



## KEYNOTE ADDRESS

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Writing against the subjugation of women in 1869, John Stuart Mill wrote that “laws and institutions require to be adapted, not to good men, but to bad.”<sup>1</sup> You cannot justify an institution on the basis that good men will not abuse it. So too with times: laws and institutions need to be adapted not to good times, but to bad. It may be relatively easy to agree on what the laws should be in times of ease and peace—in the good times. When the times are bad, it is more difficult.

And we have had since 9/11 plenty of bad times.

How have we approached them? How have we adapted our laws and institutions to the bad times? And in doing so, what are the constitutional and international norms and standards we have drawn on?

I have been arguing for some time in public speeches, as well as in internal debate, that maintaining the rule of law is a key element in responding to the challenges we face. That is an argument I want to develop this evening. The core message is that in the end it is not expediency that will win, but principle. That we must fight for the values we are trying to protect. That individual liberties are not an obstacle to fighting terror but part of the response to it. If we do not respect them in the end we will be the losers.

## *The Constitutional Context: Written vs. Unwritten Constitution*

Let me start by considering where the United Kingdom has looked for its constitutional standards and norms. You all know well that the United Kingdom, if not alone, then at least in select company, has no written constitution. This is odd perhaps for the country that produced Magna Carta and the Bill of Rights 1689 before ever such documents were created in many other countries.

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\* Her Majesty’s Attorney General (United Kingdom). These remarks were delivered on February 16, 2007 at the *Stanford Law Review* Symposium, “Global Constitutionalism,” co-sponsored with the Stanford Constitutional Law Center.

1. JOHN STUART MILL, ON THE SUBJECTION OF WOMEN ch. 2 (1869), available at [http://gutenberg.com/eBooks/BlackMask\\_Online/subjectwomen.htm](http://gutenberg.com/eBooks/BlackMask_Online/subjectwomen.htm).

This means we have had the flexibility of an unwritten constitution as opposed to the certainty—and perhaps the rigidity—of a written one. Prime Minister William Gladstone summed it up when he said: “[A]s the British Constitution is the most subtle organism which has proceeded from the womb and the long gestation of progressive history, so the American Constitution is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man.”<sup>2</sup>

I do not intend to explore this issue in any great detail this evening, beyond saying that I have come increasingly to the view that it is time to look hard at producing a written constitution for the United Kingdom. Because for all its advantages, flexibility can sometimes give rise to uncertainty. And when there are big decisions to be taken, uncertainty can be unsettling and even corrosive. In the United Kingdom, for example, there is a recurring debate about what the proper role of Cabinet should be in taking the big decisions—such as the use of military force. In the same way there is debate about the respective roles of Parliament and the executive in taking such decisions—should Parliament have a right to be informed, or to be consulted, or to give or withhold consent to military action? What are the respective roles of the two Houses of Parliament? Such debate is healthy. But in the end you need to settle the debate, otherwise you end up arguing forever about the mechanics of how decisions should be (or should have been) taken, rather than about the merits of the decision itself. In the United Kingdom, we have no written constitution for settling debates of that kind. So we have to rely on convention, and precedent, and sometimes on political expediency.

But that does not mean we do not have a set of core values and principles and liberties on which there is general consensus. Many of these values today find reflection in international treaties and domestic laws. But the acceptance of many of them in the United Kingdom predates such instruments. They are to be found in the common law wrought often in the political struggles of the day: habeas corpus, freedom of speech, fair trial, independent judiciary, democratic control of the executive, and so on. I will return to these.

### *Parliamentary Sovereignty*

In the absence of a written and entrenched constitution, the key principle in our constitution has been that of Parliamentary sovereignty. Dicey said too famously for repetition before such a distinguished audience that Parliament could do anything but change a man into a woman. Though even that proposition understated the power of Parliament when it enacted the Gender Recognition Act 2004. That statute followed litigation against the United Kingdom in the European Court of Human Rights, which in a case called

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2. W. E. Gladstone, *Kin Beyond Sea*, N. AM. REV., Sept.-Oct. 1878, at 185, available at <http://cdl.library.cornell.edu/cgi-bin/moa/moa.cgi?notisid=ABQ7578-0127-22>.

*Goodwin*<sup>3</sup> found that the lack of legal recognition for transsexual people violated their right to respect for their private life, their right to marry, and the prohibition on discrimination. In response, the 2004 Act provides for the issue of a “gender recognition certificate” to a person who has lived in the other gender, or has changed gender under the law of another country. The effect of a gender recognition certificate is that: “[T]he person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman).”<sup>4</sup>

Dicey would have been proud.

The concept of parliamentary sovereignty was expressed more prosaically but no less trenchantly by the Privy Council in *Madzimbamuto v. Lardner-Burke*,<sup>5</sup> in which the consequences of the unilateral declaration of independence by Rhodesia were in issue. The Privy Council noted:

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do these things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.<sup>6</sup>

This means that ultimately Parliament could enact any laws it thought fit to tackle the issues of terrorism—and that is theoretically, if not politically, true even after the passing of the Human Rights Act to which I will turn shortly.

