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"BUILDING A BETTER SOCIETY"

JUSTICE 10TH ANNUAL RIGHTS LAW CONFERENCE –
BUILDING ON 10 YEARS OF THE HUMAN RIGHTS ACT

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Introduction

I start by thanking *Justice* for inviting me to give this keynote address and by congratulating them for holding this timely event today. The workshop sessions will cover an enormously wide range of important topics with excellent speakers. As keynote speaker, I see my role as one of suggesting some broad general themes. I hope these themes will be helpful to the discussions that will take place in the various workshops today.

It may help to give you an idea of the scheme of this address. I propose to begin my address with a few thoughts about the last ten years. I will then make and develop my overarching point. In a nutshell, my overarching point is that the effect of the Convention has been to alter the way we think about the position of the individual in relation to the state. Where human rights are engaged, the Human Rights Act 1998 means that we now start by focusing on the rights of the individual rather than those of the majority.

I will then identify four of the consequences which flow from this refocusing:

The Human Rights Act 1998 has changed the way we think about democracy.
We need to think about the institutions of our democracy to ensure that they are appropriate to the needs of the human rights era.

Questions of human rights can no longer be decided in isolation from developments in human rights jurisprudence in other parts of the world.
Human rights jurisprudence will more and more infuse the common law and be one of the major ways in which it is developed in this jurisdiction in the next ten years.

In so far as I express any view on any question of law which is not yet settled, my view is of course subject to its being worked out on the anvil of adversarial argument should the issue fall to be decided by me as a judge.

Some thoughts about the last ten years

It is now ten years since the Human Rights Act was enacted. It was enacted in my final year as Chair of the Law Commission of England and Wales. It was not brought in to force until 2 October 2000 – co-incidentally the day on which I became a member of the Court of Appeal of England and Wales.
In the course of the bill's passage through Parliament, there was much enthusiasm for the new legislation and, in the period leading up to its commencement, there was a great deal of preparation, particularly by civil servants in Whitehall and by the Judicial Studies Board. I took a little time out myself and I had the privilege of spending a month at the European Court of Human Rights. In that time, I learnt at first hand the sheer scale and variety of that court's work and the way in which it worked.

Perhaps the first point that an English lawyer notices about the Convention is the open-textured way in which Convention rights are expressed. After 10 years we are now very familiar with them but we should not forget that they are enunciating broad statements of principle and setting standards, and that we need to respond to them on that level and not in the way that we would approach an ordinary statute. Even though ten years has passed, let us not forget that the Convention encapsulates standards and values and that it is a living instrument whose meaning may change over time. As Justice Kirby of the High Court of Australia has said, if you construe a constitution as if it were a last will and testament, that is what it will become[1]. In the discussions today, it is I suggest important to keep this point in mind and to avoid getting distracted from the substance of the rights by intricacies in the case law.

I also sat as an ad hoc judge in the European Court of Human Rights on two cases. One of them, *Z v United Kingdom*[2], was of great importance to the common law of negligence. It made it clear that there was no violation of article 6 if the domestic court held that there was no duty of care owed, in that case by a public authority to a citizen. The other case, *T.P. and K.M. v United Kingdom*[3], is less well known but it is also important. It established that, where there is a complaint in which human rights are engaged, there has to be a system, through the courts or otherwise, for investigating the complaint and where appropriate providing redress. This follows from article 13. This holding operates in certain circumstances to counterbalance the situation which arises if the court holds as a matter of domestic law that there is no breach of the duty of care. (Since the Human Rights Act 1998, a remedy for a violation of human rights has been provided by sections 6 and 7 in cases where those sections apply).

For me, sitting in Strasbourg was an illuminating experience. It does not always come through the judgments but the judges often bring very different experiences to bear from those of the judges in the United Kingdom. Review by a supranational court can in appropriate cases be a salutary experience.
At the time of the enactment of the Human Rights Act 1998, there was concern in the United Kingdom about the impact of the Human Rights Act on the resources of public institutions. There was likewise a great concern that the integration of human rights jurisprudence would cause difficulty; in the end it did not cause a constitutional crisis. Great credit must be given to the Appellate Committee of the House of Lords for this smooth transition. The fact that members of the Appellate Committee sit also on the Privy Council may well have something to do with this as cases in the Privy Council

[1] The Hamlyn Lectures, *Judicial Activism, By The Hon. Justice Michael Kirby AC CMG, Justice of the High Court of Australia,* (2004), 40.
[2] Application no. 29392/95 (2001) 34 EHRR 97.

