

“My own contribution [to this lecture] is intended to consider the changing role of an independent judiciary in today’s world. I can highlight my general theme with Your Royal Highness’ own words from a speech in 1987, which are as relevant today, if not more so:

“Over the recent years, the role of the judiciary has become of increasing importance. In countries which practise a democratic form of government, the judiciary has been looked upon as the defender of any encroachment to the Rule of Law. This duty to uphold the Rule of Law, I may add, is not only imposed on the judiciary but also on the executive and the legislature by recognising that they can never be above the law; by giving an unstinting support for the courts which administer the law; and, in constructing the law, to give an honest account of what is practical and not merely a rhetorical account of what is desirable.” (*“Creativity of Judges” in Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches, 2004*)

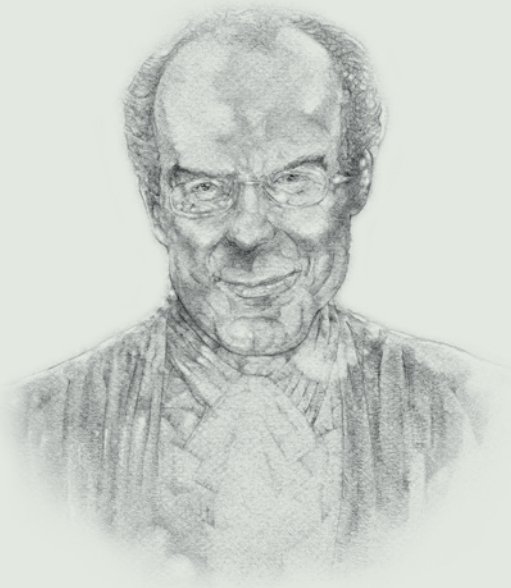
Lord Mance of Froggnal

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



The Right Honourable Lord Mance of Frognal

The Changing Role of an Independent Judiciary



Jonathan Hugh Mance
(b. 6 June 1943)

Lord Mance was born in 1943 and was schooled at Charterhouse. He read jurisprudence at University College, Oxford University and was called to the English Bar by the Middle Temple in 1965.

Lord Mance was a leading commercial barrister of his time, specialising in areas such as commercial insurance law. He became a Queen's Counsel in 1982, and sat as a Recorder until 1993. He chaired various Banking Appeals Tribunals and was a founder director of the Bar Mutual Indemnity Insurance Fund.

Lord Mance was appointed a High Court Judge of the Queen's Bench Division in 1993. He was subsequently promoted to the Court of Appeal, serving as a Lord



Justice of Appeal from 1999 to 2005. Lord Mance was appointed a Lord of Appeal in Ordinary in 2005. In the 2007 Privy Council case of *Prince Jefri Bolkiah and Others v The State of Brunei Darussalam and Brunei Investment Agency* [2007] UKPC 63, his Lordship had occasion to follow the decision of the Federal Court of Malaysia in *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 delivered by Raja Azlan Shah CJ (as His Royal Highness then was) on the interpretation of the Evidence Act.

Lord Mance represents the United Kingdom on the Council of Europe's Consultative Council of European Judges, being elected its first chair from 2000 to 2003. He was also the Chairman of the International Law Association and the Lord Chancellor's Advisory Committee on Private International Law. He is a member of the Judicial Integrity Group and the seven-person panel set up under the Treaty on the Functioning of the European Union (Article 255) to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the European Court of Justice and General Court.

Lord Mance served from 2007 to 2009 on the House of Lords European Union Select Committee, chairing sub-committee E which scrutinised proposals concerning European law and institutions. In 2006 he chaired a working group under the auspices of the All Party Parliamentary Group on the Great Lakes Region, recommending changes in the procedures for enforcement of the OECD Guidelines for Multinational Enterprises, and in 2008 he led an international delegation for the same Group and the Swedish Foundation for Human Rights, reporting on the problems of impunity in relation to violence against women in the Congo.

Lord Mance's interests include languages and music. He is also a keen tennis enthusiast, being a member of both the Cumberland Lawn Tennis Club and the Bar Lawn Tennis Society.



Lord Mance was the first Justice from the newly created Supreme Court of the United Kingdom to deliver a lecture in The Sultan Azlan Shah Law Lecture Series. The Supreme Court came into existence on 1 October 2009, replacing the 600-year-old Appellate Committee of the House of Lords. Interestingly, Lord Mance delivered the leading judgment in one of the first cases to be decided by the Supreme Court, *Re Sigma Finance Corporation* [2010] 1 All ER 571, a case concerning the interpretation of contracts.

Lord Mance was accompanied to the 2009 lecture by his wife, Lady Justice Mary Arden who is currently a Judge of the Court of Appeal of England and Wales. Lady Justice Arden read law at Cambridge University and obtained an LLM degree from Harvard Law School. She was called to the Bar by Gray's Inn in 1971 and became an *ad eundem* (honorary) member of Lincoln's Inn in 1973. She became a Queen's Counsel in 1986 and was appointed to the Court of Appeal in October 2000, becoming only the third female judge to sit on the Court of Appeal.

To date, Lord Mance and Lady Justice Arden are the first and only married couple to have sat on the Court of Appeal at the same time.



The critical issue today is often how far it is the role of an independent judiciary to oppose or check the sovereignty not of the executive, but of Parliament. But Parliament today is all too often no more than the mouthpiece of the executive.

The judicial role is being performed overtly in new areas of pressing public interest and to a greater extent than ever before under general scrutiny.

The Changing Role of an Independent Judiciary

Lord Mance of Frogmal
Justice of the Supreme Court of the United Kingdom

Your Royal Highnesses, Vice-Chancellor, Ladies and Gentlemen, it is a privilege to be the first Justice of the Supreme Court of the United Kingdom to participate in this renowned series of lectures. I follow in some extremely distinguished footsteps, including many of my predecessors in the Appellate Committee of the House of Lords. My own contribution is intended to consider the changing role of an independent judiciary in today's world. I can highlight my general theme with Your Royal Highness' own words from a speech in 1987, which are as relevant today, if not more so:

Over the recent years, the role of the judiciary has become of increasing importance. In countries which practise a democratic form of government, the judiciary has been looked upon as the defender of any encroachment to the Rule of Law. This duty to uphold the Rule of Law, I may add, is not only imposed on the judiciary but also on the

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Highness Sultan
Azlan Shah*

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

¹ Sultan Azlan Shah, “Creativity of Judges” in *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches*, 2004, edited by Dato’ Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia, page 295.