### *Constitutional Reform*

The context is that the United Kingdom has been through a period of unprecedented constitutional change since the Labour government came to power in 1997. Vernon Bogdanor, Professor of Government at Oxford University, has said in a recent article:

Since Blair came to office, Britain has been engaged in a process quite unique in the democratic world, that of converting an uncodified constitution into a codified one, but by piecemeal means. . . . It is beginning to look as if they will need to accustom themselves to living in [a half-way house] for rather a long time, at least until the foundations of the new constitution have been fully tested by experience.

. . . What is already clear, however, is that the constitutional reforms of the Blair government are far-reaching in their implications and almost certainly

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3. *Goodwin v. United Kingdom*, App. No. 28957/95, 35 Eur. H.R. Rep. 18 (Eur. Ct. H.R. 2002).

4. Gender Recognition Act, 2004, c.7, § 9(1).

5. [1969] 1 A.C. 645.

6. *Id.* at 723.

permanent. They will be remembered long after most current political squabbles are forgotten.<sup>7</sup>

Those reforms include, in the first four-year session of the Labour government, some eleven statutes of constitutional significance. Amongst these were the Human Rights Act 1998 (to which I will return); the statutes providing for devolution to Scotland and Wales; the Freedom of Information Act 2000; and the House of Lords Act 1999 (which largely removed hereditary peers from the second legislative chamber—in a continuing process on which further proposals were published only last week).<sup>8</sup>

More recently, in 2005, Parliament passed the Constitutional Reform Act. This made major changes to the role of Lord Chancellor, who is no longer head of the judiciary, nor speaker of the House of Lords, nor responsible for judicial appointments, which now fall to an independent commission. The Act also paved the way for the establishment of a supreme court and the removal of the Law Lords from the House of Lords.

Section 1 of the 2005 Act deserves particular mention. It provides that the Act “does not adversely affect (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor’s existing constitutional role in relation to that principle.”<sup>9</sup>

It is understandable that section 1 should have referred specifically to the role of the Lord Chancellor, since reform of that office was the focus of the Act as a whole. But in singling out his role, Parliament cannot have meant that the Lord Chancellor alone is responsible for upholding the rule of law. That would imply that other ministers can be cavalier about the law. That would clearly not be right, nor is it my experience. All ministers in the U.K. government are bound by a—nonstatutory—Ministerial Code which refers to the “overarching duty on Ministers to comply with the law, including international law and treaty obligations, to uphold the administration of justice and to protect the integrity of public life.”<sup>10</sup>

### *The Role of the Attorney General*

What about my own role as Attorney General? This too has recently come under scrutiny, and indeed is subject to a current inquiry by the Constitutional Affairs Committee of the House of Commons. This is not the occasion for navel-gazing on my part but it would be right for me to say something about how my role fits into our unwritten constitutional system.

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7. Vernon Bogdanor, *The Historic Legacy of Tony Blair*, 106 CURRENT HIST. 99, 101 (2007).

8. CROSS-PARTY WORKING GROUP ON LORDS REFORM, THE HOUSE OF LORDS: REFORM, 2007, Cm. 7027.

9. Constitutional Reform Act, 2005, c. 4, § 1.

10. U.K. CABINET OFFICE, MINISTERIAL CODE: A CODE OF ETHICS AND PROCEDURAL GUIDANCE FOR MINISTERS ¶ 1.5 (2005).

The office of Attorney General is very ancient—going back to 1243, or 1315, or 1461, depending on how you view the history.

Like the rest of our constitution, the office has evolved over time. As Attorney General, I am a minister of the Crown and a member of the government. I am its chief legal adviser. By statute, I am responsible for superintending the main prosecuting authorities. As a minister, I attend Cabinet and—with the Lord Chancellor and the Home Secretary—have policy responsibility for criminal justice matters.

But when exercising certain other functions—in particular those relating to individual criminal cases—I act independently of the government, in the public interest.

As Lord Bingham put it in a case called *H & C*: “It is very well-established that when exercising a range of functions the Attorney General acts not as a minister of the Crown . . . but as an independent, unpartisan guardian of the public interest in the administration of justice.”<sup>11</sup>

That role was recognised recently when a Judge of the High Court of Northern Ireland referred concerns about the appointment of a Victims Commissioner to me as Attorney General, calling on me to instigate an inquiry. I was seen as capable of acting independently in the public interest, even though the case involved another government minister and his department.

There has been much comment about the tensions in my dual role as government minister and independent guardian of the public interest. Sometimes there *are* tensions and sometimes there are difficult decisions to be taken. But *someone* has to take them. I do not believe it would be an improvement for such decisions to be taken by a civil servant or appointed official outside Parliament. A key line of accountability would then be lost.

In the course of a recent debate, one of my recent predecessors as Attorney General, Lord Mayhew, put it eloquently:

It is said that the Attorney-General cannot determine these matters, and . . . that to set aside all partisan considerations is more than can be asked of flesh and blood in the Attorney General’s position. However, I disagree; I have seen it done, and I venture to claim that I have done it myself.<sup>12</sup>

I agree with those sentiments and am clear that in performing my independent public interest functions, including in relation to prosecutions, my duty is to the law and not to party loyalties.

