SULTAN AZLAN SHAH
LAW LECTURES
1986 32 2018
YEARS

Politics and the Judiciary

The Right Honourable
Lord Reed

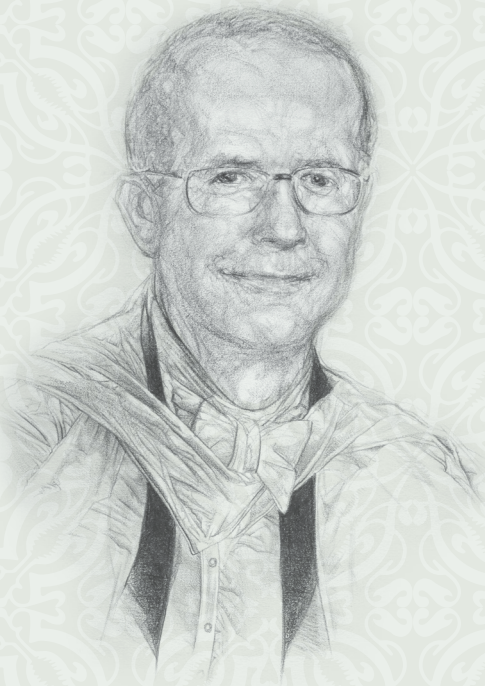
Deputy President of the Supreme Court of the United Kingdom

I must begin by expressing my gratitude for being invited to come to this beautiful and fascinating country to give the thirty-second in this renowned series of lectures in honour of the late Sultan.

I am only too well aware that I am following in the footsteps of some very distinguished judges and jurists, and am conscious of the honour of being given the opportunity to add my contribution.

Lord Reed

The Right Honourable Lord Reed



Robert John Reed
(*b.* 7 September 1956)

Politics and the Judiciary

Robert John Reed, Lord Reed is the Deputy President of the United Kingdom Supreme Court, having been appointed to the post on 7 June 2018, the youngest Justice to be so appointed.

Lord Reed read law at the University of Edinburgh, Scotland, graduating with First Class Honours and winning the prestigious Vans Dunlop Scholarship. He then undertook and obtained his Doctor of Philosophy at Balliol College, Oxford University.

He was admitted to the Faculty of Advocates, Scotland, in 1983, and to the English Bar by the Honourable Society of the Inner Temple in 1991.

Lord Reed, who maintained a broad civil practice whilst at the Bar, was appointed as Queen's Counsel in 1995, and as Advocate Depute (Scottish prosecutor responsible for prosecuting serious and complex crimes) in 1996. He was appointed as a Senator of the College of Justice and a judge of the Scottish Court of Session in 1998. Having served as principal judge of the Commercial Court, Lord Reed was then promoted to the (appellate) Inner House and also appointed to the Privy Council on 29 January 2008.

On 6 February 2012, Lord Reed was appointed as a Justice of the United Kingdom Supreme Court. He is one of the two Scottish Justices of the UK Supreme Court.

Lord Reed was appointed as a Non-Permanent Judge of the Hong Kong Court of Final Appeal on 18 January 2017, and is also a member of the panel of ad hoc judges of the European Court of Human Rights.

As a judge, Lord Reed has participated in numerous landmark cases involving important issues of common law, constitutional law and human rights. Lord Reed delivered the lead judgment of the UK Supreme Court in *R (UNISON) v Lord Chancellor* [2017] UKSC 51, an important judgment dealing with the constitutional right of access to the courts and the importance of the rule of law.

In welcoming Lord Reed's appointment as the Deputy President of the UK Supreme Court, Lady Hale, the President of the UK Supreme Court, described Lord Reed as "a most distinguished and deeply principled jurist. Since joining the Supreme Court in 2012 he has made a significant contribution in many areas, but in particular in developing the common law and championing the rule of law and access to justice."

Lord Reed is a Bencher of the Honourable Society of the Inner Temple. He is the High Steward of the University of Oxford, has been the Visitor of Balliol College, University of Oxford University since 2011, and is a Fellow of the Royal Society of Edinburgh.

