THE JUDGES' DILEMMA

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Some people see the world's problems only in black and white. For them there are no shades of grey, no dilemmas. They present themselves as strong, forceful, unforgettable characters. In times of crisis or uncertainty they provide strong leadership. Even in more ordinary times they attract admiration because of their clarity of thought and their self-confidence. It is a challenge to live up to their example.

Dr Francis Mann was, I suspect, such a person. I did not know him nearly as well as many of you did. In fact I met him only once. It was an occasion that would have presented most of us with a dilemma. But not for him. It was a reception that was being given as part of an important international conference in the Parliament Hall in Edinburgh. He was a guest at that reception and, as I was the Lord President of the Court of Session, I was the host. There was somebody there that he very much wanted to meet, and it was not me. But one of the organizers thought that, as one of our principal guests, he ought to be introduced to me first. This was a situation with which, I think, we are all familiar. How does one contain oneself when the need to respect formality gets in the way of pleasure? Dare one run the risk, while exchanging meaningless pleasantries, of losing the opportunity of speaking to the one person in the room above all that one wishes to speak to? As I held out my hand in greeting, Francis Mann addressed only four words to me. 'Where is Mr Penrose?' he said. I saw George Penrose, one of Scotland's leading commercial lawyers, among a group of people on the other side of the Hall. So I pointed him out. And that was it. In a moment Dr Mann was gone. I never saw him again. For him, on that occasion at least, it seemed that there was no dilemma. It was either George Penrose or me, and it was George Penrose that he wanted to speak to.

Of course, neither of us could have foreseen that many years later I would have the honour of delivering the 32nd lecture in this remarkable series which bears his name. And an honour it is indeed for me, despite the brevity of that one meeting, to have been invited to do so. It is perhaps some small recompense for my failure to capture his attention on that occasion that I should be permitted to join with so many other Francis Mann lecturers who, like me,

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have admired his clarity of thought and his directness in celebrating his memory.

In a radio broadcast a few months ago, before the Beijing Olympics, the journalist Clive James reflected on the view of the totalitarian ruler that peace is achieved by silencing everyone who might contradict him. That would indeed be the best safeguard, he thought, if the law was not even more important. And, he added, there are no laws that do not produce dilemmas. The fate of Tibet, for example, was news outside China. But inside China there was no news except news controlled by the State. There was no news that applied to Tibet. So there were no dilemmas. He confessed that he did not think that China should have been awarded the Olympic Games. But he said that his best hope for China now was that, as it had engaged with the world outside, it had entered the stage when dilemmas will be possible. A dilemma, he said, is the surest sign that the rule of law exists.

So what about us? The rule of law exists here—an elusive concept, no doubt, although much elucidated by Lord Bingham's celebrated Sir David Williams lecture.[1] Thanks to his fourth sub-rule which requires adequate protection for human rights,[2] we are permitted to question ourselves, our opinions and our institutions. Inevitably this freedom, which we all value, produces dilemmas, and when they arise they must be solved by somebody.

I am not concerned in this lecture with the dilemmas that politicians must wrestle with—how to reconcile our need for reliable sources of energy, for example, with the need to protect the environment. Nor am I concerned with the doctor's dilemma that George Bernard Shaw found so troublesome—the murderous absurdity, as he described the situation before the advent of the National Health Service, that a surgeon has a pecuniary interest in cutting off his patient's leg. His job is to cure people, but the more limbs he cuts off the more he is paid. 'Treat the private operator exactly as you would treat a private executioner', was Shaw's advice.[3] I invite you instead to concentrate on the dilemmas that belong to the judges, and to the appellate judges on whom the ultimate responsibility lies in particular. This raises problems of demarcation. Is there a boundary between those dilemmas that others should solve and those that ought to be left to the judges? At what point must the democratic mandate that our legislators enjoy yield to the discriminating skills of the judges—and vice versa? And where, in the context of the European Convention on Human Rights, does the boundary lie between those dilemmas that our judges must solve and those that must be left to Strasbourg? Some cases raise a problem of an even more delicate kind. How far, if at all, ought

[1] Lord Bingham of Cornhill, 'The Rule of Law' [2007] CLJ 67.
[2] ibid 75.
[3] GB Shaw, 'Preface on Doctors' in *The Doctor's Dilemma: A Tragedy* (Penguin, London, 1913).

judges to allow perceptions of public interest to influence their judgment on issues of principle?

