LORD NEUBERGER OF ABBOTSBURY MR

RIGHTS AND RESPONSIBILITIES: CIVIC DUTY AND THE RULE OF LAW

2009 DENNING LECTURE

INNER TEMPLE, 23 NOVEMBER 2009

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(1) Introduction

1. Lord Denning is undoubtedly the most famous of my very many predecessors as Master of the Rolls - at least to the modern equivalent of the person whom he would have known as the man on the Clapham omnibus. That is saying something when you consider that the office stretches back over more than 740 years – the earliest recorded MR being John de Kirkby (about whom, by contrast, absolutely nothing is known). It is now ten years since Denning died at the appropriately memorable age of 100; having spent 38 years as a judge, over half of that period as Master of the Rolls.

2. His judgments ranged from the familiar byways of contract law to the broad avenues of family law, across the highways of tort to the High Trees of estoppel. Amidst all this he always demonstrated, as the Denning Law Journal has it, a commitment to a number of fundamental values: freedom of the individual; independence from state intervention; the preservation of human rights; the preservation of judicial independence; integrity, creativity; and libertarianism.[1] As Lord Bingham has reminded us, he was 'the best known

[1] http://www.denninglawjournal.com/index.htm

and best loved judge in our history'.[2] It is therefore truly an honour, albeit a rather awe-inspiring honour, to have been asked to deliver this year's Denning Lecture.

3. At the outset of his judicial career in 1949 – I say outset, but by then having been a High Court judge for four years, he was settling into his second year in the Court of Appeal – Denning gave the inaugural series of Hamlyn lectures. His subject matter was, those of you who did not know won't be surprised to hear, *Freedom under the Law*. He opened those lectures by saying this:

> "*What matters in England is that each man should be free to develop his own personality to the full: and the only duties which should restrict this freedom are those which are necessary to enable everyone else to do the same. Whenever these interests are nicely balanced, the scale goes down on the side of freedom. . . I hope to show how the English law has kept in the past the balance between individual freedom and social duty: and how it should keep the balance in the social revolution of today, drawing on the experience and laws of other European countries for the lessons we can learn from them.*"[3]

4. He then elaborated on what he meant by freedom, in these terms:

> "*By personal freedom I mean the freedom of every law-abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasions without let or hindrance from any other persons. Despite all the great changes that have come about in the other freedoms, this freedom has in our country remained intact. It must be matched, of course, with social security, by which I mean the peace and good order of the community in which we live. The freedom of the just man is worth little to him if he can be preyed upon by the murderer or thief.*" [4]

5. Denning went on to consider, amongst other things, freedom from arbitrary arrest, freedom from oppression, and freedom from torture. He examined habeas corpus, that

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[2] Bingham, *The Times* (18 June 1999) cited in Goff, *Alfred Thompson Denning (1899 – 1999)*, in Oxford Dictionary of National Biography, (OUP) (2004) (http://oxforddnb.com accessed on 17 November 2009).
[3] Denning, *Freedom under the Law*, (Stevens) (1949) at 4 – 5. (http://law.exeter.ac.uk/hamlyn/Digital%20files/Freedom%20Under%20the%20Law%201.pdf).
[4] Denning, *ibid*, at 5.

great protector of civil liberty. He then proceeded to discuss freedom of mind and freedom of conscience, and jury trials – that '*bulwark of our liberties*', as he would famously describe it in 1966 in *Ward v James*[5], or as de Tocqueville described it many years earlier, that '*peerless teacher of citizenship*'.[6] Finally, he went on to examine justice between the citizen and the state as well as state power, or rather, powers.

6. These fundamental principles, which Lord Denning so eloquently and persuasively expounded and supported, seem, at least to those who have the good fortune to live in this country, almost timeless in their fundamental nature. However, the great man's views were inevitably imbued, not only with an inimitable and indomitable experience and belief in the common law, but also with the recent experience of a world that had been enmeshed in the darkness of totalitarian dictatorships and the devastation of the Second World War. It is interesting to revisit these principles now, sixty years on, from the perspective of a rather different world order.

