THE *Sultan Azlan Shah* II
Law Lectures

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Rule of Law, Written Constitutions & The Common Law Tradition

Visu Sinnadurai
Editor

Lord Saville of Newdigate
Cherie Booth QC
Justice Anthony Kennedy
Baroness Helena Kennedy QC
Tony Blair
Lord Mance of Frognal
Lord Rodger of Earlsferry

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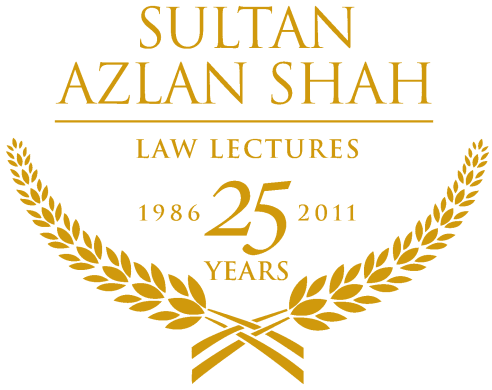
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1986 25 2011
YEARS

OFFICIALLY LAUNCHED BY

His Royal Highness Raja Nazrin Shah

ON 1 DECEMBER 2011, KUALA LUMPUR

TO

His Royal Highness

Sultan Azlan Shah

Sultan of Perak

This publication is dedicated by

Raja Nazrin Shah

to commemorate

25 Years of

The Sultan Azlan Shah Law Lectures

1986–2011

“A most distinguished jurist, statesman and upholder of the Rule of Law.”

Lord Woolf
Lord Chief Justice of England and Wales

The Rule of Law requires fidelity to the following principles:

1 The Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all its officials.

2 The Law must respect and preserve the dignity, equality, and human rights of all persons. To these ends the Law must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them.

3 The Law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfil just expectations and seek redress of grievances without fear of penalty or retaliation.

Justice Anthony Kennedy
Written Constitutions and the Common Law Tradition
20th Sultan Azlan Shah Law Lecture, 2006

The Sultan Azlan Shah Law Lectures is one of the most prestigious lecture series of the common law world.

Baroness Kennedy QC
Legal Challenges in Our Brave New World
21st Sultan Azlan Shah Law Lecture, 2007

There are a number of possible milestones of distinction for one who is pursuing a career as a member of the English Bench. Foremost amongst these is to be invited to deliver the Sultan Azlan Shah Lecture.

Lord Phillips of Worth Matravers
Right to Privacy: The Impact of the Human Rights Act 1998
17th Sultan Azlan Shah Law Lecture, 2003

The Sultan Azlan Shah Law Lectures

The Series 1986–2011

1986

First Lecture

"Colour of Office": Restitutionary Redress against Public Authority

Professor WR Cornish

1987

Second Lecture

Money in the Law

Professor AG Guest

1988

Third Lecture

Judicial Legislation: Retreat from Anns

Lord Oliver of Aylmerton

Fourth Lecture

The Spycatcher: Why Was He Not Caught?

Lord Ackner

1989

1990

Fifth Lecture

Administrative Law Trends in the Commonwealth

Sir Robin Cooke

1991

Sixth Lecture

Negligence in the World of Finance

Lord Mustill

Seventh Lecture

Commercial Disputes Resolution in the 90's

1992

Lord Donaldson of Lymington

Eighth Lecture

Commercial Fraud Trials: Some Recent Developments

1993

Lord Mackay of Clashfern

Ninth Lecture

The Modern Approach to Tax Avoidance

Lord Keith of Kinkel

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Tenth Lecture

Equity and Commercial Law: Do They Mix?

1995 *Lord Browne-Wilkinson*

Eleventh Lecture

Contract Law: Fulfilling the Reasonable Expectations of Honest Men

Lord Steyn

1996

1997

Twelfth Lecture

Judicial Review of Financial Institutions

Lord Woolf

Thirteenth Lecture

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

1998 *Lord Nolan*

Fourteenth Lecture

The Impact of Regionalism: The End of the Common Law?

Lord Slynn of Hadley

1999

Fifteenth Lecture

Construction of Commercial Contracts: Strict Law and Common Sense

2000

Lord Clyde

Sixteenth Lecture 2001

The Law as the Handmaid of Commerce

Lord Bingham of Cornhill

Seventeenth Lecture

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2004 Eighteenth Lecture

Information Technology: A Tool for Justice

Lord Saville of Newdigate

Nineteenth Lecture

The Role of the Judge in a Human Rights World

Cherie Booth QC

2005

Twentieth Lecture 2006

Written Constitutions and the Common Law Tradition

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Legal Challenges in Our Brave New World

2007 *Baroness Kennedy of The Shaws QC*

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Upholding the Rule of Law: A Reflection

Tony Blair 2008

2009 Twenty-Third Lecture

The Changing Role of an Independent Judiciary

Lord Mance of Frognal

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2010

Bias and Conflicts of Interests–Challenges for Today's Decision-Makers

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Would it have Made Any Difference?
Cause and Effect in Commercial Law

Editor's Note II

The Sultan Azlan Shah Law Lectures: Rule of Law, Written Constitution and the Common Law Tradition, contains the collection of the full text of the eighteenth to the twenty-fourth annual lectures delivered from 2004 to 2010. The first volume entitled *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, published in 2004, contains the first seventeen lectures delivered during the period 1986 to 2003.

As stated in the Introduction to that volume (reproduced at pages 25–35 below), since 1986, when the First Sultan Azlan Shah Law Lecture was delivered in Kuala Lumpur, distinguished Lord Chancellors, Masters of the Rolls, Lords of Appeal in Ordinary, a President of the New Zealand Court of Appeal, and academics from the Commonwealth have been invited to partake in the premier law lecture series of Malaysia.

In recent years, the lectures have been delivered by Associate Justice Anthony Kennedy of the Supreme Court of the United Stated of America; Ms Cherie Booth QC, a leading barrister and the first woman to deliver a lecture in this series; Baroness Helena Kennedy, the ardent campaigner of human rights; Mr Tony Blair, the former British Prime Minister; Lord Mark Saville, Justice of the Supreme Court of the United Kingdom and the chairman of the inquiry into the infamous Bloody Sunday deaths; Lord Jonathan Mance, the first Supreme Court Judge of the newly established Supreme Court of the United Kingdom; and finally Lord Alan Rodger, also a Supreme Court Judge of the United Kingdom.

The speakers who graced our shores, each conferring on the series the measure of prestige befitting its Patron, His Royal Highness Sultan Azlan Shah, have delivered authoritative, stimulating and thought-provoking lectures on a wide range of topics.

The idea for a series of annual public lectures in law in honour of His Royal Highness Sultan Azlan Shah was conceived in 1985. In the same year, in the presence of His Royal Highness Sultan Azlan Shah, Professor JAG Griffith of the London School of Economics delivered a public lecture entitled *Judicial Decision Making in Public Law*. At this lecture, it was announced that this annual series would henceforth be known as the Sultan Azlan Shah Law Lectures (see [1985] 1 MLJ *clxv*). In 1986, Professor WR

Cornish delivered the First Sultan Azlan Shah Law Lecture entitled *"Colour of Office": Restitutionary Redress against Public Authority.*

For the past 25 years, eminent speakers have delivered the Sultan Azlan Shah Law Lecture each year, except for the year 2002. In 2002, for what would have been the seventeenth lecture, the Honourable Associate Justice Anthony Kennedy of the Supreme Court of the United States of America was unable to deliver his lecture due to insurmountable difficulties. Therefore, the Sultan Azlan Shah Law Lecture delivered in 2003 by the Master of the Rolls, Lord Phillips of Worth Matravers, entitled *Right to Privacy: The Impact of the Human Rights Act 1998* is considered as the seventeenth of the series. In 2006, Associate Justice Anthony Kennedy delivered the twentieth lecture which is now contained in the present volume.

The Twenty-Fifth Sultan Azlan Shah Law Lecture is scheduled to be delivered in December 2011 by Lord Robert Walker, Justice of the Supreme Court of the United Kingdom.

Whilst the best endeavours have been made to faithfully reproduce the lecture series in its entirety as delivered by the speakers, for consistency, minor editorial changes have been made. Headings, additional footnotes, citations and other references have been incorporated where necessary. In certain instances, editorial notes have been added.

Apart from the text of the seven lectures, the speeches delivered by His Royal Highness Raja Nazrin Shah, the Right Honourable Lord Chief Justice of England and Wales, Lord Woolf, and Professor Dato' Seri Visu Sinnadurai at the Official Book Launch of *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches of HRH Sultan Azlan Shah* and *The Sultan Azlan Shah Law Lectures: Judges on the Common Law* (both edited by Dato' Seri Visu Sinnadurai, and published by Professional Law Books and Sweet & Maxwell Asia) on 13 April 2004, have been included at the end of this volume.

This volume also contains a consolidated and comprehensive index of all subject matters appearing in this volume as well as those appearing in the earlier volume containing the first seventeen lectures.

Dato' Seri Visu Sinnadurai

Kuala Lumpur
13 October 2011

Acknowledgements II

The compilation and publication of the lectures in *The Sultan Azlan Shah Law Lectures: Rule of Law, Written Constitutions and the Common Law Tradition* would not have been possible without the unstinting support and encouragement of His Royal Highness Raja Nazrin Shah, Raja Muda of Perak, who, as in the previous volume, believed strongly in the value of this publication.

The Sultan Azlan Shah Foundation must also be acknowledged for its kind support of this publication in pursuit of the advancement of legal literature in this country.

My profound appreciation goes to Joel Ng who, as in the earlier volume, acted as my co-editor, and who managed the entire project with utmost skill and professionalism.

Joel, together with Low Weng Tchung and Chan Mun Fei, provided invaluable assistance in the preparation of this book, especially in editing and proofreading the text, and in providing useful and constructive comments to the layout and design of the book. I would like to put on record my gratitude to them for their hard work.

I record my appreciation to Devaraj Letchumanan, and the editorial team of Sweet & Maxwell Asia, particularly Rachel Jaques, Kevin Ooi and Edward Goh, for their support. Thanks are also due to Andrew Wong of Compass Creative for once again designing the book and for masterfully creating the artwork; Chris Lin who did the pencil and charcoal sketches of the speakers; and Philippa Findlay of Puddingburn Publishing Services for preparing the Index.

Lastly, I would like to thank RNS Publishers and Sweet & Maxwell Asia (Thomson Reuters) for all assistance rendered in the publication of this book.

Dato' Seri Visu Sinnadurai
Editor

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Introduction II

To commemorate the 25th year of the Sultan Azlan Shah Law Lectures, this book is published as a sequel to *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, published in 2004.

The Sultan Azlan Shah Lecture Series was established in 1986 to honour His Royal Highness Sultan Azlan Shah, specifically His Royal Highness' contribution to the development of Malaysian law.[1] It has, over the years, established itself as one of the most prestigious lecture series in the Commonwealth.

Whilst the first volume contained the first 17 lectures that were delivered by eminent jurists from the common law countries, this second volume contains the text of the lectures delivered from 2004 to 2010, that is the eighteenth to the twenty-fourth lecture. It contains the text of the lectures of Associate Justice Anthony Kennedy of the United States Supreme Court; Ms Cherie Booth QC, a leading Queen's Counsel on employment and

[1] See Introduction to *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, edited by Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia, reproduced at pages 25–35, below.

discrimination law, and the first woman to deliver a lecture in this series; Baroness Helena Kennedy, the ardent campaigner of human rights; Mr Tony Blair, the former British Prime Minister; Lord Mark Saville, Lord of Appeal in Ordinary and the Chairman of the inquiry into the infamous Bloody Sunday deaths; Lord Jonathan Mance, the first Supreme Court Judge of the newly established Supreme Court of the United Kingdom to deliver the Sultan Azlan Shah Lecture; and finally Lord Alan Rodger, also a Supreme Court Judge of the United Kingdom. The Twenty-Fifth Lecture will be delivered by Lord Robert Walker of the Supreme Court of United Kingdom on 1 December 2011.

The main theme of the 17 lectures delivered and published in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law* was the common law tradition. That same theme may also be discerned from the seven subsequent lectures now contained in this volume entitled *The Sultan Azlan Shah Law Lectures: Rule of Law, Written Constitutions and the Common Law Tradition*. This title, derived from the title of Justice Anthony Kennedy's lecture, "Written Constitutions and the Common Law Tradition",[2] alludes to the three main themes emphasised with great passion and eloquence by Justice Kennedy in his lecture, namely the importance of the common law tradition, the Rule of Law, and the approach to be adopted for the interpretation of written constitutions. The thread of these main themes can be found running through the seven lectures contained in this volume.

[2] Twentieth Sultan Azlan Shah Law Lecture delivered in 2006, pages 209–267, below.

The common law tradition

Lord Mance in his lecture[3] expressed this sentiment concerning the lecture series:

> This lecture series is a singular bridge … between our two respective common law countries, with their common law traditions. I hope that it will long remain so.

Justice Anthony Kennedy, the first United States Supreme Court judge ever to address a Malaysian audience, highlighted the same theme in his lecture:

> One essential framework for the judicial process in your own country, in the United States, and in many other constitutional democracies is the common law tradition and the common law method of reasoning.

The common law tradition's appeal to citizens who aspire to define their existence and identity in a democratic society was explained by Justice Kennedy in the following manner:

> The common law method is a powerful manifestation of the desire of all people to define their own human potential, to understand their own struggle for existence, to recognise the deep yearning to shape their own true destiny, and to go beyond old limits to touch what once was beyond reach.

[3] "The Changing Role of an Independent Judiciary", Twenty-Third Sultan Azlan Shah Law Lecture delivered in 2009, pages 377–429, below.

Justice Kennedy's lecture highlights the intimate relationship between the common law tradition and the Rule of Law; how they are intertwined and inextricably linked. The success of the common law method in informing, defending and upholding the Rule of Law can be attributed to its inherent flexibility and ability to evolve and adapt to changing circumstances, drawing upon lessons from the past, and the customs and traditions of the people to fully understand and appreciate the new directions in which law and society must head. Again, Justice Kennedy succinctly explained this in his lecture as follows:

> While the common law provided cause for optimism in the enterprise of establishing a law that binds the government and gives rights to the person to challenge arbitrary official action, it taught another lesson. It taught this warning: Do not try to impose a legal system with rules so detailed and precise that they do not allow the system to learn from human experience … The common law method depends upon our knowledge of the customs and traditions of our people … The case-by-case methodology of the common law, borrowed by the courts for constitutional interpretation, is a limit on the discretion of the judges. We do not start from square one each time we consider a question. Instead, we must consider how the basic principle has been embodied and elaborated in our whole long tradition.

The illustrated and celebrated history of the common law has shown us that judges have always turned to the

common law method and tradition as a compass in discharging their duty of administering justice according to law. The symbiotic relationship between the common law and the Rule of Law was noted by Justice Kennedy, who observed that "[t]here is broad consensus in constitutional democracies that the judiciary can use the common law method to defend our liberties and certain fundamental rights in a constantly changing society", thereby upholding and strengthening the Rule of Law, a theme to which we now turn.

The Rule of Law

The Rule of Law has been the main principle which His Royal Highness Sultan Azlan Shah emphasised in many of his judgments and lectures.[4] His Royal Highness is a fervent believer in this principle, and this same belief was expanded upon by many speakers.

Perhaps the clearest definition of what the Rule of Law means is that elucidated by Justice Anthony Kennedy in his lecture. He poignantly pointed out:

> The Rule of Law requires fidelity to the following principles:
>
> 1. The Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all its officials.

[4] See *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches by HRH Sultan Azlan Shah*, 2004, edited by Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia.

2. The Law must respect and preserve the dignity, equality, and human rights of all persons. To these ends the Law must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them.

3. The Law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfil just expectations and seek redress of grievances without fear of penalty or retaliation.

The Rule of Law is not an ancient or archaic relic which serves no meaningful purpose. On the contrary, the Rule of Law remains the beacon which enlightens and guides us through the challenging times and unchartered territories that both law and society must necessarily face in a human rights world. Justice Kennedy observed:

> The ongoing common law elaboration and application of the meaning inherent in the definition of the Rule of Law must be our common task. The world is waiting; the world is watching. We must go forward in attaining the Rule of Law with greater determination than ever before. Freedom, yours and mine, is in the balance.

That the Rule of Law requires the continuous development of systems which improves access to justice is emphasised by Lord Saville in his lecture entitled "Information Technology: A Tool for Justice",[5] where his Lordship observed:

[5] Eighteenth Sultan Azlan Shah Law Lecture delivered in 2004, pages 59–125, below.

> The Rule of Law is the bedrock of a just society. But however good our laws may be and however independent and impartial our judges may be, justice (the reason for the Rule of Law) is not truly justice if it takes too long, if it is too expensive for people to use, or if it is not available to all.

The law is fundamentally a limitation on human conduct, with a view towards enhancing human conduct; the development of the law is necessarily incremental in line with the common law tradition. Thus, having regard to constantly evolving social norms rather than adopting a radical, abrupt or casual process, the Rule of Law demands and compels fidelity to the principles highlighted by Justice Kennedy.

In similar vein, Baroness Helena Kennedy in her lecture entitled "Legal Challenges in Our Brave New World"[6] emphasised:

> The Rule of Law is one of the tools we use in our stumbling progress towards civilising the human condition: a structure of law, with proper methods and independent judges, before whom even a government must be answerable. It is the only restraint upon the tendency of power to debase its holders. As we know, power is delightful and absolute power is absolutely delightful.

It is important not to lose sight of the truism that the fundamental and manifest duty to uphold the Rule

[6] Twenty-First Sultan Azlan Shah Law Lecture delivered in 2007, pages 273–323, below.

of Law is not merely the task of the judiciary but that of all participants in a democratic society, especially the three branches of government, namely, the Executive, the Legislature and the Judiciary.

In this regard, it can perhaps be said that no speaker has had a more profound experience with the practical workings of the Rule of Law than the former Prime Minister of the United Kingdom, the Right Honourable Mr Tony Blair, who delivered the Twenty-Second Lecture entitled "Upholding the Rule of Law: A Reflection"[7] and whose perspective and views on the Rule of Law were shaped and moulded by his unique experiences as a law student, a lawyer, a lawmaker and as the Prime Minister of the United Kingdom.

Mr Blair's lecture provides an extraordinary insight into the conflict faced by the Executive in a democratic country in balancing the extent to which the Rule of Law should be upheld, on the one hand, and preserving national security on the other. This was particularly so during the period in which he held the office of Prime Minister, especially following the tragic events of September 11, aggravated by what Baroness Helena Kennedy described in her lecture as the "legal black hole that is Guantanamo Bay". Further, he was faced with the English judiciary's bold efforts in reminding British lawmakers that it is precisely where the Rule of Law breaks down that terrorism takes root, and that even in times of war the law is not and will not stay silent. This conflict reached boiling point in the landmark case of *A v Secretary of State for the Home Department*,[8] a

[7] Twenty-Second Sultan Azlan Shah Law Lecture delivered in 2008, pages 329–371, below.

[8] [2005] 2 AC 68, HL.

case alluded to by many speakers whose lectures appear in this volume. In this case, a nine-man panel of the House of Lords ruled (by a majority) that the indefinite detention without trial of suspected terrorists was in breach of their fundamental rights to liberty and to a fair trial under the Human Rights Act 1998.

In his lecture, Mr Blair spoke of the "essential tension, perhaps natural tension, which exists between those exercising political power and the judiciary exercising the Rule of Law". He confessed to being "frequently accused as Prime Minister of trampling over inalienable rights, despite introducing the Human Rights Act, probably the most far-reaching extension of judicial capacity to hold the Executive to account in recent British history".

Indeed, Mr Blair provided a remarkable insight into the tensions and challenges faced by lawmakers and the judiciary in relation to the Rule of Law and national security in a human rights world. In particular, Mr Blair explained the British Government's position vis-à-vis the anti-terrorism laws which were held by the House of Lords to be incompatible with the Human Rights Act 1998. Mr Blair observed:

> I could see the terrorist threat. The intelligence about it was daily. The capacity of these people to do evil, to sacrifice the lives of innocent people in pursuit of an unnegotiable cause was manifest. I was trying to protect the public. The House of Lords, I felt, seriously misjudged the threat and misunderstood the only practical way of dealing with it.

He further observed:

> When governments are carrying out their responsibility with regard to national security or making decisions clearly and plainly in the political domain and doing so not out of caprice but a genuine appreciation of public interest, courts should be reluctant to intervene. Notice I do not say: should never intervene. But they should take on a self-regulatory presumption that guards against substituting their political judgment for that of the elected politician. It must be remembered that judges simply do not bear any direct responsibility if as a result of their decisions government cannot, for example, stop a terrorist attack. The buck stops with the government, not the judges.

Mr Blair's views on the need for the judiciary to exercise restraint in matters relating to national security appear to be in sharp contrast to those expressed by the other distinguished speakers.

Baroness Kennedy QC, one of the leading civil liberties and human rights barristers in England, in delivering the Twenty-First Sultan Azlan Shah Law Lecture[9] was critical of the British Government's approach to anti-terrorism legislation. She observed:

> The government has now invented control orders for terrorism and are now looking at similar orders to deal with professional criminals. The attractiveness of avoiding traditional processes is what stimulated our former Prime

[9] "Legal Challenges in Our Brave New World", pages 273–323, below.

> Minister to advocate wholesale reform of the criminal law. For him and many others, the old standards create too high a hurdle for the State.

Baroness Kennedy warned that "[i]t is precisely when there is high political fever that the controlling power of the judiciary becomes so important. The judges have to curb governmental excess; they are the guardians of the Rule of Law and it is crucial that they do not allow themselves to be co-opted by the Executive." She further observed:

> As a result of upholding the Rule of Law, our judges have had to shoulder the brickbats of the ill-informed. Some politicians and elements of the media accuse the judiciary of being out of touch with public opinion.

In a strong rebuke on the willingness of lawmakers to abandon adherence to the Rule of Law in challenging times, Baroness Kennedy drew upon the lessons of Guantanamo Bay:

> Law depends on principles, forged in the fires of human experience, which should not be abandoned when our democracy is being challenged. There can be no black holes like Guantanamo where law's writs do not run. Law must be ever present. We have to be alert to the echoes of Guantanamo within our own systems.

Similarly, the United States Supreme Court in the case of *Hamdan v Rumsfeld*[10] held that military commissions

[10] 548 US 557 (2006).

set up by the Bush administration to try detainees at Guantanamo Bay lacked the power to proceed because its structures and procedures violated both the Uniform Code of Military Justice and the Geneva Convention. Justice Kennedy who was part of the coram observed in that case:

> Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review.

The same sentiments were echoed by Lord Mance, a Law Lord of the House of Lords and now a Justice of the United Kingdom Supreme Court, who pertinently observed when delivering the Twenty-Third Sultan Azlan Shah Law Lecture entitled "The Changing Role of an Independent Judiciary":[11]

> Terrorism is an area par excellence where there has been intense legal focus on governmental reactions, in the interests of the peaceful majority, to the threat posed by a small, ill-defined and difficult to identify minority. It is easy, but only too dangerous, to argue that desperate times call for desperate measures, and justify a loosening of the ordinary standards of liberty and behaviour for which democracies stand.

[11] Twenty-Third Sultan Azlan Shah Law Lecture delivered in 2009, pages 377–429, below.

Lord Mance further added:

> It is not enough to point to a majoritarian view. The protection of a dominant majority is usually easy enough. But human rights are not utilitarian. The greatest good of the greatest number is not the test. It is a central role of the modern court to protect unpopular causes and individuals.

Sharing his own reflections in his lecture, Mr Tony Blair made clear in no uncertain terms of his own belief in the Rule of Law, observing that:

> I believe the Rule of Law fundamentally dignifies human existence. It lifts us out of the barbarous wastelands governed by brute force and lets us occupy the fertile terrain of predictable justice. It sets an ambition not just for our laws but for our souls. It civilises, it inspires. It takes us to a higher and better place. …
>
> Doing the right thing is the hardest duty of a political leader. It is also the supreme duty of the judge. In this sense leaders are judges, and judges leaders. This is the principle I took from my earliest days at the Bar into political life. It is what I owe the Rule of Law. It is why I believe in it still.

Role of the judiciary in a human rights world

This leads to the next question: What, then, is the role of the judiciary in upholding the Rule of Law and defending

human rights in these uncertain times? Perhaps the answer can be found in the observations of none other than Ms Cherie Booth QC, the wife of Mr Blair, who in delivering the Nineteenth Sultan Azlan Shah Law Lecture entitled "The Role of the Judge in a Human Rights World",[12] observed that:

> The importance of the judiciary in this context is that judges in constitutional democracies are set aside as the guardians of individual rights. Their supervisory role becomes intimately tied up with ensuring and enhancing a democracy that is participatory, inclusive and open. …
>
> There is an obvious conflict that arises between the need for national security and human rights. The government, even in times when there is a threat to national security, must act strictly in accordance with the law. …
>
> The judiciary now has the important task of reviewing executive action against the benchmark of human rights. Thus, the transfer of power is not to the judiciary but to the individual.

Ms Booth's lecture explores in detail the increasingly important role of judges in a human rights world, emphasising the need for the judiciary to lead the way in this brave new world. She observed:

> [The court's] democratic potential lies … in the vital and complementary role that judges can play in engaging with

[12] Nineteenth Sultan Azlan Shah Law Lecture delivered in 2005, pages 131–197, below.

> national issues so as to create a public dialogue about the core human rights values that lie at the heart of all inclusive, open democracies. In our troubled times, where terrorism, division, and suspicion of others are the order of the day, this role for judges is perhaps more vital than ever before.

As one of the leading barristers on human rights in the United Kingdom, Ms Booth was able to build upon her in-depth knowledge and experience of the legitimate expectations of British citizens vis-à-vis the judge's role as a watchful guardian of their fundamental rights. She pointed that:

> The responsibility for a value-based, substantive commitment to democracy rests in large part on judges. The importance of the judiciary in this context is that judges in constitutional democracies are set aside as the guardians of individual rights. Their supervisory role becomes intimately tied up with ensuring and enhancing a democracy that is participatory, inclusive and open.

Ms Booth's speech highlights the fact that we now live in "an age of human rights", which brings with it "huge potential for [judges] of the world's highest courts to speak a common language", and in which "judges are afforded the opportunity and [entrusted with the] duty to do justice for all citizens by reliance on universal standards of decency and humaneness". More importantly, Ms Booth sounded a timely caution for the need to appreciate the difficult task entrusted to the judiciary:

> We live in challenging times. Our institutions are under threat; our commitments to our deepest values are under pressure; our acceptance of difference and others is at a low point. It is at this time that our understanding of the importance of judges in a human rights age should be at its clearest. And it is at this time that our support for the difficult task that judges have to perform is at its highest.

Other distinguished speakers added invaluable insight into the changing role of an independent judiciary to meet the challenges of our times. Lord Mance, in the Twenty-Third Sultan Azlan Shah Law Lecture, "The Changing Role of an Independent Judiciary",[13] observed that "[t]he judicial role is being performed overtly in new areas of pressing public interest and to a greater extent than ever before under general scrutiny."

His Lordship's lecture also explores the various developments in the law which has required the English judiciary to re-examine and reinvent itself to address novel and difficult issues of law without compromising principles such as the Rule of Law which they hold in the highest esteem. He explained the challenges which the judiciary must take into account:

> Judges find themselves faced with difficult, delicate and nuanced decisions in increasingly controversial areas. The courts employ various concepts to allow flexibility and to explain and objectivise their response to such difficulties.
> …

[13] Twenty-Third Sultan Azlan Shah Law Lecture delivered in 2009, pages 377–429, below.

> Courts are increasingly involved in very public issues which affect individuals and communities on a day to day basis, and on which very profoundly different views may be held by different individuals and groups.

It is then the role of the independent judiciary, having regard to the common law tradition and their understanding of the different cultures, traditions and views of different individuals and groups, to adjudicate disputes in an independent and impartial manner. Lord Mance explained the underpinning philosophy of the independent judiciary as follows:

> It is not enough to point to a majoritarian view. The protection of a dominant majority is usually easy enough. But human rights are not utilitarian. The greatest good of the greatest number is not the test. It is a central role of the modern court to protect unpopular causes and individuals.

In this regard, the Twenty-Fourth Sultan Azlan Shah Law Lecture delivered by Lord Rodger of Earlsferry entitled "Bias and Conflicts of Interests—Challenges for Today's Decision-Makers"[14] provides an in depth examination of the independence and impartiality of judges and decision makers. Setting the scene for his lecture, Lord Rodger pertinently observed that "[t]he court always has to ensure that it maintains the confidence of the contemporary public in its independence and impartiality." Lord Rodger addressed the issue of bias with his customary courage and intellectual honesty, observing that:

[14] Twenty-fourth Sultan Azlan Shah Law Lecture delivered in 2010, pages 435–497, below.

> Allegations of bias can arise in a variety of ways. At one extreme a judge or tribunal could be biased because one of the parties had actually given a financial bribe. …
>
> Sometimes the judge may be influenced by fear of some powerful and ruthless authority. More commonly, the risk will be that the judge may have been influenced in more subtle ways—by friendship, or out of gratitude for some appointment or other favour, either for himself or for a member of his family, or, even more insidiously, by a prospect of future promotion.

Drawing together the common recurring themes in the seven lectures, Lord Rodger observed that the recusal of judges to avoid an appearance of bias "helps to maintain the Rule of Law by sustaining public confidence that our legal systems will afford everyone a fair trial by an independent and impartial court. That and nothing less is ultimately what all judges have sworn a solemn oath to do."

The test for bias, according to Lord Rodger, must be determined and applied "against the background of the traditions, history and culture of its own society, which may affect the way that the public view such matters", echoing the common law method and tradition referred to by Justice Kennedy in the Twentieth Sultan Azlan Shah Law Lecture.[15]

Lord Rodger also observed that the duty of impartiality "is simply one aspect of everyone's wider right to a fair trial, which is now recognised as one of the key components of

[15] Twenty-First Sultan Azlan Shah Law Lecture delivered in 2007, pages 273–323, below.

a democratic society." One may pause to observe that the development of the modern duty of impartiality is very much influenced by the human rights age in which we now reside.

Lord Rodger's lecture is a timely reminder of the duty of impartiality of judges which is very often taken for granted, a duty which entails avoiding an appearance of bias; to ensure the system is such that the public would have confidence in the impartiality of the decision reached by the judge in the particular circumstances; to recuse from hearing a case in which the judge has an interest, whether perceived or real. Judges must always hold themselves to the highest standards of impartiality to justify their reputation as independent judges of integrity, for in Lord Rodger's words, "they have to earn that respect: it does not come automatically".

The duty of impartiality and transparency of decision makers was perhaps reflected in Lord Saville's herculean efforts in chairing the second Bloody Sunday Inquiry, which formed the subject matter of the Eighteenth Sultan Azlan Shah Law Lecture entitled "Information Technology: A Tool for Justice".[16] Lord Saville explained in his lecture how the advances in information technology allowed the Inquiry to be conducted in the most transparent, fair and accountable manner possible, with the overriding objective of ensuring that the persons involved in the Inquiry were afforded the twin essentials of access to justice and the right to a fair hearing before the Inquiry, in line with the spirit of the human rights era.

[16] Eighteenth Sultan Azlan Shah Law Lecture delivered in 2004, pages 59–125, below.

Information technology was utilised, in Lord Saville's words, as a "tool for justice", which no doubt was of invaluable assistance to Lord Saville in his relentless and tireless pursuit of the truth. This is evident in the final report published by Lord Saville in June 2010, which ran to some 200 chapters over 4,500 to 5,000 pages, and which was made fully available online.

Lord Saville's pioneering approach in utilising information technology in improving access to justice has been proven to be the way forward and has since been emulated in many common law jurisdictions.

Written constitutions and the common law tradition

Last but not least, we turn to the relationship between written constitutions and the common law tradition. Justice Kennedy's lecture at the Twentieth Sultan Azlan Shah Law Lecture[17] enlightens us as to how the common law tradition is instructive in the dynamic interpretation process of written constitutions such as the written constitution of the United States of America. Referring to the famous words of John Marshall CJ that a constitution is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs", Justice Kennedy observed that:

> … the common law method has proven in the history and tradition of our Court to be instructive, and often

[17] "Written Constitutions and the Common Law Tradition", pages 209–267, below.

necessary, when we interpret our written constitution, the Constitution of the United States.

In his lecture, Justice Kennedy recounts several instances in the history of the United States Supreme Court where the Court relied on a common law approach in interpreting the United States Constitution, for example in the landmark case of *New York Times v Sullivan*[18] dealing with the law of defamation and the legal protection the First Amendment to the United States Constitution affords to the press.

The common law method is necessary in the interpretation of written constitution because, as Ms Cherie Booth QC observed in her lecture:[19]

> Constitutional disputes can seldom be resolved with reference to the literal meaning of the constitution's provisions alone. Constitutional documents do not fall from the sky in neat and digestible form. Nor are they holy writ. …
>
> Many of a constitution's provisions are the result of political compromises made during the drafting process.

Many eminent and outstanding jurists, including no less than His Royal Highness Sultan Azlan Shah, have repeatedly cautioned against adopting a literal interpretation of written constitutions, and Ms Booth's observations above no doubt reflect this established principle of constitutional law. As Ms Booth observed:

[18] 376 US 254 (1964).

[19] Nineteenth Sultan Azlan Shah Law Lecture delivered in 2005, pages 131–197, below.

> A failure to interpret a Constitution in [a] broad and purposive manner means not only that citizens are denied the fullest enjoyment of their rights under law. In addition, a sterile, backward-looking approach to constitutional interpretation puts the entire constitutional project at risk.

Ms Booth's concerns above may be fully appreciated when read together with Lord Mance's observations in the Twenty-Third Sultan Azlan Shah Law Lecture[20] on the utmost importance of a written constitution, in that "[w]ritten constitutions impinge, to greater or lesser extent, on Parliamentary sovereignty and entrench rights, and like codes offer a visible explanation of the source of judges' authority", and further that "[i]n countries with a written constitution, the basic principle of separation of powers can operate as a direct limit on the powers of the executive and legislature, enforceable by the judges".

It is therefore of concern that in this age of human rights, where fundamental rights and liberties are subject to continuous evolution and not regression, there are still judges who, in complete oversight of the entrenched constitutional principles, adopt a literal interpretation of written constitutions to deny the existence of these fundamental rights and liberties.

It cannot possibly be seriously contended that the central themes of the Rule of Law, separation of powers and the independence of the judiciary do not form part of a nation's constitutional law unless they are expressly provided for in the written constitution of that nation.

[20] "The Changing Role of an Independent Judiciary", pages 377–429, below.

Judges who subscribe to such misconceived views[21] would do well to pay heed to the wise words of Justice Kennedy in his lecture:

> It must be clear at the outset that a decision interpreting a constitutional provision has consequences quite different from a decision interpreting or elaborating the common law. Legislatures can change common law precedents in the ordinary course but do not have this latitude with respect to constitutional decisions. So judges must find and respect special constraints when they turn to constitutional adjudication. … In constitutional cases a judge must make doubly sure that a sound policy is justified by the constitutional text, prior cases, and the well-accepted principles and traditions of the people.

The search for principle is aided by the invaluable guidance which may be derived from a comparative study of the constitutional jurisprudence of other Commonwealth jurisdictions, such as the United Kingdom and the United States of America. As Ms Booth observed in her lecture, "judging is now an international business" and "there is a growing trend towards cross-constitutional discussion and learning".[22]

Conclusion

The seven lectures contained in this volume invite us to return to first principles: to understand and to never lose sight of the dynamic relationship between the Rule of Law,

[21] See for example the decision of the majority in *PP v Kok Wah Kuan* [2007] 6 AMR 269 at 279–280; [2008] 1 MLJ 1 at 16–17, FC.

[22] See also the views expressed by Justice Kennedy on the relevance of common law principles and international principles and writings as an aid to the interpretation of the constitution, at pages 209–267, below, and also Lord Mance's views at page 423, below..

written constitutions and the common law tradition; to appreciate the changing role of an independent judiciary in a human rights world and the challenges they face; to remember the courageous words of Lord Atkin in *Liversidge v Anderson*[23] that "it has always been one of the pillars of freedom, one of the principles of liberty … that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law." The speakers through their lectures ask of lawyers and judges alike this important question: What is the legacy that we hope to leave behind? For, as Justice Kennedy observed fittingly in the Twentieth Sultan Azlan Shah Law Lecture:

> The task of the law, the task of lawyers, is to tell the story of a people so they can strive to fulfil their aspirations from one generation to the next.

As these seven lectures contained in this volume, *The Sultan Azlan Shah Law Lectures: Rule of Law, Written Constitutions and The Common Law Tradition*, delivered by seven pre-eminent jurists of diverse backgrounds will testify, the Sultan Azlan Shah Law Lectures continue to bind the peoples of the Commonwealth through the common law tradition. On this 25th year of the series, the aspiration expressed that "the Sultan Azlan Shah Law Lectures will not only endure but will remain a reference point for those interested in the vitality and the development of the common law"[24] is ever so closer to realisation.

[23] [1942] AC 206, HL.

[24] See the Introduction to *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, reproduced at pages 25–35, below.

Introduction

Reproduced from *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, edited by Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia. Pages and chapters referred to in this section are from that publication.

Established to honour His Royal Highness Sultan Azlan Shah's contribution to the Faculty of Law, University of Malaya specifically, and to the development of Malaysian law generally, especially so since Merdeka, the Sultan Azlan Shah Law Lecture Series was conceived and initiated by Professor Dato' Seri Dr Visu Sinnadurai during his tenure as Dean of the Faculty of Law, University of Malaya (1983–1986).

On the 75th year of His Royal Highness' birth it is a fitting tribute to the man who proclaimed that "the common law and its development should be homogenous in the various sections of the Commonwealth",[1] to compile this series of lectures given by a spectrum of esteemed and astute legal minds from across the Commonwealth who intimate a common concern for the state of this shared heritage: "that body of law which has been judicially evolved from the general custom of the realm".[2]

Since 1986, when the First Sultan Azlan Shah Law Lecture was delivered in Kuala Lumpur, distinguished

[1] Per Raja Azlan Shah J (as he then was) in *Raja Mokhtar bin Raja Yaacob v Public Trustee, Malaysia* [1970] MLJ 151 at 152; referred to by Lord Nolan in chapter 13, *Certainty and Justice: The Demands on the Law in a Changing Environment* (see page 302, below).

[2] *Termes de la Ley*, 1641; referred to by Lord Nolan, *Certainty and Justice* (see page 302, below).

Lord Chancellors,[3] Masters of the Rolls,[4] Lords of Appeal in Ordinary,[5] a President of the New Zealand Court of Appeal,[6] a Justice of the Supreme Court of The United States of America[7] and academics from the Commonwealth[8] have been invited to partake in the premier law lecture series of Malaysia. The speakers who graced our shores, each conferring on the series the measure of prestige befitting its Patron, have delivered authoritative, stimulating and thought-provoking lectures on a range of topics now compiled in this volume. Whilst the subject matter contained in this volume is multifarious, exploring such seemingly disparate topics from the *Spycatcher* case[9] to commercial fraud cases,[10] there is a common thread that runs through the corpus. This is the development of that ancient and unique institution of the common law. Hence the subtitle of this book: *Judges on the Common Law.*

With the modern world developing at such an exponential rate, it is a pertinent and wholly contemporary question to ask whether the common law still fulfils rapidly changing social and commercial needs, whether it still retains the same efficacy it once enjoyed in the face of an overwhelming proliferation of legislation in recent times, whether the tensions created by a dichotomy of common law and statute law have become a hindrance and, moreover, whether the common law permits judges to "make the law" despite the sovereignty of the legislature.

The flexibility of the common law to adapt to a changing environment emerges as one of the key concerns

[3] Lord Mackay who delivered the eighth lecture in 1993; and Lord Irvine, invited to deliver the seventeenth in 2003. Unforeseeably, Lord Irvine resigned from his post and was forced to re-prioritise his schedule.

[4] Lord Donaldson delivered the seventh lecture in 1992; Lord Woolf, the twelfth in 1997; and Lord Phillips, the seventeenth in 2003.

[5] Lord Oliver, 1988; Lord Ackner, 1989; Lord Mustill, 1991; Lord Keith, 1994; Lord Browne-Wilkinson, 1995; Lord Steyn, 1996; Lord Nolan, 1998; Lord Slynn, 1999; Lord Clyde, 2000; Lord Bingham, 2001.

[6] Sir Robin Cooke, now Lord Cooke, in 1990.

[7] Justice Anthony Kennedy in 2002.

throughout the book, whether overtly stated or implied in the content of each chapter. If, to take an example, we look at certain themes that have been deemed trends by the speakers we may see that flexibility in action. Key overarching developments of recent times in the common law have been first, the recognition of the need for certainty and thus predictability; second, the gradual abandonment of the strict "black-letter" approach to interpreting statutes in favour of a more purposive, relative one, of the Continental kind; and third, the balancing act that has to be performed by the courts to meet fairly the demands of these developments.

These trends are most demonstrable in relation to commerce since it is in this field that much weight and complexity have been added in our modern era and it is on this area of the law that a sizeable proportion of the lectures focus. Lord Steyn in his lecture, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men*,[11] Lord Clyde, in *Construction of Commercial Contracts: Strict Law and Common Sense*,[12] and most recently Lord Bingham, in *The Law as the Handmaid of Commerce*,[13] all explore the problems of achieving a balance between certainty and common sense or, in other words, between a strict approach and that of the purposive kind.

The common law has played the key role in meeting the requirements of modern commerce by adapting itself to these needs rather than by attempting to bend commercial interests to its will. This is demonstrated in landmark

[8] Professor WR Cornish in 1986, and Professor AG Guest in 1987; Professor JAG Griffith delivered the pre-inaugural lecture, *Judicial Decision Making in Public Law,* in 1985.

[9] Fourth lecture, *The Spycatcher: Why Was He Not Caught?* by Lord Ackner. See chapter 4.

[10] Eighth lecture, *Commercial Fraud Trials: Some Recent Developments* by Lord Mackay. See chapter 8.

[11] Chapter 11.

[12] Chapter 15.

[13] Chapter 16.

cases such as *Mannai*[14] and *West Bromwich*,[15] in which the guidelines for interpretation have changed from the rigidity of *Hankey v Clavering*[16] to the use of such principles as reasonableness, and reference to the "factual matrix", as well as the ordinary meaning of words in contracts.

Whilst, in commerce, the overriding requirement is a need for certainty and thus predictability, in some cases this has proved to be unfair. Therefore, though the common law retains its tenet of objectivity, it has increasingly been more willing to soften that approach when injustice arises or public interest may be harmed. Moreover, it can safely be said that this approach has been adopted to meet commercial reality. In other words, because errors in the drafting of contracts are an inevitable consequence of the modern commercial world's methods of transaction and deal-making, it is necessary for the courts to find the purpose of the contract rather than apply blanket strict rules to every case with no room for discretion. The emphasis in the above lectures is squarely focused on the fact that the common law has retained its sound and commercially inclined framework of certainty whilst at the same time has come to require that parties involved in a contract must act in accordance with good faith and fair dealing. All three of the Law Lords address this development as something necessary to keep pace with the world of commerce, each elaborates the trend in his own way and not all would agree with each other's opinions but it is significant that they feel a desire to deliberate this crucial evolution of the common law in the first place.

[14] *Mannai Investment Company Limited v Eagle Star Life Assurance Company Limited* [1997] AC 749; [1997] 3 All ER 352, HL; referred to by Lord Clyde in chapter 15, *Construction of Commercial Contracts: Strict Law and Common Sense.*

[15] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98; referred to by Lord Clyde, *Construction of Commercial Contracts.*

[16] [1942] 2 KB 326; referred to by Lord Clyde, *Construction of Commercial Contracts.*

Indeed, a further manifestation of the ways in which the common law, and thus the courts, has tailored itself to ever-growing commercial needs is given in the history of the birth of the English Commercial Court in *Commercial Disputes Resolution in the 90's*[17] by Lord Donaldson.

Following on from this area it would be unwise to leave out Lord Browne-Wilkinson's lecture, *Equity and Commercial Law: Do They Mix?*[18] For, whilst the common law and equity are distinct entities, the principles behind the common law's shift of approach to commerce echoes those equitable principles of justice and fairness. They employ separate remedies—equity provides for injunctions and specific performance where common law does not—but given the proliferation in commerce of trusts such as pension funds and investment trusts, and the deepening issue of fiduciary duties, it is of contemporary importance and commercial expediency to elaborate on the courts' same general power to review disputes from a purposive approach, as is the case with the new common law approach. This Lord Browne-Wilkinson did, with the added caveat, of course, reminiscent of the speakers above, that the judges' discretion ought to be exercised with "extreme caution".[19]

Again, this thread is also picked up by Lord Nolan in his address, *Certainty and Justice: The Demands on the Law in a Changing Environment*,[20] but with a much wider scope. Like the other speakers, he also condones that development of a purposive approach in common law in the most general sense. Here he applies that same principle to interpretation

[17] Chapter 7.

[18] Chapter 10.

[19] Chapter 10, at pages 252-253, 260, below.

[20] Chapter 13.

of statutes and to judicial review. He addresses that burning question of whether there is much room left for the common law in the light of the proliferation of statute law, the desire of the legislature to restrict law-making by the courts and, significantly, in the light of the UK's loss of sovereignty to (what is now called) the European Union. He concludes that the role of judges and the common law have not been diminished drastically, that there is scope for them still, despite a narrowing of jurisdictional freedom.

This line of argument is continued the following year in *The Impact of Regionalism: The End of the Common Law?* [21] by Lord Slynn. He concurs with his colleague that the common law continues to thrive despite the impact of supra-national bodies' sovereignty. Although Lord Slynn acknowledges that European legislation takes precedence over national statute law when they contradict one another, he argues that this makes little difference to the domestic courts: they still retain their vital role as interpreters and implementers of legislation, wherever this legislation may be derived from. Indeed, the influx of European methods seen in the Continental shift from "black-letter" law to purposive interpretation has had a positive impact on the courts and, in turn, has been absorbed through osmosis into the common law. Even taking into account this impact, the common law reigns over many areas in which Europe plays no part. This is especially the case in commercial contracts drafting and judicial review, amongst many others. Lord Slynn's learned opinion can be summed up very simply: the common law is

[21] Chapter 14.

far from being abandoned whatever the external influence is.[22] Lord Chancellor Irvine[23] would probably have gone on a similar vein had he had the opportunity to deliver his lecture on *Commerce, Common Law and the Commonwealth: New Dimensions in Malaysia and UK Law.*

One of the areas which speakers have used to exemplify the common law's continuing efficacy is the law of negligence. This is a topic upon which two other distinguished speakers have seized: Lord Oliver in *Judicial Legislation: Retreat from Anns*,[24] and Lord Mustill in *Negligence in the World of Finance*.[25] Here, they expound on the fact that the courts have independently created certain principles or tests in which a duty of care can be said to have arisen, starting from *Donoghue v Stevenson*,[26] and running through to *Anns v Merton Borough Council*[27] and *Caparo plc v Dickman*,[28] and ending up with the principles of foreseeability of damage, proximity or neighbourhood, and whether it is "fair, just and reasonable" to impose such a duty. The two speakers, and also Lord Nolan in the thirteenth lecture, have hit upon an area in which the common law still thrives, inevitably debating that controversial matter of whether judges find law or create it. The very fact that the *Anns* question produced such heated opinions, even in the lectures compiled in this book, shows the mechanisms of the common law in operation. And the fact that, subsequent to these particular two lectures which focus on *Anns*, the decision was departed from by the House of Lords in *Murphy v Brentwood District Council*,[29]

[22] See page 334, below.

[23] See note 3, above; and see pages 429-430 for a short biographical note.

[24] Chapter 3.

[25] Chapter 6.

[26] [1932] AC 562.

[27] [1978] AC 728.

[28] [1990] 2 AC 605.

[29] [1991] AC 398; [1990] 2 All ER 908, HL.

demonstrates the adaptability of the common law and the role judges play. This in turn shows why it has survived and flourished for so long.

In a similar vein, the debate explored by Professor Cornish about restitutionary redress against a public authority[30] has also been absorbed by the common law. Perceptively, he was prompted to ask, "Why should there not always be a right to demand what [public bodies] had no right to demand?",[31] although at the time of his lecture being delivered the position that had been held for over 200 years was that money paid to a public authority under mistake of law is not recoverable. Since then, the traditional doctrine has been overruled by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council*,[32] showing once again that the common law's adaptability is the key to its success.

Apart from this theme of the flexibility of the common law to adapt to a changing environment, the other interesting theme in the series relates to the issue arising from a common law that places the judiciary in the role of constitutional guardian.

This is an issue quite explicitly addressed by Sir Robin Cooke (now Lord Cooke of Thorndon) in his lecture *Administrative Law Trends in the Commonwealth*[33] in which he explores the tensions arising from judicial review. In the lecture, he confronts head-on the conflict

[30] First lecture, *"Colour of Office": Restitutionary Redress Against a Public Authority.* See chapter 1.

[31] See page 17, below.

[32] [1999] 2 AC 349; [1998] 3 WLR 1095; [1998] 4 All ER 513, HL.

[33] Chapter 5.

between the rights of government and ministers to make discretionary decisions and the inalienable rights of subjects to have recourse to justice. Despite the landmark ruling of *Anisminic*[34] which proclaimed that the courts cannot be excluded from intervening to prevent even a statutory body exceeding the jurisdiction granted by Parliament and stated the need for an administrator to act fairly, reasonably and in accordance with the law, tensions still persist in the field of judicial review and, therefore, in the issue of the courts' jurisdiction. Fortunately, in Malaysia, it is accepted that "[t]he writ of certiorari clearly survives because it is fundamental to the courts' constitutional and common law role as guarantors of due process and fair administration of law".[35] Sir Cooke concludes, along similar lines, that judicial review is a component of the Rule of Law and thus a necessary safeguard of democracy despite the tension inherent in it.