### *The Human Rights Act*

The constitutional reform most relevant to the present debate is the Human Rights Act 1998. This Act, as I imagine is well known in this audience, gave effect in domestic law to the provisions of the European Convention on Human

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11. R v. H, [2004] UKHL 3, [46], [2004] 2 A.C. 134, 158.

12. 689 PARL. DEB., H.L. (5th ser.) (Feb. 1, 2007) 349 (Lord Mayhew).

Rights (ECHR). This charter was drawn up in the aftermath of the Second World War and sets out the classic values and liberties of a free democratic society—respect for life, prohibition of torture, freedom from arbitrary arrest, the right to a fair trial, the freedoms of speech, of thought, of religion, of association, to family life and privacy. British lawyers played a large part in its drafting, and the rights contained in it were already recognised in the United Kingdom—an important fact to note when some ignorantly claim that they want to reject the European Convention in favour of a British bill of rights. The rights contained in it are all, I am proud to say, British rights.

The Human Rights Act (HRA) was drafted in such a way as to work within our existing constitutional framework. A key provision is that parliamentary sovereignty is preserved. So the courts cannot strike down an act of Parliament on the ground that it offends the Convention rights. They can, if of the view that the act is incompatible, make a declaration to that effect, but that does not invalidate the act or any step taken under it. A person could still be convicted and go to prison for offending a provision of a law held to be incompatible. But this declaration of course would have a powerful effect on political and public opinion, and the HRA provides a fast-track method for remedying the incompatibility in Parliament without having to go through the full process of a new act of Parliament. Though government and Parliament might take the view, as they did when part of our 2001 terrorism laws were declared incompatible, to re-legislate in full rather than attempt to rectify the position with the fast-track procedure of a remedial order.

Parliamentary sovereignty is also underlined by the obligations in section 19 of the Act. This requires a minister who introduces a bill to Parliament to certify whether, in his opinion, it is compatible with the Convention rights. Section 19 has been an important mechanism in embedding human rights at the heart of government. It means that the level of scrutiny given to human rights in drawing up legislation is strengthened. It gives an added dimension to my role in relation to the rule of law, since the minister's judgment on compatibility with the ECHR must of course be made on the basis of legal advice. Normally such advice is given by departmental legal advisers, but the most difficult and sensitive cases are referred to me. In any event the Solicitor General and I see the memoranda of ECHR compatibility on every bill in order to ensure that the analysis stands up. In fact, only two bills have so far been introduced without a certificate of compatibility under section 19(1)(a).

The Human Rights Act has undoubtedly been a major constitutional reform. In my view, it is one of the great achievements of the present British government. And it has been highly successful in embedding respect for human rights on the part of decision-makers and policy-makers. Politically the ride has sometimes been choppy. On occasion the Act has been blamed for decisions which seem to favour the rights of an individual over the wider interests of the community. Some of these decisions appear to defy common sense. But more

often than not the decision turns out to have nothing to do with “human rights” at all.

To give just a few examples: In one notorious case, a man evaded arrest by climbing on to a roof. While he was on the roof, which was surrounded by the police pursuing him, he was supplied with cigarettes, drink and food—supposedly Kentucky Fried Chicken. A spokeswoman for the police was quoted as saying that “although he’s a nuisance, we still have to look after his well-being and human rights.”<sup>13</sup> In truth, the idea that the suspect had a “human right” to be fed Kentucky Fried Chicken is obviously absurd. The decision to give him food was an operational matter for the police as part of their strategy for talking him down—successfully, as it turned out.

Another example concerns the convicted multiple murderer, Dennis Nielsen. The story got about that he had been able, while in prison, to obtain hardcore pornography by citing his rights under the Human Rights Act. There was outrage in the media. In fact, Nielsen’s challenge to the prison governor’s *refusal* to give him access to pornography was, rightly, thrown out by the court at the preliminary permission stage.

A more serious case was that of Anthony Rice, who was released from a life sentence and tragically went on to murder Naomi Bryant nine months later. This was a case in which the responsible officials in the Parole Board and Probation Service did not ask all the right questions, gave too much weight to arguments about Rice’s human rights and the risk of being sued by him, and not enough to the need to protect the wider public.

This is not a problem inherent in the Human Rights Act itself, nor in the European Convention. Most of the rights in the Act and the Convention provide for a balance to be struck between the rights of the individual and the interests of the community. In Anthony Rice’s case, officials struck the wrong balance.

Ministers are therefore now embarked on a programme of education and raising awareness about the benefits of the Act but also to bust myths of the sort I have mentioned. Public protection and human rights do not need to be two sides of a coin.

It is important to note too that even if the Human Rights Act were repealed tomorrow, the United Kingdom would still be bound by the ECHR in any event, at least so long as the United Kingdom remained a party to the Convention.