² The Supreme Court will take over the devolution jurisdiction of the Privy Council, but otherwise simply adopts the jurisdiction of the House of Lords.

executive and the legislature by recognising that they can never be above the law; by giving an unstinting support for the courts which administer the law; and, in constructing the law, to give an honest account of what is practical and not merely a rhetorical account of what is desirable.¹

Recent constitutional changes

Let me begin with a few words directed to the United Kingdom's most recent constitutional change: the establishment by the Constitutional Reform Act 2005 of a new Supreme Court to replace the Lords of Appeal in Ordinary. This is a quite substantial alteration in form and public appearance—but not so obviously in substance.² It was first announced in June 2003 by the then-Prime Minister Tony Blair, last year's lecturer, as part of a complex of reforms. A new appointments system for all judges was also created. These changes were announced unexpectedly and without prior discussion. They proved controversial. There took place an extensive dialogue with the senior judiciary. This was followed by lengthy debate in Parliament, leading to the Constitutional Reform Act 2005.

The Act starts with a welcome endorsement of the “existing principle of the rule of law”. The Lord Chancellor—who until then straddled all three of the pillars of state and served as a visible contradiction of the separation of powers—was converted into an essentially political figure. He is now a Secretary of State for Justice (currently sitting

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³ Constitutional Reform Act 2005, section 7.

⁴ Ibid, section 18 and schedule 6.

⁵ Ibid, Part IV.

⁶ Ibid, Part III. Lord Scott's retirement and Lord Neuberger's appointment as Master of the Rolls meant that there were only ten serving Law Lords and it was necessary to appoint two new Supreme Court judges, Lord Clarke and Sir John Dyson.

in the House of Commons), but is given a special duty to preserve the independence of the judiciary. The Lord Chief Justice has taken over from the Lord Chancellor as head of the English and Welsh judiciary.³ The House of Lords now elects its own Speaker, where previously the Lord Chancellor sat.⁴ The Act provides for new independent judicial appointments commissions for the judiciary of England and Wales and of the new United Kingdom Supreme Court.⁵ The new Supreme Court consists of twelve Justices, including the ten Law Lords in office when the Court came into existence on 1 October 2009.⁶

The purpose of creating a Supreme Court is to make clear that the judiciary are independent of Parliament and the executive and to reinforce the separation of powers in the British constitution. After 2005 there came a lengthy process of deciding on the location of the new Court, and refurbishing the building eventually chosen. On 1 October 2009, the Supreme Court came into being in the old Middlesex Guildhall directly opposite Parliament. Parliament Square now offers a nice symmetry: the legislature and judiciary opposite each other on the east and west sides, the executive (represented by HM Revenue and Customs and HM Treasury—Mammon, though I fear with empty coffers!) on the north and, watching over all this, the deity in Westminster Abbey on the south side.

We have begun sitting. Our new home is already producing real benefits, internally and externally. There are better facilities all round, for the public, legal teams and

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⁷ AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edition, 1959.

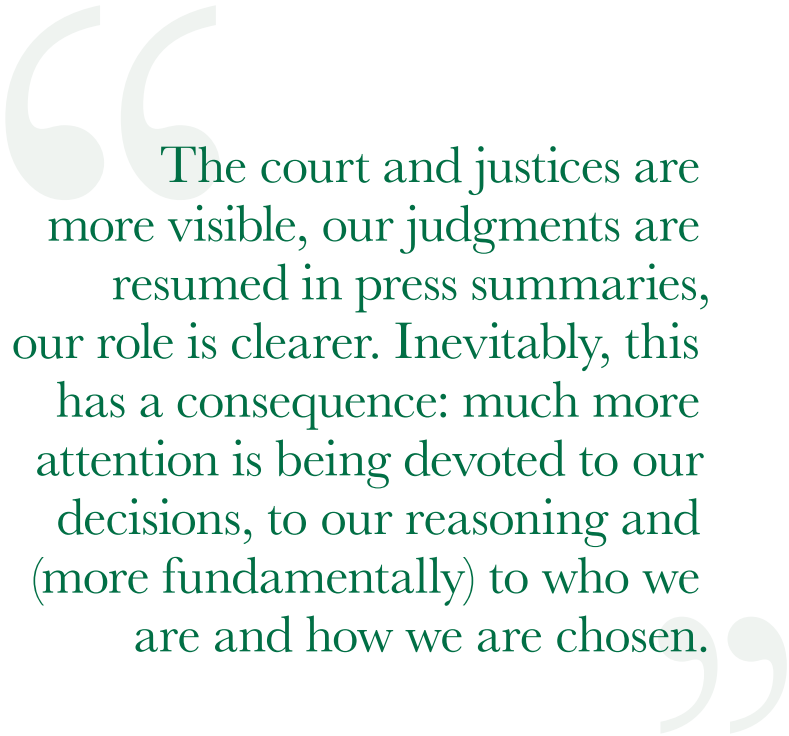
⁸ [1999] 2 AC 349 at 358G-H.

⁹ Expounded in *Blackstone's Commentaries*, 6th edition, 1774, pages 88–89, and *Hale's Common Law of England*, 6th edition, 1820, page 90.

judges. We have more judicial assistants and the building encourages closer collaboration with them—though they will certainly not write our judgments as some say can happen in the United States! Above all, the court and justices are more visible, our judgments are resumed in press summaries, our role is clearer. Inevitably, this has a consequence: much more attention is being devoted to our decisions, to our reasoning and (more fundamentally) to who we are and how we are chosen.

