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Dissonant Constitutionalism and Lady Hale

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Stories of constitutional struggle almost always revolve around power and self-interest; the legislature looking to make its mark, or the executive overstepping certain bounds. It is the commonplace story of the separation of powers, each entity desiring more clout and none of them willing to concede any. These tired examples are external and overt, and align well with our thoughts on constitutional politics in contemporary democracies. Rarely do such accounts involve internal—personal—struggle. Additionally, constitutional struggles are almost always borne out in formal settings: the judiciary issuing a judgement, or a ministerial department issuing a new regulation. Rarely do such struggles involve more informal settings. The latter, in both these examples, is the struggle of Lady Hale, now President of the United Kingdom Supreme Court. This piece argues that Lady Hale, much like many constitutional actors in the UK (lawyers, judges, scholars, etc.), is experiencing cognitive dissonance about the current state of the UK constitution, and especially its underlying principles. However evidence of her dissonance has not played out in formal settings, such as judgements, but in extra-judicial speeches, as will be shown below.

The UK provides unique characteristics as to how and why such dissonance amongst constitutional actors may be more prevalent than elsewhere. In terms of its legal constitutional arrangements, the UK operates on what can be termed "Diceyan constitutionalism": an uncodified constitution operating on parliamentary sovereignty and the rule of law, the former of which remains the underlying principle.[1] Although this general approach still holds for the UK, a new method of legal protection, called the "new commonwealth model", has arisen.[2] Even beyond the commonwealth, however, the constitutional landscape has further transformed. Written constitutions are the zeitgeist, and the powers of constitutional courts are

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1 *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5, paras 40-44, 48, 90.

2 For the most prominent account, see S Guardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013).

unparalleled and increasing.[3] The UK contains neither of these, and parliamentary sovereignty, for better or worse, has been upheld as the UK's primary constitutional principle. It is this steadfast attachment to parliamentary sovereignty that has led to Lady Hale's—and no doubt, many UK constitutional philosophers'—dissonance.

An inherent element of dissonance lies within the UK judiciary's DNA. Most judges, and especially those sitting on the higher-level courts, were educated under the doctrine that Parliament, not the courts, had the final say in legal matters. Indeed there is widespread consensus that the UK judiciary has played a significant role throughout the years in upholding the principle of parliamentary sovereignty.[4] The most recent example came in *Miller*.[5] A significant amount of judges—and every member of the UKSC—gained their legal education when there was no HRA 1998, no Supreme Court, little devolution, and no statutory mention of the rule of law.[6] Over the years, however, judges have had to account for the new institutional and constitutional arrangements. These internal constitutional changes need to be coupled with the external constitutional landscape, where written constitutions and extremely powerful constitutional courts are now ubiquitous.[7] But the dissonance shown by Lady Hale is different: as noted above, it does not focus merely on the interaction of the separation of powers: although it centres on the underlying principles of UK constitution, it is a more nuanced and personal form of constitutional struggle.

COGNITIVE DISSONANCE AND DISSONANT CONSTITUTIONALISM

Although law is plagued with areas of conflict, dissonance is not exactly the same thing. The main difference is that conflict occurs pre-decision, while dissonance occurs post-decision. Thus the uncomfortable tension that one feels after a decision is made is dissonance, and stems from the pre-decision feelings of being conflicted by different cognitions. The concept of cognitive dissonance arose to prominence in the 1950s, after publication of Festinger, Riecken and Schachter's *When Prophecy Fails*,[8] followed a year later by Festinger's classic, *A Theory of Cognitive Dissonance*.[9] In the latter Festinger noted that humans try "to establish internal

[3] R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).
[4] See, e.g., TT Arvind and L Straton, "Legal ideology, legal doctrine and the UK's top judges" (2016) *Public Law* 418, 424-25.
[5] *Miller* n 1.
[6] Regarding the latter, see the Constitutional Reform and Governance Act 2005.
[7] Hirschl n 3.
[8] L Festinger, H Riecken, and S Schachter, *When Prophecy Fails* (Harper-Torchbooks 1956).
[9] L Festinger, *A Theory of Cognitive Dissonance* (Stanford University Press 1957).