Let me sketch in the background to those questions a bit more. There is an obvious tension between what we expect of our judges and what the public expects of our legislators. Legislators are too often tempted to respond to public pressure—as to the punishment of crime, to take just one example. Sentencing practice, which used to be the preserve of the judges, has become encrusted with rules laid down by Parliament. Some legislative intervention is obviously necessary. But statute law is essentially static. It leaves little room for the exercise of discretion or for flexibility—often deliberately so, as our legislators are increasingly reluctant to leave things to the judges. The democratic mandate lies with the legislators, and respect for that mandate is an essential component of the modern concept of democracy. But democracy is an imperfect form of government. Solving problems by placing the answers into pre-determined boxes can make prisoners of us all. It inhibits freedom of thought. It stifles the development of ideas. It fills up the prisons too, as we can see in the case of the huge increase in the use in England and Wales of indeterminate sentences for public protection which has resulted from no doubt well-meaning but overzealous legislation by Parliament.[4] Dealing with prisoners in that category through a system designed for those serving life sentences has created widespread bottlenecks, resulting in time spent in custody which often far exceeds that which a judge using his own discretion would have regarded as appropriate.

Fortunately for us, that is not the way the common law works. It has been built up by the judges over the centuries by the solving of dilemmas. Even today this is one of its primary characteristics. At its best it is a living instrument which provides our system with the vigour it needs to face up to the demands of human nature, which are not and cannot remain static. Last year, in the Mann Lecture which he gave in this hall, Lord Hoffmann examined the present state of the duty of care in English common law. In his view—and he thought that Dr Mann, with his admiration for the good sense of the common law would have agreed—the concept of the duty of care gives the English law of negligence a sophistication, pragmatism and predictability which continental systems lack. We have our own hierarchy of moral values, our own culturally-determined sense of what is fair and unfair. He thought that it would be wrong to submerge this part of our heritage under a pan-European jurisprudence of human rights. In his view the jurisprudence of the Strasbourg court creates a dilemma. It seemed to him to have passed far beyond its modest ambitions and was seeking to impose what he described as a Voltairian uniformity of values. Voltaire, you may recall, was a revolutionary, a crusader against established opinions. He hoped that we would resist this. Is there something here that the judges must guard against?

[4] Criminal Justice Act 2003 (UK) s 225.

There are also occasions when, as result of decisions of the Strasbourg court, the judges are faced with what has been described by Professor Sandra Fredman as a democratic dilemma.[5] She attributes this in part to the increasing willingness of that court to impose positive duties on contracting States. A democratic dilemma arises where the judges are faced with a situation where our legislators cannot be relied upon to give effect to the values that are recognized in Strasbourg. The key, Professor Fredman suggests, is to see adjudication by the judges as feeding into the political process.[6] The making of a declaration of incompatibility is an obvious and perfectly respectable way of achieving this, as Parliament itself has sanctioned this procedure. There is another dilemma where Parliament has not yet spoken on an issue which is ripe for legislation, and it is at least highly likely that it will not follow the lead indicated by Strasbourg. Can the judges take the initiative, or must they always leave it to the legislators? Are there cases, as Baroness Hale asked in her Tom Sargant Memorial annual lecture,[7] where the judges can and should go further than Strasbourg?

Professor Fredman's democratic dilemma and Lord Hoffmann's warning against Strasbourg-induced uniformity present the judges of today with some very real problems when they are confronted by issues about the Convention rights. The opportunity to challenge decisions of the executive on the ground that they are incompatible with them has given the exercise of the judicial function an intensity which is quite new. And it has thrown up problems for the judges which sometimes seem to be much more about values than they are about law. From time to time judges are quite open about this, declaring in as many words that they are facing a dilemma. Let me give you some examples. If you will permit me, I will give five.

