


Your Royal Highnesses,
distinguished guests,
ladies and gentlemen,
I am deeply grateful
to the organisers of
this prestigious lecture
series for inviting me to
give the 30th lecture

in honour of the late Sultan
and for thinking me worthy
to join the extraordinarily
distinguished list of judges and
jurists who have preceded me.



Baroness Hale of Richmond

The Supreme Court: Guardian of the Constitution?

30th Sultan Azlan Shah Law Lecture, 2016



The Right Honourable The Baroness Hale of Richmond

The Supreme Court: Guardian of the Constitution?



Brenda Marjorie Hale
(b. 31 January 1945)

Lady Hale is the United Kingdom's most senior woman judge. In 2004, she became the first, and sadly the only, woman 'Lord of Appeal in Ordinary' in the entire 133-year history of the Judicial House of Lords, after a varied career as an academic lawyer, law reformer and judge.

She was educated at Richmond High School for Girls in Yorkshire and Girton College, Cambridge. She was called to the English Bar by Gray's Inn in 1969, topping the list in the Bar Finals in 1968, and was appointed Queen's Counsel in 1989. She taught law at Manchester University for 18 years, specialising in family and social welfare law, and also practised for a while at the Manchester Bar.



In 1984 she became the first woman to serve on the Law Commission, a statutory body which promotes the reform of the law. There she led the work of the family law team, resulting (among others) in the Children Act 1989, the Family Law Act 1996 and the Mental Capacity Act 2005.

She was a founder member of the Human Fertilisation and Embryology Authority and chair of its Code of Practice Committee from 1990 to 1994, when she was appointed a Judge of the Family Division of the High Court, the first to be appointed direct from academia rather than the legal profession.

Lady Hale was appointed a Privy Councillor and promoted to the Court of Appeal of England and Wales in 1999, becoming only the second woman ever to be appointed to the Court of Appeal, and in 2004 to the House of Lords. This was the top court for the whole United Kingdom, until the “Law Lords” became the Justices of the newly established Supreme Court of the United Kingdom in 2009. She was appointed as President of the Supreme Court on 5 September 2017, after having served as its Deputy President since 2013. On 21 March 2018 she was appointed as a Non-Permanent Judge of the Hong Kong Court of Final Appeal.

Lady Hale has delivered judgment in numerous important decisions of the House of Lords and the Supreme Court. These include *Stack v Dowden* [2007] UKHL 17, a leading English property law decision which recognised a rebuttable presumption that co-habiting couples own equal shares in their property. In *Sharland v Sharland* [2015] UKSC 60, a panel of seven Justices of the Supreme Court held that a consent order governing a financial settlement between a divorcing husband and wife which was procured by fraudulent non-disclosure should be set aside.

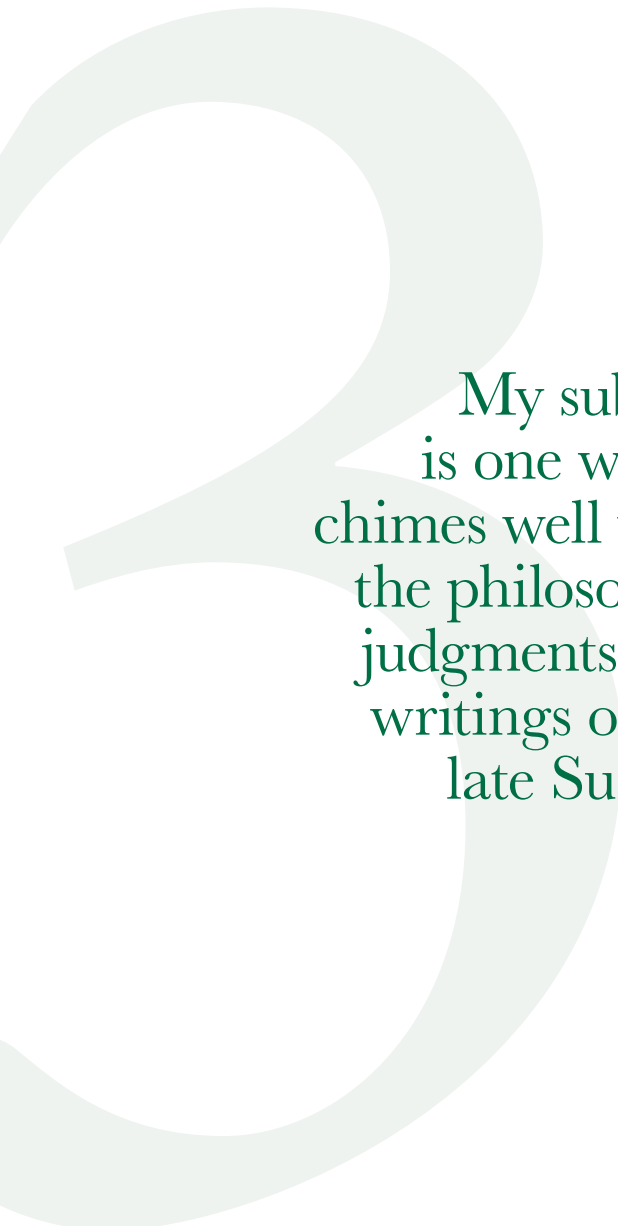


More recently, Lady Hale participated in several landmark decisions of the Supreme Court, including *Patel v Mirza* [2016] UKSC 42, in which a panel of nine Justices of the Supreme Court considered the issue of the common law doctrine of illegality as a defence to a civil claim, and held that the earlier well-known decision of the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 should no longer be followed. In *Willers v Joyce* [2016] UKSC 43, Lady Hale was in the majority of a panel of nine Justices of the Supreme Court which authoritatively recognised the tort of malicious prosecution of legal proceedings under English law.