Let me illustrate this point by reference to one of the issues that has faced us in responding to the modern threat of terrorism: how to deal with certain foreign nationals in the United Kingdom who had no immigration right to remain, but were believed to pose a threat to national security. Under

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13. Richard Savill, *KFC Meal ‘Ensures Siege Man’s Rights,’* TELEGRAPH.CO.UK (London), June 7, 2006, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/06/07/nrights07.xml>; see also John Coles, *Finger Nickin’ Good Farce,* SUN ONLINE, June 7, 2006, <http://www.thesun.co.uk/article/0,,2-2006260255,00.html>.



immigration laws, such people would normally have been deported. But our ECHR obligations—following a judgment of the European Court of Human Rights in a case called *Chahal*<sup>14</sup>—have meant that we could not deport them to a country where there was a risk that they would face death, torture or inhuman or degrading treatment. I will deal in more detail later with our response to that problem.

But the point I make now is that this issue flows from the United Kingdom's international obligations under the Convention itself. It was not created by the Human Rights Act and would not go away if the Act were repealed. That would happen only if the United Kingdom were to withdraw from the Convention altogether—an unthinkable eventuality which would represent a completely backward step, reducing the protection for the rights and liberties of the people of the United Kingdom and sending a wholly negative message to other states in the Council of Europe and the rest of the world about our attitude to human rights and the rule of law.

#### *The Challenges We Face—And Our Response to Them*

I started by saying that the real test of our laws and institutions comes when times are bad. Our times today do indeed present us with problems which are real and grave. I need not recite the list of terrorist atrocities in different corners of the globe since 9/11 though I would mention specifically the suicide bombings on the London Underground on July 7, 2005.

I am aware from my own responsibility for the prosecution services of the number of cases going through the courts now—more than twenty ongoing terror trials with not far short of one hundred defendants. What is more, the head of the Security Service—what many still know as MI5—Eliza Manningham-Buller together with the Home Secretary have recently referred to the extent of the domestic threat. She has talked of intelligence of some thirty active plots and nearly 1600 individuals believed to be engaged in plotting terrorism.<sup>15</sup>

I would never suggest that those problems could justify setting aside our principles and commitment to fundamental liberties. As President Aharon Barak of the Israeli Supreme Court said (in the case *Anonymous v. Minister of Defense*):

There is no avoiding—in a democracy aspiring to freedom and security—a balance between freedom and dignity on the one hand, and security on the other. Human rights must not become a tool for denying security to the public and the State. A balance is required—a sensitive and difficult balance—

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14. *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413 (Eur. Ct. H.R. 1996).

15. See *MI5 Tracking '30 UK Terror Plots'*, BBC NEWS, Nov. 10, 2006, <http://news.bbc.co.uk/1/hi/uk/6134516.stm>.

between the freedom and dignity of the individual, and national security and public security.<sup>16</sup>

But equally no one can deny that things have changed, and that striking the right balance has become more difficult.

What then has been our response to the changes, and how have we sought to strike that balance?

### *Strengthening the Criminal Law*

Strengthening the criminal law has been a key part of our strategy for dealing with the heightened terrorist threat. The first line of defence should be the criminal law. If crimes have been committed or plotted then they are crimes notwithstanding that they are politically motivated. Terrorists are criminals. We should neither dignify their cause by denying that fact nor complicate our legal thinking by doing so.

The difficulty has been to recognise that some plots have to be disrupted before they come to terrible fruition. We have therefore strengthened our laws to enable intervention at an earlier stage—by focusing on preparation for terrorism, the possession of terrorist articles, the training of terrorists, the incitement of terrorism, disseminating terrorist publications and so on. And Parliament has given greater powers, such as an increase in pre-charge detention for questioning.

Legislation is of course not the only answer. We have had to back up legislative words with front-line action and investment. So we have increased the resources dedicated to counter-terrorism in the police and the Crown Prosecution Service, who now have a dedicated division of specialist terrorism prosecutors. I have been leading a specific strand of work dedicated to improving the response of the police and prosecutors to tackling what we have termed “radicalisers”—that is, those who by words or actions lead or encourage others into terrorism.

### *Preventive Measures*

However, we have had to wrestle with those instances where there is a well-founded fear that an individual presents a risk, but insufficient evidence to support a criminal prosecution. That raises the question what preventive powers are justifiable, and very real issues about the conflict between individual rights and security.

Traditionally countries have guarded themselves against such risks in two ways.

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16. CA 7048/97 Anonymous v. Minister of Defense, [2001] IsrSC 54(1) 721, 741.

The first is the use of immigration powers to remove aliens believed to be dangerous from their territory. This has long been recognised as a legitimate response in international law.

So article 1.F of the 1951 Geneva Convention on Refugees provides that the provisions of the Convention do not apply to “any person with respect to whom there are serious reasons for considering that . . . he has been guilty of acts contrary to the purposes and principles of the United Nations.”<sup>17</sup> And articles 9 and 32 of the Convention entitle a state to deny refugee status to an individual who is a risk to national security or public order. This is a strong statement because refugee rights do not come into play unless there is a well-founded fear of persecution if the person is not allowed to stay in the requested state.

