The Right Honourable Lord Nolan

Certainty and Justice: The Demands on the Law in a Changing Environment

Michael Patrick Nolan
(*b.* 10 September 1928)

Lord Nolan was educated at Ampleforth in Yorkshire and at Wadham College, University of Oxford where he has been an Honorary Fellow since 1992.

Called to the Bar, Middle Temple, in 1953, Lord Nolan was appointed a Queen's Counsel in 1968. He was a Judge of the High Court of Justice from 1982–1991 and was Presiding Judge on the Western Circuit from 1985–1988. He was a Lord Justice of Appeal from 1991–1993.

He was knighted in 1982 and became a Privy Counsellor in 1991. In 1994 Lord Nolan was made a Life Peer and a Lord of Appeal in Ordinary.

Lord Nolan retired as a Lord of Appeal in Ordinary on 30 September 1998.

A leading expert on ministerial ethics and standards of conduct, Lord Nolan was appointed by

the then Prime Minister, John Major, to chair the Committee on Standards in Public Life, established in 1994 (Lord Nolan, *Standards in Public Life: First Report on Standards in Public Life* (1995) Cm 2850-1, HMSO: London). The Committee was set up in response to concerns about the conduct of some politicians following the "cash for questions" scandal in which it was alleged that some MPs were taking cash for putting down parliamentary questions. The Committee specifically looked at the practices of those who serve the public including MPs, civil servants and appointees to non-departmental public bodies such as the BBC.

Following reports from the Committee, the House of Commons set up new machinery to oversee members' conduct. Lord Nolan retired from the committee in 1997.

In 2000, he once again chaired another review committee: Review of Child Protection in the Catholic Church in England and Wales. At the invitation of Archbishop Cormac Murphy-O'Connor, Archbishop of Westminster, and with the consent of the Catholic Bishops of England and Wales, Lord Nolan agreed to chair the group whose remit was "to examine and review arrangements made for child protection and the prevention of abuse within the Catholic Church in England and Wales, and to make recommendations". The review was set up following a series of allegations of child abuse by Catholic priests. The final report of the inquiry made a total of 83 recommendations to protect children and was welcomed by welfare organisations across the UK.

Lord Nolan also takes a keen interest in academia having sat as Chairman of the Board, Institute of Advanced Legal Studies, University of London from 1994–2000; and being Chancellor of Essex University since 1997.

Lord Nolan, together with Sir Stephen Sedley, authored *The Making and Remaking of the British Constitution*, Blackstone Press Limited, London, 1997.

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Lord Nolan
Lord of Appeal in Ordinary, House of Lords

Text of the Thirteenth Sultan Azlan Shah Law Lecture delivered on 28 August 1998 in the presence of His Royal Highness Sultan Azlan Shah.

Your Royal Highness, you have conferred upon me a great honour by inviting me to give this, the Thirteenth Sultan Azlan Shah Law Lecture. I am very proud that my name should be added to those of my distinguished predecessors. The privilege of being invited to give this lecture is one which I value all the more highly because it comes when I am about to end my full-time service as a Law Lord.

It will be the last public utterance on legal matters which I shall make in that capacity. I could not have hoped for a happier or more celebrated occasion upon which to do so. I am very grateful to Your Royal Highness for the extremely generous and thoughtful hospitality which you have extended to my wife and myself. May I also take this opportunity of thanking Dato' Dr Visu Sinnadurai and all of those who have gone to so much trouble to make the arrangements for my visit.

All privileges carry corresponding responsibilities. I am deeply conscious of the responsibility which I bear to try to be worthy of the opportunity to give this lecture, and in doing so to try to address matters of common importance and concern. I say this with diffidence, because my direct personal experience of Malaysian law is limited to the tax cases in which I was concerned while at the Bar. But I am encouraged by my profound conviction that the basic principles of law, and in particular the common law, to which Malaysia and the United Kingdom subscribe

derive their strength from the sharing of experience. In *Raja Mokhtar bin Raja Yacoob v Public Trustee Malaysia*,[1] Your Royal Highness stressed the importance of the court in the different Commonwealth jurisdictions applying the same principles so that "the common law and its development should be homogeneous in the various sections of the Commonwealth". That is certainly the view which we hold in the United Kingdom.

