Civil Liberties in the War on Terror

The Third Audrey Ducroux Memorial Lecture

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It is for me a poignant duty, but also a great privilege, to deliver the third Annual Audrey Ducroux Memorial Lecture. It is poignant because Audrey was a very dear friend to my wife, Helen, and to me and our children. Audrey and Helen met nearly 30 years ago. It was a rapturous friendship from first sight. She worked with Helen to gain experience of the English matrimonial system. Helen introduced her to the Academy. She became a regular visitor to our home in London and in the country. She always came laden with gifts which always included saucisson Lyonnais and a bottle of her own vineyard's Brouilly. Today I wear in her honour a tie she gave me. She had boundless energy and enthusiasm and was never without a smile. How cruel that one whose essential characteristic was of *joie de vivre* should be struck down by cancer at the age of forty-two in the prime of life. We miss her. I remember vividly receiving the awful news of her death. It is an event imprinted on my mind.

So is the day, 9/11/2001, when 2974 people were murdered by 19 hijackers who crashed their planes into the Twin Towers, the Pentagon and the fields of Pennsylvania. We were watching the television as the drama unfolded. Who can ever forget it? Then we saw the President promising, "We're gonna get them folks" and though it was perhaps not the most stirring call to action, the world agreed with him. Nine days later, he addressed a joint session of Congress and the American people but

now his speech writers had injected passion into the rhetoric and the world received into the modern lexicon of our language the blighted phrase, "the war on terror". On that day he told the world:

> "Our enemy is a radical network of terrorists and every government that supports them. [Applause]. Our war on terror begins with Al Qaeda, but it does not end there. It will not end till every terrorist group of global reach has been found stopped and defeated. [Applause]. Our response involves more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. Freedom and fear are at war."

Are we entitled six years later to ask: has fear been vanquished, has freedom triumphed? Our fears for our safety have certainly not been assuaged. We may live with our fear but if anything it has been heightened since the terrorists struck down 202 in the bombing in Bali in October 2002, 173 on the trains in Madrid in March 2004, 9 in the Australian Embassy in Jakarta in September 2004 and 52 in London in July 2005. In the last few days the news has broken of the arrest in Germany of three men plotting to bomb Frankfurt Airport and the Ramstein American Air Base. This morning we saw Osama Bin Laden threatening more mayhem. If one thing is certain, it is that somewhere, sometime there will be another attack.

What about freedom? Have our freedoms, our civil liberties been preserved, or have they been trampled upon instead of being protected? That is the essential question I want to explore with you. That is the focus of this paper. It may seem to be a political question and as such it should not be one for a serving judge to address. Politics is for judges what sex is for the celibate monk – something undoubtedly pleasurable and even important for mankind but alas no longer for us to indulge in. So I must answer the question as a judge. I hope to do so in a way which will be thought provoking, but not in a way which is provocative. I do not wish to offend.

Please feel free to differ from any opinion I may express. My views are no better than yours. In this way we shall all respect one of our fundamental liberties - freedom of expression. Can I add the caveat that today's thoughts may very well change as they are refined by the cut and thrust of adversarial argument I may hear in any concrete case I may in the future have to decide.

Let me begin by defining our terms. When we speak of freedom, we speak of freedom under the law because, as declared in John Locke's second Treatise of Government written in 1690, "Wherever law ends, tyranny begins". Or as Thomas Paine famously stated in 1766:

> "In America the law is king. For as in absolute governments the king is law, so in free countries, the law ought to be king and there ought to be no other."

There we have a classic assertion that the rule of law must always prevail. The acid way to ascertain whether this soi disant "war on terror" protects or diminishes civil liberty is to judge the extent to which legislative and executive action meets this litmus test of the rule of law. Thus the framework of this lecture is to examine what steps the executive and the legislature have taken in waging this war on terror and what responses the courts have given when those steps have come under challenge.

First let me put the matter into some historical perspective because it is always useful to see the problem against the backdrop of history. A recurring theme of history is that in times of war, even liberal democracies have adopted measures infringing human rights in ways that are wholly disproportionate to the crisis. We can do no better than start with the last world war.

It was not until I had arrived here that the significance of this proud city's struggle for freedom seemed of any relevance to the crisis we face today. Here for the 900 days of the siege the citizens of Leningrad lived with the daily threat of death, but they did not flinch. Anna Akhmatova wrote in her diary on 23 February:

> "We have no fear of bullets nor do we grieve for our houses; but we are resolved to preserve our mother tongue in all its truth and force."

