

**PUBLIC LECTURE – Faculty of Law, University of Sydney  
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**"The Law's Response to Terrorism - What mechanisms can best balance the interests of society and the rights of individuals?"**

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**Thanks** to David Kinley for inviting me here to give this talk. As a fellow Ulsterman it's a matter of considerable pride that the first holder of a chair in human rights law in Australia should be from my part of the world.

**Thanks** too to all of you for coming. I really appreciate your taking the time and trouble. I plan to speak for about 40 minutes, leaving some time thereafter for comments and questions.

I am not at all sure what kind of people are in the audience this evening but I have chosen to try to be as **pragmatic** as possible in this talk. I don't want to theorise too much, or to be too rhetorical. The time constraints mean that I will have to be very general at times but occasionally I will get down to brass tacks – looking at some real cases and some recent reports. I am taking it for granted, by the way, that societies throughout the world want to protect themselves against what is loosely called terrorism and that they will devise laws and practices to help them to do so. My perspectives will, I'm afraid, be a bit **Euro-centric, and common law centric**, because those are the ones I am most familiar with.

During my short stay in Australia I have been fascinated to read about the anti-terrorism laws here and to note that some of them go even further than the measures taken in Britain or America. This is undoubtedly due, in part, to the absence of a Bill of Rights in this jurisdiction, surely a state of affairs which cannot persist for much longer? I was tempted to spend the entire lecture **measuring Australia's anti-terrorism laws against the standards set by the European Convention on Human Rights**, just in case Mr Howard decides to ratify the European Convention, but I think I'll keep that piece of speculation for the pages of a law journal.

I'll also be taking advantage of a part of **my own background** that I cannot escape – the fact that I was brought up and still work in a part of the world where terrorism was rife for decades. I have been affected by the fact that I was working in an ambulance control centre on Bloody Friday in 1972 – when a series of 22 IRA bombs went off in Belfast killing 9 people and seriously injuring 130 others. I have been affected by the fact that one of the two colleagues who joined the Law Faculty at Queen's on the same day as I did in 1979 was murdered in the grounds of the university four years later simply because he dared to proclaim that he was proud to be a young unionist. And I have been affected by the fact that as someone who was born a Protestant (but who has had no religion for the last 30 years) terrible atrocities were being carried out supposedly in my name by Loyalist paramilitaries. Moreover my involvement in civil liberties work in Northern Ireland has long made it obvious to me that some members of the security forces which were there to protect us against terrorists were themselves, at times, committing shocking acts, including colluding with Loyalist paramilitaries to murder Republicans and Catholics. I have been affected by all of these things. None of us can escape his or her past. We are inevitably shaped by it. But **two things I have learned from my own** – one, the use of violence for political ends is a very real, dangerous and frightening phenomenon,

and will no doubt continue to be so for generations to come (certainly if we are talking about such violence committed by states) and, two, the steps taken to combat such politically motivated violence must themselves be very carefully considered – otherwise they will be ineffective and possibly even counter-productive: it is possible to argue that in the 1970s, 80s and 90s some of the measures taken to deal with paramilitary violence in Northern Ireland actually prolonged the troubles there, handing publicity coups to the paramilitaries and blinding outsiders to where the greater evils lay. On the other hand, one of the difficulties in this field is that it is extremely difficult to prove just exactly how effective anti-terrorism measures are, or have been; we cannot know for certain how much better or worse things would have been had certain laws not been in place.

**The main message I want to get across this evening is actually a simple one.** It is that in dealing with what is referred to as terrorism there are rarely obvious solutions, very few black and white choices, no quick fixes. What is required is a complex legal and political strategy that “manages” or “curtails” the problem. Devising and implementing that strategy requires constant care and attention, frequent reassessments of whether it is proving successful and a clear willingness to make changes to it if and when they are deemed necessary. This is an area where, like so many others in life, there are few absolutes to work with. You might think that is a strange thing for a human rights lawyer to say, but I would maintain that it’s true. Human rights, to my mind, are not absolutes; they are precious values but very frequently, and justifiably, they have to make room for (I don’t say take second place to) other values. The challenge for a human rights lawyer, especially of the academic variety, is to specify precisely when and how human rights can be accommodated when new policies are being devised to deal with new threats to democracy.

In fact I think there is often **too much attention paid to the wrong issues in this field.** Of course it is important to debate ardently what laws are to be in place to combat terrorism, but what is actually even more important is how those laws are actually used in practice. And sometimes it is more important to scrutinise not laws but practices and procedures. Two weeks after the bombs on the London underground and buses in July 2005, which killed 56 people, there were further attempts to blow up tubes and buses, but mercifully they failed. People accused of those attempts are currently being tried in London. But just a day after those failed attempts, at Stockwell Tube Station, London police officers shot dead a Brazilian man, Juan Charles de Menezes, believing he was a suicide bomber. They did so not because of any new laws that had been passed but because the Association of Chief Police Officers in England and Wales had told their armed officers that if and when they had the chance to intercept a suicide bomber they should shoot to kill. Mr de Menezes was, however, an entirely innocent man. Later the Crown Prosecution Service decided not to try any of the police officers involved in this killing for murder or manslaughter but the force is to be prosecuted for breaking health and safety legislation. That might sound a rather weak response, especially as it may not lead to any police officer serving time in prison for the killing, but arguably it is a more sensible one, one that will rectify the systemic defects in the practices used by police officers. And of course a large compensatory sum should be awarded to Mr de Menezes’ family.