This train of thought is echoed by Lord Woolf in his lecture *Judicial Review of Financial Institutions*,[36] but in relation to review of institutions in the United Kingdom such as the Stock Exchange and the Take-overs and Mergers Panel. He argues that whether the powers of regulators be of a private, contractual nature or derived from statute, they should not be beyond the jurisdiction of the courts if they endanger public interests. In both Sir Cooke's and Lord Woolf's lectures we can perceive that the principles laid down in *Ridge v Baldwin* are to be praised, ie a public body has a "duty to act judicially in the administration of that

34 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

35 Per Abdul Hamid LP in *Sabah Banking Employees' Union v Sabah Commercial Banks' Association* [1989] 2 MLJ 284 at 286. See page 124, below.

36 Chapter 12.

power and it is therefore subject to judicial review by way of certiorari and prohibition".[37] Sir Cooke and Lord Woolf would both agree that the courts' jurisdiction should not be limited to such an extent that they are unable to uphold the Rule of Law, a principle, and now a well-established maxim, that was asserted by His Royal Highness in the landmark case of *Sri Lempah*: "Every legal power must have legal limits, otherwise there is dictatorship."[38]

Whilst the topics of the first sixteen lectures related mainly to commercial law or public law, there was a thematic shift in 2002. Justice Kennedy's proposed lecture on *Human and Economic Rights: Their Evolution Under the American Constitution* was to be the first lecture in the series to focus on human rights. This was soon followed by the most recent lecture delivered by Lord Phillips in 2003 on *Right to Privacy: The Impact of the Human Rights Act 1998*.[39]

What the Sultan Azlan Shah Law Lecture Series has successfully aimed to communicate over its illustrious eighteen years are the expert and contemporaneously salient opinions of legal luminaries from around the Commonwealth. The benefit derived from the fact that these prominent and sagacious speakers are given free reign to elaborate on whatever topic that concerns them has been the production of a collection that yields brilliant insights into an extensive range of legal issues.

Moreover, because of the nature of the tie that binds the Commonwealth, the series has perhaps inadvertently

[37] [1964] AC 40 at 186.

[38] Per Raja Azlan Shah Ag CJ (Malaya) (as he then was) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise* [1979] 1 MLJ 135 at 148; referred to by Professor Cornish in chapter 1, "*Colour of Office*": *Restitutionary Redress against Public Authority* (see page 9, below), Sir Robin Cooke in chapter 5, *Administrative Law Trends in the Commonwealth* (see page 107, below), and Lord Woolf in chapter 12, *Judicial Review of Financial Institutions* (see page 286, below).

[39] Chapter 17.

become a testament to that tie: the common law itself. As long as that continues to evolve and its progress is felt throughout the Commonwealth, the Sultan Azlan Shah Law Lectures will not only endure but will remain a reference point for those interested in the vitality and development of the common law.

Editor's note *(added in November 2011)*

In the volume entitled *The Sultan Azlan Shah Law Lectures: Judges on the Common Law* (published in 2004) it was noted (at page 26) that the First Sultan Azlan Shah Law Lecture delivered by Professor WR Cornish in 1986 was referred to with approval by the House of Lords in *Woolwich Building Society v Inland Revenue Commissioners (No 2)* [1993] AC 70; [1992] 3 All ER 737, HL.

Since the publication of the said volume, the Eleventh Sultan Azlan Shah Law Lecture delivered by Lord Steyn in 1996 entitled "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (pages 263–278) has been referred to by the English Court of Appeal in *Petromec Inc and others v Petroleo Brasileiro SA Petrobas and others* [2005] EWCA Civ 891; [2005] All ER (D) 209, which was subsequently referred to by the High Court in *Holloway and another v Chancery Mead Ltd* [2008] 1 All ER (Comm) 653.

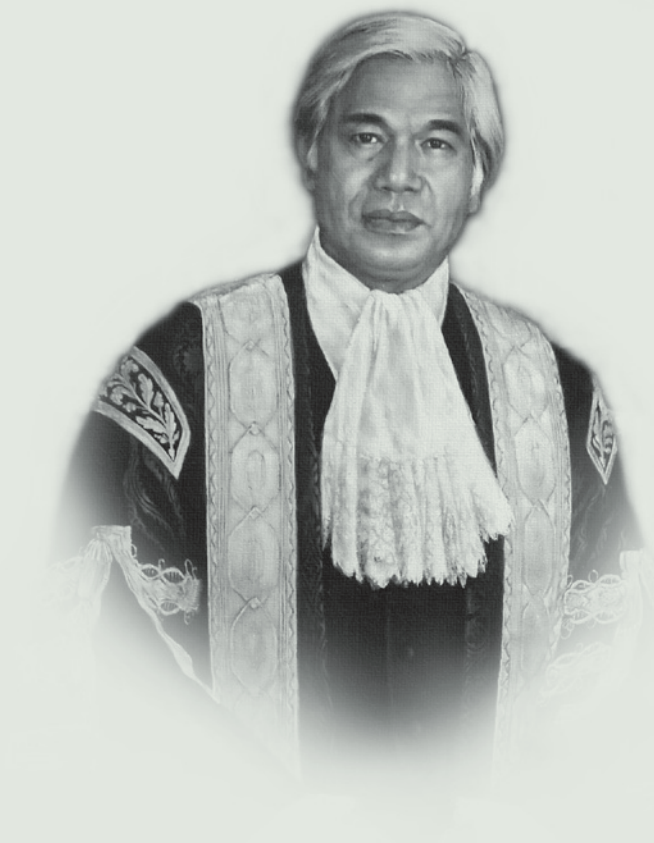
Most recently, the United Kingdom Supreme Court in *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50 (2 November 2011) agreed with the observations of Lord Steyn in the said lecture that in the interpretation of written contracts "commercially minded judges would regard the commercial purpose of the contract as more important than niceties of language" and that "a fair construction best matches the reasonable expectations of the parties" (page 276, *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*).

His Royal Highness Sultan Azlan Shah enjoys the highest regard and esteem amongst the international legal community.

His reputation as a truly great lawyer, as a judge of great distinction and as a Chief Justice and Head of State of immense wisdom and courage extends far beyond these shores. His love of law and His commitment to justice have been His hallmarks.

Baroness Helena Kennedy QC
Legal Challenges in Our Brave New World
21st Sultan Azlan Shah Law Lecture, 2007

His Royal Highness Sultan Azlan Shah



King of Malaysia, Sultan of the State of Perak, Lord President of the Federal Court (now renamed Chief Justice of Malaysia), Chief Justice of the High Court of Malaya: These are the high constitutional positions which His Royal Highness Sultan Azlan Shah held, or currently holds.

On 18 September 1989, on being installed as the Ninth King of Malaysia, His Majesty Sultan Azlan Shah pledged "to rule Malaysia with utmost justice based on the Laws and the Constitution of the nation … to stand for justice and peace of the Nation".

It is a great honour for me to be
invited by His Royal Highness
to deliver the eleventh
in a series of annual lectures
which bear His prestigious name.
I am the more honoured since
His Royal Highness
is both a distinguished
jurist and an eminent
former judge
whose valuable
contribution to
the law is widely known
beyond the frontiers
of this country.

Lord Steyn
Contract Law: Fulfilling the Reasonable Expectations of Honest Men
11th Sultan Azlan Shah Law Lecture, 1996

In accordance with the principles enshrined in this pledge, and similar pledges His Royal Highness Sultan Azlan Shah took, first, on His elevation as a High Court Judge in 1965, and subsequently in 1984, on His ascension to the throne as the Sultan of Perak, His Royal Highness discharged His constitutional duties with fervent conviction. Upholding Justice and adherence to the Rule of Law were two pillars which His Royal Highness fervently believed were of utmost importance for the proper administration of justice and good government. These were the guiding principles that His Royal Highness always subscribed to in the performance of His onerous duties.

His Royal Highness Sultan Azlan Shah was born in Batu Gajah, State of Perak on 19 April 1928. His father was His Royal Highness Sultan Yusuf Izzuddin Shah (the 32nd Ruler of the State of Perak), and His mother, Yang Teramat Mulia Toh Puan Besar Perak, Hajah Hatijah Binte Dato' Ahmad Dewangsa.

His Royal Highness received His early education at the Government English School in Batu Gajah and at the Malay College in Kuala Kangsar. Thereafter, His Royal Highness read law at the University of Nottingham and was conferred the degree of Bachelor of Laws in 1953. In the following year, His Royal Highness was admitted to the English Bar by the Honourable Society of Lincoln's Inn.

He was made a Bencher of Lincoln's Inn in 1988.

> As your Highness has in the past observed, public confidence in the judiciary is based upon a number of criteria. These include: judicial independence, the integrity of the adjudicator, and the impartiality of adjudication.

The Right Honourable Tony Blair
Upholding the Rule of Law: A Reflection
22nd Sultan Azlan Shah Law Lecture, 2008

[1] The Privy Council in *Prince Jefri Bolkiah and Others v The State of Brunei Darussalam and Brunei Investment Agency* [2007] UKPC 63 followed the decision of Raja Azlan Shah CJ (as His Royal Highness then was) in the Federal Court case of *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16.

His Royal Highness ascended the throne of the State of Perak on 3 February 1984 as the 34th Sultan of Perak and was officially installed as the Ruler on 9 December 1985.

In 1984, His Royal Highness was elected as the Timbalan Yang di-Pertuan Agong of Malaysia. In 1989, He was elected as the Ninth Yang di-Pertuan Agong of Malaysia (King of Malaysia), a position He held until 25 April 1994.

His Royal Highness' career in the Judiciary was both outstanding and exemplary. In 1965, at the age of only 37, His Royal Highness was elevated to the Bench of the High Court of Malaya, being the youngest judge to be appointed in the Commonwealth. His subsequent rise in the Judiciary was meteoric. In 1973, His Royal Highness was made a Federal Court Judge and six years later in 1979, His Royal Highness was appointed the Chief Justice of the High Court of Malaya, an office which He held until His appointment as the Lord President (now Chief Justice of Malaysia) of the Federal Court of Malaysia on 12 November 1982. He relinquished His position as the Lord President of the Federal Court when on 1 July 1983, His Royal Highness was appointed as the Raja Muda of Perak (Crown Prince of the State of Perak).

On the Bench, His Royal Highness delivered several important and authoritative judgments which are still followed by the Malaysian courts, and more recently by the Privy Council.[1] He dealt with the questions of law involved in each case succinctly and was most forthcoming in His application of legal principles to

> Your Royal Highness, it is an immense privilege to be asked to give this lecture. I am well aware of the distinction of my eleven predecessors and the role these lectures have already played in developing the heritage which Malaysia shares with my country and other members of the Commonwealth, namely the common law and respect for the Rule of Law.

Lord Woolf MR
Judicial Review of Financial Institutions
12th Sultan Azlan Shah Law Lecture, 1997

[2] *Raja Mokhtar bin Raja Yaacob v Public Trustee, Malaysia* [1970] 2 MLJ 151 at 152, HC.

[3] *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 at 160, FC.

the facts of the case. Where local provisions existed, He applied them. Where there was none, His Royal Highness modified the application of the relevant common law to suit local conditions. Where there was no corresponding Malaysian law, His Royal Highness was not constrained to apply the common law or practice. In applying the common law, He not only took into consideration relevant English cases, but also cases from other Commonwealth jurisdictions. In one case, Raja Azlan Shah J (as He then was) said:

> Although decisions of the Commonwealth Courts are not binding, they are entitled to the highest respect. In my view it is important that I should apply the principles formulated in [the Australian and English cases] so that the common law and its development should be homogeneous in the various sections of the Commonwealth.[2]

In another case dealing with banking law where the appeal raised "points of intricacy and commercial importance", Raja Azlan Shah FJ (as He then was) said:

> In arriving at this view I have been greatly assisted by two Commonwealth cases which seem actually to cover the point. I realise that both these cases do not bind this court, but I know of no reason why I should not welcome a breath of fresh air from the Commonwealth.[3]

In all cases before Him, His paramount concern was to dispense justice, and to uphold the Rule of Law. In one case He said:

> His Royal Highness Sultan Azlan Shah is both a distinguished jurist and a former judge whose reputation for learning extends beyond the confines of this country.

Lord Oliver of Aylmerton
Judicial Legislation: Retreat from Anns
3rd Sultan Azlan Shah Law Lecture, 1988

[4] *Public Prosecutor v Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128 at 129, HC.

[5] [1979] 1 MLJ 135 at 148.

[6] Professor MP Jain, *Judgments of Sultan Azlan Shah,* page 365, quoting Raja Azlan Shah FJ (as He then was) in the Federal Court decision in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at 189, FC.

[7] See comments in *Judgments of His Royal Highness Sultan Azlan Shah with Commentary,* 1986, edited by Professor Dato' Visu Sinnadurai, Professional Law Books Publishers, Kuala Lumpur, 1986.

[8] Edited by Professor Dato' Visu Sinnadurai, Professional Law Books Publishers, Kuala Lumpur, 1986.

> … every citizen, irrespective of his official or social status is under the same responsibility for every act done without legal justification. This equality of all in the eyes of the law minimises tyranny.[4]

And in the often quoted decision in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd*,[5] He said:

> Unfettered discretion is a contradiction in terms … Every legal power must have legal limits, otherwise there is dictatorship …

Further, as one leading jurist had pointed out:

> In many pronouncements of His Majesty, in the area of administrative law, one can find streaks of creativity and judicial activism … His Majesty exhibited a positivistic judicial attitude towards the Constitution … Raja Azlan Shah FJ did recognise that "the Constitution is not a mere collection of pious platitudes. It is the supreme law of the land …"[6]

It has been said that these judgments delivered by His Royal Highness on the Bench constitute a great contribution to the development of law in Malaysia at a crucial time in the country's history.[7] The judgments delivered by His Royal Highness are published in a volume entitled *Judgments of His Royal Highness Sultan Azlan Shah with Commentary.*[8]

> Your Royal Highness has said succinctly that, "Whilst it is true that judges cannot change the letter of the law, they can instil into it the new spirit that a new society demands."
>
> (Sultan Azlan Shah, "Interpretive Role of Judges" in *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches.*

Lord Mance of Frognal
The Changing Role of an Independent Judiciary
23rd Sultan Azlan Shah Law Lecture, 2009

[9] Edited by Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia, 2004.

On several occasions, His Royal Highness was Himself invited to deliver public lectures on certain important areas of Malaysian law. His lectures on *The Supremacy of Law in Malaysia* delivered in 1984 at the *Tunku Abdul Rahman Lecture XI*, organised by the Malaysian Institute of Management; *The Right to Know* delivered in 1986 at the Universiti Sains Malaysia Public Lecture; and *Checks and Balances in a Constitutional Democracy* delivered in 1987 to the Harvard Club of Malaysia, continue to be the classic expositions on these areas of the law. His Royal Highness' views expressed in *The Role of Constitutional Rulers: A Malaysian Perspective for the Laity* provide a clear insight on the role and the workings of the Sultans in the country. These and other lectures delivered by His Royal Highness are published in a collection entitled *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches of HRH Sultan Azlan Shah*.[9]

His Royal Highness Sultan Azlan Shah has contributed significantly to higher education in the country. He was appointed as the Pro-Chancellor of Universiti Sains Malaysia in 1971 and the Chairman of the Higher Education Advisory Council in 1974. Since 1986, His Royal Highness Sultan Azlan Shah has been the Chancellor of the University of Malaya, the oldest university in the country. His Royal Highness has been an external examiner to the Faculty of Law, University of Malaya, since the establishment of the Faculty in 1972. His Royal Highness, among others, is also the Royal Patron of the Malaysian Law Society in Great Britain and Eire, the British Graduates Association of Malaysia, and the Academy of Medicine of Malaysia.

> The Sultan Azlan Shah Law Lectures is one of the most prestigious lecture series of the common law world.

Baroness Helena Kennedy of The Shaws QC
Legal Challenges in Our Brave New World
21st Sultan Azlan Shah Law Lecture, 2007

In recognition of His enormous contribution to the country's judicial system and higher education, He has been awarded honorary degrees from several universities within the country and abroad: His Royal Highness was awarded an Honorary Doctorate in Literature by University of Malaya (1979); an Honorary Doctorate of Law by Universiti Sains Malaysia (1980); His alma mater, the University of Nottingham conferred on His Royal Highness an Honorary Doctorate of Law (1986). His Royal Highness was also awarded Honorary Doctorates of Law by the University Gadja Mada, Jogjakarta, Indonesia (1990), University of Brunei Darussalam (1990), and University Chulalongkorn, Bangkok, Thailand (1990). In 1999 His Royal Highness was conferred the Honorary Doctor of Laws by the University of London.

His Royal Highness has gained international recognition not only amongst the legal fraternity but also by other professionals. In 1991, His Royal Highness was awarded an Honorary Fellowship of the Royal College of Physicians of Ireland, the Fellowship of the Royal College of Surgeons of Ireland, the Honorary Fellowship of the Royal College of Surgeons of Edinburgh and also the Honorary Fellowship of the Royal College of Surgeons of England in 1999.

Since His school and university days, His Royal Highness has been actively involved in sports, especially in the game of hockey. His Royal Highness was the longest serving President of the Malaysian Hockey Federation (1976–2004); He is presently the President of the Asian

> The continuance of
> this lecture series is a tribute
> to His Royal Highness
> Sultan Azlan Shah's
> steadfast commitment
> to the Rule of Law.
> The distinguished way
> you discharged your duties
> to the judiciary,
> Your Royal Highness,
> and the evident purpose
> in your life and thought
> to preserve and ennoble
> the law confirm
> the resolve of those who
> still serve on the Bench.

Justice Anthony Kennedy
Written Constitutions and the Common Law Tradition
20th Sultan Azlan Shah Law Lecture, 2006

Hockey Federation and sits on the Executive Board of the International Hockey Federation representing Asia. He is also an avid golfer.

His Royal Highness is the Royal Patron of many organisations including the Malaysian Medical Relief Society (MERCY Malaysia), the World Wildlife Fund Malaysia (WWF-Malaysia), and the Malaysian Nature Society.

In 2006 the Sultan Azlan Shah Foundation was established to promote arts, culture, education, and sports. The Foundation actively supports the annual Sultan Azlan Shah Law Lecture Series and the annual Sultan Azlan Shah Cup Men's International Hockey Tournament.

His Royal Highness Sultan Azlan Shah continues to take a keen interest in the development of the law in the country. In honour of His Royal Highness' outstanding contribution to the development of Malaysian law as well as legal education in the country, The Sultan Azlan Shah Law Lecture Series was initiated in 1986. Over the past 25 years the Lecture Series has been recognised as the most major and prestigious public lecture series in the country. Leading jurists from across the Commonwealth have been invited to partake in the premier annual law lecture.

In 2011 the Oxford Centre for Islamic Studies, a Recognised Independent Centre of the University of Oxford, established a new Sultan Azlan Shah Fellowship

> The Sultan Azlan Shah Law Lecture is a lecture seen both here and in England as of considerable prestige. It is not surprising that it should be so regarded since the tributes to His Royal Highness, when an honorary LLD was recently conferred on Him by Her Royal Highness, The Princess Royal, as Chancellor of the University of London, recognised His Royal Highness' great contribution to the law in Malaysia and to the high regard in which He is held as a jurist there and here.

Lord Slynn of Hadley
The Impact of Regionalism: The End of the Common Law?
14th Sultan Azlan Shah Law Lecture, 1999

in honour of His Royal Highness Sultan Azlan Shah with the following aim: "The Sultan Azlan Shah Fellowship will enable the Centre to broaden and enrich the teaching of law at Oxford and help promote understanding between different legal traditions and the societies by which they have been nurtured. It will create an enduring legacy for the visions and achievements of His Royal Highness and most appropriately it would do so at the alma mater of the Crown Prince of Perak, HRH Raja Dr Nazrin Shah, and at the first Muslim institution of its kind to be established in the 900-year history of the University of Oxford."

His Royal Highness Sultan Azlan Shah is married to Her Royal Highness Tuanku Bainun, and they have five children. Their eldest son, His Royal Highness Raja Nazrin Shah, is currently the Crown Prince of the State of Perak.

"A most distinguished jurist, statesman and upholder of the Rule of Law."

Lord Woolf
The Official Book Launch 2004

Your Royal Highness, to be invited to give the lecture which bears your name is to be granted a great honour by a judge and jurist of international repute.

It is an honour which I feel I hardly deserve, especially when I consider the distinction of those who have given this lecture in the past.

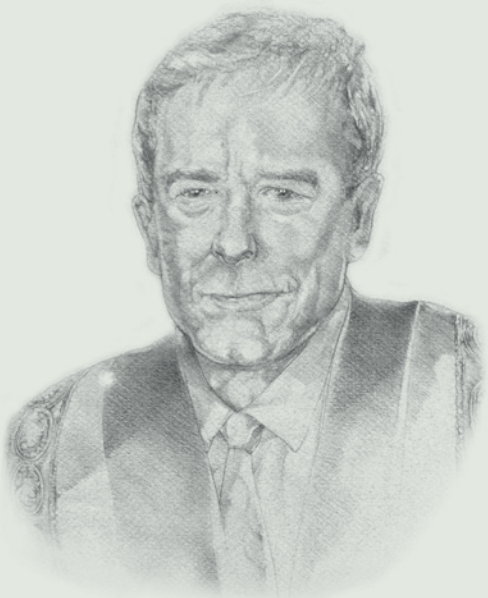
Lord Saville of Newdigate

Information Technology: A Tool for Justice

18th Sultan Azlan Shah Law Lecture, 2004

The Right Honourable Lord Saville of Newdigate

Information Technology: A Tool for Justice



Mark Oliver Saville
(b. 20 March 1936*)*

Lord Saville of Newdigate was born in 1936. He was educated at Rye Grammar School and read law at Brasenose College, Oxford University. There he graduated with a first class Bachelor of Arts in Jurisprudence and also a first class Bachelor of Civil Law, and was awarded the Vinerian Scholarship, the prestigious prize awarded to the University of Oxford student who achieves the best performance in the Bachelor of Civil Law degree examination.

Lord Saville was called to the Bar by the Middle Temple in 1962. He became a Queen's Counsel in 1975 and a Bencher of the Middle Temple in 1983. He was appointed a Judge of the High Court in 1985, and later became the head of the Commercial Court, acquiring a reputation for streamlining the

commercial court, making hearings efficient and cutting costs. He was appointed a Lord Justice of Appeal in 1994, and his meteoric rise through the ranks of the judiciary culminated in his appointment in 1997 as a Lord of Appeal in Ordinary.

Between 1994 and 1996 he chaired a Committee of the Department of Trade and Industry concerned with arbitration legislation. The Committee produced an Arbitration Bill, which Lord Saville is said to have drafted almost single-handedly, and which has now been enacted as the English Arbitration Act 1996, an Act which has been very "highly regarded around the world" (*The Guardian*).

Lord Saville received an Honorary Doctorate in Law from Guildhall University in 1997 and was made an Honorary Fellow of Brasenose College, Oxford in 1998. He also received an Honorary Degree of Doctor of Laws from Nottingham Trent University in 2008.

Lord Saville enjoys a strong reputation as one of the outstanding commercial lawyers and judges of his time. Sir Scott Baker, a retired English Court of Appeal judge, described Lord Saville as being without doubt the most brilliant of his generation. "A meticulous perfectionist", Lord Saville has been praised for "his clear mind, his attention to detail, and his aptitude for hard work" (*The Times*). He is also well-known for being one of the most tech-savvy judges in the English judiciary.

On 29 January 1998 Lord Saville was appointed to chair the second Bloody Sunday Inquiry into the events of 30 January 1972 in Londonderry, Northern Ireland. Lord Saville's report on the Inquiry was published on 15 June 2010. The final report is between 4,500 and 5,000 pages and runs to some 200 chapters, and can be accessed online at http://bloody-sunday-inquiry.org/. The Inquiry was the longest running inquiry in British legal history and cost approximately £200 million between 1998 and 2010.

Lord Saville has been praised for the way he used new information technology to assist in the Inquiry and his enthusiasm for the way advances in technology can be used to change the way in which the courts currently work. Professor Richard Susskind, the information technology adviser to the Lord Chief Justice, has said that the Inquiry is "the leading showcase demonstrator of what technology can achieve in the modern court. There is nowhere in the world where information technology has been used so pervasively." Therefore, it was most appropriate that the Eighteenth Sultan Azlan Shah Law Lecture which Lord Saville delivered was entitled "Information Technology: A Tool for Justice".

Upon the conclusion of the second Bloody Sunday Inquiry, Lord Saville resumed his duties as a Justice of the newly-established United Kingdom Supreme Court, including delivering judgments in two cases involving areas of law for which his expertise is renown, namely *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, the first arbitration dispute to come before the United Kingdom Supreme Court, as well as *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad* [2011] 1 All ER 869, an important marine insurance case. He also had occasion to deliver the judgment of the Privy Council in *Borrelli & Ors v Ting & Ors (Bermuda)* [2010] Bus LR 1718 involving the issue of duress.

Lord Saville retired from the United Kingdom Supreme Court in September 2011 at the age of 74, a year before the mandatory retirement age.

Lord Saville is married to Jill Gray and they have two sons. He has been a Member of the Garrick Club since 2002, and his recreations are sailing, flying, computers and gardening.

The Rule of Law is the bedrock of a just society. But however good our laws may be and however independent and impartial our judges may be, justice (the reason for the Rule of Law) is not truly justice if it takes too long, if it is too expensive for people to use, or if it is not available to all.

I firmly believe that the use that we have made of information technology has saved substantial sums of money, has given us a tool to enable us to do a better job than would otherwise have been the case and has made this an Inquiry which, whatever its other shortcomings may be, has been truly public.

18

Information Technology: A Tool for Justice

Lord Saville of Newdigate
Lord of Appeal in Ordinary, House of Lords

Text of the Eighteenth Sultan Azlan Shah Law Lecture delivered on 22 September 2004 in the presence of His Royal Highness Sultan Azlan Shah

Your Royal Highness, to be invited to give the lecture which bears your name is to be granted a great honour by a judge and jurist of international repute. It is an honour which I feel I hardly deserve, especially when I consider the distinction of those who have given this lecture in the past. What is more, it has given me the opportunity to revisit your beautiful country for the first time for nearly twenty years; and for my wife and me to enjoy your boundless and gracious hospitality. Thank you very much indeed.

The Rule of Law is the bedrock of a just society. But however good our laws may be and however independent and impartial our judges may be, justice (the reason for the Rule of Law) is not truly justice if it takes too long, if it is too expensive for people to use, or if it is not available to all.

I have believed for some years that information technology has the potential to change our justice systems for the better in all these respects. As Professor Richard

Delay, expense, and unavailability do exist and I am convinced that the appropriate application of information technology is a formidable means of tackling these defects in our justice system.

Susskind has pointed out, information technology has reached the stage where it can now not just automate existing procedures and practises, but can provide entirely new ways of doing things.

Of course, in the context of justice systems, indeed in the context of any form of human activity, doing something in a new or different way is not an end in itself. "If it ain't broke, don't fix it" is a very sound, good rule.

There is no point in spending time and money on devising new methods of doing things if the end result is not an improvement on what went before. However, delay, expense, and unavailability do exist and I am convinced that the appropriate application of information technology is a formidable means of tackling these defects in our justice system.

It so happens that since 1998 I have been given a unique opportunity to demonstrate what can be achieved with the use of information technology. At the beginning of that year I was appointed Chairman of a public inquiry into something that happened in Northern Ireland over thirty years ago. That Inquiry is still continuing, though it is now reaching its closing stages.

At this point some of you, if not all of you, may be wondering how I am able to extol the application of information technology to judicial proceedings in the context of an Inquiry that has already lasted over six and

> The island of Ireland has had an unhappy history, with an unhappy relationship with Great Britain. One result has been a division in that island along sectarian lines. This is known nowadays as the sectarian divide, but what in truth that means is that between Catholics and Protestants there has been great fear, hatred and mistrust, and a significant lack of religious tolerance or willingness to compromise.

a half years and has cost astronomical sums of money. I shall do my best to explain why I believe in the worth of the technologies that we have used.

To put the Inquiry into context it is necessary to set out some of the background to the particular events with which I am concerned. This can only be done in the most general of terms, since there are aspects of that background that are in dispute in the Inquiry, and on which it would be wrong for me to express any view until we have heard and considered all the evidence and submissions.

The Bloody Sunday Inquiry—Background

Northern Ireland is part of the United Kingdom. It is a small part of the island of Ireland, about the same size as the state of Connecticut. The rest of the island is the independent country of Ireland; also known as Eire or the Irish Republic. The whole of the island used to be part of the United Kingdom, but in 1921 Eire became an independent state.

The island of Ireland has had an unhappy history, with an unhappy relationship with Great Britain. One result has been a division in that island along sectarian lines. This is known nowadays as the sectarian divide, but what in truth that means is that between Catholics and Protestants there has been great fear, hatred and mistrust, and a significant lack of religious tolerance or willingness to compromise. To many people looking from a distance, even from only

The majority of people in the island of Ireland have been Catholic, but for historical reasons there is in the north a substantial and majority Protestant population.

These people did not want to be independent. They wanted to remain part of the United Kingdom and did not want to become part of a Catholic country.

across the Irish Sea, it is difficult to understand how such deep divisions along religious lines between two religions which have so much in common have survived into modern times.

The majority of people in the island of Ireland have been Catholic, but for historical reasons there is in the north a substantial and majority Protestant population. These people did not want to be independent. They wanted to remain part of the United Kingdom and did not want to become part of a Catholic country. They opposed every attempt to give the island even a modicum of what was called Home Rule. So when after the First World War the British Government finally decided to give Ireland its independence, it was confronted with the problem of what to do about the people there who did not want it. This was a serious problem, because this part of the population was so opposed to leaving Britain that any attempt to make them do so would undoubtedly have led to a civil war in Ireland.

The solution that was adopted was to divide the island into two parts, leaving the six counties in the north that had a predominately Protestant population as part of Britain. That is why the present full name of my country is the United Kingdom of Great Britain and Northern Ireland.

This division may have been the only solution at the time, but it was far from perfect. The Irish in the south thought it wrong that part of what they regarded as their island should remain British. Furthermore, though in a

> Part of the population was so opposed to leaving Britain that any attempt to make them do so would undoubtedly have led to a civil war in Ireland.

minority, there was a large Catholic population in the north, who thought the same. The Protestant majority in the north held the view that they were and should remain British. Since they were the majority, they dominated the provincial government of Northern Ireland and were determined to do everything in their power to keep Northern Ireland part of Britain. The Catholic population regarded itself as the subject of religious discrimination, treated in effect as second class citizens in many respects, including the areas of housing and jobs.

The British Government in London apparently did little about this state of affairs. It must be remembered that Ireland had been a problem for Britain for hundreds of years, and when independence was granted to the south, Northern Ireland was given its own provincial government to run its own affairs. Many felt that the British had in effect heaved a sigh of relief and largely looked the other way, hoping that at last the problem of Ireland had gone away.

The problem of course had not gone away. There were those in Ireland who thought that if they used violent methods, they could achieve union with the rest of the island. They believed (or at least expressed the belief) that Britain was clinging onto Northern Ireland as one of its colonies and that they could and should use force to fight the colonial power (as other colonies had done) in order to achieve their aim of a united independent Ireland.

This to my mind was always a simplistic view and as time went on, more and more grievously mistaken. The

> The solution that was adopted was to divide the island into two parts, leaving the six counties in the north that had a predominately Protestant population as part of Britain. That is why the present full name of my country is the United Kingdom of Great Britain and Northern Ireland.

problem lay not in delusions of empire, but in the fact that a majority of people in Northern Ireland wanted to remain British, a fact which fundamentally distinguished it from other places where people had sought independence by forceful means.

Matters came to a head in the nineteen sixties. That was a decade when the concept of violent action in support of civil rights swept across the world. Northern Ireland was no exception. The Irish Republican Army (IRA—terrorists or freedom fighters, depending on your point of view) grew in strength and engaged in increasingly violent and deadly activities. There were good people in the government of Northern Ireland who realised that the Catholic people there should have the same civil rights as everyone else and who worked towards this, as well as many equally good people who wanted union with the Republic, but only through peaceful and non-violent means. Sadly the fear, hatred and suspicion that divided the two parts of the population ran too deep for these good people to turn others away from violence.

This violence grew. The police began to lose control and in 1969 the Northern Ireland government asked the British Government to send troops to help to keep order. This was done and at first the Catholic population in Northern Ireland welcomed the soldiers, thinking that they would act to protect them from what they perceived to be a government and police force intent only in keeping them subjugated. But the violence continued and in the course of it a number of Catholics were killed and injured,

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leading the Catholic population in the main to believe that the soldiers were simply the agents of the Northern Ireland Government, no better than the police.

In August 1971 the Northern Ireland government decided to introduce internment without trial of suspected terrorists, expressing the view that this was the only feasible means of reducing violence and restoring law and order.

With hindsight, the introduction of internment, at least in the form that it took, may well have been a mistake. Because in those days much of the violence came from those who wanted union with the Republic, most of those interned were Catholics. It would seem that poor intelligence had led to the internment of many in respect of whom there were no good grounds for suspecting them of terrorism. The Catholic population saw internment as a gross breach of their civil rights, as one more example of discrimination against them.

The Northern Ireland Government simultaneously introduced a ban on marches. This infuriated both sections of the sectarian divide. The Protestants were prohibited from conducting their traditional marches; while those who wished to march in support of civil rights were also prohibited from doing so. The reason given for prohibiting all marches was to reduce the opportunity for the violence that sadly so often accompanied these events.

Notwithstanding this prohibition, the Northern Ireland Civil Rights Association decided to hold an anti-

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internment civil rights march in January 1972, in the city of Londonderry. This small city, which many call Derry, lies in the far west of Northern Ireland, close to the border with the Republic.

The authorities decided to stop this march from reaching its objective, the City Guildhall, using the army to do so. The city had been the scene of violent riots over the preceding months and of deadly attacks by the IRA on the security forces. Much of the city lay in ruins through arson and bomb attacks. So the authorities used the army to set up barriers, so as to keep the march in the Catholic areas of the city, known as the Creggan and the Bogside.

The march took place during the afternoon, on Sunday, 30 January 1972. It would seem that many of those who marched that day were intent on making a peaceful protest, but there were others, mostly young people, who engaged in rioting and stoning the troops manning the barriers. Then, between about ten to four and twenty past four that afternoon a number of people were killed and injured through army gunfire on the streets of the city. The circumstances in which this occurred are matters of great controversy and form the subject matter of the present Inquiry.

Within a very short time the British Government announced that there would be a public inquiry into the matter, to be conducted by Lord Widgery, then the Lord Chief Justice of England. In a matter of weeks this inquiry

“There were those in Ireland who thought that if they used violent methods, they could achieve union with the rest of the island. They believed (or at least expressed the belief) that Britain was clinging onto Northern Ireland as one of its colonies and that they could and should use force to fight the colonial power (as other colonies had done) in order to achieve their aim of a united independent Ireland.”

produced a report, which many on the Catholic side of the sectarian divide categorised as an outrageous cover-up and whitewash of the actions of the soldiers. They expressed the belief that in truth the soldiers had deliberately shot dead innocent people, some indeed alleging that this had been done on instructions from those in government.

The years passed. The violence continued. There were many atrocities. Over the last thirty years people continued to be killed and injured, as the result of violence not just by the IRA, but by those in the Protestant population who also thought that violence was the way to solve the problem as they saw it, as well as deaths and injuries arising from the actions of the security forces. The British and Irish governments made attempt after attempt to try and work out a peaceful solution, acceptable to all. Finally in 1998 a peace agreement was reached, though on both sides of the sectarian divide there remain those who are violently opposed to this peace process.

Over three and a half thousand people have died violently over the last thirty years as a result of the troubles in Northern Ireland. But to the Catholic population that Sunday in January 1972, which immediately became known across the world as Bloody Sunday, remains of particular and special importance, not just because of the deaths and injuries on that day, but also because of the belief that the inquiry held immediately afterwards was an unforgivable denial of justice.

> A majority of people in Northern Ireland wanted to remain British, a fact which fundamentally distinguished it from other places where people had sought independence by forceful means.

Many continued to campaign for a new inquiry and finally, in 1998, the British Government, as part of the peace process, agreed to set one up. That is the Inquiry that the British Government asked me to chair, and which I am now conducting with the assistance of two judicial colleagues, one from Canada and one from Australia.

Tribunals of Inquiry (Evidence) Act 1921 and Public Inquiries

This Inquiry was set up by Parliament and is running under the provisions of the Tribunals of Inquiry (Evidence) Act 1921. Its terms of reference are "*to inquire into the events of Sunday, 30th January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day.*" With the exception of the last twelve words, the terms of reference are identical to those for the previous inquiry.

There have been about 21 public inquiries under this Act. There are also many public inquiries conducted under the provisions of other statutes, for example planning inquiries and the like. It is interesting to note that the 1921 Act started life as a Bill designed to deal with a specific matter (allegations against certain officials in the then Ministry of Munitions) and it was only during its passage through Parliament that it was decided to adapt it so that it could be used in the future in order to set up an independent tribunal to inquire into any matter of urgent public importance.

> The violence continued and in the course of it a number of Catholics were killed and injured, leading the Catholic population in the main to believe that the soldiers were simply the agents of the Northern Ireland Government, no better than the police.

This was in theory a good idea, since in the past previous inquiries into alleged misconduct by public servants had usually been conducted by a Select Parliamentary Committee or Commission of Inquiry, with the result that there was a tendency for party political considerations and loyalties to play a part in the conclusions reached.

This tendency came to a head when a Select Committee was appointed to investigate what was known as the Marconi scandal. In 1912 the Liberal Government had accepted a tender from the English Marconi Company for the construction of a chain of state owned telegraph stations throughout the Empire. There were rumours that the Government had corruptly favoured this company and that certain of its prominent members had improperly profited from this contract.

The result of the Inquiry was that the majority Liberal members of the Committee produced an exonerating report, while the minority members found that there had been gross impropriety. When the report came to be debated in the House of Commons, the House divided along strictly party lines, with the result that the majority view of the Committee was accepted.

This was the last time a matter of this kind was investigated by a Select Committee. But the haste with which the 1921 legislation appears to have been drafted and passed through Parliament meant that the Act in a number of respects was defective.

Because in those days
much of the violence came from
those who wanted union with
the Republic, most of those
interned were Catholics.

It would seem that
poor intelligence had led
to the internment of
many in respect of whom
there were no good grounds
for suspecting them
of terrorism.

The Catholic population
saw internment as
a gross breach of their civil rights,
as one more example
of discrimination against them.

In 1966 Lord Justice Salmon (as he then was) was asked to report on inquiries and his report contained a number of recommendations for improvements, (as well as a fascinating summary of the history of inquiries), but the Act has not been amended and remains as it was originally enacted.

However, Lord Justice Salmon also expressed his views on how the proceedings of an inquiry under this Act should be conducted, principally so that the procedure should be fair to all concerned, particularly those in respect of whom serious allegations were being made. These views have become known as "the Salmon Principles" and as often happens in the law, have tended to become words writ in stone and to take on an almost statutory importance.

However, in my view the real importance of what Lord Justice Salmon said lies not so much in the procedures he suggested should be adopted, but in the reason for such suggestions, which is to ensure that public inquiries are conducted fairly as well as thoroughly and impartially. I myself believe that the correct procedures for ensuring fairness often depend on the subject matter and form of the inquiry; and that slavishly to apply the same procedures without regard to their efficacy in any given case is to lose sight of the wood for the trees, and to confuse the means with the end.

> The Northern Ireland Government simultaneously introduced a ban on marches. This infuriated both sections of the sectarian divide. The Protestants were prohibited from conducting their traditional marches; while those who wished to march in support of civil rights were also prohibited from doing so.

The Bloody Sunday Inquiry and Information Technology

Public inquiries of the present kind are inquisitorial in nature, rather than adversarial. As I said in my Opening Statement in the Inquiry, from the point of view of the Tribunal, unlike ordinary litigation, there are no sides, nor, again unlike ordinary litigation, is the task of the Tribunal to decide which side has put up the better case, acting as sort of referee to ensure that the litigation is conducted within the rules and giving the result at the end of the day.

In contrast the task of a Tribunal conducting a public inquiry under the 1921 Act is to try itself to seek the truth, in the present case about what happened on Bloody Sunday. It is for the Tribunal to take the initiative in trying to discover what happened, by collecting the relevant material, deciding such matters as who should be asked to give oral evidence and (through its Counsel) being the principal questioner of the witnesses.

It has sometimes been exceptionally difficult to maintain the inquisitorial nature of the present Inquiry, since there is of course a very sharp division between the families of those who died and the wounded on the one side, and the soldiers (and certain government departments) on the other.

The families believe that their relatives were shot and killed or wounded without any justification at all.

> The march took place during the afternoon, on Sunday, 30 January 1972. It would seem that many of those who marched that day were intent on making a peaceful protest, but there were others, mostly young people, who engaged in rioting and stoning the troops manning the barriers. That afternoon a number of people were killed and injured through army gunfire on the streets of the city. The circumstances in which this occurred are matters of great controversy and form the subject matter of the present Inquiry.

The soldiers insist that they were reacting to incoming fire from terrorists and were, in effect, simply seeking to defend themselves in a proper and lawful way.

In addition the families felt that they were not allowed to be either properly represented at the previous inquiry nor given all the relevant evidence, and so came to the present inquiry with an understandable anxiety that matters should be conducted differently this time round.

However, we were convinced that the Inquiry had to remain inquisitorial in nature, since we alone started with no preconceptions save for our duty to seek the truth with fairness, thoroughness and impartiality. To allow the Inquiry to drift into an adversarial battle would, we considered, gravely hamper the search for the truth and leave the Tribunal with the risk of deciding instead who had made the better case before it; something that of course may not correspond with the truth at all.

Thus we are not engaged in determining whether the families or the soldiers are right, but in what in fact happened, which may or may not correspond with what they believe and assert took place on that day.

This particular public inquiry has raised formidable problems. Our basic task was to try and discover what happened in those few minutes thirty years ago, but we could not confine ourselves to the actual incident, since to our minds it can hardly be understood unless it is placed in the context of the overall situation at the time.

“The Catholic side of the sectarian divide expressed the belief that in truth the soldiers had deliberately shot dead innocent people, some indeed alleging that this had been done on instructions from those in government.”

The present position in Northern Ireland is far from perfect, but it is entirely dissimilar to the situation in 1972, where there were daily bombing and shooting incidents, rioting and arson and violent confrontations with the security forces. For example, three days before Bloody Sunday two police officers were murdered by gunfire as they patrolled the streets of the city. Thus we have looked at the situation as it developed in Northern Ireland over the preceding months, including the plans and actions of the Northern Ireland and British governments and of the way in which the police and army were used to try and keep order.

We also looked at the plans and actions of those who decided to organise a march on that day, as well as the plans and actions of the soldiers and of the IRA, the latter having been on any view engaged in deadly violence in the city in the days and weeks preceding Bloody Sunday; and, it is alleged, on the day itself.

We have listened to the evidence of politicians and civil servants in both the British and Northern Ireland governments, including that of Sir Edward Heath, the United Kingdom Prime Minister at the time. We have also listened to the evidence of many of the people who took part in the march, many of the large number of journalists who were present, many of the soldiers who were there (including those who admit to firing), and a considerable number of those who were members of the two wings of the IRA (Official and Provisional) present on the day.

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We have looked at the many photographs and the footage that was filmed on the day; and examined the statements that were taken soon after the event, as well as the evidence that was given to the previous inquiry. We have had to bear in mind that with the passage of so much time, memories in nature of things are often likely to become dim or distorted.

Above all, and particularly because there had been an earlier inquiry which many regarded as flawed, it was clear from the outset that to the greatest degree possible, this must indeed be a *public* inquiry, so that all concerned could see how we were conducting it, and have access to the evidence and materials that we were examining, as well as to our proceedings, to the greatest degree possible.

I believe that without using information technology we would simply have been unable to achieve this aim of conducting what can properly be called a public inquiry. We have tens of thousands of documents and photographs, tens of hours of video footage, statements from well over fifteen hundred witnesses, and hearings that have taken over 450 days.

Those days started with Counsel to the Tribunal going through the documentary and other material and drawing our attention to the most important statements of evidence, having necessarily taken many months to prepare that presentation, which took many weeks to complete.

> The Inquiry's terms of reference are "to inquire into the events of Sunday, 30th January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day."

We then heard much shorter submissions from the lawyers acting for the families of those who were killed and the wounded and the soldiers. We then embarked on hearing oral evidence, though on a number of occasions we have had to spend substantial periods of time hearing arguments and then preparing and giving rulings upon a variety of interlocutory matters. We have heard oral evidence from hundreds and hundreds of people.

In addition to the general need to hold a public inquiry, it is clearly of prime importance that the relatives of those who died should be given a full opportunity of seeing how we are conducting the inquiry, since under Article 2 of the Human Rights Act (a statute which incorporates the European Convention on Human Rights into our law) they have a right to a proper inquiry into deaths at the hands of state agencies.

Simply to hold the inquiry in public would not really suffice. In any legal proceedings involving documentation of any size, the public will have very little understanding of what is going on, since it is simply not feasible to provide them with copies of the documents.

What we have done in this regard is to scan the documents, photographs and films, together with the statements of evidence that we have taken, and which were taken at the time, into computers, so that they exist in digital form. This then enables us to do a variety of thing that would otherwise be impossible.

> The Tribunals of Inquiry (Evidence) Act 1921 started life as a Bill designed to deal with a specific matter (allegations against certain officials in the then Ministry of Munitions) and it was only during its passage through Parliament that it was decided to adapt it so that it could be used in the future in order to set up an independent tribunal to inquire into any matter of urgent public importance.

In the first place, those who attend the Inquiry were able to see the material in question, as it was presented to the Tribunal and examined with the witnesses, because it was put on large screens for the public to see. It was also made available in like form to the media.

The Inquiry was principally held at the Guildhall in the city where Bloody Sunday occurred. However the evidence of the soldiers and some others was taken in London at the Central Hall, Westminster, since the courts directed that for security reasons the evidence of these witnesses should not be taken in Northern Ireland.

Not all who live in that city and have an interest in the proceedings were able to come here to watch and listen, so we had a video link which enabled the proceedings and the material being considered by us to be seen on screens at the Guildhall, where we had previously been conducting the Inquiry.

Public interest in the Inquiry is not, of course, limited to those who are able to attend the hearings in London or the Guildhall. Bloody Sunday is of international interest and concern. So we have a web site on the Internet. On this site much of the evidential material may be found, together with a daily transcript of our proceedings and such things as the many rulings that we have had to make during the course of the Inquiry.

By these means we have, I believe, really been able to make this Inquiry public, to a degree that formerly would

Lord Justice Salmon expressed his views on how the proceedings of an inquiry under this Act should be conducted, principally so that the procedure should be fair to all concerned, particularly those in respect of whom serious allegations were being made. These views have become known as "the Salmon Principles" and as often happens in the law, have tended to become words writ in stone and to take on an almost statutory importance.

simply have been impossible. At present there are over 120 gigabytes of electronic evidence, 60,000 pages of digitised documents, 2500 digitised photographs and 20 digitised videos amounting to many hours in length. Each of these pieces of evidence is uniquely indexed, using the system we have developed for referencing documents, and may be retrieved and displayed in the manner that I have described in a matter of a second or so.

This Inquiry has taken a very long time indeed. But the task that we were given was immense. We had to interview and take statements from a very large number of people, some of whom now live abroad. We had to retrieve documents from the Public Record Offices of both Great Britain and Northern Ireland and from numerous government departments and other sources.

We have employed experts in many fields, ranging from the historical to the forensic. We have had to examine the whole of the evidence and material submitted to the previous inquiry, and to investigate how that inquiry was conducted, so as to be able to form a view as to the reliability of the testimony given on that occasion, which at least had the advantage of being more or less contemporaneous.

We have had to collate and analyse all this evidence and material and, through our Counsel, present it in the clearest way possible.

Without information technology, I believe that the time needed would have been far greater than we are likely to take.

“The real importance of what Lord Justice Salmon said lies not so much in the procedures he suggested should be adopted, but in the reason for such suggestions, which is to ensure that public inquiries are conducted fairly as well as thoroughly and impartially.”

For example, there are many interested individuals who are legally represented at the Inquiry. The lawyers of course must be provided with all the material relevant to their clients so that they can properly represent them. It is simply impracticable for them all to attend with paper bundles of the documents. It would in any event mean that whenever a particular document was to be examined, each of the lawyers would have to select the appropriate bundle and turn to the appropriate page.

The Tribunal and the witness would have to do likewise. Anyone who has conducted litigation with an appreciable number of documents will know how time consuming this exercise can be. Some will be unable to find the right bundle or the right document. The numbering or referencing system often breaks down, with some having a different system from others. The witness will have to be helped to find the right bundle and the right document. Much of the day will be spent in taking out the appropriate bundle, finding the document, then replacing the bundle and doing the same exercise with another bundle, rather than examining the document and asking questions about it. Over the course of a hearing day the time taken for these purposes would be very long indeed. This is truly wasted time; by digitising we have reduced this to insignificance. Any document, photo, video, statement or transcript can be brought up on screen in a couple of seconds.

The team needed to conduct an Inquiry like this is substantial. The Tribunal is assisted by Counsel, who

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present the evidence to it. This, of course, involves a very large and time consuming amount of preparatory work. Our Counsel have divided between themselves the work of actually questioning the witnesses before the Tribunal, but obviously they must be constantly aware of what is taking place, even if they are elsewhere preparing for the next witnesses. They must also have access at all times to the evidence and material. They therefore have access to CCTV as well as to the computers holding the evidence and materials, so that they are never out of touch with the proceedings. The same applies to the lawyers acting for the interested parties.

The overall administration of the Inquiry is in the hands of a senior civil servant. This person has responsibility for the staff, for managing the financial provisions, for dealing with government departments and outside contractors, for matters of security, for organising the accommodation required for the Inquiry, and for a variety of other matters. She and her assistants again had to have the means to be able to follow the proceedings, having no time to attend the hearings themselves. This could not be provided without the use of information technology.

We are also served by the legal secretary to the Inquiry. He is primarily responsible for the gathering of evidence, to be the main interface between the Inquiry and the interested parties, to liaise with government departments and other organisations over the collection of evidence and like matters, to deal with ancillary litigation connected

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with the Inquiry, together with a host of other duties. He and his assistants again had to be constantly aware of what was going on, so again they were provided with electronic means of following what is taking place at the hearing.