Under the European Convention on Human Rights too there are a number of clear statements that the right of states to control the presence of aliens is not touched by the Convention rights. So in *Abdulaziz* the Court said: “[A]s a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.”<sup>18</sup>

Despite the approach taken in the Refugee Convention, however, the ECHR ruled that it was not possible to remove aliens to their own country (normally the only country that would take them) if they would there suffer a serious risk of treatment contrary to article 3 of the ECHR, that is to say torture, or inhuman or degrading treatment or punishment. The case of *Chahal v. United Kingdom*<sup>19</sup> concerned a Sikh extremist who claimed that he would face torture if deported from the United Kingdom to India. The European Court held that the only relevant question was whether there were substantial grounds for believing that there was a real risk of ill-treatment on return. The deporting state was not permitted to take into account the national security risk posed to its own citizens.

Note that the issue was not whether the risk to him of deportation outweighed the risk to the general population if he were to stay but whether the national security risk could be taken into account at all. The court by a narrow majority ruled that the national security risk could not be taken into account at all. The result was that as long as the risk of mistreatment to the foreign national passed a certain threshold it trumped any national security consideration.

There is reason to doubt that this was the correct legal solution and the issue will be re-litigated in a Dutch case pending before the European Court,

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17. Convention and Protocol Relating to the Status of Refugees art. 1.F, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150, 156.

18. *Abdulaziz v. United Kingdom*, App Nos. 9214/80, 9473/81, 9474/81, 7 Eur. H.R. Rep. 471, 497 (Eur. Ct. H.R. 1985).

19. App. No. 22414/93, 23 Eur. H.R. Rep. 413 (Eur. Ct. H.R. 1996).

*Ramzy*,<sup>20</sup> in which the United Kingdom has intervened. In that case, we are arguing (along with a number of other intervening states) that (contrary to *Chahal*) the Convention should allow a balance to be struck between, on the one hand, the rights of the deportee and, on the other hand, the national security of the deporting state and the safety of its citizens. But for the time being the effect had been that dangerous foreign nationals could not be refused permission to stay in the United Kingdom even if they otherwise had no immigration right to do so, provided they could show there was a risk of mistreatment if they were sent back. I will return in a moment to the U.K. government's attempt to deal with this issue and the response of the courts.

Let me turn before that to the second traditional response to such concerns; and that is internment. There is both in my country and in this a history of using internment as a method of protecting against those thought to present a threat to the nation, especially in times of war or other emergency. One such example in the United Kingdom was the notorious Regulation 18B, which allowed enemy aliens in Britain to be locked up without trial where the Secretary of State had "reasonable cause to believe" that they were of hostile associations. In a famous—or infamous—judgment,<sup>21</sup> a majority of the House of Lords held that this meant what it said and that the decision of the minister was unreviewable. In a stirring minority judgment now generally taken to be the correct view, Lord Atkin (he of the ginger beer bottle fame from *Donoghue v. Stevenson*<sup>22</sup>) held that the minister's power was not uncontrolled but that it was open to the court to review whether the minister did, in fact, have reasonable cause for his belief. In a much-quoted passage Lord Atkin said:

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 on recent authority 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.<sup>23</sup>

Internment was also a technique used between 1971 and 1975 to deal with the troubles in Northern Ireland. There are strong views that the result was counterproductive in the long run: the images, for example of Long Kesh, H block, and hunger strikers are still evocative and some would say led to the strengthening not the weakening of the IRA and other paramilitary organisations.

We do not currently have any active power to intern in the United Kingdom, though there is in effect an enabling power in a 2005 act.<sup>24</sup> Use of

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20. *Ramzy v. The Netherlands*, App. No. 25424/05 (Eur. Ct. H.R.).

21. *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.).

22. [1932] A.C. 562 (H.L.).

23. *Liversidge*, [1942] A.C. at 244.

24. Prevention of Terrorism Act, 2005, c. 2, § 4.

that power would require a derogation from the European Convention, and Parliament's express approval. We would have to think very long and very hard before seeking such approval—and would have to recognise the certainty of legal challenge.

There may of course be an ability to detain certain people who have been involved in active combat under the rules of the Law of Armed Conflict. But the limits of that are important. I would, for myself, not go along with any simplistic idea that anyone involved in terrorism can be held for taking part in the war on terror and detained until the end of that threat.

The expression “war on terror” is an understandable phrase to indicate the extent of the threat and the determination of purpose to respond to it. But it is dangerous if used as a legal expression. It might imply, for example, that the same legal consequences arise as in an ordinary war, such as the right to hold a captured soldier until the end of hostilities. And who is to say when the war on terror will come to an end any more than the war on want?

### *Managing the Risk*

I mentioned in particular the problem we face with foreign nationals who are thought to present a risk to national security, but cannot be deported. In 2001 the government was faced in essence with a choice: either leave them to roam free in the country, or detain them unless and until they left the country voluntarily.

Bearing in mind the heightened threat since 9/11, in 2001 Parliament passed legislation<sup>25</sup> providing for their detention *if they would not leave voluntarily*. It is important to stress this last point because no person detained was prevented from leaving the country. Indeed a number of those originally subject to the orders did so. The purpose of this so-called three-walled prison was to say: “[W]e will respect your human rights by not forcing you to go back to a country where they might be violated. But we will respect the rights of the rest of the community by not allowing you to roam free amongst them.” I also underline that this regime applied only to people who had no immigration right to remain in the United Kingdom.