Similarly, in January of this year the **Police Ombudsman for Northern Ireland** published a devastating report in which she concluded that during the 1990s the police in Northern Ireland colluded with Loyalist informers to turn a blind eye to the killing of several people. No special anti-terrorism law created such breaches of the rule of law – it was simply very bad policing.

## Language issues

So my first main point tonight is that commentators should avoid getting too hung up on the wording of new laws because very often this is less important than the way these laws are applied and interpreted by law enforcers.

**But wording can of course be important**, if only because of the general impression it conveys rather than the specific meaning it is intended to communicate. In this context it is now customary for human rights lawyers to condemn the phrase so beloved by President Bush – “the war against terrorism”. Personally I don’t object to this, so long as it is not taken in a literal sense, to mean that the laws of war are to be applied in the fight against terrorists. The laws of war, let’s recall, allow combatants to seek out and kill one another; they allow the use of violence in an offensive and not just a defensive mode and they allow the taking and keeping of prisoners for the duration of the conflict. I don’t think we should be approaching terrorism with those laws in mind. **But it’s worth saying, is it not, that we should be adopting a completely zero tolerance of terrorism.** We should be discouraging and deterring it at all possible opportunities. We should be wary of excusing terrorism because of some deep-down “root causes”. By all means let us examine and discuss those root causes; let us take steps to alleviate them, but **let us never accept that they are in any sense an acceptable defence to a charge against terrorism.**

One of the dangerous myths being propagated about the peace process in Northern Ireland (a process further cemented last week, I hope, through the elections held there for a local Parliament) is that it was brought about because of the armed struggle of the IRA. Wrong! It was brought about because the IRA (and some Loyalist groups) decided in 1994 to give up the armed struggle and use the ballot box instead. We have seen how spectacularly more successful the ballot box has been for Irish Republicans than violence ever was. We have got to where we are in Northern Ireland not because of the violence but in spite of it. There is possibly a message there for other politically motivated violent groups. The Maoist guerrillas in Nepal may have recently learned the same lesson. Let’s hope that Hamas, the Tamil Tigers, ETA, FARC and a host of other rebel organisations around the world can come to the same conclusion soon.

## Defining “terrorism”

Although I have already used the word terrorism in this talk, I want to stress that I do not consider it to be essential to define terrorism in law.<sup>1</sup> I think it is a term that could be dispensed with in legal texts – just as activities such as paedophilia, or smuggling, or corruption, are dealt with by criminal laws which do not actually use those expressions very much, if at all. The search for a definition of terrorism is a chimera, not least, of course, because whenever states do try to define it they conveniently forget to include within it the use of violence by state for political ends! As the Canadian Supreme Court said in ***Suresh v Canada (Minister of Citizenship and Immigration)*** [2002] 1 SCR 3, at para.94: “The absence of an authoritative definition means that, at least at the margins, ‘the term is open to politicized manipulation, conjecture, and polemical interpretation’”.

So far the international community has at least agreed that attacks on civilians are unjustified, even if the terrorist group is a so-called “freedom-fighting” group, but I think **the United Nations has made a mistake in trying to be too prescriptive** as

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<sup>1</sup> Though I greatly respect the book recently published by a member of this University’s Faculty of Law, Dr Den Saul: *Defining Terrorism in International Law*, Oxford University Press, 2006.

to what laws can or cannot be made to deal with terrorism. I was confirmed in my view when I read the report published in December 2006 on Australia's anti-terrorism laws by Martin Scheinin, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. He bases his work on what the UN deems to be terrorism, which is enshrined in UN Security Council Resolution 1566 (2004), suggested by Russia following the attack on a school in Beslan, Ossetia, by Chechnyan rebels. Para.3 of this Resolution calls upon all states to prevent and punish criminal acts which are:

- committed with the intent to cause death or serious bodily injury, or the taking of hostages, with the purpose of:
  - provoking a state of terror in the general public or in a group of persons or particular persons,
  - intimidating a population, or
  - compelling a government or an international organization to do or to abstain from doing any act; and
- all other acts which constitute offences defined in the international conventions and protocols relating to terrorism.

This definition specifically excludes acts which are not committed with the intent to cause death or serious bodily injury. So blowing up unsupervised power lines or an evacuated building, planting hoax bombs, spreading an electronic virus, issuing death threats, etc are not included within the UN definition and Scheinin criticises Australia for being over-inclusive in its definition of "terrorist act" in section 100.1 of the Criminal Code. But to my mind, and I suspect the minds of most ordinary people, such acts should be included. On the other hand, **isn't the UN's definition overly inclusive?** Wouldn't Jack the Ripper, or any other serial murderer, be a terrorist in its eyes?

