Lord Sumption and the Limits of the Law BY NICHOLAS **BARBER**, RICHARD **EKINS** AND PAUL **YOWELL**, eds [Oxford: Hart Publishing, 2016. xiv + 231 pp. Hardcover: £50.00]

On 20 November 2013, Jonathan Philip Chadwick Sumption, a Justice of the Supreme Court of the United Kingdom since 2012, delivered the 27th Sultan Azlan Shah Lecture in Kuala Lumpur. Entitled "The Limits of Law", it explored the role that judicial review should play in a democratic system, expressing concern that particularly insofar as questions of fundamental rights are concerned, the English courts' expanding resort to judicial review was increasingly impinging upon political terrain that is more properly the purview of parliament. His argument along these lines derived primarily from two claims. The first is that judicial modes of investigation, which generally limit their focus to the concerns of the parties before the court, are inappropriate in the context of the much more polycentric nature of questions of fundamental rights (at p 26):

> Litigants are only concerned with their own position. Single-interest pressure groups, which stand behind a great deal of public law litigation in the [United Kingdom ("UK")] and the [United States ("US")], have no interest in policy areas other than their own. The court, being dependent in the generality of cases on the material and arguments put before it by the parties, is likely to have no special understanding of other areas. Lon Fuller famously described these as 'polycentric' problems. What he meant was that any decision about them was likely to have multiple consequences, each with its own complex repercussions for many other people. 'We may visualise this kind of situation by thinking of a spider's web', he wrote; 'a pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole'.

The second concerns the claim that parliament is the principal font of political legitimacy in a democratic system (at p 25):

> I have already mentioned Professor Ronald Dworkin, whose death last year deprived us of one of the most formidable defenders of rights-based law defined by judges. He defended it against those who would leave this to the legislature by arguing that judges were more likely to get the answer right. 'I cannot imagine', he wrote, 'what argument might be thought to show that legislative decisions about rights are inherently more likely to be right than judicial decisions.' The

> problem is that this assumes a definition of 'rightness' which is hard to justify in a political community. How do we decide what is the 'right' answer to a question about which people strongly disagree without resorting to a political process to mediate that disagreement? Rights are claims against the claimant's own community. In a democracy, they depend for their legitimacy on a measure of recognition by that community. To be effective, they require a large measure of public acceptance through an active civil society. This is something which no purely judicial decision-making process can deliver.

Along these lines, Sumption also questioned the 'living instrument' approach to fundamental rights interpretation that has been adopted by the European Court of Human Rights ("ECHR"), in which that Court "interprets the [European Convention for the Protection of Human Rights and Fundamental Freedoms [*Convention*]] in the light of the evolving social conceptions common to the democracies of Europe, so as to keep it up to date" (at p 20):

> Put like that, it sounds innocuous, indeed desirable. But what it means in practice is that the Strasbourg Court develops the Convention by a process of extrapolation or analogy, so as to reflect its own view of what rights are required in a modern democracy. This approach has transformed the Convention from the safeguard against despotism which was intended by its draftsmen into a template for many aspects of the domestic legal order. . . None of these extensions is warranted by the express language of the Convention, nor in most cases are they necessary implications. They are commonly extensions of the text which rest on the sole authority of the judges of the court. The effect of this kind of judicial lawmaking is in constitutional terms rather remarkable. It is to take many contentious issues which would previously have been regarded as questions for political debate, administrative discretion or social convention, and transform them into questions of law to be resolved by an international judicial tribunal.

Sumption grounds his critique of the Strasbourg Court's interpretive methodology on three observations (at pp 20, 21):

> In the first place, it is not consistent with the ordinary principles on which written law is traditionally elucidated by judges. . . The function of a court dealing with [written law] is essentially interpretative and not creative.
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> . . .
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> Second, the power to extrapolate or extend by analogy the scope of a written instrument so as to enlarge its subject matter is not always easy to reconcile with the rule of law. It is a power which no national judge could claim to exercise in relation to a domestic statute, even in a common law system. It is potentially subjective, unpredictable and unclear.
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> . . .
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> Third, the Strasbourg Court's approach to judicial lawmaking gives rise, as it seems to me, to a significant democratic deficit in some important areas of social policy.

