

HIS ROYAL HIGHNESS

*Sultan
Azlan Shah*

A Tribute



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*Sultan
Azlan Shah*

.....
A Tribute

Visu Sinnadurai
Editor



2014

The publisher would like to thank the Sultan Azlan Shah Foundation
for its support of this publication.



YAYASAN SULTAN AZLAN SHAH
SULTAN AZLAN SHAH FOUNDATION

P U B L I S H E D B Y



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

The Rt Honourable Lord Woolf
Lord Chief Justice of England and Wales

Official Book Launch of *Constitutional Monarchy, Rule of Law and
Good Governance: Selected Essays & Speeches* by HRH Sultan Azlan Shah

13 April 2004



“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
Associate Justice, Supreme Court of the United States
Written Constitutions and the Common Law Tradition
20th Sultan Azlan Shah Law Lecture, 2006



“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.”

The Rt Honourable Lord Steyn

Lord of Appeal in Ordinary, House of Lords UK

Contract Law: Fulfilling the Reasonable Expectations of Honest Men

11th Sultan Azlan Shah Law Lecture, 1996

Preface

The publication of *His Royal Highness Sultan Azlan Shah: A Tribute* would not have been possible without the unstinting support and encouragement of His Royal Highness Sultan Nazrin Shah.

The editing of this publication was both different from and more difficult than others that I had undertaken before. This book is meant to be a tribute to an extraordinary person and his significant contributions, particularly in the area of law. Naturally, reservations and concerns were ever present in our minds as to whether justice could be done in this short publication. It was also an emotional journey. I have to acknowledge at the outset that this publication is but a modest attempt to reflect the passionate interest that His Royal Highness Sultan Azlan Shah had for the law. It is my earnest hope that this publication will be a meaningful gesture in remembrance of His Royal Highness Sultan Azlan Shah, who was indeed a unique Monarch.

The contents of this publication endeavour to offer an insight into a particular aspect of His Royal Highness' contribution to the Nation, namely in the area of the law. It is published in conjunction with the 28th Lecture of the annual Sultan Azlan Shah Law Lectures, the lecture series so aptly named in honour of His Royal Highness, and in which, over the past 27 years, His Royal Highness took a keen and personal interest.

The first part of the publication offers a humble perspective of His Royal Highness' commitment to the law. It includes quotes and highlights from the many important judgments His Royal Highness delivered whilst he was a Judge, Chief Justice (Malaya) or as Lord President of the Federal Court (now renamed Chief Justice of Malaysia), and from the many speeches His Royal Highness delivered during his reign. Whilst most of these speeches have been published in a separate volume (*HRH Sultan Azlan Shah, Constitutional Monarchy, Rule of Law and Good Governance*, 2004), the well-received speech entitled "*Fifty Years of Constitutionalism and the Rule of Law*", which His Royal Highness delivered subsequent to the publication of that work, is included in this volume. This volume also includes a chapter entitled "*A Perspective of HRH Sultan Azlan Shah's Contribution to the Development of Malaysian Law*", comprising the reflections of academics from the Faculty of Law, University of Malaya, that explore and record the significant contributions of His Royal Highness in various branches of the law gleaned from the judgments delivered by His Royal Highness.

The second part of the publication contains the texts of lectures given in His Royal Highness' honour, primarily the Sultan Azlan Shah Law Lectures. It contains the texts of the 25th Sultan Azlan Shah Law Lecture delivered by the Right Honourable Lord Walker of Gestingthorpe on 1 December 2011, on the topic "*Would it have Made Any Difference: Cause and Effect in Commercial Law*"; the 26th Sultan Azlan Shah Law Lecture delivered by the Honourable Lord David Pannick QC on 5 September 2011, entitled "*Scandalising the Judiciary: Criticism of Judges and the Law of Contempt*"; and the 27th Sultan Azlan Shah Law Lecture delivered by the Right Honourable Lord Sumption on 20 November 2013, entitled "*The Limits of Law*".

The publication also contains the text of a lecture delivered in the University of Oxford in early 2014 by the Right Honourable Lord Phillips of Worth Matravers, who was appointed as the first Sultan Azlan Shah Fellow at the Oxford Centre for Islamic Studies. (Lord Phillips delivered the 17th Sultan Azlan Shah Law Lecture in 2003 entitled "*Right to Privacy: The Impact of the Human Rights Act 1998*".)

The texts of the first 24 lectures delivered from 1986 to 2010 were published earlier in two volumes: *The Sultan Azlan Shah Law Lectures: Judges on the Common Law* (2004), and *The Sultan Azlan Shah Law Lectures II: Rule of Law, Written Constitutions and the Common Law Tradition* (2011).



This publication, undertaken within a short space of time, could not have been achieved without the dedication, and immense assistance of many, especially my Editorial Team.

My profound appreciation goes to Joel Ng, who acted as my co-editor, and who brought his wealth of publishing experience to bear on the project. Joel, together with Low Weng Tchung, provided invaluable assistance in the preparation of this book, and in providing useful and constructive comments as to the layout and design of the book. I record my heartfelt gratitude to them for their unstinting efforts. I also wish to express my appreciation to Chan Mun Fei, Jonathan Tan Kwan Nyan and David Choung for their assistance, especially in conducting research, in editing and proofreading the text.

The Sultan Azlan Shah Foundation has generously made it possible for this publication to be made available to the audience at the 28th Sultan Azlan Shah Law Lecture, and also to schools, academic institutions and libraries. I express my appreciation to the Foundation for its kind support.

I record my appreciation to Mr Omar Ariff Kamarul Ariffin, the outstanding photographer whose photographs of His Royal Highness Sultan Azlan Shah, previously published in *A Year in the Reign of Sultan Azlan Shah* (RNS Publications, 2010, Private Collection), are reproduced in this book; Andrew Wong of Compass Creative who

designed the book and for masterfully creating the artwork; Nelson Peh for undertaking the difficult task of creating the multimedia presentation; and Chris Lin who did the pencil and charcoal sketches of the speakers.

Lastly, and by no means least, I would like to thank RNS Publications for all assistance rendered in the publication of this book.


Tan Sri Dato' Seri Dr Visu Sinnadurai

Editor

Kuala Lumpur

29 August 2014





A King is a King,
whether he is
an absolute or
constitutional
monarch.

The only difference between
the two is that whereas
one has unlimited powers,
the other's powers are
defined by the Constitution.

But it is a mistake to think
that the role of a King, like a President,
is confined to what is laid down
by the Constitution.
His role far exceeds those
constitutional provisions.

HRH Sultan Azlan Shah
The Role of Constitutional Rulers



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HIS ROYAL HIGHNESS

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Visu Sinnadurai

For the past 28 years, distinguished jurists from around the world have come to Malaysia to deliver the annual Sultan Azlan Shah Law Lecture. Justice of the Supreme Court of the United States, Lord Chancellor, Masters of the Rolls, Law Lords, former Prime Minister, Justices of the Supreme Court of the United Kingdom, world renowned academics, leading Queen's Counsel, spouse of a Prime Minister, and Human Rights Advocates have delivered these lectures in honour of a great jurist and a respected Monarch—His Royal Highness Sultan Azlan Shah.

These annual lectures gave enormous joy and pride to His Royal Highness as the speakers spoke on selected topics in areas of law which were not only of great public interest, but which were also close to His Royal Highness' heart. On their part, the speakers expressed immense honour in being invited to deliver the lectures which bear His Royal Highness' name.



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
here and there.

Lord Slynn of Hadley

Lord of Appeal in Ordinary, House of Lords UK

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

14th Sultan Azlan Shah Law Lecture, 1999

The Right Honourable Lord Woolf, Lord Chief Justice of England and Wales, at the official book launch of *The Sultan Azlan Shah Law Lectures: Judges on the Common Law* said:

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.

In his opening remarks at the 20th Sultan Azlan Shah Law Lecture in 2006, the Right Honourable Justice Anthony Kennedy, Justice of the United States Supreme Court said:

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.

At the 11th Sultan Azlan Shah Law Lecture in 1996, the Right Honourable Lord Steyn of the House of Lords (now the Supreme Court of the United Kingdom) said:

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



“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.”

Professor Dato' Seri Visu Sinnadurai

Official Book Launch of
*Constitutional Monarchy, Rule of Law
and Good Governance: Selected Essays &
Speeches by HRH Sultan Azlan Shah*

13 April 2004

judge whose valuable contribution to the law is widely known beyond the frontiers of this country.

The Honourable Baroness Helena Kennedy of The Shaws QC (now Principal of Mansfield College, Oxford University) observed at the 21st Sultan Azlan Shah Law Lecture in 2007:

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

Over the years, the prestige of the lectures has been attested to by record-breaking attendances for a public lecture in the country, drawn by the majestic presence of His Royal Highness Sultan Azlan Shah.

His Royal Highness' presence will be sadly missed.

An illustrious jurist, a great Monarch who was much loved and held in great admiration by all, His Royal Highness Sultan Azlan Shah was a man of immense wisdom, distinction, and great charisma. He was truly an icon.

The learned judgments that His Royal Highness delivered whilst a judge have stood the test of time and continue to be authoritative. His words of wisdom which he so generously imparted as reflected in the many leading judgments, and in the many speeches which His Royal Highness delivered on Constitutional Monarchy, the Rule of Law, and Good Governance, will continue to provide



“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

Lord of Appeal in Ordinary, House of Lords UK

Judicial Legislation: Retreat from Anns

3rd Sultan Azlan Shah Law Lecture, 1988

guidance and inspiration, and will remain etched in our minds.

His Royal Highness' contribution to the development of the law as a judge; the role he played in upholding the Rule of Law, Independence of the Judiciary, and the ethics and principles of Good Governance which he so strongly advocated will live on for generations. Those who knew His Royal Highness will miss the kindness, the warmth and the love he gave so readily. His Royal Highness Sultan Azlan Shah has left an indelible mark in our lives and will always be remembered with respect and affection. 🕌







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.

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”.

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 passionately 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.

Unfettered discretion
is a contradiction in terms ...

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.

per Raja Azlan Shah Acting CJ (Malaya)

Pengarah Tanah dan Galian, Wilayah Persekutuan

v Sri Lempah Enterprise Sdn Bhd

[1979] 1 MLJ 135, Federal Court

quoted by **Professor WR Cornish**

“Colour of Office”: Restitutionary Redress Against Public Authority

1st Sultan Azlan Shah Law Lecture, 1986

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.

On 1 July 1983, His Royal Highness was appointed as the Raja Muda of Perak (Crown Prince of the State of Perak). His Royal Highness ascended the throne of the State of Perak on 3 February 1984 as the 34th Sultan of Perak.

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



... 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.

per Raja Azlan Shah J

Public Prosecutor v Tengku Mahmood Iskandar & Anor

[1973] 1 MLJ 128, High Court

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 (Malaya) in the Federal Court case of *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16.

the High Court of Malaya, being the youngest judge to be appointed to the High Court 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 on 2 February 1984, a day before his ascension to the throne of Perak.

On the Bench, His Royal Highness delivered several important and authoritative judgments that 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 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 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



“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.”

HRH Sultan Azlan Shah

Changing Face of Legal Research

Official Launch of Lawsearch

14 April 1989, Kuala Lumpur

quoted by **Justice Anthony Kennedy**

Written Constitutions and the Common Law Tradition

20th Sultan Azlan Shah Law Lecture, 2006

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.

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

⁵ [1979] 1 MLJ 135 at 148.

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 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:

... 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 Enterprise Sdn Bhd*,⁵ he said:

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



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.

HRH Sultan Azlan Shah

Interpretive Role of Judges

Official Launch of *Sinnadurai, Law of Contract*, Third Edition

20 March 2003, Kuala Lumpur

quoted by **Lord Mance of Frogna**

Changing Role of an Independent Judiciary

23rd Sultan Azlan Shah Law Lecture, 2009

⁶ Professor MP Jain, *Judgments of Sultan Azlan Shah*, page 365, quoting Raja Azlan Shah FJ 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.

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

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.

“As fundamental rights
are not the same as ordinary rights,
they can only be suspended or
abridged in the special manner
provided for it in the Constitution.

In my opinion,
the purpose of enacting
a written Constitution
is partly to entrench
the most important constitutional
provisions against repeal
and amendment in any way
other than by a specially
prescribed procedure.”

per Raja Azlan Shah FJ

Loh Kooi Choon v Government of Malaysia

[1977] 2 MLJ 187, Federal Court

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 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. In 1986, His Royal Highness Sultan Azlan Shah was appointed the Chancellor of the University of Malaya, the oldest university in the country. His Royal Highness was an external examiner to the Faculty of Law, University of Malaya, since the establishment of the Faculty in 1972. His Royal Highness, among others, was 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.

In recognition of his enormous contribution to the country's judicial system and higher education, he was 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 Gadjah Mada, Jogjakarta, Indonesia (1990), University of



“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

Tunku Abdul Rahman Lecture XI, Malaysian Institute of Management

23 November 1984, Kuala Lumpur

quoted by **Lord Woolf**

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Good Governance: Selected Essays & Speeches* by HRH Sultan Azlan Shah

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Brunei Darussalam (1990), and University Chulalongkorn, Bangkok, Thailand (1990). In 1999 His Royal Highness was conferred an Honorary Doctor of Laws by the University of London.

His Royal Highness received 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 was 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 was the President of the Asian Hockey Federation and sat on the Executive Board of the International Hockey Federation representing Asia. He was also an avid golfer.

His Royal Highness was 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.



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.

HRH Sultan Azlan Shah

Creativity of Judges

Official Opening of the Fourth International
Appellate Judges Conference and the Third Commonwealth
Chief Justices Conference
20 April 1987, Kuala Lumpur

quoted by YAB Tun Hussein Onn

Official Launch of *The Judgments of
HRH Sultan Azlan Shah with Commentary*
28 February 1986, Kuala Lumpur

also quoted by Cherie Booth QC

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

The Foundation actively supports the annual Sultan Azlan Shah Law Lecture Series and the annual Sultan Azlan Shah Cup Men's International Hockey Tournament.

In 2011 the Oxford Centre for Islamic Studies, a Recognised Independent Centre of the University of Oxford, established a new Sultan Azlan Shah Fellowship in honour of His Royal Highness Sultan Azlan Shah.

His Royal Highness Sultan Azlan Shah was steadfastly committed to 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 28 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.

His Royal Highness Sultan Azlan Shah married Her Royal Highness Tuanku Bainun in 1955. Their children are Raja Nazrin Shah, Raja Azureen, Raja Ashman Shah, Raja Eleena and Raja Yong Sofia.







His Royal Highness Sultan Nazrin Shah

His Royal Highness Sultan Azlan Shah was succeeded by his son, His Royal Highness Sultan Nazrin Muizzuddin Shah. His Royal Highness Sultan Nazrin Shah was proclaimed the 35th Sultan of the State of Perak on 29 May 2014.

His Royal Highness Sultan Nazrin Shah is committed to the advancement of education, maintaining a keen interest in the areas of economics, history and political development. In 1989, His Royal Highness was appointed Pro-Chancellor of the University of Malaya. In 2014, His Royal Highness was appointed the Chancellor of the University of Malaya. He is also the Royal Patron of the Merdeka Award Board of Trustees.

His Royal Highness has a particular interest in Islamic finance, and is the Royal Patron of the Malaysian International Islamic Financial Centre (MIFC). In his capacity as the Crown Prince of Perak, he was the President of the Perak Council on Islam and Malay Custom. His Royal Highness was Malaysia's Special Envoy to the United Nations Alliance of Civilizations Conference, an initiative

“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.”

His Royal Highness Raja Nazrin Shah

Crown Prince of the State of Perak

Official Book Launch of *Constitutional Monarchy, Rule of Law and
Good Governance: Selected Essays & Speeches by HRH Sultan Azlan Shah*

13 April 2004

for Interfaith and Inter-civilisation Dialogue, and the Asia-Pacific Interfaith Dialogue.

His Royal Highness obtained his Bachelor of Arts (BA) with Honours in Philosophy, Politics and Economics from the University of Oxford, and a Doctor of Philosophy (PhD) in Political Economy and Government from Harvard University.

His Royal Highness is an Honorary Fellow of Worcester College, University of Oxford, and of Magdalene College, University of Cambridge. He is a Member of the Board of Trustees of the Oxford Centre for Islamic Studies, University of Oxford, Eminent Fellow of the Institute of Strategic and International Studies, and Royal Fellow of the Malaysian Institute of Defence and Security.

The eldest son of Sultan Azlan Muhibbuddin Shah and Raja Permaisuri Tuanku Bainun, His Royal Highness Sultan Nazrin Shah was born on 27 November 1956. His Royal Highness Sultan Nazrin Shah is married to Her Royal Highness Raja Permaisuri Tuanku Zara Salim. The Royal couple have two children.

His Highness Raja Ashman Shah

Their Royal Highnesses Sultan Azlan Shah and Tuanku Bainun sadly, and most unexpectedly, lost their second son, His Highness Raja Ashman Shah on 30 March 2012, when



“The existence of the 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.”

HRH Sultan Azlan Shah

Supremacy of Law in Malaysia

Tunku Abdul Rahman Lecture XI, Malaysian Institute of Management

23 November 1984, Kuala Lumpur

quoted by Lord Rodger of Earlsferry

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

24th Sultan Azlan Shah Law Lecture, 2010

he suddenly passed away from a severe asthma attack. His Highness Raja Ashman was a pious, humble, and down to earth Prince who befriended everyone irrespective of status or creed.

His Highness Raja Ashman was the Raja Kechil Sulung of Perak. His Highness held a degree in Economics from the University of Nottingham, and a Master of Law from Cambridge University. He was admitted to the English Bar by the Honourable Society of Lincoln's Inn.

His Highness Raja Ashman was a keen hockey fan and often accompanied His Royal Highness Sultan Azlan Shah to international matches and tournaments, especially the annual Sultan Azlan Shah Cup Men's International Hockey Tournament.

His Highness Raja Ashman married Datin Seri Noraini Jane Kamarul Ariffin on 26 September 1991. Their children are, son Raja Ahmad Nazim Azlan Shah, who holds the position of Raja Kechil Sulung of Perak (currently an undergraduate at Cambridge University), and daughters Raja Emina Aliyyah (studying at Melbourne University), and Raja Bainunnisa Safia (an undergraduate at Oxford University).

A filial son, a loving husband, a doting father and a caring brother, Raja Ashman Shah remains fondly in our hearts, a true Gentleman and Friend. 🌹



“The Constitution
as the supreme law,
unchangeable by
ordinary means,
is distinct from
ordinary law and
as such cannot be
inconsistent with itself.

It is the supreme law
because it settles the norms
of corporate behaviour
and the principle of
good government.”

per Raja Azlan Shah FJ

Loh Kooi Choon v Government of Malaysia

[1977] 2 MLJ 187, Federal Court



“... the Constitution is
not a mere collection
of pious platitudes.
It is the supreme law
of the land ...”

per Raja Azlan Shah FJ

Loh Kooi Choon v Government of Malaysia

[1977] 2 MLJ 187, Federal Court

“... just as politicians
ought not to be judges,
so too judges
ought not to
be politicians.”

HRH Sultan Azlan Shah

Supremacy of Law in Malaysia

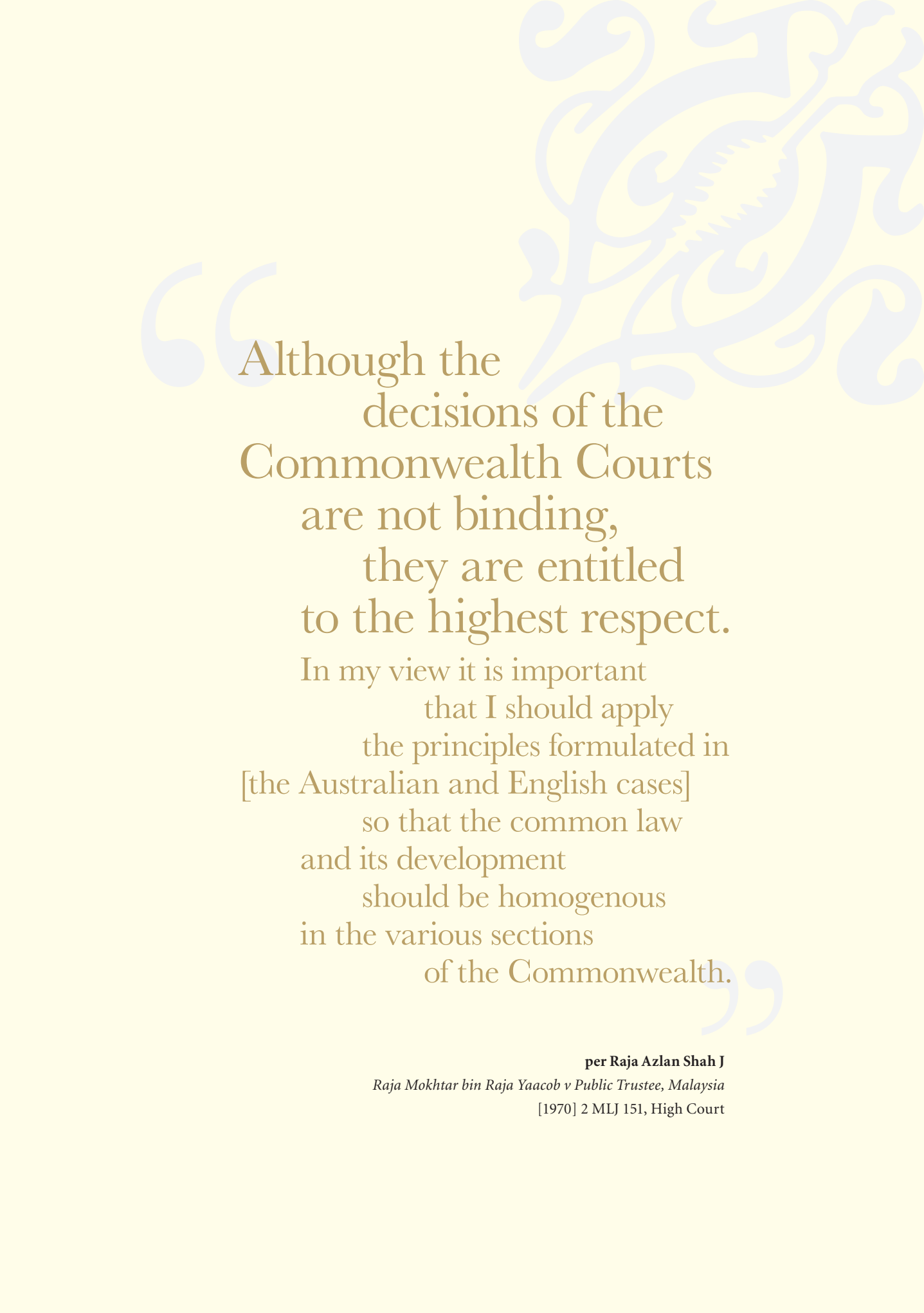
Tunku Abdul Rahman Lecture XI, Malaysian Institute of Management

23 November 1984, Kuala Lumpur

quoted by **Cherie Booth QC**

The Role of the Judge in a Human Rights World

19th Sultan Azlan Shah Law Lecture, 2005



Although the
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 homogenous
in the various sections
of the Commonwealth.

per Raja Azlan Shah J

Raja Mokhtar bin Raja Yaacob v Public Trustee, Malaysia

[1970] 2 MLJ 151, High Court



His Majesty
contributed a lot to
the development
of Malaysian law.
Although a member
of the Perak Royal
family, as a legal
officer he was very
much in touch with
both the elite and
the masses.

It is his ability and
willingness to understand,
appreciate and be aware
of the problems of the
ordinary citizens that has
enabled him to make a
substantial contribution
to the development of
Malaysian law since
independence.

Adapted from speech at
the Official Launch of *The Judgments of*
HRH Sultan Azlan Shah with Commentary,
editor, Visu Sinnadurai,
28 February 1986, Kuala Lumpur.

A Tribute by Tun Hussein Onn

Former Prime Minister of Malaysia

As an exemplary legal officer, His Majesty Sultan Azlan Shah has always been regarded as one of the most outstanding judges in the Malaysian judiciary. His Majesty is well known for his firmness in upholding justice. As far as His Majesty is concerned, no person is above the law, nor is anyone entitled to any special consideration. He firmly believes that everyone is equal before the law and that no one should be accorded special treatment. This principle he upheld both in words and in deeds and he was determined to do justice both to the accused and to the State.

His Majesty contributed a lot to the development of Malaysian law. Although a member of the Perak Royal family, as a legal officer he was very much in touch with both the elite and the masses. It is his ability and willingness to understand, appreciate and be aware of the problems of the ordinary citizens that has enabled him to make a substantial contribution to the development of Malaysian law since independence. He was conscious of the changes



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that were taking place in the country and was keen and flexible enough to modify and adapt the laws to suit local conditions and circumstances.


As a Ruler, His Majesty takes great pains to keep abreast with affairs of the State. He has made attempts to meet, to know and to understand State officials and to learn the problems that the State is faced with. Despite his responsibilities and busy schedule, he takes a keen interest in education and sports. He has been the Pro-Chancellor of Universiti Sains Malaysia since 1971 and Chairman of the Advisory Council on Higher Education since 1974.

In sports, his main interest lies in hockey. His Majesty is the President of the Hockey Federation of Malaysia, President of the Asian Hockey Federation and Vice-President of the International Hockey Federation. He is also a very keen golfer.

I am sure that Malaysians in general are indeed proud to have a Sultan who has served the country with great distinction. The people of Perak in particular will undoubtedly benefit from the wisdom of a Ruler who has vast experience in the Malaysian judiciary.

Truly, His Majesty not only possesses leadership qualities but also has demonstrated those qualities with excellence. He is a man who practises what he preaches. This is another important hallmark of a great leader who has lived up to the principles that he professes. I am proud to say that he is one of the few models of leadership by example. 🏵





On the Perak
throne Sultan
Azlan Shah has
reached high
constitutional
office indeed.

Malaysia is lucky to have
a distinguished jurist
as attested to by the
collection of judgments
herein presented—with
great experience in
administering the law
and actually seeing it in
operation and its impact
in real life on Parliament,
Government and on the
ordinary citizen.

Adapted from speech at
the Official Launch of *The Judgments of*
HRH Sultan Azlan Shah with Commentary,
editor, Visu Sinnadurai,
28 February 1986, Kuala Lumpur.

A Tribute by Tun Mohamed Suffian

Former Lord President, Federal Court, Malaysia

This book makes history: it is the first collection within the covers of a single book of the judgments of a judge in this country.

It is fitting that the judge so honoured is Duli Yang Maha Mulia Paduka Seri Sultan Azlan Muhibbuddin Shah (better known among the legal fraternity as Raja Tun Azlan Shah), Sultan of the State of Perak, the fifth Lord President of the Federal Court, who reached the pinnacle of the judiciary after 17 years on the superior courts—at the comparatively youthful age of 54, an achievement predicted for him by the first Lord President Tun Sir James B Thomson who recommended his elevation in 1965 at the age of 37. But for his sudden succession to the Perak throne he would have had 28 years on the superior bench and the opportunity of leading and moulding the Malaysian judiciary for 11 years. The judiciary's loss is undoubtedly Perak's gain.

Educated at Nottingham University, now famous for the quality of its legal education, and at Lincoln's Inn by whom he was called to the English Bar in 1954, at an early



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he was a good and patient
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what was being said ...

It was only after
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that counsel realised
to his dismay that
the Lord President's
reticence meant that
he was only listening, but
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stage of his career in the public service he showed remarkable interest in the law by subscribing, at his own expense, to the *All England Law Reports* and buying law books which the judicial or legal department, because of financial and bureaucratic constraints, was unable to supply, and by the practice, which I adopted but only haphazardly as being too tedious, of noting in a large book points of law which might become useful later on. It was on this foundation that was laid the learning which shines through in his judgments.

At work on the Bench he was a good and patient listener, seldom interrupted or asked questions and thereby gave the impression of agreeing to what was being said. It was a good way of curbing prolix counsel, for the experienced judge knows that with some counsel the more you try to steer them away from tedious repetitions and irrelevancies the more persistent and garrulous they become; all the while you are thinking of the reserved judgments still to be pondered and written and the long list of trials and appeals to be disposed of. It was only after Raja Tun Azlan Shah had delivered judgment that counsel realised to his dismay that the Lord President's reticence meant that he was only listening, but not necessarily agreeing.

In a splendid lecture, the Tunku Abdul Rahman Lecture XI, delivered to the Malaysian Institute of Management on 23 November 1984 entitled *Supremacy of Law in Malaysia*, the Sultan gave his views on the relations between Parliament, the executive and the judiciary.



The way he performs
the duties of his
high royal office
supported by his gracious
Raja Permaisuri
in wisely guiding
the destiny of his people
should make his erstwhile
colleagues in the judiciary
and of the Bar proud
that the profession is capable
of producing not only
distinguished prime ministers.

On the Perak throne Sultan Azlan Shah has reached high constitutional office indeed. Malaysia is lucky to have a distinguished jurist as attested to by the collection of judgments herein presented—with great experience in administering the law and actually seeing it in operation and its impact in real life on Parliament, Government and on the ordinary citizen. The way he performs the duties of his high royal office supported by his gracious Raja Permaisuri in wisely guiding the destiny of his people should make his erstwhile colleagues in the judiciary and of the Bar proud that the profession is capable of producing not only distinguished prime ministers. 🏰



After graduating
he was called to
the English Bar
by Lincoln's Inn.
On his return to
Malaya he rapidly
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offices

—as a magistrate, a
prosecutor and a legal
adviser to governments.
So successful was he that
he was appointed to the
High Court Bench at the
early age of 37. Indeed it
is believed that no one,
before or since, anywhere
in the Commonwealth,
has been made a High
Court judge at—for that
office—so tender an age.

Oration by Professor JC Smith, CBE, QC,
MA, LL.D, LL.D, FBA for the Conferment of
the Degree of Doctor of Laws *honoris causa*
on His Majesty Sultan Azlan Shah
at the Congregation of the
University of Nottingham, UK
for the Conferment of Degrees,
Nottingham, 11 July 1986.

A Tribute by Professor JC Smith

Former Tutor of HRH at Nottingham University, UK

Chancellor, thirty-three years ago a young Malayan student stood before your predecessor to receive the degree of Bachelor of Laws. Today, he returns after a career in which he reached the very pinnacle of the legal profession in Malaysia. He returns as Sultan of Perak, as Deputy to the King of Malaysia and as himself, the Chancellor of a great University, the University of Malaya.

Azlan Shah was a cheerful and popular undergraduate in our Department of Law who took his legal studies seriously—but not too seriously. He was renowned for his athletic prowess, especially hockey, at which he represented not only the University but also the Northern Counties. After graduating he was called to the English Bar by Lincoln's Inn. On his return to Malaya he rapidly made his mark in the legal profession in a variety of offices—as a magistrate, a prosecutor and a legal adviser to governments. So successful was he that he was appointed to the High Court Bench at the early age of 37. Indeed it is believed that no one,



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But he listened with
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on the facts of the law.”

before or since, anywhere in the Commonwealth, has been made a High Court judge at—for that office—so tender an age. On the Bench the youthful judge's reputation grew. In 1979 he became Chief Justice of the High Court and in 1982 he attained the highest judicial office, Lord President of the Federal Court of Malaysia. He had the important judicial quality of being a good listener with almost infinite patience who rarely interrupted evidence or argument and then only when it was necessary to do so. But he listened with a percipient and critical mind, as became clear when—sometimes to the discomfiture of those appearing before him—he pronounced judgment on the facts of the law. The breadth and depth of his learning in the law as it appeared in the law reports astonished—and greatly gratified—those who taught him in his student days. We like to think that, at least, we sowed the seeds which, in time, produced so rich a harvest.

In 20 years on the Bench he tried cases and heard appeals involving a great range of law and many of his learned judgments are reported in the law reports. It is a remarkable tribute to his judicial work that those judgments have been collected and published as a separate volume: *Judgments of His Royal Highness Sultan Azlan Shah With Commentary*, edited by Professor Dato Dr Visu Sinnadurai, Professional Law Books Publishers, 1986. They constitute a great contribution to the development of the law in Malaysia at a crucial time in its history.



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in its history.

A study of these judgments reveals how much of the common law is indeed common to both England and Malaysia. We invoke the same principles and frequently rely on the same authorities. It is remarkable that we find a Malaysian judge, towards the end of the twentieth century, quoting the words of the great Lord Chief Justice of England, Sir Edward Coke, to King James the First; and Coke himself was quoting Bracton who wrote in the 13th century. “The King”, he said, “is under no man, but is under God and the Law.”

In Azlan Shah, Malaysia has a stout defender of the rule of law, of the independence of the judiciary, of the presumption of innocence and of those principles of natural justice and of equity which we value so highly. He has earned respect and admiration for his absolute impartiality. The rich and powerful who came before Mr Justice Azlan Shah soon learnt that, in his court, their wealth and power counted for nothing. The corrupt were told in forthright terms of the abhorrence in which he held their conduct.

Throughout his career he has maintained a close interest in University education and particularly legal education. Even as Chief Justice and Lord President, he continued to act as an external examiner for the degree of Bachelor of Laws in the University of Malaya. Today’s law graduands may reflect that this would be rather like having Lord Denning as one of their examiners.




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His work has been recognised in many ways: by the establishment of an annual series of lectures, the Sultan Azlan Shah Law Lectures, to be given in the Faculty of Law of the University of Malaya; by the conferment on him of honorary degrees, of Doctor of Literature by the University of Malaya and of Doctor of Laws by the Science University of Malaya. Most recently he has been elected Chancellor of the University of Malaya.

His succession to the throne of Perak necessarily brought his judicial career to an end and that was a great loss to the law in Malaysia. But there is counterbalancing gain for he brings to his present role as a constitutional Ruler unrivalled knowledge and experience of the functioning of the Malaysian Constitution and of the powers and duties of Parliament, the executive, the courts and the Ruler himself.

He no longer plays hockey but is still very active on various national and international bodies concerned with the administration and encouragement of that game; and it is said that he is now as proficient with a golf club as he formerly was with a hockey stick. At a recent gathering of Malaysian students in London, the respect and affection in which he is held by the young people of his country was manifest.