The basic constitutional structure of the United Kingdom has, in principle, been unchanged since the 17th century constitutional settlement, achieved after the Civil War. The great constitutional lawyer, Dicey, analysed it over a century ago. Parliament is sovereign, the executive administers the law and the judiciary adjudicates upon disputes regarding its meaning and application.⁷ However, this has never been the full picture: in areas not covered by statute, there is the common law. Judges have for centuries developed—or to put it bluntly, “made”—the common law (subject always to subsequent statutory reversal). As Lord Browne-Wilkinson said in *Kleinwort Benson Ltd v Lincoln CC*:⁸

The theoretical position has been that judges do not make or change law: they discover and declare the law which is throughout the same. According to this theory,⁹ when an earlier decision is overruled the law is not changed: its true nature is disclosed, having existed in that form all along. This theoretical position is ... a fairy tale in which no-



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¹⁰ Sultan Azlan Shah, “Interpretive Role of Judges” in *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches*, 2004, edited by Dato’ Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia, page 303.

¹¹ It has been suggested jurisprudentially by Dworkin that an ideal judge (Judge Hercules) would be able to give a single right answer to any particular issue: “Hard Cases” (1975) 88 *Harvard Law Review* 1057. If so, the value of such an insight is, through human imperfection, largely inspirational.

one any longer believes. In truth, judges make and change the law. The whole of the common law is judge-made and only by judicial change in the law is the common law kept relevant in a changing world.

Even when interpreting statutes, judges are not, cannot be, mere technicians—however much law-makers and politicians might wish. Literalism and rigid rules of construction may in the past have given law the appearance of mathematical certainty, but they are unsophisticated tools which failed to reflect the realities and nuances of life. The judge must act consistently with the legislative scheme. But the law-maker never foresees every problem; there are often difficult issues regarding the nature and boundaries of the intended scheme—especially so in changed social conditions. Your Royal Highness has said succinctly that, “Whilst it is true that judges cannot change the letter of the law, they can instil into it the new spirit that a new society demands.”¹⁰

Sometimes there are apparently conflicting provisions; increasingly, there is a backdrop of relevant constitutional provisions or principles which may influence interpretation. The judge must weigh all these matters when deciding what interpretation best fits. Judging has never been a science. It is a discipline: the judge seeks to be loyal to the aim and spirit of the law and to precedent and principle.¹¹ Judging can therefore also be a lonely matter. Appellate courts can give binding guidance on principle. But it is down to the individual judge to balance the relevant balance factors in

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¹² Mr Berlusconi, the Italian Prime Minister, at one point tried to introduce a similar prescription in relation to the Italian judiciary.

¹³ In their interesting comparative work, *Common law et tradition civiliste* (Droit et Justice series, Presses Universitaires de France), Duncan Fairgrieve and Horatia Muir-Watt attribute the common law practice of full reasoned individual judgments to the fact that common law judges act without the backing of any code. Each decision has thus to be placed carefully in the context of prior case law.

any case. This is nowhere more so than when he or she is exercising a discretion, for example whether to grant bail or other relief.

Finally, the judge will be loyal to the shape in which the case is put before him. He will not surprise the parties with thoughts of his own that they have not had the opportunity of addressing. This underlines the importance of the Bar, and of the co-operation between Bench and Bar which is the hallmark of our common law system.

In civil law, the tradition of the judge as mere technician still lingers. And, since the theory operates on the basis that the law has a fixed content, civil law judges are expected to know the law and to do their own researches into it. The Emperor Napoleon in Article 5 of the French Civil Code sought to prohibit judges from adopting any sort of general interpretative reasoning. Judges were to decide cases by simple application of the language of the Code to the dispute before them. French Cour de Cassation judgments are still in a form reflecting this dogma.¹²

In contrast, common law judges have carefully to place each decision in the context of prior case law and the submissions before him. In this way, the common law judge aims to legitimise his or her decisions and to ensure their social acceptability.¹³ The common law's traditional invocation of the reasonable person fits into the same pattern. The common law judge is appealing to the ordinary member of the public. The civil law judge, in

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¹⁴ 5 US (1 Cranch) 137 (1803).

¹⁵ [1967] 1 AC 259.

¹⁶ [1977] AC 195.

contrast, stamps the authority of a code onto the public coming before him or her. Naturally, there is here some over-simplification, but the difference still appears in the contrasting judgment styles of common and civil law.

Written constitutions

Within common law countries, there is also a contrast between the United Kingdom and countries like Malaysia with Westminster style constitutions. Written constitutions impinge, to greater or lesser extent, on Parliamentary sovereignty and entrench rights, and like codes offer a visible explanation of the source of judges' authority. I say to a greater or lesser extent: if a constitution provides that the rights it contains can be overridden by any law that Parliament deems fit to enact, then Parliamentary sovereignty in truth remains untouched. Constitutions commonly enable courts to strike down even primary legislation infringing entrenched rights—following in this respect the United States example established in the famous case of *Marbury v Madison*.¹⁴

In countries with a written constitution, the basic principle of separation of powers can operate as a direct limit on the powers of the executive and legislature, enforceable by the judges. In *Liyanage v The Queen*¹⁵ and *Hinds v The Queen*,¹⁶ the Privy Council read that basic principle into the Westminster style constitutions of Ceylon and Jamaica. In the one case, it struck down

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¹⁷ Ibid, at 212, per Lord Diplock; followed in *Director of Public Prosecutions of Jamaica v Mollison* [2003] 1 AC 41.

¹⁸ [2007] 4 AMR 568; [2007] 5 MLJ 174.

Editor's note: The Court of Appeal held that section 97(2) of the Child Act 2001 contravened the doctrine of separation of powers. On appeal, the Federal Court overruled the Court of Appeal's decision. In coming to his decision, Abdul Hamid Mohamad PCA (the acting Chief Justice at that time) observed that the doctrine of separation of powers "is not a provision of the Malaysian Constitution" and that its application "depends on the provisions of the Constitution". He added: "A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine." See *Public Prosecutor v Kok Wah Kuan* [2007] 6 AMR 269 at [17]; [2008] 1 MLJ 1 at [17].

¹⁹ [2008] UKPC 25.