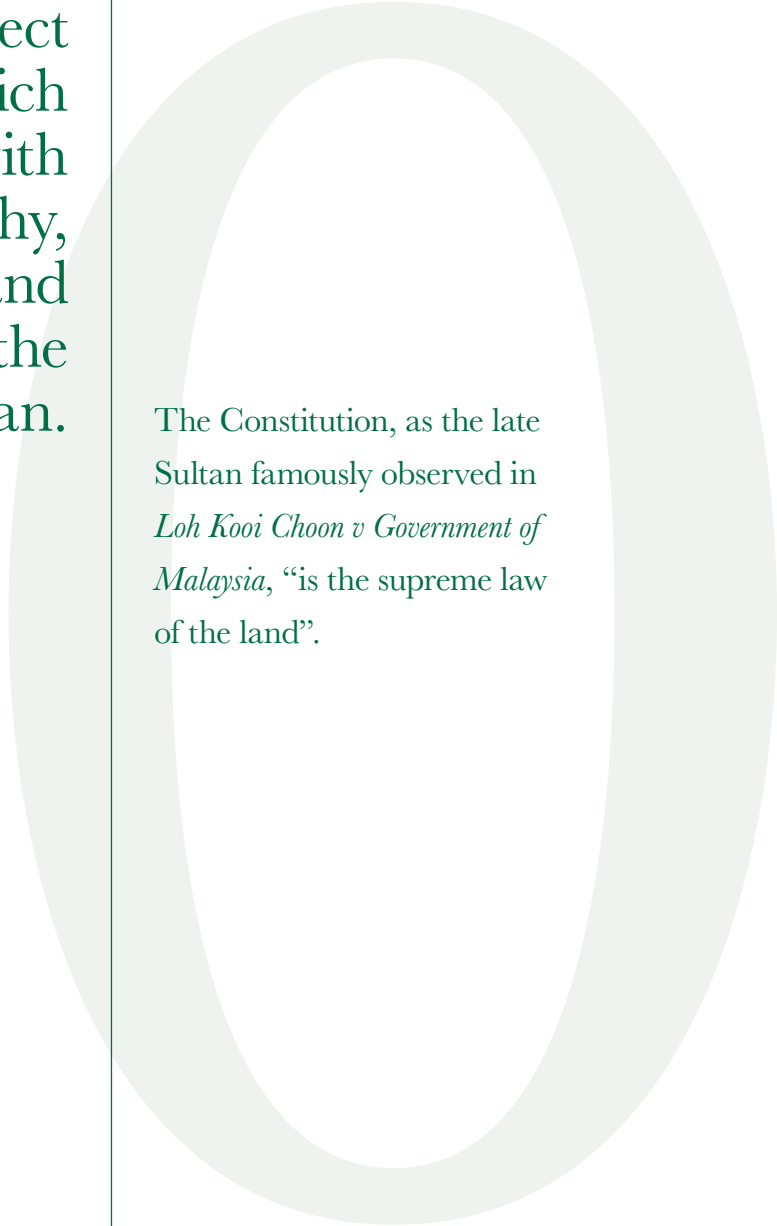
Lady Hale is author and co-author of a number of books, including *The Family, Law and Society: Cases and Materials* (6th edn, 2009) and *Mental Health Law* (5th edn, 2010). She retains her links with the academic world as Chancellor of the University of Bristol and Visitor of Girton College.

She also helped to establish the United Kingdom Association of Women Judges in 2004 and from 2010 to 2012 served as President of the International Association of Women Judges, a world wide body of both men and women judges committed to equality and human rights for all.

Lady Hale is married to Dr Julian Farrand, previously a Professor of Law at Manchester University. He is now the editor of *Emmet and Farrand on Title*, the principal textbook for conveyancing practitioners.



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The Constitution, as the late
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Malaysia*, “is the supreme law
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30

The Supreme Court: Guardian of the Constitution?

Baroness Hale of Richmond
Deputy President of the Supreme Court of the United Kingdom

Your Royal Highnesses, distinguished guests, ladies and gentlemen, I am deeply grateful to the organisers of this prestigious lecture series for inviting me to give the 30th lecture in honour of the late Sultan and for thinking me worthy to join the extraordinarily distinguished list of judges and jurists who have preceded me. It is a particular pleasure to be able to visit your country at long last, as I have met so many wonderful young Malaysian students who are reading for the English Bar in London, as the late Sultan did. I shall treasure this moment when I have the privilege of calling them to the Bar as Treasurer of Gray's Inn next year.

My subject is one which chimes well with the philosophy, judgments and writings of the late Sultan. It is also hugely topical in my own country, indeed so topical

*Text of the Thirtieth
Sultan Azlan Shah
Law Lecture delivered
on 9 November 2016
in the presence of
His Royal Highness
Sultan Nazrin Shah.*

“ The fact that we in the United Kingdom do not have a written Constitution does not mean that we do not have a constitution. We clearly do.