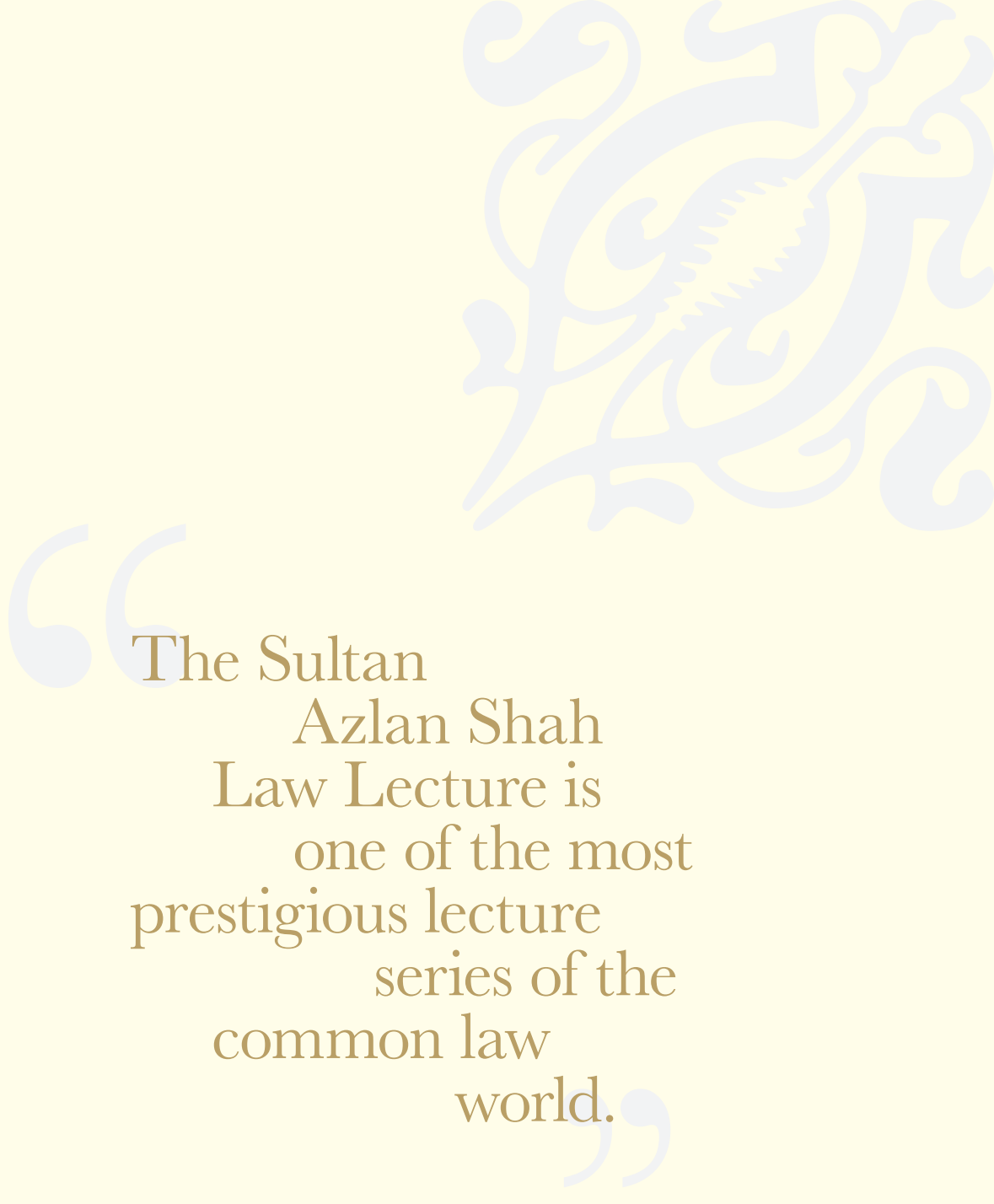
Chancellor, I present to you His Royal Highness, Sultan Azlan Shah, as eminently worthy to receive the degree of Doctor of Laws, *honoris causa*. 






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

Lord Saville of Newdigate
Lord of Appeal in Ordinary, House of Lords UK
Information Technology: A Tool for Justice
18th Sultan Azlan Shah Law Lecture, 2004



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

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



We must ever be
mindful that written
constitutions are
mere parchment
pieces.

It is important that there must
be, in the hearts and minds
of those who are entrusted to
administer and uphold the
Constitution, a belief in the
values and principles that
animate the august document.

Text of Opening Address delivered at
the 14th Malaysian Law Conference,
Kuala Lumpur Convention Centre,
29 October 2007.



Fifty Years of Constitutionalism and the Rule of Law

His Royal Highness Sultan Azlan Shah
Sultan of Perak Darul Ridzuan

This year marks the 50th year of our nation's Independence. It is also the 50th year of our Merdeka Constitution.

Malaysia and its people have every reason to celebrate this joyous occasion as the country prospers as a constitutional democracy with a constitutional monarchy in the form as established by the Merdeka Constitution in 1957.

Not all countries that achieved their freedom at the end of the colonial period are today able to celebrate their independence with pride. Some are under military rule, whilst others have had their institutions undermined or even abolished.

The 50th anniversary of our Independence is therefore an appropriate moment for all of us to reflect upon the strength of our constitutional system. As we rejoice in our success, it is important to be alert to the pitfalls of failure if proper regard is not given to our constitutional mechanisms.

“The prescription that
“we are a government
of laws, not of men”
describes
the basic principle
that runs through
our entire Constitution
—the principle of
the Rule of Law.”

¹ *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at 188. |

We must ever be mindful that written constitutions are mere parchment pieces. It is important that there must be, in the hearts and minds of those who are entrusted to administer and uphold the Constitution, a belief in the values and principles that animate the august document.

I had occasion to observe when sitting in the Federal Court in 1977 that “the Constitution is not a mere collection of pious platitudes”. I spoke then of the three essential features of our Constitution. I said:

It is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach.

The second is the distribution of sovereign power between the States and the Federation ...

The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.¹

The prescription that “we are a government of laws, not of men” describes the basic principle that runs through our entire Constitution—the principle of the Rule of Law.

The Rule of Law is the defining feature of democratic government. In delivering the 11th Tunku Abdul Rahman



I wish to state with
all fortitude that
without
a reputable judiciary—
a judiciary endowed
and equipped
with all the attributes
of real independence
—there cannot be
the Rule of Law.

² “Supremacy of the Law”, in *Constitutional Monarchy, Rule of Law and Good Governance* (2004) at pages 13 – 14.

³ Speech delivered on 13 April 2004, reproduced in *The Official Book Launch: Constitutional Monarchy, Rule of Law and Good Governance & The Sultan Azlan Shah Law Lectures: Judges on the Common Law* (2004), at page 21.

Lecture in November 1984, I again defined it as follows:

“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.”²

In a speech delivered in Kuala Lumpur in April 2004, Lord Woolf spoke of the Rule of Law:

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.³

The reference by Lord Woolf to the role of the judiciary is highly significant. I wish to state with all fortitude that without a reputable judiciary—a judiciary endowed and equipped with all the attributes of real independence—there cannot be the Rule of Law.

All countries, including those that are totalitarian regimes, have courts. But as I observed previously:



In matters concerning
the judiciary,
it is the public perception
of the judiciary that
ultimately matters.
A judiciary loses
its value and service
to the community
if there is no
public confidence in
its decision-making.

⁴ “Supremacy of the Law”, note 2 above, at page 14.

⁵ Patrick Devlin, *The Judge* (OUP, 1981), at page 3.

The [mere] existence of courts and judges in every ordered society proves nothing; it is their quality, their independence, and, their powers that matter.⁴

In matters concerning the judiciary, it is the public perception of the judiciary that ultimately matters. A judiciary loses its value and service to the community if there is no public confidence in its decision-making.

In this regard the principal quality that a judiciary must possess is *impartiality*. Lord Devlin said of “judicial impartiality” that it exists in two senses—the reality of impartiality and the appearance of impartiality. He emphasised that the appearance of impartiality was the more important of the two.⁵

Impartiality also means that judges are not only free from influence of external forces, but also of one another. No judge however senior can dictate to his brethren as to how a decision should be arrived at.

It is of the essence of a judge’s character that he must be a person of unquestionable integrity who brings an unbiased mind to his task. Like Caesar’s wife, he should be above suspicion.

It is said that public confidence in the judiciary is based on four evaluating criteria. They are:

- (1) the principle of independence of the judiciary;
- (2) the principle of impartiality of adjudication;



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⁶ See speech by Lord Hope of Craighead, CMJA Edinburgh 2000 Conference Report, at page 89.

⁷ “The Role of Constitutional Rulers and the Judiciary: Revisited”, in *Constitutional Monarchy*, note 2 above, at page 400.

⁸ NH Chan, *Judging the Judges* (Alpha, 2007), Chapter 5 at pages 115 et seq.

⁹ See Wu Min Aun, “The Judiciary at the Crossroads” in *Public Law in Contemporary Malaysia*, Wu Min Aun (ed), at pages 76 et seq.

¹⁰ “Four Decades in the Law—Looking Back” in *The Constitution of Malaysia: Further Perspectives* (OUP, Singapore, 1986) at page 215.

- (3) the principle of fairness of trial; and
- (4) the principle of the integrity of the adjudicator.⁶

How does our judiciary measure today against these criteria?

Sadly, I must acknowledge there has been some disquiet about our judiciary over the past few years and in the more recent past. In 2004, I had stated that it grieved me, having been a member of the judiciary, whenever I heard of allegations against the judiciary and the erosion of public confidence in the judiciary.⁷

Recently there have been even more disturbing events relating to the judiciary reported in the press. We have also witnessed the unprecedented act of a former Court of Appeal judge writing in his post-retirement book of erroneous and questionable judgments delivered by our higher courts in a chapter under the heading “When Justice is Not Administered According to Law”.⁸ There are other serious criticisms.⁹

I am driven nostalgically to look back to a time when our judiciary was the pride of the region, and our neighbours spoke admiringly of our legal system. We were then second to none and the judgments of our courts were quoted confidently in other common law jurisdictions. As Tun Suffian, a former Lord President of the then Federal Court, said of the local judges who took over from the expatriate judges after Merdeka, that the transformation was without “any reduction in standards”.¹⁰



“There is no reason
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their duties
impartially,
confidently and
competently.”

Admittedly society is more complex today and the task of the judges may be more difficult than what it was before, but the values I speak of are universal and eternal.

There is no reason why judges with the assured security of tenure they enjoy under the Constitution should not discharge their duties impartially, confidently and competently.

Judges are called upon to be both independent and competent. In these days, judges must be ever mindful that the loss of independence can come from many sources, and not just from the Executive. Therefore, judges must piously resist the lure of socialising with business personages and other well-connected people. They may discover at their peril that they have compromised themselves in the cases that come before them with the unedifying spectacle of recusal applications.

Nothing destroys the confidence the general public or the business community has in the judiciary more than the belief that the judge was biased when he decided a case, or that the judge would not be independent where powerful individuals or corporations are the litigants before him.

Confidence in the judiciary may also be eroded where the business community perceives incompetence in decision-making. A judgment in a banking or commercial transaction that is contrary to established norms or which is incomprehensible in its reasoning is bound to give rise to suspicion and loss of confidence.



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¹¹ Published in the Report entitled “Doing Business 2008”. |

It therefore becomes apparent, that our attempts to establish ourselves as a leading financial and commercial center will fail if we do not have a competent judiciary to decide on complex commercial disputes. In this regard, it is of utmost importance that the foreign investor has faith in the competence and integrity of our judiciary.

The international foreign investor also expects a speedy resolution of their cases before the courts. Delays cause loss of profits to the business community. In the recent World Bank survey on resolution of commercial disputes, Malaysia ranks poorly, 63 amongst 178 economies.¹¹ A similar report by the US State Department warns American businessmen to be wary of the slow process of adjudication of cases before the Malaysian courts. This is indeed a poor reflection on our courts.

Countries such as Singapore and Hong Kong, who have a similar legal system and who share similar laws, and whose judges and lawyers are trained as ours, are ranked in these surveys as amongst the best in the world (Hong Kong is placed first and Singapore ranks as fourth in the world).

The reason is obvious: these countries have undertaken major reforms in their court structure and procedures and have introduced more efficient and transparent commercial courts so as to attract the foreign investor.

Maybe it is also time for us to consider such changes in our legal system and introduce a strong central commercial



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The inevitable
consequence of incompetence
is delayed judgments and
backlog in cases
leading to
all round dissatisfaction.”

court in Putrajaya as in London, with specially trained judges who are familiar with the new and ever changing commercial laws and their developments, so that we too can become the center for the resolution of commercial disputes in the region.

I should point out that mere cosmetic changes alone would not suffice. If we wish to achieve this goal, it is imperative that major reforms are introduced. Many other countries have taken such steps to establish specialised commercial courts. Recently, the Dubai Commercial Court (where one of our own former Chief Judge has recently been appointed to sit as a judge in this new court), and the Qatar Commercial Court have been established.

I know that judging is an arduous task calling for a good mind and a capacity for hard work. The inevitable consequence of incompetence is delayed judgments and backlog in cases leading to all round dissatisfaction.

Only last week, I read in a latest Malaysian law report that a case of medical negligence involving the death of a lawyer took 23 years to reach the Court of Appeal. Similarly, there have been reports that some judges have taken years to write their grounds of judgments involving accused persons who had been convicted and were languishing in death row.

Surely such a situation cannot be tolerated in any progressive nation. Heavy is the head that is responsible for the administration of justice.



“The Bar and
its leadership
must ensure there is
a high standard
of integrity
and ethics among
its members.

A Bar that is riddled
with bad practices
cannot assist
the administration
of justice.”

¹² “The Legal Profession and Legal Practice”, in *Constitutional Monarchy*,
note 2 above, at page 315.

It will also be appropriate for me to say a few words on lawyers.

The administration of justice is not just the role of the judiciary. I had said previously in July 1984 on the occasion of a farewell dinner speech to the Bar Council on leaving office as the Lord President, that there cannot be an independent judiciary without an independent Bar. I stated further that the judiciary cannot function without the legal profession.¹²

This symbiosis calls for a proper understanding of the relationship between the Bench and the Bar. The Bar and its leadership must ensure there is a high standard of integrity and ethics among its members. A Bar that is riddled with bad practices cannot assist the administration of justice.

In this respect the relationship between judges and lawyers must be a proper and correct one. As I have said earlier, judges are supposed to be no respecters of persons who appear before them. This rule applies not only to litigants but also to lawyers. It is not just a matter of prudence and good practice, but fundamentally one of ethics.

As is often said, there are good lawyers and bad lawyers. Whilst the majority of lawyers discharge their duties as officers of the court with professionalism and dedication, there have been cases of some others who have brought disrepute to the legal profession. There have been allegations against some lawyers that in clear dereliction of



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their responsibilities, they have either misled the courts, or attempted to choose the judges or courts for their cases to be heard so as to obtain a favourable decision in their client's favour. This is a serious interference with the administration of justice and the process of the court.

There is one further important point that I feel compelled to say.

This deals with a judge's quality in decision-making. We in Malaysia live in a multi-cultural and multi-religious society. Our founding fathers accommodated this diversity into our Constitution that is reflected in the social contract, and saw this diversity as strength.

Judging in a diverse society is not an easy task. Judges in many parts of the world face similar difficulties. Those of you who were present at the lecture delivered by Justice Albie Sachs at the Second Tun Hussein Onn Lecture last week will know how the Constitutional Court of South Africa, as the guardian of the constitution, wrestle to arrive at a just decision when dealing with issues relating to diversity or discrimination.

Judges in Malaysia must be ever mindful that they are appointed judges for all Malaysians. They must be sensitive to the feelings of all parties, irrespective of race, religion or creed, and be careful not to bring a predisposed mind to an issue before them that is capable of being misconstrued by the watching public or segments of them.



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¹³ Tun Suffian, note 10 above, at page 216.

¹⁴ “The Role of Constitutional Rulers and the Judiciary: Revisited”, in *Constitutional Monarchy*, note 2 above, at page 401.

I am reminded of the proud accolade of the late Tun Suffian in his Braddell Memorial Lecture in 1982, when speaking of the Malaysian judiciary to a Singapore audience he said:


In a multi-racial and multi-religious society like yours and mine, while we judges cannot help being Malay or Chinese or Indian; or being Muslim or Buddhist or Hindu or whatever, we strive not to be too identified with any particular race or religion – so that nobody reading our judgment with our name deleted could with confidence identify our race or religion, and so that the various communities, especially minority communities, are assured that we will not allow their rights to be trampled underfoot.¹³

I have found it necessary to speak at some length on these matters because it is my earnest hope that the Malaysian judiciary will regain the public's confidence and it will once again be held in the high esteem as it once was held.

In conclusion, I wish to say, as I have said on a previous occasion, “in the judiciary, people place their trust and hope”.¹⁴

It now gives me great pleasure in officially declaring open the 14th Malaysian Law Conference. I wish all of you a fruitful and meaningful discussion and exchange of ideas. 🍀





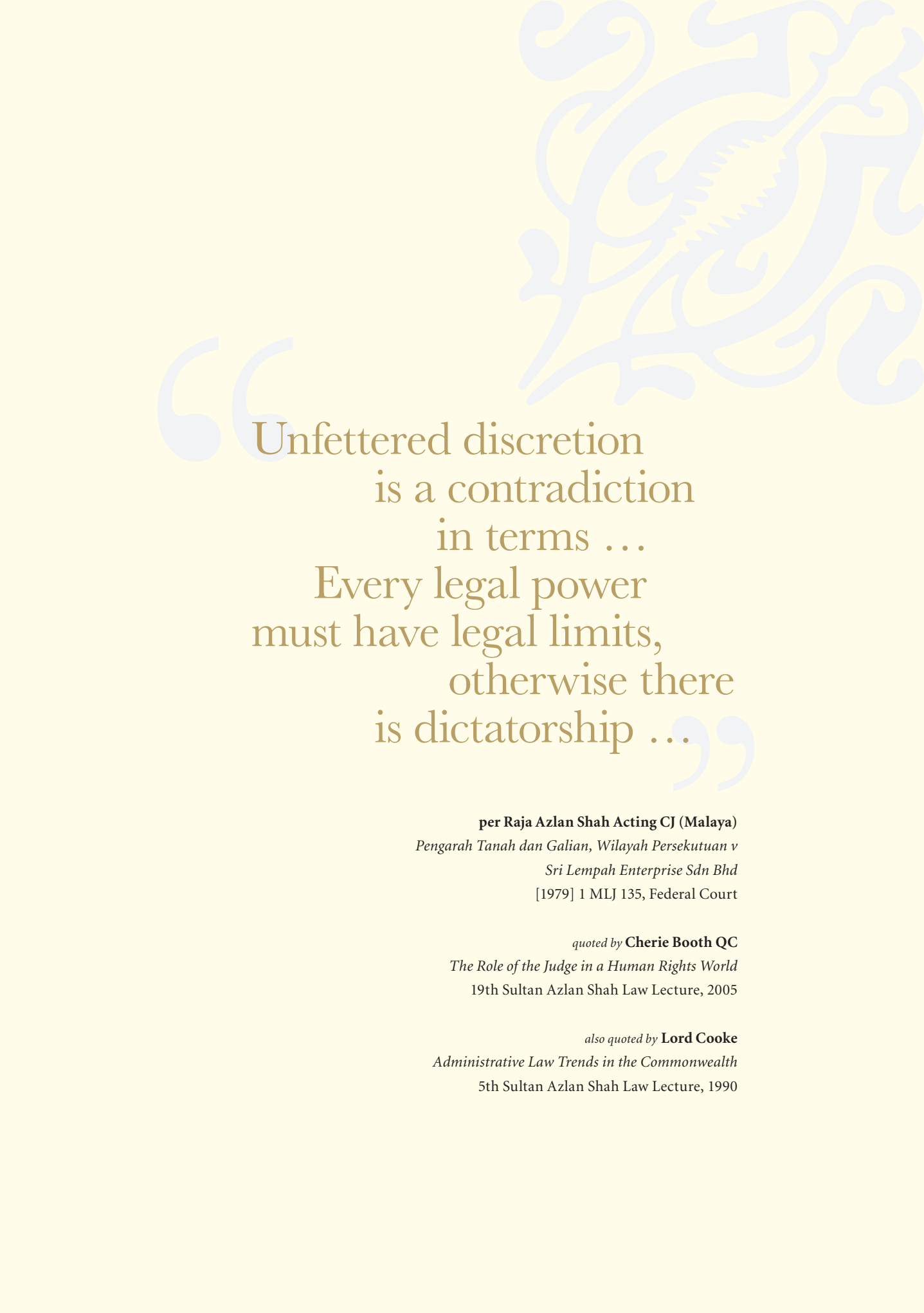
The Conference of Rulers is a constitutional body established under Article 38 of the Constitution with certain executive deliberative and consultative functions.

The executive functions are those of

- (a) electing and removing the Yang di-Pertuan Agong and his Deputy,
- (b) in the matter of religion, agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole and
- (c) consenting or withholding consent to any law such as a law which affects the privileges, position, honours or dignities [of the Rulers] or a law which alters the boundaries of a state and making or giving advice on any appointment which requires the consent of the Conference ...

Insofar as these executive functions are concerned, the Rulers act in their discretion.

per Raja Azlan Shah Acting LP
Phang Chin Hock v Public Prosecutor (No 2)
[1980] 1 MLJ 213, Federal Court



Unfettered discretion
is a contradiction
in terms ...

Every legal power
must have legal limits,
otherwise there
is dictatorship ...

per Raja Azlan Shah Acting CJ (Malaya)

Pengarah Tanah dan Galian, Wilayah Persekutuan v

Sri Lempah Enterprise Sdn Bhd

[1979] 1 MLJ 135, Federal Court

quoted by **Cherie Booth QC**

The Role of the Judge in a Human Rights World

19th Sultan Azlan Shah Law Lecture, 2005

also quoted by **Lord Cooke**

Administrative Law Trends in the Commonwealth

5th Sultan Azlan Shah Law Lecture, 1990

“In countries which
have a written constitution,
the constitution itself
generally spells out
the scope of the powers
of each of the organs
of government.

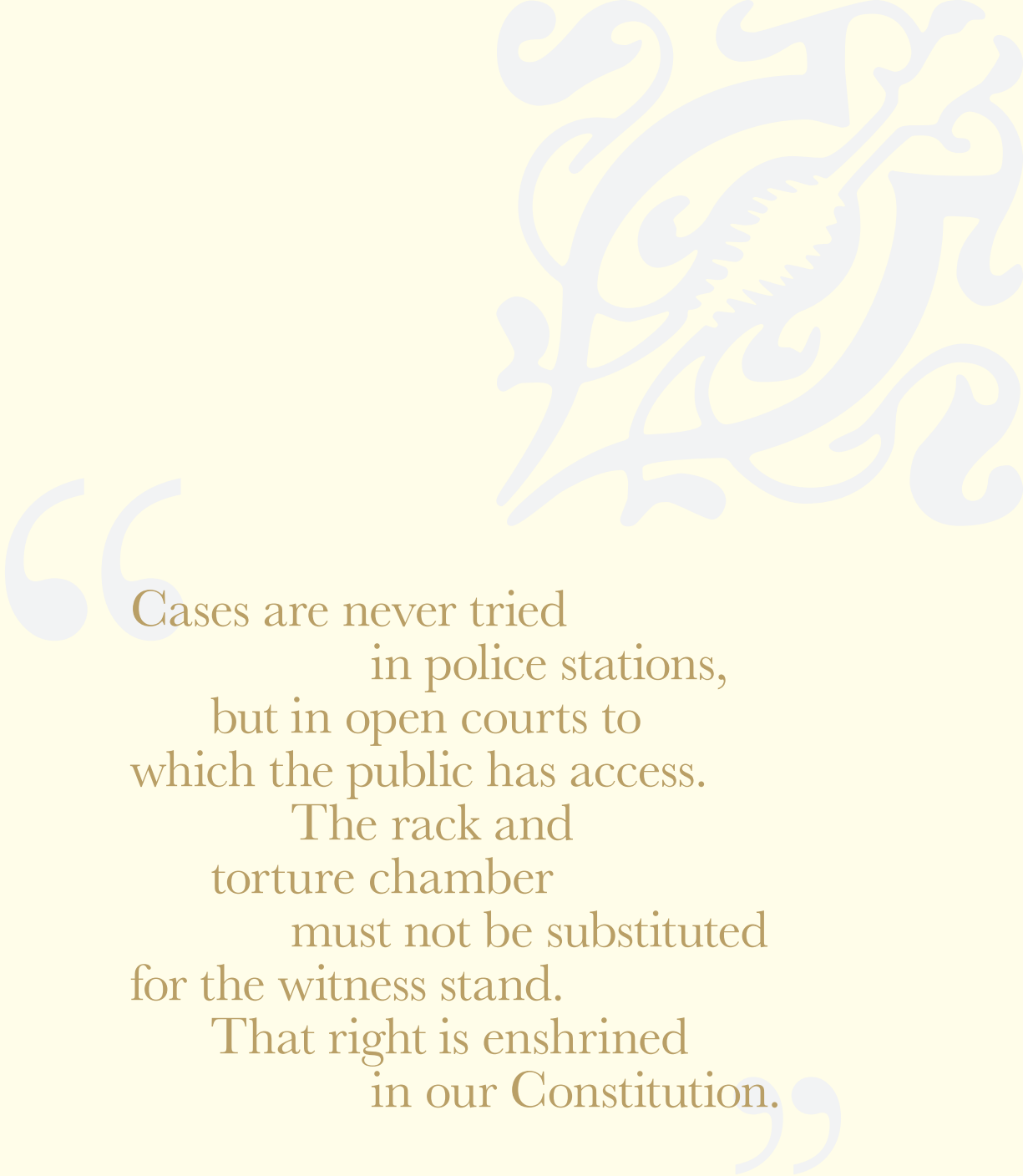
In such countries,
the powers of the three organs
can only be exercised
in accordance with
the terms of the constitution
from which such
powers are derived.”

HRH Sultan Azlan Shah

Checks and Balances in a Constitutional Democracy

Harvard Club of Malaysia

19 September 1987, Kuala Lumpur



Cases are never tried
in police stations,
but in open courts to
which the public has access.
The rack and
torture chamber
must not be substituted
for the witness stand.
That right is enshrined
in our Constitution.

per Raja Azlan Shah Acting LP

Dato Menteri Othman Bin Baginda & Anor

v Datuk Ombi Syed Alwi Bin Shed Idrus

[1981] 1 MLJ 29, Federal Court



A Perspective of HRH Sultan Azlan Shah's Contribution to the Development of Malaysian Law

His Royal Highness Sultan Azlan Shah was a judge of the superior courts of Malaysia for a period of some 20 years. He was, at the age of 37, the youngest judge to be appointed to the High Court of Malaya. Further, in the normal course of events, His Royal Highness would have been the longest serving Lord President of the Federal Court of Malaysia (for a term of 11 years) had it not been for the sudden turn of events which persuaded him to relinquish the highest judicial office in Malaysia upon his ascension to the throne of the State of Perak.

In 1965, at the age of only 37, His Royal Highness was elevated to the Bench of the High Court of Malaya, and in 1973, His Royal Highness was elevated to the Federal Court of Malaysia as a Federal Court Judge. 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 of the Federal Court of Malaysia on 12 November 1982.

His Royal Highness' meteoric advancement within the judiciary in Malaysia is clear testimony of his intellect and capabilities and of his contribution to the development



of Malaysian law. His Royal Highness has always been regarded as one of the most outstanding judges in the history of the Malaysian judiciary. During his tenure as a High Court Judge, Federal Court Judge, Chief Justice and as Lord President, His Royal Highness had the unique distinction of having some 280 of his judgments reported in the law journals. In another 200 reported cases, His Royal Highness was a member of the Federal Court which heard and determined the cases. His Royal Highness heard and determined more than 150 cases in the High Court, sitting as a High Court Judge at first instance whilst holding office as a Federal Court Judge.

The judgments delivered by His Royal Highness were always well received by the legal fraternity. His style was distinctive: he was concise, comprehensive and clear. He dealt with the questions of law involved in each case succinctly and was most forthcoming in his application of legal principles to the facts of the case.

The impact of His Royal Highness' judgments in most branches of the law was such that they contributed to the rapid development of Malaysian law since Independence. His Royal Highness not only modified the application of the relevant English law to suit local conditions, but where there were no corresponding local provisions, His Royal Highness in certain cases did not feel constrained to apply English law or practice. For example, in *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260, the jurisdiction to grant Mareva injunctions as

under English law was given recognition in the Malaysian legal system. In *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, His Royal Highness broke new ground by recognising the existence of collateral contracts in Malaysia.

In cases where local provisions existed, His Royal Highness always applied them. In *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21, His Royal Highness considered section 66 of the Contracts Act when dealing with the rights of the parties under an illegal contract rather than merely relying on accepted English legal principles. Indeed, earlier in *Dorothy Kwong Chan v Ampang Motors Ltd & Anor* [1969] 2 MLJ 68, Raja Azlan Shah J refused to follow the then-existing English law on the position of a dealer in a hire purchase transaction. His Lordship said that for commercial expediency and for “the mercantile needs of this country”, the dealer had to be treated as an agent of the finance company. His Royal Highness was thus able to create and develop a corpus of Malaysian legal principles hitherto in its infancy.

It should perhaps be pointed out that in many of his decisions His Royal Highness did not feel compelled to adhere to the strict application of the law alone. Many of His Royal Highness’ decisions are influenced by the principles of Equity. Thus His Royal Highness not only applied the law but also administered justice in the cases heard and determined by him. In *Kersah La’usin v Sikin Menan* [1966] 2 MLJ 20, His Royal Highness held that a purchaser of land



who had gone into possession under a sale and purchase agreement had an interest in the land even prior to the registration of the memorandum of transfer.

Other notable features which one may discern from His Royal Highness' judgments are his concern and high regard for upholding justice. In many of his decisions, His Royal Highness took great pains to point out that no person was above the law nor was anyone entitled to any special consideration. In *Ismail v Hasnul* [1968] 1 MLJ 108, Raja Azlan Shah J said:

The practice in all courts has been that a subpoena may be issued against anybody, be he a Minister of the Government or a non-entity ... Injustice will arise if equals are treated unequally.

Similarly, in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, His Royal Highness in passing sentence, though mindful of the public position held by the accused, refused to take into consideration these extraneous factors and reiterated:

I repeat what I had said before. The law is no respecter of persons.

ADMINISTRATIVE LAW

Administrative law is a subject which was always of great interest to His Royal Highness Sultan Azlan Shah. In many pronouncements of His Royal Highness in the area of administrative law, one can find streaks of creativity and judicial activism.

Natural justice

From amongst His Royal Highness' early decisions, reference needs to be made to *Doresamy v Public Services Commission* [1971] 2 MLJ 127, where Raja Azlan Shah J, taking a liberal view of natural justice emphasised upon the need for legal representation before administrative bodies in the following words:

The considerations requiring assistance of counsel in the ordinary courts are just as persuasive in proceedings before disciplinary tribunals. This is so especially when a person's reputation and livelihood are in jeopardy. If the ideal of equality before the law is to be meaningful every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review stage. Where he has a statutory right of appeal and the regulations are silent on the right to the assistance of counsel, he cannot be deprived of such right of assistance.



A very significant pronouncement in the area of administrative law made by His Royal Highness is found in *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152. In his opinion, Raja Azlan Shah FJ made the following classic statement:

In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled judicial, quasi-judicial, or administrative or whether or not the enabling statute makes provision for a hearing.

This statement of law by Raja Azlan Shah FJ is very meaningful as it expanded the scope of natural justice in Malaysia. By this pronouncement, Raja Azlan Shah FJ brought Malaysian administrative law in line with English administrative law where a new liberal trend had been introduced in this area by the House of Lords' decision in *Ridge v Baldwin* [1964] AC 40. *Ketua Pengarah Kastam* can really be regarded as a landmark case in Malaysian administrative law.

In *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196, Raja Azlan Shah CJ (Malaya), sitting in the Federal Court, made a great contribution to the development of Malaysian administrative law by laying down the proposition that the relationship between a lecturer and the university is not purely that of "master and servant" but that a lecturer "has a status supported

by statute” and that he “is entitled to the protection of a hearing before the appropriate disciplinary authority”.

Ultra vires

An important case decided by His Royal Highness on the issue of ultra vires acts by statutory authorities is *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135. Here, in one of his most famous judgments, Raja Azlan Shah Acting CJ (Malaya) very forcefully expressed the idea of controlled discretionary power as follows:

Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise there is dictatorship ... In other words, every discretion cannot be free from 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. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.

His Royal Highness’ emphasis on the courts being the protectors of the people against the abuse of power by the government or public authorities unmistakably echoes the



great dissent of Lord Atkin in *Liversidge v Anderson* [1942] AC 206 at 244, where Lord Atkin said that “it has always been one of the pillars of freedom, one of the principles of liberty ... that 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.”

Government privilege

In *BA Rao v Sapuran Kaur* [1978] 2 MLJ 146, Raja Azlan Shah FJ went into the question of the scope of the government privilege not to produce documents in the court as envisaged in section 123 of the Evidence Act. This pronouncement brought Malaysian law in line with the progressive view taken in this connection in *Conway v Rimmer* [1968] 2 AC 910. Raja Azlan Shah FJ stated the principle as follows:

In this country, objection as to production ... is decided by the court in an inquiry of all available evidence. This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest.

Declaration

On the other hand, one can point out some of the pronouncements where His Royal Highness Sultan Azlan Shah adopted a cautious view of the law. In *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234, Raja Azlan Shah Acting LP said :

Thus it can be seen that the modern use of declaratory judgment had already developed into the most important means of ascertaining the legal powers of public authorities in the intricate mixture of public and private enterprise which is becoming a distinctive feature of our life. But we must add a warning note that its use must not be carried too far. The power to grant declaratory judgment in lieu of the prerogative orders or statutory reliefs must be exercised with caution. The power must be exercised “sparingly”, with “great care and jealousy”.