Lord Reed is married to Lady Jane MyIne with two children.

Editor's note

On 11 January 2020, Lord Reed succeeded Lady Hale of Richmond (who delivered the Thirtieth Sultan Azlan Shah Law Lecture) as President of the United Kingdom Supreme Court, and became a Life Peer, Lord Reed of Allermuir, in recognition of his contribution to law and justice reform.

In 2019, Lord Reed together with Lady Hale delivered the unanimous judgment of the Supreme Court in *R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41, a landmark constitutional case dealing with the supervisory jurisdiction of the judiciary, and the boundary between the royal prerogative and the operation of the constitutional principles of Parliamentary sovereignty and responsible government. The Supreme Court held that the issue of whether the United Kingdom Prime Minister's advice to the Queen was lawful was justiciable in a court of law, and that a decision to prorogue Parliament (or to advise the monarch to do so) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. The court observed that by deciding justiciable issues of law, it would be performing its proper function under the constitution and would be giving effect to the doctrine of separation of powers. It also emphasised that the courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament, and the fact that the minister is politically accountable to Parliament does not mean that he is immune from legal accountability to the courts. See further remarks on this case on pages 150 and 314 above.

Adjudication of a constitutional nature is not new, and its existence should not be controversial. Judicial review of governmental action has existed for centuries, and is an essential means of ensuring that the executive remains within the limits of the law.

Its growth in modern times reflects not the emergence of power-hungry judges but the enlargement of the range of governmental functions, and a consequent increase in the extent of official decision-making.

32 Politics and the Judiciary

Lord Reed*
Deputy President of the Supreme Court of the United Kingdom

Thirty-second Sultan Azlan Shah Law Lecture delivered on 22 November 2018 in the presence of His Majesty Sultan Nazrin Shah, Deputy King of Malaysia and Her Royal Highness Tuanku Zara Salim.

Your Royal Highnesses, distinguished guests, ladies and gentlemen, I must begin by expressing my gratitude for being invited to come to this beautiful and fascinating country to give the thirty-second in this renowned series of lectures in honour of the late Sultan. I am only too well aware that I am following in the footsteps of some very distinguished judges and jurists, and am conscious of the honour of being given the opportunity to add my contribution. I must also express my thanks to Your Royal Highnesses for the warmth and generosity of the hospitality you have extended to my wife and myself. I am also most grateful to Tan Sri Dato' Seri Visu Sinnadurai for the care which he has taken in arranging our visit.

I have chosen to speak this evening about constitutional law, which was a subject of particular interest to Sultan Azlan Shah. I will refer to the United

Kingdom, since that is the country with whose law and institutions I am most familiar. But the questions I am going to discuss are not unique to Britain: they arise in every liberal democracy. I should make it clear at the outset that I am expressing a purely personal view.

> It has long been recognised that political institutions should be subject to checks and balances in order to avoid the risk that they may themselves undermine the values which they are intended to promote.

The history of Western political thought is a history of the development of ideas about political values, such as liberty, equality and justice. But it is also a history of the development of ideas about the institutional structures and procedures through which a society's values can be put into practice. Such institutions provide a peaceful means of resolving differences of view between the members of a society as to its values, and as to how those values should best be given effect. In most modern democracies, the legitimacy of such institutions is derived from popular consent, expressed through elections at which proponents of different points of view are organised in political parties which are themselves engines of compromise between a variety of viewpoints. Institutions of this kind are aptly

described as political, since they determine a society's policies.

It has also long been recognised that political institutions should be subject to checks and balances in order to avoid the risk that they may themselves undermine the values which they are intended to promote. Thinking about this problem underwent its most radical development in the modern era in 17th century England and 18th century France and the United States, in response to crises in government. The most influential theorist was Montesquieu, who identified as the key feature of the British constitution of his day, and the source of the liberty enjoyed by the British people, the separation of powers under the constitutional settlement arrived at in 1688. Although it is questionable whether Montesquieu properly understood the British constitution of his day, and it is clear that neither that constitution, nor any other I know of, adopted the separation of powers in a pure form,[1] nevertheless his theory influenced the post-revolutionary constitutions of the United States and France, and many other constitutions around the world. Today, all liberal democracies are committed in some degree to the separation and limitation of powers. It is only totalitarian states that are committed to the idea of an indivisible, centralised and unlimited sovereign power.

