THE INAUGURAL BONAVERO INSTITUTE ANNUAL HUMAN RIGHTS LECTURE

The Democratic Virtues of Human Rights Law – A Response to Lord Sumption's Reith Lectures

The Old Hall, Lincoln's Inn, London, 20 February 2020.

Robert Spano

Ladies and gentlemen,

1. I extend my gratitude to the Bonavero Institute of Human Rights at the University of Oxford, and its Director, Justice Catherine O'Regan, for inviting me to speak this evening.

2. At the outset let me say this, I bring an external perspective, I will not be commenting on domestic political issues or developments in the British legal system. For that I am not equipped. Rather, I will begin by focussing in general on Lord Sumption's views on the expanding role of law at the expense of politics before engaging with his third lecture, entitled 'Human Rights and Wrongs', and his criticism of the European Court of Human Rights. I proceed in this manner as it is difficult to disentangle the third lecture from Lord Sumption's overall thesis. The five lectures must in other words fairly be read as a whole. When referring to his lectures, I will use the language Lord Sumption deploys in his published volume entitled *Trials of the State – Law and the Decline of Politics.*[1] In

[1] Jonathan Sumption, *Trials of the State – Law and the Decline of Politics*, Profile Books, London (2019).

my intervention, I offer my personal views which should not be ascribed to the Court on which I serve.

3. This evening I will be taking issue with a number of elements in Lord Sumption's lectures. However let me be clear, broadly speaking his thesis and the debate it has triggered is to be welcomed. A robust discussion on the trajectory of our societies and their normative foundations is crucial for a community's sustained legitimacy and growth. Lord Sumption, an eminent British historian and jurist, Queen's Counsel and former Justice of the Supreme Court of the United Kingdom, is particulary well-placed to partake in such a debate. It is a great pleasure for me to share the stage with him and principal Helen Mountfield QC here this evening in the Old Hall at Lincoln's Inn.

4. I will proceed in two parts which will encapsulate my two central arguments, which are these:

5. First, it seems that Lord Sumption underestimates the value of human rights law in legitimising political outcomes in a democracy. He eloquently states at the start of his third lecture, and I quote, "Human rights is where law and politics meet", but counsels that this can be an 'unfriendly meeting'. True, but incomplete in my view. Law plays an integral part in justifiably characterising political action as democratic. In a State, governed by the rule of law, the legitimate exercise of political power must always be regulated by the law. Law and politics are thus inextricably entwined in a true democracy. It is imperative to appreciate these premises of my intervention this evening. They form, I submit, the cornerstones of the Convention system and the work of its court, the European Court of Human Rights.

6. My second argument is this: Lord Sumption's description of the nature of the judicial process in human rights cases is to some extent misconceived. In particular, when it comes to the Strasbourg Court, his thesis, as I will explain, lacks a comprehensive and nuanced understanding of the historical development of the Court and the Convention system. As will be demonstrated, when examining the jurisprudence of the Strasbourg Court an appreciation of its history is crucial.

7. I begin by examining Lord Sumption's general thesis in favour of more politics and less law. As I understand him, his thesis centers around his disapproval of the legalisation, or in other words, the judicialisation, of the process of dispute resolution in society. He argues in his first lecture, *Law's Expanding Empire*, and I quote, '[rules] of law and the discretionary powers which law confers on judges limit the scope for autonomous decision-making by individuals', close quote.[2]

8. In his second lecture, entitled *In Praise of Politics*, Lord Sumption argues that although majority rule is a basic principle of democracy, majoritarian decision-making is only enough to authorise state action, it is not enough to make them legitimate. That is because majority rule is no more than a rule of decision. This is one reason, he continues, that all democracies have evolved methods of limiting or diluting the power of majorities. He then considers two of them, representative politics and law.[3]

9. Lord Sumption claims that courts have come to share the general suspicion of the political process and of political reasoning as an element in public decision-making. They have developed a broader concept of the rule of law which greatly enlarges their

[2] Ibid, 11.
[3] Ibid, 24-25.

constitutional role.[4] He then arrives at the core of his argument. He states that the judicial resolution of policy issues undermines the single biggest advantage of the political process which is to accommodate the divergent interests and opinions of citizens. He concludes his second lecture with characteristic eloquence, stating the following, and I quote: "Litigation can rarely mediate differences. It is a zero sum game. The winners carry off the prize, and the losers pay. Litigation is not a consultative or participatory process. It is an appeal to law. Law is rational. Law is coherent. Law is analytically consistent and rigorous. But in public affairs, these are not always virtues. Opacity, inconsistency and fudge may be intellectually impure, which is why lawyers do not like them. But they are often inseparable from the kind of compromises that we have to make as a society if we are to live together in peace", close quote.[5]

10. I begin my response by making clear that there are many elements in Lord Sumption's overall thesis with which I agree. In particular his distinction between the authority of majority rule, on the one hand, and, on the other, the legitimacy of majoritarian decision-making in a democracy, is apposite. It is clear, as he correctly argues, that the authority of majority rule does not necessarily connote democratic legitimacy. However, his views on the nature and role of the judicial process in a democracy require a considered response.

