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# TERRORISM AND THE RULE OF LAW\*

LORD PETER GOLDSMITH, QC\*\*

## I. INTRODUCTION

I am delighted to be here with you this evening to deliver the first Ramo Lecture in International Law and Justice. There are two distinct but strongly connected reasons for this sincere pleasure.

The first is my very warm respect and affection for Roberta Cooper Ramo, the eponymous heroine of this lecture series. We first met Roberta and Barry Ramo a decade ago when Roberta had been elected the first woman President of the American Bar Association. This year she has been made the first Vice President of the American Law Institute. In 2000, she was made an honorary member of the English Bar and a member of the ancient Gray's Inn, one of the four original Inns of Court. This is a very rare and signal honour accorded because of our respect and affection for her work. These are only three among her many other achievements and accolades. She is one of the most distinguished lawyers of her generation, an international advocate for justice, well-known and highly regarded in legal circles as far afield as Europe and Asia, as well as throughout the United States, and a marvelous advertisement for the legal profession. How could a profession which contains Roberta not be a caring, compassionate, and all round good place to be? And I can say that together with her husband, Dr. Barry Ramo, she is a marvelous ambassador for New Mexico. The first time we met, she produced a wonderful book on the startlingly beautiful scenery of this wonderful state. My wife Joy and I are delighted finally to get to see it in person, and to give this lecture in this excellent institution of learning. Roberta, you should know, has set us a test—to leave New Mexico wanting always to order green chili with our pizza. I cannot fail to express the warmth of our affection for the highly respected TV personality, Barry, who is Roberta's other half. I have yet to check with him whether another reason for taking green chili with pizza is that it helps with the cholesterol.

As you have heard, we got to know each other during her term as ABA President when I was the Chairman of the Bar of England and Wales. We worked happily together on a number of occasions.

One of these was in the millennium year when Roberta was the Chairperson of the ABA Conference, which took place in London, for I believe only the third time since the Second World War. It was so significant an event that the Prime Minister, Tony Blair, opened the conference in the Royal Albert Hall. We collaborated in procuring a book entitled *Common Law, Common Values, Common Rights*—a remarkable collection of essays by fifty judges, scholars, and jurists from both sides of the Atlantic.<sup>1</sup> This was made possible only by two things: the energy and

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\*\* Attorney General of Great Britain. Goldsmith earned a double first class honors degree from Cambridge. After earning a master degree at University College London he was called to the Bar, Gray's Inn in 1972. He was appointed Her Majesty's counsel in 1987. He was named a life peer in 1999 and a privy counselor in 2002. Goldsmith was chairman of the Bar of England and Wales and also held a number of posts in international legal organizations. In 1996, he founded the Bar Pro Bono Unit, which he chaired until 2000. Goldsmith was the prime minister's personal representative to the Convention for the European Charter for Fundamental Rights.

1. ROBERTA COOPER RAMO, *COMMON LAW, COMMON VALUES, COMMON RIGHTS* (2000).

personal contribution of Roberta and the continuing friendship and common heritage between the United States and the United Kingdom.

## II. COMMON HERITAGE AND THE RULE OF LAW IN THE UNITED KINGDOM AND THE UNITED STATES

It is that common heritage in the common law that is the second reason for my pleasure at being here. No student of the law could fail to note, from the most cursory examination of our legal texts and cases, the strong bond that connects us even though it is over 200 years since we have shared a common government or a common court. It is not surprising that the early American settlers should have taken as their legal texts the basic English works, such as Blackstone's commentaries, the legal best seller of the day. Yet even over two centuries after the Revolution, our law continues to be cross-pollinated by each other as judges, lawyers, scholars, and students draw inspiration and help from decisions in each other's common law courts. The textbooks are full of examples. I note particularly the development of the law of negligent misstatement where the U.K. House of Lords, in the seminal case of *Caparo v. Dickman*,<sup>2</sup> relied heavily on the wisdom of Benjamin Cardozo in the two decisions of *Ultramares v. Touche*<sup>3</sup> and *Glanzer v. Shepard*<sup>4</sup> in the New York Court of Appeals.