Millions died to save the values in which they believed. Loss of life of that scale put our war on terror into a new perspective for me and whilst not wishing for a moment to minimise the loss of 3,400 souls to Bin Laden, it does bring a different sense of proportion to the dangers we face as we go about our daily lives and the steps we can legitimately take to confront them. It prompts the questions: what is the true magnitude of the threat we face and how many of our fundamental freedoms are we required to sacrifice to meet it?

Sunday 7th December 1941 is seared into the United States' psyche. Pearl Harbour. One consequence was that 120,000 Americans of Japanese descent were placed in detention camps. Much later in 1988, Congress acknowledged that these actions were taken "without adequate security reasons" and were "largely motivated by racial prejudice, wartime hysteria and a failure of political leadership". But at the time it looked very different. Mr Korematsu, a Californian of Japanese ancestry, challenged the constitutionality of the order for his detention. The issue for the United States' Supreme Court was whether military necessity was established. Justice Black stated:

> "To cast this case into outlines of racial prejudice without reference to the real military dangers which were presented, merely confuses the issue."

Demonstrating considerable deference to the executive he concluded:

> "The military authorities considered the need for action was great and time was short. We cannot, by availing ourselves of the calm perspective of hindsight, now say that at that time those actions were not justified."

Here in the United Kingdom our courts also fell into step with the demanding beat of the drums of war. The Defence Regulations of 1939 provided that if the Secretary of State had reasonable cause to believe any person to be of hostile origin, he could order his detention. The House of Lords held in Liversidge v Anderson [1942] A.C. 206, 244 that, as a matter of statutory construction, the court could not enquire whether the Secretary of State in fact had reasonable grounds for his belief. But one beacon of light shone out in this darkness. Lord Atkin dissented. Back in the dark days of 1941 he knew there was a war on. He lived in Gray's Inn. He saw our ancient hall, chapel and library and much of our beautiful Georgian squares destroyed by the Luftwaffe yet he was courageous enough to incur the wrath of his colleagues by expressing his opinion in resounding terms:

> "In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

We spurn the lasting legacy of World War II at our peril. All were determined that Auschwitz, Dachau and Belsen should never happen again. And so there was huge momentum to enhance the dignity of man and not to defile it. But first came the question of what to do with the defeated Nazi leaders. At the Yalta meeting, Churchill was unashamedly of the view that they should be shot on capture. Roosevelt urged caution and favoured putting the captured on trial provided "it was not too judicial". Stalin could accept that – and perhaps he even smiled at the

Roosevelt reservation as he contemplated the possibility of the Allies adopting the unique case-management he deployed in the trials of his political opponents. From their accord emerged the International War Crimes Tribunals of Nuremberg and Japan. The rule of international law had prevailed. Since then there have been international tribunals to try crimes against humanity, for example, Mr Milosovich, those responsible for atrocities in Sierra Leone and Rwanda. Sadly the United States has not wholeheartedly participated in the establishment of an international criminal court but no one doubts that international criminal law is established and is a fact.

The second impetus was to boost human rights. The Charter of the United Nations established in 1945 proudly proclaimed:

> "We the peoples of the United Nations
> Determined
> To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
> To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained ..."

In 1948 Eleanor Roosevelt's great monument, the Universal Declaration of Human Rights, was described by her when presented to the General Assembly, as "the international Magna Carta of all man". Its preamble nobly declares:

> "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
> Whereas it is essential … that human rights should be protected by the rule of law, ...
> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women ...

> Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms, ..."

If you add the International Conventions on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966, you have a virtual international Bill of Rights in place.

British diplomats and British lawyers were most active in the establishment of the European Convention on Human Rights and the United Kingdom was one of the first signatories to the Convention even though it did not become part of British law until the passing of the Human Rights Act 1998, legislation that it is almost ironic to recall was introduced with a great fanfare by the Labour Government.

Equally important for present purposes was the Geneva Convention 1949, to which I must refer later, which laid down the rules for the treatment of prisoners of war.

After World War II came the Cold War, a state of armed hostility rather than actual war though war seemed perilously close in October 1962. Imagine how different the world might have been if, as the Russian missiles steamed towards Cuba, President Bush, Vice-President Cheney and Defence Secretary Donald Rumsfled had had their fingers on the nuclear button.

And now the Cold War has given way to the so-called war on terror. Let us examine that phrase for a moment. It is for me an exasperating, insidiously dangerous misuse of language. "War" is defined in the *Oxford Dictionary* as:

> "Hostile contention by means of armed forces, carried on between nations, states or rulers."