The advance of technology has gone far towards eliminating the boundaries of time and space. The law can only continue to play its proper part in the service of the community—and in particular the commercial community—if it can match the requirements of an increasingly complex and demanding world, a world which now works a 24-hour day. By this I do not mean that the courts should try to reach their decisions at the speed at which decisions are made on the Stock Exchange. What I mean is that the pace of events increases the need for the law to fulfil its traditional role of providing the essential elements of certainty and continuity, and of making available, in addition to its armoury of injunctions and other instant holding measures, a reasonably prompt, but balanced and thoughtful response to the problems and crises of daily life. To this end, communication and dialogue between the lawyers of countries with similar traditions and ideals is more important now than it has ever been.

I have spoken of the sharing of experience, and of the common law tradition which both Malaysia and the United Kingdom have inherited. What is the common law? We find it defined in the 1641 edition of *Termes de la Ley* as "that body of law which has been judicially evolved from the general custom of the realm", and custom in turn is there defined "to be a law or right not written, which, being established by long use and a consent of our ancestors, has been and daily is put in practice". It was modelled from the outset upon the behaviour and the standards of the "*liber et legalis homo*", the "free and lawful man" who is first to be found in *Glanville's Treatise*. He was conceived to be a reasonable man, innocent of crime and wrongdoing,

1 [1970] MLJ 151.

honest in his dealings, efficient in his work, of good repute among his neighbours, a man of firmness and courage animated by a spirit of friendship for his fellow men.[2] In this list of qualities one sees the origins of such familiar concepts as the presumption of innocence in criminal cases, the principles underlying the law of contract and the implication of contractual terms, the torts of libel and negligence, and the general rule that in each area the burden lies upon the complainant to prove that his adversary has fallen below the level of conduct which the common law requires.

The free and lawful man was the forerunner of the reasonable man of later years. He was sometimes referred to as "the man on the Clapham Omnibus", but this, to my mind, tended to disguise the reality that when a judge invokes the wisdom of a reasonable man he is in fact inevitably invoking his own alter ego. The definition of the common law which I have quoted correctly makes it clear that the law has been judicially evolved. It is for the judges, as the prerogative is for the monarch in the United Kingdom, an infinite source of authority whose output is constrained only by statute.

Developing common law

The great strength of the common law has been to promote certainty by following the principle of stare decisis. Its main function is to resolve disputes on new sets of facts by applying the principles derived from earlier decisions on similar facts. But over the centuries it has tended to acquire too long a baggage train of binding precedents, some of which are incompatible with modern notions of justice. If judges are to retain their constitutional role of declaring what the law is, as distinct from making new law and thus usurping the functions of the legislature, the scope for judge-made modifications of the common law is limited. But in *Reg v R*,[3] Lord Keith of Kinkel said boldly that:

The common law is capable of evolving in the light of changing social, economic and cultural developments.

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See Richard O'Sullivan QC, *The Spirit of the Common Law* (1965) at 142 and the authorities there cited.

3
[1992] 1 AC 599 at 616.

> The common law is … capable of evolving in the light of changing social, economic and cultural developments.

This statement was made in the context of a criminal case. It is precisely in line with the philosophy expressed by Your Royal Highness also in a criminal case, *Public Prosecutor v Massam Bin Abu and others*[4] in the words:

> … the law must aspire at certainty, at justice, at progressiveness. That is so only if the courts from time to time lay down new principles to meet new social problems.

But the limits of such evolution would not extend to the creation of entirely new criminal offences, however great the apparent justification for it. Thus in *R v Bow Street Magistrates Court, ex parte Choudhury,*[5] Watkins LJ regarded it as a "gross anomaly" that the law of blasphemy in England applies only to those who blaspheme against the beliefs of the established Church. But he held that:

> In our judgment where the law is clear it is not the proper function of this court to extend it; particularly is this so in criminal cases where offences cannot be retrospectively created. It is in that circumstance the function of Parliament alone to change the law.

Parliament and the common law

Over the course of the last two centuries Parliament has been doing precisely that with ever increasingly frequency. As early as 1948 Lord Macmillan, in his Andrew Lang Lecture on Law and Custom,[6] said that:

> The lover of our ancient laws and institutions … cannot but look with some dismay at the process which we see daily in operation around us, whereby the customary common law of the land, which has served us so well in the past, is being more and more superseded by a system of laws

4
(1971) 4 MC 192 at 193.

5
(1990) 91 Cr App Rep 361 at 403.