harmony, consistency, or congruity among [their] opinions, attitudes, knowledge and values".[10] If a decision is made which arouses dissonance, we attempt to reduce it through certain methods. Often these reduction behaviours occur through attitudinal changes, as opposed to behavioural changes, but they can occur through both. In short, individuals often justify their decisions through a change in their attitudes. For example, someone who is choosing between a practical fuel-efficient car and a sports car may justify their decision to purchase the sports car by changing their attitudes to certain features: e.g., they made a major financial investment, and fuel efficiency is not really that important to them.[11] Reduction of these dissonant cognitions is a key aspect of dissonance theory. Without a doubt, the implications of cognitive dissonance theory for jurisprudence is enticing, given the many difficult decisions judges face on a daily basis.

Here I propose that Lady Hale uses her extra-judicial speeches to reduce her cognitive dissonance about the UK constitution and her role as a Supreme Court Justice in upholding parliamentary sovereignty. There is little doubt that the justices, and especially one as tuned-in as Lady Hale, have recognised the well-documented changes in the domestic and international constitutional landscape. This includes a diminished role for parliamentary sovereignty throughout the world. But domestically, even with membership in the EU, parliamentary sovereignty has been taken extremely seriously: for example, the Human Rights Act 1998 upholds parliamentary sovereignty. Thus, for all its changes throughout the years, the fundamentals of the UK constitution remain unchanged: Parliament is still the UK's highest legal authority, and the judiciary often recognises this, as they have done in *Miller* and other cases. But recognition of parliamentary sovereignty does not necessary align with advocating it. If justices wanted to advocate it, they could do so in the very extra-judicial speeches that I examine below.

There is a feeling from many constitutional actors in the UK that parliamentary sovereignty has had its time. Either it is on its way out,[12] never was as defining as it is believed to be,[13] or it is only one principle amongst other underlying principles,[14] and not *the* underlying constitutional principle. And therein lies the attitude adjustment necessary for Lady Hale:

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[10] *Ibid* at [260].
[11] J Cooper, *Cognitive Dissonance: Fifty Years of a Classic Theory* (Sage 2007).
[12] M Elliott, "United Kingdom: Parliamentary sovereignty under pressure" (2004) 2(3) *International Journal of Constitutional Law* 545.
[13] F Davis, "Brexit, the Statute of Westminster and Zombie Parliamentary Sovereignty" (2016) 27(3) *King's Law Journal* 344. Of course, in Scotland the principle of parliamentary sovereignty has always been questioned more forcefully than in England. See, e.g., JDB Mitchell, *Constitutional Law* (W. Green & Son Ltd. 1964) 49-73.
[14] CJS Knight, "Bi-polar sovereignty restated" (2009) 68(2) *Cambridge Law Journal* 361.

although she has contributed to upholding parliamentary sovereignty throughout her judicial career—and this aligns with the constitutional mores of the time—her extra-judicial statements advance the idea that parliamentary sovereignty should no longer be the defining feature of the UK constitution. Thus she is able to reduce her post-decision dissonance by giving extra-judicial speeches that question the value of parliamentary sovereignty or show it as a diminished value within a flexible UK constitution. Those teaching UK constitutional law may do something similar: we describe parliamentary sovereignty to students as the underlying principle of the constitution, but some may then write journal articles arguing a contrary position or advocate change to a fellow scholar, thus potentially reducing their cognitive dissonance.[15] Lawyers working on public law cases, or those working in parliament may experience similar feelings. This phenomenon, and how is transpires in the UK, is best described as: dissonant constitutionalism.

LADY HALE'S RECENT EXTRA-JUDICIAL SPEECHES

One speech from each of the past three years (2015-2017) is analysed below. All three involve general discussion of the UK constitution, and a number of themes involving where parliamentary sovereignty stands in the UK constitution arise, including: the lack of a UK written constitution, the potential striking down of legislation, whether the UKSC is a proper public law/constitutional court, and questioning the true "guardians" of the UK constitution. All of these seem to challenge the status quo, and are perhaps signs of dissonance reduction.

