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SPECIAL CONFERENCE ISSUE
THE NEW ZEALAND BILL OF RIGHTS ACT

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
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NEW ZEALAND CENTRE FOR
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TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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THE MORAL FORCE OF THE UNITED KINGDOM'S HUMAN RIGHTS ACT

Rabinder Singh*

This article is based on a lecture that was delivered while the author was still in practice at the Bar of England and Wales. The theme of the lecture was the historical and philosophical origins of human rights law and, in particular, the United Kingdom's Human Rights Act 1998. Drawing on his experience of cases in the first decade that that Act was in force, he suggests that the courts of the United Kingdom have sought to give powerful expression to the moral force of human rights law, in particular the concept of equality and the protection of minorities. He also seeks to address the question whether human rights need to be balanced against responsibilities.

The Human Rights Act 1998 (UK) is the nearest thing that the United Kingdom has to a bill of rights. Some have suggested that it should be repealed and replaced by what they call a British bill of rights, and a commission has been established by the coalition government in the United Kingdom to inquire into that possibility, which is due to report by the end of 2012.[1] Others have expressed surprise at that suggestion, as they thought that the United Kingdom already had one – and that the Human Rights Act is that bill of rights.[2]

As you might imagine, the Human Rights Act did not emerge out of the blue in 1998, when it was passed by the United Kingdom Parliament. It has a history and a pedigree, a lineage in human rights thinking which goes back hundreds and perhaps thousands of years, in both religious and secular thought. It belongs as much to the moral realm as to the legal. In *R (Daly) v Secretary of*

* Justice of the High Court of England and Wales. This is a revised version of a public lecture given at Victoria University of Wellington on 29 August 2011. I am grateful to contributors to the discussion after the lecture and also to the anonymous referee.

1 Commission on a Bill of Rights *Discussion Paper: Do we need a UK Bill of Rights?* (United Kingdom, August 2011).

2 See for example Francesca Klug "A Bill of Rights: Do We Need One or Do We Already Have One?" [2007] PL 701. This was published before the general election of 2010 (which produced a coalition between the Conservatives and Liberal Democrats) in response to the suggestion by some that the Human Rights Act 1998 (UK) should be replaced by a British bill of rights.

State for the Home Department that great New Zealand judge, Lord Cooke, when sitting in the House of Lords, said:[3]

> The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.

In *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* Lord Steyn said that: "The Universal Declaration of Human Rights (1948) was a proclamation of ethical values rather than legal norms."[4] Later in the same paragraph he said that: "The moral force of this instrument was enormous."[5] It is that moral force of the Human Rights Act which will be the theme of this paper.

The words of art 1 of the *Universal Declaration of Human Rights* pronounce to the world that: "All human beings are born free and equal in dignity and rights."[6]

At first sight this statement may seem to us today to be obvious, perhaps even trite. But it is a remarkably modern view. First, note that it does not say, as Rousseau did in the opening line of *The Social Contract*, only that "Man is born free".[7] Here we have equality too. True it is that the United States Declaration of Independence did refer to equality but Thomas Jefferson's words started with the proclamation that: "…all men are created equal", not all human beings.[8]

It is also worth noting that the *Universal Declaration of Human Rights* refers to all human beings being "born" with certain rights, not that they are created or, as the United States Declaration of Independence went on to say, that they are "endowed by their Creator with certain inalienable rights" and that "among these are the right to life, liberty and the pursuit of happiness." This reflects the secularisation of human rights. This is not to deny the importance of religious thought in the origins and development of human rights. To the contrary, it is clear that all the major faiths (and many minor ones) have emphasised the sanctity and dignity of human life; that each human being is the individual child of God. As Robert Kennedy put it in 1966 in his famous "tiny ripple of hope" speech, delivered in Cape Town, at the height of apartheid in South Africa:[9]

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3 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 132 (HL) at [30].

4 *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1 (HL) at [46].

