

# Lord Mance gives speech to mark 175th anniversary of founding of Hoge Raad, The Netherlands

## The Rule of Law - Common Traditions and Common Issues

1 October 2013

Your Majesty, President of the Hoge Raad, Your Excellencies, distinguished colleagues and fellow guests:

Three centuries ago, Your Majesty's relative, King William III, appointed so-called Lords Justices to help govern England during his absences. Some of them may have been summonsed to The Hague. Certainly, it is an honour that the Hoge Raad has asked a United Kingdom Supreme Court Justice to speak at its 175<sup>th</sup> anniversary celebration. The common law is a world force, but a minority interest *within* Europe. But I believe that it has been loyal and effective in applying and developing European law. This afternoon is a handshake across the Channel, witnessing genuinely friendly relations between different European judiciaries and legal systems.

It was not always so. 400 years ago, the Dutch and British were arguing about access to the East Indian Spice Trade. The British invoked no lesser authority than Hugo Grotius. Had not *Mare Liberum*, already widely known as his work, advanced the principle of free navigation and trade? The British were less happy with Grotius's response: *pacta sunt servanda* – contracts must be honoured: the Dutch had bought exclusive rights from local rulers to the spice harvest in exchange for military protection. So: the British were free to navigate, but must buy from the Dutch! And, 40 years on, a British riposte banning imports on foreign ships led to the first English (or, as we say, Dutch) trade war.

Fortunately, we share happier legal memories. Both countries look back to resounding affirmations of the rule of law in the 16<sup>th</sup> and 17<sup>th</sup> centuries. Three years ago the Dutch branch of the International Law Association celebrated its 100<sup>th</sup> anniversary in the Ridderzaal. There, I saw the text of the Act of Abjuration 1568, in which the United Provinces disclaimed Philip II of Spain because a prince should not only “defend and preserve” his subjects, but should “govern them according to equity”. They added that Philip II had become prince “under certain conditions” which he had sworn to maintain<sup>1</sup> but he had “begun to alter the course of justice after the Spanish mode”.

Similar issues came to a head in England in the 17<sup>th</sup> century, when we executed one king and expelled another. This has proved a surprisingly successful basis of our unwritten Constitution. The rule of law and judicial independence in the United Kingdom owe much to the accession in 1688 of William III, Stadtholder of Orange, to the British thrones. To appeal to the English, who were busy ousting King James II, William issued a declaration echoing the Act of Abjuration. “The Reasons [he said] inducing him to appear in Armes in England” were that James II’s regime was “over-turning the Religion, Laws and Liberties” of England, Scotland and Ireland and promoting “Arbitrary Government”.

Once James had fled, William arrived in London. This was an awkward period. One wit said: just as “no one knew what to do *with* him, so also no one knew what to do *without* him”. But the period was well used to consolidate the British “laws and liberties”, of which William had spoken. A declaration of rights was prepared, read to William before he was offered the Crown and made into a statute, the Bill of Rights 1689, still in force. This identifies abuses which were never to recur: the assertion of executive power to suspend or dispense with the law; taxes and armed forces raised without parliamentary

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<sup>1</sup> Anticipating Rousseau’s social contract by 200 years.

consent; restrictions on the free election of MPs and on freedom of speech and debate in Parliament<sup>2</sup>; failure to summons regular Parliaments.

The Bill of Rights also condemns judicial abuses, including excessive bail and illegal and cruel punishments. As originally drafted it guaranteed judicial tenure. This was too much even for William, who said it involved a new principle. But he observed it in practice, and accepted it later. The Act of Settlement 1701 still guarantees to judges like myself ascertained salaries and fixed tenure. We remain removable only for misconduct “upon the address of both Houses of Parliament” (which itself could now only follow a full judicial investigation).

“En un momento dado” to appropriate a football metaphor, in 2009 the Supreme Court came into existence: not due to constitutional crisis, but part of a back of the envelope plan in 2003, which took some years to straighten out – suggesting that, while judges must not, politicians do sometimes succumb to the urge to shoot in order to score. The Supreme Court is thus a newcomer – but we are also successors to members of the House of Lords who served for centuries as Britain’s highest court. Our transmutation has been significant. But the significance has not been jurisdictional or substantive. It has been organisational, presentational and public.

In Parliament we were judicial hermits: sheltered, independent and inaccessible. In our new home opposite Parliament we have not only much improved facilities for our work, but over 70,000 visitors and over 350 educational groups a year, open days, guided tours, moots, exhibitions, media officers, hearings webstreamed continuously and judgments handed down with oral summaries on YouTube. The “UK Supreme Court” is less romantic than the House of Lords, but readily identified, understood and reported upon – an important contribution to open, transparent justice.

