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OF ENGLAND AND WALES

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IMPACT OF TERRORISM ON THE RULE OF LAW

AMERICAN BAR ASSOCIATION CONFERENCE,
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It is a great pleasure to have the honour of giving the first address to the first meeting that the International Law Section of the American Bar Association has ever held in London. We are delighted to welcome you here - perhaps more delighted than were the inhabitants of Virginia, who welcomed the first permanent English settlers to the North America Continent 400 years ago. I was over there earlier in the year taking part in the celebrations marking that event and I gave, at Richmond, a talk on terrorism and the rule of law, which has, I understand, just been published in the University of Richmond Law Review. Some water has flown under the bridge since then, and I have been invited to bring the talk that I gave up to date.

In times of war courts tend to be particularly diffident about questioning steps taken by the executive in the interests of national security. In the infamous case of Liversidge v Anderson [1942] 2 AC 206 the House of Lords held that the Home Secretary could not be required to provide any justification for his exercise of the right to detain a man without trial on the ground that he believed that this was necessary because of his hostile associations.

The diffidence persisted in England even after the war.

In 1977 the Secretary of State served a deportation notice on a Mr Hosenball, a United States Citizen working as a journalist on the ground that he had sought and obtained for publication information harmful to the security of the United Kingdom. When he refused to provide any details of this allegation Mr Hosenball sought judicial review of the decision. This was refused. This is what the great Lord Denning had to say:

> *There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task. In some parts of the world national security has on occasions been used as*

an excuse for all sorts of infringements of individual liberty. But not in England. Both during the wars and after them, successive Ministers have discharged their duties to the complete satisfaction of the people at large."

Deference to the executive has not, I believe, been a notable feature of American jurisprudence.

The difference between our two jurisdictions is, of course, that in your jurisdiction the rights of the individual are embodied in and protected by a written Constitution. And you have a Supreme Court with jurisdiction to protect those rights to the extent of striking down legislation that is unconstitutional.

In this jurisdiction the Constitution is largely unwritten. Parliament is supreme and the courts cannot refuse to give effect to legislation on the ground that it is unconstitutional. Both out countries are now facing a new kind of conflict — that created by international terrorism. Yet despite the threat of terrorism, the United Kingdom courts are not showing the traditional deference to action taken by the executive in the interests of national security. The change in stance is largely attributable to the Human Rights Act 1998, which came into force in 2000. This Act was passed by the present Administration soon after they came into office. The Act allows individuals to invoke the provisions of the Human Rights Convention in disputes with Government and it requires judges to enforce Convention rights.

We cannot strike down legislation that conflicts with the Convention, but we can make a declaration that it is incompatible with the Convention. This is just about as good, because the Government up to now has always responded to a declaration of incompatibility by changing the offending law. More significantly we now have to scrutinise executive action to ensure that it does not infringe human rights. We can no longer hold that actions taken in the interests of national security by the executive are not justiciable if those actions are alleged to infringe individual human rights.

The consequence of this has been a series of decisions of the Courts holding unlawful legislation, statutory regulations and executive action designed to address the problem of terrorism.

The Human Rights Convention, as interpreted by the European Court at Strasbourg, poses a problem for the Government. The Court has ruled in a case called Chahal v United Kingdom (1996) 23 EHRR 413 that it is contrary to the Convention to deport an illegal immigrant if he will be at risk of torture or inhuman treatment if he is sent home, however great a threat he may pose to your security. However, at the same time, it is contrary to the Convention to detain someone without trial simply because you have reasonable grounds to believe that he is involved in terrorism.

The Convention permits a country to derogate from the prohibition of detention without trial but only 'to the extent strictly required by the exigencies of the situation.. .in time of war or other public emergency threatening the life of the nation'.

After 9/11 the British Government decided that the threat of terrorism in Britain was such as to amount to a public emergency threatening the life of the nation and purported, on that ground, to derogate from the Convention.

It did so in respect of 'foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism' or of being connected to terrorist groups and 'who are a threat to the security of the United Kingdom'. Relying on this derogation Parliament then passed the Anti- Terrorism, Crime and Security Act that permitted an alien to be detained indefinitely if the Home Secretary reasonably suspected that he was a terrorist and believed that he was a threat to national security, but was unable to deport him because he would be at risk of inhuman treatment in his own country. The Home Secretary immediately certified that a number of aliens fell within the scope of the new Act, and they were locked up.

It was made plain to them that if they wanted to go back to their own countries they were free to go. They did not do so. What they did was to exercise a right of appeal for which the Act made provision. The case is known simply by the initial of one of the appellants as 'A' [2004] UKHL 56.

The procedure governing this appeal was unusual, involving a special judicial tribunal known as SIAC with special powers.