The UN, be it noted, has never linked its definitions of terrorism to the motives of the alleged terrorists. But in UK law, Australian law and (until recently) Canadian law such links have been made. Section 100.1 of your Criminal Code defines a terrorist act as an action, or threat of action, done with the intention of "advancing a political, religious or ideological cause". The UK's Terrorism Act 2000 and Canada's Anti-Terrorism Act 2001 contain similar provisions. But we find no such provisions in anti-terrorism legislation in the USA or in civil law countries such as France, Germany and Italy. In *R v Khawaja*, on 24 October 2006, Rutherford J in the Ontario Superior Court of Record, applying the Canadian Charter of Rights and Freedoms, ruled that the phrase used in the Canadian Act could not be justified in a free and democratic society. He said that:

*"the concern is that the focus on the essential ingredient of political, religious or ideological motive will chill freedom protected speech, religion, thought, belief, expression and association, and therefore, democratic life; and will promote fear and suspicion of targeted political or religious groups, and will result in racial or ethnic profiling by governmental authorities at many levels"* (para.73).

The Canadian government has announced that it is not going to appeal this decision – it can live it. And the Canadian Senate has recently recommended legislative removal of the offending words.<sup>2</sup>

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<sup>2</sup> Recommendation 1 in its February 2007 review of the Anti-terrorism Act 2001.

**And we have to remember what the purpose of such a definition is.** It is to trigger the adoption of special laws and practices which would otherwise not be used as part of the ordinary criminal law. But just because one sort of special law or practice is justified for one purpose does not mean that all sorts of others are justified too. There are at least eight different stages in the criminal justice system where some kind of special law or practice might be contemplated in the terrorism context. But the special characteristics of terrorism are not always relevant at every stage. You might want to proscribe certain organisations because you do not want them to be able to raise funds or to hold public meetings, but that does not mean that you need to have special laws governing the arrest, detention and questioning of people who participate in the activities of or who support such organisations. You might want to give the police special powers to search for materials that might be used for terrorist purposes (we all readily support such searches at airports), but that does not mean that anyone caught with such materials has to be tried in a special way.

As became very evident in Northern Ireland, **the more the legal system makes “terrorist suspects” into a special category, the easier it is for the people in that category to allege that they are being persecuted** by the legal system and the more difficult it is for the government to maintain the line that these people are simply criminals. To this day prisoners in Northern Ireland who have been convicted of offences under the special anti-terrorism legislation put in place for the province are housed separately from other prisoners and separately from prisoners representing rival paramilitary groups. At an annual cost of millions of pounds the British government falls for the line that these prisoners are somehow special. The Spanish government makes the same mistake by applying special rules to prisoners who have acted for ETA – they are imprisoned at an average of 600 kilometres away from where their families live in order to make it more difficult for family visits to occur. This approach simply helps to make the prisoners into martyrs and boosts ETA's cause. Earlier this month the Spanish government announced that it was going to release into house arrest an ETA prisoner who, having already served 18 years in prison for his involvement in 25 murders, was into the third year of an additional 3-year sentence for making more threats. He had become seriously ill after being on hunger strike for more than 16 weeks (and being force-fed). Despite the protests on the streets this weekend, I think the socialist government was right to release this man. It was an excellent way of preventing ETA from claiming a martyr and of indirectly demonstrating to ETA how hated they are by so many ordinary Spaniards.

The general thinking is that greater efforts must be made to ensure that a guilty terrorist does not go free than that a guilty ordinary criminal does not go free, presumably because terrorists are more dangerous. **But why, then, do we not have different laws and practices depending on the seriousness of the criminal charges brought against a defendant?** Why does an alleged shoplifter face the same tough criminal procedures as an alleged murderer? Personally I am against making any but the most minor changes to the criminal justice system in the processing of terrorists. I am not convinced that Australia's resort to questioning warrants and questioning and detention warrants (both for ASIO) are justifiable. The latter envisages up to 7 day detentions just for questioning. Neither power would, I think, be allowable under the ECHR, even if a derogation notice were to be issued. The Convention's ban on arresting anyone who is not reasonably suspected of an offence is just too essential (although the European Court came close to allowing it in Northern Irish cases such as *Brannigan and McBride v UK*). I am more willing to contemplate the justifiability of **control orders** (where there is no real deprivation of liberty) but not **preventative detention orders** (PDOs) – not yet used (allowing detention for 48 hours plus whatever the state allows – a total of 14 days in NSW).

**To make disclosure of the existence of a PDO a crime punishable with up to 5 years in prison seems particularly Orwellian.** The English Court of Appeal, in August 2006, upheld the legitimacy of control orders from an Article 6 point of view (i.e. they can be subjected to judicial review) but it invalidated one control order that was too drastic in its scope.

### **The “balance” metaphor**

It is wrong to think that legal systems, including the international legal system, had not thought about dealing with terrorism before 9/11. As Resolution 1566 recognises, there were already many relevant laws and conventions in place. But because legal texts, especially international ones, are usually drafted in very general terms, the custom developed of counter-posing steps to deal with terrorism against steps to protect human rights (Kofi Annan felt particularly honour-bound to remind state governments of the need to protect human rights while combating terrorism). And human rights conventions have traditionally been constructed in similar ways – they confer rights but go on to say that these rights are not absolute.

**The Benthamite critique of human rights seems very apposite here** – in his essay “Anarchical Fallacies”, which was a critique of the French Declaration of the Rights of Man and of the Citizen, published in English in 1843, he pointed out that the Declaration did not confer “real” rights because the government could always limit those rights. The rights were therefore imaginary. Marie-Bénédicte Dembour has recently demonstrated how this critique could also be applied to the European Convention on Human Rights,<sup>3</sup> and I think one could also apply it to other human rights charters. The fact is that very few, if any, rights are absolute – freedom from torture is supposed to be absolute, but what amounts to torture? Freedom from degrading treatment is also meant to be absolute but can this really be so when people are degradingly treated in prisons all over the world every day and no-one raises a finger to help them?