7. And what a sixty years it has been. In the forty years since 1949, the UK saw increased prosperity, enormous social changes especially as a result of the watershed "swinging sixties", changes in attitudes to ethnic minorities and women, the establishment and eventual British membership of the EU, and the development, even the explosion, of domestic judicial review. In the past twenty years alone, we have seen the collapse of the Soviet Empire, the start of the internet, and the acceptance of the precedence of EU law in our courts, in *ex p Factortame Ltd (No 2)* [1991] 1 AC 603. In the past ten years, we have seen the introduction of the European Convention on Human Rights into UK law, the establishment of the UK Supreme Court, as well as the horrors of terrorism in New York, London, Madrid, Nairobi, Mumbai, Bali, and the so-called 'War on Terror', and its spin-offs such as the regrettable Guantanamo Bay[7].

8. These significant and fast-moving changes require us to identify the fundamental aspects of such freedoms, of our legal rights and responsibilities. By that I mean those aspects

[5] [1966] 1 QB 273 at 295.
[6] Cited in Auld, *A Review of the Criminal Courts of England and Wales* (2001) (http://www.criminal-courts-review.org.uk/auldconts.htm) at 135.
[7] Bar Council Annual conference 2008, cited in Clarke, *Open Societies and the Rule of Law*, (Atkin Lecture 2008) (http://www.judiciary.gov.uk/docs/speeches/mor-atkin-lecture-08.pdf) at [29].

which are immutable, and cannot be surrendered because of changes, whether technological, political or social. But there are aspects of these rights and responsibilities which can, should, and inevitably will, change with the passage of time. The common law can pretend that whatever the court says is the law has always been the law but this is, as Lord Reid once said, a '*fairy tale*'[8] that won't do in the real world, and may conceivably not even be true much longer in court. The truth is that publicly perceived and generally accepted social and moral standards change, and, within limits, the legislature and the courts must reflect those changes, if they are to retain democratic relevance and public confidence. In an era of great and fast change, it is therefore particularly important to identify what one might now call the core, almost immutable, values of any rights and responsibilities.

9. It is impossible to be didactic as to the precise extent of those core values. To most informed people in this country, capital punishment is not merely unacceptable: its continued abolition represents a core value, as it is under the European Convention. But that was not the case 200 years ago in the so-called age of enlightenment, or even 50 years ago, when it was still part of our legal system. And it is still now not the case in parts of the United States. Equal rights for same-sex relationships is now a given in Western Europe, but, at least as between men in the United Kingdom, such relationships were illegal fifty years ago, and 200 years ago they could lead to the death penalty. On what I was brought up to call the Whig view of history, we are always marching forward, so some might think that those developments can be treated as tucked under our belts as new core values. But even the rose-tinted spectacle wearing Whigs must accept that there will be some pretty big hiccups on the forward march. So we must be careful in our identification, and retention, of our core values.

10. I cannot even begin re-examine everything Denning had to say in his four 1949 lectures. I do, however, want to look at some of the issues Denning raised then. I shall do so through examining *Rights and Responsibilities: Civic Duty and the Rule of Law*. First, I examine rights and responsibilities, their past development and present status. I then examine respect, acceptance and the denial of those rights and responsibilities. Finally, I examine our commitment to civic duty and the rule of law. Before doing so however I should like to

[8] Lord Reid, (1972-73) J.S.P.T.L. 22, cited by Lord Browne-Wilkinson in *Kleinwort Benson v Lincoln City Council* [1999] 1 AC 153 at 167.

recognise that, in putting together this evening's lecture, I owe a great debt to John Sorabji, who is a lawyer and a scholar.

(2) Rights and Responsibilities: Past and Present

11. The law has long been engaged in the discussion of rights and the responsibilities which they carry with them, but, thanks to the introduction of the Human Rights Act 1998 ("the HRA") in 2000, we in the UK have been particularly conscious of them in the past decade. The Judges in this country are not only having to develop the law to cope with social and technological changes, and changes in perceptions and standards. We are also having to "play catch-up" on half a century's worth of Strasbourg's interpretation and development of the Convention. And, as I have mentioned, a great deal happened in that half-century, the same half century which followed Lord Denning's lectures, and many of those changes impinged on rights and responsibilities. But the fundamental nature of many of those rights and responsibilities, is not new. Let me consider a few examples.