Evidence, disclosure of which would have adverse implications for security, can be put before SIAC as 'closed' material. This is not disclosed to the terrorist suspect. It is disclosed to a special advocate, whose duty it is to protect the suspect's interests, but once he has seen the material, the special advocate is no longer permitted to communicate with the suspect.

Let me return to the case of A. The appeal of the alien terrorist suspects detained under the 2001 Act went right up to the House of Lords, our most senior court. They sat 9 strong, instead of the usual 5. The appeals were allowed. The majority of the Lords accepted that derogation from the Convention was possible in that there existed a 'public emergency threatening the life of the nation'.

They held, however, that the terms of the derogation and of the Act were unlawful in that they went beyond what was 'strictly required by the exigencies of the situation.

Three factors weighed particularly in their reasoning. The first was the importance that the United Kingdom has attached since at least Magna Carta, to the liberty of the subject. The second was that the measures only applied to aliens.

There were plenty of terrorist suspects who were British subjects. How could it be necessary to lock up foreign suspects without trial if it was not necessary to lock up the British suspects? Finally, the measures permitted those detained to opt to leave the country. If they were so dangerous, this did not seem logical, for they would be free to continue their terrorist activities overseas. And so the House of Lords quashed the Derogation Order and declared that the relevant provisions of the Act were incompatible with the Convention.

Lord Hoffmann alone did not consider that the terrorist threat amounted to 'a public emergency threatening the life of the nation'.

In a Churchillian dissent he said:

> "*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*"

Parliament's reaction to the Law Lords' decision was to pass a new Act; the Prevention of Terrorism Act 2005. This, among other things, empowers the Secretary of State to place restrictions on terrorist suspects by making them subject to Control Orders. The restrictions must not, however, be so severe as to amount to deprivation of liberty. A number of procedural safeguards are imposed by the Act, including automatic review of Control Orders by the Court.

So far as the Government is concerned, Control Orders have not proved a great success.

The first batch of Control Orders imposed by the Home Secretary required the suspects to stay confined within small apartments for 18 hours a day, and placed restrictions on where they could go and whom they could see in the remaining 6 hours.

These orders were challenged and a Division of the Court of Appeal over which I presided upheld the finding of the judge of first instance that the orders were unlawful, in that the restrictions they imposed amounted to deprivation of liberty.

The Home Secretary immediately imposed modified Control Orders in place of the old ones, reducing the curfew period to 14 or in some cases 12 hours a day.

To no avail, Ouseley J quashed a Control Order in respect of a terrorist suspect known as AF on the ground that the application for a control order amounted to a criminal charge, that the procedure for challenging the order breached the right to a fair trial and that the use of closed evidence was unfair. If this judgment is correct, control orders are effectively torpedoed. The judge in that case gave permission for the Government to use our 'leapfrog' procedure to appeal directly to the House of Lords. That appeal was heard in July together with appeals from the decisions of the Court of Appeal in the cases I mentioned earlier, and judgment is awaited.

Meanwhile no less than 7 of the 17 terrorist suspects who have been subjected to Control Orders have absconded. John Reid, when Home Secretary, described Control Orders as trying to 'hold soup in a sieve'.

His predecessor, Charles Clarke, has been critical the way in which judicial decisions have time and time again defeated the steps taken by Government to deal with terrorist suspects. When giving evidence to a Parliamentary Committee, he protested:

> "*The judiciary bears not the slightest responsibility for protecting the public and sometimes seems utterly unaware of the implications of their decisions for our society*".

This added fuel to a picture that the media like to paint of the judges being at war with the executive.

It is a false picture. Judges are simply doing their best to apply the laws that Parliament has enacted, which include the law that requires them to give effect to the Human Rights Convention.

There was a second round of litigation that had led to the Lords' famous decision in A. The issue was whether a court can receive evidence that has, or may have, been obtained by the use of torture. The Court of Appeal held that, in the circumstances of that case at least, it could, provided that the United Kingdom authorities were not party to the torture. On appeal to the House of Lords, sitting seven strong, the decision of the Court of Appeal was unanimously reversed. Their Lordships held that evidence obtained by torture was not admissible in an English court, whoever had done the torturing. There was, however, a critical issue on burden of proof.

Should evidence be shut out whenever there is a risk that it may have been obtained by torture or only where the court is satisfied on balance of probabilities that is has been obtained in that way. By a slender majority of 4 to 3 the Lords decided that the latter was the position.

This means that the English courts will admit evidence where there is a possibility, but not where there is a probability, that it has been obtained by torture.

At the end of last year, two gentlemen called Ahmad and Aswat were resisting extradition from the United Kingdom to the United States on the ground, inter alia, that they might find themselves subjected to 'extraordinary rendition'.