But it is different from most other constitutions in that its governing principle is that sovereign power is not distributed between the three branches of government but resides solely in Parliament (or strictly, the Queen in Parliament).

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that I shall have to be particularly careful about what I say, for reasons which will emerge.

The Constitution, as the late Sultan famously observed in *Loh Kooi Choon v Government of Malaysia*,¹

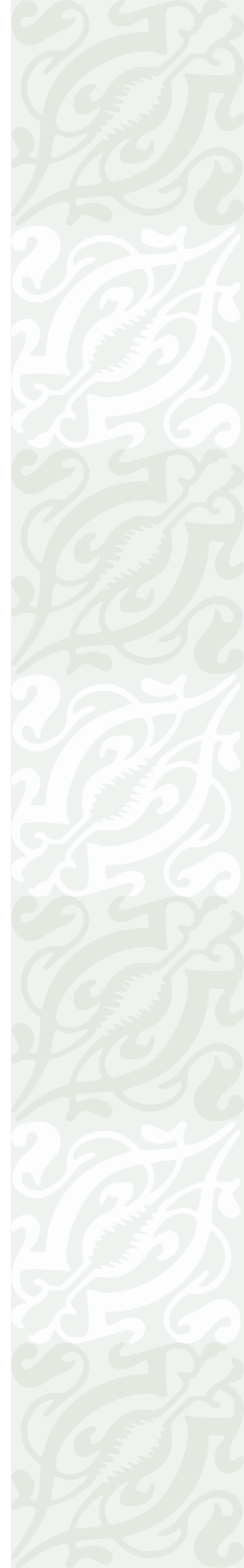
... is the supreme law of the land embodying three basic concepts: one of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation. ... The third is that 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.

All but three of the countries in the common law world, to which we both belong, and indeed in the rest of the world, have such a Constitution which fulfils those basic tasks: it is the supreme law, as your own Constitution provides in Article 4; it protects the fundamental rights of individuals, as your own Constitution does in Part II; it defines where executive, legislative and judicial power is to be held, and the relationship between those institutions, as your own Constitution does in Part IV, which provides for a constitutional monarchy on the Westminster model; and in a federal state it distributes powers between federal and state authorities, as your own Constitution does in Part VI.

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The three exceptions are New Zealand, Israel and the United Kingdom. But the fact that we in the United Kingdom do not have a written Constitution does not mean that we do not have a constitution. We clearly do. But it is different from most other constitutions in that (at least as we have always been taught) its governing principle is that sovereign power is not distributed between the three branches of government but resides solely in Parliament (or strictly, the Queen in Parliament). Parliament can make or unmake any law. Whether there are any limits to that is contested, as we shall see.

All countries with a written constitution have a supreme or constitutional court which can truly be called the guardian of the constitution. Countries with legal systems based on the continental European model, such as most of Europe, Latin America and parts of the Far East, have constitutional courts which are separate from the ordinary law courts. They all have a power of abstract review—a new or proposed law is referred to them so that they can rule on whether or not it is constitutional. Some also have a power of concrete review—the same question can come before them in a concrete case involving real facts and real people. Some have exclusive jurisdiction, in that they are the only court which can answer such question. The reason is to give such a judicial review a degree of democratic legitimacy—the laws passed by Parliament can only be challenged before a specialist body which itself has a degree of democratic legitimacy—in Germany for example, judges of the constitutional court are nominated by political



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² 5 US 137 (1803).

³ *United Bank Mizrahi v Migdal Cooperative Village* [1995] IsrSC 49(4) 221.

parties in proportion to their popular support. But some share it with the ordinary law courts.

In the common law world, which includes most of the English-speaking world as well as Israel, the Indian sub-continent, Malaysia, Singapore and Hong Kong, such constitutional questions are decided by the ordinary courts, usually in the context of concrete cases, although there are some constitutions, for example in Canada and Ireland, which allow for abstract questions on the validity of proposed legislation to be referred to the Supreme Court for a ruling. Most of the modern constitutions on this model provide expressly for judicial review of legislation, as does your own in Article 128.

The Constitution of the United States of America, adopted in 1787, together with the Bill of Rights of 1791, did not expressly provide for the Supreme Court of the United States to strike down federal legislation as unconstitutional, as opposed to the legislation of the states. But the Supreme Court very soon decided, in *Marbury v Madison*,² that this was a necessary incident of a Constitution which limited the powers of the federal legislature. Even more striking is the state of Israel, which does not have a written Constitution, but it does have two laws, called basic laws, which were passed as the beginning of a project towards adopting such a Constitution; and the Supreme Court has held that other laws can be struck down if they are inconsistent with those basic laws.³

