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Editorial

Defending the children of the poor

'Social justice' has become a very prevalent concept in political thinking to which it would appear that all three major political parties subscribe. JUSTICE has been a willing contributor to an initiative of the Smith Institute to evaluate the government's perspective on criminal justice as seen within an overall commitment to social justice. This has led to the publication of a book, *Social justice: criminal justice*,[1] to which Sally Ireland and Roger Smith made a contribution, 'Due process and social justice – time to re-examine the relationship'. The concept of social justice merits some examination.

In his contribution to the book,[2] John Denham presents as a symbol of criminal justice the statue on top of the Old Bailey – as featured in JUSTICE's own logo. He characterises the figure as 'blindfold, dispassionate, objective …'. He contrasts notions of the procedural fairness that it represents with substantive economic and social fairness. Interestingly, far below the statue and over the main entrance to the Old Bailey is a motto that combines the concepts of social and criminal justice rather well: 'Defend the children of the poor and punish the wrongdoer'.

In discussing the topic of social and criminal justice, we should concentrate on that strand of government policy which has been directed to defending, in the words of the Central Criminal Court, the children of the poor. We need to begin with recognition of the extent to which the government has implemented a range of initiatives – from prosecution policies to the drive against anti-social behaviour – that have been designed to target crimes that have been hidden precisely because they are directed against the children of the poor or, as we might say now, marginalised – racial and homophobic violence; threats and intimidation on housing estates. We should consider four questions.

First, have we now reached a point where criminal justice might beneficially be removed from its place at the apex of febrile politics? A Parliamentary answer revealed that 404 new offences were created between May 1997 and April 2005.[3] In the eight years between 1997 and the end of 2005, there have been 23 Acts of Parliament with Police, Crime, Criminal, Offence or Terrorism in their title. These contain a total of 2087 sections supplemented by 178 schedules. We have of course had to deal with terrorism but in fact, for all the controversy it attracts, it is not terrorism that is responsible for the massive rise in offences.

We now have think tanks[4] explicitly endorsing the notion of 'symbolic legislation', ie legislation whose main value is in the passage rather than the implementation. To

the extent that this contributes to the triumph of illusion over reality, this must be a very dangerous concept. Do we really need to keep pace with an average annual creation of 50 new offences, three Acts, 250 sections and 20 odd schedules?

Second, do we need to reconsider the way that government is extending discretion at the expense of precision? We have ended the distinction between arrestable and non-arrestable offences, so that now a police officer has massively increased powers of arrest. Furthermore, the issue of discretion is effectively at the core of the debate about the proposed clause on glorification of terrorism. It is certainly at the heart of the concern about the misuse of anti-social behaviour orders and responsible for the occasional examples of utter absurdity that have surfaced. The difficulties that arise when public officials exercise power with little precision are well-known and are not confined to their operation in the field of public order or crime. In the early 1980s, the social security system was deliberately revamped to provide a legal basis for decisions that were hitherto taken on the basis of discretion, albeit limited by secret codes.

This leads to a more general, third – and hardest – question. What is the weight to be given to the principles of due process in the fight against types of crime that are hard to address by traditional methods? What, in any given case, are the true demands of due process, rather than accreted historical practice? There is no easy answer to this, and the debate is at the core of the issues of anti-social behaviour and jury trial that we discussed in previous editions. The issue is really one of degree: how far can the criminal justice system take on the role of defending the children of the poor – in extreme form, a social or economic objective – and still maintain those qualities of blindness, dispassionateness and objectivity? We need to keep cross-checking progress against the obvious danger of letting justice's blindfold slip: the loss of objectivity and the consequent failure of due process. We might remember the prejudice that gave rise to the celebrated miscarriages of justice of the 1990s or the biased implementation of the old 'sus' or suspected person laws. These were both immeasurably damaging to the kind of 'tolerant, thriving and successful society' that Lord Falconer argues in his contribution to the book[5] is the ultimate objective of our criminal justice system.

But the balance of discretion arises in many reforms that are still being considered. In January, the Prime Minister raised a situation that might bring some of these issues to a head.[6] He posited the position of a person 'with £10,000 on them in cash in the middle of the city at 2am'and expressed frustration that 'to prove that ... [they] … got this money through specific acts of drug dealing may be too hard. You may know it. But, how do you prove it?' He expressed frustration at the restrictions of due process. But we surely need to hesitate before replying that we need a solution such as some provision that simply deems cash to have come from illegal sources. Due process is guaranteed by most constitutional documents from the United States

constitution to Magna Carta to the European Convention on Human Rights for good reason. The danger of assumption is that it is another word for prejudice.

Finally, we might ask if the combination of a frenetic political atmosphere and practical restrictions can lead to unexpected and contradictory results, with liberally intended reforms turning back on themselves. For example, we face two main policy failures over the use of prison. It remains overused - particularly for short offences - and, partly in consequence, is too punitive. The Home Secretary calls in his contribution for 'a package of support and interventions' for each prisoner. The latest annual report of the Chief Inspector of Prisons indicates some of the practical problems facing this ideal. She indicates quite precisely how 'population pressures limit prisons' so that 'in nine out of the 18 local prisons we inspected, the figures recorded simply misrepresented real outcomes'. In Dorchester, for example, staff unaccountably doubled the number of hours that prisoners were out of their cells in their records, from 6.5 to 13, thereby somewhat changing the impression of the actual regime in the prison. They simply doctored their statistical returns. The stark reality of crowded and under-funded prison services has to be faced: another reason to row back on the punitive rhetoric that has attached to crime over the last two decades.

So, should we proceed with policies to protect the children of the poor and punish the wrongdoer? If so, we might want to ask some questions as we do about the desirability of greater deliberation, more precision, less discretion, more realism and, above all, less rhetoric.

Notes

1 The Smith Institute, 2006, ed. B Shimshon. Available from the Smith Institute, 3rd Floor, 52 Grosvenor Gardens, London SW1.
2 'Fairness and the criminal justice system', p28, n1 above.
3 Baroness Scotland to Lord Tebbit, HL [2770] Lords Hansard, 24 November 2005.
4 C Fieschi, 'Symbolic Laws', *Prospect*, February 2006.
5 'What is criminal justice for?', p8, n1 above.
6 Launch of 'Respect' action plan, 10 January 2006: http://www.number-10.gov.uk/output/Page8898.asp.
7 'Where next for penal policy', p174, n1 above.
8 http://inspectorates.homeoffice.gov.uk/hmiprisons/docs/annualreport2004-5.pdf.

Human rights and the rule of law

Ross Cranston QC

Ross Cranston QC introduces the first three articles in this edition which take their text from lectures in a recent series held by the LSE law department and Clifford Chance in conjunction with JUSTICE.

A recent decision of the House of Lords considered the compatibility of the stop and search regime in the Terrorism Act 2000 with the rights in the European Convention on Human Rights to liberty and security, privacy and family life, free expression, and freedom of assembly. In the course of his speech Lord Bingham made the connection between these human rights, restrictions on them, and the rule of law:

> *The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly-accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided.*[1]

It is this link between human rights and the rule of law which provides the background to the LSE-JUSTICE-Clifford Chance lectures held at the London School of Economics and Political Science. We have invited leading figures from the judiciary, politics and NGOs to set out their views and three of the contributions from the first bracket of lectures held in February and March 2006 follow.

It is not my intention in this brief introduction to summarise these contributions. Rather I wish to sketch a little more the rationale of the series. To put it in a nutshell, promoting human rights is not enough unless the legal system is built on certain fundamental values. The rule of law is one, but another of JUSTICE's primary concerns, access to justice, is also crucial. Although these fundamental values do not found individual legal claims to the same extent as human rights do, they are the backdrop against which human rights concerns are advanced. Often the importance of fundamental values like the rule of law

passes unnoticed, although casual observation of countries where they are sickly or absent soon underlines how essential they are. They are the counterparts in the legal system to free and fair elections, universal suffrage and government accountability in the political sphere.

That does not mean that there is necessarily uniform agreement on what fundamental values such as the rule of law entail. In broad outline, however, we can say that the rule of law means that the state acts under legal authority and in accordance with law. Police abuse provides one of the worst examples of the rule of law being violated, as does a judiciary which kowtows to the state or powerful interests. Equal application of the law to all, including those powerful interests, is essential. Yet breaches of the rule of law can also occur in the daily functioning of state administration, as where those administering social benefits or services use the wide discretion legislation confers on them to impose values on the recipients which they have themselves evolved without authority or public debate. In this context definite and transparent rules, coupled with systems of external review, can bring the system back into line with the rule of law.

However, the rule of law must mean more than government acting in accordance with law. One aspect is institutional arrangements like an independent, impartial and non-corrupt judiciary, laws which are clear and publicly available, and a court system which is efficient and provides access to those unable to have their disputes resolved elsewhere. Moreover, the substantive law itself must accord with at least basic notions of justice. This is the most controversial aspect. Some proponents of the rule of law emphasise protection of property and contractual rights as the most important requirements of the rule of law. Yet that can be only part of the story, for laws at base must be consistent with the full range of constitutional and human rights. Moreover, they should guarantee other fundamental legal values such as access to justice and equality before the law. For what use is the rule of law if individuals and groups cannot vindicate rights recognised by the legal order, or if treatment in the substantive law violates notions of equal respect and differences in treatment cannot be rationally justified?

That leads to some further points. One is the overriding importance of how a value like the rule of law works in practice. At one level, this is the obvious issue that procedures and institutional arrangements must deliver the protections afforded by the rule of law, ie the independence of the judiciary. At its simplest, a lack of financial resources can undermine the promise held out. Secondly, 'the rule of law' is a phrase which slips readily off the tongue. Yet sometimes it has acted as a cloak for restrictive practices in the legal system and institutional arrangements which can no longer be justified. The rule of law deserves more.

Finally, we should not underestimate the potential of the rule of law as an advocate for change. Not enough has been made of this fundamental value in the case for changes in our system of justice and for a greater allocation of resources to guarantee legal and human rights. All this requires a serious and sophisticated analysis of the concept: these lectures contribute to that end.

Ross Cranston QC was the Labour MP for Dudley North until April 2005 and is a professor of law at the London School of Economics.

Notes

1 *R (on the application of Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12.

Government and the rule of law in the modern age

The Rt Hon The Lord Goldsmith QC, HM Attorney General

This is the text of the lecture given by the Rt Hon Lord Goldsmith QC, HM Attorney General, at the London School of Economics and Political Science on 22 February 2006 as part of the series on the rule of law organised by the LSE Law Department and Clifford Chance in conjunction with JUSTICE.

When last year Parliament passed the Constitutional Reform Act much time had been spent debating and finally agreeing its first clause. The Act itself is of course very important in terms of the establishment of a Supreme Court distinct from Parliament and in attenuating, if not completely abolishing, the traditional role of the Lord Chancellor in key areas, especially the selection of judges.

However, I propose to concentrate on the significance of the very first provision of the Act, and indeed the only provision within Part 1. It provides that the Act 'does not adversely affect: (a) the existing constitutional principle of the rule of law or (b) the Lord Chancellor's existing constitutional role in relation to that principle'.

This certainly illustrates the importance attached to the rule of law in the modern age – even if it does not much elucidate what the rule of law is, how it works and who is supposed to police it.

I want to take the opportunity to focus on three themes.

First, why is the rule of law so important that it needed its existence to be underlined in the course of other constitutional change?

Second, who polices the rule of law? Is it only the judges and the courts? What is the role of Parliament?

Thirdly, does the rule of law mean the rule of lawyers? And if it does not, how we do avoid the impression that this *is* what is actually happening?

I approach these topics from the experience of nearly five years as Attorney General, the most senior law officer responsible for the most sensitive legal advice to government and for the public prosecution authorities.

I start with the question of what is the rule of law.

If you rely on the press, I think you would pick up two messages about the rule of law. The first is that it is some sort of fight-to-the-death battle between the judiciary and executive. So, in 2004, the *Guardian* reported 'the rule of law is under threat to an extent unprecedented in recent times, the judges believe'.[1] Not much has changed since then. Marcel Berlins, writing at the beginning of this year, commented: 'who would have thought, only a few years ago, that our much maligned conservative, allegedly out-of-touch, government lackey judiciary would be the main defenders of our liberties and the rule of law against an executive (Labour, what's more) hell-bent on destroying them?'[2]

But the rule of law also crops up in the press as being something which defines our society. We cling to the rule of law in the face of the terrorist threat – thus the Queen speaking after the bombings of 7 July 2005 said: 'atrocities such as these simply reinforce our sense of community, our humanity, our trust in the rule of law'.[3] And regimes which engage in abhorrent practices such as torture are condemned for their failure to respect the rule of law.

Many judges and academics have grappled with the nature of the rule of law and why it matters. I do not intend to attempt this evening some learned analysis of my own as to what it means in theory. I do not embark on that for two reasons. First, my own attempts at a philosophical and historical analysis would be poor compared to the excellent existing academic work and would add little, if anything. Second, I want to concentrate today on what I – as Attorney General – see as the practical implications: the rule of law in practice.

It is sufficient therefore if I emphasise three perhaps obvious but nonetheless important points about the rule of law.

The first is that the rule of law applies to government. 'Be you never so high, the law is above you' said Lord Denning memorably in *Gouriet v Union of Post Office Workers*.[4] That was of course said in relation to the refusal by my predecessor Sam Silkin to grant consent to a relator action. The action was one which Mr Gouriet wanted to bring to obtain an injunction against the Union of Post Office Workers to stop them calling a boycott of all post between the UK and South Africa in a protest against apartheid. Silkin had argued that his decision was not subject to review by the courts.

I cannot resist pointing out in fairness to Sam Silkin that, despite the resonance of Lord Denning's remark – which he used to justify his conclusion that the Attorney's decision was justiciable – the House of Lords in fact agreed with Silkin, noting that in this case the Attorney General was accountable to the

public for the exercise of his public interest powers through Parliament and not through the courts.

Let me be clear. Some of these issues are difficult. The great challenge for free and democratic states is how to balance the need to protect individual rights with the imperative of protecting the lives of the rest of the community. This balance is not easy and it would be foolish to pretend that in all cases everyone agrees with the balance which the government has struck. Of course there is controversy but it is not through government failing to consider its legal obligations.

But, whilst emphasising that government must be subject to the rule of law, we need to recall that so too is everybody else. A key part of government is, therefore, to enforce the law with vigour and rigour. As Attorney General, I have responsibility for how public prosecutions occur. I will return to that issue.

The second point to make about the rule of law is that it is not simply about rule *by* law. Such a proposition would be satisfied whatever the law and however unfair, unjust or contrary to fundamental principles, provided only that it was applied to all. Instead it seems to me clear that the rule of law comprehends some statement of values which are universal and ought to be respected as the basis of a free society.

This is why I have previously expressed the view that even when emergency or time of war permit some modification to, or even derogation from, certain rights, there are some rights so fundamental that there can be no compromise on them. Certain rights – for example the right to life, the prohibition on torture, on slavery – are simply non-negotiable.

As regards the prohibition on torture, the government has been accused in some quarters of seeking to undermine this fundamental right. This is in the context of seeking to deport foreign nationals who pose a risk to national security to countries where they may face torture. But it is precisely because the government cares about the rights of these individuals that it has sought to negotiate memoranda of understanding with the countries concerned to guard against risks such as torture. I do not accept the charge that such memoranda will never be worth the paper that they are written on. As the Liberal Democrat peer and QC, Lord Carlile of Berriew, said in a recent report: 'It really is a counsel of despair to suggest that no verifiable or satisfactory agreement can ever be reached with apparently recalcitrant countries'.[5]

There are other rights 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. These principles are not just short-term objectives – they are the permanent foundations of a free society.

The third point is that the rule of law has universal application. There should be in modern society no outlaws; no people to whom the law does not apply, who can ignore its constraints and to whom therefore anything can be done. They should be bound by the law and held rigorously to account in accordance with the law when they do not uphold it – but the law should not treat them as non-persons either. 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? There is much attraction in this line of attack. But the response to it is one of principle and pragmatism.

First, in confronting terrorism we are fighting for the safety of our citizens but also 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, and which threaten those values and our way of life.

This is why it is important, as Defence Secretary John Reid made clear the other day, not to allow respect, sympathy and understanding for the position in which our soldiers find themselves – which we all naturally share – to be treated as a call for British forces to operate outside the law. As he rightly said, bending the rules or avoiding them altogether is not an option because these are the very principles we are fighting to defend.[6] It is right therefore that where there are credible accusations of criminal behaviour involving our armed forces or anyone else, they should be properly investigated and, where there is sufficient evidence to prosecute and the public interest so requires, there should be prosecutions. And any such prosecutions will be brought under British law in a British court. It is precisely because our servicemen and women are subject to British law in this way that they need have no fear of being brought before the International Criminal Court in the Hague, which has jurisdiction only when states are 'unable or unwilling' genuinely to carry out an investigation or prosecution.[7]

Second, determining if a particular person is or is not a terrorist requires more than mere assertion on the part of an authority, however genuine and well intentioned that authority may be. Our tradition requires such an assertion to be subject to testing by an independent and competent tribunal.

So the rule of law is essential, it is fundamental and it is, or should be, of universal application. Who then enforces it? And what indeed is the role of the Attorney General in this field?

For many the assumption is that this is the role of the courts. That was Lord Denning's assumption in *Gouriet.*[8] Many other judges have seen it the same way. Lord Justice Laws, for example, in an important judgement expounding the limits of judicial intervention in the *International Transport Roth* case,[9] sees the maintenance of the rule of law as something that lies particularly within the constitutional responsibility of the courts.

No-one would take issue with the idea that the courts are responsible for upholding the rule of law. But from my experience as Attorney General I would disagree with anyone who suggested that the courts have a monopoly on seeing that the rule of law is observed, that the courts *alone* are responsible for upholding it.

This is surely not the case. Who would want to live in a society where the executive could act in defiance of the rule of law safe in the knowledge that the courts would right all wrongs in the end? A society where an individual could be detained at will by the executive on the reassurance that once his case was heard by the court, he would be freed?

In my view all the organs of state – the executive, legislature and judiciary – have a shared responsibility for upholding the rule of law. This is not to downplay the responsibility of the courts – they provide the critical long-stop guarantee – but the rule of law will only have real meaning in practical terms in a society in which all organs of the state are mindful of their obligations to respect it.

This is all the more important as there are areas where rightly the courts do not enter. Despite the astounding rate of expansion of judicial review – in 1981 there were 558 applications for judicial review; by 2001 the number had jumped to nearly 5000 applications, almost 10 times as many – there are still no-go areas for the courts, referred to by Lord Phillips as 'forbidden areas'.[10] One such area relates to certain decisions taken under the prerogative, such as to whether or not to go to war. Thus in the CND challenge seeking a declaration in advance of the Iraq conflict in 2003 Mr Justice Richards said:

> *In my view it is unthinkable that the national courts would entertain a challenge to a Government decision to declare war or to authorise the use of armed force against a third country. That is a classic example of a non-justiciable decision.*[11]

Although that proposition has been followed since by the Court of Appeal, some lawyers obviously do not consider it unthinkable at all. So, as I speak the House of Lords are seised with appeals by anti-war protestors seeking to establish that this is an arena into which the courts should step. The government remains clearly of the view that this is not a matter for the courts. So we await the decision of the House of Lords.

But the exclusion of the courts is not limited to the exercise of certain prerogative powers. To take another example. The classic and well-established doctrine is that international treaties do not form part of English law unless and until incorporated specifically. So, subject to limited exceptions, English courts have no jurisdiction to apply them.[12]

Even where the courts do have jurisdiction, the doctrine of deference or judicial restraint means that they will be very circumspect about overriding the decisions of the democratically elected bodies. As Lord Woolf put it in a lecture in Oxford in 2003:

> *There are situations where the national legislature or the executive are better placed to make difficult choices between competing considerations than the national courts.*[13]

For all these reasons it is critical that we in government do not abdicate our own responsibility for ensuring respect for the rule of law by simply leaving it to the courts.

The government and its machinery do recognise the importance of the rule of law. That in a sense is in part what the controversy about my legal advice relating to the Iraq conflict was about. It is well illustrated by the now well-known request by the then Chief of the Defence Staff for a clear statement – yes or no – as to whether the use of armed force would be lawful. As he has since put it, he needed 'an unambiguous black-and-white statement saying it would be legal for us to operate if we had to'.[14] Rightly the armed services – as did the civil service – needed to know that they were covered by a clear statement of lawfulness.

But in general, what are the mechanisms other than judicial supervision for ensuring the rule of law within government? I want to refer particularly to three.