Whether or not the theory of the separation of powers is precisely reflected in any constitution in the real world, it is a valuable way of understanding that different

institutions of the state have different functions, and that those functional differences are reflected in the nature and procedures of those institutions. In the United Kingdom, for example, the government has primary responsibility for drafting the laws which are presented to Parliament. That function is reflected in the experience of most of its members as professional politicians elected by the public, and in the procedures that it follows, which enable it to consult individuals and organisations with relevant expertise or concerns. It has a close relationship with the media and pressure groups, and is properly responsive to public opinion. Although it may carry out public consultations, its decision-making processes focus on private discussion of questions of public policy, and are designed to result in decisions for which the members of the Cabinet accept collective responsibility. Those decisions will often reflect compromises, and may consequently be expressed in terms which are ambiguous or even inconsistent, but are designed to make them acceptable to both sides of the argument. In politics, as in diplomacy, evasion and ambiguity can be constructive, and may be necessary to achieve a consensus. Politicians typically defend their decisions on the basis of their moral convictions or their views of social or economic policy. Their decisions are accepted as legitimate because of the government's democratic mandate.

The courts, on the other hand, are responsible for the resolution of disputes over the application or interpretation of the law. That function is reflected in the

recruitment of the judiciary from experienced lawyers or teachers of law. Judicial decisions are based on evidence and arguments presented in open court by the parties to the dispute. Judgments are designed to set out the reasoning of the judges in unambiguous terms, with disagreement between them resulting, in common law systems, in dissent rather than compromise. It would be incompatible with the function of the courts for their decisions to be influenced by the media, pressure groups or public opinion. Judges are experts in the analysis and application of legal rules and principles, and in the interpretation of legal texts. Their independence from the world of politics enables them to determine the meaning of those rules and texts by professional methods, unaffected by political programmes or the necessity of winning elections. That is what allows them, when a constitutional conflict arises, to give effect to the constitution as they construe it as independent and expert interpreters, rather than as one or another group of politicians might wish it to be construed.

Considering the relationship between politics and the judiciary at this general level, two relatively recent developments in our societies also have to be taken into account. The first is the extension of the suffrage since the 19th century. This has resulted in a great expansion in the range of activities undertaken or regulated by the state, as the mass electorate created by universal suffrage have expected the state to protect them against risks and to give effect to prevailing values. So there has been a large increase in the volume, scope and complexity of

legislation, and a corresponding change in the range of matters which have to be decided by the courts.

The second development relates to the concern I mentioned earlier, that the exercise of political power should be subject to limitations so as to ensure that it is not destructive of the values which it is intended to promote. The idea that the courts should be able to hear complaints that the government is acting unlawfully, by means of what lawyers call judicial review, is far from new, but it has developed in importance and scope as the activities of government have grown and impinged increasingly on citizens' lives.

The idea that the activities of the legislature should also be open to challenge in the courts developed more recently, and can be seen as a consequence of the theory of the separation of powers. The establishment of constitutions dividing the powers of the state between different bodies raised the question of who was to police the boundaries of their competence. So the idea emerged that legislative activity should also be subject to judicial review. It was first established in the United States in 1803, in the case of *Marbury v Madison*,[2] but for a long time it was confined to the US. In Europe, judicial review of legislation was thought to be incompatible with the sovereignty of the monarch, and where monarchies were replaced by popular sovereignty, it was thought to be incompatible with democracy. In almost all European countries, it required

the experience of 20th century dictatorship to overcome the old reservations.[3]

Britain remains an exception: judicial quashing of legislation continues to be regarded as incompatible with the sovereignty of the Queen in Parliament. That exception is however qualified by the European Communities Act 1972, under which the courts cannot apply legislation where to do so would be incompatible with Britain's obligations as a member of the European Union, and by the Human Rights Act 1998, which allows the courts to make declarations that legislation is incompatible with fundamental rights. Parliament has almost always responded by amending the legislative provisions declared incompatible.[4]