11. First, courts importantly promote the determination and upholding of rights in ways consistent with the constitutional ideal of legal and political equality. Legal adjudication and political debate are not mutually exclusive. They are complementary parts of an inclusive democratic structure designed to ensure that all

[4] Ibid, 34-35.
[5] Ibid, 41-42.

individuals are treated with equal concern and respect. As Lady Hale stated eloquently in the 2004 judgment in the House of Lords in the *Ghaidan* case, "[democracy] values everyone equally even if the majority does not".[6] This statement is fully in harmony with the Convention and the jurisprudence of the Strasbourg Court. Indeed, as recently explained extrajudicially by my colleague, the current UK Judge, Tim Eicke, this inclusive view of the democratic concept has a long historical pedigree.[7] Almost forty years ago, the Plenary of the Old Court said the following in the famous judgment in *Young, James and Webster v the United Kingdom,* and I quote: "Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position," close quote.[8]

12. It follows that although Lord Sumption is correct that compromise is often necessary for the furtherance of peace in a democratic society, political action in achieving such common solutions, which excludes the meaningful participation of marginalised groups or minorities, is anathema to a true democracy. Unchecked majority rule, that takes no account of the interests of the minority, risks descending into authoritarianism. In short, elections do not create omnipotence. Ladies and gentlemen this is, I submit, the core of the democratic virtue of human rights law.

13. Second, Lord Sumption pleads, as I understand it, in favour of a system of democratic majoritarianism, but one which attempts to limit the dangers of oppression by robust representative politics.

---

[6] *Ghaidan (appellant) v Godin-Mendoza (FC) (Respondent)* [2004] UKHL 30, § 132.
[7] Tim Eicke, 'Democracy as a European (Convention) Value', The 33rd Annual James Wood Lecture, Glasgow University, 24 October 2019.
[8] *Young, James and Webster v the United Kingdom,* [Plenary Court], no. 7601/76, 7806/77, 13 August 1981, § 63.

He warns against a set of substantive rights being fixed in a manner that legally constrain political majorities, the substance of which are interpreted and applied by courts.

14. But, I ask, is this belief in the virtues of representative politics belied by past and more recent history? The answer seems clear. A society of rational human beings, a community of civilised peoples, can learn from their past failures, readily appreciate the foibles of the human condition. Society may have readily experienced that the 'opacity, inconsistency and fudge' of the political process, to use the words Lord Sumption favourably deploys to characterise its virtues, can carry with it grave dangers. European societies established a structure of constitutional democracy in which certain fundamental rights and values were given normative status limiting majoritarian rule. In this manner they attempted to make the political process itself more rational, less prone to being dominated by gut feelings, by fear, anger and hatred, all primitive human elements that have given life to populist and ultimately self-destructive tendencies.

15. My third reflection on Lord Sumption's general more-politics-less-law thesis begins with the following question which I allow myself to submit to you in rather blunt terms: Is this really the time in European history to place our bet on more politics and less law? To entrust our destiny to the existence of good faith in the political process and argue in favour of limiting the review powers of independent and impartial judges? Truth is after all a cornerstone of democracy. The fundamental premise of democratic politics is that societal solutions and communal compromises are adopted on the basis of some minimum set of shared values and the existence of objective truths. Does that premise hold true in contemporary political processes in our part of the world? I fear not. Nationalism,

tribalism, dislocation, fears of social change and the distrust of outsiders are on the rise again as people, limited by their partisan silos and filter bubbles, are losing a sense of shared reality and the ability to communicate across social and sectarian lines.[9] No, I argue, it is not unjustified to claim that now is not the time for more politics and less law in the sense advocated by Lord Sumption.