To make human rights activists, especially human rights lawyers, feel better about the fact that human rights are not absolute the metaphor of a “balance” is often employed. But it is important to be aware that **the “balancing” metaphor can be misleading. Society and individuals are interdependent.** One of society’s interests is the protection of the human rights of people living in that society. Conversely, the rights of individuals include the right to be protected against terrorism. The European Court of Human Rights has begun to develop the notion of positive obligations on states – duties to take steps to protect rights rather than just duties not to interfere with rights. **The Court has greatly developed the rights contained within Article 2** of the European Convention (the right to life): states must have in place a proper policing system, an effective prosecution system, a system for investigating deaths, a system for protecting people whose lives are under a real and immediate threat. If the UK was doing nothing to protect people against terrorism a victim, or even a potential victim, could well take a successful case in Strasbourg. Last year, under the ECHR as it is applied in the UK, an English High Court judge awarded substantial damages to the family of a man who was murdered by a gangster on the basis that the police had not adequately protected the victim against such an attack.<sup>4</sup> The European Court has recently begun to develop its jurisprudence under Article 8 (the right to a private and a family life) in the same way. The Supreme Court of India, of course, has for many years built a huge edifice of rights on the foundations of the right to life as protected by Article 21 of the 1950 Constitution of

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<sup>3</sup> *Who Believes in Human Rights?*, Cambridge University Press, 2006.

<sup>4</sup> *Van Colle v Chief Constable of the Hertfordshire Police* [2006] EWHC 360 (QB) (10 March 2006).

India. It will be interesting to see whether the same interpretation will eventually be given to the right to life enshrined in section 9 of **Canberra's Human Rights Act 2004**<sup>5</sup> or **Victoria's Charter of Human Rights and Responsibilities Act 2006**.<sup>6</sup>

### The “recipe” metaphor

I prefer the metaphor of a recipe to that of a balance. Rights need to be – and are – protected in accordance with a complicated mixture of rules, principles and other mechanisms, legal, political and international. It is those mechanisms which I will focus on during the remainder of this lecture, but the primary ingredient in the mix has to be the state's duty to protect people against violent acts and to justify limitations to human rights imposed in fulfilment of that duty to protect. The Canadians and the South Africans, under their respective Bills of Rights, which borrow a little from the ECHR in this regard – or rather from the jurisprudence of the European Court – have sophisticated systems for ensuring that only proportionate inroads are made into human rights. They insist on limitations being for a legitimate purpose, only such as are necessary in a democratic society and proportionate to the mischief being targeted.

### Two case studies from UK law

#### *Incitement to violence*

In Britain it is a crime to stir up hatred against any group on racial or religious grounds. Two weeks ago the country's highest court, the House of Lords, held that using the words “bloody foreigners” and “get back to your own country” can transform the offence of using abusive words and behaviour with intent to cause fear or provoke violence, contrary to section 4 of the Public Order Act 1986, into the racially aggravated form of that offence, contrary to section 31(1)(a) of the Crime and Disorder Act 1998.<sup>7</sup> And in July of last year the same court held that a defendant should have been convicted of sending, by means of a public telecommunications system, messages that were grossly offensive contrary to section 127 of the Communications Act 2003, when he used words such as “wogs” and “niggers”.<sup>8</sup>

In my view it is right that these offences exist, if only as indicators of society's great disapproval of the sentiments expressed. Yet at the moment it is not an offence to say that one supports terrorism. Even at the height of the troubles in Northern Ireland it was not an offence to do so. There had to be some additional act, like rattling a collecting can or urging people to join an illegal paramilitary organisation. Last year there was a great hullabaloo in Britain over **section 1 of the Terrorism Act 2006**. This makes it an offence for a person to publish a statement that is likely to be understood by some members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism. The person involved must, however, either intend members of the public to be so encouraged or induced, or be reckless as to whether they will be. For the avoidance of doubt the Act goes on to say that the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism include statements which glorify the commission of such acts (whether in the past, in the

<sup>5</sup> “(1) Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life.  
(2) This section applies to a person from the time of birth.”

<sup>6</sup> “Every person has the right to life and has the right not to be arbitrarily deprived of life.”

<sup>7</sup> *R v Rogers* [2007] UKHL 8.

<sup>8</sup> *DPP v Collins* [2006] 1 WLR 2223.

future or generally) and are statements from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances. The maximum sentence is 7 years' imprisonment and an unlimited fine. **I don't myself have a great deal of difficulty with this provision**, because I believe that prosecutors and judges will apply it appropriately, **but I know that many human rights lawyers do**.

*Preventative searches*

**Mr Gillan**,<sup>9</sup> was a PhD student studying in Sheffield when, on 9 September 2003, he went to London to protest peacefully against an arms fair being held at an exhibition centre in East London. He was riding his bicycle near the Centre when he was stopped by two male police officers. They searched him and his rucksack and found nothing incriminating. They gave him a copy of the Stop/Search Form 5090 which recorded that he was stopped and searched under section 44 of the Terrorism Act 2000. The search was said to be for "Articles concerned in terrorism". The whole incident lasted about 20 minutes.

