



LORD CHIEF JUSTICE  
OF ENGLAND AND WALES

**Speech by Lord Phillips of Worth Matravers  
Lord Chief Justice of England and Wales**

**Cardiff Business Club**

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It is 95 years since the first speech was made at this Club and the distinction of those who have gone before me is such that I approach my task with trepidation. Being called Phillips I ought to have some Welsh connections, but the best that I can do, and it is not a bad best, is to have a daughter-in-law who hails from Porthcawl.

95 years ago Cardiff Bay was not the playground that it is today. It was a busy port serving a thriving industrial community and, as Chairman of the British Maritime Law Association I had intended to talk about the law of the sea. But then something happened to cause me to change my mind. I read an account of the evidence given on 17th January by the ex Home Secretary, Charles Clarke to the House of Lords Select Committee on the Constitution. He raised some very interesting issues, but some of his comments disclosed, so it seemed to me, a fundamental misconception of the role of the judge. And I believe that it is a misconception that is very widely shared. I know it is shared by some close members of my own family.

And it is this. That it is open to a judge to decide a case on the basis of his personal view of the requirements of justice. When he comes to sentence a criminal, he can impose whatever sentence he believes the criminal deserves. When a challenge is made to a decision by government, the judge can if he chooses frustrate the wishes of Parliament by declaring the decision unlawful

Those who make such suggestions often accuse judges of being divorced from the real world and obsessed with human rights, so that they give precedence to the rights of illegal immigrants and terrorist suspects over the interests of the community. Here, by way of example, are two passages from Charles Clarke's evidence:

[The operation of the Human Rights Act] "sometimes appears to place the human rights of a suspected criminal ahead of the rights of those threatened by that criminality, the wider needs of society or the consequences for society of any particular decision."

"the judiciary bears not the slightest responsibility for protecting the public and sometimes seems utterly unaware of the implications of their decision for our

society.”

Judges have also recently been under attack in the field of criminal law where the media and on occasion Ministers have attacked individual judges for imposing what were alleged to be unduly lenient sentences.

There was a time when judges had a very wide discretion as to how they decided cases before them, but that was a very long time ago. Today a judge's room for manoeuvre is very restricted. In civil cases the judge's duty is to resolve disputes in accordance with the law. Usually the critical issue before the judge is one of fact. Once the facts are determined their legal implication is usually clear.

The judge's role is different to what when presiding over a criminal trial. There, at least in the case of the more serious offences, it is for the jury to decide guilt or innocence and that will involve a mixed question of law and fact. The judge directs the jury on the law to be applied and the jury decide the relevant facts and then apply the law to it, returning a simple verdict of innocent or guilty. Once the defendant is convicted, the judge then has to impose the appropriate sentence. In the majority of criminal cases there is no trial. The defendant pleads guilty. Once again the judge has to decide the appropriate sentence, and in doing so he will give the defendant a reduction to reward him for pleading guilty and sparing victim and witnesses the stress of a trial and the state the expense of a trial. Again when deciding the appropriate sentence the judge's room for manoeuvre is quite severely circumscribed.

What is the nature of the law that restricts a judge's room for manoeuvre? To an extent it is law made by the judges. Originally judges administered justice as delegates of the King. The King used himself to sit in his own court resolving disputes between his subjects, but in the 12<sup>th</sup> century Henry II laid the foundations of the modern judiciary by appointing 18 judges learned in the law, most of them being clergy to exercise this function for him. 5 remained in London sitting on the King's Bench in the Palace of Westminster and the remainder went round the country on circuit.

That pattern is still replicated today by the judges of the Queen's Bench and it is reflected by the fact that I am here this week to preside over appeals to the Criminal Division of the Court of Appeal that will be heard in this city.

Law reporters reported the decisions of the judges in London and later travelled with the judges reporting their decisions on circuit. The publication of these reports saw the growth of the doctrine of precedent. A judge is required to regard the decision of a senior court as establishing as a binding law the principles laid down by the superior courts. All judges are bound by previous decisions of the Court of Appeal, including the Court of Appeal itself.

The Judicial Committee of the House of Lords, who are the twelve Law Lords who make up what is in effect our Supreme Court, can overrule the Court of Appeal. They used to consider that they were bound to follow their own previous decisions, but now in rare cases they will depart from one of their previous decisions if they decide that decision is, or has become, unsatisfactory. An example of this was the decision of the House of Lords abolishing the long established principle that a man

is, in law, incapable of raping his own wife.