He had revealed a similar cautious attitude as regards the issue of a declaration in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29. Raja Azlan Shah FJ observed:

Consistency makes for certainty, and this court being at the centre of the legal system in this country, is responsible for the stability, the consistency and the predictability of the administration of law.



In *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68, Raja Azlan Shah Acting LP held that the power of the Attorney General under regulation 2(2) of the Essential (Security Cases) Regulations 1975 was one of “pure judgment” and not subject to an “objective test” and not amenable to judicial review. His Lordship noted that the regulation was “certainly draconian in its terms”, but concluded that the language of the regulation left no room for a judicial examination as to the sufficiency of the grounds on which the Attorney General acted in forming his opinion, and a contrary construction would render inefficacious the whole purpose and scheme of the Regulations as a whole.

The landmark judgments of His Royal Highness Sultan Azlan Shah on administrative law are widely acknowledged to have been instrumental in the seismic shift of Malaysian administrative law towards a more liberal and progressive view post-independence, whereby governmental and administrative action are subject to rigorous scrutiny through judicial review by the courts. In this, Malaysian law proudly marched alongside the similar trend under English administrative law, developed by such great English judges as Lord Reid, Lord Wilberforce and Lord Diplock.

LAND LAW

Exercise of power by State Authority

His Royal Highness' defence of the property rights of private individuals against the arbitrary exercise by a public authority such as the State Authority of its powers may be seen in the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135. This case throws considerable light on the scope and extent of the State Authority's power to impose such conditions which it deems fit in matters pertaining to land use and planning.

The decision of Raja Azlan Shah Acting CJ (Malaya) serves as a warning to the State Authority that the exercise of its discretion is not unfettered but is instead subject to scrutiny and control by the courts.

Caveats

The decision of Raja Azlan Shah FJ in the Federal Court case of *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53, dealing with caveats, is authority for the proposition that a purchaser of land under a contract of sale acquires a contractual right in respect of the land which is capable of being protected by the entry of a private caveat in respect of the said land.

CONSTITUTIONAL LAW

From the judgments delivered by His Royal Highness on constitutional law, a few general observations may be made as regards His Royal Highness' approach to the Malaysian Constitution. The first thing which strikes a reader of these opinions is that His Royal Highness had an unrivalled knowledge and understanding of the Federal Constitution. The second feature of these opinions is that, by and large, His Royal Highness exhibited a positivistic judicial attitude towards the Constitution.

In *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, Raja Azlan Shah FJ recognised that “the Constitution is not a mere collection of pious platitudes”, and that:

it is the supreme law of the land embodying three basic concepts: one of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation ... The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among, the executive, legislative and judicial branches of government, compendiously expressed in modern terms that we are a government of laws not of men.

In one of His Royal Highness' opinions, he adopted and advocated a liberal judicial attitude towards the

Constitution. This is what Raja Azlan Shah Acting LP said in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29:

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.

Post-script

No meaningful discussion of Malaysian constitutional law can possibly take place without first having regard to the seminal judgment of Raja Azlan Shah FJ in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 in which His Royal Highness expressed an absolute conviction that “we are a government of laws, not of men”. His Royal Highness emphasised that “each country frames its constitution according to its genius and for the good of its own society”, and encouraged the study of other Constitutions “to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law”. His Royal Highness was also astutely aware and

appreciative that “a Constitution has to work not only in the environment in which it was drafted but also centuries later”, a need which remains just as true today as it was nearly four decades ago.

Further, His Royal Highness Sultan Azlan Shah displayed a remarkable understanding and sensitivity as to the forms and limits of judicial review, especially the need for the courts to respect the juridical boundaries envisaged by the doctrine of separation of powers, so that the courts would not usurp the role of parliament or encroach onto the province of the executive or legislature. Thus, in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, Raja Azlan Shah FJ observed that criticisms of the wisdom of legislative or government policy should properly be “addressed to the legislature, and not the courts”, for in a democracy the people “have their remedy at the ballot box”.

In *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, His Royal Highness held that matters of succession of a Ruler (including election of Undangs (Ruling Chiefs)) were non-justiciable, as otherwise the courts would be usurping the function of the Dewan (The Council of the Yang di-Pertuan Besar and the Ruling Chiefs) expressed in the Federal Constitution.

Elsewhere, the judgment of Raja Azlan Shah Acting LP in *Phang Chin Hock v Public Prosecutor (No 2)* [1980] 1 MLJ 213 contains a masterful and classic exposition of

the constitutional role, functions and workings of the Conference of Rulers and the Yang di-Pertuan Agong, the highest constitutional offices which His Royal Highness later held and performed with utmost distinction. Of the distinction between the roles of the two constitutional offices of a Ruler and the Yang di-Pertuan Agong, His Royal Highness observed:

In all his functions, the Yang di-Pertuan Agong is not a Ruler within the meaning of a Ruler of a constitutional state of the Federation. When a Ruler becomes the Yang di-Pertuan Agong, he cannot hold at the same time his position of a Ruler but he is required to appoint a Regent. At the Conference of Rulers, the Regent attends as a Ruler, but the Yang di-Pertuan Agong is not entitled to attend as a Ruler and for this reason, he does not attend on the first day when the Rulers exercise the functions set out which lie within their discretion. Law and procedure therefore are matters which cannot come within the honours, etc. of the Rulers.

Where a matter fell squarely within the jurisdiction and competence of the judiciary, His Royal Highness emphatically defended the constitutional role of the judiciary. The most well-known example of this approach can be found in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, where His Royal Highness emphatically stated that the courts are “the only defence of the liberty of the subject against departmental aggression”, and serve as “a most



important safeguard for the ordinary citizen” to ensure that governmental powers are “exercised in accordance with the law”. Similarly, in *Public Prosecutor v Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128, His Royal Highness observed that “cases are never tried in police stations, but in open courts to which the public has access. The rack and torture chamber must not be substituted for the witness stand”. His Royal Highness’ unwavering belief in the supremacy of the rule of law arguably found its best expression in the same case, where His Royal Highness pithily observed, “The only superior to be obeyed is the law and no superior is to be obeyed who dares to set himself above the law.”

We may now say with the highest degree of certainty that the authoritative statements of principles by His Royal Highness Sultan Azlan Shah have defined and shaped our understanding of modern Malaysian constitutional law.

COMMERCIAL AND CONTRACT LAW

In certain areas of the law of contract, His Royal Highness made some important decisions which have contributed to the development of the law of contract in Malaysia. His enunciation of certain principles of the law of contract remain authoritative in Malaysia. Similarly, in the sphere of commercial law, the contribution of His Royal Highness is of great significance.

Collateral contract

In *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, Raja Azlan Shah CJ (Malaya) took a bold step in recognising the existence of collateral contracts in Malaysia. There were no reported cases in Malaysia prior to His Royal Highness' decision in this case where the application of collateral contracts in Malaysia was recognised. It is for this reason that the decision of His Royal Highness in the Federal Court in *Tan Swee Hoe* is significant. His Royal Highness, by relying on certain English cases which had established the existence of collateral contracts, held that such contracts should be recognised under Malaysian law. This is a major contribution by His Royal Highness in that branch of the law of contract in Malaysia dealing with the admissibility of oral evidence to prove the existence of a separate contract which was meant to be collateral to the main contract.

In this case, His Royal Highness demonstrated an astute appreciation and sensitivity for the need for the law to accommodate the needs of ordinary people. His Royal Highness, in rejecting an argument that an oral agreement was not binding on the appellants, pertinently observed:

We do not see how the appellants can escape from the bond of the oral promise which was given and which seems to us to have been given for perfectly good consideration. It may well be asked: why not put the oral promise into the written agreement if it is so important? The short answer is that often people do not behave in this way and the law

should accommodate to the needs of ordinary people and not expect from them the responses of astute businessmen.

In *Bolkiah (His Royal Highness Prince Jefri) and Others v State and Another (No 4)* [2007] UKPC 63, a Privy Council Appeal from Brunei concerning the interpretation of sections 91–92 of the Brunei Evidence Act, which is identical to the Malaysian Evidence Act, the Privy Council referred to the judgment of Raja Azlan Shah CJ (Malaya) in this case. Lord Mance observed:

... the Malaysian Federal Court of Civil Appeal applied the common law authorities to which I have referred and took the same view as I would under the identically worded provisions of ss 91 and 92 of the Malaysian Evidence Act. They are *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 (where judgment was given by no less than Raja Azlan Shah CJ) and *Tan Chong & Sons Motor Co Sdn Bhd v McKnight* [1983] 1 MLJ 220. Written agreements were in these cases executed on the faith of an inconsistent collateral oral promise and representation, respectively, and ss 91 and 92 were held to be no bar to such promise and representation being proved and relied upon. I would not wish to disagree with these authorities.

Promissory estoppel

The decision of Raja Azlan Shah FJ in the Federal Court case of *Sim Siok Eng v Government of Malaysia* [1978] 1 MLJ 15 is the leading case in Malaysia which establishes the rule

that in certain cases the doctrine of promissory estoppel is applicable against the Government. In fact, in *Cheng Keng Hong v Government of the Federation of Malaya* [1966] 2 MLJ 33, one of the earliest cases decided by His Royal Highness as a High Court Judge, Raja Azlan Shah J similarly held that a letter written by an officer purportedly on behalf of the Chief Architect of the Ministry of Education to a contractor gave rise to an estoppel whereby the then Government of the Federation of Malaya was precluded from disputing the authority of the officer.

Restitutionary remedies

In the context of restitution under section 66 of the Contracts Act 1950 in relation to illegal agreements, the decision of His Royal Highness in the Federal Court case of *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 is salutary. The detailed analysis of the section by His Lordship in that case is illustrative of his extensive knowledge of the provisions of the Contracts Act. It is also a landmark decision whereby the Federal Court recognised that the defence of illegality expressed by the maxim *ex turpi causa non oritur actio* applied to claims for restitution under section 66 of the Contracts Act.

Illegal contracts

In *Tan Bing Hock v Abu Samah* [1967] 2 MLJ 148, one of the earliest cases to be reported in Malaysia on the validity of



an agreement to assign forest rights under a forest licence, Raja Azlan Shah J held such agreement to be illegal as contravening the Forest Rules (Pahang) 1935. His Lordship categorised such contracts to possess “the notorious badge of the *Ali Baba* form of contracts”, a phrase which ever since has been commonly used to describe a contract whereby an interest or right conferred on a particular person is purportedly assigned or transferred to another who is not entitled to such rights or interest. His Royal Highness in this case also held that even though a contract which is illegal had been executed by both the parties to the contract, it did not prevent the defendant from raising the defence of illegality.

Insurance

In the landmark case of *Boon & Cheah Steel Pipes Sdn Bhd v Asia Insurance Co Ltd & Ors* [1973] 1 MLJ 101, the court had to determine the correct test to establish constructive total loss in marine insurance claims. Raja Azlan Shah J boldly declined to follow the “prudent uninsured owner” test as explained by Lord Abinger CB in *Roux v Salvador* 132 ER 413 at 421 and Vaughan Williams LJ in *Angel v Merchant’s Marine Insurance Company* [1903] 1 KB 811 at 816. His Royal Highness observed:

I cannot subscribe to this view. In determining whether the cargo was a constructive total loss, the true test in the present case where the cargo could be looked at

and the cost of repair estimated, is whether the cost of recovering, reconditioning and forwarding the cargo to the destination would exceed their value on arrival. The “prudent uninsured owner” test must be discarded.

In that case, counsel for the defendant insurer was Michael Mustill QC, later Lord Mustill, who was a leading authority on insurance law in the United Kingdom (Lord Mustill delivered the Sixth Sultan Azlan Shah Law Lecture in 1991 entitled “Negligence in the World of Finance”). This decision of Raja Azlan Shah J is quoted as authority for the principle of law he enunciated in several major textbooks in the Commonwealth on the law of marine insurance. (See for example FD Rose, *Marine Insurance: Law and Practice* (2nd edition) at paras 9.43 and 20.29; John Dunt, *Marine Cargo Insurance* at paras 13.38, 13.41, 13.47.)

Equitable assignments and equitable right to liens

In *Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196, Raja Azlan Shah J took a bold step in recognising a right in equity to a lien which had not complied with the provisions of the National Land Code. At a time when there was much uncertainty as to the application of equitable rules under the Torrens system of registration as embodied in the National Land Code, the views expressed by His Royal Highness in this case were most welcomed in clearing this uncertainty. During the course of the judgment, His Lordship said:



Independent of our land legislation our courts have always recognised equitable and contractual interests in land.

ARBITRATION

Prior to the introduction of the Arbitration Act 2005 (Act 646), the law and practice of arbitration were mainly governed by the Arbitration Act 1952 (Act 93) as well as the common law. His Royal Highness Sultan Azlan Shah delivered authoritative judgments in several landmark decisions dealing with two important areas of arbitration law, namely the challenging of arbitration awards and the stay of court proceedings in favour of arbitration.

Challenging arbitration awards

In the landmark case of *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, Raja Azlan Shah J laid down the authoritative test to be applied by Malaysian courts in determining whether a court is entitled to interfere with the award of an arbitrator.

In that case, His Royal Highness held that it is essential to keep in mind the distinction between (i) a case where a dispute is referred to an arbitrator in whose decision a question of law becomes material, and (ii) a case in which a specific question of law has been referred to him. In the former case the court may interfere if and when any error

appears on the face of the award, but in the latter case no such interference is possible based on the ground that an erroneous decision had been made on the question of law.

The decision in *Sharikat Pemborong* also authoritatively settled the law on what amounts to “misconduct” by an arbitrator. His Royal Highness clarified that “in the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude”. In *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441, the Federal Court declined to depart from, and re-affirmed the statement of principles by Raja Azlan Shah J in *Sharikat Pemborong*.

Stay of proceedings in favour of arbitration

Elsewhere, on the issue of matters agreed to be referred to arbitration by the parties to a contract, Raja Azlan Shah J in an important judgment in the case of *Alagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208 held that persons who seek to stay court proceedings and remit the matter in dispute to arbitration under section 5 of the Arbitration Ordinance 1952 have to satisfy the following conditions:

- (i) that the matters in dispute arose out of the contract between the parties and are matters within the scope of the arbitration agreement;



- (ii) that there is no sufficient reason why the said matters should not be referred to arbitration in accordance with the agreement;
- (iii) that the application was made by a party to the agreement or by some person claiming through or under such a party;
- (iv) that they have not taken any further step in an action beyond entering appearance; and
- (v) that at the time when the action was commenced they were and still remain ready and willing to do all things necessary to the proper conduct of the arbitration.

In *Lan You Timber Co v United General Insurance Co Ltd* [1968] 1 MLJ 181, Raja Azlan Shah J stated the applicable principles in similar terms.

The statement of principles by His Royal Highness in *Alagappa Chettiar* continues to be followed. *Alagappa Chettiar v Palanivelpillai & Ors* was discussed extensively by M Sornarajah (CJ Koh Professor of Law at the National University of Singapore and Tunku Abdul Rahman Professor of Law at the University of Malaya) in an article entitled “Stay of Litigation Pending Arbitration” (6 SACJ 1994, page 61).

In this regard, it is evident that His Royal Highness was acutely aware of the increasing importance of arbitration

as an alternative dispute resolution mechanism, and took great care to formulate the applicable principles in His Royal Highness' customary clear and lucid manner.

CRIMINAL LAW

As a judge His Royal Highness Sultan Azlan Shah decided a number of criminal cases and as usual His Royal Highness expressed with clarity and felicity the principles of law applicable. Many of the cases touch not only on questions of criminal procedure and evidence, but also substantive law. For example in *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, light was shed on the distinction between murder and culpable homicide not amounting to murder; in *Sathiadas v Public Prosecutor* [1970] 2 MLJ 241, Raja Azlan Shah J dealt with the ingredients of the offence of criminal breach of trust; and in *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153, Raja Azlan Shah J dealt with the ingredients of a conspiracy.

Sedition

In *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108, Raja Azlan Shah J dealt with the law of sedition and provided valuable guidance on the interpretation of the Sedition Act 1948. His Lordship said:

In interpreting the Sedition Act 1948, I have been urged by Sir Dingle Foot to follow the common law principles



of sedition in England. In England it can now be taken as established that in order to constitute sedition the words complained of are themselves of such a nature as to be likely to incite violence, tumult or public disorder. I can find no justification for this contention. The opinion of the Judicial Committee of the Privy Council in *Wallace-Johnson v The King* demonstrated the need to apply our own sedition law although there is close resemblance at some points between the terms of our sedition law and the statement of the English law of sedition.

Raja Azlan Shah J then added:

Although it is well to say that our sedition law had its source, if not its equivalent from English soil, its waters had, since its inception in 1948, flowed in different streams. I do not think it necessary to consider the matter in great detail because I have been compelled to come to the conclusion that it is impossible to spell out any requirement of intention to incite violence, tumult or public disorder to constitute sedition under the Sedition Act. The words of subsection (3) of section 3 of our Sedition Act and the subject-matter with which it deals repel any suggestion that such intention is an essential ingredient of the offence.

During the course of his judgment in *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108, His Lordship made the following observation on freedom of expression:

It is of course true, as a general statement, that the greatest latitude must be given to freedom of expression. It would also seem to be true, as a general statement, that free and frank political discussion and criticism of government policies cannot be developed in an atmosphere of surveillance and constraint. But as far as I am aware, no constitutional state has seriously attempted to translate the *right* into an absolute right. Restrictions are a necessary part of the *right* and in many countries of the world freedom of speech and expression is, in spite of formal safeguards, seriously restricted in practice.

After a detailed study of the position as to freedom of speech in India, United States and England, His Lordship observed:

My purpose in citing these cases is to illustrate the trend to which freedom of expression in the constitutional states tends to be viewed in strictly pragmatic terms. We must resist the tendency to regard right to freedom of speech as self-subsistent or absolute. The right to freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the law. If he says or publishes anything expressive of a seditious tendency he is guilty of sedition. The Government has a right to preserve public peace and order, and therefore, has a good right to prohibit the propagation of opinions which have a seditious tendency. Any government which acts against sedition has to meet the criticism that it is seeking to protect itself and to keep itself in power.



Raja Azlan Shah J then pointed out:

Whether such criticism is justified or not, is, in our system of Government, a matter upon which, in my opinion, Parliament and the people, and not the courts, should pass judgment. Therefore, a meaningful understanding of the right to freedom of speech under the Constitution must be based on the realities of our contemporary society in Malaysia by striking a balance of the individual interest against the general security or the general morals, or the existing political and cultural institutions. ...

A line must therefore be drawn between the right to freedom of speech and sedition. In this country the court draws the line.

Possession of obscene publication

In *KS Roberts v Public Prosecutor* [1970] 2 MLJ 137, Raja Azlan Shah J made some of his characteristic remarks in dealing with a case of possession of an obscene publication. One of the grounds of appeal was that the publication was an approved publication by the Government and therefore not an obscene publication. Raja Azlan Shah J said:

I think there is a fallacy in the argument. In my view the word *approved* strong as it is, cannot be read without any qualification. It does not mean *extra legem*. We boast of being a free democratic country but that does not mean

that we are not subject to law. The impugned article is clearly obscene and a publication is an obscene publication even if only part of it is obscene.

Voluntarily causing hurt

In *Public Prosecutor v Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128, Raja Azlan Shah J dealt with the offence of voluntarily causing hurt. The learned President of the Sessions Court in that case, after finding the accused guilty, had made an order binding over the accused under section 173A of the Criminal Procedure Code having taken into consideration the fact the accused was a prince of the Royal House of Johore. The Public Prosecutor appealed. Raja Azlan Shah J began his judgment by saying:

Today it is not so much the respondents who are on trial but justice itself. How much justice is justice? If the courts strive to maintain a fair balance between the two scales, that is, the interest of the accused person and the interest of the community, then I must say justice is just. The aim of justice must be balance and fairness. No tenderness for the offender can be allowed to obscure that aim. The concept of fairness must not be strained till it is narrowed to a filament.

Later in his judgment, Raja Azlan Shah J said that the learned President in making the order had thereby conflicted with Article 8 of the Constitution which says that all persons are equal before the law. He added:



That implies that there is only one kind of law in this country to which all citizens are amenable. With us, 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 minimizes tyranny.

ADMINISTRATION OF CRIMINAL JUSTICE

His Royal Highness Sultan Azlan Shah's foremost case on the administration of criminal justice was on the trial process in the case of *Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139, where His Royal Highness adopted the decision of the Privy Council in *Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49, and in the process changed the law in Malaysia with regard to the duty of the presiding judicial officer at the end of the prosecution case. He must be satisfied that a *prima facie* case is proved and *prima facie* now means all essential elements of the offence charged are proved, the facts being not inherently incredible.

PRACTICE AND PROCEDURE

His Royal Highness Sultan Azlan Shah had more than an ample share of procedural cases for his consideration during his years as Judge, Federal Court Judge, Chief Justice and Lord President. His Royal Highness' contribution to the development of our case law on civil procedure is significant and immense.

History will probably give the most prominent place to His Royal Highness' decision in *Zainal Abidin v Century Hotel* [1982] 1 MLJ 260. This case saw the dramatic entrance of the *Mareva* injunction into our jurisdiction. But the contributions of this former illustrious member of the Malaysian judiciary embraces almost all aspects of procedure from such preliminary issues as limitation to the final matters of appeal and execution. Each case is an example of His Royal Highness' clarity of expression and his wide and sound understanding of civil procedure.

In the area of limitation and the pleading of an acknowledgment His Royal Highness' decision in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 was adopted and applied by the Privy Council in *Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1.

Pleadings

His Royal Highness' judgments display a liberal approach to the interpretation of the rules of court and practice. His Royal Highness was not one for permitting technical points to deny justice to a party. In *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10, His Royal Highness in delivering the judgment of the Federal Court said:

As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on

a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

By this His Royal Highness must not be assumed to be indifferent to instances of non-compliance with procedure. His firm attitude for compliance of settled procedure is evident from many of His Royal Highness' cases. In *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157, Raja Azlan Shah FJ said:

If we are to maintain a high standard in our trial system, it is indubitably not to treat reliance upon forms of pleading as pedantry or mere formalism.

Mareva injunction

Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd [1982] 1 MLJ 260 indicates His Royal Highness' bold stand over the need to incorporate modern trends and ideas into our law. His Royal Highness in delivering the judgment of the Federal Court said:

In this country we encourage greater foreign participation and investment in development projects. In such a situation where foreign businessmen including foreign multinational corporations have injected large sums of

money and have substantial assets in this country, it would be a potential vehicle of injustice if the plaintiff is denied the facilities afforded by a *Mareva* injunction against the foreign defaulter who may try to dissipate his funds and assets in this country. It is significant that in other jurisdictions the *Mareva* principle has been adopted. The existence of the *Mareva* jurisdiction had been affirmed in New Zealand and Australia, except New South Wales (see *Hunt v BP Exploration Company (Libya) Ltd*). In Singapore, the existence of the jurisdiction has been acknowledged, although there is as yet no judicial pronouncement upon it (see [1981] 2 MLJ cvii). We have a good deal of commercial activity involving foreign parties and the application of the *Mareva* doctrine is likely to play an important role. It is an extremely useful addition to the judicial armoury and is clearly capable of general application.

Contempt of court

His Royal Highness' emphasis on adherence to the rules of natural justice can be seen in his caution in several cases that the courts should be very reluctant to invoke their power to summarily commit persons for contempt of court. This was because, as Raja Azlan Shah Acting LP observed in *Jaginder Singh & Ors v Attorney-General* [1983] 1 MLJ 71,

... the summary contempt procedure more often involves a denial of many of the principles of natural justice,

requiring, as it did in this case, that the judge should not only be both prosecutor and adjudicator, but should also have been witness to the matters to be adjudicated upon.

Similarly, in *Karam Singh v Public Prosecutor* [1975] 1 MLJ 229, Raja Azlan Shah FJ observed:

The power [to summarily commit a person for contempt of court] is both salutary and dangerous. ... it should be used reluctantly but fearlessly when and only when it is necessary to prevent justice from being obstructed or undermined. That is not because judges, witnesses and counsel who are officers of the court, take themselves seriously, but because justice, whose servants we all are, must be taken seriously in a civilized society if the rule of law is to be maintained.

EVIDENCE

His Royal Highness left an indelible mark in the law of evidence, one of the most important branches of law and practice.

Extrinsic evidence

In the landmark decision of *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, Raja Azlan Shah CJ (Malaya) held that notwithstanding the provisions of sections 91

and 92 of the Evidence Act which provide that extrinsic evidence is generally inadmissible to vary or qualify the terms of a written contract, the law recognised that a collateral agreement can exist side by side with the main agreement which it contradicts, which was not precluded by sections 91 and 92 of the Act. As we have seen above, this case is also a landmark decision in the law of contract. This landmark decision of His Royal Highness was followed by the Privy Council in *Bolkiah (His Royal Highness Prince Jefri) and Others v State and Another (No 4)* [2007] UKPC 63.

Assessing credibility of witnesses

One of His Royal Highness' most important contributions to the law of evidence can be seen in his seminal judgment in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, where Raja Azlan Shah FJ laid down an authoritative statement of principle on the correct approach to be adopted by the courts in assessing the credibility of witnesses and accepting or rejecting their evidence. His Royal Highness observed as follows:

The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the

other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

Expert evidence

In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212, Raja Azlan Shah CJ (Malaya) in an important judgment highlighted the proper approach to be adopted by the courts in dealing with expert opinions. His Royal Highness opined:

Our system of jurisprudence does not generally speaking, remit the determination of dispute to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion.

LABOUR LAW

The judgments of His Royal Highness Sultan Azlan Shah on labour law reflect a keen understanding of the competing legal rights of management and labour. The judgments have touched on many points relating to labour law, but it is in the field of industrial disputes that His Royal Highness' judgments have left an indelible mark.

Industrial Relations Act

In several judgments His Royal Highness lucidly expounded the legislative rationale behind the introduction of the Act. In *Non-Metalic Mineral Products Manufacturing Employees Union & Ors v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67, Raja Azlan Shah FJ explained it thus:

The Act is intended to be a self-contained one. It seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given in circumstances peculiar to each dispute and the Industrial Court is to a large extent free from the restrictions and technical considerations imposed on ordinary courts.



Remedies of a dismissed worker

In *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238, Raja Azlan Shah CJ (Malaya) gave an exegesis on the essential distinction in the remedies available to a dismissed worker at common law and under the Act. It has now become a classic with students and lawyers alike on the question. It deserves full reproduction:

In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, for example, a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given ... At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, viz, an award of damages. Further, the courts will not normally “reinststate” a workman who has been wrongfully dismissed by granting a declaration that his dismissal was invalid: see *Vine v National Dock Labour Board*; *Francis v Municipal Councillors of Kuala Lumpur*. At the most it will declare that it was wrongful. However his common law right has been profoundly affected in this country by the system of industrial awards enacted in the Industrial Relations Act 1967. The wrongfully dismissed workman can now look to the remedies provided by the arbitration system. He can now look to the authorities or his union to prosecute the employer

and force the latter to reinstate him. Reinstatement, a statutorily recognized form of specific performance, has become a normal remedy and this coupled with a full refund of his wages could certainly far exceed the meagre damages normally granted at common law. The speedy and effective resolution of disputes or differences is clearly seen to be in the national interest, but it is also apparent that any attempt to impose a legal obligation without a prior exploration for a voluntary conciliation could aggravate rather than solve the problem. To this end the Director General is empowered by section 20 of the Act to offer assistance to the parties to the dispute to expedite a settlement by means of conciliatory meetings.

A consistent feature of the His Royal Highness' judgments on labour law have been their expository character, particularly on those parts of the Act that had hitherto bedevilled labour lawyers. In *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129, Raja Azlan Shah CJ (Malaya) gave quietus to the long debate whether there still existed under the new regime of the Act the distinction between contractual termination of employment and dismissal.

Discretion of Minister

In another case, *National Union of Hotel, Bar & Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189, Raja Azlan Shah CJ (Malaya) dealt with the equally vexed problem of the jurisdiction of the Minister of Labour

to refer disputes to the Industrial Court and the extent to which that discretion is subject to judicial review by the High Court. His Lordship was not content merely to rely on the *Wednesbury* principle propounded by Lord Greene MR on the discretionary power of public officials, or its later enunciation in *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665, but sought to relate the principle contextually to the discretionary power envisaged under the Act:

He is an elected Minister and is entitled to have his opinion of industrial problems within the area of his responsibility respected. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient.

Earlier in the judgment Raja Azlan Shah CJ (Malaya) had, however, made it clear that the Minister did not exercise an unfettered discretion and that his decision was open to challenge if he had misconstrued the Act or exercised his powers in a way as to defeat the policy and object of the Act.

Trade union

A survey of Malaysian labour cases reveals that organised labour had its best judicial spokesman in His Royal Highness Sultan Azlan Shah. Of these, *Non-Metallic Mineral Products Manufacturing Employees Union & Ors v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67 was hailed as a “labour charter” by trade unions soon after its decision.


The *South East Asia Fire Bricks* case was a landmark decision for legitimate trade union activity. His Royal Highness put the point beyond peradventure that a trade union could engage in lawful strike and in consequence its members would not jeopardise their contracts of employment. His Royal Highness took the opportunity to declare:

Workers organisations cannot exist if workers are not free to join them, to work for them, and to remain in them. This is a fundamental right which is enshrined in our Constitution and which expresses the aspiration of workmen. It is declaratory of present day industrial relations that management should encourage workmen to join a union and to play an active part in its work, but this is restricted to the activities of a registered trade union, such as the freedom to strike. “The right of workmen to strike is an essential element in the principle of collective bargaining” per Lord Wright in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch & Anor* [1942] AC 435, 463. That is a truism. There can be no equilibrium in industrial relations today without the freedom to strike. If workers could not, in the last resort, collectively withhold their labour, they could not bargain collectively.

His Lordship was careful to enter the caveat that his declaration of trade union rights was confined to the activities of a registered trade union only. Later in the judgment he cautioned that strike action must be for a lawful purpose. It was typical of the balanced view that



His Royal Highness Sultan Azlan Shah took on the vexed problems posed by industrial conflict.

His Royal Highness' definitive pronouncements in this regard helped to shape the growth of a proper body of industrial law under the new regime of the Act. 

Editor's note

Freely adapted from *Judgments of His Royal Highness Sultan Azlan Shah with Commentary* (Professional Law Books Publishers, Kuala Lumpur, 1986), edited by Professor Dato' Dr Visu Sinnadurai, from chapter entitled "Contributions of HRH Sultan Azlan Shah to the Development of Malaysian Law". The contributors of the original version on the various fields of law were the then academics from the Faculty of Law, University of Malaya.


Due to space constraints, the present revised version includes adaptations of the commentaries on Criminal Law by Professor Tan Sri Ahmad Ibrahim (former Dean of Faculty of Law, University of Malaya, later Dean of the Kulliyyah of Laws, International Islamic University of Malaysia); Administration of Criminal Justice by Associate Professor Mimi Kamariah Majid (later Professor Dato' Dr, former Dean of Faculty of Law, University of Malaya, author of *Criminal Procedure in Malaysia*); Administrative Law and Constitutional Law by Professor MP Jain (author of *Administrative Law in Malaysia and Singapore*); and Practice and Procedure by Associate Professor P Balan, (later Professor Dato', former Dean of Faculty of Law, University of Malaya).

Other original contributors whose adapted commentaries are included in this revised version are: Professor Dato' Dr Visu Sinnadurai (former Dean of Faculty of Law, University of Malaya); Associate Professor Teo Keang Sood (now Professor at National University of Singapore, co-author of *Land Law in Malaysia: Cases and Commentary*); and Cyrus V Das (now Dato' Dr, External Examiner, Faculty of Law, University of Malaya).

This revised version contains a Post Script on Constitutional Law by Low Weng Tchung, and new materials on other fields of law.

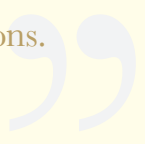
“The decision to
abolish appeals to the
Yang di-Pertuan Agong
comes within the matters
which the Rulers may
deliberate upon,
subject to the condition
that their deliberations
are in accordance with
the advice of their Executive Councils
and in the company of the
Yang di-Pertua-Yang di-Pertua Negeri
and the Yang di-Pertuan Agong.
But the Rulers
take no decision
in the matter.”


per Raja Azlan Shah Acting LP
Phang Chin Hock v Public Prosecutor (No 2)
[1980] 1 MLJ 213, Federal Court



“The consultative functions of
the Conference in clause (5)
is limited to administrative
action under Article 153
[of the Constitution]
i.e. to matters affecting
the special position,
in West Malaysia,
of the Malays.


But in their deliberative functions, the Rulers may range over any field since clause (2) refers to questions of national policy and any other matter the Conference thinks fit. When they come to these functions, the practice has developed, they sit on the second day of the Conference and they are then attended by the Yang di-Pertuan Agong who shall be accompanied by the Prime Minister. In their deliberations, the clause specifically provides that not only the Rulers and the Yang di-Pertua-Yang di-Pertua Negeri but also the Yang di-Pertuan Agong shall act in accordance with the advice of the respective Executive Councils and Cabinet respectively. Necessarily in these matters, the Rulers make no decisions.





In all his functions,
the Yang di-Pertuan Agong
is not a Ruler within
the meaning of
a Ruler of a constitutional
state of the Federation.