[3] Application no. 28945/95 (2001) 34 EHRR 42.

frequently raise constitutional questions. Constitutional issues require considerable judgment and sensitivity to the environment in which they are given.
As you will shortly hear, I have recently been visiting courts in France. In the course of my visit, I saw a memorial to the seventeenth century French statesman, Mazarin. One of the figures in that memorial is that of the goddess of Prudence. She is holding a mirror so that she can see over her shoulder and backwards into history. One of the strengths of our common law tradition is its methodology. It builds on what has gone before. In this way it ensures so far as possible that, if there is change, the transition is smooth and occurs in a way that is consistent with the traditions of our society. For my part I consider that the common law has had an important role in securing change and stability in our law over many centuries and it is a tradition of which we should be very proud. It has enabled the judges in an appropriate case to move the law on in accordance with social conditions and needs.

At the same time, there are limits to the role of the courts. There are other ways in which the rights guaranteed by the Convention can be enforced. There are, of course, pressure groups like Justice and they have a very valuable role to play. I would like to express my particular admiration for the work Justice has done over the last year. Human rights can also be enforced through the normal processes of law reform, including a project conducted by the Law Commission of England and Wales or the Law Commission of Scotland or (now) the Northern Ireland Law Commission. In the recent case of *Van Colle v Chief Constable of Hertfordshire Police*[4], in which *Justice* made a joint intervention with MIND and INQUEST, Lord Phillips, now the Senior Law Lord, held:

> "[102] The issues of policy raised by this appeal are not readily resolved by a court of law. It is not easy to evaluate the extent to which the existence of a common law duty of care in relation to protecting members of the public against criminal injury would in fact impact adversely on the performance by the police of their duties. I am inclined to think that this is an area where the law can better be determined by Parliament than by the courts. For this reason I have been pleased to observe that the Law Commission has just published a Consultation Paper No 187 on "*Administrative Redress: Public Bodies and the Citizen*" that directly addresses the issues raised by this appeal."

Leaving issues to Parliament is not always the answer but there is more reason to do so where there is a Law Commission project on foot or a recent Law Commission report. One of the most difficult questions for a judge is when to leave an issue to Parliament. Similar difficulties can arise in determining the relative institutional competence of the courts and other institutions, but this exercise does not discharge the court from its responsibility to review the acts of a public authority at the appropriate level.

The structure of the Human Rights Act 1998 is probably unique in the world. There are limitations in it on the enforcement of human rights. Declarations of incompatibility can only be made in the higher courts, but it does not appear that this restriction has given rise to any serious difficulty. There are other limitations. If a declaration of incompatibility is made, it is not binding on the parties to that case. There is also no right to compensation if a public authority has acted pursuant to statute in violating human rights. Those restrictions are more controversial, but are consistent with Parliamentary sovereignty. It is still necessary in these cases, and in cases caught by the transitional provisions in the Human Rights Act 1998, for the parties affected to apply to the Strasbourg court. Overall, the Human Rights Act 1998 is also subject to criticism by those who oppose any form of protection for Convention rights but I have to proceed on the basis that those arguments have been rejected by Parliament. With these qualifications,

[4] [2008] UKHL 50, [2008] 3 All ER 977.

however, the structure of the Human Rights Act 1998 has been widely welcomed as a means of giving protection to Convention rights in domestic law. Moreover, some problems arise not out of the structure of the Human Rights Act 1998 but out of the way litigation is funded. I note that there is no session today devoted solely to access to justice but it is an internationally known fact that the costs of proceedings in England are considerable, and any discussion of bringing rights home not just to our shores, but to the average citizen's living room, has to solve this problem as well.