6
The Times, 6 April 1948.

> which have no regard for the usages and customs of the people, but are dictated by "ideological theories".
>
> There will soon be little of the common law left in either England or in Scotland, and the Statute Book and vast volumes of statutory rules and orders will take its place. The work of our courts is more and more concerned with the interpretation of often unintelligible legislation and less concerned with the discussion and the development of legal principles.

I would respectfully agree that, even by 1958, the area formerly dominated by the common law had been largely inundated by the flood of reforming legislation, though much of the legislation was concerned with the promotion and pursuit of political and social ends rather than with substantive alterations of the common law. Since 1972, when the European Community Act of that year made the Treaty of Rome 1957 part of English law, another flood of legislation has threatened to submerge not only our common law but also part of our statute law. As early as 1974, in *Bulmer Ltd v Bollinger SA*,[7] Lord Denning MR said:

> But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.

He continued:[8]

> The statute is expressed in forthright terms which are absolute and all-embracing. Any rights or obligations created by the Treaty are to be given legal effect in England without more ado. Any remedies or procedures provided by the Treaty are to be made available here without being open to question. In future, in transactions which cross the frontiers, we must no longer speak or think of English law as something on its own. We must speak and think of Community law, of Community rights and obligation and we must give effect to them. This means a great effort for the lawyers. We have to learn a new system.

7
[1974] 1 Ch 401 at 408.

8
Ibid, at 419.

The acceptance thus accorded to the introduction of supervening Community law has been dutifully maintained by the courts throughout the 1980s and 1990s. Relations between judges and other lawyers in the United Kingdom and on the Continent are closer and friendlier than they have ever been. The public mood, however, has developed rather differently. And it came as something as a shock to those inside as well as outside the legal profession when, in the *Factortame* case,[9] the House of Lords was, for the first time, required to ignore or "disapply" a United Kingdom Act of Parliament, the Merchant Shipping Act 1988, in deciding how to deal with the case before it. The requirement followed a ruling by the European Court of Justice in reply to a question referred to it by the House. The effect of the ruling was that, in a case concerning Community law, in which an application was made for interim relief, if the national court considered that the only obstacle which precluded it from granting such relief was a rule of national law, it had to set that rule aside. It is something of a historical irony that the United Kingdom, the home of the Judicial Committee of the Privy Council which has for so long acted, and still does act, as the final court of appeal for many other jurisdictions throughout the world, should now find itself subject to rulings made from the Continent. The House of Lords, having considered the ruling, decided that section 14 of the Merchant Shipping Act, which deals with the requirements for the registration of fishing vessels, was the only obstacle to the grant of interim relief. Apart from the requirements of that section, the claim for relief was made out. The section was therefore set aside and relief granted. This was no more than a consistent and logical development of the law as enacted in the 1972 Act, as Lord Bridge in *Factortame* was at pains to make clear; but the practical result of the case, namely that the House of Lords granted an injunction to forbid a Minister from obeying an Act of Parliament, was seen by many as a revolutionary development.

Interpretation—future scope of the common law

What scope remains then for the common law when almost every department of life is governed to some extent by domestic or European legislation? What purpose can the common law now serve? Part of

9 *Factortame Ltd and others v Secretary of State for Transport (No 2)* [1991] 1 AC 603; [1991] 1 All ER 70, CJEC and HL.

the answer lies in the consequences which have followed Lord Macmillan's complaint that "the work of our courts is more and more concerned with the interpretation of often unintelligible legislation and less and less concerned with the discussion and development of legal principles".

The amount of help given by statutes themselves to their interpreters is strictly limited. Almost always, the interpretation of a statute depends upon the meaning given to it by the courts, using methods of interpretation which have been built up over the centuries as part of the common law. The precise approach will depend upon the subject matter of the statute. For example, in the case of penal and fiscal measures, the Act will in general be strictly construed, though subject now in the fiscal area to the *Ramsay* principle[10] which I shall discuss later. In other branches of the law the courts in the last 50 years have tended towards the "purposive" approach, the approach which (rather in the Continental manner) looks for the principles underlying the legislation, and attempts to construe the words used in a manner which will give effect to these principles. Save in cases where the statute is clearly designed to amend the common law it will be assumed, especially if it affects fundamental concepts, to be consistent with it. Thus in his 1996 John Maurice Kelly Memorial Lecture Lord Hoffmann said:

Save in cases where the statute is clearly designed to amend the common law it will be assumed, especially if it affects fundamental concepts, to be consistent with it.