War surely connotes a concerted all-out attack on the nation's geographical integrity, not an isolated attack against individual national targets to make a political point. War involves some mass mobilisation of troops with casualties among the armed forces and civilians on a large scale. War is fought against a state's structured group of combatants, not against a constantly moving amorphous group of individuals having no national connection. Real war ends with victory or defeat or an Armistice. How will we know when this was has been won or lost? Will it ever be won or lost? Moreover, how in any conventional sense, still less in any sense recognisable in international law, can war possibly be waged against a state of mind – terror? To wage war against being terrified is an palpable nonsense.

Is the phrase "war on terrorism" or "war on terrorists" any more accurate? "Terrorism" is not a live enemy but a means to an end. Terrorism is a political weapon. Declaring war on terrorism is like declaring war on bows and arrows. War against terrorism or terrorists is as metaphorical as the war on drugs or on crime generally. It is incapable of precision because, surprisingly, even today there is no universally accepted definition of terrorism. One man's terrorist remains another man's freedom fighter.

The problem that has arisen through this sloppy or extravagant language is that whereas the "war on terror" nomenclature may have begun as a rhetorical flourish, the misuse of the phrase has fuelled troubling confusion as to legal rules that are applicable to the manner of waging of the response to it. The "war" rhetoric serves to emphasise the security imperative with the consequence that it also erroneously

suggests that the imperative of national security can trump the observance of the core value of Human Rights law. Because this war has the objective of destroying "terror" and "terrorist groups of global reach", it is a war that may never end, and thus the terminology of "war" provides a pretext to detain persons by reference to the rules of war that do permit detention of combatants during armed conflict, but in circumstances where this detention is now on an indefinite basis. Ambiguity as to whether this war is truly a war provides scope for the manipulation of the law and the selective application of standards which suit the protagonists' agenda of the moment. The grave danger is that where confusion is generated around the proper law which must govern the situation, then the rule of law and respect for it cannot but suffer.

How much better the world might have been if, instead of adopting a military concept of a war on terror we had accepted that prevention is better than cure and so embraced an intelligence based model for the defence of society which concentrated, for example, on the following:

(1) through enhanced intelligence, seeking to identify, capture and disrupt the inner circle, the committed core of Al Qaeda terrorists;

(2) safeguarding the most dangerous weapons to keep them out of terrorists hands;

(3) identifying and protecting the most vulnerable targets;

(4) controlling the movement of the money which funds terrorist activity;

(5) (and this I think is perhaps most important of all), reducing the creation of 'wannabe' terrorists by addressing the grievances and anger that drive them to extreme violence in the first place.

But the nomenclature of the war on terror has stuck and the hawks on both sides rejoice. From the blue corner Dick Cheney was to proclaim in the days immediately after 9/11, "We need to work on the dark side", an ominous prediction of what was to happen, and a revealing insight into the administration's mind. From the red corner there came the equally chilling words of Mohammed Siddique, one of those who carried a bomb onto the London Underground. The theme of war allowed him to glorify his action in his recorded suicide message:

> "I'm going to talk to you in a language that you understand. Our words are dead until we give them life with our blood. I and thousands like me are forsaking everything for what we believe. Your democratically elected governments continuously perpetrate atrocities against my people all over the world. And your support of them makes you directly responsible, just as I am directly responsible for protecting and avenging my Muslim brothers and sisters. Until we feel secure, you will be our target. And until you stop the bombing, gassing, imprisonment and torture of my people we will not stop this fight. We are at war and I am a soldier. Now you too will taste the reality of this situation."

His attempt to justify his murderous actions by claiming to be a noble soldier fighting a war rather than a wicked callous murderer demonstrates the dangerous consequences of insisting that we are at war.

Think how differently the world might have been had the homespun declaration of the President "We're gonna get them folks" been translated into a call for the international agencies to track down and try in an internationally recognised criminal court those guilty of these terrible crimes against humanity. Instead the United States has been driven into deeper and deeper difficulties by the paradox of treating criminal acts as war crimes. How did this happen?

On 12th September 2001 the Security Council obtained a unanimous resolution condemning the attacks of 9/11 and calling on the international community to

redouble its efforts "to prevent and suppress international terrorism". But it went further. It recognised "the inherent right of individual or collective defence". The Patriot Act was rushed through not only to give the President authority to use all necessary force against those responsible in order to prevent further attack but also to confer vast powers on the executive to override civil liberties and to erode judicial scrutiny of its actions. Because Osama Bin Laden was in Afghanistan, the bombing campaign began there on 7th October 2001 even though war had not been declared on Afghanistan or the Taliban. By mid-November the Taliban's hold on the country had collapsed, though that is not how it will appear to our brave troops fighting and being killed in Helmansland today, six years later. By January 2002, hundreds of ordinary Taliban foot-soldiers who may or may not have been Al Qaeda's supporters were captured but Bin Laden himself and most of his essential staff escaped.