When a Ruler becomes the
Yang di-Pertuan Agong,
he cannot hold at the same time
his position of a Ruler but he is
required to appoint a Regent.
At the Conference of Rulers,
the Regent attends as a Ruler,
but the Yang di-Pertuan Agong is not
entitled to attend as a Ruler
and for this reason,
he does not attend on the first day
when the Rulers exercise the functions
set out which lie within their discretion.
Law and procedure therefore are
matters which cannot come
within the honours, etc. of the Rulers.



per Raja Azlan Shah Acting LP

Phang Chin Hock v Public Prosecutor (No 2)

[1980] 1 MLJ 213, Federal Court

“ 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

Life Baroness, United Kingdom Parliament

Legal Challenges in Our Brave New World

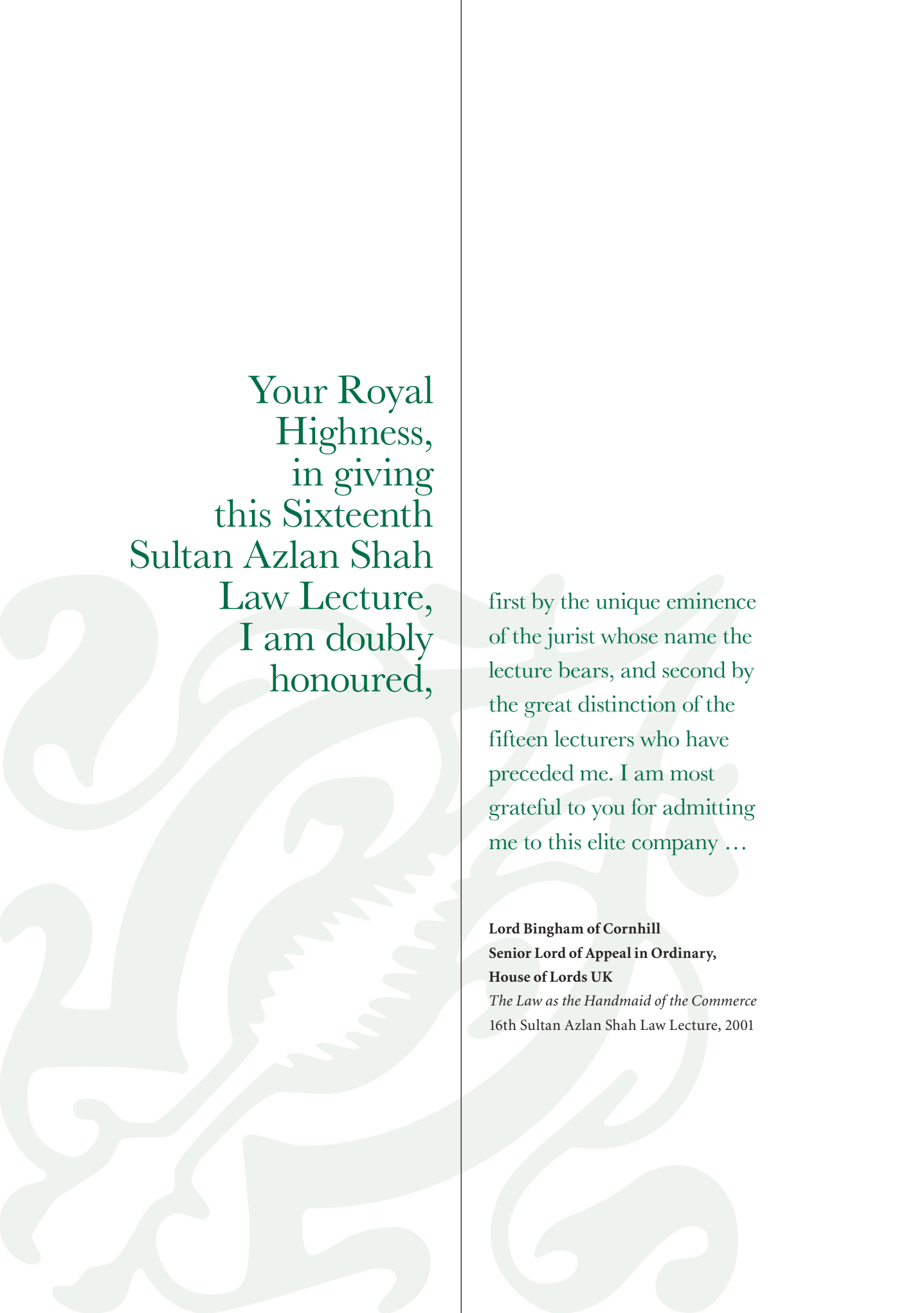
21st Sultan Azlan Shah Law Lecture, 2007



SULTAN
AZLAN SHAH



Lectures in Honour of
His Royal Highness Sultan Azlan Shah



Your Royal
Highness,
in giving
this Sixteenth
Sultan Azlan Shah
Law Lecture,
I am doubly
honoured,

first by the unique eminence
of the jurist whose name the
lecture bears, and second by
the great distinction of the
fifteen lecturers who have
preceded me. I am most
grateful to you for admitting
me to this elite company ...

Lord Bingham of Cornhill
Senior Lord of Appeal in Ordinary,
House of Lords UK

The Law as the Handmaid of the Commerce
16th Sultan Azlan Shah Law Lecture, 2001



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Twenty-Fourth Lecture

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LORD SUMPTION

Justice of the Supreme Court of the United Kingdom

2013 Twenty-Seventh Lecture

The Limits of Law

LORD WALKER OF GESTINGTHORPE

Justice of the Supreme Court of the United Kingdom

2011 Twenty-Fifth Lecture

Would it have Made Any Difference?


Cause and Effect in Commercial Law

LORD WOOLF

Master of the Rolls, Court of Appeal

1997 Twelfth Lecture

Judicial Review of Financial Institutions



May I begin by expressing
my appreciation of the honour
which you have done me
by inviting me to deliver
this prestigious lecture.
It is an honour
which is greatly
increased by the
gracious presence
of His Majesty,
a jurist of international
distinction after whom
the lecture
is named.


Lord Donaldson of Lynton

Master of the Rolls, UK

Commercial Disputes Resolution in the 90's


18th Sultan Azlan Shah Law Lecture





Your Royal
Highness, it is
a great honour
for me to be
invited to give
this lecture.

I am deeply conscious
that I am following in the
footsteps of some very
distinguished judges and
jurists who have given the
Sultan Azlan Shah Law
Lecture in previous years.



Lord Walker of Gestingthorpe

Would it have Made Any Difference?

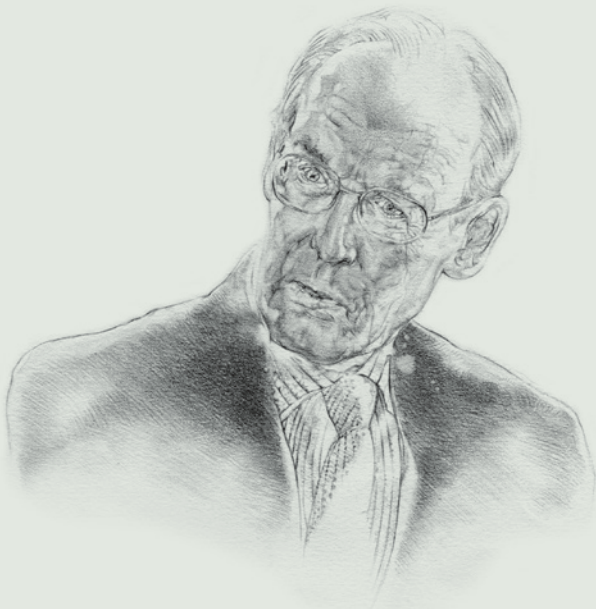
Cause and Effect in Commercial Law

25th Sultan Azlan Shah Law Lecture, 2011



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 Robert 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 *Thorne v Major* [2009] 1 WLR 776.


More recently, Lord Walker together with Lady Hale delivered the joint leading judgment in *Jones v Kernott* [2011] UKSC 53 (9 November 2011), an important case on constructive trust. The United Kingdom Supreme Court had to determine the beneficial interests of an unmarried couple who had prior to their separation acquired a house in joint names intending it to be their family home, and to revisit the earlier decision of the House of Lords in *Stack v Dowden* [2007] 2 AC 432.



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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In judicial review of official decision-making the official decision-maker may have failed to follow the appropriate procedure. He may have failed to carry out proper consultations, or to give a proper period for lodging objections. In such a case the riposte “It would not have made any difference anyway,” carries very little weight.

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

Your Royal Highness, it is a great honour for me to be invited to give this lecture. I am deeply conscious that I am following in the footsteps of some very distinguished judges and jurists who have given the Sultan Azlan Shah Law Lecture in previous years.

On this occasion I cannot forbear to mention my sadness—shared, I am sure, by all who knew him—that last year’s lecturer, my friend and colleague Alan Rodger, Lord Rodger of Earlsferry, died a few months ago. He was most unexpectedly struck down by a fatal disease while he was still in his intellectual prime. His death is a great loss to the British judiciary and public, and a grievous personal loss for many of us.

I am going to speak this evening about cause and effect in commercial law, with a quick look also at public law. Questions of causation are among the most interesting and difficult topics that have to be addressed by legal scholars, lawyers and judges. They are by no means limited

Text of the Twenty-Fifth Sultan Azlan Shah Law Lecture delivered on 1 December 2011 in the presence of His Royal Highness Sultan Azlan Shah

If expert evidence
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is that the
patient has no cause
of action in tort.

¹ [2005] 2 AC 176.

² (2010) 240 CLR 537.

to the tort of negligence, but that is probably the field in which they most often occur.

Late diagnosis in clinical negligence

In the area of clinical negligence, for instance, there is the recurring problem of late diagnosis. If a doctor negligently fails to send his patient for an x-ray, or an MRI scan, or a biopsy, and as a result there is a delay (whether measured in days, or weeks, or months) in the correct diagnosis of some serious condition, how much difference does that make to the patient's prospects of a full recovery? And how much difference does it make to the patient's legal rights? If expert evidence indicates, on the balance of probabilities, that prompt diagnosis would have made no difference to the patient's chances, then the law's hard answer is that the patient has no cause of action in tort (though there may be a claim for nominal damages for breach of contract). That is because the tort of negligence requires not only a duty of care and a breach of that duty, but also loss occasioned by the breach.

In the leading English case of *Gregg v Scott*¹ there was (through a doctor's negligence) a delay of nine months in the diagnosis of a particularly serious form of cancer. In the leading Australian case of *Tabet v Gett*² a six-year old child was admitted to hospital with headaches and nausea, and there was a delay of only 24 hours (but potentially a crucial 24 hours) in her being examined by CT scan and EEG. In

The tort of negligence requires
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³ Occasionally it depends on what the patient would have decided if properly advised of an unavoidable risk: *Chappel v Hart* (1998) 195 CLR 232; *Chester v Afshar* [2005] 1 AC 134.

each case the conclusion on the evidence was that there was less than an even chance that early diagnosis would have made a significant difference to the prognosis. The House of Lords in the former case, and the High Court of Australia in the latter case, declined to develop the law so as to extend the notion of “loss of a chance” to the field of personal injury caused by medical negligence.

That is a very interesting area, but it is not what I am going to speak about this evening. I have mentioned it to point a contrast. Where difficult problems of causation arise in clinical negligence, it is usually³ because medical science cannot give a definite answer to a scientific question. Expert witnesses differ in their opinions. The origin or the future course of some trauma or infection or carcinoma may be a matter on which medical science cannot yet give a precise aetiology or make a confident prognosis prediction.

Loss of a chance

In another type of negligence case establishing causation, and hence liability, depends not on medical science but on the court’s own judgment, on the evidence, as to how one or more human beings would have acted but for the negligence complained of. Some of these are “loss of a chance” cases in the full sense: a chance of future benefit is what the plaintiff has lost. All of them involve a lost chance in the wider and looser sense that the court has lost the chance of ever knowing for certain what would have

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⁴ [1911] 2 KB 786.

⁵ *Editor's note:* *Chaplin v Hicks* was discussed in detail by Peh Swee Chin FCJ in the Federal Court decision of *Selva Kumar Murugiah v Thiagarajah Retnasamy* [1995] 2 AMR 1097; [1995] 1 MLJ 817. *Chaplin v Hicks* was also referred to by the Federal Court in *Tham Cheow Toh v Associated Metal Smelters Ltd* [1972] 1 MLJ 171, FC.

⁶ You can learn more about Mr Hicks from the judgment of Gummow J in *Tabet v Gett* (2010) 240 CLR 537, 560.

happened but for the defendant's breach of duty. Instead the court has to construct a hypothetical, parallel universe in which there was no fall from grace, and decide what difference (if any) it would have made to the plaintiff if things had gone as they should.

The earliest well-known case on loss of a chance is *Chaplin v Hicks*⁴ which is celebrating its centenary this year. It is a case that is still cited in the courts of Malaysia,⁵ but I hope I may be pardoned for mentioning it again. It is sometimes referred to as the beauty contest case, but that is a misdescription which does not do justice to the talented Miss Chaplin. It was a competition for aspiring actresses, organised by a popular newspaper, no doubt in order to boost its circulation. The original plan was for the photographs of 24 finalists to be published in the paper and for the 12 winners to be decided by readers' votes (which might have made it little more than a beauty contest). But in the event over 6,000 young ladies entered the competition and the rules were changed to cope with the unexpectedly large number.

Fifty finalists were chosen by readers on a regional basis, and they were probably chosen for their looks. But the winners were to be chosen by Mr Seymour Hicks,⁶ a well known actor-manager, by auditions (or at least interviews) at the Aldwych Theatre in London. Mr Hicks could be expected to choose the winners on the basis of acting ability as well as looks. We know from the law report that Miss Chaplin was the top finalist for the London region. We also

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know that she was already an actress, because she was at the time appearing at Dundee in Scotland, where a redirected letter reached her on 6 January 1909, telling her to be at the Aldwych Theatre at 4.00 pm that day. That was impossible for her, and that is how she lost her chance.

The jury awarded her £100. We shall never know what was in the jury's collective mind. But in principle they had two tasks. The first was to decide whether there had been a breach of contract, and they decided there was a breach, since Miss Chaplin had not been given a reasonable opportunity of presenting herself for selection. The second task was to assess the value of what she had lost. This depended on whether Mr Hicks, as a very experienced judge of acting talent, would have chosen her for a prize. The jury's award showed that they thought she had a very good chance.

Solicitors

In *Chaplin v Hicks* the issue was what difference it would have made if Mr Hicks, as judge of a talent contest, had seen Miss Chaplin. A much more common version of that situation is when the court has to decide what conclusion a real judge would have reached on a plaintiff's claim, which has never had, and never will have, its day in court. That happens whenever a claim becomes statute-barred or is struck out for want of prosecution as a result of a lawyer's breach of a professional duty of care, and the client seeks a remedy against the lawyer instead.

In *Chaplin v Hicks* the issue was what difference it would have made if a judge of a talent contest had seen Miss Chaplin. A much more common version of that situation is when the court has to decide what conclusion a real judge would have reached on a plaintiff's claim, which has never had, and never will have, its day in court.

⁷ *Kitchen v Royal Air Force Association* [1958] 1 WLR 563, 575.

⁸ *John v Rees* [1990] Ch 345, 402.

A well-known example in England is the case of Mrs Kitchen, whose husband was electrocuted in an accident said to have been caused by the negligence of the electricity board. Her solicitors' negligence led to the claim becoming statute-barred. In the Court of Appeal⁷ Lord Evershed MR said that the solicitor was liable if Mrs Kitchen had lost "a chose in action of reality and substance" and if so, though its valuation might be difficult, "it is the duty of the court to determine that value as best it can." Mrs Kitchen had been a truthful and candid witness and she was awarded £2,000, about two-thirds of the full amount of her claim against the electricity board. This all happened over 50 years ago, when the real value of money was very different.

It would be very rare for a plaintiff in that situation to recover 100% of a claim turning on the outcome of what would have been contested litigation. Many of you will be familiar with some well-known observations of Megarry J⁸ but they will bear repetition:

As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

Even more difficult questions can arise in claims for professional negligence in lawyers' advisory work. A

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⁹ *Benton v Millar & Poulgrain* [2005] 1 NZLR 66.

¹⁰ Glazebrook and Young JJ, who gave a joint judgment.

striking example is the New Zealand case⁹ of Mr Benton's claim against his solicitors.

You need to know that New Zealand family law provides for a matrimonial home to belong to the married couple in equal shares, unless there is a written agreement, based on independent advice to both sides, for some other ownership. When Mr Benton married in 1976 he owned a house in Auckland and his wife owned a building plot in another town. At first they lived in his house but they also built a house on her plot. He paid most of the building cost and she transferred to him a 21% interest in the new house. In 1983 he retired and they decided to see whether they liked living in the new house. The next year he sold his house and used a large part of the proceeds to purchase her 79% interest in the new house. It was at this stage that his lawyer failed to advise him about the Matrimonial Property Act 1976. Later he spent more money on extending the house.

In 1995 the couple separated and in 1996 Mr Benton was advised by other lawyers that he must pay \$90,000 to settle his separated wife's unanswerable claim to half the value of the house, even though he had bought out the whole of her interest at market value, and disposed of his own house in the process.

I have had to go into the facts in some detail to explain the complexities of the causation problem as it was seen by the majority in the Court of Appeal.¹⁰ If in 1984

New Zealand family law provides for a matrimonial home to belong to the married couple in equal shares, unless there is a written agreement, based on independent advice to both sides, for some other ownership. Mr Benton’s lawyer failed to advise him about the Matrimonial Property Act 1976.

¹¹ Note 9 above, at page 90. |

the solicitor had advised Mr Benton about the Matrimonial Property Act, he might have said that he trusted his wife, and that he didn't want to opt out of the Act. And if he had wanted to opt out, would she have agreed? And if she had not agreed, would he have gone ahead anyway?

At first instance, the Divisional Court dismissed Mr Benton's claim on the basis that he had suffered no loss. On a first appeal to the High Court he succeeded but was awarded only about 40% of what he claimed. On a second appeal the Court of Appeal awarded him \$90,000 (which included an element for deferment). Even the Court of Appeal was split in its reasoning. Hammond J thought it better to concentrate on what actually did happen:¹¹

It is correct that a great many solicitor's negligence cases, as to damages, turn on "what if" questions. That is one reason why they are so contentious, and so frequently go to appeal. However, I take the view (and this is my point of departure from the judgment of my colleagues) that it is more in accord with fundamental principle, and with the facts of this instance, to say simply that there was a direct form of loss which flowed from the failure of the solicitor to ... give the relevant advice ... the measure of damages is simply what it cost to remove the blot from the clean title which Mr Benton thought he was getting.

I see a lot of force in that. The \$90,000 which Mr Benton had to pay was a fact that made "what if?" questions irrelevant.

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¹² Ibid, at pages 79–80.

¹³ *Hotson v East Berkshire Health Authority* [1987] 1 AC 750, 762.
The situation envisaged in the example actually occurred six years later
in *Lillicrap v Nalder & Son* [1993] 1 WLR 94.

There is one point on the majority judgment in *Benton* which it is worth emphasising.¹² The “loss of a chance” approach is appropriate only for quantifying damages once some loss has been established. If the plaintiff would have taken just the same course of action whether or not he got careful advice, he has lost nothing from negligent advice. And the fact of loss, as opposed to its quantification, is an all-or-nothing question to be decided on the balance of probabilities. This is established by numerous authorities, one of the clearest explanations being by Sir John Donaldson MR:¹³

Take the case of a solicitor who fails to advise his client that the property which he is about to purchase is subject to a right of way. If the client had been told, he would or would not have gone ahead with the transaction. That would have been *his* choice, not the choice of fate ... the damages recoverable by the solicitor’s client would therefore be all or nothing depending on whether he could prove, on the balance of probabilities, that he would have abandoned the transaction.

Similarly if Mr Benton had agreed in cross-examination that he did trust his wife and that he would not have tried to opt out of the Matrimonial Property Act, or if other evidence had led the court to that conclusion, that would have been the end of Mr Benton’s claim against his solicitor. His loss would have been the result of his own choice.

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¹⁴ *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, 1609. |

That distinction is reasonably clear in principle, but in practice it may become elusive. As it was put in *Allied Maples*¹⁴ it is sometimes difficult to tell where causation (leading to liability for a loss) ends and quantification (of the amount of the loss) begins.

Allied Maples was another solicitor's negligence claim raising quite complex questions of the "what if?" variety. The company was a subsidiary within the Asda supermarket group. It was negotiating to buy a portfolio of 48 leasehold retail outlets for £26 million. In the course of the negotiations the seller, a company in another group, proposed that four of them should be acquired indirectly, by the purchase of all the shares in one of its subsidiaries, after other leasehold properties had been hived off to another group company. The purchaser's solicitors failed to spot a defect in this change of plan: the purchaser might find that its newly-acquired subsidiary incurred losses because it was still liable on the tenant's covenants in respect of properties which it no longer owned, as they had been hived off.

The deal was completed on this defective basis, and the unforeseen liability did arise. The company sued its solicitors and a split trial was ordered (first on liability, and then if necessary on quantum). The Court of Appeal criticised this decision for a reason that I have already mentioned: in a situation like this, it is hard to know where causation ends and quantification begins.

A lot turned on the hypothetical question: if the solicitors had drawn attention to the problem before

“It is sometimes difficult to tell where causation (leading to liability for a loss) ends and quantification (of the amount of the loss) begins.”

¹⁵ *Caparo Industries Plc v Dickman* [1990] AC 605.

Editor's note: See also the Sixth Sultan Azlan Shah Law Lecture, *Negligence in the World of Finance* (1991) by Lord Mustill, where *Caparo* is discussed.

exchange of contracts, what would have happened? At one extreme, the purchaser might have pulled out of the whole deal (the judge thought this very unlikely). At the other extreme, it might have decided to run the risk (this seems to have been regarded as even less likely). In between, the parties might have continued to negotiate and agreed a reduced price (unlikely, because of the difficulty of putting a figure on the risk). Alternatively the purchaser might have succeeded in negotiating a limited tailor-made covenant for indemnity (the judge thought this the most likely outcome, but did not quantify the chance). The Court of Appeal directed that the issue of quantum of damages (depending on evaluation of the chance of successful renegotiation) should go to trial.

Professionals

I do not want you to think that it is only lawyers who sometimes make expensive mistakes. So do auditors, valuers, and even (just occasionally) actuaries. In relation to auditors I should reiterate a very basic point: before a plaintiff gets to quantifying his loss he must establish that loss has been caused by a breach of the defendant's duty, and before he gets to that he must establish that the defendant did indeed owe him a duty of care. The basic duty owed by a company's auditors is to the company as a corporation, not to individual shareholders, or creditors, or prospective lenders or equity investors. That was finally established as part of the law of England by *Caparo*¹⁵ in

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¹⁶ *Barings Plc v Coopers & Lybrand* [1997] PNLR 179.

¹⁷ *Killik v Price Waterhouse Coopers* [2001] PNLR 1.

¹⁸ *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360, 1375.

1990. That decision is recognised as an important landmark in the general development of the tort of negligence.

It is only in special circumstances that auditors will be held (on an objective test) to have assumed responsibility towards a wider class. That may occur, for instance, if the auditors' firm has a hands-on involvement in arranging finance (so as to assume responsibility towards prospective lenders)¹⁶ or in preparing a valuation of shares which were to be compulsorily acquired from minority shareholders (so as to assume responsibility to the individual shareholders affected).¹⁷

If both a duty and a breach are established, issues of causation may arise. For some time the decision of the English Court of Appeal in *Galoo*¹⁸ was much cited as an authority. Auditors who had failed to spot overstatements of stock and profits in three consecutive years' accounts of a trading company were held not liable for its eventual decline into insolvency. Upholding a strike-out, the court stated:

The breach of duty gave the opportunity to Galoo and [its holding company] to incur and to continue to incur trading losses: it did not cause those trading losses, in the sense in which the word "cause" is used in law.

But later cases have shown that *Galoo* does not establish any general rule. This is an area in which the court must play close attention to the particular facts as pleaded and proved. There is a valuable discussion in the judgments

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¹⁹ *Sew Hoy & Sons Ltd v Coopers & Lybrand* [1996] 1 NZLR 392, 408.

²⁰ [1990] 2 AC 605, 615, quoting Brennan J in *Sutherland Shire County v Heyman* (1985) 157 CLR 424, 487.

²¹ *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191.

of the New Zealand Court of Appeal in *Sew Hoy*,¹⁹ where Thomas J saw *Galoo* as

a timely reminder that the answer to this question will not be resolved by the application of a formula but by the application of a judge's common sense. The judge needs to stand back from the case, examine the facts closely, and then decide whether there is a causal link between the failure and the loss in issue which can be identified and supported by reasoned argument.

Sew Hoy, and numerous other cases, show that where damages are claimed for breach of some professional duty, questions of causation cannot be considered apart from the scope of the duty owed. In *Caparo*²⁰ Lord Oliver said:

It has to be borne in mind that the duty of care is inseparable from the damage which the plaintiff claims to have suffered from its breach. It is not a duty to take care in the abstract but a duty to avoid causing to the particular plaintiff damage of the particular kind which he has in fact sustained.

Negligent valuation in falling property market

That brings me to the large and controversial topic of SAAMCO (an abbreviation for South Australia Asset Management Corporation).²¹ It raises the almost insoluble problem of damages for a negligent valuation made in a

The basic duty
owed by a company's
auditors is to
the company
as a corporation,
not to individual shareholders,
or creditors, or
prospective lenders or
equity investors.
It is only in special
circumstances that
auditors will be held
to have assumed
responsibility towards
a wider class.

²² *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*
[1999] 1 NZLR 664.

²³ *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413.

²⁴ "Negligent valuers and falls in the property market" (1997) 113 LQR 1.

falling property market—a phenomenon that Britain has seen three times during my professional career.

The decision in *SAAMCO* has been followed in New Zealand²² but not in Australia.²³ It has been criticised by Professor Jane Stapleton, one of the world's leading scholars on legal causation, as a case in which Lord Hoffmann (who gave the leading speech) aimed at avoiding a false paradox, and in doing so created a real and disturbing one.²⁴

Let me try and explain the problem in *SAAMCO*, and then make just two brief comments on it. Suppose that at a time when the property market is booming and valuers are inclined to be bullish, a professional valuer values an office block at £10 million. Suppose that this valuation is excessive, indeed so excessive as to be negligent. A proper valuation would have been £8 million. A bank, relying on the valuation, advances £6 million secured by a mortgage. The mortgagor defaults at a time when the property market has fallen by 40%, and on a forced sale the lender realises only £3 million. What is the proper measure of damages?

The bank's total loss is £3 million (disregarding interest and costs). But arguably this was the result of two causes: the valuer's negligence, which was his fault, and a general fall in the market, which was not his fault. One approach would be to say that 40% of the loss was caused by the falling market and 60% by the valuer's negligence, resulting in damages of £1.8 million. In *SAAMCO* Lord Hoffmann treated the fall in the market as having the effect

Thomas J said:

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common sense.

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and then decide whether
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be identified and supported
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of capping damages at the amount of the initial disparity between the valuer's figure and the correct figure. That would produce damages of £2 million. On this example the difference between £1.8 million and £2 million is not enormous, but different figures can produce a bigger gap, and the gap can go either way.

My first comment is that there is an important distinction, which Lord Hoffmann discusses at length, between providing information and providing advice. Normally a valuer provides no more than information: his expert opinion, right or wrong, as to the current value. If he goes further and makes a recommendation (for instance, to make a mortgage advance of 65% of his valuation) he is in danger of being held responsible for more remote consequences, including a fall in the market, because he may be supposed to be providing for that risk. The fact that the valuation in the Australian case of *Kenny & Good* recommended a 65% advance is one of the reasons (though not the only reason) for the High Court of Australia differing in that case from the House of Lords in *SAAMCO*.

My second comment is that whether the scope of the duty of care is seen as a special aspect of causation, or as a separate element of liability for civil wrongs, is a question that legal scholars will continue to debate for a long time. Decisions of the highest courts will probably move at a slower pace in the wake of the academic debate. The clearest statement of where English law has got to at present is

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from its breach.

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to take care in the
abstract but a duty
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to the particular
plaintiff damage
of the particular kind
which he has in fact
sustained.”

²⁵ *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 AC 190, 207
(Lord Hobhouse referred to it as the *Banque Bruxelles* principle, that of
another of the conjoined appeals in the Court of Appeal [1995] QB 375).

²⁶ *Smith New Court Ltd v Citibank NA* [1997] AC 254.

probably in the speech of Lord Hobhouse in the *Platform Loans* case, in which he said of the SAAMCO principle:²⁵

[The] principle is not derived from any application of mathematics. The loss suffered by the lender in the event of a market fall may not be directly proportionate or equivalent to the original over-valuation. The ... principle is essentially a legal rule which is applied in a robust way without the need for fine tuning or a detailed investigation of causation.

Other commercial cases

So far I have been looking at cases where the cause of action is the tort of negligence, sometimes with a concurrent liability in contract. I want to mention three other commercial cases involving different causes of action.

The first is *Smith New Court*.²⁶ It was a case of deceit—that is deliberate deception inducing the plaintiff to act to his detriment. Citibank held 29 million shares in Ferranti, a quoted British electronics manufacturer. Citibank sold them to Smith New Court, a market-maker, telling them, falsely, that there were two other purchasers actively competing for the shares. As a result Smith New Court bought at 82 pence a share, paying the full market price, whereas a substantial discount might have been expected for such a large placing. What neither Smith New Court nor Citibank knew was that Ferranti had been the victim of a

“Suppose that at a time when the property market is booming, a professional valuer values an office block at £10 million, a valuation so excessive as to be negligent. A proper valuation would have been £8 million. A bank, relying on the valuation, advances £6 million secured by a mortgage. The mortgagor defaults at a time when the property market has fallen by 40%, and on a forced sale the lender realises only £3 million. What is the proper measure of damages?”

²⁷ *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353.

huge fraud, which was disclosed about six weeks after the deal. Ferranti lost almost half of its net assets and its profits dropped by 60%. Smith New Court disposed of its holding in parcels at a total loss of over £11 million.

The House of Lords held that Citibank was liable for the whole loss. The stock market valuation was not a true indication of the value of the shares when they were purchased because there was a false market. Citibank was liable for the whole loss caused directly by its own employee's deceit, even though it had nothing to do with the fraud that caused the loss.

The next case is about the charter of a ship²⁷—the vessel's name was *The Golden Victory*—decided by the House of Lords four years ago. It was a sort of mirror image of the loss of a chance cases in that it was a case in which the court did know how events had turned out, but the parties did not, at the time of the breach of contract, know how events would turn out.

In 1998 *Golden Strait*, the owners of *The Golden Victory*, chartered it for seven years to Nippon Yusen. Either party had the right to cancel the charter in the event of war or hostilities between (so far as relevant) the United States, the United Kingdom and Iraq. In December 2001 the charterers repudiated the charter, when it still had four years to run. In March 2003 hostilities, sometimes called the Second Gulf War, broke out between the United States, the United Kingdom and Iraq. Various issues of law arose,

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²⁸ Ibid, at paragraph 7.

²⁹ *Bwllfa & Merthyr Dare Collieries v Pontypridd Waterworks Co*
[1903] AC 426, 429.

the most interesting of which was whether the outbreak of hostilities put a cap on the charterers' liability to pay damages for their repudiation of the contract.

The arbitrator, looking at the factual situation as at December 2001, held that a reasonably well-informed person would have considered hostilities between the United States or the United Kingdom and Iraq as "not inevitable or even probable but merely a possibility". But there were various delays in the arbitration process, hostilities did occur in March 2003, and the arbitrator, feeling himself bound by authority, reluctantly decided in favour of the charterers that there should be a cap on the damages. He was reluctant because as he put it:²⁸

It does not seem to me that it can be right that the value of that which the owners have lost (and which is calculable on the date of breach in the then prevailing circumstances) should thereafter vary according to when a determination is made in proceedings to enforce their rights and in perhaps quite different circumstances.

The arbitrator's decision was upheld by the Commercial Court and by a unanimous Court of Appeal. But the House of Lords was divided three-two in dismissing the further appeal. The majority thought it right, in order to avoid over-compensating the owners, to depart from the normal rule that damages should be ascertained as at the date of breach. They relied on an old House of Lords case²⁹ about statutory compensation for mining operations

Whether the scope of the duty of care is seen as a special aspect of causation, or as a separate element of liability for civil wrongs, is a question that legal scholars will continue to debate for a long time.

³⁰ Note 27 above, at paragraph 22.

³¹ *Hilton v Barker Bousie & Eastwood* [2005] 1 WLR 567.

in which the Earl of Halsbury LC (with characteristic outspokenness) rejected the notion that “you should shut your eyes to the true sum now you do know it, because you could not have guessed it then.”

For the minority Lord Bingham stressed the importance of certainty in commercial cases. In rejecting the argument about over-compensation he observed:³⁰

There are, in my opinion, several answers to this. The first is that contracts are made to be performed, not broken. It may prove disadvantageous to break a contract instead of performing it. The second is that if, on their repudiation being accepted, the charterers had promptly honoured their secondary obligation to pay damages, the transaction would have been settled well before the Second Gulf War became a reality. The third is that the owners were, as the arbitrator held ... entitled to be compensated for the value of what they had lost on the date it was lost, and it could not be doubted that what the owners lost at that date was a charterparty with slightly less than four years to run.

He distinguished the mining case as concerned with a statutory right to “full compensation”, not a common law claim for damages.

The third commercial case I want to mention brings us back to solicitors. It was treated primarily as a contract case because there was argument about an implied term. It could have been pleaded as a breach of fiduciary duty.³¹ I sat

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on the case in the House of Lords, and though I had by then been in the law for nearly 50 years I found the facts fairly shocking.

Mr Hilton was an honest, hard-working builder seeking to set up in a modest way as a property developer. He acquired a building plot, got a bank loan, and built a small block of flats. In the course of this activity he met Mr Bromage, who expressed interest in buying the flats, and introduced Mr Hilton to Barkers, Mr Bromage's solicitors. What Barkers knew, but Mr Hilton did not know, was that Mr Bromage had just come out of prison for numerous bankruptcy offences. Barkers knew because they had arranged his defence on the criminal charges. They did not disclose any of this to Mr Hilton, nor did they disclose that they lent money to Mr Bromage (who had no significant assets) to enable him to pay the deposit when he contracted with Mr Hilton to buy the flats. Barkers were acting for both parties. Mr Bromage then refused to complete the purchase but also refused to remove his caution from the register. Mr Hilton could not sell the flats to anyone. He got into more and more serious financial difficulties and was made bankrupt.

When he sued the solicitors he lost both at first instance and in the Court of Appeal. Their reasoning was (in part) that if the solicitors had told Mr Hilton that they could not act for him, he would have gone elsewhere, still ignorant that Mr Bromage was a rogue, and the same sorry story would have unfolded—so no loss was caused, it was

The notion that one breach of duty by the solicitors should exonerate them in respect of a second and more serious breach of duty seems contrary to commonsense and justice.

³² Ibid, at paragraph 38.

