MASTER OF THE ROLLS

LORD NEUBERGER OF ABBOTSBURY, MASTER OF THE ROLLS

PROTECTING HUMAN RIGHTS IN AN AGE OF INSECURITY

COMMONWEALTH LAW CONFERENCE, HYDERABAD

7 FEBRUARY 2011

---

(1) Freedom and Security[1]

1. Karl Popper concluded the final chapter of the first volume of his seminal work, *The Open Society and Its Enemies*, by saying this,

> '[I]f we wish to remain human, then there is only one way, the way into the open society. We must go on into the unknown, the uncertain and insecure, using what reason we may have to plan as well as we can for both security *and* freedom.'[2]

Earlier on, Popper had this to say about security and freedom,

> '[T]he alleged clash between freedom and security, that is, a security guaranteed by the state, turns out to be a chimera. For there is no freedom if it is not secured by the state; and conversely, only a state which is controlled by free citizens can offer them any reasonable security at all.'[3]

[1] I should express my thanks to John Sorabji for all his help in the preparation of this lecture.
[2] Popper, *The Open Society and Its Enemies*, Vol. 1 (Routledge) (1945) at 201.
[3] Popper (1945) Vol. 1 at 111.

2. In recent years, Popper's chimera has become a matter of acute political and jurisprudential debate across the world. The debate raises questions of principle, such as our commitment to the rule of law, and questions of practical importance, such as how to protect people living in a liberal democracy against prospective terrorists. In an age of insecurity, those questions have not only focused on human rights, but have called into question our commitment to those rights.

3. In an age of insecurity it is often difficult to keep hold of the truth in Popper's statement that the clash between security and freedom – freedom guaranteed by human rights – is a chimera. As US Supreme Court Justice Thurgood Marshall famously said, in *Skinner v. Railway Labor Executives Association*[4],

> 'History teaches us that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. . . . When we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.'

In such times, the clash between security and freedom, between security and human rights seems to be anything but a chimera. Purportedly in order to protect security, freedom, constitutional rights or human rights are often set aside or at least marginalised - almost as if they were mere luxuries to be reserved for quieter, more peaceful times.

4. Popper was – as usual – right though: the clash between security and freedom, properly understood, is a chimera. Without security, there would be no real liberty, a fact recognised by both Article 3 of the Universal Declaration of Human Rights and Article 5 of the European Convention on Human Rights; both of which link the rights to liberty and to

[4] 489 U.S. 602 (1989)

security. But if security is provided in such a way as effectively to undermine liberty, it has largely lost its point. The recognition of the intrinsic link between liberty and security can be traced back to John Locke's observation that government was necessary in order secure 'life, liberty and estate.'[5]

5. It is equally important to acknowledge that the proper enforcement of security is not only one of the fundamental functions of any government, as part of the rule of law. It is also necessary because, without it, all other fundamental rights cannot sensibly be exercised. Equally, without a proper commitment to liberty and those other fundamental rights which give substantive content to the rule of law; we would have no real security: we would simply have, at best, arbitrariness, and, at worst, terror.

6. The question for any State is thus how best to secure freedom through security, without security undermining freedom, but also without freedom undermining security. In an age of insecurity, in time of war or when the State faces the threat of domestic or international terror, this question as we all know becomes all the more pressing; and can, as Justice Marshall suggested, lead us into actions that cause us to regret. Our commitment to freedom can leach out of what it means to provide security; and steps can well be taken which undercut those very rights which security can only properly exist in order to protect.

7. In the United Kingdom, the government has very recently concluded a review of control orders. Lord Macdonald, the former Director of Public Prosecutions, noted in that review, how there was

[5] Gearty, *Can Human Rights Survive*, (Cambridge) (2006) at 74

> 'A] widespread perception, apparently transcending political ideologies and different political parties, that the boundary between freedom and security may have started to shift in the wrong direction in the United Kingdom in recent years, partly as a result of our responses to the increased security threats we have been facing, and partly because of an apparent increase in the State's ambition to be present in the more private spheres of human life.'[6]

Steps taken to ensure the security in which freedom could be exercised were perceived to have undermined that very freedom and its exercise. That policy review has proposed less restrictive forms of security measures; although for many they still remain controversial. For some they do not provide sufficient security. For others they remain too restrictive of freedom. And so the democratic debate continues.