2015 St. Andrews speech

In her 2015 inaugural address at the Institute of Legal and Constitutional Research at the University of St. Andrews, Lady Hale made a number of stimulating observations.[16] Although she began her speech by noting that the UKSC is "not a constitutional court on continental lines", she took particular concern in observing how continental and other constitutional courts around the world operate.[17] She accentuated how most Anglo-American jurisdictions follow the common law model of a written constitution, which includes judicial review on the validity of statutory law. Using *Marbury v Madison*[18] as an example of how this develops even when a

[15] Although, whether or not teaching the traditional view of the UK constitution is a "decision" is certainly up for debate.
[16] Lady Hale, "The UK Supreme Court in the United Kingdom Constitution" (8 Oct 2015) 1-2. https://www.supremecourt.uk/docs/speech-151008.pdf (emphasis is mine).
[17] *Ibid* at [1-2].
[18] *Marbury v Madison*, 5 US 137 (1803).

written constitution does not explicitly mention constitutional review, she further notes that the UK does not have such a document, and therefore a similar trajectory for the UKSC would be unlikely.[19] But that is hardly her final view.

Lady Hale goes on to cite Dicey's key constitutional principles, but notes that they have undergone some "subtle changes" since first articulated.[20] Some major questions are then set out regarding parliamentary sovereignty and rule of law. The first is where the sovereignty of Parliament stands today, after ceding legislative competence both downwards (i.e., through devolution) and upwards (i.e., to the EU).[21] Lady Hale questions how these developments have affected the UKSC's power to rule on the validity of Acts of Parliament.[22] After these intriguing sovereignty questions, she then boldly asks,

> "Where stands the rule of law today? The rule of law has historically been the servant of Parliamentary sovereignty…In those rare cases where the two organising principles of our Constitution might conflict, which will take priority? Might the rule of law, in fact, become the organising principle of our Constitution?"[23]

It is difficult to consider the above statement as a mere thought experiment, as opposed to a suggestive piece of foreshadowing. Her questions seem more like prominent declarations regarding what should—or indeed may—happen to the UK constitution. Of course, a taste of this was provided in her 2005 *Jackson* dissent,[24] but such prominent rhetoric displays that Lady Hale now has another outlet for dissonance reduction: extra-judicial speeches.

Justice Hale also discusses the "very new" powers of abstract review the UKSC gained on devolved parliaments, which occurs after pieces of legislation have passed all Parliamentary stages, but before they receive the Royal Assent.[25] Although the court has not had any referrals from Scotland as yet, they have had three such referrals from Wales. The first two were deemed to be within Wales' devolved powers, but the third piece of legislation, the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, was found by the Court to be outside of the Assembly's devolved powers.[26] Lady Hale even provocatively notes that the "majority were noticeably less respectful of the decisions of a democratically elected legislature" than they had

[19] Lady Hale, "The UK Supreme Court" at [2].
[20] *Ibid* at [3].
[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid*.
[24] *R (Jackson) v Attorney General* [2005] UKHL 56, paras. 142-166.
[25] Lady Hale, "The UK Supreme Court" at [9].
[26] *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*, [2015] UKSC 3.

been in the past.[27] Even if this statement is accurate, it is certainly not encouraging to hear that judges were less respectful of such decisions. In fact, Lady Hale's statement comes across more as a warning than anything.

The end of the speech provides more dissension. First adopting a softer tone, Justice Hale accentuates the current situation as regards parliamentary sovereignty: "We will, of course, continue to do whatever Parliament tells us to do".[28] Yet her close adopts an about-face, as she maintains: "It has always been the role of a *constitutional court* to protect fundamental rights, within the framework of the law and the Constitution, and that is what an independent judiciary will continue to do to the best of its ability".[29] Thus, she has gone from the UKSC merely resembling other constitutional courts, to recognising the UKSC as a full-blown constitutional court. She continues by stating that, "The rule of law is something more than the mere servant of Parliament. The quid pro quo is that we must stay true to our judicial oath, 'to do right by all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will'".[30] Although the reader is left to ponder what that the "something more" is, the statements certainly challenge the constitutional status quo in the United Kingdom.