Mindful of the need to strike a balance between collective security and individual liberty, the legislation contained significant safeguards, including a right of appeal to an independent judicial body presided over by a senior judge, and the right of detainees to have their cases reviewed by that body every three months. Appeals under the rest of the normal appellate process were allowed.

Nonetheless the legislation was very controversial, not least because it involved the United Kingdom derogating to a limited extent from its ECHR obligations, as the Convention itself allows in time of public emergency threatening the life of the nation.

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25. The Anti-terrorism, Crime and Security Act, 2001, c. 24, pt. 4.

The legislation was challenged in the courts and there too there was a divergence of views amongst the judiciary. The Court of Appeal of three judges, including the Lord Chief Justice, found that the legislation was compatible with our ECHR obligations.<sup>26</sup> However, while the House of Lords<sup>27</sup> found that there was a public emergency threatening the life of the national, with the exception of one judge they did not consider that detention without trial was strictly necessary to deal with the emergency. A key point for them was that the legislation only applied to foreigners. The government's position was that British nationals were less of a threat—though the strength of that position became increasingly fragile in the period after 9/11 when it started to become apparent that British nationals had been involved in training and taking part in action with the Taliban, and there was evidence of British nationals involved in terrorist plots—and that in any event we could treat foreign nationals in this one respect differently by relying on the well established right of sovereign nations to exclude foreigners from our territory. The House of Lords disagreed.

As explained earlier, the courts could not and did not strike down the legislation. However, in response to the finding of incompatibility the government accepted that it should not maintain the legislation in force. Instead it has adopted a three-fold response.

One strand has been to seek to re-litigate the *Chahal*<sup>28</sup> decision as I have explained above.

Secondly, in the Prevention of Terrorism Act 2005, the government took new powers to impose control orders. Control orders are available wherever there is a reasonable suspicion that an individual is involved in terrorism and it is considered necessary to impose the order to protect the public from the risk of terrorism. A wide range of obligations may be imposed by way of a control order—such as a requirement to stay at home for a given number of hours a day, or a prohibition on the use of the telephone or internet. However, importantly, unless the government makes a new derogation from the European Convention—which it has not sought to do—a control order cannot be used to impose house arrest or any other obligations which together amount to a deprivation of liberty.

The control order legislation, too, has been the subject of challenge in the courts. In one case, a particular order was struck down on the grounds that the restrictions in it unlawfully amounted to a deprivation of liberty, contrary to article 5 of the ECHR. Only today, the High Court has struck down another

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26. *A. v. Sec'y of State for the Home Dep't*, [2002] EWCA (Civ) 1502, [2004] Q.B. 335.

27. *A. v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.).

28. *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413 (Eur. Ct. H.R. 1996).

order on similar though not identical grounds.<sup>29</sup> The Home Secretary has said he is disappointed at the finding and will appeal. He has replaced the order which was challenged with one which is inevitably weaker and hence provides less protection to the public than he would have wished. In another earlier case, however, a more general challenge to the legislative framework for control orders failed before the Court of Appeal. These cases show how difficult it can be to strike the right balance between individual rights and the protection of the public. They also show however the importance we have attached to ensuring that there is proper provision for judicial scrutiny, inconvenient and frustrating though this may sometimes be for the executive.

One important feature of the legislation is that, where the conduct of which the individual is suspected may have involved the commission of a criminal offence, before making a control order the Secretary of State must first consult the chief officer of the relevant police force to see whether there is evidence that could realistically be used for a criminal prosecution.<sup>30</sup> And if a control order is made, the chief officer of police must keep under review the possibility of a criminal prosecution. In other words, the possibility of bringing the individual before the ordinary criminal courts must be kept under active review.

The government's third line of response to the House of Lords case has been to negotiate memoranda of understanding with the various Middle Eastern and North African countries to which we would like to be able to deport those foreign nationals who pose a risk to the United Kingdom's national security. The idea is that the countries concerned should give suitably reliable, though non-legally binding, assurances as to how the individuals will be treated on their return, thus minimising the risk that they will be mistreated contrary to article 3 of the ECHR. So far we have concluded arrangements with Jordan, Libya, Lebanon, and Algeria. In separate recent judgments our Special Immigration Appeal Commission has ruled that three individuals could lawfully be deported to Algeria on the basis of assurances given by the Algerian government that they would not be mistreated there.<sup>31</sup> The degree of confidence which could be placed in the assurances was key to the lawfulness of their return. It was relevant that they had been given at the highest level and that it was in the political interests of Algeria to abide by them. Another very important factor (though this would not be essential in all cases) was that there was adequate provision for compliance with the assurances to be verified.

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29. Sec'y of State for the Home Dep't v. E, [2007] EWHC (Admin) 233.

30. Prevention of Terrorism Act, 2005, c. 2, § 8.

31. Y v. Sec'y of State for the Home Dep't, App. No. SC/36/2005 (Aug. 24, 2006); G v. Sec'y of State for the Home Dep't, App. No. SC/02/05 (Feb. 8, 2007); see Special Immigrations Appeals Commission (SIAC), Outcomes Database, <http://www.hmcourts-service.gov.uk/legalprof/judgments/siac/siac.htm>.

