, Routledge, 2002); A Margalit, *On Compromise and Rotten Compromises* (Princeton, Princeton University Press, 2009).

³⁰ See, eg, A Lipjhart, *Patterns of Democracy: Government Form and Performance in Thirty-Six Countries* (New Haven, Yale University Press, 1999); K Armingeon, 'The Effects of Negotiation Democracy: A Comparative Analysis' (2002) 41 *European Journal of Political Research* 81.

³¹ The influence of Catholic thought in particular had important links to political and social corporatism: see H Wilensky, 'Leftism, Catholicism, and Democratic Corporatism' in P Flora and AJ Heidenheimer (eds), *The Development of Welfare States in Europe and America* (New Brunswick, NJ, Transaction Books, 1981).

they feel they have to. And if the compromises run too deep, they become a type of power-sharing arrangement with clientelist features that are downright regressive. Greece provides one example, and Colombia yet another. So if compromise is not always good, but is often good because it promotes equality, then we must ask whether we can design institutions that can correct for the process of political compromise when we can reasonably predict that political compromise can offend and not protect equality. Only a fool would be oblivious to the influence on professional politics of concentrated media, access by wealthy elites, and straightforward majoritarian bias and misinformation. And as a footnote, we should also be clear that the British political system in fact exemplifies a winner-takes-all system rather than a compromise democracy.³²

In constructing democratic systems that respect the value of political equality, nations often depart from the norm of formal voting equality in a number of ways. The most widespread departure is representative rather than direct democracy. Direct democracy is no longer in fact impossible, and the call for referenda and ballot initiatives on all manner of issues is a major development in contemporary politics, as is the rise of protest parties, some of which offer software designed for real-time polling on minute political issues.³³ This is direct democracy 1.0, showing in real political theatres as we speak. We have all sorts of good quintessentially democratic reasons for stemming this tide and defending representative democracy.

Another frequent departure is bicameralism with weighted representation of federal sub-units in the second chamber. The US model is radically inequalitarian and thus probably undemocratic,³⁴ but there are many others that are more defensible in terms of political equality. A related example would be consociational systems with minoritarian veto players, such as in Northern Ireland, Switzerland, the Netherlands, Belgium and many other countries.³⁵ The point of consociational democracy is to preserve stability, but also to facilitate inclusion of groups at risk of harm in winner-takes-all politics, like in Britain and America. A step further still is legislative quotas for race and gender, which are used in well over fifty countries around the world.³⁶

³² A Lijphart, *Democracy in Plural Societies*, (New Haven, Yale University Press, 1977) ch 2; A Lijphart, *Patterns of Democracy: Government Form and Performance in Thirty-Six Countries* (New Haven, Yale University Press, 1999). For critique, see B Barry, 'Political Accommodation and Consociational Democracy' (1975) 5 *British Journal of Political Science* 477; DL Horowitz, *Ethnic Groups in Conflict* (Berkeley, University of California Press, 1985) 568–76.

³³ Especially Germany's 'Piraten Partei' and its use of 'Liquid Feedback' software, something I criticise as incompatible with the practice of *good compromise* in J King, 'Down with Pirates' *UK Constitutional Law Blog* (20 October 2012), available at: <http://ukconstitutionallaw.org>.

³⁴ RA Dahl, *How Democratic is the American Constitution?*, 2nd edn (New Haven, Yale University Press, 2003) 43–54 (also confirming American exceptionalism on this issue).

³⁵ A Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven, Yale University Press, 2012) especially ch 3.

³⁶ ML Krook, 'Quota Laws for Women in Politics: Implications for Feminist Practice' (2008) 15 *Social Politics* 345; D Ruedin, 'Ethnic Group Representation in Cross-national Comparison' (2009) 15 *Journal of Legislative Studies* 335.