5 At [46].

6 *Universal Declaration of Human Rights* GA Res 217, III (1948), art 1.

7 Jean-Jacques Rousseau *The Social Contract and Discourses* (Dent, London, 1913).

8 *Declaration of Independence* (1776).

9 Robert F Kennedy "Day of Affirmation Speech" (University of Capetown, South Africa, 6 June 1966).

> At the heart of … Western freedom and democracy is the belief that the individual man, the child of God, is the touchstone of value, and all society, groups, the state, exist for his benefit.

Nevertheless, what has become apparent since the Enlightenment is that it is no longer necessary to believe in a divine creator to believe in human rights. Many people who are atheists, in particular humanists, do so because they cherish the individual human being. As William Shakespeare put it in *Hamlet*: "What a piece of work is a man, how noble in reason, how infinite in faculties."[10] Hamlet himself may have questioned the value of what he called "this quintessence of dust", but many would still marvel at what the individual human being is capable of at his or her best.[11]

The philosopher of the Enlightenment who has perhaps had the most lasting influence on human rights thought is Immanuel Kant. In particular the principle of universalisability or the categorical imperative: that a human person is an end and not a means, and that we should treat others as we would have them treat us.[12] Two hundred years later, much in Ronald Dworkin's writing, in particular, the principle of equal concern and respect, is derived from Kantian ethics.[13] This strand in moral philosophy is fundamentally inconsistent with the other great strand handed down to us from Enlightenment thinking, the philosophy of utilitarianism associated with Jeremy Bentham. He famously said that talk of rights was nonsense and talk of natural rights was "nonsense upon stilts".[14] Going back to Kantian ethics, there is no great mystery about this. Most children understand the concept. And I believe it gives us a great insight into the fundamental values of human rights.

One of those values is mutual respect. What does that mean? I think the key is the notion of empathy – that you should put yourself in someone else's shoes. Can you see the world from his or her point of view? Sometimes people suggest that talk of rights is selfish. It is all about "me me me." I do not share that view. I do not think it is about me. I think it is about you, her, him – the network of people in our community. I will return to this theme of the importance of community to a proper understanding of human rights later.

Another key idea is the principle of equality. That all human beings are equal – no matter what their colour, religion, gender, wealth, education or any other status. This is again about mutual respect. It is about caring about another person even if he or she is not like us. Perhaps he or she

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10 William Shakespeare *Hamlet* (Dent, London, 1934) at Act II, Scene II.

11 At Act II, Scene II.

12 Immanuel Kant *Groundwork for the Metaphysics of Morals* (Broadview Press, Peterborough, 2005) at 87.

13 See Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, 1977); Ronald Dworkin *Sovereign Virtue* (Harvard University Press, Cambridge, 2000).

14 Jeremy Bentham "Anarchical Fallacies" in *The Works of Jeremy Bentham* (William Tait, Edinburgh, 1843) vol 2, 489 at 501.

believes in things or says things which we totally disagree with. But the human rights response is not to silence him or her. Our response is to allow people to have their say, even those we regard as misguided or just plain wrong.

There is one other thing I would like to add here. Mutual respect is not the same thing as mutuality. Some people suggest that the basis of human rights is mutuality, in other words that we should treat others as they would treat us. I do not think that is right. I think the basis of human rights is that we should treat others as we would want them to treat us – not how they would treat us. Even if we know that, given half the chance, they would bully us or hate us or mistreat us, we should not respond in kind. We should not stoop to the level of others – instead we should stick to our own values.

It is arguable that the most important word in the European Convention on Human Rights (the European Convention) is "everyone".[15] Each of the main articles in the European Convention begins with the word "everyone". So, quite apart from art 14, which prohibits discrimination in the enjoyment of rights, the rights in the European Convention belong to everyone. That is the fundamental premise of human rights thought: that we are all entitled to some basic rights because of our common humanity, not because they have been conferred or earned. Nor can they be lost or given away: for example, no one can sell himself or herself into slavery. That was the original meaning of the word "inalienable", which is to be found in the opening words of the United States Declaration of Independence: rights which cannot be alienated are rights which cannot be given away or sold.