³³ See for instance *Enron Coal Services v English Welsh and Scottish Railway Ltd* [2011] EWCA Civ 2.

said, by that breach of duty. I did not agree with that, and I am glad to say that my colleagues agreed with me.³²

The notion that one breach of duty by [the solicitors] (failure to tell Mr Hilton that they could not act for him and that he should seek independent advice) should exonerate [the solicitors] in respect of a second and more serious breach of duty (failure to disclose to Mr Hilton facts which would have saved him from ruin) seems contrary to commonsense and justice.

Public law

With increasing statutory regulation commercial law often gets entangled with public law. It is therefore appropriate to add a short postscript about causation in public law.

Judicial review is not in general concerned with the award of damages. But in England private law claims for damages can arise as a so-called “follow-on” claim under public law regulation of competition, and when they do questions of causation often arise. For example, a large company may have abused its market dominance, but it may be difficult for a smaller company to establish that a loss which it has suffered (for instance, failure to win a lucrative contract) is attributable to that cause.³³

Compensation for compulsory purchase of land also involves questions of causation of a hypothetical nature,

“With increasing
statutory regulation
commercial law
often gets
entangled with
public law.”

³⁴ See for instance *Spirerose v Transport for London* [2009] 1 WLR 1797.

³⁵ *Porter v Secretary of State for Transport* [1996] 3 All ER 693.

but they are largely regulated by detailed statutory provisions of limited interest except to specialists.³⁴ Let me give you a flavour of just how hypothetical it can get.

It was a general principle of law, now qualified by numerous statutory exceptions, that on the compulsory acquisition of land for a scheme of development any value added by that scheme is to be disregarded in assessing the compensation, since the landowner is to be compensated for what he has lost, and no more. In one case³⁵ land on the edge of Evesham, a market town in the west of England, was needed for the construction of a by-pass to relieve traffic congestion in the town. There were two possible routes, referred to by the planners as the yellow route and the green route. The authorities chose the yellow route and so in the acquisition of land on that route the construction of a by-pass on the yellow route had to be disregarded, and the possibility of the land being developed for housing was also disregarded.

But the owners of the land on the yellow route put forward the ingenious argument that if the construction of a by-pass on the yellow route had to be disregarded, Evesham still needed a by-pass, and so it must be assumed that there would be a by-pass on the alternative green route. If that were to happen the new road on the green route would form a physical boundary to the outward spread of Evesham, and would add force to the argument that planning permission would then have been granted for the residential development of most of the land (including the yellow

“A large company
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market dominance,
but it may be difficult
for a smaller company to
establish that a loss which
it has suffered is attributable
to that cause.”

³⁶ *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22; [1988] AC 473. |

route) which lay within the physical boundary. The Court of Appeal accepted this argument, but the effect of the decision was quickly altered by amending legislation. The case illustrates the general principle that there are limits to how far any statutory hypothesis can be taken to its apparently logical conclusion.

The *Takaro Properties* case³⁶ was something of a cause celebre in New Zealand 25 years ago, though the claim came to nothing in the end. Some investors developed a high-grade holiday resort in the New Zealand uplands aimed at the top of the tourist market. It failed to attract enough wealthy customers and it had to close. Other foreign investors showed an interest in trying to turn it round, but their investment needed government approval, which the Minister, Mr Rowling, repeatedly declined to give. The company sued him in a private law action for damages.

At first instance it failed completely, the judge finding that even if approval had been given, the enterprise was facing “nothing but disaster”. The Court of Appeal took a different view, holding that the Minister had failed to exercise due care in his decision, and awarding NZ\$300,000 for the loss of a chance of turning round the enterprise.

In the Court of Appeal Cooke J agreed on NZ\$300,000 but by a different route, reducing his original figure of NZ\$500,000 because the Minister might have been induced to change his mind by judicial review. That seems contrary to the normal principle that the duty to mitigate does not

Occasionally, because
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discretionary remedy,
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in a democratic society
the public are entitled
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regardless of
the likely outcome.

³⁷ *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, 615.

require a plaintiff to embark on speculative litigation. Finally the Privy Council held that there was no breach of any duty, and probably no private law duty at all.

The last point I want to make about causation in public law is the most important. In judicial review of official decision-making the official decision-maker may have failed to follow the appropriate procedure. He may have failed to carry out proper consultations, or to give a proper period for lodging objections. In such a case the riposte “It would not have made any difference anyway,” carries very little weight.

Occasionally, because judicial review is a discretionary remedy, it may be enough to cover a small defect. But in a democratic society the public are entitled to have their say, and to deny that right is a serious failing, regardless of the likely outcome. It was put very well by Lord Hoffmann in the *Berkeley*³⁷ case, in which one gallant lady protester upset plans for the redevelopment of the Fulham football stadium in West London. The European Directive on Environmental Impact Assessment required, Lord Hoffmann said,

... the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues.

The court in *Ex parte Nash*
said that
only “in the very plainest
of cases one can say
that the breach
could have made
no difference.”

³⁸ *R v Chelsea College of Design ex p Nash* [2000] ELR 686, at paragraph 50. |

There are many similar statements of principle about the importance of proper procedures in official decision-making, especially where it involves consultation in order to assess public opinion. For instance in another environmental case³⁸ the court said that only “in the very plainest of cases ... one can say that the breach could have made no difference.”

That is enough. I have taken you on a rather wandering and inconclusive journey. Thank you very much for your patience in accompanying me on the journey. 🍀

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.

per Raja Azlan Shah Acting LP

Dato Menteri Othman bin Baginda & Anor v

Datuk Ombi Syed Alwi bin Shed Idrus

[1981] 1 MLJ 29, Federal Court



ROYAL ADDRESS

His Royal Highness Raja Nazrin Shah

Regent of Perak Darul Ridzuan

*26th Sultan Azlan Shah
Law Lecture*

Ladies and Gentlemen,

My father, His Royal Highness Sultan Azlan Shah was so very much wishing to attend this evening's lecture as he had done for the past 25 years. He was particularly looking forward to this lecture by the Honourable Lord Pannick.

His Royal Highness returned to Kuala Lumpur yesterday after undergoing successful medical treatment in London. However, on the advice of his personal physicians, he is unable to grace us with his presence this evening.

Lord and Lady Pannick,

HRH Sultan Azlan Shah and HRH Tuanku Bainun have asked me to convey their personal greetings to you both, and to extend their regrets to you for not being able to grace this evening's event.




Ladies and Gentlemen,

The Honourable Lord Pannick needs very little introduction. Your overwhelming presence here this evening is a testimony of his eminence.

Not only is Lord Pannick one of the most outstanding Queen's Counsel in the Commonwealth, he is also a Member of the British Parliament sitting in the House of Lords. Lord Pannick is an accomplished author, including two legal classics, the first on *Judges* and the second on *Advocates*. His brilliance in advocacy, his immense influence in law-making, and his thought-provoking writings are his hallmarks. He has been acknowledged as a "living-legend" and "the greatest barrister in the country". Lord Pannick is indeed a great jurist.

Ladies and Gentlemen, it now gives me great pleasure to invite The Honourable Lord Pannick to deliver the Twenty-Sixth Sultan Azlan Shah Law Lecture.

Lord Pannick.



“The law is sedulous
in giving accused persons
the right to a fair trial
and to be defended
by counsel.

Those fundamental
rights must always
be kept inviolate
and inviolable,
however crushing
the pressure of
incriminating proof.”

per Raja Azlan Shah J

Public Prosecutor v Tengku Mahmood Iskandar & Anor

[1973] 1 MLJ 128, High Court

“It is an enormous honour and pleasure to be the Twenty-Sixth Sultan Azlan Shah Law Lecturer.

Knowing, as I do, of His Royal Highness' own distinguished contribution to, and interest in, the development of public law, I want to speak about a topic in that field.”

Lord David Pannick QC

Scandalising the Judiciary:

Criticism of Judges and the Law of Contempt

26th Sultan Azlan Shah Law Lecture, 2012



Lord David Pannick QC

Scandalising the Judiciary: Criticism of Judges and the Law of Contempt



David Philip Pannick
(b. 7 March 1956)

Lord David Pannick QC was born on 7 March 1956. He read law at Hertford College, University of Oxford, where he obtained his Bachelor of Arts (Jurisprudence) degree as well as the prestigious Bachelor of Civil Law degree. He was called to the English Bar by the Honourable Society of Gray's Inn in 1979 and was made a Bencher in 1997. He became an Honorary Fellow of Hertford College, University of Oxford in September 2004.

Lord Pannick was appointed as a Queen's Counsel in 1992, and has been a Fellow of All Souls College, University of Oxford since 1978. He was Junior Counsel to the Crown (Common Law) from 1988 to 1992, a Recorder on the South Eastern Circuit from 1995 to 1998, and a deputy High Court judge from 1998 to 2005.



In 2008, Lord Pannick was raised to a life peerage as a Crossbencher in the House of Lords as Baron Pannick of Radlett in the county of Hertfordshire.

Lord Pannick maintains a broad practice including Public Law & Human Rights, Media & Entertainment, Employment & Discrimination, Sports Law, EU & Competition, Professional Discipline, and Telecommunications.

He is held in the highest regard as one of the leading barristers of his time. Legal directories cite and commend Lord Pannick as “legendary”, “spectacular in all respects”, “an absolute dream to work with” and “a polymath to beat all polymaths” but to name a few. In 2012, *The Times* named Lord Pannick as one of the most influential lawyers in the UK, noting that Lord Pannick was described by one judge as “leader of the Crossbenchers” and having “incredible influence” in Parliament, and that Lord Pannick “is one of the country’s most powerful advocates”.

Lord Pannick has appeared in numerous landmark cases in the Appellate Committee of the House of Lords and in the new Supreme Court. He has appeared before the European Court of Justice in Luxembourg and in the European Court of Human Rights in Strasbourg, as well as the courts of Hong Kong, Brunei, Gibraltar and the Cayman Islands.

In *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, the last judgment delivered by the Appellate Committee of the House of Lords in July 2009 before the opening of the new Supreme Court, Lord Pannick acted for Debbie Purdy in this case which established that the Deputy Public Prosecutor has a duty to publish guidelines concerning his discretion to prosecute those who aided and abetted an assisted suicide abroad.

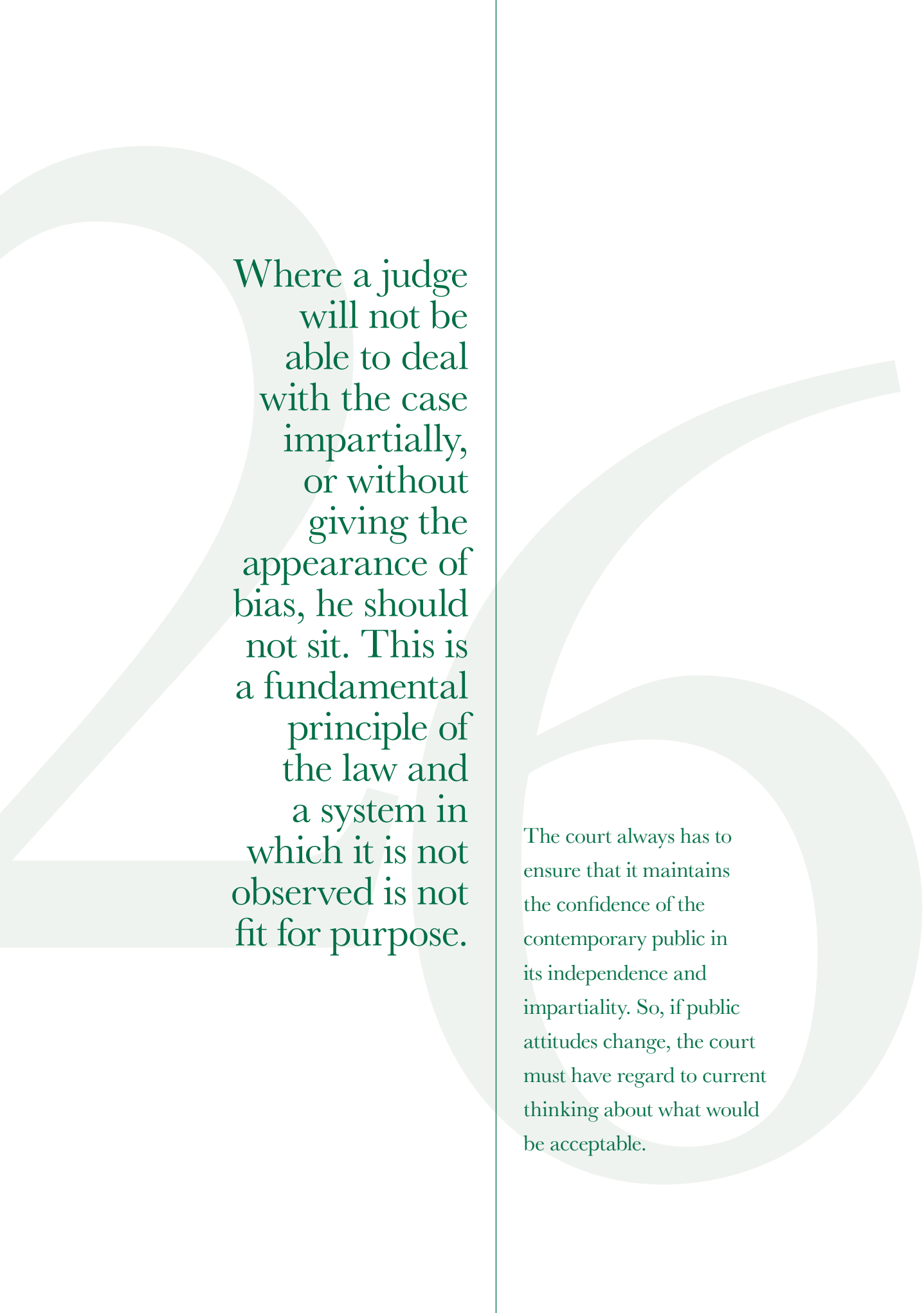


Lord Pannick also acted for an international firm of chartered accountants in *R (Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, where the UK Supreme Court considered the issue of whether the common law principle of legal advice privilege could extend to communications in connection with legal advice given by professional people other than lawyers, such as accountants and tax advisers.

In 2013, Lord Pannick acted for the Hong Kong Commissioner of Registration in the landmark constitutional case of *Vallejos v Commissioner of Registration* [2013] HKCFA 17, where the Hong Kong Court of Final Appeal had to decide whether Hong Kong legislation restricting foreign domestic helpers from qualifying for permanent residence contravened the Hong Kong Basic Law and was therefore unconstitutional.

Lord Pannick is an avid writer and writes a fortnightly column on legal matters for *The Times*, and is co-author and general editor with Lord Lester of Herne Hill QC of *Human Rights Law and Practice* (3rd edition, 2009). He is the author of the legal classics *Judges* (1987, Oxford University Press), *Advocates* (1992, Oxford University Press), and *Judicial Review of the Death Penalty* (1982, Duckworth). He is a member of the Editorial Board of *Public Law* (Sweet & Maxwell).

Lord Pannick is married to Lady Nathalie Trager-Lewis and has six children. He is a fan of Arsenal football club and the British television series *Coronation Street*.



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.

Scandalising the Judiciary:

Criticism of Judges and the Law of Contempt

Lord Pannick QC
Life Baron, United Kingdom Parliament

Your Royal Highnesses, distinguished guests, ladies and gentlemen, it is an enormous honour and pleasure to be the Twenty-Sixth Sultan Azlan Shah Law Lecturer. Knowing, as I do, of His Royal Highness' own distinguished contribution to, and interest in, the development of public law, I want to speak about a topic in that field. The truly great judges who have preceded me in giving this annual lecture, lawyers such as Lord Bingham, Lord Woolf and Lord Mackay, were rarely the subject of any criticism of their judgments, so it is an irony indeed that the subject of my lecture is insults to, and abuse of, the judiciary for performing their judicial function.

In 1900, Mr Justice Darling was the presiding judge at the Birmingham Spring Assizes. Mr Howard Gray, the editor of the local newspaper, the *Birmingham Daily Argus*, wrote a less than flattering article which the official Law Reports

Text of the Twenty-Sixth Sultan Azlan Shah Law Lecture delivered on 5 September 2012 in the presence of HRH Raja Nazrin Shah, Crown Prince of Perak, and HRH Tuanku Zara Salim.

Lord Atkin:

“No wrong
is committed by
any member of
the public who exercises
the ordinary right
of criticising,
in good faith,
in private or public,
the public act done
in the seat of justice”.

¹ *R v Gray* [1900] 2 QB 36, 37.

² *R v Gray* 82 LT Reports 534 (1900).

³ See, for example, *Dictionary of National Biography* 1931-40 (LG Wickham Legg (ed), 1949), page 211: “in charges of less gravity he often allowed himself to behave with a levity quite unsuited to the trial of a criminal case. ... [He] frequently lost the respect of the jury to such an extent that they ignored or paid little attention” to him.

⁴ [1900] 2 QB 36, 39-42.

say, somewhat sanctimoniously, it was “unnecessary” to set out in detail.¹ Fortunately, another set of law reports, the *Law Times*, did inform its readers of the contents of the offending article, so preserving them for analysis by future generations of lawyers. In the article, Mr Gray described the judge as an “impudent little man in horsehair, a microcosm of conceit and empty-headedness”. Mr Gray added that “no newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt”. He suggested that the judge, assessed on his merits, would have been “a successful bus conductor”.²

Mr Gray’s invective, harsh though it sounds, was in fact kinder than the view of legal historians about Mr Justice Darling’s contribution to jurisprudence.³ But Mr Gray was charged with contempt of court. He swore a grovelling affidavit of apology, no doubt on legal advice. The Lord Chief Justice, Lord Russell, described the article as “scurrilous abuse of a judge in his character of a judge”. Finding contempt of court to be proved, the Lord Chief Justice said that but for the apology, the editor would have been sent to prison “for a not inconsiderable period of time”. Instead Mr Gray was fined £100 and ordered to pay the costs.⁴

Criticism of judges continues to be a risky activity in many jurisdictions, including the United Kingdom. The subject of my lecture this evening is the branch of the law of contempt of court exemplified by Mr Gray’s case: that is contempt by “scandalising the judiciary”, or as Scottish

“Lord Atkin explained that
“the wrong-headed are
permitted to err”, so a contempt
could not be established by
proving that the criticism of
the judiciary was unjustified.
“Justice is not a cloistered virtue:
she must be allowed to suffer
the scrutiny and respectful, even
though outspoken, comments of
ordinary men”.

⁵ *R v Vidal*, *The Times*, 14 October 1922.

⁶ *R v Freeman*, *The Times*, 18 November 1925 and *Arlidge, Eady & Smith on Contempt* (4th edition, 2011), paragraph 5-228. He threatened to continue sending the judge three such letters a day.

law calls it, “murmuring judges”. In this lecture I want to identify the range of cases around the common law world where this category of contempt continues to be applied, and then I want to assess whether scandalising the judiciary should remain a criminal offence.

I should make clear that I am not concerned in this lecture with other branches of the law of contempt. I am not addressing the contempts of court which occur when a person says or does something that impedes a fair trial in a civil or criminal court, or contempt in the face of the court, or a threat of physical violence to a judge or a statement which has public order consequences. What I am interested in this afternoon are critical, rude or downright offensive comments made out of court about judges and justice which do not impede justice in specific proceedings.

After Mr Gray’s case in 1900, there were another five successful prosecutions in England for scandalising the judiciary in the early decades of the 20th century. They involved an aggrieved litigant who was sentenced to four months’ imprisonment for walking up and down outside the Law Courts in the Strand with a placard accusing the President of the Probate Division and Admiralty Division of the High Court of being “a traitor to his duty”;⁵ another dissatisfied litigant was imprisoned for eight months for sending a series of letters to a judge, Mr Justice Roche, accusing him of being “a liar, a coward, a perjurer”, and who unwisely told the court that he “withdrew nothing and apologised for nothing”;⁶ the editor of the *New Statesman*

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and the critic must be
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and not acting in malice
or attempting to impair
the administration of justice”.

⁷ *R v Editor of the News Statesman ex parte DPP* (1928) 44 TLR 301.

⁸ *R v Wilkinson*, *The Times*, 16 July 1930 and *Arlidge, Eady & Smith on Contempt* (4th edition, 2011), paragraph 5-230. At the hearing, the defendants refused to apologise and repeated the allegations.

⁹ *R v Colsey*, *The Times*, 9 May 1931.

magazine avoided a prison sentence after apologising for an article stating that the birth control pioneer, Marie Stopes, had no hope of receiving a fair hearing from Mr Justice Avory when he presided over a libel claim brought against her, “and there are so many Avorys”;⁷ three men were imprisoned for an article in the *Daily Worker* newspaper which suggested that Mr Justice Swift was a “bewigged puppet” who had displayed “a strong class bias” in sending Communist leaders to prison;⁸ and the fifth and final case concerned the editor of the magazine, *Truth*, whose title was misleading, who was fined for publishing an article suggesting that Lord Justice Slesser could not have taken an impartial view on legislation being applied in his court because, as Solicitor-General, he had steered the relevant statute through Parliament.⁹

That was the last successful prosecution for this branch of contempt of court in England, though there have since been, as I shall explain, many successful prosecutions in other parts of the world.

Two important cases in London recognised that the law must allow for a right to criticise the judiciary. In 1936, the Privy Council allowed an appeal from the judgment of the Supreme Court of Trinidad and Tobago which had fined the editor of the *Port of Spain Gazette*, Andre Ambard, £25 for publishing an article critical of the local courts for alleged inequality in sentencing in criminal cases. Lord Atkin, for the Board, stated that “no wrong is committed by any member of the public who exercises the ordinary right

“Lord Justice Salmon:
“The authority and reputation
of our courts are not so frail
that their judgments need to be
shielded from criticism”.

¹⁰ *Ambard v Attorney-General for Trinidad and Tobago*
[1936] AC 322, 335-337.

¹¹ *R v Commissioner of Police of the Metropolis ex parte Blackburn*
(No 2) [1968] 2 QB 150. Mr Hogg had suggested that the relevant
legislation had been “rendered virtually unworkable by the unrealistic,
contradictory and, in the leading case, erroneous decisions of the
courts, including the Court of Appeal”.

¹² See Lord Denning MR at pages 154G and 155E. See also Lord Justice
Salmon at page 156D-E on the “inaccuracies and inconsistencies” in
the article. And Lord Justice Edmund Davies said at pages 156G-157B
that it was “open to doubt” whether Mr Quintin Hogg’s article had
“paid proper respect to the standards of accuracy, fairness and good
taste”, but that his Lordship’s “conclusions regarding the fairness and
good taste of the article in question are immaterial”.

of criticising, in good faith, in private or public, the public act done in the seat of justice”.

Lord Atkin explained that “the wrong-headed are permitted to err”, so a contempt could not be established by proving that the criticism of the judiciary was unjustified. He emphasised that “Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men”.

Lord Atkin concluded that the case before the Privy Council “concerns the liberty of the Press, which is no more than the liberty of any member of the public, to criticise temperately and fairly, but freely, any episode in the administration of justice”.¹⁰

Applying these principles, the Court of Appeal in 1968 dismissed an application for alleged contempt brought by a private individual, Mr Raymond Blackburn, against Mr Quintin Hogg MP, later Lord Chancellor Hailsham. Mr Hogg had written a magazine article criticising a Court of Appeal decision on gaming law. Mr Hogg’s article suggested that the Court of Appeal should “apologise for the expense and trouble” to which it had put the police.¹¹

The Court of Appeal held that the article was “erroneous” but “errors do not make it a contempt of court”.¹² Lord Denning pointed out that the contempt powers of the court should not be used as a means to uphold judicial dignity. He emphasised: “We do not fear criticism, nor do we resent it.”

“The offence
of scandalising the judiciary
is based on assumptions
which seem to be
very dubious
—not only that
public confidence in
the administration of justice
would be undermined
by critical comments
but also that such confidence is
maintained or restored
by a criminal prosecution,
or the threat of
a criminal prosecution.”

¹³ Ibid, at page 155A-C.

¹⁴ Ibid, at page 155F.

¹⁵ *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322, 335.

¹⁶ *R v Commissioner of Police of the Metropolis ex parte Blackburn* (No 2)
[1968] 2 QB 150, 155G.

Lord Denning explained why the courts did not fear or resent criticism. It was because,

there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man ... to make fair comment, even outspoken comment, on matters of public interest.¹³

Lord Justice Salmon added that “the authority and reputation of our courts are not so frail that their judgments need to be shielded from criticism”.¹⁴

The judgments in *Ambard* and *Blackburn* emphasised the importance of free speech in relation to criticism of the courts but they also made clear that there are limits to freedom of expression in this context. In *Ambard*, the 1936 decision of the Privy Council, Lord Atkin said that critics of the judiciary were required to “abstain from imputing improper motives to those taking part in the administration of justice” and the critic must be “genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice”.¹⁵

In the *Blackburn* case, Lord Justice Salmon said that “no criticism of a judgment, however vigorous, can amount to contempt of court, provided it keeps within the limits of reasonable courtesy and good faith”.¹⁶

When I was a student at Oxford University in the 1970s, the law of scandalising the judiciary was regarded

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being over-sensitive,
“vulgar debunking
cannot be
permitted to
pollute the stream
of justice”.

¹⁷ *Secretary of State for Defence v Guardian Newspapers* [1985] AC 339, 347A.

¹⁸ *McLeod v St Aubyn* [1899] AC 549, 554 and 561.

as an historical curiosity, with little if any contemporary relevance. In 1984, in the Appellate Committee of the House of Lords, Lord Diplock described the application of contempt law to statements “scandalising the judges” as “virtually obsolescent in England”.¹⁷ Lord Diplock’s statement echoed what had been said by Lord Morris in 1899 for the Privy Council. The Board considered an appeal against a sentence of 14 days’ imprisonment imposed on the agent of a newspaper in Grenada in the Caribbean which had published articles critical of the acting Chief Justice of St Vincent. One of the articles had described him as “a briefless barrister, unendowed with much brain”. In allowing the appeal, on technical grounds, Lord Morris said that contempt of court by scandalising the judiciary had become “obsolete” in the United Kingdom. That was a year before the prosecution of Mr Gray. Lord Morris added (in words that bring no credit on the Privy Council) that

in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of and respect for the court.¹⁸

A branch of the law declared to be obsolete in 1899 and 1984 refuses to lie down. As Mark Twain said of an obituary published during his lifetime, the report of the death was an exaggeration. Prosecutions for contempt by scandalising the judiciary have continued to be brought over the last 30 years in many jurisdictions and some of them have succeeded.

The offence of scandalising the judiciary should be abolished.

¹⁹ *Badry v Director of Public Prosecutions* [1983] 2 AC 297. Concerning an allegation of judicial bias, Lord Hailsham of St Marylebone LC said at page 304G that “nothing really encourages courts or Attorneys-General to prosecute cases of this kind in all but the most serious examples, or courts to take notice of any but the most intolerable instances”.

²⁰ *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225, 230-231 (Richmond P for the Court of Appeal of New Zealand). A real risk of undermining public confidence sufficed; there was no need for the prosecution to show a clear and present danger of a court being influenced or impeded in the administration of justice (page 234). Recent cases where scandalising the judiciary has been established include *Solicitor-General v Smith* [2004] 2 NZLR 540 (High Court of New Zealand). See ATH Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (April 2011), pages 68-71.

²¹ *Gallagher v Durack* (1983) 152 CLR 238, 243. The trade union leader’s statement was “insinuating that the Federal Court had bowed to outside pressure in reaching its decision”, an unwarranted imputation of a “grave breach of duty by the court” (page 244). One of the five judges, Murphy J, dissented from the decision to refuse leave to appeal. He stated at page 246 that a “clear and present danger to judicial administration” was required before such a contempt could be proved as this would involve “a better balance between the conflicting interests of free speech and of integrity of the judicial system”. See also *Re Colina ex parte Torney* (1999) 200 CLR 386 (High Court of Australia); *R v Hoser & Kotabi Pty Ltd* [2003] VR 194 (Supreme Court of Appeal of Victoria); and *Attorney-General for the State of Queensland v Colin Lovatt QC* [2003] QSC 279 where Chesterman J in the Supreme Court of Queensland held a senior counsel in contempt by scandalising the judiciary by stating of the magistrate—during court proceedings while representing a client—“This bloke’s a complete cretin”. Chesterman J concluded: “It conveyed, and I have no doubt was meant to convey, the imputation that [the Magistrate] was an idiot, a simpleton, who lacked the necessary intellectual power to discharge the important functions of his judicial office. ... Few things could be more likely to impair the authority of the courts than to have it stated publicly that a judicial officer is mentally deficient and thereby incapable of performing his function”.

In 1982, the Privy Council upheld a conviction for scandalising the judiciary in Mauritius by an allegation of judicial bias, the judgment in the Privy Council being delivered by Lord Hailsham, the Lord Chancellor, as Quintin Hogg had by then become.¹⁹ Neither of the parties referred to one of the leading authorities: the 1968 Court of Appeal judgment concerning Mr Hogg's magazine article.

In New Zealand, in 1977, the Court of Appeal upheld a fine imposed on a radio station which had broadcast a news item which wrongly suggested that a judge had improperly dismissed a serious criminal charge behind closed doors. The court said that the comment was unfair and false in alleging judicial impropriety. The court explained that the basis of this branch of the law of contempt is that "it is contrary to the public interest that public confidence in the administration of justice should be undermined".²⁰

In Australia, in 1983, the High Court refused to grant leave to appeal against the finding by the Federal Court that a trade union leader was guilty of contempt, and should be sent to prison for three months, for stating that a court had allowed an appeal in an earlier case because of strike action by workers. Gibbs CJ stated:

The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.²¹

Judges, like other public servants,
are subject to criticism.
In this context, as in others,
freedom of expression is
a core value of a free society.

²² *R v Kopyto* (1987) 47 DLR (4th) 213, 223-224 (Cory JA).

²³ *Ibid*, at page 219.

²⁴ One judge held that an offence of scandalising the judiciary was inconsistent with the right to freedom of expression under the Canadian Charter of Rights. Two judges held that the offence was committed only if the publication created a substantial and immediate danger to the administration of justice. And the other two judges held that the offence could be established only if the publication created a serious risk of bringing the administration of justice into disrepute. They all agreed that the offence was not established on the facts.

²⁵ *Wong Yeung Ng v The Secretary for Justice* CACV 161A/1998 (Court of Appeal, 9 February 1999), paragraph 53 where Vice-President Mortimer said that “sustained scurrilous, abusive attacks made in bad faith, or conduct which challenges the authority of the court, are not susceptible of reasoned answer. If they continue unchecked they will almost certainly lead to interference with the administration of justice as a continuing process”. See also *Secretary for Justice v Choy Bing Wing* HCMP 1313/2010 (Court of First Instance, 7 January 2011).

²⁶ Mr Justice Litton PJ said, for the majority of the Appeal Committee of the Court of Final Appeal (one judge out of three dissented): “Where the contemnor goes way beyond reasoned criticism of the judicial system and acts in bad faith, as the applicant has done in this case, the guarantee of free speech cannot protect him from punishment”: *Wong Yeung Ng v The Secretary for Justice* FAMC No 8 of 1999 (Court of Final Appeal, 23 June 1999), paragraph 11.

In 1987, the Court of Appeal of Ontario, in Canada, allowed an appeal by a lawyer who had been convicted of scandalising the judiciary by what one judge in the Court of Appeal described as “the whining of an unhappy loser”.²² The lawyer had told a newspaper reporter that the decision against his client was “a mockery of justice. It stinks to high hell”²³—a feeling that all advocates have had, though most of us express such views only to our sympathetic spouses or our domestic pets. The Canadian court of five judges agreed that the comments did not amount to a contempt, though they were badly split as to the reasons for that conclusion. However, the majority said that the offence of scandalising the judiciary was not of itself inconsistent with the right to free speech.²⁴

In Hong Kong, in 1999, the Court of Appeal upheld a sentence of four months’ imprisonment on the editor of the *Oriental Daily News*, a Chinese-language newspaper, for acts of contempt which included scandalising the judiciary. The newspaper, annoyed by adverse decisions by the courts and by the Obscene Articles Tribunal, published a series of abusive and offensive articles, impugning the integrity of the judiciary and the tribunal and abusing them as “scumbags”, “pigs” and “dogs”, with various additional epithets.²⁵ The Appeal Committee of the Court of Final Appeal refused leave to appeal.²⁶

Also in 1999, the Supreme Court of India held that scandalising the judiciary is a criminal offence consistent with the constitutional right to free speech. Chief Justice Dr

There are limits
to freedom of speech
in this context.
It is unlawful
to insult the judiciary
with scurrilous abuse,
or to allege bad faith
or a lack of
impartiality,
at least where there is
no reasonable basis
for such criticisms.

²⁷ *Narmada Bachao Andolan v Union of India* (1999) AIR SC 3345, 3346-3347, paragraph 6.

²⁸ *Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321.

²⁹ *Re Chinamasa* (2000) 12 BCLR 1294, 1309-1310.

³⁰ *BBC News Website*, 18 July 2002.

Anand said that while the court should avoid being oversensitive, “vulgar debunking cannot be permitted to pollute the stream of justice”.²⁷

In the same year, 1999, the Court of Appeal of Malaysia sent a journalist to prison for six weeks for contempt of court by scandalising the judiciary. He had written an article which stated that a civil claim brought by the wife of a Malaysian judge on behalf of her son had been improperly expedited because of the father’s status.²⁸

In Zimbabwe, in 2000, the Supreme Court held that the offence of scandalising the judiciary was compatible with the constitutional right to freedom of speech. Chief Justice Anthony Gubbay said that judges, unlike most public figures, “have no other proper forum in which to reply to criticisms” and so they deserve protection against allegations of “improper or corrupt motives or conduct”.²⁹ The case concerned highly critical comments by the Attorney-General, later the Minister of Justice of Zimbabwe, about a judicial decision. Those comments were later held to be a contempt of court and a fine was imposed on the Minister.³⁰

In South Africa, in 2001, the Constitutional Court held that the offence of scandalising the judiciary continued to apply, particularly in relation to statements “reflecting adversely on the integrity of the judicial process or its officers” and which were “likely to damage the administration of justice”. Justice Kriegler, for the Court, recognised that

I am not presuming
to advise you what the law
should be in Malaysia
or indeed in
any other jurisdiction.
Though I would hope
that the points I make
may be considered relevant
in each jurisdiction.