By an executive order of 13th November 2001, the President asserted authority to establish secret military commissions to try non-Americans suspected of violating the rules governing the conduct of warfare. Condign rules of procedure and evidence were prescribed. The Athenian legislator, Dracon, would have been speechless in admiration. A defendant could be found guilty even if the tribunal could not be satisfied beyond reasonable doubt and the death penalty then imposed with no other appeal than to the President. The internationally respected jurist, Ronald Dworkin, writing in the New York Review of Books, *The Threat to Patriotism*, February 28, 2002 was scathing.

> "This is the kind of "trial" we associate with the most lawless of totalitarian dictatorships. If any American were tried in that way, even for a minor offence, let alone a capital crime, we would denounce that government as itself criminal."

By January 2002 the first captives arrived at Guantanamo Bay Naval Base in Cuba. The Defence Secretary proclaimed on 15th January 2002:

> "There is no doubting the legality of the way these combatants have been imprisoned. There is no doubting the legality of the right of the US to remove them for trial in Guantanamo."

The Bush administration were asserting that the naval base was not technically on US soil, the captives held there were not subject to US law and did not have access to the rights guaranteed by the US constitution or the protection of the United States justice system. Lord Steyn, a senior judge in the House of Lords, who, like me, grew up under Apartheid in South Africa and so know all about detention without trial and without access to lawyers, was driven to say that much as he had always admired American democratic values, the treatment of these detainees was a stain on American justice. And, to avoid your criticism that my disapproval is directed only at the United States, may I add that Her Majesty's Government, with the Attorney General a belated exception, is complicit in that shame. Guantanamo Bay is surely an unmitigated disaster.

Why? In the first place, because of the way in which the news was broken to the world on television. Groups of bound and shackled men in orange jump-suits, on their knees, heads bowed, that is the image of Guantanamo. Google Guantanamo and that is the picture that one sees. Pause for but a second and ask what would have been our reaction if those had been American and British soldiers held in an Al Qaeda camp. It would have caused outrage. So was this good PR in the battle to win the hearts and minds of the moderate Muslims? Does it dampen or fuel the fervour of the likes of Mohammed Siddique? But those are political points and I must return to the legal ones.

Deprived of the protection of the law, the detainees were in a legal black hole. A White House press release of 7th February 2002 explained that the Geneva Convention did not apply because, first, Al Qaeda was not a state party to the Convention. It is a foreign terrorist group and as such its members are not entitled to POW status. The flaw in that argument is that if they are not POWs, does it not follow their status is that of international criminals guilty of crimes against humanity and they should be treated as such? Secondly, it was suggested that although the ruling Taliban had never been recognised as the legitimate Afghan government, the state of Afghanistan was a party to the Convention; yet, because the Taliban foot-soldiers did not wear a distinctive uniform recognisable at a distance and so were indistinguishable from the civilian population at large, they were not "lawful combatants". The Red Cross challenged this view and although, Article 5 of the Convention provided that in the case of doubt, status should be determined by a competent tribunal, the Bush Administration denied them that right. There is, moreover, a flaw in this second argument. What seems conveniently to have been overlooked is that the 1977 Protocol to the Geneva Convention which was introduced after the Vietnam War to deal with the Vietcong, recognised that the armed combatants would not always be distinguishable from the civilian population yet they were to be given the same protection as that afforded to prisoners of war. The inconsistency of the Administration's position was that these captives were being denied the benefits of the Geneva Convention yet the U.S. military authorities, not the civilian courts nor any international organisation, were being given the right to treat the prisoners virtually as they wished. That is almost certainly what happened. These detainees were being denied their right to be tried according the rules of regular

judicial proceedings and were also being denied all the protections, protections described, or do I mean decried, by former Attorney General Alberto Gonzales as "quaint" and "obsolete", all the protections which are built into the Convention and which include the right to be protected from acts of violence and intimidation, to be free from insult, demeaning ill-treatment and public curiosity. How more insulting to a Muslim than to shave his beard? It may be a totally insignificant matter to those not of that faith, but it could be of monumental importance to all Islamists keen to exploit the West's denigration of their religion. The ubiquitous and potentially calamitous danger is that the way we wage war on terror will - and whether rightly or wrongly simply will not matter - be perceived as an attack on Islam and the Muslim faith and that will encourage all those who dream of the emergence of the new Caliphate and will precipitate even greater turmoil for the West.