My first example is about how to reconcile two apparently equal values. It is a case about a man who was arrested and detained in a detention centre operated by British forces in Iraq.[8] His internment was thought to be necessary for imperative reasons of security in Iraq. He was suspected of being a member of a terrorist group involved in weapons smuggling and other terrorist activities. But he was not charged with any offence, and no charge or trial was in prospect. He complained that his continued detention infringed his rights under article 5(1) of the Convention. Various issues were raised. The one that is relevant to this discussion turned on the relationship between article 5(1) of the Convention, which protects the right to liberty, and article 103 of the UN Charter which provides that, in the event of a conflict between obligations under the Charter and their obligations under an international agreement,

[5] S Fredman, 'From Deference to Democracy: The Role of Equality under the Human Rights Act 1998' [2006] 122 LQR 53, 76.

[6] ibid 78.

[7] Baroness Hale of Richmond, 'Law Lords at the Margins' JUSTICE: Tom Sargant Memorial Annual Lecture, 15 October 2008.

[8] *R (Al-Jedda) v Secretary of State for Defence* [2008] AC 332.

obligations under the Charter must prevail. The coalition forces were in Iraq under the authority of a Security Council resolution. This gave them authority to take all necessary measures to contribute to the maintenance of security and stability. On the one hand the appellant was entitled to submit that, while the maintenance of international peace and security is a fundamental purpose of the UN, so also was the promotion of respect for human rights. On the other, the power to detain was being exercised for imperative reasons of security. It was hard to see how this could do otherwise than breach the detainee's rights under article 5(1).

One solution to this dilemma would have been for the State to exercise its power of derogation under article 15 of the Convention. But this was an overseas peace-keeping operation which did not threaten the life of the nation here at home. It was conceded that the power was not available. So the House of Lords was faced with a clash between a duty to detain on the express authority of the Security Council and a fundamental human right. It would have been so much simpler, said Baroness Hale,[9] if the European Convention had contained a general provision to the effect that the rights guaranteed are qualified to the extent required or authorized by resolutions of the United Nations. But it did not, so some other way had to be found. The House had, in effect, to create a new law. It decided that the Convention right was qualified but not displaced. The UK could lawfully exercise the power to detain that the UN had authorized where this was necessary for imperative reasons of security. But it must ensure that the detainee's rights were not infringed to any greater extent than was inherent in such detention.

That was a case about detention. What about methods of interrogation? The House of Lords has, of course, made its position clear. Evidence that has been obtained by torture may not lawfully be admitted against a party to proceedings in a UK court.[10] But the House was divided on the test that was to be applied to determine the question whether evidence alleged to have been obtained by torture was admissible. That was where the dilemma lay. The prohibition against the use of torture is absolute. But there is no absolute rule that tells us what a judge should do if he is faced with its alleged use, which may or may not be true. How far is the answer to be guided by principle? How far is it to be guided by what is practicable? Should the judge refuse to admit the evidence if he is unable to conclude that there is *not* a real risk that the evidence has been obtained by torture? Or should he refuse to admit the evidence only if he is satisfied that the evidence *was* obtained by torture? We split four to three on that issue. It was not an easy choice. I have to confess that my own instinct, where the safety of the public is at stake, is to lean towards a solution that is practicable if principle permits this. How will it work out in practice, I ask myself, as I am confronted by issues where, if

[9] para 125.
[10] *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221.

principle were to be taken to be the sole guide, its application would satisfy our consciences but not—as it seems to me—serve the interests of those in the real world. But we are what we are, and I am aware that not all judges would agree with me.

No modern democratic country in modern times has been more exposed to the tensions that occur where terrorism stalks the streets and fetters are placed on the interrogation methods that may be used by the authorities than the State of Israel. The Supreme Court of Israel had to face up to this issue in September 1999.[11] The way it resolved the issue provides me with my second example. The question before the court related to government directives authorizing methods for use by the General Security Service when interrogating suspected terrorists. They included repeated and forceful shaking, sleep deprivation and being kept in positions of extreme discomfort for prolonged periods. The question was whether these methods were in accordance with the law of Israel, which prohibits torture. The principal argument that was used to defend them was that they were necessary. It was said that they were needed to prevent serious risk to human life, especially where there was reason to think that a harmful event was imminent. This is the ticking bomb syndrome. Of all dilemmas, this must be the most acute. You have the one person before you who knows where the bomb is. Yet in States that are parties to the Convention that person has an absolute right not to be tortured. How does one measure such a case against the dilemma that the Attorney General, Sir Peter Rawlinson, faced in 1970 when he ordered the release of Leila Khalid, a member of the PLO, from prosecution in this country following her attempt to hijack an aircraft? He did this on advice that there was a risk that Swiss and German hostages would be killed unless she was released.[12]