²⁰ [2008] UKPC 42.

legislation directed at depriving particular individuals retrospectively of their right to jury trial; in the other, legislation establishing a new Gun Court, outside the constitutionally provided court scheme, and giving to the executive the right to determine how long a sentence an individual served. The Privy Council said in *Hinds* that under such constitutions:

It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government.¹⁷

In *Kok Wah Kuan v Public Prosecutor*¹⁸ your Court of Appeal on 12 July 2007 followed these authorities and reached a similar result in relation to a statutory provision that a child convicted of murder should be detained during executive pleasure.

Recent Privy Council decisions in the same sense are *Horace Fraser v Judicial and Legal Services Commission*¹⁹ and *Angela Inniss v AG of St Christopher and Nevis*.²⁰ In these cases, a judge and registrar were engaged by the Government under contracts for periods expressed in years. The relevant constitutions provided for powers of discipline over and removal of such persons to be vested in judicial or public services commissions, which could in turn only act on reasonable cause. But the judge's and registrar's contracts also included small print. This on its face gave the Government power to terminate the engagements at any time on three months notice, even if the yearly contract periods had not expired.



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The Privy Council held that the small print must be read subject to the constitutional protection conferred by the relevant commission. Notice during the main contract period amounted to removal. It could only be given if the commission had adjudicated on the matter and decided for good cause that removal was necessary.

Even much more general concepts—like that of a “democratic” state or of the Rule of Law—can, in a written constitution, operate as an effective limit on legislative and executive powers. In *State of Mauritius v Khoyratty*²¹ the Legislative Assembly, by ordinary constitutional amendment involving a three-quarters majority of the Assembly, purported to abolish the right to apply to a court for bail in terrorism or serious drugs cases. Delays pending trial were commonplace, so that persons suspected of such offences were languishing on remand in prison for long periods. But the Constitution contained in section 1 a provision that Mauritius “shall be a democratic state”, and this could only be amended by vote of two-thirds of the electorate *and* of all the members of the Assembly—in practice an insuperable barrier. The Privy Council held that section 1 was not a mere preamble but a separate, substantial guarantee of the separation of powers. Complete abolition of the right to apply for bail pending trial in terrorism or serious drugs cases infringed that principle. It could not be achieved therefore by ordinary constitutional amendment, let alone by ordinary legislation.

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²² Cabinet Office, 1987.

²³ Sir Robin Cooke, "Administrative Law Trends in the Commonwealth" (1990, Fifth Sultan Azlan Shah Law Lecture) in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, edited by Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia, Chapter 5.

²⁴ Lord Woolf, "Judicial Review of Financial Institutions" (1997, Twelfth Sultan Azlan Shah Law Lecture) in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, Chapter 12.

²⁵ Lord Slynn of Hadley, "The Impact of Regionalism: The End of the Common Law?" (1999, Fourteenth Sultan Azlan Shah Law Lecture) in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, Chapter 14.

²⁶ Cherie Booth QC, "The Role of Judges in a Human Rights World" (2005, Nineteenth Sultan Azlan Shah Law Lecture), pages 131–197 above.

Parliamentary sovereignty

In constitutional theory, the sovereignty of the United Kingdom Parliament remains unchanged. But the tectonic plates, governing the relationship between different pillars of the state, have begun to shift. The movement started some years prior to the Constitutional Reform Act. Various factors—many touched on in previous Sultan Azlan Shah lectures—are responsible:

- since the 1970s, the growth of judicial review—this gave rise in the 1990s to a Civil Service booklet called *The Judge Over Your Shoulder*²² and was the subject of the lectures given by Sir Robin (later Lord) Cooke in 1990²³ and Lord Woolf in 1997;²⁴
- since 1972, the European Community—the subject of the lecture given in 1999 by Lord Slynn,²⁵ who sadly died earlier this year;
- since 2 October 2000, the European Convention on Human Rights, domesticated by the Human Rights Act 1998—the subject of Cherie Booth QC's lecture in 2005;²⁶ and
- since the 1990s, the parallel recognition of fundamental common law rights. The main achievement under this fourth head here has been the principle of legality—the strong common law presumption that the more fundamental the right,

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²⁷ *Council for Civil Service Unions v Minister of State for the Civil Service*
[1985] AC 374 at 408–411, per Lord Diplock.

²⁸ Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

²⁹ Case C-213/89, *R v Secretary of State for Transport, ex parte Factortame Ltd*
[1990] ECR I-2433; *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603.

the less likely that Parliament intended its abrogation, unless very clear words have been used.

I will take these factors in turn. Judicial review holds government to account, it insists on good governance and it does so now on a coherent basis. Released from former procedural complexities, executive action is scrutinised under three classic heads: illegality, procedural irregularity and irrationality.²⁷ But the common law has traditionally been cautious about challenges on irrationality. European law has recently encouraged us to more intensive and substantive review, based on proportionality, especially in the area of human rights. Administrative law is today recognised as an essential tool by which the judges hold government to its proper limits.

Second, an ever-growing source of law in the United Kingdom is European Community legislation. This has a double-barrelled effect: first, domestic legislation is to be construed so far as possible consistently with European legislation;²⁸ and, second, if domestic legislation cannot in this way be reconciled with directly applicable European legislation, it is simply invalid and the judges must hold it so.²⁹ This applies as much to legislation passed subsequent to the European Communities Act 1972 as before.

Under the traditional rule of Parliamentary supremacy, an Act of Parliament passed after 1972 could have been expected to overrule European law, if the two were inconsistent. Not so with the European Communities

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³⁰ *Internationale Handelgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1974] 2 CMLR 540. See also the *Solange II* decision: *Re Wünsche Handelgesellschaft* [1987] 3 CMLR 225.

Act 1972. It renders invalid any subsequent Act inconsistent with European law. The exercise of Parliamentary sovereignty reflected in the passing of the 1972 Act has the somewhat paradoxical effect that Parliament is no longer sovereign in the area of European Community law—so long as the United Kingdom remains within the European Community. It is, I add, inconceivable that we shall not do so.