Even more than that, we can see as we examine our laws the unifying principles and features that flow through both our sets of laws. To discover these unifying principles was one purpose of the book of essays to which I have referred.<sup>5</sup> And I believe that we found them in a set of twelve principles subscribed to by the distinguished committee we were proud to work with, headed on the U.K. side by Lord Steyn, one of our most senior Law Lords, and for the U.S. side by Supreme Court Justice Anthony Kennedy: the right to own property, the freedom and sanctity of contracts, the obligation on those who cause unjustified harm to others to pay compensation, the protection of the family, and the right of access to justice amongst others. I should tell you that we spent one memorable drafting session in a room in the House of Lords known as the Moses Room from the tableau on the wall depicting the Ten Commandments being delivered. What an inspiration!

But the principle which we put first at the head of this list of principles was the Rule of Law. About the Rule of Law we said this: "The rule of law is the basis of a free society. No one—government, corporation, or individual—is above the law. The law derives its legitimacy and authority from the people."<sup>6</sup>

You will see immediately why I have wanted a major part of what I say in this inaugural Ramo Lecture to be about the Rule of Law, the importance of which was emphasised by being the first principle in the set we developed in the Moses Room in the House of Lords. And what better place to talk about the Rule of Law than in the United States, which has such a proud tradition in upholding the Rule of Law. I have always regarded it as a striking fact that the American State itself, though

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2. [1990] 2 A.C. 605 (appeal taken from Eng.).

3. 174 N.E. 441 (N.Y. 1931).

4. 135 N.E. 275 (N.Y. 1922).

5. RAMO, *supra* note 1.

6. *Id.* at viii.

founded in a Revolution, was at the same time a strong affirmation of legality. As Justice Anthony Kennedy has noted, “The American Constitutional System was inspired by fundamental confidence in [our] law as a liberating force.... When we declared independence, we conceived of our cause, we found our identity, we justified our rebellion in legal terms.”<sup>7</sup>

The Rule of Law is of course more than just rule *by* law. It is in part a statement of the universality of law, and of its application to all. One of our greatest and most innovative judges once declared it simply in these terms: “Be you never so high, the law is above you.”<sup>8</sup> Interestingly, if I may digress, he said that in a case in which the object of his admonition was one of my predecessors, Sam Silkin, the Attorney General of the day, who had argued that certain decisions of his—in this case a decision not to lend his name to an injunction to prevent criminal conduct in the course of a fierce industrial dispute—were not amenable to review by the courts.<sup>9</sup> As you can tell from the dictum, Lord Denning was against that proposition and gave Silkin what was described in the correspondence columns of the *Times* newspaper as a “bloody nose.” Out of respect for him, however, I should go on to say that, on appeal, the House of Lords took a different view from that which Lord Denning had taken.<sup>10</sup> But the rightness of the *general principle* remains.

For the United States, the Rule of Law has found concrete expression in the Constitution and in the review powers of the Supreme Court. Ever since *Marbury v. Madison*,<sup>11</sup> this power of judicial review over executive acts has given the law and the courts a very sharp role in the public life of the nation.

Our own form of judicial review is a different animal, though it is growing in stature. At one stage, British judicial review was really limited to the acts of subordinate courts and bodies and within relatively narrow bounds. But there has been very significant development during the professional lifetime of lawyers of my generation. This has partly been the result of the growth of the administrative state—one historian has noted that before the First World War, the only public officials with whom the honest Englishman would have had any dealings were the mailman and tax collector—but partly the result of another feature altogether: a development by the courts of a process for ensuring that public decision making is taken according to law and is accountable to law, in other words upholding the Rule of Law.

But there remains a critical distinction here from the situation in the United States. It can be seen in a quotation I will give from Lord Griffiths, sitting as a member of the House of Lords in 1994, when he said that “the great growth of administrative law during the latter half of the [twentieth] century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended.”<sup>12</sup> Whilst that extract illustrates the wide role of the

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7. Anthony M. Kennedy, *Our Shared Legal Tradition*, in *RAMO*, *supra* note 1, at xxiii.

8. *Gouriet v. Union of Post Office Workers*, 1977 Q.B. 729, 762 (Eng. C.A.) (quoting Thomas Fuller).