First, there are the internal mechanisms. The principal of these is the internal validation of proposals with our domestic and international legal obligations. I regard this as a critical safeguard for the rule of law and one I see first hand at work day in day out. It has been given added force by the requirement under s19 Human Rights Act 1998 (HRA) for the minister in charge of a bill to make a statement to Parliament as to compatibility with the European Convention on Human Rights (ECHR). Although not a requirement of the Act, it is now expected that a similar statement should accompany any statutory instrument which is subject to mandatory debate in Parliament or which amends primary legislation. Before this obligation existed of course there was consideration whether the proposal breached any legal obligation. But s19 HRA has deepened the analysis and intensified the consideration in a very strong way. It is actually this, in my opinion, which has had the greatest impact on bringing respect for fundamental rights sweeping through Whitehall's corridors – rather than the power of the court to rule on non-compliance. It is not generally understood that proposals are modified, dropped or sometimes never even see the light of day because they would not otherwise be lawful. But any government lawyer would confirm it.

I should add that the way that s19 certificates are given is most certainly not to preclude good proposals just because they might arguably be non-compliant. But nor is it that a statement of compatibility can be given just because it is arguable that the provision *is* ECHR compliant. The practice which has been followed is that the minister giving the certificate needs to be satisfied that it is more likely than not that the courts will uphold the proposal as compliant. The minister's judgment is necessarily made on the basis of legal advice. That advice comes from departmental lawyers, sometimes supplemented by external advice or advice from the Law Officers. The Law Officers will normally only be called upon to advise in the most difficult or sensitive cases. But called upon, we are.

We also see the memoranda of ECHR compatibility which each department now produces to accompany a bill. These are produced by departmental lawyers and explain why, in relation to every relevant provision, they consider the ECHR issues to fall on the right side of the line. Any issues of concern are brought to the attention of me or the Solicitor General. Sometimes Parliamentary Counsel too will bring matters of concern to our attention. If such concerns cannot be resolved before introduction of the bill, the provision in question must be dropped until the Law Officers have had a chance to look at the matter in detail.

The auditing of proposals to ensure compliance with legal obligations is not limited to new legislation. It applies in every area of activity, executive and legislative, domestic and international including, of course, starting military action and the way war is waged. Targeting decisions, for example, are subject to legal clearance. There is testament to how well this is dealt with, not just by the lawyers but by military commanders too, by the rejection by the Chief Prosecutor of the International Criminal Court of complaints concerning military operations in Iraq.

So respect for the rule of law does not depend on whistleblowers; it is a part of the everyday business of government.

Here the Law Officers play a key role as advisers on the most sensitive and difficult issues; as scrutineers of departmental analysis of ECHR compliance; and as superintending ministers for the legal services provided in government. I superintend, for example, the Treasury Solicitor, the largest provider of legal advice to government outside prosecutions. So I regard one of my responsibilities as Attorney General to uphold the rule of law.

It was interesting therefore to note that when it came to the debates on the Constitutional Reform Act 2005 little attention was given by many to this aspect. Given that it is no part of the Lord Chancellor's role to advise government, the role of the Law Officers – who are regarded as the final authorities on legal issues in government – deserved perhaps greater note.

But my role in protecting the rule of law is not limited to the provision of legal advice. The greatest threat we currently face is terrorism. The aim of the terrorists is to destroy our way of life and everything we hold sacred, including the rule of law. As superintending minister for the prosecuting bodies, I regard it as one of my key tasks to ensure that the criminal law is used as effectively as possible to combat terrorism, thus safeguarding the rule of law. Obviously, we need to focus on terrorists who bomb and kill. But it is critical we also target those who are one degree removed, those who use words to incite the men of action. The recent conviction of Abu Hamza was a welcome result, but in my view we need to do more to target this group, building on the very effective work of the Crown Prosecution Service and police in using the criminal law to target another group who once saw themselves as beyond the law, the animal rights extremists. We need too to continue to ensure the tools of prosecution do not lag behind an ability to identify threats. That is why I am pleased Charles Clarke made clear recently that there is serious work in train to determine whether we can use intercept evidence in court without compromising our vital interests.

The second extra-judicial mechanism is the growing use of independent commissioners and reviewers to ensure that the law is upheld.

I will cite two examples:

The Regulation of Investigatory Powers Act 2000 created both an Intelligence Services Commissioner and an Interception of Communications Commissioner. In an area rife with secrecy for essential reasons of national security and in which there is little judicial involvement, these Commissioners play a vital role in ensuring that the law is being applied and reassuring the public of this fact.

The other example relates to the field of terrorism where there has long been use of an independent reviewer of terrorism legislation. The present reviewer is of course Lord Carlile of Berriew to whom I have already referred. He is responsible for reviewing the working of the Terrorism Act 2000 and the Prevention of Terrorism Act 2005. While it was in force, he was also responsible for reviewing Part IV of the Anti-terrorism, Crime and Security Act 2001. His latest report was highly significant in the recent carrying forward of the provisions of the Prevention of Terrorism Act 2005. He looked at the control orders made, praised the quality of decision making by the Home Secretary and the preparation by officials and other authorities involved and concluded that he would have reached the same conclusion as the Home Secretary in every case before him.

The third element of protection for the rule of law is the one that actually is the most important because it oversees all that the others are doing. That is Parliament itself.

Parliament provides a high degree of scrutiny of the effectiveness of legislation and government action but also of its lawfulness. It is Parliament to whom the declarations of compatibility under the Human Rights Act 1998 are made. It is Parliament who debate the legality of provisions proposed. It is Parliament who receive reports of independent reviewers such as Lord Carlile. It is to Parliament that Sam Silkin and the House of Lords said the Attorney General was accountable – not to the courts.

Parliamentarians are well-informed on these issues. They are assisted too in many ways: by the briefing of NGOs such as JUSTICE, the Law Society and the Bar Council; by the work of the Joint Committee on Human Rights which, although still only a baby in terms of the life of the Mother of Parliaments, is proving a vital force in these areas of debate; by the work of other Select Committees which examine these issues – I would single out the Home Affairs Select Committee of the House of Commons in domestic affairs, and the European scrutiny committees of both Houses.

I should mention too the work of the Joint Committee on Statutory Instruments. This sounds a dull old body but government lawyers who draft such instruments shake with fear at the prospect of having their instrument publicly criticised by the Committee. It is highly unlikely that the courts will strike down any one statutory instrument out of the myriad created every year. The possibility of being criticised by the Joint Committee is, on the other hand, a very real one. In the case of statutory instruments, therefore, I would suggest that Parliament plays a more important role in keeping the government on the straight and narrow than do the courts.

I have left mention of Parliament till last not because it is the least important of these safeguards for the rule of law. But for quite the opposite reason – that its role is of fundamental importance. It is something that lawyers would do well to remember – that democracy and the liberties which we now take for granted were fashioned by parliamentarians far more than by the courts.

That leads me to my final issue: is the rule of law the same as rule by lawyers?

In *Alconbury*,[15] Lord Hoffman said that:

> *The Human Rights Act 1998 was no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers.*

There are many who think that, however, it is exactly the rule by lawyers which has been inaugurated. Melanie Phillips described it[16] as now 'an industry which threatens to usurp the democratic process itself' and where law had become a 'kind of secular religion, with lawyers the new priesthood'.

Whilst I do not agree that this is an accurate picture of our present position, I believe there are serious points here which deserve consideration.

There is a risk that some lawyers express themselves with an arrogance which suggests that law is the only morality. This is a dangerous proposition. It is dangerous because the law can be uncertain and dependent on a final adjudication which does not make those who took a different view of the law immoral. Take for example the decision in relation to Part IV of the Anti-Terrorism, Crime and Security Act. The outcome of that case was not certain. Quite the contrary. Although the decision of the House of Lords was strong, at least one member took a different view as had the whole of the Court of Appeal, presided over by Lord Woolf. This did not mean, in my view, that the government and Parliament had been acting immorally in settling on the policy which ultimately the House of Lords struck down.

That case also illustrates that the government, even when disappointed with the result, acts to comply with the law. It moved swiftly to remove the legislation, even though it was not obliged to under the structure of the Human Rights Act 1998. I know that the solution sought has been controversial but it has been a solution attempting to comply with the law and balance the rights of the individual against the rights of the many.

But the proposition that the law is the only morality is also dangerous because it risks playing down or even ignoring the importance of other reasons why it might be wrong to do something. A course of action needs to be right as well as lawful. Being lawful is a necessary but not a sufficient condition to taking that course of action. And whilst lawyers may have the final say on whether something is lawful, it is for others to decide whether it is right to do it. The recent cartoon furore is a case in point: it was right that the debate centred principally on whether the newspapers who carried the cartoons did so responsibly or wisely, whether they should have realised the offence – and perhaps more - that their actions would bring, rather than whether they had the legal right to print the cartoons. Lawyers have no greater wisdom on the former question though they have something to say on the latter. Even there the role of the lawyer is more limited than some would acknowledge – because the right of freedom of expression can, like many other rights, be curtailed where the interests of a democratic state requires it. Why should lawyers have some monopoly of determining what the interests of a democratic state require? On the contrary, their views are likely to be less informed and valuable than that of others – especially democratically elected politicians. This is why courts recognise that in their appreciation of these areas they must pay great respect to the views of Parliament and government.

Lawyers must therefore be wary of losing sight of this important fact. Indeed, otherwise there is a real risk that law becomes a weapon of choice in what are in reality political debates.

As I have been arguing it is not lawyers alone who are responsible for maintaining the rule of law. Nor does good government depend on the rule of law alone. Good government requires a much wider debate and all of us, but perhaps especially lawyers, must remember that, even while we celebrate the newly elevated status of the law in public life.

The Rt Hon The Lord Goldsmith QC is Her Majesty's Attorney General.

Notes

1 Clare Dyer, 5 March 2004.
2 2 January 2006.

3 As reported in the *Daily Mail*, 8 July 2005.
4 [1977] 1 All ER 696.
5 Paragraph 25 of report on Prevention of Terrorism Act 2005, 2 February 2006.
6 Speech at King's College London, 20 February 2006.
7 Article 17 of the Rome Statute of the International Criminal Court.
8 See n4 above.
9 *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, paras 83 to 87.
10 *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, para 106(iii).
11 *Campaign for Nuclear Disarmament v Prime Minister of the United Kingdom and others* [2002] EWHC 2759 (QB), para 50, at para 59.
12 See, for example, *R v Lyons* [2002] 3 WLR 1562.
13 'The Impact of Human Rights', The Oxford Lyceum, 6 March 2003.
14 The *Observer*, 1 May 2005.
15 *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, para 129.
16 The *Daily Mail*, 28 February 2005.

Changing the rules: the judiciary, human rights and the rule of law

Roger Smith

This is the text of the lecture given by Roger Smith at the London School of Economics and Political Science on 1 March 2006 as part of the series on the rule of law organised by the LSE Law Department and Clifford Chance in conjunction with JUSTICE. This lecture reflects on the concept of the rule of law from the viewpoint of JUSTICE, an organisation that consciously expresses its mission as 'advancing access to justice, human rights and the rule of law'.

I take my title, 'Changing the rules', from the Prime Minister's speech in which he noted the Anti-Terrorism, Crime and Security Act 2001 had been 'declared partially invalid' by the courts but that 'the mood is now different' after the bombings of last July and 'the rules of the game are changing'. In saying this, he simultaneously appeared to be addressing two rather different audiences – aspiring jihadis and sitting judges. He envisaged court challenge to a policy of agreeing diplomatic assurances to allow the return of detainees to countries suspected of human rights abuse. In the event of losing, he announced that:

> *We will legislate further including, if necessary, amending the Human Rights Act in respect of the European Convention of Human Rights.*[1]

It is somewhat unclear, since national legislation could not affect the UK's obligations under the European Convention on Human Rights (ECHR) itself, quite how such an amendment could satisfactorily be sustained once a case reached the European Court of Human Rights. However, Mr Blair's statement is a reminder of the instability of the current constitutional balance.

I want to examine how the rules governing the constitutional relationship between the different branches of government are already changing.

The rule of law was, famously, one of Dicey's twin pillars of the constitution. The other was Parliamentary sovereignty. His perception of the rule of law was expressly articulated in relation to the role of a Parliament which:

> *Has, under the English constitution, the right to make any law whatever, and further, no person or body is recognised by the law of England as having a right to override and set aside the legislation of Parliament.*[2]

I follow Lord Goldsmith's approach in his lecture in this series in avoiding a definition of the rule of law. And I agree with him that courts are only its guardians of last resort and that the executive, and indeed the legislature, have a logically prior role in upholding it.

I agree also that the rule of law is not just 'rule by law'. The concept implies more than a set of technical principles. In the Attorney General's words, it 'comprehends some statement of values which are universal and ought to be respected as the basis of a free society'. For Dicey, by contrast, lack of universality was precisely the point. He saw the rule of law as a distinctly English phenomenon and was happy to quote Voltaire's wonder that in arriving from France: 'he had passed out of the realm of despotism to a land where the laws might be harsh but where men were ruled by law and not by caprice'.[3] Echoes of such Europhobic disdain might still be identified in some contemporary political resistance to human rights as a dangerously continental influence.

The Constitutional Reform Act 2005 (CRA) offers no helpful definitions but declares that it does not adversely affect –

> *(a) the existing constitutional principle of the rule of law; and*
> *(b) the Lord Chancellor's existing constitutional role in relation to that principle.*[4]

The effect of the first assertion may be uncertain: the second surely cannot be entirely correct. The whole point of the Act was significantly to change the Lord Chancellor's existing constitutional role. For a start, postholders will cease to be judges. Regardless of such cavils, the website of the Department of Constitutional Affairs proudly proclaims:

> *We are responsible for upholding the rule of law.*[5]

It is not alone. Promotion of the rule of law is an explicit objective of both our Foreign and Commonwealth Office[6] and the US Department of State.[7] Indeed, adherence to the rule of law is a settled general principle of the UK government and, if not all states, all that claim to be liberal democracies. As Lord Steyn put it, the UK Parliament does not operate:

> *in a vacuum. Parliament legislates for a European liberal democracy based upon the traditions of the common law … and … unless there is the*

> *clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the Rule of Law.*[8]

I take the implicit question behind these series of lectures – reasonably posed by Professor Cranston, a former member of both executive and legislature – to be whether changes are happening within, or challenges occurring to, the meaning of the rule of law in contemporary Britain. It would be surprising if we could detect neither. After all, Tony Blair announced to his first party conference as leader in 1994:

> *We are putting forward the biggest programme of change to democracy ever proposed by a political party.*[9]

Labour's commitment to constitutional change in its first administration was remarkable. As Lord Bingham remarked with characteristic dryness:

> *To have enacted 11 statutes of constitutional significance, in some cases major significance, in the first legislative session of a new parliament is, indeed, a striking record – an exercise on which, perhaps, only a fresh and energetic government, unconstrained by long experience of office, would ever have embarked.*[10]

Nor was constitutional reform limited to the first session. Much time in Labour's second administration was occupied by the CRA. That Act and the Human Rights Act 1998 (HRA) undoubtedly changed the balance of powers. Both Acts may, however, have unexpected and unbalancing side effects. The HRA sought to provide mechanisms that incorporated the ECHR into domestic law but preserved Parliamentary sovereignty. It provided a balance between a judicial duty to construe compatibly 'so far as is possible' with the Convention and, if not, the duty to make a declaration of incompatibility.[11] Lord Irvine effectively argued that it amounted to no more than a re-arrangement of the pieces on the existing constitutional board in providing:

> *a modern reconciliation of the inevitable tension between the democratic right of the majority to exercise powers and the democratic need of the individual and minorities to have their human rights secured.*[12]

That reconciliation has surely gone a little further than Lord Irvine admitted at the time, affecting the balance between judiciary, executive and legislature – and thereby notions of Parliamentary sovereignty and the rule of law.

I want to begin, however, with another question: whether the statutory framework of the CRA, explicitly designed to 'uphold the continued independence of the

judiciary',[13] will not only continue that independence but also begin to develop a new constitutional identity for them. Hitherto, the relationship of judges and government has been close. Lord Schuster, permanent secretary of the Lord Chancellor's Department in the inter-war years, called his department 'some kind of link or buffer' between government and judiciary. His successor, Sir Albert Napier, thought of it as a form of constitutional 'hinge'.[14]

The CRA formally breaks that close relationship, based on the particular combination of roles formerly undertaken by the Lord Chancellor – judge, minister, legislator. The Lord Chancellor loses his role as head of the judiciary on 3 April 2006 – and retains very limited powers of judicial appointment only for a further year.[15] He will no longer be required by convention, like Lord Falconer and his immediate predecessors, to have had a career as a distinguished lawyer. Indeed, the statutory qualifications for the postholder require only experience as a minister, member of either house of parliament, certain types of lawyer, legal academic or such 'other experience that the Prime Minister considers relevant'.[16] A rumour circulated before the last election that Mr Blunkett was lined up for the post and he would, indeed, have qualified under the Act. Lord Woolf has revealed that he 'still had real concerns for the future' on precisely this ground because:

> *The government has made no secret of the fact that in future the Secretary of State for Constitutional Affairs is likely to be a member of the Commons and could well be a non-lawyer.*[17]

In considering the effects of the Act, it is necessary to assume that this will be its eventual result. Within a short time, we may have a Lord Chancellor lacking any natural affinity with the lawyers and judges with whom s/he needs to interact. The relationship may better resemble that between the Secretary of State for Health and the General Medical Council.

We need to think through all the consequences. Exchange between judiciary and executive is likely to be more formal. This is entirely proper but we might note the magnitude of the informal role helpfully played by Lord Woolf in relation to the CRA. It is entirely arguable that his lengthy concordat with Lord Falconer outflanked what might have been overwhelming opposition to a badly handled proposal. This was not all. Lord Woolf has given an interesting account of his informal liaison with ministers. Thus, he saw off a Home Office proposal to take over the magistrates courts on which 'it was not appreciated within government that it was inappropriate'; he impressed on the government the constitutional importance of their judiciary proposals – 'it was apparently seen by government as a reform capable of being achieved by press release'; he

indicated that the judiciary were extremely concerned at attempts to oust their jurisdiction in asylum matters – 'apparently this was of little concern'.[18]

A level of informal contact will, no doubt, continue but will become less easy to assume. A future Lord Woolf is likely to be put in a more public position. From April 2006, the Lord Chief Justice will become the President of the Courts of England and Wales. Lord Woolf's successor, Lord Phillips, will become:

> *Responsible for representing the views of the judiciary of England and Wales to Parliament, the Lord Chancellor and to Ministers of the Crown generally.*[19]

And may:

> *Lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary or otherwise to the administration of justice.*[20]

This makes him very much more visible, and thereby exposed, than any previous equivalent. He will have a staff of some 60-70 people – with, it seems, at least six press officers. When combined with the effect of a Supreme Court transferred to a new location across Parliament Square from the Houses of Parliament, the separation of the judiciary from the executive will be much more apparent. Processes that are now hidden and informal will become much public and formal. The President will be at the apex of formal consultative and collaborative mechanisms in the form of the Judges Council and a new Judicial Executive Board.[21] The Judges Council sounds a fairly anodyne beast but let us remember how it burst upon the political scene in 1990 to express horror at Lord Mackay's proposed reforms of the legal profession. Mere news of a proposed half day meeting of the council led to a flush of intemperate headines that included 'Rebel judges stop courts' and an MP with a gift for imagery annnounced: 'Beneath the wigs and gowns, we have seen the feet of clay'.[22]

Lord Woolf's experience indicates the range of issues which may arise for the President. On the Constitutional Reform Bill, he played a typically strong hand, making only one false move – the celebrated reference to Lord Falconer as the 'cheerful chappie' – which caused a media firestorm and for which he immediately apologised. But, take an example of the more prosaic kind of issue that might occur. The Criminal Justice Act 2003 makes it easier for bad character evidence to be called against a defendant. This was highly contentious. Indeed, JUSTICE firmly opposed it in the Bill. However, with some amendment, the provision was passed. The Judicial Studies Board duly established a programme so that every relevant judge would be trained by the planned implementation

date in March 2005. Suddenly on 25 October 2004, the Prime Minister and the Home Secretary announced the implementation date would be brought forward to 15 December. No coherent reason was advanced: some said that a headline was needed. A President asked to comment by a Parliamentary committee on such a decision might find it difficult to resist and might well find the Judges Council particularly incensed. Any adverse comment does not necessarily trespass against the separation of powers but it will lift the senior judiciary into much greater public prominence with the fourth estate – the media. The CRA may, therefore, lead to somewhat of a paradox. It will, in time, deprive serving judges of the opportunity to use their position in the legislature to promote their views. A future Lord Woolf will be but Sir Harry. However, the President gains the responsibility to speak to Parliament as an outsider with, paradoxically, greater public visibility.