This basic insight into the nature and source of human rights leads to a realisation that there is no inconsistency between the notion of democracy and a belief in human rights. It is sometimes suggested that there is. But I would suggest that the notion of democracy itself rests on this more basic value of human equality, that everyone counts but no one counts more than anyone else. That is why everyone has a vote but no one has more than one vote. Whatever the differences in our wealth, background or education, we are all equal at the ballot box. That is a profoundly moving and noble idea.

As Lady Hale put it in the leading case on gay rights under the Human Rights Act, *Ghaidan v Godin-Mendoza*:[16]

> Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention … is respect for human

15 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953) [ECHR].

16 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 (HL) at [132].

> dignity and human freedom … Second, such treatment is damaging to society as a whole. Wrongly to assume that some people have talent and others do not is a huge waste of human resources. … Third, it is the reverse of the rational behaviour we now expect of government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions. Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not.

To that eloquent summary I would add one further rationale for why equality is so important as an underlying value of human rights. Experience around the world, both from history and from recent times, has shown that respect for equality is essential for the maintenance of social peace. Conversely, when some groups in society feel that they are systematically excluded from the benefits of membership of that society, whether in the form of legal rights, or social and financial benefits, particularly if they perceive that there is discrimination against them on the basis of race or some similar status, these people may well resort to violence. This is not to excuse such violence; but it would be unrealistic to ignore the danger to peace and social stability which may result from systematic discrimination.

Another insight as to the importance of equality was provided in *A v Secretary of State for the Home Department* (*Belmarsh*) by Lord Bingham when he quoted Sir Hersch Lauterpacht's seminal work from 1945, where he suggested that the claim to equality "is in a substantial sense the most fundamental of the rights of man."[17] Lord Bingham then expressly approved the following passage from Jackson J in a United States case, *Railway Express Agency Inc v New York*:[18]

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government, than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Belmarsh concerned the Anti-terrorism, Crime and Security Act 2001 (UK), which was enacted by the United Kingdom Parliament within weeks of the terrible events of "9/11". Part 4 of that Act conferred a power on the Secretary of State for the Home Department to authorise the detention of

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17 Hersch Lauterpacht *An International Bill of the Rights of Man* (Columbia University Press, New York, 1945) at 115 as quoted by Lord Bingham in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 (HL) [*Belmarsh*] at [46].

18 *Railway Express Agency Inc v New York* 336 US 106 (1949) at 112–113 as quoted by Lord Bingham at [46].

certain persons who were suspected of international terrorism. Such persons had to be foreign nationals and there had to be a legal obstacle to their deportation: usually this would be where they could not be returned to their own country as there was a real risk of torture or other ill-treatment, so that there would be a breach of art 3 of the European Convention if they were to be deported.[19] Around 14 such individuals were detained in Belmarsh, a high security prison in south-east London. As it turned out, they were held there without charge or trial for several years.

In order to avoid a possible breach of the European Convention, the United Kingdom Government lodged a formal derogation from art 5 (the right to liberty and security) with the Secretary-General of the Council of Europe.[20] Such a derogation is in principle permitted under art 15 where there is a public emergency threatening the life of the nation and where it is strictly required by the exigencies of the situation. The House of Lords held in *Belmarsh* that this derogation had not been lawfully made and so the legislation was contrary to the European Convention. However, since the offending provisions were in primary legislation, the courts had no power to strike them down, as they might in a constitution such as that of the United States. Instead, as is well known, the scheme of the Human Rights Act empowers the higher courts in the United Kingdom to make a declaration of incompatibility[21] and that is what the House of Lords did in respect of Part 4 of the Anti-terrorism, Crime and Security Act.