> For centuries the principles which protect individual rights have been part of the common law. The American Bill of Rights is based upon the common law. And while in theory these common law rights can be overridden by statute, the fact that they are embedded in the history and culture of the United Kingdom makes the courts assume, when they have to interpret legislation, that Parliament intended to respect them.

Further, despite Lord Macmillan's fears, the process of judicial interpretation has gone beyond mere translation and has resulted in

10 See *Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300.

the development of important new legal principles. Let me give three examples.

The first was mentioned by Lord Woolf when giving this lecture last year.[11] It arose in the case of *Anisminic Ltd v Foreign Compensation Commission*.[12] Anisminic sought to challenge a determination made by the Commission. The Commission objected, pointing out that under section 4(4) of the Foreign Compensation Act 1950:

> The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.

The House of Lord, by a majority, decided that the word "determination" must be construed so as to apply only to a determination which the Commission had jurisdiction to make. This determination having been made (as it was held) without jurisdiction section 4(4) could not prevent the court from quashing it.

Commenting upon *Anisminic* in *O'Reilly v Mackman*,[13] Lord Diplock said:

> The breakthrough that *Anisminic* made was the recognition by the majority of this House that if a tribunal … mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie, one into which it was not empowered to enquire and so had no jurisdiction to determine. Its purported "determination", not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity.

The second example which I would call to mind is the decision of the House of Lords, again by a majority, in *Pepper v Hart*.[14] That was the case in which the House decided that, in order to construe an ambiguous provision in a Finance Act 1976, they were entitled to refer to the Hansard report of debates in the House of Commons, so as to see whether the words with which the responsible Minister

11
See chapter 12, *Judicial Review of Financial Institution*s, above.

12
[1969] 2 AC 147.

13
[1983] 2 AC 237 at 278.

14
[1993] AC 593; [1993] 1 All ER 42, HL.

introduced the measure resolved the ambiguity. The Attorney General had strongly opposed the taxpayer's argument, on constitutional grounds and on grounds of comity between the Houses. He suggested that the proposed reference to Hansard might infringe Article 9 of the Bill of Rights 1689, which provides "that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". The Lord Chancellor, Lord Mackay of Clashfern, however, who gave the sole dissenting speech, did not "find the objections in principle to be strong". He was more concerned with the practicalities of finding reliable illumination amongst the speeches made in the debates, and concerned also about the amount of time and money which litigants would have to expend on what might turn out to be fruitless searches.

These concerns, I believe, have proved to be fully justified, and I know of no subsequent case in which *Pepper v Hart* researches have produced crucial guidance. The *Pepper v Hart* decision was undoubtedly influenced by the obvious injustice of the Executive explaining a taxing measure to the House of Commons on the basis that its scope was intended to be limited, and subsequently proceeding to argue in the courts that it had a wider effect. This was not the first occasion upon which such a thing had happened; see my reference to the case of *Congreve v Inland Revenue Commissioners*[15] in my speech in *IRC v Willoughby*.[16] The question at issue in *Congreve* was whether section 18 of the Finance Act 1936, which was designed to prevent the avoidance of tax by means of the transfers of assets abroad, applied only in the case where the transfer had been effected by the taxpayer concerned. When the 1936 Finance Bill was being debated in the House of Commons, the Finance Secretary to the Treasury had made it plain that, for liability to arise under the section, the transfer of assets must have been made by the individual who was to be assessed. But assessments for the years 1935/1936 to 1940/1941 were made upon Mr Congreve on the basis that the section applied irrespective of the identity or residence of the person who made the relevant transfer of assets. The free and lawful man would not approve of such behaviour.

15 [1948] 1 All ER 948.

16 [1997] 1 WLR 1071 at 1075.

The assessments were upheld both by the Court of Appeal and by the House of Lords. It is interesting to note, that even if the *Pepper v Hart* approach had been permissible in those days, the result would have been the same because the House of Lords could detect no ambiguity in the statute. The argument of the taxpayer was rejected because, in the words of Lord Simonds, "the language of the section is plain".

My third example again takes us into tax law. It represents a new approach to tax avoidance devices, designed to bring them within the scope of taxing provisions which, if normal methods of construing contracts and fiscal statutes were followed, they would or might escape. The principle was first elaborated by the House of Lords in *WT Ramsay Ltd v Inland Revenue Commissioners*.[17] It was carried forward by the House in *Furniss v Dawson*[18] where Lord Brightman described its essential features in these terms:

> First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (ie, business) end … Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax—not "no business effect". If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. A court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.