JUSTICE supported most of the CRA. However, there will be little benefit if it results in senior judicial figures getting more of the kind of verbal battering that can arise in the bearpit of politics. We might recall the report in the *Sunday Times* that:

> *A senior government minister, thought to be Blunkett, was quoted as calling Woolf 'a muddled old codger' with 'an out-of-touch' way.*[23]

Lord Falconer was particularly lucky that Lord Woolf did not, as was reported he would, resign on the spot. Unless we are clear about the constitutional changes to come, this sort of destructive row will erupt more often. I am concerned that it will be linked in the mind of the public and media to the different issues raised by the HRA.

In this context, it is perhaps regrettable that the opportunity was not taken to create a Ministry of Justice focused on matters relating to the legal system, as had been the almost universal demand from all those who campaigned for reform of this kind. Instead, we got a Department of Constitutional Affairs (DCA) which took over a disparate range of matters from the Home Office, from electoral matters to House of Lords reform. It may be hard, therefore, for ministers to concentrate on core responsibilities for legal and judicial affairs. The justice system is sufficiently important to have its own ministry with its own ministers. They do not need the distraction of a range of issues – from the Channel Islands to electoral reform – passed over to streamline the Home Office's focus on criminal justice. An arguable consequence of the lack of focus is that, by default, the Attorney General is actually emerging as a voice within government for the rule of law. Lord Goldsmith's speech in this series got press coverage for his criticism of Guantanamo Bay. As a practising lawyer, the Attorney General may well have an affinity with lawyers that may be lacking for DCA ministers

without a background in the law. Yet, the Attorney has other responsibilities for prosecution and advice to the government which may mean that the DCA's ministers would be structually better able to take this role without conflict.

In the context of human rights, Lord Goldsmith ended his speech with a celebration of the 'newly elevated status of the law in public life' but warned against seeking to replace rule by Parliament by rule by lawyers. I want specifically to address this in the context of my previous argument. The CRA implements a much greater formal separation of judiciary, executive and legislature. At the same time, the HRA potentially sets up a countervailing trend that increases a blurring between such powers. Interestingly, Dicey, the great proponent of Parliament, acknowledged that the boundaries of sovereignty always were fuzzy. He gave the example of whether the 'Imperial Parliament' could actually abolish 'Scotch law'.[24] Actual powers at their outermost limits are perhaps always difficult to define with precision. This is partly because any constitutional balance of powers requires a degree of consensus to be workable.

The HRA – strengthening, as it does, judicial review of executive and legislative action – exposes the judiciary in an unprecedented way. If lawyers and judges have largely accepted the concept of incorporation, the popular press certainly has not. The *Daily Express* announced a verdict on asylum with the headline: 'Who is running Britain, Mr Blair? You should ask Mr Justice Collins.' The *Daily Mail* has taken a similarly strong Diceyan view:

> *Unaccountable and unelected judges are openly and with increasing arrogance and perversity, usurping the role of Parliament, setting the wishes of the people at nought and pursuing a liberal, politically correct agenda of their own.*[25]

The *Sun* typically personified the argument:

> *While her husband battles to tighten Britain's terror laws, his wife bleats about remembering terrorists' rights … Does she ever think how damaging her interventions are for her husband, our democratically elected prime minister?*[26]

Such hostility requires a response. We need to ask why the popular press is so hostile and then whether we can do anything about it?

Partly, the answer lies in the deep influence of a reductionist form of Diceyan dualism on domestic culture. No matter that when Dicey talked of Parliament he quite decidedly did not mean a party-dominated House of Commons, the British public has a deep regard – born, no doubt, of several centuries of battle

against the Crown – for Parliamentary supremacy. As a nation, we accept the supremacy of the democratically elected lower house – exactly the legal point in the House of Lords' decision in *Jackson*, the challenge to anti-hunting legislation.[27] Thus, we have difficulty – both judicially and politically – in accepting limitations, for example in relation to the European Union and the contentious notion that there might be common law constitutional concepts that are superior to Parliament, such as access to the courts.[28] The widespread cultural acceptance of the legitimacy of the House of Commons is precisely the reason why the executive is able to exert such centralised control and is the problem that has held up reform of the House of Lords – though it is interesting that this is now re-emerging as a political issue.

As a nation, we have been slow to accept the constitutional status of human rights. Lord Hoffman observed of the long-term effect of incorporation:

> *The courts of the United Kingdom, though acknowledging the sovereignty of Parliament [will] apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.*[29]

This has not penetrated general public consciousness. We need to develop a public understanding of the need for Dicey's dualism to be replaced by a new trinity – Parliamentary sovereignty, the rule of law and the protection of human rights as set out – at least for the time being – in the ECHR. Let me indicate from the Attorney's own speech, the importance of so doing. He said:

> *I have previously expressed the view that even when emergency or time of war permit some modification to, or even derogation from, certain rights, there are some rights so fundamental that there can be no compromise on them. Certain rights, for example the right to life, the prohibition on torture, on slavery – are simply non-negotiable.*

The right to life is contained in Article 2 of the European Convention, the prohibition on torture in Article 3, the prohibition on slavery in Article 4, the provision on derogation in Article 15. It is not surprising that the Attorney has previously expressed the view that these are non-derogable rights. Add the principle against retrospectivity in Article 7 and he has repeated the full content of Article 15(2). This is not accidental. The Convention was drafted by common lawyers in our Foreign Office. It is, in the words of Lord Steyn, 'a coherent if ageing charter of fundamental rights'.[30] I want to stress the coherence while acknowledging the ageing. Ministers should feel able to admit that we are subject to its provisions; to make explicit their acceptance of a constitutional reform that they initiated.

In this context, we must also remember incorporation was advanced as only an initial step, first by Charter 88 and then by the Labour party. Its adoption was accompanied by none of the vigorous popular debate that surrounded the enactment of the Canadian Charter of Fundamental Rights and Freedoms in 1982 or, indeed, that preceded that of the US Bill of Rights in 1789. Incorporation was intended only as a halfway house to a full-grown domestic bill of rights. There was – and could be – no debate about content. The very idea was that we adopted wholesale a convention originally drafted almost fifty years previously – hook, line and sinker. Thus, we missed the full force of a debate about how the Convention may be European in name but reflects the domestic cultural values of the United Kingdom.

The Convention provided an easily digestible charter of rights but has disadvantages which lawyers should remember. It is not transparent. The words of the Convention are only a start: they have been significantly expanded by jurisprudence of a European Court of Human Rights which declared the Convention a ‘living instrument’. It is precisely this process that caused Mr Blair his immediate problem last summer. He confronts the effect of the 1996 case of *Chahal* which confirms that national security should not override the obligation against collusion in torture.[31] It is true that no UK government signed up to a deal that restricted its powers in the terms of *Chahal*. However, it signed up to – and Lord Goldsmith made very clear it has no continuing difficulty with – the principle of no torture or ill-treatment. The court’s extension of the principle in *Chahal* was entirely rational and, indeed, in realpolitik terms, makes complete sense. In the modern world of global comunication, a state that does not comply with Article 3 is a menace to every other. It exports – precisely as Algeria does – its militants around the world. The consequent containment of a small number of individuals within the UK is entirely rational. It is, in a sense literally, a small price to pay for a wider principle. We need to get this point across and, I think, we must acknowledge that this has not yet been adequately done.

It is an enormous weakness of the HRA that (however attractive to some in the audience) you need a lawyer – or, at least, a very good and up-to-date textbook – to understand it. Take, as an example, the idea of proportionality that has been inferred by the European Court of Human Rights from the words ‘necessary in a democratic society’. A leading author called this ‘the defining characteristic of the Strasbourg approach to the protection of human rights’.[32] Yet, it is invisible in the text. Furthermore, as domestic caselaw grows, so there develops an unavoidable accretion of cases unremarked in the original text. An answer to the simple question of which authorities are bound by the HRA requires a small treatise on the difference between functional and institutional tests.[33]

We must admit that human rights is dangerously drifting away from accessiblity – encouraging its characterisation as the province of lawyers not people. We might note that the much-derided European Charter of Fundamental Rights and Freedoms provides an example of one way of countering this: a summary in which detail is sacrificed to clarity. Ultimately, the rights debate needs to move on to the need for some such readable and accessible charter or bill of rights. Such a charter would need, as does the European Charter, to take the European Convention as its base. In adopting a British model, we might take the European Charter (though this will set up enormous cultural resistance) or draft our own. However, if the latter, we would do well to recall Augustine's anguished plea: 'let me repent, O Lord, but not yet'. Let us work out a domestic bill of rights but not quite yet. The process would create a morass into which legions and years could be lost. Practically, for the time being, we are stuck with the Convention as the best bill of rights we can practically have.

The Convention inevitably raises the issue of the relationship of the judiciary with the legislature in making law and, at the very limit, whether there are ways in which the very sovereignty of Parliament may be impugned. Judges have admitted to lawmaking ever since Lord Reid revealed that any other view was 'a fairy tale' but judgments required by the HRA, admittedly a statute duly passed by the legislature, get pretty close not only to making law but to declaring limits on Parliament's power to do so. This is difficult territory for which to find the right language. That of judicial deference has passed out of favour. I am not sure that talk of 'discretionary areas of judgement', understandable though it may be to lawyers, means much to a lay audience. I agree with Lord Bingham's exposition but it is hard to condense this into a textbook for children:

> *The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.*[34]

The intention of the government in passing the HRA was to mitigate the consequences of Lord Bingham's type of discrimination through the power of a court to declare legislation incompatible with the Convention but without any power to strike it down. Parliament would then decide whether to pay any attention. Among litigators, s4 was disparagingly referred to as the 'wooden spoon'. It has, in the event, proved rather more valuable. The government

has, as a matter of fact, honoured all declarations by re-legislating. Indeed, the political lesson of the legal decision in the *Belmarsh*[35] case may be that the larger the implication, the stronger the political imperative to replace the impugned provisions. It may be too soon to argue that this can amount to a constitutional convention. But, the power to grant a declaration had always to be read in connection with the requirement on ministers to certify an act as compatible, which Lord Goldsmith commends, and also the over-riding jurisdiction of the European Court of Human Rights which he does not mention. A government minister certifies each Bill as Convention-compliant. Thus, a judicial declaration to the contrary indicates, on the face of it, a ministerial misunderstanding.

In theory, the government could sit it out and appeal to the European Court, or indeed seek to legislate without such a certification. This remains legally possible. Such a formula upholds Parliamentary sovereignty in that it does not allow the court to nullify the legislation. However, the European Court's doctrine of 'margin of appreciation' applies to 'national authorities', that is decisions of governments as upheld by national courts. It is not carte blanche for governments themselves. Signatories to the European Convention agree that decisions of the European Court are to be implemented under the 'supervision' of the Council of Europe's committee of members.[36] So, the government is caught in a kind of catch-22. A ministerial declaration that a provision is incompatible will provide pretty conclusive grounds for the European Court to accept that the government is right. It will then so rule. There is no way out of this. The European Court is effectively supranational because members of the Council of Europe agree to respect its decisions – albeit that the process of enforcement is not perfect and there may be delays if not evasions.

Thus, the HRA preserves Parliamentary sovereignty, as we might say, with a twist. The government followed the Belmarsh case by presenting what became the Prevention of Terrorism Act 2005. The original legislation is not annulled by the court but falls de facto if not de jure. Our limited experience to date is that the court can effectively force the executive to return to the legislature. This would seem a reasonable – and, indeed, desirable – result. Replacement legislation may, of course, present issues in its turn – as did the 2005 Act. It was rushed through Parliament amid chaos in 18 days flat from beginning to end. This was so fast that the government could not produce amendments promised in the House of Commons by the time that the Bill was debated in the House of Lords. The decision of a court takes us only so far: the struggle to balance liberty and security continues. That is unavoidable. It is politics.

We are within the hallowed walls of the London School of Economics. We talk of the role of the judiciary. We cannot do so without making some reference to John Griffith. He argued – at a time when this was a common view among trade

unions and the left – that the judges were an unrepresentative conservative brake on progressive change and, by the later editions of his famous book,[37] he was able to cite the *Fares Fair* case to prove it pretty conclusively. Should we read about the changing composition of the US Supreme Court with some trepidation? Though those likely to be translated as the first justices of our Supreme Court appear to be universally wise and sensitive to constitutional balance, could this all change over time – perhaps through an appointment process that may now be effectively free of political influence but inclined, through the caution of committee, to make uninspiring appointments of judges with little imagination or understanding? This is a risk but, I would argue, an acceptable one. In the three decades since the outrageous *Fares Fair* decision, much has changed. During two long periods of uninterrupted one party government, the judiciary have developed core principles of review that are now supplemented by the HRA. This takes the judiciary into an overt constitutional role with transparent, if admittedly still evolving, principles - whereas John Griffith's thesis was that they had a covert one with none.

At one level, a degree of tension between judiciary and executive is a sign of a healthy democracy. However, the kind of vituperative language used by the press suggests that such stresses can be destructive when not understood, explained or accepted. We will need ultimately to define more precisely the role of the judiciary and the impact of human rights on the rule of law. For the moment, however, we might be best to take advantage of the flexibility that our unwritten constitution bequeaths and encourage, as far as we can, the new balance of powers to settle down with as little fuss as is possible. Our prize is a changed balance in the constitution so that citizens can supplement the democratic accountability of those in public authority with a greater degree of legal accountability against democratic norms. That would be an enormous legacy for any government. But it leaves us in a somewhat unsatisfactory position. Government may threaten further legislation and supporters of human rights fear it - while acknowledging that the current position is unsatisfactory and will require further statutory intervention in due course. This is politically unstable and logically difficult to justify. Our hope must be that familiarity will breed consent and that the media, public and politicians will gradually accept a rebalanced constitution. Our fear must be that the unfamiliar position in which the CRA and HRA put the judiciary will set off a series of negative responses.

I began with a quote from the Prime Minister's press conference: the rules are changing. I want to end by supplementing that with part of Bob Dylan's lyrics to 'The Times, They are a'changing':

> *Come writers and critics who prophesize with your pens*
> *And keep your eyes open, the chance won't come again*
> *And don't speak too soon, the wheel's still in spin.*

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Notes

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26 28 July 2005.
27 *Jackson v Attorney General* [2005] UKHL 56.
28 See *R v Lord Chancellor ex p Witham* [1997] ICHRL 23 (7 March 1997).
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34 *A and another* v *Secretary of State for the Home Department (Respondent)* [2004] UKHL 56, para 29.
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36 Art 46(2).
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Terrorism and the rule of law

Shami Chakrabarti

This is the text of the lecture given by Shami Chakrabarti, Director of human rights group Liberty, at the London School of Economics and Political Science on 8 March 2006 as part of the series on the rule of law organised by the LSE Law Department and Clifford Chance in conjunction with JUSTICE. It is an updated version of the fifth annual Hands lecture given in Oxford in October 2005.

> *I am going to keep this short and to the point because it's all been said before by far more eloquent people than me.*
>
> *And our words have no impact upon you, therefore I'm going to talk to you in a language that you understand.*
>
> *Our words are dead until we give them life with our blood….*
>
> *I and thousands like me are forsaking everything for what we believe.*
>
> *Our driving motivation doesn't come from tangible commodities that this world has to offer….*
>
> *Your democratically elected governments continuously perpetuate atrocities against my people all over the world.*
>
> *And your support of them makes you directly responsible, just as I am directly responsible for protecting and avenging my Muslim brothers and sisters.*
>
> *Until we feel security, you will be our targets. And until you stop the bombing, gassing, imprisonment and torture of my people we will not stop this fight.*
>
> *We are at war and I am a soldier. Now you too will taste the reality of this situation.*

These words are even more chilling to read aloud than they were to hear as spoken by the thirty-year-old Yorkshire man Mohammad Sidique Khan. Spoken and it would seem deliberately recorded some time in advance of his suicide and murder of six innocents in the Edgware Road Circle Line bombing in London on 7 July. But what is our answer? What has it been up to now and what should it

be? What is the appropriate and effective philosophical, operational and social response to Khan's grandiose prayer before death? Surely, this question cuts to the heart of the nature of modern British democracy, society and perhaps the essence of humanity itself. I don't rehearse this diatribe to shock and certainly not (to use a now fashionable term) to 'glorify' the murderous suicide bomber, but in an attempt to ground a discussion of core principle within the reality of a current threat – something that politicians perennially accuse human rights campaigners of failing to do. My concern is how we learn the lessons of the past whilst also being informed by new and developing threats to our lives and way of life.

Others will no doubt devote many years to studying the words and experiences of Qutb and Bin Laden and the geo-political twists and turns that made them possible or inevitable. There is no doubt value in that work, but I am wary of the ease with which we become mesmerised by distant, demonic, almost Bond-style villains, however charismatic. Their role in our consciousness both terrifies and lets us off the hook. If the threat is essentially from a far-away megalomaniac with some bizarre power of remote control over dark-skinned suicidal clones here in the United Kingdom, the prescription seems all too simple. Exceptional times call for exceptional measures: militarism abroad and martial law at home, until the arch-villain and his entire global network have been extinguished.

As individuals we need do little more than appreciate real danger and sign on the dotted line. We must give a blank cheque to government and others charged with our security. Surely they must be unfettered by the normal constraints of our rights, freedoms and the rule of law at such a moment? This is the time for men of action not ideas. Let them get on with the job of destroying those who simply hate us, in the hope that at some point in the future, they will hand our open society back to us, a little bruised and battered, but essentially intact.

My problem is not simply that I fear the side effects of the antidote (though of course I do), but that I see the threat itself somewhat differently. I look not to far-away places and global masterminds but closer to home, to the actions and motivations of Britons of my own generation. I am neither a theological scholar nor a psychologist so please forgive some crude and lay observations upon Khan's statement:

Like many young men throughout history and the world, he believes he has found a cause greater than himself, and is now prepared or determined to give his life in its pursuit. He has found an ideological or spiritual inspiration above and beyond more common tawdry concerns – 'tangible commodities that this world has to offer'. But he feels an emotional as well as an ideological connection to his 'Muslim brothers and sisters'. He has found a 'people' a 'we'

that is distinct and separate from his family, town and country. Yet he does not speak like a radical cleric or a clone. Despite the obvious illogic of punishing innocent Britons for the suffering of others around the world, he attempts to plead injustice and ill-treatment (by our own democratic standards) rather than his ideological superiority. Ironically therefore, both in his comments about 'bombing, gassing, imprisonment and torture' and in his all too predictable 'I am a soldier' flourish, he does speak to us in a language that we understand. He takes both the dove's repugnance at gassing, torture etc and the hawkish 'war on terror' metaphor of Bush and Blair administrations and throws them back in our faces.

Now, once we get past an understandable revulsion at attempting even to consider Khan's remarks, it is easy to dismiss them as any real illumination of what makes him tick. They may well have been written by others. They are obviously designed to push our buttons and more importantly, those of a next wave of potential recruits. But that, in a sense, is the whole point. In order to thrive, this latest totalitarian challenge, like others before it, must develop at the ideological and social as well as the operational level. And accordingly, the response must be on all of these levels as well. In Britain at least, we should be capable of learning from past failings in anti-terror strategy and wary of seeing new threats as either entirely similar to or different from those of the past. Northern Irish paramilitaries were not all gentleman nor intellectuals nor monsters. Equally, it is as foolish as it is racist to over or under-estimate all those who fall into the new extremism as completely insane.

The past should warn of the dangerous counter-productivity of repression and injustice. It should also warn of the unintended consequences of over-broad repressive measures, way beyond the duration and extent of a terror threat. However, it is also vital that those who seek to defend rights and freedoms should never fall into the trap of predicating their argument upon a non-existent or exaggerated threat. If our values are truly fundamental and enduring, they have to be relevant whatever the level of threat. Further and understandably, the business of intelligence (whatever its inevitable weaknesses) is the prerogative of governments rather than their critics.

We should be sceptical both of those who seem to promise the risk-free society and of those who pretend it is already here. We should remember that the foundations of liberal democracy are not as some populist politicians would paint them, vague, noble but somehow naïve and open-ended notions of limitless tolerance to the point of moral relativism. Modern ideas of democracy, human rights and the rule of law are not, as the Prime Minister's speechwriters would suggest, heirlooms of the permissive 1960s or distant nineteenth century. All those who came before us played their part, but in truth, if we owe our

modern notions of liberal society and democratic world to any one generation, it is to those who lived through the Holocaust and the Blitz and designed the best framework possible for the avoidance of further such terrors.