16. Just to be absolutely clear at this point so my remarks will not be misconstrued or misinterpreted. By this I do not speak of weakening the role of politics, but rather for law to continue to sustain its true and inclusive democratic character. By this I also do not mean that pure policy issues and matters of high politics should be resolved in the courtroom. Far from it, but I do argue that in the age we live in, independent and impartial judges are quite fundamental for the sustained legitimacy of the political process and the separation of powers. This is not at all about 'judges seizing the policy agenda', as some have claimed. Of course judges should not remake society. They have a modest role; they assist society in not losing sight of our consensus principles. Courts are primarily concerned with 'process not substance, with how things get done rather than what is done'. Judges are in other words 'oiling the democratic machine, not telling it what to produce'.[10]

17. So, in concluding this first part of my intervention, I submit to you ladies and gentlemen that one has to readily appreciate that the often uncompromising attitude of political actors is the totem of our current culture of clashing visions. Hence, and with respect, Lord Sumption's more politics-less-law-thesis manifests it seems to me

[9] Michiko Kakutani, *The Death of Truth, Notes on Falsehood in the Age of Trump*, (2018), 12.

[10] Conor Gearty, 'The Supreme Court judges are oiling the democratic machine, not telling it what to produce', https://blogs.lse.ac.uk/brexit/2019/09/25/the-supreme-court-judges-are-oiling-the-democratic-machine-not-telling-it-what-to-produce/

an overly idealised view of politics, a view removed from the realities of every day hardships which, when they engender disputes, require resolution by independent and impartial courts, applying methods of principle.

18. This latter point brings me to my second part where I address in more detail Lord Sumption's core argument related to the limits of the judicial process as a substitute for political compromise. I will in particular engage with his criticism of the European Convention on Human Rights and the Strasbourg Court, the subject matter of his third Reith lecture, entitled *Human Rights and Wrongs*.

19. Allow me to begin this second part by asking you these questions: How can politics alleviate the torment of parents searching for hope when they are told that their sick child is facing a certain death; or resolve the fact-specific clash between the free-speech rights of journalists and the privacy rights of public persons, the latter alleging defamation; or further engage in the delicate balancing of interests implicated when the criminally accused faces charges on national security grounds whilst having to defend him- or herself without access to evidence?

20. Let me be clear, all of these disputes, as they arise from the complexities of life's happenstance, are not resolved by the judge on a blank slate. Of course not. Politics should set the framework in written statutes or other positive norms. Yes, the framework is often a value-system based on compromise promulgated into law. And in a democratic society governed by the rule of law and the separation of powers this legislative framework sets boundaries for the judge, sometimes strict, often open to interpretation and the application of reasoned discretion with the aim of giving life to the legislative will. But in a democratic society, the role of politics ends there; that is the point at which politics has done its job, it is not

equipped to resolve live controversies. Politicians are not elected to be dispute resolution arbiters applying the craft of the law on the basis of evidence and formalised and impartial procedures. In a democratic society, the meeting of law and politics is not necessarily unfriendly, as Lord Sumption claims. On the contrary this meeting is both unavoidable and necessary for a democratic society aspiring to be governed by the rule of law to properly function and not explode into chaos.

21. I make these points now as they are particularly salient when one examines the criticism levelled by Lord Sumption at the Convention system and the Strasbourg Court. The core of his argument is this: The Strasbourg Court has adopted an interpretive method, in particular the living instrument doctrine, which does not respect the natural limits of the Convention's text. In fact, he claims, it has 'invented rights'. It has interfered with national political processes in a manner which undermines democracy. It is guilty of 'mission creep'. It interprets the Convention in a manner that only provides 'very limited allowances for differences between [the member States'] moral values, their political cultures or their institutional traditions'.[11]

22. These are strong words indeed. Allow me to begin with these words of caution: This debate, if it is to be useful and reasonable, not mere hyperbole, cannot be couched in black and white terms, an either/or. Of course, the Strasbourg Court, like any court, has at times arrived at results which can legitimately be criticised. By some it will be considered that the Court will have entered into the realm of national politics. But one should be cautious in overstating the case. With great respect, Lord Sumption's thesis does just that.

[11] Ibid, 56-60.

I argue that more depth is needed, a subtle appreciation of history and a smidgen of nuance.

23. To start with, let's turn to history, because when critically assessing the Strasbourg Court, it is crucial. Indeed, an eminent historian like Lord Sumption will be aware of Justice Oliver Wendell Holmes's famous aphorism: "A page of history is worth a volume of logic." In other words, when analysing methodological approaches applied by national and in particular international courts, at the level of theory and principle, it is important to be mindful of their historical trajectories. As Lord Sumption points out, 'rights do not exist in a vacuum'.[12] The same applies *a fortiori* to courts, in particular an international human rights court, like the one in Strasbourg.