This doctrine of precedent is very important, for it produces relative certainty as to what the law is. And it enabled the judges to build up a body of law by their own decisions. This judge made law is the foundation of our law and is known as the common law. It has, however, been varied and overlaid by a vast body of statute law. Statutes are not always clear and it is for the judges to interpret them, but in doing so it is the duty of the court to do its best to deduce from the statute the intention of Parliament. Once a statute has been interpreted by a higher court, that interpretation also becomes a binding part of our law. So you will appreciate why it is that a judge has very little room for manoeuvre. He has to find the relevant facts and then apply to them the law as it has been laid down by Parliament or established by the higher courts.

How about the sentencing of offenders?

It used to be the judge who decided on the sentence after an offender was convicted, although the choice was limited. At the beginning of the 19<sup>th</sup> century there were 220 offences that carried the death penalty and the task for the judge was to decide whether to commute this to flogging and, if so, how many strokes of the cat o'9 tails should be administered. When imprisonment replaced these more robust punishments Parliament usually enacted a maximum sentence for particular offences, leaving it to the judge to decide the appropriate sentence within that maximum. More recently Parliament has legislated over what some consider to be the judges' territory by laying down rules that significantly restrict the judge's discretion. Statutes provide alternatives to custody – fines and a wide variety of community punishments. Judges are directed which to choose. We are forbidden to impose a sentence of imprisonment if there is a viable alternative and, if we do impose a sentence of imprisonment, we are directed that it must be the shortest commensurate with the seriousness of the offence. The sentence that we impose will not normally be carried out, for in most cases statute provides that the offender is to be released on licence after he has served half the term of imprisonment imposed.

In the case of some offences the judge is required to apply a presumption that the offender is dangerous and, unless satisfied that the presumption is rebutted, to impose an indeterminate sentence in order to protect the public. The offender will then not be released unless and until the parole board is satisfied that he no longer poses a danger. But when imposing one of these sentences the judge has to specify the minimum term that the offender must serve by way of punishment before he is even considered for release. And this will be half the sentence he would have imposed, in order to reflect the fact that prisoners are normally released after serving half their sentences.

There are further restrictions on our freedom to impose the punishment that we believe fits the crime. Some offences attract minimum sentences. If an offender is convicted of illegal possession of a firearm he must get at least five years. The sentence for murder is life imprisonment, but prisoners are usually released on licence at some point. The judge specifies the minimum term that should be served before release can be considered. Once again Parliament has laid down ground rules for deciding on the minimum term. These have ratcheted up the length of sentences imposed. I chair the Sentencing Guidelines Council, a statutory body that gives

guidance on sentences, and judges are required to have regard to our guidance – a further restriction on their freedom. Thus, because the Council has so directed, a judge should reduce a sentence, often by as much as a third, if a prisoner pleads guilty.

So far I have described the restrictions on a judge's room to manoeuvre when dealing with disputes between individuals and when dealing with criminals. I now want to come to the judge's role in ruling on disputes between individuals and the State. The life of the individual in modern society is beset by officialdom at every turn. We need a licence to drive a car. We need a permit to extend our house. We need a passport if we are to go into and out of the country. Nearly half the workforce of the country is employed in regulating how we all behave. In doing this, officials exercise powers conferred by Parliament or the prerogative power of the Crown.

Many of these powers give the executive a discretion as to how to act. When I started out as a young barrister 45 years ago, the judges did not interfere much with the exercise of executive discretion. But over the last half century they have asserted a growing jurisdiction to review the lawfulness of executive acts. We will rule unlawful an administrative decision if the person executing it has shown bias, has had regard to irrelevant matters or failed to have regard to relevant matters or otherwise have acted in a manner that is irrational. The test that we apply is to ask whether any reasonable official could have acted in the manner under review. It is in relation to the exercise of judicial review that judges are often criticised for frustrating the will of Parliament, but even here we are only attempting to make an objective application of the law. We proceed on the basis that, when conferring powers on officials, Parliament expected the officials to apply them for proper reasons and that decisions based on improper reasons defeat the intention of Parliament.