The principle of equality was important to the decision in *Belmarsh* in two ways. First, the House of Lords held, by a large majority, that the discrimination between British citizens and foreign nationals in the context of a power of executive detention was unjustified and a breach of art 14 of the European Convention.[22] Although the Government had derogated from art 5, it had not sought to derogate from art 14. But, secondly, the discrimination in issue had a more profound consequence. This is because it tended to undermine the justification put forward by the Government as to why the power of executive detention was needed at all – in other words the justification for the derogation even from art 5 did not make sense. Quite simply, the House of Lords could not understand what reason there could be for wishing to detain some, but not all, terrorist suspects without trial after 9/11. They therefore could see no rational connection between the aim of the legislation and the means chosen.[23] This need for a rational connection is one of the

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19 Article 3 of the European Convention provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

20 Human Rights Act 1998 (Designated Derogation) Order 2001 (UK).

21 Section 4.

22 *Belmarsh*, above n 17, at [50]–[70] per Lord Bingham, [138] per Lord Hope, [157] per Lord Scott and [234]–[236] per Lady Hale.

23 *Belmarsh*, above n 17, at [43] per Lord Bingham, [132]–[133] per Lord Hope, [158] per Lord Scott, [188]–[189] per Lord Rodger and [231] per Lady Hale.

classic ingredients of the principle of proportionality, which is a critical tool of analysis and adjudication in human rights law.

It was also in *Belmarsh* that Lord Bingham met head-on the suggestion that there is anything undemocratic about the courts enforcing human rights. He was addressing an argument that had been made at the hearing by the Attorney-General and said:[24]

> I do not … accept the distinction he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. … But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the [Human Rights Act] to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues [the issue in the case itself concerned the legality of the Government's derogation from the right to liberty in art 5 purportedly made under art 15 of the European Convention]. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible [as happened in *Belmarsh* itself] the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The [Human Rights Act] gives the courts a very specific, wholly democratic, mandate.

I would add only that the remedy in practice very often lies with Parliament itself, as occurred in response to the judgment in *Belmarsh*, when primary legislation was quickly introduced to repeal Part 4 of the Anti-terrorism, Crime and Security Act, which had been declared by the House of Lords to be incompatible with human rights.

To this, one can also add the observations of Lady Hale in *R (Countryside Alliance) v Attorney General*, which concerned the compatibility of the Hunting Act 2004 (UK). This Act bans the hunting of wild mammals by chasing them with dogs, a controversial measure which was enacted by the House of Commons without the consent of the unelected upper House using the procedure in the Parliament Act 1949 (UK):[25]

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24 At [42].

25 Parliament Act 1949 (UK), s 1; *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] AC 719 (HL).

> [113] The Human Rights Act 1998 has for the first time (outside the particular territory of European Community law …) given us all rights against the state. … If Parliament makes laws which might be incompatible with our Convention rights, the courts and others applying those laws must, so far as possible, read and give effect to them in a way which is compatible with the Convention rights: s 3(1). If Parliament makes a law which cannot be read compatibly with the Convention rights, the courts and others must still give effect to it, but the higher courts may declare that it is incompatible: … s 4. Such declarations have proved powerful incentives to Government and Parliament to put the matter right: for if the court is right, the United Kingdom is in breach of its international obligations in maintaining such a law on the statute book.
>
> [114] … the purpose of … human rights instruments is to place some limits upon what a democratically elected Parliament may do: to protect the rights and freedoms of individuals and minorities against the will of those who are taken to represent the majority. Democracy is the will of the people but the people may not will to invade those rights and freedoms which are fundamental to democracy itself.