Sumption's lecture generated considerable interest in Britain. The headline from The Guardian read: "Senior judge: European court of human rights undermining democratic process". In October of 2014, a conference was organised at Oxford University in which "nine leading scholars" were invited to reflect upon that lecture (at p 1). *Lord Sumption and the Limits of the Law* is the product of that conference.

Of course, debates over the proper scope of judicial review, particularly as concerns the protection of human rights from offending statutory legislation, has been a staple of American public law discourse for over a century. The UK's experience with such review, by contrast, is of much more recent origins. And it is an experience that is shaped by a significantly different constitutional structure and—at least until Brexit becomes a reality—a significantly different structure of state sovereignty. The dialogue documented in this volume may represent one of the first efforts to explore this debate specifically in the context of Britain's experiences. For someone like this reviewer who comes out of the American tradition—and it is the American tradition that has largely dominated more global discussions of judicial review and rule of law—this makes this volume particularly interesting.

This difference is directly discussed in the very first response to Sumption's lecture produced in this volume, an essay by Martin Loughlin entitled "Sumption's Assumptions". In that essay, Loughlin acknowledges the contribution that Lord Sumption's lecture has had on stimulating debate within Britain on the proper role of judicial review in a democracy, but at the same time—and drawing considerably from American constitutional debates—he argues that the force of Sumption's argument is its rather simplistic understanding of the nature and complexity of what a constitutional system—including the roles that law, democracy and judging play in that system—is all about. And this, perhaps paradoxically, limits his ability to advance useful British perspective on the subject (at p 43):

> [Sumption's] intervention reads most cogently as the recurrence of a distinctive English voice. This is the voice of a privileged elite who find intellectual stimulation in dwelling on the evident deficiencies in the functioning of modern constitutional democracies without offering any serious analysis or any practical remedy.

In the next essay, Sandra Fredman defends the 'living instrument' approach of the Strasbourg Court, arguing that while it is not without problems, it is still the best approach given the alternative, which she identifies as originalism and textualism. She notes that (at p 64):

> [T]he arguments of uncertainty and democratic deficit apply equally to [originalism and textualism]. This is because human rights principles are necessarily couched in open-textured terms. There is no objectively 'true' interpretation... [And] [e]ven if the intention of the original drafters can be discerned, it is not clear that they have any continuing democratic mandate.

She continues by noting that "[t]he question then becomes not so much whether the decision is based on judges' personal values, but whether the reasons given are persuasive" (at p 64). The issue, in other words, is one of honesty not objectivity,

and the living instrument approach, if not more objective, is at least more honest than either originalism or textualism in its portrayal of what really lies behind the judges' decision.

By contrast, the essay by Leonard Hoffmann, a retired senior British judge who from 1995 to 2009 served as a Lord of Appeal in Ordinary (Britain's highest court of appeal prior to the establishment of the Supreme Court in 2009), is much more sympathetic to Sumption's critique of the living instrument approach, at least as it applied to the ECHR. The problem with regards to the ECHR is three-fold (at p 71):

> First, there is the conceptual problem of a court trying to apply the generalities of the rights enumerated in the Convention to specific situations in 47 countries with widely different legal systems, histories, cultures and religions.
> . . .
> Second, there is the question of democratic control. . . [In contrast to domestic constitutions], [a]n amendment to the [*Convention*], however, is in practice virtually impossible. . . The people and politicians of each individual Member State therefore have virtually no control over the law binding upon their country. . .
> Third, there is the question of legitimacy. A national court, even though it does and should consist of unelected judges, has a legitimacy simply from being part of the national legal system. . . A court comprising 47 foreign judges is in a very different position.

Hoffmann's critique seems directed primarily at the ECHR, but in the next essay, John Finnis extends that critique to British domestic courts in developing their interpretations of both the *Convention* and the *Human Rights Act 1998* (UK), c 42, incorporating that *Convention* into British domestic law. He first argues that the *Convention*, while useful as an "*aide-memoire* for [domestic] legislators" seeking to implement that *Convention* domestically, is a "mess" insofar as providing "a helpfully precise guide to adjudication" (at p 80). Along these lines, he then argues that the 'living instrument doctrine' as embraced both by the ECHR and the British Supreme Court represents a "profoundly flawed and unwarranted exercise[] of purportedly judicial power." (at p 73) Analysing in particular the court's decisions extending the right to vote to convicted criminals and extending rights to political asylum, he concludes that (at p 74):

> [T]here are good reasons to conclude that among the usurpations of legislative power by the Strasbourg Court (and by courts that loyally follow it) are some that unconscionably prejudice the European domain's right of self-determination and, without logically sound or juridically valid warrant, block its peoples' escape from possible catastrophe.