12. First, the right to fair trial. Magna Carta established a right to a fair trial in England, or as Coke CJ would have put it, Magna Carta affirmed the common law right to fair trial.[9] In the wording of chapter 29 of Magna Carta's 1297 version - that is to say the one which remains, now 712 years later, on the statute book ,

> "*No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.*"[10]

13. This would in time become translated into the 5th and 14th Amendments to the US Constitution; the former amendment being part of the US Bill of Rights.[11] It would then find expression in the 20th Century, first as, Article 10 of the Universal Declaration of Human Rights in 1948 and, shortly thereafter, as Article 6 of the European Convention on

[9] Coke, *Institutes of the Law*, Vol. II at 50.
[10] Magna Carta (1297) 1297 c. 9 25 Edw. 1 cc 1 9 29 (http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1517519#918934).
[11] *Solesbee v Balkcom* 339 US 9 (1950) at 16; cf *Snyder v Massachusetts* 291 US 97 (1934) at 105; *Scott v Sandford* 60 US (19 How.) 393 (1857) at 450.
US (19 How.) 393 (1857) at 450

Human Rights. It is of course the right of litigants to receive a fair trial and the responsibility on the part of the state to ensure that right is received in practice.

14. Recently this year in *Michel v The Queen* [2009] UKPC 41[12], the Privy Council invoked the fair trial principle in relation to criminal proceedings in the Channel Islands. The trial judge had interrupted too many times, made too many remarks favourable to the prosecution during the evidence, raised too many questions to witnesses which undermined the defence, so that the overall effect was that the defendant had not had a fair trial. So the case was sent back for a re-trial. Judicial exuberance happens sometimes: judges are human beings, and a rehearing because the trial was unfair is, while regrettable, nothing very remarkable. However, the striking thing was that the Privy Council thought that the defendant had been rightly convicted; indeed, they found it difficult to see how any result other than a guilty verdict could have eventuated. Nonetheless, the right to a fair trial was considered so fundamental that the point could come, as it sadly did in that case, that the unfairness alone was enough to undermine the conviction. In other words, as that case neatly demonstrates, it is more than a merely procedural protective rule: it is a substantive, free-standing right.

15. Second, there is the right to liberty and security. Any first year law student knows the famous case of *Entick v Carrington* (1765) 19 Howell's State Trials 1030, in which the right to liberty and security (as well as property) in England was so clearly propounded; such rights had already, in other circumstances, long been protected by the common law writ of habeas corpus. As Lord Camden put it in his judgment,

> "*The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for*

[12] http://www.bailii.org/uk/cases/UKPC/2009/41.html.

bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment."

16. Lord Camden thus eloquently gave expression to what are now Articles 3 and 17 of the Universal Declaration and Articles 5 and 8, and Article 1 of the First Protocol, of the European Convention. As Justice Bradley of the US Supreme Court put it in *Boyd v United States*,

> "*The principles laid down in [Lord Camden's] opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.*"[13]

Lord Camden thus also gave expression to what would become the 4th amendment, as well as another aspect of the 5th Amendment, of the US Constitution.[14] Again we see an application of the principle that individuals should be accorded both liberty and security by the state, leading to the state's responsibility to secure that right; something which, as mentioned earlier, Denning discussed in his 1949 lectures.

17. English law had a very limited concept of a right to privacy, when it was not linked to another right, such as trespass to the person or to property. This was well demonstrated by

[13] 116 US 616 (1886) at 630.
[14] *Ibid* at 630: "*Can we doubt that, when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and "unreasonable" character of such seizures?*"

the decision in *Kaye v Robertson* [1990] FSR 62, where it was held that a TV star had no claim against a newspaper which published photographs of him, lying unconscious following an accident, obtained by a photographer trespassing in the hospital.

18. So the Human Rights Act has added a considerable new dimension to our domestic law, through Article 8 of the European Convention. It is therefore no surprise to find a welter of cases in the English courts over the last decade where the important right of privacy has been considered and developed by our courts. It is interesting to see how it has been developed: rather than being introduced as a freestanding new common law right, it has been "shoe-horned" into the law of confidence, as Lord Phillips, then Master of the Rolls, put it in *Douglas v Hello! (No. 6)*: when sitting with his two successors in that post.[15]