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<sup>2</sup> Its provision that “That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament” still governs the relationship between our sovereign Parliament and British courts.

The new UK Supreme Court is thus a blend of new and old. But I do not compete for the oldest history. I know that the Hoge Raad may claim ancestry in the Hoge Raad van Holland, Zeeland en West-Friesland, going back to the 1580s. Nor do I dare take statistical issue with the World Justice Project, which the President has quoted. What matters is that we both enjoy long and solidly-based traditions. The accumulated experience of the past, including its occasional mistakes, promotes the certainty, equality of treatment and fairness which are hallmarks of justice. It is not lightly to be cast aside. In some areas there is a real need for harmonised solutions. But in core areas like civil and criminal law, which concern both our courts, the European Union Treaties understandably focus on cooperation, not harmonisation. And in Vienna a month ago, the Secretary-General of Unidroit reminded the European Law Institute of the importance *outside* Europe and in international negotiations of the time-tested solutions of different European legal families. A great British judge, Lord Goff, once called judges “pilgrims .... on the endless road to unattainable perfection” and said that “conversations among pilgrims can be most rewarding”<sup>3</sup>. This is only so, if each pilgrim adds something different.

Whatever our differences however, we all face common problems. *The End of History*<sup>4</sup> has not occurred. Threats even within stable democracies have required courts to think deeply about values inherent in the concept of law, its making and application. They sometimes involve constraints a majority may resent. As put in the House of Lords in 2004: “Democracy values everyone equally, even if the majority does not<sup>5</sup>” and, as former Chief Justice of Israel Aharon Barak famously said: “Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand<sup>6</sup>”. I have been asked to outline some UK experience.

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<sup>3</sup> *Spiliada Maritime Corp v Cansulex* [1988] AC 460, 488B-C.

<sup>4</sup> Predicted by Francis Fukuyama 20 years ago.

<sup>5</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30, para 132, per Lady Hale.

<sup>6</sup> Israel Supreme Court, judgment of 6 September 1999 on General Security Service Practices.

The Act of Abjuration recited that a prince must “defend and preserve” his *own* subjects. Under the European Convention on Human Rights, states must look after *others’* subjects so far as lies within their jurisdiction, even when they wish to be rid of them<sup>7</sup>. The state’s potential responsibility for actions outside Europe is increasingly apparent. The Supreme Court has held by majority that the British state may be liable for deaths occasioned in Iraq - including deaths of British soldiers killed by enemy action (or by so-called “friendly” fire) in circumstances allegedly attributable to failure properly to equip or train such soldiers for operations in Iraq<sup>8</sup>. The Hoge Raad has addressed the issue of the Netherlands’ liability for deaths occasioned during operations carried out by its forces at Srebrenica under the aegis of the United Nations<sup>9</sup>.

Faced with threats which seem existential, it is easy to think of public safety as paramount; that *inter armes silent leges*, but Grotius was wise to say: “All things are uncertain the moment people depart from law”. That does not mean that the law itself is always clear-cut. There are often balances to be struck - that is the interest and difficulty of the modern judicial role. Article 15 of the Human Rights Convention itself enables a state “in time of war or other public emergency threatening the life of the nation” to derogate from its Convention obligations so far as required by the exigencies of the situation. But this article is heavily qualified and the only attempt to invoke it after 9/11 failed in the House of Lords in the *Belmarsh* case<sup>10</sup>.

In that case, the UK government had invoked article 17 to permit indefinite detention without trial of foreigners suspected of terrorist connections. A majority of the Law Lords accepted the government’s judgment that there was a threat to the life of the

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<sup>7</sup> *Soering v UK* (14038/88) (1989) 11 EHRR 439; *Chahal v UK* (22414/93) (1996) 23 EHRR 413.

<sup>8</sup> *Al Skeini v UK*, (55721/07) (2011) 53 EHRR 18; *Smith v Ministry of Defence* [2013] UKSC 41.

<sup>9</sup> Decisions of 6 September 2013 nos. 12/03324 and 12/03329. The cases in this and the previous footnote illustrate the increasing intermeshing of national and international law.

<sup>10</sup> *A v Secretary of State for the Home Department* [2004] UKHL 71. *Belmarsh* was the prison where the UK was detaining the suspect aliens.

nation<sup>11</sup>. But they held the legislation incompatible with the Convention. It was discriminatory and disproportionate, targeting only suspect foreigners. There were British subjects who could equally well be described as “suspected international terrorists”. The court’s approach was sadly confirmed on 7 July 2005 when home-grown British terrorists exploded bombs on London transport, killing 52 and wounding over 700 others.

Parliament accepted the decision. It replaced detention with control orders, confining all suspects to home for specified periods a day, under conditions. The courts held some of such periods excessive, but control orders survived until 2012<sup>12</sup>.