24. When interpreting and applying the Convention the Strasbourg Court has gone through four stages since its establishment in 1959. The first stage, the so-called Diplomatic Phase, occurred from 1959 till approximately the beginning of the 1970s, when the Court was perhaps a minor player, composed mainly of statesmen, professors with diplomatic experience, the Court not being considered a force to be reckoned with by the relatively small number of member States that had accepted its jurisdiction.

25. Then, things changed during the second phase, from the beginning of the 1970s until the fall of the Berlin Wall in 1989. This is the phase that some commentators have called the Judicial Phase.[13] It is when the Court formulated its main general principles, like the living instrument doctrine, the principle of autonomous interpretation and the margin of appreciation, which are still applied today. Why did this happen? There are probably many

[12] Ibid, 49.
[13] See Ed Bates, *Evolution of the European Convention on Human Rights*, Oxford University Press, 2010, 24.

reasons. Remember, at this point in time, the Court operated in a European environment receptive to increased integration and cooperation between States. International organisations were viewed as catalysts for increased prosperity and human rights became a true and independent legal discipline. Then, when the Berlin Wall fell in 1989 the Court entered its third phase, The Post-Communist Phase, with the Convention system expanding dramatically to the East up and until the beginning of the new century, the Court in between being drastically restructured with Protocol 11, the abrogation of the Commission and the establishment of the permanent Court in 1998. The Court was subsequently flooded with cases and Protocol 14 was drafted. At the same time we see that the European environment became less receptive to international intrusion in domestic affairs but also that some domestic systems, like in the United Kingdom, had fully embedded the logic and principles of the Convention into their national laws and practice. Thus, began the fourth and current phase in the life of the Court approximately with the start of the Interlaken Reform process a decade ago. This is a phase in respect of which I coined the now often used term the Age of Subsidiarity in an article published in 2014.[14]

26. In the last decade or so the Court has to a considerable extent recalibrated the methodological parameters of its jurisprudence towards a more democratically-incentive review mechanism. When national authorities have in good faith balanced competing interests, in other words, themselves adequately assessed the necessity of an interference into qualified rights, the Court is increasingly ready to apply the rule that it will require strong

[14] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', HRLR 14 (3), 2014, 487-502. See also, Robert Spano, 'The Future of the European Court of Human Rights – Subsidarity, Process-Based Review and the Rule of Law', HRLR 18 (3), 473-494.

reasons for it to substitute its judgment for the one adopted by the national authorities.

27. There are many examples of this subsidiarity-based approach in the case-law of the Strasbourg Court, none of which are referenced by Lord Sumption. Let me take just one, the judgment in the case of *Ndidi v the United Kingdom* of 2017,[15] a case dealing with the rights of immigrants, an area of the law which has often been the subject-matter of criticism directed at the Court in this country. A Nigerian national complained that his deportation from the United Kingdom would constitute a disproportionate interference with his right to respect for his family and private life under Article 8 of the Convention, a provision to which I will return in a moment. The Court found no violation of the Convention. It opined that the margin of appreciation has been generally understood to mean that, where domestic courts have carefully examined the facts, applying relevant human rights standards consistently with the Convention and the Court's case-law, and adequately balanced the applicant's personal interests against the more general public interest, it would not be for the Strasbourg Court to substitute its own assessment of the merits for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so.

28. It is true that in his published volume of the Reith Lectures, Lord Sumption adds a paragraph, not included in his initial public speech, stating, and I quote, that in the "last ten years, the Strasbourg court has undoubtedly become somewhat more sensitive to the political implications of its decisions and less aggressive in its expansion of Convention rights", close quote. However, it seems to me that his overall criticism and core

[15] *Ndidi v the United Kingdom*, no. 41215/14, 14 September 2017, § 76.

arguments directed at the Strasbourg Court unfortunately fail to adequately take exactly this historical development into account.