Under **section 44 of the Terrorism Act 2000** an authorisation under subsection (1) authorises any constable in uniform to (amongst other things) stop a pedestrian at a place specified in the authorisation and to search the pedestrian and anything carried by him or her. Such an authorisation can be given only if the person giving it considers it expedient for the prevention of acts of terrorism. It can be given only by a very senior police officer (in London, a commander of the metropolitan police). If given orally it must be confirmed in writing as soon as is reasonably practicable. By **section 46** an authorisation may not be for longer than 28 days. The giver of an authorisation must inform the Secretary of State as soon as is reasonably practicable and if the Secretary of State does not confirm the authorisation within 48 hours of the time when it was given it ceases to have effect (without invalidating anything done during the 48-hour period). When confirming an authorisation the Secretary of State may substitute an earlier, but not a later, time of expiry. Under **section 45** the stop and search power may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind.<sup>10</sup> A constable exercising the power may not require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves. The constable may detain the person for such time as is reasonably required to permit the search to be carried out at or near the place where the person is stopped. Where the pedestrian applies for a written statement that he or she was stopped by virtue of section 44, the written statement must be provided, so long as the application is made within 12 months of the date on which the pedestrian was stopped. **Section 47** makes it an offence punishable by imprisonment or fine or both to fail to stop when required to do so by a constable, or wilfully to obstruct a constable in the exercise of the power conferred by the authorisation.

**The House of Lords held unanimously that this power was not in breach of the right to liberty** conferred by Article 5 of the European Convention, even though the

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<sup>9</sup> *R (Gillan) v MPC* [2006] UKHL 12.

<sup>10</sup> A similar departure from principle was made in s.13A of the Prevention of Terrorism (Temporary Provisions) Act 1989, inserted by s.81 of Criminal Justice and Public Order Act 1994. Schedule 7 to the Terrorism Act 2000 also makes detailed provision for the stopping and questioning of those embarking and disembarking at ports and airports, without reasonable suspicion, supplemented by a power to detain for a period of up to nine hours.

authorisation in question had been continuously in force throughout the whole of London since February 2001. The power is still used from time to time today – although it is hard to know when an authorisation has in fact been issued.

I think the House of Lords was right to take this decision. Allowing oneself to be subjected to these brief searches, with all the legal safeguards attached, is a price we must learn to pay for the prevalence of terrorism. It is a price that was paid in Northern Ireland (in different respects) and one we readily pay at airports. I would even venture to suggest that **the police power to stop and question people that was (and is) used in Northern Ireland is also acceptable**, provided the safeguards are complied with of course. **Section 89 of the Terrorism Act 2000** allows a police or army officer to stop a person for so long as is necessary to question him or her to ascertain his or her identity and movements, what he or she knows about a recent explosion or another recent incident endangering life and what he or she knows about a person killed or injured in a recent explosion or incident. It is an offence punishable with a fine of up to £5,000 to fail to stop when required to do so, to refuse to answer a question addressed under the section or to fail to answer to the best of one's knowledge and ability.

**I shall now return to the various legal, political and international safeguards and review mechanisms which should, I think, be borne in mind when devising the right recipe for countering terrorism.**

#### Legal safeguards

- **Constitutional review of legislation: *R v Khawaja***, already mentioned; the **Jack Thomas case** currently being considered by Australia's High Court (having attended the hearing last month and listened to the Court's questions to the Solicitor General, I would place a large amount of money on the Court rejecting the claim that the issuing of control orders is unconstitutional).
- The UK does not have constitutional review but it does have a Human Rights Act which allows it to declare statutory provisions to be incompatible with the ECHR and that is exactly what a 9-member House of Lords did in **the A case** in December 2004.<sup>11</sup> With only one dissenting voice (Lord Walker) they declared the indefinite detention provision for non-British nationals, a measure taken in express derogation from the ECHR, to be incompatible with the Convention – because it was discriminatory and disproportionate. **Lord Hoffmann** went even further, holding that the UK should not have tried to derogate from the ECHR in the first place. There was, he found, no threat to the life of the nation (which is what is required before a derogation is permissible). He said, in words reminiscent of Lord Atkin's in the war-time case of *Liversidge v Anderson*:

*“The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.”* (para.97)

- Laws can be influenced by international law too. **The House of Lords' decision in the *Pinochet* case** was, in 1999,<sup>12</sup> a great example of judicial

<sup>11</sup> *A v Secretary of State for the Home Department* [2005] 2 AC 68.

<sup>12</sup> [2000] 1 AC 147.

activism on that score, for there the court ruled that there was no so-called sovereign immunity for the crime of torture; **Jones v Ministry of the Interior of Saudi Arabia (2006)** was, however, very disappointing, because there the House of Lords ruled that there was still sovereign immunity for civil liability for torture.<sup>13</sup>