Let me now turn to human rights, for they are a very material consideration in judicial review of administrative action. The abuse of human rights that provoked the Second World War led, in 1950, to the conclusion of the European Convention on Human Rights. That Convention requires the Member States to observe and protect the human rights specified in the Convention. Some human rights are absolute, such as the right conferred by Article 3 not to be subjected to torture or inhuman or degrading treatment. Most rights are qualified. Thus the right to liberty conferred by Article 5 can be interfered with in the case of the lawful arrest and detention of criminals or for the purpose of preventing unauthorised entry into this country or of deporting those who have entered the country without authority. Under the Convention an international court was set up at Strasbourg, the European Court of Human Rights. Individual citizens can bring claims against their countries if they have infringed their human rights.

The United Kingdom played a leading role in the negotiation of the Human Rights Convention, but then failed to make it part of our law.

UK citizens could not sue the government in this country for infringing their human rights; they had to go off to Strasbourg. All this changed when the current Government introduced the Human Rights Act 1998. That Act places a duty on all public authorities to observe citizens' human rights and citizens can sue for damages if their rights are infringed. The Act requires the judges to enforce human

rights and expressly requires us to take account of decisions of the Strasbourg Court when doing so. So once again we are required to follow precedent, but this time the precedents are set not by a United Kingdom Court, but by an international court.

What happens if an Act of Parliament expressly authorises an official to act in a way that infringes a Convention right? It is a fundamental constitutional principle in this country that Parliament is supreme.

Judges cannot refuse to apply an Act of Parliament on the ground that it is unconstitutional or contrary to a Convention to which the United Kingdom is party.

The Human Rights Act provides that if an Act of Parliament infringes the Human Rights Convention the judge must nonetheless apply the Act, but can make a declaration that it is incompatible with the Convention. So far the Government has taken declarations of incompatibility very seriously and hastened to amend laws that the judges have ruled incompatible with the Convention.

At about the same time that the Human Rights Convention was concluded, the European Nations also concluded a Refugee Convention. This requires States to give asylum to refugees who face persecution in their own countries. There is, however, an exception to this. The Convention entitles a State to deport someone who is a threat to its national security, even if that individual will be at risk of persecution when sent home. Despite this, the Strasbourg Court, in a case called *Chahal*, has ruled that it is a breach of the Human Rights Convention to deport someone who will be at risk of inhuman treatment in his own country, even if he is an illegal immigrant and however great a risk he may pose to the security of the country that he has illegally entered.

I have now set the scene for considering some of the cases where judges have come in for criticism in circumstances where I shall suggest they had no alternative but to decide as they did.

The Human Rights Convention permits States to derogate, that is to opt out, of some of its provisions 'to the extent strictly required by the exigencies of the situation...in time of war or other public emergency threatening the life of the nation'. After 9/11 the Government purported to derogate from the Convention by passing an Act, the Anti-Terrorism, Crime and Security Act 2001, that gave them the power to lock up without trial:

"foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism ...and who are a threat to the national security of the United Kingdom".

The Home Secretary then proceeded to execute this power by locking up a number of terrorist suspects that, ideally, he would have liked to deport but whom he was prevented from deporting because of the decision in *Chahal*. He made it plain, however, that should they wish to leave the country they were free to do so.

The Act was challenged in judicial review proceedings brought by these suspects on two grounds (1) there was no 'public emergency threatening the life of the nation'. (2) the measure was discriminatory and infringed Convention rights to a greater

extent than was 'strictly required by the exigencies of the situation'. The case went right up to the House of Lords. They ruled that the derogation was unlawful and that the Act was incompatible with the Convention. How, they asked, could it be essential to lock up aliens without trial when it was not necessary to lock up terrorist suspects who were citizens of the United Kingdom, of whom there was no shortage? Secondly, if these aliens were so dangerous, why was the Home Secretary prepared to allow them to go to some other country where they could continue with their terrorist activities?"

Now in reaching this decision the Law Lords were doing no more than their duty in applying the Human Rights Convention. Charles Clarke expressed dissatisfaction with the whole process. Government takes advice before passing legislation as to whether it complies with the European Convention. For legislation to be overturned by the House of Lords years later he described as "a ludicrous way of proceeding which dangerously undermines confidence in every aspect of the police and criminal justice system when the public first and foremost seeks protection against terrorist threats". He went on to comment: "I do not accept that the practical meaning of "upholding the rule of law" and its impact on the security of our society can be resolved only by the most senior judiciary, the Law Lords."

One suggestion that he made was that "the senior judiciary might give a formal opinion upon the extent to which proposals for legislation comply with the European Convention before Parliament debates the Bill, rather than possibly years later". On the face of it this is an attractive suggestion, but there is a snag. The Strasbourg Court requires that any individual whose human rights are adversely affected by governmental action must have a right to challenge that action in a court of law. If the senior judiciary have already resolved the issue before such a challenge is made, how can the individual making the challenge have a fair hearing? It is for this reason that we have separation of powers and the judges, including the Law Lords, play no part in the process of legislation.