Because the Inquiry had to move to London from its primary site at the Guildhall, we had offices in and near the Central Hall, Westminster, as well as in and near the Guildhall. Apart from Counsel, the Secretary and the Solicitor to the Inquiry, there are many others in our staff who can only function properly if they have full access to what is going on at the hearing, as well as the ability to communicate swiftly with each other, notwithstanding the hundreds of miles that divide them.

The ability to communicate without delay has been of inestimable advantage. We use internal email to the greatest possible extent. By this means the staff can keep constantly in touch with each other. Furthermore, unlike most legal proceedings, the Tribunal is also able to use this means of communication whilst actually sitting, so that it is not isolated from everything else.

By way of example, I got messages during the day informing me of the progress of matters of current concern so that I could, if appropriate, give an immediate response with my colleagues. Again, something may arise during the course of a hearing day which led my colleagues and me to decide that some further action should be taken. I could immediately communicate what we wanted to Counsel or

“The task of a Tribunal conducting a public inquiry under the 1921 Act is to try itself to seek the truth.”

the Inquiry Solicitor or other members of the staff, so that the necessary action could be taken without delay. I could do this whether the person concerned was Counsel sitting in front of me, or someone in an office on the other side of the Irish Sea.

A hearing day of course required a great deal of advance preparation by all concerned. The way we chose to proceed was to take written statements from potential witnesses, in the main using an outside firm of solicitors who could provide a sufficient number of properly qualified and experienced lawyers for this task. Those giving statements had of course the right to have a solicitor of their own present during this exercise, in order to see that their rights were properly protected. In view of the number of potential witnesses, the statement taking process took a very long time.

The written statements were scanned into the system and distributed to all the interested parties, who in the main comprise the families of those who died and the wounded and of course the soldiers. The Tribunal and its Counsel then considered which witnesses should be called to give oral evidence, and drew up a programme for attendance at the Inquiry, taking account to the greatest degree possible of the convenience of the witness.

In this latter regard we have developed what we called the Witness Liaison Team. They were responsible, among other things, for arranging for the attendance of the witnesses, but do much more.

> The Inquiry had to remain inquisitorial in nature, since we alone started with no preconceptions save for our duty to seek the truth with fairness, thoroughness and impartiality. To allow the Inquiry to drift into an adversarial battle would, we considered, gravely hamper the search for the truth and leave the Tribunal with the risk of deciding instead who had made the better case before it; something that of course may not correspond with the truth at all.

Those who attend court as witnesses are very often critical of the process as it applies to them. They are not kept informed of events and are often kept waiting an inordinate length of time with no adequate explanation for the delay. Giving evidence can be a nerve racking experience for those who are not used to the courts, but in the main scant regard is paid to this.

In this Inquiry the Witness Liaison Team meet the witness upon arrival at the hearing. We have a witness suite where the witness can relax and where the procedures are explained. For those witnesses who were present on the day, we have developed a computer programme to assist the witness in giving evidence.

The city is nowadays very different from 1972. In particular there were three large high rise flats in the area called the Bogside, the part of the city in which much of the action took place. These have long since disappeared. What we have done is to create a virtual reality representation of the city as it was on the day in question, using contemporary photographs and computer models of the buildings as they were. The programme starts by showing a map of the city with a number of hotspots (some 80 in all) marked on it. The system is interactive so by touching a particular hotspot the scene as seen from that position appears. It is possible then by touching the screen to expand the view and look round 360 degrees from the position chosen or indeed to "walk" through the scene. The witness can thus explain with the aid of the programme his location and what was happening and where, if necessary by touching the screen

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to draw a line or other mark, which can then be recorded electronically as part of the evidence of that witness.

This virtual reality programme has been designed so that it can be used by all, even those with no previous experience in using computers. It only took a few minutes for the Witness Liaison Team to show the witness how to work the programme; and it has proved to be a most useful tool.

The Witness Liaison Team did all they could to ensure that the witness was comfortable. Some requested a mid-morning break for medical or other good reasons, and this request was communicated to the Tribunal together (often by email) with any other relevant details about the witness which it was important for the Tribunal to know in order to make the experience of giving evidence as comfortable as possible.

Witnesses were called to give oral evidence in cases where the Tribunal considered the witness to be of particular importance, or where it appeared that the witness could usefully expand upon his written evidence, though we have made clear that the written testimony of a witness (whether or not called to give oral testimony) is and remains part of the material that the Tribunal will consider in making its report.

In many cases the witness will have made previous statements; some indeed gave evidence to the previous

“With the passage of so much time, memories in nature of things are often likely to become dim or distorted.”

inquiry, some have given interviews to the Press or taken part in television programmes dealing with Bloody Sunday.

Many also made statements immediately after the events in question. In the case of a number of those who took part in the march that day, we traced to New York a series of tape recordings that were made at the time, where people were asked to recount what they saw and heard. Where these exist, they are played to the witness concerned by the Witness Liaison Team before giving evidence. Many had forgotten about these recordings and were amazed to hear their own voices from thirty years ago. Those recordings now form part of our digitised record. Statements and evidence of the witness (including any such recordings) are electronically filed so that there is a complete dossier for each witness, readily accessible at any time.

In order properly to question the witness, it is necessary to ensure that all relevant documents and statements are brought to the attention of the witness. We have made clear that we are conducting an open Inquiry where witnesses are not to be taken by surprise and must be given proper advance notice of matters that concern them, particularly of the details of any allegations of misconduct or wrongdoing. Those in respect of whom such allegations are made are, of course, entitled to legal representation, so that their interests are properly protected.

When the witness had been sworn, Counsel to the Inquiry started the questioning. Here we took advantage

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of the LiveNote method of transcription. This is a well known and respected form of real time transcription where everything that is said to or by the witness appears virtually instantaneously in typescript on the laptop computers used by all the counsel involved as well as the Tribunal.

One of the advantages of LiveNote is that each individual user (including the members of the Tribunal) can make private notes on the laptop as the hearing proceeds, and ascribe these notes to particular issues or in any other chosen way, so that they can be retrieved at any later time, and if necessary re-sorted.

LiveNote also has an automatic indexing system. It is a tool of very great value. Every evening the transcript for the day is posted on our Web Site, and so is available for anyone to read anywhere in the world.

The basic technology we are using is not today's cutting edge state of the art, for we have been using the elements of it for some years. But what we have done (and may well be the first to have done) is to bring all these elements together into one integrated system for use in a courtroom environment.

We have, of course, taken advantage of improvements in the basic technology as they have been developed, for example the increase in the storage capacity of computers, including laptop machines.

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We have tens of thousands of documents and photographs, tens of hours of video footage, statements from well over fifteen hundred witnesses, and hearings that have taken over 450 days.”

The present position is that we can store on each laptop the entire transcript and will continue to be able to do so, with the result that everything said during the course of the hearings can be easily transported and will be instantly available. We are engaged in doing the same with all the documents and other evidential material that we have gathered.

We make an audio record of the proceedings. We have used technology which enables us easily to retrieve what was said at a particular moment on a particular day. This recording is of very high quality and thus is likely to avoid any disputes as to precisely what was said, or even the tone of voice being used. It may also have some historical value.

At the outset we decided, however, not to have a video recording of the hearings, since it seemed to us that this might well inhibit the witnesses. However, in some cases it was necessary to take oral evidence by means of a video link to another place, for example where the witness was abroad and unable or unwilling to come to the Inquiry; and where there were no means of requiring him to do so.

In general terms the information technology systems we use are as follows. The PC Network spans the two hearing sites and the two sets of Inquiry offices. There are approximately 100 PCs and laptops and some 20 servers, using Compaq and Fujitsu Siemens equipment. The PC Network is managed by Fujitsu Services and uses the latest Microsoft Windows. For the evidence display (which spans

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five sites) we use Trial Pro Version 4, with the evidence controlled and manipulated by legal teams using touch screen technology. For the Real Time Transcription we are using Version 7 of LiveNote. The Virtual Reality program was supplied by the Northern Ireland Centre for Learning Resources. CCTV and the audio (the latter managed by MK Audio) also span five sites, broadcasting the proceedings in the hearing chamber save where the Tribunal has ruled otherwise for reasons of security. In total these systems require some skilled 17 staff.

The Inquiry has cost to date a vast sum of money, and much more will have to be spent. It has been the subject of great criticism for this reason, though this has come in the main from those who were opposed to instituting a new inquiry at all. Every effort is made by the staff of the Inquiry to satisfy themselves that money is properly spent and not wasted and all expenditure has to be properly recorded and accounted for to the government department involved, which in this case is the Northern Ireland Office.

Much of the money has gone on paying the fees of the many lawyers attending the hearings. This has been the subject of particular criticism. But any public inquiry is going to be very expensive. To achieve its purpose it must be thorough, but it must also be fair and open. To my mind fairness dictates that those who face allegations of serious misconduct (in the present case, many of the soldiers face allegations of murder and others of either complicity in murder or of conduct which they must have appreciated

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was likely to lead to the death of innocent people) must have legal advice and assistance so that their rights are properly protected.

Similarly, the families of those who died have (as already observed) a statutory right to a proper open inquiry where death has been caused at the hands of state agencies, so they too in my view should have the benefit of legal representation in order that their interests are properly protected. Those who were wounded may not have the same statutory rights, but to my mind are also, as a matter of fairness, entitled to be legally represented for the same reasons.

Comparisons have been drawn with other Inquiries, where legal representation for interested parties has been limited and where such representatives have not been allowed to question witnesses; and it has been suggested that we should have followed the same path and thereby saved a lot of money and time. This however is wholly to ignore the subject matter of the present inquiry and the context in which it is being held, particularly the previous inquiry where the legal representatives of the families of those who died were not given all the relevant material, and though allowed to ask questions, were thereby substantially hampered in doing so.

In the course of the Inquiry, the Tribunal has had to consider and make rulings upon a number of matters of great importance, where the views of the families and those

> We have, I believe, really been able to make this Inquiry public, to a degree that formerly would simply have been impossible. At present there are over 120 gigabytes of electronic evidence, 60,000 pages of digitised documents, 2,500 digitised photographs and 20 digitised videos amounting to many hours in length. Each of these pieces of evidence is uniquely indexed, using the system we have developed for referencing documents, and may be retrieved and displayed in the manner that I have described in a matter of a second or so.

of the soldiers have been in very sharp conflict. Among other matters, we have made rulings on whether the soldiers were entitled to anonymity when they gave evidence, and on whether they should give their evidence in London or at the Guildhall. These rulings have been successfully challenged by way of judicial review in the courts. Court challenges to interlocutory rulings of a Tribunal of Inquiry are very time consuming and expensive, but to my mind are really inevitable in an inquiry of the present kind, especially where human rights are involved.

The successful challenges to our rulings on anonymity and venue have themselves entailed substantial delay and expense. All the documents have had to be examined and re-examined so that soldiers' names are redacted and ciphers put in their place, while the move to London meant the setting up of a new hearing room together with arrangements to enable representatives of the families to stay in London so that they can continue to observe the proceedings. The cost of that move alone was over £15 million.

The two rulings successfully challenged involved the question whether to any and if so what degree the public nature of the Inquiry should give way to other considerations, including human rights, in particular the right to life given by Article 2 of the Convention on Human Rights.

In addition we have made a number of other rulings on the right to life which have not been the subject of

> Without information technology, I believe that the time needed would have been far greater than we are likely to take.

successful challenge, for example that some of the police should give their evidence screened, since they had reasonable grounds for fearing that their lives (and those of their families) would be put at risk from paramilitaries were this not to be done. We have also had to grapple with questions concerning journalistic privilege and applications by government departments for Public Interest Immunity protection.

All in all, the Inquiry has turned into a massive exercise, taking a great deal of time and costing a great deal of money. The first two years were spent in collecting and analysing material. The public presentation of this material then took our Counsel over forty days to present. We then spent the following years listening to the evidence of hundreds of witnesses, reading the statements of hundreds of others, as well as examining new material as it continued to be collected.

By way of example, members of our team spent some two years examining secret documents held by the security services, to see if they had anything of relevance to our Inquiry. Unfortunately, these services did not keep Bloody Sunday files as such, so it was necessary to sift through the voluminous paperwork created in the course of thirty years of the Troubles in Northern Ireland to see if there was anything of value.

To my mind, however, the decision to use information technology is one that has saved and will continue to save

> We have made clear that we are conducting an open Inquiry where witnesses are not to be taken by surprise and must be given proper advance notice of matters that concern them, particularly of the details of any allegations of misconduct or wrongdoing.

very substantial sums of money. Of course we have to pay for the technical staff we employ and the hardware and software that we use, but the efficiency gains are very great. It is impossible to provide a precise estimate of the savings we hope to achieve through the use of information technology, but in terms of time it seems to me that the Inquiry would have taken many months if not years longer had we not been able to employ these tools. The daily cost of the Inquiry when it is sitting runs into many tens of thousands of pounds, so every day saved means a significant saving of money.

We have now reached the end of the evidence gathering part of the exercise. We have received written and oral closing submissions from the interested parties, which we are now considering. These are voluminous (as one would expect, given the amount of material we have collected) but our task of considering them has been greatly assisted and speeded up by scanning the submissions onto our servers, and hypertexting the references said to support their arguments. Thus I can sit at my desk, using one screen of my desktop computer to look at the submission and click on a link which brings up the material relied upon on another screen, and then, on that other screen, look forward or backwards from the particular reference to check, for example, its context. All this material being on central servers, I can cut and paste to my laptop which I use for the purpose of writing myself.

At the end of the day there will be time for reflection, in particular whether there might be different and better

Any public inquiry
is going to be very expensive.
To achieve its purpose
it must be thorough,
but it must also be
fair and open.

To my mind fairness dictates
that those who face allegations
of serious misconduct must have
legal advice and assistance so that
their rights are properly protected.
Similarly, the families of those
who died have a statutory right
to a proper open inquiry
where death has been caused
at the hands of state agencies.

ways of dealing with public concern over an incident like Bloody Sunday. However, despite the criticism of the time and money the Bloody Sunday Inquiry has cost, there is a curious absence of any viable suggestions as to how we could have taken less time or spent less money, given the nature and size of the task. But I firmly believe that the use that we have made of information technology has saved substantial sums of money, has given us a tool to enable us to do a better job than would otherwise have been the case and has made this an Inquiry which, whatever its other shortcomings may be, has been truly public.

Editor's note

On 14 June 2010, *The Report on the Bloody Sunday Inquiry* was made public: See http://www.bloody-sunday-inquiry.org/.

The Saville Report found, inter alia, as follows:

> None of the casualties shot by soldiers … was armed with a firearm or (with the probable exception of one victim) a bomb of any description. None was posing any threat of causing death or serious injury. In no case was any warning given before soldiers opened fire.
>
> We have concluded … that … many of these soldiers have knowingly put forward false accounts in order to seek to justify their firing.
>
> In the case of those soldiers who fired in either the knowledge or belief that no one in the areas into which they fired was posing a threat of causing death or serious injury, or not caring … it is at least possible that they did so in the indefensible belief that all the civilians they fired at were probably either members of the Provisional or Official IRA or were supporters … and so deserved to be shot notwithstanding that they were not armed. (*The Guardian*, 16 June 2010.)

See also *A Statement to the House on the Saville Inquiry by the Prime Minister: The Telegraph*, 15 June 2010.

“Let me start by saying that in an age of human rights, officers of the bench are provided an expanded potential to do justice … as Your Highness put it in a speech in 1986,

“In countries which practice a democratic form of government, the judiciary has been looked upon as the defender of any encroachment to the rule of law.” (28 February 1986 at the Official Launch by YAB Tun Hussein Onn of *The Judgments of HRH Sultan Azlan Shah with Commentary*)”

Cherie Booth QC
The Role of the Judge in a Human Rights World
19th Sultan Azlan Shah Law Lecture, 2005

The Honourable Cherie Booth QC

The Role of the Judge in a Human Rights World

Cherie Booth
(b. 23 September 1954*)*

Ms Cherie Booth has the distinction of being the first woman as well as the first practising member of the British Bar to deliver the Sultan Azlan Shah Law Lecture.

Born in Bury in 1954, Ms Booth read law at the London School of Economics and Political Science (LSE) and created history when she became the first and only person to obtain an LSE degree with a first class in all her subjects. She then excelled in her Bar examinations and was called to the Bar by Lincoln's Inn in 1976. She became Queen's Counsel in 1995, and was appointed as a Recorder in the County Court and Crown Court in 1999. She is a Bencher of Lincoln's Inn and an Honorary Bencher of King's Inn, Dublin.

Ms Booth is an accomplished barrister. As a founding member of Matrix Chambers, London, her areas of specialisation include public law, human rights, media and information law, employment law and European Community law. Ms Booth has appeared in a number of landmark cases dealing with human rights and employment issues, such as *Ali v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363, where the House of Lords considered whether the exclusion of a child from a State school violated the child's right to education under the European Convention of Human Rights; *R (on the application of Purja and others) v Ministry of Defence* [2004] QB 36, a case dealing with the differential treatment afforded to Ghurkha soldiers in the British Army; and *R (Shabina Begum) v Head Teacher and Governors of Denbigh High School* [2007] 1 AC 100, where Ms Booth represented a girl who was expelled from school for wearing a *hijab*, a case which raised the important issue of the right to manifest religious beliefs.

Ms Cherie Booth is actively involved in a number of professional organisations, and has held several important positions including former Chair of Bar Information Technology Committee; Chair of the 1997 Bar Conference; former Vice-Chair of the Equal Opportunities Committee to Bar Council; and a member of the Local Government and Planning Bar Association, IBA, FRSA, the European Women Lawyers Association and the European Employment Lawyers Association.

Ms Booth is Chancellor and Honorary Fellow of Liverpool John Moores University, Governor and Honorary Fellow of the LSE and the Open University. She is also a Fellow of the Royal Society of Arts, an Honorary Fellow of the Institute of Advanced Legal Studies, and a Fellow of the International Society of Lawyers for Public Service.

In January 2011, Ms Booth was appointed as the first Chancellor of the Asian University for Women, Bangladesh, and more recently as Visiting Professor in Law at The Open University.

Ms Booth has written and lectured widely on issues such as children's rights, the rights of women, the international judiciary, the influence of international law on domestic courts and the 1998 British Human Rights Act. She authored a chapter on the prospects for the International Court in *From Nuremberg to the Hague: The Future of International Criminal Justice* (2003, Cambridge University Press), and co-authored a chapter on the liability of public authorities in *Professional Negligence and Liability* (2004, LLP).

Ms Booth is actively involved in a number of charities, including President of Bernado's; Trustee of Refuge; Trustee of Citizenship Foundation; and Vice President of Family Mediators Association. She is also the Patron of several foundations and associations, including Sargent Cancer Care for Children, Greater London Fund for the Blind, The Lord Slynn European Law Foundation, Asian Women of Achievement Awards and the European Federation of Black Women Business Owners.

In 2008, the Cherie Blair Foundation for Women was set up to provide women entrepreneurs with access to business development support, networks, finance and technology, especially in Asia, Africa and the Middle East.

In recognition of her work, she has been conferred many honorary degrees, including LLD (Hons), University of Liverpool (2003), Hon D Litt UMIST and Doctor of Laws (Westminster University).

Ms Cherie Booth is married to The Honourable Mr Tony Blair, who, at the time Ms Booth delivered the Nineteenth Sultan Azlan Shah Law Lecture, was the Prime Minister of Britain. They have four children—Euan, Nicholas, Kathryn and Leo.

A constitutional court's democratic potential lies not only in its guardian role of ensuring that a government "show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance"; it lies also in the vital and complementary role that judges can play in engaging with national issues so as to create a public dialogue about the core human rights values that lie at the heart of all inclusive, open democracies.

In our troubled times, where terrorism, division, and suspicion of others are the order of the day, this role for judges is perhaps more vital than ever before.

19 The Role of the Judge in a Human Rights World

Cherie Booth QC

Text of the Nineteenth Sultan Azlan Shah Law Lecture delivered on 26 July 2005 in the presence of His Royal Highness Sultan Azlan Shah

Chancellor of the University of Malaya, Your Royal Highnesses, Distinguished Guests, Ladies and Gentlemen.

I, first of all, thank Your Royal Highnesses Sultan Azlan Shah, and Tuanku Bainun, for being so kind and hospitable to me on this, my first visit, to Malaysia. I had read about how welcoming and kind Malaysians were, but I did not realise just how true that was till I experienced your very generous hospitality. I am sad that I am here for just a short time, but I am sure this, my first visit, to Malaysia will not be my last.

I also of course thank you, Your Royal Highness, for the great and rare privilege that you have granted to me to deliver this Nineteenth Law Lecture named in your honour. When Professor Dr Visu Sinnadurai came to visit me in London at the suggestion of our Lord Chief Justice Lord Woolf, little did I realise just what a task I was taking on. And he certainly did not tell me that there would be so many people here at this lecture. But those of you who know will know that Professor Visu is very, very persuasive.

> Plainly, the powers of the executive in any modern democratic nation state are significant. Ordinarily, in such systems of government the courts will "respect all acts of the executive within its lawful province, and the executive will respect all decisions of the court as to what its lawful province is".

[1] "Administrative Law Trends in the Commonwealth", in Visu Sinnadurai (ed), *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, Professional Law Books and Sweet & Maxwell Asia, pages 105-130.

[2] *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd* [1979] 1 MLJ 135.

[3] "Deference: A Tangled Story", [2005] PL Summer 348.

[4] Ibid, at page 348.

And despite what the Vice Chancellor has kindly said about me, I am really not such a great phenomenon. I am very honoured indeed to join a very distinguished company of speakers, which includes British and Commonwealth judges and eminent academics. I am delighted to be both the first practising barrister and possibly even more delighted to be the first woman to be asked to deliver this lecture.

In the Fifth Sultan Azlan Shah Lecture,[1] Lord Cooke (or Sir Robin Cooke, as he then was, President of the New Zealand Court of Appeal) began his lecture by quoting the following dictum of Your Royal Highness:

> Unfettered discretion is a contradiction in terms … Every legal power must have legal limits, otherwise there is dictatorship.[2]

While Your Highness was actually expressing an essential premise of administrative law, this is an apt introduction to the theme of this lecture, namely the role of the judiciary in reviewing and keeping check upon the power of the executive. Plainly, the powers of the executive in any modern democratic nation state are significant. Ordinarily, in such systems of government the courts will, in the words of Lord Steyn, "respect all acts of the executive within its lawful province, and the executive will respect all decisions of the court as to what its lawful province is".[3]

However, as Lord Steyn continued, "[w]hen the executive strays beyond its lawful province the courts must on behalf of the people call it to account".[4]

> As kings and queens
> lost their divine right and
> as many countries
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> or Malaysia)
> lost their kings and queens,
> states continued to
> maintain an affinity
> between their
> secular systems of
> government and
> the sacred figure
> of justice.

[5] See "Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction", *Yale Journal of Law & Feminism* 2002, vol 15, 393–418.

[6] See *Shield of Achilles: War, Peace and the Course of History*, Penguin.

The idea of justice is an ancient and feminine one, whether in the form of the Egyptian goddess Maat, or the Norse goddess Skadi; and of course the eponymous Roman goddess, Justitia,[5] the long robed woman holding the scales and the sword with her eyes often blindfolded has represented justice down the centuries. Gradually the idea of justice has become associated with the judge. As kings and queens lost their divine right and as many countries (but not the United Kingdom or Malaysia) lost their kings and queens, states continued to maintain an affinity between their secular systems of government and the sacred figure of justice. Indeed in Europe and the United States, men and women who sit on the courts, particularly the higher courts have been called "justices". More recently, in a new South Africa the judges who sit on the bench of that country's Constitutional Court are referred to as "justices".

In the modern age, science and philosophy have moved from the idea that status or fate prescribes what we are to the idea that it is contract or choice that determines our destiny. But as we move from what Professor Philip Bobbit[6] has describe as the "nation state" to the "market state", the role of those who interpret our choices and contracts moves to centre stage. So we move from the ancient High Priest to the human rights judge.

What then is the role of a judge in a human rights world? That is the topic of this lecture, and one that I hope to answer through a discussion of various themes.

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[7] "The Courts and the Constitution", Lecture delivered at King's College on 14 February 1996.

[8] Ibid, at page 18.

An expanded sense of justice under an inclusive and open democracy

Let me start by saying that in an age of human rights, officers of the bench are provided an expanded potential to do justice. Lord Bingham, while still Master of the Rolls,[7] suggested that the road map for judges wishing to achieve justice starts with the judicial oath, whereby a newly-appointed judge swears to:

> do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will.

Lord Bingham explained the elements of this oath succinctly as follows:

> First, the judge must do what he (or, of course, she) holds to be right … But secondly, and vitally, he must do right according to the laws and usages of the realm. He is not a free agent, who can properly give vent to his own whims and predilections, or even (save within very narrow limits) give effect to his own schemes of law reform …
>
> Thirdly, the judicial oath makes clear … that in administering the law the judge must act with complete independence, seeking neither to curry favour nor to avoid any form of vindication. And fourthly, so far as humanly possible, judges must decide cases with total objectivity, having no personal interest beyond that of reaching a just and legally correct solution.[8]

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[9] Lord Woolf, "The International Role of the Judiciary", 13th Commonwealth Law Conference, 16 April 2003, at pages 1–2.

[10] Ibid, at page 2.

[11] 28 February 1986 at the Official Launch by YAB Tun Hussein Onn of *The Judgments of HRH Sultan Azlan Shah with Commentary,* 1986, edited by Professor Dato' Visu Sinnadurai, Professional Law Books Publishers, Kuala Lumpur.

Lord Woolf, the former Lord Chief Justice of England and Wales, has remarked that

> [j]ust as the common law has been evolving with increasing rapidity, so has the role of the common law judge. The judge's responsibility for delivering justice is no longer largely confined to presiding over a trial and acting as arbiter between the conflicting positions of the claimant and the defendant or the prosecution and defence.[9]

Rather, says Lord Woolf,

> [t]he role of the judiciary, individually and collectively, is to be proactive in the delivery of justice. To take on new responsibilities, so as to contribute to the quality of justice.[10]

Or as Your Highness put it in a speech in 1986,

> In countries which practice a democratic form of government, the judiciary has been looked upon as the defender of any encroachment to the Rule of Law.[11]

Of course, these statements take on a particular meaning when one considers the modern advance in human rights. For those states that have their own binding human rights bills or that allow regard to be had in judicial decision-making to international or regional human rights standards, there is a potential for judges to look beyond the remit of the common law to universal notions of justice

“It is important for us to stress that
we do live in an age
of human rights,
in a human rights world.
This age brings with it
huge potential for justices
of the world’s highest courts
to speak a common language.
As judges embark
on constitutional
interpretation
they are afforded
the chance to
narrate the values
that underpin
the very essence
of our humanity.”

embodied in the idea of fundamental rights. This potential is of undoubted importance for the citizens who are the direct beneficiaries of these rights.

I can speak from my own experience here. As you may know the United Kingdom has recently taken steps to "bring human rights home" through its Human Rights Act. These fundamental rights extend from the right to life to the right to marry; from the right not to be subjected to inhuman or degrading treatment to the right to a fair trial; from the right to free speech to the right of privacy: to name but a few.

While Britain was very much involved in the drafting of the European Convention on Human Rights and was one of the first countries to sign it, up until five years ago, a British citizen simply could not stand before a British court and assert that his or her fundamental rights under the Convention had been violated. That was not an available option, for although Britain had signed the Convention, it had no direct force in our law. The only use that could be made of the Convention in Britain was to refer to it as an aid in deciding the meaning of ambiguous British legislation.

Quite incredibly, we had to leave our shores and travel to Strasbourg to the European Court to seek protection of our Convention rights. And even if then, after that long and expensive road, the European Court agreed that British laws were incompatible with fundamental rights and freedoms, there was no *legal* obligation on our government to change

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> from the right
> to free speech
> to the right of privacy.

[12] I Leigh "The UK Human Rights Act 1998: An Early Assessment" in G Huscroft and P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law,* 2002, pages 323, 330.

[13] Lord Bingham, "The European Convention of Human Rights: Time to Incorporate" 109 LQR (1993) 390 at 400.

them. That this was wrong is well evidenced by the fact that as a result of the many journeys our citizens made to Strasbourg, the European Court had held the United Kingdom to be in violation of its Convention obligations on over 50 occasions.[12]

Under the United Kingdom's Human Rights Act this historical justice deficit has been corrected by an invigorated potential for judges to do right by reference, domestically, to standards respected globally. Now, because of the Human Rights Act, British citizens, like citizens in almost every other European country, can rely on their Convention rights in their own courts, before their own judges, and with the knowledge that their country has committed itself to the fulfilment of the highest ideals of human rights. As one of our senior Law Lords noted with respect to the merits of direct incorporation of the European Convention:

> … the change would over time stifle the insidious and damaging belief that it is necessary to go abroad to obtain justice. It would restore this country to its former place as an international standard bearer of liberty and justice. It would help to reinvigorate the faith, which our eighteenth and nineteenth century forbears would not for an instance have doubted, that these were fields in which Britain was the world's teacher, and not its pupil. And it would enable the judges more effectively to honour their ancient and sacred undertaking to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.[13]

> British citizens, like citizens in almost every other European country, can rely on their Convention rights in their own courts, before their own judges, and with the knowledge that their country has committed itself to the fulfilment of the highest ideals of human rights.

[14] *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology,* 2000 (Oxford: Oxford University Press), at page 110.

[15] Hope Chigudu and Ezra Mobogori, "Harnessing the Creative Energy of Citizens" in *Civil Society in the New Millennium Africa Regional Report*, 2000.

I am therefore heartened that Britain has joined the ranks of other constitutional democracies in Europe, the Commonwealth, and beyond. This is an important trend. For some time now international lawyers have been talking about an emerging norm of democratic governance. This norm of democratic governance has as its focus periodic multiparty elections, within the framework of institutions which guarantee respect for the Rule of Law and safeguard civil rights. Of importance is that increasingly the trend is towards democracies which guarantee respect for the Rule of Law and rights through domestic, constitutional charters. Through these constitutional instruments states are able to drive for a form of democratic politics that Susan Marks has called "inclusive democracy",[14] a value-driven form of democracy that has strong similarities with the recent thinking in political studies about what has become known as "good governance". According to one definition of the term,

> good governance is about pursuing and promoting the greatest good for the greatest number of citizens at all times, while equally respecting and according due protection to those who may hold a different view.[15]

If democracy is seen simply as an arithmetical, procedural one determining how a government is put into or is removed from power, then we risk acceptance of crass majoritarianism. In this guise, the right to democratic governance will have obscured the substantive moral content of a truly democratic political regime, one which

> If democracy is seen simply as an arithmetical, procedural one determining how a government is put into or is removed from power, then we risk acceptance of crass majoritarianism.

[16] See in this regard Aidan O'Neill, "Scotland's Constitution and Human Rights", paragraph 2.12.

[17] Pope John Paul II, *Centesimus Annus,* 1991, at page 46.

[18] *S v Makwanyane* 1995 (3) SA 391 (CC).

[19] Ibid, at paragraph 88.

is required to protect and proclaim the value of human life, and to provide the conditions for each individual's flourishing, even in the case where a majority of the electorate may favour the deprivation or attenuation of rights for unpopular minorities—whether that be present day asylum seekers in the more developed countries of the Commonwealth, or Jews in the Germany of the early 1930s.[16]

It is the duty of the State authorities, especially in democratic systems, to stand up for and protect fundamental rights, often against majority opinion. As Pope John Paul noted in his 1991 encyclical *Centesimus Annus*, "a democracy without values easily turns into open or thinly-disguised totalitarianism".[17] I think Arthur Chaskalson, recently retired Chief Justice of South Africa, put it well in the *Makwanyane* case,[18] the landmark decision of the Constitutional Court which struck down the death penalty in South Africa in 1995. He said:

> Those who are entitled to claim [human rights protection] include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.[19]

On the Pope's or Judge Chaskalson's analysis, a political regime—even one supported or elected by a majority of the population—which sought to deny basic rights to those falling within its care, would be in danger of forfeiting the right to call itself "democratic".

> It is the duty of the State authorities, especially in democratic systems, to stand up for and protect fundamental rights, often against majority opinion.

The institutional importance of the judiciary as guardian of human rights – the interpretative twist and the trouble of counter-majoritarianism

What about the judiciary within this vision of an inclusive democracy? In a human rights world, what role should the "justices" play in the pursuit of true democracy? I think it is clear that the responsibility for a value-based, substantive commitment to democracy rests in large part on judges. The importance of the judiciary in this context is that judges in constitutional democracies are set aside as the guardians of individual rights. Their supervisory role becomes intimately tied up with ensuring and enhancing a democracy that is participatory, inclusive and open.

This ability to do justice for all individuals—including the worst and weakest in a society—is then an inherent aspect of the judiciary's institutional role in a constitutional democracy. In an age of human rights, the difference of course is that judges are afforded the opportunity and duty to do justice for all citizens by reliance on universal standards of decency and humaneness.

However, for all its emancipatory potential, this institutional role for judges comes with its own problems which must be confronted. I will touch briefly on two such problems: *first*, the problem of interpreting a text that contains commitments to universal human rights ideals expressed in broad and open-ended terms; and *second*, the counter-majoritarian problem—the problem of unelected

> A political regime—even one supported or elected by a majority of the population—which sought to deny basic rights to those falling within its care, would be in danger of forfeiting the right to call itself "democratic".

[20] *Dato Menteri Othman bin Baginda & Anor v Datuk Ombi Syed Alwi bin Shed Idrus* [1981] 1 MLJ 29 at 31.

judges overturning laws drafted by elected officials, through reliance on constitutional rights.

The twist of interpretation

The special institutional role of judges in a constitutional democracy demands of them that they interpret their constitutional document in a way that eschews formalism and literalism. Your Royal Highness put it this way in a judgment in 1981:[20]

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way—"with less rigidity and more generosity than other Acts". A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation.

For judges schooled in the tradition of narrow linguistic interpretation of laws (and there are many of them), this often poses a problem. That is not least of all because constitutional disputes can seldom be resolved with reference to the literal meaning of the constitution's provisions alone. Constitutional documents do not fall from the sky in neat and digestible form. Nor are they holy

> The responsibility for a value-based, substantive commitment to democracy rests in large part on judges. The importance of the judiciary in this context is that **judges in constitutional democracies are set aside as the guardians of individual rights.** Their supervisory role becomes intimately tied up with ensuring and enhancing a democracy that is participatory, inclusive and open.

[21] See Jeffrey Rosen, "So What's the 'Right' Pick?", *New York Times*, 3 July 2005.

writ. Rather, many of a constitution's provisions are the result of political compromises made during the drafting process. And where the document entrenches human rights the text will invariably speak to the attainment of universal and eternal standards, rather than laying down technical and easily discernible rules.

Whether one reads the American Bill of Rights, the Canadian Charter of Rights and Freedoms, the Malaysian Constitution, the Constitution of India or the South African Bill of Rights, or regional instruments such as the European Convention on Human Rights, one is struck by the general and abstract terms in which the rights are formulated. Their application to particular situations and particular circumstances will necessarily be a matter for argument and controversy.

For some judges the controversy can be resolved or avoided by seeking to uncover the "original intent" of the Founding Fathers. (There were few Founding Mothers involved in drafting early bills of rights like that of the United States Constitution!) In the United States the staunchest defender of this originalist interpretation is Supreme Court Justice Antonin Scalia. Already in the United States there is much debate about who will be appointed to replace Justice Sandra Day O'Connor following the announcement of her forthcoming retirement from the United States Supreme Court. One view—apparently endorsed by President Bush[21]—is that preference should be given to a judge who is committed to constitutional interpretation by faithful reference to the text's original meaning.

> In an age of human rights, judges are afforded the opportunity and duty to do justice for all citizens by reliance on universal standards of decency and humaneness.

[22] At least in respect of the Founding Fathers of the United States Constitution it is not insignificant that the drafters would have been white, male, heterosexual, and some would have been slave-owners!

[23] In *Lawrence v Texas* 71 USLW 4574 (2003) at 4580.

I think it is fair to say that such an interpretative stance is suspect when considered against the very idea of a constitutional document. Such a document is intended to articulate the most basic ideals of our humanity, ideals which are not static—trapped and rarefied in some bygone era[22]—but rather ideals which are often only unearthed or polished or refined as we with time stumble and struggle towards their full realisation. For this and other reasons many of Justice Scalia's colleagues on the Supreme Court disagree with him about the proper approach to constitutional interpretation. The disagreement is well captured in the reasons expressed by Justice Kennedy for deciding in June 2003 that the Equal Protection and Due Process clauses of the Eight and Fourteenth Amendments rendered unconstitutional a Texas statute criminalising private adult, consensual homosexual conduct. In contrast to Scalia's originalist understanding of the Constitution which would have allowed the law to remain on the statute books, Justice Stevens wrote this for the majority:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[23]

> Constitutional disputes can seldom be resolved with reference to the literal meaning of the constitution's provisions alone. Constitutional documents do not fall from the sky in neat and digestible form. Nor are they holy writ.

[24] *Ex Parte Attorney-General Namibia: In Re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC).

[25] Ibid, at 91D-F.

[26] Ibid.

To similar effect is the finding by Chief Justice Mahomed of the Namibian Supreme Court in a case which outlawed corporal punishment by organs of state as cruel and inhuman.[24] To him constitutional interpretation involves

> [a] value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in a civilized international community.[25]

To Chief Justice Mahomed this is not a "static exercise". Rather it is a "continually evolving dynamic". For instance,

> [w]hat may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.[26]

The approach of Justices Stevens and Mahomed – what some refer to as value-based or purposive interpretation— has increasingly come to be accepted as the most appropriate means of discerning a Constitution's true meaning. In my own country leading British Law Lords have rejected the strict legalistic approach as an inadequate means for the interpretation in particular of human rights norms.

> Many of a constitution's provisions are the result of political compromises made during the drafting process.

[27] See Johan Steyn, *Democracy Through Law: Selected Speeches and Judgments*, 2004, at pages xviii and 77.

[28] Ibid, at pages 24–26.

[29] Ibid, at page 60.

[30] Ibid, at pages 62–63.

[31] In *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 359–360 the Canadian Supreme Court opined that:

> "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. … this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter."

[32] *S v Mhlungu* 1995 (3) SA 391 (CC).

[33] Ibid, at paragraph 8.

Lord Steyn for instance has spoken against formalistic approaches to legal reasoning[27] and argues that judges must be open about all factors, including moral and ethical principles, that influence their judgments and acknowledge that different judicial answers are always possible.[28]

Importantly, to Lord Steyn interpretation is never merely a question of looking for the ordinary meaning of discrete words, nor is interpretation limited to cases where a text is ambiguous.[29] Statutes should rather be purposively interpreted as if they are speaking in the "present tense" or are "always speaking" rather than being limited to the historical context in which they first appeared.[30] This too is the view of leading constitutional courts such as the Supreme Court of Canada[31] and the South African Constitutional Court. For example, the South African Constitutional Court,[32] referring to a dictum of Lord Wilberforce, has said that:

> A constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid [what Lord Wilberforce called] "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government.[33]

> A constitutional document is intended to articulate the most basic ideals of our humanity, ideals which are not static—trapped and rarefied in some bygone era—but rather ideals which are often only unearthed or polished or refined as we with time stumble and struggle towards their full realisation.

[34] The Hamlyn Lectures, *Judicial Activism,* by The Hon Justice Michael Kirby AC CMG, Justice of the High Court of Australia, (2004), 40.

A failure to interpret a Constitution in this broad and purposive manner means not only that citizens are denied the fullest enjoyment of their rights under law. In addition, a sterile, backward-looking approach to constitutional interpretation puts the entire constitutional project at risk. As Justice Kirby, a leading human rights judge from Australia so eloquently reminds us:

> Construing a constitution with a catchcry about "legalism", with nothing more than judicial case books and a dictionary to help, and with no concept of the way it is intended to operate in the nation whose people accept it has their basic law, is a contemptible idea. As one anonymous sage once put it: if you construe a constitution like a last will and testament, that is what it will become.[34]

The counter-majoritarian dilemma

Of course, the primary criticism of such a value-based or purposive approach to constitutional interpretation is the potential it holds for judges to impose their own values of what is moral, socially beneficial or politically correct. And that leads me to highlight the second problem posed by the institutional role afforded judges in a constitutional democracy. That problem—the counter-majoritarian dilemma—has been described by one academic as follows:

> As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

[35] Dennis Davis, "Democracy – Its Influence upon the Process of Constitutional Interpretation" (1994) 10 SAJHR 104.

[36] "Supremacy of Law in Malaysia", The Eleventh Tunku Abdul Rahman Lecture, 23 November 1984. See Dato' Seri Visu Sinnadurai (ed) *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches by HRH Sultan Azlan Shah,* 2004 Professional Law Books and Sweet & Maxwell Asia, pages 13–33.

[37] Learned Hand, one of the greatest United States judges, had surprisingly strong views against judicial activism in constitutional matters. The most formal statement of his views appeared in his 1958 Holmes Lectures, and is encapsulated in the following passage:

> "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs … [having] a satisfaction in the sense that we are all engage in a common venture." (Learned Hand, *The Bill of Rights,* 1958, at pages 73–74, quoted in Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution,* 1996, at pages 342–343.)

Unlike Learned Hand, I am wholly committed to the idea of a constitutional democracy in which judges uphold rights against public morality. I see far greater value in the views of Ronald Dworkin who convincingly argues that Learned Hand's dream of living in a society in which he has "some part in the direction of public affairs", is, paradoxically, best realised through the very judicial activism that Hand deplores. See Dworkin, *Freedom's Law*, esp pages 343–347. See further the discussion below regarding the importance of judicial review as a tool for real participatory democracy.

[38] See generally Janet Kentridge and Derek Spitz, "Interpretation" in Chaskalson, et al, *Constitutional Law of South Africa,* 1996, pages 11–16.

> Constitutional review is conducted by unelected judges who are empowered to overturn the will of a democratically elected and accountable legislature in terms of a process of interpreting abstract constitutional provisions. In short, the question arises as to how to account for and justify the curtailment of the operation of a democratic political system by an unaccountable institution.[35]

Or as Your Highness pithily put it in 1984,

> … just as politicians ought not to be judges, so too judges ought not to be politicians.[36]

Those critics who are wary of the power of judges perceive the essence of the problem to be a subversion of democracy. Democracy, as it is commonly perceived, entails that political power should be disposed of by the people. When unelected judges take over the democratic role, a possible legitimacy problem emerges. The exclusive views of what Learned Hand described as a "bevy of Platonic Guardians"[37] take precedence and they alone, as an all-powerful body, may directly override the will of an elected legislature, and indirectly then, the will of the electorate.[38] What increases the tension is that in today's human rights age, judges exercise the power of judicial review by recourse to value-laden, often imprecisely worded and invariably loftily expressed constitutional rights.

An obvious riposte to critics of judicial review is to point out that the power of judicial review is accorded to

> A failure to interpret a Constitution in a broad and purposive manner means not only that citizens are denied the fullest enjoyment of their rights under law. In addition, a sterile, backward-looking approach to constitutional interpretation puts the entire constitutional project at risk.

[39] As Greenberg says in his opus on United States Constitutional Law, "[t]he scholarly historical debate over the legitimacy of judicial review curiously goes on, although it is a debate about an accomplished fact." See Jack Greenberg, *Judicial Process and Social Change: Constitutional Litigation,* 1977, page 599.

[40] McLachlin "The Charter: A New Role for the Judiciary?" (1991) vol xxxix *Alberta Law Review* 540 at 541.

[41] The Hamlyn Lectures, *Judicial Activism,* by The Hon Justice Michael Kirby AC CMG, Justice of the High Court of Australia, (2004), 72.

judges by "the people" through present day constitutional arrangements.[39] Chief Justice Beverley McLachlin's comments with regard to the Canadian Supreme Court are therefore equally apposite for other constitutional courts. She has said that:

> The fact is that the Constitution, not the judges, compels the courts to act as final arbiters of what is right and just, to stand as the guardians of the Constitution. While the courts may choose between relative degrees of judicial activism, and while the extent to which they defer to the legislative branch may vary, the fundamental fact remains that the courts cannot avoid the new responsibilities and powers which the Charter has placed upon them. The question is not whether they do it, but how they do it.[40]

Nonetheless, I would suggest that in order to keep the counter-majoritarian problem in check it behoves judges to keep in mind certain basic points if they are to avoid a legitimacy problem.

The first is that as much as human rights principles might drive a judge to conclude that a rule of the common law or a provision in a statute breaches a fundamental constitutional guarantee, judges must bear in mind, as Justice Kirby reminds them, that "one settled human rights principle is addressed to the judiciary itself".[41] That principle is encapsulated in Article 14 of the International Covenant on Civil and Political Rights, which requires not only that judges should be competent and independent, but also that

> Critics who are wary of the power of judges perceive the essence of the problem to be a subversion of democracy. An obvious riposte to critics of judicial review is to point out that the power of judicial review is accorded to judges by "the people" through present day constitutional arrangements.

[42] Ibid.

[43] Johan Steyn, *Democracy Through Law: Selected Speeches and Judgments*, 2004, page 130.

they should be impartial in the discharge of their duties. In the context of the awesome power of judges to act in a counter-majoritarian way, the principle of impartiality

> … helps to remind judges that they have no rights, as an elected legislator may, to pursue an agenda that they conceive to be in the interests of society. They are adjudicators. They must approach the resolution of the parties' dispute without partiality towards either side. Nor must they be obedient to external interest.[42]

That is so whether those outside interests are political, cultural or religious.

Aside from impartiality, judges have a duty, as Lord Steyn has put it, "of reaching through reasoned debate the best attainable judgments in accordance with justice and law".[43] This may seem an obvious point, but one that is often overlooked. In cases where judges overturn the laws of democratically elected officials their decisions often have a ripple effect through society. That is because a decision, for instance, to strike down a statute that allows the death penalty, or to overturn a law—like the Texas statute I spoke of earlier—that proscribes punishment for sexual relations between homosexuals, is to act against sometimes overwhelming public support for such laws. All the more reason then for judges to engage critically and openly with the public's opinion and to explain why they refuse to be led by it. Critical scrutiny of the public's morality might reveal that the public's opinion is swayed by information which

> Article 14 of the International Covenant on Civil and Political Rights requires not only that **judges should be competent and independent,** but also that **they should be impartial in the discharge of their duties.**

[44] John Rawls, *Political Liberalism*, 1996, page 225. Since citizens are a disparate group who hold differing views on a variety of topics, meaningful debate cannot take place between them unless they first agree on the framework and tools that make debate possible. According to Rawls, when engaging in public reason citizens may rely only on "presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial" (page 224).

[45] Ibid, at page 235.

[46] Ibid.

is false, fraught with prejudice, or mired in sentiment. In response, judges in a human rights age have the opportunity and responsibility to openly explain why such views are incorrect.

The type of persuasion that courts might employ can usefully be explained by what John Rawls calls "public reason". Rawls discusses public reason as a method of argument—a discourse of persuasion—and argues that people should engage in debate by using methods of reasoning which "rest on the plain truths now widely accepted, or available, to citizens generally."[44] This public reason is peculiarly suited to the court's work in a constitutional democracy. As Rawls has said,

> … the court's role is … to give due and continuing effect to public reason by serving as its institutional exemplar.[45]

While ordinary citizens and legislators are entitled to vote and debate on the strength of reasons that are not always public, the court has only public reason to rely on. Unlike citizens and legislators who may be influenced by majoritarian pulls and pushes, judges must "justify by public reason why they [decide] as they do" and "make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions."[46]

The same point is made, for example, by Alexander Bickel who, commenting on the United States Supreme Court's power to effect social change, says that

> Aside from impartiality, judges have a duty, as Lord Steyn has put it, "of reaching through reasoned debate the best attainable judgments in accordance with justice and law".

[47] Quoted in Jack Greenberg, *Judicial Process and Social Change: Constitutional Litigation,* 1976, at page 556.

> … the Court is the place for principled judgment, disciplined by the method of reason familiar to the discourse of moral philosophy, and in constitutional adjudication, the place only for that, or else its insulation from the political process is inexplicable.[47]

Terrorism and judicial review as an essential component of democracy

This then brings me back to democracy. Contrary to the sceptics of judicial review who believe that such a power frustrates the will of the people, it will already be clear that I am of the view that judicial review is a vital ingredient for the attainment of true, inclusive democracy.

For one thing, a purposive or value-laden theory of constitutional interpretation is built on the idea of a novel institutional role for the judiciary. Its proponents acknowledge the counter-majoritarian nature of judicial review, but argue that such an institutional role is a prerequisite for the protection of individual rights. The counter-majoritarian difficulty is then not so much a problem, as it is a tool for true democracy. The courts, insulated from the populist strains of the political process are now the guardians of principle. While the collective welfare of the community is best left to the people to decide via a majoritarian legislature, rights *against* such a collective welfare are best determined by the judges who are insulated from the demands of the political majority whose interests would override minority rights.

Critical scrutiny of the public's morality might reveal that the public's opinion is swayed by information which is false, fraught with prejudice, or mired in sentiment. Judges in a human rights age have the opportunity and responsibility to openly explain why such views are incorrect.

[48] *S v Makwanyane* 1995 (3) SA 391 (CC) at paragraph 88.

[49] 319 US 624 63 Sct 1178 (1943) at 638.

[50] Ronald Dworkin, *Life's Dominion,* 1993, page 123.

Epitomising this view, former Chief Justice Chaskalson, in the judgment of the South African Constitutional Court which struck down the death penalty as unconstitutional, had the following to say about public opinion:[48]

> Public opinion may have some relevance to this inquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. … The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.

In a similar vein are the remarks of Justice Jackson in *West Virginia State Board of Education v Barnette and Others*:[49]

> The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of the majorities ... and to establish them as legal principles to be applied by the courts. One's right to life ... and other fundamental rights may not be submitted to (the) vote; they depend on the outcome of no elections.