9. *Id.*

10. *Gouriet v. Union of Post Office Workers*, 1978 A.C. 435 (appeal taken from Eng.).

11. 5 U.S. 137 (1803).

12. *R v. Horseferry Magistrates Court ex parte Bennett*, [1994] 1 A.C. 42, 62 (1993).

Court, the Court stops short of a role of reviewing the actions of Parliament itself. For under the classic statement of our law, the Courts are not able to review the acts of parliament itself and in some way declare that they are unconstitutional and should not be given effect.

You may know that our present government introduced the Human Rights Act in 1998.<sup>13</sup> Under this Act, the provisions of the European Convention of Human Rights are given effect as a matter of domestic law.<sup>14</sup> This has had the effect of giving us the closest thing we have had to a Bill of Rights since 1688. It enables the Courts to test executive action and subsidiary legislation against a set of fundamental rights. It allows them too to examine primary legislation. But here the principle of parliamentary sovereignty, which is the bedrock of our constitutional arrangements, is preserved. The Courts can interpret primary legislation to accord with the fundamental rights contained in the Act—indeed they are under a strong obligation to do so—but they cannot strike down the legislation if, after all interpretation has been done, they find the legislation to conflict with the Human Rights Act obligations. Courts are limited to a statement of incompatibility of the legislation with a Convention right (as the rights in the Act are known), which leaves the law intact but puts strong political and public pressure on parliament to change the law. Although limited in this way, the increase in the Court's power as a result of the Human Rights Act has given rise to much discussion and no little anxiety in some quarters about the increase in responsibility on the shoulders of the courts. For one thing, the Courts now have the power to judge whether certain acts are "proportionate and necessary"<sup>15</sup>—a new concept in our domestic law. It heightens the risk of conflict between the judiciary and the democratically elected powers because it appears to put the judge at the policy coalface. You would find no problem with this approach, which is even less, as I have said, than you are used to with the Supreme Court.

We are, I believe, answering the conundrum which some have seen—the spectre of judges overriding decisions of the democratically elected bodies apparently because they do not agree with the social objective the legislators are trying to achieve or the way they have chosen to go about it. The answer lies in a developing doctrine of judicial self-restraint known as the *doctrine of deference* in which the judges give great weight to the decisions of the bodies they are reviewing. This helps, I believe, to maintain the essential role of the Court—to see that the Government governs lawfully—that is the Court's job—and not to determine if the Government is governing well—which it is for the electorate to judge.

Despite these differences in the doctrine of judicial review on our respective sides of the Atlantic, we share a philosophy of the Rule of Law. It was summed up by Louis Jaffe, the American scholar, writing in 1965: "The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate."<sup>16</sup>

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13. Human Rights Act, 1998, c. 42 (Eng.).

14. *Id.*

15. *See generally id.* § 3.

16. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965).

### III. THE MODERN THREAT OF TERRORISM

Let me turn then against this background to the modern threat of terrorism. Terrorism is not a new phenomenon. We in the United Kingdom suffered a decades long campaign of terrorism in Northern Ireland. We were not alone. There were terrorists in the nineteenth century, such as the Russian nihilists. Indeed, even earlier—though the expression “terrorist” has by no means only been applied to those who act against the State. The Revolutionary French Convention declared a campaign known as “The Terror to suppress internal unrest and ward off foreign threats.” One of its leaders, Robespierre, was indeed denounced as a terrorist when he in his turn was overthrown and led to the guillotine. And as late as the early twentieth century, Trotsky was writing an apologia of terrorism when used as part of the dictatorship of the proletariat.

But many believe, as I do, that the appalling events of 9/11 opened a new chapter in terrorism. And subsequent events have claimed still more innocent lives in Bali Mombasa, Casablanca, Istanbul, Riyadh, Israel, Madrid, horrendously in School Number 1 in Beslan, and so on.