The Supreme Court was prepared to accept that, in the appropriate circumstances, the investigators might avail themselves of the defence of necessity if, after the event, they were to be accused of criminal activity. But it rejected the argument that it was possible to infer from necessity that such acts could be authorized in advance. The defence of necessity dealt with a person's reaction to a given set of facts. It was not the source of general administrative power. The court was well aware that its decision that there could be no blanket immunity would make it harder to deal with the harsh reality of the situation facing Israel. But, as Chief Justice Barak said in his judgment,[13] this is the destiny of democracy. Not all the practices that are available to its enemies are available to it. Nevertheless, in the final analysis, democracy has the upper hand. It has a choice. In a democracy the decision whether

[11] Supreme Court of Israel, sitting as the High Court of Justice, HC 5100/94 and others, 6 September 1999.

[12] J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, London, 1984) 324, quoted in *R (Corner House Research and Campaign against Arms Trade v Director of the Serious Fraud Office* [2008] EWHC Admin 714, para 81.

[13] para 39.

means which the ordinary law does not permit may be sanctioned for use in extreme circumstances lies with the legislature. 'We do not take any stand on this matter at this time', said the Chief Justice: 'It is there that the various considerations must be weighed. The pointed debate must take place there.'

The result of that case was to pass the question whether such methods could be authorised in advance to the legislature. It was there that the political consequences were to be confronted. But what if the legislature is persuaded, in times of crisis, to create schemes that are given the façade of the rule of law by the democratic mandate but conflict with human rights or lack any substantive legal protections for the individual? Our judges are inhibited, of course, by the doctrine of the sovereignty of Parliament. How far deference should be given to the democratic mandate where the issue is not foreclosed by that doctrine is another matter. This is a matter for the judges. Where Parliament gives authority for the exercise of exceptional powers, deference really flies out of the window. The test of compatibility with Convention rights must be applied in full measure. If there is a dilemma here, it is likely to lie in the choice of remedy.

Then there is the problem that arises where it is said that the legislature will decline to intervene to give effect to a Convention right. Here is a dilemma of a different kind—a classic democratic dilemma. The question is whether it is for the judges to resolve the issue if it is clear the legislature will very probably decline to do so. This brings me to my third example.[14] It is a case about adoption. Alone among all the jurisdictions of the United Kingdom, legislation in Northern Ireland does not permit adoption by a couple who are living together but are not married to each other. A couple who were unmarried had been living together there for more than ten years. They wished to adopt a ten–year-old child of whom the woman was the natural mother and the father was someone other than her male partner. They invited the court to declare that the provisions of a Northern Ireland Order which disqualified them should not be applied and that they were eligible to be considered as adoptive parents regardless of the fact that they were unmarried. They said that the provisions of the Order contravened their rights to respect for family life under article 8 taken in conjunction with article 14 of the Convention, and that they were discriminatory. The case reached the House of Lords and it raised a short but highly sensitive issue of principle. Should the law be changed by judicial decision, or should the matter be left to the democratically elected Northern Ireland Assembly which now has responsibility for reforming the law on this subject, as the law of adoption is within its legislative competence?