The *Belmarsh* case came a second time to the highest court<sup>13</sup>. Some of the evidence relied on came from foreign states. The persons under control orders argued that it had been, or might have been, obtained by torture of the relevant witnesses. The Law Lords held that evidence *shown* to have been obtained by torture was inadmissible<sup>14</sup>. But a minority<sup>15</sup> thought that this did not go far enough. Evidence ought to be excluded, even if all that could be shown was a plausible *risk* that the evidence had been obtained by torture. The foreign torturer does not boast of his trade ....<sup>16</sup>.

In another highly contentious case, Binyam Mohamed, a detainee held in Guantanamo Bay and charged by US military prosecutors with terrorist offences, alleged that his confessions had been extracted by US officials by torture or inhuman treatment in Pakistan with British complicity. He claimed disclosure in the United Kingdom of

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<sup>11</sup> Only Lord Hoffmann differed, saying (provocatively): “The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these”.

<sup>12</sup> They were then replaced then by a less intrusive scheme of “prevention and investigation measures”.

<sup>13</sup> [2005] UKHL 71.

<sup>14</sup> It was so held as long ago as Felton’s case in 1628. Article 15 of the UN Convention on Torture 1984 now also prohibits the use of evidence established to have been obtained by torture.

<sup>15</sup> Led by the late Lord Bingham, himself the author of a well-known book on *The Rule of Law* (2010) (Allen Lane).

<sup>16</sup> The contrasting judgments are an example of public discussion of a difficult issue in the common law tradition.

documents specifically relating to him which he said would prove this. The Divisional Court ordered disclosure, subject to any overriding interest of state security<sup>17</sup>. An issue then arose whether there should be public disclosure of seven paragraphs of this Court's judgment summarising US government reports to the British security services concerning the claimant's treatment in Pakistan. This led to a Court of Appeal judgment considering in detail the interplay between the call of open justice and the need to avoid undermining international cooperation and security<sup>18</sup>. Disclosure of the relevant paragraphs was in the event ordered<sup>19</sup>.

In a yet further stage of Binyam Mohamed's case, the highest court had to rule on the legitimacy of courts inventing special procedures, to protect the national interest by avoiding disclosure to the public and Binyam Mohamed of the secret service material on which the government wished to rely to defend Binyam Mohamed's claim<sup>20</sup>. Such procedures would depart radically from the familiar model of public trial whereby both parties as well as the judge see all relevant material. We held that the common law recognises no such procedures. If compatible with the Human Rights Convention at all, they must have Parliamentary sanction and appropriate safeguards<sup>21</sup>.

Parliament has in various areas sought to address this problem by introducing special procedures whereby sensitive material produced before the court is shown to specially vetted advocates, rather than to the individual to whom the state says it cannot safely be shown. We have upheld such procedures where they have Parliamentary sanction. But,

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<sup>17</sup> R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1) [2008] EWHC 2048; [2009] 1 WLR 2579.

<sup>18</sup> R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2010] EWCA Civ 65; [2011] QB 218.

<sup>19</sup> The Court of Appeal held that open justice prevailed principally because a US court had in the meanwhile held that the claimant's allegations of mistreatment were well-founded.

<sup>20</sup> Al-Rawi & Others v The Security Service [2011] UKSC 34.

<sup>21</sup> The cases did not in fact proceed to trial, the government having preferred to settle them by large payments. Parliament has since legislated to enable courts to use a special procedure under defined conditions in such cases: Justice and Security Act 2013. A parallel issue arose in an ordinary domestic context in R v Davis [2008] UKHL 36, when we held that the common law knew no procedure whereby a witness who showed that he feared for his life if his identity was disclosed to the defendant could give evidence without his identity being disclosed to the defendant. Again, Parliament legislated to permit this under limited conditions: Criminal Evidence (Witness Anonymity) Act 2008.

where the issue is one of effective liberty – e.g. whether a suspect can be detained or made subject to a control order - we have held, following Strasbourg authority, that the substance of the case against the persons affected must always be disclosed<sup>22</sup>.

Effective liberty is not always at stake. In 2010 we had to deal with an immigration officer, who had his security clearance withdrawn and so lost his job<sup>23</sup>. He sued for wrongful dismissal, and wanted to know more about the reasons why he had been seen as a security threat. His cousin had been convicted of a terrorist offence, and his brother arrested but not charged, but he said he had nothing to do with that. We had an unattractive choice, between ordering disclosure, declaring the claim untriable – non-justiciable - or upholding the special procedure which Parliament had introduced, without ordering any further disclosure. We chose the last course<sup>24</sup>.