As the principle has developed, however, in these and other cases, it has come to be described by a number of Members at the House of Lords not just as a means of eliminating the bogus element from artificial transactions designed to avoid tax, but as a development of the purposive approach to statutory construction. This development is to be seen most clearly in the speeches of the members of the House of Lords in the recent case of *Inland Revenue Commissioners v McGuckian*,[19] to which I was not a party. At the risk of over-

17
[1982] AC 300.

18
[1984] AC 474.

19
[1997] 1 WLR 991, HL.

simplifying a complex issue, I would describe the views expressed as calling for the application of such general terms as "income", "capital gain" and "capital loss" to the commercial substance rather than the legal effect of the particular transaction.

The facts of *McGuckian* were straightforward. As part of a tax avoidance scheme, a non-resident company sold the right to receive a particular dividend to another company for a price equal to 99% of the dividend. It claimed that the price received was capital, but the House of Lord held, applying the *Ramsay* principle, that it was income within the meaning of section 478 of the Income and Corporation Taxes Act 1970, the successor to section 18 of the Finance Act 1936 which I have already mentioned with reference to the *Congreve* decision. Lord Steyn cited the speech of Lord Wilberforce in *Ramsay* to the effect that, even in the case of a taxing Act, the court is not confined to a literal interpretation, and added that "there may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded".

Lord Cooke,[20] strongly supporting the purposive approach, added:[21]

> I suspect that advisors of those bent on tax avoidance, which in the end tends to involve an attempt to cast on other taxpayers more than their fair share of sustaining the national tax base, do not always pay sufficient heed to the theme in the speeches in the *Furniss* case especially those of Lord Scarman, Lord Roskill and Lord Bridge of Harwich to the effect that the journey's end may not yet have been found.

This development has caused considerable controversy in both professional and political circles. The one area in which the courts, in particular the House of Lords, have always been especially careful to apply the canons of strict construction is the area of tax, lest it be said that the judges were taking it upon themselves to usurp the historic and jealously guarded role of the elected House of Commons.

20
See chapter 5, *Administrative Law Trends in the Commonwealth*, above, delivered by Lord Cooke in December 1990.

21
[1997] 1 WLR 991 at 1005.

The judicial doctrine exemplified by the *Ramsay* and *McGuckian* decisions has also been criticised by the Tax Law Review Committee, a large and influential committee drawn from representatives of the judiciary and the professions, the political parties, the Inland Revenue and business, under the chairmanship of Lord Howe. In a recent report, the Committee, while acknowledging that this doctrine has played an important role in counteracting some of the most uncommercial tax avoidance operations concluded nevertheless that "innovative judicial anti-avoidance techniques are unsatisfactory", for two main reasons. The first was that a judicial doctrine fashioned on a case by case basis through the hierarchy of the courts produces considerable uncertainty. The second was that a developing judicial doctrine, however radical, operates retrospectively and offers no clear framework within which it shall operate or not. The report favoured the introduction of a general anti-avoidance provision, fashioned to take account of the not always satisfactory experience of such provisions in other jurisdictions and supplementing rather than replacing specific anti-avoidance measures. The debate continues.

Let me make clear my belief that the United Kingdom judges are not by reference to the Ramsay principle or in any other way seeking to extend their power. They are rather seeking to remedy what they see as the inadequacies of the statute law, and of too literal an approach to the interpretation of statutes, when measured by reference to common law concepts.

Let me make clear my belief that the United Kingdom judges are not, by reference to the *Ramsay* principle or in any other way, seeking to extend their power. They are rather seeking to remedy what they see as the inadequacies of the statute law, and of too literal an approach to the interpretation of statutes, when measured by reference to common law concepts. If I may be permitted a quite general personal observation, based on my acquaintance with judges from most parts of the common law world, judges are not interested

in the pursuit of power. If they were, they would not have become judges. The danger that I foresee for the judges is that of becoming overloaded by the community with responsibilities for the solution of problems which go beyond the traditional bounds of the law. I should like to say a little more about this point, but in the meantime let me return to the present.