He then ends by "[suggesting]. . . repealing (without replacing) the [*Human Rights Act 1998*]" (at p 74).

By contrast, Aileen Kavanagh is much more optimistic about the courts' capacity for shaping both the *Convention* and the *Human Rights Act 1998* into a meaningful 'guide for adjudication' (as per Finnis), so long as courts remain aware of their "epistemic and other institutional limitations" and take this into account in their reasoning

(at p 124). She described the relationship between the legislature and the courts as one of "partners in a joint enterprise", rather than as a stark master-servant relationship such as implied by Sumption, in which each has its own set of complementary institutional strengths and weaknesses (at p 124). She notes, along these lines, that it was parliament itself that gave the courts competence to adjudicate claimed violations of the *Convention*, suggesting that even parliament recognised that there were some things that courts did better than they could do: "Parliament has charged the courts with a responsibility of its own, namely to scrutinise such legislation for compliance with individual rights. This responsibility is complementary to—rather than in conflict with—Parliament's own tasks." (at p 136) She notes (at p 140):

> The courts provide a valuable forum in which individuals can bring claims and grievances about the application of the law to their circumstances. Given their independence and their legal expertise, the courts can hear and adjudicate individual claims, resolving the difficult legal issues which arise in the context of an individual case. They have a role to play in upholding the rule of law—and enforcing it against the other branches—even when complex and controversial issues of social policy are at stake.

Jeff King amplifies Kavanagh's argument by showing that Sumption's claim about the proper relationship between the legislature and the courts is ultimately founded on a highly problematic notion of 'democracy'. Democracy is the product, not simply of competitive elections, but of a whole array of institutional features, most importantly that of political equality (at p 149):

> Judicial review of legislation on human rights grounds is best understood in precisely [this] 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, of the 21 statutes to date found incompatible with the [*Convention*] by UK courts and not overturned on appeal, the overwhelming majority of cases concerned groups that are marginalised in the political process. . .

Seen in this light, the supposed tension that Sumption draws between democratic legitimacy and judicial review of legislation is illusory. King concludes by noting (at p 151):

> Parliament chose to give the UK courts a mandate under the [*Human Rights Act 1998*] 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.

But Carol Harlow, in her essay, suggests that the institutional interactions at issue in fundamental rights adjudication are more complicated than is captured by a limited focus on the courts on one hand and Parliament on the other. Rather, adjudication

under the *Convention* involves the interaction of a much wider diversity of actors, including transnational and national courts, various other international, regional and domestic political bodies as well as domestic legislatures. Given this complexity, she argues, it is better to approach the issue of rights adjudication from a dialogic rather than from a getting-the-right-answer perspective. Like Kavanagh, Harlow argues that (at p 174):

> [A] collaborative model is both preferable and within reach. There are many forms of dialogue, both formal and informal, which allow judges to talk vertically to judges and horizontally to legislators. Governments talk to each other horizontally in councils and committees, and also talk diagonally in interventions made to supranational courts. . . Dialogue affords the best hope of preserving the distinctive British culture of rights and reinforcing the democratic element of the parliamentary sovereignty doctrine while allowing at the same time for progress. Parliaments and the courts must be prepared to engage constructively in a process of coordinate construction; equally, they must face up to the need for tough, multi-level dialogue with Strasbourg.

In the next essay, Paul Craig offers a different critique of Sumption, one that focuses not on Sumption's characterisation of the relationship between judicial review and democracy, but on his characterisation of the differences between political rights adjudication under public law and private rights adjudication under private law. Looking at the law of negligence as an example, he shows that adjudication under private law also frequently requires the courts to reflect on complex and polycentric issues of social policy and even democratic legitimacy. So public law is not unique in this, and in this sense, Sumption's argument proves too much: it actually represents an attack, not simply on the competence of the courts to sit in judgment of disputes over issues of fundamental rights, but on the competence of the courts to sit in judgment of any dispute whatsoever. He concludes (at p 192):

> Insofar as we are concerned about the limits of law, then this must apply equally to contestable normative judgments that the courts routinely make, as well as to the balancing of incommensurables. Insofar as we are concerned about the limits of law viewed from both dimensions, then our considered conclusions from a public law perspective must cohere with those that inform our thoughts about private law. The assumption that there is some stark dichotomy in this respect as between public and private law does not withstand close analysis.