2016 speech in Malaysia

Another example stems from one of Lady Hale's late 2016 speeches: the Sultan Azlan Shah Lecture in Kuala Lumpur, Malaysia.[31] This speech was widely read, as Lady Hale controversially alluded to the impending Brexit case, *Miller*, even if the resulting fervour was misplaced.[32] Challenges to the constitutional status quo, and therefore levers for dissonance reduction, abound in her speech. For instance, Lady Hale titled the speech: "The Supreme Court: Guardian of the Constitution?" Employing this type of "guardian" rhetoric explicitly cloaks the speech in forceful, provocative language. The talk begins similar to the 2015 St. Andrews speech, discussing written constitutions and how far the UK is out-of-step with the international constitutional landscape. *Marbury v Madison* and the striking down of

[27] Lady Hale, "The UK Supreme Court", at [10]. This exact line is also used in the 2016 Malaysia speech below, at [6].
[28] *Ibid* at [16].
[29] *Ibid* at [17] (emphasis is mine).
[30] Ibid at [17].
[31] Lady Hale, "The Supreme Court: Guardian of the Constitution?", Sultan Azlan Shah Lecture (9 November 2016), https://www.supremecourt.uk/docs/speech-161109.pdf.
[32] BC Jones, "Where do Justice Ginsburg and Justice Hale—and Judicial Independence—Go from Here?" *International Journal of Constitutional Law Blog* (30 November 2016), http://www.iconnectblog.com/2016/11/where-do-justice-ginsburg-and-justice-hale-and-judicial-independence-go-from-here/.

parliamentary acts is again discussed, and the theme of "constitutional guardians" aligns well with the discussion in her 2015 speech of "proper" or "official" constitutional courts.[33]

Lady Hale then articulates a number of ways in which members of the UKSC have become "*the* guardians of the United Kingdom constitution".[34] Firstly, as mentioned in the 2015 speech, she discusses the abstract powers of review regarding the validity of devolved legislation, touching on some matters noted in the 2015 speech. Then she moves onto administrative judicial review, noting the deep historical relevance of this process, but adding, "In this we see ourselves as the servants of the sovereign legislature".[35] Interesting statement, considering she began this section by noting the UKSC was "the guardian of the UK constitution".

Lady Hale continues by discussing one of her favourite extra-judicial topics: constitutional review of legislation. She ultimately concedes the following,

> "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".[36]

Although capitulating in tone, adding the qualifier "I think" to whether the Justices are comfortable with their current role instils little, if any, confidence in the statement. And neither does the analysis below it. Again discussing *Jackson*,[37] Lady Hale chooses to bracket a quote by former UKSC Deputy President Lord Hope, which can only be characterised as a distortion of the UK constitution: "The rule of law enforced by the courts is the ultimate controlling factor upon which our constitution is based".[38] She merely adds that the person who wrote the majority opinion, Lord Bingham, "did not agree".[39]

It then comes as no surprise that when concluding her speech, Lady Hale notes in relation to the *Miller* case that the Government had abandoned claims of justiciability, and that at least in that sense, "it is accepted that we are indeed the guardians of the Constitution: if only we knew what it meant".[40] Perhaps this last clause remains the clearest sign of Lady Hale's constitutional conflict. Nevertheless, it is indeed peculiar that "the" has been added to the

[33] Lady Hale, "Guardian of the Constitution" at [3].
[34] *Ibid* (emphasis is mine).
[35] *Ibid* at [6].
[36] *Ibid* at [9-10].
[37] *R (Jackson) v Attorney General* [2005] UKHL 56.
[38] Lady Hale, "Guardian of the Constitution" at [11].
[39] *Ibid*.
[40] *Ibid* at [13].

phrase "guardians of the Constitution"; after all, Lady Hale failed to insert it into the title of her address.