Contrast the position in other European countries with their written constitutions. There, supreme constitutional courts have made clear that, at least in their eyes, their domestic constitutions place continuing limits on European legislative sovereignty; European legislation will be acceptable so long—but only so long—as it continues broadly to respect those limits.

The best-known decision in this connection is the decision of the German Constitutional Court (Bundesverfassungsgericht) in *Solange I*, refusing to recognise the unconditional supremacy of the European Community when Community law could impact upon the basic rights contained the German Constitution.³⁰

The same Court in a more recent decision of 30 June 2009 approved the Treaty of Lisbon as compatible with the German Basic Law (a decision which perhaps signifies the Community's increasing awareness of fundamental rights and the German recognition of the increasingly important role of the European Community at both a

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

³¹ Section 3.

³² Section 4.

³³ [2004] UKHL 56; [2005] 2 AC 68.

national and a supra-national level). But the approval was conditional upon German legislation providing for closer scrutiny of European legal proposals, in order to remedy what the German Constitutional Court perceived as a lack of democratic legitimacy and control at the level of the European Parliament.

Third, the Human Rights Act 1998 also requires United Kingdom courts to interpret domestic legislation so far as possible consistently with the European Convention on Human Rights.³¹ But, if that is not possible, the result is not to make the domestic legislation invalid. It is to enable the court to make a declaration of incompatibility which does not in fact invalidate the legislation.³² The understanding is that Parliament will then reconsider and repeal or amend the offending legislation; this is what has to date always happened.

For example, in *A v Secretary of State for the Home Department*,³³ in December 2004 a law authorising the detention without trial of aliens—but not British nationals—suspected of terrorist involvement was declared discriminatory and incompatible with the Convention. United Kingdom nationals suspected of terrorist activity were just as likely to represent a danger, yet there was no provision for suspending habeas corpus to allow their detention. The Government allowed the legislation to lapse (and substituted a system of control orders, which has also had to be modified in the light of subsequent declarations of incompatibility).

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³⁴ See *R v Home Secretary, ex parte Pierson* [1998] AC 539 at 575C-D, and *R v Home Secretary, ex parte Simms* [2000] 2 AC 115 at 131E-G.

³⁵ An appeal from: *A, K, M, Q & G v Her Majesty's Treasury* [2008] EWCA Civ 1187; [2009] 3 WLR 25 and *HAY v Her Majesty's Treasury* [2009] EWHC 1677 (Admin).

³⁶ Terrorism (United Nations Measures) Order 2006 (SI 2006/2657); Al-Qaida and Taliban (United Nations Measures) Order 2006 (SI 2006/2952). The present point arose in respect of the latter order.

³⁷ Section 1(1).

Fourthly, there is the principle of legality: this consists of a strong presumption that the more fundamental the right, the less likely that Parliament intended its abrogation, unless very clear words were used.³⁴ It is a powerful interpretative tool, almost as powerful as the obligation to interpret legislation so far as possible consistently with European Community law and the European Human Rights Convention.

The existence of rights which the common law recognises as fundamental may be relevant in circumstances to which the Human Rights Convention, as interpreted by the Strasbourg court, does not extend.

The first case to come before the new United Kingdom Supreme Court saw such an argument.³⁵ By the United Nations Act 1946 Parliament granted to the executive power to make subordinate legislation, without further Parliamentary scrutiny, in order to give domestic effect to Security Council Resolutions under Chapter VII of the UN Charter. By Resolution (No 1267) the Security Council required all states to freeze assets of persons on a Security Council list of persons associated with the Taliban and Al-Qaida. The United Kingdom Government made Orders in Council³⁶ to give effect to this obligation.³⁷ Individuals identified by the Security Council thus became subject to orders within the United Kingdom which subjected all aspects of their personal or other expenditure to executive control and scrutiny.

The principle of legality consists of a strong presumption that the more fundamental the right, the less likely that Parliament intended its abrogation, unless very clear words were used. It is a powerful interpretative tool.

³⁸ The House of Lords had held in the earlier case of *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 AC 332 that a Security Council resolution requiring detention without trial for security reasons of Iraqis in Iraq prevailed *pro tanto* over the right not to be detained save in circumstances specified in Article 5 of the Human Rights Convention.

³⁹ Negative answers were given to these questions by the majority of the Supreme Court in its decision dated 27 January 2010: [2010] UKSC 2.

⁴⁰ These are analysed and put into a conceptual framework in an article “Bi-polar Sovereignty Revisited” [2009] CLJ 361 by CJS Knight, who I am lucky enough to have as my legal assistant, and to whom I am indebted for assistance in relation to research for and preparation of this lecture.

⁴¹ [2005] UKHL 56; [2006] 1 AC 262 at [102].

For reasons into which I need not go, the Human Rights Convention was, on one view, of no assistance.³⁸ But the individuals pointed out that the orders meant that they had no opportunity to challenge judicially, or even know the basis of, their appearance on the Security Council list. They argued that so fundamental an inroad on their ordinary rights to use their property could not have been intended to be taken away by a power to make subordinate legislation. They asked rhetorically: What if a Security Council Resolution had named them as persons who should be detained without trial? Could the apparently general language of the United Nations Act really have so large a grasp? Could habeas corpus and individual rights be so easily set aside?³⁹

It has also been mooted, judicially as well as extra-judicially, that the common law may have a force going beyond statutory interpretation: that there may be constitutional fundamentals⁴⁰—again, for example, the right of access to a court—which “even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish” by primary legislation. Comments in this sense were made in *R (Jackson) v Attorney General*.⁴¹ This was a case on the validity of the Hunting Act 2004, by which the Labour Government sought to abolish fox hunting. (The Act seems in reality to have had remarkably little impact on this traditional country activity.) But the case was litigated to the House of Lords, where Lord Steyn explained Parliamentary sovereignty as “a construct of the judges”, created by them and capable of being qualified by

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⁴² Ibid, at [102] per Lord Steyn, [105]-[108] per Lord Hope and [159] per Baroness Hale.