29. Lord Sumption focusses his substantive criticism of the Court's jurisprudence mainly on Article 8 of the Convention, the right to privacy, and on the living instrument doctrine. He explains it, and I quote, as a 'process of extrapolation or analogy, so as to reflect [the Court's] own view of what additional rights a modern democracy ought to have'. The Court in other words resorts to the living instrument doctrine to 'declare rights which are not [in the Convention]". He concedes 'that some development of the text is unavoidable when applying an abstract statement of principle to concrete cases. In addition, some concepts in the Convention ... plainly do evolve over time with changes in our collective values'. But, he concludes, the 'Strasbourg Court has gone much further than that'. In support of this conclusion he compares, in his fourth lecture, entitled *Lessons from America*, the Court's case-law under Article 8 with the US Supreme Court's substantive due process doctrine.[16]

30. Ladies and gentlemen, these arguments are problematic on several levels.

31. First, let me immediately dispose of the inapposite comparison Lord Sumption makes between the US and European models, and in particular his reference to the use of the substantive due process doctrine in American constitutional law. The US Constitution does not, I repeat, not encompass a textually based right to private life, the European Convention on Human Rights does, quite explicitly. This is a fundamental difference of principle, a difference not readily appreciated in Lord Sumption's lectures. The European States that have signed and ratified the Convention, including the

[16] Ibid, 56-57 and 84.

United Kingdom, have done so in the full and complete knowledge that they are incorporating a legal right to private life into their domestic legal systems, a right they also were perfectly aware would be interpreted and applied by the Strasbourg Court.

32. Second, Lord Sumption claims that the right to private life under Article 8 of the Convention was 'designed as a protection against the surveillance state in totalitarian regimes'. It surely was, but on what basis can he reasonably claim that the purpose of this provision was only limited to surveillance activities? That conclusion can certainly not be derived from the text of Article 8, which makes no reference to such activities. In fact, by making this claim, Lord Sumption is himself normatively interpreting the concept of private life within Article 8 engaging in the type of process of extrapolation from the text which the Strasbourg judges are required to perform. But on what basis can it then convincingly be argued that the way in which the Court has interpreted the right to private life is legally erroneous or, indeed, overly expansive. Expansive in what sense? The text only refers to the concept of 'private life', there is no textual limitation as to the scope of the right in the terms of the provision itself. That is the text formulated by the drafters and subsequently adopted and ratified by 47 member States of the Council of Europe, including the United Kingdom, which moreover enacted the Convention into law with the Human Rights Act in 1998. In other words, viewing the broad manner in which the Convention guarantees are worded, it is quite difficult to fully grasp what is meant by the claim, also propounded recently by some others, that the Court has in select judgments, and, I quote: "brazenly [departed] from the terms of the [Convention]".[17]

[17] Richard Ekins, *Protecting the Constitution* – How and why Parliament should limit judicial power. Policy Exchange, 2019, 8.

33. Indeed, those, like Lord Sumption, who argue that the Strasbourg Court has interpreted Article 8 too broadly have themselves adopted their own viewpoint of how that concept should be interpreted. Clearly, their viewpoint has to then be normatively justified on the basis of legal arguments which, when it comes to Article 8, cannot naturally be limited to the mere 'text' of the provision. Simply saying that the Strasbourg Court has gone too far, strayed from the text, invented rights, is, with respect, unhelpful rhetoric unless it can justifiably be supported by a normative framework of interpretive analysis based on the Convention's text, structure and history. Although Lord Sumption's lectures were, of course, not meant to be an exhaustive treatise on these issues, one is unable to identify in his lectures cogent analytical elements substantiating his criticism. However, I respectfully submit that a careful, comprehensive and historical analysis of Strasbourg case-law will easily uncover such arguments. One may then agree or disagree with them, but they are there. At the end of the day, one gets the sense that, in substance, some of the Strasbourg Court's interpretive outcomes under Article 8 of the Convention are not to Lord Sumption's liking, but that cannot alone and justifiably sustain the criticism he levels at the Court.

34. There is an important element of interpretive principle in play here that those, like Lord Sumption, fail perhaps to appreciate fully when it comes to the Court's interpretation and application of the Convention's so-called qualified provisions, Articles 8 to 11. These provisions require a convincing demonstration by the member State that an interference with a right was necessary in a democratic society. Lord Sumption correctly states that the 'Strasbourg court tends to give a wide scope to the rights protected by the Convention' and that it does so 'precisely in order to require

more and more legislative and governmental measures to be justified in court'.[18] However, he seems to view this as a negative side-effect of the Convention system.