8. In any liberal and democratic state, it is, of course, the function of the executive and the legislature to consider and take the difficult, sometimes controversial, policy decisions as to the steps to be taken to give the necessary degree of security in which our freedoms can flourish. They do so, as Popper also noted, through the operation of free and fair elections, in which 'the rulers may be dismissed by the ruled.'[7] Free discourse, the powerful scrutiny of a free press, informed public debate and the democratic franchise serve as a powerful antiseptic, not least when a State is ultimately controlled by free citizens. Mistakes can be corrected. Regrets can be learnt from. And new safeguards of liberty will be forged from controversies involving, as Justice Frankfurter put it, "not very nice people".[8]

9. What is the role of the judiciary; the third branch of the State? Much will depend on the nature of a State's constitution. The United Kingdom, rather unfashionably, has an unwritten constitution, a concept which some might think is a contradiction in terms. The

---

[6] Macdonald, *Review of Counter-Terrorism and Security Powers* (Cm 8003) at (2) (http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/report-by-lord-mcdonald?view=Binary)

[7] Popper (1945) Vol. I at 124.

[8] See *United States v Rabinowitz*, 339 U S 56 (1950) at (69), it '*is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.*'

centrepiece of this constitution is traditionally said to be Parliamentary sovereignty, but even that has been questioned by some, including two of my illustrious predecessors as Master of the Rolls, Lord Denning and Lord Woolf. Both of them have suggested that a situation could arise where Parliament enacted primary legislation to which the courts could, would and should refuse to give effect, i.e. which the courts would effectively overrule. Having said that, let me assume the traditional view is correct, and, assuming Parliamentary sovereignty, consider the role of the courts have in protecting human rights in an age of insecurity.

(2) Human Rights and the Judiciary

10. The starting point is to acknowledge what cannot be done. Primary laws, i.e. statutes enacted by Parliament and signed by the Queen, cannot be struck down by the courts. We UK judges cannot, unlike judges in countries where government is limited by the terms of a codified constitution, strike down properly enacted laws on constitutional grounds, such as their breaching fundamental rights. So the UK courts cannot take ultimate policy decisions, which remain entirely in the province of the legislature.

11. The Human Rights Act 1998, while sometimes said to be a vehicle enabling the courts to enter into the realm of policy, has in fact done nothing in principle to alter that position. Indeed, the 1998 Act affirms parliamentary sovereignty. It is true that the courts can strike down regulations (included delegated legislation) and ministerial decisions if they conflict with fundamental human rights, but that involves no new principle: we could always strike down regulations and decisions if they were irrational. The 1998 Act enables the courts to subject primary legislation to rigorous rights-based scrutiny, but it does not permit the courts to strike down such legislation on such grounds. If there is a conflict between a statute and human rights, the court must make a declaration of incompatibility, but that is what it

says, a declaration. It informs Parliament that legislation is incompatible with the fundamental rights guaranteed by the Rights Convention, but the legislation remains in force. It is left to Parliament to take the policy decision, whether or not to amend the legislation.

12. Because of the Human Rights Act 1998, the courts can now review the legality of any statutory provisions, in order to assess whether they conform with the fundamental rights guaranteed under the European Convention on Human Rights, or, if they do not, whether this could be justified as arising under the limited power it provided to derogate from those rights in time 'war or other public emergency threatening the life of the nation'. This new power is however a limited form of constitutional review. As ever Lord Hoffmann expresses the position with great clarity. He described it in this way,

> 'Until the Human Rights Act 1998, the question of whether the threat to the nation was sufficient to justify suspension of habeas corpus or the introduction of powers of detention could not have been the subject of judicial decision. There could be no basis for questioning an Act of Parliament by court proceedings. Under the 1998 Act, the courts still cannot say that an Act of Parliament is invalid. But they can declare that it is incompatible with the human rights of persons in this country. Parliament may then choose whether to maintain the law or not. The declaration of the court enables Parliament to choose with full knowledge that the law does not accord with our constitutional traditions.'[9]