Happily, mutual problems like these can now often be decided with mutual assistance. An example is the litigation following Security Council resolutions under Chapter VII, requiring the freezing of assets of persons placed on a Security Council blacklist as suspected terrorists or imposing other sanctions. There has been litigation in both European Courts, the UK Supreme Court and the Hoge Raad. An asset freezing order can have a draconian effect like house arrest. In the *Kadi 1 and 2* cases, the Court of Justice has twice ruled that European Union measures to give effect to such resolutions must meet European standards, including a suspect's right to know at least the substance of the case against him and to have it properly adjudicated.

In *Ahmed v The Treasury*<sup>25</sup>, the Supreme Court cited the *Kadi* case when striking down an order made by the executive to give domestic effect to the Security Council's asset

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<sup>22</sup> *AF v Secretary of State* [2009] UKHL 28; *Home Office v Tariq* [2010] UKHL 108.

<sup>23</sup> *Home Office v Tariq* [2010] UKHL 108.

<sup>24</sup> We examined considerable Strasbourg authority, including the important case of *Doorson v The Netherlands* (1996) 22 EHRR 330, para 70 and a recent decision in *Kennedy v United Kingdom* (Application No 26839/05) (unreported) 18 May 2010.

<sup>25</sup> [2010] UKSC 2



freezing resolutions. The order was made by the UK Treasury under an apparently unlimited power contained in The United Nations Act 1946. But we held that this could not extend to interference with basic individual liberties. In 1946 international law applied essentially between States. Security Council resolutions directed at individuals - non-state actors – are a remarkable modern phenomenon (even if they might not too much have surprised Hugo Grotius, who, in the pre-Westphalian world, saw international law as part of natural law and as directly relevant to individual liberties). In *Abmed* we therefore held that, if individual assets were to be frozen, the measure had to have the democratic safeguard of public debate in Parliament, rather than be by executive order.

In *Nada v. Switzerland*<sup>26</sup> the European Court of Human Rights relied upon both *Kadi* and *Abmed*, in holding Switzerland liable for the way it implemented the Security Council's asset freezing orders. On 14 December 2012, the Hoge Raad cited *Kadi* and *Nada*, when striking down a sanctions order against Iranians<sup>27</sup>.

The modern legal world thus depends on this constructive interplay of different legal systems. Sometimes tensions may, of course, exist between principles each claiming a respectable basis - sometimes these are best left unresolved. In *Kadi* and *Nada*, the two European Courts avoided ruling directly upon any hierarchy of the UN Charter and the European Treaties or Human Rights Convention, although insisting that European measures comply with European standards. Within the EU, constitutional courts have been careful not to accept that EU law can override their constitutions, but generally careful to qualify this, by treating it as irrelevant so long as (“solange<sup>28</sup>”) EU law generally meets their constitutional requirements.

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<sup>26</sup> Application no. 10593/08.

<sup>27</sup> LJN: BX8351.

<sup>28</sup> See the German Federal Constitutional Court's decisions in *Solange-I* BVerfGE 37, 271 2 BvL 52/71 and *Solange-II* BVerfGE 73, 339 2 BvR 197/83.

Britain is peculiar in having no written constitutional backstop. The 17<sup>th</sup> century left us with Parliamentary sovereignty, qualified now by Parliament's acceptance of the European Treaties and Human Rights Convention. But absolute sovereignty is only acceptable when tempered by give and take. Fundamental common law principles do exist central to the rule of law; and what courts might do if any legislator, national or supranational, ever acted directly contrary to the rule of law is best left unanswered<sup>29</sup>.

In this context Dicey<sup>30</sup> compared the “sound and lasting quality” of the various British institutions to the work of bees constructing a honeycomb. A British Law Lord added that:

“In the field of constitutional law the delicate balance between the various institutions .... is maintained to a large degree by the mutual respect which each institution has for the other.”<sup>31</sup>”

The same recipe for harmony applies at all national, European and international levels. Mutual respect derives from mutual acknowledgement and application of common principles. The same mutual respect is reflected by today's memorable celebration attended by representatives of all branches of the state and from abroad. Thank you again for asking me to speak; congratulations to the Hoge Raad; and best wishes for the next 175 years!

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<sup>29</sup> The nearest that the United Kingdom Parliament came to testing the limits was in 2004 when the government proposed to abolish the courts' entire power of judicial oversight over decisions to be taken by a new immigration tribunal. Access to the courts is fundamental common law right. Lord Woolf, then Lord Chief Justice of England and Wales, gave a speech on the rule of law in which he observed that, if Parliament did the unthinkable, then so might the courts. The government withdrew the proposal. It is not insignificant that the Constitutional Reform Act 2005 a year later referred expressly to “the existing principle of the rule of law”.

<sup>30</sup> The Law of the Constitution (10th ed) (1959), page 3.

<sup>31</sup> Lord Hope in Jackson v Attorney General [2005] UKHL 56, para 125.