Legal ideas
do not stop
at passport
control.

³¹ *The State v Mamabolo* (2001) 3 SA 409 (CC), at paragraphs 33, 45 and 61.

³² *Shadrake v Attorney-General* [2011] SGCA 26 (27 May 2011) at paragraphs 22 and 143.

the scope for conviction on a charge of scandalising the judiciary must be “narrow indeed if the right to freedom of expression is afforded its appropriate protection”. On the facts, the court allowed the appeal by an official who had been convicted for commenting that a judge had made a mistake in granting bail to an offender.³¹

In Singapore, in 2011, the Court of Appeal upheld a sentence of six weeks’ imprisonment on an author who had written a book suggesting that the decisions of the courts in death penalty cases were influenced by political considerations. Justice of Appeal Andrew Phang Boon Leong, for the Court of Appeal, identified the fundamental purpose of the law relating to scandalising the judiciary as “to ensure that public confidence in the administration of justice is not undermined”. The Court of Appeal found that the book contained “a series of fabrications, distortions and false imputations in relation to the courts of Singapore”. While recognising that the appellant was free to engage in the debate for or against capital punishment, he was not free, said the court, to “scandalise the very core of the mission and function of the judiciary”.³²

So the common law of scandalising the judiciary remains alive and active in many parts of the common law world. The case-law recognises three main principles. The first is that judges, like other public servants, are subject to criticism. In this context, as in others, freedom of expression is a core value of a free society.

The existence of a criminal offence of scandalising the judiciary will inevitably deter people from speaking out on perceived judicial errors. Judges, like other public servants, must be open to criticism because freedom of expression helps to expose error and injustice and it promotes debate on issues of public importance.

³³ *The State v Mamabolo* (2001) 3 SA 409 (CC), at paragraphs 16-20.

³⁴ See for example Lord Steyn for the Privy Council in 1999 in upholding the constitutional validity of the offence of scandalising the judiciary in Mauritius, where a newspaper had falsely alleged that the Chief Justice had selected which judges should hear his libel claim against a politician: *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 305-306.

The second principle of the common law is that there are limits to freedom of speech in this context. It is unlawful to insult the judiciary with scurrilous abuse, or to allege bad faith or a lack of impartiality, at least where there is no reasonable basis for such criticisms.

The third principle of the common law is that the justification for the criminal offence, and therefore the circumstances in which it may be applied, are based not on protection of the dignity of the individual judge but on the need to maintain public confidence in the administration of justice. The argument was stated by Justice Kriegler for the South African Constitutional Court in 2001:

Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute.³³

Similar reasoning has been expressed by many other judges.³⁴

The European Court of Human Rights has accepted that, in principle, States may use the criminal law to protect courts from unfounded attacks by way of insults or allegations of bias in order to maintain the public confidence that judges need to be able to perform their function of

Houlden JA:

“If the way in which judges and courts conduct their business commands respect, then they will receive respect, regardless of any abusive criticism that may be directed towards them.”

³⁵ See *Barfod v Denmark* (1989) 13 EHRR 493, 500-501, paragraphs 33-34; *Prager v Austria* (1995) 21 EHRR 1, 19-21, paragraphs 34-38; and *De Haes v Belgium* (1997) 25 EHRR 1, 55-56, paragraphs 46-49, and in particular at paragraph 37: “The courts – the guarantors of justice, whose role is fundamental in a state based on the rule of law – must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to criticism”. See also *Zugic v Croatia* (Application No 3699/08, 31 May 2011) at paragraphs 46-49.

³⁶ *Skalka v Poland* (2003) 38 EHRR 1, 10, paragraph 45. The European Court has also overturned some criminal sanctions on the basis that it was not necessary to restrict free speech where the criticism of judges was on a matter of public interest: see, for example, *Hrico v Slovakia* (Application No 49418/99, 20 July 2004); and *Amihalachioaie v Moldova* (2005) 40 EHRR 833, 840, paragraphs 35-36.

³⁷ Peter Hain, *Outside In* (Biteback Publishing Ltd, 2011), pages 332-333.

upholding justice under the rule of law.³⁵ Severe sanctions have, on occasions, been overturned by the European Court as disproportionate, as in the case of a man sent to prison for eight months in Poland for writing a letter to the President of the Regional Court describing his judicial colleagues as “irresponsible clowns”.³⁶ But the European Court has not questioned the validity of laws which penalise abuse of the judiciary or criticism which impugns judicial integrity.

All of this amounts to a formidable quantity and quality of judicial authority across the common law world. But is it persuasive? The question of principle remains: should the offence of scandalising the judiciary remain part of the law? That issue is currently being considered by Parliament in London. The impetus for reconsideration of whether to retain the common law offence is the attempt, earlier this year, to prosecute Mr Peter Hain MP, the former Secretary of State for Northern Ireland. In 2011, Mr Hain published his autobiography. He was critical of the way in which a Northern Ireland High Court Judge, Mr Justice Girvan (now a Lord Justice), had, a few years earlier, dealt with a judicial review application against one of Mr Hain’s decisions. Mr Hain described the judge’s conduct as “high-handed and idiosyncratic” and said he “thought the judge off his rocker”.³⁷ All authors hope that their work will attract a wide audience. But not necessarily an audience in the Attorney-General’s department. Mr John Larking QC, the Attorney-General for Northern Ireland, brought proceedings against Mr Hain in the High Court of Northern Ireland alleging that the comments were in contempt of

The modern offence of scandalising the judiciary recognises that some criticism of the judiciary is lawful.

What is prohibited is abuse and unfounded allegations of judicial impropriety. But it is unlikely to promote public confidence that the courts themselves assess whether allegations of impropriety against the judiciary are justified.

³⁸ *The Guardian*, 17 May 2012.

³⁹ *Hansard*, House of Lords, 2 July 2012, columns 555-566. Lord Carswell's speech is at column 561.

⁴⁰ Columns 563-564.

court. The legal proceedings attracted very considerable criticism, and indeed far more attention than Mr Hain's book would otherwise have received. Mr Larkin withdrew the charge of contempt after Mr Hain made clear in a letter that he had not intended to question the motivation or capabilities of the judge. Mr Larkin concluded that he no longer believed there was any risk of damage to public confidence in the administration of justice.³⁸

As a result of this failed prosecution, I, as a member of the House of Lords, tabled an amendment to the Crime and Courts Bill during the Committee Stage this summer to abolish the common law offence of scandalising the judiciary. The amendment was signed by, amongst others, Lord Mackay of Clashfern, a former Lord Chancellor. I suggested that Mr Hain was entitled to express criticism of a judicial judgment, whether his views are right or wrong (on which I take no position), respectful or outspoken. During the debate in the House of Lords in June, the amendment was supported by Lord Carswell, a former Lord Chief Justice of Northern Ireland and a former member of the Appellate Committee of the House of Lords. He said that the offence of scandalising the judiciary was not necessary and that if judges were unjustly criticised (as he had been), "they have to shrug their shoulders and get on with it".³⁹ The Minister, Lord McNally, gave the amendment a cautious welcome and said that the Ministry of Justice wanted to consult with the judiciary over the summer before deciding whether to support the amendment at Report Stage.⁴⁰ As a result of the debate in Parliament, the Law Commission of England and

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⁴¹ Law Commission Consultation Paper No 207, “Contempt of Court: Scandalising the Judiciary” (10 August 2012).

⁴² *R v Kopyto* (1987) 47 DLR (4th) 213, 255. Cory JA added at page 227: “the courts are not fragile flowers that will wither in the hot heat of controversy”.

Wales expedited the publication of a consultation paper in which it proposed that the offence of scandalising the judiciary should be abolished.⁴¹

There are four main points which I think are central to an analysis of whether to maintain this criminal offence. I emphasise that the strength or otherwise of these points will depend on the circumstances in each jurisdiction. I am certainly not presuming to advise you what the law should be in Malaysia or indeed in any other jurisdiction. Though I would hope that the points I make may be considered relevant in each jurisdiction. Legal ideas do not stop at passport control.

The first point is that the offence of scandalising the judiciary is based on assumptions which seem to me to be very dubious indeed. This criminal offence assumes not only that public confidence in the administration of justice would be undermined by critical comments but also that such confidence is maintained or restored by a criminal prosecution, or the threat of a criminal prosecution. The true position is surely as stated by Houlden JA in the Ontario Court of Appeal:

If the way in which judges and courts conduct their business commands respect, then they will receive respect, regardless of any abusive criticism that may be directed towards them.⁴²

Mr Justice Black for the
United States Supreme Court
doubted that
“respect for the judiciary
can be won by shielding judges
from published criticism”.
He added that
“an enforced silence
... would probably
engender resentment,
suspicion and
contempt much more
than it would
enhance respect”.

⁴³ See Clive Walker, “Scandalising in the Eighties” (1985) 101
LQR 359, 381-384.

If confidence in the judiciary is so low that statements by critics would resonate with the public, such confidence is not going to be restored by a criminal prosecution in which judges find the comments to be scandalous or in which the defendant apologises. The paradox of this area of the law is that the statements most likely to undermine public confidence in the judiciary—one hopes this is never the case in any of the jurisdictions in which these issues have arisen—are those that are true or least have some basis.

The irony is that public confidence is surely undermined far less by a hostile book or newspaper comment that would otherwise have been ignored than by maintaining and applying a criminal offence which suggests that the judiciary is such a delicate flower that it, alone amongst public institutions, needs protection from criticism and cannot maintain its reputation by public perception of how it actually performs its functions.

The second point is that the existence of a criminal offence of scandalising the judiciary will inevitably deter people from speaking out on perceived judicial errors. Judges, like other public servants, must be open to criticism because in this context, as in others, freedom of expression helps to expose error and injustice and it promotes debate on issues of public importance. The damage done by the maintenance of this offence substantially outweighs, in my opinion, any possible good that it achieves.⁴³ Indeed, there is a particular reason of principle why judges should not impose restrictions on free speech that relates to the

“Where criticism deserves a response, there are other means of answering it than a criminal prosecution. Often, the criticism of a judge will not deserve a response. In those rare cases where an answer is required, it is wrong to suggest that judges cannot answer back and so a criminal prosecution is the only remedy.”

⁴⁴ *The State v Mamabolo* (2001) 3 SA 409 (CC) (Sachs J, concurring judgment), paragraph 78.

⁴⁵ See *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 306B-E (Lord Steyn for the Judicial Committee of the Privy Council). See also, for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 32 and 38-39 (Mason CJ and Brennan J in the High Court of Australia); *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225, 229-230 (Richmond P for the Court of Appeal of New Zealand); and *Shadrake v Attorney-General* [2011] SGCA 26 (Andrew Phang Boon Leong JA for the Court of Appeal of Singapore, 27 May 2011) at paragraphs 83-84.

⁴⁶ *R v Kopyto* (1987) 47 DLR (4th) 213, 226 .

performance of their own functions. Justice Albie Sachs pointed out in the South African Constitutional Court that “as the ultimate guardian of free speech, the judiciary [should] show the greatest tolerance to criticism of its own functioning”.⁴⁴

The third point is that the modern offence of scandalising the judiciary recognises that some criticism of the judiciary is lawful. What is prohibited is abuse and unfounded allegations of judicial impropriety.⁴⁵ But it is unlikely to promote public confidence that the courts themselves assess whether allegations of impropriety against the judiciary are justified. As for abuse, there are serious difficulties with a criterion which is based on politeness, and not just as to whether it should really be the function of the criminal law to enforce polite behaviour. As Cory JA said in the Ontario Court of Appeal,

Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public to the need for reform, and to suggest the manner in which that reform may be achieved.⁴⁶

The fourth point is that where criticism deserves a response, there are other means of answering it than a criminal prosecution. Often, the criticism of a judge will not deserve a response. A wise judge follows the advice of Lord Justice Simon Brown (now Lord Brown of Eaton-under-Heywood) in a case in 1999: “a wry smile is, I think, our

Respect for the judiciary,
so vital to the maintenance
of the rule of law,
is undermined rather
than strengthened
by the existence and use
of a criminal offence
which provides special protection
against free speech
relating to the judiciary.

⁴⁷ *Attorney-General v Scriven* CO 1632/99 (Divisional Court) as quoted in *Arlidge, Eady and Smith on Contempt* (2011, 4th edition), footnote to paragraph 5-207.

⁴⁸ *McLeod v St Aubyn* [1899] AC 549, 561.

⁴⁹ See *The State v Mamabolo* (2001) 3 SA 409 (CC) (Kriegler J for the Constitutional Court of South Africa), paragraph 24: “it is not the self-esteem, feelings or dignity of any judicial officer, or even the reputation, status or standing of a particular court that is sought to be protected, but the moral authority of the judicial process as such”.

⁵⁰ *The Times*, 22 and 24 July 1992.

⁵¹ *The Guardian*, 9 March 2011. See also *Arlidge, Eady and Smith on Contempt* (2011, 4th edition), paragraph 5-208.

usual response and the more extravagant the allegations, the more ludicrous they sound”.⁴⁷ As Lord Morris said for the Privy Council in 1899, judges are “satisfied to leave to public opinion attacks or comments derogatory or scandalous to them”.⁴⁸ In those rare cases where an answer is required, it is wrong to suggest that judges cannot answer back and so a criminal prosecution is the only remedy. In London, the Lord Chief Justice gives regular press conferences to address issues of judicial administration. He can make a public statement in answer to criticisms, where appropriate. The equivalent senior judge in other jurisdictions could respond in similar ways if critical comments are thought to deserve an answer.

Although contempt of court is not concerned to protect the reputation of an individual judge,⁴⁹ it is relevant that there is a remedy in libel law for false and critical allegations about a particular judge. Mr Justice Popplewell won damages of £7,500 from a newspaper in 1992 for libel after it wrongly suggested that he fell asleep during a murder trial.⁵⁰ Last year, Lord Justice Sedley won an apology in the High Court after bringing libel proceedings in respect of false statements in the *Daily Telegraph* about his conduct of a case.⁵¹

The conclusion which I have reached on this interesting area of law—I hope this audience finds it as interesting as I do—is that respect for the judiciary, so vital to the maintenance of the rule of law, is undermined rather than strengthened by the existence and use of a criminal

Justice Albie Sachs pointed out
in the South African
Constitutional Court that
“as the ultimate guardian
of free speech,
the judiciary [should]
show the greatest
tolerance to criticism
of its own
functioning”.

⁵² *Bridges v State of California* 314 US 252, 270-271 (1941).

⁵³ *The State v Mamabolo* (2001) 3 SA 409 (CC) (Sachs J, concurring judgment in the Constitutional Court of South Africa), paragraph 78.

offence which provides special protection against free speech relating to the judiciary. Other legal systems do not share the commitment of the United States to freedom of expression. Our jurisdictions recognise, rightly I think, that restrictions on free speech are often necessary to protect other valuable social goals. But there is force in the comment by Mr Justice Black for the United States Supreme Court in a 1941 judgment overturning a fine on newspapers for critical comments about pending litigation. The judge doubted that “respect for the judiciary can be won by shielding judges from published criticism”. He added that “an enforced silence ... would probably engender resentment, suspicion and contempt much more than it would enhance respect”.⁵² Respect for the courts will be all the stronger “to the degree that it is earned, rather than to the extent that it is commanded”.⁵³ The offence of scandalising the judiciary should be abolished. ❧



The judiciary
has freedom
from political,
legislative and
executive
control.

It is only when the judiciary
enjoys such freedom can
the judiciary be said to be
independent.

HRH Sultan Azlan Shah

Checks and Balances in a Constitutional Democracy

Harvard Club of Malaysia

19 September 1987, Kuala Lumpur



ROYAL ADDRESS

His Royal Highness Raja Nazrin Shah

Regent of Perak Darul Ridzuan

*27th Sultan Azlan Shah
Law Lecture*

The Right Honourable Lord Sumption and Lady Sumption,

His Royal Highness Sultan Azlan Shah was particularly looking forward to this lecture to be delivered by the Right Honourable Lord Sumption, but on the advice of his personal physicians, His Royal Highness is unable to grace us with his presence this evening.

HRH Sultan Azlan Shah and HRH Tuanku Bainun have asked me to convey their personal greetings to you both, and to extend their deep regrets for not being able to grace this evening's event.

My wife and I wish you both a very warm welcome to Malaysia. On behalf of the Sultan Azlan Shah Foundation and the University of Malaya, I thank you, Lord Sumption, for the honour you bestow on us by being the Speaker for this evening's Lecture.



Ladies and Gentlemen,

The Right Honourable Lord Sumption needs very little introduction. Your overwhelming presence here this evening is clear recognition of his eminence.

Lord Sumption is one of the most outstanding jurists in the United Kingdom, if not in the Commonwealth. His elevation directly from the English Bar to the highest court in the United Kingdom, the Supreme Court, the first barrister in over 60 years to do so, is a clear testimony of his brilliance.

During the relatively short period during which Lord Sumption has sat on the Supreme Court, he has already made a significant mark by delivering some of the leading judgments of the Court.

Only recently, in an important decision of the Supreme Court, Lord Sumption held that school authorities could not delegate their duty of care towards school children to a third party so as to absolve it from an action in negligence brought against the school. In that case, it was held that the school was still liable in negligence when a student suffered serious brain injuries during a swimming lesson in the school swimming pool, even though the school did not conduct the lessons itself.

In another case decided earlier this year, Lord Sumption elucidated with clarity the century-old principle of company law, the doctrine of piercing or lifting of the corporate veil, and how it may intersect with a matrimonial case.

In that case, seven properties, five of which were in London, were held by two offshore companies, and not in the name of the husband. The question



before the Supreme Court was whether the court had power to order the transfer of these seven properties to the wife given that they legally belonged not to the husband but to his companies. It was held that as the husband, and not the two companies had provided the funds to purchase the properties, and as he had control over the two companies, the properties were held on trust for the husband, and therefore formed part of the matrimonial assets which the wife was entitled to.

This decision has been hailed as a landmark decision in both company law and family law.

One fact that many of you may not be aware of is that Lord Sumption, even before studying law, studied at Eton and then studied history at Magdalen College, Oxford where he obtained a First. Subsequently, as a Fellow at Magdalene College, he taught history for five years. It may come as a surprise to some of you that Lord Sumption is quoted to have said, “I don’t love law but I enjoy practising it. I do love history.”

His first book on pilgrimage in the Middle Ages was published in 1974, followed by *The Albigensian Crusade* in 1978.

Since the late 1990s he has been engaged on a vast narrative history of the Hundred Years War. Three volumes (*Divided Houses*, *Trial by Battle*, and *Trial by Fire*) have been published to critical acclaim. I understand that there will be another two: the fourth being scheduled to appear in 2015 to coincide with the 600th anniversary of the English victory at Agincourt. His work on the Hundred Years War has also been aptly described as a “magisterial account”, and “one of the great historical works of our time”.



Only after his stint as an academician did Lord Sumption pursue a career in law. To quote: “Eventually law seemed to offer the best opportunity for an intellectually stimulating occupation with the opportunity to make a reasonable living”. The rest is “history” as they say.

Today, besides being a brilliant jurist and a well-regarded historian, Lord Sumption is a Governor of the Royal Academy of Music; he plays the piano and has a keen interest in the opera.

He is truly an amazing and inspirational figure to all of us who have not pursued a legal career as yet, and are harbouring an ambition to do so.

Ladies and Gentlemen, it now gives me great pleasure to invite The Right Honourable Lord Sumption to deliver the Twenty-Seventh Sultan Azlan Shah Law Lecture.

The Right Honourable Lord Sumption.



I am not going to suggest
that the fabric of society
will break down because
judges make law
for which there is no
democratic mandate.

The process by which democracies decline
is more subtle than that. They are rarely
destroyed by a sudden external shock or
unpopular decisions. The process is usually
more mundane and insidious.

What happens is that they are slowly drained
of what makes them democratic,
by a gradual process of internal decay
and mounting indifference, until one suddenly
notices that they have become something different,
like the republican constitutions of Athens
or Rome or the Italian city-states
of the Renaissance.

Lord Sumption

The Limits of Law

27th Sultan Azlan Shah Law Lecture, 2013

“Your Royal Highness, ladies and gentlemen, it is a great honour as well as a personal pleasure for me to be giving the Sultan Azlan Shah Law Lecture.

This is the twenty-seventh lecture in this distinguished series, and I am conscious that I am following in the footsteps of some of the outstanding jurists of the common law world.”

Lord Sumption

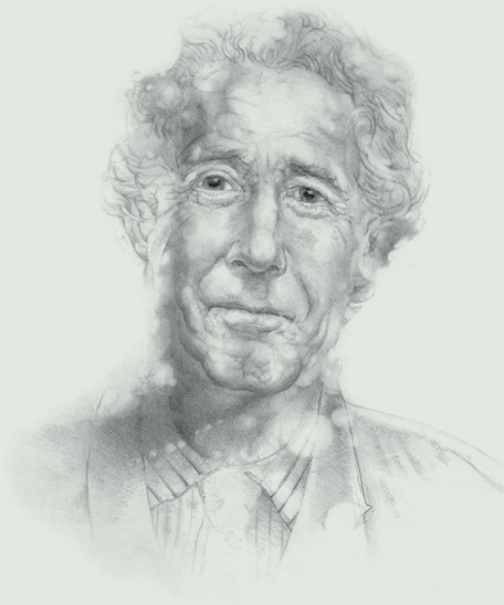
The Limits of Law

27th Sultan Azlan Shah Law Lecture, 2013



The Right Honourable Lord Sumption

The Limits of Law



Jonathan Sumption
(b. 9 December 1948)

Lord Jonathan Sumption, OBE was born on 9 December 1948. He was educated at Eton College and then Magdalen College, Oxford University, where he graduated with first-class honours in history in 1970.

Lord Sumption taught history at Magdalen College for five years prior to becoming a barrister. He was called to the Bar by the Honourable Society of the Inner Temple in 1975, became a Queen's Counsel in 1986 and a Bencher of the Inner Temple in 1991.

In May 2011, Lord Sumption was appointed to the United Kingdom Supreme Court (previously the Appellate Committee of the House of Lords), the United Kingdom's highest court. He was the first barrister in



more than 60 years to be appointed to the United Kingdom's apex court directly from the Bar.

Prior to his appointment as a judge of the Supreme Court, Lord Sumption had been a recorder and Deputy High Court Judge, and a judge of both the Court of Appeal of Jersey and the Guernsey Court of Appeal. He was also a commissioner of the Judicial Appointments Commission, the body which takes responsibility for appointing judges in England and Wales.

While at the Bar, Lord Sumption was one of England's most sought-after barristers, and has been described as the "cleverest man in Britain". He received universal acclaim from legal directories in the United Kingdom, where he was, among other things, said to be "the best barrister in the country bar none"; "the Rolls-Royce of the commercial Bar"; and "the best of his and quite likely any other generation".

Lord Sumption appeared in numerous landmark decisions of the English courts, including many well-known House of Lords decisions such as *Moore Stephens v Stone & Rolls Ltd* [2009] UKHL 39, *Three Rivers District Council v Bank of England* [2004] UKHL 48, *Dubai Aluminium v Salaam* [2002] UKHL 48, *Equitable Life Assurance v Hyman* [2000] UKHL 39; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] UKHL 12. He was also regularly instructed to appear in other leading common law jurisdictions such as Australia and Hong Kong.

In his last trial conducted as a barrister before being sworn in as a justice of the United Kingdom Supreme Court, Lord Sumption acted for Roman Abramovich, the owner of Chelsea Football Club, in his successful defence against



a £3.2 billion lawsuit brought by the late Boris Berezovsky, a case which was described in the media as the biggest private court case in British legal history.

Lord Sumption has delivered judgment in numerous landmark decisions of the UK Supreme Court since his appointment in 2011.

In *Woodland v Essex County Council* [2013] UKSC 66, Lord Sumption delivered the judgment of the Supreme Court holding that school authorities could not delegate their duty of care towards school children to a third party so as to absolve itself from an action in negligence brought against the school. In that case, it was held that the school was still liable in negligence when a student suffered serious brain injuries during a swimming lesson in the school swimming pool, even though the school did not conduct the lessons itself.

Lord Sumption delivered the leading judgment in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, wherein Lord Sumption provided an authoritative restatement of the century-old principle of company law, the doctrine of piercing or lifting of the corporate veil, and how it may intersect with a matrimonial case. This decision has been hailed as a landmark decision in both company law and family law.

In *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, Lord Sumption delivered the leading judgment of the Supreme Court which held that the UK Treasury had acted unlawfully in directing sanctions to be imposed restricting the appellant Iranian commercial bank from accessing the UK financial markets. The decision was based on the grounds that the Treasury's direction was irrational, disproportionate and discriminatory, and that the Treasury, in breach of the rules of natural justice, had failed to give the bank an opportunity to make representations before the direction was made.



Lord Sumption also gave judgment in the decision of the UK Supreme Court in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, a case of great public interest where an enlarged panel of nine Supreme Court justices had to determine whether the present state of the law of England and Wales relating to assisting suicide infringed the European Convention on Human Rights, and whether the code published by the Director of Public Prosecutions relating to prosecutions of those who are alleged to have assisted suicide was lawful.

Outside of the law, Lord Sumption is also an accomplished medieval historian, owning in excess of 7,000 history books. His critically-acclaimed work on the Hundred Years War—with three volumes entitled *Trial By Battle* (1990), *Trial by Fire* (1999) and *Divided Houses* (2009) published to date—has been described as “magisterial” and as a work that continues “to redefine our understanding of the Hundred Years’ War”. Lord Sumption once observed of war: “war has been the chief collective enterprise of mankind until quite recently. War is destructive and inhumane. Yet it has shaped human institutions. It has stretched human experience and human capabilities.”

Lord Sumption is the Deputy Chairman of the Governing Body of the British Royal Academy of Music. Between 2002 and 2011, he was a regular book reviewer for *The Spectator*. He was honoured as an Officer of the Most Excellent Order of the British Empire (OBE) in 1998.

Lord Sumption is married to Teresa Sumption, née Whelan and has three children.



“Of course, a sovereign
Parliament may transfer part
of its legislative power
to other bodies which are
not answerable even indirectly
to the people of
the United Kingdom.

But it would be odd to deny that
this undermines the democratic process,
simply because Parliament has done it.

A democratic Parliament
may abolish elections
or exclude the opposition
or appoint a dictator.

But that would not
make it democratic.”

Lord Sumption

The Limits of Law

27th Sultan Azlan Shah Law Lecture, 2013



Parliament is
sovereign and
has the sole
prerogative
of legislating.
Ministers are
answerable to
the courts for
the lawfulness
of their acts.

But they are accountable
exclusively to Parliament
for their policies and for the
efficiency with which they
carried them out, and of
these things Parliament was
the sole judge. This is neat.
It is elegant. And it is
perfectly useless, because
it begs all the difficult
questions.

27

The Limits of Law

Lord Sumption

Justice of the Supreme Court of the United Kingdom

Your Royal Highness, ladies and gentlemen, it is a great honour as well as a personal pleasure for me to be giving the Sultan Azlan Shah Law Lecture. This is the twenty-seventh lecture in this distinguished series, and I am conscious that I am following in the footsteps of some of the outstanding jurists of the common law world. I am also conscious, as I suspect all of us are, that I am doing so in the absence of His Royal Highness Sultan Azlan Shah, for whom these lectures have been a source of justifiable pride. I am sure that I reflect the feeling of all of us in wishing him a swift return to good health.

The title of my lecture is not, I am afraid, calculated to tell you much about its contents. It is in part inspired by a well-known essay published in 1978 called “The Forms and Limits of Adjudication” by Lon Fuller, the distinguished legal philosopher who held the chair of law at Harvard for many years. Professor Fuller took as his starting point the

Text of the Twenty-Seventh Sultan Azlan Shah Law Lecture delivered on 20 November 2013 in the presence of HRH Raja Nazrin Shah, Crown Prince of Perak, and HRH Tuanku Zara Salim.

In a precedent-based system,
judges lay down
general statements of
principle which then
stand as authority
in future cases.

They do not
merely discover
legal principles
concealed in the
luxuriant undergrowth
of ancient principle
and scattered
legal decisions,
as the great eighteenth century
jurist Blackstone supposed
and generations of common
lawyers pretended.

¹ [2005] 2 AC 680 at [32]. |

fact that the system of adjudication by courts of law was what he called “a form of social ordering”. It was part of the complex mechanism by which the relations between people are governed and regulated. It operates side by side with other means of social control, such as legislation, administrative action, professional self-regulation, and more or less powerful social or cultural conventions. The question which he asked himself was this: what kinds of social tasks can properly be assigned to judges and courts, as opposed to these other agencies of social control?

It is a much-debated question, and there are two features of our legal culture that make it a particularly important and difficult one.

The first is that in the common law world there are unquestionably some areas in which judges necessarily make law. In a precedent-based system, they lay down general statements of principle which then stand as authority in future cases. They do not merely discover legal principles concealed in the luxuriant undergrowth of ancient principle and scattered legal decisions, as the great eighteenth century jurist Blackstone supposed and generations of common lawyers pretended. They make law within broad limits determined by statute and legal policy. In recent years, appellate courts in the United Kingdom have been increasingly open about this. In 2005, in *Re Spectrum Plus Ltd*,¹ Lord Nicholls of Birkenhead put the point in this way:

“Laws J, one of the most thoughtful constitutional lawyers to have sat on the English bench in recent times, considered that access to justice at an affordable price was not just another government service. It was a constitutional right, which could only be restricted with specific statutory authority. Since Britain does not have a written constitution, Laws J was exercising a purely judicial authority when he declared this constitutional right to exist.”

Judges have a legitimate law-making function. It is a function they have long exercised. In common law countries much of the basic law is still the common law. The common law is judge-made law. For centuries, judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations.

Just as common law judges make law, so also they unmake it. They overrule past decisions, even those of the highest appellate courts. The declaratory theory of law holds that in that case the earlier decisions must always have been wrong. It was just that the courts had taken a long time to realise it. As Lord Reid put it in *West Midland Baptist Association Inc v Birmingham Corporation*,²

We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that [the existing rule] is wrong, we must decide that it always has been wrong.

But this is now overtly recognised as the fiction it always has been. The courts of the United States, India, Ireland and the European Union have all asserted the right in certain categories of case to overrule a decision only with prospective effect, a function previously regarded as the special domain of the legislature. In the *Spectrum Plus* case, the House of Lords held that in a suitable case it would do so too. So judges can now not only say that the law was one thing yesterday and another tomorrow. They can actually admit that they are doing it. It is a very significant power.

“Just as common law
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so also they unmake it.

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It is not a power that would be recognised in all legal cultures. Article 5 of the French Civil Code, which has been part of the Code from its inception at the beginning of the 19th century, provides that “judges are not permitted to adjudicate on cases before them by way of statement of general principle or statutory construction.” This means that judges may only formulate principles applicable to the particular facts before them. They may not purport to lay down general rules which would apply in any other case. That would be classified as an essentially legislative function. In keeping with that principle, there is with limited exceptions no doctrine of precedent in French law. This is one reason why the social and political implications of judicial decisions are usually more limited in civil law jurisdictions than they are in the world of the common law.

There is a second reason why we need to think seriously about the proper role of judges in the ordering of society. We live in an age of unbounded confidence in the value and efficacy of law as an engine of social and moral improvement. The spread of Parliamentary democracy across most of the world has invariably been followed by rising public expectations of the state, of which the courts are a part. The state has become the provider of basic standards of public amenity, the guarantor of minimum levels of security and, increasingly, the regulator of economic activity and the protector against misfortune of every kind. The public expects nothing less. Yet protection at this level calls for a general scheme of rights and a more intrusive role for law. In Europe, we regulate almost every

“The power to extrapolate
or extend by analogy the scope
of a written instrument
so as to enlarge its subject-matter
is not always easy to reconcile
with the rule of law.

It is a power which
no national judge
could claim to exercise
in relation to a
domestic statute, even in
a common law system.

It is potentially
subjective, unpredictable
and unclear.”

aspect of employment practice and commercial life, at any rate so far as it impinges upon consumers. We design codes of safety regulation designed to eliminate risk in all of the infinite variety of human activities. New criminal offences appear like mushrooms after every rainstorm. It has been estimated that in the decade from 1997 to 2007, more than 3,000 new criminal or regulatory offences were added to the statute-book of the United Kingdom. Turning from statute to common law, a wide range of acts which a century ago would have been regarded as casual misfortunes or as governed only by principles of courtesy, are now actionable torts.

This expansion of the empire of law has not been gratuitous. It is a response to a real problem. At its most fundamental level, the problem is that the technical and intellectual capacities of mankind have grown faster than its moral sensibilities or its co-operative instincts. At the same time other restraints on the autonomy and self-interest of men, such as religion and social convention, have lost much of their former force, at any rate in the West. The role of social and religious sentiment, which was once so critical in the life of our societies, has been largely taken over by law. So when Lord Nicholls spoke in *Spectrum Plus* of the judiciary's duty to keep the law abreast of current social conditions and expectations, he was making a wider claim for the policy-making role of judges than he realised. Popular expectations of law are by historical standards exceptionally high.

“The moment that
one moves beyond cases
of real oppression
and beyond
the truly fundamental,
one leaves the realm
of consensus behind
and enters that of
legitimate political debate
where issues ought
to be resolved
politically.”

These changes bring into sharper focus the question which I posed at the outset of this lecture: what sort of social reordering can properly be assigned to judges and courts, as opposed to other agencies of social control such as administrators or legislators? In theory, English law has a coherent answer to this question. It was given by Lord Diplock in his speech in the House of Lords in *R v Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Businesses*.³ Parliament is sovereign and has the sole prerogative of legislating. Ministers are answerable to the courts for the lawfulness of their acts. But they are accountable exclusively to Parliament for their policies and for the efficiency with which they carried them out, and of these things Parliament was the sole judge. This is neat. It is elegant. And it is perfectly useless, because it begs all the difficult questions. What is a question of law? What is a question of policy? The Diplock test will yield a different answer depending on how you define the issue.