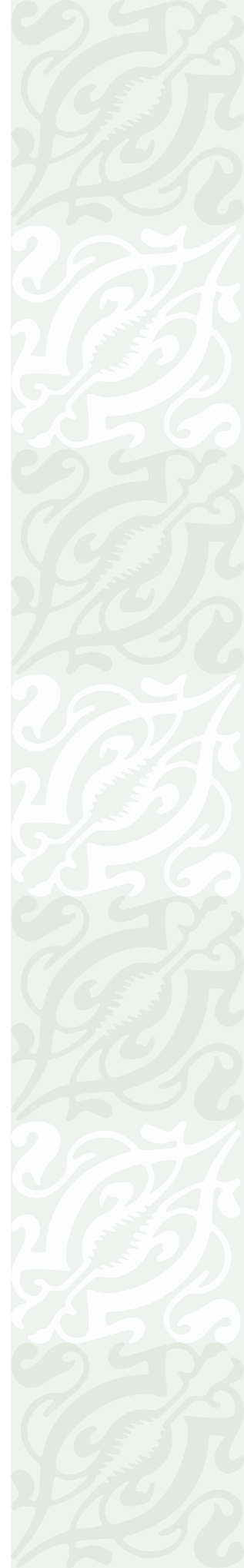
“The Constitution of the United States of America did not expressly provide for the Supreme Court of the United States to strike down federal legislation as unconstitutional. But the Supreme Court very soon decided, in *Marbury v Madison*, that this was a necessary incident of a Constitution which limited the powers of the federal legislature.”

⁴ It was entitled “The Law as the Handmaid of Commerce”, reproduced in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law* (Professional Law Books, 2004).

In the United Kingdom, of course, things are different. Until 2009, the top court was a committee of the Upper House of Parliament. The Law Lords combined the roles of judge and Parliamentarian. Their leader, the Lord Chancellor, combined the roles of Speaker of the House of Lords, senior member of the government, and Head of the Judiciary. In the early years of this century, it was recognised that, however well this arrangement had worked in practice, it could not be justified in principle. One of the strongest proponents of change was the great Lord Bingham, senior Law Lord (who delivered the 16th Sultan Azlan Shah lecture in 2001, although not on that subject).⁴ But what should take the Law Lords' place? There were several suggestions.

One was to combine the jurisdiction of the House of Lords with the jurisdiction of the Judicial Committee of the Privy Council. That would have made practical sense, as the same judges sit in both courts. But it would not have made institutional sense, as the Judicial Committee is constitutionally the top court for a number of independent countries who would be understandably unwilling to accept the hegemony of the United Kingdom once more. The benefit of our being the same judges is that we do have experience of constitutional adjudication in the judicial committee, where we are not infrequently called upon to decide upon the constitutionality, not only of acts of government and public authorities, but also of Acts of Parliament.

Another suggestion was that we should become a constitutional court along continental lines, with no



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jurisdiction in ordinary cases but to whom constitutional questions could be referred by the ordinary courts if they came up in concrete cases or perhaps by the government if they wanted an abstract ruling. There were two objections to this. Without a written Constitution, how were we to know what a constitutional question was? How could we have such a system without also having the power to strike down Acts of Parliament? The second objection was that this is alien to our usual common law way of doing things—constitutional points come up in the context of real cases involving real people and are decided by the courts in which they arise.

That objection also applied to a third idea: that a Supreme Court might operate on similar lines to the Court of Justice of the European Union in Luxembourg—setting UK-wide standards in the interpretation and application of UK law by answering questions referred to it by the appeal courts in the three jurisdictions of Scotland, Northern Ireland and England and Wales, and then sending the case back to be decided by them. This is the neat solution which combines uniformity of interpretation of European Union law with the sovereign power of individual member states to decide the cases arising in their jurisdiction and enforce the results. Such a court might also decide cases where the governments of the UK were in dispute with one another or where European Law required that a UK statute be disregarded.

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⁵ “A New Supreme Court for the United Kingdom”, University College London Constitution Unit, Spring Lecture, 1 May 2002, <https://www.ucl.ac.uk/political-science/publications/unit-publications/90.pdf> (accessed 8 August 2018).

Not surprisingly, Lord Bingham did not warm to any of these alternative ideas. His preference was for the minimalist option: “a supreme court severed from the legislature, established as a court in its own right, re-named and appropriately re-housed, properly equipped and resourced and affording facilities for litigants, judges and staff such as, in most countries in the world, are taken for granted.”⁵ Otherwise, it would be business very much as usual. And that is more or less what we have got. We certainly have a lovely building, appropriately situated on Parliament Square, properly resourced, not least with facilities for broadcasting our proceedings online. You are all very welcome to visit us, either virtually or in person. Nevertheless, Lord Bingham might be surprised at the extent to which we now safeguard the various functions of a Constitution suggested by the late Sultan.

There are three ways in which we have definitely become the guardians of the United Kingdom Constitution.

First and most obvious is that we rule upon the validity of the laws passed by the devolved legislatures in Scotland, Wales and Northern Ireland. The United Kingdom has not become a truly federal state, because England does not have her own Parliament. But the other parts of the United Kingdom now do have their own Parliaments with powers to pass their own laws. If they pass laws which are *ultra vires* their powers we can declare that they are “not law”. This can come up in a concrete case; but the law officers of each



The Supreme Court recognised that this was a matter of social and economic policy in which weight should be given to the judgment of the democratically elected legislature as to how the balance between the various interests should be struck. Crucially, it recognised that the Scottish Parliament was not to be regarded in the same light as an ordinary local authority. The wider grounds for judicial review of administrative action, which can be used to attack the decisions of local government, did not apply.

⁶ Wales Bill 2016-17, which had, at the time of the Lecture, reached the Committee stage in the House of Lords.
Editor's note: The Wales Act 2017 received Royal Assent on 31 January 2017.

⁷ *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868.