- Decisions by public authorities can be subjected to **judicial review** (ensuring that, at least, due process is complied with). Attempts to deny recourse to judicial review will, at least in Britain, lead to a constitutional crisis.<sup>14</sup> And in **R (Jackson) v AG (2006)** more than one of the 9 Law Lords involved intimated that the sovereignty of Parliament did not extend to enacting a law which deprives judges of the right to review the legality of government actions.<sup>15</sup>
- **Prosecutions can be made conditional** on specific consent from the DPP and/or Attorney General – though it is not always easy to judicially review such decisions (especially decisions not to grant consent).
- The guilt or liability of defendants can be assessed in criminal and civil proceedings. **In one case in the UK** the House of Lords held that a provision in the Terrorism Act 2000, which apparently placed the burden of proof on the defendant to show that he was not in possession of certain objects for terrorist purposes, was actually imposing only an evidential burden – forcing him to make a prima facie case – not a legal burden. This was despite the fact that Parliament had clearly intended a legal burden to be imposed.<sup>16</sup>
- **The common law can still be relied upon to uphold certain basic values:** e.g. *A (No.2)* in the House of Lords, December 2005, where 7 judges said evidence that might have been obtained abroad by torture could not be admitted in evidence, although only Lords Bingham, Nicholls and Hoffmann said that the burden of proof was on the state to show that it had not been so obtained.<sup>17</sup> Also the European Human Rights Centre case – common law (or at any rate a domestic statute) proved better than the ECHR.<sup>18</sup>

### Political review mechanisms

There is a good chapter on this issue [Ch.14] in the report on the Anti-Terrorism Act 2001 published last month by the Special Committee of the Canadian Senate.<sup>19</sup>

- **Inquiries can be held** into what [additional] anti-terrorism measures are required (as in the Diplock and Lloyd inquiries in the UK). These can be valuable, if done properly and not rushed. They allow for studies to be made of laws in other countries and for high level public debate to occur.
- **New laws may be made liable to review**, whether on-going (with perhaps annual reports) or periodic or *ad hoc*. These reviews may be conducted by

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<sup>13</sup> [2006] 2 WLR 1424.

<sup>14</sup> See Andrew Le Sueur, "Three strikes and it's out? The UK government's strategy to oust judicial review from immigration and asylum decision making" [2004] *Public Law* 225.

<sup>15</sup> [2006] 1 AC 262.

<sup>16</sup> *Attorney General's Reference (No.4 of 2002)* [2005] 1 AC 264.

<sup>17</sup> *A v Secretary of State for the Home Department (No.2)* [2006] 2 AC 221.

<sup>18</sup> [2005] 2 AC 1.

<sup>19</sup> "Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-Terrorism Act" (February 2007).

the government itself or by independent reviewers. **Examples of the former** are the reports produced by the Home Secretary on the use of control orders in the UK. In Canada the Attorney General must report annually on the use made of investigative hearings and preventive arrest powers. **Examples of independent reports** are those produced by committees of Parliament in Australia (the PJCIS) and Canada (though the first such 3-year review, due at the end of 2004 is still only part-complete – only the Senate Committee has reported) and the report produced by the Newton Committee of Privy Counsellors on the UK's 2001 Anti-terrorism Act at the end of 2004. The best example of reports by an independent reviewer are the annual reviews conducted in the UK by Lord Carlile QC, a former Liberal Democrat MP. He advertises for submissions, he meets with interested parties, he has sight of all confidential papers, he collects statistics and he publishes detailed reports. But of course there are risks in this method of review too:

- a lot depends on the abilities and diligence of the person appointed (Lord Carlile's predecessors were not so conscientious);
  - the temptation is to focus on how the laws have operated in practice in the past year and not on whether they are still in fact necessary;
  - there is no guarantee that the reviewer's recommendations will be accepted by the government (although if he or she felt constantly ignored, he or she could resign)
- In Australia, of course, **the Security Legislation Review Committee, chaired by Simon Sheller, reported in June 2006**, on the operation and effectiveness of the anti-terrorism legislation enacted in Australia in 2002 and 2003. It did not find that there had been any excessive or improper use of the provisions in question. But it did think that the provisions on proscription needed to be amended, though the members of the committee differed as to how best to amend them, and it recommended the repeal of the provision making it an offence to "associate with terrorist organisations". It also recommended repeal of the provision criminalising (under "advocacy") directly praising the doing of a terrorist act in circumstances where there is a risk that such praise might lead a person to engage in a terrorist act. It also wanted some offences not to be offences of strict liability and burdens of proof on the defendant to be evidential only, not legal. It called for an independent reviewer to be appointed or for a further review by an independent body such as itself after a further three years.
- Also in Australia, the **Parliamentary Joint Committee on Intelligence and Security has produced good reports** (e.g. on ASIO's questioning and detention powers – November 2005) and on the anti-terrorism legislation (December 2006). It is to look at the proscription of terrorist organisations later in 2007. It too has recommended the appointment of an independent reviewer, reporting annually to Parliament. Amazingly (to me) it contemplates continuance of the offence of treason (albeit with amendments – a retrograde step I think; never during the Northern Ireland troubles – unlike in South Africa – was anyone charged with treason). I'm really not sure you need a separate crime of sedition either. The PJCIS also recommended that the requirement of advancing a political, religious or ideological cause be retained. Unlike the Sheller Committee it did not call for the repeal of the advocacy provision, but it did agree that the risk involved (of leading someone to engage in a terrorist act) should be made into a "substantial" risk.