19. Of course, *Entick* was concerned with arbitrary use of state power, a topic on which we have always prided ourselves as leading the world, and Europe in particular. But two centuries of relatively enlightened government may have instilled in our forebears, even, dare I say it, in Lord Denning, a degree of complacency. Thus, there is the salutary example of *Liversidge v Anderson* [1942] AC 206, Mr Liversidge was detained under Regulation 18B of the Defence (General) Regulations 1939, on the ground that the Home Secretary had 'reasonable cause to believe' that he 'had hostile associations'. Despite the reference to "reasonable belief", Viscount Maugham, with whom Lords Macmillan, Wright and Romer agreed, refused to accept that the court should be able to assess whether the Secretary of State's belief was reasonable. This sorry decision prompted the famous dissenting speech of Lord Atkin, which almost everyone now agrees was right. But the majority view should remind us of at least two important points. First, in times of national emergency, even eminent judges can be tempted to compromise on fundamental rights and principles. Secondly, while the UK's record on human rights and freedoms is second to none, we do not have an unblemished record, and we have things to learn from other jurisdictions just as much as they have things to learn from us. In other words, the common law, with its many virtues and extraordinary strengths, is not perfect.

20. This point has been brought into sharp focus, at any rate to my eyes, now that we have to apply the Human Rights Act. Privacy is one example. In another recent case, *Trent Strategic Health Authority v Jain & Anor* [2009] UKHL 4, [2009] 2 WLR 248, the House

[15] [2006] QB 125 at [53].

of Lords had to consider a claim by the owners of a care home which had been closed following an order of the court made *ex parte* pursuant to an application by a local authority. The application had not been made dishonestly, but it had been made very negligently and the order was quite unjustified. The owners, as you may imagine, had suffered very substantial loss. The House unanimously held that they had no cause of action, as the statutory procedures had been complied with: so, despite the closure being the result of high-handed, incompetent and unjustifiable action by the executive, there was no cause of action in English law. Unfortunately for the claimant, the closure occurred before the Human Rights Act came into force. The clear, *if obiter*, indication from the House was that, if the claimants pursued their case to Strasbourg under article 6 or article 1 of the first protocol, they should succeed.

21. Reverting back more than two centuries to Lord Camden's judgment in *Entick*, its writ runs wider than liberty, security and the protection of property. In adverting to the silence of the books, his judgment rests on an acceptance of a further, a third, human right: *nulla poena sine lege*, as Justinian put it.[16] This of course is now expressed in Article 11(2) of the Universal Declaration. And in the more modern language of Article 7 of the European Convention it is the right that: '*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed*.' And we can see the double aspect of the right. It looks to protecting individuals, but it does so by placing a responsibility on the state not to enact retrospective law. In that area, the common law marches with the Convention.

22. A recent example may be found in the House of Lords' decision in *Norris v United States* [2008] UKHL 16, [2008] 2 WLR 673. The principal issue was whether Mr Norris should be extradited from the UK to the US to face charges for price-fixing in the US, in the light of his alleged activities in the 1990s. In order to extradite him, the US prosecution authorities had to satisfy the so-called double criminality test, namely that price-fixing was an offence in both the UK and in the US. Since the Sherman Act of 1890, it had been a crime in the US, so the issue was whether it had become a crime in the UK before it was statutorily made so by the Enterprise Act 2002.

[16] Justinian, *Code*, at 1.14.7 (http://uwacadweb.uwyo.edu/blume&justinian/Code%20Revisions/Book1rev%20copy/Book%201-14rev.pdf)

23. There were a number of cases in the 19th and 20th centuries where English judges had held that entering into a price-fixing arrangement (as opposed to misleading potential purchasers as to whether there was a price-fixing arrangements) was not a crime, although legislation in the latter half of the 20th century had rendered most such arrangements unenforceable. The US prosecution authorities contended that, with the change in business ethics, the influence of EU law (especially the articles of the Treaty of Rome banning anticompetitive behaviour) and international comity, the common law had moved on. One of the reasons this contention was rejected was that the common law, especially I think in the criminal field, should be clear and certain, a point which the House of Lords also had in mind when they gave their last judgment, in the assisted suicide case, *R (Purdy v DPP* [2009] UKHL 45, [2009] 3 WLR 403. The guidelines which existed did not give sufficient information to those considering assisting in a suicide to be able to form a reasonable view as to the likelihood of the DPP authorising a prosecution.