This institutional role ensures that courts develop what Dworkin calls a "Constitution of Principle".[50] Such a

> Unlike citizens and legislators who may be influenced by majoritarian pulls and pushes, judges must "justify by public reason why they [decide] as they do" and "make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions."

[51] Ibid.

[52] See the Islamic Human Rights Commission press release of 7 July 2005 at www.ihrc.org.uk.

constitution of principle, enforced by independent judges, is not undemocratic. On the contrary, it is a precondition of legitimate democracy that government is required to treat individual citizens as equals and to respect their fundamental liberties and dignity. As Dworkin points out,

> [u]nless those conditions are met, there can be no genuine democracy, because unless they are met, the majority has no legitimate moral title to govern.[51]

Nowhere has the importance of independent judges policing a constitution of principle become clearer than in the context of the ongoing threat and reality of terrorism. I say this in the same month that London has experienced the consequences of a series of bomb blasts killing many innocent civilians, and maiming many others. Nothing I say here could possibly be construed as making light of these horrific acts of violence, or of the responsibility imposed on the United Kingdom's and other governments to keep the public safe, or of the difficult and dangerous task performed by the police and intelligence services.

At the same time, it is all too easy for us to respond to such terror in a way which undermines commitment to our most deeply held values and convictions and which cheapens our right to call ourselves a civilised nation. Were it otherwise, it would not have been necessary for the Islamic Human Rights Commission to have reportedly warned London Muslims after the attack to stay at home for fear of reprisals.[52]

> Judicial review is a vital ingredient for the attainment of true, inclusive democracy.

[53] President Aharon Barak, "Foreword: A Judge on the Role of the Supreme Court in a Democracy", (2002) 116 *Harvard Law Review* 19, 160.

[54] [2004] UKHL 56, 16 December 2004.

[55] See the speech by Lady Justice Arden, "Human Rights in the Age of Terrorism", Third University of Essex and Clifford Chance Lecture, 27 January 2005.

[56] Lady Justice Arden points out that the speech of Lord Woolf in the Court of Appeal in *A v Secretary of State* was for instance referred to by the Supreme Court of India in December 2004: *People's Union of Civil Liberties v Union of India* 2003 SOL Case No 840.

The choice of options in response belongs to the executive or legislature. But these choices too are not unbridled. As the President of the Supreme Court of Israel has put it,

> [t]he court's role is to ensure the constitutionality and legality of the fight against terrorism. It must ensure that the war against terrorism is conducted within the framework of the law.[53]

There is an obvious conflict that arises between the need for national security and human rights. Recently the House of Lords in its decision in *A v Secretary of State for the Home Department*[54] has come to grapple with this conflict when faced with a challenge to indefinite detention of foreigners at Belmarsh prison, but not nationals, under the United Kingdom's Anti-terrorism, Crime and Security Act of 2001. The House ruled that such detention was a breach of the European Convention on Human Rights. It is a landmark decision, described by Lady Justice Arden[55] as a

> … decision that will be used as a point of reference by courts all over the world for decades to come,[56] even when the age of terrorism has passed. It is a powerful statement by the highest court in the land of what it means to live in a society where the executive is subject to the Rule of Law.

What the *A case* makes clear is that the government, even in times when there is a threat to national security, must act strictly in accordance with the law.

> While the collective welfare of the community is best left to the people to decide via a majoritarian legislature, rights against such a collective welfare are best determined by the judges who are insulated from the demands of the political majority whose interests would override minority rights.

I should add that the reaction of the general public to the decision in the *A case* has not been uniformly favourable. Lady Justice Arden has pointed out that

> [s]ome members of the public have expressed the view that the judges had taken over the government's role in deciding how to react to a terrorist threat.

Judges to educate the public and government

Of course the public has in this respect failed to appreciate that the outcome of the case was not driven by what the judges thought or felt about the appropriate reaction to a terrorist threat, but rather what the European Convention demands. I am accordingly in full agreement with Lady Justice Arden when she says that the decision in the *A case* should not be misinterpreted as a transfer of power from the executive to the judiciary. The position is that the judiciary now has the important task of reviewing executive action against the benchmark of human rights. Thus, the transfer of power is not to the judiciary but to the individual.

To my mind what the *A case* further demonstrates is the potential for judges to educate the public about the real meaning of democracy. In this age of human rights, constitutional courts the world over have found themselves cast as educators in a national forum. With each and

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[57] Eugene Rostow, "The Democratic Character of Judicial Review" (1952) 66 *Harvard Law Review* 193 at 208. See also Christopher Eisgruber, "Is the Supreme Court an Educative Institution?" (1992) 67 *New York University Law Review* 961; Ralph Lerner, "The Supreme Court as Republican Schoolmaster" (1967) *Supreme Court Review* 127; Alexander Bickel, *The Least Dangerous Branch*, 1962, page 26; Robert Bork, *The Tempting of America,* 1990, page 249.

[58] George Devenish, *A Commentary on the South African Bill of Rights,* 1999, page 4.

every contentious matter that these courts hear, judges are forced to grapple with opinions held by the public, often exemplified in parliamentary legislation subject to constitutional challenge. Judges are forced in their judgments to respond in a way that teaches citizens and government about the ethical responsibilities of being participants in a true democracy committed to universal human rights standards.

The statement by Rostow that the United States Supreme Court is, "among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar",[57] is now equally appropriate with regard to all constitutional courts. The judges' role then is a complex amalgam in which

> … the judiciary becomes the guardian of the constitution and the system of democratic values and government it embodies, which involves the protection of individual and minority rights, and inevitably involves the disciplining of certain manifestations of majority rule.[58]

This is so even when—one might say particularly when—a nation is confronted by the threat of terrorism. A judge's decision becomes then the vehicle by which one arm of the government reminds citizens of what it means to live in a democratic society. In the *A case* Lord Bingham powerfully addressed this issue in the following passage:

> There is an obvious conflict that arises between the need for national security and human rights. The government, even in times when there is a threat to national security, must act strictly in accordance with the law.

[59] [2004] UKHL 56, at paragraph 42.

> I do not accept the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true … that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the Rule of Law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 [Human Rights] Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right … . The 1998 Act gives the courts a very specific, wholly democratic mandate … .[59]

Another expression of this idea is provided by Professor Archibald Cox in his Chichele Lecture, delivered in Oxford in 1976. Discussing the role of the United States Supreme Court as a constitutional body, Cox said:

> Constitutional adjudication depends, I think, upon a delicate, symbiotic relationship. The Court must know us better than we know ourselves. Its opinions may, as I have said, sometimes be the voice of the spirit, reminding us of

> The judiciary now has the important task of reviewing executive action against the benchmark of human rights. Thus, the transfer of power is not to the judiciary but to the individual.

[60] *The Role of the Supreme Court in American Government*, Chichele Lectures, Oxford, 1976, at 117, quoted in MM Corbett "Aspects of the Role of Policy in the Evolution of Our Common Law" (1987) 104 SALJ 52, 67.

[61] Ronald Dworkin, *Life's Dominion*, 1993, at page 37.

[62] See too the views of Alan Hutchinson, "Reconceiving the Rule of Law" in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order,* 1999, at page 196. Hutchinson argues that the critics of constitutional review are obsessed with majoritarian process. In other words, they are wary of judicial review because it interferes with "democracy" as reflected in majority politics and legislation. However, Hutchinson points out that "democracy" involves a substantive element which both justifies the power of government and limits what can be done in the name of majoritarianism (hence the term "constitutional democracy"). According to Hutchinson then:

> "Once the principle of democracy is accepted to have a substantive as well as formal dimension, the justification for judicial action must also be viewed in substantive as well as formal terms. The work of courts need not be judged by their capacity to be objective and impartial nor by their willingness to be consistent with and not interfere with majority politics. Instead they can be evaluated in terms of the value choices that they make and the contribution that their decisions make to the promotion of democracy in the here-and-now." (page 209)

[63] See Dworkin, *Life's Dominion*, 1993, esp pages 343–347.

> our better selves … But while the opinions of the Court can help to shape our national understanding of ourselves, the roots of its decisions must be already in the nation.[60]

This process, I would suggest, is democracy *affirming*, rather than democracy *limiting*. As Ronald Dworkin has emphasised with regard to the United States Constitution, a moral reading of the constitution demands that judges make contemporary judgments of political morality, and it therefore encourages an open display of the true grounds of judgment. Only with those true grounds of judgment out in the open do judges stand a hope of constructing "franker arguments of principle that allow the public to join in the argument."[61]

Dworkin argues that a government where citizens actively debate the principled issues of the day would be better realised when final decisions involving constitutional matters are removed from ordinary politics and left to the courts.[62] That is because ordinary politics generally prevent any reasoned argument from occurring, since such politics are usually aimed at political compromise between the most powerful groups. However, when an important constitutional issue has been decided by the Supreme Court, the debate around that issue is then forced to deal with the reasoned judgment of the court, and better achieves that vision of a government in which all citizens have a chance to engage in the "common venture" of public debate.[63]

> Judges in their judgments respond in a way that teaches citizens and government about the ethical responsibilities of being participants in a true democracy committed to universal human rights standards.

[64] See Hutchinson, "Reconceiving the Rule of Law", note 62, above.

[65] Ibid.

[66] See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, 2000, at page i.

In contrast therefore to the depiction of a constitutional court as a "deviant institution" [64] by those who are fearful of its counter-majoritarian tendencies, it becomes more appealing to understand the court as a "democratic institution".[65] Its democratic potential lies not only in its guardian role of ensuring that a government "show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance";[66] it lies also in the vital and complementary role that judges can play in engaging with national issues so as to create a public dialogue about the core human rights values that lie at the heart of all inclusive, open democracies. In our troubled times, where terrorism, division, and suspicion of others are the order of the day, this role for judges is perhaps more vital than ever before.

The importance of cross-constitutional dialogue

In an age of human rights, the process of judging which I have been speaking about thus far is no longer one to be undertaken by national judiciaries in isolation. Today we can see the extent to which judging is now an international business. While reference to foreign and international law in United States cases may still be somewhat rare and controversial, the fact is, as Anne-Marie Slaughter has pointed out, there is a growing trend towards cross-constitutional discussion and learning with judges in Israel inspecting Canadian precedents on minority rights cases, and judges in the South African Constitutional Court

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[67] Anne-Marie Slaughter, "Judicial Globalisation", *Virginia Journal of International Law* 40 (2000); Anne-Marie Slaughter and David Bosco, "Plaintiff's Diplomacy", *Foreign Affairs* 79 (September/October 2000): 102.

[68] Johan Steyn, *Democracy Through Law: Selected Speeches and Judgments*, 2004, page 159.

[69] Claire L'Heureux-Dube, "The Importance of Dialogue: Globalisation and the International Impact of the Rehnquist Court", (1998) *Tulsa Law Journal* volume 15 at 17.

[70] Ibid, at 21.

[71] See Lord Goff of Chieveley, "The Future of the Common Law" (1997) 46 ICLQ 745 at 748.

studying German cases to interpret social and economic rights claims.[67] In the United Kingdom, both during the period of semi-incorporation of the European Convention on Human Rights before the Human Rights Act was passed and now most certainly after the Human Rights Act came into force, British lawyers and judges have looked to foreign and international law for guidance in human rights cases. That is not surprising when one connects, as does Lord Steyn, constitutional reform in the United Kingdom to the constitutional "renaissance" throughout the Commonwealth.[68]

There is an increased sophistication in and acceptance of what Canadian Supreme Court Justice Madame L'Hereux-Dube has called "dialogue": the practice of citing, analysing, relying on, or distinguishing the decisions of foreign and supranational tribunals.[69] Whereas the earlier practice was one of "reception"—newly created constitutional courts applying the reasoning of older tribunals, particularly British and American courts—Justice L'Hereux-Dube highlights that today judges live and practice a new trend: one in which courts look to a "broad spectrum of sources" and "mutually read, and discuss, each others' jurisprudence" in a transcultural constitutional dialogue.[70] In equal vein, Lord Goff of Chieveley has warned that

> [c]omparative law may have been the hobby of yesterday, but it is destined to become the science of tomorrow. We must welcome, rather than fear its influence.[71]

> A moral reading of the constitution demands that judges make contemporary judgments of political morality, and it therefore encourages an open display of the true grounds of judgment.

[72] Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108 *Yale Law Journal* 1225 at 1232.

[73] Ibid at 1232. See too Justice Breyer in his extrajudicial writings where he argues that reliance on international and transnational precedents aids United States constitutional interpretation, "simply because of the enormous value in any discipline of trying to learn from the similar experience of others": Stephen Breyer, Keynote Address, (2003) 97 ASIL Proc 265 at 267. See also La Forest J in her extrajudicial writings, "The Use of American Precedents in Canadian Courts" (1994) 46 *Maine Law Review* 211 at 220:

> "The greater use of foreign material affords another source, another tool for the construction of better judgments … The greater use of foreign materials by courts and counsels in all countries can, I think, only enhance their effectiveness and sophistication."

[74] See the special issue "Constitutional Borrowing" (2004), *International Journal of Constitutional Law*, vol 2, 1, 178, cited in Jolyon Ford, "International and Comparative Influence on the Rights Jurisprudence of South Africa's Constitutional Court", in Max du Plessis and Stephen Pete (eds), *Constitutional Democracy in South Africa 1994-2004*, 2004, Butterworths Lexis Nexis, Durban, at page 44, footnote 65.

This "science of tomorrow" is an important one, no doubt. It is important for all justices who preside over superior courts. As Mark Tushnet, a leading American constitutional scholar puts it, thinking about, and drawing from, the constitutional experience of other courts "can be part of the ordinary liberal education of thoughtful lawyers."[72] After all "if one believes that constitutional interpretation is the application of reason to problems of governance within a framework set out in the Constitution's words, experience elsewhere is relevant because it provides information that an interpreter committed to reason might find helpful".[73]

To believe otherwise is to cling to the implausible notion that a judge cannot expand his or her awareness and knowledge by drawing on other sources and experiences. Surely the importance of comparative constitutional lawyering—whether one is an American, British, South African or Malaysian judge—is its potential to act as "a counter to the natural, parochial tendencies of national constitutional theory, method, law"?[74]

In this context a leading academic has explained that:

> Confronting the power of others' ideas about common problems or concerns can contribute to a better intellectual product and can also impose the discipline of explanation upon the decision-maker. … Confrontation with and reasoning about the relevance and persuasive value of significant foreign decisions on analogous problems adds

> Today judges live and practice a new trend: one in which courts look to a "broad spectrum of sources" and "mutually read, and discuss, each others' jurisprudence" in a transcultural constitutional dialogue.

[75] VC Jackson, "Narratives of Federalism: Of Continuities and Comparative Constitutional Experiences" (1999) 51 *Duke Law Journal* 223 at 254–260; see also his statement that "even if the reasoning of the foreign court ultimately is rejected, explaining why it is inapplicable or wrong could improve the quality of the court's reasoning, making its choices more clear to the audience of lawyers, lower courts, legislators, and citizens". (Ibid)

> to the mechanisms of accountability, through reason giving.[75]

The fact of the matter is that the international nature of constitutionalised human rights means that domestic judges are engaged in a common exercise. Even as they seek solutions to local problems, they do so by drawing on an increasingly interconnected global set of standards, and by considering the experience of others who have faced similar issues.

I return again to the problem of terrorism. While each of the world's nations have localised responsibilities to their citizens to act against terrorism, the experience of others who face similar threats and have considered appropriate responses is of obvious importance. For instance, the House of Lords in the *A case* appears to have drawn inspiration from the findings of the Israeli Supreme Court which has developed a unique jurisprudence on the judicial approach to counter-terrorism laws. President Barak has given many judgments on this issue. One discerns a close parallel in thinking between the House of Lords in *A* and the oft-quoted passage in the ticking bomb case, in which President Barak said:

> We conclude this judgment by revisiting the harsh reality in which Israel finds itself …
>
> We are aware that this decision does not make it easier to deal with that reality. This is the fate of democracy, as not all means are acceptable to it, and not

> The importance of comparative constitutional lawyering is its potential to act as "a counter to the natural, parochial tendencies of national constitutional theory, method, law".

[76] Justice Michael Kirby, *Through the World's Eye,* 2000, Federation Press, Sydney, *Preface.*

> all methods employed by its enemies are always open before it. Sometimes, democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the Rule of Law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.

I venture to suggest that such comparative learning is vital to democracies around the world. Our problems are not unconnected and our democratic aspirations are not dissimilar. As Justice Kirby of the Australian High Court has pointed out in his book *Through the World's Eye*, while we once may have seen "issues and problems through the prism of a village or a nation-state, especially if we were lawyers" today, in an age of human rights, "we see the challenges of our time through the world's eye".[76]

Conclusion

It has come time now for me to conclude. Although there are many that through their actions diminish the claim, I think it is important for us to stress that we do live in an age of human rights, in a human rights world. As my Matrix colleague Rabinder Singh QC has said:

> Since World War Two, in particular, the age-old problem of whether there are human rights and where they come from—whether from pure reason, natural law, divine

> This age brings with it huge potential for justices of the world's highest courts to speak a common language. Independent judges providing purposive interpretations of their country's most fundamental rights are an important component of any true democracy.

[77] Rabinder Singh, *The Future of Human Rights in the United Kingdom: Essays on Law and Practice*, 1997, at page 38.

> origin or universal custom—has been largely avoided, if not resolved, by the social fact that the international community has come to accept a set of principles as being of global application.[77]

This age brings with it huge potential for justices of the world's highest courts to speak a common language. Independent judges providing purposive interpretations of their country's most fundamental rights are an important component of any true democracy. As judges embark on constitutional interpretation they are afforded the chance to narrate the values that underpin the very essence of our humanity. This is not only a democratic role played by courts that act as guardians of the weakest, poorest, and most marginalised members of society against the hurly-burly of majoritarian politics. It is also a chance for judges to play a vital role as teachers in a national seminar on the topic of meaningful, inclusive democracy in the twenty-first century. In this role, the rhetorical possibility exists for judgments to draw upon relevant comparative and international rights experience to paint enriched and enriching tapestries of our common human rights and international law commitments.

We live in challenging times. Our institutions are under threat; our commitments to our deepest values are under pressure; our acceptance of difference and others is at a low point. It is at this time that our understanding of the importance of judges in a human rights age should be at its clearest. And it is at this time that our support for the difficult task that judges have to perform is at its highest.

Courts must consider the traditions of their own nations in interpreting their respective constitutions. Still, the experience of other nations may be instructive. As Your Highness wrote in this context,

"The law must develop and grow. We should not be insular but expand our horizon by looking at case law of other common law jurisdictions as well. We should then adopt what is most suitable to us in the Malaysian context." *(Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches, 2004)*

Justice Anthony Kennedy
Written Constitutions and the Common Law Tradition
20th Sultan Azlan Shah Law Lecture, 2006

The Right Honourable Justice Anthony Kennedy

Written Constitutions and the Common Law Tradition

Anthony McLeod Kennedy
(b. 23 July 1936*)*

Widely viewed by conservatives and liberals alike as balanced and fair, Justice Anthony Kennedy was sworn in as an Associate Justice of the United States Supreme Court on 18 February 1988, upon President Ronald Reagan's nomination.

His appointment to his current judicial office would appear to have been charted from his youth. Born in central California in 1936 to Anthony J Kennedy, a respected private legal practitioner, and Gladys McLeod Kennedy, a leader in Sacramento civic activities, Justice Kennedy was exposed early in his life to the workings of the law: at age eleven, he worked after school for the state Senate as a page boy; later on he spent time in his father's law office proofreading wills and accompanying his father at counsel table while Kennedy Senior tried cases.

After attending public school in Sacramento, Justice Kennedy went on to obtain his BA from Stanford University and the London School of Economics, and his LLB from Harvard Law School.

Justice Kennedy then went to work for a private law firm in San Francisco. His father unexpectedly died in 1963 and Kennedy returned to Sacramento to run his father's law firm, a post he held for the next 12 years. He also served as a Professor of Constitutional Law at the McGeorge School of Law of the University of the Pacific from 1965–1988.

At the age of 38, when he was appointed to the Court of Appeals in 1975, Justice Kennedy was one of the youngest in the history to be appointed as a federal appellate judge in the United States. In 1988, he was unanimously voted by the Senate to the Supreme Court.

Through the opinions he has held in the cases that have come before him, Justice Kennedy has gained a reputation as a judge who is conservative but not confrontational, able to build bridges to more liberal judges. Justice Kennedy has played a pivotal role in some important decisions of the Supreme Court.

Some landmark decisions

As a Justice of the United States Supreme Court, Justice Kennedy has participated in, and delivered the majority opinion of the Supreme Court in many landmark cases in recent years, involving novel and important aspects of the law, including constitutional law, due process, personal liberty, administration of justice, right to life, discrimination, and affirmative action just to name a few.

Rights of suspected terrorists

In *Boumediene v Bush* (2008), Justice Kennedy, writing the majority opinion of the Supreme Court, found that the constitutionally guaranteed right of habeas corpus applied even to persons held in Guantanamo Bay on suspicion of terrorism, holding that suspension of that right under the Military Commissions Act of 2006 was unconstitutional. Justice Kennedy pointed out that there may be times where the courts may have to abstain from "questions involving formal sovereignty and territorial governance … [but to] hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.' *Marbury v Madison* (1803)."

In the same case, in dealing expressly with terrorist threats, Justice Kennedy observed:

> The real risks, the real threats, of terrorist attacks are constant and not likely soon to abate. The ways to disrupt our life and laws are so many and unforeseen that the Court should not attempt even some general catalogue of crises that might occur. Certain principles are apparent, however. Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept. …
>
> Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary

as the responsibility to hear challenges to the authority of the Executive to imprison a person.

Justice Kennedy also participated in other landmark Supreme Court cases dealing with the rights of detainees in Guantanamo Bay such as *Rasul v Bush* (2004), *Hamdi v Rumsfeld* (2004), and *Hamdan v Rumsfeld* (2006).

Administration of criminal justice

In the area of administration of criminal justice, Justice Kennedy has been consistently an advocate of rights of prisoners and other offenders, most notably in cases involving juvenile offenders and also overcrowding prisons.

Juvenile offenders: death penalty and life imprisonment without parole

The constitutionality of the death penalty for juvenile offenders was considered by the Supreme Court in *Roper v Simmons* (2005) (a case referred to by Justice Kennedy in the Twentieth Sultan Azlan Shah Law Lecture). Justice Kennedy, writing the majority opinion, ruled that it was unconstitutional to impose the death penalty on juvenile offenders.

Justice Kennedy once again wrote the majority opinion of the Supreme Court in *Graham v Florida* (2010), ruling that the Constitution did not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime. In this case, Justice Kennedy meticulously analysed the general principles of criminal sentencing, considered earlier decisions of the Supreme Court on the issue, including *Roper v Simmons*, before making references to the international opinions and principles adopted by other countries in dealing with a similar issue. He then poignantly pointed out:

There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over …

The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. See, eg, [*Roper v Simmons*] … Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question. …

The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, "the overwhelming weight of international opinion against" life without parole for non homicide offenses committed by juveniles "provide[s] respected and significant confirmation for our own conclusions." *Roper*, supra, at 578.

Overcrowded prisons

In *Brown v Plata* (2011) the Supreme Court considered the effect of overcrowding of prisons in the State of California, ruling that "[c]onditions in California's overcrowded prisons are so bad that they violate the Eighth Amendment's ban on cruel and unusual punishment", and ordered the State to reduce its prison population by more than 30,000 inmates. Justice Kennedy, writing for the majority, described such a prison system which failed to deliver minimal care to prisoners with serious medical and mental health problems as producing "needless suffering and death". The majority opinion included photographs of inmates crowded into open gymnasium-style rooms and what Justice Kennedy described as "telephone-booth-sized cages without toilets" used to house suicidal inmates, and highlighted that suicide rates in the State's prisons have been 80 percent higher than the average for inmates nationwide (*The New York Times*).

Privacy and freedom of speech: "pure speech and commercial speech"

Justice Kennedy is a fervent supporter of the right to privacy and freedom of speech. As he observed in the recent case of *Sorrell v IMS Health Inc* (2011), "Privacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers."

Justice Kennedy has participated in numerous Supreme Court cases involving the validity of regulations affecting internet and broadcasting, such as *Ashcroft v ACLU* (2004), *Turner Broadcasting v Federal Communications Commission* (1997) and the *AT&T cases* involving the interpretation of provisions of the Freedom of Information Act: *Talk America Inc v Michigan Bell Telephone Co* (2011) and *FCC v AT&T Inc* (2011).

Justice Kennedy also participated in the case of *Citizens United v Federal Elections Commission* (2010), which is perhaps the most important recent decision of the Supreme Court dealing with issues of freedom of speech, election funding and information in the context of corporations. On political speech, Justice Kennedy observed:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. … The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." … For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. … We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers …

Justice Kennedy then pointed out that even a corporation had the same right to political speech:

> Under the rationale of these precedents, political speech does not lose First Amendment protection "simply because its source is a corporation" ... The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons."…

The following observations made by Justice Kennedy in his opinion in *Citizens United* on the changes in "speech dynamic" are noteworthy:

> With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred …
>
> When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves …
>
> Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials. …

On new forms and forums in relation to speech, Justice Kennedy added:

> Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues … The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech. …
>
> Governments are often hostile to speech … "Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it." [*McConnell v Federal Election Commission* 540 US 93], at 341 (opinion of Kennedy J).

Comparative law and constitutional interpretation

Justice Kennedy recognises the importance of comparative law in the interpretation of the Constitution of the United States, often making reference to common law developments, and to other international opinions and conventions in his opinions, as can be seen for example in the cases of *Boumediene v Bush* (2008), *Roper v Simmons* (2005) and *Alden v Maine* (1999). However, in *Graham v Florida* (2010), he observed that in so doing "[t]he judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But '[t]he climate of international opinion concerning the acceptability of a particular punishment' is also 'not irrelevant'."

Non-judicial involvements

Justice Kennedy wrote and created the framework for the *Trial of Hamlet*, a mock trial where forensic psychiatrists testify regarding Hamlet's criminal responsibility, and the jury renders a verdict. Justice Kennedy performed it for the Shakespeare Society in Washington, DC; for the Boston Bar Association in Boston, Massachusetts; for the Chicago Humanities Festival in Chicago, Illinois; and more recently in 2011 for the Shakespeare Center of Los Angeles.

Justice Kennedy has lectured in law schools and universities throughout the United States and has visited and lectured at over 125 different universities. In addition to teaching students, he has given lectures in teaching methods to law professors. He has also taught at universities in other parts of the world, particularly in China, where he is a frequent visitor. Some of his lectures to groups in China have been disseminated throughout that country. He is a member of the Asian Law Initiative of the American Bar Association. Beginning in 1986, he has taught each year at the University of Salzburg, Austria. The course, entitled *Fundamental Rights in Europe and the United States*, has attracted students from throughout the United States, Europe, and other countries.

Justice Kennedy also served on the board of the Federal Judicial Center and on two committees of the US Judicial Conference. In response to a keynote address to the American Bar Association, the ABA convened the Kennedy Commission on Criminal Justice. That Commission issued a comprehensive report and remains active in proposing changes in the areas of corrections and rehabilitation. Justice Kennedy is a member of the United Nations Commission on the Empowerment of the Poor.

He and his wife, Mary, who is also a native of Sacramento, California, have three children.

The Rule of Law requires fidelity to the following principles:

1 The Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all its officials.

2 The Law must respect and preserve the dignity, equality, and human rights of all persons. To these ends the Law must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them.

3 The Law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfil just expectations and seek redress of grievances without fear of penalty or retaliation.

20

Written Constitutions and the Common Law Tradition

Justice Anthony Kennedy
Supreme Court of the United States

Text of the Twentieth Sultan Azlan Shah Law Lecture delivered on 10 August 2006 in the presence of His Royal Highness Sultan Azlan Shah.

Your Royal Highness Sultan Azlan Shah; Your Royal Highness Sultan Idris; Your Royal Highness the Crown Prince; and my fellow citizens of a world still in search of better understanding through the Rule of Law.

Thank you for inviting me to deliver the Sultan Azlan Shah Law Lecture. For the last 20 years jurists and academics have come to Malaysia to address the state of the law and its progress. It is an honour to contribute to this outstanding lecture series in your nation, which is committed to a written constitution and the rights it guarantees to all of your citizens.

The continuance of this lecture series is a tribute to His Royal Highness Sultan Azlan Shah's steadfast commitment to the Rule of Law. The distinguished way you discharged your duties to the judiciary, Your Royal Highness, and the evident purpose in your life and thought

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decisions.
So judges must find
and respect special constraints
when they turn to
constitutional adjudication.

to preserve and ennoble the law confirm the resolve of those who still serve on the Bench. Your example and your friendship inspire us to rededicate ourselves to the law and its promise. Thank you for your sponsorship, your gracious welcome, and for the honour you and your family and His Royal Highness Sultan Idris confer by being in attendance here today.

It is a pleasure, too, to express our warm thanks to Dr Visu Sinnadurai for extending the invitation to deliver this lecture and to visit your country. Dr Visu's own respect for the law and his wise and gentle counsel are a tribute to your nation and its people. Thank you so much, Dr Visu, for your many courtesies to all of us.

As the first American to have the privilege to participate in this lecture series, it seems to me appropriate to discuss my own country's approach to a difficult challenge in the law: how a judiciary should interpret a written constitution to preserve its original promise and structure in the context of inevitable changes taking place over time. My thesis is that the American courts could not have discharged this responsibility were it not for their own training and background in the common law, its substance, its processes, and its traditions.

It must be clear at the outset that a decision interpreting a constitutional provision has consequences quite different from a decision interpreting or elaborating the common law. Legislatures can change common

"The common law method has proven in the history and tradition of our Court to be instructive, and often necessary, when we interpret our written constitution, the Constitution of the United States."

law precedents in the ordinary course but do not have this latitude with respect to constitutional decisions. So judges must find and respect special constraints when they turn to constitutional adjudication. Not the least of those constraints is the special care that must be taken to ensure that the constitutional text and its purpose are the framework for the inquiry.

My object here is not to explore and define those constraints in detail, other than to note that this whole subject has been one of absorbing interest in America since the founding of our Republic. My more narrow thesis today is to say that, assuming those constraints can and will be expressed and explored by the courts as part of the on-going process of discerning our Constitution and its meaning, the common law method, or, to be more precise, an analogue of the common law method, has proven, in the history and tradition of our Court, to be instructive, and often necessary, when we interpret our written constitution, the Constitution of the United States.

The common law tradition and constitutional development

Let us begin with the English common law tradition that was transmitted to our two countries as well as to other nations that sought to establish a legal system that could guide their judges and be accepted as just by their people.

It is our human destiny
to venture beyond
what we know.
It is our destiny
to strive to touch
what once might
have seemed
beyond reach.
It is our destiny
to learn and then
to teach.

These were the forces driving
the common law as it emerged
from the doubts and obscurities
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It is our human destiny to venture beyond what we know. It is our destiny to strive to touch what once might have seemed beyond reach. It is our destiny to learn and then to teach. These were the forces driving the common law as it emerged from the doubts and obscurities of ancient times to define legal principles and a legal process.

The common law had to emerge from the tensions, the dualities that are always part of the human experience: the dualities of ignorance and insight; malice and magnanimity; recognition of human limitations and the human instinct and determination to find new truths.

Beyond these dualities common to human experience then and now, the work of elaborating the law was difficult when the world of thought was constrained by other dualities that, considered in present terms of reference, would all but blind any real clarity of vision; for in ancient times superstitions held sway where science and rationality now seek to come forward.

Our predecessors in the law commenced their work when the world of thought had yet to confront dualities that today are known and understood, even if not resolved. Among these were the distinctions, or the lack of all distinction, between superstition and psychology; between physics and folklore; between magic and medicine; between the laws of God accepted by faith and the laws of natural phenomena that can be demonstrated. All these were barriers to clarity of thought and accuracy of judgment.

> The essential role courts play in illuminating our constant search for the meaning of justice is more than a source of professional pride. It can be defended on grounds that **it is society's way of searching for justice.**

Still, beginning at least from the time of King Henry II of England, judges began to give reasons for their decisions. By doing so they could strive to convince the litigants that their case had been decided in a neutral way and by neutral principles. From this process stability and consistency emerged when the decision, and any later resulting general principle, proved sound. Thus did the common law seek to find its own meaning; thus did it seek to discover itself.

And so the law proceeded case by case to explain our own behaviour and to build upon what is honourable in human striving and motivation. Down through the centuries the law sought to define concepts of guilt, negligence, and damages. As a result, consideration and performance in contracts, fault and causation in torts, and the proper measure of damages for different causes of action had been explained and elaborated in considerable detail by the mid-part of the 18th century. When the common law seemed to stall, or become captive to its fictions, the legislative power stepped in, as in the case of statutes that were necessary to define the crime of embezzlement.

The 18th century saw consolidation of this process of explanation and synthesis with the entry on stage of an important writer in the law and with the culmination of a profound philosophical influence. The writer was Blackstone. Whatever doubts there were about a now-complex common law that could present difficulties even to its judges, Blackstone's synthesis demonstrated a remarkable degree of coherence in common law doctrines and their

> When the common law seemed to stall, or become captive to its fictions, the legislative power stepped in.

suitability for an ever more sophisticated world of trade and manufacturing. *Blackstone's Commentaries* demonstrated that common law can make common sense. The author had a wide readership in the American colonies. In the late part of the 18th century sales of *Blackstone* in America were second only to those of the Bible. In an age that drafted constitutions, including the Polish Constitution in 1791 and then the Napoleonic Code in 1804, publication of the Commentaries might have counselled against any grand undertaking to codify the common law.

The philosophic influence, dating before Blackstone and comprising a far larger universe than the law and its commentaries, was the expansive thought of the Enlightenment. Eighteenth century statesmen considered themselves to be the beneficiaries of Enlightenment thought. When Isaac Newton, a century before the American constitutional convention in Philadelphia, explained the law of gravity, he kept in motion the idea that humankind might define and set forth the laws of the natural universe. The Americans asked why stop there? Why not define as well the principles of good government?

When the framers of the Constitution met in Philadelphia, the Enlightenment had emboldened them with a newfound confidence that freedom could be more secure if government existed by conscious design. If the common law courts, working through centuries of doubt and superstition, could devise a framework with a rational order, as set out in so substantial a way by Blackstone,

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[1] *McCulloch v Maryland* 4 Wheat. 316, 415 (1819).

how much more successful could the Americans be if the Constitution provided a rational structure at the outset? With constitutions, just as with the common law, consistency and a just order could be sought by rational inquiry and discourse.

While the common law provided cause for optimism in the enterprise of establishing a law that binds the government and gives rights to the person to challenge arbitrary official action, it taught another lesson. It taught this warning: Do not try to impose a legal system with rules so detailed and precise that they do not allow the system to learn from human experience. As John Marshall, the great American Chief Justice, observed in one of the first leading decisions interpreting the new charter: A constitution is "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." [1]

The crises of human affairs, or, to be less dramatic, the rules for resolving a simple quarrel between two litigants, cannot be predicted with complete accuracy. So, too, a constitution that seeks to provide a detailed set of answers risks mistake and the consequent loss of confidence among the people.

When they wrote the Constitution and the Bill of Rights the framers used inspiring, resounding phrases, but phrases often of generality, not narrow, specific meaning. The Constitution, with but little elaboration, addresses freedom of speech and freedom of the press; the right of

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the people to be secure against unreasonable searches and seizures; and the right not to be deprived of life, liberty, or property without due process of law.

If the framers had presumed to know each and every precept for a just society, they would have been more specific. They were not so brazen. They were more modest, more thoughtful, more respectful of the precept that to err is human. They knew that any one generation, including their own, can be blind to the persisting injustices, the prejudices, the inequalities of its own time. The whole idea of a constitution is to allow each succeeding generation to rise above the inequities obscure to those who first adopt it.

What then was the means of keeping a constitution? One mechanism to evolve was judicial interpretation, a process subject to debate, skepticism, and sometimes ridicule, at the beginning even as now. Its detractors notwithstanding, the process has served us well. It is the basis not only for resolving disputes but also for teaching the meaning of freedom.

The framers were well aware of the possibility that some judges could be hostile to liberty. The Declaration of Independence, after all, gave as one justification for the Revolution the oppression of tyrannical judges. Despite this, the framers provided not just for a judiciary but a judiciary with life tenure. They were convinced from their common law experience that an independent judiciary was essential for constitutional government.

“While the common law provided cause for optimism in the enterprise of establishing a law that binds the government and gives rights to the person to challenge arbitrary official action, it taught another lesson. It taught this warning: Do not try to impose a legal system with rules so detailed and precise that they do not allow the system to learn from human experience.”

As the Marshall Court and the Supreme Court in the decades that followed began to develop doctrines of constitutional interpretation, our understanding of constitutional dynamics progressed. In tandem with an increasing awareness of the judicial power in constitutional interpretation, the common law in the mid-19th century was coming to a new awareness of the sources and foundations for its own rules. There was now a clear recognition that reason and sound policy, not blind adherence to unarticulated premises, were the surest source of law.

Oliver Wendell Holmes Jr was one of the most gifted participants in this process. He wrote:

> The truth is that law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

In commenting on the judicial process, Holmes made this further remark:

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, consideration of what is expedient for the community concerned.

As John Marshall, the great American Chief Justice, observed in one of the first leading decisions interpreting the new charter: A constitution is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

Holmes was surely right to point out that we must articulate our premises. His observations taught generations of judges and commentators to do just that. His constant tendency to suggest that expedience is the foundation for wise policy seems to me a too limited and constrained interpretation of the principles and moral underpinnings that guided the framers. That discussion can be left for another time. The point here is that the reasons animating a judicial decision can and must be explained.

In a non-constitutional case the safeguard that the common law judge has in knowing that a wrong decision or unsound rule can be corrected by legislative action is welcomed, not resented, by the judge. Let there be no mistake about this: a judge who knows a legislature can change a rule has a sense of confidence, of reassurance, of satisfaction, in knowing that the judgment of the court will not be binding for future cases if a legislature chooses to change it. That reassurance is not present in cases involving constitutional interpretation. In constitutional cases a judge must make doubly sure that a sound policy is justified by the constitutional text, prior cases, and the well-accepted principles and traditions of the people.

By relying on the reasoning of prior cases, courts engage in principled decision-making and draw upon the accumulated knowledge and insight of dedicated jurists who have confronted similar questions. In *Calvin's Case*, a seminal English decision from 1608, Lord Edward Coke made this observation on the utility of the case law process:

> The crises of human affairs, or, to be less dramatic, the rules for resolving a simple quarrel between two litigants, cannot be predicted with complete accuracy. So, too, a constitution that seeks to provide a detailed set of answers risks mistake and the consequent loss of confidence among the people.

> [T]he laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience (the trial of light and truth) fined and refined, which no one man (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto.

The common law method depends upon our knowledge of the customs and traditions of our people. And a constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles that preserve their freedom.

The common law method in constitutional interpretation

Let us now turn to constitutional interpretation and to two illustrations of its reliance on the common law method.

The Fourth Amendment guarantees the right of the people to be secure in their homes against unreasonable searches and seizures. By their considered choice of the term "unreasonable", the framers must have anticipated that its meaning could be apparent only over the course of time; and they must have intended that the judiciary would elaborate the meaning of the provision from case to case.

The Supreme Court of the United States, like so many other courts in our system, has devoted substantial time

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[2] 126 S. Ct. 1515 (2006).

and resources to interpreting the Amendment. In just the last two decades the Supreme Court has decided over 60 search and seizure cases. The case-by-case methodology of the common law, borrowed by the courts for constitutional interpretation, is a limit on the discretion of the judges. We do not start from square one each time we consider a question. Instead, we must consider how the basic principle has been embodied and elaborated in our whole long tradition.

As you well know, one of the recurring fascinations of the case law method is that lawyers and judges sometimes find that what appears to be a simple, fundamental, straightforward question has not been answered by a decided case—not last year, not last decade, not for the last 200 years. This was the problem the Court confronted last term in *Georgia v Randolph*.[2]

The issue was a simple one. It is well established that police may search a home if they have consent of the occupant to do so. What happens, though, if two occupants are present and one consents to the police entry but the other objects? The background, an all too familiar prelude for many legal disputes, was a troubled marriage. Scott Randolph had been living with his wife, Janet Randolph; but she left their home for several months, taking the couple's young son with her. Later she returned. After an argument, Scott Randolph left the house with the child. Janet Randolph called the police. Upon their arrival, she told them of her concerns for the boy and added that her

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husband was a cocaine user. As the wife was talking with the police, the husband came back to the house. (The child had been left with friends.)

Confronted with the allegations by the wife that the husband used cocaine, the husband denied wrongdoing. Indeed, he countered by saying his wife abused drugs and alcohol. At that point, Janet Randolph volunteered that "items of drug evidence" were inside the house. An officer asked the husband for permission to enter. He unequivocally said no. The officer asked the wife; she consented; the officer entered. He found evidence of cocaine use. Based on the discovery, the officer obtained a warrant to search the house. The warrant-based search disclosed further evidence of drug possession and use. The State of Georgia charged the husband with drug offenses. The issue was whether the evidence was admissible at trial.

Two background rules were clear. First, if a warrant is issued based on evidence obtained earlier in an illegal entry, the warrant is defective, and, as a general matter, cannot support a later search. Second, if an entry is based on consent, the entry is lawful. So we come to the basic question: Suppose the wife consents to police entry but the husband, who is also present, does not. May the officers enter? Or is this a correct statement of the issue? Is it a better formulation to ask about co-occupants or co-tenants, comprising a larger definitional set than husband and wife? Does it really make a difference that the occupants are married? All of the Justices framed the issue not in terms of husband vs wife but rather as co-occupant vs co-occupant.

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Perhaps you are interested to know the outcome. In a 5-4 decision, the Court held that, at least in these circumstances, the objection of an occupant who is present overrides the consent of the co-occupant. So there was no valid consent for the initial police entry. The state court, which had reached the same conclusion and ordered the evidence suppressed, was affirmed.

The decision to focus on the relation between occupants of the home, and not the narrower subset of husband and wife, was not discussed by the Court. The underlying premise seems to be that if a co-tenant who is not married can foreclose police entry by withholding consent, the right of a married person to object should be no less.

Perhaps you are thinking that the term "occupant" is somewhat imprecise for such an important inquiry. Should we not talk in terms of co-lessors or co-tenants? If we did, would we not find in the law many precedents instructing us regarding conflicting rights and duties when co-tenants or co-lessors disagree about how the property is to be used? The Court did not attempt to rely upon these cases. It concluded the Fourth Amendment interest here is defined as a societal expectation of privacy.

Why is it, both in the case of a common law dispute and a constitutional adjudication, that we rely on judges to state what societal expectations are? Are not judges sometimes among the more cloistered, even reclusive, members of

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[3] *Georgia v Randolph* 126 S. Ct. 1515 (2006), at 1521–1522.

[4] Ibid, at 1522–1523.

our society? There are various answers, it seems. To some extent the judges' conclusions are descriptive, that is to say descriptive of a prevailing norm. The judges are not relying upon their personal experiences. The judges are framing an objective definition of a prevailing norm based on data and arguments presented by counsel and the contending parties. Judges give reasons for their decisions, so there is clarity. Judges give the reasons in the same mode of analysis over time, so there is consistency. A ruling as to the contours of the societal norm, furthermore, is not entirely descriptive. It is normative as well. The Court, again instructed by arguments and contentions of the members of its bar, reaches a judgment respecting whether an expectation of privacy in a specific context is a reasonable one given our history and traditions as a people.

So, the Court noted, it is a usual social expectation among a group of tenants that "any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." [3] In the situation where the co-occupant is present and objects to entry, however, the Court determined that a different understanding obtains. The Court observed,

> [I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out". Without some very good reason [such as a health or safety emergency], no sensible person would go inside under those conditions.[4]

> The common law method depends upon our knowledge of the customs and traditions of our people. And a constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles that preserve their freedom.

[5] See ibid, at 1534.

In other words if someone comes to your door and your roommate tells him to enter but you tell him to go away, the person ordinarily would not feel comfortable entering. Ordinary social expectations provide a guarantee of privacy against intrusions when an occupant with a joint right of control is present and objects.

As the Court explained, moreover, honouring the occupant's objection to police entry protects the Fourth Amendment's central value of privacy in the home while posing no great obstacle to the societal interest in law enforcement. Notwithstanding the invalidity of the wife's consent to authorise a warrantless search, police could use information or evidence she provided them to obtain a warrant authorising a search of the premises.

The Chief Justice wrote the principal dissenting opinion. He contended that social expectations do not support providing a veto to a present, objecting tenant. He added, more generally, that the Court's previous decisions did not support the majority's conclusions in this case. He argued that when an individual shares a home with someone else, that individual assumes the risk that the co-occupant may invite others to enter. If a spouse may consent to a search when her husband does not object, because he is detained outside or sleeping in another room (as occurred in two earlier cases),[5] the same result should follow, according to the dissent, when the husband is standing right next to her. In both cases, in the Chief Justice's view, the salient point was that the objecting resident had already

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compromised his privacy by agreeing to share his living space with someone else.

Both the majority and the dissent were required to make certain assumptions about the social norms governing the admission of third persons by co-tenants or co-occupants. And, just as was true in the common law, once an expectation is identified and protected, it becomes more firmly rooted. The Court's pronouncements can become self-fulfilling. If the Court says a police search is reasonable, like searches will tend to take place and society will come to regard them as reasonable. The Court's decisions can have broad implications for shaping societal understandings.

Both the majority opinion and the Chief Justice's dissent illustrate how the common law method of interpretation can support principled constitutional decision-making. By respecting the results and the reasoning of prior cases, the Court avoided an open-ended inquiry into the meaning of "reasonableness" under the Fourth Amendment. Instead, it looked to the principles developed, one case at a time, in previous Fourth Amendment decisions and sought to apply those principles in the new circumstances presented by the case before it. The Court also looked to the common understanding of social expectations, a historic source of law in the common law tradition. The result—notwithstanding the somewhat surprising absence of clear precedent on the point—was a constrained decision-making process, a decision that flowed from the collective wisdom of judges making decisions

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[6] See 376 US 254 (1964).

over time based on neutral principles and not the personal predilections of individual judges.

If I have not trespassed too long upon your patience, please let me turn to another case where the common law method was used for constitutional interpretation. It has become a foundation of our free speech and free press jurisprudence under the First Amendment to the Constitution of the United States. The case is *New York Times v Sullivan*, decided in 1964.[6]

Let us suppose that we are practicing law together, as partners in a major New York law firm. It is 1964. One of our best clients comes to consult us. He is the publisher of *The New York Times*.

He tells us this. The paper published a full page protest. The protest was signed by eminent Americans, including Eleanor Roosevelt. The newspaper did not compose it, so in some respects it was like a paid advertisement. The statement protested the treatment of civil rights workers and black students at the hands of the police in Montgomery, Alabama. Though there was substantial truth to the basic charges, some of the specific details were false. For instance, the protest stated that Dr Martin Luther King had been arrested seven times when in fact he had been arrested four times. It was not true, as the protest stated, that truckloads of police had ringed the Alabama State College campus in Montgomery.

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The Chief of Police of Montgomery, Alabama was Chief Sullivan. He was not mentioned in the advertisement by name. Still, he sued on the grounds that the advertisement necessarily referred to him and the falsehoods damaged his reputation. Under Alabama law he recovered the sum of $500,000, which would be a substantial sum now and certainly was a huge verdict in 1964. It might have become even worse from the newspaper's point of view. As you know, each publication can be a separate tort. So Sullivan and others defamed by the ad might have sued in other States as well as Alabama and recovered again.

When our law firm meets with the publisher of *The New York Times*, he tells us that the Supreme Court of the State of Alabama has affirmed the defamation judgment. He asks if we can take the case to the Supreme Court of the United States on the theory that guarantees in the First (and Fourteenth) Amendment require the verdict to be set aside.

When the publisher asks our advice and we turn to the existing law in 1964, we have to tell him there is not much that helps. Most, if not all, States in the United States allow recovery for the common law tort of defamation.

On the other hand, as is true in all constitutional democracies, criticisms of public officials are an important part of our political dynamic. The American press has long played an essential role in our public dialogue and discussion of public affairs. Newspapers might not maintain this role and function if subject to suits of this sort.

> The Court reaches a judgment respecting whether an expectation of privacy in a specific context is a reasonable one given our history and traditions as a people.

> Ordinary social expectations provide a guarantee of privacy against intrusions when an occupant with a joint right of control is present and objects.

In our imaginary law firm meeting suppose there is a brainstorming session, and lawyers begin offering suggestions for what rule might be adopted to relieve the newspaper of its predicament. As an extreme measure, we could say there could be no defamation action at all, or, at least, no defamation action against the institutional press. Or we could argue there can be no damages at all, perhaps devising a proceeding where the injured person can seek to restore his or her reputation but without collecting damages. Or we could urge that damages are limited. There might be no punitive damages.

What about pain and anguish from loss of reputation? Should we eliminate that, too, and allow damages for out of pocket injury only, say lost earnings if the defamed official is fired from his or her job? Or we could borrow from other common law doctrines and say that there must be an intent to injure or knowledge of falsity or some degree of fault. Again, note that this changes the common law definition, because at the outset defamation had not been cast as an intentional tort in the sense of requiring that the speaker knew of the falsity of the statement.

Surely, however, the framers of the American Constitution were familiar with the law of defamation. Can it be supposed that in drafting the First Amendment they overruled or changed defamation law *sub silentio* and that no one discovered this for 175 years?

Let us suppose that the discussion is somewhat inconclusive, but the Supreme Court takes the case and you

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are asked to argue it. What is your theory going to be? On your side there is the substantial tradition of a free press. Still, you have little law to help you. Which, if any, of the theories we have discussed do you argue? Or do you argue for all of them? The advocate for *The New York Times* declined to endorse any one remedy over another. Instead, by not committing himself to any one legal remedy, he seemed to encourage the Court to engage in a wide-ranging inquiry in order to determine the appropriate First Amendment remedy.