Other areas of common law development

It is not solely in the development of new principles and doctrines based upon the interpretation of statutes that the common law remains alive and kicking. There are still important areas of the law in which the common law continues to play its historic role of incremental development, confronting new problems as they arise, solving them by reference to the principles established in earlier cases, and in doing so adding to the store of case law and precedent. One of these is judicial review, a subject upon which I shall touch only lightly because it has been fully, and so much better dealt with by others, including Lord Woolf in last year's lecture. The one aspect which I wish to mention is the extent to which, despite their different terminology and different methods of approach, administrative law in the United Kingdom and the *Continental droit administrative* have tended to converge and combine. Thus the Continental notion of proportionality, which was said by Lord Diplock to mean "not using a steam hammer to crack a nut", appears on examination to be remarkably similar to the concept of reasonableness as understood in the common law. The matter is still one of dispute amongst those more learned than I, but I cannot help feeling that the differences are largely semantic. I only hope that, in the interests of euphony, the word "proportionality" will not have to be added to the ugly trio "illegality", "irrationality" and "procedural impropriety".

The law of negligence continues to develop incrementally, but by no means uncontroversially. No other branch of the law has occupied so much of the House of Lords' time during the last ten years. One of the most elusive and troublesome concepts in that

branch of the law is the third of the elements now recognised as being necessary in order to establish the existence of a duty of care. As Lord Bridge put it in *Caparo plc v Dickman*,[22] after reviewing the earlier cases:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

In the case of disputes between individuals, the question of what is "fair, just and reasonable" may not be too difficult to answer. But in the context of a claim against, for example, the police, or the auditor of a public company, or a local authority it may involve the courts in considering the public interest and issues of public policy in the broadest sense, with little assistance save for that provided by the opposing parties and by the judges' experience. It is not an area in which precedents can normally help because the different departments of public life vary so widely. For example in *Hill v The Chief Constable of West Yorkshire*[23] it was held that as a matter of public policy the police were immune from actions for negligence in respect of their activities in the investigation and suppression of crime. In *Caparo* itself the same considerations led to the auditors of a public company being held to have no responsibility towards non-shareholders contemplating investment in the company in reliance on the published accounts. And in the group of cases reported under the title *M v Newham LBC*,[24] the House of Lords held that it would not be fair, just and reasonable to superimpose a common law duty of care on a local authority in relation to the performance of its statutory duties to protect children against ill-treatment; but that such a duty did arise in relation to the provision of psychological advice by the local authority, albeit that the advice was provided in the exercise

22
[1990] 2 AC 605 at 617.

23
[1989] 1 AC 53.

24
[1995] 2 AC 633.

of a statutory power. Sometimes the courts, including the House of Lords, have permitted and indeed welcomed the intervention of a Government Department, not so much as an *amicus curiae* but as a source of evidence as to where the public interest lies. In a very recent case concerning issues of public policy, *In re L* (not yet reported),[25] which concerned the right and/or duty at common law of a local authority hospital to detain, in his own interest, but against the wishes of the family with whom he lived, a mental patient who was incapable of consenting to his detention, the House of Lords was greatly assisted by interventions from not only the Secretary of State for Health, but also the Mental Health Act Commission and the Registered Nursing Homes Association. This resort to sources of expert knowledge independent of the dispute was widely welcomed and may point the way ahead.

An earlier case, in which I was not concerned, but in which I have no doubt that my fellow Law Lords would have been glad of such assistance, was that of *Airedale NHS Trust v Bland*.[26] That was the case in which the courts were asked to, and did, declare that it was lawful for the doctors to discontinue life-sustaining treatment for a patient whose injuries suffered some years previously had left him in a vegetative state from which, according to the evidence, he could not recover. I, for my part, would not have agreed; but no one could question the sincerity or thoroughness of the anxious consideration which all of the judges concerned, in the House of Lords and below, gave to their decision. The point which I am making, however, is that the courts were entrusted with the responsibility for resolving an issue which raised not only a question of law but questions of profound social, moral and ethical significance.