I would single out three features. The first is the willingness of the terrorists to inflict the most enormous casualties and damage. The scale of the losses on 9/11 was unprecedented. Whilst British casualties were dwarfed by American, the number of British citizens who lost their lives, sixty-five, was itself the single largest terrorist loss that my country had suffered. But it is not just the scale of loss. It is the willingness to inflict loss without limit. In speaking about those terrorists, Tony Blair has said, “[W]hat galvanized me was that it was a declaration of war by religious fanatics who were prepared to wage that war without limit. They killed 3,000. But if they could have killed 30,000 or 300,000 they would have rejoiced in it.”<sup>17</sup>

The second feature, and one of the most pertinent to the issues facing governments, is the international nature of such terrorism. It is now clear that it is organized and executed through an international network of cells and different organizations able to call on help and assistance from many determined people in different countries. This diffuse and globalized structure presents enormous challenges to the law enforcement agencies of individual countries.

The third, and it is strongly connected with the globalization of terror, are the challenges of modern technology. One aspect of this is the use of unconventional weapons, as demonstrated in the use of commercial airlines as flying bombs. But it is also the communications technology, which means that no longer need conspirators sit together in a darkened cellar where undercover intelligence might enable them to be overheard and apprehended. They may plot by Internet and cell phone, by satellite, and by coded messages on websites.

These factors—the willingness to cause mass casualties, the international nature of the threat, the use of modern technology, and the interest in unconventional weapons—present new challenges to us all.

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17. *Prime Minister Tony Blair* (BBC broadcast, Mar. 5, 2004), available at <http://www.number-10.gov.uk/output/Page5461.asp> (last visited Feb. 7, 2005).

#### IV. DEALING WITH TERRORISM IN THE UNITED KINGDOM

Let me turn now to the steps we have been taking in the United Kingdom to deal with the problem of modern terrorism and refer to how we have sought to stay true to the principles of the Rule of Law. I should emphasise one thing. It is most definitely not my purpose to offer a commentary, let alone a critique, on the steps which have been taken in or by the United States. But I trust that, with our common heritage, you may find of interest the solutions we have sought to find to deal with our common problem.

##### *A. Terrorism and the Use of Force*

Moreover I want to focus today on the issue of domestic action and the action of law enforcers rather than to enter the area of the use of military force. That is not to deny in any way the availability of a military option where justified. For example, we regard it as significant that the Resolutions passed by the U.N. Security Council in the immediate aftermath of 9/11 recognised both that large scale terrorist action could constitute an armed attack, and that force might, in certain circumstances, be used in self-defence against those who plan and perpetrate such acts and against those harbouring them, if that is necessary to avert further such terrorist acts.<sup>18</sup> Indeed, it was on that basis that U.K. forces participated in military action against Al-Qaeda and the Taliban in Afghanistan.

##### *B. Responsibilities of National Governments*

It is against this background of the features of the modern threat of terrorism that we must consider the most appropriate steps to protect our citizens. The primary responsibility for this in both our countries, indeed in any modern democratic State, falls on the Government. It is, in the first instance, for Governments to assess the need for action. It is their responsibility to protect the security of the people. They are in the best position to judge the nature of the threat; they have sources of information denied to others and which cannot be shared. And Government has also, as Lord Hoffman, another of our senior House of Lords judges has said, the democratic accountability to make these decisions, which our judges lack.<sup>19</sup> But that does not mean that the courts should abdicate all responsibility for these areas. Whilst paying proper respect to the role of the democratically elected bodies of Government and their decisions, the Courts will act to scrutinize the lawfulness of Government action, as Lord Woolf, our Lord Chief Justice, has described it, retaining their supervisory role to protect fundamental freedoms.<sup>20</sup>

Governments cannot remove completely the risk of atrocities by legislative means—it would be impossible to do so. But I believe everyone would agree that we should do as much as we sensibly and lawfully can to protect our citizens. The

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18. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001), available at [www.un.org](http://www.un.org); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001), available at [www.un.org](http://www.un.org); S.C. Res. 1377, U.N. SCOR, 56th Sess., 4413th mtg., U.N. Doc. S/RES/1377 (2001), available at [www.un.org](http://www.un.org).

19. Sec'y of State for the Home Dep't v. Rehman, 2003 A.C. 153.

20. A v. Sec'y of State for the Home Dep't, [2003] 1 All E.R. 816.

price of failure could be exceptionally high. As Her Majesty's Attorney General, I have been one of the Ministers of the U.K. Government who has had to consider and help fashion our response to the events of 9/11. We have been grappling with how we should confront the difficult question of striking the balance between protection of our security and the protection of fundamental rights and freedoms.