24. Finally in this part, I turn to freedom of expression: the Article 10 right in the European Convention; Article 19 of the Universal Convention; and before them both the 1st Amendment to the US Constitution. I say finally, although freedom of speech is as human rights go first, more accurately I think, one of the first, amongst equals. It is the *sine qua non* of any free, liberal and open society. It is the means by which truth is told to power. It is, as A. C. Grayling, described it in his recent book *Liberty in the Age of Terror*, '*the fundamental civil liberty*'.[17] For Lord Steyn, it is the '*primary right*' and the '*life blood of democracy*.'[18] For Judge LJ, now our Lord Chief Justice, it is, along with the right to fair trial, '*bred in the bone of the common law*.'[19] It is difficult to imagine anyone properly disagreeing with any of those statements, even if, as Watkins J noted in *Verrall v Great Yarmouth BC*, '*much blood*' had to be '*spilt over the centuries*' for us to reach the position that freedom of speech was a '*fundamental freedom [England could] pride itself on maintaining.*'[20]

25. It is of such fundamental importance in part because it is only through free speech that one can achieve true democratic accountability, indeed judicial accountability through open

[17] (Bloomsbury) (2009) at 63.
[18] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at 126.
[19] *R v Central Criminal Court, ex parte Bright* [2001] 2 ALL ER 244 at [87].
[20] [1981] QB 202 at 205.

justice, debate, discussion and education. Without it an open society is as nothing. It is not simply the case as Milton put it that "*He who destroys a good book, kills reason itself*"[21]. But I think it goes further than that: he who destroys *any* book destroys liberal democracy itself. Not for Milton the Günter Grass view that even bad books being books and therefore sacred.[22] However, freedom of expression is required not simply for the thoughts we agree with, but with those we disagree with: as Oliver Wendall Holmes put it in *United States v. Schwimmer*,

> "*. . . if there is any principle . . . that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.*"[23]

26. Of course, as is almost always the case, the position in practice is rather more nuanced. Within a liberal democracy proper limits can, indeed most enlightened people would say "must", be placed on the right to free speech - in order to protect the reputation of individuals through libel laws, to respect privacy or family life, or in order to protect democracy from those who set out to destroy it, in order to ensure public safety – as the famous denial of the right to cry "Fire" in a crowded building. In other words the right is again one which carries with it the responsibility to use it wisely and with proper consideration for the rights of others.

27. The ambit of those limits, of the nature of that responsibility, is set out today in Article 10(2) as Lord Bingham explained in *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247. As he put it, any encroachments on the right to free speech must be prescribed by law, they must further a legitimate aim (such as protecting the right to respect for privacy), and they must be necessary in a democratic society. To justify this three-stage test, one only has to consider how easy it is for repressive, totalitarian, or even misguided, governments to invoke public safety or the need to protect democracy in order to justify almost any restriction on freedom of speech.

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[21] Milton, *Areopagitica: A speech of Mr. John Milton for the liberty of unlicensed printing to the Parliament of England*, (http://www.gutenberg.org/cache/epub/608/pg608.txt.utf8).
[22] Grass, *The Tin Drum* (1959).
[23] 279 U.S. 644 (1929) at 654 – 655.

28. Those who wish to see how the freedom of expression right came to be given proper attachment here would do well to look at the events which surrounded the case of *R v Woodfall* (1770) 5 Burr. 2661 and the history of seditious libel and the eventual victory of freedom of the press. Lord Denning himself has provided a good summary of this case and the 'constitutional crisis' which surrounded it and the birth of the free press.[24] With that plug for Denning's book, I now turn to the second part of tonight's lecture: respect, acceptance and denial of rights and responsibilities.

(3) Rights and Responsibilities: Respect, Acceptance or Denial

29. Simply by reviewing, and then only glancingly, a few fundamental human rights and the responsibilities they carry with them, it can be seen that they have a long and important history, an interesting and active present, and a promising if unpredictable future. For those who wish to look more closely at of the history of another fundamental right, there is the analysis of the development of the common law's repugnance of torture in the House of Lords' judgments in *A & Others v Secretary of State for the Home Department* [2006] 2 AC 221. It is also plain to see that the development of our commitment to human rights forms a central part of the long struggle for the establishment of representative, liberal democracy governed by the rule of just law. They form the basis by which England, and then the United Kingdom was transformed, sometimes in hard fought ways, from a 'government of [executive] will to a government of law.'[25] It is unsurprising that Dicey in his *Introduction to the Study of the Law of the Constitution*, could conclude that in England, 'individual rights are the basis not the result of the law of the constitution.'[26] I agree with Dicey, although I'd add responsibilities after his reference to rights.