It was clear that the choices that would have to be made by the Assembly would be choices on an aspect of social policy. It was clear too that these were choices about which opinions might reasonably differ in a modern

[14] *In re G (Adoption: Unmarried Couple)* [2009] 1 AC 173.

democratic society. This suggested that it was a matter for the legislature. But it was also a case about discrimination, as to which the judges have a particular responsibility. It is with them that the ultimate safeguard rests against discrimination. So the House was presented with a dilemma. Should they remove the discrimination against unmarried couples, or must they leave this to the Assembly which would almost certainly decline to remove it? Opinions were divided on the question how the case would have been seen in Strasbourg. A decision in that court that the matter was within each State's margin of appreciation would point more strongly in favour of leaving the issue to the Assembly. Some of us thought that its developing jurisprudence showed that it was not at all unlikely that it would hold that there was a violation of article 14, which pointed in the other direction. In the end however the majority decided that, as the discrimination on the issue of eligibility so obviously could not be justified, it was for us to deal with it. We held that the rejection of the appellants as ineligible for adoption on the ground only that they were unmarried was unlawful, despite the fact that this went ahead of any decision that had yet come out of Strasbourg.

What then if the conflict between the law and a Convention right arises in the international context? What if the other State is not a party to the Convention and its law is, on any reasonable interpretation if it, incompatible with a person's Convention rights? This is the kind of dilemma that presents itself in so-called 'foreign' cases. These are cases where it is claimed that the State's conduct in another territory will lead to a violation of the person's Convention rights in that other territory—as where a person who is suffering from HIV/AIDS but has no right to remain in this country claims that it would be contrary to her right to life under article 2 of the Convention to be sent back to a country which does not have the medical resources to provide her with the medication she needs to combat the disease.[15] The Strasbourg court has held that a comparison between the health benefits which are available in the expelling state and those in the receiving country does not, in itself, give rise to an entitlement to remain in the territory of the expelling State.[16] This is a pragmatic approach. It recognizes the potential imposition of a wide-ranging liability as a result of acts or omissions of non-signatory States for breaches of the Convention, which in its scope is primarily territorial. So an expelling Contracting State cannot be required to return aliens only to a country which enforces all the rights and freedoms set out in the Convention.[17] Otherwise the Contracting States would be acting as guarantors for the enforcement of the Convention rights by the rest of the world.[18]

[15] *N v Secretary of State for the Home Department* [2005] 2 AC 296.
[16] *D v United Kingdom* [1997] 24 EHRR 423.
[17] *F v United Kingdom* (application no. 17341/03, 22 June 2004).
[18] *Z and T v United Kingdom* (application no. 27034/05, 28 February 2006).

This problem arose in the case which I have selected as my fourth example. The appellant was the mother of a boy who was then seven years old and a citizen of Lebanon. She appealed against the refusal of her claim for asylum on the ground that if she were to be returned to Lebanon she would lose her right to his custody.[19] This was because Shari'a law transfers a child's custody after the age of seven to his father or his extended family. Yet her son had been brought up exclusively by her and he had no relationship at all with his father. There was a prospect that the mother would be allowed some access to the child during supervised visits. If so, her contact with the child would not be entirely eliminated. But the issue of custody would be determined by an entirely arbitrary rule, contrary to the mother's rights under article 8 and article 14 of the Convention. As the Court of Appeal said,[20] the dilemma that the case presented was that, whilst one aspect of family life (the daily care of the child) would on the evidence be infringed in an arbitrary and discriminatory way, another aspect of family life (contact) potentially remained in place. There was another dilemma too. On the evidence infringements of article 8 and article 14 were inevitable in every such case where the expulsion of a divorced Muslim woman would be to a territory governed by Shari'a law. Does the Convention really require the contracting States to guarantee their enforcement in all countries where family life is regulated by such doctrines?

The threshold that has been set by the Strasbourg court is that, where extradition proceedings are concerned, an applicant is required to prove that there will be a flagrant denial of the Convention right.[21] In *Ullah v Special Adjudicator*[22] Lord Bingham said that the correct approach in cases involving qualified rights such as those under article 8 was that only in cases of a flagrant denial or a gross violation could it be said that the treaty obligation under the Convention was being breached. Unlike domestic cases where there is no threshold, the seriousness of the violation or the importance of the right involved must be considered. But, as the example of the Muslim woman facing loss of custody of her son on their return to Lebanon shows, the application of a threshold test of this kind is far from easy. How does one apply this test to a case where one aspect of family life will be lost for ever but there is a real prospect of retaining another part? Is this to be determined by assessing the quality of what remains or its quantity? In her case the dilemma was resolved by the House of Lords on humanitarian grounds. They were so compelling that the case was decided in her favour. Other cases may not be solved so easily.