There has been a large number of landmark cases under the Human Rights Act 1998 in the years since its commencement. I can do no more than single out one that bears on the overarching point that I will make. It is the *Belmarsh* case[5]. It concerned suspected terrorists who were aliens and who could not be deported because of fears for their safety in the countries to which they would be returned. They were held in indefinite executive detention in Belmarsh prison.

By its decision the House of Lords, in exercise of its powers conferred by the Human Rights Act 1998, by a majority quashed the Human Rights (Designated Derogation) Order 2001, and made a declaration that section 23 of the Anti-terrorism Crime and Security Act 2001 (providing for detention without trial) was incompatible with articles 5 and 14 of the Convention.

The first issue arose from article 15 of the Convention and it concerned the question whether the government were right in saying that circumstances had arisen entitling the United Kingdom to derogate from the Convention under article 15. Article 15 provides that "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation..." Specifically the question was whether a state of emergency had arisen for the purposes of article 15. The House of Lords (by a majority) rejected the detainees' arguments on this point. The House was prepared to attach great weight to the judgment of the Secretary of State and Parliament on the issue whether there was a public emergency threatening the life of the nation.

The second issue was whether the provisions of the 2001 Act relating to detention violated Convention rights only "to the extent strictly required by the exigencies of the situation" for the purposes of article 15. Here the detainees' arguments focused on the fact that the powers of detention related only to foreign nationals who could not be deported. It could not be said that foreign nationals were the only threat; if they were a threat, they could under the 2001 Act go abroad and carry on their activities from abroad. They could be detained even if the threat that they presented was not as members of Al-Qaeda but of some other organisation altogether that had not been responsible for the state of emergency justifying the derogation. The House of Lords (by a majority) accepted these arguments: in a word, section 23 was irrational. The power of detention did not prevent any person who was content to return to his own country from doing so and carrying on terrorist activities from there.

The third issue was whether the powers of preventive detention discriminated unjustifiably between non-UK nationals and UK nationals, who could not be detained on suspicion. The House held that there was unjustified discrimination. The power of detention did not prevent United Kingdom nationals from carrying on terrorist activities because they could not be detained under this power.

[5] *A v Secretary of State for the Home Department* [2005] 2 AC 68.

I have called the *Belmarsh* case a landmark case. It was the first major challenge to the enforcement of human rights in the courts. The field was the highly charged one of terrorism. Nonetheless the House did not shrink from reaffirming the values in the Convention and enforcing Convention rights. It demonstrated that it was part of the courts' role to give content and teeth to human rights.

A crucial change – my overarching point

I now come to what I have called my "overarching" point. The point that I want to make is that the Human Rights Act 1998 has focused attention at the first stage on the individual rather than the state. That is quite different from the position that prevailed in such cases before the Human Rights Act 1998 (and still prevails in other judicial review cases), and it has changed the way in which we think about democracy. The *Belmarsh* case is indeed an example of this refocusing and that case could not of course have been decided the way it was before the Human Rights Act 1998. I need to develop my "overarching" point.

This "overarching" point can be developed by reference to the ideas in John Stuart Mill's famous essay, *On Liberty*. In this essay, John Stuart Mill put forward the idea that the individual should be allowed the greatest freedom unless it could be shown that his actions would harm others. This is called the "harm principle". Mill wrote:

> "That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of the civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."

An individual was entitled to act without restriction unless his conduct concerned others:

> "To justify [compulsion], the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."

Mill also developed the argument that each individual has a right to liberty of self-development. Again this is subject to the rights of others. He says in *On Liberty*:

> "In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others."

The more that individuals develop themselves the more they and society would benefit.

The harm principle is not uncontroversial or easy to apply. But it throws light on the effect of the Convention.

The Convention distinguishes between absolute rights and qualified rights. Absolute rights include the right to life and the prohibition on torture. The court cannot interfere with absolute rights, nor can the state. Qualified rights include the right to respect for private and family life, freedom of thought, conscience and religion and so on. These rights are said to be qualified because the state can interfere with them in limited circumstances. (The right to property is a form of qualified right, but the state is allowed

greater latitude to interfere with this right than with the rights conferred by articles 8 to 11, and so in the interests of simplicity I leave that right out of account for the purposes of this address).