Many totalitarians have confused our open liberal society with one devoid of all ideological or moral content. It is an easy enough mistake and one which many authoritarians and even some of the more liberal-minded amongst us help to perpetuate. All true democrats believe in liberty, equality, justice and the ultimate dignity and worth of every human being. It is all too easy to caricature this as weakness or even decadence from within or without our society. It is so easy to blame crime on our system of justice or truancy on a lack of corporal punishment at home and school. It is even easier, it seems, to blame every single societal ill on the various flows of migration that marked the end of Empire. Surely if unwittingly, every time that one of our politicians or other public figures denigrates progressive post-war values, they play a little more into the hands of those who think that we believe nothing, that ours is an amoral society in inevitable decline.

It seems to me therefore, that if we are to meet a significant threat on ideological, operational and social levels, it is not enough to establish that we are against suicide bombing, or dictatorship or religious fundamentalism (save in its more palatable western forms). It is time to rediscover what we actually believe and why. What is the code that we live by, our answer to Sidique Khan's diatribe? What is our entry in the competition of ideas, of visions capable of inspiring the young? What (to use a now notorious phrase), are the 'rules of the game' that some are so keen on changing?

The philosophy of post-war democrats is that of fundamental rights, freedoms and the rule of law. This is the legacy of Eleanor Roosevelt and yes, of Winston Churchill here in the United Kingdom – one of the greatest proponents of the European Convention on Human Rights (now contained within our Human Rights Act). Shame on any young Conservative who makes the convenient choice of forgetting this. Shame also, on New Labour politicians who behave as if our rights and freedoms were theirs to give and take away.

In this philosophy, democracy is more than simple majority rule. The rule of law, and in particular, a small but vital bundle of non-negotiable rights and freedoms protect individual human beings (and groups thereof) from each other and a majority that might otherwise descend into a mob. In the final analysis, by protecting free elections and speech, privacy and fair trials and so on, these rights and freedoms protect democratic society itself. For it is respect for these rights which distinguishes democrats from dictators. Our current batch of democratic politicians should cherish that distinction rather more

than they do. It is also highly arguable that if any really valuable and universal notion of 'terrorism' is ever to be achieved, it must target not all those who take up arms against a state (however oppressive) but those who abandon the ethical framework of human rights in the process (by for example, indulging in inhuman and degrading treatment and torture). Ultimately, just as there can be no enduring free markets without some regulation of the associated business dealings – enforceable criminal and contract law as a bare minimum – without core fundamental rights and freedoms, democracy is at best transient and at worst completely illusory. But what are some of these rights and freedoms and how (apart from providing the framework of democratic ideals), do they guide appropriate responses to threats such as that posed from terrorism?

Article 2 of the European Convention protects the all-important right to life.[1] In Convention terms it is the ultimate reflection of the crucial human rights value in the sanctity of each individual life. It is perhaps the mirror image of utilitarian creeds in which individual life is cheap in furtherance of the greater good and where (as in Mohammad Sidique Khan's statement), the ends justify the means. Crucially therefore, the development of this provision by the Strasbourg human rights court has required more than restraint from signatory states. It binds them with a positive obligation to protect the lives of people (not just their own citizens) within their jurisdiction. In the wake of the London bombings, senior police officers and government ministers were quick and right to cite this provision repeatedly. Sadly, they rarely seem to read much further. It also requires the highest standards by way of independent investigation and adjudication whenever someone dies at the hands of or in the care of the state.

Interestingly, this right (like most of the others) is not absolute. Unsurprisingly (in the light of its genesis), this is not a pacifist doctrine. Deprivation of life does not breach the right in a narrow set of circumstances and where the force used is no more than 'absolutely necessary'. Further 'derogation' (or special exception) is permitted in relation to lawful acts of war.[2] Absolute necessity is of course the principle relevant to the use of lethal force in the context of suspected suicide bombers. It is against this stringent standard that those holding and directing police firearms must be scrutinised. It is this principle that must guide those attempting to cut through spin and cover-up in investigating the death of Jean Charles de Menezes. Are internal police instructions and manuals adequate in this regard? How adequate was the relevant intelligence and surveillance operation? What safeguards are in place to lessen the risk of fatal error? How adequate is and was the relevant operational chain of command? As is so often the case, the Convention provides neither magic solutions nor unreasonable straightjackets for those charged with safeguarding the public interest. It does

provide an appropriately rigorous framework for the scrutiny of the use of power at legislative, policy and operational levels.

Article 3 contains the injunction that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'. It enjoys special status as one of the very few absolutes in the Convention framework. It contains no qualifications or exceptions whatsoever. Even the doctrine of derogation (or special exception or opt-out in time of war or public emergency threatening the life of the nation) does not apply. In a philosophy of so few absolutes, it is worth pondering this one a little. Why is the intentional ending of another human life sometimes permissible but torture never, even in the hackneyed and infamous ticking bomb scenario? In the light of the Convention's historical context, it takes little imagination to understand why those who had seen fresh images of concentration and death camps and heard testimony from Japanese prisoners of war might find particular abhorrence in acts of torture and inhuman and degrading treatment. A further clue perhaps lies in the choice of the word 'inhuman', a suggestion that some acts of cruelty cross a line beyond which they debase perpetrator, victim and wider society – even to the point of robbing us of some of that which makes us human.

In truth, we will all die one day and aspire to a range of possible quick, painless and dignified ends. Some of us even seek autonomy over the manner and moment of our death, at least in preference to lingering pain and suffering. Others find human existence so mystically precious that they believe whatever the temptations, one should not seek to choose even the moment of one's own death. Most of us can imagine last resort scenarios where we might justify taking life in self-defence or defence of others. To take human life (whether in war or other scenario) is rightly, the gravest rational choice imaginable. It means to choose the moment of another's death – in a sense, quite literally to 'play God'. But when we subject another to torture or to inhuman or degrading treatment, we play a somewhat darker role – torturer, tormentor. The political or legal system or society that directs or permits this action is the very heart of darkness that Churchill's generation was seeking to avoid.

So the rule against torture is an absolute even in wartime. This is reflected not simply in our human rights convention, but in a range of constitutional and international instruments reflecting the same ideals around the globe. Very simply, it is inconvenience or article of faith depending upon your belief in fundamental rights and freedoms. In any event, it has relevance to several questions of responding to present and future threats.

As part of an international anti-terror response, is it sometimes permissible to receive intelligence that may have been obtained by torture and place it

in evidence before a British court concerned with the liberty of a suspect or accused person? Our highest court decided this issue last year.[4] I must agree that if we truly believe in the absolute nature of the rule against torture, we cannot feed a justice system or find someone a 'terrorist' or remove his liberty for any significant period of time with the fruits of this poison tree.

Is material gained by torture reliable? As someone with a relatively low pain threshold, I would say no. Others say that it can sometimes be (a strange answer to the charge of unreliability). Ultimately, it is hard to see how democratic governments can plead the case against torture (whether perpetrated by terrorists or dictators), if they indulge in the complicity of reliance upon its product. The challenge often put in retort is whether one simply closes one's ears and mind to all intelligence from dubious sources or indeed from all non-democratic governments. My answer is this. If I were a Prime Minister or Home Secretary or Chief Constable who received a phone call warning of an imminent attack, I would take proportionate preventative action first and ask difficult questions later. However, it is one thing to evacuate part of a city or even to arrest a suspect on intelligence from unscrupulous sources. It is quite another to build significant and enduring decisions about life and liberty upon possible torture.

Whatever the rights and wrongs of recent foreign policy, recent events and even comments by Dame Eliza Manningham-Buller should have reminded us of the vital distinction between secret intelligence and proper evidence. Both have a role in a democracy and sometimes one may be hardened into the other. The only reason that the House of Lords Appellate Committee had to venture into the murky waters of material gained by torture is that government has sought in recent years to build a parallel system of quasi-justice on secret intelligence and suspicion rather than charges, evidence and proof. This is not so much the 'battering of the criminal justice system' that the Prime Minister boasted of in his last party conference speech,[6] but the complete circumvention of it.

In the longer term, this continual blurring of traditional constitutional distinctions, a recurring theme of the last eight years, whilst producing short-term fixes for the politician of the moment, should cause intelligence and legal communities equal concern. Over-burdening intelligence and circumventing or bending justice presents serious risks to the long term integrity of both systems.

The next aspect of undermining the absolute prohibition upon torture lies in the question of deportation. For nearly a decade, the Strasbourg court has maintained that a signatory state 'subjects' someone to torture by sending him to another jurisdiction where he faces that real risk.[7] This, in my view, is

an obvious extrapolation of both the absolute prohibition in Article 3 and the principle that human rights belong to all human beings rather than a country's own citizens.

Our government would like to deport some people within its broad discretion to deal with those foreign nationals who are 'non-conducive to the public good'. The problem arises where there is a significant risk that such a person might be tortured if returned home. This of course is the conundrum that resulted in the now long-discredited policy (in Britain at least), of detaining such people indefinitely without trial. The latest approach is two-pronged and strangely contradictory. On the one hand, the government is negotiating so-called 'memoranda of understanding' – bilateral agreements with countries whose record on torture might make it difficult for domestic and international courts to stomach deportation. The agreements will contain assurances from the countries concerned that they will not mistreat an individual returned under such an arrangement. The assurance is designed to persuade a court that notwithstanding a country's repeated breaches of multilateral international human rights instruments, this individual will not be tortured or killed.

Can such a specific assurance be believed in the face of countervailing evidence of past and continuing bad practice? Presumably, this is a matter of case by case analysis for the courts. However, our government itself seems to lack sufficient faith in these assurances to leave the question of their credibility to the independent judiciary in London or Strasbourg. At the same time as negotiating these documents therefore, the government is pursuing a legal strategy of attempting to overturn the absolute nature of Article 3 protection in deportation cases. The argument, as I understand it, is that in the context of a deportation pursuant to national security, the risk of torture to the suspect must be balanced against the risk that he is said to pose to public safety. The absolute right becomes qualified.

I can see only three ways in which such an argument may be advanced:

1. This fundamental and universal right only extends to a state's own citizens. This type of analysis was of course advanced by the Attorney General and roundly rejected by the House of Lords in 2004[6] – the Belmarsh argument.

2. A state is somehow not quite responsible for torture that happens after it sends someone (whatever the anticipated risk) beyond its jurisdiction – the 'see no evil' argument.

3. The rule against torture is not as absolute as it appears and can somehow be trumped by national security concerns – the honest argument.

Any of these arguments (if successful), could be used to legitimise the practice of 'extreme rendition' which has been adopted by our closest ally – the United States. All of these arguments completely undermine positive notions of seeking to wipe out torture from the face of the Earth. The third approach would open up the way for some of the 'torture light' arguments conducted in the States after September 11 to be entertained here in the United Kingdom and elsewhere. In reality, all three arguments are variations on a theme of diluting Article 3's absolute protection and sending the according signal to dictators, terrorists and their sympathisers around the globe.

Articles 5 and 6 of the Convention respectively protect us from arbitrary detention and provide the right to a fair trial, including the presumption of innocence in the context of criminal charges. On the government's own contention, Article 5 was breached by the Belmarsh internment policy. That is why it attempted a derogation which was eventually found wanting by the House of Lords. In the words of the Council of Europe's Human Rights Commissioner, at least some of the new anti-terror control orders (made under last year's Prevention of Terrorism Act) are likely to breach Article 6 – not surprising as they amount to some quite significant interferences with liberty without charge or trial.[7]

The latest attack upon our traditional ideas of due process comes in the form of a policy contained in the government's new Terrorism Bill, but borne of a press release from the Association of Chief Police Officers in the wake of the July bombings. The government sought to extend the period of pre-charge detention for terror suspects from 14 to 90 days – the limit being just four days in any other criminal case, however complex. By contrast, Article 5 demands prompt information of the reasons for your arrest and any charges against you. As Lord Steyn remarked as part of the BBC's 'Panorama' programme on the subject, it is hard to imagine periods of more than the present 14 days constituting a 'prompt' charge. Lord Lloyd, another former Law Lord, rightly described the policy as yet another form of internment.[8] Whilst the ensuing Parliamentary auction of our liberties resulted in a compromise figure of 28 days, the Chancellor and Prime Minister-in-waiting has openly mooted the revisiting of 90 days in due course.

The profound fear is that this new mutation of internment, like previous versions, will be disastrously counter-productive to each of the ideological, social and operational counter-terror efforts. One has of course to imagine not those eventually charged with terror-related offences, for they would be detained for several months pending trial in any event. Instead imagine those released after 89 or 90 days. They return home, quite possibly to areas with a high proportion of British Muslims, having served the equivalent of a six-month prison sentence

without ever having been charged with anything. Members of extremist groups (quite possibly now underground groups – as the government also seeks to ban extreme non-violent organisations) have been visiting the detainee's family during his absence. The extremists say that they have been protecting the family from the press and vigilantes during that extended period. Ultimately, 'so-called British justice' is denigrated as a discriminatory sham. It is contrasted with the comforting protection of one's 'own people'. If one reflects upon the Northern Irish experience for more than a few seconds, it is difficult to imagine how this policy can possibly prevent more terrorists than it recruits.

Even where people are not actually recruited into extreme or violent groups, it is unlikely that they will have much appetite for reporting genuine suspicions to the police, much less joining police and security services in anything like the numbers that they should during the years ahead. Ultimately it is more and better intelligence, not more and worse laws that will deliver Britain and its people from the present threat.

Article 10 of the Convention guarantees the right to freedom of expression. It is (like many others – including respect for privacy and freedom of conscience) a qualified or balanced right, which may be subject to restrictions that are necessary and proportionate (eg to the interests of national security) and prescribed by law. It is nonetheless the very oxygen of democratic society and restrictions should be approached with according grave caution.

In a move once more reminiscent of the Northern Irish experience, the new Terrorism Bill attempts to address the threat by curtailing speech. Its original draft contained a speech offence (glorifying, exalting or celebrating terrorism) so broad that it came with a twenty-year watershed, requiring the Home Secretary to decide which earlier acts of politically motivated crime around the world should count as terrorism rather than freedom-fighting. Mercifully, this provision was scrapped as a discrete offence. However, the broad and vague concept of 'glorification' was, until House of Lords intervention, collapsed into the remaining speech offence of 'encouraging terrorism'. More importantly however, and in contrast with traditional offences of incitement, you can commit this offence (which attracts a seven-year maximum sentence) without intending that anyone should be encouraged into acts of terrorism. It is sufficient that you were reckless as to whether some members of the public are likely to understand your words as encouragement – whether they are in fact encouraged or not.

This is an offence of loose talk or reckless speech which would permit those who have or would have been criticised in the past for say, expressing some level of sympathy with Palestinian suicide bombers or their families, to face prosecution

in the future. Classic political arguments about the circumstances in which taking arms against a state is justified, could land participants in jeopardy. It is important to remember that the relevant definition of terrorism is incredibly broad, covering politically-motivated threats and crimes against the property and personnel of non-democratic governments around the world. It may no longer be lawful to express the view that the Zimbabwean people will only enjoy democracy after the overthrow of Robert Mugabe. Further, musing upon how many lives might have been saved by a timely assassination of Saddam Hussain might reasonably be seen as possible encouragement to terrorism in the face of other dictators.

The draft law is plainly dangerous but in the deft hands of the DPP, how might it help the anti-terror effort? Incitement to murder has long been an offence at common law and in 2000 the government created a specific statutory offence of inciting terrorism. Deliberate intention on the part of the speaker is quite properly required by these offences and it seems that avoiding this vital component was a major factor in the design of the new measures. This is of course quite unacceptable. It is highly likely that the new offence would constitute both a disproportionate interference with the right to free expression and one that is not sufficiently narrowly defined to be in accordance with the law. Once more the danger is not merely of the long-term constitutional consequences of an over-broad speech offence, but of significant counter-productivity in the face of the current threat. Banning unpopular, distasteful or even offensive speech in the current context risks criminalising hundreds and thousands of people.

Instead of isolating the terrorists and their supporters, the government will place many currently law-abiding people upon the other side of the line on the basis of views rather than actions. At a time when there is greatest need to openly take on the political discourse, this proposal will drive it underground – out of cross-cultural public meetings into colleges, out of colleges into mosques, out of mosques and into living-rooms and other private spaces where it may fester unchallenged.

Article 15 of the Convention is important to the present discussion – not least because it provided the standard applied by the Law Lords in the Belmarsh case. Those who find our human rights convention of little relevance in dangerous times should reflect upon the drafters' decision to provide a safety valve or derogation, or special exception provision for possible use in moments of greatest national peril: 'In time of war or other public emergency threatening the life of the nation…' special exception is permitted from most of the Convention rights 'to the extent strictly required by the exigencies of the situation.' The duality of the test for derogation is important. In a society founded upon the

rule of law, the test of strict necessity rightly guides those who govern, even at the moment of greatest national crisis.

But when does that moment arise? Since the Belmarsh decision of 2004, and subsequently since the atrocity of July, there has been much political scoffing at the one Law Lord (Lord Hoffman) who found that the public emergency limb of the derogation test had not been met by the current threat. In a now historic passage of his speech, Lord Hoffmann remarked of the policy of interning foreign national suspects that:[9]

> *The real threat to the life of the nation comes not from terrorism … but from laws such as these.*

On 4 August of last year (in a now historic press conference), the Prime Minister publicly and confidently doubted 'that those words would be spoken now.' But is that right? Or instead, is it a complete misunderstanding of the essence of civilised society – 'the life of the nation'?

We certainly know that this country faces a grave and possibly unquantifiable threat from those who would spend their own lives on the prize of taking many others. Mohammad Khan provides a clear, chilling and public reminder. We fear and even expect that more of our lives will be taken before this particular breed of totalitarianism is defeated. But is 'the life of the nation' equivalent simply to a certain level of risk to a large number of people? Alternatively does it relate to supplies of water, food, fuel, medicine and to the functioning of the democratic state itself? I prefer the latter view, not through a lack of care for loss of life – far from it.

It simply seems to me that a state of 'public emergency' of indefinite length is as dangerous as the unending 'war on terror' which allows the murderer to call himself a soldier. A limitless state of emergency is a contradiction in terms. It is no longer a temporary departure from the proper and normal order of society for as short a period as possible in order to re-establish means of existence, government and law. It is instead a new state of being. A state of constitutional poverty without the ethical framework that we most need in times of greatest difficulty.

Loss of the rule of law and human rights framework would also deprive us of the very inspiration that is the ultimate antidote to the threat. There has been in my view, far too much public hand-wringing about what it means to be British and what the ties that bind us should, or ought to be. I am as certain in my core beliefs as any of those who challenge them, and my values are as British as they are even-handed and universal. Those in permanent search of new codes for

living would be well-advised to remember those we already have. Surely there has never been a nobler or more rational system designed by man.

Shami Chakrabarti is the director of Liberty.

Notes

1 Art 2 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR):

1. Everyone's right to life shall be protected by law…
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
    a. in defence of any person from unlawful violence;
    b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    c. in action lawfully taken for the purpose of quelling a riot or insurrection.

2 Cf Art 15 ECHR.
3 *A & Ors v Secretary of State for the Home Department* [2005] UKHL 71.
4 Speech by the Tony Blair to the Labour Party Conference, 27 September 2005, available at http://www.labour.org.uk/index.php?id=news2005&ux_news%5Bid%5D=ac05tb&cHash=d8353c3d74.
5 Cf *Chahal v UK*, 15 November 1996, 23 EHRR 413.
6 *A(FC) & Ors v Secretary of State for the Home Department: X (FC) & Anor v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.
7 *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4-12 November 2004, for the attention of the Committee of Ministers and the Parliamentary Assembly*, CommDH(2005)6 Original version, available at http://news.bbc.co.uk/1/hi/uk_politics/4071968.stm.
8 Cf http://news.bbc.co.uk/1/hi/uk_politics/4318114.stm.
9 See n9 above.

Of bricks and mortar: mutual recognition and mutual trust in EU criminal justice co-operation – the first experiences in the courts of England and Ireland

Maik Martin

Mutual recognition of judicial decisions is the cornerstone of criminal justice co-operation. This is the European Union's official philosophy underlying instruments such as the European Arrest Warrant. First experiences in the courts of England, Ireland and Germany show, however, that a lack of mutual trust in EU member states' criminal justice systems considerably hampers the application of that philosophy in practice. This article assesses the emerging case-law in order to determine how successfully mutual recognition works in practice and how well it protects fundamental rights, concluding that some measure of harmonisation in EU criminal law is necessary if mutual trust is to be achieved.