[19] *EM (Lebanon) v Secretary of State for the Home Department* [2008] 3 WLR 931 (HL).
[20] [2006] EWCA Civ 1531, para 69.
[21] *Soering v United Kingdom* (1989) 11 EHRR 439, para 111.
[22] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 24.

My fifth and final example is of a case where the Grand Chamber of Strasbourg court confessed in as many words that it was faced with a dilemma. The applicant had been diagnosed with pre-cancerous condition of the ovaries. She sought IVF treatment with her male partner prior to their removal. Each of them provided gametes for the creation of embryos which were frozen and stored. By the time when the applicant sought to have the embryos removed for use she had separated from her partner. He then withdrew his consent to the continued storage of the embryos. This struck at the heart of their agreement, as the legislation that permits this procedure[23] requires an effective consent by both parties before an embryo can be used. Her application for an injunction requiring him to restore his consent was dismissed. An appeal was unsuccessful[24] as was her application to the court in Strasbourg.[25] As the Grand Chamber put it,[26] a dilemma was central to the case. It involved a conflict between the article 8 rights of two private individuals. How could one strike a fair balance between their competing interests? Each party's interest was entirely irreconcilable with that of the other. If the applicant was permitted to use the embryos the man would be forced to become a father, whereas if his refusal or withdrawal of consent was upheld the applicant would be denied the opportunity of becoming a genetic parent. Whatever solution the national authorities might adopt was bound to result in the interests of one or other of the parties to the IVF treatment being wholly frustrated. The Court solved the dilemma by taking other factors into account. It held that the national authorities were entitled to give weight to the fact that the legislation that was in issue served a number of wider public interests, such as upholding the primacy of consent and providing legal clarity and certainty. So the balance was tilted in favour of the national authorities.

What I have said so far raises a number of questions about the state of our law. It can no longer be said that the law provides all the answers. The outcomes in cases such as those I have mentioned cannot be explained in that way. You have to look behind the rules to find out what is going on. Here then is the judges' dilemma. Judgments must be made on issues that are far removed from the application of black letter law that most of them, when they began their careers, were trained in. Should they stray into this uncertain territory where law has ceased to be an autonomous discipline? The answer in many cases is that they have no choice. There are some questions that only they can solve, and all too often they in their turn create their own dilemmas. Given that it is for the judges to resolve them, how should they equip themselves for this task?

As my examples have shown, it is competing values, not rules of law, that have to be balanced against each other in this kind of decision taking.

[23] Human Fertilisation and Embryology Act 1990, Schedule 3, para 6(3).
[24] *Evans v Amicus Healthcare Ltd* [2004] QB.
[25] *Evans v United Kingdom* (2008) 46 EHRR 34.
[26] para 73.

Awareness of this task—the ability to spot a dilemma of that kind when it arises—is now part of the judge's equipment. So too is a heightened awareness of the consequences of the decision either way. Sometimes the balance that has to be struck is on the horizontal plain between individuals, as where one person's right to free expression comes into conflict with another's right to privacy or where two people have identical rights under article 8 that are in conflict with each other. More often, as most of my examples have shown, it is has to be struck on the vertical plain between an individual and the executive. Where the interests of the individual and the interests of society conflict it is not much help for the judge to be told that the law provides the answer. As I have said, this is no longer always so. The proposition that the solution must depend on the balance of the arguments, while true, is not very helpful either. All too often, as we explore the frontiers of this area of the law, the arguments are just as compelling on one side as they are on the other. The scales refuse to move in either direction. Yet a balance must be struck, and it is for the judges to carry out that exercise.