If the individual complains that his human rights have been infringed, then the court has to ask if the right is an absolute one or qualified one. If it is an absolute right, no one can interfere with it and the individual's right must prevail.

If the right is a qualified one, such as the right to freedom of expression and freedom to manifest one's religion, the right is not unlimited, but it is still not open to the state simply to interfere with it as it chooses.

It must meet the requirements of the Convention. It must show in accordance with the express requirements of the Convention that the interference is prescribed by law, necessary in a democratic society and proportionate. In order to show that the interference is proportionate, the state must show a pressing social need.

As with Mill's harm principle, the state must justify its interference with the individual's freedom to act as he determines. The Convention reaches in this respect the same broad result as Mill's harm principle.

We can contrast this result with judicial review where no human rights are involved. A decision made by the state that is within the law is not set aside as unreasonable unless it is perverse. Moreover, and this is an important point in practice, the onus of showing that it is perverse lies on the individual seeking to establish that it is perverse and not on the state. This would not meet Mill's harm principle.

As it seems to me, one of the most notable changes made by the Human Rights Act 1998 has been to refocus the law at the initial stage on the rights of the individual. Either his rights cannot be abridged, or, if the state can interfere with them, the onus has shifted to the state to show that any interference with the right is essential and not just one which could not be classed as being perverse.

I said at the start of this address that there are some consequences that flow from this refocusing and that I would identify four of them. I now turn to the consequences I would like to mention.

First, the Human Rights Act 1998 has changed the way we think about democracy.

It used to be enough to speak of democracy as requiring that each person had one vote and all that that entails. However, with the refocusing of the law on the individual at the first stage where human rights are engaged, we can see that, equally importantly, democracy also consists of a complex interplay between majority and minority rights. In this way, the Human Rights Act 1998 has changed the way we think about democracy.

Indeed, one of the by-products of the Convention is that when it comes to the qualified rights we are expressly directed to think about democracy. The question of what democracy means and requires needs to be considered in more depth now as part of the legal issue of determining whether the state was entitled to interfere with the right in question.

There is some guidance in the authorities as to what is necessary in a democratic society. Baroness Hale has held that democracy is founded on the principle that each individual

has equal value.[6] Lord Hoffmann has referred to equality before the law as one of the building blocks of a democracy.[7] In a case concerning the limits of the procedural duty to hold an investigation under article 2 of the Convention, I held that the interests of a democracy did not require that there should be an investigation into questions of the allocation of public resources, which was a question for the executive and Parliament,[8] and that approach was approved by the House of Lords.[9]

Much more thought, however, could usefully now be given to what is meant by "necessary in a democratic society". Interestingly, the European Court of Human Rights has said relatively little about the meaning of democracy in this context. I think that there is probably a good reason for this, namely that the term needs to be understood in the context of the particular member state. It is therefore something that we should expect to be free to decide for ourselves.

Secondly, we need to think about the institutions of our democracy to ensure that they are appropriate to the needs of the human rights era.

The Victorians built great buildings like the Royal Courts of Justice. They did so on a breathtaking scale. They planned for a society in which public institutions would play an important part.

In the 21st century, we have to build institutions for the future. They are institutions of a different kind. They are the institutions necessary to ensure the success of individual rights. Society has to protect a liberal democracy from within and from those forces within society that would if accepted diminish its liberal values.

To recognise, protect and enhance human rights, the state has to have the correct fabric of laws and institutions fitted to the task.

In fact, we're on the eve of an important institutional change in our legal system. Under a year from now the work of the Appellate Committee of the House of Lords will be transferred to the new Supreme Court of the United Kingdom. This represents a unique opportunity for setting up an apex court for the 21st century. It will of course have the same powers, and only the same powers, as the existing Appellate Committee of the House of Lords. Nonetheless the institution of the Supreme Court is the start of a new chapter. There are many issues to be considered.