⁴³ *Doctor Bonham's Case* (1610) 8 Co Rep 107 at 118a. Although for an argument that “void” meant something very different at the time see: I Williams, “*Dr Bonham's Case* and ‘Void’ Statutes” (2006) 27 *Journal of Legal History* 111.

⁴⁴ *De Rege Inconsulto*, 1625, echoing *The Political Works of James I*, (1610).

them, and Lord Hope and Baroness Hale identified “the Rule of Law” as “the ultimate controlling factor on which our constitution is based”.⁴²

Such thinking takes one back to the constitutional battles of the 17th century, mentioned earlier. Chief Justice Coke, a thorn in the flesh of James I, suggested famously in 1610 that natural law would prevail over any Act of Parliament that was “against common right and reason”.⁴³ In reaction, Sir Francis Bacon, Coke’s great adversary and James I’s supporter, advised judges that, although they might like to regard themselves as lions, they should be “lions *under* the throne; being circumspect that they do not check or oppose any points of sovereignty”.⁴⁴

Bacon was arguing the royal or executive cause. That cause was decisively lost during the later Civil War when sovereignty passed to Parliament. The critical issue today is often how far it is the role of an independent judiciary to oppose or check the sovereignty not of the executive, but of Parliament. But Parliament today is all too often no more than the mouthpiece of the executive. So the change in the issue may be seen as more cosmetic than substantial. In general, it is an issue which the great institutions of state would all do well to avoid bringing to a point. Lord Hope put this attractively in the Hunting Act case, when he said at paragraph 125 that:

In the field of constitutional law the delicate balance between the various institutions whose sound and lasting

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⁴⁵ See also: Lord Steyn, “Contract Law: Fulfilling the Reasonable Expectations of Honest Men” (1996, Eleventh Sultan Azlan Shah Law Lecture); and Lord Clyde, “Construction of Commercial Contracts: Strict Law and Common Sense” (2000, Fifteenth Sultan Azlan Shah Law Lecture) in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, edited by Dato’ Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia.

Lord Diplock once deplored the transfer from the sphere of statutory interpretation to the sphere of contractual construction of the expression “purposive construction”: *Antaios Co SA v Salen AB* [1985] AC 191. But I think he meant simply that contracts, the prime legal product of personal autonomy, should not be approached with any pre-conception that what the parties had agreed should coincide with any higher social goal.

⁴⁶ [1990] 2 AC 605.

quality Dicey (at page 3) likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has for the other. In *Pickin v British Railways Board* [1974] AC 765, 788A-B Lord Reid observed that for a century or more both Parliament and the courts have been careful to act so as not to cause conflict between them. This is as much a prescription for the future as it was for the past.

The prescription is all the more important in an era when the Rule of Law and the protection of individual liberties represent values frequently under threat as law-makers react to perceived internal or external threats, particularly threats of terrorism. Judges find themselves faced with difficult, delicate and nuanced decisions in increasingly controversial areas. The courts employ various concepts to allow flexibility and to explain and objectivise their response to such difficulties. One of the most pervasive is “reasonableness”; another introduced from Europe has been “proportionality”.

There is nothing new about the invocation of reasonableness in civil law. In contract, the aim has always been to identify the meaning that a reasonable person would have attached to the contract in the light of their contractual purpose objectively ascertained in the light of the surrounding circumstances.⁴⁵ Reasonableness also features among the factors deployed in deciding whether or not to recognise a duty of care in the tort of negligence: see eg *Caparo v Dickman*⁴⁶ and *Barclays Bank plc v Customs*

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⁴⁷ [2006] UKHL 28; [2007] 1 AC 181.

⁴⁸ *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, replacing the old test from *R v Gough* [1993] AC 646.

⁴⁹ I should however be cautious about this—not just because robes and wigs may sometimes have encouraged judicial self-importance (“judgitis”), but also because in the Supreme Court we have decided to continue the House of Lords committee room tradition of not robing. We also continue to sit on the same level as counsel and to continue the tradition of hearings as a form of learned debate.

⁵⁰ [2007] UKHL 37; [2007] 1 WLR 2679 at [81].

and Excise Commissioners.⁴⁷ It is central to the question whether a duty of care, once recognised, has been observed or broken.

In public law, reasonableness has long played a key role in the form of the *Wednesbury* test. But it has a wider application. Whether a judge was or appeared biased is no longer determined from the viewpoint of the court, but by the court asking itself whether there was or would have appeared to be bias in the eyes of a fair-minded and informed member of the public—a reasonable member of the public neither unduly compliant or naïve nor unduly suspicious.⁴⁸

Again, the test is expressed in objective terms, distancing it from the personal predilections or prejudices of the particular judge. Tools which lend objectivity to the judicial process can be important for the judge him or herself, and also for public confidence. (In the past, one might have added: in the same way that judicial robes and/or headgear symbolised and underlined the distance between the judge's private inclinations and public duties.)⁴⁹ However, it is sometimes also important to remember, as I noted in *R v Abdroikof*,⁵⁰ that

... the fair-minded and informed observer is him or herself in large measure the construct of the court. Individual members of the public, all of whom might claim this description, have widely differing characteristics, experience, attitudes and beliefs which could shape their

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⁵¹ Lord Mustill, “Negligence in the World of Finance” (1991, Sixth Sultan Azlan Shah Law Lecture) in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, edited by Dato’ Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell Asia. See also J Stapleton, “Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence” (1995) 111 LQR 301, which urged courts to be more open in identifying the policy choices and considerations underlining their decisions.

answers on issues such as those before the court, without their being easily cast as unreasonable.

Courts aim at results which are and will be accepted as fair, they use language which will have a resonance with their listeners and the public, but such language should not be allowed to obscure an important underlying reality—that the court is itself often reaching a difficult policy decision. In his Sultan Azlan Shah lecture on the duty of care in tort, Lord Mustill identified as the root of the problem “a reluctance on the part of judges to accept inwardly, and afterwards to acknowledge outwardly, that decisions in this field are essentially concerned with social engineering”—the “refraction through the judge’s eyes of a set of contemporary economic and political value-judgments”. So “the first step which should be taken ... is to recognise that we are here concerned with policy”.⁵¹

The almost inevitable consequence of such realism is that other issues, which I have already touched in passing, come to the fore: Who are these judges? How were they appointed? Are they properly prepared for their task? And are they doing it efficiently? What are the ethical standards to which they adhere and how are these enforced? Are they appropriately answerable for their decisions?