As one would expect, my examples show that the way the problem is to be solved will vary with the subject-matter. There is no simple solution that fits all cases. Sometimes, as in my first example of the person detained in Iraq, a way can be found of reconciling two propositions that at first sight are irreconcilable by creating new law. So too where, in extradition cases, the Secretary of State for the Home Department wishes to rely on material the disclosure of which he considers to be contrary to the public interest. Here too there is a dilemma.[27] Either the material must be disclosed in fairness to the individual, or the Secretary of State will risk being unable to justify the order which she seeks. The solution which the Strasbourg court has encouraged[28] and this country has adopted, drawing on an example from Canada, is a more effective form of judicial control which enables the material to remain closed but scrutinized with the assistance of special advocates.[29] Whether that solution will work in all cases has yet to be determined—this is an unresolved dilemma. Sometimes the propositions are completely irreconcilable, as in my fifth example where consent was withdrawn to use of the frozen embryos. Something then has to give, and other factors that at first did not seem to carry weight may be taken into account to show which it has to be. The democratic dilemma was solved by the Supreme Court of Israel in my second example by leaving it to the legislature to take the crucial step of authorizing extreme measures of extracting information. But this may create its own problems if the legislature is persuaded to enact measures that arguably infringe Convention rights. In my fourth example from Northern Ireland on the other

[27] As Lord Hoffmann recognized in *Secretary of State for the Home Department v MB* [2008] AC 440.

[28] See *Chahal v United Kingdom* (1996) EHRR 413.

[29] Special Immigration Appeals Commission Act 1997, section 6.

hand the judges took it upon themselves to resolve the discrimination issue which the legislators would in all probability have left untouched. This example suggests that awareness of the consequences of avoiding the problem is likely to determine whether the judges ought to assume the responsibility of dealing with it.

As for the Convention rights, one rule at least is clear. The task is to analyse the jurisprudence of the Strasbourg court and, having identified its limits, to apply it to the facts. As Lord Bingham famously said in *Ullah*,[30] the duty of national courts is simply to keep pace with the jurisprudence that emanates from Strasbourg. Our judges cannot allow sympathy for the appellant, that source of so many dilemmas, to divert them from this task. It is not for them to search for a solution to the problems created by the Convention rights which is not to be found in the Strasbourg case law. It is for the Strasbourg court, not for them, to decide whether its case law is out of touch with modern conditions and to determine what further extensions, if any, are needed to the rights guaranteed by the Convention. Equally, it is for the Strasbourg court to define the circumstances in which a threshold must be crossed before a Convention right can be relied on to prevent a person's removal to a third country where there is a risk of its being breached. Our judges must take its case law as they find it, not as they would like it to be or not to be, although they can and do through their judgments indicate to their colleagues in Strasbourg their views about the direction the law should take to their colleagues in Strasbourg. If the result is unpalatable, the issue as to whether domestic law should be more generous to the individual is ultimately one for the devolved institutions and for Parliament. In this way decisions by the judges may, as Professor Fredman said, feed into the political process. But it is an imperfect solution, as the legislature may be unwilling to face up to the challenge that this presents.

This sounds like an abdication of responsibility. I would, for my part, strongly contest this. The Convention is, after all, an international instrument. It is not for the domestic courts to be more generous than its uniform application throughout the States parties according to the guidance of the Strasbourg court would justify. But, if I may return finally to what Lord Hoffmann said last year, attempts to mould the common law to fit in with the values of the Strasbourg court should be resisted. The Human Rights Act 1998 was designed to create a parallel system for bringing rights home, not to change the common law so that it too could accommodate them. It is right and proper to have regard to the Convention rights in matters of procedure and, where their application gives rise to a dilemma, to look to the decisions of Strasbourg court for guidance. But it is not part of the function of the Strasbourg court to tell us what the content of our substantive common law should be. Our system can stand side by side with that which depends on the

[30] [2004] 2 AC, para 20; see also Lord Brown of Eaton-under-Heywood in *R (Al-Skeini) v Secretary of State for Defence* [2007] 1 AC 153, para 106.

application of the Convention rights.[31] No doubt, as Lady Justice Arden has said,[32] human rights jurisprudence will invigorate the common law. But we must find our own solutions, not take them from Strasbourg. On that point, I would suggest, our judges can relax. Here at least—at last, one might even say—they face no dilemma.

[31] See *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 224.

[32] The Rt Hon Lady Justice Arden, 'Building a Better Society' JUSTICE 10th Annual Human Rights Law Conference, 21 October 2008.