The European Union is becoming an area of freedom, security and justice for its citizens. This, at least, is what Articles 2 and 29 of the Treaty of Amsterdam stipulate, calling upon the member states to develop common action, inter alia, in the field of judicial cooperation in criminal matters. On the basis of this exhortation the EU member states, at the Tampere EU Council in 1999[1] and in the Council's Hague Programme in 2004,[2] confirmed that mutual recognition would be the cornerstone of judicial co-operation in criminal matters. This statement was the theoretical foundation of a plethora of measures which were adopted, or are currently being discussed or drafted, under the provisions of the EU Treaty governing police and judicial co-operation in criminal matters: the EU's so called 'Third Pillar'.

In May 2005 the European Commission considered the implementation of the mutual recognition principle to be one of the most promising EU activities in the area of criminal justice.[3] Whether this claim is actually well-founded is, of course, debatable; undoubtedly, not all promises that were associated with the principle of mutual recognition and the first measures founded upon it could be kept in practice. This will be shown in the course of this article, which will draw heavily on emerging patterns of judicial attitudes as they can be distilled from recent case-law of the courts of England, Ireland and Germany dealing with the

European Arrest Warrant[4] (EAW) – the first fully operative mutual recognition instrument. While measures founded upon the mutual recognition of judicial decisions in criminal matters will do much to achieve an area of freedom, security and justice within the EU, they cannot do so alone. This will be demonstrated with regard to the first practical experiences with the EAW. For the principle of mutual recognition to operate smoothly, facilitating judicial co-operation while ensuring adequate protection of an affected person's fundamental rights, a certain degree of harmonisation or approximation of the laws of EU member states will be indispensable. This applies not only to criminal procedural rules – in particular, safeguards for fairness in criminal proceedings – but also to certain areas of the member states' substantive criminal law. Many, if not most, of the difficulties that have arisen in the courts of England, Ireland and Germany upon application of the EAW scheme can be shown to have at least one of their causes in the lamentable absence of a sufficient degree of harmonisation of the criminal law and procedure in the EU and the resulting lack of real trust in other member states' laws and procedures.

The principle of mutual recognition as envisaged by the EU Council

The concept of mutual recognition, which is now at the centre of the EU's efforts to improve judicial co-operation in criminal matters, is a well-recognised feature of EC law.[5] In EC internal market law, under the ECJ's jurisprudence in *Cassis de Dijon*,[6] the principle allows the free movement within the Community of goods lawfully marketed in any one member state. Under EC international civil procedure instruments, especially Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial disputes,[7] the civil courts of the member states are obliged to recognise automatically and without further proceedings or formalities the final decisions and certain other orders of other member states' courts and give them effect and enforce them in their jurisdiction.

Following the Tampere conclusions 1999, and in accordance with the Hague Programme 2004, the same principle is now to form the basis for future judicial co-operation not only in civil but also in criminal matters. This brings about significant change to the way judicial co-operation in criminal matters is effected: previously, under a number of bilateral and multilateral treaties and conventions (like the European Convention on Mutual Assistance in Criminal Matters of 1959),[8] the guiding principle was that of mutual *assistance* rather than mutual recognition. This meant that states had to petition for each other's help in returning a person sought for standing trial or for the execution of a prison sentence abroad; they had to ask for the taking of evidence in another member state. The requested state, through its courts and competent government departments, then took an independent (and, particularly in the extradition

context, often political) decision as to whether or not to grant the request for legal assistance. Admittedly, the conclusion of more co-operation-oriented conventions under the roof of the Council of Europe or the EU narrowed the scope for signatory states to refuse the rendering of mutual assistance or extradition of offenders. However, it was not envisaged that the granting of assistance would be automatic. Legal assistance, as a rule, could only be rendered where the requirement of dual criminality was satisfied, ie where the conduct underlying the request for assistance would have been punishable under the criminal law not only of the request*ing* state but also that of the request*ed* one, had it occurred there.

Now the principle of mutual recognition as envisaged by the EU member states entails an entirely new approach, both through the drastic reduction of the grounds member states can rely on for refusing the execution of another member state's judicial request for assistance, and through the virtual removal of the dual criminality requirement. What the EU Council and the Commission have aimed for is the establishment of a system of near-automatic recognition and execution of member states' judicial decisions in criminal matters with very limited scope for active judicial involvement in the requested member state. This should allow for what the Council has euphorically described as the free movement of judicial decisions within the EU.[9] On the basis of the Tampere conclusions and the very ambitious Hague Programme, the EU Council has so far adopted three Framework Decisions based on the concept of mutual recognition in the field of criminal justice co-operation: the Framework Decision on the European Arrest Warrant (EAW),[10] the Framework Decision on the application of the principle of mutual recognition of financial penalties,[11] and the Framework Decision on the execution of orders freezing property or evidence.[12] Further measures are currently being discussed governing almost all stages of criminal proceedings, such as the gathering and transmission of evidence, the taking into account of foreign criminal convictions in criminal proceedings for other offences in another member state, the transfer of convicted persons, and non-custodial pre-trial supervision measures.[13]

Most of these instruments share three common characteristics that can be identified as constituting the principle of mutual recognition in criminal justice co-operation:

1. The first is the stipulation of a duty of the requested state to execute the decision of another member state's judicial authority, provided that the decision is communicated in compliance with certain minimum formal requirements using a pro forma contained in the relevant Framework Decision. An EAW, for instance, has to contain information on the person sought, the conduct alleged against him or her, a description of the issuing

state's criminal provisions penalising the conduct in question, and evidence of an enforceable final judgment or arrest warrant in the issuing state.[14] Ideally, the requested court would not go behind the information given in the appropriate form where the relevant boxes are ticked; a prima facie case on the evidence for the granting of recognition and the execution of the request will not have to be made out by the issuing state. Thus, once all the right boxes were ticked and the requisite information given, the EAW would have to be given effect. The requested state, as a rule, would not enjoy a discretion whether or not to recognise and execute the foreign decision. This 'pro forma approach' is the basis of a system of free movement of judicial decisions within the EU.[15]

2. The second characteristic is the radical reduction of the grounds the requested state can rely on to refuse to recognise and execute the foreign decision. Typically, as in the EAW Framework Decision, refusal is limited to cases where there would be a bar to proceedings in the executing state for reasons of an amnesty, a previous conviction or acquittal for the conduct having given rise to the foreign decision under the notion of ne bis in idem, a time bar on prosecution in the requested state, or certain cases where the requesting state is exercising extraterritorial jurisdiction over conduct that has actually occurred in the executing state.[16]

3. The third, and probably most controversial element of the mutual recognition measures is the effective removal of the dual criminality requirement. Like the EAW Framework Decision in its Article 2(2), these instruments contain a long list of categories of offences for which dual criminality for the recognition and execution of a foreign judicial decision may no longer be required. The implications of this characteristic of mutual recognition instruments will be discussed towards the end of this article.

Flanking measures: a quest for mutual trust

In Tampere and in The Hague the EU Council had recognised that mutual recognition measures limiting judicial involvement and oversight in the recognition and enforcement of another member state's judicial decisions could only be contemplated where there would be a consensus on the existence of a generally comparable standard of procedural propriety and of relevant procedural safeguards for the affected individual. Only where there was a reasonable degree of mutual trust between member states' courts would they accept the drastic limitations of their powers to exercise judicial control over the process of recognition and execution of decisions emanating from other member states' criminal justice systems on the basis of a pro forma approach as envisaged by the Council and Commission.[17]

This degree of trust as a constituent element of an evolving common judicial culture as propagated by the Commission[18] will be greatly furthered by the adoption and implementation of Third Pillar instruments fleshing out in greater detail the rights already enshrined in Article 6 of the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights in Strasbourg. This project has been the subject of a Commission proposal for a Framework Decision laying down certain procedural rights of suspects or defendants such as the rights of access to a lawyer and an interpreter and the provision of legal aid.[19] This proposal is currently being debated in the EU Council where, alas, agreement on its scope, content and relationship with the ECHR seems difficult to reach. Establishing common standards in the laws governing the presumption of innocence and the gathering and admissibility of evidence, as envisaged by the Council and Commission,[20] will also provide a sound basis on which the free movement of judicial decisions within the EU could be achieved. However, while the harmonisation or approximation of national laws is a necessary measure to instil a certain degree of trust in each other member state's criminal justice system, it is, on its own, not a sufficient step to attain that trust and confidence between member states' judiciaries. A consistently high standard both of adherence to procedural law and of the correct application of the respective substantive criminal law will need to be shown to allow a common judicial culture to grow. Only where the promise of the meticulous observance of fair trial safeguards is honoured, and seen to be honoured, in practice can there emerge the trust on which a common judicial culture can be built.

Building a common judicial area – issues of procedural propriety and fundamental rights

The formidable difficulties inherent in the creation of a European area of justice where judicial decisions of all member states are recognised and executed with minimum judicial involvement in the executing member state are beginning to emerge in the decisions on the execution, or refusal thereof, of the first fully operative mutual recognition instrument, the EAW, in the member states' courts. Drawing on decisions in the English and Irish courts, supplemented with selected rulings by the German courts, a strong case can be made for adopting measures at EU level enhancing trust and confidence of judges in the legal systems of other member states, short of saying that the mutual recognition programme as epitomised by the EAW is a solution ahead of its time.[21] These selected judicial decisions demonstrate quite clearly that the issue of mutual trust in other states' criminal justice systems is indeed a complicated and sensitive one which does not lend itself to a single, straightforward solution. Different judges have grappled with the concept of mutual recognition and the limitations this principle puts on their power to inquire into the propriety of the underlying foreign proceedings and to vet these proceedings (or those for which

the execution of the foreign decision will pave the way) for actual or potential and anticipated breaches of a defendant's fundamental rights. A coherent approach of the judiciary in England and Ireland in addressing these issues has yet to emerge, however; as will be shown, the courts' jurisprudence on these questions still seems to be in what could be termed a stage of experimentation.

The 'pro forma approach': a question of trust and competence

Concerning what I have termed the 'pro forma approach' which the EU's mutual recognition programme intends the courts of executing states to adopt, an obvious question has emerged with which the courts have struggled considerably: how far are the executing courts allowed to inquire into the validity of an EAW presented to them in what looks on its face to be the form prescribed by the Framework Decision and relevant national legislation?

In one set of decisions it was discussed whether the executing courts would be entitled or even mandated to examine whether the factual conduct described in the EAW giving rise to a prosecution in the issuing member state could amount to the criminal offence under the law of that state as was claimed in the EAW pro forma. No clear line is discernible in the approaches the courts have taken on this issue so far. In *Palar v Court of First Instance Brussels,*[22] the Divisional Court refused to execute a Belgian EAW, declaring that while the court would be obliged to proceed in a spirit of co-operation and comity with other member states, it remained the case that the conduct said to constitute the extradition offence in question had to be specified correctly in the warrant. The description of the conduct would have to be capable of amounting to the criminal offence as indicated on the EAW; a reasonable degree of congruence of facts and legal classification under the law of the issuing state would therefore be required. Similarly, in Germany the Karlsruhe Court of Appeal made clear that it would need to be satisfied that the conduct specified in an EAW would fall within the group of extraditable offences to which the dual criminality exception applied as defined by the law of the issuing state.[23] In *Office of the King's Prosecutor Brussels v Cando Armas & ors,*[24] however, Lord Hope of Craighead stated in the House of Lords that while judges would have to ensure that an offence alleged in an EAW was an extradition offence under the English Extradition Act 2003 implementing the EAW Framework Decision, they need not concern themselves with the criminal law of the issuing state when addressing the question whether the offence specified in the EAW was such an extradition offence. The same line of reasoning was taken by Smith LJ giving judgment in *Boudhiba v Central Examining Court No 5 of the National Court of Justice Spain*[25] in the Divisional Court, citing the ethos of trust underlying the EAW scheme in the sense that member states would only issue EAWs in accordance with their own law.

A related question addressed rather inconsistently by the Irish courts was whether the executing courts were competent to examine the validity of the procedures leading to the issuing of an EAW. In *Minister for Justice, Equality and Law Reform v Fallon*[26] Geoghegan J in the High Court of Ireland permitted evidence to be heard on the question whether the EAW issued by an English court was invalid due to the underlying domestic warrant having been 'spent' prior to the issuing of the EAW. The judge, while accepting the general rule that a court should refrain from making inquiries into the validity of extradition warrants unless it were necessary to do so to protect fundamental or constitutional rights, considered that the invalidity of an English domestic warrant would require her to refuse the request for surrender of the person sought under the EAW. Similarly, in Germany the Stuttgart Court of Appeal held that despite the absence of an express provision governing the effect of a time bar to proceedings under the law of the issuing state, the courts in the executing state would be competent and indeed mandated to carry out an inquiry as to whether prosecutions in the issuing state were time barred and whether, on that account, an EAW must not be executed.[27] In the Irish case of *Fallon v Governor of Cloverhill Prison*,[28] however, the Irish High Court considered that only in the most exceptional case of manifest bad faith could the inherent integrity of an EAW be challenged.

A final and very interesting case to be presented here is that of *Enander v Governor of HMP Brixton and the Swedish National Police Board*,[29] where the Divisional Court was faced with the question whether an EAW issued by the Swedish National Police Board could be considered to have been issued by a 'judicial authority' for the purposes of the English Extradition Act 2003 and the EAW Framework Decision. Under Article 6 of the Framework Decision, the determination of the competent judicial authority is left to the laws of the member states, the only requirement being the notification of the EU Council of the choice of competent authority. Swedish law provided the Police Board with powers to issue EAWs; the appropriate notification had also been made. Consequently, the court refused to look behind the warrant and the determination of the competent authority by Sweden: while the Framework Decision contained the term 'judicial authority', it did not define it and expressly left the determination to member states' law. As Openshaw J remarked in the decision, any other interpretation would require each executing state to investigate whether the function of issuing the warrant was undertaken by someone who in the UK would be recognised as a person exercising a judicial function. Such an inquiry would be fraught with considerable practical difficulty and would deprive the EAW scheme under the Extradition Act 2003 of its efficacy. It would run counter to the principle of mutual recognition and mutual trust.

All these decisions demonstrate the difficulty the courts have in applying the concept of mutual recognition in a spirit of mutual trust in the propriety and accuracy of foreign judicial decision-making: with the EAW Framework Decision being silent on the question as to how much 'at face value' courts in the executing state are supposed to take an EAW issued in the prescribed form with the right boxes ticked, judges in the executing state have yet to adopt a coherent and clear line as to how far an inquiry into the propriety and validity of an EAW *under the law of the issuing state* might go, and how searching it might be. These difficulties are likely to be exacerbated once the courts are faced with challenges to the execution of financial penalties or prison sentences handed down in another member state under future Third Pillar instruments.

The issue of ECHR compliance and mutual recognition

The above cases primarily dealt with issues of the procedural validity and sufficiency of EAWs under the system of mutual recognition. The fair operation of that system is at issue to an even greater extent in cases where it is alleged that the execution of the foreign judicial decision could lead to a breach of the fundamental rights of the person affected by that decision. Where it is alleged that a person sought by means of an EAW may not receive, in the issuing state, a trial conforming to the requirements of Article 6 of the ECHR, how will the executing court approach such an issue, bearing in mind its obligations under the principle of mutual recognition as set forth in the EAW Framework Decision and implementing legislation?

The EAW Framework Decision does not contain an express provision allowing refusal to grant execution of a EAW on human rights grounds as such, but states both in its recitals 12 and 13 and in Article 1(3) that it respects fundamental rights and that it shall not modify member states' obligations to protect such rights. However, individual member states like Germany, the UK and Ireland, in their implementing legislation, have given effect to these clauses by expressly providing for human rights grounds for refusal of execution of an EAW.[30]

The way the courts in the UK and Ireland have approached the application of these clauses in EAW cases, and other extradition cases where the same issues arise, is difficult to sum up succinctly because of considerable inconsistency. In particular, it remains a somewhat open question what importance, if any, the courts attach to the fact that all EAW-issuing member states are signatories to the ECHR and what degree of reliance the executing courts should place on this fact. In the UK, the courts in extradition cases seem to follow the precedent set by the House of Lords in the asylum case of *R (on the application of Ullah) v Special Adjudicator*,[31] in which it was held that successful reliance on ECHR rights other than Article 3 would require a very strong case showing that the right in

question would be completely denied or nullified by the alleged breach in the country seeking extradition. The Divisional Court in the non-EAW extradition case of *R (on the application of Bermingham) v Director of the Serious Fraud Office* expressly adopted this approach.[32] It has also been effectively followed in the EAW case of *Boudhiba v Central Examining Court No 5 of the National Court of Justice Spain*,[33] where Smith LJ, in the Divisional Court, stated that where there would only be anecdotal evidence as to breaches of human rights in the issuing country, an alleged al-Qaeda terrorist sought by Spain could nevertheless be surrendered to Spain as he would be able to complain about rights infringements in that country through his lawyers to the Spanish courts and to the Strasbourg court if necessary. Only where the person sought could establish a real danger that a breach of human rights would occur and that nothing could be done to stop it would execution of an EAW be refused on human rights grounds. With regard to the lengthy periods of pre-trial detention permissible under Spanish law, the judge refused to consider what she described as an established feature of Spanish law to amount to a breach of Article 5 of the ECHR in the absence of any reported challenges to the length of pre-trial detention to the Strasbourg court. This approach of a heavy reliance on the ECHR and the remedial capacity of the Strasbourg mechanism follows similar statements in the Divisional Court in *Ramda v Secretary of State for the Home Department and the Government of France*[34] and *R (on the application of Labi) v Secretary of State for the Home Department*.[35] Conversely, another constitution of the Divisional Court, in 2002 in the first *Ramda* case,[36] remarked that the European Court of Human Rights was not a court of appeal and that the Strasbourg court itself had gone out of its way to stress that it would be primarily for national authorities to ensure compliance with the ECHR and afford redress for non-compliance. Therefore, the Divisional Court did not consider the UK authorities justified in treating the Strasbourg court as part of the French legal system when assessing the chances whether a person sought by France would receive a fair trial upon extradition there. In the High Court of Ireland, Peart J went even further when he held, in an interlocutory decision in *Minister for Justice, Equality and Law Reform v Stapleton*,[37] that where the court was satisfied on reasonable grounds that if surrendered to another member state the person sought would not receive a fair trial, it would be bound under the human rights clause in the Irish European Arrest Warrant Act 2003 to refuse his surrender *even if* there were procedures available in the issuing state by which an application to prohibit his trial could be made based on the asserted risk that the trial would not be fair. The judge went on to state, unequivocally, that the person sought would be entitled to have his rights under the Irish Constitution or the ECHR vindicated in the requested Irish jurisdiction, rather than being required to have them vindicated in the issuing state.

The issue of the refusal of recognition and execution of an EAW – the epitome of an EU mutual recognition instrument – for actual or anticipated breaches of

ECHR rights is far from being a straightforward one upon which to adjudicate. It will always be a legitimate question for the courts executing a foreign decision just how much reliance to place on the issuing state's membership of the ECHR and the effectiveness of the Strasbourg mechanism. This issue is made much more intricate by the reasonably high standard of ECHR compliance of EU member states: where the executing courts require a suspect to establish a certain pattern of flagrant and irreparable ECHR violations in the issuing country for it to be satisfied that execution of an EAW would lead, with a high degree of probability, to an irremediable breach of that person's fundamental rights, this is certainly a dauntingly formidable, if not impossible, task. This, is has to be conceded, is not a problem which is unique to EAW cases or those arising from the performance of a mutual recognition obligation. It is a general problem of addressing and assessing potential fundamental rights violations in third countries from an ex ante perspective, and raises the question of whether it is legitimate to point a potential victim of such violations to what is still largely an ex post facto redress mechanism in another jurisdiction with the possibility of a recourse to an international judicial body. However, improving ECHR compliance and fair trial standards by means of the adoption of a Third Pillar instrument fleshing out some or most of the Article 6 rights in greater detail than provided in the ECHR would make these standards more visible and more uniformly and readily invoked. Such an instrument could not, of course, entirely prevent breaches of those standards; however, it would add a further basis upon which mutual trust between member states in each other's criminal justice systems could evolve, through visible compliance with its provisions. The remarks of the House of Lords European Union Committee with regard to the EAW in its report on procedural rights in criminal proceedings is a particularly poignant summary of the difficulties underlying the envisaged near-automatic recognition of judicial decisions throughout the EU:[38]

> *a national judge may have no choice but to enforce the order of a court of another member state without himself examining the facts and merely on the basis of a form containing a number of boxes that have been ticked. For such a system to be acceptable there must be confidence that the individual, the subject of the proceedings, has been and will be treated fairly. Compliance by member states with minimum procedural standards for criminal investigations and prosecutions is, therefore, essential.*

Sovereignty and common values – harmonisation of substantive law?