13. Perhaps the best known example of the exercise of this power was in the Belmarsh case, *A v Secretary of State for the Home Department*[10]; a case concerning detention without trial or charge; something which in his judgment, Lord Hoffmann, from whose speech I have just quoted, noted was 'antithetical to the instincts and traditions of the people of the United

[9] *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [90].
[10] [2005] 2 AC 68

Kingdom.'[11] Those detained were non-UK nationals suspected of involvement in terrorism, and whom the Home Secretary wished to deport. The power under which such detention could be authorised was contained in primary legislation – a 2001 Act[12]. As Lord Hoffmann rightly noted, prior to the 1998 Act, the courts would have had no power to review the validity of this part of the legislation,[13] although they could have reviewed the exercise of the power by way of traditional judicial review.

14. The House of Lords concluded that the provisions in the 2001 Act were not compatible with the requirements of the European Human Rights Convention. It quashed the detention orders, which had been made under delegated legislation and went on to say that the legislation was incompatible with Articles 5 and 14 of the Rights Convention. The declaration did not however strike the provision from the Statute book. It simply informed Parliament of the court's view that it did not stand up to scrutiny.

15. The ultimate policy decision however remained in Parliament's hands, and thus, as a consequence of democratic accountability, in the electorate's hands: Parliament amended the law and introduced the very control orders which are now, as I mentioned earlier, to be replaced following Lord Macdonald's review. It was not for the UK courts to take the policy decision. It was for the courts to scrutinise the legislation, to see if it could be interpreted consistently with fundamental rights, and, if not, to inform Parliament and the public that it was incompatible with those rights.

16. Some may see this as a rather weak form of rights protection; weak because it leaves a law which infringes fundamental rights intact. Some may say, for that reason, that this is no

[11] [2005] 2 AC 68 at [86]
[12] Part 4 of the Anti-terrorism, Crime and Security Act 2001
[13] *Ibid* at [90]

protection at all. I think though that there is a good argument that in age of insecurity, and equally in an age of security, this is a particularly strong form of protection and one of which Karl Popper would have approved. Why?

17. The answer lies partly in the common law, and partly in the UK's wider constitutional traditions, to which Lord Hoffmann referred at the end of the passage I quoted from his speech in the Belmarsh case.

18. These wider constitutional traditions are based on a respect for, and commitment to, the rule of law, and they developed as part of the United Kingdom's constitutional settlement. That settlement evolved during the 17th, 18th and 19th centuries, occasionally violently, but on the whole rather gradually, and at times almost absent-mindedly and haphazardly. The evolution nonetheless had a central feature, namely that the constitutional traditions are the very essence of the fabric of our society. They are traditions which were fought for (occasionally violently) and developed over many years and were formed in the crucible of injustice. And they are lived traditions. In this they are more powerful than any document, whether a constitution, a statute or a court order.

19. Those traditions have ensured that our commitment to the rule of law is not a formalistic commitment, but a full-blooded one. Written constitutions, which permit judges to override the legislature, or statutes, which express the will of Parliament, can be torn up by dictators. The ultimate protection for constitutional and fundamental human rights is for those rights to become an inherent part of the fabric of society. As an aside, I should add that even this rather attractive-sounding state of affairs is not without risk: human rights and other aspects of our constitutional tradition can easily become taken for granted, as we become complacent. No-one should ever forget that the price of liberty is eternal vigilance.

20. Reverting to my main theme, there is real, if paradoxical, force in the notion that the fact that our courts cannot strike down legislation actually bolsters our commitment to the rule of law. This limitation on the powers of our judges has done two things. First, by preventing the judges from entering the policy arena, it has helped to ensure that they attain a high level of independence and respect. Judges in the UK are not political and we are not generally seen as political. No doubt, some of us have political views, but we set them aside in their entirety when performing our judicial functions. In the 1880s, W.S. Gilbert suggested that, when in the House of Commons, MPs had "to leave their brains outside and vote just as their leaders tell them to".[14] If that was true then, it is, of course no longer true. However, we judges do have to leave our political views outside when we go into court, and I believe that this assists in ensuring that we are impartial and are respected for our impartiality.