⁸ *Rothwell v Chemical and Insulating Co Ltd* [2007] UKHL 39; [2008] AC 281.

country can refer a new law to us after it has been passed by the Parliament in question but before it receives the Royal Assent. An Act of a devolved Parliament might not be law for two reasons. First, its subject matter might not be within the scope of the powers delegated by the UK Parliament: at present, everything which is not reserved to the Westminster Parliament is devolved to the Scottish Parliament, whereas everything which is not devolved to the Welsh Assembly is reserved to the Westminster Parliament (but that is about to change).⁶ Second, it might be incompatible either with the European Convention on Human Rights or with the law of the European Union (until we leave).

Curiously, the insurance industry has provided us with examples of both concrete and abstract review in the context of asbestos-related injuries. An example of concrete review is the *AXA Insurance* case.⁷ The Damages (Asbestos-related Conditions) (Scotland) Act 2009 provided (with retrospective effect) that pleural plaques, pleural thickening and asbestosis constituted actionable harm, reversing the effect of a recent decision of the House of Lords which had held that they did not.⁸ The insurance industry (yes, insurance companies do have human rights) complained that this was an unjustifiable breach of their property rights, protected by Article 1 of the First Protocol to the European Convention. The Supreme Court agreed that this was an interference with their property rights, but held that it was justified as a proportionate means of achieving a legitimate aim. The court recognised that this was a matter of social and economic policy in which weight should be given to

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An example of abstract review is the case about the *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*.⁹ This was a private member's Bill making employers and their insurers pay the cost of National Health Service treatment for asbestos-related diseases caused by the employers' breach of duty. The Counsel General for Wales, equivalent of the Attorney General, thought that it was within scope, but he knew that the Association of British Insurers proposed to challenge this, so he made the reference rather than wait for a case to trundle up through the courts in the usual way (as the AXA case had done). The challenge was partly on the ground that the Bill was a retrospective interference with the insurers' property rights and partly on the ground that it did not relate to "funding for the NHS in Wales" which is a devolved matter. The majority held that it was outside scope on both grounds. The Lord Chief Justice of England and Wales, who was asked to sit in the Supreme Court on this occasion because he is a Welshman, held that it did relate to funding for the NHS; it was unjustifiably retrospective in its effect, but only in a limited respect which could easily be cured by amending the Bill before submitting it for Royal Assent. (I agreed with the Lord Chief Justice.) The

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The statutory power
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¹⁰ *R (Public Law Project) v Lord Chancellor*
[2016] UKSC 39; [2016] 3 WLR 387.

majority were noticeably less respectful of the decisions of a democratically elected legislature than the court had been in the *AXA* case.

The next constitutional role which we clearly perform is keeping the government and executive within the powers which Parliament has given them. This is nothing new. The higher courts have been doing this for centuries through the mechanisms of the prerogative writs and declarations, and now through the unified procedure for judicial review. In this we see ourselves as the servants of the sovereign legislature. A recent example is the *Public Law Project* case.¹⁰ The Legal Aid, Sentencing and Punishment of Offenders Act 2012 drastically cut down on public funding for legal services in civil and family cases by taking whole areas of work outside the scope of any sort of legal advice, help or representation. The “legal services” for which public funding would be available were listed in a schedule to the Act. Fortunately, the Act contained a “Henry VIII clause” allowing the Lord Chancellor by delegated legislation to amend the schedule by adding, or taking away, particular legal services. The Lord Chancellor proposed to amend it by introducing a residence test, so that only people who had been lawfully resident in the United Kingdom for 12 months would qualify. We held that a power to specify the legal services for which public funding would be available did not include a power to specify the people for whom it would be available.

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¹¹ A reference to the Prince of Wales' handwriting.

¹² *R (on the application of Evans & Anor) v Attorney General*
[2015] UKSC 21; [2015] AC 1787.

That, I suspect, was a comparatively simple example, depending as it did on statutory construction. Rather more controversial was the so-called “black spider¹¹ letters” case, which concerned a journalist’s request under the Freedom of Information Act 2000 to see the letters passing between HRH the Prince of Wales and various government departments between September 2004 and March 2005. This was refused by the Cabinet Office on various grounds and the refusal was upheld by the Information Commissioner. But the Upper Tribunal, after hearing several days of evidence about the constitutional conventions governing the relationship between the Monarch, the heir to the throne and the government, and, of course, reading the letters, concluded that the public interest in disclosure was greater than the public interest in the various grounds for refusing it. The Attorney General then issued a certificate overriding that decision, as provided for in the 2000 Act, stating that he had on reasonable grounds formed the opinion that the departments were entitled to refuse disclosure. The journalist therefore sought judicial review of that certificate. He failed in the High Court but succeeded in both the Court of Appeal (led by last year’s lecturer, Lord Dyson) and, by a majority, in the Supreme Court.¹² None of us, of course, had seen the letters.

Lord Neuberger (and two other Justices) held that to allow a member of the executive to overrule the decision of a court or judicial tribunal simply on the ground that he disagreed would cut across two constitutional principles

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which were fundamental to the rule of law: first, that a judicial decision is binding between the parties and cannot be ignored or set aside by anyone; and second, that the decisions and actions of the executive are reviewable by the court. The statutory power would have to be “crystal clear” to subvert those principles and this was not. In his view, the Attorney General could only override the tribunal’s decision if there had been a material change in circumstances since then or the tribunal’s decision was manifestly flawed in fact or law. Lord Mance (your lecturer in 2009) and I were rather more cautious but agreed that a higher hurdle than rationality was required for a valid certificate. It was not good enough for the Attorney General simply to weigh the relevant public interests differently from the tribunal. He could not disagree with the factual or legal findings of the tribunal, at least without explaining why the tribunal had been wrong. So we agreed in the result.