Mutual recognition under the EU's Tampere and Hague approach means, in effect, overlooking differences in the way criminal justice systems in the member states operate – these national differences shall not stand in the way of the free movement of judicial decisions within the Union once certain standards and

formalities in the way judicial decisions are transferred are observed. However, mutual recognition à la Union does not stop there. Through the abolition of the dual criminality requirement found in traditional mutual legal assistance conventions for most common criminal offences (eg murder, grievous bodily harm, rape, theft, robbery, drug trafficking etc), even the substantive criminal law of the executing state will, to a large extent, become immaterial for the purposes of the recognition and execution of another member state's court decision. According to the mutual recognition instruments adopted so far, for a long list of generic offences, the conduct giving rise to the judicial decision sought to be executed abroad has only to be penalised under the law of that issuing state; whether it is also criminalised by the law of the executing state is immaterial.

This, it might be said, should be a normal thing for a Europe that grows ever closer. Indeed, it was Lord Bingham of Cornhill, who, in the House of Lords in the case of *Cando Armas*,[39] opined that underlying the list of offences in the EAW Framework Decision for which the dual criminality requirement was abolished was the unstated assumption that offences of that character would feature in the criminal codes of all member states and that thus dual criminality could, in effect, be taken for granted. However, were such an assumption really to hold true, the abolition of the dual criminality requirement would have been unnecessary. While it is evident that most offences for which the dual criminality requirement is, or will be, removed actually *do* feature in most criminal codes throughout the EU, this cannot be said of all of them; it also has to be recalled that the definition of some offences in the criminal laws of the member states can and do vary in important detail. Euthanasia, for example, generally falls within the definition of murder under English and German law; this, at least in its generality, is not the case in the Netherlands, where this conduct is covered by specific provisions. Under the heading of 'racism and xenophobia', as the category reads in the current Framework Decisions, dual criminality is abolished for a wide range of offences not known to a considerable number of member states, such as the offence of denial of the Holocaust, which exists in French, German and Austrian law but not in English law. Taking, for instance, the notorious case of David Irving: had he been made the subject of an EAW by an Austrian court addressed to the UK for conduct which, had it occurred in the UK, could not have amounted to a criminal offence, the UK courts would have been obliged to order his surrender. Even more astonishingly, under current proposals for an European enforcement order,[40] the UK might, at some point, even be required by the Austrian courts to execute a prison sentence passed on Mr Irving by them. It can hardly come as a surprise, then, that in Belgium, the law implementing the EAW scheme is currently being challenged in the Cour d'Arbitrage, which in turn has referred to the ECJ for a preliminary

ruling the question of whether, under the EU Treaty, the stipulation of a duty of the member states to abolish the dual criminality requirement was lawful.[41]

The virtual abolition of the dual criminality requirement cannot, by itself, be considered a step to strengthen mutual trust between the EU member states in each others' criminal justice systems. It would be a formidable task indeed to explain the logic behind the fact that, while one member state has made the conscious choice not to penalise certain conduct, it would nonetheless be obliged to enforce, albeit indirectly, the criminalisation of such conduct by another member state's legislation. This is the effect that the application of the principle of mutual recognition has on judicial co-operation in criminal matters in the absence of any significant harmonisation, or approximation, of the substantive criminal law within the EU. The relative success of the programme of mutual recognition of judicial decisions in civil and commercial matters was not, to such an extent, dependant upon a harmonisation of national substantive laws. This is largely to be attributed to the marked difference between the general perceptions of criminal law and private law: the former is to a much greater extent considered a vehicle for, and expression of, common social and ethical values prevailing in a state as laid down by national legislatures in an exercise of a nation's ultimate sovereignty. There will therefore be much less willingness, generally, to accept the enforcement of other states' ethical stances as embodied in their criminal laws, particularly when it comes to highly sensitive and contentious issues such as euthanasia, abortion or issues of freedom of speech as raised by penalising the denial of the Holocaust. While this reluctance both to accept and to give up certain value positions expressed in EU member states' respective criminal laws will certainly prove to be a near insurmountable obstacle to a harmonisation of parts of the criminal law, such harmonisation would doubtlessly give the application of the principle of mutual recognition in the context of criminal justice co-operation much greater momentum.[42]

Trust, experience and harmonisation – a conclusion

As this article has tried to demonstrate with examples taken from some of the first cases in which the courts of England, Ireland and Germany were called upon to apply the mutual recognition principle under the EAW scheme, a true common judicial area throughout the European Union depends upon trust between member states' courts in the standards of their respective criminal justice systems. Mutual recognition would be facilitated by the gradual harmonisation of member states' procedural and substantive criminal laws; this harmonisation would foster confidence and trust between member states' judiciaries and other actors in the criminal justice systems. However, trust is something that can neither be forced nor ordered by European institutions or through legislation – it has to grow and be nurtured by the visible experience of each other's criminal justice systems operating a high standard of rights protection and procedural

propriety. Mutual recognition is therefore not the cornerstone, but the bricks for this most welcome and long-awaited building called an 'area of freedom, security and justice' currently under construction. However, without the mortar of mutual trust in the delivery of justice of a consistently high standard, this building is unlikely to be a stable and sheltering one.

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Notes

1 *Conclusions of the Tampere European Council 15-16 October 1999*, http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm.
2 Council of the European Union, 5 November 2004, 14292/04, http://europa.eu.int/comm/justice_home/doc_centre/doc/hague_programme_en.pdf.
3 *Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between member states,* 19.05.2005, COM(2005) 195 final, at para 4, http://europa.eu.int/comm/justice_home/doc_centre/criminal/doc/com_2005_195_en.pdf.
4 *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedure between Member States*, O.J. L 190 18.07.2002 p0001.
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14 Art 8 EAW Framework Decision.
15 Recital 5 EAW Framework Decision.
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The definition of terrorism in UK law

Eric Metcalfe

This article is based upon JUSTICE's response to Lord Carlile's review of the definition of terrorism in UK law.

Introduction

The definition of terrorism in UK law is currently the subject of a review by the Independent Reviewer of Terrorism Legislation, Lord Carlile of Berriew QC. Notwithstanding the seriousness of the terrorist attacks of 9/11 and 7/7, this article argues that the current definition is too broad and that a narrower and more perspicacious definition of terrorism would lead to both more effective counter-terrorism legislation and better protection for fundamental rights in the UK.

This article is divided into five parts. The first examines the concept of terrorism, its relationship with the rule of law in democratic societies, and the distinction between terrorism and the legitimate use of force in non-democratic ones. The second sets out the specific issues relating to a *legal* definition of terrorism including, in particular, the importance of legal certainty. The third examines existing definitions of terrorism in international law and in other common law jurisdictions, attempting to identify common elements and key features of those definitions. The fourth considers the existing definition of terrorism in UK law as set out in s1 Terrorism Act 2000 (TA 2000) and identifies several problems with it, including the broad scope for interference with fundamental rights. The fifth and last proposes a series of changes to the existing definition in s1 TA 2000 in order to make it compatible with the protection of basic rights. An alternative draft definition of terrorism is set forth in the appendix.

The concept of terrorism

Among the definitions of 'terrorism' offered by the Oxford English Dictionary is:

> *2. gen. A policy intended to strike with terror against whom it is adopted; the employment of methods of intimidation*

At its core, the OED definition suggests, terrorism is intimidation, ie the threat or infliction of harm to coerce others. What is missing from the above definition is what distinguishes terrorism from other kinds of intimidation such as extortion,

blackmail or kidnapping, which is the use of intimidation for some political or ideological purpose. Similarly, the OED definition fails to capture what seems most characteristic of terrorism as a modern phenomenon: the infliction of civilian casualties for a political end.

It is this sense of terrorism as violence *for a political purpose* which marks it out as profoundly anti-democratic, in a way that ordinary crimes are not. In a democracy, laws are the outcome of a process in which all participate and by which all are bound:[1]

> *The citizen gives his consent to all the laws, including those which are passed in spite of his opposition, and even those which punish him when he dares to break any of them.*

Participants in a democracy have a duty to support just institutions even where they, as individuals, favoured a different outcome than that of the majority.[2] In turn, individuals' human rights impose a series of constraints upon the state, preventing a majoritarian government from imposing rules that violate their fundamental interests in 'life, freedom and well being'.[3]

Of course any law-breaking, however minor, is a transgression of this democratic order, but terrorism involves a more fundamental violation of basic rights: threatening human life to subvert the democratic process itself. This use of violence – and, increasingly, the infliction of mass casualties – also marks terrorism out from other crimes that seek to affect the integrity of the democratic process, eg electoral fraud. In addition, modern advances in firearms, explosives and biological, chemical, nuclear and radiological weapons make it possible for smaller groups of individuals to inflict greater numbers of casualties – and hence present a greater threat to public safety and the democratic process – than in times past.

It would be wrong to assume, however, that any use of violence for a political end is always terrorism or that every use of force by the state itself is necessarily legitimate. First, many states are not democratic and/or lack respect for fundamental rights. Of the 191 member states of the United Nations in 2006, at least 16 countries – representing a combined population approaching 1.7 billion people[4] – entirely lack functioning democratic institutions. Of the remaining 175 member states, a substantial number have only limited democratic institutions and an unhappy record of widespread and systemic violations of human rights.[5] In this context, it is instructive to recall the historical origin of the concept of terrorism:[6]

> *1. **Government** by intimidation as directed and carried out by the party in power in France during the Revolution of 1789-94; the system of the 'Terror' (1793-4);*

This governmental origin of the term 'terrorism' reminds us that the state's monopoly on the use of force,[7] necessary to ensure the rule of law in democratic societies, can itself become an obvious instrument of coercion and repression.

Secondly, it is widely accepted that where a government is sufficiently arbitrary or oppressive, the use of force against that government is justified in order to effect change, ie the introduction or restoration of democratic institutions and the protection of fundamental rights. As Locke wrote in his Second Treatise of Government:[8]

> *[W]henever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge which God hath provided for all men against force and violence. Whensoever, therefore, the legislative shall transgress this fundamental rule of society, and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and by the establishment of a new legislative (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society.*

Or, as was more famously articulated 86 years later:[9]

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*

The precise conditions under which it is legitimate to use force to achieve such ends has been the subject of several centuries of debate,[10] of which the

current debate over the definition of terrorism appears to be but a continuation. Nevertheless, it is a matter of historical fact that many if not most democratic institutions in place today owe their introduction to some prior use of force that, at the time, was undoubtedly unlawful and arguably terroristic in the eyes of the governments against whom it was used.[11] Moreover, given the significant proportion of the world's population that currently live under repressive governments,[12] the view expressed by the Home Secretary that he could not 'think of a state of affairs in the world today where violence would be justified as a means of bringing about change'[13] seems, at best, hopelessly optimistic and, at worst, wilfully naive.

If it is to command broad support, therefore, a definition of terrorism must be capable of distinguishing between those kinds of political violence which seek to establish democracy and/or the protection of fundamental rights where they are absent and those kinds which seek to subvert and destroy them where they are present.

Considerations concerning a legal definition of terrorism

The natural and ordinary meaning of words often bears little relation to how they are defined in law. For a variety of reasons, a legal definition of terrorism need not resemble its definition in everyday language.

Indeed, it is appropriate to question whether a legal definition of terrorism is even necessary. The mere fact that some idea or thing is important (eg poses a serious threat to public safety or raises some urgent social problem) does not mean that it must therefore given a legal definition. In both statute and common law, many key legal terms are often left undefined, eg 'reasonableness'. In a different way, a concept may be both important and yet irrelevant to the operation of the law. For example, evidence of a suspect's motives or reasons for acting may be extremely important in the detection and investigation of crime, as well as central to a jury being satisfied that the suspect in question possessed the necessary mens rea for the commission of an offence. Nonetheless, 'motive' is itself not an element of criminal responsibility under UK law, and indeed expressly so.[14]

It therefore seems relevant to note that any conceivable terrorist act is already an offence under UK criminal law, eg murder and attempted murder, conspiracy to cause explosions, unlawful possession of firearms and ammunition, etc. Accordingly, it seems doubtful that a legal definition of 'terrorism' should be necessary in order to assign criminal liability to the activities of terrorists. Strictly speaking, such a definition would be required only to the extent that it was thought necessary to provide aggravated offences, eg conspiracy to cause

explosions for a terrorist purpose (because violence for the purpose of political intimidation attracts particular moral opprobrium).

Beyond this, a legal definition of terrorism – and, by extension, the justification for a special legal framework to combat terrorism – seems more a matter of utility rather than necessity. Undoubtedly, terrorism presents distinct operational challenges for law enforcement agencies above and beyond most ordinary crime. In particular, the risk of mass casualties suggests that a proportionately greater emphasis on detecting and preventing terrorist activity is required than might normally be the case.[15] Similarly, the complex and increasingly transnational nature of terrorist organisations and the sophistication of their techniques means that investigating and prosecuting terrorist offences often involves significant evidential difficulties. But such evidential difficulties are not unique to terrorist prosecutions (indeed, they are strikingly similar to those found in respect of serious organised crime). And to overly-dramatise the risks to public safety posed by terrorism may distort rational assessment of the risks posed by other kinds of criminality.

Nonetheless, although a definition is not strictly required, a legal definition of terrorism would serve as a useful shorthand or trigger for an array of special measures, eg proscription of terrorist groups, restrictions on terrorist financing and property, etc, that may be justified in combating terrorism. In such circumstances, though, the utility of having a legal definition of terrorism must be weighed against other considerations, specifically:

- the principle of equality before the law;
- the principle of legal certainty, especially in the criminal law; and
- the importance of fundamental rights.

As noted above, any legal definition must also have regard to the need to distinguish terrorism from the legitimate use of force against repressive governments in other parts of the world.

First, the principle of equality before the law – treating like cases alike and different cases differently[16] – is a core principle of justice and the rule of law. It applies generally to all legislation, but is particularly important to consider whenever legislation seeks to address some special case or circumstance (eg a terrorist threat). Fairness and consistency demand that, since the essence of terrorism is a breach of the criminal law, those suspected of terrorist offences should enjoy the same rights and procedural guarantees as those suspected of other kinds of criminal offences.

Secondly, the principle of legal certainty – another core principle of the rule of law – requires that any law providing a criminal offence should be clearly defined,[17] so that individuals may know in advance whether their conduct is likely to breach it. Consequently, insofar as the definition of terrorism forms an element of criminal liability under counter-terrorism legislation, it is essential that 'terrorism' itself be defined as precisely and unambiguously as possible.

Thirdly, the definition of terrorism should be drawn in such a way that it does not authorise, through the operation of special counter-terrorism laws, unnecessary and disproportionate interference with fundamental human rights.[18] A more detailed analysis of the human rights considerations in relation to the current definition is given below.

Accordingly, the principles identified by Lord Lloyd of Berwick in his 1996 review of counter-terrorism legislation[19] that informed the parliamentary debate on the 2000 Act[20] continue to hold true:

> *(i) legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure;*
>
> *(ii) additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual;*
>
> *(iii) the need for additional safeguards should be considered alongside any additional powers;*
>
> *(iv) the law should comply with the UK's obligations in international law.*

Definitions of terrorism in international law and other common law jurisdictions

As the Newton Committee noted in its 2004 report, 'there is no universally accepted definition of terrorism'.[21] It instead offered the following summary:[22]

> *There are broadly two points of view. One is that violence against the public and against public institutions is terrorism, irrespective of the merits of the objectives of the perpetrators, and the other is that it is possible to distinguish terrorists from 'freedom fighters' – those pursing the right to self-determination in societies where there are no legitimate means of securing change – by the merits of their objectives.*

This section provides a brief analysis of the key elements of the various definitions of terrorism found in international law and those of other common law jurisdictions.[23] By and large, the approach in other common law jurisdictions has been to define terrorism by reference to the *intention* of those committing certain offences, eg 'to intimidate or coerce a civilian population'.[24] By contrast, the typical approach at the international and regional level has been to eschew references to intentions and purposes and instead define terrorism by incorporating reference to specific acts which are *intrinsically* terrorist in nature,[25] irrespective of the intention behind them, eg placing or causing to be placed 'on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft'.[26]

Violence or the threat of violence

Unsurprisingly, offences against the person are the core of all common law definitions and most international definitions of terrorism. A fairly typical example is that found in the Canadian Anti-Terrorism Act 2001, prohibiting any act or omission which intentionally:[27]

> *(a) causes death or serious bodily harm to a person by the use of violence,*
>
> *(b) endangers a person's life, [or]*
>
> *(c) causes a serious risk to the health or safety of the public or any segment of the public…*

The exceptions are those international counter-terrorism instruments focusing on terrorist actions in particular contexts, eg the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988. In such contexts, the kinds of actions prohibited are typically those which 'endanger safety', eg the safe working of a ship, aircraft, airport, etc.

With the intent to intimidate or cause fear or terror

As noted above, the intentional element of intimidation is a central feature of most common law definitions of terrorism. It was also a key element of the first attempt to define terrorism at international law, the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism:[28]

> *All criminal acts directed against a State and* ***intended or calculated to create a state of terror*** *in the minds of particular persons or a group of persons or the general public.*

References to 'the public' or 'population' are typically qualified by reference to 'sections of the public'.[29] More recently, attempts at definitions at the international level have included explicit reference to acts which seek to 'compel a Government *or an international organisation* to do or to abstain from doing any act'.[30] Interestingly, both the 2002 EU Council Framework Decision on combating terrorism[31] and New Zealand's Terrorism Suppression Act 2002[32] restrict this to acts committed with the aim of '*unduly* compelling' such outcomes.

For a political, ideological or religious purpose

Again, this purposive element is standard among definitions of terrorism in most common law jurisdictions but absent from most international definitions. It is meant to encompass political intimidation but exclude, presumably, intimidation of governments or the public for merely criminal purposes, eg serious organised crime. The broadest purposive element is that found in the UN General Assembly Resolution 51/210:[33]

> *criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable,* ***whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.***

Damage to property and other kinds of harm

The inclusion of property damage as a potential terrorist act is not uncommon as a feature of both common law jurisdictions and international definitions, but is almost always qualified by the requirement to demonstrate some sufficient nexus with public safety. For example, the Canadian definition includes any act or omission which:[34]

> *(c) causes a serious risk to the health or safety of the public or any segment of the public;*
>
> *(d) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (a) [death or serious bodily harm] to (c); or*
>
> *(e) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private ….*

The 1997 International Convention for the Suppression of Terrorist Bombings[35] provides, among other things, that a terrorist offence is committed where

an explosive is detonated 'into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility' with the intent to:[36]

> *cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in* ***major economic loss****.*

Article 1(3) of the African Convention on the Prevention and Combating of Terrorism includes reference to terrorist acts which:

> *cause damage to public or private property, natural resources, environmental or cultural heritage …*

A terrorist act under the Suppression of Terrorism Act 2002 (New Zealand) includes the:[37]

> *introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country …*

Article 2(1)(a)(i) of the 2005 International Convention on Combating Acts of Nuclear Terrorism,[38] includes among its definition of terrorist offences possession of radioactive material or use of a radioactive device 'with the intent to cause substantial damage to property or to the environment'.

Targeting of civilians

References to the targeting of civilians are prominent in some international definitions but absent from most domestic ones. For example, the 1999 International Convention for the Suppression of the Financing of Terrorism includes reference to:[39]

> *Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict.*

Paragraph 3 of UN Security Council Resolution 1566 (2004) similarly defines terrorism as:[40]

> *any action ... that is intended to cause death or serious bodily harm to civilians or non-combatants…*

References to 'civilian populations' appear in the domestic law definitions of the US[41] and New Zealand,[42] but are absent from those of Australia, Canada, Hong Kong and India.