Let me illustrate this point with an example, not particularly important in itself, but revealing nonetheless. In England, the administration and jurisdiction of the higher courts is governed by the Senior Courts Act 1981. Section 130 of that Act, which remained in force until 2003, is not normally regarded as a great engine of social policy. It empowered the Lord Chancellor to fix the level of court fees. In 1997, the Lord Chancellor introduced new regulations. Their effect was to increase the court fees, while at the same time omitting provisions in the previous regulations which had exempted people on income support. They now had to

Lack of democratic
legitimacy is a potential
problem about all
judge-made law.

In a common law system
it has to be accepted
within limits.

But it is a potentially
a rather serious problem
in the case of judicial decisions
about supposedly
fundamental rights.

⁴ *R v Lord Chancellor ex parte Witham* [1998] QB 575. |

pay the court fee just like anyone else. The object was to reduce the net cost to the state of funding the court system, but the effect was necessarily to make access to the courts more expensive for the poorest section of society.

Mr Witham was a man on income support who wanted to bring an action for libel but could not afford the court fee. So he applied for judicial review of the new regulations.⁴ Now there are at least three different approaches that one might take to a problem like this one. The first is to say that a service such as the administration of justice should be viewed in the same way as any other service provided by the state. It is simply one of a number of competing claims on a limited pot of money. All public services have an opportunity cost. The money that is spent on one service is not available to spend on another which might be equally beneficial. Who is to say whether it is more important that the poor should have affordable access to the courts or that they should have affordable access to hospitals, schools, or any of the other publicly provided services of the state? This is precisely the kind of policy decision which on any orthodox view of English public law is not for judges. It is an inescapably political question.

But there is a second approach. One could say that affordable access to justice was so fundamental a right that the state was under an absolute legal duty to provide it. From this it would follow that access to justice trumped all other calls on the state's budget. Put like that, the question ceases to be a political issue and becomes a legal one.

“Democracy is a constitutional mechanism for arriving at decisions for which there is a popular mandate. But the Convention and the Strasbourg court use the word in a completely different sense, as a generalised term of approval for a set of legal values which may or may not correspond to those which a democracy would in fact choose for itself.”

A third approach is to recognise the absolute character of the duty to provide affordable access to the courts to the poor, while doing it in some other way. For example, one might make legal aid available on a more generous basis or increase income support payments so that the higher court fees became affordable. That approach raises yet further questions. The practical effect of providing legal aid is to increase the resources available to citizens provided that they spend it on litigation. Yet is litigation such a valuable part of our social culture that we should privilege it in this way? If Mr. Witham's income support payments had been increased by enough to pay the court fee, he might have preferred to spend the money on a holiday than on suing his detractor. Is this a choice that should be denied to him? These are not straightforward questions. But more important than their inherent difficulty is that they are not legal questions. We are back in the realms of politics.

Mr Witham's case came before a Divisional Court of the Queen's Bench division, which quashed the regulations. Laws J, one of the most thoughtful constitutional lawyers to have sat on the English bench in recent times, delivered the leading judgment. He considered that access to justice at an affordable price was not just another government service. It was a constitutional right, which could only be restricted with specific statutory authority. Since Britain does not have a written constitution, Laws J was exercising a purely judicial authority when he declared this constitutional right to exist. What he did not do was consider the implications of the question for the distribution of the government's

“What kinds of
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as opposed to
other agencies
of social control?”

⁵ Ibid, at page 586D-E. |

resources or the appropriate method of helping the poor. Indeed, he seems to have thought that the question did not arise. This was because in his view reduced court fees were not a state subsidy supported by taxpayers' money.⁵ He thought that in this respect they were different from legal aid, which the executive would be at liberty to regulate at its discretion.

Now, I am not saying that the result of this case was necessarily wrong, and in any event it was subsequently given statutory force. But it cannot possibly be justified on these grounds. Since the cost of running the courts greatly exceeds the revenue derived from court fees, reducing court fees inevitably involves a large measure of public subsidy, just as legal aid does. The real question was not about the importance of keeping down court fees, but about the *relative* importance of doing so, relative, that is, to other possible uses of the money or other possible ways of helping the poor. What the Divisional Court did was reduce the question before it to a binary question: Was it fundamental to the legal order that the poor should be able to afford court fees—Yes or No? By classifying the question in that narrow way, the court turned it into a question of law. Had it confronted the real issue, it might have concluded that it wasn't a justiciable issue at all.

I cite this minor corner of English public law because it perfectly illustrates the problems associated with the judicial resolution of questions with wider policy implications. But this is not a problem peculiar to English law. There has been

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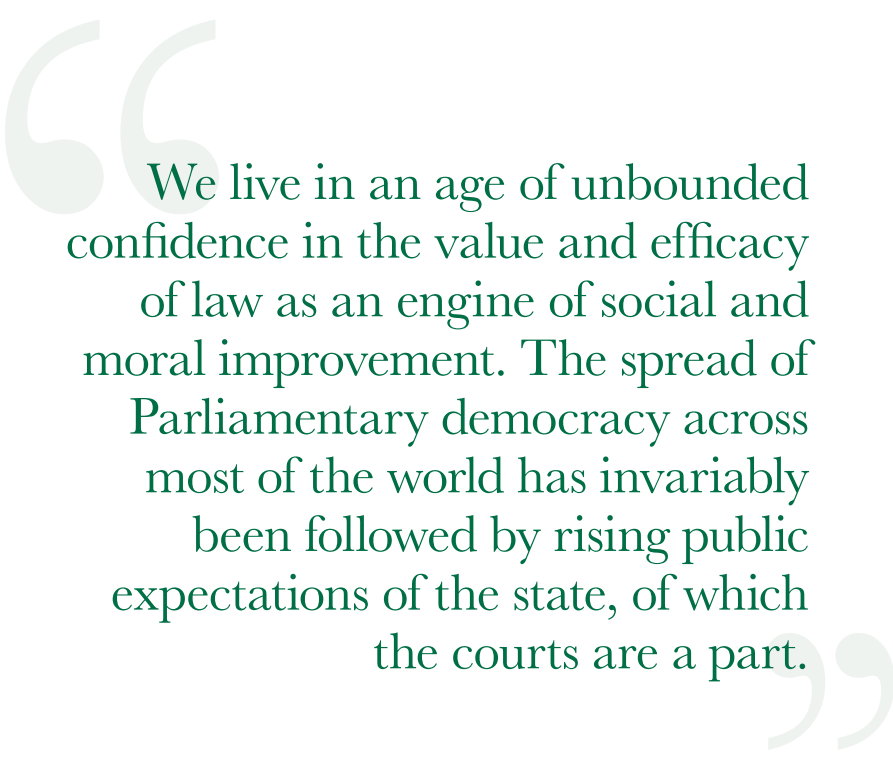
It is a very
significant power.”

a notable tendency in other common law jurisdictions to characterise as questions of law issues which do not really lend themselves to a legal solution. The tendency has been particularly marked in the United States, where it was first noticed by the great French political scientist Alexis de Tocqueville as early as the 1830s. "Scarcely any political question arises in the United States," de Tocqueville wrote, "that is not resolved sooner or later into a judicial question."

In Europe, much the most notable monument of this tendency to convert political questions into legal ones is the European Convention for the Protection of Human Rights and Fundamental Freedoms. This is such an important feature of the current British and European legal scene that it is worth dwelling on it for a while.

The Convention is a treaty initially made between the non-communist countries of Europe in 1950, in the aftermath of the Second World War. It reflected the concern of European nations to ensure that the extremes and despotism and persecution characteristic of the German Third Reich were never repeated, as well as a growing fear of the new totalitarianism then coming into being in the Soviet-dominated communist block.

In all countries of the Council of Europe, the Convention now has the force of law: that is to say that it is not just an international obligation of the signatory states, but is part of their domestic legal order. In the United Kingdom, effect has been given to it since 2000 by



We live in an age of unbounded confidence in the value and efficacy of law as an engine of social and moral improvement. The spread of Parliamentary democracy across most of the world has invariably been followed by rising public expectations of the state, of which the courts are a part.

the Human Rights Act 1998. Alone of the many national and international declarations of human rights, the European Convention provides for its enforcement by an international court, the European Court of Human Rights at Strasbourg, with the right to hear individual petitions and to make decisions which the contracting states bind themselves to put into effect. In the United Kingdom, this is achieved by conferring on all public authorities, including the courts, a statutory duty to give effect to the Convention so far as statute permits. Where statute does not permit, the courts may make a declaration of incompatibility. The understanding is that Parliament will then amend the law so as to remove the inconsistency. The Act provides that in applying the Convention, the courts are bound to have regard to the decisions of the Strasbourg court.

The text of the Convention is wholly admirable. It secures rights which would almost universally be regarded as the foundation of any functioning civil society: a right to life and limb and liberty, access to justice administered by an independent judiciary, freedom of thought and expression, security of property, absence of arbitrary discrimination, and so on. Nothing that I have to say this evening is intended to belittle any of these truly fundamental rights.

But the European Court of Human Rights in Strasbourg stands for more than these. It has become the international flag-bearer for judge-made fundamental law extending well beyond the text which it is charged with applying. It has over many years declared itself entitled to

“The state has become
the provider of basic standards
of public amenity,
the guarantor of minimum
levels of security and,
increasingly, the regulator
of economic activity
and the protector against
misfortune of every kind.

The public expects
nothing less.”

treat the Convention as what it calls a “living instrument”. The way that the Strasbourg court expresses this is that it interprets the Convention in the light of the evolving social conceptions common to the democracies of Europe, so as to keep it up to date.

Put like that, it sounds innocuous, indeed desirable. But what it means in practice is that the Strasbourg court develops the Convention by a process of extrapolation or analogy, so as to reflect its own view of what rights are required in a modern democracy. This approach has transformed the Convention from the safeguard against despotism, which was intended by its draftsmen, into a template for many aspects of the domestic legal order. It has involved the recognition of a large number of new rights which are not expressly to be found in the language of the treaty.

A good example is the steady expansion of the scope of Article 8. The text of Article 8 protects private and family life, the privacy of the home and of personal correspondence. This perfectly straightforward provision was originally devised as a protection against the surveillance state by totalitarian governments. But in the hands of the Strasbourg court it has been extended to cover the legal status of illegitimate children, immigration and deportation, extradition, aspects of criminal sentencing, abortion, homosexuality, assisted suicide, child abduction, the law of landlord and tenant, and a great deal else besides. None of these extensions are warranted by the express

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language of the Convention, nor in most cases are they necessary implications. They are commonly extensions of the text which rest on the sole authority of the judges of the court. The effect of this kind of judicial lawmaking is in constitutional terms rather remarkable. It is to take many contentious issues which would previously have been regarded as questions for political debate, administrative discretion or social convention and transform them into questions of law to be resolved by an international judicial tribunal.

There appear to me to be a number of potential issues about this way of making law.

In the first place, it is not consistent with the ordinary principles on which written law is traditionally elucidated by judges. A system of customary law like the common law may within broad limits be updated and reformulated by the courts which made it in the first place. But very different considerations apply to a written instrument like the Convention, which records not just an agreement between states but the limits of that agreement. The function of a court dealing with such an instrument is essentially interpretative and not creative. The Vienna Convention of 1969 on the Law of Treaties requires every treaty to be interpreted in accordance with the ordinary meaning to be given to its terms, having regard to its object and purpose. While every one will have his own take on particular decisions, there are undoubtedly some cases in which the approach of the Strasbourg court to the Human

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It is a constraint on
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Rights Convention goes well beyond interpretation, and well beyond the language, object or purpose of the instrument. In practice, it seeks to give effect to the kind of Convention that the court conceives that the parties might have agreed today. This process necessarily involves the recognition by the court of some rights which the signatories do not appear to have granted, and some which we know from the negotiation documents that they positively intended not to grant.

Secondly, the power to extrapolate or extend by analogy the scope of a written instrument so as to enlarge its subject-matter is not always easy to reconcile with the rule of law. It is a power which no national judge could claim to exercise in relation to a domestic statute, even in a common law system. It is potentially subjective, unpredictable and unclear. Beyond a very limited point, the reformulation of a written instrument so as to satisfy changed values since it was made is not necessarily an appropriate judicial function. Let me suggest an analogy drawn from recent English case law.

In *Norris v United States of America*,⁶ a bold attempt was made by a Divisional Court in England to rewrite the elements of the common law offence of conspiracy to defraud, so as to cover economic cartels which, although unlawful, had never hitherto been regarded as criminal. The Divisional Court's decision would have been perfectly acceptable by Strasbourg standards. It was a response to changing attitudes to economic manipulation. Cartels

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are less acceptable today than they were a hundred years ago when the law in this area was made. But in the view of the House of Lords, which unanimously overturned the Divisional Court's decision, this was not an acceptable way for judges to change the law. Once a principle of law is established, Lord Bingham observed,⁷ "the requirement of certainty is not met by asserting that at some undefined later time a different view would have been taken." There are of course particular reasons for insisting on the requirement of certainty in the criminal law. But, albeit within broader limits, the same principle must surely apply to all law.

Third, the Strasbourg court's approach to judicial lawmaking gives rise, as it seems to me, to a significant democratic deficit in some important areas of social policy. This is a particular problem given the inherently political character of many of the issues which it decides. Most of the human rights recognised by the Convention are qualified by express exceptions for cases where the national law or action complained of was "necessary in a democratic society" (or some equivalent phrase). The case law of the Strasbourg court provides a good deal of guidance about how these qualifications are to be applied. The court must ask itself a number of questions: Is the measure being challenged necessary? Does it have a legitimate purpose? Does it conform to current practice among other signatories to the Convention? Does it pursue its purpose in a satisfactory way? What alternative and possibly less intrusive measures would have been enough? These questions have only to be stated for it to be obvious that they are questions of policy. Most

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people would regard them as inherently political questions. But their inclusion in the Convention to a considerable extent removes them from the arena of legitimate political debate, by transforming them into questions of law for judges.

Lack of democratic legitimacy is a potential problem about all judge-made law. In a common law system it has to be accepted within limits. But it is a potentially a rather serious problem in the case of judicial decisions about supposedly fundamental rights. It is important to bear in mind that in a Parliamentary democracy the legislature can selectively enact into law whatever parts of the Convention or the case law of the European Court of Human Rights it pleases. We do not need the Convention in order to introduce changes for which there is a democratic mandate. The Convention and its judicial apparatus of enforcement are only necessary in order to impose changes for which there is no democratic mandate. It is a constraint on the democratic process. I think that most people would recognise that there must be some constraints on the democratic process in the interests of protecting politically vulnerable minorities from oppression and entrenching a limited number of rights that the consensus of our societies recognises as truly fundamental. Almost all written constitutions do this. But the moment that one moves beyond cases of real oppression and beyond the truly fundamental, one leaves the realm of consensus behind and enters that of legitimate political debate where issues ought to be resolved politically.

“The United Kingdom has shown a remarkable ability to adapt peaceably to changing realities. Some of these changes have radically disturbed existing expectations and vested interests. Yet the law has adapted itself to them in a way which has generally been accepted by a broad consensus among its citizens. This process of compromise and adaptation in the face of disruptive social change owes almost everything to politics. Courts of law could not have done it. It is not their job.”

⁸ [2005] ECHR 681.

⁹ [2012] ECHR 868.

An interesting illustration has recently been provided by a highly charged issue about the right of convicted prisoners in the United Kingdom to vote in elections. This rule has been part of the statute law of the United Kingdom since the inception of our democracy in the 19th century and has been regularly reviewed and re-enacted since. It has considerable public support. It may or may not be a good rule, but it has nothing to do with the oppression of vulnerable minorities. Yet in two cases, *Hirst v United Kingdom*⁸ and *Scoppola v Italy*,⁹ the European Court of Human Rights has held that the automatic disenfranchisement of convicted prisoners is contrary to the Convention.

In both cases, the court's reasoning revealed its limited interest in the democratic credentials of such policies. In the first, they declined to accept the argument based on democratic legitimacy on the ground that Parliament cannot have devoted enough thought to the penal policy involved. In the second, they disregarded it even more summarily on the ground that the issue was a matter of law for the court, and implicitly, therefore, not a matter for democratic determination at all.

But of course to say that it is a question of law is simply to point out the problem. The Strasbourg court directed the United Kingdom to bring forward legislative proposals intended to amend the relevant statute. The government has brought forward legislative proposals, but the United Kingdom Parliament has declined to approve them. The resultant collision between an irresistible force

“The social and political implications of judicial decisions are usually more limited in civil law jurisdictions than they are in the world of the common law.”

and an immoveable object was considered a month ago by the Supreme Court in *R (on the application of Chester) v Secretary of State for Justice*,¹⁰ in which we held that we were bound to follow the law repeatedly declared by the Strasbourg court, although we declined to grant a remedy as a matter of discretion.

The case law of the European Court of Human Rights, which is largely based on the court's view of what is appropriate to a democratic society, is an interesting example of the ambiguity of political vocabulary. Properly speaking, democracy is a constitutional mechanism for arriving at decisions for which there is a popular mandate. But the Convention and the Strasbourg court use the word in a completely different sense, as a generalised term of approval for a set of legal values which may or may not correspond to those which a democracy would in fact choose for itself.

In his famous essay, "Politics and the English language", written in 1946, George Orwell observed that "if thought corrupts language, language can also corrupt thought". "Democracy" was prominent in the catalogue of words that he singled out as having become largely meaningless in consequence. To give the force of law to values for which there is no popular mandate is democratic only in the sense that the old German Democratic Republic was democratic. Personally, if I may be allowed to speak as a citizen, I think that most of the values which underlie judicial decisions on human rights, both at Strasbourg and in the domestic courts of the United Kingdom, are wholly

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the empire of law
has not been gratuitous.
It is a response
to a real problem.
At its most fundamental level,
the problem is that
the technical and
intellectual capacities
of mankind have
grown faster than
its moral sensibilities
or its co-operative
instincts.”

admirable. But it does not follow that I am at liberty to impose them on a majority of my fellow-citizens without any democratic process.

The answer which is normally put forward to defend of the democratic credentials of this kind of judge-made law is that Parliament has implicitly authorised it, by not reversing the decisions which it disapproved, or in the case of decisions under the Human Rights Convention, by passing the Human Rights Act 1998. I would suggest that the reality, however, is somewhat more complicated.

The treatment of the Convention by the European Court of Human Rights as a “living instrument” allows it to make new law in respects which are not foreshadowed by the language of the Convention and which Parliament would not necessarily have anticipated when it passed the Act. It is in practice incapable of being reversed by legislation, short of withdrawing from the Convention altogether. In reality, therefore, the Human Rights Act involves the transfer of part of an essentially legislative power to another body. The suggestion that this is democratic simply confuses popular sovereignty with democracy. Of course, a sovereign Parliament may transfer part of its legislative power to other bodies which are not answerable even indirectly to the people of the United Kingdom. But it would be odd to deny that this undermines the democratic process, simply because Parliament has done it. A democratic Parliament may abolish elections or exclude the opposition or appoint a dictator. But that would not make it democratic.

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I have spoken mainly of these questions in a British context because that is where my own experience lies. But the frame of mind underlying the case law of the European Court of Human Rights is symptomatic of a much wider phenomenon, namely the resort to fundamental rights, declared by judges, as a prime instrument of social control and entitlement. The main casualty of that approach is the political process, which is no longer decisive over a wide spectrum of social policy.

In many countries, including the United Kingdom, there is widespread disdain for the political process and some articulate support for an approach to lawmaking that takes the politics out of it. This reflects the contempt felt by many intelligent commentators for what they regard as the illogicality, intellectual dishonesty and the irrational prejudice characteristic of party politics. The American philosophers John Rawls and Ronald Dworkin have been perhaps the most articulate modern spokesmen for this point of view.

I think that their attitude, which is shared by some judges, overlooks some fundamental features of the political process. Democracy requires a minimum degree of social cohesion and tolerance of internal differences in order to function properly. But provided that these conditions exist, I would like to suggest to you that politics is quite simply a better way of resolving questions of social policy than judge-made law.

In “Politics and the English language”, George Orwell observed that “if thought corrupts language, language can also corrupt thought”. “Democracy” was prominent in the catalogue of words that he singled out as having become largely meaningless in consequence. To give the force of law to values for which there is no popular mandate is democratic only in the sense that the old German Democratic Republic was democratic.

The public law questions which come before the courts are commonly presented as issues between the state and the individual. But most of them are in reality issues between different groups of citizens. This applies particularly to major social or moral issues, and more generally to issues on which people hold strong and divergent positions. The essential function of politics in a democracy is to reconcile inconsistent interests and opinions by producing a result which it may be that few people would have chosen as their preferred option, but which the majority can live with.

Political parties are rarely monolithic. Although generally sharing a common outlook, they are unruly coalitions between shifting factions, united only by a common desire to win elections. They, therefore, mutate in response to changes in public sentiment, in the interest of winning or retaining power. In this way, they can often be a highly effective means of mediating between those in power and the public from which they derive their legitimacy. They are instruments of compromise between a sufficiently wide range of opinions to enable a programme to be laid before the electorate with some prospect of being accepted. The larger a democracy is, and the more remote its political class from the population at large, the more vital this process of mediation is.

It is true that the political process is often characterised by opacity, fudge, or irrationality, and who is going to defend those? Well, at the risk of sounding paradoxical, I am going to defend them. They are tools of compromise, enabling

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Unfortunately, few people recognise this. They expect their politicians to be not just useful but attractive. They demand principle, transparency and consistency from them. And when they do not get these things, they are inclined to turn to courts of law instead. The attraction of judge-made law is that it appears to have many of the virtues which the political process inevitably lacks. It is transparent. It is public. Above all, it is animated by a combination of abstract reasoning and moral value-judgment, which at first sight appears to embody a higher model of decision-making than the messy compromises required to build a political consensus in a Parliamentary system. There is, however, a price to be paid for these virtues. The judicial resolution of major policy issues undermines our ability to live together in harmony by depriving us of a method of mediating compromises among ourselves. Politics is a method of mediating compromises in which we can all participate, albeit indirectly, and which we are therefore more likely to recognise as legitimate.

During the 1960s, the United Kingdom Parliament enacted a number of measures designed to liberalise long-standing features of our law. Two notable monuments of this period were the decriminalisation of homosexuality and the authorisation in certain circumstances of abortion. These measures were highly controversial, and were strongly

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opposed by significant sections of the public. In both cases, the parliamentary debates squarely addressed the moral issues, and represented the whole spectrum of contemporary opinion. The legislation which emerged contained carefully framed limitations and exceptions meeting some, although by no means all of the objections. By and large the results of these enactments have been accepted, and the principles underlying them have become largely uncontroversial. This is the paradigm case of how the political process ought to work. It also suggests that it is perfectly capable of successfully addressing major moral issues which would today be characterised as engaging human rights.

I venture to suggest that if similar reforms had been imposed judicially, they would not have been so readily accepted. The continuing controversy in the United States about the decision of the US Supreme Court in *Roe v Wade*¹¹ to recognise judicially the almost unrestricted constitutional right of a woman to an abortion certainly suggests that that is so. Like other ancient nations, the United Kingdom has shown a remarkable ability to adapt peaceably to changing realities. Some of these changes have radically disturbed existing expectations and vested interests. Yet the law has adapted itself to them in a way which has generally been accepted by a broad consensus among its citizens. This process of compromise and adaptation in the face of disruptive social change owes almost everything to politics. Courts of law could not have done it. It is not their job.

I have already mentioned Professor Ronald Dworkin, whose death last year deprived us of one of the most

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formidable defenders of rights-based law defined by judges. He defended it against those who would leave this to the legislature by arguing that judges were more likely to get the answer right. "I cannot imagine", he wrote, "what argument might be thought to show that legislative decisions about rights are inherently more likely to be right than judicial decisions." The problem is that this assumes a definition of "rightness" which is hard to justify in a political community. How do we decide what is the "right" answer to a question about which people strongly disagree, without resorting to a political process to mediate that disagreement? Rights are claims against the claimant's own community. In a democracy, they depend for their legitimacy on a measure of recognition by that community. To be effective, they require a large measure of public acceptance through an active civil society. This is something which no purely judicial decision-making process can deliver.

But I would go further than this. Unlike Professor Dworkin, I *can* imagine why legislative decisions about rights are more likely to be correct than judicial ones, even if what one is looking for is the intellectually or morally ideal outcome. The reason, as it seems to me, is that rights can never be wholly unqualified. Their existence and extent must be constrained to a greater or lesser extent by the rights of others, as well as by some legitimate collective interests.

In deciding where the balance lies between individual rights and collective interests, the relevant considerations will often be far wider than anything that a court can



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comprehend simply on the basis of argument between the parties before it. Litigants are only concerned with their own position. Single-interest pressure groups, who stand behind a great deal of public law litigation in the United Kingdom and the United States, have no interest in policy areas other than their own. The court, being dependent in the generality of cases on the material and arguments put before it by the parties, is likely to have no special understanding of other areas.


Lon Fuller famously described these as “polycentric” problems. What he meant was that any decision about them was likely to have multiple consequences, each with its own complex repercussions for many other people. “We may visualise this kind of situation by thinking of a spider’s web”, he wrote; “a pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole”. In such a case, he suggested, it was simply impossible to afford a hearing to every interest affected. One of three consequences follows, and sometimes all three at once.


First, the judge may produce a result which because of its unexpected repercussions is unworkable or ineffective or obstructive of other legitimate activities. Secondly, the judge may end up by acting unjudicially. He may consult third parties, or make guesses about facts of which he has no sufficient knowledge and cannot properly take judicial notice. Thirdly, he may reformulate the issue so as to make it a one-dimensional question of law in which the only relevant interests appear to be those of the parties before

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the court, which is what the Divisional Court did in Mr Witham's case. Decisions made in this way are necessarily made on an excessively simplified and highly inefficient basis.

Now, I would be the first to acknowledge that some degree of judicial lawmaking is unavoidable, especially in an uncoded common law system. It is a question of degree how far this can go consistently with the separation of powers. Even in a case where the limits have been exceeded, I am not going to suggest that the fabric of society will break down because judges, whether sitting in London, Strasbourg, Washington or anywhere else, make law for which there is no democratic mandate. The process by which democracies decline is more subtle than that. They are rarely destroyed by a sudden external shock or unpopular decisions. The process is usually more mundane and insidious. What happens is that they are slowly drained of what makes them democratic, by a gradual process of internal decay and mounting indifference, until one suddenly notices that they have become something different, like the republican constitutions of Athens or Rome or the Italian city-states of the Renaissance. 



Law is an
essential
component
of every
conservation
strategy.

Legal principles and rules
help convert our knowledge
of what needs to be done
into binding rules that
govern human behaviour.
Law is the bridge between
scientific knowledge and
political action.



HRH Sultan Azlan Shah

The New Millennium: Challenges and Responsibilities

Universiti Kebangsaan Malaysia

23 August 1997

quoted by **Lord Carnwath of Notting Hill**

Environmental Law in a Global Society

28th Sultan Azlan Shah Law Lecture



The Right Honourable Lord Carnwath of Notting Hill, CVO

Environmental Law in a Global Society



Robert John Anderson Carnwath
(b. 15 March 1945)

Lord Robert Carnwath of Notting Hill, CVO was born 15 March 1945. He was educated at Eton College, and read law at Trinity College, Cambridge University, where he was made an honorary fellow in 2013.

Lord Carnwath was called to the Bar by the Honourable Society of the Middle Temple in 1968, and was elected as a bencher in 1991. He was appointed a Queen's Counsel in 1985, and was the Attorney General to the Prince of Wales from 1988 to 1994, for which he was made a Companion of the Victorian Order. During his career at the Bar, Lord Carnwath specialised in planning, local government, environmental and administrative law. He was formerly Chairman of the Administrative Law Bar



Association, and between 1980 and 1985 he was also junior counsel to the Inland Revenue in tax matters.

Lord Carnwath authored the Carnwath Report on Enforcing Planning Control, published by the Department of the Environment in April 1989. Its main recommendations were enacted in the Planning and Compensation Act 1991, paving the way for major reform in the planning enforcement system in the United Kingdom.

Lord Carnwath was appointed to the High Court in 1994 and sat as a justice in the Chancery Division. Between 1999 and 2002, he was also Chairman of the Law Commission of England and Wales. Lord Carnwath was elevated to the Court of Appeal in 2002 and was made a member of the Privy Council.

In November 2007, Lord Carnwath was made the Senior President of Tribunals under the Tribunals, Courts and Enforcement Act 2007, with an express statutory duty to “develop innovative methods of resolving disputes that are of a type that may be brought before tribunals”. He was responsible for planning and implementing major reforms of the tribunal system across the United Kingdom following the 2001 Leggatt Report on the review of UK tribunals. Some of Lord Carnwath’s key successes in his role as Senior President of the Tribunals between 2007 and 2012 include the integration of the tribunals of England and Wales into the UK court service, as well as forming a specialist environment tribunal with expertise in resolving environmental issues and disputes.

Lord Carnwath was appointed as a Justice of the United Kingdom Supreme Court in April 2012, and was sworn in as a Supreme Court Justice on 15 May 2012.



To this day, Lord Carnwath maintains a significant interest in environment law. Lord Carnwath is the joint founder of the EU Forum of Judges for the Environment, and served as the Forum's Secretary General between 2004 and 2005. He is the President of the UK Environmental Law Association, as well as the UK Planning and Environment Bar Association. He is also a member of the editorial board of the Journal of Environmental Law. From 2002 to 2004, following the 2002 Johannesburg Global Judges' Symposium, Lord Carnwath represented the UK judiciary on a United Nations Environment Programme (UNEP) working group set up with the aim of improving the understanding and practice of environmental issues amongst judges across the world. He also co-chaired the judicial editorial board for the 2004 UNEP Judicial Handbook on Environmental Law.

Lord Carnwath is currently one of nine members of the UNEP International Advisory Council for the Advancement of Justice, Governance and Law for Enforcement Sustainability.

As a judge, Lord Carnwath has made significant contributions to the development of English environmental and planning law, in particular in the field of common law nuisance.

In 2012, Lord Carnwath delivered the judgment in *Barr v Biffa Waste Services Ltd* [2012] EWCA 312, a leading case of great public interest on the law of nuisance and environment. The case raised an important question of principle: whether waste disposal under an environmental license and waste management permit could amount to a defence of statutory authority to a nuisance claim.



In February 2014, Lord Carnwath delivered judgment in the case of *Coventry v Lawrence* [2014] UKSC 13, a landmark Supreme Court decision on common law nuisance dealing with the issue of balancing the rights of private homeowners to reasonable enjoyment of their land, and the right to carry out activities in the public interest under the grant of planning permission, in that case speedway and motocross racing activities carried on since 1984.

In November 2013, Lord Carnwath delivered the UK Constitutional and Administrative Law Bar Association (ALBA) Annual Lecture entitled “From Judicial Outrage to Sliding Scales—Where Next for Wednesbury?”, which contained an illuminating discussion of the development of the well-known Wednesbury principle for judicial review.

Lord Carnwath is married to Lady Bambina Carnwath. He plays the piano and is a renowned viola player, and he enjoys both tennis and golf. He is also a member of the Bach Choir, one of the world’s leading choruses founded in 1876.

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Environmental Law in a Global Society

Lord Carnwath

Justice of the Supreme Court of the United Kingdom

The Twenty-Eighth Sultan Azlan Shah Law Lecture
was delivered by Lord Carnwath of Notting Hill in
the presence of His Royal Highness Sultan Nazrin Shah
on 9 October 2014.

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.

HRH Sultan Azlan Shah

Creativity of Judges

Official Opening of the Fourth International Appellate Judges Conference and the Third Commonwealth Chief Justices Conference
20 April 1987, Kuala Lumpur



LECTURE BY

First Sultan Azlan Shah Fellow

Lord Phillips of Worth Matravers

at the

OXFORD CENTRE FOR ISLAMIC STUDIES, UNIVERSITY OF OXFORD

On 12 February 2014, Lord Phillips of Worth Matravers, the first Sultan Azlan Shah Fellow, delivered a lecture on “The Elastic Jurisdiction of the European Court of Human Rights” at the University of Oxford.

Lord Phillips, formerly President of the UK Supreme Court, and Visiting Fellow, Mansfield College, University of Oxford, was introduced by the Director of the Oxford Centre for Islamic Studies, Dr Farhan Nizami. Baroness Helena Kennedy QC, Principal of Mansfield College, who delivered the Twenty-First Sultan Azlan Shah Law Lecture (2007) in Kuala Lumpur entitled “Legal Challenges in Our Brave New World”, gave the vote of thanks. His Royal Highness Raja Dr Nazrin Shah, The Crown Prince of the State of Perak (now His Royal Highness Sultan Nazrin Shah, Sultan of Perak) and Trustee of the Oxford Centre for Islamic Studies, graced the occasion.

In 2011, the Oxford Centre for Islamic Studies established the Sultan Azlan Shah Fellowship 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 [now His Royal Highness Sultan Nazrin Shah, Sultan of Perak], and at the first Muslim institution of its kind to be established in the 900-year history of the University of Oxford.”

Lord Phillips of Worth Matravers was appointed the first Sultan Azlan Shah Fellow in 2013. Lord Phillips also delivered the Seventeenth Sultan Azlan Shah Law Lecture in 2003 entitled “Right to Privacy: The Impact of the Human Rights Act 1998”.

The Oxford Centre for Islamic Studies is a Recognized Independent Centre of the University of Oxford. It was established in 1985 to encourage the scholarly study of Islam and the Islamic world. HRH The Prince of Wales is the Patron of the Centre. It is governed by a Board of Trustees consisting of scholars and statesmen from different parts of the world, alongside representatives of the University of Oxford.

The Elastic Jurisdiction of The European Court of Human Rights

The Lord Phillips of Worth Matravers, KG, PC
Sultan Azlan Shah Fellow, Oxford Centre for Islamic Studies
Visiting Fellow, Mansfield College

I selected the title of this evening's lecture several months ago. I had not anticipated how topical it would be. Sir John Laws, who sits in the Court of Appeal, three serving members of the Supreme Court, Lord Sumption, Lady Hale and Lord Mance, the recently retired Lord Chief Justice, Lord Judge and, most recently, Lord Dyson, Master of the Rolls, have all now given lectures that have focused on the European Court of Human Rights at Strasbourg.