One of those is the selection of cases, for example, should the court take on different cases or should it have different criteria, for instance, for cases which raise issues of a constitutional nature?

There is another issue on which I have spoken this year and that is the form of judgments. This may seem a very narrow and technical area but it is in fact all about the way in which courts communicate with the public. Things have changed radically in the last 50 years. The public is no longer simply content to be told what the law is. They want to know why it is. This is particularly the case with human rights. The judgment at whatever level it is given must be clearly reasoned and speak to the issues. When the court is dealing with an issue of a person's human or constitutional rights, the audience is not just the parties and practitioners. It is also the general public because when, for instance, there is a significant question of human rights many members of the public will be interested or involved.

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6 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [132].
7 *Matadeen v Pointu* [1999] AC 98 at 109.
8 *R (o/a Scholes) v Secretary of State for the Home Department* [2006] EWCA Civ 1343, 93 BMLR 132.
9 *R (o/a Gentle and others) v Prime Minister and others* [2008] 2 All ER 1 at [9[, [28], [29] and [74].

I would expect that, if the Supreme Court evolves, it will only do so slowly in the way that institutions have evolved throughout our history. I cannot say whether or how it will evolve or how long it will take to evolve but let me illustrate how courts evolve by taking the example of the Conseil Constitutionnel, or Constitutional Council, in France. I choose this example because I have recently visited the Conseil Constitutionnel and thus can speak with the benefit of my researches. It is I think of some considerable interest to *Justice* in view of its recent report, *A British Bill of Rights: informing the debate*.

The Conseil Constitutionnel was set up in 1958 to monitor disputes arising from elections and also the boundary between Parliament and the executive. The President or the Prime Minister or the Speaker of the French Parliament or a specified number of members of Parliament can ask the Conseil Constitutionnel, after a statute is passed by the Parliament but before it is brought into force, to consider whether the statute is in accordance with the Constitution. The Conseil Constitutionnel is not a court in the ordinary sense. Its membership is drawn not simply from judges. Its members include distinguished persons from other walks of life. In the form in which it was originally set up, the Conseil Constitutionnel was not unlike, as it seems to me, a select committee of the House of Lords. It heard evidence from those it chose to call as witnesses.

The Conseil Constitutionnel produced decisions on issues of constitutionality. In due course the Conseil Constitutionnel held that it could consider the question of constitutionality by reference not only to the actual provisions of the Constitution but also by reference to documents referred to in the recitals to the Constitution. This included the far-reaching *Declaration of the Rights of Man 1789* and also the preamble to the previous constitution of 1946 setting out socio-economic rights. Later the Conseil Constitutionnel went further still and held that it could assess whether a legislative proposal was constitutional by reference to general principles to be found in legislation passed by Parliament in the period 1789 to 1946.

Finally in July 2008 the French Parliament adopted a law which enables either the Conseil d'Etat or the Cour de Cassation to refer to the Conseil Constitutionnel a question of constitutionality arising in the course of litigation. This is a major change. When this amendment comes into force, the Conseil Constitutionnel will perform not only an anterior review of legislation (like a select committee of the House of Lords) when requested to do so by Parliament but also a posterior review of legislation when an issue arises in litigation as to its constitutionality. In either case it will be able to annul the law if it considers it to be unconstitutional in the sense that I have described. In some ways, this development is comparable to the right given by the Human Rights Act 1998 to an individual citizen to challenge a law on the ground that it is incompatible with human rights. But it goes much further than the Human Rights Act 1998 did. It enables the citizen to argue that primary legislation is unconstitutional and to seek an order that it be set aside.

No doubt the Parliament of the United Kingdom, if it were ever so minded, could likewise give an individual the right to challenge legislation on the grounds that it is not in conformity with the fundamental principles of the common law. Until that happens the individual citizen must look to Community law, the Convention and (to the extent that it is available) the common law to protect his rights. Such protection will not, save in the case of Community law, avail against incompatible primary legislation, or, in the case of common law rights and in some circumstances, Convention rights, against incompatible secondary legislation. It is for others to say whether that position is anomalous, but it is the law of the land. The like position in French law has apparently proved unsustainable in the longer term.