The starting point is uncontroversial. The State has dual responsibilities: to protect its citizens and their property from terrorist attack and to guarantee the fundamental rights of those within its jurisdiction. But how do we balance these two objectives, which will often conflict?

I do not believe this can be a simple utilitarian calculation of balancing the right to security of the many against the legal rights of the few. That would be to ignore the values on which our democratic society is built. These may be expressed in different ways in our different constitutional traditions but they are rooted in shared ideals. In the war on terrorism, we are fighting for more than the safety of our citizens, though that is a huge objective for us. We are fighting for the preservation of our democratic way of life, our right to freedom of thought and expression, and our commitment to the Rule of Law, for the liberties which have been hard won over the centuries and which we hold dear. These are the very liberties and values which the terrorists seek to destroy, not only through mass murder and destruction of property, but also through the climate of fear that their actions create, and are intended to create.

Some would not accept this. It is a bitter pill to swallow for those who have seen and experienced the devastation that results from terrorist outrages to see systems established to protect the legal rights of those they believe responsible for them. And those who are responsible, let it be admitted, do not have a single shred of concern for the legal or human rights of those they would kill, maim, and terrorise. So why should we care, some would say, about theirs?

The answer to this is that the Rule of Law is the heart of our democratic systems. As President Barak of the Israeli Supreme Court put it: "[T]he war against terrorism is a war of a law abiding nation and law abiding citizens against law breakers. It is, therefore, not merely a war of the state against its enemies; it is also a war of the Law against its enemies."<sup>21</sup>

There will always be measures which are not open to Governments. Certain rights—for example the right to life, the prohibition on torture, on slavery—are simply non-negotiable. There are others such as the presumption of innocence or the right to a fair trial by an independent and impartial tribunal established by law, where we cannot compromise on long-standing principles of justice and liberty, even if we may recognise that there may sometimes be a need to guarantee these principles in new or different ways.

This has consequences for the manner in which the State is required to respond to the most extreme provocation. Those suspected of being terrorists are not outside the law, nor do they forfeit their fundamental rights by virtue of that fact. The result

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21. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 152 (2002).



may be to put limits on actions which would be in the interests of the many. Again to quote President Barak of the Israeli Supreme Court:

This is the destiny of...democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.<sup>22</sup>

But this does not mean that the law is an inflexible tool in Governments' responses to terrorism. Far from it.

The first point to make is that the law recognises that there is a balance to be struck between the rights of the individual and the rights of society. While the terrorist does not forfeit his fundamental rights, the law does recognise that those rights can be restricted or derogated from in particular circumstances. Rights are not only one-way. And it is not only the rights of suspected persons which are important. The rights and liberties of other citizens are important too. Let us not forget that terrorism, by its methods and aims, has the potential to render nugatory all the individual rights which we all hold so dear.

The Universal Declaration of Human Rights, the aspirational document from which so many other human rights instruments stem, itself in Article 29 expressly recognises the duties of everyone to the community and the limitation on rights in order to secure and protect the rights of others.<sup>23</sup> This is the position under the European Convention on Human Rights too. As Lord Bingham, our most senior Law Lord, stated in a judgement of the Privy Council,

Judicial recognition and assertion of human rights defined in the Convention is not a substitute for the process of democratic government but a complement to them....The [European] Court has...recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention.<sup>24</sup>

This is not to suggest that striking this balance is easy or that there will always be general agreement as to the way it should be struck. It will often be a hard

22. H.C. 5100/94, Pub. Comm. Against Torture in Isr. v. The State of Israel, 53(4) P.D. 817, *reprinted in* 38 I.L.M. 1471, 1488 (1999).

23. Article 29 reads as follows:

- (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
- (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
- (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

*A Universal Declaration of Human Rights*, U.N. GAOR, 3d. Sess., Res. 71, U.N. Doc. A/810 (1948), available at [www.un.org](http://www.un.org).