These are both long-standing and traditional ways in which the Supreme Court (and indeed all the higher courts) have been guardians of our constitutional arrangements. A third important—some would say the most important—constitutional role of the courts is protecting the fundamental rights of individuals against encroachment by the state. Some would say that in my country this goes back to the middle ages and the invention of habeas corpus, but it certainly goes back to the 17th century battles against the Kings of England. In 1765, Sir William Blackstone, discerned three fundamental rights in English law:

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- (1) rights of
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- (2) rights to
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- (3) rights to property.

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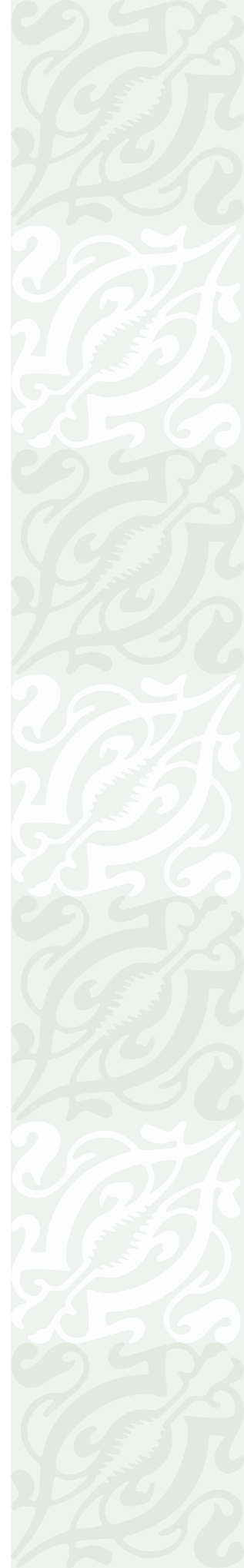
¹³ *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115.

¹⁴ *R v Secretary of State for the Home Department, ex p Brind*
[1991] 1 AC 696.

- (1) rights of personal security—a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation;
- (2) rights to personal liberty—the power of loco-motion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law; and
- (3) rights to property—freedom from taxation unless imposed by Parliament.

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The courts were able to protect those rights against encroachment by government officials. There is still plenty of scope for developing the common law to protect fundamental rights, for example to a fair procedure before the Parole Board which determines when certain prisoners can be released.¹³ But the courts had little scope to protect them against encroachment by Parliament. If Parliament placed restrictions, for example on the right of free speech, there was nothing the courts could do, even if those restrictions were not compatible with the European Convention on Human Rights,¹⁴ which the United Kingdom had been the first to ratify in 1950. But the Human Rights Act 1998 has made three important changes.



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the Convention rights.

¹⁵ Section 3(1).

¹⁶ *Ghaidan v Godin Mendoza* [2004] UKHL 30; [2004] 2 AC 557.

¹⁷ Section 4.

First, it has made the rights set out in the Convention into rights in UK law—no longer are we relying solely on the common law and what we can make of it; we have a clear statement in the Convention of what the rights entail and the circumstances in which they may be qualified or taken away. This has the benefit that we can explain our decisions in terms which the European Court of Human Rights in Strasbourg will understand, because we are all using the same concepts. This is, I believe, the main reason why the UK has lost fewer cases in Strasbourg in recent years.

Second, the Act requires that, so far as it is possible to do so, both primary and secondary legislation should be read and given effect compatibly with the Convention rights.¹⁵ We are no longer searching only for the intention of the legislature but for a way of reading its words which is compatible with the Convention rights if at all possible. Thus, for example, the words “living with each other as husband and wife” could be read as including a same sex couple whose relationship was as marriage-like as an unmarried opposite sex couple’s relationship.¹⁶

Third, while the Act does not allow us to “strike down” provisions in Acts of the UK Parliament which cannot be read compatibly with the Convention rights, we can declare that they are incompatible.¹⁷ This is a neat way of reconciling the protection of fundamental rights with the sovereignty of the UK Parliament. The law remains unchanged but the government and Parliament are given a clear message that we think it to be in breach of the UK’s international

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¹⁸ *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56; [2016] 3 WLR 1267 (the problem only arises for people born before 1 July 2006).

¹⁹ [2014] UKSC 38; [2015] AC 657.

²⁰ The Sexual Offences Act 2003 (Remedial) Order 2012.

obligations under the Convention. A recent example is the declaration that it is unjustifiably discriminatory to impose a good character requirement before people born of unmarried parents can acquire British citizenship while children born of married parents get it automatically, no matter how badly behaved they are.¹⁸

But the power is discretionary and in *R (Nicklinson) v Ministry of Justice*¹⁹ a nine-judge court disagreed about whether it would be appropriate to exercise it in the delicate matter of the law prohibiting assisting suicide. Four of the Justices thought that this was a profound moral question which should be left to the judgment of Parliament. Five of us thought that the court did have the constitutional authority to declare the law incompatible with the Convention right to respect for private life: this includes the right to choose the time and manner of one's passing. But only two of those five would have made such a declaration then and there.

