



The Right Honourable Lord Keith of Kinkel

The Modern Approach to Tax Avoidance



Henry Shanks Keith
(7 February 1922 – 21 June 2002)

Lord Keith was born into a distinguished Edinburgh legal family. His grandfather had been named a Knight Grand Cross of the British Empire. His father, Baron Keith of Avonholm, was also a Law Lord, with a penchant for dissenting opinions. Harry Keith became the top classics scholar—or dux—at the Edinburgh Academy.

After the war (where he had been commissioned in the Scots Guards and saw action in North Africa and Italy), Lord Keith was demobbed as a Captain, and resumed his studies at Magdalen College, Oxford. After graduation, he acquired an LLD from Edinburgh University. He became an Advocate at the Scottish Bar in 1950 and a Barrister at Gray's Inn in 1951.

He first went on the Bench in 1970 as Sheriff Principal of Roxburgh. A year later he became a Senator of the College of Justice, where he displayed an unexpected ability to deal with criminal trials. In 1974, he was named one of the two Scottish Judges on



the Judicial Committee of the Privy Council. On the nomination of the Callaghan Government, he became a Privy Councillor in 1976, and a Lord of Appeal in Ordinary in the House of Lords in 1977. In 1986 he became Senior Law Lord presiding over one of the two appellate committees of the Judicial Committee of the Privy Council. He retired as a Law Lord on 19 September 1996, after which he was awarded the Knight Grand Cross of the British Empire.

In the House of Lords, Lord Keith showed an independent mind. He gave leading judgments in many well-known cases, such as *Spycatcher*, and his judgments in a number of appeals involving economic loss resulting from negligence were seen as a determined attempt to halt the creeping advance of that branch of the law into new and unexplored fields. As *The Times* obituary noted, “his judgments made an important contribution to the law, notably reinforcing press freedom”.

Lord Keith also delivered a number of judgments in the Privy Council on appeals from Malaysia, notably on land law and revenue law. In the leading cases dealing with forfeiture of land under the National Land Code, *United Malayan Banking Corporation Berhad and Johore Sugar Plantation and Industries Berhad v Pemungut Hasil Tanah, Kota Tinggi* (1984) 4 PCC 313, and fraud under the National Land Code, *Datuk Jagindar Singh, Datuk P Suppiah and Arul Chandran v Tara Rajaratnam* (1985) 4 PCC 505, the judgments were delivered by Lord Keith.

Lord Keith also delivered the judgments of the Privy Council in the following appeals from Malaysia: *Mamor Sdn Bhd v Director General of Inland Revenue* (1985) 4 PCC 465 (revenue law); *Garden City Development Berhad v Collector of Land Revenue, Federal Territory* (1982) 4 PCC 67 (land law); *Lam Wai Hwa and Another v Toh Yee Sum and Others* (1983) 4 PCC 213 (family law); *Pan Choon Kong v Chew Teng Cheong and Loh Kian Tee* (1984) 4 PCC 231 (contract); and *Pemungut Hasil Tanah v Kam Gin Paik and Others* (1986) 4 PCC 545 (land law).

Lord Keith died on 21 June 2002.

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Lord Keith of Kinkel
Lord of Appeal in Ordinary, House of Lords

The Ninth Sultan Azlan Shah Law Lecture delivered by Lord Keith of Kinkel in 1994, has been irretrievably lost.

It is replaced in this volume with *Policy Considerations in Judicial Decision Making*, a lecture delivered in Kuala Lumpur in 1987 by Lord Hailsham of St Marylebone, Lord Chancellor .





The Right Honourable Lord Hailsham of St Marylebone

Policy Considerations in Judicial Decision Making



Quintin McGarel Hogg
(9 October 1907–12 October 2001)

Lord Hailsham, born Quintin McGarel Hogg on 9 October 1907, was educated at Eton College and Christ Church, Oxford. Lord Hailsham then embarked on an academic career, becoming a Fellow of All Souls in 1931. He then trained in law, and was called to the Bar in 1932.