Yet another departure is found in the appointment of executive officials and even judges. In this country, the Conservative Party introduced the election of police and crime commissioners, which went ahead with an average voter turnout of 15.1 per cent.³⁷ And in the United States, state judges campaign on conviction rates. Is it undemocratic to regard that as pure folly? On the popular mandate theory offered by Lord Sumption, these officials would be yet more legitimate than those appointed by the executive and who are not accountable periodically to the people. But in a true democracy, we want efficient and non-corrupt crime prevention by career professionals rather than careerist politicians. The same is true of central bank independence, appointments to major agencies and so on.

Now we defend each of these institutions, or some of them, not as some infringement of democracy, but as arrangements that secure the value of political equality and thus democracy itself (or they may secure other ends, such as common welfare, stability etc). Judicial review of legislation on human rights grounds is best understood in precisely the same way. It is one possible mode of institutional design to protect political equality and basic rights in a system where formal voting equality creates a predictable problem. It might work poorly in some countries, like in the US. But in this country,³⁸ of the 21 statutes found incompatible with the European Convention by UK courts and not overturned on appeal, the overwhelming majority of cases concerned groups that are marginalised in the political process: homosexuals, transgender people, mental health patients, foreign terror suspects and, yes, prisoners—and, contrary to Lord Sumption's claim, there are good reasons to think prisoners are a politically marginalised group. The remainder concerned groups that were not politically marginalised, but not influential either: lorry drivers, care workers and children of deceased fathers conceived by fertility treatment. Moreover, about one-third of these cases involved legislation where the legislature had never even debated the rights-issue at stake in the case. There was no deal on the matter. On the whole, the record of the Human Rights Act suggests it has contributed to egalitarian outcomes and, at any rate, the remedies have been remarkably timid and required only minor legislative tweaking in almost all cases. That record may change and it may do more to harm than to help political equality. But for the moment, the legislative review under the Human Rights Act appears to have promoted rather than impeded the value of equality that inspires any convincing conception of democracy.

³⁷ Electoral Commission, *Police and Crime Commissioner Elections in England and Wales: Report on the Administration of the Elections held on 15 November 2012* (London, HMSO, March 2013) 3.

³⁸ I examine the experience with s 4 declarations and the responses of Parliament in detail in J King, 'The Role of Parliament Following Section 4 Declarations of Incompatibility' in H Hooper, M Hunt and P Yowell (eds), *Parliaments and Human Rights* (Oxford, Hart Publishing, 2015), and see 179 for an illustration of judgments relating to marginalized groups.

III. THE PLACE OF POLYCENTRICITY

Although Lord Sumption borrows his own title from Lon Fuller's famous essay 'The Forms and Limits of Adjudication', the idea of polycentricity makes only a late appearance in his speech. Essentially, the idea is that polycentric issues should not be adjudicated. Polycentric issues are those that comprise vast web of interlocking interests, such that changes to any interest are communicated through the web to other relationships of interest, ad infinitum.³⁹ Decisions concerning how to regulate an industry, or fund a school system, for instance, are polycentric because the policies adopted will affect a multitude of interacting parties who must adjust in myriad ways to the demands imposed upon them. Fuller thought these issues ill-suited to adjudication because the complexity led to judges making guesses, consulting non-represented parties and so on. His key point was that the distinguishing feature of adjudication as a mode of decision-making is that it gives to the party affected by the decision a right to participate in the adjudication. Polycentric issues affected many dispersed parties who cannot even be identified, let alone heard in court.

This idea continues to have huge purchase in English public law, even though it has died a slow death in the US. It died there because everyone knew that common law adjudication and American constitutional law were rife with polycentric issues. In the common law, we allow our judges to fashion the rules in cases that decide whether pure economic loss is recoverable; whether private parties should be able to recover compound rather than simple interest from public authorities; the scope of public policy in commercial contracting; the nature and grounds of judicial review; and of course supervision of the taxation system, one subject I explored in some detail in an article.⁴⁰ Fuller never adequately answered the challenges posed by these types of counter-examples.⁴¹

In my book *Judging Social Rights*, I tried to rescue Fuller's idea from dismissal by clarifying how we could admit its relevance on the one hand and non-decisiveness on the other.⁴² There are factors that attenuate the weight a judge ought to give to the polycentric character of an issue presented to litigation. One of these is factors is the mandate, and it is important for the present discussion. If the legal regime tells the judge to adjudicate a question of proportionality, then it is not for the judge to refuse to do this, as Lord Justice Laws proposed doing in the case concerning David Miranda and Glenn Greenwald,⁴³ and as Lord Sumption has remarkably argued in this very speech.