- Also in Australia, the Council of Australian Governments (COAG) is to review the Anti-terrorism Act 2005.
- New laws may be made subject to sunset clauses – i.e. they lapse unless specifically renewed. Renewal could be by executive order (subject to affirmation by Parliament, or at least to Parliament’s refusal to object to it) or by a whole new Act. This approach was adopted for the indefinite detention provisions in the UK’s 2001 Act (and the provisions were not renewed after a year because the courts had by then declared them incompatible with European Convention rights). It was also adopted (after 5 years) to the investigative hearings and preventive arrest provisions of Canada’s Anti-terrorism Act 2001 (see the House of Commons interim report in October 2006, recommending renewal until the end of 2011, and a further parliamentary review then): the investigative hearings power has not been used yet, but it has been upheld as constitutional by the Supreme Court of Canada; the preventive arrest power has also not been used yet. The absence of sunset provisions in the Australian legislation is, I think, regrettable. During the Northern Irish troubles most of the terrorist legislation had to be renewed by Parliament after just one year (or, at the most, after 5 years).
- **Agencies working in the field of terrorism may be made liable to review** (e.g. police and security agencies):
  - **By Inspectors** (e.g. the Inspector General of Intelligence and Security in Australia;<sup>20</sup> the Inspector General of the Canadian Security Intelligence Service; the Inspector of Constabulary in the UK); these inspections focus on operational policies and professional standards.
  - **By Ombudsmen:** Australia’s Commonwealth Ombudsman can deal with complaints about maladministration generally (but not ASIO), can investigate complaints against the Australian Federal Police and can periodically inspect the records of the AFP and the Australian Crime Commission. There is also a role for the Privacy Commissioner (and HREOC) in this field.
  - **By oversight bodies** such as Canada’s Security Intelligence Review Committee, the Commissioner of the Communications Security Establishment and the Commission for Public Complaints against the RCMP; the UK’s Intelligence and Security Committee, which reports to the Prime Minister and is staffed by officials from the Cabinet Office, and the UK’s Office of Surveillance Commissioners.
  - the Canadian Senate endorsed the view of Justice O’Connor (expressed in December 2006 when examining the Maher Arar affair) that **an enhanced review and complaints body should be established to oversee the RCMP**, especially in relation to its national security functions; I would suggest that the powers of the Police Ombudsman of Northern Ireland would be a good model to follow in this regard;
  - Justice O’Connor recommended the establishment of an integrated review co-ordinating committee, made up of the chairs of existing oversight bodies, and **the Canadian Senate Committee has**

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<sup>20</sup> Oversees the activities of 6 federal agencies: ASIO, ASIS, DSD, Defence Imagery and Geospatial Organisation, Defence Intelligence Organisation and Office of National Assessments.

**recommended a new Parliamentary Committee** along the same lines:

*“While duplication of effort should be avoided, it is necessary, given Canada’s constitutional framework, to have parliamentary review and scrutiny that complements the policy and operational decisions of the government. The fact that the Anti-terrorism Act provides for the courts to authorize certain investigative powers of police is another example of complementary oversight. If the government, the courts and Parliament each fulfil their respective roles in Canada’s anti-terrorism framework, there is three-pronged oversight and accountability through the executive, judicial and legislative branches” (p.120).*

- Other kinds of watchdogs:
  - Law reform bodies: the topic of sedition was, I notice, referred to the Australian Law Reform Commission.
  - Public inquiries: e.g. the **Bloody Sunday Tribunal** in the UK – the former Australian High Court judge, Justice Toohey, is a member of that – and other inquiries into deaths in which members of the security forces might be implicated. **The Hutton Inquiry** in Britain into the death of a government scientist, Dr David Kelly, was a hugely important affair in 2003. It revealed an immense amount of information. Had the conclusion gone against the government it is conceivable that the PM would have had to resign. Lord Hutton has recently gone into print defending himself against accusations of bias (pro-government and anti-BBC).<sup>21</sup>
  - NGOs – e.g. valuable reports by Human Rights Watch, Amnesty International, Human Rights First.

**We must be wary of “knee-jerk” legislation** as a response to terrorism. This was all too apparent in the UK during the troubles in Northern Ireland:

- the Prevention of Terrorism (Temporary Provisions) Act 1974 was passed within a week of the Birmingham pub bombings in November 1974;
- the Criminal Justice and Public Order Act 1998 was a reaction to the Omagh bomb of August 1998;
- the Anti-terrorism, Crime and Security Act 2001 was a response to 9/11, as was:
  - the Anti-terrorism Act 2001 in Canada,
  - **the USA PATRIOT Act 2001** [the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act]; it was renewed overwhelmingly by both the Senate and the House of Representatives last March; of course it is based to some extent on the RICO Act, which alters the criminal justice system to allow it to deal more effectively with organised crime, racketeering and drug trafficking [the Racketeer Influenced and Corrupt Organizations Act 1990];
  - legislation in Australia following the Bali and London bombings in 2002 and 2005.

One of the difficulties with reviews is that **they cannot say what would have happened if the laws in question had not been put in place**. Nor can they

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<sup>21</sup> [2006] *Public Law* 000.

accurately assess how many terrorist acts the laws deterred. In Northern Ireland, however, there was a certain amount of mission creep as regards some anti-terrorist laws: special arrest powers were used, for example, even though “ordinary” arrest powers would have sufficed. Certain crimes were automatically designated as “scheduled offences” even though there was no evidence of paramilitary involvement. Regular reviews can help to stop this “infection” of ordinary laws.