Lord Hailsham was a Conservative Member of Parliament for Oxford (1938–1950). In 1950, he succeeded his father as Viscount Hailsham and sat in the House of Lords; but in 1963, he renounced the title and returned to the House of Commons as Member of Parliament for St Marylebone, London, where he served until 1970.

He was First Lord of the Admiralty (1956–1957), deputy party leader and then leader in the House of Lords (1957–1960 and 1960–1963), and Minister for Science and Technology (1959–1964).



With the encouragement of the then resigning Prime Minister Harold Macmillan, he contested the party leadership (1963), but lost to Sir Alec Douglas-Home. Unsuccessful, he went back to his law career. He accepted a life peerage (1970) and served two terms as Lord High Chancellor (1970–1974) under Prime Minister Heath, and subsequently under Mrs Margaret Thatcher (1979–1987).

His writings include an autobiography, *A Sparrow's Flight: The Memoirs of Lord Hailsham of St Marylebone* (1990), and two political works, *The Purpose of Parliament* (1946) and *Science and Politics* (1963).

Lord Hailsham was the Editor-in-Chief of *Halsbury's Laws of England*.

Lord Hailsham died on 12 October 2001.

Policy Considerations in Judicial Decision Making

Lord Hailsham of St Marylebone
Lord Chancellor

I am delighted to have had this opportunity of visiting Malaysia and seeing something of it at first hand. Like many in Britain, I have been greatly impressed by all that I have read and heard about the dynamic developments in this country over recent years. The steady development of agricultural and natural resources and the recent strides made in high technology industries are achievements which have caught the attention of the world.

Malaysia is an independent non-aligned country. The long tradition of friendship and cooperation which exists between us was built up in different historical circumstances. Yet the strong ties between us endure because there are sound reasons for maintaining and extending them. Britain and Malaysia are both democratic nations with a strong commitment to industrial development, investment and trade. We understand the fundamental importance of a free enterprise system and the dangers that protectionism pose for our trade and economic growth. We are both oil and gas exporters, and are both involved in promoting new technology. We have many shared perceptions in international affairs. We also share a fundamental commitment to the rule of law. Close similarities exist between our legal systems, and strong friendships exist within our legal communities.

Our ties are reflected in our close relationship in commerce and investment, in the large number of Malaysian students who are currently

Public lecture delivered on 22 April 1987 in conjunction with the Fourth International Appellate Judges' Conference, Kuala Lumpur. Reproduced from Law, Justice and the Judiciary: Transnational Trends, 295–299, editors: Salleh Abbas and Visu Sinnadurai, 1988.

studying in the United Kingdom, and in unofficial exchanges at all levels. My own visit, at the invitation of the Lord President of the Supreme Court, is one small example of these exchanges.

In raising the question of policy considerations in judicial decision making, you have opened a chink in a very wide door indeed and, introducing the subject within the confines of a short speech my difficulty will be to avoid writing a book instead of introducing a short discussion.

But I will start with a very practical consideration. Judges do not select the cases which come before them. The litigants and the authorities do that for them. Nevertheless they have to decide every case which does come before them in one way or the other. There is no such thing as “no bid” in the game of judicial auction bridge. Judges mark up the score and do not indulge in the bidding.

Therefore there is a sense in which judges cannot avoid being law makers. Nevertheless, there is virtue in the mythology of judicial jurisprudence. The mythology is that judges do not make law. They only interpret it. This is very sound sense. If they were once to admit that they made law they would very soon find themselves in trouble. They would be in trouble with the legislature which claims the monopoly of law making. They would be in trouble with the teachers of law, a highly respectable and very powerful body. They would be in trouble with the students one of whom wrote to *The Times* when Lord Denning was still Master of the Rolls imploring him not to make any more new law until she had passed her Bar examinations.

Worst of all, they would be in trouble with the profession who, after all have the duty of advising their clients as to what the courts are likely to decide in the particular circumstances of a given concrete case. For them at least a certain degree of certainty and a certain

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degree of durability are excellencies preferable even to abstract justice when this is to be measured by the uncertain length of an unknown judge's foot. So as Lord Radcliffe once observed somewhere or other, if the judges cannot avoid making law, let them at least never admit that they are making it. Mythology is at least an important factor in decision making.