³⁹ L Fuller, 'The Forms and Limits of Adjudication' (1978–79) 92 *Harvard Law Review* 353. The paper was a draft published posthumously. As explained on the editor's opening note on the paper, the first draft was written in 1957 and was revised in 1959 and 1961. For my own discussions, which elaborate on the points made here, see J King, 'The Pervasiveness of Polycentricity' [2008] *Public Law* 101; and J King, *Judging Social Rights* (Cambridge, Cambridge University Press, 2012) ch 7.

⁴⁰ King, 'The Pervasiveness of Polycentricity' (n 39) 111–23.

⁴¹ On this question, see Paul Craig in Ch 10 of this volume.

⁴² King, *Judging Social Rights* (n 39) ch 7.

⁴³ *R (Miranda) v Secretary of State for the Home Department* [2014] EWHC 255 (Admin); [2014] 1 WLR 3140 (Queen's Bench Division) at [40]

I should at this point recall some of the more left-leaning advocates of the idea of polycentricity as a guide to justiciability that Lon Fuller borrowed the idea from Michael Polanyi's book *The Logic of Liberty*.⁴⁴ Polanyi was concerned not with adjudication, but with government control of the economy, and his book was a tract against central planning. Friedrich Hayek and Polanyi largely agreed with one another on the libertarian implications of the idea.⁴⁵ The idea of polycentricity advocated limiting regulation of the economy for the same reasons Fuller advocated limiting adjudication of those issues—the epistemic challenge for the decision-maker.

The riposte to this line of libertarian reasoning is that even if market regulation involves executive attempts to regulate extreme complexity, the alternative of self-coordination is harmful enough to justify certain trade-offs. The same is true of adjudication. We let our judges make up the private law because they are good at it (so the argument runs) and it suits the market and private persons. In the EU, for instance, Member States wanted the Court of Justice for the European Union to adjudicate issues that are highly polycentric simply because, I assume, these remedies were seen as necessary for a viable common market. National legislatures often do the same with consumer protection legislation, employment protection, judicial review of tax authorities and much else. The UK has recently adopted a general anti-abuse rule empowering Her Majesty's Revenue and Customs to counteract 'abusive' tax arrangements, following on from years of debate on the merits of a general anti-avoidance rule.⁴⁶ No doubt such a rule will raise polycentric issues for adjudication, but it was a good idea because the status quo ante was far more costly.

Parliament chose to give the UK courts a mandate under the Human Rights Act to adjudicate polycentric issues. I would respectfully argue that it is not for Lord Sumption to second-guess that choice, least of all under a theory that it is best for judges not to tell parliamentarians what to do. Parliament decided this was a step towards greater accountability and greater political equality, and that it was consonant with the values to which modern democratic orders aspire. The problem they recognised was that there was a deficit in a legal order in which nationals and foreigners alike could not raise human rights claims in our own courts. The belief that giving a domestic avenue for raising Convention claims could provide a remedy and enhance the accountability of executive and legislative authority has not been shown to be wrong. And nothing in the idea of polycentricity shows it to be wrong.

⁴⁴ M Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (New York, Routledge & Kegan Paul, 1951) especially 170ff.

⁴⁵ King, 'The Pervasiveness of Polycentricity' (n 39) 104–05; FA Hayek, *The Constitution of Liberty* (London, Routledge Classics, 2006) 140–41.

⁴⁶ Part 5 of and schedule 43 to the Finance Act 2013. For context on the new institutions, see J Freedman, 'Creating New UK institutions for Tax Governance and Policy Making: Progress or Confusion?' [2013] *British Tax Review* 373. For further consideration of the anti-abuse rule, see J Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-avoidance Principle' [2004] *British Tax Review* 332.