2017 speech in Canada

The final speech analysed comes in mid-2017, almost half a year after the *Miller* case, at the Canadian Institute for Advanced Legal Studies.[41] Starting off on well-trodden ground, Justice Hale points out the UK's lack of a codified constitution. She then goes on to analyse three separate constitutional issues in a UK context: protection of fundamental rights; distribution of sovereign powers between States and the Federation; and distribution of sovereign power. This analysis focuses on the third. However there is one lingering issue from earlier speeches that is resolved. After wavering in previous speeches as to whether or not the UKSC was a constitutional court, Lady Hale decides this definitively in this speech, noting that whether or not they have been officially anointed as such, "the Court has to behave like a proper constitutional court".[42]

Lady Hale begins her discussion of the third topic, distribution of sovereign power, by noting it is the "biggest" and "most fundamental" issue of the three, yet qualifies this by cheekily stating "we always thought that we knew what it meant".[43] What follows is a detailed examination of ways parliamentary sovereignty has been challenged over the years. She cites a recent article by Fergal Davis, who notes that parliamentary sovereignty was conceded long before the EC Act 1972, and argues that Brexit requires a fresh constitutional settlement.[44] After further discussion of some parliamentary sovereignty restraints (e.g., rules of statutory construction, voluntary conceding of power), Lady Hale then identifies a "change" that could "prove more radical and fundamental" than anything noted above, and that threatens the very idea of representative democracy: no, not the rise of authoritarianism or the sickening hate speech we see on social media, but…citizens voting in referendums.[45] Although Justice Hale is right to say that the holding of referendums could become more commonplace within the UK (especially given that it is legislated for in the European Union Act 2011), a conclusion that "the 'people'…is a contestable concept" does not exactly make the case that parliamentary

[41] Lady Hale, "The United Kingdom Constitution on the Move" The Canadian Institute for Advanced Legal Studies' Cambridge Lectures (7 July 2017), https://www.supremecourt.uk/docs/speech-170707.pdf.
[42] *Ibid* at [6].
[43] *Ibid* at [8].
[44] F Davis, "Brexit, the Statute of Westminster 1931 and Zombie Parliamentary Sovereignty" (2016) 27(3) *King's Law Journal* 344.
[45] Lady Hale, "Constitution on the Move" [13-14].

sovereignty has been seriously challenged; nor does her other conclusion, that parliamentary sovereignty had been damaged by MPs respecting the referendum vote.[46]

The speech concludes with discussion around the rule of law and *Miller*, with Lady Hale assuring the audience that the rule of law is "alive and well".[47] And given the changing nature of the UK constitution, Justice Hale declares that a written document will not come into being "any time soon".[48] From the perspective of UK Supreme Court justices, this is not necessarily a bad thing. As Lady Hale notes,

> "This means, of course, that the Supreme Court is not going to get the power to behave like other Supreme Courts in the common law world, including the Supreme Court of Canada, and strike down Acts of the UK Parliament as unconstitutional and that, as far as I am concerned, is a very good thing"![49]

Digesting Lady Hale's speeches

One of the intriguing aspects of Lady Hale's speeches is that if you were to cherry pick particular bits of them—similar to what I have done above—the UK constitution could be seen in two very different lights. This is especially relevant in the 2015 speech at St. Andrews, which distinctly wavers between loyalty to Parliament and the current constitutional arrangements, and forceful questioning of the current underlying constitutional principles. The latter includes suggestions that the current arrangements are obtuse or irrelevant in an increasingly modern constitutional landscape. Some may contend that that the speeches represent a traditional separation of powers constitutional struggle of the judiciary looking to assert itself. But that version is too simplified. Justice Hale's conflict—and her subsequent dissonance—surrounding the UK constitution are deeper than most, and by articulating this (at times) alternative constitutional vision, the reduction of her cognitive dissonance is playing out in her speeches. Thus, the speeches embody a genuine struggle—a type of dissonant constitutionalism that we rarely see displayed in democracies.