Judicial review of the acts of the government and the legislature—what I shall call constitutional adjudication—has also become established elsewhere in the world, promoted by two factors above all. The first was the ending of the colonial era, and the consequent need for new constitutional arrangements. That resulted in the establishment of constitutions, usually containing provisions guaranteeing fundamental rights, provisions defining the relationships between the different arms of the state, and provisions enabling the courts to enforce the constitution. The second factor was the establishment of international codes of human rights in the wake of the abuses committed by some states during the 20th century. Many countries have ratified treaties establishing such codes and

have implemented them in their domestic law. One aspect of these codes is a guarantee of judicial independence.

> There has been an emphasis in recent years on the importance of keeping the courts out of politics and keeping politics out of the courts.

Partly as a consequence of these developments, there has been an emphasis in recent years on the importance of keeping the courts out of politics and keeping politics out of the courts. In the United Kingdom, for example, the establishment of the Supreme Court reflected the view that it was inappropriate that the final court of appeal was constituted as a committee of the Upper House of Parliament. So when the Supreme Court was established, the former members of the Appellate Committee of the House of Lords moved across Parliament Square into their new home, facing Parliament but excluded from its activities. The Supreme Court became the final interpreter of the European Communities Act and the Human Rights Act as well as of our domestic constitutional law, and it was also given the jurisdiction, previously held by the Judicial Committee of the Privy Council, to decide disputes over the limits of the powers of the devolved legislatures and executives in Scotland, Northern Ireland and Wales. As a result, the Supreme Court took on many of the functions of a constitutional court.

Another aspect of the same reforms was a change in the position of the Lord Chancellor, who ceased to be simultaneously the head of the judiciary, the Speaker of the House of Lords and a senior government minister, and instead became a minister of justice. Another element was the establishment of an independent Judicial Appointments Commission with responsibility for recommending candidates for appointment to the bench in England and Wales, with similar arrangements for the other parts of the United Kingdom and for the Supreme Court. The selection commission for the Supreme Court, for example, is normally chaired by the President of the Court, and includes one other senior judge and a member of each of the Judicial Appointments Commissions for England and Wales, Scotland and Northern Ireland. It makes its recommendations after consulting the Lord Chancellor, the First Minister in Scotland, the First Minister for Wales, the Judicial Appointments Commission for Northern Ireland and a number of senior judges. All of these measures were intended to create a visible separation between the courts and the political branches of the state.

It is not my intention to question the value of the restrictions implicit in the separation of powers, or the consequent principle of judicial independence. Far from it: the independence of the judiciary is critical to its performance of its role. It cannot be seen by the public to apply the criminal law properly unless it is independent of the prosecution and the defence, and it cannot effectively

protect human or constitutional rights, when they present an obstacle to the government's or legislature's preferred solution to a problem, unless it is independent of those institutions.

> Lord Bingham once remarked, a country where they never disagree is unlikely to be one that any of us would want to live in.

But neither the separation of powers, nor the principle of judicial independence, means that the courts have to be isolated from the other branches of the state.[5] Although the different functions of the state are best performed by different institutions, those institutions have to operate with some degree of integration if society is to function well. This point was well made by Justice Robert Jackson of the United States Supreme Court [6] in the case of *Youngstown Sheet and Tube Co v Sawyer*,[7] where he said:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

How are this interdependence and reciprocity to be achieved? In my view, they can be achieved without

jeopardising the independence of the judiciary if, in the first place, the legislature, the government and the courts understand and respect each other's role. Better understanding between the three branches of the state is the key to better relations. That is not to deny that there will be tensions from time to time between the courts and the other branches of the state. As Lord Bingham once remarked, a country where they never disagree is unlikely to be one that any of us would want to live in.[8] But they need to bear in mind constantly that they share a commitment to the fundamental values of our society, and share responsibility to ensure that it remains a healthy democracy committed to the rule of law. Bearing that in mind, they have to treat each other with mutual respect, giving proper weight to each other's functions and responsibilities. By doing so, they can better secure public confidence in all three institutions.