But she ended that passage with this important caveat: "To qualify as such a fundamental right, a freedom must be something more than the freedom to do as we please, whether alone or in company with others."[26]

This accords with another fundamental doctrine in the jurisprudence of the European Court of Human Rights, which has always emphasised that, while the only system of government which is compatible with the European Convention is a democratic one, a democratic society is not one which is simply a majoritarian one. Rather the Court has repeatedly stressed that a democratic society is one which is characterised by tolerance, pluralism and broad-mindedness.[27] It is that word "pluralism" which is of particular interest in this context. It suggests not only different points of view but also strong civil society institutions which stand between the individual and the state, such as charities, trade unions, faith groups and other voluntary associations. It also suggests a society which is not afraid to have vigorous debate, in which important issues are discussed in an open and respectful way, where sometimes we may have to agree to differ rather than always impose our own view through the force of law, still less the coercion of the criminal law.

I am now coming to the end of my career at the Bar. It has been my privilege to have acted as an advocate in many interesting cases which have arisen under the Human Rights Act in its first 11 years of operation in the United Kingdom. I have appeared on behalf of the government and other public authorities as well as on behalf of individuals and non-governmental organisations. My personal view is that the Human Rights Act has had a humanising influence on our society and in particular our legal system. I have already mentioned *Belmarsh*, regarded by many people as the most important case decided in the United Kingdom since the Second World War. If that case had

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26 At [114].

27 See for example *Handyside v United Kingdom* (1976) 1 EHRR 737 (ECHR) at [49].

been decided the other way by the House of Lords, as it was by the Court of Appeal, there might still be some terrorist suspects languishing in prison in the United Kingdom without charge or trial.

I have also mentioned the *Ghaidan* case, which powerfully demonstrated the capacity of the Human Rights Act to advance the rights of same-sex couples even before the Civil Partnerships Act 2004 (UK) came into force.[28] In that case the House of Lords in effect departed from its own decision of just five years earlier, in which it had held that the succession rights given to the spouse of a deceased tenant by the Rent Act 1977 (UK), as amended, did not extend to a same-sex partner.[29] In *Ghaidan*, the House of Lords held unanimously that such an interpretation would violate art 14 of the European Convention, which prohibits discrimination in the enjoyment of the other rights in the European Convention – in that case the right to respect for the home in art 8. More controversially, the House of Lords also held, by a majority, that the relevant legislation could and therefore must be read as if the definition of spouse does include a same-sex partner. This was because of the strong interpretative obligation in s 3 of the Human Rights Act.[30]

I am aware that the Supreme Court of New Zealand has not felt able to follow a similar approach in the context of the interpretation provision in s 6 of the New Zealand Bill of Rights Act 1990.[31] It would not be appropriate for me to comment on whether that is right or desirable since that is a matter of New Zealand law. What I can say is that the outcome in *Ghaidan* can perhaps be understood in the particular context of the United Kingdom: I refer not only to the text of s 3 of the Human Rights Act but also the potential consequences if a compatible interpretation had not been possible in that case. There would almost certainly then have been issued a declaration of incompatibility under s 4. It would also probably have resulted in the government of the United Kingdom being found to be in breach of its international obligations under the European Convention by the European Court of Human Rights in Strasbourg. Compensation claims might then have been expected against the state rather than private landlords. As we shall see, the international legal framework which binds the United Kingdom in Europe has exercised a strong influence on the way in which the domestic courts have tended to interpret the Human Rights Act. This is what sometimes has been called the mirror principle, in other words the notion that the domestic statute should, so far as possible, reflect the position in Strasbourg.[32] It is not always possible to respect the

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28 *Ghaidan*, above n 16.

29 *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL).

30 This section requires that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights."

31 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1. See also Claudia Geiringer "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*" (2008) 6 NZJPIL 59.

32 See *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at [20] per Lord Bingham.

mirror principle. However, my opinion is that the domestic courts in the United Kingdom strive to do so whenever they can.