### International review mechanisms

- International courts or committees can sometimes be asked to adjudicate upon the compliance of national laws with international standards (e.g. the European Court of Human Rights, the UN Human Rights Committee [witness the case taken against Australia in relation to the homosexual laws in Tasmania by Rodney Croome and Nick Toonen]. International agencies can monitor the situation and issue reports (the UN’s Human Rights Committee, the UN’s Special Rapporteur – e.g. Martin Scheinin’s report on Australia published in December 2006: **they don’t always get things exactly right**). Cf. the **US Department of State’s Annual Reports** (that on the UK, including Northern Ireland, was published just last week).
- **The role of the European Court of Human Rights:** let’s not assume that the European Court of Human Rights sets the world’s highest standards as far as protection of rights under anti-terrorism legislation is concerned:
  - it allows states much too much leeway (“**margin of appreciation**”) as regards derogations from (e.g) Article 5 (the right to liberty);<sup>22</sup>
  - it permits states to hold people in custody for years while they are being investigated for alleged offences;
  - it permits “**special advocates**” in cases where it is deemed too dangerous to give the defendant access to sensitive information (*Chahal v UK*);
  - it tolerates very lax arrest powers (*O’Hara v UK* etc);
  - however it does impose a **burden of proof** on states in cases where people in state custody go missing (Russian case concerning Chechnya) and it has been reasonably tough on Turkey as regards village destructions and police brutality.
- International criminal courts now exist to try people (whether state actors or not) for international crimes such as genocide or crimes against humanity. Witness last month’s decision by the **International Court of Justice** on Bosnia-Herzegovina’s claim that Serbia and Montenegro committed genocide in the 1990s.<sup>23</sup>

My essential message is that a democratic legal system has at its disposal a range of mechanisms for ensuring that risks to human rights are minimised. The mechanisms need to be used as part of the mix when protecting society’s interests as well as individuals’ rights.

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<sup>22</sup> This stems from the very first decision issued by the European Court of Human Rights, in 1961, *Lawless v Ireland* (1979-80) 1 EHRR 15. Disappointingly, it was approved by the House of Lords in the *A* case [2005] 2 AC 68.

<sup>23</sup> Decision of 26 February 2007; No.91.

### **Eliminating conditions that may allow terrorism to flourish**

It is obviously desirable that people not be tempted into committing terrorism in the first place. They are unlikely to be so tempted if they live in a society where they enjoy extensive liberty to live their life as they choose, especially with regard to religion and culture. In 2004 **the Advisory Council of Jurists of the Asia-Pacific Region**, after condemning all acts of terrorism, made this the first plank of any proposed “comprehensive response to terrorism”. The former UN Secretary-General, Kofi Annan, and the UN General Assembly in Resolutions, has said that **human rights, along with democracy and social justice, will, in the long-term, be one of the best prophylactics against terrorism.**

Yet as has been noted by Melanie Phillips, a British columnist who was speaking in Sydney just 10 days ago, it would be naïve to think that those who are dedicated to terrorism today are complaining that there is not enough tolerance and democracy in the world. Far from it. Many of the would-be terrorists are advocates of an intensely undemocratic society and are unlikely to be bought off by the promise of a greater dose of it. **Many of them want a theocracy, an Islamic caliphate, where Imams and Ayatollahs rule.** It can be questioned whether a healthy democracy should allow any ministers of religion to stand for election to Parliament (for many years certain types of ministers were banned from standing for the Westminster Parliament). If such religious fanatics are elected democratically, what should be done?

When the Islamic Salvation Front won the first round of elections in **Algeria in 1991** the army intervened and postponed the second round to prevent what they feared would be an extremist government. In the subsequent crackdown and insurgency some 100,000 deaths had occurred by 1998, including many indiscriminate massacres of villagers by extremists. The government gained the upper hand by the late-1990s and the ISF's armed wing, the Islamic Salvation Army, disbanded in January 2000. It's impossible to know whether there would have been fewer deaths had the army not stepped in.

Many of the countries which have experienced serious attacks in recent years are flourishing pluralistic democracies. The US, the UK, Spain, India – they are all very good examples of democracies at work, and even though some commentators have tried to compare the evangelicalism of the neo-conservatives in America, or the deep religiosity of Tony Blair, with the religious fanaticism of the Taleban or the Mohamed al-Sadr, this is clearly completely inappropriate.

The reality is that **democracy is a delicate flower.** It needs careful nurturing and constant oversight. It can be undermined by corruption, by big business, and even by public relations spin as much as it can be by criminality and violence. The concept of a failed state is, unfortunately, increasingly part of reality.

So I would not over-estimate what changes need to be made to so-called Western democracies to make them less likely to be seedbeds for terrorism.

Where I would press for change is in international policy. I am not of the Robert Fisk or John Pilger school of thought, which appears to attribute all of the world's ills to **the Israeli occupation of Palestine**, but I do agree that that occupation is a basic injustice which has to be addressed as a matter of urgency. I agree with the focus given to the Israeli-Palestine conflict **by Conor Gearty in his 2005 Hamlyn Lectures** (“Can Human Rights Survive?”), where he effectively attributes today's scepticism around the very idea of human rights to the failure to solve that particular

Middle East problem. It is not foolish to suggest that until it is solved the scourge of international terrorism will remain with us. But you'll be relieved to know that that is not a topic which I am able or willing to explore further this evening.

Thank you.