However, this is easier said than done. In the remainder of this lecture, I would like to discuss some of the problems which lie in the way, and to suggest some possible ways of addressing them.

The greatest single difficulty arises from the delicate relationship between democracy and constitutional adjudication. In Britain, it is sometimes suggested that the judiciary has recently assumed a greater policy role than it traditionally performed, through the growth of judicial review, the advent of the Human Rights Act, and the UK's membership of the EU with its Charter of Fundamental

Rights. The suggestion is made that, in order for adjudication of this kind to be compatible with democratic principles, the appointment of the highest judges should be decided on a political basis, as in the United States, rather than on the recommendation of an independent body such as the Judicial Appointments Commission.

In response, one might point out that adjudication of a constitutional nature is not new, and that its existence should not be controversial. Judicial review of governmental action has existed for centuries, and is an essential means of ensuring that the executive remains within the limits of the law. Its growth in modern times reflects not the emergence of power-hungry judges but the enlargement of the range of governmental functions, and a consequent increase in the extent of official decision-making. If the incorporation of human rights treaties and our membership of the EU have required the courts to decide questions which might not have come before them in the past, that is the result of Parliament's decision to enact the relevant legislation, as proposed by the government. There is nothing undemocratic about Parliament itself deciding to protect human rights. And it has taken democratic decisions to give the function of protecting those rights to the courts, and to establish a method of appointing judges which places at its centre a body independent of politics.

All that is true; but it does not perhaps go to the heart of the complaint that constitutional adjudication is

inherently anti-democratic and must therefore be brought under democratic control. There are a number of other points which might be made in response.

The first is that constitutional adjudication is no more irreconcilable with democracy than is a constitution itself. A constitution, whether codified as in Malaysia or uncodified as in the United Kingdom, provides the framework within which democratic politics operate. It is premised on a conception of democracy which is more complex than simply the will of the ruling majority. Democracy cannot function without the rights and freedoms necessary for the operation of the democratic process, such as freedom of speech, freedom of association and assembly, the right to participate in elections, and the right of access to independent courts which can apply and enforce the laws which the legislature has enacted; for if citizens cannot avail themselves of the laws which the legislature enacts, then democratic elections to the legislature become pointless.[9] These rights are guaranteed by most constitutions because they are vital to democracy, and the courts perform a crucial role in a democracy by putting them into effect.

The future of a democratic society also depends on protecting the rights of today's minority, which may be the majority of the future. Their opportunity to achieve electoral success depends on safeguards against abuses of majority power. The courts are the arm of the state which can best be relied on to protect their rights, since they are the only arm of the state that is not controlled by the

majority or dependent on its approval. More generally, in the absence of independent courts, disagreements between a majority and a minority over the lawfulness of the majority's behaviour are always likely to be decided in favour of the majority, since no one can prevent it from acting in accordance with its understanding of the law, short of violent resistance.

As that discussion indicates, far from depriving constitutional adjudication of legitimacy, the fact that judges are unelected and independent of politics is precisely why they can take decisions which may be unpopular with the majority but which give effect to the law. Given the nature of their function, their lack of political accountability for their judicial decisions is one of their main virtues. It is their independence from politics, together with high professional standards, that inspire the public confidence from which they derive their authority.

So, although politicians may sometimes find the enforcement of constitutional guarantees by the courts to be burdensome, or consider the decisions of the courts in particular cases to be unjustified, and although those sentiments may sometimes be shared by a majority of the electorate, nevertheless the stability of a democracy depends on ensuring that legal limitations on the exercise of political power are independently enforced.