If a declaration is made, there are three choices: for a relatively simple case, the government can promote a "fast track" remedial Order in Parliament to put it right (another sort of Henry VIII clause); for a more complicated case requiring a new legislative scheme, they can promote an Act of Parliament; but if they so choose, they are free to do nothing and accept whatever the international consequences this brings. An example of the first was the Order giving people on the sex offenders' register a very limited right to challenge their continued inclusion if they could demonstrate that they were no longer a risk.²⁰

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²¹ *Hirst v United Kingdom (No 2)* (2004) 38 EHRR 40; *Scoppola v Italy (No 3)* [2012] ECHR 868; *Smith v Scott* [2007] SCLR 268.

An example of the second was the Gender Recognition Act 2004, which introduced a scheme for recognising changes of sex in certain circumstances. An example, and so far the only example, of the third is the so-called “blanket ban” on any sentenced prisoner voting in elections. Both the Strasbourg and a UK court have declared this incompatible with the Convention right to vote,²¹ and various possibilities have been canvassed, but none has yet been enacted. That apart, however, the record of curing the incompatibilities found has been exemplary.

This does, of course, illustrate the gaping hole in the power of the Supreme Court of the United Kingdom to act as guardian of the UK Constitution in the same way that other supreme and constitutional courts do the world over. We cannot strike down Acts of the UK Parliament. But please do not think that I—or any of my brethren—want us to be able to do that. We are, I think, very comfortable with the role that we do have. This includes the various rules of statutory interpretation which govern the way in which we read legislation and enable us to safeguard fundamental rights and the rule of law.

The first is the principle of legality. This means that the UK Parliament is not taken to intend to override fundamental rights or the jurisdiction of the courts by general or ambiguous words. If Parliament wants to interfere with fundamental rights, or to subvert the rule of law, it has to be specific, so that Parliamentarians understand what they are voting for and can face up to

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²² *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 539; *Ahmed v HM Treasury* [2010] UKSC 2 and 5; [2010] 2 AC 534.

²³ (1765) 2 Wilson KB 275; 95 ER 807.

²⁴ *Anisminic Ltd v The Foreign Compensation Commission* [1969] 2 AC 147.

²⁵ *HM Treasury v Ahmed* [2010] UKSC 2; [2010] 2 AC 534.

²⁶ [2011] UKSC 46; [2012] 1 AC 868, at paragraph 153.

²⁷ My predecessor as Deputy President of the Court.

the political consequences.²² This principle dates back at least as far as the famous 18th century case of *Entick v Carrington*.²³ Its best known modern manifestation is probably the *Anisminic* case:²⁴ the House of Lords construed the provision that a “determination” of the Foreign Compensation Commission “shall not be called in question in any court of law” to refer only to a valid determination; the determination in that case had been invalid because it had taken into account a factor which the Commission had no right to take into account. Another example is the very first case to come before the UK Supreme Court, where we held that the very general power in the United Nations Act 1946, to make Orders in Council so as to comply with the UK’s obligations under the United Nations Charter, did not empower the Treasury to provide for draconian asset-freezing orders against individuals without due process of law.²⁵ In the *AXA* case, Lord Reed took the view that, if the UK Parliament cannot itself take away fundamental rights by general words, then neither could it create another body, such as the Scottish Parliament, which was free to abrogate fundamental rights or to violate the rule of law.²⁶

It is fair to say that the Scots have always been rather more sceptical of the untrammelled sovereignty of Parliament than have the English. In the *AXA* case, after pointing out the power which a government elected with a large majority has over a single Chamber Parliament, Lord Hope²⁷ said this:

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²⁸ [2011] UKSC 46; [2012] 1 AC 868, at paragraph 51.

²⁹ [2005] UKHL 56; [2006] 1 AC 262.

³⁰ *Ibid*, at paragraph 107.

³¹ Tom Bingham, *The Rule of Law* (Penguin Books, 2011), page 167.

It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts protecting the interests of the individual. ... The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.²⁸

Of course, the same could be said of a government which can control the House of Commons, because ultimately it can override the House of Lords. In *R (Jackson) v Attorney General*,²⁹ the case which decided whether the Hunting Act 2004 was a valid Act of Parliament, Lord Hope had said this:

The rule of law enforced by the courts is the ultimate controlling factor upon which our constitution is based ... the courts have a part to play in defining the limits of Parliamentary sovereignty.³⁰

Lord Bingham did not agree. It was not the judges who had invented the sovereignty of Parliament, which was the product of the 17th century constitutional upheavals, and it was not for them to change it.³¹ Fortunately, the issue has not yet been put to the test.

Another relevant principle of statutory construction is now emerging. Just as fundamental rights or the rule of law can only be abrogated by express statutory provision, a statute of fundamental constitutional importance, such as the European Communities Act 1972 itself, cannot be

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³² *Thoburn v Sunderland City Council*
[2002] EWHC 195 (Admin); [2003] QB 151.