*Torture/Mistreatment*

Another important issue with which we have had to wrestle is how to deal with information about suspected terrorists, where there is a risk that the information may have been obtained through the use of torture or degrading treatment.

Torture is one of the most abhorrent violations of human rights and human dignity. There has been no lawfully sanctioned torture in England since 1640. The objections to the use in legal proceedings of evidence obtained by torture arise not only from the barbarism of the practice, but also from the notorious unreliability of such evidence. But does that mean that such information must be ignored even where it could assist in preventing acts of terrorism or in apprehending those responsible for such acts?

These questions have been considered by the House of Lords in one of the strands of litigation arising out of the detention of suspected foreign terrorists. Commenting on the use of such information for operational purposes, Lord Bingham observed that even if under “officially authorised British torture” (were such a thing thinkable), “a man revealed the whereabouts of a bomb in the Houses of Parliament, the authorities could remove the bomb and, if possible, arrest the terrorist who planted it.”<sup>32</sup>

In other words, the authorities would not be obliged to *ignore* the information for operational purposes merely because of its objectionable origins.

More difficult however is the question whether such material should be admissible as evidence in legal proceedings, and what test should be applied for determining whether evidence has in fact been obtained by torture. The House of Lords has clearly stated the general rule that evidence obtained by use of torture is not admissible in legal proceedings. This was not only on the basis of the common law principles that such evidence is “unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to do justice.”<sup>33</sup>

In addition, that conclusion flowed from the European Convention on Human Rights, “which itself takes account of the all but universal consensus embodied in the [U.N. Convention Against Torture].”<sup>34</sup>

The House of Lords also held that, once an appellant had raised in a general way a plausible reason why evidence might have been procured by torture, the onus then passed to the tribunal to consider the suspicion, investigate it if necessary and determine, as far as practicable, whether it should be taken into account. The majority of the House held that the tribunal should

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32. *A. v. Sec’y of State for the Home Department*, [2005] UKHL 71, [47], [2005] 3 W.L.R. 1249, 1281.

33. *Id.* at [52], [2005] 3 W.L.R. at 1281.

34. *Id.*



refuse to admit the evidence if satisfied, on a balance of probabilities, that it was obtained by torture.

The case also dealt with the distinction between torture on the one hand, and inhuman or degrading treatment on the other hand. Lord Bingham accepted that the two kinds of abusive conduct should not be assimilated, saying: “Special rules have always been thought to apply to torture, and for the present at least must continue to do so.”<sup>35</sup> However both he and Lord Hoffman questioned where the boundaries between the two forms of mistreatment now lay, Lord Bingham commenting that “[i]t may well be that the conduct complained of in *Ireland v. United Kingdom*, or some of the Category II or III techniques [complained of at Guantanamo Bay] would now be held to fall within the definition in article 1 of the Torture Convention.”<sup>36</sup>

So in this area too important moral and legal questions are resolved by reference to domestic and international standards bearing the hallmarks of constitutional norms.

#### *Holding on to Our Principles*

The burden of what I have been saying so far is that under the United Kingdom’s particular unentrenched constitutional arrangements it would be open ultimately to Parliament to legislate in any way it thought fit. It would have to do so in the face of the Human Rights Act perhaps. But Parliamentary sovereignty is preserved by that Act. The United Kingdom might have to withdraw from some international obligations, notably the European Convention itself. But though I would regard that as out of the question, it is at least theoretically possible. In practice, however, both Parliament and the courts have looked to domestic and international standards.

So shorn of the constraints of an entrenched and enforceable constitution what are the principles on which legislative changes should be based?

I am clear that the response has to be a principled one—and not one driven simply by expediency.

Part of the reason for that is in the need for us to show the strength of our values. In his speech at the Los Angeles World Affairs Council last year, Prime Minister Tony Blair called for a complete renaissance of our strategy against the arc of extremism fanning out across the world.<sup>37</sup>

His central message was that we will not win the battle against this global extremism by conventional means alone but by winning at the level of values as much as force.

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35. *Id.* at [53], [2005] 3 W.L.R. at 1284.

36. *Id.*

37. Tony Blair, U.K. Prime Minister, Speech to the Los Angeles World Affairs Council (Aug. 1, 2006) (transcript available at <http://www.pm.gov.uk/output/Page9948.asp>).

He posed the question, which values will govern the future of the world: those of “tolerance, freedom, respect for difference and diversity” or those of “reaction, division and hatred.”<sup>38</sup> To win the war of values we have to show, in his words, that “our values are stronger, better and more just, more fair than the alternative” and that “we are even-handed, fair and just in our application of those values to the world.”<sup>39</sup>

I believe this statement of the central position of values in the struggle against extremism is of key significance in understanding how we should approach our legal responses to terrorism.

I have already said that the challenges we face post 9/11 are real and grave. But they do not change *everything*, and do not justify *any* response, however extreme, which might increase our security. They do not justify a response which would throw away or undermine the very freedoms and values which the terrorists would destroy.

I have articulated three principles which I believe should guide us in formulating our response.