Nevertheless, care has to be taken if constitutional adjudication is to be accepted as legitimate. The greatest risk

arises from the fact that judicial decisions can have political consequences. Cases in which the outcome is politically sensitive give rise to a problem because the way in which courts arrive at their decisions is not well understood. My impression is that people often assume that judges decide cases by taking a vote after the hearing, in the same way as juries, and voting in accordance with their personal opinion on the issues that are raised. In reality, in the courts on which I have worked, the hearing and the discussion immediately afterwards are only the beginning of a much longer process in which the judges collaborate and integrate their expertise in order to tackle the problem before them: a process which usually involves considering large quantities of written material, researching and analysing the relevant law, and writing and revising judgments containing detailed analyses of the issues in the case. The judges are compelled by the nature of their task, as well as by their professional standards, to focus exclusively on the legal issues raised by the case, and not on the possible political consequences of their decision.

For example, almost two years ago the Supreme Court had to decide a challenge to the government's decision to initiate the process for leaving the EU without the authority of an Act of Parliament.[10] Some sections of the media reported the case on the mistaken assumption that the Justices involved would decide it on the basis of their personal opinions about Brexit. But the case turned on pure points of constitutional law, concerning the scope of prerogative powers and the legal consequences

of membership of the EU. The Justices' views of Brexit, whatever they may have been, had nothing to do with their determination of the legal question they had to decide. As anyone who took the trouble to read the judgments could see, the Justices did their job of identifying the legal issues in the case and deciding them as best they could, applying the relevant precedents and standard interpretative techniques: the prosaic but vital routine of a judge's life.

The decisions judges arrive at may be completely at odds with their personal opinion about the case before them, if indeed they have any personal opinion at all. As Justice Scalia of the US Supreme Court once said, "If you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong." [11] So in situations where the legal question cuts across a political debate, it is important that the court should make it clear that it is concerned only with questions of law. The Supreme Court does so not only through what the Justices write in their judgments but also through a communications strategy which includes working with the media, including social media, live-streaming our proceedings, and making recordings of our hearings available to the public and to broadcasters. It is also important that politicians should understand what the courts are doing, and support the courts in the face of unjustified criticism. Judges cannot justify their own decisions outside the court without degrading the significance of their judgments as the authoritative explanation of the reasons for their decision.

So the Supreme Court engages with Parliament through meetings with Parliamentarians and officers of Parliament and appearances before parliamentary committees, at which each side can get to understand better the role of the other and the problems which they face.

> In saying that judges are concerned only with questions of law, I do not mean to suggest that every difficult legal question has a single right answer.

In saying that judges are concerned only with questions of law, I do not mean to suggest that every difficult legal question has a single right answer. In many cases the application of established legal methods enables courts to arrive at an answer on which all their members agree. Even the Supreme Court, which hears only the most difficult cases, arrives at a unanimous decision most of the time. But there are also cases where different judges take different views. This again can give rise to a suspicion that judges simply apply their own preferences. But as Justice Scalia explained:[12]

> As every law student learns, one finds in a very wide range of cases indeed, that arguments—rational, persuasive, decent arguments—can be made on both sides of the question. The law thus requires real choices from both judges and lawyers, but it informs those choices, which

> should not be merely a matter of preference or calculation, but should rather express the result of the mind's engagement with the materials of the law.

So in hard cases, far from doing as they please, judges worry and sometimes lose sleep over legal problems, and struggle to solve them. Their decision may turn on their understanding of the deep structure of a branch of the law, or of its historical development, or of the construction which will best give effect to the meaning of an obscure provision in an Act of Parliament, or on what might be described as their judicial philosophy. But that is not politics by another name. The resultant decision should be the product of a diligent and honest effort to apply the law.

I have emphasised the importance of effective communication between the courts and the public, and between the courts and the other arms of the state, recognising the importance of a point which was made by the late Sultan Azlan Shah. As he wrote: [13]

> A judiciary may only be said to be independent if it commands the confidence of the public. Statements made as to its independence by the judges, or even the politicians, do not measure public confidence in the judiciary. At the end of the day, it is this public perception that ultimately matters.

The interaction between politics and the judiciary can affect this perception in a number of ways. I would like finally to touch briefly on five aspects of that interaction:

judicial appointments, the relationship between the government and the courts, the tasks which politicians set for the judiciary, political respect for judicial decisions, and judicial respect for political decisions.