30. It is not enough to agree however that human rights and responsibilities are nothing new, that they form part of a long democratic tradition steeped in the development of the rule of law. Indeed, there is a danger that the more we think of them as being well established, the greater the danger of our taking them for granted. So it is good that topics such as the true nature and extent of such rights and responsibilities, and the respect to be accorded to them are the subjects of ongoing discussion. But discussing the nature and extent of rights is not the same thing as ensuring their respect. It is one thing to accept that there is a right

[24] Denning, *Landmarks in the Law*, (Butterworths) (2005) at 283ff.
[25] Mienecke cited in Hayek, *The Constitution of Liberty* (Routledge) (2006) at 151.
[26] (Macmillan & Co) (1902) (6th edn.) at 203.

to liberty and to security. It is another to respect it, to decide how best to reconcile liberty and security, which often gives rise to a tension.

31. This debate becomes more acute in situations where, for instance, it might become necessary in time of war or other national emergency which appears to threaten the life of the nation to derogate, for a time, from the right to liberty in order to provide necessary security. It leads to mistaken decisions like *Liversidge*, to the risks identified by Lord Hoffmann, in another famous dissenting speech in the House of Lords in *A v Secretary of State* [2005] UKHL 56, [2005] 2 AC 68, such as someone who

'*has no intention of doing anything wrong may be reasonably suspected of being a supporter on the basis of some heated remarks overheard in a pub. The question in this case is whether the United Kingdom should be a country in which the police can come to such a person's house and take him away to be detained indefinitely without trial.*'[27]

To paraphrase Lord Denning, the freedom of the just is worth little to them if they can be preyed upon indiscriminately.

32. The tension which this debate involves can be characterised as weak, in that it presents a qualified challenge to respect for human rights: it accepts the validity of those rights and operates within the lawful framework they provide. It does not challenge human rights, or any human right. On the contrary: it takes its starting point Articles 5 and 15 of the Convention, and operates within the framework of law they provide.

33. There is, of course, a much stronger challenge, namely one which at heart does not accept the existence of human rights. This can manifest itself officially or unofficially. It is official where a state expressly rejects the very idea of human rights, that an individual has a right to freedom of expression, to liberty and security, to freedom of religion or conscience, to respect for private life. Totalitarian societies, in Karl Popper's description "closed societies", throughout history have rejected such rights and the responsibilities they impose on a state, and have mistreated their citizens accordingly. But there are more commonly cases where states tacitly reject a commitment to these very rights, while paying lip service to them. It is one thing for a state to sign up to the Universal Declaration of

[27] [2005] UKHL 56, [2005] 2 AC 68 at [87].

Human Rights 1948 or to place guarantees of such rights in a Constitution; it is another for a state to operate consistently with those commitments and guarantees. Rights here are not genuinely respected or even accepted, but are simply the fig leave that tyrants wear in polite society. Human rights may have a long history, but their universal acceptance remains an ongoing project.

34. A different sort of question arises in relation to the true nature and extent of human rights and responsibilities. I have in mind that questions can arise as to whether social or economic rights, such as a right to healthcare, or to education or to housing, can properly be regarded as human rights, and if so how and against whom they are enforced. This is an ongoing political debate in many jurisdictions, as the consistently excellent Parliamentary Joint Committee on Human Rights mentioned in its report entitled *A Bill of Rights for the UK?*[28]. The Committee noted in particular how

> "*In any country debating whether or not to adopt a national Bill of Rights, one of the most controversial issues is whether the Bill of Rights should include economic and social rights. This is hardly surprising: the debate is an outcrop of often deeply submerged but sincerely held differences between reasonable people about the most fundamental questions of political philosophy, including the nature of liberty and the appropriate role of the State in preventing inequality.*"[29]

As a serving Judge, I am, perhaps fortunately, precluded from entering into that difficult debate.

35. Even in those countries that accept human rights, as we have done for some 200 years or more, the position is not always straightforward. It is not a question of absolutes, save for those rights from which no derogation is permitted – in the case of the European Convention, Article 2, the right to life (albeit that can in respect of deaths arising from lawful acts of war); Article 3, the prohibition of torture; Article 4(1), the prohibition on slavery; and Article 7, the right not to be punished except according to law. However, where other rights are concerned, a balance often has to be struck, and it is struck in a number of ways.

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[28] House of Lords, House of Commons Joint Committee on Human Rights, *A Bill of Rights for the UK*?, (29th Report of Session 2007-2008) (HL Paper 165-I, HC 150-I) (http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf)

[29] House of Lords, *ibid* at [147].