24. *Procurator Fiscal v. Brown*, [2003] 1 A.C. 681 (P.C.).

balance and extraordinary times will justify it being struck in different ways. Surely, for example, we should be prepared to accept more intrusion into our personal lives through more sharing of information between public agencies if that is needed to help detect and prevent more terrorist attacks or bring to justice those responsible. And (and this is the second point I would make in this regard), extraordinary events will lead to derogations from the practices we observe in times of peace and tranquillity. This right is recognised, for example, by the European Convention on Human Rights, now the bedrock of human rights protection in the United Kingdom, which permits derogations from some fundamental rights in times of emergency.

And the third point I would make is that in order to ensure that we can effectively combat terrorism, and defend the rights of society, we need to be flexible and imaginative in our approach to legal process and recognise that some restriction on fundamental rights may well be required. But in saying this, I want to be clear about two points. First, any restriction on fundamental rights must be imposed in accordance with the Rule of Law. And second, while we must be flexible and be prepared to countenance some limitation of fundamental rights if properly justified and proportionate, there are certain principles on which there can be no compromise.

### *C. National Measures Taken*

The United Kingdom has taken a number of steps to counter terrorism. Many of these are not announced with extensive media coverage, but are practical measures that continue in the background as a quiet and effective method of combating terrorism on a number of fronts.

The United Kingdom maintains organized and effective border control. We have comprehensive visa regimes and checking systems. Specialist expertise is shared between police, special branch, security service, and immigration and customs. We have strengthened security and immigration controls. We have recently overhauled and strengthened strategy and practice in relation to targeting terrorist funds. We have both reinforced our own legislation and developed new multi-agency structures. The United Kingdom has fully implemented key anti-terrorist resolutions from the U.N. Security Council. Over 160 countries have taken action under these resolutions since 9/11 and \$112 million has been frozen worldwide. In the United Kingdom, before and since 9/11, we have frozen \$100 million, relating to assets of 200 individuals and 100 organizations. The U.K. Proceeds of Crime Act 2002,<sup>25</sup> providing for the policing of all crime, not just terrorism, gives tough new powers for police and customs officers to seize money made from and intended for use in crime. The U.K. National Infrastructure Security Co-Ordination Centre (NISCC) works to protect communications and utilities infrastructure from attack.

In the United Kingdom, we have also felt the need to make new anti-terrorism provisions in legislation. You, in the United States, responded to September 11th with the USA PATRIOT Act.<sup>26</sup>

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25. Proceeds of Crime Act, 2002, c. 29 (Eng.).

26. USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

The Terrorism Act 2000<sup>27</sup> is the primary piece of U.K. counter-terrorist legislation. It outlaws certain terrorist groups and makes it illegal for them to operate in the United Kingdom. This proscription can specifically extend to groups such as Al-Quaeda. The Act gives police wider stop and search powers, and powers of detention. It creates new criminal offences, including inciting terrorist acts, seeking or providing training for terrorist purposes at home or overseas, and providing training in relation to weapons. The Muslim cleric Abu Hamza al-Masri is now facing trial for offences under this Act, among others.

A second act of Parliament, the Anti-Terrorism, Crime and Security Act 2001,<sup>28</sup> which was introduced in the aftermath of September 11th, was aimed at enhancing the United Kingdom's anti-terrorist and security capacity even further, by providing additional measures to tackle terrorist financing, streamlining relevant immigration procedures, enhancing measures to combat the proliferation of weapons of mass destruction, and enabling the retention of communications data for use in terrorist investigations.

I would like to illustrate how the Government sought to strike the balance between the rights of individuals and of society by reference to one provision, which has been particularly controversial—and sometimes, though inaccurately, compared with detention provisions in Guantanamo Bay which are of a different nature—but which illustrates the need for flexibility and imagination while not compromising on fundamental principles.

Forgive me if I spend a moment or two explaining the power as there has been a degree of misunderstanding it. Like all sovereign countries, we reserve the right to control the entry, residence, and expulsion of aliens. This is a well-established international right reflected in State practice and international agreements. It is normally exercised by refusing entry to an unacceptable alien, by imposing conditions on that person whilst in the country, or, if that person has once been admitted, to deport him. The power to refuse entry or deport is particularly exercised in relation to those who are regarded as a threat to public safety or national security.