When the Law Lords ruled the 2001 Act incompatible with the Convention, the Home Secretary lost no time in introducing a new Act, the Prevention of Terrorism Act 2005. This, among other things, gives the Home Secretary the power to impose Control Orders placing restrictions on terrorist suspects provided that they do not amount to 'deprivation of liberty'. Orders were made in respect to six terrorist suspects, 5 of whom were Iraqi nationals and one probably an Iranian. These order required the men to remain in small flats, selected for them in areas not of their choosing, for 18 hours out of every 24.

The remaining 6 hours each day were periods of only relative freedom, in that each could not go outside a relatively modest geographical area, nor arrange to meet anyone who had not obtained clearance from the Home Office. Visitors to the flats also had to be vetted by the Home Office and the flats were subject to random searches by the police. Each subject was restricted to a single land telephone line, the inference being that this would be monitored. The men who were subject to these control orders brought judicial review proceedings to challenge them. The reviewing judge allowed their challenge, ruling that the restrictions placed on them were so severe that they amounted to deprivation of liberty and thus were unlawful. The Secretary of State appealed, and I sat on that appeal. We dismissed it, holding that the judge had been correct to conclude that these men had been deprived of

their liberty. The Secretary of State has sought permission to appeal to the House of Lords so the Court of Appeal may yet be held to have been wrong.

But after we had dismissed his appeal, counsel for the Home Secretary asked us to specify what would be a lawful Control Order. We declined to do so. We held that it was the Secretary of State's job to decide the terms of the Control Order that he wished to impose within the constraint that the Orders he imposes must not deprive people of their liberty.

He at once imposed new Orders, with the curfew period reduced to 12 hours, but he has complained that it is quite wrong that judges are not prepared to discuss with him at the outset what precautions are lawful. He is particularly bitter that the Senior Law Lord, Lord Bingham, declined an invitation to meet him to discuss the situation.

I can understand Lord Bingham's reservations. Judges must be particularly careful not even to appear to be colluding with the executive when they are likely later to have to adjudicate on challenges of action taken by the executive. At the same time I can understand Charles Clarke's frustration. As Lord Chief Justice I meet regularly with the Home Secretary, but we are careful only to discuss matters that are appropriate, such as the implications that proposed legislation will have on the resources needed for the administration of justice.

Let me end by turning to another area where judges are frequently subject to criticism, and that is sentencing. Sentencing can be very difficult because the judge is not merely concerned with punishment but also with the prevention of re-offending. So far as the latter is concerned a non-custodial sentence that requires the offender to submit to drug treatment, or anger management or psychiatric treatment may be more effective than a short term imprisonment.

It is also much more expensive to keep someone in prison than to punish them in the community by, say, unpaid work. I am known for my enthusiasm for keeping less serious offenders out of prison where appropriate community sentences are available.

But the media are always on the look-out for a sentence that they can castigate as 'letting an offender walk free'. A few months ago the Recorder of Cardiff had to sentence a sex offender who had carried off a young girl in his van and subjected her to a serious indecent assault. He ruled that he was a dangerous offender and imposed one of the new indeterminate sentences, directing that he would have to serve at least 5 years before he could even be considered for release. This brought a storm of press protest with comments such as 'judge allows sex beast to walk free after 5 years'. The Home Secretary commented publicly that he considered the sentence 'unduly lenient'. What the press did not say was that there was no likelihood that this offender would be released after 5 years because this would not be considered safe. The 5 year 108 day minimum term had been correctly calculated by the judge, who was subject to the constraints that I described earlier. It represented an 18 year sentence, discounted by one third to give credit for the fact that the offender had pleaded guilty and then halved to reflect the fact that prisoners who are not dangerous are released on licence when they have served half their sentence, and finally reduced to reflect time served on remand.

That case demonstrates that it is not appropriate for Ministers to criticise sentences imposed by judges. It is the Attorney General's job to consider whether a sentence is unduly lenient. If he concludes that it is he can appeal to the Court of Appeal for the sentence to be increased. The Attorney General did not appeal in that case, because the sentence was perfectly proper.

I think that I have used up the time allocated to me before inviting questions, and I shall be happy to do my best to answer questions on any topic.