In the end the Court, as a matter of First Amendment constitutional law, in effect changed the defamation law of the States. For defamation against public officials, the Court imposed a degree of fault as a condition for recovery. The Court held there could be no recovery in these circumstances absent a showing of malice. It defined malice as a term of art to mean knowledge of falsity or reckless disregard for the truth. Based on its newly promulgated standard, the Court reversed the judgment against *The New York Times*. Since 1964, the rule has been extended. For example, it gives a certain degree of protection even in cases where the defendant is not a public official. It is a cornerstone of American First Amendment law.

Note the somewhat ironic consequence of this decision in light of the thesis we are discussing. The Court used a common law approach in interpreting the Constitution; yet in doing so it transformed the common law of defamation. *New York Times v Sullivan* and the cases

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which expand upon it have been deemed an important part of the legal protection the First Amendment affords to the press. Note, too, the consequences of the Court's entry into this field of law in so dramatic a way: The law of unintended consequences follows, and the Court has altered the political and economic dynamic in unforeseen ways. There is a cost to the reputation and dignity of public officials, who must accept indignity and loss of honour to make breathing room for the press. This can cause young, talented people to refrain from rendering public service.

Just as *Georgia v Randolph* does, then, *New York Times v Sullivan* shows how logical reasoning and philosophy can be constrained and informed by case law, traditions, and contemporary understandings. These cases also give some indication of how broad constitutional provisions can be interpreted consistently with the particular characteristics of a given nation.

Some countries may not agree that one resident's objection should outweigh another's consent to police entry into the home. Others may not agree that the interest in free speech should outweigh a public official's interest in protecting his or her reputation from false allegations. Despite these potential differences in discrete applications of fundamental rights, there is broad consensus in constitutional democracies that the judiciary can use the common law method to defend our liberties and certain fundamental rights in a constantly changing society.

“The Court looked to the common understanding of social expectations, a historic source of law in the common law tradition.

The result was a constrained decision-making process, a decision that flowed from the collective wisdom of judges making decisions over time based on neutral principles and not the personal predilections of individual judges.”

The common law and the Rule of Law

The two cases we have discussed and many other cases we could have mentioned re-establish this proposition: One essential framework for the judicial process in your own country, in the United States, and in many other constitutional democracies is the common law tradition and the common law method of reasoning.

This familiar process is becoming instrumental, too, in transnational courts. The essential role courts play in illuminating our constant search for the meaning of justice is more than a source of professional pride. It can be defended on grounds that it is society's way of searching for justice. The ancient common law sought to embody, to give substance and content to, the deepest aspirations of the English people. The task of the law, the task of lawyers, is to tell the story of a people so they can strive to fulfill their aspirations from one generation to the next. Recall what Prince Hamlet said when he told Polonius to accommodate the actors who came to perform at Elsinore. "[L]et them be well used, for they are the abstract and brief chronicles of the time." We can forgive Mr Shakespeare's bias for saying that actors are the key story tellers of our times, but he might have said that in England the truest chronicles of the time were found in the law reports. The whole dynamic of the common law is to tell the story of a people. The case books, as Holmes said, are the story of our moral life.

Now we have a new awareness of the ancient aspirations and yearnings common to peoples around

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[7] Sultan Azlan Shah, *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches*, edited by Dato' Seri Visu Sinnadurai, 2004, Professional Law Books and Sweet & Maxwell Asia, page 326.

[8] 543 US 551 (2005).

the world. The common law method is a powerful manifestation of the desire of all people to define their own human potential, to understand their own struggle for existence, to recognise the deep yearning to shape their own true destiny, and to go beyond old limits to touch what once was beyond reach. As the world grows smaller and we ask whether our own generation is making a valuable addition to the legacy of the law, perhaps we can say this: The world is beginning to find that it speaks the same language when it searches for truth.

The precise nature of these principles can vary from country to country, so courts must consider the traditions of their own nations in interpreting their respective constitutions. Still, the experience of other nations may be instructive. As Your Highness wrote in this context,

> The law must develop and grow. We should not be insular but expand our horizon by looking at case law of other common law jurisdictions as well. We should then adopt what is most suitable to us in the Malaysian context.[7]

We concluded the same in a recent case called *Roper v Simmons*,[8] where the United States Supreme Court held that the imposition of the death penalty on a person who committed his crime when he was under 18 years of age violates the Constitution's prohibition on cruel and unusual punishment. For this conclusion the Court relied on the growing consensus in the United States that capital punishment is too severe for juveniles. An even stronger

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international consensus, while not controlling, supported the Court's judgment by providing some additional confirmation.

Perhaps our time can be known as an era when we came to the realisation that what was the common law in the time of Henry II or Mr Shakespeare, when lawyers and judges tried to give verbal expression to the best of human aspirations, has now become a conversation for the same purpose among many nations and many peoples. A shorthand phrase for the most admirable end of this process is the Rule of Law.

The Rule of Law

What, then, is the Rule of Law?

Although I cannot recall hearing the phrase in common usage when attending college and law school a half century ago, it has deep roots. The potential and significance of the phrase has been appreciated by some scholars for at least a century. Walter Bagehot, AV Dicey, and Friedrich Hayek all wrote about the term. Until the last two decades or so, however, the phrase did not have the prominent place in general discourse that it has today.

True, the term evokes the phrase *Per Legem Terrae*, or Law of the Land, dating at least from Magna Carta. Yet that phrase, too, was not self-defining. It was an appeal to

The law is superior;
the law is just;
the law is
enforceable.

The law is a liberating force.
The law is a promise.
The law is a covenant.
The law tells us—
the law tells the world
—that freedom
is our birthright.
We can use the law
to secure that birthright
for ourselves,
and we must work
to obtain it for
all of humankind.

a general civic understanding that principles of fairness and justice must be respected. (Magna Carta, as we know, went on to spell out some particular guarantees in its other provisions.)

If parsed in its most literal sense, the phrase Rule of Law can be misleading. Suppose an authoritarian or dictatorial regime publishes its decrees and is efficient in enforcing them to preserve security and order. A grammarian adhering to a strict, literal approach might say the regime adheres to the Rule of Law; but all of us know this is a far cry from the meaning or intent of the phrase as we have come to use it. It is a common idiom that the Rule of Law is not extant simply because a dictator makes trains run on time.

The term Rule of Law is often invoked yet seldom defined. There are risks in attempted definitions: the risk of saying too much or too little; of prolixity which defeats the allure of short definition; of a summary so facile that discovery of truer principles is inadvertently foreclosed; of opening the bidding to competing lists of various social goods; of engaging in debate that by itself might diminish the resonance of the phrase. Still, we must not fear analytic inquiry. So it seems appropriate, with these disclaimers, to explore the meaning of the phrase.

As a beginning point for further consideration, let me suggest this: The Rule of Law requires fidelity to the following principles:

> The Court used a common law approach in interpreting the Constitution; yet in doing so it transformed the common law of defamation. *New York Times v Sullivan* and the cases which expand upon it have been deemed an important part of the legal protection the First Amendment affords to the press.

1. The Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all its officials.

2. The Law must respect and preserve the dignity, equality, and human rights of all persons. To these ends the Law must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them.

3. The Law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfil just expectations and seek redress of grievances without fear of penalty or retaliation.

You may see a thematic progression here. The law is superior; the law is just; the law is enforceable.

If we can accept this at least as a working model for further discussion, let me offer just a few comments.

The first precept addresses not just governments but all officials, from the most minor functionary to the head of state. Whether or not this is redundant, it seems necessary. Officials must be taught, and then ever reminded, that they perform their office, for instance, issue permits or grant licenses, not because they chose to do so but because the law requires them to do so where the circumstances warrant.

“The phrase
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vibrant, not wooden,
adaptive, not intractable.
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Save as an ordinary courtesy and to promote civility, one who obtains a permit need not thank the official. If the permit is justified, the government should grant it even if, as a personal matter, the official might prefer not to do so. Government is the servant of the law and the people. It is not the other way around.

Consider next the second point, addressing the dignity, equality, and human rights of all persons. Though surely the other two provisions do not exceed it in importance, in a sense it is unsatisfactory because one wonders if it is complete. Furthermore, it is stated in such general terms that it all but restates the question of how best to define rights of fundamental importance. Still, it teaches that the rights of persons are central to any definition or understanding of the law's first objective.

The phrase Rule of Law is vibrant, not wooden, adaptive, not intractable. It reminds us that the law exists in order to tell the story of peoples, their defeats, their victories, their dreams, their hopes.

So how well are we doing at telling the story of our own time, the central theme of which should be a universal commitment to the Rule of Law? Do we even have a clear understanding of what we mean by the term? We will find there are some basic misconceptions.

A book I like to recommend to people, particularly young people who want to know about the nature and

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background of the law, is a work now over 40 years old, by Aleksander Solzhenitsyn. The book is *One Day in the Life of Ivan Denisovitch*. It is an account of heroic efforts to vindicate the human spirit, describing a single day in the life of a prisoner in a Gulag under the Soviet regime. Solzhenitsyn came to the United States, and because of this book and his other works, became something of a hero of mine.

In June of 1978, he was invited to deliver an address at the Harvard Class Day exercises. I was then living in California but eagerly obtained a copy of his remarks. Like many others, I was disappointed, even shocked, to learn that he used the address to attack the West for its devotion to legal institutions and to the law. He denounced our emphasis on the law and the resources that we devote to its elaboration, saying in effect: "Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyses man's noblest impulses."

I was baffled by the comment. Further reflection suggested an explanation. The American definition of the law and the American conception of a Constitution based on the law are altogether different from the definition and conception that was in Solzhenitsyn's mind. For him law was *dictat*, ukase, a mandate, a command, a threat. It was, in sum, a cold decree. For Americans, the law is a liberating force. The law is a promise. The law is a covenant. The law tells us—the law tells the world—that freedom is our

> One essential framework for the judicial process in your own country, in the United States, and in many other constitutional democracies is the common law tradition and the common law method of reasoning.

[9] An earlier, abbreviated version of these remarks was given at the American Bar Association's annual convention in Honolulu, Hawaii.

birthright. We can use the law to secure that birthright for ourselves, and we must work to obtain it for all of humankind.

Again I ask, how well are we doing in the work of teaching the decency and the primacy of the Rule of Law? It seems to me our momentum has been stalled of late, leaving me with a sense of unease, even foreboding.

Here, in a country that is ever aware of the vast oceans around it, we might use a metaphor: we may be in a period of quiet where the tide has gone out. Are we prepared for a great tide, even a tsunami, of demands and grievances by those who have not understood or benefited from the concept of the Rule of Law?

Make no mistake. Our best security is in the world of ideas; and as to the idea of the Rule of Law there are millions who are suspending judgment before committing themselves to accepting it. Make no mistake. For these millions the verdict is still out. The ongoing common law elaboration and application of the meaning inherent in the definition of the Rule of Law must be our common task. The world is waiting; the world is watching. We must go forward in attaining the Rule of Law with greater determination than ever before. Freedom, yours and mine, is in the balance.[9]

His Royal Highness Sultan Azlan Shah enjoys the highest regard and esteem amongst the international legal community.

His reputation as a truly great lawyer, as a judge of great distinction and as a Chief Justice and Head of State of immense wisdom and courage extends far beyond these shores. His love of law and His commitment to justice have been His hallmarks.

Baroness Helena Kennedy QC
Legal Challenges in Our Brave New World
21st Sultan Azlan Shah Law Lecture, 2007

The Honourable Baroness Kennedy of The Shaws QC

Legal Challenges in Our Brave New World

Helena Kennedy
(b. 12 May 1950*)*

Baroness Helena Kennedy was born in 1950 and is one of Britain's most distinguished lawyers and active public figures. She has spent her professional life giving voice to those who have least power within the system, championing civil liberties and promoting human rights.

Baroness Kennedy is a leading barrister and an expert in human rights law, civil liberties and constitutional issues. She read law at the Council of Legal Education, London and was called to the English Bar by Gray's Inn in 1972. She was appointed Queen's Counsel in 1991, and is a member of Doughty Street Chambers in London. In her practice of law as a barrister, she has acted in many of the most prominent cases of the last 30 years including the Brighton Bombing,

the Michael Bettany espionage trial, the Guildford Four appeal and the bombing of the Israeli embassy.

In 1997, Baroness Kennedy was made a life peer in the House of Lords, where she participates in debates on issues concerned with human rights, civil liberties, social justice and culture. She has led the opposition to encroachments on the right to jury trial and was awarded the Spectator's Parliamentary Campaigner of the Year Award in 2000 for her courageous stand against the government.

Baroness Kennedy was a seminal force in promoting equal opportunities for women at the Bar. Ahead of her time, she was a singular voice in the seventies and eighties, writing and broadcasting on the discrimination experienced by women in the law, whether as lawyers or users of the law. She became a member of the Bar Council to champion women in the profession and called for research into the experience of women lawyers and particularly their absence on the Bench. This led to changes in policy in the Lord Chancellor's Department and codes of practice at the Bar.

Baroness Kennedy is the Chair of Justice—the British arm of the International Commission of Jurists. From 1992 to 1997, she was the Chair of Charter 88, the constitutional reform group which efforts led to the incorporation of the European Convention on Human Rights into British law via the Human Rights Act 1998, as well as a whole range of constitutional reforms, including reform of the House of Lords.

She was a Commissioner on the National Commission for Education 1991–1993, and then chaired the Further Education Commission into Widening Participation which produced the seminal report Learning Works (1997). As a result the sector created a trust in her name—the Helena Kennedy Foundation—

which provides bursaries to help the most disadvantaged in society move into higher education.

She was also the Chair of the Human Genetics Commission from 1998 to 2007 and the British Council from 1998 to 2004. She also chaired the Power Inquiry, which reported on the state of British democracy and produced the Power Report in 2006. In 2004, she was Chair of the Inquiry into Sudden Infant Death for the Royal Colleges of Pathologists and of Paediatrics, producing a protocol for the investigation of such deaths. She was the British member of the International Bar Association Task Force on Terrorism.

In 1992 she received the Women's Network Award for her work on women and justice and in 1995 added to it the UK Woman of Europe Award. For her work on equal rights she was recognised by the National Federation of Women's Institutes in 1996 who presented her with their Campaigning and Influencing Award—Making a World of Difference. In 1997 *The Times* of London gave her their Lifetime Achievement in the Law Award for her work for women and the law, and *The Spectator* made her Parliamentarian of the Year 2000.

Baroness Kennedy has received honours for her work on human rights from the governments of France and Italy and has been awarded more than thirty honorary doctorates. She is a Bencher of Gray's Inn and was President of the School of Oriental and African Studies, University of London from 2002 to 2011. She was elected the Principal of Mansfield College, Oxford University and began her tenure as Principal in Autumn 2011.

She is married to Professor Iain Hutchison, one of the world's leading oral and maxillofacial surgeons and founder of charity the Facial Surgery Research Foundation.

Judges have a vital role in guarding the Rule of Law in times of social change and in times of terrorism. We too have to be the guardians of the law. If any people know that law is the autobiography of a nation it is us. We also know that some of the chapters make better reading than others.

We who work with the law, who understand law's importance, who love the law have to be its defender. We must be the protectors of those who are vulnerable to abuse. We have to stand up and be counted. We have to protect the things that make our nations great. We also have to protect brave judges who act with courage and defend the Rule of Law. We have to raise the alarm call when we see our systems of law being eroded. We have to believe that the world can be a better place.

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Legal Challenges in Our Brave New World

Baroness Kennedy of The Shaws QC
Life Baroness, United Kingdom Parliament
President of the School of Oriental and African Studies, University of London

Text of the Twenty-First Sultan Azlan Shah Law Lecture delivered on 17 July 2007 in the presence of His Royal Highness Sultan Azlan Shah

Your Royal Highness Sultan Azlan Shah, the Sultan of Perak; Your Royal Highness Raja Nazrin Shah, the Raja Muda of Perak; Your Royal Highness Tuanku Zara; Honourable Ministers; the Honourable Menteri Besar of Perak; Your Excellencies; Judges; Pro-Chancellors; distinguished guests; ladies and gentlemen.

It is a great pleasure to be here today. His Royal Highness Sultan Azlan Shah enjoys the highest regard and esteem amongst the international legal community. His reputation as a truly great lawyer, as a judge of great distinction and as a Chief Justice and Head of State of immense wisdom and courage extends far beyond these shores. His love of law and his commitment to justice have been his hallmarks. When I was asked to deliver this lecture I was filled with delight and a sense of humility to receive such an honour. The Sultan Azlan Shah Law Lectures is one of the most prestigious lecture series of the common law world. But I was also thrilled to have the opportunity to come and meet this great man.

“It is precisely when there is high political fever that the controlling power of the judiciary becomes so important. The judges have to curb governmental excess; they are the guardians of the Rule of Law and it is crucial that they do not allow themselves to be co-opted by the Executive.”

I have called this lecture "Legal Challenges in Our Brave New World" because I think that the global challenges facing us in these times do present legal systems with complex problems. Conundrums are puzzling questions and within the law we are often confronted with precisely that—puzzling questions. As a lawyer practicing in the fields of crime, public interest and constitutional law, I have settled on those puzzles which are closest to my own field of work:

- How do we balance security and liberty when we are confronted with international terrorism?

- How do we deal with international crime of all kinds when legal systems around the world are so different? Can synergies and modalities be created between legal systems—for the reception of evidence or for the extradition of accused—when standards and values and indeed rules of evidence within systems are at such odds?

- In such uncertain times, are our societies becoming increasingly risk-averse and willing to lower legal standards to combat crime and anti-social behaviour?

- As the general population within our nations become better educated, less deferential and more individualistic, are we seeing a shift in expectations concerning law? Is the increasing resort to litigation, the demand for a greater say for victims, more vocal

> Just as the big idea of the 20th century had been democracy, so I believe that the big idea of the 21st century would be human rights.

criticism of judges a reflection of these social changes and what impact is it having on our systems? Are we seeing a loss of trust?

- And finally, whilst the rhetoric of human rights is on the lips of politicians everywhere, is the international commitment to human rights advancing or receding?

As the millennium dawned I had thought we were embarking on a new era. Just as the big idea of the 20th century had been democracy, so I believed that the big idea of the 21st century would be human rights.

It is illuminating to think of the origins of human rights in two distinct waves. The first wave was in the 18th century with the American and then the French revolution after which Tom Paine's ideas about the rights of man—liberty, equality and fraternity—became the basis of new constitutions and fuelled political change even within parliamentary monarchies like our own. The second wave came in the aftermath of the Second World War when the horrors of the Holocaust instigated the creation of the Universal Declaration of Human Rights. The idea that law had been subverted in Nazi Germany for ethnic and social cleansing shook confidence in the Rule of Law. Judges had sought to defend their own conduct with the excuse that they were only administering the laws which had been passed democratically.

The purpose of the Declaration was to create a template of universal values against which all laws should

> The conventions spawned by the Universal Declaration of Human Rights sought to recognise that people could be persecuted not just by the state but by their neighbours and the state had a duty to protect everyone within its jurisdiction —and not just its citizens.

[1] *R (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.

be tested. These values are in fact very much common law values. The conventions spawned by the Universal Declaration of Human Rights sought to recognise that people could be persecuted not just by the state but by their neighbours and the state had a duty to protect everyone within its jurisdiction—and not just its citizens.[1] Human rights conventions acknowledged that certain rights derived not just from citizenship but from our very humanity. At the core of this new conception of human rights there was also the idea of balance and proportionality. Sometimes rights conflicted. Freedom of speech may at times have to be curtailed to preserve the right to life. Freedom to bear arms may be curtailed in the interests of community safety. In this new disposition, the role of the judiciary as independent arbiters often having to reconcile individual rights and the needs of the larger community becomes ever more vital.

By the end of the 20th century there were 119 electoral democracies in the world. On the human rights front we had just had the decision of the House of Lords in the *Pinochet* case which had established the principle that a former Head of State could be extradited to another country for crimes against humanity. There had been international tribunals created to try egregious offences against humanity in the aftermath of the horrifying events in Bosnia and Rwanda. Human rights standards were beginning to operate as a set of principles against which all our systems would be tested. With the spread of democracy a real dialogue about the meaning of human rights became possible.

Human rights conventions acknowledged that certain rights derived not just from citizenship but from our very humanity. At the core of this new conception of human rights there was also the idea of balance and proportionality.

[2] *Ireland v United Kingdom* 1978 ECHR

But the new century really started on 9/11, 2001 when to use the words of the great Irish poet William Yeats "all changed, changed utterly". The terrible events in the United States on that day, which caused the death of several thousand people, were the prelude to a whole series of cataclysmic responses and counter responses—the invasions of Afghanistan and Iraq; the counter insurgency in both those countries; the bombings of Bali, Madrid, London; an attempted firebomb now in Glasgow, my home city; the creation of the legal black hole that is Guantanamo Bay; the shameful treatment of prisoners in Abu Ghraib prison. The horrors are countless; and while threats and atrocities were occurring well before 9/11, the register of violence has moved up in scale. As a result, human rights advances have not just stalled but in relation to torture have gone into reverse gear.

The phenomenon of terrorism is not new to the British; we have had our own dark experiences all too recently over the Irish troubles.[2] Terrorism is one of the great challenges to the Rule of Law. In the face of such provocation the temptation to erode civil liberties is great but this is precisely the repression terrorists seek to stimulate and if great care is not taken, emergency measures to combat terrorism end up undermining the very freedoms we value and eat into the fabric of our societies.

I want to start by asserting the obvious—law matters. Law and democracy are described as the twin pillars of our nations but, in fact, law has to come first. As we saw in the

> The role of the judiciary as independent arbiters often having to reconcile individual rights and the needs of the larger community becomes ever more vital.

aftermath of the disintegration of Yugoslavia and in Iraq, if there is a legal vacuum after a conflict, however brief, crime and mayhem will occupy that space.

Law is the bedrock of a nation; it tells us who we are, what we value. It regulates our human relationships one to the other and our relationships as citizens with the state. Law is cultural. It comes out of the deep wellsprings of history and experience within a country. For you, it was your fight for independence, your struggle with the legacy of colonialism and your struggle, too, for a constitutional settlement that respected the different peoples who inhabit your nation. For us our law is rooted in early struggles to contain the power of the King, the aristocracy and the State. Deep wounds have existed in Britain around religion and the persecutions connected to those religious conflicts. Law depends on principles, forged in the fires of human experience, which should not be abandoned when our democracy is being challenged. Like all the senior judges in Britain, I firmly believe that there can be no black holes like Guantanamo where law's writs do not run. Law must be ever present. And we have to be alert to the echoes of Guantanamo within our own systems.

In our modern world, globalisation is providing many benefits, with access to goods and commodities from every corner of the globe. The opening up of global markets has provided huge opportunities for wealth creation within our nations. But the very developments that make global markets work—electronic transfer of money,

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telecommunications (the mobile phone, the internet, the web, email), ease of travel, the softening of borders, deregulation, offshore banking—all equally facilitate markets in other commodities like drugs, arms, explosives, fissile material, people—women and children for sexual purposes, babies for childless couples—as well as human eggs and human organs. International crime and terrorism are the underbelly of globalisation.

This new world has also brought increased levels of anxiety. These sources of anxiety are different in different countries but what is shared is a widespread and unfocused sense of insecurity. There is a feeling that powerful forces beyond the nation state—supranational institutions and international corporations—seem to have more power than our own governments or at least power that cannot be constrained effectively by our own governments.

In Britain there is now much greater insecurity in work—flexible employment brings the risk of being sacked tomorrow because cheaper labour is available elsewhere in the world. We are also seeing the rolling back of the welfare state. Changed demographics mean there are fewer young people to support the aged. People enjoy longer lives but how well are they supported? There are fears about inadequate pensions.

There are greater gaps between rich and poor. The arrival of new immigrants in our midst provides ready scapegoats to explain everything from stretched public

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resources to crime. In popular nightmares, the threatening stranger is not just at the border but at your front gate. In this uncertain, frightening world it is easy to seek out strong government and for government to read this as a licence to authoritarian laws.

I have spent most of my professional life giving voice to those who have least voice within our legal system. My clients' experience and pain have been the best point of entry into understanding why our legal protections matter. As Oliver Wendell Holmes, the American Supreme Court Justice said of his career: "The life of the law has not been logic. It has been experience." Experience has taught us that rights are indispensable to democracy.

However it is not always simple to make the arguments for the presumption of innocence, the high standard of proof before conviction, the rules as to the inadmissibility of certain evidence. Legal safeguards restrain the State from enforcing some majority preferences.

The general public often maintain that the courts are too soft on crime, that criminals are inadequately punished and that the guilty are going free. There are some accused whose alleged crimes are so abhorrent that many would be happy to see them forgo a trial. There is nothing new in the public holding those views. But the risks attached to following the majority are precisely why protections and safeguards have to exist.

“Terrorism is one of the great challenges to the Rule of Law. In the face of such provocation the temptation to erode civil liberties is great but this is precisely the repression terrorists seek to stimulate and if great care is not taken, emergency measures to combat terrorism end up undermining the very freedoms we value and eat into the fabric of our societies.”

As nations we have stopped telling the stories of why the Rule of Law came into being and why legal safeguards are democracy's lifeblood.

Knowledge of the abuses of the past and the historic battles for rights and liberty gives us the power to say "no" and the ability to give reasons for the rejection when governments seek to pass oppressive laws. If we do not understand our own history of past struggle we are much more likely to be taken in by new-fangled dogma. In order to renew or reform effectively, you need to understand the old. If the urgently evanescent—tomorrow's headline, the next poll or the next vote—is all that matters, discernment drops away.

We should have learned from history that in the long run abuses by the State are far more dangerous to liberty and democracy than individual criminal conduct, dangerous and disturbing as that is.

The Rule of Law is one of the tools we use in our stumbling progress towards civilising the human condition: a structure of law, with proper methods and independent judges, before whom even a government must be answerable. It is the only restraint upon the tendency of power to debase its holders. As we know, power is delightful and absolute power is absolutely delightful.

History is dogged by the tragic fact that whenever individuals, political parties or countries become too

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powerful they are tempted to refuse to subordinate that power to wider and higher law. I am afraid we have seen it recently with the United States picking and choosing when to apply the Geneva Convention.

The important thing for all of us to remember is that the Rule of Law is not simply what a government says it is: obeying rules that you have formulated yourself is no great discipline. Many a totalitarian government has sought to maintain that passing laws and requiring people to adhere to them is the Rule of Law. In the modern world the Rule of Law in the area of crime means having clearly defined laws, circumscribed police powers, access to lawyers, an open trial process, rules of evidence, the right of appeal and an onerous burden of proof shouldered by the State. The accused is presumed innocent. In international dialogue adherence to such due process is urged upon every nascent democracy.

After the London bombings on 7 July 2005 the British Prime Minister Tony Blair declared that the rules of the game had to change; by that he was referring to the way in which the criminal justice system operated. He was saying in stronger terms what he had long felt and repeatedly reiterated in preceding years—that the legal system was predicated on principles that needed revisiting. In 2003 he had claimed that the criminal justice system had been "a vital step of progress when poor people were without representation unjustly convicted by corners cut". Then he said "but today in Britain in the 21st century it is not the

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innocent being convicted. It's too many of the guilty going free. Too many victims of crime and always the poorest who are on the front line."

At his political party conference in 2005, Prime Minister Blair said:

> For eight years I have battered the criminal justice system to get it to change. And it was only when we started to introduce special anti-social behaviour laws, we really made a difference. And I now understand why. The system itself is the problem. We are trying to fight 21st century crime—anti-social behaviour, binge drinking, organised crime, terrorism—with 19th century methods, as if we are still living in the times of Dickens.
>
> The whole of our system starts from the proposition that its duty is to protect the innocent from being wrongly convicted.
>
> Don't misunderstand me. That must be the duty of any criminal justice system.
>
> But surely our primary duty should be to allow law-abiding people to live in safety. It means a complete change of thinking. It doesn't mean abandoning human rights. It means deciding whose human rights come first.

Now many of us can sympathise with some of those sentiments. Indeed it is also a miscarriage of justice if

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guilty people can play the system to their own advantage and secure acquittals. But in my experience that does not happen in Britain with great frequency.

Victims of crime are justified in complaining about a system that treats them merely as witnesses, does not afford them respect and is insensitive to their experience. Citizens today complain with greater vehemence than ever before because people are better educated and better informed. They are more demanding of their civic institutions. There is a tension between the rights of victims and those of defendants but it is within that tension that justice is defined.

When Prime Minister Blair referred to his experience of reform relating to anti-social behaviour (such as unruly behaviour in streets by gangs of youths or the neighbours playing loud music into the night or dumping rubbish on the street) he was referring to the creating of civil orders with criminal sanctions attached. An anti-social behaviour order allows the banning of an individual from an area on hearsay evidence to the police without a court hearing. Breach of the order carries imprisonment.

This new order had its roots in the inventiveness of women's organisations to find mechanisms to deal promptly and effectively with domestic violence. It taught many of us lessons about the law of unintended consequences. The success of bypassing normal criminal procedures in the domestic violence arena did not escape the notice

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of ministers—here was a speedy process which avoided contested court hearings and the time consuming task of gathering admissible evidence.

Extrapolating from it, the government has now invented control orders for terrorism and are now looking at similar orders to deal with professional criminals. The attractiveness of avoiding traditional processes is what stimulated our former Prime Minister to advocate wholesale reform of the criminal law. For him and many others, the old standards create too high a hurdle for the State.

Clearly the law has to be fine-tuned to fit a changing world. If law is completely out of touch with public sentiment it will be held in contempt.

Law has a central role to play in any new landscape and legal systems must learn to adapt or they will lose the confidence of the public. Law in democratic societies receives legitimacy from the consent of the people. However, the challenge is how to adapt to new circumstances without abandoning essential tenets. Any process of reform must take place against a backdrop of principle: retreat from the Rule of Law, human rights or civil liberties is short-sighted and should be unthinkable but it is the remedy within easy reach when politicians are faced with intractable problems.

Important debates are now taking place across the common law world about reform and a central conundrum is what aspects of our law should be non-negotiable.

> There is a feeling that powerful forces beyond the nation state—supranational institutions and international corporations—seem to have more power than our own governments or at least power that cannot be constrained effectively by our own governments.

The argument I would make is that distinctions have to be made between process reform and substantive reform. There are qualitative differences between the two which seem to escape some politicians and even some lawyers. Process reform which is about procedure is of much less consequence, while substantive changes can have disturbing implications for other parts of our carefully knit checks and balances. The law is not just an instrument; it is a fabric. Pulling it too fiercely in any direction can cause it to unravel.

One of the outcomes of the anti-social behaviour orders which seemed so attractive as a solution to low level youth crime is that far larger numbers of young people are ending up in prison for trivial breaches of the orders and, as we know, prison is the best school for more serious crime. We are also seeing a crisis in our prisons because of the huge increase in the prison population.

Terrorism is of course at the other end of the scale from the irritations of unsociable conduct. It presents our societies with the fraught problem of balancing security and liberty. One of the primary purposes of government is the protection of citizens. The rhetoric of all governments who reduce rights is that they are doing so in the interests of the people and to counter disruptive elements in society. Citizens can easily feel that the measures are all about the "other", someone unlike them. Decent people have nothing to fear, they are told. The notion is that other people's liberty is being traded but liberty is not divisible in this way.

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> new immigrants
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> to explain everything
> from stretched
> public resources
> to crime.

[3] Human Rights Act 1998 (operative from 2000).

[4] *A & Ors v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

It is precisely when there is high political fever that the controlling power of the judiciary becomes so important. The judges have to curb governmental excess; they are the guardians of the Rule of Law and it is crucial that they do not allow themselves to be co-opted by the Executive.

The American and British response to the atrocities of 9/11 was to immediately introduce the wartime measure of detention without trial for non-citizens. That is one of the advantages of calling the response to these crimes a "war on terror". It is not just rhetoric. It allows for the suspension of habeas corpus and the introduction of very tough measures unacceptable in times of peace.

Although our detention without trial was not quite Guantanamo Bay, it was a disavowal of the human right to due process before the removal of liberty. What was perplexing was that this was done so soon after introducing a Human Rights Act into British law.[3] To do this he [Prime Minister Tony Blair] had to declare a public emergency threatening the life of the nation, thereby enabling the United Kingdom to derogate from the European Convention of Human Rights. No other country in Europe felt the need to do this.

Our derogation led ultimately to the famous Belmarsh detainee case where the judges in the House of Lords on 16 December 2004[4] held that such detention without trial contravened human rights because it was unjustifiably discriminatory, directed as it was at aliens. It created a

> In this uncertain, frightening world it is easy to seek out strong government and for government to read this as a licence to authoritarian laws.

[5] Prevention of Terrorism Act 2005.

hierarchy of the value to be attached to certain human beings, when the whole point of human rights, as I have indicated, is to see the value in our common humanity.

The whole notion of contemporary human rights is to reach beyond rights vested in us as citizens and to recognise rights vested in us by virtue of our common humanity. When we said "never again" after the Second World War we were rejecting registers of difference when it came to basic rights. We were making that shockingly principled statement that even terrorists have rights. It is stated clearly by Thomas Paine much earlier: "He that would make his own liberty secure must guard even his enemy from repression." The judges in our highest court were holding the line at a very difficult time.

The government could have ignored the judgment as judges in the United Kingdom have no power to strike down legislation; they make a declaration of incompatibility if they believe a particular statute cannot be reconciled to the European Convention of Human Rights. Our Human Rights Act is not entrenched and does not have the status of a written constitution. We retain the formal conviction that the sovereignty of Parliament is sacrosanct but in reality we have accepted a body of principle or higher law with which Parliament should comply.

The government therefore accepted the ruling, albeit ungraciously, but brought in sweeping powers to make control orders[5] providing for deprivation of liberty

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without charge or trial and applying to citizens and non-citizens alike. The control orders limit liberty and impose swingeing restrictions on fundamental freedoms: placing tight restrictions on movement, allowing people out of doors for a few hours a day with a tagging device in place, banning unauthorised access to friends and relatives, barring the use of telephones and computers.

These are Executive orders made by the Home Secretary on the basis of secret intelligence and amount to "house arrest" but they do not require a derogation from the European Convention. They can be renewed indefinitely so they are indeterminate. There is judicial oversight in that those made subject to the orders can apply to the courts for their removal but the hands of the judiciary are largely tied because it is deemed that those best placed to determine whether there is a threat to the public are government ministers.

The Royal College of Psychiatrists has petitioned Parliament to have in mind that "indeterminate detention, lack of normal due legal process and the resultant sense of powerlessness, are likely to cause significant deterioration in detainees' mental health".

The standard of proof for control orders is that there must be reasonable grounds for suspicion of involvement in terrorism and a belief that it is necessary to protect the public from risk, so the standard is lower than the balance of probabilities. The intelligence is unavailable to the detainee

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> when governments seek
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> If we do not
> understand
> our own history
> of past struggle
> we are much more
> likely to be taken in
> by new-fangled
> dogma.

[6] [2005] UKHL 71; [2006] 2 AC 221.

or his lawyer. (Even the standard of proof for refusing bail is higher in that it is "substantial grounds to fear breach"). Sixteen people are currently subject to such orders but appeals are working their way through the system.

As I said at the commencement of this address, when very different systems try to work in conjunction, new problems can emerge. Statements can be produced from other jurisdictions, which raise questions about admissibility. Was the witness paid or offered other inducements such as a reduced sentence or impunity? Have efforts been made to determine whether he or she has reason to lie? Has someone been interrogated in circumstances and using methods that would be unacceptable in the United Kingdom?

In 2005, in *A & Ors v Secretary of State for the Home Department (No 2)*,[6] the House of Lords judges were asked to determine whether detention could be based on evidence which may be the product of torture. Much of the intelligence in relation to suspected terrorists derives from intelligence agencies in other countries where torture is endemic. There is nothing new about the use of intelligence. The use of intelligence was a common start in Irish terrorist trials but it was the springboard for the hard work of traditional policing with evidence-gathering from surveillance, from eavesdropping, questioning witnesses and suspects and forensic analysis. When completed, good, old-fashioned trials followed. The judges in the case of *A* again fearlessly upheld the prohibition on torture and the uses of the product of such conduct, restating the

“We should have learned
from history that
in the long run
abuses by the State
are far more
dangerous to liberty
and democracy
than individual
criminal conduct,
dangerous and
disturbing as that is.”

unreliability of such evidence and asserting strongly the importance of not colluding in it.

As a result of upholding the Rule of Law, our judges have had to shoulder the brickbats of the ill-informed. Some politicians and elements of the media accuse the judiciary of being out of touch with public opinion. The debate which has ensued in Britain revolves around whether we are too purist in an impure world. It is claimed that the standard of proof is too high when dealing with some of the challenges of new times. It is argued by government ministers that the protection of citizens and the prevention of crime may involve abandoning traditional methods. These are also arguments currently made in the United States to justify their interrogation methods and their policy of extraordinary rendition, whereby suspects are flown to other countries for interrogation.

In the United Kingdom currently there are 80 cases of alleged Islamist terrorism waiting to be tried. Most allege conspiracy to cause explosions, or the possession of articles for the purposes of terrorism, or failure to inform the authorities about terrorist-linked matters. The evidence is largely generated by technology—bugging of houses and cars by MI5, the penetration of computers which produces evidence of clever email systems of communication (the saved draft system as a dead letter drop), and the electronic hoarding and then sharing of jihadist material of a highly inflammatory nature (beheadings, torture, films of suicide bombers glorifying their acts of terrorism); the latter are

The Rule of Law
is one of the tools we use
in our stumbling progress
towards civilising
the human condition:
a structure of law,
with proper methods
and independent judges,
before whom even
a government must
be answerable.
It is the only restraint
upon the tendency of power
to debase its holders.
As we know,
power is delightful
and absolute power
is absolutely
delightful.

shared like pornography, passed between young men as part of an induction into militant groupings.

So it is not just the evidence that is computer generated; this is crime which is computer generated. Boys sit alone in their bedrooms and become inducted and groomed for *jihad* through email, through the Internet, without their parents having the slightest clue. The connections are international; the combining feature is usually a profound sense of hostility to western hegemony and dominance. These young men are increasingly prepared to participate in suicide bombing missions.

What is the answer to such frightening vistas? Let me deal first with what is not the answer. It is not the answer for any of our countries to level down by reducing our own system's standards in order to create systems of co-operation with other countries. Because other jurisdictions—particularly those with civil justice systems—accept evidence which is based on hearsay and even hearsay upon hearsay, this is no reason for introducing the same relaxed rules in our own courts. It may work perfectly well within the inquisitorial system but is inimical to the common law adversarial process. Legal transplants have all the same problems as medical transplants. The immune system is usually not geared to accept the new arrival and the side effects can be very damaging to the body legal just as to the human body. Other legal systems have different checks and balances and we should be ever mindful of that.

> History is dogged by the tragic fact that whenever individuals, political parties or countries become too powerful they are tempted to refuse to subordinate that power to wider and higher law.

The second warning I would give is not to imagine that new anti-terror laws will be temporary—they are invariably around for a very long time and often become permanent. Nor can they be vacuum packed so that radical new proposals will confine themselves exclusively to terrorism. Once the police and the courts are given a swathe of new powers, paradigms shift, as do the cultures within legal systems.

In Britain the special procedures introduced for dealing with Irish terrorism meant we had a whole swathe of miscarriages of justice derived mainly from the extraction of false confessions by the police. However, within the police forces involved in those cases there followed a succession of other wrongful convictions unrelated to terrorism but caused by the corruption of the policing culture. It was like a poison in the system. If certain bad practices seemed to work in terrorist case why not in other cases too?

So how do we proceed if we are not going to give in to terrorism? Any legal modification should be tested against the concept of proportionality. Do the new laws reflect pressing social need? Are the reasons necessary and sufficient? Could alternative methods be used which are less abusive of civil liberties and require fewer departures from the ordinary legal arrangements? Is the deleterious effect proportionate to the value to the security forces?

Some extension of detention prior to charge may well be permissible in dealing with alleged terrorists, where so

> Many a totalitarian government has sought to maintain that passing laws and requiring people to adhere to them is the Rule of Law. In the modern world the Rule of Law in the area of crime means having clearly defined laws, circumscribed police powers, access to lawyers, an open trial process, rules of evidence, the right of appeal and an onerous burden of proof shouldered by the State. The accused is presumed innocent.

much evidence is coming from computers which need to be disembowelled, from documents in other languages which need to be translated, from foreign police agencies. But safeguards must exist to ensure that any such extension is consistent with human rights; habeas corpus must be available after a stated number of days. In Britain such detention can now be for up to 28 days. There is also talk of extending it to 90 days, which in my view is excessive.

Any detention without trial should be resisted. Proceeding to trial is the best way to deal with terrorism. While we may accept some actions that involve incursions into our liberty to investigate or prevent acts of terrorism, no change in our legal regime should be countenanced which involves detaining people without charge and without the right to judicial review. Nor should we accept the lowering of standards when seeking to establish guilt. Sometimes we have to draw back from steps which may seem reasonable in the interests of security because of what it will do to the system as a whole. Occasionally we may have to release a person we think might be guilty because we know that to do otherwise will destroy something of greater value.

Legislation which departs from the normal rules must be highly specific and targeted, with inbuilt sunset clauses declaring the lifespan of such law. Targeting the wrong people is worse than futile. It does nothing to protect the public, damages innocent people and destroys confidence in the government in the end because the very

It is a miscarriage of justice if guilty people can play the system to their own advantage and secure acquittals.

There is a tension between the rights of victims and those of defendants but it is within that tension that justice is defined.

communities which could provide support and intelligence about terrorists in their midst become so alienated from the State.

Extradition procedures must also be improved but that should not mean the kind of streamlining that removes any opportunity at all for a court to examine the quality of evidence against an accused. We have to remain alert to the ways in which states can abuse extradition procedures.

In 2003 Russia sought the extradition from Britain of the former deputy Prime Minister of Chechnya, Ahmed Zakayev. The allegations included terrorism, armed rebellion and assorted crimes, which had been examined meticulously by the Danish authorities when he was living there and deemed to be unfounded. Much of the Russian evidence was based on hearsay and the central allegations came from a Chechen colleague of Zakayev, who eventually testified to the English court that he had given false information to the Russians only because he was tortured. It was manifest to the court that the extradition request was political and it was not granted. Zakayev's crime is that he was a persuasive champion of non-violent Chechen self-determination.

This kind of example shows how wary we must be of international agreements for easy handover when there are terrorism allegations.

The new Eurowarrant—the European-wide arrest warrant—is all about ease of handover. It makes no habeas

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corpus provisions and means a British citizen can be arrested in Manchester for actions, which are not criminal under English law, on an arrest warrant issued in another European country. And this is not confined to terrorism. The ostensible purpose was to create collaborative processes for combating serious crime. The only role for a British court is to establish that the documentation is correct. Fears that we are seeing a slow shift towards a "*corpus juris*" for Europe, which will iron out systemic differences, sends shudders through the hearts of committed common lawyers.

On 31 March 2003, David Blunkett, the then British Home Secretary, signed an extradition treaty with the United States. Its effect is to remove the need for a prima facie case before removal of suspects to the United States. There was no consultation or warning and it was assumed that it was linked to "the war on terror". As the date will indicate it was within days of the Iraq invasion.

The new process will simply involve determining identity and procedural compliance. There is no reciprocity in the treaty. American citizens will not be handed over to Britain in the same way because to do so would contravene a United States citizen's constitutional rights. Already three British businessmen have been extradited to Texas not for anything to do with terrorism but for links with the Enron fraud. They argued vociferously that the evidence would not have borne out the allegations and in any event they should have been tried in a British court.

> Clearly the law has to be fine-tuned to fit a changing world. If law is completely out of touch with public sentiment it will be held in contempt.

The concern which I share with you today is that we may be making legal sacrifices in our brave new world which we will come to regret. Globalisation means the nation state is being redefined. In the new world national sovereignty is receding. Whatever the advantages which accrue to our nations in this new deregulated world, a downside is becoming apparent. As multinational corporations have gone in pursuit of international markets, insisting upon the dispensing of inhibitory rules or law which might get in the way, so international criminals have swum in their wake taking advantage of the same freedoms. Terror networks like Al Qaida and other international criminal organisations make use of all the same advances in communications, swift transport and money transfer.

In this vista it is important to protect human rights and the standard within the common law.

Creating a world that is respectful of human rights, respectful of law, is a journey, which sometimes feels utopian. But our only hope is a world governed by law and consent. Judges have a vital role in guarding the Rule of Law in times of social change and in times of terrorism.

So what is the role of the rest of us—we who are the lawyers, academics and practitioners?

Well, we too have to be the guardians of the law. If any people know that law is the autobiography of a nation it is us. We also know that some of the chapters make better reading than others.

Any process of reform
must take place against
a backdrop of principle:
retreat from
the Rule of Law,
human rights
or civil liberties
is short-sighted
and should be
unthinkable
but it is the remedy
within easy reach
when politicians are faced
with intractable problems.

We who work with the law, who understand law's importance, who love the law have to be its defender. We must be the protectors of those who are vulnerable to abuse. We have to stand up and be counted. We have to protect the things that make our nations great. We also have to protect brave judges who act with courage and defend the Rule of Law. We have to raise the alarm call when we see our systems of law being eroded.

We have to believe that the world can be a better place.

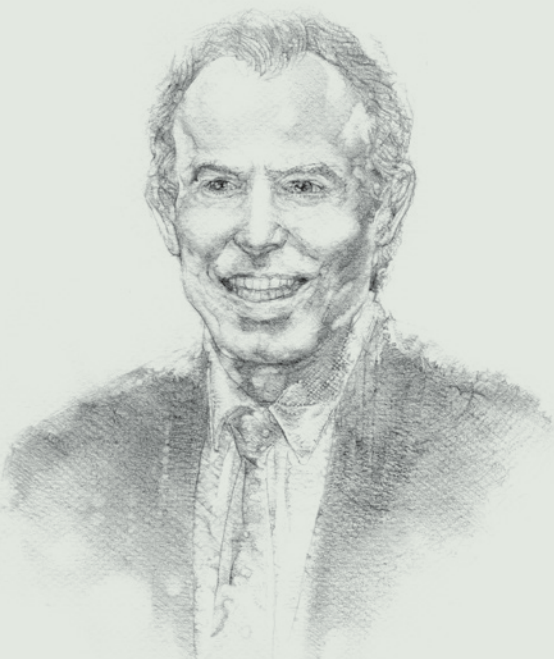
“As your Highness has in the past observed, public confidence in the judiciary is based upon a number of criteria.

These include:
judicial independence, the integrity of the adjudicator, and the impartiality of adjudication.”

The Right Honourable Tony Blair
Upholding the Rule of Law: A Reflection
22nd Sultan Azlan Shah Law Lecture, 2008

The Right Honourable Tony Blair

Upholding the Rule of Law: A Reflection



Anthony Charles Lynton Blair
(b. 6 May 1953*)*

Born in 1953 in Edinburgh, Scotland, The Right Honourable Tony Blair attended Fettes College in Edinburgh. Later, he attended St John's College of the University of Oxford, where he combined interests in religion and music with the study of law, and received a law degree in 1975.

He was called to the Bar by the Honourable Society of Lincoln's Inn the following year. Mr Blair then enrolled as a pupil barrister at the 11 King's Bench Walk Chambers founded by Derry Irvine, who later became the first Lord Chancellor appointed by Mr Blair.

It was during Mr Blair's legal career when he became increasingly involved in politics such that in 1983 he was elected to the House of Commons to the parliamentary

seat of Sedgefield, a constituency he represented till 2007. Mr Blair, at the young age of 44, became the Prime Minister of Great Britain and Northern Ireland after the Labour Party, the party he led from 1994 to 2007, won the 1997 general election.

During Mr Blair's tenure as Prime Minister, several major constitutional reforms were introduced. In 2003, Mr Blair announced his intention to abolish the constitutional post of the Lord Chancellor. The Constitutional Reform Act that was passed in 2005 greatly reduced the role of the Lord Chancellor in relation to the judiciary; further, the Lord Chancellor can now be appointed from either Houses of Parliament and is no longer automatically Speaker of the House of Lords. The Constitutional Reform Act 2005 also created a new Supreme Court of the United Kingdom to replace the Judicial Committee of the House of Lords, creating a new apex court of the United Kingdom that was separate and independent from the legislature.

Mr Blair was also responsible for incorporating the European Convention on Human Rights into English law by the introduction of the Human Rights Act 1998. This led to further legislative changes towards greater respect for human rights such as the introduction of the Civil Partnership Act 2004 by Mr Blair's government.

During Mr Blair's tenure, after the 11 September 2001 incident, anti-terrorism laws such as the Anti-Terrorism, Crime and Security Act 2001 were swiftly passed to counter terrorist threats. However, this Act was soon after declared to be incompatible with the Human Rights Act by the House of Lords in *A v Secretary of State for the Home Department* [2005] 2 AC 68. Subsequent to the terrorist attack in London in July 2005, various other anti-terrorism laws were enacted such as the Prevention of Terrorism Act 2005 and the Terrorism Act 2006.

Though subject to some strong criticisms, Mr Blair has always been a strong advocate of a values-based, activist and multilateralist foreign policy—an

agenda that combined tackling terrorism and intervention in Iraq, Afghanistan, Kosovo and Sierra Leone, with action on issues like climate change, global poverty, Africa and the Middle East Peace Process.

Tony Blair is also widely credited for his contribution towards assisting the Northern Ireland Peace Process by helping jointly to negotiate the Good Friday Agreement which created an elected, devolved power-sharing assembly in Northern Ireland for the first time since 1972.

Mr Blair continues to be active in public life after his retirement as Prime Minister in June 2007. He has many interests, not least his current role in the Middle East. He is the Quartet Representative for the USA, United Nations, Russia and European Union, helping the Palestinians to prepare for statehood as part of the international community's effort to secure peace. He also lends his extensive experience towards the development of African countries though the Africa Governance Initiative, which works closely with African countries to eradicate ingrained poverty and to establish sustainable economies independent of aid.

In addition he continues to be an advocate on issues such as religion and climate change. He launched the Tony Blair Faith Foundation to promote understanding between the major faiths, and increase understanding of the role of faith in the modern world. Mr Blair is also leading the Breaking the Climate Deadlock initiative in strategic partnership with The Climate Group to develop decisive political support for a new international agreement on climate change among major countries.