Another striking aspect of the speeches is the explicit focus on constitutional arrangements. In two separate speeches Lady Hale notes that she is happy that the UKSC cannot strike down Acts of Parliament.[50] This is the power that most constitutional courts around the world possess, but which the UKSC does not. Of course, not having to determine whether

[46] *Ibid* at [14-15].
[47] *Ibid* at [15].
[48] *Ibid* at [17].
[49] *Ibid*.
[50] Lady Hale, "Guardian of the Constitution" and "Constitution on the Move".

parliamentary-backed statutory law should override a written constitution is indeed a comfortable place to be in compared to other courts, who must frequently decide these issues. But advocating for the UKSC to be a "proper" constitutional court; denigrating the UK for not having a written constitution; and championing the rule of law to either parallel or replace parliamentary sovereignty as the underlying principle of the UK constitution are things that will bring this about. Lady Hale certainly knows this. Her insistence on challenging the fundamental principles of the UK constitution—which have been in place since the Glorious Revolution—is more radical than having the powers to strike down statutory law.

THE PUBLIC ROLE OF UKSC JUDGES

Senior UK judges have always been major public figures, and extra-judicial speeches will often attract the interest of the press.[51] During these activities, they are asked to remain politically neutral and not to engage in controversy. Indeed, extra-judicial speeches and writings have long been a part of the common law tradition, and this is especially true in the UK. The 2009 UKSC *Guide to Judicial Conduct* formalises this, stating that:

> "[T]he Justices recognise that it is important for members of the Court to deliver lectures and speeches, to take part in conferences and seminars, to write and to teach and generally to contribute to debate on matters of public interest in the law, the administration of justice, and the judiciary. Their aim is to enhance professional and public understanding of the issues and of the role of the Court".[52]

Ewing asserts that the rules in the UK as regards judicial speech have been relaxed in recent years, and standards in the 2009 UKSC *Guide* remain more "permissive than restrictive".[53] Although judges share the right to freedom of expression like any citizen, they are also constrained by their judicial role, in the sense that they must "uphold the dignity of their office". And yet, Ewing has rightly pointed out that there is not a hard and fast rule against bias or impartiality as regards extra-judicial speech, but a more obscure rule of *misjudgement* when expressing their views; after all, judges have been permitted to attack governments, criticise foreign governments, and robustly—and publicly—disagree with one another.[54]

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[51] E.g., M Scott, "After discussing Brexit's potential legal hitches, Lady Hale may be wise to quit Article 50 case" *The Telegraph* (17 November 2016), http://www.telegraph.co.uk/news/2016/11/17/after-discussing-brexits-potential-legal-hitches-lady-hale-may-b/.

[52] United Kingdom Supreme Court, "Guide to Judicial Conduct" (2009), 3.4, https://www.supremecourt.uk/docs/guide-to-judicial_conduct.pdf.

[53] K Ewing, "Judges and free speech in the United Kingdom", in HP Lee, *Judiciaries in Comparative Perspective* (Cambridge 2011) 242-43.

[54] *Ibid* at [250-51].

In the speeches examined above, the claims made by the new UKSC President probably do not violate any standards of impartiality set out in statutory form or by any Code. Partisan politics is not a direct element of the speeches, and the statements also do not engender any perceived bias or pre-judgment of cases. Some material, however, deals with perhaps more significant issues: what constitutional principles the UK is founded on, and which ones should stay in operation. In some ways these examples are similar to the Sheriff Peter Thompson case in the 1970s, which remains the only modern case of judicial removal based on extra-judicial speech. Thompson was not directly advocating or engaging in party politics (although his views did align with one party), but addressing the underlying principles of how the governmental system of Scotland was run.[55] He believed that having a national legislature and increased Scottish Home Rule would be beneficial. Ultimately, however, he was stripped of his judicial duties for advocating such views. No one would possibly consider this fate for Lady Hale, but what she is advocating in some of her speeches above is not entirely different. Thankfully, times have changed.

CONCLUSION

Although controversial extra-judicial speeches certainly remain cause for concern, this article provides an alternative view of this controversy: perhaps such provocations should be more accepted. As long as these speeches remain a place for judges to reduce their cognitive dissonance over various matters that arise through their jurisprudence—and therefore, such provocations are not seen in their more formal responsibilities, such as judgements—they may be a healthier and less controversial way of dealing with constitutional conflict.

Ultimately, Lady Hale's struggles remain all of our struggles.

[55] *Ibid* at [237-39].