You will not be surprised, therefore, to be told that we have the power under our immigration laws to deport a foreigner who is suspected of being involved in international terrorism either at the moment of entry or thereafter. What is more, we have the power to detain such people whilst the deportation process takes place—which can sometimes take time, especially if appeal processes against deportation orders are prolonged. Of course such powers, which are powers of immigration control, cannot by their nature apply to our own nationals who, unlike foreigners, have a right by their citizenship to be here in their own country and to move about it without hindrance.

But our power to deport is subject to one exception. The European Court of Justice in Strasbourg has held, in a case concerning a Mr. Chahal, that we cannot deport such a person if there is a serious risk that he will on deportation be

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27. Terrorism Act, 2000, c. 11 (Eng.).

28. Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.).

subjected to death or torture or to inhuman or degrading treatment.<sup>29</sup> In short, out of concern for the human rights of the person we would like to deport, and otherwise have a right under national and international law to deport, deportation cannot take place so long as that risk exists. It might be because his home country is one with a repressive regime or where the police practice torture.

What is more, under our domestic law and probably under European human rights law too, we are not allowed to detain people pending deportation unless deportation is likely within a reasonable time. I can digress to say that this does not appear always to be the position in the United States.

In the aftermath of 9/11, we were faced with a problem. There was a group of foreign nationals who had no immigration right to be in the United Kingdom, who the Home Secretary and our security services suspected of being involved in international terrorism, and who posed a threat to national security. Prosecution was not an available option and so our first reaction otherwise was to deport, but because of fears for their safety if returned to their own country, we could not return them there. We were happy for them to go, but could not force them to do so. However, the judgement of the Government and of Parliament—to whom this issue was put—was that we could not let these people roam free on the streets. In short, out of concern for their human rights, we would not deport them, but out of concern for the human rights of law-abiding British citizens, we would not allow them to remain at large.

That rather long explanation is the background to the new powers we took, which involved new legislation and required a derogation from the full conditions of the European Convention of Human Rights to enable it to be in compliance with our Human Rights Act.<sup>30</sup> The power enables us to detain those against whom there are reasonable suspicions of being involved in international terrorism. Please note, however, that this is not internment in the usual sense because they are free to leave the country at any time. Indeed, two of the first batch of twelve detainees did just that. This is, as it has been described, a prison with three walls. What is more, if the situation changes and they can safely be deported, for example, as a result of their home countries giving bankable assurances as to their treatment if returned, then they will be returned. This is, therefore, the exercise of an immigration power.

Nonetheless, because the detention periods could be substantial, and because we recognise the huge importance of personal liberty, it was a difficult decision for the Government to take and it was fully debated in Parliament. What is more, it is surrounded with safeguards. This includes a full judicial review of the material on which the judgement of the Home Secretary has been made, with appeals to the highest courts in the country and periodic reviews thereafter. It is also a temporary power which has to be renewed each year by a Parliamentary vote and will expire altogether five years after the law was passed.

Given our commitment to the Rule of Law, the power is subject to strong judicial scrutiny. Both the validity of the law itself and the validity of the case of the detention of each detainee—there have been less than twenty in total certified under

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29. *Chahal v. United Kingdom*, [1996] 23 Eur. H.R. Rep. 413.

30. Human Rights Act, 1998, c. 42 (Eng.).

this process—have been going through the courts. The validity of the law was upheld by the Court of Appeal presided over by our Lord Chief Justice, Lord Woolf,<sup>31</sup> but has now been the subject of an appeal before an almost unprecedented nine judge court in our House of Lords.<sup>32</sup> The individual cases have, in all but one case, also been upheld by the Courts.

In finding for the Government on appeal the Lord Chief Justice said:

The unfortunate fact is that the emergency which the Government believes to exist justifies the taking of action which would not otherwise be acceptable. The [ECHR] recognises that there can be circumstances where action of this sort is...justified. It is my conclusion here, as a matter of law, and that is what we are concerned with, that action is justified. The important point is that the courts are able to protect the rule of law.<sup>33</sup>

As I have said, the judicial scrutiny of the measures is not over, and we are currently awaiting the judgement of the House of Lords in this matter.