If the American courts were slow to react, the English courts were not. In November 2002 the Court of Appeal had to consider the application of the mother of one of the detainees, Ferroz Abbassi, a British citizen, to compel the Foreign Office to take steps to demand of the American authorities that his human rights be protected. It was opposed by the Government. The application rightly failed because the Court could not interfere in the conduct of our diplomatic relations with a foreign state. Nevertheless the Court did not flinch from expressing its view about Guantanamo which the court condemned as "a clear breach of international law, particularly in the context of human rights." Led by Lord Phillips, the English court invoked the principle of habeas corpus and the fundamental principle of English law that every imprisonment must be treated as unlawful unless it could be justified. This was a legal black hole and so the court held: "What appears to us objectionable is that Mr

Abbassi should be subject to indefinite detention in a territory over which the United States has exclusive control but he has no opportunity to challenge the legitimacy of his detention before any court or tribunal."

It was not until 28th June 2004, two and a half years after the detainees had arrived at Guantanamo, that the United States Supreme Court began to grapple with the problem. Rasul v Bush was the first habeas corpus submission by a foreign national to reach that court. The Supreme Court dismissed the argument that the naval base at Guantanamo was beyond the reach of US law. This was the first chink of light in the black hole. The Supreme Court ruled that the executive lacked the authority to deny captives access to the United States justice system and held that the captives did have the right to initiate habeas corpus proceedings. The court ruled that the executive was obliged to provide captives with an opportunity to hear and attempt to refute whatever evidence had caused them to have been classified as "enemy combatants". The response of the Government was to create the Combatant Status Review Tribunal and to pass the Detainee Treatment Act 2005 which explicitly restricted further applications for bringing habeas corpus proceedings.

At the same time, Hamdi v Rumsfeld decided that because Hamdi held American as well as Saudi citizenship, he was entitled as a US citizen at the very least to have the right to challenge his detention before an impartial judge. Justice Sandra Day O'Connor presciently observed:

> "As critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."

Two years later, Hamdan v Rumsfeld reached the US Supreme Court in July 2006. The court ruled that the executive lacked the constitutional authority to set up the military commissions to try captives taken in the war on terror. The proper authority to do so was Congress. Consequently the Military Commissions were illegal, both under military justice law and the Geneva Conventions. The government's reaction to this set-back was to pass through Congress the Military Commissions Act 2006 giving explicit congressional authority to use military commissions similar to those that had just been declared unlawful. Most of the heinous features were retained so that suspects were still restricted from attempting to refute or even to learn about evidence against them that was classified as secret. Even use of evidence extracted from the suspect or other witnesses through use of "extended interrogation techniques" or "coercive interrogation", glib euphemisms, surely, for torture, was permitted provided that evidence was extracted before the passing of the Detainee Treatment Act on 31st December 2005 which belatedly but only prospectively protected inmates from such torture. In this way the essential dilemma has been perpetuated, the paradox of treating as war crimes those acts which are contrary to the ordinary common law.

The most recent challenge in the Supreme Court was launched in Boumediene v Bush. On 29th June 2007 the Supreme Court granted permission for appeals which will determine whether the Military Commissions Act 2006 validly stripped the federal court of jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at Guantanamo Bay and whether a petition which established that the United States government had imprisoned the petitioners for over five years

demonstrated unlawful confinement requiring the grant of habeas corpus relief or at least a hearing on the merits. This appeal is fixed to be heard in October. Is one entitled to express dismay that it taken such a long time to get to the heart of the matter? Justice delayed, especially over fundamental questions like unlawful detention, is surely justice denied.

The Australians among us might be interested to learn about the case of an Australian citizen detained in Guanatanamo, David Hicks. He was said by the United States ambassador to Australia to be one who would kill Australians and Americans without blinking an eye, and, consistently with the view that he was among the worst of the worst, he was charged with murder. Notwithstanding all the coercive interrogation, there was still no evidence to support that charge and it was dropped. He was, however, persuaded in some dubious plea bargain to plead guilty to providing material support for terrorism even though this was a civil offence, not one in the military law calendar, and, even worse, it was an offence that was created retrospectively. He was then deported to Australia to serve his nine months' prison sentence. Malcolm Fraser, the Prime Minister of Australia from 1975 to 1983 wrote in *The Jurist* on April 30th 2007:

> "And so this story comes to an end but at what price? The main story is not David Hicks. The main story is a willingness of two allegedly democratic governments prepared to throw every legal principle out the window and establish a process that we would expect of tyrannical regimes. That our own democracies should be prepared to so abandon the rule of law for an expedient and as I believe, evil purpose should greatly disturb all of us. But how many are concerned? Too many are not concerned because they believe that such a derogation of justice can only apply to people who are different, in some indefinable way.
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> Only the other day I was speaking with somebody who quite plainly believed that Hicks deserved anything that was meted out to him because he was what he was, the rule of law did not need to apply. For somebody who has done terrible things, why does he deserve justice? That denies the whole basis of

> our system, the necessity of a civilised society which cannot exist unless there is an open, predictable justice system that applies equally to every person."