The recent developments in the United Kingdom, which I have outlined, make all these questions more telling. The judicial role is being performed overtly in new areas of pressing public interest and to a greater extent

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⁵² The most prominent devotee of this approach is Justice Antonin Scalia. See *A Matter of Interpretation: Federal Courts and the Law*, 1997; “The Rule of Law as a Law of Rules” (1989) 56 U Chi L Rev 1175; and “Originalism: The Lesser Evil” (1989) 57 U Cin L Rev 849. The Privy Council has not taken the same approach: *Charles Matthew v The State* [2005] AC 433.

⁵³ There was in 1998 somewhat hysterical headlines in *The Guardian*, on the appointment of two judges with commercial and company law backgrounds to the House of Lords: “Lord Justices Hobhouse and Millett, Who they?” and “Commercial lawyers to judge human rights”.

than ever before under general scrutiny. The courts are no longer enforcing reasonable expectations *in favour of* reasonable people—injured victims. Only too often, they are identifying, and enforcing adherence by the executive or legislature to, proper standards in favour of *unreasonable* people—people who have behaved unreasonably, people who reasonable people have every reason to dislike or to suspect of the grossest misconduct.

When doing this, courts are particularly open to criticism that they are reflecting their own predilections or preferences, and to inquiry as to the source of their legitimacy to do this.

Even where courts can base themselves on a written constitution, they may feel a need to deflect such suggestions. The originalist theory of interpretation of the United States Constitution—that it should be read as understood at the time of its enactment⁵²—may perhaps be seen in this light.⁵³

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

Mr Blair, in last years' lecture, did not like the House of Lords' decision in the case of *A*, which declared the detention

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⁵⁴ *A v Secretary of State for the Home Department*
[2004] UKHL 56; [2005] 2 AC 68.

⁵⁵ T Blair, “Upholding the Rule of Law: A Reflection”
(2008, Twenty-Second Sultan Azlan Shah Law Lecture), pages 329–371 above.

⁵⁶ Lord Steyn, “Guantanamo Bay: A Legal Black Hole” [2004] 53 ICLQ 1.
See also Opinion No 8 (2006) of the Consultative Council of European Judges
at [75]: www.coe.int/judges.

⁵⁷ European Convention on Human Rights, articles 8–11.

of aliens suspected of terrorism to be discriminatory and incompatible with human rights.⁵⁴ He said that the House had “seriously misjudged the threat and misunderstood the only practical way of dealing with it”.⁵⁵

I was not a member of the court at that time, and I hope that it is more than loyalty that causes me to disagree. Over-reaction risks undermining the very values which anti-terrorism measures aim to protect. Witness the disaster of Guantanamo Bay, and the damage done to the image of its creator.⁵⁶

Delicate balancing exercises may also have to be undertaken in respect of other rights, such as those to respect for private life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association.⁵⁷ All may be made subject to restrictions—under the European Convention on Human Rights such “as are prescribed by law and are necessary in a democratic society” in the interests of various specified matters, such as national security, public safety, the protection of public order, the protection of the rights and freedoms of others and, in the case of freedom of expression, the maintenance of “the authority and impartiality of the judiciary”. I note that the rather differently, and on its more widely worded Article 10(2) of the Malaysian Constitution allows Parliament to impose such restrictions “as it deems necessary *or expedient*” in various interests, which also include “morality”.

Courts aim at results which are and will be accepted as fair, they use language which will have a resonance with their listeners and the public, but such language should not be allowed to obscure an important underlying reality—that the court is itself often reaching a difficult policy decision.

⁵⁸ *Texas v Johnson* 491 US 397 (1989).

⁵⁹ *R (Williamson) v Secretary of State for Employment and Education* [2005] UKHL 15; [2005] 2 AC 246.

⁶⁰ *R (Begum) v Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100.

⁶¹ *Ghai v Newcastle CC* [2009] EWHC 978 (Admin). The case has however gone to appeal, where it appears from reports that one issue is whether the ban and such rites are really inconsistent.

Editor's note: The appeal against the High Court's decision has been allowed.

Without specifically deciding whether there was an infringement of Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Court of Appeal adopted a wide meaning to the word "crematorium" and held that the legislation in question could accommodate the claimant's wishes to be cremated in accordance to his Hindu belief of cremation by way of open air funeral pyre.

See [2010] EWCA Civ 59; [2010] 3 WLR 737.

When does freedom of expression, often represented by the press, outweigh an individual's right to privacy? What limitations may be appropriate on expressions, verbal or physical, of view or, more fundamentally, of religious belief? This was the issue in the United States in the case about prohibitions of flag-burning.⁵⁸ United States federal and state statutes had outlawed flag-burning in response to protest burnings of the United States flag in opposition to the Vietnam war. The United States Supreme Court struck them down as inconsistent with freedom of expression. More recently, in the United Kingdom, it has been held that a religious belief in the virtue of corporal punishment in schools could not outweigh a statutory prohibition;⁵⁹ and that schools might, if they so chose by a carefully considered policy, legitimately require students to refrain from wearing for religious reasons a head-dress which their religion did not positively require them to wear.⁶⁰ A first instance court has also upheld the legitimacy of what it identified as a ban on open air cremation preventing orthodox Hindus from practising their funeral rites.⁶¹

The phrase in the European Convention on Human Rights—"necessary in a democratic society"—brings the judicial role into the forefront of public attention. And it does so in a more intensive way than anything traditionally involved in administrative law judicial review (although it has, as I have said, also begun to influence traditional common law review).

I will give an example of the continuing difference. In cases involving the unlawful occupation of property by

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⁶² [2008] UKHL 57; [2009] 1 AC 367 at [135] per Lord Mance, citing *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 at 531 per Lord Bridge of Harwich; and *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1130B-C per Laws LJ (“the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake”).