We shall have to see how the Conseil Constitutionnel evolves in the future. I do not suggest that there will be a parallel development in the United Kingdom but the Conseil Constitutionnel illustrates how institutions can change and evolve as circumstances require. In making this point, I have no specific institutions in the United Kingdom in mind. I am simply re-affirming the importance of having appropriate institutions and the need for vigilance here.

Thirdly, question of human rights can no longer be decided in isolation from developments in other parts of the world.

When questions of human or constitutional rights arise **t**he judicial system can no longer operate in complete isolation from what is going on in the rest of the world. Courts must be mindful of the experience in other countries and learn what they can from them. Accordingly I have always strongly supported meetings of judges from different jurisdictions. Personal contacts are extremely important. It enables ideas to be exchanged and networks to be built up.
I also support the study of comparative human rights and constitutional law. The question of course is always one of deciding what the law in this jurisdiction is. However, comparative law can enrich our understanding of human rights and constitutional rights in our own jurisdiction and enable us better to resolve new cases as they arise.

Fourthly, human rights jurisprudence will more and more infuse the common law and be one of the major ways in which it is developed in this jurisdiction in the next ten years.

Over the centuries judges have been responsible for developing the common law. The common law has enabled the law to adapt incrementally and thus in a way which encourages change commensurate with stability as social conditions require. It may be that more change is required and from time to time the Law Commissions make recommendations for change, or Parliament itself makes a change in the law. But there are still whole swathes of law that are common law and for which judges are responsible. Their role is crucial. They are at the heart of the system for human rights.

Building up human rights jurisprudence is in some respects the same type of task as developing the common law, though there may be new priorities, including a need for communication and transparency.

Human rights require that regard be had not just to legal rules but also to the wider context in which the rules operate. Law, it is sometimes said, is a discourse on other discourses. In the field of human rights, we are all discovering that law has new boundaries: the limits are not now the same as we always thought they were. So there may need to be a dialogue, not in the formal sense but in the sense of an awareness, between the law and other disciplines so that so far as possible decisions are taken on the basis of best information available.

This country is rightly proud of its common law tradition. The common law has contributed much to human rights and will continue to do so. But the traffic goes both ways. Over the decade to come, human rights jurisprudence may well become a crowbar for opening up and reinvigorating the common law in aspects of private law. Indeed, in some areas it has done so already. Human rights jurisprudence may also be used as a reason for changing the *Wednesbury* test in judicial review to one of proportionality. The existence of the new system for the protection of human rights can occasionally be used as a reason for restricting the development of the common law, as it was in *Van Colle*. However, it is likely that it will more often be used as a means of putting the common law

on a more openly principled basis and bringing it up to date. Certainly that has been my experience in the Court of Appeal in the last few years.

Conclusions

So the overarching idea that I wish to start this conference with is this.

The Human Rights Act 1998 has made a profound difference to the work of the courts in the years since its commencement, and I have no doubt that it will continue to affect what we do and how we think in the years ahead.

The Human Rights Act has focused attention at the first stage on the individual and the onus has changed from the individual to the state to justify any interference with his human rights in those cases where some interference is permitted. That is quite different from the position that prevailed before the Human Rights Act, and still prevails in judicial review where human rights are not engaged.

The Human Rights Act has changed our understanding of democracy. We can now clearly see that democracy is also a complex interplay between majority and minority rights. Lawyers could usefully consider what it means to be "necessary in a democratic society".

There are important consequences from this, including the following:

- The Human Rights Act 1998 has changed the way we think about democracy. We need to think about the institutions of our democracy to ensure that they are appropriate to the needs of the human rights era. We need to be mindful of the experience in other countries and learn what we can from them.

- Human rights jurisprudence will more and more infuse the common law and be one of the major ways in which it is developed in this jurisdiction in the next ten years.

- Human rights jurisprudence will reinvigorate the common law.

These are the thoughts I would like to leave you with as you go through the programme today. The first 10 years has been very important and productive but there is still much to be done.

Thank you for your attention.