21. This is not to say that all our decisions are met with universal applause; indeed, it would be worrying if they were. But the strength of our judiciary, and the confidence in which it is held, is partly attributable to its lack of politicisation. The judges can stand back from the heat and light of political argument, and ask Parliament, as Conor Gearty, put it, to 'think twice, not to blindly obey.'[15] Indeed, it isn't only Parliament we ask to think twice, we also ask the public to think about what is being done by their elected representatives in Parliament and whether they consider it consistent with their understanding of our constitutional tradition and its commitment to the rule of law.

22. And this encapsulates the second consequence of our limited jurisdiction: the ultimate decision lies in the hands of the people, expressed through elections, not through unelected judges. If the people conclude Parliament has erred, they can express their views through the

[14] Iolanthe Act II
[15] Gearty, *ibid*, at (96).

ballot box in peaceful elections. The choice ultimately always remains in their hands. As such the tradition remains something which is lived by the people.

23. Thus, while our commitment to the protection of human rights may seem weak because the courts cannot strike down legislation, in the long term the real extent of any commitment to the rule of law and human rights depends on society's belief in it, and not on a voice of authority, no matter what that authority might be. A court judgment striking down a law today may seem to protect human rights in an age of insecurity, but if it breeds disengagement from a commitment to those rights amongst those who make up our society it ultimately has the opposite effect.

24. The common law, which unites almost all us Commonwealth lawyers and judges here today, represents the judicial embodiment of this commitment. Interestingly, the courts started to develop the common law around the time that a crude form of parliament came into existence. Without a written constitution, but with a gradually developing tradition of the sort I have been discussing, the judges started developing a rights-based set of rules – indeed with equity, two sets of rights-based rules. True it is that those rights were mostly rights of a private law nature, but early on the rights of the individual against the state came to be developed.

25. It was common law principles and traditions which led the House of Lords, in ringing terms to reject the notion that evidence obtained by torture could ever be received by a UK court[16]. The House had no difficulty in disposing of the argument that, even at a time of national insecurity, no court could receive such evidence to assist the state in establishing that a person was a terrorist. The case is a modern exemplar of the commitment of the common

[16] *A (FC) v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221

law to fundamental rights. It also highlights one of the main differences between the functions of the executive and the judiciary. A judge should never receive evidence obtained by torture, let alone act on it, but a government minister or a policeman who is offered evidence of terrorist activity would be under a positive duty to act on it, even if it is obtained by torture (although they should of course do nothing to condone or encourage torture)[17]. That serves to emphasise how the role of the executive is essentially pragmatic, whereas the judiciary's duty is to stand by fundamental principles – in a common law system, the judges are the lions under the throne.[18]

(3) Conclusion

26. In May 1944, when the world was beginning to emerge from the horrors of the Second World War, Justice Learned Hand said this:

> 'I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.
>
> And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow.'[19]

27. There is nothing new in this insight. It goes to the heart of what it means to be a liberal democracy. It lies at the heart of Thomas Paine's famous remark that

[17] Ibid, [46] and [47] per Lord Bingham of Cornhill, and [92] per Lord Hoffmann
[18] Francis Bacon, *Essays, Civil and Moral, LVI "Of Judicature"*
[19] Reprinted at http://www.criminaljustice.org/public.nsf/enews/2002e67?opendocument

> "He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."[20]

28. In an age of insecurity governments, legislatures, courts and constitutions can do much to protect human rights, to ensure that the clash between freedom and security ever remains a chimera. But it is the hearts and minds of men and women which are the true protectors of human rights, and the common law underscores and represents a living embodiment of what is in the peoples' hearts and minds.

Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Communications Office.

---

[20] Paine, *First Principles of Government (1795)*, in *The Writings of Thomas Paine*, Vol. III (ed. Conway) (Putnam & Son (1895)) at 277.