³³ *R (on the application of Buckinghamshire County Council
and others) v Secretary of State for Transport & Anor*
[2014] UKSC 3; [2014] 1 WLR 324.

impliedly repealed or amended by a later ordinary statute. It has to be done expressly. Thus, in the “*Metric Martyrs*” case, the Weights and Measures Act 1985, which allowed the use of imperial weights and measures (pounds and ounces), had not impliedly repealed the power contained in the European Communities Act 1972 to make delegated legislation so as to conform our law to an EU Directive requiring the use of metric measures.³²

But in the *HS2* case³³ we had to consider whether the same principle could apply as between two statutes of constitutional importance, so that the European Communities Act 1972 had not provided for the implied repeal of such a fundamental principle as Article 9 of the Bill of Rights of 1689, that “freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”. The issue was whether the hybrid bill procedure, which the government proposed to adopt for approving the project to build a high-speed rail connection between London and the English midlands, complied with the requirements of the European Environmental Impact Assessment Directive. It was argued that we would have to scrutinise the details of what actually went on in Parliament for this purpose. Curiously, it was the Supreme Court which raised the question of whether such scrutiny was compatible with the Bill of Rights and whether one constitutional statute, the European Communities Act 1972, could impliedly overrule or modify another, the Bill of Rights 1689. In the end, the

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problem did not arise, because we held that the proposed procedure would comply with the Directive in any event.

Talk of European Union law brings me at long last to a case of such fundamental constitutional importance that, when it does come to the Supreme Court, we plan that all 11 of the current serving Justices shall sit on it. As is well known, the referendum on whether the United Kingdom should leave or remain in the European Union produced a majority of 51.9% in favour of leaving. But that referendum was not legally binding on Parliament. There is, of course, no doubt that, just as Parliament made the law which brought European Union law into the UK legal order after the UK government had entered into the accession treaty, Parliament can unmake that law. The question is the process whereby we arrive at that result. This entails the constitutional division of responsibility and power between the government and Parliament.

Article 50 of the Treaty of the European Union provides that “any Member State may decide to withdraw from the Union in accordance with its own constitutional arrangements” (Article 50(1)). A Member State which decides to withdraw shall notify the European Council of its intention. The Council is then expected to negotiate and agree upon the arrangements for withdrawal with the Member State. These have to be agreed by the Council, acting by a qualified majority, and by the European Parliament (Article 50(2)). However, the Treaties shall cease to apply to the State in question from the date of the entry

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into force of that agreement or, failing that, two years after the notification, unless the Council unanimously agrees to extend the period (Article 50(3)). The issue is whether giving that notification falls within the prerogative powers of the Crown in the conduct of foreign relations or whether it falls foul of the rule that the prerogative cannot be used in such a way as to frustrate or substantially undermine an Act of the United Kingdom Parliament. The argument is that the European Communities Act 1972 grants rights to individuals and others which will automatically be lost if the Treaties cease to apply. Such a result, it is said, can only be achieved by an Act of Parliament. Another question is whether it would be enough for a simple Act of Parliament to authorise the government to give notice, or whether it would have to be a comprehensive replacement for the 1972 Act.

The contrary argument is that the conduct of foreign affairs, including the making and unmaking of treaties with foreign powers, lies within the prerogative powers of the Crown (what you would call the executive power of the Federation). The EU Referendum Act 2015 neither expressly nor by implication required that further Parliamentary authority be given to begin the process of withdrawal. The basis on which the referendum was undertaken was that the government would give effect to the result. Beginning the process would not change the law.

Just before I left to come here, a unanimous Divisional Court held that the Secretary of State does not have power

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³⁴ *R (Miller and others) v Secretary of State for Exiting the European Union*
[2016] EWHC 2768 (Admin).

under the royal prerogative to give notice to withdraw from the European Union.³⁴ The court held that just as making a treaty does not change the law of the land, unmaking it cannot do so, but triggering Article 50 will automatically have that effect. What has to be done instead is perhaps not so clear. But the case is destined for our Court, so I must say no more.

The case raises difficult and delicate issues about the constitutional relationship between government and Parliament. What is meant by the exercise of the executive power of the state? To what extent can it be exercised in a way which may undermine the exercise of the legislative power of the state? We do not have a written Constitution to tell us the answer. But I doubt whether many written Constitutions would tell us the answer either. Article 80 of your Constitution tells us that the executive authority of the Federation extends to all matters with respect to which the federal Parliament may make laws and the executive authority of the states extends to all matters with respect to which the state legislatures may make laws. External affairs, including treaty-making, are on the federal list. But that looks to me as if it is dealing with the subject matter with which the federal and state authorities respectively may deal, rather than with the relations between the federal executive and Parliament (or for that matter between the state executives and legislatures). You will know better than I.

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Perhaps significantly, the government has given up the argument that the issue is not justiciable in our courts. To that extent, at least, it is accepted that we are indeed the guardians of the Constitution: if only we knew what it meant. But I hope, your Royal Highness, that your late father, in whose honour we are all here this afternoon, would approve of our efforts to decide it. 🍀

EDITOR'S NOTE:

The appeal came before the UK Supreme Court in December 2016. In its judgment of 24 January 2017 ([2017] UKSC 5; [2018] AC 61), the Supreme Court, by a majority (8:3), affirmed the Divisional Court's decision, holding that withdrawal was a significant constitutional change, and that it would be inconsistent with long-standing and fundamental principle for such a change to be brought about by ministerial decision or ministerial action alone. The court further held that the prerogative to make and unmake treaties, which operated wholly on the international plane, could not be exercised in relation to the EU treaties in the absence of domestic sanction in appropriate statutory form.