But, at least let it never degenerate into outright hypocrisy. Whatever the mythology, at least let us be frank with one another. As the old Latin tag has it: "Times change and we change with them."

Let anyone who doubts this and is research minded compare the decisions of Lord Coke as Chief Justice or Lord Eldon as Lord Chancellor in any given term with a list of the reported cases based on customary law in the comparable term of 1986 and ask them how in any of the first two volumes are in any way relevant to the decisions of the third. Or let him look, let us say, at the judgments of Lord Reid based on English customary law in the volume of 1964 Appeal Cases and reflect on the extent to which English customary law has developed in the 20 years preceding and the 20 years following that year. The fact of the matter is that the common law is changing all the time with contemporary opinion and contemporary changes. The fact that we do not notice the change or underestimate its extent is due to the fact, as the Latin tag suggests, that we are merely the fishes in the stream. We may notice the eddies, but not the current. The discipline upon us is that we have to make our decisions within the existing fabric of the common law so that each decision leaves a coherent body of doctrine available for our successors which is also compatible with that left us by our predecessors. The Good Book assures us that one cannot tack a new piece of cloth to patch an old garment. But, in interpreting the common law we do practically nothing else. This is because the metaphor is inexact. We are not dealing with a piece of cloth, but with a living body of doctrine of which, though we may not discern it, there are growing points and withering points. In time the withered boughs must be sawn off and discarded, but the growing points need to be carefully tended, at times ruthlessly pruned, but only so that they may branch and flourish.

When we are dealing with statute law we are dealing with a totally different problem. In dealing with customary law we are adapting inherited doctrine to current needs. When we are dealing with statute law we are handling words—other people’s words—laid down in advance by our parliamentary masters with their confident sense of supernatural wisdom. All cases deal with something which has happened. But statutes deal, sometimes with excessive confidence, with the legal consequences of what is expected to happen in the future. But, alas for mice and men, the *casus omissus*, the unexpected instance, only too often forcibly intrudes itself upon our attention, or else the legal consequences may involve disagreeable repercussions which the zealous legislator never contemplated. So then the judge has to decide to which of two schools of statutory interpretation he is to adhere, the *literalists*, who claim that the natural grammatical meaning is what Parliament must have intended, however absurd its consequences may be, and the *mischievites*, seeking what Lord Coke described as the “mischief” which the Act was intended to combat, and giving a purposive construction based on the perception of the judge as to what Parliament must have intended, however inconsistent with the grammatical sense of the words. Both agree that the will of Parliament must be respected. But what was the will of Parliament? The two sides differed. For a long time, the literalists had it all more or less their own way in the English courts. But of recent years the mischievites and their purposive interpretation have staged something of a comeback. To some extent the battle rages round the question to what external material the construing court may have recourse. I once presided in an appeal which turned on the construction of a statute based on the report of a committee on which two of my four judicial brethren and both leading counsel instructed on behalf of the opposing parties had sat as members. The literalists had a rough time in that debate, and on the whole the mischievites have now more or less won the day and look with impunity on blue books, Law Commission reports, and other travaux préparatoires, but never, pace Lord Denning, at *Hansard*, or the notes on clauses or instructions to Parliamentary Counsel.

At the end of the day it is wise for judges to have studied as part of their training, or at least read widely, material outside their speciality. They ought at least to have a nodding acquaintance with history, not least of their own country, and it may be perhaps have thought or read a little about political or moral philosophy, and, I would suggest even a little theology as contained in their own religion. Justice may be blind, but she is not as blind as she is painted, and,

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though many attempts have been made, and continue to be made, to divorce law and morality (between which there can never be either a direct correspondence or a one-for-one relationship) all have ended in failure, and, in principle, are bound to fail. For, in the end, law exists to give effect, though with suitable limitations for human fallibility and human differences, to the moral judgments of

mankind and not simply the command of the ruler, or the interests of the mighty. A law which is not protected by the sanction of conscience as well as the words of a statute is not a law likely to be literally obeyed, and a judge who is not sensitive to the social atmosphere and moral judgments of his contemporaries is not likely to leave a permanent mark on his country's jurisprudence. 