Mr Blair is married to Ms Cherie Booth QC, a leading barrister on human rights, employment and discrimination law in the United Kingdom. They have four children—Euan, Nicholas, Kathryn and Leo.

I believe the Rule of Law fundamentally dignifies human existence. It lifts us out of the barbarous wastelands governed by brute force and lets us occupy the fertile terrain of predictable justice. It sets an ambition not just for our laws but for our souls. It civilises, it inspires. It takes us to a higher and better place.

The truth is that people can be indifferent to the Rule of Law, except when their own freedom is in jeopardy and then, by God, they value it. There is something indescribably uplifting about a system in which people are tried according to the Law: and something indescribably demeaning about a system where you know it is not the Law but money, influence or power that decides the outcome.

22 Upholding the Rule of Law: A Reflection

Tony Blair
Former Prime Minister of Great Britain and Northern Ireland

Text of the Twenty-Second Sultan Azlan Shah Law Lecture delivered on 1 August 2008 in the presence of His Royal Highness Sultan Azlan Shah

To His Royal Highness, Sultan Azlan Shah, to Her Royal Highness Tuanku Bainun, thank you for your warm welcome and for the honour of inviting me to give this the Twenty-Second Lecture. To the Crown Prince Raja Nazrin and Her Royal Highness Tuanku Zara, thank you also for your kindness to me and my family and may I offer many congratulations on the recent birth of your son. My thanks indeed to all the members of the Royal family I have had the joy of meeting.

And finally to the extraordinary Professor Visu Sinnadurai, also affectionately known as "Prof", I believe, many thanks for your exemplary organisation of tonight's speech.

I am ashamed to say this is my first time in Malaysia. If I have my way, it will not be the last. I have been overwhelmed by the beauty of the country and the warmth of its people. It is a privilege to be here.

> There was never at any time during those years of practice, a moment when I entertained the slightest hesitation about the sanctity, importance and validity of the Rule of Law.

It is, as well, a delight to reflect on a subject I have seen from many angles—the Rule of Law.

I am a lawyer, born into a lawyer's family, married to a lawyer. My brother Bill has just become a High Court Judge, much to my pride, and my daughter, Kathryn, is now a law student. So it runs in the blood! My time at the Bar, I look back on with affection. The times I argued a case well and won, I look back upon with pleasure. The times my advocacy ended in disaster, I look back upon with pain.

There is nothing—not even now, not even in the worst moments of Prime Ministers Question Time (and there were a few)—which compares to the humiliation meted out by an irritable judge to a young advocate.

In my early days at the Bar, I used to specialise in "returns", that is cases of other more senior barristers returned to me because they did not want them or could not do them. Unsurprisingly they were normally the really tough ones. So rather too frequently I was in front of the Court of Appeal arguing the unarguable. I remember one time, by mistake and still in my final six months of pupillage, sitting in the Queen's Counsel row much to the amusement of the rest of the Bar crowding in for the next case

On another occasion I suffered the ultimate disgrace, beaten by a litigant in person.

The worst was in front of a Court of Appeal headed by the famous and irascible Lord Justice Megaw whose very

> Re-reading the previous lectures given in this series, two things stand out to me: First, they are of universally high quality, some truly outstanding—a tribute to both the pulling power of His Highness and to the intellect of the lecturer. Secondly, the lectures show the broad range, the fascinating capacity to engage in new thinking, that is the hallmark of the common law system.

[1] HRH Sultan Azlan Shah, "Supremacy of the Law in Malaysia", in *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches*, 2004, edited by Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia, page 13.

look used to turn the advocates knees to water. I put my hopeless case, I fear somewhat repetitiously rambling on. His look got darker and darker. Finally he interrupted me and said: "Mr Blair that's the sixth time you have made that point. And let me tell you something: it wasn't a very good point the first time you made it. So can you kindly spare us a further reiteration and conclude?"

But whatever the experience I enjoyed or suffered as a barrister, I took the independence of the British Judiciary for granted. I took the integrity of the Bar as a given. It never even occurred to me to doubt either. Occasionally when I collided in the course of my practice with legal systems less sound than my own, I marvelled at how lucky we were and how unfortunate were those who lived under those poorly run and alien jurisdictions. There was never at any time during those years of practice, a moment when I entertained the slightest hesitation about the sanctity, importance and validity of the Rule of Law. As you, Your Highness once said, in a phrase that has all the admirable simplicity of a political sound bite—if you do not take that as an insult—"the Rule of Law means literally: the rule of the law".[1] It implies legitimacy, fairness, independence, integrity, justice.

That was my calling. Those were the principles governing it.

Re-reading the previous lectures given in this series, two things stand out to me:

“There are dangers
in judicial activism,
but they are ultimately
outweighed by
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free and
independent
judiciary,
feeling and indeed,
on occasions,
asserting that freedom
and independence.”

First, they are of universally high quality, some truly outstanding—a tribute to both the pulling power of His Highness and to the intellect of the lecturer.

One of them of course was my own dear wife Cherie. It is sometimes said that we both could have gone either way: she the politician and me the lawyer as opposed to the other way round. I rather think we both made the right choice! She was too prone to speak her mind for a politician. And she was a far better lawyer than me! I am afraid I always had something lacking as a lawyer.

I recall even as a student, never quite getting it. In one of the early lectures that I attended (they tend to stand out since I did not attend many), the professor was describing the ground-breaking tort case of *Donoghue v Stevenson*, where the House of Lords held there was a duty of care on the part of a manufacturer of ginger beer to a lady in a cafe whose ginger beer turned out to contain part of a decomposed snail. Various students asked various proper legal questions. Suddenly I could contain myself no more and asked: "Yes but couldn't she have got over it? I mean alright it's not nice but all the way to the House of Lords over a bit of snail?" The professor looked at me very sadly.

Secondly, the lectures show the broad range, the fascinating capacity to engage in new thinking, that is the hallmark of the common law system. Lawyers are not always thought of as creative thinkers or philosophers, at least outside of their creativity in presenting a case. Yet these

“In today’s world, obedience to the **Rule of Law** is not just right in itself; it is an important part of creating a successful country. In today’s world, it is a vital component of economic success. In today’s world, it is integral to a well-functioning society.”

lectures chart a series of extraordinary legal developments over the years showing how with skill, determination but also sensitivity, doctrines of administrative law originated, new commercial law processes were brought into being, equitable concepts fashioned to bring fluidity to the often arid rigidity of the common law itself.

If you are like me and spend time in the company of a young child, you will have watched the wonderful movie "Ratatouille" about a rat that became a great chef in partnership with a young man in Paris. The rat's father is horrified at the fraternising with the humans, who will always be to him, the enemy: "You can't change nature", he shouts at his son.

"Dad," the son replies, "change is nature."

What the lawyers have accomplished, at their best, is to get the law to change with the times. Today the context of change in which the law operates is greater than ever before. Indeed the predominant characteristic of today's world is the pace, scope and scale of change. From the rise of China and India—now a fact and throwing into chaos some of the traditional ideas about political power residing in the West—to the Sovereign Wealth Funds now accumulating many times the financial wealth of the traditional global institutions; to the development of whole new business sectors and industries with extraordinary speed, many of whom were barely glimpsed even ten years ago; the world has its finger on the fast forward button.

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Indeed the predominant characteristic of today's world is the pace, scope and scale of change.

Adapt or fall behind. That is increasingly the message for companies, countries or people.

Into this melange of shifting economic and social forces, where fits the Rule of Law? It might be thought with its traditions, history and formulations, often of an archaic nature, that it would be swept away by the same tide of change. Instead, on the contrary, as I shall argue, the Rule of Law occupies a place today not less important but more so, in ensuring globalisation is benign in its effects. So far from losing relevance, the Rule of Law has gained it.

When later in life I became a Member of Parliament and then Prime Minister, I saw the Rule of Law from a completely different perspective. I saw it as a lawmaker and then, as Prime Minister, as the head of the Executive branch of government. As a lawmaker, I had to come to terms not with interpreting the law but designing it. I started to understand the complexities of balancing intricate interests with legal clarity, started to imagine the impact of the law on people, not from the point of view of a lawyer arguing a case, but from the point of view of the person in the street asking whether a law was just or unjust, sensible or foolish, wise or ignorant.

As Prime Minister however, the application of my commitment to the Rule of Law was sometimes severely tested. The hardest thing about being Prime Minister is not making the decisions; it is implementing them. Constantly you come up against the rigidity of the

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bureaucracy, the defiance of vested interests, usually if not always masquerading as the public interest; and you come up against the insistence of the Rule of Law that the law comes first, and the law is the law interpreted by judges. So whereas the Prime Minister and government want to go crashing through these obstacles, desperate to implement change in the face of the public impatience that the change come quicker, the Law sometimes stands in the way, hand upraised, saying until there is due process there will be no due progress. Sometimes the Law will say no: this far and no further. And it is all very well to say: that is obvious; of course the Law should do that; anything else is totalitarian. But take some specific examples and you will see how open to challenge this is, when you are in the harsh reality of politics.

In the aftermath of 11 September 2001 we passed new anti-terrorist laws. Some years later these laws were subject to a legal case under the Human Rights Act. We had sought to say to suspected terrorists: you can leave this country freely; but if you stay in Britain, you stay locked up. We could not be sure that we could successfully prosecute these people. We could not forcibly deport these suspected terrorists to their countries of nationality either, as the European Court of Human Rights had some years earlier imposed restrictions on us in that regard, where there was a threat that they would be subjected to ill-treatment upon return. In designing the anti-terrorist laws we were careful to ensure we respected previous judicial decisions. But we were sure, as an Executive, that these people posed a risk

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[2] *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

to our security. I have no doubts they did. But the fact is we could not prove it, beyond reasonable doubt, in order to secure a conviction in law. So we passed legislation allowing us to detain them. If they wanted to leave Britain, they were free to go. But they could not walk free on our streets.

The British public are greatly attached to the Rule of Law. But overwhelmingly they supported our position as a government. They believed that the terrorist threat justified suspending the normal processes of the law. They believed that usually those processes should be upheld. But they thought these circumstances were unusual. And I agreed wholeheartedly.

The House of Lords held that these anti-terrorism laws were contrary to the Human Rights Act.[2] I remember being absolutely furious. I could see the terrorist threat. The intelligence about it was daily. The capacity of these people to do evil, to sacrifice the lives of innocent people in pursuit of an unnegotiable cause was manifest. I was trying to protect the public. The House of Lords, I felt, seriously misjudged the threat and misunderstood the only practical way of dealing with it. Indeed a few months later terror struck London and over 50 innocent people died in the worst terrorist attack London ever saw.

I recall in Number 10 Downing Street, straight after hearing the news of the court ruling, pacing up and down the study, berating the court and expostulating at the ludicrous way they sought to substitute their judgement

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for mine. A member of staff concurred and added: "They should be stopped from ruling in these cases."

Immediately I turned round to him and said: "Oh no, no that would be completely wrong. I profoundly disagree with them but I profoundly believe in their right to do it. I think they have made the wrong judgement. But I think it is right that they can; that they are above me, not me above them."

So there is an essential tension, perhaps natural tension, that exists between those exercising political power and the judiciary exercising the Rule of Law. I was frequently accused as Prime Minister of trampling over inalienable rights, despite introducing the Human Rights Act, probably the most far-reaching extension of judicial capacity to hold the Executive to account in recent British history.

When I removed some of the traditional appurtenances of the Lord Chancellor, I did it principally so that the House of Lords could elect its own Speaker and most vital of all for the government, so that the Lord Chancellor could concentrate on running the vast Department of State that runs the Court system, rather than spend hours a week on ceremonial duty. We also made judicial appointments into a transparent and infinitely more objective system. But it did not stop the accusations being made.

For my part, I was frequently angry with what I saw as a creeping judicial tendency to make the law rather than to

> The hardest thing about being Prime Minister is not making the decisions; it is implementing them. Constantly you come up against the rigidity of the bureaucracy, the defiance of vested interests, usually if not always masquerading as the public interest.

interpret it. Justice Heydon of the High Court of Australia has stated that judicial activism, taken to extremes, can spell the death of the Rule of Law. Someone else once said: judges should indeed make law but better keep silent about doing it.

But the explosion in administrative law and human rights cases has blurred the lines of demarcation between law and politics. Especially when governments are carrying out their responsibility with regard to national security or making decisions clearly and plainly in the political domain and doing so not out of caprice but a genuine appreciation of public interest, courts should be reluctant to intervene. Notice I do not say: should never intervene. But they should take on a self-regulatory presumption that guards against substituting their political judgement for that of the elected politician. It must be remembered that judges simply do not bear any direct responsibility if as a result of their decisions government cannot, for example, stop a terrorist attack. The buck stops with the government, not the judges.

And with the ultimate responsibility should come the ultimate power.

Lord Woolf, another very eminent former speaker here, has observed that in the context of the Human Rights Act:

> It is Parliament's responsibility to legislate. The task of the court is to interpret that legislation. But the courts should not treat section 3 [of the Human Rights Act] as a licence

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no due progress.
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this far and no further.

[3] Squire Centenary Lecture:
"The Rule of Law and a Change in Constitution",
3 March 2004.

[4] *Vriend v Alberta* [1998] 1 SCR 493 at [136].

> to intrude into Parliament's role … in the final analysis, [it is] … "only a rule of interpretation. It does not entitle the judges to act as legislators".[3]

Mr Justice Cory in the Canadian Supreme Court put it like this:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice … .[4]

But of course it is easy to say, hard sometimes to do. With cases of claims to asylum in Britain on the grounds of persecution, we faced a similar issue. Our asylum laws are governed by the Geneva Convention on Refugees, itself formed in the wake of the Holocaust. The presumption is with the person claiming asylum. The overarching memory is that of Jews turned away when fleeing Hitler and the Nazis. The same mindset fashioned the European Convention on Human Rights. The trouble is the context today is completely different. Bluntly, most asylum claims today are those of economic migrants. They may well have a good case for economic migration; but their claims to persecution are often farfetched. Yet time and again when we toughened the laws on asylum, the courts would strike them down. When, finally, we sought to oust the courts' jurisdiction in such cases the judiciary rebelled.

In the course of that debate, we actually had an interesting dialogue, formally and informally between

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Executive and Judiciary, and in the course of the dialogue at least understood each other's concerns.

It might seem such a notion of dialogue—which, of course, eschewed individual cases—is inconsistent with the Rule of Law. In fact, done properly, it sustains it. It allows the law to evolve with sensible appreciation of real life, political practicality.

So let us be clear: the adherence to the Rule of Law can give governments a serious headache. And courts are made up of humans, not divines. Their own instincts and beliefs can play a part in their judgement. A 50/50 case can turn on their subjective views, not some objective yardstick and such views can easily translate into personal prejudices.

There are dangers in judicial activism, but they are ultimately outweighed by the benefits of a free and independent judiciary, feeling and indeed, on occasions, asserting that freedom and independence.

Fundamentally we politicians are better below the law than above it. And this is where the whole question of the Rule of Law takes on a new and even greater meaning for today's world. The proper place of the Rule of Law in a nation has an impact and import far wider than constitutional principle.

I have argued strongly here in favour of reverence for the Rule of Law, irrespective of its irritation to political

“In designing
the anti-terrorist laws
we were
careful to ensure
we respected
previous judicial
decisions.”

leaders, regardless of its inconvenience, regarding as an imperative that the law is administered without "fear or favour". So I have argued this from principle.

Let me step down from that high pedestal for a moment and descend to the realms with which I am more familiar in my latter years: practical politics.

My view is that, in today's world, obedience to the Rule of Law is not just right in itself; it is an important part of creating a successful country. In today's world, it is a vital component of economic success. In today's world, it is integral to a well-functioning society.

I believe adherence to the Rule of Law applies in all circumstances and at all stages of development. Perhaps, before saying why, I should explain what I understand by the Rule of Law.

To me, it means the following. It means an independent judiciary, one that is independent of government and not dependent on it or subservient to it. Unless the public accepts that the judiciary are independent, they will have no confidence in the honesty and fairness of the decisions of the courts. This independence is exemplified in the judicial oath. Lord Bingham explained the elements when he said:

> First, the judge must do what he (or, of course, she) holds to be right … But secondly, and vitally, he must do right

> Judicial independence has a corollary: a government that accepts such independence and would not interfere with it. It means judges free from any taint of corruption. A corrupt judiciary is the mark of a country that is not yet mature. A judiciary that has become corrupt is the mark of a country in decline.

[5] "The Courts and the Constitution", Lecture delivered at King's College on 14 February 1996, at page 18.

> according to the laws and usages of the realm. He is not a free agent, who can properly give vent to his own whims and predilections, or even (save within very narrow limits) give effect to his own schemes of law reform … Thirdly, the judicial oath makes clear … that in administering the law the judge must act with complete independence, seeking neither to curry favour nor to avoid any form of vindication. And fourthly, so far as humanly possible, judges must decide cases with total objectivity, having no personal interest beyond that of reaching a just and legally correct solution.[5]

This judicial independence has a corollary: a government that accepts such independence and would not interfere with it. It means judges free from any taint of corruption. A corrupt judiciary is the mark of a country that is not yet mature. A judiciary that has become corrupt is the mark of a country in decline. As your Highness has in the past observed, public confidence in the judiciary is based upon a number of criteria. These include: judicial independence, the integrity of the adjudicator, and the impartiality of adjudication.

The Rule of Law also means a Bar of quality and integrity, where certain standards are considered not optional but absolute.

These principles are clear and obvious. Less clear and less obvious are those things that go to make up the content of the Rule of Law. You can have a legal system that is

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independent of the Executive, where the judges are honest, but where the processes of justice are slow, ineffective and outdated. This is where reform of the judicial system is not a betrayal of the principles of the Rule of Law but can often be the only way of salvaging them.

A legal system where cases take years to be heard, where justice is only available to the wealthy, the legally aided or the obsessive is not a system capable of delivering the Rule of Law, however much, in theory, it may be compatible with it. In the United Kingdom, in recent years, there has been fundamental reform of the civil process, led in an exemplary way by Lord Woolf; and there have been various, somewhat less successful, attempts to reform the criminal law process. But, as in the old adage, justice delayed is justice denied. *Bleak House* was a novel not about lawyers who were corrupt in the way we would understand it, but about a system corrupted instead by desuetude.

The Rule of Law also means laws that are clear, that can be understood, and therefore complied with. It means rules of procedure that are transparent; rules of evidence that make sense and are fair; and a process that as a whole, not just in the letter of the law, tends towards the efficient and proper relationship between law and real life.

So that is what I mean by the Rule of Law. And I daresay there are qualities or aspects that can be added to it and that a variety of national circumstances will produce a variety of ways in which principle becomes practice. But

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I think those basic principles apply universally and that without them, the Rule of Law means little or nothing.

Why is it so important today? Why should we elevate it even higher than it has been, now, as a governing guide?

The answer, very simply is because today, more than ever, the Rule of Law is an essential part of stable and good governance, and stable and good governance is an indispensable accompaniment on the journey to a modern and successful country.

This arises from the globalised nature of the 21st century world. Today, our economies are subject to huge forces of globalisation, changing, churning, creating new industries in place of old, new ways of working, new technologies, new paradigms of success that take root in an unbelievably short space of time. In such a world, a number of consequential developments are happening. Capital is footloose, vast amounts of it. It is true that right now the West faces the credit crunch, and a financial malaise. But do not ignore the past decade that has seen a huge expansion of financial liquidity, new financial instruments dragging enormous corporate, economic and then social change in their slipstream. You may agree or disagree with these developments but it is impossible to deny their salience.

But what this means is that this investment looks for an outlet. Moreover, it is matched by an equally large expansion of global skills, global know-how and global

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intellectual capital also looking for a place to locate. It is why good universities are today a major part of a strong economy.

I often say to people that whereas our eldest three children went to United Kingdom universities and would not really have thought of anything else, at least for their first degree, our youngest, Leo, now eight, when in a decade thinking of his choice of university, will in all likelihood think globally.

There is out there taking shape before our eyes, a generation of young global citizens, with an open attitude to other people, cultures and countries, with the desire to travel and the means to do it, with minds better informed and more inquisitive than their grandparents could have dreamt of. They will search for the place to go. And they will choose that place without prejudice but with precision, a choice based on the opportunities certainly, but also the values of the place they choose.

Likewise the global footloose capital is searching for a stable place to invest. It wants to know that its investment will be properly protected by proper rules, properly administered. It wants to be sure that if it enters into a contract, its contractual partner, who can, if things go wrong, be known hereinafter as "the defendant", if I can borrow the old phrase from pleading, is going to have to argue the case on the merits, not be able to purchase it. A business looking to invest wants to know there are laws and they will be obeyed.

> There is an essential tension, perhaps natural tension, that exists between those exercising political power and the judiciary exercising the Rule of Law.

Now, of course resource-rich nations are sufficient honey-pots that these strictures can often be laid aside in pursuit of the opportunities for exploitation. But increasingly that is not the case. There is a trend, starting with the Extractive Industries Transparency Initiative, which I helped establish as British Prime Minister, towards ensuring global rules for such global players. But more than that, the players themselves prefer the certain and the fair to the arbitrary and the unfair.

Likewise for those young people, the ones who, over time, will develop the technological breakthroughs, the exciting new business ventures, who will help enlarge the pool of global talent still further as their efforts multiply, they will go where the open face of merit, not the hidden face of influence, is rewarded. They will go where they feel at home. And that will be where there are rules, and where the rules are the same for everyone, and are fairly and evenly applied.

So what is happening is that to the high-flown tenets of principle in support of the Rule of Law are being added arguments of very practical, real life expedience.

I see this the whole time in my new life. True, some countries offer opportunities so great their shortcomings in the Rule of Law are minimised. But for others, the absence of the Rule of Law means the loss of business. It means a poor reputation. It means that that nation ceases to be an attractive prospect in which to invest, to work, to live.

“I was frequently accused as Prime Minister of trampling over inalienable rights, despite introducing the Human Rights Act, probably the most far-reaching extension of judicial capacity to hold the Executive to account in recent British history.”

Frequently in the work I do now, not least in Africa, I am asked how to help poor nations. Many of these have received billions of dollars of aid over many decades and not always to the best effect. I reply: get good governance. Get a proper judiciary; proper laws. Get a reputation as a place where there is a commercial and criminal legal system that operates fairly and with proper speed. Do the same with your tax system. And then just wait for the businesses to come. They will; but not to nations that treat the Rule of Law as an optional extra, or even worse, as an impediment.

This is, if you like, an almost utilitarian argument for the Rule of Law. It makes an analysis of the wave of globalisation and it argues that from self-interest the Rule of Law should be accorded respect. The whole point about globalisation is that it is pushing the world together. The term "global community" is a cliché precisely because it is true. Such a community only functions, as indeed any community does, through common values. Societies do not work unless together they represent some common social attitudes, standards and norms. Society is something we share. That is impossible to do without a shared purpose or at least, shared values. Otherwise how do we govern ourselves consistently or sensibly?

If this is true, then the global community, no less than that of the national community and countries like Britain and Malaysia, must hold values in common in order to function effectively and cohesively. The Rule of Law is surely one such value.

> The Rule of Law also means laws that are clear, that can be understood, and therefore complied with. It means rules of procedure that are transparent; rules of evidence that make sense and are fair.

A final reflection, however: I would never want to justify the Rule of Law solely on utilitarian grounds. I believe there is a more profound reason for its centrality. I believe the Rule of Law fundamentally dignifies human existence. It lifts us out of the barbarous wastelands governed by brute force and lets us occupy the fertile terrain of predictable justice. It sets an ambition not just for our laws but for our souls. It civilises, it inspires. It takes us to a higher and better place.

It does so because it democratises power. It democratises money and influence. All those things we invariably crave as fallible and selfish human beings and all those things that we know in our better selves need to be constrained by something more equalising and more just.

The Rule of Law is an arbiter. It is also a guide. Of course, it is itself highly fallible. It is bound to be. It is executed by those selfsame human beings with human faults and inadequacies. But the inadequacies are not born of corruption and the faults are not deliberately designed for gain. Where there is error its source is not wilful, it does not originate in malice or the perverting of the proper course of justice; and the errors pale in to insignificance once alongside the virtues.

In the end these two arguments for the Rule of Law—the practical and the principled—come together. Though, in exceptional cases, it is possible to have the Rule of Law without true democracy, it is impossible to

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have true democracy without the Rule of Law. The Rule of Law is an indispensable part of good governance and good governance is an indispensable part of a successful nation state. It is morally right and politically wise. It is, in short, not the past but the future. It casts a light to lighten our road to it. And like any light, it shows the things we would prefer not to see as well as the things we rejoice in seeing. But it allows us to move forward as free and sentient citizens.

The values that predominate in a decent and worthwhile society are not owned by West or East, Christian or Muslim, rich or poor. Yes, different nations are at different stages of development. Yes, you cannot impose holus-bolus one system from one country onto another system in another country. All of that is true.

But I long ago learnt to distrust the myth that some people love democracy and some are at ease with dictatorship; that some revere the Rule of Law and some are indifferent to it; that some prize liberty and some despise it. No people have ever chosen freely to remove their democracy. Dictators are called dictators precisely because the people have not chosen them. No one who has ever talked to those who have experienced arbitrary law enforcement, the secret police, the indiscriminate or sometimes very discriminating arm of an unaccountable state, can ever feel comfortable with such mythology. The truth is that people can be indifferent to the Rule of Law, except when their own freedom is in jeopardy and then, by God they value it. There is something indescribably

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uplifting about a system in which people are tried according to the Law: and something indescribably demeaning about a system where you know it is not the Law but money, influence or power that decides the outcome.

Applying the Rule of Law takes persons of courage. The true judge finds the facts as he or she sees them. A simple statement, is it not? But what it means is profound. It means the courage to decide according to the truth as you perceive it, not according to the conventional wisdom, not according to the convenient, the popular, the expedient, but what you believe is true and right. Doing the right thing is the hardest duty of a political leader. It is also the supreme duty of the judge. In this sense leaders are judges, and judges leaders. This is the principle I took from my earliest days at the Bar into political life. It is what I owe the Rule of Law. It is why I believe in it still.

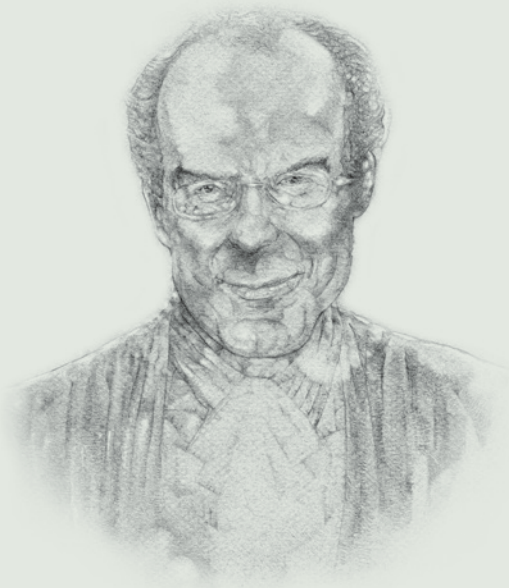
My own contribution [to this lecture] is intended to consider the changing role of an independent judiciary in today's world. I can highlight my general theme with Your Royal Highness' own words from a speech in 1987, which are as relevant today, if not more so:

"Over the recent years, the role of the judiciary has become of increasing importance. In countries which practise a democratic form of government, the judiciary has been looked upon as the defender of any encroachment to the Rule of Law. This duty to uphold the Rule of Law, I may add, is not only imposed on the judiciary but also on the executive and the legislature by recognising that they can never be above the law; by giving an unstinting support for the courts which administer the law; and, in constructing the law, to give an honest account of what is practical and not merely a rhetorical account of what is desirable." *("Creativity of Judges" in Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches, 2004)*

Lord Mance of Frognal
The Changing Role of an Independent Judiciary
23rd Sultan Azlan Shah Law Lecture, 2009

The Right Honourable Lord Mance of Frognal

The Changing Role of an Independent Judiciary



Jonathan Hugh Mance
(b. 6 June 1943*)*

Lord Mance was born in 1943 and was schooled at Charterhouse. He read jurisprudence at University College, Oxford University and was called to the English Bar by the Middle Temple in 1965.

Lord Mance was a leading commercial barrister of his time, specialising in areas such as commercial insurance law. He became a Queen's Counsel in 1982, and sat as a Recorder until 1993. He chaired various Banking Appeals Tribunals and was a founder director of the Bar Mutual Indemnity Insurance Fund.

Lord Mance was appointed a High Court Judge of the Queen's Bench Division in 1993. He was subsequently promoted to the Court of Appeal, serving as a Lord

Justice of Appeal from 1999 to 2005. Lord Mance was appointed a Lord of Appeal in Ordinary in 2005. In the 2007 Privy Council case of *Prince Jefri Bolkiah and Others v The State of Brunei Darussalam and Brunei Investment Agency* [2007] UKPC 63, his Lordship had occasion to follow the decision of the Federal Court of Malaysia in *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 delivered by Raja Azlan Shah CJ (as His Royal Highness then was) on the interpretation of the Evidence Act.

Lord Mance represents the United Kingdom on the Council of Europe's Consultative Council of European Judges, being elected its first chair from 2000 to 2003. He was also the Chairman of the International Law Association and the Lord Chancellor's Advisory Committee on Private International Law. He is a member of the Judicial Integrity Group and the seven-person panel set up under the Treaty on the Functioning of the European Union (Article 255) to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the European Court of Justice and General Court.

Lord Mance served from 2007 to 2009 on the House of Lords European Union Select Committee, chairing sub-committee E which scrutinised proposals concerning European law and institutions. In 2006 he chaired a working group under the auspices of the All Party Parliamentary Group on the Great Lakes Region, recommending changes in the procedures for enforcement of the OECD Guidelines for Multinational Enterprises, and in 2008 he led an international delegation for the same Group and the Swedish Foundation for Human Rights, reporting on the problems of impunity in relation to violence against women in the Congo.

Lord Mance's interests include languages and music. He is also a keen tennis enthusiast, being a member of both the Cumberland Lawn Tennis Club and the Bar Lawn Tennis Society.

Lord Mance was the first Justice from the newly created Supreme Court of the United Kingdom to deliver a lecture in The Sultan Azlan Shah Law Lecture Series. The Supreme Court came into existence on 1 October 2009, replacing the 600-year-old Appellate Committee of the House of Lords. Interestingly, Lord Mance delivered the leading judgment in one of the first cases to be decided by the Supreme Court, *Re Sigma Finance Corporation* [2010] 1 All ER 571, a case concerning the interpretation of contracts.

Lord Mance was accompanied to the 2009 lecture by his wife, Lady Justice Mary Arden who is currently a Judge of the Court of Appeal of England and Wales. Lady Justice Arden read law at Cambridge University and obtained an LLM degree from Harvard Law School. She was called to the Bar by Gray's Inn in 1971 and became an *ad eundem* (honorary) member of Lincoln's Inn in 1973. She became a Queen's Counsel in 1986 and was appointed to the Court of Appeal in October 2000, becoming only the third female judge to sit on the Court of Appeal.

To date, Lord Mance and Lady Justice Arden are the first and only married couple to have sat on the Court of Appeal at the same time.

The critical issue today is often how far it is the role of an independent judiciary to oppose or check the sovereignty not of the executive, but of Parliament. But Parliament today is all too often no more than the mouthpiece of the executive.

The judicial role is being performed overtly in new areas of pressing public interest and to a greater extent than ever before under general scrutiny.

23 The Changing Role of an Independent Judiciary

Lord Mance of Frognal
Justice of the Supreme Court of the United Kingdom

Text of the Twenty-Third Sultan Azlan Shah Law Lecture delivered on 15 December 2009 in the presence of His Royal Highness Sultan Azlan Shah

Your Royal Highnesses, Vice-Chancellor, Ladies and Gentlemen, it is a privilege to be the first Justice of the Supreme Court of the United Kingdom to participate in this renowned series of lectures. I follow in some extremely distinguished footsteps, including many of my predecessors in the Appellate Committee of the House of Lords. My own contribution is intended to consider the changing role of an independent judiciary in today's world. I can highlight my general theme with Your Royal Highness' own words from a speech in 1987, which are as relevant today, if not more so:

> Over the recent years, the role of the judiciary has become of increasing importance. In countries which practise a democratic form of government, the judiciary has been looked upon as the defender of any encroachment to the Rule of Law. This duty to uphold the Rule of Law, I may add, is not only imposed on the judiciary but also on the

> Courts are increasingly involved in very public issues which affect individuals and communities on a day to day basis, and on which very profoundly different views may be held by different individuals and groups.

[1] Sultan Azlan Shah, "Creativity of Judges" in *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches,* 2004, edited by Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia, page 295.

[2] The Supreme Court will take over the devolution jurisdiction of the Privy Council, but otherwise simply adopts the jurisdiction of the House of Lords.

> executive and the legislature by recognising that they can never be above the law; by giving an unstinting support for the courts which administer the law; and, in constructing the law, to give an honest account of what is practical and not merely a rhetorical account of what is desirable.[1]

Recent constitutional changes

Let me begin with a few words directed to the United Kingdom's most recent constitutional change: the establishment by the Constitutional Reform Act 2005 of a new Supreme Court to replace the Lords of Appeal in Ordinary. This is a quite substantial alteration in form and public appearance–but not so obviously in substance.[2] It was first announced in June 2003 by the then-Prime Minister Tony Blair, last year's lecturer, as part of a complex of reforms. A new appointments system for all judges was also created. These changes were announced unexpectedly and without prior discussion. They proved controversial. There took place an extensive dialogue with the senior judiciary. This was followed by lengthy debate in Parliament, leading to the Constitutional Reform Act 2005.

The Act starts with a welcome endorsement of the "existing principle of the rule of law". The Lord Chancellor—who until then straddled all three of the pillars of state and served as a visible contradiction of the separation of powers—was converted into an essentially political figure. He is now a Secretary of State for Justice (currently sitting

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[3] Constitutional Reform Act 2005, section 7.

[4] Ibid, section 18 and schedule 6.

[5] Ibid, Part IV.

[6] Ibid, Part III. Lord Scott's retirement and Lord Neuberger's appointment as Master of the Rolls meant that there were only ten serving Law Lords and it was necessary to appoint two new Supreme Court judges, Lord Clarke and Sir John Dyson.

in the House of Commons), but is given a special duty to preserve the independence of the judiciary. The Lord Chief Justice has taken over from the Lord Chancellor as head of the English and Welsh judiciary.[3] The House of Lords now elects its own Speaker, where previously the Lord Chancellor sat.[4] The Act provides for new independent judicial appointments commissions for the judiciary of England and Wales and of the new United Kingdom Supreme Court.[5] The new Supreme Court consists of twelve Justices, including the ten Law Lords in office when the Court came into existence on 1 October 2009.[6]

The purpose of creating a Supreme Court is to make clear that the judiciary are independent of Parliament and the executive and to reinforce the separation of powers in the British constitution. After 2005 there came a lengthy process of deciding on the location of the new Court, and refurbishing the building eventually chosen. On 1 October 2009, the Supreme Court came into being in the old Middlesex Guildhall directly opposite Parliament. Parliament Square now offers a nice symmetry: the legislature and judiciary opposite each other on the east and west sides, the executive (represented by HM Revenue and Customs and HM Treasury–Mammon, though I fear with empty coffers!) on the north and, watching over all this, the deity in Westminster Abbey on the south side.

We have begun sitting. Our new home is already producing real benefits, internally and externally. There are better facilities all round, for the public, legal teams and

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[7] AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edition, 1959.

[8] [1999] 2 AC 349 at 358G-H.

[9] Expounded in *Blackstone's Commentaries*, 6th edition, 1774, pages 88–89, and *Hale's Common Law of England*, 6th edition, 1820, page 90.

judges. We have more judicial assistants and the building encourages closer collaboration with them—though they will certainly not write our judgments as some say can happen in the United States! Above all, the court and justices are more visible, our judgments are resumed in press summaries, our role is clearer. Inevitably, this has a consequence: much more attention is being devoted to our decisions, to our reasoning and (more fundamentally) to who we are and how we are chosen.

The basic constitutional structure of the United Kingdom has, in principle, been unchanged since the 17th century constitutional settlement, achieved after the Civil War. The great constitutional lawyer, Dicey, analysed it over a century ago. Parliament is sovereign, the executive administers the law and the judiciary adjudicates upon disputes regarding its meaning and application.[7] However, this has never been the full picture: in areas not covered by statute, there is the common law. Judges have for centuries developed—or to put it bluntly, "made"—the common law (subject always to subsequent statutory reversal). As Lord Browne-Wilkinson said in *Kleinwort Benson Ltd v Lincoln CC*:[8]

> The theoretical position has been that judges do not make or change law: they discover and declare the law which is throughout the same. According to this theory,[9] when an earlier decision is overruled the law is not changed: its true nature is disclosed, having existed in that form all along. This theoretical position is … a fairy tale in which no-

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[10] Sultan Azlan Shah, "Interpretive Role of Judges" in *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches*, 2004, edited by Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia, page 303.

[11] It has been suggested jurisprudentially by Dworkin that an ideal judge (Judge Hercules) would be able to give a single right answer to any particular issue: "Hard Cases" (1975) 88 *Harvard Law Review* 1057. If so, the value of such an insight is, through human imperfection, largely inspirational.

> one any longer believes. In truth, judges make and change the law. The whole of the common law is judge-made and only by judicial change in the law is the common law kept relevant in a changing world.

Even when interpreting statutes, judges are not, cannot be, mere technicians—however much law-makers and politicians might wish. Literalism and rigid rules of construction may in the past have given law the appearance of mathematical certainty, but they are unsophisticated tools which failed to reflect the realities and nuances of life. The judge must act consistently with the legislative scheme. But the law-maker never foresees every problem; there are often difficult issues regarding the nature and boundaries of the intended scheme—especially so in changed social conditions. Your Royal Highness has said succinctly that, "Whilst it is true that judges cannot change the letter of the law, they can instil into it the new spirit that a new society demands."[10]

Sometimes there are apparently conflicting provisions; increasingly, there is a backdrop of relevant constitutional provisions or principles which may influence interpretation. The judge must weigh all these matters when deciding what interpretation best fits. Judging has never been a science. It is a discipline: the judge seeks to be loyal to the aim and spirit of the law and to precedent and principle.[11] Judging can therefore also be a lonely matter. Appellate courts can give binding guidance on principle. But it is down to the individual judge to balance the relevant balance factors in

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[12] Mr Berlusconi, the Italian Prime Minister, at one point tried to introduce a similar prescription in relation to the Italian judiciary.

[13] In their interesting comparative work, *Common law et tradition civiliste* (Droit et Justice series, Presses Universitaires de France), Duncan Fairgrieve and Horatia Muir-Watt attribute the common law practice of full reasoned individual judgments to the fact that common law judges act without the backing of any code. Each decision has thus to be placed carefully in the context of prior case law.

any case. This is nowhere more so than when he or she is exercising a discretion, for example whether to grant bail or other relief.

Finally, the judge will be loyal to the shape in which the case is put before him. He will not surprise the parties with thoughts of his own that they have not had the opportunity of addressing. This underlines the importance of the Bar, and of the co-operation between Bench and Bar which is the hallmark of our common law system.

In civil law, the tradition of the judge as mere technician still lingers. And, since the theory operates on the basis that the law has a fixed content, civil law judges are expected to know the law and to do their own researches into it. The Emperor Napoleon in Article 5 of the French Civil Code sought to prohibit judges from adopting any sort of general interpretative reasoning. Judges were to decide cases by simple application of the language of the Code to the dispute before them. French Cour de Cassation judgments are still in a form reflecting this dogma.[12]

In contrast, common law judges have carefully to place each decision in the context of prior case law and the submissions before him. In this way, the common law judge aims to legitimise his or her decisions and to ensure their social acceptability.[13] The common law's traditional invocation of the reasonable person fits into the same pattern. The common law judge is appealing to the ordinary member of the public. The civil law judge, in

> Your Royal Highness has said succinctly that, "Whilst it is true that judges cannot change the letter of the law, they can instil into it the new spirit that a new society demands."

[14] 5 US (1 Cranch) 137 (1803).

[15] [1967] 1 AC 259.

[16] [1977] AC 195.

contrast, stamps the authority of a code onto the public coming before him or her. Naturally, there is here some over-simplification, but the difference still appears in the contrasting judgment styles of common and civil law.

Written constitutions

Within common law countries, there is also a contrast between the United Kingdom and countries like Malaysia with Westminster style constitutions. Written constitutions impinge, to greater or lesser extent, on Parliamentary sovereignty and entrench rights, and like codes offer a visible explanation of the source of judges' authority. I say to a greater or lesser extent: if a constitution provides that the rights it contains can be overridden by any law that Parliament deems fit to enact, then Parliamentary sovereignty in truth remains untouched. Constitutions commonly enable courts to strike down even primary legislation infringing entrenched rights—following in this respect the United States example established in the famous case of *Marbury v Madison*.[14]

In countries with a written constitution, the basic principle of separation of powers can operate as a direct limit on the powers of the executive and legislature, enforceable by the judges. In *Liyanage v The Queen*[15] and *Hinds v The Queen*,[16] the Privy Council read that basic principle into the Westminster style constitutions of Ceylon and Jamaica. In the one case, it struck down

> Judging has never been a science. It is a discipline: the judge seeks to be loyal to the aim and spirit of the law and to precedent and principle.

[17] Ibid, at 212, per Lord Diplock; followed in *Director of Public Prosecutions of Jamaica v Mollison* [2003] 1 AC 41.

[18] [2007] 4 AMR 568; [2007] 5 MLJ 174.
Editor's note: The Court of Appeal held that section 97(2) of the Child Act 2001 contravened the doctrine of separation of powers. On appeal, the Federal Court overruled the Court of Appeal's decision. In coming to his decision, Abdul Hamid Mohamad PCA (the acting Chief Justice at that time) observed that the doctrine of separation of powers "is not a provision of the Malaysian Constitution" and that its application "depends on the provisions of the Constitution". He added: "A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine." See *Public Prosecutor v Kok Wah Kuan* [2007] 6 AMR 269 at [17]; [2008] 1 MLJ 1 at [17].

[19] [2008] UKPC 25.

[20] [2008] UKPC 42.

legislation directed at depriving particular individuals retrospectively of their right to jury trial; in the other, legislation establishing a new Gun Court, outside the constitutionally provided court scheme, and giving to the executive the right to determine how long a sentence an individual served. The Privy Council said in *Hinds* that under such constitutions:

> It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government.[17]

In *Kok Wah Kuan v Public Prosecutor*[18] your Court of Appeal on 12 July 2007 followed these authorities and reached a similar result in relation to a statutory provision that a child convicted of murder should be detained during executive pleasure.

Recent Privy Council decisions in the same sense are *Horace Fraser v Judicial and Legal Services Commission*[19] and *Angela Inniss v AG of St Christopher and Nevis*.[20] In these cases, a judge and registrar were engaged by the Government under contracts for periods expressed in years. The relevant constitutions provided for powers of discipline over and removal of such persons to be vested in judicial or public services commissions, which could in turn only act on reasonable cause. But the judge's and registrar's contracts also included small print. This on its face gave the Government power to terminate the engagements at any time on three months notice, even if the yearly contract periods had not expired.

> Common law judges have carefully to place each decision in the context of prior case law and the submissions before him. In this way, the common law judge aims to legitimise his or her decisions and to ensure their social acceptability. The common law's traditional invocation of the reasonable person fits into the same pattern. The common law judge is appealing to the ordinary member of the public.

[21] [2006] UKPC 13; [2007] 1 AC 80.

The Privy Council held that the small print must be read subject to the constitutional protection conferred by the relevant commission. Notice during the main contract period amounted to removal. It could only be given if the commission had adjudicated on the matter and decided for good cause that removal was necessary.

Even much more general concepts—like that of a "democratic" state or of the Rule of Law—can, in a written constitution, operate as an effective limit on legislative and executive powers. In *State of Mauritius v Khoyratty* [21] the Legislative Assembly, by ordinary constitutional amendment involving a three-quarters majority of the Assembly, purported to abolish the right to apply to a court for bail in terrorism or serious drugs cases. Delays pending trial were commonplace, so that persons suspected of such offences were languishing on remand in prison for long periods. But the Constitution contained in section 1 a provision that Mauritius "shall be a democratic state", and this could only be amended by vote of two-thirds of the electorate *and* of all the members of the Assembly—in practice an insuperable barrier. The Privy Council held that section 1 was not a mere preamble but a separate, substantial guarantee of the separation of powers. Complete abolition of the right to apply for bail pending trial in terrorism or serious drugs cases infringed that principle. It could not be achieved therefore by ordinary constitutional amendment, let alone by ordinary legislation.

> Written constitutions impinge, to greater or lesser extent, on Parliamentary sovereignty and entrench rights, and like codes offer a visible explanation of the source of judges' authority.

[22] Cabinet Office, 1987.

[23] Sir Robin Cooke, "Administrative Law Trends in the Commonwealth" (1990, Fifth Sultan Azlan Shah Law Lecture) in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, edited by Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia, Chapter 5.

[24] Lord Woolf, "Judicial Review of Financial Institutions" (1997, Twelfth Sultan Azlan Shah Law Lecture) in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, Chapter 12.

[25] Lord Slynn of Hadley, "The Impact of Regionalism: The End of the Common Law?" (1999, Fourteenth Sultan Azlan Shah Law Lecture) in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, Chapter 14.

[26] Cherie Booth QC, "The Role of Judges in a Human Rights World" (2005, Nineteenth Sultan Azlan Shah Law Lecture), pages 131–197 above.

Parliamentary sovereignty

In constitutional theory, the sovereignty of the United Kingdom Parliament remains unchanged. But the tectonic plates, governing the relationship between different pillars of the state, have begun to shift. The movement started some years prior to the Constitutional Reform Act. Various factors—many touched on in previous Sultan Azlan Shah lectures—are responsible:

- since the 1970s, the growth of judicial review—this gave rise in the 1990s to a Civil Service booklet called *The Judge Over Your Shoulder*[22] and was the subject of the lectures given by Sir Robin (later Lord) Cooke in 1990[23] and Lord Woolf in 1997;[24]

- since 1972, the European Community—the subject of the lecture given in 1999 by Lord Slynn,[25] who sadly died earlier this year;

- since 2 October 2000, the European Convention on Human Rights, domesticated by the Human Rights Act 1998—the subject of Cherie Booth QC's lecture in 2005;[26] and

- since the 1990s, the parallel recognition of fundamental common law rights. The main achievement under this fourth head here has been the principle of legality—the strong common law presumption that the more fundamental the right,

> In countries with a written constitution, the basic principle of separation of powers can operate as a direct limit on the powers of the executive and legislature, enforceable by the judges.

> General concepts—like that of a "democratic" state or of the Rule of Law—can, in a written constitution, operate as an effective limit on legislative and executive powers.

[27] *Council for Civil Service Unions v Minister of State for the Civil Service* [1985] AC 374 at 408–411, per Lord Diplock.

[28] Case C-106/89, *Marleasing SA v La Comercial Internacionale de Alimentacion SA* [1990] ECR I-4135.

[29] Case C-213/89, *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-2433; *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603.

the less likely that Parliament intended its abrogation, unless very clear words have been used.

I will take these factors in turn. Judicial review holds government to account, it insists on good governance and it does so now on a coherent basis. Released from former procedural complexities, executive action is scrutinised under three classic heads: illegality, procedural irregularity and irrationality.[27] But the common law has traditionally been cautious about challenges on irrationality. European law has recently encouraged us to more intensive and substantive review, based on proportionality, especially in the area of human rights. Administrative law is today recognised as an essential tool by which the judges hold government to its proper limits.

Second, an ever-growing source of law in the United Kingdom is European Community legislation. This has a double-barrelled effect: first, domestic legislation is to be construed so far as possible consistently with European legislation;[28] and, second, if domestic legislation cannot in this way be reconciled with directly applicable European legislation, it is simply invalid and the judges must hold it so.[29] This applies as much to legislation passed subsequent to the European Communities Act 1972 as before.

Under the traditional rule of Parliamentary supremacy, an Act of Parliament passed after 1972 could have been expected to overrule European law, if the two were inconsistent. Not so with the European Communities

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[30] *Internationale Handelgesellschaft mbH v Einfuhr- und Vorratstelle fur Getreide und Futtermittel* [1974] 2 CMLR 540. See also the *Solange II* decision: *Re Wunsche Handelgesellschaft* [1987] 3 CMLR 225.

Act 1972. It renders invalid any subsequent Act inconsistent with European law. The exercise of Parliamentary sovereignty reflected in the passing of the 1972 Act has the somewhat paradoxical effect that Parliament is no longer sovereign in the area of European Community law—so long as the United Kingdom remains within the European Community. It is, I add, inconceivable that we shall not do so.

Contrast the position in other European countries with their written constitutions. There, supreme constitutional courts have made clear that, at least in their eyes, their domestic constitutions place continuing limits on European legislative sovereignty; European legislation will be acceptable so long—but only so long—as it continues broadly to respect those limits.

The best-known decision in this connection is the decision of the German Constitutional Court (Bundesverfassungsgericht) in *Solange I*, refusing to recognise the unconditional supremacy of the European Community when Community law could impact upon the basic rights contained the German Constitution.[30]

The same Court in a more recent decision of 30 June 2009 approved the Treaty of Lisbon as compatible with the German Basic Law (a decision which perhaps signifies the Community's increasing awareness of fundamental rights and the German recognition of the increasingly important role of the European Community at both a

> It is not enough to point
> to a majoritarian view.
> The protection of a dominant
> majority is usually easy enough.
> But human rights
> are not utilitarian.
> The greatest good
> of the greatest number
> is not the test.
> It is a central role
> of the modern court
> to protect
> unpopular causes
> and individuals.

[31] Section 3.

[32] Section 4.

[33] [2004] UKHL 56; [2005] 2 AC 68.

national and a supra-national level). But the approval was conditional upon German legislation providing for closer scrutiny of European legal proposals, in order to remedy what the German Constitutional Court perceived as a lack of democratic legitimacy and control at the level of the European Parliament.