These powers are temporary. A debate has started, therefore, on what should be the position when their time runs out, as our assessment is that the United Kingdom is likely to continue to face a serious and ongoing threat from international terrorism. A crucial parameter for this debate, however, remains our commitment to fundamental rights. We will need to ensure that any measures are fully consistent with our legal obligations.

#### *D. International Cooperation*

That leads me to my final theme—the need for international cooperation to address the threat posed by international terrorism. I have already said that the nature of the threat is such that our ability to defend our citizens is dependent to an unprecedented extent on securing international cooperation. Again, I do not want today to enter the lively debate about the efficacy or otherwise of the United Nations in this context. Rather, I simply want to address a few observations on the need for national law enforcement agencies to cooperate in the fight against international terrorism, which was only recently condemned in strong terms by the United Nations Security Council as the biggest threat to international peace and security in the world today.

Law enforcement remains based firmly on a national level. Law enforcement agencies have to operate within their own national systems and national laws. But a terrorist may have contacts and collaborators in any number of countries. We need an international *legal infrastructure* to combat this situation, and we need to collaborate on the sharing of intelligence, also a key part of fighting international terrorism. I am sure that the answer to all this can only be found through international cooperation. A good deal has been done on this already in the aftermath of September 11th.

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31. *A v. Sec'y of State for the Home Dep't*, [2003] 1 All E.R. 816.

32. The House of Lords judgement had not been handed down at the date of this lecture.

33. *A v. Sec'y of State for the Home Dep't*, [2003] 1 All E.R. 816.

At the European level, a Special Council of European Heads of State met in September 2001 to agree to a Joint Action Plan to deal with terrorism.<sup>34</sup> Sixty-eight concrete actions were identified and agreed upon, ranging from agreement on fast-track extradition and arrest warrant procedures, to new measures for the collection and exchange of evidence and the freezing of assets.

We have put in place new measures for extradition, implementing a new system based on a European arrest warrant. This speeds up and lowers the costs of extradition between the United Kingdom and other E.U. States, thus enhancing the fight against crime. We have too concluded a new treaty on extradition with the United States, which simplifies the procedures. Ministers specifically agreed that it was right to enter into such a treaty with the United States, a trusted partner with a mature legal system guaranteeing appropriate safeguards in the domestic courts. An important proviso is that the death penalty cannot be imposed on people we extradite.

Practical cooperation and exchange of information is also a key part of the fight against terrorism. In Europe, much work has been done to strengthen the links between prosecuting and investigating authorities, particularly through Europol, the European Judicial Network, and Eurojust, which brings together judicial and prosecuting experts from all European countries and will, I believe, have a significant effect on ensuring better and faster cooperation.

At the international level, too, we have seen remarkable cooperation and we are continuing to develop new standards and best practices to counter, amongst other things, terrorist financing. There are strategies being put in place at a more practical level, such as a coordinated G8 approach to international transport security standards.

## V. CONCLUSION

Let me conclude. I started by referring to the dual responsibilities on Government: to protect its citizens from terrorist attack and to uphold fundamental rights for all in its jurisdiction. The stakes could not be higher—loss of life, loss of liberty. Our Government is committed to taking all necessary steps to protect its citizens.

As Attorney General of the United Kingdom, I believe this goal is compatible with upholding the fundamental rights of all, including those accused of committing terrorist acts. The aim of the terrorist is not only to kill, maim, and destroy, but also to undermine our societies. It is important that the terrorists do not gain such a victory. Of course there is more to be done: to address the underlying causes of terrorism, to tackle poverty, to promote democracy, and to improve respect for human rights and justice.

Prime Minister Blair also said, in his speech earlier this year to which I have already referred, “[T]his threat [of terrorism] cannot be defeated by security means alone... Its final defeat is only assured by the triumph of the values of the human spirit.”<sup>35</sup> For this reason, we should all continue to seek to meet the threat of terrorism within the context of the Rule of Law. In that way, we can maintain, in the face

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34. Council Framework Decision, 2002/475/JHA, 2002 O.J. (L 164) 3.

35. Blair, *supra* note 17.

of evil, the values of democracy, which our two countries share. This will be the true defeat of terrorism.