An example is provided by the case of *R (Al-Skeini) v Secretary of State for Defence*, in which the House of Lords held, by a majority, that the Human Rights Act applied to British forces outside the territory of the United Kingdom in those exceptional circumstances where a person fell within the jurisdiction of the United Kingdom within the meaning of art 1 of the European Convention, even though the events took place outside the territory of the United Kingdom.[33] It rejected the argument that, even in cases that fell within the jurisdiction of the United Kingdom and therefore could be actionable in the European Court of Human Rights, the Human Rights Act should be interpreted as having no application because it did not have any extra-territorial effect. Lord Rodger took the view that that argument would defeat the "central purpose" of the Human Rights Act, which was to provide a remedial structure in domestic law for the rights guaranteed by the European Convention, as it would leave a victim without a remedy in the courts of the United Kingdom where they would have a remedy in Strasbourg.[34]

This had the important practical consequence that the case of Baha Mousa, who died in British custody in Iraq in September 2003, not only fell within the United Kingdom's jurisdiction under art 1 of the European Convention but was also one which was justiciable in the English courts. Eventually the Secretary of State for Defence established an independent public inquiry into the Baha Mousa incident. Sir William Gage, a retired Court of Appeal judge, conducted that inquiry in 2009–2010 and he is due to publish his report on 8 September 2011.[35] Sir William examined not only the individual circumstances which led up to the death of Baha Mousa and the ill-treatment of other detainees at the time but wider systemic issues about how certain techniques, which were prohibited and unlawful, had come to be used in Iraq. These techniques included hooding detainees and forcing them to adopt what are called "stress positions".[36] We await Sir William's report with interest but there can be little doubt that it will have a profound impact on the further development of moral standards in the United Kingdom's armed forces and perhaps on British society more generally.

Before I leave the case of *Al-Skeini* I should mention that the cases which were unsuccessful in the House of Lords proceeded to the European Court of Human Rights, where the Grand Chamber

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33 *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153 at [56].

34 At [56].

35 This paper is based on a lecture that was delivered shortly before the report of the Baha Mousa Public Inquiry by Sir William Gage was published on 8 September 2011: William Gage *The Report of the Baha Mousa Public Inquiry* (HC 2010-12, 1452).

36 See Gage, above n 35, at [1.11].

gave a unanimous judgment in favour of the applicants on 7 July 2011.[37] All of the victims who had died in that case were held to fall within the jurisdiction of the United Kingdom. There was held to have been a violation of the right to an effective and independent investigation of their deaths under art 2 of the European Convention.

Of course, it is important to appreciate that the United Kingdom was a free society committed to human rights even before the Human Rights Act. Many of the rights in the European Convention are based on concepts which were and remain embedded in the common law, such as personal liberty and the abhorrence of torture. However, the common law was not always up to the task of protecting human rights to the full extent required by modern international standards. The change effected by the Human Rights Act was clearly enunciated in the decision of the House of Lords in *R (Laporte) v Chief Constable of Gloucestershire*, a case about the freedom to demonstrate peacefully arising from an attempt to protest against the Iraq war at a United States airforce base at Fairford in England.[38] In a case decided by the Divisional Court in 1935, Lord Hewart CJ had observed that, although there had been much talk during the hearing of the right to protest, the common law did not know of such a right. He said that: "English law does not recognise any special right of public meeting for political or other purposes."[39] In 2006, with the Human Rights Act now firmly in place, Lord Bingham was able to refer to a "constitutional shift" which had taken place, so that there certainly was a right to peaceful assembly in art 11 of the European Convention, which is one of the rights set out in Schedule 1 to the Human Rights Act.[40]

The case of *R (Limbuela) v Secretary of State for the Home Department* provides an important illustration not only of the potential of the Human Rights Act to have a humanising effect on society but also the subtle relationship between Parliament and the courts which has resulted from the Human Rights Act.[41] This case concerned the provisions of s 55 of the Nationality, Immigration and Asylum Act 2002 (UK). Section 55(1) was on its face a draconian measure, which prohibited the Secretary of State for the Home Department from giving any support to a person who had not claimed asylum as soon as reasonably practicable after arriving in the United Kingdom. In practice this had the consequence that many asylum claimants were refused any support in circumstances where they had sought to claim asylum a few days after arrival in the United Kingdom but not at the port of arrival, which may have been because of linguistic, cultural or other understandable difficulties. They could not be given any accommodation, food or washing facilities. And they could

37 *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 (Grand Chamber, ECHR).