The first of these is respect for the rule of law. So we have always striven to ensure that our actions are justified and supported by the law. To quote Aharon Barak, former President of the Israeli Supreme Court, again: “The war against terrorism is a war of a law-abiding nation and law-abiding citizens against law breakers. It is, therefore, not merely a war of the state against its enemies; it is also a war of the law against its enemies.”<sup>40</sup>

The rule of law also means adhering to our domestic and international legal obligations. For us the most important is the European Convention on Human Rights. It means recognising that although there are certain liberties which can be adjusted or even derogated from in times of war or emergency—as article 4 of the International Covenant on Civil and Political Rights and article 15 of the European Convention on Human Rights both explicitly allow—those changes should be only those which are truly needed to deal with the emergency threat and are proportionate to it.

It means also recognising that domestic executive action must be subject to democratic and judicial control.

So we are clear too that, as well as subjecting ourselves to the democratic process—to Parliament and the people—we accept the critical role of the courts in reviewing our action. So in all the special measures we have taken we have allowed for the courts to have the right to review not only the action taken but the basis on which it has been taken.

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38. *Id.*

39. *Id.*

40. Aharon Barak, President, Israeli Supreme Court, *The Role of a Supreme Court in a Democracy and the Fight Against Terrorism: Peter Allan Memorial Lecture in Law* (Apr. 11, 2005), in 35 HONG KONG L.J. 287 (2005).

And where the courts have ruled, then we recognise that it is part of the rule of law that we must obey. So, when in 2004 the House of Lords ruled against our legislation on detention of foreign nationals, even though, as I have explained, it could not strike down the legislation, the government responded by bringing forward new, more modest, provisions.

The second principle I would identify is that we should maintain our commitment to fundamental values and freedoms, many of which are to be found in the ECHR as I have said. I cannot believe it would be right to give up these values on which our societies are based in our struggle to meet the challenge of terrorism. These shared freedoms and values represent our democratic way of life. These are liberties which were hard won over the centuries. They are the very liberties the terrorists would destroy. We cannot give the terrorists the victory they seek by the way we seek to combat their evil.

The third principle is that of proportionality. One of the key themes of the ECHR is the concept of balance. The Convention took its lead in this respect from the Universal Declaration of Human Rights—and in particular, article 29, which expressly recognises the duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others. Under the Convention some rights are absolute. They are so fundamental that there can be no compromise on them. We take the view that the prohibition on torture is simply nonnegotiable. I regard the right to a fair trial as another of those fundamentals. That is why we have rejected reducing the burden of proof for terrorism offences and allowing secret evidence in terrorism trials.

Other rights however may be subject to adjustment or even derogation in the interests of others. Where, however, there is adjustment, our actions need to be proportionate and necessary to meet the threats we face. And the greater the level of intrusion, the stronger the safeguards need to be.

This means going no further than is necessary to meet the threat. It means having proper safeguards in place. A key safeguard will be the role of the independent courts to scrutinise our actions. Whilst the courts are clear that in certain areas they would defer to or respect the view of the democratically elected politicians, they are also clear that their overall role to scrutinise remains.

We need in this context too to recognise that our actions, unless demonstrably justified, will themselves be taken as indicating that we do not in truth espouse the values of freedom, equality, justice and tolerance. In this context particular aspects of our responses can be symbolic. That is one of the reasons I have been a vocal critic of the detention and trial processes of Guantanamo Bay. For many people it has become a symbol of injustice which is why I have repeatedly called for its closure.

In a speech in Miami earlier this week, I welcomed some of the changes made by the Military Commissions Act signed into law late last year—such as the removal of the possibility that detainees would be convicted on the basis of

evidence heard in secret and that they had not seen or had a chance to contradict; and the amendments made in the Senate to exclude evidence obtained by torture—though there remain some definitional questions of importance. But I also referred to criticisms that remain: of a law which treats aliens in a different way from American citizens; that still allows coerced evidence to be used in certain cases; that excludes the application of habeas corpus.

But my own views about Guantanamo Bay are well-known and I do not repeat them here although they are as strong as ever. So I do not intend to say any more about that today.

Nor do I want to be taken as suggesting that this is the only problem we face. Only last week it was alleged on national radio in the United Kingdom by a suspect released from custody after a few days that Britain had become a police state. That is absolutely not the case: the powers governing arrest and detention in custody for questioning require the judgment of independent prosecutors and are subject to the overall control of the courts. But it illustrates the importance of considering very carefully whether there truly is a need for new laws and that they are proportionate and subject to proper safeguards. This is why, in considering whether a further extension to the period of detention for questioning is appropriate, we need to be clear that there is a firm evidential case to support it.

### *Conclusion*

These are difficult times. But in tackling them we must hold on to the values we are seeking to protect. We in the United Kingdom and the United States face many of the same challenges. For us both, our laws and institutions are being put to a severe test. We will not always agree on the right response to those challenges, and sometimes the debate will be robust. Our constitutional frameworks are different. But in the end we are fighting for the same values—freedom, tolerance, fairness, and equality.

Tony Blair concluded his Los Angeles speech by saying this: “Our values are worth struggling for. They represent humanity’s progress through the ages and at each point we have had to fight for them and defend them. As a new age beckons, it is time to fight for them again.”<sup>41</sup>

That clarion call is one to be heeded.

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41. Blair, *supra* note 37.