The final essay in the volume is by Ralph Bellamy. A highly regarded advocate for thinking about constitutionalism as an ultimately political rather than legal phenomenon, Bellamy somewhat surprisingly criticises Sumption for actually being too legalistic in his approach to constitutionalism. In particular, he notes how implicit in Sumption's critique is a presumption that public law adjudication must and can only revolve around the search for objective *legal* resolutions to public law disputes: "On his account, constitutionalism is about *legal* limitation" (at p 200) [emphasis added]. But in fact, a perspective of political constitutionalism recognises that courts are in fact political actors, and properly so (at p 195):

> Political constitutionalism does not place [the] courts outside politics, but advocates their operating as part of the political system so as to promote the determination and upholding of rights in ways consistent with the constitutional ideal of legal and political equality. Legal and political adjudication are not separated, but are treated as complementary parts of a process designed to ensure that all individuals are treated with equal concern and respect.

Like many of the other authors in this volume, Bellamy argues for conceptualising the normative relationship between the courts and other constitutional bodies as a dialogic process rather than as simply a legal relationship. He argues that in the context of human rights litigation, this dialogic process can be promoted by keeping judicial review but limiting it to what he calls 'weak review' (at pp 202, 203):

> What might be the forms and limits of rights-based judicial review within a political constitution? With regards to its form, bills of rights need not be outside of politics—they can be normal pieces of democratic legislation which a legislature enacts to highlight that certain interests deserve especial consideration, establishing special procedures to vet laws and executive acts for compliance. Meanwhile, independent judges operating within a democratically dependent court can be authorised by such legislation to further improve public deliberation by obliging governments and legislatures occasionally to reconsider their decisions in the light of individual cases that may suggest they overlooked the impact of their policies on certain under-represented individuals. However, such judicial review may be limited to 'weak review', whereby the legislature may choose after due reconsideration to leave a given law or decision unchanged. . .

The volume concludes with a response by Sumption himself, delivered at the conclusion of the Oxford conference. His responses to the individual essays are too wide ranging to survey in this review: suffice it to note that he does not find any particular critique to be persuasive enough to cause him to rethink his argument. Using the American Supreme Court judgment deriving a constitutional right to abortion out of the due process clause as an example, he reiterates the regulatory dysfunctionalities that he says can easily be occasioned when a court adopts a living instrument approach to fundamental rights. "However," he concludes, "I have no quick fix to offer" (at p 224):

> I am wholly unrepentant about criticising the current state of affairs. . . which need to be recognised and discussed, by judges among others. The UK has a long tradition[] of achieving significant constitutional change by accident. . . But I doubt whether it is true today. We need to know where we are going. That means that if we choose constitutional change, we should do it on purpose and not as a byproduct of decisions, however, enlightened, made by diplomats and lawyers.

So, where does this leave us? This review was written two weeks after the British polity chose to leave the European Union. On the one hand, this may ultimately render Sumption's criticisms moot: judicial review of legislation for incompatibility

with fundamental rights has been very much tied up with Britain's membership in that Union, and it may be the case that exiting that membership may return the courts to their earlier state of affairs, wherein judicial review of legislation will again no longer be a juridical option.

On the other hand, Britain's judiciary and its constitutionalism have both undergone considerable institutional and ideological evolution in response to four decades of Union membership, and to the particular responsibilities that membership imposed on the courts, including the review of legislation for compatibility with fundamental rights—and I suspect that it may well be the case that too much has been done to be undone. It is interesting to note that it took some 80 years for judicial review to become an accepted part of the American constitutional order. And it was not at all an easy or straightforward journey. In this sense, the proper point of comparison insofar as both Sumption's critique and the responding essays in this volume are concerned is not necessarily with the American constitutional order of the late 20th century and early 21st country—it is with the American constitutional order of the late 18th and early 19th century. And to this reviewer, this makes this volume quite interesting indeed.

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