If all that was not enough, the American authorities have been practising "extraordinary rendition" in which detainees are transported to countries that have no qualms about torturing prisoners. The process seems to be accurately summarised by an unnamed official who was interviewed by the Washington Post on 26th December 2002:

> "We don't kick the shit out of them. We send them to other countries so they can kick the shit out of them."

How charming. How true. Once again the Bush Administration has placed itself above the law and the individual concerned beyond the protection of the law. Once again the British Government is shamefully complicit in this practice.

At least, as I hope I have demonstrated, the courts in America have, if regrettably slowly, asserted the rule of law but in their battle with the executive, it has not been or has not yet been a resounding victory.

In the United Kingdom there has been a similar conflict between the executive and the judiciary. The United Kingdom Government's reaction to 9/11 was twofold. One was to issue a derogation from Article 5 of the European Convention on Human Rights which protects the liberty of the subject. Article 15 of the Convention permits derogation "in time of war or public emergency threatening the life of the nation", but then only "to the extent strictly required by the exigencies of the situation". The Government exercised its right to derogate because "there existed a terrorist threat to

the United Kingdom from persons suspected of involvement in international terrorism."

The second measure, rushed through Parliament, was the Anti-Terrorism, Crime and Security Act 2001, Part IV of which gave the Secretary of State power to detain persons indefinitely on reasonable suspicion without charge or trial. This was challenged in A v Secretary of State for the Home Department [2004] UKHL 56. All the appellants were foreign non-UK nationals. None had been subject of any criminal charge. In none was there was a criminal trial in prospect. All challenged on human rights grounds. Nine members of their Lordship's House sat on the Committee to hear this appeal, usually there are only five. The appeal was allowed essentially for three reasons. (1) It was irrational to address only the threats posed by foreign Al Qaeda terrorists and their supporters and not also the equal threat posed by UK nationals. The irrationality of treating British citizens as presenting no risk to the nation was exposed by the July 2005 bombings in London, all of which were carried out by young Muslims born and bred in Yorkshire. (2) The detention orders were disproportionate because they permitted detention of those who sympathised with terrorist activity abroad even if they did not pose any threat to UK security. (3) It was discriminatory because it applied only to non-nationals and not to UK nationals. In the result the control orders were quashed.

So was the statutory instrument which permitted derogation from the E.C.H.R. Lord Hoffman, another South African, was much derided in sections of the press for saying in his inimitably forthright style that "the real threat to the life of the nation comes not from terrorism but from laws as these".

The dilemma which is the focus of this lecture, namely the tension between arms of democracy - legislature and executive on the one hand and the judiciary on the other - was at the heart of the argument in this case. Lord Goldsmith, the Attorney General, submitted that:

> "as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not judicial judgment … It was not for the courts to usurp authority properly belonging elsewhere."

Lord Bingham's retort was sharp:

> "It is of course true that the judges in this country are not elected and are not answerable to Parliament … But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision – making as in some way undemocratic … The HRA gives the court a very specific wholly democratic mandate. As Professor Jowell has put it: "The Courts are charged by Parliament with delineating the boundaries of a rights based democracy".

The Government was not best pleased. Reacting like the Bush administration to this rebuff from the judiciary, the Blair response was to force through with difficulty the Prevention of Terrorism Act 2005. The Government's initial attempt to impose control orders for ninety days was defeated in Parliament by the Labour Party rebels who, very properly, argued that detention for ninety days was equivalent to a six month prison sentence allowing for early release for good behaviour. That would not be compatible with the duty imposed by Article 6 to hold not only a fair trial but also a prompt trial. Instead the Act introduced the imposing of "obligations" on those suspected of being engaged in terrorist-related activity. This is now being tested in

the courts, leading to further clashes between the Government and the judiciary. In the first case, MB v Secretary of State [2006] EWCA Civ 1140, the Government argued that so long as the court was satisfied that the Secretary of State reasonably suspected the individual in question, the court should not test for itself whether his reasons were in fact well-founded. This was held to be unfair: the Secretary of State could not fairly impose a control order on the basis of suspicion but then deny the detained person the opportunity of showing that the Secretary of State had in fact got it wrong. The Home Secretary of the day, Charles Clarke, reacted furiously to Sullivan J.'s initial decision, accusing him of failing to take responsibility for the battle against terrorism. This did not prevent the Court of Appeal upholding the judge.