The Court held "there was no evidence whatsoever that any person extradited to the United States from the United Kingdom or anywhere else, has been subsequently subjected to rendition, extraordinary of otherwise". There was no reason why the two gentlemen should not be extradited.

This is not the only occasion on which the English Court has had to take the unusual step of considering the legitimacy of what has been taking place on your side of the Atlantic.

Detainees at Guantanamo Bay have included a number of British subjects. In 2002, one of these, Mr Abbasi, instigated, with the aid of relatives, judicial review proceedings in the English Court. He alleged that he was being unlawfully detained contrary to his fundamental human rights and sought a mandatory order that the Foreign Secretary should intervene on his behalf. The Foreign Secretary objected that the case was not justiciable, as it called for a review of his conduct of foreign affairs and this fell outside the jurisdiction of the court. He also contended that the English Court would not investigate the legitimacy of the actions of a foreign sovereign state.

These submissions were upheld by the judge of first instance, who refused Mr Abbasi's application.

He appealed and I presided on that appeal. We allowed the appeal. We held that, where human rights were engaged, the English Court could investigate the actions of a foreign sovereign state. We heard the appeal at the time when

the District Court of Columbia had ruled that the United States courts had no jurisdiction over aliens detained at Guantanamo.

After reviewing both English and United States Authority, we commented ([2002] EWCA Civ 1598 at paragraphs 64 and 66):

> *"...we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles, recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black hole'...What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.*
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> *It is important to record that the position may change when the appellate courts in the United States consider the matter."*

And, of course, the position did change when, by a majority of six to three, the Supreme Court in Rasul v Bush (2004) 542 US 466 ruled that foreign nationals held at Guantanamo could use the US court system to challenge their detention.

I have described how in England the courts have repeatedly upheld challenges of actions taken by Parliament and the executive that are aimed at dealing with terrorist suspects.

There are parallels between what has been happening in my jurisdiction and what has been happening in yours. Our Government can derogate from the Human Rights Convention if this is necessary to deal with a state of emergency threatening the life of the nation. After its first unsuccessful attempt to do so it has not tried again. The US Constitution prohibits Congress from suspending the 'Privilege of the Writ of Habeas Corpus save where 'in Cases of Rebellion or Invasion public Safety may require it'. Congress has not suspended the writ of habeas corpus.

In Hamdi v Rumsfeld (2004) 542 US 507 Mr Hamdi, a US Citizen, who had been declared an 'illegal enemy combatant', successfully invoked it. The Supreme Court held that he could not be held indefinitely in a US military prison without an opportunity to contest the allegations made against him by a neutral arbiter. He had allegedly been captured fighting American forces in Afghanistan.

Those forces were the pursuant to the resolution of congress after 9/11 authorising the President to "use all necessary and appropriate force against those nations, organisation or persons he determines planned, authorized, committed or aided the terrorist attacks or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States".

Significantly in Hamdi, the Supreme Court recognised that this resolution empowered the detention of an enemy combatant's in Afghanistan, even if he was US citizen, pending the conclusion of hostilities there. It left unanswered the question of whether terrorist suspects who were not engaged in open warfare against the United States, could lawfully be detained as 'enemy combatants'.

There are many who answer this description detained in Guantanamo; citizens of many different nations, many of them friendly to the United States, seized not only in Afghanistan, but in other countries where there are no current hostilities. Hundreds of detainees commenced applications for habeas corpus before or following the decision in Rasul.

Congress responded by passing the Detainee Treatment Act which removed the jurisdiction of the courts to entertain applications for habeas corpus by aliens detained at Guantnamo.

It gave the Court of Appeals for the DC Circuit exclusive jurisdiction in respect of judicial review challenges by such detainees. In Hamdan v Rumsfeld (2006) 126 S Ct 2749 the Supreme Court held that this Act did not, on its true construction, apply to applications for habeas corpus made before the date that the Act came into effect — and that was the vast body of applications that had already been made by detainees at Guantanamo. Hamdan, a Yemeni national, challenged the jurisdiction of the military commission before whom he was due to be tried for "conspiracy to commit. . . offences triable by military commission".

The Supreme Court, by a majority, upheld this challenge, holding that there was no basis for ousting the jurisdiction of the Federal Courts. It further found that the military commission, both in structure and in procedure, violated the provisions of both the Uniform Code of Military Justice and Article 3 of the Third Geneva Convention.

The reaction to this decision was the Military Commissions Act of 2006, signed into law by President Bush on 17 October 2006. This sets up military commissions to try terror suspects found to be 'alien unlawful enemy combatants'. It provides:

> *"(1)No court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."*
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> *(2) [subject to certain exceptions] no court, justice or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination".*

Senator Cornyn commented of this section "It will finally get the lawyers out of Guantanamo Bay".