First, it is understandable that governments are commonly involved in senior judicial appointments, since these appointments are of considerable public importance. But it is one thing for the government to wish to be satisfied that candidates possess the necessary integrity, dedication, ability and experience: something which is done in Britain by having appointments made on the basis of the recommendations of an independent judicial appointments commission, which consults responsible figures in government and the judiciary and carries out its own assessment of the candidates. It is a different matter for judicial appointments to be made on political grounds, with candidates approved or disapproved according to whether they are thought likely to advance political causes on the bench. A system of that kind can easily endanger public confidence that judges are politically impartial, and it is only that confidence which enables their decisions in controversial cases to be accepted on all sides as legitimate.

In Britain, it is also important to remember that Parliament has the last word. Although the Supreme Court takes important decisions, it is in Parliament that the most important questions are finally determined. The position is very different from in the United States, where for example it was not Congress that guaranteed abortion rights to all American women, or that allowed same-sex couples

in every state to marry, but the Supreme Court.[14] It is the Court that has the final word: its decisions cannot be reversed by Congress, other than by a constitutional amendment. In Britain, on the other hand, it was Parliament that legalised abortion and same-sex marriages. The UK Supreme Court does not have the power to change the law in that way, and the Justices would not want to have that power. So the context of judicial appointments in Britain is different from that in the United States. And in Britain, our democratic legislature decided as recently as 2005 to establish a system of appointments based on the recommendation of an independent statutory commission.

Considering next the relationship between the government and the courts, this altered in Britain as a consequence of the change I mentioned earlier in the role of the Lord Chancellor. The courts have taken on more responsibility for their own administration under concordats or framework agreements with the government, and within the courts the judges have taken on greater administrative responsibilities than previously. The first concordat was entered into by the Lord Chancellor and the Lord Chief Justice, and a similar concordat was later entered into between the Supreme Court and the Ministry of Justice, which explains their respective responsibilities in relation to the administration of the Court, highlights the independence of the Court in relation to judicial decisions, and sets out the agreed arrangements in relation to operational matters such as the appointment of staff, the financial resources of the

Court, accountability to Parliament, and the resolution of disputes. It also provides a framework for consultation and the exchange of information.

In relation to the tasks which politicians set for the judiciary, I have explained how politics often require compromise. Sometimes that can result in legal texts which are expressed in ambiguous terms, enabling an agreement to be reached, but leaving some of the most difficult questions to be decided in court. This does not necessarily cause particular problems for the courts, but it can risk damaging their reputation if they are left to resolve highly controversial questions which the politicians found too sensitive. Legislation protecting fundamental rights may also require the courts to adjudicate on questions which raise controversial social or moral issues, particularly if the government or legislature has been reluctant to address them. The courts have no option but to deal with the cases brought before them, and to develop legal doctrine in order to decide them. As it develops, and a body of principles and precedents is built up, so adjudication according to ordinary legal methods becomes progressively easier, but the initial period can embroil the courts in controversies as they endeavour to perform the task which the legislature and government have imposed on them. That is a time when support from the other branches of the state can be particularly important.

That leads me to the subject of political respect for judicial decisions. A potential difficulty arises from the

weakening of the relationship between the judiciary and the other branches of the state which has occurred during the past century. Today in Britain, for example, there are far fewer MPs than in the past who have practiced law before entering Parliament, and even fewer who continue to practice after their election. Equally, whereas senior officials in the Lord Chancellor's Department were once almost entirely lawyers or people with practical experience of the courts, today relatively few of the senior officials in the Ministry of Justice have comparable experience. Conversely, there is not a single English judge who has served as an MP or Minister. In the past, the position was different. So the links have weakened, leading to the risk of a lack of mutual understanding, and of a weakening of the mutual respect on which the satisfactory working of a liberal democracy depends. To counter that, it is necessary to forge new links: to develop new mechanisms for ensuring that the government and Parliament understand and respect the role of the courts, and vice versa. I have already mentioned some of the steps which the Supreme Court has taken with that in mind.