Third, the Human Rights Act 1998 also requires United Kingdom courts to interpret domestic legislation so far as possible consistently with the European Convention on Human Rights.[31] But, if that is not possible, the result is not to make the domestic legislation invalid. It is to enable the court to make a declaration of incompatibility which does not in fact invalidate the legislation.[32] The understanding is that Parliament will then reconsider and repeal or amend the offending legislation; this is what has to date always happened.

For example, in *A v Secretary of State for the Home Department*,[33] in December 2004 a law authorising the detention without trial of aliens—but not British nationals—suspected of terrorist involvement was declared discriminatory and incompatible with the Convention. United Kingdom nationals suspected of terrorist activity were just as likely to represent a danger, yet there was no provision for suspending habeas corpus to allow their detention. The Government allowed the legislation to lapse (and substituted a system of control orders, which has also had to be modified in the light of subsequent declarations of incompatibility).

> The Human Rights Act 1998 requires United Kingdom courts to interpret domestic legislation so far as possible consistently with the European Convention on Human Rights. But, if that is not possible, the result is not to make the domestic legislation invalid. It is to enable the court to make a declaration of incompatibility which does not in fact invalidate the legislation.

[34] See *R v Home Secretary, ex parte Pierson* [1998] AC 539 at 575C-D, and *R v Home Secretary, ex parte Simms* [2000] 2 AC 115 at 131E-G.

[35] An appeal from: *A, K, M, Q & G v Her Majesty's Treasury* [2008] EWCA Civ 1187; [2009] 3 WLR 25 and *HAY v Her Majesty's Treasury* [2009] EWHC 1677 (Admin).

[36] Terrorism (United Nations Measures) Order 2006 (SI 2006/2657); Al-Qaida and Taliban (United Nations Measures) Order 2006 (SI 2006/2952). The present point arose in respect of the latter order.

[37] Section 1(1).

Fourthly, there is the principle of legality: this consists of a strong presumption that the more fundamental the right, the less likely that Parliament intended its abrogation, unless very clear words were used.[34] It is a powerful interpretative tool, almost as powerful as the obligation to interpret legislation so far as possible consistently with European Community law and the European Human Rights Convention.

The existence of rights which the common law recognises as fundamental may be relevant in circumstances to which the Human Rights Convention, as interpreted by the Strasbourg court, does not extend.

The first case to come before the new United Kingdom Supreme Court saw such an argument.[35] By the United Nations Act 1946 Parliament granted to the executive power to make subordinate legislation, without further Parliamentary scrutiny, in order to give domestic effect to Security Council Resolutions under Chapter VII of the UN Charter. By Resolution (No 1267) the Security Council required all states to freeze assets of persons on a Security Council list of persons associated with the Taliban and Al-Qaida. The United Kingdom Government made Orders in Council[36] to give effect to this obligation.[37] Individuals identified by the Security Council thus became subject to orders within the United Kingdom which subjected all aspects of their personal or other expenditure to executive control and scrutiny.

> The principle of legality consists of a strong presumption that the more fundamental the right, the less likely that Parliament intended its abrogation, unless very clear words were used. It is a powerful interpretative tool.

[38] The House of Lords had held in the earlier case of *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 AC 332 that a Security Council resolution requiring detention without trial for security reasons of Iraqis in Iraq prevailed *pro tanto* over the right not to be detained save in circumstances specified in Article 5 of the Human Rights Convention.

[39] Negative answers were given to these questions by the majority of the Supreme Court in its decision dated 27 January 2010: [2010] UKSC 2.

[40] These are analysed and put into a conceptual framework in an article "Bi-polar Sovereignty Revisited" [2009] CLJ 361 by CJS Knight, who I am lucky enough to have as my legal assistant, and to whom I am indebted for assistance in relation to research for and preparation of this lecture.

[41] [2005] UKHL 56; [2006] 1 AC 262 at [102].

For reasons into which I need not go, the Human Rights Convention was, on one view, of no assistance.[38] But the individuals pointed out that the orders meant that they had no opportunity to challenge judicially, or even know the basis of, their appearance on the Security Council list. They argued that so fundamental an inroad on their ordinary rights to use their property could not have been intended to be taken away by a power to make subordinate legislation. They asked rhetorically: What if a Security Council Resolution had named them as persons who should be detained without trial? Could the apparently general language of the United Nations Act really have so large a grasp? Could habeas corpus and individual rights be so easily set aside?[39]

It has also been mooted, judicially as well as extra-judicially, that the common law may have a force going beyond statutory interpretation: that there may be constitutional fundamentals[40]—again, for example, the right of access to a court–which "even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish" by primary legislation. Comments in this sense were made in *R (Jackson) v Attorney General*.[41] This was a case on the validity of the Hunting Act 2004, by which the Labour Government sought to abolish fox hunting. (The Act seems in reality to have had remarkably little impact on this traditional country activity.) But the case was litigated to the House of Lords, where Lord Steyn explained Parliamentary sovereignty as "a construct of the judges", created by them and capable of being qualified by

> Lord Steyn explained Parliamentary sovereignty as "a construct of the judges", created by them and capable of being qualified by them, and Lord Hope and Baroness Hale identified the Rule of Law as "the ultimate controlling factor on which our constitution is based".

[42] Ibid, at [102] per Lord Steyn, [105]-[108] per Lord Hope and [159] per Baroness Hale.

[43] *Doctor Bonham's Case* (1610) 8 Co Rep 107 at 118a. Although for an argument that "void" meant something very different at the time see: I Williams, "*Dr Bonham's Case* and 'Void' Statutes" (2006) 27 *Journal of Legal History* 111.

[44] *De Rege Inconsulto,* 1625, echoing *The Political Works of James I,* (1610).

them, and Lord Hope and Baroness Hale identified "the Rule of Law" as "the ultimate controlling factor on which our constitution is based".[42]

Such thinking takes one back to the constitutional battles of the 17th century, mentioned earlier. Chief Justice Coke, a thorn in the flesh of James I, suggested famously in 1610 that natural law would prevail over any Act of Parliament that was "against common right and reason".[43] In reaction, Sir Francis Bacon, Coke's great adversary and James I's supporter, advised judges that, although they might like to regard themselves as lions, they should be "lions *under* the throne; being circumspect that they do not check or oppose any points of sovereignty".[44]

Bacon was arguing the royal or executive cause. That cause was decisively lost during the later Civil War when sovereignty passed to Parliament. The critical issue today is often how far it is the role of an independent judiciary to oppose or check the sovereignty not of the executive, but of Parliament. But Parliament today is all too often no more than the mouthpiece of the executive. So the change in the issue may be seen as more cosmetic than substantial. In general, it is an issue which the great institutions of state would all do well to avoid bringing to a point. Lord Hope put this attractively in the Hunting Act case, when he said at paragraph 125 that:

> In the field of constitutional law the delicate balance between the various institutions whose sound and lasting

Sir Francis Bacon advised judges that, although they might like to regard themselves as lions, they should be "lions *under* the throne; being circumspect that they do not check or oppose any points of sovereignty".

[45] See also: Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1996, Eleventh Sultan Azlan Shah Law Lecture); and Lord Clyde, "Construction of Commercial Contracts: Strict Law and Common Sense" (2000, Fifteenth Sultan Azlan Shah Law Lecture) in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, edited by Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia.

Lord Diplock once deplored the transfer from the sphere of statutory interpretation to the sphere of contractual construction of the expression "purposive *construction*": *Antaios Co SA v Salen AB* [1985] AC 191. But I think he meant simply that contracts, the prime legal product of personal autonomy, should not be approached with any pre-conception that what the parties had agreed should coincide with any higher social goal.

[46] [1990] 2 AC 605.

> quality Dicey (at page 3) likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has for the other. In *Pickin v British Railways Board* [1974] AC 765, 788A-B Lord Reid observed that for a century or more both Parliament and the courts have been careful to act so as not to cause conflict between them. This is as much a prescription for the future as it was for the past.

The prescription is all the more important in an era when the Rule of Law and the protection of individual liberties represent values frequently under threat as law-makers react to perceived internal or external threats, particularly threats of terrorism. Judges find themselves faced with difficult, delicate and nuanced decisions in increasingly controversial areas. The courts employ various concepts to allow flexibility and to explain and objectivise their response to such difficulties. One of the most pervasive is "reasonableness"; another introduced from Europe has been "proportionality".

There is nothing new about the invocation of reasonableness in civil law. In contract, the aim has always been to identify the meaning that a reasonable person would have attached to the contract in the light of their contractual purpose objectively ascertained in the light of the surrounding circumstances.[45] Reasonableness also features among the factors deployed in deciding whether or not to recognise a duty of care in the tort of negligence: see *eg Caparo v Dickman*[46] and *Barclays Bank plc v Customs*

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[47] [2006] UKHL 28; [2007] 1 AC 181.

[48] *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, replacing the old test from *R v Gough* [1993] AC 646.

[49] I should however be cautious about this—not just because robes and wigs may sometimes have encouraged judicial self-importance ("judgitis"), but also because in the Supreme Court we have decided to continue the House of Lords committee room tradition of not robing. We also continue to sit on the same level as counsel and to continue the tradition of hearings as a form of learned debate.

[50] [2007] UKHL 37; [2007] 1 WLR 2679 at [81].

and Excise Commissioners.[47] It is central to the question whether a duty of care, once recognised, has been observed or broken.

In public law, reasonableness has long played a key role in the form of the *Wednesbury* test. But it has a wider application. Whether a judge was or appeared biased is no longer determined from the viewpoint of the court, but by the court asking itself whether there was or would have appeared to be bias in the eyes of a fair-minded and informed member of the public—a reasonable member of the public neither unduly compliant or naïve nor unduly suspicious.[48]

Again, the test is expressed in objective terms, distancing it from the personal predilections or prejudices of the particular judge. Tools which lend objectivity to the judicial process can be important for the judge him or herself, and also for public confidence. (In the past, one might have added: in the same way that judicial robes and/or headgear symbolised and underlined the distance between the judge's private inclinations and public duties.)[49] However, it is sometimes also important to remember, as I noted in *R v Abdroikof*,[50] that

> … the fair-minded and informed observer is him or herself in large measure the construct of the court. Individual members of the public, all of whom might claim this description, have widely differing characteristics, experience, attitudes and beliefs which could shape their

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[51] Lord Mustill, "Negligence in the World of Finance" (1991, Sixth Sultan Azlan Shah Law Lecture) in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, edited by Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia. See also J Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence" (1995) 111 LQR 301, which urged courts to be more open in identifying the policy choices and considerations underlining their decisions.

answers on issues such as those before the court, without their being easily cast as unreasonable.

Courts aim at results which are and will be accepted as fair, they use language which will have a resonance with their listeners and the public, but such language should not be allowed to obscure an important underlying reality—that the court is itself often reaching a difficult policy decision. In his Sultan Azlan Shah lecture on the duty of care in tort, Lord Mustill identified as the root of the problem "a reluctance on the part of judges to accept inwardly, and afterwards to acknowledge outwardly, that decisions in this field are essentially concerned with social engineering"—the "refraction through the judge's eyes of a set of contemporary economic and political value-judgments". So "the first step which should be taken … is to recognise that we are here concerned with policy".[51]

The almost inevitable consequence of such realism is that other issues, which I have already touched in passing, come to the fore: Who are these judges? How were they appointed? Are they properly prepared for their task? And are they doing it efficiently? What are the ethical standards to which they adhere and how are these enforced? Are they appropriately answerable for their decisions?

The recent developments in the United Kingdom, which I have outlined, make all these questions more telling. The judicial role is being performed overtly in new areas of pressing public interest and to a greater extent

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[52] The most prominent devotee of this approach is Justice Antonin Scalia. See *A Matter of Interpretation: Federal Courts and the Law,* 1997; "The Rule of Law as a Law of Rules" (1989) 56 U Chi L Rev 1175; and "Originalism: The Lesser Evil" (1989) 57 U Cin L Rev 849. The Privy Council has not taken the same approach: *Charles Matthew v The State* [2005] AC 433.

[53] There was in 1998 somewhat hysterical headlines in *The Guardian*, on the appointment of two judges with commercial and company law backgrounds to the House of Lords: "Lord Justices Hobhouse and Millett, Who they?" and "Commercial lawyers to judge human rights".

than ever before under general scrutiny. The courts are no longer enforcing reasonable expectations *in favour of* reasonable people—injured victims. Only too often, they are identifying, and enforcing adherence by the executive or legislature to, proper standards in favour of *unreasonable* people—people who have behaved unreasonably, people who reasonable people have every reason to dislike or to suspect of the grossest misconduct.

When doing this, courts are particularly open to criticism that they are reflecting their own predilections or preferences, and to inquiry as to the source of their legitimacy to do this.

Even where courts can base themselves on a written constitution, they may feel a need to deflect such suggestions. The originalist theory of interpretation of the United States Constitution–that it should be read as understood at the time of its enactment[52] —may perhaps be seen in this light.[53]

Terrorism is an area *par excellence* where there has been intense legal focus on governmental reactions, in the interests of the peaceful majority, to the threat posed by a small, ill-defined and difficult to identify minority. It is easy, but only too dangerous, to argue that desperate times call for desperate measures, and justify a loosening of the ordinary standards of liberty and behaviour for which democracies stand.

Mr Blair, in last years' lecture, did not like the House of Lords' decision in the case of *A*, which declared the detention

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[54] *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

[55] T Blair, "Upholding the Rule of Law: A Reflection" (2008, Twenty-Second Sultan Azlan Shah Law Lecture), pages 329–371 above.

[56] Lord Steyn, "Guantanamo Bay: A Legal Black Hole" [2004] 53 ICLQ 1. See also Opinion No 8 (2006) of the Consultative Council of European Judges at [75]: www.coe.int/judges.

[57] European Convention on Human Rights, articles 8–11.

of aliens suspected of terrorism to be discriminatory and incompatible with human rights.[54] He said that the House had "seriously misjudged the threat and misunderstood the only practical way of dealing with it".[55]

I was not a member of the court at that time, and I hope that it is more than loyalty that causes me to disagree. Over-reaction risks undermining the very values which anti-terrorism measures aim to protect. Witness the disaster of Guantanamo Bay, and the damage done to the image of its creator.[56]

Delicate balancing exercises may also have to be undertaken in respect of other rights, such as those to respect for private life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association.[57] All may be made subject to restrictions—under the European Convention on Human Rights such "as are prescribed by law and are necessary in a democratic society" in the interests of various specified matters, such as national security, public safety, the protection of public order, the protection of the rights and freedoms of others and, in the case of freedom of expression, the maintenance of "the authority and impartiality of the judiciary". I note that the rather differently, and on its more widely, worded Article 10(2) of the Malaysian Constitution allows Parliament to impose such restrictions "as it deems necessary *or expedient*" in various interests, which also include "morality".

> Courts aim at results which are and will be accepted as fair, they use language which will have a resonance with their listeners and the public, but such language should not be allowed to obscure an important underlying reality—that the court is itself often reaching a difficult policy decision.

[58] *Texas v Johnson* 491 US 397 (1989).

[59] *R (Williamson) v Secretary of State for Employment and Education* [2005] UKHL 15; [2005] 2 AC 246.

[60] *R (Begum) v Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100.

[61] *Ghai v Newcastle CC* [2009] EWHC 978 (Admin). The case has however gone to appeal, where it appears from reports that one issue is whether the ban and such rites are really inconsistent.

Editor's note: The appeal against the High Court's decision has been allowed. Without specifically deciding whether there was an infringement of Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Court of Appeal adopted a wide meaning to the word "crematorium" and held that the legislation in question could accommodate the claimant's wishes to be cremated in accordance to his Hindu belief of cremation by way of open air funeral pyre. See [2010] EWCA Civ 59; [2010] 3 WLR 737.

When does freedom of expression, often represented by the press, outweigh an individual's right to privacy? What limitations may be appropriate on expressions, verbal or physical, of view or, more fundamentally, of religious belief? This was the issue in the United States in the case about prohibitions of flag-burning.[58] United States federal and state statutes had outlawed flag-burning in response to protest burnings of the United States flag in opposition to the Vietnam war. The United States Supreme Court struck them down as inconsistent with freedom of expression. More recently, in the United Kingdom, it has been held that a religious belief in the virtue of corporal punishment in schools could not outweigh a statutory prohibition;[59] and that schools might, if they so chose by a carefully considered policy, legitimately require students to refrain from wearing for religious reasons a head-dress which their religion did not positively require them to wear.[60] A first instance court has also upheld the legitimacy of what it identified as a ban on open air cremation preventing orthodox Hindus from practising their funeral rites.[61]

The phrase in the European Convention on Human Rights—"necessary in a democratic society"—brings the judicial role into the forefront of public attention. And it does so in a more intensive way than anything traditionally involved in administrative law judicial review (although it has, as I have said, also begun to influence traditional common law review).

I will give an example of the continuing difference. In cases involving the unlawful occupation of property by

Terrorism is an area *par excellence* where there has been intense legal focus on governmental reactions, in the interests of the peaceful majority, to the threat posed by a small, ill-defined and difficult to identify minority.

It is easy, but only too dangerous, to argue that desperate times call for desperate measures, and justify a loosening of the ordinary standards of liberty and behaviour for which democracies stand.

[62] [2008] UKHL 57; [2009] 1 AC 367 at [135] per Lord Mance, citing *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 at 531 per Lord Bridge of Harwich; and *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1130B-C per Laws LJ ("the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake").

[63] J Bentham, "Anarchial Fallacies" in Bowring (ed), *The Works of Jeremy Bentham*, 1838–1843, page 501.

persons (example, Romas or gypsies) who have made it their home, the common law has traditionally said that the ownership and right to possession of property outweighs all other interests. The European Court of Human Rights has told us that this is not good enough. Proportionality requires the court to consider whether even a trespasser's right to a home outweighs, even if only temporarily, the owners' right to repossess his property.

In the most recent decision on this issue at the highest domestic level, the House of Lords wrestled with this difference in a way which may not have closed the gap between domestic and Strasbourg case law: *Doherty v Birmingham City Council*.[62] The Supreme Court is shortly to be asked yet again to revisit the area.

Courts are therefore increasingly involved in very public issues which affect individuals and communities on a day to day basis, and on which very profoundly different views may be held by different individuals and groups. It is not enough to point to a majoritarian view. The protection of a dominant majority is usually easy enough. But human rights are not utilitarian. The greatest good of the greatest number is not the test. Not surprisingly, Jeremy Bentham, the protagonist of utilitarianism, thought that it was "nonsense on stilts" to speak of absolute rights.[63] But written constitutions along the United States and Westminster style, the Universal Declaration of Rights and the European Convention on Human Rights prove him wrong. It is a central role of the modern court to protect unpopular causes and individuals.

> Delicate balancing exercises may also have to be undertaken in respect of other rights, such as those to respect for private life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association.

[64] [2002] UKHL 19; [2002] 2 AC 883.

[65] [1976] AC 249 at 277–278.

[66] *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 AC 332

[67] Constitutional Reform Act 2005, sections 25–31.

Another influence which I wish briefly to mention is public international law. This has, to a remarkable extent, become part of the common fare of domestic courts. I take two examples.

In *Kuwait Airways Corp v Iraqi Airways Co*,[64] the House of Lords refused to apply an Iraqi law passed by Saddam Hussein to confiscate Kuwait Airways aircraft which had been taken to Iraq following Iraq's illegal invasion of Kuwait, which was at the time being maintained in breach of the Security Council's Chapter VII resolutions. To apply a foreign confiscatory law of that nature would have been a breach of the public policy of the English courts. Racist laws such as those of Nazi Germany would not be recognised in the United Kingdom for the same reason: *Oppenheimer v Cattermole*.[65]

More recently, however, in *Al-Jedda* [66] the House of Lords held that a Security Council Resolution authorising the detention by British forces of suspects without trial in Iraq overrode the protection of Article 5 of the Human Rights Convention.

I return to the questions asked about modern judges. Who are they? How were they appointed? What are the standards to which they adhere and how are these enforced? Are they appropriately answerable for their decisions? The creation of the new United Kingdom Supreme Court and the establishment of a new system of appointments are steps aimed at providing a partial answer.[67]

> The recognition of the value of diversity is I believe a fundamental in modern society. Different human beings —different sexes, ethnic groups, persons with different career paths—bring different experiences and insights which the variety and complexities of the issues coming before modern courts require.

[68] The point was made with great force by The Honourable Michael Kirby AC CMG in a recent lecture.

[69] CCJE, Opinion No 1 (2001) at [45].

We have sought to explain more openly on our website and in our exhibition space who we are, what our careers have been and what judging involves—as I said earlier "not a science, but a discipline". We have of course a way to go. Other jurisdictions have made speedier progress than the United Kingdom towards diversity. It is not just a question of appearances. The recognition of the value of diversity is I believe a fundamental in modern society.[68] Different human beings—different sexes, ethnic groups, persons with different career paths—bring different experiences and insights which the variety and complexities of the issues coming before modern courts require. The fear is sometimes expressed that the common law will in Europe disappear under harmonising tendencies. I do not think so. European history and culture are witnesses to the value of diversity, even if they may also have caused some of its past problems.

The questions I have been discussing have a resonance in all legal systems. Ten years ago I was elected as first chair of a novel body, the Consultative Council of European Judges ("CCJE"), established by the Council of Europe. We commended the creation of an independent, non-political authority to have responsibility in all aspects of judicial life, from appointment to promotion, deployment, discipline and removal. It should be "an independent authority with substantial judicial representation chosen democratically by other judges".[69] But—and with the years I have become ever more convinced of this—the judicial role should not be preponderant.

> The phrase in the European Convention on Human Rights—"necessary in a democratic society"—brings the judicial role into the forefront of public attention. And it does so in a more intensive way than anything traditionally involved in administrative law judicial review.

[70] CCJE, Opinion No 4 (2003).

[71] JS Mill, *Considerations on Representative Government*, 1861, page 4.

[72] Available at www.unodc.org/pdf/corruption/bangalore_e.pdf (accessed 30 September 2011).

[73] Available at www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf (accessed 30 September 2011).

Otherwise, there remains the risk of unconscious self-replication.

Another important theme is that judges should themselves have and undertake responsibility for training and for the production and publication of ethical guides;[70] that (save of course in cases of corruption) judges should answer for the content and quality of their decisions through the appellate process, accompanied by the freedom of the public to comment on judicial decisions; that measures of performance by reference to the throughput or speed handling of cases can be particularly problematic if undertaken by the executive; and should if used be sensitively devised and controlled by the judiciary itself.

Such issues may not be headline-grabbing, but they are essential practical elements without which a properly functioning judiciary cannot be independent. John Stuart Mill reminded us that institutions "do not resemble trees which, once planted, are 'aye growing while men 'are sleeping'. In every stage of their existence they are made what they are by human voluntary agency."[71]

Another body with an international impact is the Judicial Integrity Group, which has been responsible, after world-wide consultations, for producing the United Nations' Bangalore Principles of Judicial Conduct[72] and a Commentary[73] thereon—general principles which seek to identify the common values to which judges world-wide, to whatever legal tradition they belong, should adhere.

"Judges should answer for the content and quality of their decisions through the appellate process, accompanied by the freedom of the public to comment on judicial decisions."

"Judicial independence is a fundamental value, not of course in the interests of the judiciary, but as a pre-requisite to their performance of a role which is in the interests of society as a whole."

Judicial independence is a fundamental value, not of course in the interests of the judiciary, but as a pre-requisite to their performance of a role which is in the interests of society as a whole.

I believe that international dialogue on all these matters is increasingly important. This lecture series is a singular bridge in that respect between our two respective common law countries, with their common law traditions. I hope that it will long remain so. It has been an honour to be part of it. Thank you.

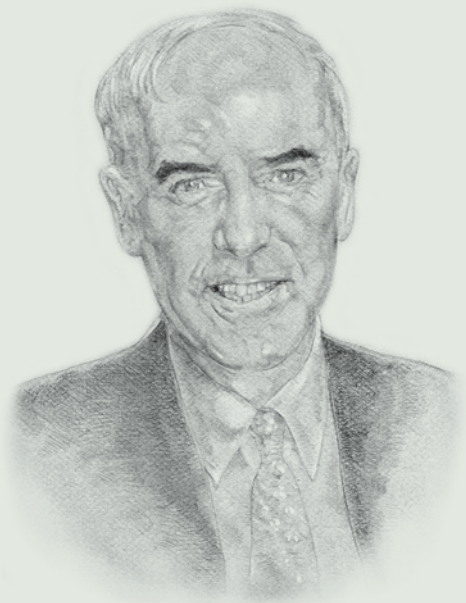
I have been discussing the need for judges to be, and to be seen to be, impartial. That is, quite simply, a basic requirement of any legal system which aspires to ensure the Rule of Law. Your Royal Highness put the position precisely in your 1984 lecture on the Supremacy of Law in Malaysia when you said:

"The existence of courts and judges in every ordered society proves nothing: it is their quality, their independence, and their powers which matter … The rules concerning the independence of the judiciary … are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the Rule of Law." *("Supremacy of Law in Malaysia" in Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches, 2004)*

Lord Rodger of Earlsferry
Bias and Conflicts of Interests
—Challenges for Today's Decision-Makers
24th Sultan Azlan Shah Law Lecture, 2010

The Right Honourable Lord Rodger of Earlsferry

Bias and Conflicts of Interests —Challenges for Today's Decision-Makers



Alan Ferguson Rodger
(18 September 1944 – 26 June 2011)

Lord Rodger was born in Glasgow in 1944. He read law at the University of Glasgow, where he obtained a double first in Scots and Civil Law, and pursued his doctorate in Roman Law at the University of Oxford. He remained at Oxford as a junior research fellow at Balliol College, and then as a fellow and tutor of New College from 1970 to 1972.

Lord Rodger was called to the Scottish Bar in 1974 and was appointed Queen's Counsel in 1985. In 1989 Lord Rodger was appointed Solicitor General for Scotland, and in 1992 he became Lord Advocate (the Scottish equivalent of the Attorney General), at which time he was made a life peer and Privy Councillor. He was said to be the only British law officer to have taken part in proceedings before the International Court of Justice, the European Court of Justice,

the European Court of Human Rights and the European Commission of Human Rights (*The Telegraph*).

Amongst the innovative changes Lord Rodger introduced during his time as Lord Advocate include allowing cameras in court to record court proceedings, the introduction of the right of Scottish prosecutors to appeal against sentences considered too lenient, as well as a wide-ranging review of the criminal justice system to look for cost savings (*The Telegraph*).

Lord Rodger was appointed a Court of Session judge in 1995, and was then one of the youngest appointees to the Scottish Bench. He was Lord Justice General of Scotland and Lord President of the Court of Session, the Head of the Scottish judiciary, from 1996 to 2001. (Interestingly, the post of Lord President of the Federal Court of Malaysia, which was created under the Federal Constitution just before the formation of Malaysia, had a Scottish origin, and was in fact first occupied by a Judge of Scottish origin, namely the Right Hon Tun Sir James Thompson who was Lord President from 1963 to 1966.) The Twenty-Fourth Sultan Azlan Shah Law Lecture was therefore an unprecedented occasion, featuring two distinguished jurists who have held the high post of Lord President of their respective judiciaries, namely His Royal Highness Sultan Azlan Shah and Lord Rodger of Earlsferry.

Lord Rodger became a Law Lord in 2001 and in 2009 became one of two Scottish Justices of the newly established Supreme Court of the United Kingdom. His judgments were marked by great learning, luminous clarity and human understanding. Lord Rodger applied his intellect with common sense, and was not alienated from the "real world". He was not to be mistaken for a conservative judge who viewed the world from the comfort of an Ivory Tower, or a high pedestal.

Indeed, Lord Rodger was more than aware of the trends and insights of the 21st century. This awareness was often reflected in his judgments. For example, in July 2010, Lord Rodger in the Supreme Court decision of *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2011] 1 AC 596 highlighted the freedom

of all members of the British society to "enjoy themselves going to Kylie [Minogue] concerts" and "drinking exotically coloured cocktails" if they so wished.

Amongst Lord Rodger's well known judgments in the House of Lords and in the Supreme Court were *A and others v Secretary of State* [2005] 2 AC 68 (where a nine-man panel of Law Lords considered the right to liberty of a suspected terrorist under the Human Rights Act 1998) and *Regina (Gentle) v Prime Minister and others* [2008] AC 1356 (where a nine-man panel of Law Lords had to decide whether the British Government was obliged to hold an independent inquiry into the lawfulness of the invasion of Iraq). Lord Rodger also delivered judgment in the important cases of *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61, a landmark case on the measure of damages for breach of contract; and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, an important decision on whether the common law rule excluding evidence of pre-contractual negotiations should be departed from.

Lord Rodger was regarded as one of the finest legal minds of his generation, an outstanding jurist who "combined a stellar professional career as advocate, law officer and judge with a global academic reputation as scholar and historian" (*The Guardian*). He was an Honorary Bencher of Lincoln's Inn and was appointed as the High Steward of Oxford University in 2008.

Apart from the law, Lord Rodger had a deep commitment in his professional and academic life to his colleagues, students and support staff. He never married, but he became a father figure and role model to many younger people, especially students (*The Guardian*).

Lord Rodger passed away on 26 June 2011 aged 66 after a short illness. Lord Phillips, President of the United Kingdom Supreme Court, in a tribute to Lord Rodger, remarked that "for 10 years [Lord Rodger] has been a mainstay of the Law Lords and of the Supreme Court. He was an outstanding jurist and a wonderful companion. His premature death is a tragic loss to the court and to the nation."

Where a judge will not be able to deal with the case impartially, or without giving the appearance of bias, he should not sit. This is a fundamental principle of the law and a system in which it is not observed is not fit for purpose.

The court always has to ensure that it maintains the confidence of the contemporary public in its independence and impartiality. So, if public attitudes change, the court must have regard to current thinking about what would be acceptable.

24 Bias and Conflicts of Interests —Challenges for Today's Decision-Makers

Lord Rodger of Earlsferry
Justice of the Supreme Court of the United Kingdom

Text of the Twenty-Fourth Sultan Azlan Shah Law Lecture delivered on 6 October 2010 in the presence of His Royal Highness Sultan Azlan Shah

Your Royal Highness, I must begin by expressing my gratitude for the invitation to come to Malaysia to give this lecture. I am only too well aware of the roll of distinguished judges who have preceded me and am conscious of the honour of having the opportunity to add my contribution. In thanking everyone for the care that has gone into arranging my trip, I can only say how sorry I am that the start of the new Supreme Court term prevents me from staying longer and seeing more of the country.

I have chosen to speak this evening about bias and conflicts of interest or—to describe the same thing in another way—the requirement that a tribunal making a decision should not only be impartial but should be seen to be impartial. The same principle is applied in many common law and allied jurisdictions. So I have felt free to take quite a lot of my examples from Scottish cases which

“A judge cannot refuse to sit because, say, the case concerns a matter of great public controversy in which any decision is likely to bring down criticism on the judge, or because one of the parties is powerful and popular and a finding against him would make the judge unpopular.”

may not be so well known to you, but which happen to illustrate points which are not covered in the more familiar English authorities.

The paradigm decision-maker is the judge. And most of the examples which I shall be discussing this evening concern judges. But there are plenty of other decision-makers in respect of whom similar issues arise. Here in Malaysia you do not use juries, but in Britain we do. And allegations have quite frequently been made that a jury was not impartial—for example, because a juror went out on a date with one of the accused after he was acquitted at the half-way stage of the trial, when the jury still had to consider the case against his brother. But questions may also arise about the impartiality of members of an employment or other specialist tribunal, or of a planning or licensing board. Questions may even arise about the impartiality of an arbitrator—despite the fact that the parties will usually choose somebody whom they consider to be impartial between them. If he turns out not to be, his decision will be set aside.

To sit, or not to sit

Where a judge will not be able to deal with the case impartially, or without giving the appearance of bias, he should not sit. This is a fundamental principle of the law and a system in which it is not observed is not fit for purpose. Nonetheless, the duty *not* to sit in these circumstances is an

> The duty to sit also prevents counsel from trying to shop around for their preferred judge by advancing some reason why it might be better for some other judge to hear their case. The question is not whether their preferred judge might be more appropriate in some respect but whether the judge to whom the case has been assigned has a valid ground for recusing himself.

exception to the judge's general duty to sit in any case that is validly placed before him. The rationale of that general rule is to ensure that even the least worthy or most unpopular litigants are entitled to have a fair trial of their dispute. Therefore a judge cannot refuse to sit because, say, the case concerns a matter of great public controversy in which any decision is likely to bring down criticism on the judge, or because one of the parties is powerful and popular and a finding against him would make the judge unpopular. If the Rule of Law is to prevail, the judge must sit in all such cases, unless he has a valid reason for not doing so. At a slightly less exalted level, the duty to sit also ensures that the work of the court is properly shared among the judges and that a lazy judge—strange to tell, such creatures do exist—cannot avoid a long and difficult case. The duty to sit also prevents counsel from trying to shop around for their preferred judge by advancing some reason why it might be better for some other judge to hear their case. The question is not whether their preferred judge might be more appropriate in some respect but whether the judge to whom the case has been assigned has a valid ground for recusing himself. Like any other exception to an important general duty, the judge's duty not to sit when he is conflicted must be kept within appropriate bounds.

Varieties of bias

Allegations of bias can arise in a variety of ways. At one extreme a judge or tribunal could be biased because one of

> Allegations of bias can arise in a variety of ways. At one extreme a judge or tribunal could be biased because one of the parties had actually given a financial bribe. Unfortunately, corruption of that blatant kind has by no means been unknown in recent years in Malaysia.

[1] 4 October 2010, page 2. The magistrate was sentenced to three years' imprisonment and fined RM15,000 on the first charge of accepting a bribe of RM3,000 to reduce a sentence for a drugs offence to a two-year good behaviour bond of RM1,000. He was sentenced to three years' imprisonment and fined RM25,000 on the second charge of asking for a bribe of RM5,000 for a similar purpose. The periods of imprisonment were to run concurrently.

the parties had actually given a financial bribe. In Britain such a case would be virtually unheard of nowadays but, even in the short time I have been here, I have become aware that, unfortunately, corruption of that blatant kind has by no means been unknown in recent years in Malaysia. Indeed Monday's *New Straits Times*[1] contained a report of a magistrate being convicted of accepting and soliciting a bribe to pronounce a more lenient sentence in a drugs case.

If I do not dwell on these shocking cases, it is simply because they are much better known to you than to me and, in any event, the legal position is clear: any decision by the corrupt judge must be set aside.

The same would apply if a judge were blackmailed by one of the parties.

Although a slightly different principle is involved, the position is equally clear if a judge has a financial interest in the outcome of the case—by reason, say, of being a shareholder in one of the parties. Sometimes the judge may be influenced by fear of some powerful and ruthless authority. More commonly, the risk will be that the judge may have been influenced in more subtle ways—by friendship, or out of gratitude for some appointment or other favour, either for himself or for a member of his family, or, even more insidiously, by a prospect of future promotion.

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[2] *Barrs v British Wool Marketing Board* 1957 SC 72 at 82.

Many modern legal systems try to reduce these risks by providing that, even if the executive appoints the judges, it must act on the advice of an independent commission. This kind of commission has now been introduced in Malaysia. Such commissions tend to work slowly and not all their appointments are wise. But they do at least provide some assurance that the public will not see those who are appointed as being beholden to the executive which appointed them.

Right to a fair trial

Not so long ago, if the subject of bias came up at all, it tended not to be in connexion with the courts as such, but in connexion with some lesser administrative body which was said to have offended the principles of natural justice. Then, to use the words of Lord President Clyde:

> It is not a question of whether the tribunal has arrived at a fair result; for in most cases that would involve an examination into the merits of the case, upon which the tribunal is final. The question is whether the tribunal has dealt fairly and equally with the parties before it in arriving at that result. The test is not "Has an unjust result been reached?" But "Was there an opportunity afforded for injustice to be done?" If there was such an opportunity, the decision cannot stand.[2]

Many modern legal systems try to reduce these risks by providing that, even if the executive appoints the judges, it must act on the advice of an independent commission.

Or, to put the matter another way, the Lord President said that the test was not "Has injustice been committed?" but "Has fair play been exercised?"

I have chosen to discuss the matter under the separate heading of bias. But, as the Lord President's formulation suggests, the right to the decision of an independent and impartial judge or tribunal is simply one aspect of everyone's wider right to a fair trial, whether of a civil dispute or of a criminal charge, which has long been recognised by the common law and which is now recognised as one of the key components of a democratic society.

In the passage which I quoted, Lord President Clyde adopts an objective approach. This is essential, not least because, where a judge or tribunal *is* actually biased, this will often not be immediately apparent from the decision. After all, if a judge has taken a bribe to decide in your favour, he will not want to be caught and so—usually, at least—risk losing his job and going to prison. He will therefore take pains to formulate his judgment in such a way that he will appear to have considered all the issues with due care before finally—and perhaps with a false display of reluctance—coming down in your favour. In this way, the judge will not only conceal what is actually going on, but he will go a long way towards making his decision immune to appeal on the legal or factual analysis.

In a legal system which allows for appeals, influencing the first instance judge is not going to do much good if his

> The test was not "Has injustice been committed?" but "Has fair play been exercised?"

[3] See D Daube, "Recht aus Unrecht", in HC Ficker, D König et al, eds, *Festschrift für Ernst Von Caemmerer* (1978), pages 13–19, and also in C Carmichael, ed, *Collected Works of David Daube vol 1, Talmudic Law* (1992), pages 15–21.

[4] D.12.4.3.5, Ulpian 26 *ad edictum*.

[5] D Daube, "A Corrupt Judge Sets the Pace", in D Nörr and D Simon, eds, *Gedächtnisschrift für Wolfgang Kunkel* (1984), pages 37–52, and also in David Daube, *Collected Studies in Roman Law* (edited by D Cohen and D Simon, 1991), pages 1379–1394.

judgment will inevitably be overturned on appeal. So, by dint of careful drafting, the judgment of a judge who is actually biased may appear entirely convincing.

Indeed, one can go further. The decision of a partial judge may not only be "correct" as a matter of substance: it may even introduce a sound and desirable development in the law. This is not as surprising as it may seem at first sight. One ancient authority is recorded as pondering an ingenious solution to a particular legal problem—and adding, "How many more such ingenious suggestions would have come into the mind of someone who had been bribed to think them up?"[3]

In other words, bribery may be the mother of invention. In Justinian's Digest,[4] we find mention of a judge who corruptly decided a case of unjust enrichment to the benefit of a favourite of the Emperor Nero. Even though the decision was corrupt, it successfully established a legal principle which was then adopted by all the leading Roman jurists.[5]

For present purposes that ancient case serves as a further reminder that in a modern legal system which upholds the Rule of Law, the decision of a judge or tribunal which is not seen to have been impartial must be set aside—even if, as a matter of substance, the decision is perfectly defensible, or indeed commendable, on both the facts and the law.

> The right to the decision of an independent and impartial judge or tribunal is simply one aspect of everyone's wider right to a fair trial, which is now recognised as one of the key components of a democratic society.

[6] [2002] 2 Crim App R 267.

[7] Ibid, at 284.

In the criminal law, in particular, this means that, if the judge has appeared to be biased against the defendant, the verdict convicting him must be quashed. Quite simply, the accused has not had the fair trial which is the necessary preliminary to any valid verdict and sentence.

In *Randall v The Queen*,[6] in the slightly different context of a trial in which the prosecutor had behaved outrageously, Lord Bingham—whose recent death has cast a shadow over the entire legal world–put the point with characteristic clarity:

> But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.[7]

So where an appeal court concludes that the trial court was actually biased, or that an observer would conclude that there was a real possibility that it was biased, the conviction must be quashed. There is no room for the appeal court to go on—in the jargon—to "apply the proviso" and to consider whether, on the evidence, an impartial lower court would have convicted him anyway.

> Where a judge or tribunal *is* actually biased, this will often not be immediately apparent from the decision. After all, if a judge has taken a bribe to decide in your favour, he will not want to be caught and so risk losing his job and going to prison. He will therefore take pains to formulate his judgment in such a way that he will appear to have considered all the issues with due care before finally—and perhaps with a false display of reluctance—coming down in your favour.

[8] [2010] 1 WLR 879.

[9] Ibid, at 889, paragraph 34.

The Privy Council recently adopted that approach in *Michel v The Queen*[8] which arose out of a major prosecution for money laundering in Jersey. The evidence against the appellant looked very strong. But the Board quashed his conviction because, in its view, when the defendant gave evidence at his trial, the interventions of the presiding judge were so frequent and so hostile as to give every impression that the judge had made up his mind against the defendant. Lord Brown described the proper role for a judge during the course of a trial in this way:

> Of course he can clear up ambiguities. Of course he can clarify the answers being given. But he should be seeking to promote the orderly elicitation of the evidence, not needlessly interrupting its flow. He must not cross-examine witnesses, especially not during evidence-in-chief. He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make obvious to all his own profound disbelief in the defence being advanced.[9]

The very open way in which the judge intervened and expressed himself in that case indicates that he himself was quite unaware of the impression that he was making or that he was doing anything wrong. He would certainly not have seen himself as acting in a biased or partial manner. But the law does not intervene to punish knowing misconduct on the part of the judge. It intervenes to protect the defendant's

> In a modern legal system which upholds the Rule of Law, the decision of a judge or tribunal which is not seen to have been impartial must be set aside.

[10] *Metramac Corporation v Fawziah Holdings* [2007] 5 MLJ 501.

right to a fair trial. So, even though the judge acts in all good faith, if his conduct makes it appear that there was a real possibility that he was biased against the defendant, the verdict must be quashed. It is then up to the appeal court to decide whether there should be a fresh trial.

A court of appeal can also appear to be biased, although that is likely to happen even more rarely. But the decision of the Malaysian Federal Court in the *Metramac* case illustrates the point. Although the Federal Court rightly stressed that the threshold for intervening was high, it concluded on the basis of a careful analysis of the Court of Appeal's judgment that the lower court had indeed proceeded on a mistaken preconception which vitiated its impartiality and required that its judgment should be set aside.[10]

In the last few years there appears to have been an explosion in the Commonwealth case law on the subject of bias on the part of judges or tribunals. I do not believe that this indicates that all over the Commonwealth there are actually more judges or tribunals who are biased. Rather, a variety of factors may account for the increase in cases. I have time to mention only two—the emergence and elaboration of the doctrine of apparent bias and the advent of the Internet.

Lord Bingham put the point with characteristic clarity: "The right of a criminal defendant to a fair trial is absolute."

[11] W Blackstone, *Commentaries on the Laws of England* (1768) vol 3, page 361. Blackstone went on to point out that, if a judge did actually behave in the flagrantly biased way which the law would assume was impossible unless and until it actually occurred, he would suffer a heavy censure at the hands of those to whom he was accountable for his conduct. The exact nature of the process is not clear. But, at all events, it would not be of much comfort to the litigant who had suffered from the judge's prejudice.

Apparent bias

In Britain, on the whole, the courts are still respected. But today it is recognised that they have to earn that respect: it does not come automatically. By contrast, there is a telling passage in *Blackstone's Commentaries* where he says that, in his time—the late eighteenth century—English law held "that judges or justices cannot be challenged. For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."[11]

This statement by Blackstone speaks volumes for the authority which he saw as automatically attaching to the office of an English judge at that time. Plainly, English law no longer sees judges in quite the same way. But, so long as it did, there was no need to consider how things might look to a litigant or to any outsider. Since, *ex hypothesi*, there was no possibility of an English judge being biased, the judge could take a decision even in circumstances where someone not versed in the law might think that there was, at the very least, a risk that he would be biased. In other words, not only was there no possibility of *actual* bias, but there was equally no possibility of an *appearance* of bias. It was, supremely, the insider's view of judges and of the legal world.

Blackstone's motto was really that we should trust the judges. Scots Law was never quite so trusting about its judges. And, of course, for many years now, English law has

> Where an appeal court concludes that the trial court was actually biased, or that an observer would conclude that there was a real possibility that it was biased, the conviction must be quashed. There is no room for the appeal court to go on—in the jargon—to "apply the proviso" and to consider whether, on the evidence, an impartial lower court would have convicted him anyway.

[12] *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 at 259.

[13] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119.

[14] [2002] 2 AC 357 at 494, paragraph 103.

departed from Blackstone's view and has accepted that a judge may be partial.

It follows that in certain circumstances you may reasonably infer, from something that the judge has said or done or from the surrounding circumstances, that the judge *may* have been biased. But, for all the reasons I have given, proving it would often be difficult. So the law takes a further, critical, step. It decides that there is no need to prove that the judge *was* biased: a judgment cannot stand if it appears that the judge *may have been* biased. Hence the famous aphorism of Lord Chief Justice Hewart—not himself a paragon of impartiality—that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[12]

Where the judge has a financial interest in the outcome, disqualification is automatic. In *Pinochet No 2*[13] the House of Lords held that automatic disqualification may apply in some other exceptional cases—in particular, where the organisation with which Lord Hoffmann was associated had a very real, though non-financial, interest in the outcome of the case which he was hearing. For the most part, however, the effect of the particular relationship or other circumstances must be considered and tested. After some shilly-shallying, the accepted test in Britain is now to be found in the oft-cited words of Lord Hope in *Porter v Magill*: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[14]

> The law does not intervene to punish knowing misconduct on the part of the judge. It intervenes to protect the defendant's right to a fair trial.

[15] *Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 at 325, paragraph 12. See also *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293.

I doubt whether, in practice, there is any material difference between this test and the "real danger of bias" test which was adopted by the Federal Court in the *Mohamed Ezam* case.[15]

I shall come back to the fair-minded observer in a moment. At present, we just need to note that nowadays few litigants ever suggest that the judge or tribunal in their case was actually biased. All they say is that, for some particular reason, the judge gave an appearance of bias. In a society which does not defer unduly to judges or assume that they are immune to factors which would influence other men and women, that is enough. So the rise in the number of Commonwealth cases where issues of bias are raised is not, in itself, a reliable pointer to a corresponding increase in the number of judges or tribunals who are actually biased.

Advent of the Internet

The other factor which I must mention is the arrival of the internet. It used to be difficult to investigate a judge's background. Now it is comparatively simple. Googling his name may immediately produce various cases in which the judge was involved or connexions which he may have had with individuals or companies. It may reveal her passion for a particular football team or his involvement with his old university or school.

> Even though the judge acts in all good faith, if his conduct makes it appear that there was a real possibility that he was biased against the defendant, the verdict must be quashed.

[16] [2008] 1 WLR 2416; 2009 SC (HL) 1.

[17] *Pembangunan Cahaya Tulin v Citibank* [2008] 5 MLJ 206.

It used to be rare for judges to give interviews or speak at conferences, but it is relatively common today. A casual remark in such an interview or talk may easily reach the Internet and, if it does, it is liable to stay there—ready to be found and exploited by anyone researching the judge's background.

A litigant or lawyer who does not want the judge to sit may use the results of such investigations to try to build a case for the judge standing down. Equally, a defeated litigant may use the technique to build a case for saying that the decision should be set aside because the judge was partial.

The House of Lords case *Helow v Secretary of State for the Home Department*[16] is instructive. It involved a Palestinian woman who claimed refugee status in Britain. Her case was rejected by the Home Office and by the relevant tribunal. She applied for leave to appeal to the court. Her application was dealt with on paper and was refused by the judge, Lady Cosgrove, who is Jewish.

The applicant then brought a petition asking for the judge's decision to be set aside on the ground of her apparent bias against the applicant. The applicant did not suggest that the judge would be biased, or would be regarded as biased, merely because of her religion. In Britain any such suggestion would have been dismissed—and in Malaysia the Court of Appeal has also roundly rejected any attempt to hold that a judge should be disqualified from sitting on the supposed basis of bias by reason of his or her religion.[17]

> In the last few years there appears to have been an explosion in the Commonwealth case law on the subject of bias on the part of judges or tribunals.

In *Helow*, however, the applicant's legal advisers spotted that the judge was a member of the International Association of Jewish Lawyers and Jurist. Again, the aims of that organisation were unobjectionable. But, as Lord Mance pointed out, the applicant's lawyers used the Internet to investigate the contents of the quarterly journal of the association, some of which were very hostile to the Palestinian cause.

The lawyers then deployed these to mount a double-headed challenge to Lady Cosgrove. They argued, first, that there was a real possibility that a judge who read a journal containing such articles would herself be biased against a Palestinian activist applicant. Secondly, they argued that there was a real possibility that she would be subconsciously biased as a result of reading these articles.

Despite some doubts on Lord Walker's part, the House of Lords rejected both arguments and the applicant's appeal failed. But the significant fact is that, up until just a few years ago, it would have been virtually impossible for lawyers to mount a challenge of this kind without quite disproportionate effort and expense. Today, the material comes at the click of a mouse. Doubtless, in future we can expect other challenges based on such internet searches.

The fair-minded and informed observer

Picking up what I said earlier, the accepted test is now whether "the fair-minded and informed observer", having

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[18] [2008] 1 WLR 2416, 2417-2418, paragraph 1;
2009 SC (HL) 1, 3, paragraph 1.

considered the facts, would conclude that there was a real possibility that the judge or tribunal was biased. As Lord Hope noted in *Helow*, "the fair-minded observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively."[18]

He went on to point out that this observer has attributes which many of us might struggle to attain. He or she is not unduly sensitive or suspicious and is not to be confused with the person who complains that the judge is biased. Above all, the fair-minded observer is "informed".

Should we welcome this newcomer to our legal village? Not *particularly* warmly, perhaps. The whole point of inventing this fictional character is that he or she does not share the viewpoint of a judge. Yet, in the end, it is a judge or judges who decide what the observer would think about any given situation.

Moreover, the informed observer is supposed to know quite a lot about judges—about their training, about their professional experience, about their social interaction with other members of the legal profession, about the judicial oath and its significance for them, etc. Endowing the informed observer with these pieces of knowledge is designed to ensure that any supposed appearance of bias is assessed on the basis of a proper appreciation of how judges and tribunals actually operate. The risk is that, if

> Blackstone's motto was really that we should trust the judges. Scots Law was never quite so trusting about its judges. And, of course, for many years now, English law has departed from Blackstone's view and has accepted that a judge may be partial.

[19] *R v Secretary of State for the Environment and another, ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 at 316.