On 20 February 2007 the US Court of Appeals for the D C Circuit handed down a decision in relation to claims for habeas corpus filed by detainees at Guantanamo before the Military Commissions Act came into force. The majority held that the Act removed the jurisdiction of the court to entertain their claims. One of the primary purposes of the Act had been to overrule Hamdan and it had done so.

The bone of contention between the majority, whose decision was given by Judge Randolph and Judge Rogers, who dissented, related to the effect of the Suspension Clause of the Constitution.

The majority held that this clause protected the right to habeas corpus as it existed in 1789. At that date aliens held outside the jurisdiction of the United States had no such right to claim habeas corpus. In a lengthy dissent Judge Rogers expressed the view that the Act fell foul of the Suspension Clause. I must confess that I found her dissent somewhat more powerful than did the majority, who described it as 'full of holes'.

On April 2 the Supreme Court, by a majority, denied petitions for certiorari by a number of Guantanamo detainees, who sought to challenge the constitutionality of the Military Commissions Act. But this was only on the procedural ground that the petitions were premature.

Later, on 29 June 2007, the Supreme Court agreed to hear the appeal from the decision in which judge Rogers dissented and the hearing is expected to take place later this year.

At the same time proceedings before the Military Commissions set up by the Military Commissions Act 2006 had run into difficulties. Two military judges dismissed the charges against Hamdan and Omar Khadr on the basis that the tribunal lacked jurisdiction to deal with detainees who were not classed as 'unlawful enemy combatants'.

Most Guantanamo detainees have been classified merely as 'enemy combatants', rather than 'unlawful enemy combatants' by the earlier hearings of the Combatant Status Review Tribunal. Such rulings were held to be dispositive under the Act and were thus insufficient to subject the detainees to the jurisdiction of the Commissions.

Finally I would like to quote from the majority decision of the Fourth Circuit of the US Court of Appeals, given on 11 June of this year by Circuit Judge Diana Gribbon Motz, in al-Marri v Wright (No 06-7427) (2007). The Court rejected the Government's contention that its jurisdiction to hear a habeas corpus petition of an alien, lawfully resident in the US, had been removed, after his detention, by the Military Commissions Act:

> *"For over two centuries of growth and struggle, peace and war, the Constitution has secured our freedom through the guarantee that, in the United States, no one will be deprived of liberty without due process of law. Yet more than four years ago military authorities seized an alien lawfully residing here. He has been held by the military ever since — without criminal charge or process.*
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> *He has been so held although the Government has never alleged that he is a member of any nation's military, has fought alongside any nation's armed forces, or has borne arms against he United States anywhere in the world. And he has been so held, without acknowledgement of the Constitution, solely because the Executive believes his military detention is proper."*

What we have been seeing in each of our jurisdictions is a conflict between the desire of the executive to take certain pre-emptive measures against terrorist suspects and overriding legal principles — in our case the European Convention on Human Rights and in yours the Constitution of the United States.

In each case the courts have been called on to perform their duty of upholding the rule of law. Not everyone has appreciated this, giving that word each of its meanings.

The desirability of preventing terrorists from blowing up innocent citizens is one that we would all endorse. But terrorism is spawned by ideology.

John Reid, our former Home Secretary, said that we were living through what was "at heart an ideological struggle"; a struggle between democracies and "the core values of a free society" on the one hand and "those who would want to create a society which would deny all the basic individual rights that we now take for granted" on the other.

At a lecture given at the London School of Economics last year, Shami Chakrabarti, the Director of the human rights group Liberty, observed

> *"the philosophy of post [Second World] war democrats is that of fundamental rights, freedoms and the rule of law. This is the legacy of Eleanor Roosevelt and.. .of Winston Churchill.. .If our values are truly fundamental and enduring, they have to be relevant whatever the level of the threat".*

I share those sentiments, and would suggest that the legacy goes back further.

Respect for human rights must, I suggest, be a key weapon in the ideological battle. Since the Second World War we in Britain have welcomed to the United Kingdom millions of immigrants, many of them refugees from countries whose human rights were not respected.

The prosperity of the United States is built on immigrants who have been welcomed from every corner of the globe. It is essential that they, and their children and grandchildren should be confident that their adopted countries treat them, and those who are nationals of the countries from which they have come, without discrimination and with due respect for their human rights. If they feel that they are not being fairly treated, their consequent resentment will inevitably result in the growth of those who, actively or passively, are prepared to support the terrorists who are bent on destroying the fabric of our society. The British Human Rights Act and the United States Constitution are not merely their safeguards. They are foundations of our fight against terrorism.