36. First, one type of right often needs to be balanced against another. Perhaps the most familiar example is Article 8, the right to respect for private and family life, versus Article 10, the right to freedom of expression. We are all familiar with the types of difficult issues which this balancing act gives rise to, through cases such as *Campbell v MGN Ltd* [2004] 2 AC 457, *Ash v McKennitt* [2007] 3 WLR 194, *Murray v Big Pictures (UK) Ltd* [2008] 3 WLR 1360, and most recently, *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB).

37. Second, individual rights need to be balanced against their internal limits: the Article 9 right to freedom of thought, conscience and religion must often be assessed against limits '*necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others*.' As Lord Bingham, for instance, noted in *R (Pretty) v DPP* [2002] 1 AC 800 at [31], while a belief in the virtue of assisted suicide is protected by the Article 9 right, its manifestation was properly subject to limits imposed by the criminal law, where, as for instance there, it was submitted that Mrs Pretty's husband acted in accordance with that belief should be absolved from criminal liability.

38. Third, there is the need in certain cases to balance the rights themselves against an overarching need to protect the very life of the nation and in doing so, for a short period, suspend those rights by derogating from our commitment to them. As I put it in *A & Others v Secretary of State for the Home Department* in the context of control orders made under the Anti-Terrorism, Crime and Security Act 2001,

> "*. . . the power to detain a person in custody in circumstances where there is insufficient evidence to mount a prosecution against him for any imprisonable offence . . . is a draconian power which, save in the most exceptional circumstances, is fundamentally inconsistent with the role of government in a democratic society. However, the legislature gave such a power to the Secretary of State, because of another fundamental role of government in a democratic society, namely the duty to ensure the safety and well-being of its citizens.*"[30]

[30] [2004] EWCA Civ 1123, [2005] 1 WLR 414 at [283].

39. Absent such protection, there would be no rights to enjoy once the danger such draconian powers are intended to meet has passed. In other words the state's responsibility to maintain its existence as one committed to the rule of law, democratic accountability and due process, can in certain emergency circumstances require it to derogate, temporarily, from its responsibility to protect some individual human rights, although there are certain rights from which no state committed to the rule of law can ever properly derogate, even in times of emergency. For the others, the state's responsibility to protect, in the words of the Convention's preamble our commitment to '*justice and peace*' may legitimately require a delicate balance to be struck. In this the three branches of the state – executive, legislature and judiciary – each have a role to play. That is their civic duty. It is the expression of our commitment to the rule of law. It is to that I now turn in the final part of this talk.

(4) Civic Duty and the Rule of Law – A Commitment to Justice and Peace

40. In a recent lecture on defamation and hate speech given at Harvard, Jeremy Waldron raised the question, '*What does a well-ordered society look like?*' In developing his answer to that question he noted that '*societies do not become well-ordered by magic.*'[31] There is no magician's sleight of hand involved in developing a society where, as Denning had it, freedom is matched with peace and good order. That is to my mind the first point we can take from the European Convention's preamble commitment to developing justice and peace.

41. The rights set out there by the framers of that document – most of whom who were British and well versed in the common law tradition and its commitment to human rights – took pains to set out those rights which time and experience had demonstrated were essential aspects of a society committed to the rule of law. What Lord Hoffmann has recently referred to as the mission statement aspect of the European Convention may be rather more than that.[32] The rights set out in the Convention actually reflect the commitments that the long and often tortuous march of society to the considered position that in order to properly balance freedom with peace and good order certain necessary conditions must be observed.

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[31] Waldron, *Dignity and Defamation: The Visibility of Hate*, (2009 Holmes Lecture) (Harvard) (http://www.law.harvard.edu/media/2009/10/06/dean.mov).

[32] Hoffmann, *The Universality of Human Rights*, (2009 JSB Lecture) (http://www.jsboard.co.uk/downloads/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.doc).

42. The Convention thus confers rights on individuals to which the state must pay proper regard when exercising its public functions – i.e. it acts as a sort of negative brake on the state. One the other hand it imposes obligations, responsibilities on the state and those exercising public functions positively to protect those rights. The courts, for instance, cannot act inconsistently with the right to fair trial, but there is a positive, potentially heavy, responsibility on all judges actually to secure a fair trial. Equally it is the legislative and executive branches of the state's responsibility to secure its citizens' ability to gain effective access to the courts, as the domestic and Strasbourg courts have emphasised.[33]

43. So too, the exercise of the right to freedom of expression carries with it a heavy responsibility; a responsibility as John Stuart Mill might have put it, not to harm the rights of others. The prohibition on torture, to give a third example, is not simply a right not to be subjected to torture, but equally an expression of the responsibility placed on us all not to harm others and the liberal democratic nature of society as a whole.