In relation to judicial respect for political decisions, I have explained that courts focus on legal questions, not political ones. But in a case where a governmental decision is challenged, the legal question under our law may be whether the decision was one which a reasonable decision-maker might have taken. Where legislation interfering with fundamental rights is challenged, the question may be whether the interference was proportionate, or whether the

legislature's assessment that the interference was justified was manifestly without reasonable foundation. In applying legal tests of that kind, which require a judicial evaluation of the decision taken by another arm of the state, much can depend on the degree of respect which the court accords to that decision. Of course, weight plainly attaches to the assessment made by the government or legislature where they are better placed than the courts to make that assessment by reason of superior access to evidence and expertise. But even where they have no advantage of that kind over the courts, it is important to remember that on many issues, particularly those involving assessments of economic, social or moral policy, considerable weight attaches to the decisions of political institutions simply by reason of their constitutional function and their democratic legitimacy.

> Exercising a constitutional jurisdiction requires sound judgment, and sometimes judicial courage.

Exercising a constitutional jurisdiction requires sound judgment, and sometimes judicial courage. Sitting on the UK Supreme Court, on the Judicial Committee of the Privy Council, on the European Court of Human Rights and on the Hong Kong Court of Final Appeal, I have found that similar problems lie at the heart of this aspect of the judicial task in democracies around the

world. We judges can learn from our shared experience, and benefit from our mutual support. The generosity of Your Highness in holding these lectures commemorating your late father promotes this exchange of ideas, and reminds us of an outstanding example to follow.

**Speaker's note:* I am grateful to my judicial assistants Alexandra Littlewood and Michal Hain for their assistance in the preparation of the text for this lecture.

Editor's note

The Thirty-second Sultan Azlan Shah Law Lecture delivered by Lord Reed was referred to by Azahar Mohamed FCJ in the Malaysian Federal Court in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561 at paragraph [187] in support of the proposition that the Shariah Advisory Council of the Central Bank of Malaysia and the courts have to operate with some level of integration within the framework of the Federal Constitution for the proper functioning of Islamic banking and Islamic financial services in Malaysia.

In considering the constitutionality of the mandatory death penalty in *Letitia Bosman v PP & other appeals* [2020] 6 AMR 801; [2020] 5 MLJ 277, the Malaysian Federal Court in its majority decision delivered by Azahar Mohamed CJ (Malaya) referred, at paragraph [94], to Lord Reed's lecture, and concluded at paragraph [114] that this "is a controversial matter of policy ... more suitable for determination by Parliament than by the courts".

Endnotes

1 A point made, in relation to Malaysia, by the Federal Court in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1.

2 5 US 137 (1803).

3 The exception in Western Europe is Austria, which in 1920 established the world's first exclusively constitutional court, with the power to review acts of the legislature. In the former communist bloc, Yugoslavia was an exception, as was Poland towards the end of the communist era.

4 The only exception to date has concerned the exclusion from the right to vote of convicted criminals serving a sentence of imprisonment. Reform of the law in question has been controversial.

5 House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament* (July 2007), paragraph 27.

6 He had previously served in President Franklin Roosevelt's administration as Solicitor General and Attorney General.

7 343 US 579 (1952), at 587.

8 Tom Bingham, *The Rule of Law*, Penguin Books, 2011.

9 A point made in *R (UNISON) v Lord Chancellor* [2017] UKSC 51, at paragraph 68.

10 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

11 Justice Antonin Scalia, Madison Lecture at the Chapman University School of Law (29 August 2005).

12 Interview with James Boyd White, 105 Michigan Law Review 1403, 1418 (2007).

13 HRH Sultan Azlan Shah, "The Role of Constitutional Rulers and the Judiciary: Revisited", in Visu Sinnadurai (ed), *Constitutional Monarchy, Rule of Law and Good Governance*, Professional Law Books and Sweet & Maxwell Asia, 2004, page 400.

14 *Roe v Wade*, 410 US 959 (1973); *Obergefell v Hodges* 135 S Ct 2584 (2015).