38 *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 AC 105.

39 *Duncan v Jones* [1936] 1 KB 218 at 222.

40 *Laporte*, above n 38, at [34].

41 *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

not lawfully work since they were not permitted to do so. It was difficult to see what they could do to support themselves except resort to begging, crime or prostitution.

But s 55 contained a curious provision which in the end proved to be its own undoing. Section 55(5) provided an exception to the apparently draconian effect of s 55(1) to the extent necessary for the purpose of avoiding a breach of a person's rights under the Human Rights Act. Although the precise extent of this obligation was left uncertain by Parliament, this left the way open to the House of Lords to hold that, in many cases, it would be necessary to provide certain basic support to an asylum claimant since otherwise he or she would be subjected to inhuman or degrading treatment, which is in breach of art 3 of the European Convention. As Lady Hale put it:[42]

> It might be possible to endure rooflessness for some time without degradation if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading.

And Lady Hale went on to provide an important insight into the practical effect of the legislation on women in particular when she said:[43]

> If a woman … had been expected to live indefinitely in a London car park, without access to the basic sanitary products which any woman of that age needs and exposed to the risks which any defenceless woman faces on the streets at night, would we have been in any doubt that her suffering would very soon reach the minimum degree of severity required under Article 3? I think not.

As I have mentioned, the drafting of the legislation which was considered in *Limbuela* was influenced by the moral force exerted by human rights principles. This is a good example of the impact which the Human Rights Act has had, not just in the courtroom, but in the wider sphere of policy-making. This impact can also be seen in the important work done by the Joint Committee on Human Rights. This is a joint committee of both Houses of Parliament, which has a legal adviser. Among its functions is the task of advising Parliament on draft Bills as they go through the legislative process and, in particular, to assess their compatibility with human rights.[44] This is important in a democracy: human rights should not be regarded as being relevant only, or even primarily, to litigation. They belong to all of us and those of us who are fortunate to live in democracies can feel some pride that our elected parliaments take human rights seriously.

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42 At [78].

43 At [78].

44 Standing Orders of the House of Commons 2012, SO 152B.

The understandable question that is often raised when a person, especially an unappealing one like a convicted criminal or a terrorist suspect, relies on human rights is: "what about your duties? What about responsibilities?" In the United Kingdom, the Labour Government of Tony Blair which introduced the Human Rights Act felt it necessary to use the phrase "rights and responsibilities" almost as a mantra. In the Australian state of Victoria, when a Labor government introduced the Charter of Human Rights and Responsibilities Act 2006 (Vic) in 2006, it was felt important that its title should include the word "responsibilities" as well as the word "rights". The traditional answer to this question which is given by supporters of human rights is the one given by Tom Paine when the question was raised in the National Assembly after the French Revolution, when it was debating the Declaration of the Rights of Man and the Citizen. Paine said that there was no need to spell out the citizen's duties since rights belong to each one of us and so inevitably, if we have rights, we also have a duty to respect the rights of others.[45] As has sometimes been noted, my freedom to swing my arm ends where your nose begins.

In my view, while that answer is a good one, it is not by itself sufficient. The problem is that the concept of reciprocity, while it is an important moral principle, is not the basis of a legal obligation. The legal obligation in the Human Rights Act to act in a way which is compatible with the rights in Schedule 1 is not imposed on private individuals or corporations. It is imposed by s 6 only on public authorities. There is a similar provision in s 3 of the New Zealand Bill of Rights Act 1990. This reflects the position in international law generally, that human rights obligations are imposed on states and not on individuals or corporations. Time does not permit me to deal here with the important topic of positive obligations, which can sometimes arise under the European Convention and other treaties. However, the significant point for present purposes is to note that such positive obligations, when they do arise under treaties, are still imposed on the state. They are not imposed directly on private individuals or entities. The state may be in breach of its positive obligations if it fails to put in place measures to protect one individual from another, but the individual affected will still not be able to take legal action against the other individual. In that sense, neither the European Convention nor the Human Rights Act has horizontal effect.