The second case was Secretary of State for the Home Department v JJ [2006] EWCA Civ 1141 where the "obligations" imposed required the individuals concerned to move away from the area in which they had been living and to live in specially selected and security cleared accommodation. There they had to remain under curfew from 4pm overnight to 10am, i.e. for 18 hours out of 24, without stepping out so far as their gardens or even onto the communal corridor. They had to wear an electronic tag 24 hours a day and to allow the police access to the premises at any time. No visitors were allowed to the premises without approval nor could they meet with anyone in the 6 hours they were allowed off the premises unless they had Home Office approval to do so. The Act itself had provided that the Secretary of State was prohibited from making a control order that deprived an individual of his liberty, recognising that only the courts could make such an order. The issue was whether this was a deprivation of

liberty or a mere restriction on movement. Both Sullivan J. and the Court of Appeal held that this was a deprivation of liberty.

The cases have also given the opportunity for the higher courts to consider the legality of the procedures adopted in the newly constituted Special Immigration Appeals Commission. Building upon a Canadian example, appellants liable to be deported for imperilling national security are able to appoint their own solicitors and counsel to deal with all open material but special counsel are appointed to deal with the classified secret evidence and cross-examine and make submissions about it in camera. These are senior Queens' Counsel, not third rate public defenders, and conducting the hearing before a Judge of the High Court in two parts is the United Kingdom's attempt to ensure that there is a fair hearing of the whole case against the detainee even if one part of it takes place in his absence and without his ever knowing the case against him. I understand that appeals against all these matters have recently been argued in the House of Lords and their Lordships' opinions are expected to be delivered soon.

There has been much litigation about the ambit of Article 3 of the Convention which imposes an absolute prohibition for it guarantees the right not to be subjected to torture or to inhuman or degrading treatment. Of significance for present purposes, the European Court of Human Rights held in 1992 that it would be unlawful for the U.K. Government to extradite Mr Soering to Virginia where he would be at risk of the death penalty after many years on death row. It was followed in Chahal v The United Kingdom in 1997 when the Government was denied its wish to deport a Sikh separatist to India on the ground that he was a threat to national security but where, if

he were to be returned, there was an accepted risk that he would be tracked down and killed by the lawless Punjabi police. These decisions now present problems for the Government who wish to deport non-nationals suspected of terrorism to such countries as Algeria, Jordan and Libya where there was a real risk they would face death, torture or ill-treatment on their return. The Government had originally accepted it could not return them but after the London bombing in July 2005, there was a change of policy. All non-nationals were to be taken off control orders and detained with a view to deportation. This was consistent with the tough announcement by the Prime Minister on August 5th 2005, "Let there be no doubt, the rules of the game are changing". Perhaps he had not appreciated that the one and only true rule of the game is the rule of law and that is immutable. Mr Blair threatened that if his legislation met with what he called "legal obstacles" then the Government would amend the Human Rights Act. The Home Secretary was even more forthright. He said on 9th August 2006:

> "When I see the nature of the Chahal judgment by European judges that we ought to be prohibited from weighing the security of our millions of people in this country if a suspected terrorist remains here when we are trying to deport him then I sometimes feel that so many people who should be foremost in recognising the threat that exists and the nature of the threat don't get it. They just don't get it."

The solution to the impasse was that the Government set about negotiating with those countries a promise not to torture or ill-treat those who were sent back. The courts have retained their right to be satisfied that the guarantees are effective. In some cases they have been satisfied, in others they have not and the court has refused to order the deportation of the suspect concerned.

The absolute prohibition of deportation to face a risk of torture has been challenged in other jurisdictions. In Suresh v Canada the Canadian Supreme Court acknowledged the clear position under international law prohibiting deportation to face torture but nevertheless left open the possibility that in exceptional circumstances, deportation to face torture might be justified. On the other hand the Supreme Court of New Zealand interpreted its Bill of Rights in the light of guarantees under the International Covenant on Civil and Political Rights and the Convention against Torture as requiring that the right not to be deported to face torture should not be balanced against considerations of national security. The American Supreme Court has, as I understand it, reserved pronouncing on the question which recently arose but it seems likely to defer to the Administration satisfying itself that there are adequate guarantees of safety.

The UK has not had to deal with the problems faced by America of the questionable fairness of the trials of detainees by military commissions but I suspect the response of the British judiciary is fairly predictable. The House of Lords have ruled inadmissible any evidence obtained by torture, even torture by non-British agents in countries beyond our jurisdiction. The right to a fair trial enshrined in Article 6 of the Convention is a statement of no more than a fundamental principle of British justice long-established that the overall fairness of a criminal trial cannot be compromised. To receive information that may have been obtained by torture is to eat the fruit of a poisoned tree.