⁶³ J Bentham, “Anarchial Fallacies” in Bowring (ed), *The Works of Jeremy Bentham*, 1838–1843, page 501.

persons (example, Romas or gypsies) who have made it their home, the common law has traditionally said that the ownership and right to possession of property outweighs all other interests. The European Court of Human Rights has told us that this is not good enough. Proportionality requires the court to consider whether even a trespasser's right to a home outweighs, even if only temporarily, the owners' right to repossess his property.

In the most recent decision on this issue at the highest domestic level, the House of Lords wrestled with this difference in a way which may not have closed the gap between domestic and Strasbourg case law: *Doherty v Birmingham City Council*.⁶² The Supreme Court is shortly to be asked yet again to revisit the area.

Courts are therefore increasingly involved in very public issues which affect individuals and communities on a day to day basis, and on which very profoundly different views may be held by different individuals and groups. It is not enough to point to a majoritarian view. The protection of a dominant majority is usually easy enough. But human rights are not utilitarian. The greatest good of the greatest number is not the test. Not surprisingly, Jeremy Bentham, the protagonist of utilitarianism, thought that it was "nonsense on stilts" to speak of absolute rights.⁶³ But written constitutions along the United States and Westminster style, the Universal Declaration of Rights and the European Convention on Human Rights prove him wrong. It is a central role of the modern court to protect unpopular causes and individuals.

“Delicate balancing exercises may also have to be undertaken in respect of other rights, such as those to respect for private life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association.”

⁶⁴ [2002] UKHL 19; [2002] 2 AC 883.

⁶⁵ [1976] AC 249 at 277–278.

⁶⁶ *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 AC 332

⁶⁷ Constitutional Reform Act 2005, sections 25–31.

Another influence which I wish briefly to mention is public international law. This has, to a remarkable extent, become part of the common fare of domestic courts. I take two examples.

In *Kuwait Airways Corp v Iraqi Airways Co*,⁶⁴ the House of Lords refused to apply an Iraqi law passed by Saddam Hussein to confiscate Kuwait Airways aircraft which had been taken to Iraq following Iraq's illegal invasion of Kuwait, which was at the time being maintained in breach of the Security Council's Chapter VII resolutions. To apply a foreign confiscatory law of that nature would have been a breach of the public policy of the English courts. Racist laws such as those of Nazi Germany would not be recognised in the United Kingdom for the same reason: *Oppenheimer v Cattermole*.⁶⁵

More recently, however, in *Al-Jedda*⁶⁶ the House of Lords held that a Security Council Resolution authorising the detention by British forces of suspects without trial in Iraq overrode the protection of Article 5 of the Human Rights Convention.

I return to the questions asked about modern judges. Who are they? How were they appointed? What are the standards to which they adhere and how are these enforced? Are they appropriately answerable for their decisions? The creation of the new United Kingdom Supreme Court and the establishment of a new system of appointments are steps aimed at providing a partial answer.⁶⁷

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⁶⁸ The point was made with great force by
The Honourable Michael Kirby AC CMG in a recent lecture.

⁶⁹ CCJE, Opinion No 1 (2001) at [45].

We have sought to explain more openly on our website and in our exhibition space who we are, what our careers have been and what judging involves—as I said earlier “not a science, but a discipline”. We have of course a way to go. Other jurisdictions have made speedier progress than the United Kingdom towards diversity. It is not just a question of appearances. The recognition of the value of diversity is I believe a fundamental in modern society.⁶⁸ Different human beings—different sexes, ethnic groups, persons with different career paths—bring different experiences and insights which the variety and complexities of the issues coming before modern courts require. The fear is sometimes expressed that the common law will in Europe disappear under harmonising tendencies. I do not think so. European history and culture are witnesses to the value of diversity, even if they may also have caused some of its past problems.

The questions I have been discussing have a resonance in all legal systems. Ten years ago I was elected as first chair of a novel body, the Consultative Council of European Judges (“CCJE”), established by the Council of Europe. We commended the creation of an independent, non-political authority to have responsibility in all aspects of judicial life, from appointment to promotion, deployment, discipline and removal. It should be “an independent authority with substantial judicial representation chosen democratically by other judges”.⁶⁹ But—and with the years I have become ever more convinced of this—the judicial role should not be preponderant.



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⁷⁰ CCJE, Opinion No 4 (2003).

⁷¹ JS Mill, *Considerations on Representative Government*, 1861, page 4.

⁷² Available at www.unodc.org/pdf/corruption/bangalore_e.pdf (accessed 30 September 2011).

⁷³ Available at www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf (accessed 30 September 2011).

Otherwise, there remains the risk of unconscious self-replication.

Another important theme is that judges should themselves have and undertake responsibility for training and for the production and publication of ethical guides;⁷⁰ that (save of course in cases of corruption) judges should answer for the content and quality of their decisions through the appellate process, accompanied by the freedom of the public to comment on judicial decisions; that measures of performance by reference to the throughput or speed handling of cases can be particularly problematic if undertaken by the executive; and should if used be sensitively devised and controlled by the judiciary itself.

Such issues may not be headline-grabbing, but they are essential practical elements without which a properly functioning judiciary cannot be independent. John Stuart Mill reminded us that institutions “do not resemble trees which, once planted, are ‘aye growing while men ‘are sleeping’. In every stage of their existence they are made what they are by human voluntary agency.”⁷¹

Another body with an international impact is the Judicial Integrity Group, which has been responsible, after world-wide consultations, for producing the United Nations’ Bangalore Principles of Judicial Conduct⁷² and a Commentary⁷³ thereon—general principles which seek to identify the common values to which judges world-wide, to whatever legal tradition they belong, should adhere.

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Judicial independence is a fundamental value, not of course in the interests of the judiciary, but as a pre-requisite to their performance of a role which is in the interests of society as a whole.

I believe that international dialogue on all these matters is increasingly important. This lecture series is a singular bridge in that respect between our two respective common law countries, with their common law traditions. I hope that it will long remain so. It has been an honour to be part of it. Thank you. 🍀