It seems to me that several more answers need to be given as to why a human rights charter like the Human Rights Act does not set out a list of duties and responsibilities as well. The first answer is that actually to some extent it does. For example, the text of art 10(2) of the European Convention expressly refers to the "duties and responsibilities" which accompany the right to freedom of expression. There is a deeper point here. As I mentioned at the outset, the European Convention is descended from the *Universal Declaration of Human Rights*, to which it refers in its preamble. Article 29(1) of the Declaration provides that: ""Everyone has duties to the community in which alone the free and full development of his personality is possible."

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45 Thomas Paine *Rights of Man* (Broadview Press, Peterborough, 2011) at 147.

The whole of the law of human rights is infused with notions of balance between the rights of the individual and the general interest. It is untrue and alarmist when it is suggested that human rights law allows criminals to escape detection or punishment or that the rights of a wrongdoer can never be limited or curtailed. Very few rights are absolute. The one major exception is the rule against torture. Most rights can be restricted provided this is done in accordance with law, for a legitimate purpose such as the prevention of crime or disorder or for the protection of the rights of others and (most importantly) provided a fair balance is struck in accordance with the principle of proportionality.

The second part of the answer, it seems to me is that in fact the whole of the rest of the law sets out a person's duties. If you go just to the criminal law part of any series of statutes, you will see laws that now run into thousands. And of course in England, many criminal offences are still offences at common law and have not been codified in legislation. And then there are all the duties imposed by the civil law. The whole point of a bill of rights is to have a short, simple statement of a person's basic rights which can be relied upon as an enclave or oasis within the vast framework of the rest of the legal system.

The third part of the answer that can be given it seems to me is that, if the law were to attempt to set out a person's duties and responsibilities, they would either be repetitive and superfluous, as in stating that a person has a duty to obey the criminal law or to pay such taxes as are lawfully due, or (worse) would be vacuous as they would be unenforceable as a matter of legal obligation. There has already been a tendency in recent times for legislation to be enacted not because it is needed or is even intended to have any practical effect but in order to make some gesture.

Having said all of that, I am not opposed to the concept that in principle there should be responsibilities set out in a basic charter, for example to serve on a jury, a general anti-avoidance tax law, perhaps even to vote, as there is in Australia but not in the United Kingdom or New Zealand. It is arguable that such a statement of the basic duties of the citizen can have a useful educational role to play, just as one of the purposes of a bill of rights is to educate the public as to everyone's fundamental rights in a free and democratic society.

In conclusion, the Human Rights Act is currently the United Kingdom's bill of rights. Like all such charters of fundamental human rights, it is more than an ordinary law: its influence ranges beyond the courtroom to Parliament, the executive, the media and to the public generally. It is intended to lay down fundamental values for society and not detailed rules of law. The Human Rights Act also has important rhetorical force and has generated some eloquent prose from some of the most senior judges in the United Kingdom such as the late Lord Bingham, Lord Steyn and Lady Hale. They have reminded us of the moral force of the Human Rights Act and its fundamental values such as liberty, equality and the rule of law.

However, in the words of the famous Chinese curse, we live in "interesting times". In the last decade we have witnessed not only the terrible events of 9/11 and the London bombings of "7/7",

but also the worst economic crisis since the 1930s and widespread public disorder. This is a troubled world and I wish I could pretend otherwise. But things have been bad before, much worse. Those who came before us and handed down to us the *Universal Declaration of Human Rights* and the European Convention did not flinch even in the most dangerous period of the twentieth century. Modern human rights law was born out of the ashes of the atrocities of the Second World War. It must fall to us to keep those values alive in the twenty-first century when they are under challenge from so many different angles.