Limitations and exceptions

Article 2 of the 1998 Arab Convention for the Suppression of Terrorism provides that:[43]

> *All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab State.*

The Canadian Anti-Terrorism Act 2001 provides an exception to acts causing 'serious interference with or serious disruption of an essential service, facility or system' where it is:[44]

> *a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (a) to (c);*

Similar exceptions are found in the statutory definitions of Australia, New Zealand and Hong Kong.[45] The New Zealand definition, moreover, also provides that an act is not a terrorist act:[46]

> *if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.*

Lastly, Article 187A(8) of the Greek Penal Code provides that an act shall not constitute a terrorist act:[47]

> *if it is manifested as an effort for the establishment of a democratic government or for the safeguarding or restoration thereof or as an activity in favour of freedom within the meaning of article 5 paragraph 2 of the constitution or if it aims at exercising a fundamental individual, political or trade union freedom or another right laid down in the Constitution or in the European Convention on Protection of Human Rights and Fundamental Liberties.*

The existing definition of terrorism in UK law

The current definition of terrorism in s1 Terrorism Act 2000 informs virtually all criminal offences in which 'terrorism' is an ingredient. It also acts as a trigger to the exercise of a broad array of counter-terrorism powers contained not only in the 2000 Act itself, but also in the Anti-Terrorism Crime and Security Act 2001, the Prevention of Terrorism Act 2005, and the Terrorism Bill currently

before Parliament.[48] The definition has also been incorporated by reference into several other Acts of Parliament, see eg the Civil Contingencies Act 2004. As the amount of counter-terrorism legislation introducing new powers and offences grows, so too does the potential scope for the current definition of terrorism to interfere with the exercise of fundamental rights.

The broadening definition of terrorism

In his 1996 review of counter-terrorism legislation, Lord Lloyd recommended the adoption of the FBI definition of terrorism:[49]

> *The use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public, or any section of the public, in order to promote political, social, or ideological objectives.*

At the time the Terrorism Act 2000 was being passed, it was noted that the definition was in several respects broader than that recommended by Lord Lloyd, broader than the previous definition in the Prevention of Terrorism (Temporary Provisions) Act 1989,[50] and broader even than that suggested by the government's own consultation paper which had preceded the Bill's introduction in Parliament.[51] In particular:

- the formulation 'to intimidate or coerce a government, public, or any section of the public' was altered to 'to *influence* the government or to intimidate the public or a section of the public' (s1(1)(b)), 'influence' being an obviously wider term than 'intimidate';
- the language of 'serious *violence* against … property' became 'serious *damage* to property' (s1(2)(b));
- terrorism includes an action which 'creates a *serious risk to the health or safety* of the public or a section of the public' (s1(2)(d));[52]
- terrorism includes any act which is 'designed seriously to interfere with or seriously to disrupt an electronic system' (s1(2)(e)); and
- the use or threat of any action within subsection 2 'which involves the use of firearms or explosives' is by definition terrorism, even if there was no intention to influence the government or intimidate the public (s1(3)).

The relatively low threshold for damage to property

JUSTICE's briefings on the 2000 Terrorism Bill[53] expressed concern that the definition in clause 1 was 'so broad as to lack certainty'. Given, for instance, the scope for such counter-terrorism measures as proscription and stop and search to interfere with rights of free association and liberty respectively, it was predicted that 'the wide definition of terrorism, coupled with its broad powers, may create human rights problems in practice' and that 'there is a danger that

[the definition] does not strike the right balance between the needs of security and the rights and liberties of the individual'.[54] In particular, JUSTICE argued that the equivalence between serious violence against persons and serious damage to property set the threshold for terrorism too low:[55]

> *The definition has … removed the distinction usually made in the criminal law between acts which injure people and actions which damage property. The rationale behind such a distinction is the deterrence of acts which threaten life. Thus crimes that injure or endanger life normally carry higher penalties than those that damage property. No such distinction is made in the definition of terrorism adopted by the present Bill. Therefore, there is a risk that there will be no incentive, under the scheme of the Bill, for a terrorist to choose targets which do not endanger other people.*

Serious interference with or disruption to an electronic system

Similarly, under the current definition, terrorism includes acts 'designed seriously to interfere with or seriously to disrupt an electronic system' (s1(2)(e)) even where such disruption poses no serious risk to any individual person, public safety in general, or major damage to property, eg a computer virus that caused significant disruption to email traffic. The absence of any requirement in s1(2)(e) to show a sufficient nexus between disruption of an electronic system, on the one hand, and an actual risk or threat of serious harm to others seems to us plainly disproportionate. It seems doubtful that the interests of counter-terrorism are served by criminalising the actions of computer hackers and the like unless it can be shown that their actions involved the threat or risk of serious harm to others.

This failure to define terrorism in terms of the threat or use of serious violence recalls the criticisms of the definition of 'emergency' in the Draft Civil Contingencies Bill made by the Joint Committee on the Draft Bill. Noting that 'an exceptionally wide range of events or situations may give rise to a threat within the meaning of the draft Bill',[56] the Committee criticised the definition as 'drawn too widely'.[57] It said:[58]

> *We consider that the core of an emergency, particularly one meriting substantial emergency powers, is the threat to human welfare. We cannot envisage justifying the use of potentially draconian emergency powers if there was no demonstrable threat to human welfare.*

Accordingly, the committee recommended that 'the definition of an emergency is re-drafted to reflect that an emergency is a situation which presents a threat to human welfare'.[59] It is not obvious why the same considerations should not apply to the definition of terrorism. As the government itself recognised in its

1998 consultation on counter-terrorism legislation, it is important not to have a definition of terrorism that is too wide, 'which might be taken to include matters that would not normally be labelled 'terrorist':[60]

> *Violence that can be described as 'politically motivated' may arise in the context of demonstrations and industrial disputes. The Government has no intention of suggesting that matters that can properly be dealt with under normal public order powers should in future be dealt with under counter-terrorist legislation.*

Use of firearms or explosives

S1(3) provides that the use or threat of any action within subsection 2 'which involves the use of firearms or explosives' is by definition terrorism, even if there was no intention to influence the government or intimidate the public. Although the use of firearms or explosives causing serious violence or property damage for some political or ideological cause is a serious crime, it is difficult to apprehend why such actions are always *terrorist* in character as a matter of logical necessity.

In the case of damage to property, for example, it would be possible to conceive of activities involving the use of explosives that would nonetheless fall short of terrorism as commonly understood, eg crop protestors destroying a warehouse containing GM seeds in circumstances which made clear that their intention was only to destroy the seeds themselves but not to risk any other kind of harm to those involved in GM crops (eg evidence of stringent precautions taken to avoid harm to others). While such activities are undoubtedly criminal, it seems doubtful that those involved should *automatically* fall within the scope of counter-terrorism legislation by the operation of s1(3). A more proportionate approach would be to create a rebuttable evidential presumption that actions within the scope of subsection 2 are terrorist, unless shown otherwise. An alternative means of addressing this issue would be to make clearer the difference in threshold between the threat or use of violence against persons and that against property. The automatic presumption of terrorist intent would only be sustainable where firearms or explosives are used against individuals, not property.

Extra-territorial scope of counter-terrorism legislation

Perhaps the greatest scope for serious interference with fundamental rights is the increasingly extra-territorial extent of UK counter-terrorism legislation. For instance, clause 1 of the Terrorism Bill currently before Parliament provides that it is an offence to publish or cause to be published any statement which is 'likely to be understood by some or all of the *members of the public* to whom it is published'[61] as an encouragement to terrorism, whether intentionally or

recklessly. Clause 20(3)(a) provides that references to the public in Part 1 of the Bill are:

> *references to the public of any part of the United Kingdom* ***or of a country or territory outside the United Kingdom****, or any section of the public;*

Moreover, clause 17 of the Bill provides that the offences of encouragement of terrorism (clause 1), training for terrorism (clause 6), and attendance at a place used for terrorist training (clause 8), among others, shall have full extra-territorial effect.

It seems difficult to argue against the principle of giving extra-territorial effect to terrorist offences where persons abroad are planning to commit offences in the UK or against UK nationals abroad. Similarly, a compelling case can be made for criminalising the activities of UK nationals who use violence against civilians or democratic governments in other countries. Indeed, if it is possible to have universal jurisdiction for offences such as piracy or torture, it may seem hard to resist the case for making terrorist crimes punishable on a similar basis.

The main objection, therefore, is linked to the profound difficulties associated with applying the current definition of terrorism on an extra-territorial basis. Unlike piracy, there is a lack of clear consensus at the international level as to whether violence against nondemocratic or repressive governments (as opposed to civilians) constitutes terrorism per se. Although attacks against innocent civilians for a political purpose are obviously and undeniably terroristic in nature, there is much less agreement as to whether attacks by non-state actors against totalitarian or authoritarian regimes, for example, can be described as such.

The broad definition of terrorism in s1 Terrorism Act 2000 draws no distinction between the use of violence against such liberal democratic states as the UK or the US, for instance, or that against such totalitarian regimes as North Korea or Saddam Hussain's Iraq. For example, under the terms of the draft offence of encouragement to terrorism, it would be lawful to publish statements encouraging governments to employ repressive methods against their citizenry, eg Tiananmen Square, but unlawful to publish statements commending the example of the American Revolution to those living in nondemocratic countries.

Indeed, the combined scope of clauses 1 and 17 would criminalise not only the publication of such statements in the UK, but their publication anywhere in the world. Similarly, the extra-territorial scope of clauses 6 and 8 would prohibit foreign nationals training abroad to attack government troops of a repressive

regime in a foreign country. It does not seem sensible to extend the scope of UK counter-terrorism legislation in this way. Accordingly, if it is necessary to give extra-territorial effect to terrorist offences in UK law, the definition of terrorism should be qualified in such a way as to avoid criminalising the legitimate use of force against nondemocratic or repressive governments, as well as the legitimate debate, discussion and exchange of information and ideas concerning such acts.

To do otherwise would pose a severe interference with the right to free expression in the UK and fatally undermine the cause of democracy and fundamental rights abroad.[62] As UN Security Council Resolution 1456 declared:[63]

> *States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law;*

Similarly, the International Commission of Jurists' 2004 Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism states, among other things, that:[64]

> *In the implementation of counter-terrorism measures, states must respect and safeguard fundamental rights and freedoms, including freedom of expression, religion, conscience or belief, association, and assembly …*

This concern that counter-terrorism measures should not be implemented in a way that interferes with fundamental rights is also increasingly recognised in international counter-terrorism instruments themselves. For example, Article 12 of the 2005 Council of Europe Convention on the Prevention of Terrorism states:

> *(1) Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.*
>
> *(2) The establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention should furthermore be subject to the principle of proportionality, with respect to the legitimate aims*

> *pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.*

A proposed draft definition of terrorism in UK law

In the event that a legal definition of terrorism is thought necessary or desirable, therefore, the definition in s1 Terrorism Act 2000 should be amended as follows:

- the quality of intention needed for an act of terrorism against the government under s1(1)(b) should be more narrowly defined, ie 'compel', 'coerce' or 'intimidate' instead of 'influence'. This would more accurately reflect the essence of terrorism as a form of intimidation and would also bring the UK definition into line with those of other common law jurisdictions;
- a clearer distinction should be drawn in s1(2) between actions involving violence against persons and those which negatively effect other interests, eg damage to property, disruption of an electronic system, etc. Actions which do not involve direct threats to physical integrity should not be considered terrorist acts unless they involve some major threat to human welfare. This is because many kinds of political activity may otherwise fall within the definition of terrorism as currently defined, eg protests involving criminal damage, strikes or demonstrations which involve disruption to services, etc. A specific exemption for 'advocacy, protest, dissent or industrial action' should be considered as per the definition of terrorism in Australian, Canadian, New Zealand and Hong Kong law.
- in particular, serious interference or disruption to an electronic system within s1(2)(e) should only be considered a terrorist act where that disruption endangers human life or creates a serious risk to public health or safety;
- actions involving the use of firearms or explosives as set out in s1(3) should not automatically constitute terrorist acts. Instead, there should either be a rebuttable presumption that such acts are terrorist or, alternatively, s1(3) should only apply to actions involving violence against persons;
- where the definition of terrorism in UK law is given extra-territorial effect, either the operation of the provision in question or the definition itself should be qualified in such a way as to avoid criminalising the legitimate use of force against nondemocratic governments as discussed in paras 12-17 above.

The Appendix sets out an alternative to s1 Terrorism Act 2000 which incorporates these points. The aim has been to provide a definition that is both effective and proportionate, while retaining the structure of the existing definition in s1.

Having regard to the inherent difficulties of defining such a contested concept, it is doubtful that any definition could be described as ideal. Nonetheless, it offers a useful starting point for identifying the relevant issues at stake.

Appendix: JUSTICE's proposed definition of terrorism

(1) In this Act, 'terrorism' means the use or threat of action where –
- (a) the action falls within subsections (2) or (3),
- (b) the use or threat is designed to –
  - (i) coerce or compel the government or an international governmental organisation to do or refrain from doing any act, or
  - (ii) intimidate the public or any section of the public, and
- (c) the use or threat is made with the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it involves serious violence against a person.

(3) Action falls within this subsection if it –
- (a) involves serious damage to property,
- (b) involves serious damage to the environment, or
- (c) is designed seriously to interfere with or seriously to disrupt an electronic system or system of communication, and the damage, interference or disruption is of a kind likely to endanger human life or pose a serious risk to the health or safety of the public, or a section of the public.

(4) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(a)(ii) is satisfied.

(5) Subsection (6) applies if an action falls within subsections (2) or (3) and –
- (a) takes place outside the United Kingdom,
- (b) is committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom,
- (c) does not involve harm or the threat of harm to a national of the United Kingdom, and
- (d) is not designed to intimidate the public or any section of the public.

(6) The use or threat of an action to which this subsection applies shall not be considered terrorism where it is undertaken solely for the purpose of establishing or restoring democratic government.

(7) In this section –
- (a) 'action' includes action outside the United Kingdom,
- (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
- (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
- (d) 'the government' means the government of the United Kingdom or of a country other than the United Kingdom.

Explanatory notes

1. In place of the reference to the use or threat of action designed to '*influence* the government' in s1(1)(b), the draft subclause (1)(b)(i) adopts the formulation 'coerce or compel the government … to do or refrain from doing any act' that is standard in most recent domestic and international definitions. Draft clause (1)(b)(i) also includes reference to actions directed against international governmental organisations, as is currently provided by the 1999 New York Convention for the Suppression of the Financing of Terrorism, the 2002 EU Framework Decision on Combating Terrorism, the recital to the 2005 Council of Europe Convention on the Prevention of Terrorism, and clause 34 of the Terrorism Bill.

2. Subclauses (2) and (3) replace the existing structure of s1(2), separating out actions involving violence against persons from those which pose indirect threats to human welfare and public safety. The structure of subclause (3) in particular provides that actions that do *not* involve violence against persons only fall within the definition where they are of a 'kind likely to endanger human life or pose a serious risk to the health or safety of the public, or a section of the public'. This is because actions beneath this threshold do not appear to us to reach the appropriate degree of intensity to count as terrorist acts. We consider this form of drafting is marginally preferable to the alternative approach taken in Australia, Canada, Hong Kong and New Zealand, which is to provide a specific exception for serious damage and disruption caused by 'advocacy, protest, dissent or industrial action'.

3. At the same time, subclause (3) also broadens the existing grounds beyond disruption to electronic systems, to include serious damage to the environment and serious disruption to systems of communication as well.

4. Subclause (4) retains the existing absolute rule in s1(3) that actions involving the use of firearms or explosives are automatically terrorist acts. However, due to the altered structure of subclauses (2) and (3), this is strictly limited to only those actions involving serious violence against persons and not damage to property, etc.

5. Subclauses (5) and (6) offers one attempt at excluding extra-territorial jurisdiction for actions involving the legitimate use of force against nondemocratic governments as discussed above. The key conditions to be met are that the action in question:

- does not involve intimidation of the public anywhere in the world, (ie does not involve attacks against civilians);
- does not take place in the UK;
- does not relate to the UK's affairs;
- does not involve threat or harm to a UK national (including UK soldiers); and
- is undertaken solely for the purpose of establishing or restoring democratic government.

Any attack on a civilian population anywhere in the world is necessarily intimidation for a political purpose and thus terrorism. Based upon the language of Article 187A(8) of the Greek Penal Code, the exception outlined above would only cover those actions occurring outside the UK directed against the purely military targets of nondemocratic governments. Attacks against democratic governments or civilians anywhere would fall outwith the exception. It must be conceded that such an exception presents severe difficulties, not least the challenge for the UK's foreign relations with nondemocratic governments. For this reason, subclauses (5) and (6) are offered as only a tentative solution. However, the legitimate exercise of fundamental rights must in the final analysis trump the interests of diplomatic harmony.

Eric Metcalfe is director of human rights policy at JUSTICE.

Notes

1 Rousseau, The Social Contract, trans GDH Cole, Everyman, 1993, p274-275.
2 Rawls, A Theory of Justice, Oxford University Press, 1972, p355.
3 Waldron, 'Unintentional Legislation' in A. Marmor (ed.), Law and Interpretation, Clarendon Press, 1997, p2.
4 The countries and their approximate populations are as follows: Bhutan (2.2 million), Burma (42.9 million), Cuba (11.3 million), Eritrea (4.5 million), People's Republic of China (1.3 billion), Laos (6.2 million), Libya (5.7 million), Iran (68 million), Nepal (27.6 million), North Korea (22.9 million), United Arab Emirates (2.5 million), Vietnam

(83.5 million), Saudi Arabia (26.4 million), Sudan (40.1 million), Syria (18.4 million), Turkmenistan (4.9 million). Source: CIA World Factbook 2005.
5 Prominent examples include such countries as Egypt, Uzbekistan and Zimbabwe.
6 Oxford English Dictionary, p820. Emphasis added. See eg Schama, Citizens: A Chronicle of the French Revolution, Penguin, 1989, at p792, discussing the effects of the Terror on the population of the Vendée in 1794: ' whatever claims on political virtue the French Revolution may make on the historian's sympathy, none can be so strong as to justify, to any degree, the unconscionable slaughters of the winter of the year II [of the Revolutionary Calendar]'.
7 See eg Nozick, Anarchy, State and Utopia, Oxford: Blackwell, 1974, at p23: 'A state claims a monopoly on deciding who may use force when; it says that only it may decide who may use force and under what conditions; it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries; furthermore it claims the right to punish all those who violate its claimed monopoly'.
8 (1690) Bk 2,Ch 19, para 222, Two Treatises of Civil Government, Everyman, 1924, p229.
9 US Declaration of Independence, 1776.
10 See eg Rawls, Theory of Justice, n2 above, at p368. In the context of his discussion of civil disobedience, Rawls grants that 'in certain circumstances militant action and other kinds of resistance are surely justified', although he does not discuss examples.
11 See eg Gearty, 'Terrorism and Human Rights' [2005] 1 EHRLR 1 at 2: 'practically all the institutions that we value, and the esteem of many of the historic leaders that we revere, are rooted in foundations that overflow with innocent blood, shed for political ends'.
12 See eg n4 and 5 above.
13 Q21, evidence of Rt Hon Charles Clarke MP, Secretary of State for the Home Department, to the House of Commons Home Affairs Committee inquiry on the Draft Terrorism Bill (HC 515, 11 October 2005).
14 See eg *Seventh Report of Her Majesty's Commissioners on Criminal Law* (Cmd 448: March 1843), vol 19, p1: 'The motive by which an offender was influenced, as distinguished from his intention, is never material to an offence. If the prohibited act be done, and done with the intention by law essential to the offence, it is complete, without reference either to any ulterior intention or to the motive which gave birth to the intention'.
15 As one legal academic noted, 'Lawyers need abstract definitions – the famous definition of 'pornography' by Justice Potter Stewart of the US Supreme Court being the exception which confirms the rule. The rule [with terrorism] is, unfortunately, that we have to know it, *before* we see it. Therefore, although we may all agree with the Representative of the United Kingdom to the United Nations that 'what looks, smells and kills like terrorism is terrorism', as lawyers we still have to work on an abstract definition of what should legally constitute terrorism': Walter, 'Defining Terrorism in National and International Law' in Walter, Vöneky, Röben, and Schorkopf (eds), Terrorism as a Challenge for National and International Law: Security versus Liberty?, Springer-Verlag, 2004, at p25.
16 See Aristotle, Ethics, Bk V, 1131a10-b15. See eg most recently *R v Secretary of State for Work and Pensions ex p Carson* [2005] UKHL 37 per Lord Hoffman at para 10: 'The principle that everyone is entitled to equal treatment by the state, that like cases should be treated alike and different cases should be treated differently, will be found, in one form or another, in most human rights instruments and written constitutions. They vary only in the generality with which the principle is expressed'.
17 The principle of nullum crimen, nulla poena sine lege is expressed in Art 7(1) ECHR ('No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'). See also the speech of Lord Bingham of Cornhill in *R v Wilmington* [2005] UKHL 63, para 36, expressing the view that a criminal offence should be 'clear, precise, adequately defined and based on a discernible rational principle'.
18 In addition to the requirements of s3 Human Rights Act 1998, it is a principle of statutory construction that the provisions of any Act must be read narrowly where fundamental rights are engaged. See eg *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26 per Lord Bingham at para 5: 'Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment'. See also *R v Secretary of State for the Home Department,*

ex p Simms (1999) 3 WLR 328 (HLP), 340G-H per Lord Steyn. See further see Cross, Statutory Interpretation, Third edn., 1995, 165-166; *Halsbury's Laws of England*, fourth edn. reissue, vol.8(2), (1996), p13, para 6.