Some of those speakers have attacked the Court for getting too big for its boots, for invading territory that should properly be left to individual members of the Council of Europe. This criticism has not been confined to judges. Decisions of the Strasbourg Court have been attacked by Ministers and Members of Parliament as representing unwarranted challenges to parliamentary sovereignty. Nearly three years ago, Sir Nicholas Bratza, who had just been elected President of the Strasbourg Court, complained in a public seminar in Edinburgh:

*Text of lecture
delivered by the
First Sultan Azlan
Shah Fellow at the
University of Oxford
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The vitriolic—and I am afraid to say, xenophobic – fury directed against the judges of my Court is unprecedented in my experience, as someone who has been involved with the Convention system for over 40 years ... The scale and the tone of the current hostility directed towards the Court, and the Convention system as a whole, by the press, by members of the Westminster Parliament and by senior members of the Government has created understandable dismay and resentment among the judges in Strasbourg.

Nothing has changed over the last three years.

The Strasbourg Court is the creation of the European Convention on Human Rights,¹ agreed by the members of the Council of Europe. Its role is to enforce the human rights that the signatories to the Convention have agreed that they will observe. The original signatories to the Convention, of which the United Kingdom was the first in 1950, would be astonished at some of the interpretations given by the Strasbourg Court to the fundamental rights to which they signed up.

They would also be astonished at the circumstances in which the Strasbourg Court has held that the obligation to observe those rights arises. Is this cause for complaint or does it reflect a commendable determination on the part of the Strasbourg Court to move with the times? That is the question that I hope that you will be asking yourselves at the end of this lecture. I am going to try to give you the material that you will need to form a view by illustrating the ways in

¹ Section II, European Convention on Human Rights.

which the Strasbourg Court has enlarged its empire. As I do so I shall venture some personal views about these.

I am, I suspect, one of very few here who was affected by the horrendous events that led to the European Convention on Human Rights. My mother was Jewish and when in 1940 it seemed on the cards that the Germans would succeed in invading England, my father sent her with me and my even smaller sister across the Atlantic, a crossing which, with hindsight, was more perilous than staying put. After the war, the threat of Nazi Germany was replaced by the threat of Communism.

This led in 1949, at the instigation of Winston Churchill, to the founding of the Council of Europe, open to all European States that accepted the principle of the rule of law and were able and willing to guarantee democracy and fundamental human rights and freedoms. This excluded the Communist block up to perestroika and the fall of the Berlin wall, since which time Russia and almost all the new democracies of Central and Eastern Europe have become members. One of the first tasks of the initial members of the Council of Europe was to draw up the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The first Article of that Convention recorded that the parties to it agreed to secure to everyone “within their jurisdiction” the rights and freedoms set out in the Convention. This was an unusual treaty. Normally treaties

govern some aspect of the relationship between those who sign them. In this treaty each signatory agreed with the others the manner in which it would treat individuals within its own jurisdiction. This talk is going to focus on the meaning of that word “jurisdiction”.

The Convention had one other unusual feature. It made provision for the institution of the European Court of Human Rights, a transnational court to which individual citizens could bring applications against their own States for infringement of their human rights. The jurisdiction of the European Court and the right of individual petition to this Court were, however, optional extras. The United Kingdom did not sign up to these until 1966, under a Labour administration. After that, United Kingdom citizens, indeed anyone within the United Kingdom’s jurisdiction, could bring a claim at Strasbourg against the United Kingdom for violation of their Convention rights. What they could not do was to bring such a claim within this jurisdiction. Not until 1998 did another Labour administration pass the Human Rights Act, which incorporated the Convention rights into our domestic law. This imposed an obligation on the executive to observe the Convention rights and entitled individuals to sue the executive if it failed to do so. When ruling on such suits, the English courts look for guidance to decisions of the Strasbourg Court.

In a case called *Ullah*,² to which I shall revert, Lord Bingham declared: “The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves

² *R (Ullah) v Special Adjudicator* [2004] UKHL 26 at paragraph 20.

over time: no more, but certainly no less". This brought judgments of the Strasbourg Court into the public eye.

It is judgments of United Kingdom courts striking down executive action on Convention grounds, or holding legislation to be incompatible with the Convention, as defined by the Strasbourg Court, that have provoked the antagonism to which I referred at the beginning of this lecture.

The "rights and freedoms" that the signatories to the Convention agreed to secure within their jurisdictions are stated in very general terms. They include the right to life (Article 2), freedom from torture and degrading treatment or punishment (Article 3), the right to liberty (Article 5), the right to a fair trial (Article 6), the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9) and freedom of expression (Article 10). Article 14 forbids discrimination when giving effect to these rights.

Because these rights are expressed in general terms, the Strasbourg Court often has to make a ruling as to whether or not conduct constitutes an infringement of a particular right. When it does so, the Court is not concerned with the meaning or scope that those who originally signed the Convention would have intended the right to have. The Court treats the Convention as what it has described as "a living instrument".

This means that in defining the scope of a right, the Court will have regard to changes in social attitudes in the Member States of the Council of Europe. The Court laid down this principle when ruling in the case of *Tyrer v UK*³ that a sentence imposed on a 15-year-old youth of three strokes of the birch constituted inhuman and degrading punishment contrary to Article 3 of the Convention. Such punishment would not have been considered untoward in 1950.

I do not believe that many challenge the proposition that when defining human rights the Strasbourg Court should move with the times. Lord Bingham described this as the protection of rights “in the light of evolving standards of decency that mark the progress of a maturing society”.⁴ But the effect of this approach is inevitably to expand the scope of the rights protected by the Strasbourg Court and is one aspect of the elasticity in the title of my talk that I believe to be unobjectionable, indeed beneficial.

The parties to the Convention agreed to secure the Convention rights to everyone “within their jurisdiction”. What did they mean by “jurisdiction”? And does the living instrument principle apply so that it is legitimate for the Strasbourg Court to give “jurisdiction” a wider meaning than it bore when the Convention was negotiated? These were questions with which the Grand Chamber of the Strasbourg Court had to grapple in the case of *Bankovic v Belgium*.⁵ The claims in *Bankovic* were in respect of deaths or injuries caused in Belgrade by airstrikes by NATO forces

³ (1978) 2 EHRR 1.

⁴ *Reyes v R* [2002] UKPC 11 at paragraph 26.

⁵ (2001) 11 BHRC 435.

intervening in the Kosovo conflict in 1999. The issue was whether the victims were “within the jurisdiction” of the NATO countries involved. The applicants sought to equate jurisdiction with control in the context of individual human rights. Because the lives of the victims came under the control of the NATO forces, they were bound to observe the “right to life” respected by Article 2. The Grand Chamber rejected this submission.

It also rejected the suggestion that the meaning of “jurisdiction” could vary over time under the “living instrument” doctrine. The Court held that the concept of “jurisdiction” was essentially territorial. The Convention primarily governed the manner in which the Member States treated those within the territories that they governed, although there were some exceptions recognised by international law.

The Court also rejected the suggestion that you could divide and tailor the obligations under the Convention so that there could be circumstances in which only some of the Convention rights had to be secured by a State. Applying the Convention on a territorial basis engaged a State’s obligations in relation to all the Convention rights. On one view, however, the Strasbourg Court had already made a very significant departure from the territorial basis of jurisdiction.

In 1986 a young German called Soering was arrested in England, who admitted to having murdered

his girlfriend's parents in Virginia. The United Kingdom proposed to extradite him to stand trial for these murders in the United States. Mr Soering applied to Strasbourg arguing that if the United Kingdom surrendered him to the United States he would there be subjected to inhuman and degrading treatment on death row, so that his extradition would involve a violation of Article 3 of the Convention. The Court upheld his claim.⁶ In doing so, it emphasised the abhorrence of torture and held that an act of extradition that directly exposed an applicant to a real risk of being subjected to torture or to inhuman or degrading treatment or punishment would violate Article 3.

This case was followed by another, which caused much greater concern to the United Kingdom Government. Mr Chahal was a Sikh separatist leader who had unsuccessfully sought asylum in the United Kingdom. The Secretary of State had concluded that his presence in the United Kingdom posed a threat to national security and proposed to deport him to India.⁷ Mr Chahal applied to Strasbourg arguing that his deportation would infringe Article 3 because he would be exposed to the risk of torture or inhuman treatment if sent home. His claim succeeded, so that the United Kingdom was obliged to allow him to remain in this country. Furthermore, Strasbourg held that this unwelcome guest could not be held in detention without being charged with a criminal offence.⁸

I had reservations about these decisions. I shared the reaction that it was abhorrent to send someone off

⁶ *Soering v UK* (1989) 11 EHRR 439.

⁷ *Chahal v Secretary of State for the Home Department* [1995] 1 All ER 658; [1995] 1 WLR 526.

⁸ *Chahal v The United Kingdom* (1996) 23 EHRR 413.

to a country where he would suffer torture or inhuman treatment. But I was not convinced that this fell within the scope of the European Human Rights Convention.

The Convention that dealt with this situation was the UN Convention on the Status of Refugees, concluded in 1951, at about the same time as the Human Rights Convention, and including the same parties. That Convention imposed an obligation on State parties to grant asylum to those within their territory who would be at risk of persecution if sent home to their countries of nationality. However, there was an exception to this where there were reasonable grounds for considering that the refugee posed a threat to national security. Furthermore, if the Human Rights Convention precluded sending an alien back to a country where his rights under Article 3 would not be respected, why would not the same principle apply in the case of all the other Convention rights? Had Members of the Council of Europe signed up to an obligation to give shelter to aliens whose own countries did not respect fundamental rights? Indeed, on a number of occasions the Strasbourg Court had considered whether Article 6, the right to a fair trial, would be infringed by deporting an individual to a country where he would not receive a fair trial and had indicated that it would not exclude this possibility if the person risked a *flagrant* denial of a fair trial in his own country. There was, however, no case in which Strasbourg had held that this test was satisfied. In one case where the test was not satisfied, the Strasbourg Court explained:

What the word “flagrant” is intended to convey is a breach of the principle of a fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction, of the very essence of the right.⁹

Six years or so elapsed from the decision in *Chahal*, without a single case where the Strasbourg held that an expulsion or deportation of an alien satisfied this exacting test. Then the case of *Ullah*¹⁰ came before me when I was presiding over the Court of Appeal as Master of the Rolls. In that case, and one that was heard with it, applicants who had unsuccessfully sought asylum challenged the decisions that they should be sent back to their own countries, namely Pakistan and Vietnam, on the ground that they would be denied their right to practise their religions there so that their deportation would infringe Article 9 of the Convention. Because the Strasbourg Court had never actually entertained such a claim, I and my colleagues propounded the following statement of principle:

Where the Human Rights Convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage Article 3, the English court is not required to recognise that any other article of the Human Rights Convention is, or may be engaged.¹¹

Nemesis followed swiftly. The House of Lords held that we could not sweep aside Strasbourg’s statements that

⁹ *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494, Joint Partly Dissenting Opinion of Judges Sir Bratza, Bonello and Hedigan.

¹⁰ *Ullah v Special Adjudicator* [2002] EWCA Civ 1856.

¹¹ *Ibid*, at paragraph 65.

expelling an alien might, exceptionally, constitute a violation of other fundamental rights, and these included freedom of religion.¹² But still as the years went by the Strasbourg Court did not uphold any challenge to the deportation of an alien from a member State on the ground that human rights, other than Article 3, would be violated by his home country.

Indeed, this significant step was first taken not by Strasbourg but by the House of Lords in the case of *EM (Lebanon) v Secretary of State for the Home Department*.¹³ A mother and her young son had unsuccessfully claimed asylum in the United Kingdom and faced being returned home to Lebanon. There, under Shari'a law, when the son reached the age of seven he would be removed from the custody of his mother and placed in the custody of his father, from whom his mother was estranged. The House of Lords held that these facts satisfied the stringent test of a flagrant breach that destroyed the very essence of the right to respect for family life under Article 8 and allowed the mother's appeal. This was a watershed case and one that evidenced a conflict between Shari'a law and the European approach to family life.

There remained a dearth of cases in which Strasbourg held that the Convention would be infringed by deporting an alien to a country where his Convention rights would not be observed. Then came the case of *Abu Qatada v UK*.¹⁴ Mr Abu Qatada was a Jordanian citizen who faced trial in Jordan on terrorist charges. The United Kingdom was anxious to deport him to Jordan because they believed that

¹² *R (on the Application of Ullah) v Special Adjudicator; Do v Secretary of State for the Home Department* [2004] UKHL 26.

¹³ [2008] UKHL 64; [2009] 1 AC 1198.

¹⁴ [2012] ECHR 56.

he posed a threat to national security in this country. He resisted deportation on the ground that there was a real risk of a flagrant breach of his right to a fair trial if returned to Jordan because of the likelihood that evidence obtained by torture would be used against him. I presided over this case in the House of Lords and we rejected his claim,¹⁵ but it was subsequently upheld by the Strasbourg Court. Ultimately Mr Abu Qatada returned to Jordan of his own volition, relying on assurances that evidence obtained by torture would not be admitted against him, but before he did so, Strasbourg's decision provoked a wave of hostile reaction in this country.

This case, and the earlier cases of *Soering* and *Chahal* were, in my view, examples of the Strasbourg Court extending the meaning of jurisdiction beyond the territorial concept that had been agreed by those who signed the Convention. It has resulted in an overlap, and a degree of conflict, between the Human Rights Convention and the Refugee Convention. Strasbourg has, however, always been very sensitive to the importance attached by Member States to control of immigration, which explains perhaps the paucity of cases in which Strasbourg has struck down deportation on the ground of the treatment that an alien will receive when returned to his own country. So this extra-territorial extension of jurisdiction under the Convention has had limited practical impact.

There is another respect in which Strasbourg has recently extended the meaning of jurisdiction in the

¹⁵ *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10.

Convention, but before I come to that I want to place it in its context by talking a little about Article 2 of the Convention. This provides a good example of the manner in which the Strasbourg Court has tended to enlarge the scope of individual human rights.

Article 2(1) provides:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The primary meaning of this article is obvious: "thou shalt not kill". The obligations imposed by the Convention are imposed on States and State Officials, not private persons. So Article 2 prohibits the State from taking life and the importance of that Article was readily apparent after the holocaust. The obligation not to kill is what is called a "negative obligation". But the Strasbourg Court has held that Article 2, and other Articles, implicitly impose not merely negative obligations but positive obligations, that States which have signed up to the Convention have undertaken to take positive steps to safeguard the human rights to which the Convention gives effect. This duty to take positive steps is a duty to take such steps as are reasonable, having regard to, among other matters, resources. Such a test opens up the possibility of conflict between the Strasbourg Court and domestic courts as to what is reasonable.

So far as Article 2 is concerned, Strasbourg identified one particular positive obligation in relation to the right to life that has led to a lot of litigation in our courts. In 1995 Strasbourg held the United Kingdom to have violated Article 2 in the circumstances in which British troops killed three IRA terrorists who were trying to blow up Gibraltar—the famous “death on the rock” case.¹⁶ In that case the Court said this:

The obligation to protect the right to life under [Article 2], read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within its jurisdiction the rights and freedoms defined in [the] Convention” requires by implication that there should be some form of official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.¹⁷

Strasbourg subsequently extended this so-called procedural obligation so that it applied whenever a person died who was under medical care, whether public or private. And Strasbourg has laid down stringent requirements as to the thoroughness of the investigation that must be conducted. This quite exacting obligation to hold an investigation into the circumstances of a death was, for a long time, held by Strasbourg to be ancillary and parasitic to the primary obligation to protect the right to life under Article 2.

¹⁶ *McCann v United Kingdom* [1995] ECHR 31; (1995) 21 EHRR 97.

¹⁷ *Ibid*, at paragraph 161.

The Strasbourg Court only has jurisdiction over a State in respect of matters that occur after the State has ratified the Human Rights Convention. No question of a breach of Article 2 by a State can arise in relation to the causation of a death occurring before that State ratifies the Convention. For a long time the Strasbourg jurisprudence indicated that if a death occurred in a State before it ratified the Convention no ancillary obligation to investigate the death could subsequently arise under Article 2. The death and all that followed it fell to be considered as a single occurrence falling outside the temporal jurisdiction of the Court.

Then, in 2009, in a case called *Silih v Slovenia*,¹⁸ the Grand Chamber ruled that the obligation to carry out a full investigation into a death resulting from an unnatural cause was a free-standing obligation under Article 2. Even if the death occurred before the State in question had ratified the Convention, if that State chose subsequently to conduct an inquiry into the death, that inquiry had to satisfy the stringent procedural requirements of Article 2.

This enlargement of the scope of Article 2 resulted in the United Kingdom, to the Government's surprise and dismay, being held by the Supreme Court, under my Presidency, to be subject to claims under the Human Rights Act for infringement of Article 2 in respect of the contemporary conduct of inquests into killings of members of the IRA that had occurred a decade or more before the Human Rights Act came into force.¹⁹

¹⁸ [2009] ECHR 537.

¹⁹ *McCaughey & Anor, Re Application for Judicial Review* [2011] UKSC 20.

Claims under the Human Rights Act for failures to carry out investigations into deaths occurring outside the territory of the United Kingdom raised a stark issue as to whether those deaths occurred within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention. That issue came before the House of Lords in the case of *Al-Skeini*.²⁰

Members of the British armed forces had killed four Iraqi civilians and were alleged to have killed a fifth. Their relatives brought judicial review proceedings against the Secretary of State alleging that he had a duty under Article 2 to investigate these deaths. The House of Lords, other than Lord Bingham, who preferred to reserve his opinion on the point, dismissed the claims. The others held that the Iraqi victims had not been within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention when they were killed. This conclusion was firmly founded on the decision of the Grand Chamber in *Bankovic*. Conflicting dicta in a subsequent decision of a single section of the Strasbourg Court called *Issa v Turkey*²¹ were dismissed as incompatible with *Bankovic*.

The victims in *Al-Skeini* were Iraqi nationals, who were not subject to the law of the United Kingdom. This was not true of the claim subsequently brought against the Secretary of State for Defence by Mrs Smith.²² Her son had died of hypothermia while serving with the Territorial Army in Iraq. Just as in the case of *Al-Skeini* her claim was

²⁰ *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.

²¹ (2004) 41 EHRR 567.

²² *R (Smith) v Secretary of State for Defence* [2010] UKSC 29.

for a full investigation of the circumstances of her son's death pursuant to Article 2 of the Convention. She claimed that as a member of our armed forces he was subject to the jurisdiction of the United Kingdom while in Iraq and thus within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention.

Her claim succeeded in the Court of Appeal, one member of which was Dyson LJ. I presided over the appeal by the Secretary of State in the Supreme Court. Because of the importance of the case we sat nine strong to hear the appeal, instead of the usual five. By a majority of six to three we allowed the Secretary of State's appeal. I gave the leading judgment for the majority. We accepted that Private Smith, as a serving soldier, was subject to the jurisdiction of the United Kingdom as a matter of domestic law, but held that this did not mean that he fell within the jurisdiction of the United Kingdom for the purposes of Article 1. That jurisdiction was essentially territorial, as laid down in *Bankovic*.

I had the support, among others, of Lord Collins, an international jurist of the highest standing. He began his conclusions as follows:

Bankovic made it clear that Article 1 was not to be interpreted as a "living instrument" in accordance with changing conditions ... It is hardly conceivable that in 1950 the framers of the Convention would have intended

the Convention to apply to the armed forces of Council of Europe states engaged in operations in the Middle East or elsewhere outside the contracting states.²³

That was precisely my view. However, Lord Mance wrote a lengthy and powerful dissent, to which Lady Hale and Lord Kerr subscribed. He stated:

In my judgment the armed forces of a state are, and the European Court of Human Rights would hold that they are, within its jurisdiction within the meaning of Article 1 and for the purpose of Article 2, wherever they may be.²⁴

It was not long before Strasbourg proved that Lord Mance was right.

In 2011 the unsuccessful Iraqi claimants in *Al-Skeini* took their case to the Grand Chamber.²⁵ The Grand Chamber held that the House of Lords had got it wrong in *Al-Skeini*. It propounded clearly for the first time the following principle:

It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be “divided and tailored” ...²⁶

²³ Ibid, at paragraph 303.

²⁴ Ibid, at paragraph 199.

²⁵ *Al-Skeini & Ors v UK* [2011] ECHR 1093; (2011) 53 EHRR 18.

²⁶ Ibid, at paragraph 137.

The Court held that the British soldiers engaged in security operations in Basrah exercised sufficient authority and control over the Iraqis who were killed to bring them within the jurisdiction of the United Kingdom for the purposes of Article 1.

So Lord Mance and those who supported him in *Al-Skeini* have been proved correct. In a lecture delivered at Exeter University at the end of last month, Lord Dyson hailed this decision as putting the Strasbourg jurisprudence back on track. He stated:

Bankovic put the jurisprudence off course for around ten years; but since *Al-Skeini*, it has now returned to a position that many would regard as more principled and more acceptable ... once it is appreciated that the fundamental principle is that of the exercise of control and authority, then the territoriality principle loses its special significance. It goes without saying that a State exercises authority and control over all persons and things within its territorial limits. Surely, it is clearer simply to say that, whenever the State exercises control and authority over an individual, it is under an obligation under Article 1 to secure the rights and freedoms of the Convention to that individual wherever he or she happens to be.

Lord Dyson's conclusion echoed that in the concurring judgment of the Maltese member of the Court, Judge Bonello, who used language that excoriated the United Kingdom. Here is one purple passage:

Any State that worships fundamental rights on its own territory but then feels free to make a mockery of them anywhere else does not, so far as I am concerned, belong to that comity of nations for which the supremacy of human rights is both mission and clarion call. In substance the United Kingdom is arguing, sadly, I believe, that it ratified the Convention with the deliberate intent of regulating the conduct of its armed forces according to latitude: gentlemen at home, hoodlums elsewhere.²⁷

I am inclined to agree with Lord Dyson that the test of “control and authority” subsumes the test of territoriality. And it is arguable that it is a more principled test. I do not accept, however, that it is the test of jurisdiction that those responsible for the Convention intended to apply. *Bankovic* was a very carefully considered decision of the Grand Chamber intended to provide definitive guidance on the meaning of jurisdiction.

And I believe that the Grand Chamber in *Bankovic* was correct to identify that the meaning that those responsible for the Convention intended jurisdiction to bear was essentially territorial. I also believe that the Grand Chamber was correct, in principle, to hold that the “living instrument” doctrine did not apply to the meaning of jurisdiction. I view the decision in *Al-Skeini* as an extension by the Strasbourg Court of its jurisdiction which cannot be reconciled with *Bankovic*.

Whether or not it was legitimate, is this extension a matter for regret? I believe strongly in the protection of

²⁷ Ibid, at paragraph 18 of Judge Bonello’s Concurring Judgment.

fundamental human rights and there is much to be said for States being required to respect the rights of all within their authority and control. The consequences of *Al-Skeini* are, however, far reaching.

In *Smith v Ministry of Defence*,²⁸ claims were brought under Article 2 by relatives of soldiers killed in Iraq when Snatch Land Rovers in which they were patrolling were blown up. The breaches of Article 2 alleged included failure to provide better armoured vehicles and allowing soldiers to patrol in the Snatch Land Rovers.

The majority of the Supreme Court declined to strike out these claims. Giving the leading judgment for the majority Lord Hope held:

... there have been many cases where the death of service personnel indicates a systemic or operational failure on the part of the State, ranging from a failure to provide them with the equipment that was needed to protect life on the one hand to mistakes in the way they are deployed due to bad planning or inadequate appreciation of the risks that had to be faced on the other. So failures of that kind ought not to be immune from scrutiny in pursuance of the procedural obligation under Article 2 of the Convention.²⁹

I was present in the Chamber of the House of Lords when the effect of this judgment was being debated and some suggested that it would lead to judicial review of decisions taken by commanders on the field of battle. This

²⁸ [2013] UKSC 41.

²⁹ *Ibid*, at paragraph 63.

was to exaggerate the consequences of the decision, but its full impact has yet to be worked out.

I spoke at the outset of the current hostility to Strasbourg. That hostility is not primarily attributable to the extensions of Strasbourg's jurisdiction that I have been describing.

One habitual ground of complaint is the effect of Article 8 on the deportation of undesirable aliens. Article 8 protects the right to family life. Where an alien becomes part of a family in this country, and particularly when that family includes children born here, the interests of that family have to be taken into account when considering whether to deport the alien. A balance has to be struck between the interests of the State in excluding from this country those whose presence is contrary to the national interest and the interests of the family. It seems to me desirable that such a balance should be struck. The immigration tribunals and the courts are the ones who have to strike it. I do not believe that the Strasbourg Court often differs from the decisions reached by these bodies. Sometimes I read a report that, if accurate, suggests that a tribunal has been more generous to the interests of the family than Strasbourg would have required. I do not believe that Article 8 cases provide a legitimate ground for complaint about Strasbourg.

More significant is the complaint that the Strasbourg Court sometimes acts as a Court of Appeal in cases where our law provides satisfactory protection of the human right

in issue and our courts have applied the right principles, so that all that is in issue is the individual decision itself. In effect the complaint is that the Strasbourg Court grinds too small.

There has undoubtedly been force in this complaint. It was addressed at a meeting of all 47 Members of the Council of Europe at Brighton under our Presidency in 2012. The Members agreed that the Convention should be amended with the consequences that Ken Clarke described as follows:

Cases to be considered by the Court will be restricted to allegations of serious violations of the Convention or major points of its interpretation. The Court will not normally intervene where national courts have clearly applied the Convention properly.

This is the right way to approach dissatisfaction with the working of the Court, although it is no mean feat to procure agreement on the part of all Member States.

There have, however, recently been complaints about the Strasbourg Court that are not addressed by the Brighton Declaration. These have attacked Strasbourg decisions holding legislation passed by Parliament to be incompatible with the Convention. It is said that such decisions are an attack on the sovereignty of our Parliament by judges who are unelected and unaccountable and from whose decisions there is no appeal. Let me give you three examples.

The first involves a decision not of the Strasbourg Court, but of the Supreme Court under my Presidency. The Sexual Offences Act 2003 provided that anyone sentenced to more than 30 months imprisonment for a sex offence would be put on the Sex Offences Register for life, which involved quite significant restrictions, including obligations to report to a police station. We ruled,³⁰ upholding a decision of the Court of Appeal,³¹ that this was a disproportionate interference with the right to private life under Article 8. Those on the Register had to be given the right to seek a review after a specified period. David Cameron and the Home Secretary, some considerable time after our decision, saw fit to state that they were appalled by it.

The second example is the attack that the Grand Chamber made in the case of *Vinter & Ors v UK*³² on “life” within the meaning of life sentences. The Court held that to send someone to prison for life without any chance of a review constitutes “inhuman punishment” contrary to Article 3. Mr Cameron has said that he profoundly disagrees with this judgment.

The third example is the prisoners’ voting case. In *Hirst v UK (No 2)*³³ the Grand Chamber held that it was contrary to Article 3 of the First Protocol to the Convention, which guarantees free elections, to deny *all* convicted prisoners the vote. I am going to say a little about this case, but first some general comments.

Each of the three examples that I have given has one thing in common. What Strasbourg objected to was the

³⁰ *R (F (A Child)) v Secretary of State for the Home Department* [2010] UKSC 17.

³¹ [2009] EWCA Civ 792.

³² [2013] ECHR 645.

³³ (2005) ECHR 681.

absolute nature of each statutory provision: you are on the sex register for life, without review; you are in prison for life, without review; all prisoners are disenfranchised, without exception. Strasbourg does not like restrictions on liberties that make no provision for the exceptional case. In this I have some sympathy with Strasbourg. Furthermore it is usually possible to satisfy Strasbourg by a small amendment to the law that does not alter its main thrust. What harm does it do to give a person convicted of a sex offence many years ago the chance to demonstrate that he no longer poses any risk? What harm does it do to give a life prisoner the right to a review—perhaps only after 20 years—to see whether there are exceptional circumstances that justify his release before he dies? And would it really be earth shaking to give some short-term prisoners the right to vote, which most of them would not bother to exercise?

The decision in *Hirst* has, however, provoked an extreme reaction in this country. Mr Cameron has said that the idea of a prisoner voting makes him feel sick. On 10 February 2011 the House of Commons voted overwhelmingly in favour of a motion stating that the House continued to support a total ban on prisoners' voting and that "legislative decisions of this nature should be a matter for democratically-elected law makers". This motion had, of course, no legislative effect. Nor did this statement, made by David Cameron to the House at Prime Minister's Questions, the following month:

The House of Commons has voted against prisoners having the vote. I do not want prisoners to have the vote,

and they should not get the vote—I am very clear about that ... no one should be in any doubt: prisoners are not getting the vote under this Government.

A month later, the Labour Shadow Justice Minister made a press release that stated:

Labour's policy is, and always has been, that prisoners shouldn't be given the vote. Committing a crime so serious that a judge has deprived you of your liberty means you should lose your ability to vote in elections.

Then on 22 May 2012 the Strasbourg Court gave the United Kingdom six months to bring forward proposals to amend our law to comply with the *Hirst* judgment. On the last day of this six-month period the Government published a draft Bill.³⁴ This set out a choice of three responses to Strasbourg. To give the vote to prisoners serving less than four years; to give the vote to prisoners serving less than six months; or to persist in denying the vote to all prisoners. The first two options represented attempts to comply with the judgment in *Hirst*. The third option was a direct defiance of Strasbourg.

A joint Parliamentary Committee was set up to advise Parliament which, if any, of these three options to adopt and I accepted an invitation to serve as the only cross-bench member of this Committee. I was impressed by the thoroughness with which the Committee set about its task. Apart from the Parliamentary recesses we sat almost every

³⁴ Draft Voting Eligibility (Prisoners) Bill.

week from June to December, hearing evidence from about 40 witnesses. It soon became apparent that the question of whether some prisoners should get the vote was of comparatively minor significance.

The critical issue was whether Parliament should attempt to comply with the Strasbourg Court's judgment, or enact a statute designed to defy Strasbourg. A minority of the Committee, including its chair, was resolutely determined from first to last that the latter course was the one that should be adopted. Happily, the majority, of which I was one, were not persuaded to follow this course.

The most important part of our Report was that in which we considered the argument that to defer to the Strasbourg Court would be to derogate from parliamentary sovereignty. The Committee concluded that this was not the case.

Let me try to explain this in my own words. There are two different types of law. There is domestic law, which varies from State to State and determines how the individual State is governed. Domestic law is almost always governed by a written constitution. Unusually our constitutional rules are unwritten.

At the same time there is international law, which governs relations between States. International law has developed by custom, but today it includes a large number of treaties, or agreements reached between States. It is a basic

principle of international law that States should comply with the treaties that they conclude.

Under the constitutions of some countries, international conventions become part of their domestic law automatically. That is not so in the case of the United Kingdom. Under our unwritten constitution, conventions only become part of our law if Parliament passes a statute to give domestic effect to them. And under our unwritten constitution, Parliament is supreme; Parliament can pass any law it chooses.

The United Kingdom has signed up to the European Convention on Human Rights, including Article 46, which obliges it to comply with any judgment of the Strasbourg Court to which it is party.

So under international law, the United Kingdom is under a duty to comply with the *Hirst* judgment. It is, however, open to Parliament to flout that judgment if it chooses to do so. If it does, it will place the United Kingdom in breach of international law.

I do not believe that Parliament should behave in this way.

If the demands of the Strasbourg Court have become intolerable the correct course is either to get the other signatories to the Convention to amend it so as to restrict Strasbourg's powers, or to extricate ourselves from the Convention itself.

This is how our Report puts it:

... the principle of parliamentary sovereignty is not an argument against giving effect to the judgment of the European Court of Human Rights. Parliament remains sovereign, but that sovereignty resides in Parliament's power to withdraw from the Convention system; while we are part of the system we incur obligations that cannot be the subject of cherry picking.

The Report continues:

A refusal to implement the Court's judgment would not only undermine the international standing of the UK; it would give succour to those States in the Council of Europe who have a poor record of protecting human rights and who may draw on such an action as setting a precedent that they may wish to follow.


This is surely the point.

We did not sign up to the Human Rights Convention because of concerns about our own respect for human rights. We did so because of concern for the behaviour of others. The Convention and the Strasbourg Court have been and remain a powerful force for good in Europe. This country has had an admirable record before the Strasbourg Court, but has on occasion rightly been found wanting—by way of example, in denying basic rights to prisoners, in discriminating against homosexuals, in detention of terrorist suspects without trial, in permitting decisions to be

founded on evidence not disclosed to the losing party. But these shortcomings have been insignificant compared with the violations of human rights of which other Members of the Council of Europe have been indicted by Strasbourg.

I have not concealed my dissatisfaction with some aspects of the Strasbourg jurisprudence. The Brighton Declaration needs to be properly implemented. The Court needs to be more sensitive to the requirements of subsidiarity and of the margin of appreciation. But Europe needs the Convention and Europe needs the Court.

The recommendation that the Joint Committee has given to Parliament is, first, that prisoners serving less than 12 months should be permitted to vote in UK parliamentary and local and European elections, and secondly, that any prisoner who is within six months of his scheduled release date should be permitted to vote. I hope very much that this recommendation will find favour with Parliament and that, if it is implemented, it will also find favour with Strasbourg. ❧



“ It is axiomatic that
though our courts are not
strictly speaking bound by
decisions of the House of Lords,
we have always recognised
and continue to recognise
their peculiarly high
persuasive value.

Moreover the reasoning
of any judgment delivered
in the House of Lords,
whether dissenting or
concurring, commands
and must always command
the utmost respect.”

per Raja Azlan Shah J

Raja Mokhtar bin Raja Yaacob v Public Trustee, Malaysia

[1970] 2 MLJ 151, High Court



“Integrity, justice, courage,
temperance and prudence
—these are virtues that constitute
the moral character of
a good professional,
indeed that of a good man.
Integrity is a fundamental
requirement of justice.
Without integrity
there can be
no rule of law.”

His Royal Highness Sultan Azlan Shah
The New Millennium: Challenges and Responsibilities
Universiti Kebangsaan Malaysia,
23 August 1997