One unfortunate, but I think inevitable, consequence of the growth and complexity of the problems being brought before the courts is to throw a greater burden upon those presenting and preparing the cases. Advocates are expected to be able to put before the courts materials going infinitely wider than the boundaries of legal textbooks. Modern technology presents us with almost

25
Editor's note: now reported as *R v Bournewood Community and Mental Health Trust (in re L)* [1998] 3 All ER 289, HL.

26
[1993] AC 789.

unlimited possibilities for research. Much of this research, like much of the research prompted by the *Pepper v Hart*[27] decision, will prove to be fruitless, but it still has to be carried out. The presentation of the products of successful research takes up much valuable court time, because it is often virgin territory so far as the judges are concerned. The burden of cost thrown upon litigants (and upon the legal aid fund) is in danger of becoming truly prohibitive. The old legal joke that "the courts are, like the Ritz Hotel, open to everyone" has long lost whatever humour it ever had. It is not surprising, and may be something of a palliative, that new bodies are coming into existence with the aim of producing procedures less formal than those of the courts, including not only arbitration but mediation and impartial expert advice. But I see no signs of any reduction in the expectations placed upon the courts by the public and the corresponding responsibilities borne by the judges. Let me refer by way of example to the ordinary working lives of the Law Lords.

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There are twelve of us, the theory being that on each working day we shall sit in two committees of five, one in the House of Lords and one in the Privy Council, the two remaining Law Lords being free to prepare judgments and fulfil outside commitments. The practice works out rather differently. At the time of my appointment in 1994, Lord Woolf was scarcely ever available to sit, because of his responsibilities for preparing his lapidary report on civil procedure, *Access to Justice*.[28] I myself was almost at once asked to take on the role of Commissioner under the Interception of Communications Act 1985, with the responsibility for monitoring and reporting upon the telephone-tapping and other interception activities of the Government agencies, a task which occupies about four working

27
[1993] AC 593;
[1993] 1 All ER 42, HL.

28
Lord Woolf, *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, July 1996, HMSO, London.

weeks in the year. Later in 1994 I was asked to become Chairman of the Committee on Standard in Public Life, a three-year appointment which took up almost half of my working time. Almost immediately on his appointment last year, Lord Saville was entrusted with an enquiry, expected to last at least a year, into the "Bloody Sunday" shooting incident which took place in northern Ireland some 16 years ago. In 1996 Lord Lloyd was away for three months or more preparing a report on the anti-terrorist legislation. For most of the last year, Lord Nicholls has been devoting almost the whole of his time to the Chairmanship of a joint select committee of both Houses of Parliament looking at the question of parliamentary privilege. These are only some of the interesting diversions in which we have become engaged, and which no doubt add much to our store of general knowledge, but which also make it very difficult to get through our ordinary case load of appeals. We are only able to do so because of the extremely welcome and regular assistance which we get from Lord Cooke and from the retired Law Lords and also from the Commonwealth judges and the retired Court of Appeal judges who are eligible to sit in the Privy Council.

Surprising as it may seem, the Privy Council still takes up nearly half of our time, the bulk of the work coming from New Zealand and from the Caribbean jurisdictions. The disappearance of appeals from Hong Kong will undoubtedly lessen the load, but two of our members, Lord Nicholls and Lord Hoffman, may be called upon at any time to sit (as Lord Hoffman already has) on the new final court of appeal in Hong Kong.

On the domestic front, in addition to the topics which I have mentioned, the incorporation of the European Convention on Human Rights into United Kingdom statute law has raised fears of the unelected judges having too great an influence upon social and even political decision making. This, added to great growth in the judicial review of Government action and the number of cases—not a large number, but magnified by the media—in which Ministers have been overruled by judges on legal grounds, and occasionally criticised,

has led to previously unheard-of suggestions that the personal lives and any political inclinations of the judges should be explored by an independent commission before they are appointed or promoted. This proposal, though widely canvassed before the last election, has not, or at any rate not so far, been favoured by the Government.

Is there, then, a danger or even room for legitimate concern about what is sometimes called "the judicialisation" of British public life? I would answer this question by borrowing the title of a recent lecture given by Lord Steyn, which described the judiciary as "the weakest and least dangerous department of Government". Lord Steyn, in turn, had borrowed that description from the writings of the late 18th century American statesman, Alexander Hamilton, the Federalist, and opponent of Jefferson. Like Lord Steyn, I believe that the description is as true of the United Kingdom today as it was of the United States courts 200 years ago. I have said before that in my experience judges generally do not seek power, and indeed in a democracy judges have no power, save that which is conferred upon them by Parliament, by the support of the Government and by the respect of the community which they serve. I have no doubt that, in serving the community, the judges of Malaysia and the United Kingdom will remain conscious of their responsibility to provide the combination of stability, certainty and justice, based upon tried and trusted common law principles, which the frantic world of today requires. They will continue to apply the standards of the free and lawful man.

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