35. There are two salient points worth mentioning here. First, it is true that the Court's jurisprudence has certainly not given a narrow reading to the abstractly worded rights in the first paragraphs of Articles 8 to 11. But that does not necessarily mean that it is correct to claim that the Convention's scope of protection, I repeat, scope of protection, can, in all instances, be characterised as 'expansive'. Analysing whether a complaint falls, at the outset, within the scope of applicability of a Convention right is certainly an important methodological step in the analysis, that is clear. However, when assessing whether the Strasbourg Court's findings constitute, in the aggregate, an overly 'expansive' view of the reach of the Convention and its impact at national level, it is the final outcome of the assessment which matters. It is the end result that counts, not the starting-point whether an interference has occurred. For example, on issues like sexual orientation and identity, Article 8 protections are indeed robust, but in others they are quite limited, like in cases dealing with foreigners' rights and other migration issues. To be sure, even on these latter issues, member States need to justify their measures, but the Court will in general afford them a wide margin of appreciation. I refer again to the judgment in *Ndidi v the United Kingdom* as a case in point.

36. This brings me to my second point. As I mentioned a moment ago, Lord Sumption seems to view it is a negative side-effect of the Convention system that legislative and governmental measures have to increasingly be justified before a court of law because the scope of rights is broad. I respectfully disagree. In a constitutional

[18] Ibid, 62.

democracy, that is true to its name, requiring the political and executive processes to produce rational and reasoned justifications for intruding into peoples' lives is itself inherently democratic. As I have argued, when individual disputes arise, a democratic society resorts to independent and impartial courts to settle the matter which must then take into account the justifications deployed by legislative and executive processes. As I explained at the outset, courts, including the European Court of Human Rights, thus in fact promote and incentivise the democratic process; in other words they attempt to encourage a symbiotic relationship between politics and law, manifesting in practice the democratic virtues of human rights law.

37. Ladies and gentlemen, whether you agree or disagree, I hope I have managed throughout my intervention this evening to convey to you the fundamental idea that politics, by its nature, does not in principle provide individual justice; politics does not provide for a sober and principled decision-making process which delicately balances often incommensurable and contradicting values that inevitably come into play by individually lived events. Yes, politics produce generally applicable norms promulgated in legislation. Politics is capable of providing a democratically legitimate framework and a forum for compromise for competing values generally accepted by the polity. But in a democratic society independent and impartial judges are entrusted with fairly interpreting rights and values when they are triggered by concrete controversies between the State and its peoples or indeed between private individuals resulting from the vagaries or, indeed, the tragedies of everyday life. Again, ladies and gentlemen, this is not the age in our common existence to call into question the importance and utility of law, to rely solely on politics for social

justice, for the protection of human rights and for lasting peace and security.

38. So, whilst worthy of considered debate, Lord Sumption's thesis is ultimately an ode to a bygone era, a period of human history which has thankfully passed and one which we should not awaken anew. As argued cogently by Professor Samuel Moyn in his book, *The Last Utopia – Human Rights in History*, in the days of old, the point of rights was not to restrict the activities of the State by providing a courtroom forum for their protection. Instead, the main remedy for the abrogation of rights remained democratic action up to and including another revolution.[19] Ladies and gentlemen, in my view we should not again contemplate that extreme recourse.

39. However, to be fair to Lord Sumption, his lectures should not be read as an invitation to strip the courts of their power of judicial review or of the power to determine whether human rights have been violated. But at its core, the problem with his more politics-less law thesis is in fact this natural and indeed fundamental concession. Because once that concession is made, it all boils down to a line-drawing exercise between law and politics. And then we must continue to rely on and strengthen the collaboration between politicians, the community and independent courts. That requires an acceptance of the strengths and weaknesses of the separation of powers, the acceptance of the human reality that judges may get it wrong from time to time, that although one may validly disagree with individual judgments, the fundamental values of a system of constitutional democracy and the rule of law are indeed worth the occasional unfriendly meeting between law and politics.

[19] Samuel Moyn, *The Last Utopia – Human Rights in History*, Harvard University Press (2010), 27. I should note that Moyn terms these rights as "revolutionary rights".

40. To conclude, I respectfully submit to you that this is the overarching idea that animated the construction of the Convention system and has since guided the jurisprudence of the Strasbourg Court. It is a jurisprudence that does not weaken the political process, but in fact seeks to empower it. It is a jurisprudence that readily accepts that politics can't thrive without law as law forms an integral part of the political fabric of a democratic society. If law's empire is expanding, as Lord Sumption claims, it is not at the expense of politics. On the contrary, law, in particular human rights law, morally sustains and strengthens the political process in a true democracy governed by the rule of law. Together law and politics should seek to work hand in hand in creating stability and a humane society which respects rights and human dignity. Correctly understood, each has their proper role, and their work is mutually reinforcing. In short, one cannot survive without the other!

41. Thank you very much.