[20] *Regina v Abdroikof; Regina v Green; Regina v Williamson* [2007] 1 WLR 2679.

[21] [2003] ICR 856 at 861, paragraph 14.

this process is taken too far, as Sedley LJ observed, the judge will be holding up a mirror to himself.[19]

To put the matter another way, the same process will tend to distance the notional observer from the ordinary man in the street who does not know these things. And yet the whole point of the exercise is to ensure that judges do not sit if to do so would risk bringing the legal system into disrepute with ordinary members of the public.

The fair-minded observer seems to have come into existence in cases involving possible bias in judges or tribunals. From there he has recently moved into cases involving juries.[20] Yet, for many years, the courts were perfectly capable of dealing with cases involving juries simply by asking whether, for example, the safeguards in the system are such that the accused could be seen to get a fair trial from a jury who had read or seen prejudicial reports about him in the press or on television.

Similarly, we might ask whether the safeguards in the system are such that the party complaining could be seen to get a fair trial in the circumstances from the particular judge. Once it is accepted—as obviously it must be accepted—that the test is an objective one, it is perhaps questionable whether it is really helpful to concentrate on the fictional bystander and on what he is supposed to know or not to know. Indeed in *Lawal v Northern Spirit*[21] Lord Steyn suggested that it was unnecessary to delve into the characteristics to be attributed to that fictional character.

> The law takes a further, critical, step. It decides that there is no need to prove that the judge *was* biased: a judgment cannot stand if it appears that the judge *may have been* biased.

[22] CF Shand, *Practice of the Court of Session* (1848) vol 1, page 61.

[23] [2003] 1CR 856, at 865, paragraph 22, per Lord Steyn.

What the court actually has to consider is whether the system is such that the public would have confidence in the impartiality of the decision reached by the judge in the particular circumstances.

Standards of independence and impartiality

When called upon to decide the point, the court must apply current standards. These may fluctuate. One writer in the middle of the nineteenth century was conscious that earlier Scottish cases "carried jealousy of judges much farther than we do at present."[22] Clearly, he was aware of a change in approach by the court—towards narrowing the circumstances in which a judge should be obliged to stand down.

In 2003 in *Lawal v Northern Spirit* the House of Lords acknowledged that standards may have changed in recent years–in the opposite direction:

> What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago.[23]

While older cases provide interesting illustrations of the kinds of problems that may arise, and show how they were handled by the courts at the time, they may not

> Nowadays few litigants ever suggest that the judge or tribunal in their case was actually biased. All they say is that, for some particular reason, the judge gave an appearance of bias.

[24] *Smits v Roach* (2006) 227 CLR 423 at 457, paragraph 97.

[25] For the background, see Lord Rodger of Earlsferry, *The Courts, the Church and the Constitution* (2008), Chapter 3.

necessarily furnish appropriate guidance as to the solution that should be adopted in a similar situation today.

The court always has to ensure that it maintains the confidence of the contemporary public in its independence and impartiality. So, if public attitudes change, the court must have regard to current thinking about what would be acceptable. This, I think, is part, at least, of what Kirby J had in mind when he said in the High Court of Australia[24] that the cases show that different judges can reflect different assessments and reach different conclusions, and then added:

> The fact that this is so should make contemporary judges aware that, ultimately, they themselves have to shoulder the responsibility of reaching conclusions on the point and giving effect to them. They cannot ultimately hide behind a fiction and pretend that it provides an entirely objective standard by which to measure the individual case.

So, for instance, at one time it was regarded as quite acceptable for a judge to sit in a case where he had previously acted as counsel or in relation to a matter on which he had given legal advice to a party.

To take a specific example,[25] in 1873, 1897 and 1899 a counsel, Mr Blair Balfour, gave advice—actually conflicting advice—on what would happen to the property of the Free Church of Scotland if it entered into a union with another church.

> It used to be difficult to investigate a judge's background. Now it is comparatively simple. Googling his name may immediately produce various cases in which the judge was involved or connexions which he may have had with individuals or companies.

[26] Letter from the Rev John Sinclair, dated 24 May 1904, *The Times*, 2 June 1904, page 4, reprinted in (1904) 12 Scots Law Times (News) 31–32.

Very shortly after giving the last of these opinions, Mr Blair Balfour was appointed Lord President of the Court of Session and, two years later, he was raised to the peerage as Lord Kinross.

Meanwhile, in 1900 the union of the two churches had gone ahead and, a few weeks later, a tiny minority of the old Free Church ministers began an action, claiming that all the Free Church property belonged to those few members who had not entered the union.

When the case was eventually appealed to the House of Lords, it had to be heard twice because Lord Shand died after the first hearing. The Lord Chancellor, Lord Halsbury, asked Lord Kinross to sit in the second hearing—in which, incidentally, the tiny minority went on to win. The week before the second hearing, however, the writer of a letter to *The Times* pointed out that Lord Kinross had actually given opinions to the parties on the very point at issue.[26] The writer therefore questioned whether Lord Kinross should sit.

Nothing daunted, Lord Kinross set off for London to sit in the appeal. But, having discussed the matter with the Lord Chancellor, he must have had second thoughts, because, at the start of the proceedings, the Lord Chancellor indicated that Lord Kinross had decided not to sit, because he felt that he had given so many opinions on the questions that it might be considered that his mind was prejudiced.

> In Malaysia the Court of Appeal has roundly rejected any attempt to hold that a judge should be disqualified from sitting on the supposed basis of bias by reason of his or her religion.

[27] 10 June 1904, page 4.

[28] (1904) 12 Scots Law Times (News) 30.

[29] "Scottish Notes" (1904) 89 The Law Times 122–123.

[30] Editorial Review: Disqualification of Judges by Previous Connection with Cases, (1904) 24 Canadian Law Times 210–213.

The *Scotsman* Newspaper[27] thought that Lord Kinross had been wise to step down. But the Scottish legal press was indignant: "in legal circles", the *Scots Law Times* thundered, "the suggestion that Lord Kinross should not sit would meet with no support".[28]

The English *Law Times* agreed that lawyers would recognise at once that the objection was entirely ill-founded, but added that "the public find it difficult to believe in the intellectual detachment of the legal mind", before asserting that to accept any such objection to a judge would paralyse the administration of justice.[29]

The *Canadian Law Times* was having none of it: "We are not surprised" it said, "to learn that the public find it difficult to believe in the intellectual detachment of the legal mind, and we cannot understand why the administration of justice should be paralysed because a judge coming from the Bar declines to sit in cases in which he has been counsel".[30]

Surely, we would take the Canadian view today. In part, the prevailing legal analysis has changed—the English and Scottish legal journals were taking a legal insider's view of the situation. So, while they were conscious of the likely perception of the general public that a judge should not sit in those circumstances, they thought that it was wrong to allow that public perception to prevail over the view of the professionals.

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By contrast, the Canadian journal realised—as we do today—that what really matters in such situations is not that the legal community should be content, but that the court should adopt a course that can be expected to command the assent and respect of the general public, whose attitudes will often find expression in the wider press and other media. And, if there had been any room for doubt about the attitude of the public on this matter at the beginning of the twentieth century, there could surely be no doubt about their attitude today: nowadays the public would regard it as quite unacceptable for a judge to sit in a case involving a matter on which he had advised one of the parties. And it is the current public perception that matters.

Similarly, while decisions from other (foreign) jurisdictions may provide useful guidance, especially as to the test which is to be applied, a court has to apply that test against the background of the traditions, history and culture of its own society, which may affect the way that the public view such matters.

In addition, what may be acceptable, or at least tolerable, in a small jurisdiction where substitute judges cannot readily be found, may be unacceptable in a larger jurisdiction where that problem does not arise.

Nevertheless, the fact remains that judges work within a particular professional environment which can spill over into their social lives. Most lawyers count fellow lawyers and judges amongst their friends. So, when lawyers

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[31] (1881) 8 R 1006.

[32] *Shotts Iron Co v Inglis* (1882) 9 R (HL) 78; (1881-1882) LR 7 App Cas 518.

are appointed as judges, or as members of tribunals, in their new capacity they will inevitably come into contact with lawyers with whom they are friendly. Obviously, so far as possible, a judge will try to avoid having to sit on a case where one of his legal friends or colleagues is a party. But sometimes it just cannot be avoided. So questions of possible bias may arise, even where the judge has been reluctant to sit but has concluded that he really must.

To take a striking example. In 1877 John Inglis, the extraordinarily influential Lord President of the Court of Session, raised proceedings in his own court for the Scottish equivalent of a *quia timet* injunction against a company whose works were producing fumes that were damaging the trees on his country estate.

The Lord President even gave oral evidence on his own behalf in front of one of the junior judges in the court. On the facts, the case was not straightforward, but the Lord President won at first instance. The other side appealed, even though there was no real dispute on the law.[31] The Lord President won the appeal in the Court of Session. The other side appealed to the House of Lords and the Lord President triumphed there too.[32]

So far as I know, it has never been suggested that the decision of any of the three courts was other than entirely justifiable. As I have observed already, however, this is no guarantee that the judges were not influenced in favour of the distinguished litigant.

> While older cases provide interesting illustrations of the kinds of problems that may arise, and show how they were handled by the courts at the time, they may not necessarily furnish appropriate guidance as to the solution that should be adopted in a similar situation today.

Plainly, today, an outsider might wonder whether the judges in the Court of Session, in particular, would not have been influenced by having their boss as one of the parties. Probably, much the same thought would have struck an ordinary member of the public in Queen Victoria's time. Perhaps, indeed, only another judge can be confident that, far from wanting to help out the Lord President, the judges would have been most reluctant to sit. But they would have realised that it was their duty to do so, since otherwise the Lord President would be denied his right to protect his property by taking legal proceedings in the most appropriate court.

Almost certainly, however, the judges would have bent over backwards to make sure that they could not be accused of favouring the Lord President. Indeed the real risk would be that they might over-compensate and treat his side of the case with an unmerited degree of caution.

This is an example of a situation where necessity dictated that the judges had to deal with the case, even if there was a risk that they would give the appearance of bias.

In some systems such problems can be overcome by bringing in temporary judges from another system. In the Lord President's case, the availability of an appeal to the more remote House of Lords helped to defuse any risk of apparent bias in the system. The availability of an appeal to the Privy Council has served that function in some systems. But, if none of these remedies is available, the judges just have to do their best.

> While decisions from other (foreign) jurisdictions may provide useful guidance, especially as to the test which is to be applied, a court has to apply that test against the background of the traditions, history and culture of its own society, which may affect the way that the public view such matters.

[33] [2009] NZSC 72.

[34] [2007] NZCA 349.

Sometimes, of course, a lawyer will be a party in a litigation before the court where he practises and where he is on friendly terms with one or more of the judges. Again, for the same kinds of reasons, such cases can cause potential difficulties. But, as a rule, the position is quite different where, as often happens, a judge finds himself sitting on a case in which the lawyer for one of the parties is a friend, even a close friend.

At first sight nothing more was involved in the New Zealand saga of *Saxmere v The Wool Board Disestablishment Company Ltd*.[33] Wilson J was one of the three members of the Court of Appeal who allowed the Disestablishment Company's appeal in August 2007. Senior counsel for the successful appellants was a Mr Alan Galbraith QC.[34] In November of the same year it was announced that Wilson J was to be appointed to the New Zealand Supreme Court with effect from 1 February 2008.

Meanwhile, Saxmere appealed to the Supreme Court—eventually, on the ground that Wilson J should not have sat in the Court of Appeal in their case because of an appearance of bias arising from his relationship with the Company's counsel, Mr Galbraith.

In short, the allegation was that, because of his friendship and business relationship with Mr Galbraith, the independent observer would conclude that there was a real possibility that Wilson J would have been affected by an unconscious bias in favour of Mr Galbraith's clients. The

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[35] [2009] NZSC 72; [2010] 1 NZLR 35.

[36] [2009] NZSC 72, paragraph 25; [2010] 1 NZLR 35, 49, lines 33–36.

judge and counsel were not only close friends: they also shared an association in a horse stud and some broodmare partnerships.

In March 2009 the New Zealand Supreme Court—which was having to deal with an allegation involving one of its six members—dismissed Saxmere's appeal.[35]

So far as the friendship of the judge and counsel was concerned, the court pointed out that any impartial observer would note that this friendship had survived many a battle when the men appeared against one another as counsel. Indeed, the court commented that such relationships are a positive feature of our legal systems.

The court also rejected the idea that the position was different because the two men were business partners. It was difficult, they said, to see why, by itself, this would influence the judge to find in favour of his partner's clients.

But two of the judges noted that the position might be different if, as part of their business relationship, the judge was somehow financially obliged to counsel and so might fear some adverse effect on his own financial position if counsel lost the case. "Such a situation might theoretically exist," said Blanchard J, "if, for example, the judge had been lent money by counsel or was dependent on counsel in order to meet some liability."[36] But there was nothing of that kind in the materials before the court.

> In some systems such problems can be overcome by bringing in temporary judges from another system. In the Lord President's case, the availability of an appeal to the more remote House of Lords helped to defuse any risk of apparent bias in the system. The availability of an appeal to the Privy Council has served that function in some systems. But, if none of these remedies is available, the judges just have to do their best.

[37] *Saxmere v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122; [2010] 1 NZLR 76.

[38] *Cf Wilson v Attorney General* [2010] NZHC 1678.

[39] Speaker's postscript: On 21 October 2010 the resignation of Wilson J, with effect from 5.00 pm on 5 November 2010, was announced.

That was by no means the end of the story. Taking the hint from these remarks in the judgments, Saxmere set about inquiring further into the business relationship between Wilson J and counsel. The judge made two further statements to the Supreme Court about that relationship. It now emerged that, contrary to what the Supreme Court had previously supposed, there was reason to think that the business relationship between the two men was not on an equal basis and that the judge was, in effect, indebted to counsel to the tune of at least NZ$74,249—and arguably to about three times that amount.

In November 2009 the Supreme Court allowed Saxmere to reopen their appeal and, in the circumstances as now revealed, quickly concluded that the case on apparent bias was made out. The court therefore recalled their previous decision dismissing the appeal, allowed Saxmere's appeal and sent the case back for a hearing before a new panel of judges.[37] Since then, a complaint has been made to the Judicial Conduct Commissioner with a view to having Wilson J removed from office on the ground of misconduct.[38]

It would obviously be wrong to comment in detail on the circumstances of this very sensitive affair affecting the New Zealand Supreme Court, while the matter is still under investigation.[39]

The case does, however, highlight just how fact-specific issues of impartiality can be. The Supreme Court accepted that in New Zealand society the business relationship in

> Even if the judge could not be said to have any direct financial interest in his partner's clients, the public would feel that there was a real possibility that a judge, who was indebted in some way to counsel as a result of their business relationship, might be biased towards holding in favour of his clients.

[40] 2005 SC (HL) 7.

question between a judge and one of the counsel in a case would not be regarded as affecting the public's perception of the judge's impartiality. That is surely a matter which turned on the New Zealand judges' appreciation of the attitude of people in New Zealand to that situation.

But the Supreme Court thought that the indebtedness of the judge to counsel made all the difference. They did not explain exactly why. But their instinct—and it can only be a matter of instinct—was that, even if the judge could not be said to have any direct financial interest in his partner's clients, the public would feel that there was a real possibility that a judge, who was indebted in some way to counsel as a result of their business relationship, might be biased towards holding in favour of his clients. My hunch is that—especially given the way that the facts emerged—even without any close analysis of the exact position, a court in Britain might well have taken the same view as the New Zealand Supreme Court. It is the broad picture which would count with the press and other media and with the public.

Cases involving financial interests are relatively easy to deal with. Altogether more difficult are cases where the supposed conflict of interest arises out of the judges' previous involvement with the issue which they have to decide.

In *Davidson v Scottish Ministers No 2*[40] the Court of Session was concerned with the interpretation of a particular section in the Scotland Act 1998. One of the

> Cases involving financial interests are relatively easy to deal with. Altogether more difficult are cases where the supposed conflict of interest arises out of the judges' previous involvement with the issue which they have to decide.

[41] That view did indeed turn out to be wrong: *Davidson v Scottish Ministers* 2006 SC (HL) 42.

[42] *Cf Regina (Al Hasan) v Secretary of State for the Home Department; Regina (Carroll) v Secretary of State for the Home Department* [2005] 1 WLR 688 at 690–692, paras 7–11.

judges sitting in the case was Lord Hardie who had formerly been a Government law officer. In that capacity he had spoken for the Government when the Scotland Bill was before the House of Lords in its legislative capacity. In the course of debate on the Bill, Lord Hardie had expressed a view on the interpretation of the provision in question in the *Davidson* case.[41]

After the court had given its decision against Mr Davidson, he challenged that decision on the ground that Lord Hardie should not have sat. The contention was that he could not be seen to be impartial because, in judging the case, he had adopted the same interpretation of the section as he had advanced during the debate in the House of Lords. Both the Court of Session and the House of Lords agreed and quashed the court's decision.

You may see this decision as setting a commendably high standard for judicial conduct. And that may be the appropriate response in the light of political and legal history of Malaysia. But I confess that, within a British context, I have some doubts[42] about it—perhaps because I, too, have been Lord Advocate and have spoken on Bills on behalf of the Government. Presumably, it was because of that history that I was not assigned to sit on the appeal.

The simple fact, however, is that in Britain, for the most part, ministers speak to briefs written by civil servants in support of the Government line. Of course, it can be assumed that the minister thought that the view which he expressed was the accepted view or that it was at least

> Judges regularly hear appeals in which one side contends that a previous decision of the judge was incorrect.

> Judges are quite capable of accepting that they were wrong and that their previous decision should be overruled.

[43] *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2004] QB 702 at 755–756, paragraph 158.

sustainable. But often the minister will have had only a short time to master the brief or think about the point. It would, therefore, I think, be rash to conclude that, as an individual, the minister would be wedded to that view or embarrassed to have to admit later that it was wrong.

Indeed, if Lord Hardie was unable to deal with this question without the informed observer concluding that there was a real possibility that he would be biased, what would that observer say about judges who have been, for example, members of a Law Commission that produced a public report which then led to legislation? Since, as commissioners, they will almost certainly have spent far more time than any government minister in considering how the legislation was intended to be interpreted, one might think that they would be far more committed to that view than Lord Hardie would ever have been.

Yet, to hold, for example, that it was wrong for Lady Hale to sit in cases involving the English Children Act 1989, on which she was the lead Law Commissioner, would have a startling effect on the recent jurisprudence on the interpretation of that Act. Surely, no one would ever suggest such a thing. And indeed history shows that, as a judge, Peter Gibson LJ had no difficulty in deciding that the English Law Commission had got the law wrong in a report to which he had been a party.[43]

But the point is wider. I am aware of one case in which, in response to a request of one of the parties, it was decided that a particular judge should not sit in the Privy

> A previous judicial decision is a factor that is not likely to give rise to any need for a judge to disqualify himself. Our legal system really could not work properly if judges who had previous experience and expertise in a particular field were excluded from subsequently putting that experience and expertise into practice in a case where it might be most needed.

[44] *Regina v G; Regina v J* [2010] 1 AC 43, overruling *R v K* [2008] QB 827.

[45] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 QB 451 at 480, paragraph 25.

Council when a recent, and closely argued, decision of his was to be under challenge. But that is very exceptional and it is not a desirable precedent.

Indeed the practice is quite the other way: judges regularly hear appeals in which one side contends that a previous decision of the judge was incorrect. Yet the judge will often have done far more work on such a decision and, one might suppose, be more committed to his conclusion than any ministerial spokesman. Again, experience shows that in this situation judges are quite capable of accepting that they were wrong and that their previous decision should be overruled. To take a recent example, a couple of years ago, in *Regina v G*, Lord Phillips was Chairman of the Appellate Committee of the House of Lords which unanimously overruled an important decision that he had given not long before as Lord Chief Justice.[44]

Indeed, according to *Locabail*, a previous judicial decision is a factor that is not likely to give rise to any need for a judge to disqualify himself.[45] As a lawyer and as a judge, I have no doubt that this is correct, but I am less confident that even the best informed independent observer would necessarily agree.

The accepted practice may be better explained on the simple basis that our legal system really could not work properly if judges who had previous experience and expertise in a particular field were excluded from subsequently putting that experience and expertise into practice in a case where it might be most needed.

> The court always has to ensure that it maintains the confidence of the contemporary public in its independence and impartiality. So, if public attitudes change, the court must have regard to current thinking about what would be acceptable.

[46] "Supremacy of Law in Malaysia" in V Sinnadurai (ed), *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches by HRH Sultan Azlan Shah*, 2004, Professional Law Books and Sweet & Maxwell Asia, 13–33, at pages 14–15.

There I must bring this lecture to a close, even though there is much more that might be said. I have been discussing the need for judges to be, and to be seen to be, impartial. That is, quite simply, a basic requirement of any legal system which aspires to ensure the Rule of Law. Your Royal Highness put the position precisely in your 1984 lecture on the Supremacy of Law in Malaysia when you said:

> The existence of courts and judges in every ordered society proves nothing: it is their quality, their independence, and their powers which matter … The rules concerning the independence of the judiciary … are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the Rule of Law.[46]

The judge's duty of recusal helps to maintain the Rule of Law by sustaining public confidence that our legal systems will afford everyone a fair trial by an independent and impartial court. That and nothing less is ultimately what all judges have sworn a solemn oath to do.[47]

Editor's note

The Privy Council recently referred to this lecture with approval in *Belize Bank Ltd v Attorney General (Belize)* [2011] UKPC 36 (20 October 2011). Lord Brown, in paying tribute to Lord Rodger's "salutory" remarks in this lecture, observed (at [99]):

"In a characteristically thoughtful lecture … given by Lord Rodger of Earlsferry (The Sultan Azlan Shah Law Lecture 2010 entitled "Bias and

“The judge’s duty of recusal helps to maintain the Rule of Law by sustaining public confidence that our legal systems will afford everyone a fair trial by an independent and impartial court. That and nothing less is ultimately what all judges have sworn a solemn oath to do.”

[47] I am grateful to my former and present Judicial Assistants, Adil Mohamedbhai, solicitor, and Tetyana Nesterchuk, solicitor, for their assistance in the preparation of this lecture.

My friend, Professor Peter Skegg, of the University of Otago, generously took the time to supply me with updated information about the *Saxmere* case.

Conflicts of Interests—Challenges for Today's Decision-Makers") appears this, to my mind salutary, warning about the concept of the informed observer:

> Should we welcome this newcomer to our legal village? Not particularly warmly, perhaps. The whole point of inventing this fictional character is that he or she does not share the viewpoint of a judge. Yet, in the end, it is a judge or judges who decide what the observer would think about any given situation. Moreover, the informed observer is supposed to know quite a lot about judges—about their training, about their professional experience, about their social interaction with other members of the legal profession, about the judicial oath and its significance for them, etc. Endowing the informed observer with these pieces of knowledge is designed to ensure that any supposed appearance of bias is assessed on the basis of a proper appreciation of how judges and tribunals actually operate. The risk is that, if this process is taken too far, … the judge will be holding up a mirror to himself. To put the matter another way, the same process will tend to distance the notional observer from the ordinary man in the street who does not know these things. And yet the whole point of the exercise is to ensure that judges do not sit if to do so would risk bringing the legal system into disrepute with ordinary members of the public. [See pages 465–467, above.]"

Lord Dyson, echoing Lord Brown's sentiment, observed (at [75] and [76]):

"Lord Brown has quoted from the lecture given by Lord Rodger … Lord Rodger says … in relation to apparent bias that the court should 'adopt a course that can be expected to command the assent and respect of the general public'. A little later, he continues:

> Similarly, while decisions from other (foreign) jurisdictions may provide useful guidance, especially as to the test which is to be applied, a court has to apply that test against the background of the traditions, history and culture of its own society, which may affect the way that the public view such matters. In addition, what may be acceptable, or at least tolerable, in a small jurisdiction where substitute judges cannot readily be found, may be unacceptable in a larger jurisdiction where that problem does not arise. [See page 477, above.]

I agree with Lord Rodger's salutary words."

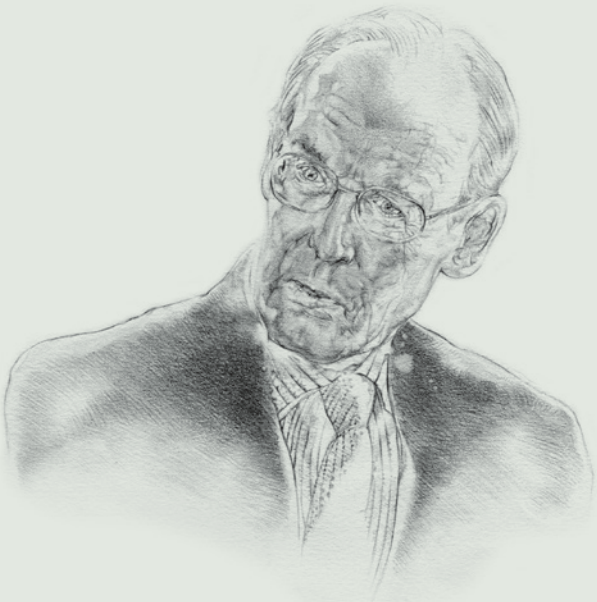
Your Highness pithily put it in 1984,

"... just as politicians ought not to be judges, so too judges ought not to be politicians."
("Supremacy of Law in Malaysia", The Eleventh Tunku Abdul Rahman Lecture, 23 November 1984, in Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches, 2004.)

Cherie Booth QC
The Role of the Judge in a Human Rights World
19th Sultan Azlan Shah Law Lecture, 2005

The Right Honourable Lord Walker of Gestingthorpe

Would it have Made Any Difference? Cause and Effect in Commercial Law



Robert Walker
(b. 17 March 1938*)*

Lord Walker was born on 17 March 1938. He was educated at Trinity College, Cambridge where he graduated in 1959 with a first class Bachelor of Arts degree in Law and Classics. From 1959 to 1961 he served in the British army (Second Lieutenant Royal Artillery, National Service List).

He was called to the English Bar by Lincoln's Inn in 1960 and was appointed a Queen's Counsel in 1982, specialising in the law of trusts, pension schemes and tax.

In 1994, Lord Walker was appointed a High Court Judge in the Chancery Division and was promoted to the Court of Appeal in 1997. His promotion was widely regarded at the time as one of the fastest promotions ever from the High Court to the Court of

Appeal. He was appointed as a Lord of Appeal in Ordinary in 2002, and became one of the first Justices of the newly established United Kingdom Supreme Court in 2009.

Lord Walker has developed a reputation for the "logical and rigorously intellectual" style of his judgments (*Times*, UK). Many of his judgments are now regarded as authoritative statements of the law, such as his discussion on the law on without-prejudice negotiations in *Unilever plc v The Procter & Gamble Co* [2001] 1 All ER 783, which was cited with approval by the UK Supreme Court in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] 4 All ER 1011. He also participated in the landmark decision in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961, where the English Court of Appeal had to decide whether conjoined twins should be separated in order to preserve the life of one while potentially sacrificing the life of the weaker twin.

Lord Walker's eminence and authority as a specialist in equity and trusts can be seen from the Privy Council decision in *Henry v Henry* [2010] 1 All ER 988 where the Privy Council, in discussing the law on proprietary estoppel, referred solely to the judgments of Lord Walker in the cases of *Gillett v Holt* [2000] 2 All ER 289, *Jennings v Rice* [2003] 1 FCR 501, *Campbell v Griffin* (2001) 82 P & CR D 43 and *Yeoman's Row Management Ltd v Cobbe* [2008] 4 All ER 713. His Lordship also delivered judgment in the latest authoritative decision of the House of Lords on proprietary estoppel in *Thorner v Major* [2009] 1 WLR 776.

Apart from his duties as a judge of the UK Supreme Court and the Privy Council, Lord Walker has been sitting as a Non-Permanent Judge of the Hong Kong Court of Final Appeal since 1 March 2009.

Lord Walker became a bencher of Lincoln's Inn in 1990 and became the Treasurer for Lincoln's Inn for the year 2010–2011. He was elected as an honorary fellow of Trinity College, Cambridge University in 2006.

Lord Walker of Gestingthorpe married Suzanne Diana Leggi in 1962. They have three daughters and one son. His interests include walking and gardening.

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Would it have Made Any Difference? Cause and Effect in Commercial Law

Lord Walker of Gestingthorpe
Justice of the Supreme Court of the United Kingdom

The Twenty-Fifth Sultan Azlan Shah Law Lecture was delivered by Lord Walker of Gestingthorpe in the presence of His Royal Highness Sultan Azlan Shah on 1 December 2011.

In *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd* (1975) you had occasion to remark:

> "Every legal power must have legal limits, otherwise there is dictatorship … In other words, every discretion cannot be free of legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression."

This uncompromising expression of a fundamental aspect of the Rule of Law has many ramifications.

Professor WR Cornish

"Colour of Office": Restitutionary Redress against Public Authority

1st Sultan Azlan Shah Law Lecture, 1986

The special institutional role of judges in a constitutional democracy demands of them that they interpret their constitutional document in a way that eschews formalism and literalism. Your Royal Highness put it this way in a judgment in 1981 [*Dato Menteri Othman bin Baginda & Anor v Datuk Ombi Syed Alwi bin Shed Idrus*]:

> "In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way—"with less rigidity and more generosity than other Acts". A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation."

Cherie Booth QC
The Role of the Judge in a Human Rights World
19th Sultan Azlan Shah Law Lecture, 2005

Inscription on memento presented to
His Royal Highness Sultan Azlan Shah

A most distinguished jurist, statesman and upholder of the Rule of Law.

Lord Woolf
Lord Chief Justice
of England and Wales

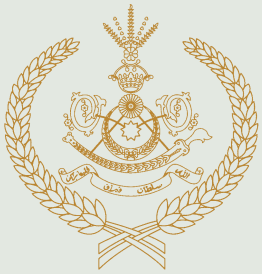
Constitutional Monarchy, Rule of Law and Good Governance

Selected Essays and Speeches

&

THE *SultanAzlanShah* Law Lectures

JUDGES ON THE COMMON LAW



The Official Book Launch

BY

The Right Honourable
Lord Chief Justice of England and Wales
Lord Woolf

13 April 2004
Mandarin Oriental Hotel
Kuala Lumpur

WITH SPEECHES BY

His Royal Highness Raja Nazrin Shah
The Right Honourable Lord Woolf
Professor Dato' Seri Visu Sinnadurai

“These lectures were only possible because the series bear the name of His Royal Highness. The fact that he had himself been Head of State and Chief Justice was important, but what really made the difference was the fact that he had an unrivalled reputation around the free world of being one of the courageous champions of the independence of the judiciary and the Rule of Law.”

Lord Woolf
Lord Chief Justice of England and Wales
at The Official Book Launch
13 April 2004

Speech by

Professor Dato' Seri Visu Sinnadurai

Editor

Your Royal Highness Sultan Azlan Shah, The Sultan of Perak, Your Royal Highness Tuanku Bainun, The Raja Permaisuri of Perak, Your Royal Highness Raja Nazrin Shah, The Raja Muda of Perak; The Right Honourable Lord Chief Justice of England and Wales, Lord Woolf; Honourable Ministers; The Honourable Menteri Besar of Perak; Your Excellencies; Chief Judges; The Attorney General of Malaysia; The Attorney General of Singapore; Judges; Distinguished Guests; Ladies and Gentlemen,

Ampun Tuanku,

Permit me to start with a few quotes:

> There cannot be an independent judiciary without an independent Bar ...
>
> —HRH Sultan Azlan Shah
> *The Legal Profession and Legal Practice* at page 312

> A judiciary may only be said to be independent if it commands the confidence of the public. Statements made as to its independence by the judges, or even the politicians, do not measure public confidence in the judiciary. At the end of the day, it is this public perception that ultimately matters.
>
> —HRH Sultan Azlan Shah
> *The Role of Constitutional Rulers and the Judiciary: Revisited* at page 400

> Though corporations exist to maximise profits, they also have a social responsibility to partake in the general development of society.
>
> —HRH Sultan Azlan Shah
> *Corporate Activity: Law and Ethics* at page 126

> The Rule of Law means ... that the government shall be ruled by the law and be subject to it ... it is often expressed by the phrase "government by law not by men".
>
> —HRH Sultan Azlan Shah
> *Supremacy of Law in Malaysia* at page 12

> Legal and ethical issues now govern the practice of medicine. A doctor has now to consider not only the medical aspects of a particular issue but also the legal and the ethical issues relating to it.
>
> —HRH Sultan Azlan Shah
> *Medicine, Ethics and the Law* at page 221

These are merely a few quotes from the book *Constitutional Monarchy, Rule of Law and Good Governance*. The book contains selected lectures, speeches and essays on law given or written by His Royal Highness Sultan Azlan Shah.

Many of you are already familiar with the large body of judgments that His Royal Highness delivered when he

was a Judge, Chief Justice and Lord President. These judgments contributed greatly towards the development of Malaysian law. Until today, many of these judgments are referred to, or applied by the courts in Malaysia.

When His Royal Highness relinquished his post as the then Lord President of the Federal Court to become the new Sultan of Perak, many thought that his contribution to the development of the law in this country would sadly come to an abrupt end, and that his outstanding talent and wisdom on the Bench would be missed.

But fortunately for us, this was not to be the situation. His Royal Highness continued to take a keen interest in the law in the country even as he performed the onerous duty of ruling the State and later the Country. His deep-rooted interest in the law, and his passion for seeking the truth, and upholding the Rule of Law, and the proper administration of justice were still very much close to his heart. So whenever the opportunity arose, he spoke publicly on these matters and gave in-depth and critical exposition of the law.

Though many of these lectures were to audiences that were predominantly from the legal fraternity, His Royal Highness was also called upon by other professionals, organisations and institutions to deliver lectures. In fact, there are many present here this evening from the other professional bodies who were involved in the organisation of some of these lectures, including the Academy of Medicine,

the Institution of Engineers Malaysia, the Malaysian Institute of Management, Harvard Club, and University of Science Penang.

But whatever the occasion, and whoever the audience, there was a consistent and recurring theme throughout the lectures: Constitutional Monarchy, Rule of Law, Good Governance, or good morals and ethics. Each lecture underscored these common themes, and the same underlying principles: the proper execution of duties and responsibilities in accordance with law by all concerned, be it King, Ruler, Government, politicians, Judges or professionals; the independence of the judiciary; checks and balances against the use of excessive powers; the need for transparency, and the like.

One unique feature that will be discerned from reading these lectures and speeches is the candour and the balanced views that His Royal Highness expresses in each of these areas of the law. In these lectures, he clearly states the legal and constitutional limits of the executive; the need for ethical conduct, both in the private and public sectors; and the important role of an independent judiciary as the pillar of democracy. Even the roles of the constitutional Rulers are carefully analysed, setting out their precise powers and limits. For example, I quote:

> It is true that appointment of a Menteri Besar is a prerogative of the Sultan. However the Ruler is not free to

> appoint anybody he likes. He must appoint a member of the Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the Assembly.
>
> —HRH Sultan Azlan Shah
> *The Role of Constitutional Rulers* at page 263

The views expressed by His Royal Highness in these speeches have often been quoted as reflecting the true position of the law in the country. For example, YM Tengku Razaleigh Hamzah in delivering the keynote address at the opening of the 12th Malaysian Law Conference in December last year [2003], on the subject "Evolving a Malaysian Nation: The Role of Law and Lawyers", quoted extensively from the public lecture which His Royal Highness delivered on "The Right to Know".

The views of His Royal Highness were always sought and were highly regarded. He is indeed a learned and wise monarch of the country of whom all are proud.

Ladies and Gentlemen,

The high regard and esteem which the legal fraternity has for His Royal Highness is also reflected in the highly successful annual public lecture, the Sultan Azlan Shah Law Lectures, organised by the University of Malaya and co-sponsored by the British Council and Malaysian Airlines Systems.

For the past eighteen years, since 1986, when the first Sultan Azlan Shah Law Lecture was delivered in Kuala Lumpur, distinguished Lord Chancellors, Masters of the Rolls, Lords of Appeal in Ordinary, a President of the New Zealand Court of Appeal, an Associate Justice of the Supreme Court of The United States of America and academics from the Commonwealth have been invited to partake in the premier law lecture series of Malaysia. Each of these jurists delivered their lecture in Malaysia in honour of His Royal Highness.

Whilst the subject matter contained in this lecture series is diverse, exploring such, seemingly disparate topics from the *Spycatcher* case to commercial fraud cases, there is a common thread that runs through the corpus. This is the development of that ancient doctrine of the common law. Hence the subtitle of the book: *Judges on the Common Law.*

I am told that this is the first volume to be published outside the United Kingdom where speeches delivered by so many Lord Chancellors, Chief Justices, Masters of the Rolls, Senior Law Lords, and leading academicians are all contained in one single volume on the common theme of the common law.

I am particularly happy that Lord Woolf is present this evening at the launch of these two books. He has given me great support over the years when organising the annual Sultan Azlan Shah Law Lecture.

Ampun Tuanku,

The task of editing both these books simultaneously was enormous, and at the same time challenging. It was no easy task editing two books which His Royal Highness had a personal interest in. His excruciating demand for perfection is, of course, well-known. This demand was met equally by my own exacting and personal desire to produce these books to a standard that was most reflective of the character, status, and wisdom of His Royal Highness.

In attempting to realise these objectives, I was assisted by many.

I thank Your Royal Highness Sultan Azlan Shah for having taken a personal interest in the publication of these books and for the many invaluable and constructive comments.

The compilation and publication of both the books would not have been possible without the unstinting support and encouragement of His Royal Highness Raja Nazrin Shah, Raja Muda of Perak. He believed strongly in the value that the publication these two volumes would bring, and, to that end, steadfastly urged it through each step of the journey. Your Royal Highness, Raja Nazrin Shah, I extend my heartfelt gratitude to you.

I express my thanks to Joel Ng who acted as my co-editor, to Kyle Sanderson and Faisal Ariff Rozali-Wathooth,

both undergraduates, from University of London and Cambridge University, respectively, and who both sacrificed their summer vacation to be in Kuala Lumpur to help me in editing the books.

Finally, I must also thank the many who have rendered assistance in the organisation of this evening's function: Mrs Emily Yung, Ong Yih Wey, the ushers, the staff of Sweet & Maxwell, the musicians and the Mandarin Hotel.

Last, but by no means least, a special thanks to our charming master of ceremonies this evening, Ms Caryn Lim.

Speech by

His Royal Highness Raja Nazrin Shah

Crown Prince of the State of Perak

Menghadap Paduka Seri Ayahanda Duli Yang Maha Mulia Sultan Azlan Muhibbuddin Shah,

Menghadap Paduka Bonda Duli Yang Maha Mulia Tuanku Bainun,

Ampun Tuanku,

Sembah anakanda mohon diampun.

Adapun anakanda bersyukur ke hadrat ILAHI kerana dengan limpah rahmat dan izin dariNya jua, Paduka Seri Ayahanda dan Paduka Bonda dapat berangkat ke Majlis Pelancaran dua naskhah penerbitan berjudut, *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches*, dan *The Sultan Azlan Shah Law Lectures: Judges on the Common Law.*

Anakanda merafakkan sembah junjungan kasih yang setinggi-tingginya atas perkenan Paduka Seri Ayahanda dan Paduka Bonda mencemar duli ke Majlis ini.

Dipohonkan limpah perkenan Paduka Seri Ayahanda dan Paduka Bonda untuk membolehkan anakanda melafazkan titah ucapan di Majlis ini dan seterusnya bagi anakanda mempersilakan The Right Honourable Lord Chief Justice of England and Wales untuk menyampaikan ucapan beliau dan seterusnya bagi beliau menyempurnakan upacara pelancaran kedua-dua naskhah buku tersebut.

Ampun Tuanku,

It is indeed my pleasant duty to address you at this ceremony celebrating the launch of the two books *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches* and *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*.

It is not often that one has the opportunity to speak at the launch of a book written by one's father, and another containing lectures by the world's leading jurists in honour of one's father.

I am overwhelmed by the presence of so many of you, representing a wide cross-section of disciplines and professions. It is rare to see such an august gathering of diplomats, Attorney Generals, Judges (former and present), senior legal officers, leading doctors, dentists, engineers, architects and members of the corporate sector at a launching ceremony of law books. This is truly reflective of the multi-faceted audience that my father himself addressed over the past few years, and the close rapport he has with so many of you.

I am also honoured by the presence of The Right Honourable Lord Chief Justice of England and Wales, Lord Woolf, who, together with Lady Woolf have specially travelled all the way from London to be present at this ceremony. On behalf of my family, I extend to them our appreciation for the honour that they bestow on us by their attendance.

During early childhood, my brother, my sisters and I remember vividly our father at home ploughing through heaps of law books and law reports late at night preparing for the cases before him the following day. At times, we saw him writing copious notes in notebooks which, I must now admit, looked more like ledger books to me then. He was then writing a judgment or making notes for future cases.

It was only recently that we discovered that over all these years he had always meticulously maintained a notebook for each branch of the law where he added annotations after reading the latest law reports or the law journals. He painstakingly did this to fulfil his keen interest in keeping abreast of the latest developments of the law. In fact, he continues with this practice even after he left the judiciary. He still reads all the foreign law reports and law journals.

These notebooks, or ledgers I thought them to be, have been carefully preserved by him over the years and they are now proudly on display in the newly opened Sultan Azlan Shah Gallery in Kuala Kangsar.

My father's love for the law, and his quest for justice was ever encompassing. Whilst serving on the judiciary, he strived to uphold the Rule of Law and the independence of the judiciary, and to dispense justice without fear or favour.

On moral and ethical values he remains uncompromising. To him the line between what is right

and what is wrong is always clearly defined. It was these very traits that both he and my mother inculcated in all their children. And it is these values that we, the children, now appreciate even more in our adult life. For this, we are truly grateful to them.

The judgments delivered by my father whilst on the Bench have been reported in the law reports and are also contained in the volume *Judgments of HRH Sultan Azlan Shah*, published in 1986. However, the many views that he expressed on certain important aspects of the law in the several speeches and lectures that he delivered both as Sultan and during his term as the Yang di-Pertuan Agong remained inaccessible.

I felt it would be a most fitting tribute to my father if these lectures, speeches and essays were compiled in a book. At the same time, I also felt that it would be most appropriate to compile all the Sultan Azlan Shah lectures delivered over the past eighteen years into a single volume, so that the wealth of knowledge contained in these lectures may be made available to a wider audience.

My ambitions to have these two publications were fulfilled when Professor Dato' Seri Visu Sinnadurai agreed to undertake the enormous task of editing and producing the books. I was confident then that with his flair for writing and his own high standards and style he would produce two outstanding publications. True to these expectations, Dato' Seri Visu has now produced the two most impressive books

on the law I have seen. Not only are they impressive, they are edited with much thought and care.

I am truly grateful to Dato' Seri Visu and his team of dedicated assistants for producing these two marvellous publications. I am confident that when you see the books you would also agree with me.

This evening we have present with us The Right Honourable Lord Chief Justice of England and Wales, Lord Woolf, to launch these two books.

Lord Woolf is an ardent supporter of the independence of the judiciary, and in recent months has been very much involved in the reshaping of the senior judiciary in England and Wales. With the planned abolition of the post of the Lord Chancellor, and the subsequent establishment of the new Supreme Court to replace the House of Lords, Lord Woolf, as the present Chief Justice, would become the new Head of the English judiciary.

There is no greater honour than to have Lord Woolf launch these books. Through the years, Lord and Lady Woolf have become treasured friends of our family and we are greatly appreciative of their support and friendship. We look forward to a strengthened friendship between our families and continued amity between our countries.

Interestingly, there is much in common between Lord Woolf and my father. Lord Woolf is the Chief Justice, and

my father too was the Chief Justice. Both are great defenders of the independence of the judiciary and the Rule of Law.

Both have been and continue to be involved in higher education. Lord Woolf was Pro Chancellor of the University of London and my father is the Chancellor of the University of Malaya. Both have a passion for justice, especially against excessive administrative actions. Lord Woolf is the co-editor of the leading treatise, *de Smith, Woolf & Jowell, Judicial Review of Administrative Action*. He is also, together with his son Jeremy Woolf QC, the co-editor of the classic work, *Zamir and Wool: The Declaratory Judgment*. But I will be quick to point out an important difference here. Unlike Lord Wolf, my father will not be able to rely on me to co-author a law book with him!

It now gives me great pleasure to call upon The Right Honourable Lord Chief Justice of England and Wales, Lord Woolf, to say a few words and to officially launch the books.

Lord Woolf.

Speech by

The Right Honourable Lord Woolf

Lord Chief Justice of England and Wales

My oldest grandchild is called Benjamin. He is aged eight and loves birthdays. This is because of the presents he receives. If you see him tackling the wrapping paper you can sense his excitement to know what the present is going to be this time. He is now of an age when he can be given a book. While he is a polite youngster and he will try and conceal his disappointment there is no doubt that he still regards a present of a book as an anti-climax. He has yet to learn just how exciting the contents of books can be.

Well, His Royal Highness is just a little older than Benjamin. To be precise in a few days he is going to celebrate his 76th birthday. It is the 50th anniversary of his being called to the Bar in London by Lincoln's Inn. I know that all his family, friends and admirers, among whom I include my wife and myself, very much hope that the two books we are going to launch today will make this a very special and memorable birthday for him. The books would never have been compiled but for his achievements as a lawyer and jurist over those 50 years. His achievements as a lawyer and jurist with a deep commitment and understanding of both the Rule of Law and the common law made the books possible, as I will now explain.

Why this is so will be revealed by the titles of the two books. The first is called *Constitutional Monarchy, Rule of Law and Good Governance*. These are three of the determining features of both Malaysia's written and Britain's unwritten constitutions. His Royal Highness is in

a position to speak with unique and outstanding authority on these subjects since I believe him to be alone in having served his country in succession as the head of the judiciary and as the constitutional monarch of the nation. The first volume is a collection of the Sultan's lectures and essays on these subjects.

It is when governments are subject to exceptional stress, such as exists in many parts of the world today, not least due to the activities of terrorists, that the Rule of Law and constitutional government need their champions to speak out on their behalf. This is what His Royal Highness is in an unrivalled position to achieve in this volume. He does so with striking force and clarity. There could not be a better time for his wise words to reach a wide audience.

What do we mean by the Rule of Law? It is a phrase that certainly in the United Kingdom is tossed around in discussion without properly being understood. But it is a phrase that goes to the heart of what a true democracy is about. It is an essential companion to parliamentary government. It is what prevents parliamentary government from descending into the elected dictatorship described by my predecessors in the 1930s.

A couple or so years ago I gave a talk on the subject in China. Afterwards I was asked a question by a member of the audience, who I am not sure was as innocent as she appeared. She asked me if there is any difference between the Rule *of* Law and the rule *by* law. The use of the word *by*

instead of *of* changes the sense dramatically. Rule by law can be the rule of the dictator. Dictators are fond of making laws to control their citizens. The Rule of Law is the rule by the laws that govern a true democracy. They are the laws that provide for a proper balance between the protection of human rights and the interests of the State, laws which an independent and responsible judiciary can enforce to protect all members of society from abuse of power.

But let me drive home my message not in my own words but in the far more eloquent words of His Royal Highness that appear in the first lecture of the first volume that we are launching today; they are:

> "The rule of law" means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrow sense, that the government shall be ruled by law and be subject to it. The ideal of the Rule of Law in this sense is often expressed by the phrase "government by law and not by men".
>
> —HRH Sultan Azlan Shah
> *Supremacy of Law in Malaysia* at page 12

I rest my case. There is nothing that I can add to this subject.

The second volume is a marvellous tribute of true affection and admiration by a son for his father. In the front piece it proclaims that it is dedicated by Raja Nazrin

Shah to His Royal Highness the Sultan. To many who are present, if not all those present, its title will not require explanation. It is *The Sultan Azlan Shah Law Lectures*. These are one of the most prestigious lectures of the common law world. They were founded in 1986 by Professor Dato' Seri Dr Visu Sinnadurai, then Dean of the Faculty of Law of the University of Malaya, in recognition of the contribution His Royal Highness the Sultan made to the University of Malaya.

Anyone can have the idea of establishing a series of lectures, but you can only attract a series of lectures of outstanding distinction to give the lectures if you can persuade the lecturers whom you have selected to accept your invitation. You have to persuade them that they should find the many hours necessary to prepare the lectures, that they should take the time off from their other commitments to travel up to halfway round the world to give the lectures. You have to persuade them that this is the one invitation, among the many others that they receive, that they should not decline.

How do you achieve this? Well first and foremost you must ensure the series of lectures are prestigious. This is why the lectures were only possible because the series bear the name of His Royal Highness. The fact that he had himself been Head of State and Chief Justice was important, but what really made the difference was the fact that he had an unrivalled reputation around the free world of being one of the courageous champions of the

independence of the judiciary and the Rule of Law. The fact that the lectures are held in this beautiful country and the lecturers and their partners are received with the greatest of hospitality helped, but what really mattered was that those invited regarded it as a great honour to be invited to give the lectures.

Of the many others who have helped to make the lectures a success there is one other person to whom a particular debt of gratitude from the common law world is due. It is my old friend Visu, who has worked indefatigably to make sure that the lectures have met with the success that they deserved. He has also made a most magnificent job of editing the two volumes. They look good and do justice to their contents. The editorial material is excellent and they have been most intelligently compiled. They need to be accessible to as large an audience as possible, and this, the distinction of their editing ensures. They look very attractive. I await the day that I will find that Benjamin is reading them with the attention they deserve.

I am proud to now launch the two volumes of the works that bear the name of Sultan Azlan Shah.

“His Royal Highness’ achievements as a lawyer and jurist with a deep commitment and understanding of both the Rule of Law and the common law made these books possible.”

Lord Woolf
Lord Chief Justice of England and Wales
at The Official Book Launch
13 April 2004

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This consolidated index contains entries for subject matters covered in this present volume as well as *The Sultan Azlan Shah Law Lectures: Judges on the Common Law* (2004).

Page references in this index are preceded by a prefix:

- "I." for pages from *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*
- "II." for pages from *The Sultan Azlan Shah Law Lectures II: Rule of Law, Written Constitutions and the Common Law Tradition*

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