44. One of the most fundamental and most difficult tasks of the courts is to balance these rights and responsibilities in individual cases. There is, as Professor Waldron might well agree, no magical means of deciding where the balance lies in many of those difficult cases. But that is the nature of the judicial function: if the answers to such questions were straightforward, litigation would not normally arise.

45. There are many types of such case, and I have already referred to some examples. Another example, which has arisen in the context of control orders, where there is a special advocate, is: how much information needs to be given to the individual who is subject to the order? How much information can be withheld consistent with the fair trial right, where there is an interest in maintain certain details secret in light of national security considerations? How do we properly balance the right to security – peace in the terms of the Convention's preamble – with the right to fair trial – with justice? Our courts have examined these questions on a number of occasions, such as *Secretary of State for the Home Department v MB and Secretary of State for the Home Department v AF* [2008] 1 AC 440. So has the Strasbourg court's Grand Chamber, most recently in *A & Others v The United Kingdom* (3455/05) [2009] ECHR 301.

[33] *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 307; *Frydlender v France* [2000] ECHR 353.

46. The Strasbourg Court accepted that the use of special advocates was essential in cases where closed hearings were required. They were essential because they provided proper protection for the right to fair trial against a background where the state was attempting to fulfil its responsibility to maintain democracy and the security of the state and its citizens. It recognised that against this background the special advocate procedure played an

> "*important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing . . . during closed hearings. [But that] the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.*"[34]

47. The question arose however as to what degree of disclosure was required. If the detainee is to be given the gist of the case against him what exactly is the gist? It is plain to see that different views can be expressed on this point: narrow or wide depending on whether you come at the question from the detainee's perspective or the state's perspective. The answer given by the House of Lords in *Secretary of State for the Home Department v AF & Others* [2009] UKHL 28 is instructive. It held that it was bound to apply the Strasbourg court's decision in *A & Others*. That decision it understood to have laid down an absolute rule that, as Lord Hope put it, if '*the rule of law is to mean anything, it is in cases such as these [i.e., control order cases] that the court must stand by principle. It must insist that the person affected be told what is alleged against him*.'[35] While the commitment to the right to fair trial remained in place, it was not, as Lord Scott put it[36], for the court to abridge or forego its responsibilities and water down the nature of that right.

48. In this we can see the recognition at the highest level that the judiciary's responsibility is one which is to ensure that the rule of law is upheld. It is not to become, in Lord Atkin's famous words in *Liversidge*, '*more executive minded than the executive*.'[37] Rather it is to scrutinise, within the compass of the law, executive action and as a consequence of the HRA legislation. In doing so it carries out its civic duty; its duty to secure peace and

[34] *A & Others v The United Kingdom* (3455/05) [2009] ECHR 301 at [220].
[35] [2009] UKHL 28 at [84].
[36] [2009] UKHL 28 at [97].
[37] *Liversidge v Anderson* [1942] AC 206 at 244.

justice. But equally it does so with a recognition that if Parliament, sovereign as it is, chose to abridge the right to fair trial expressly it could do so.

49. The question for Parliament would no doubt be whether the emergency justified such an extreme step as to abrogate the right to fair trial. It is a question which our constitution does not at the present time permit the courts to question. We do not have a constitution akin to that of the United States nor do we have a constitutional court as it does. What we do have however is a constitution which, given the fifteen changes made to it since 1997, as Vernon Bogdanor has noted in *The British Constitution*, is in a state of development. Where such changes lead we must wait to see.

50. Wherever the future may bring, however, one thing that the legislature, the executive, the judges, the public at large, should all keep in mind is the point Lord Denning made in 1949, as to what matters. It is, he said, "*that each man should be free to develop his own personality to the full: and the only duties which should restrict this freedom are those which are necessary to enable everyone else to do the same. Whenever these interests are nicely balanced, the scale goes down on the side of freedom . . .*".

51. So I end where I began, with Lord Denning on personal freedom. What better way to begin and end a talk? Thank you all very much indeed.