In its upholding of human rights, the courts have frequently incurred the wrath of the Government and certain sections of the media. At the 2006 Labour Party Conference,

the Home Secretary, Dr Reid, was forthright about his approach to national security. He said:

> "Faced with the terrorist threat, as John F. Kennedy said, we must be prepared to 'bear any burden, pay any price, face any foe, and support any friend'."

It was a pity that the Home Secretary did not complete the late President's words at his inauguration. The full quote is: "We must be prepared to bear any burden, etc., … to assure the survival and the success of liberty." That is exactly what this struggle is all about.

Of course we all have to recognise that this presents a dilemma for democracies having to combat terrorism. Many argue, and I see the force of the argument, that we have to strike an appropriate trade-off or balance between two values - freedom and security - each of which can sometimes only be served at the costs of the other. Richard Posner, a distinguished judge of the Seventh Circuit of the U.S. Court of Appeals and a foremost legal scholar of his generation, in his latest book, Not a Suicide Pact: The Constitution in a Time of National Emergency, supports this costs/benefits analysis. It was Justice Jackson who memorably said in 1949 we cannot allow our Constitution and our shared sense of decency to become a suicide pact. The difficult judgment to make is to decide how far, if at all, it is expedient to permit some erosion of civil liberties which is proportionate to the threat. It may be the privacy must be sacrificed on the altar of containment in order to facilitate the surveillance of internet and other communications by the security agencies but recent U.S. legislation to give effect to this has met with howls of protest from Europe, France and Germany in particular, where this right is zealously guarded.

Professor Tribe of the Harvard Law School justifies a hard line stance by contending that whereas it may be right in normal times to allow ninety nine guilty defendants to go free rather than wrongly convict one innocent one, this arithmetic must be revised when the acquitted guilty defendant may go on to blow up the rest of Manhattan. Dworkin provides the answer. We must decide not where our interests lie on balance, but what justice requires as a matter of fairness. Fairness requires, as a matter of equal concern for anyone who might be innocent, that we extend due process to everyone brought into the system. Whenever we deny to one class of suspects rights we treat as essential for others, we act unfairly.

Aharon Barak, president of the Supreme Court of Israel, presiding in a case in which the court held that the violent interrogation of a suspected terrorist is not lawful even if doing so may save human life by preventing impending terrorist acts, confronted the problem with these wise words:

> "We are aware that this decision does not make it easier to deal with the reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and allow it to overcome its difficulties."

In the final analysis protecting fundamental human rights is protecting democratic society itself. It is respect for these rights which distinguish democrats from dictators. The strength of democracy is that the ultimate power lies with the people. With elections looming both sides of the Atlantic, we, the electorate, have to face up to our democratic responsibilities so that, having informed ourselves of the fundamental issues which are raised by this war, we can decide whether we prefer the approach of

President George W. Bush or that of his predecessor, President Thomas Jefferson, who warned that:

> "He who trades liberty for security deserves neither and will lose both."

In the Sixth Sir David Williams Lecture on *The Rule of Law*, Lord Bingham of Cornhill, the Senior Law Lord concluded:

> "It seems to me that the rule of law does depend upon on an unspoken but fundamental bargain between the individual and the state, the governed and the governor, by which both sacrifice a measure of freedom and power which they would otherwise enjoy. The individual living in society implicitly accepts that he or she cannot exercise the unbridled freedom enjoyed by Adam in the Garden of Eden, before the Creation of Eve, and accepts the constraints imposed by the law as properly made because of the benefits which, on balance, they confer. The state for its part accepts that it may not do, at home or abroad, all that it has the power to do but only that which the law, binding upon it authorises it to do. If correct, this conclusion is reassuring to all of us who, in any capacity, devote our professional lives to the service of the law. For it means that we are not, as sometimes seen, mere custodians of a body of arid proscriptive rules but are, with others, the guardians of an all but sacred flame which animates and enlightens the society in which we live."

I am proud to be able to proclaim that Her Majesty's Judges have kept the flame of freedom alight and burning. Snuff it out and we are truly cast into darkness. But liberty does not depend entirely on the fearless independence of the judiciary. It also depends on you – lawyer and non-lawyer alike. Never forget Judge Learned Hand's famous admonition to the Yale Law School graduates of 1931:

> "Liberty lies in the hearts and minds of men and women; when it dies there, no constitution, no law, no court can save it. While it lies there, it needs no constitution, no law, no court to save it."