19 *Inquiry into Legislation Against Terrorism* (Cm 3420, October 1996), para 3.1. See also para 94 of the Privy Counsellors Review Committee chaired by Lord Newton, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC100: 18 December 2004).

20 See JUSTICE briefing for second reading of the Terrorism Bill in the House of Lords (March 2000), para 1.5.

21 See Newton Committee report, n19 above, para 79.

22 Ibid, fn11.

23 See Appendix for the text of the definitions.

24 50 United States Code §1801(c)(2)(A), as amended by section 802 of the USA PATRIOT Act.

25 This is the approach adopted most recently in Art 1(1) of the Council of Europe Convention on the Prevention of Terrorism 2005, which defines a 'terrorist offence' as 'any of the offences within the scope of and as defined in one of the treaties listed in the appendix'.

26 Art 1(c), Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971.

27 S83.01(1)(b)(i).

28 Art 1(2). Emphasis added. The Convention apparently failed to enter into force due to lack of sufficient ratification.

29 See eg Hong Kong United Nations (Anti-Terrorism Measures) Ordinance 2002, s2(3)(a): 'intended to compel the Government or to intimidate the public or a section of the public'.

30 Emphasis added. See eg UN Security Council Resolution 1566 (2004). See also Art 2(1)(b)(iii) of the International Convention on Combating Acts of Nuclear Terrorism 2005: 'With the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act'.

31 13 June 2002 (2002/475/JHA), Art 1. Emphasis added.

32 S5(2)(b).

33 17 December 1996, based on para 3 of the General Assembly's 1995 Declaration on Measures to Eliminate International Terrorism (A/RES/49/60). Emphasis added.

34 S83.01(1)(b)(i).

35 Adopted by the UN General Assembly, 15 December 1997.

36 Art 2(1)(b). Emphasis added. Reference to property damage causing economic loss is also found in article 2 of the Draft Comprehensive Convention on International Terrorism Annex I A/57/37 (Report of the Ad hoc Committee established by General Assembly Resolution 51/210 1996).

37 S5(3)(e).

38 New York, 13 April 2005.

39 New York 9 December 1999. Art 2(1)(b).

40 Para 3.

41 See n23 above.

42 See n31 above.

43 Art 2(1) of the 1999 Convention of the Organisation of The Islamic Conference on Combating International Terrorism similarly provides: 'Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime'.

44 A similar limitation was contained in the South African Anti-Terrorism Bill 2002. The Bill was nonetheless shelved following strong domestic opposition from trade unions and other civil society groups. The former characterisation of the ANC as a terrorist organisation by the Apartheid government also undoubtedly played an important part in popular resistance to the definition.

45 S100.1(2A) Security Legislation Amendment (Terrorism) 2002 (Australia) exempts 'advocacy, protest, dissent or industrial action' where those actions are not intended to cause the specified harm. S5(5) Terrorism Suppression Act 2002 (NZ) stipulates that 'the fact that a person engages any protest, advocacy, or dissent, or engages in any strike,

lockout, or other industrial action is not, by itself, a sufficient basis for inferring that the person' has an intention to commit a terrorist act. S2(b) United Nations (Anti-Terrorism Measures) Ordinance 2002 (HK) provides that threats of disruption or interference do 'not include the use or threat of action in the course of any advocacy, protest, dissent or industrial action'.
46 Ibid, s5(4).
47 Art 187A(8), as originally provided by Legislative Decree 53/1974 and as amended by Art 40 of Law 3251/2004.
48 As Lord Cope of Berkeley noted during the parliamentary debates on the 2000 Act: 'the Bill does not create an offence of terrorism in itself, but the definition is the key that allows the police, the courts, the Government, and so on, to use the special anti-terrorist measures provided by the legislation, some of which contain reference to offences which were thought necessary to their proper operation. Therefore, from the point of view of offences, but also in a much wider sense, the definition is vital to the success of the Bill' (Hansard, HL Debates, 16 May 2000, col 214).
49 Lloyd, *Inquiry into Legislation Against Terrorism,* n20 above.
50 S20 of the 1989 Act defined terrorism as 'the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear'. We fully accept, however, that the exclusion of domestic (i.e. non-Irish and non-international) terrorism from the 1989 definition was unsustainable for the reasons set out by Lord Lloyd.
51 The government consultation paper, *Legislation Against Terrorism* (Cmd 4178, December 1998), para 3.15 favoured specifying that 'serious violence' would need to be defined so that it included 'serious disruption, for instance resulting from attacks on computer installations or public utilities'.
52 The other change in s1(2)(d) was arguably implicit in the previous definition of the threat or use of serious violence.
53 See eg n19 above.
54 Ibid, para 2.16.
55 Ibid, para 2.4.
56 Report of the Joint Committee on the Draft Civil Contingencies Bill (HL 184; HC 1074, 28 November 2003), para 8.
57 Ibid.
58 Ibid, para 47.
59 Ibid, para 48. Cf ss1(1)(a) and 19(1)(a) Civil Contingencies Act 2004, defining 'emergency' as, in the first instance, 'an event or situation which threatens serious damage to human welfare'.
60 See n50 above, para 3.18.
61 Clause 1(1).
62 See eg the conclusion of the Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (HL 75; HC 561), 5 December 2005, para 13: 'we believe that the definition of terrorism—for the purposes of the [clauses 1, 2 and 8 of the Terrorism Bill]—needs to be changed in order to avoid a high risk of such provisions being found to be incompatible with Article 10 of ECHR and related Articles'. See also the observation of the UN High Commissioner for Human Rights, Ms Louise Arbour, concerning the scope of the offence of encouragement to terrorism in her letter to the UK's Permanent Representative to the UN Office and other international organisations in Geneva, 28 November 2005: 'The draft offence contained in clause 1 fails to strike a balance between national security considerations and the fundamental right of freedom of expression'.
63 UNSCR 1456 (2003), para 6.
64 Art 8.

Book reviews

Discrimination Law: Text, Cases and Materials (Second Edition)

Aileen McColgan,
Hart Publishing, 2005
766 pp £25

This is a second edition of the book which claims to offer 'comprehensive coverage of the relevant UK and European Community law with a critical analysis of that law'. As befits a subject that is currently growing exponentially it is a large book, over 750 pages. The first half of the book deals with the basic concepts of discrimination, initially direct and indirect discrimination and victimisation, before considering the concept of equality itself and then coverage of the laws and enforcement. The second half moves on to consider the basic grounds for discrimination – sex, race, disability, religion or belief and gender identity and sexual orientation, but not age. The law is stated to be accurate up to 8 April 2005.

This is essentially a casebook which contains a multiplicity of old and new materials relating to discrimination law, a fascinating collection of extracts from articles, cases, books, reports and even a JUSTICE consultation response. These reflect a rapidly developing area of law. It covers the law in Great Britain as well as, very usefully, the law in Northern Ireland, together with the effect of European law and the European Convention on Human Rights. It also uses relevant extracts from Canadian and American law and, to a lesser extent, Irish, Australian and South African law to show how the same sorts of provisions have been developed in other jurisdictions and to highlight different approaches to the same problems. The use of extracts with a linking commentary serves to set many of the current debates in their historic context and helps to explain the current complexity of the law.

The introductory chapter sets out the development of the law and its current problem areas. The discrimination chapter deals with the different definitions that have been developed in order to capture unlawful discrimination. The equality chapter has an extensive discussion of the parameters of positive discrimination and positive action which leads into a consideration of mainstreaming. The next chapter deals with the scope and coverage of discrimination law, reflecting the difference between the different grounds and how this has arisen, and this is followed by a chapter on enforcement looking at the different methods of enforcement.

The second half of the book considers each of the grounds for discrimination in turn: sex, race, disability, religion and belief and gender identity and sexual orientation, placing each in its historical context and showing the way in which the key provisions have developed.

This casebook is a real treasure chest of discrimination materials useful to both the student and the policy officer. For the practitioner it can be used to spark off new areas of enquiry to generate novel arguments.

Gay Moon, head of the equality project, JUSTICE

The Impact of Human Rights Law on Armed Forces

Peter Rowe

Cambridge University Press, 2006

277 pp £30

The publication of this book could not be timelier. With more photographs emerging of the horrendous abuse of prisoners at the US controlled Abu Ghraib jail in Iraq and video footage being released of the ill treatment of civilians in Basra by British troops, the conduct of those serving in the armed forces and the standards of behaviour they should attain to is firmly in the spotlight. To this end, Peter Rowe's intriguing book considers the elements of international and domestic human rights law that are applicable to all aspects of military service, whether on the battlefield or in the barracks.

Rowe provides an excellent overview of the possible effect of human rights norms on all types of military service, including international armed conflict and civil war. His concern is not only with human rights violations committed by servicemen against civilians. The book begins with a discussion of the human rights framework relevant to those who undertake military service, as chapters one to four of the book examine the nature of human rights law as it applies to career service personnel, conscripts and volunteers.

Chapter two turns to the issue of the obligations that a state owes its armed forces during peacetime. Statistically a soldier is more likely to be killed during peacetime than at war.[1] Rowe considers the possibility of holding the state accountable for the breach of the right to life in the case of accidental death or even suicide, recalling the allegations of bullying and abuse by senior offices that emerged after the police investigation into the deaths of four recruits at Deepcut Army Base in Surrey.[2] Using case law from the European Court of Human Rights as illustration, Rowe posits that in an instance such as this, it would be difficult to hold the army accountable. It would have to be established that there was a real and immediate risk to an individual which the military authorities had or ought to have had knowledge of.[3] This would possibly occur if the authorities became aware of a pattern of behaviour of the superiors which has contributed to the death of a soldier.[4]

Chapter five considers the applicability of human rights law, alongside and in addition to the framework of international humanitarian law, during times of international armed conflict. Over half a century after their creation, the obligations contained within the framework of international humanitarian law have been firmly assimilated into the consciousness of the armed forces and are now firmly part of military life. In contrast, Rowe argues that the human rights of foreign nationals caught up in conflict have not been 'so well bedded into the military ethos of the armed forces'.[5] Rowe puts forward the proposition that this disregard of the violation of human rights norms within the military can be laid at the door of the disciplinary procedures which focus solely on the breaching of international humanitarian law obligations.[6] The armed forces have been slow to develop the duties bestowed on a state under human rights law into offences for which individual soldiers can be held accountable.[7]

In light of the Court of Appeal's recent decision in *Al-Skeini*[8] which concerned the death of an Iraqi civilian in the alleged custody of British troops, the discussion in chapter five regarding the extent of the jurisdiction of regional and international human rights treaties during periods of occupation is most welcome. Rowe holds the view that the nature of occupation severs the link which connects the protection of an individual's human rights to their own state. Accordingly, the lacuna in the law this creates necessitates the extension of the human rights jurisdiction of the occupying force to those nationals under their control.[9] The nature and the extent of this control will be shaped and developed by the courts, a matter which will hopefully be further clarified if and when *Al-Skeini* goes before the House of Lords.

Instances of civil war have, in the latter part of the last century, given rise to some of the worst instances of mass human rights abuses. Chapter six centres on the applicability of human rights norms to situations of non-international armed conflict. Rowe acknowledges the ambiguities that arise from this form of conflict: ascertaining who is in fact an enemy combatant or a civilian, if and to what extent the national law of a state continues to apply in case of a derogation, or whether the disturbance within a state even attains the level of armed conflict. The chapter attempts to clarify and identify the legal issues, discussing a cross section of rights and the possible applicability of human rights law in each instance.

With modern warfare developing far beyond what was originally envisaged by the drafters of the Geneva Conventions over 50 years ago, the conduct of the allied forces in Iraq has exposed the limitations inherent in international humanitarian law in governing the behaviour of armed forces. This book is more than just an accessible introduction to the impact of human rights law on armed forces. Its importance lies in the foundation it lays for the future development of human rights law to meet these new legal challenges and perhaps setting a code of conduct for the military to adhere to. The appeal of this book is therefore not limited to military law academics and practitioners, but to anyone who has an interest in the evolution of human rights law.

Joanna Hunt, human rights intern with JUSTICE, winter 2006

Notes

1 At p30.
2 'Deepcut Abuses Leaked in Report', BBC News, 29 November 2004, http://news.bbc.co.uk/1/hi/uk/4052565.stm.
3 At p34.
4 At p34.
5 At p115.
6 At p116.
7 Ibid.
8 *R (Al-Skeini and others) v Secretary of State for Defence* [2005] 2 WLR 1401.
9 At p128.

Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror

Jackson Nyamuya Maogoto
Ashgate, 2005
218 pp £55

Terrorism and how to fight the 'war on terror' are hot button issues which the international community is struggling to address. This book successfully outlines and explains the challenges facing the international community, the role international law has played past

and present, and the future of counter-terrorism.

The main theme of *Battling Terrorism* is the use of military force to counter terrorism and how international law is used to achieve that goal. The author adroitly sets out the history of terrorism in the modern era, from the French Revolution to the September 11 attacks on the World Trade Towers and Pentagon, reminding the reader that the concept and use of terrorism is not new and showing how terrorism has been used to force internal change. He further highlights the development of various concepts relating to the use of force in the era of the modern nation-state, including the use of international law to justify pre-emptive strikes for purposes of self-defence. This concept of pre-emptive strike and the international law used to justify it is repeated throughout the book, to strengthen arguments for surpassing the Security Council of the United Nations (UN) in order to protect national borders.

The first half of the book provides an analysis of international law and how terrorism fits into the law, the current conflict being that while placing terrorism under domestic criminal law is limiting, it does not fall neatly into law of war or law of peace. The concept of the law enforcement paradigm is introduced in chapter two, drawing the distinction between state sponsored acts of terrorism and individual acts. The chapter further explains how the UN is facing the challenge of addressing state sponsored terrorism, moving into a discussion of past military actions and the role that the UN and international law has played in justifying or condemning them. The book emphasizes that the UN does not want to encourage, and will not support, attacks disguised as self-defence which in fact are unlawful reprisals.

What the first half of the book makes clear is that current terrorists include stateless entities that possess most of the attributes of a state: wealth, willing forces, training, organisation, and potential access to weapons of mass destruction.[1] The challenge for states as they seek to contain and punish terrorists is that they do not overstep limits set out by the UN, or infringe on other states' sovereignty and risk war.

The second half of the book focuses on the United States' post-September 11 counter-terrorism policies. The Bush doctrine is introduced in chapter four, which is the philosophy of pre-emptive strikes against states that, allegedly or in fact, sponsor terrorism. The chapter details past actions taken by the United States in an attempt to combat terrorism and illustrates what past Presidents have done in an effort to punish terrorists. Some actions have been supported: for example, the 1993 cruise missile attack on Baghdad in response to an assassination attempt on former President George Bush Sr. or the 1998 missile attack on the Al-Qaeda training camp or Sudanese pharmaceutical plant suspected of producing chemical weapons after the attacks on the US embassies in Kenya and Tanzania. The present war in Iraq, by contrast, has been strongly condemned.

What the author does particularly well is to draw attention to the steps taken in response to the September 11 attacks. The invasion of Afghanistan was supported by the UN and the international community. He emphasises the problems raised when

the United States decided to invade Iraq using the rationale that the actions were a pre-emptive strike and necessary for purposes of self-defence. The remaining chapters underline the long-term problems with blurring armed attacks and terrorist acts using Article 51 of the UN Charter (which defines armed attack) and applying it to terrorist attacks. The author debates whether this use of Article 51 is a positive step or would make it too broad, allowing for armed attacks against states who tolerate terrorists on their soil when these individuals may be viewed as criminals by the host nation and seen as terrorists abroad.

The last chapter leaves the reader well informed but with concerns about the future of the 'war on terror' and the role of the United States in addressing terrorism. The main concern of the author is the need to have and follow international rules of law in addressing terrorism, with the greatest concern being the Bush administration's desire to make pre-emptive strikes part of international law. The author is resolute in the view that this concept is a dangerous innovation and a threat to peace. While steps need to be taken to address terrorism, whish is of itself a threat to peace, it is vital that laws be followed to avoid 'loosening the indicia of state responsibility' which may result in the militarisation of crime.[2]

Melania Page, intern with JUSTICE from Boston College Law School, spring 2006

Notes

1 At p72.
2 At p184.

French Criminal Justice: A comparative account of the investigation and prosecution of crime in France

Jacqueline Hodgson
Hart Publishing, 2005
281 pp £30

At a time in which the influence and interference of the state within matters of justice in the United Kingdom continues to be an acute concern, this book provides a comprehensive comparative analysis of the functions of the judiciary and the defence in French criminal justice.

French Criminal Justice is based on the systematic observation of the daily working practices of police, gendarmes, prosecutors and juges d'instruction across a number of sites and time periods. The focus of the study is upon the process of criminal justice in France and, in particular, the ways in which it is able to protect the interests of the accused whilst at the same time ensuring the effectiveness of the criminal investigation.

Chapter two covers recent legislative trends and is likely to be accessible for both the newcomer and those familiar with the French criminal justice system. The 1993 and 2000 reforms, which made important changes to French criminal procedure, are discussed.
In many instances the reforms were essential to ensure compliance with the European Convention on Human Rights. Hodgson also provides a narrative of the change in focus when the Raffarin administration took office in 2002 and security took priority over due process protections and ECHR guarantees. Hodgson observes that despite

the apparent stability of a codified procedure setting out clear principles, in France – as in England and Wales – short-term political policies impact significantly on criminal justice.

She also touches upon areas that have aroused particular controversy, such as the provisions relating to the treatment of juvenile offenders and the removal of the obligation upon the police to inform the suspect of his right to silence, an established component of Article 6 ECHR. In relation to the latter, Hodgson notes that while member states are agreeing minimum protections for suspects as a clear guide for those states joining the European Union, France is removing one of those very protections.

Chapter three is concerned with the police, prosecutors and judges and sets out the broader position which these legal actors occupy both relative to each other and in comparison with the structural and legal cultural understanding of judges and prosecutors in England and Wales.

Chapter four examines the nature of the role played by the defence within a broadly inquisitorial model; the ways in which this is being redefined or developed through new legislation; and the ways in which the defence role is understood by legal actors.

Chapters five and six then go on to examine in detail the ways in which police enquiries are influenced or constrained by judicial supervision, and the extent to which the suspect's rights are being guaranteed through this arrangement in practice. Chapter seven explores 'instruction' and prosecution.

This book demonstrates that, whilst judicial supervision is at the centre of the procedural model of criminal justice, in practice it is the police who dominate the process of case construction. Hodgson calls into question the extent to which judicial supervision can continue to be invoked to justify the absence of certain safeguards.

Thus, Hodgson concludes that the dominant pre-trial process is one in which cases are not investigated by a judge, but by the police; in which supervision is minimal and mainly bureaucratic; which offers insufficient guarantees as to reliability of the evidence presented through the dossier; in which there is no provision for defence participation; and in which the executive has yet further opportunities to intervene.

Hodgson concedes that there are attempts to reposition French criminal procedure, to move away from the traditional adversarial/inquisitorial dichotomy towards an approach that is grounded more strongly in the jurisprudence and the protections of the ECHR. However, Hodgson persuasively argues that long term and effective change will require an acknowledgement of the realities of criminal investigation, of the marginalisation of judicial supervision, the centrality of the police construction of the case and the absence of safeguards guaranteeing sufficiently the reliability of evidence and the protection of the accused.

The socio-legal approach of this book offers a comprehensive legal analysis of the roles of police, prosecutors, defence lawyers and judges. Comparisons with the process in England and Wales both render the book more accessible and act, as the author points out, as a tool of analysis. Happily, the study does

not set out to measure whether the French criminal justice procedure is 'better' than that in England and Wales, nor whether legal systems with their roots in different procedural traditions are gradually converging. Rather, the author states her objective as being to provide a critical empirical account of pre-trial criminal justice in France and a more profound understanding of the forces by which it is shaped. In this, her objective is broadly achieved.

Laura Segger, criminal justice intern with JUSTICE, winter 2006.

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