Democracy Coping with Terror

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RULE OF LAW INSTITUTE SPEECH

I was appointed the UK's Attorney General three months to the day before 9/11 and served thereafter through a turbulent time: two major wars in Afghanistan and Iraq and the continuing aftermath of both, terrorist attacks in so many parts of the world, against commuters in Madrid, against school children in Beslan, tourists – many Australian - in Bali, ordinary people going about their lives in Saudi, Israel, India and elsewhere and of course the terrorist attacks on the London transport system which broke on 7th July 2005 during the course of a Cabinet meeting. I remember that day vividly as we watched the unfolding events from the command centre beneath our Whitehall Cabinet Office.

It is this aspect of the rule of law – the balance between national security and national values , between security of the individual and security of our fundamental rights - that I want to concentrate on today.

Of course this is only one part of the rule of law debate. As the Annual Report of the Rule of Law Institute and the media coverage of its activities which I have read illustrates – rule of law covers a much wider territory: the accessibility, clarity and quality of legislation, the activities of economic regulators, the separation of powers between political and the courts; funding for the Australian Law Reform Commission: these are just some of the issues that I see RoLIA and now ROLI have tackled. It is to be commended for the breadth of its reach and the patently professional approach it takes. It is right to recognise that the rule of law cuts across many areas of public activity and cannot be characterised by one sphere of activity. I am delighted therefore to have been invited to attend this conference being held jointly with the New South Wales Bar.

This universality of rule of law principles is illustrated by a recent initiative which has tried to index rule of law performance by different countries through study of ten factors, including accountability of government officials and agents under the law, transparency of the law, access to justice and fundamental rights. Countries are then ranked in order. Whilst I have some skepticism about the league table approach – it risk being subjective and contains difficulties in

comparative rankings in the different headings;[1] it is a useful tool in tracking problems and progress in rule of law advancement[2].

Following 9/11 we had to face what I believe is the greatest challenge for democratic countries based on the Rule of Law: how to balance the issue of the protection of the lives of our citizens – national security if you will – and the basic values and fundamental freedoms on which our societies are founded: civil liberties and fundamental values. And so it was much in mind as I confronted with Cabinet colleagues and others these issues. And as we went through debates and counter-debates about the right powers to tackle terrorism and the legislation we needed. And so it was we passed two new Acts and debated others.

These issues have not gone away. Recent revelations of bombs cleverly concealed in cargo from the Yemen are just one example of the continuing issue.

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[1] For example in the high income group of 11 countries Sweden comes, not surprisingly top in 5 of the 8 elements, whilst more surprisingly to some at least the other Board leaders are Singapore and Austria. Austria, the only European Union country to be considered for expulsion on the grounds of an extreme right wing government at the time, comes top of the Fundamental Rights chart.

[2] Australia scores in the mid range for all the categories, beating the USA in all but one category – openness of government. This particular study does not contain the UK at all.

This was illustrated also in Last Friday's edition of the Times of London by two contrasting but complementary stories: one was a report that the Movement for Democratic Change in Zimbabwe had accuesed President Mugabe of authorising the regular plundering of Zimbabwe's biggest diamond field to fund his own party's election campaign; the other reported a public speech by Sir John Sawers, the head of Britain's Secret Intelligence Service, more commonly known as MI6, in which he set out the Agency's approach to torture of suspects.

The stories are very different but what they have in common is that they illustrate that today the emphasis when considering the quality of government activity has decisively moved towards rule of law issues.

The Zimbabwe report flowed directly from the activities of the Kimberly Process, the system set up by the United Nations in 2003 to stem the flow of blood diamonds. The need for this process had been the recognition by the international community of the toxic effect in international conflict of the trade of diamonds to fund war and oppression. It is an example of international cooperation to deal with a rule of law issue.

The MI6 report was remarkable for two things. It is the first time a serving head of MI6 had spoken publicly about the Service's activities – James Bond's M you will recall did not even have a name let alone a public persona. But the cause of his appearance has been a growing debate, fuelled by allegations of the abuse of suspects in Guantanamo, in secret black prisons serviced by rendition flights, whether the UK's intelligence agencies condone torture to obtain evidence in the fight against terror. So Sir John has found it necessary to make a public statement that torture is abhorrent and that M16 rejects it. British spies do not pass information on terrorist plots to foreign governments if there is a risk of suspects being tortured, even if it could prevent an attack, he is reported to have said.

I will return later to the question of the international elements of these issues.

On this big question of security v liberty my own starting point is that Governments have a dual obligation: to protect our national security and our fundamental human rights. Our societies are based on these values; on commitment to liberty and to the Rule of Law; to our democratic way of life; to freedom of expression and thought; freedom from arbitrary arrest and to fair trial. They are actually freedoms and liberties and values which the terrorists would destroy. This makes it all the more important that we continue to hold them dear and

preserve them. Yet striking this balance is not easy for the threats from terrorism are large.

The first time I had really to focus on this question of balance – and how the law intervenes in these areas - in a real practical sense was, I suppose, on the 11th September itself when watching the horror of the Twin Towers unfold on the TV. I had to think at that moment with my staff: what if there is an aircraft heading now for Canary Wharf or for the Houses of Parliament with terrorists on board? What advice do I give the Prime Minister? Are we going to be able to shoot it down? Should we shoot it down? How do you balance the loss of innocent lives on board compared with the many more who could be killed on the ground? How do you weigh up those considerations?

But from that moment on, these questions kept coming back: the legal and policy issues we were faced with in Government became greater and greater. Domestic legislation and international cooperation. Debate inside and outside Government. My personal ideas crystallised as events changed … as events continued …. as initiatives, which we thought could be the solution, did not live up to their original promise. And because we continued to be faced with very difficult issues I came to the view – I came to it when in Government – that we need a new approach, an approach, which takes much more account of the messages we are putting out in the

battle of ideas and values, if we are ultimately to succeed in stemming the tide of extremism with which the world is increasingly faced.

The question of balance between security and values does not mean that these things have to be seen as one or the other. It is not a question of either/or. One clear example of this is in the need to have strong and competent legal systems around the world. Because having independent systems, in which people have confidence, is not only a bulwark against tyranny and a support for basic human dignity and human rights but also an essential condition for prosperity and the creation of wealth. And both injustice and poverty are causes of unrest.

Let me clear two preliminary propositions out of the way. The first is that actually nothing has changed; that terrorism has always been here and that you do not need to make any changes to your laws or ways of tackling terrorism. This proposition therefore says: 'leave the law as it is'. Having seen the extent of the terrorist threat, the number of active plots which our intelligence agencies have identified, I am clear that although Osama Bin Laden did not invent terrorism, things have changed: in scale, in the methods and aspirations of the terrorist and in the way that terrorism is conducted with modern technology and with suicide bombs. These have all changed the landscape of

terrorism. So it is reasonable to ask if the law is adequate to provide protection.

The second proposition, with which I also disagree, is the concept of the War on Terror. I increasingly came to the view that this term is not only misleading but positively dangerous. That does not mean I think there is no threat, On the contrary there is.

It is the expression. As a slogan to demonstrate the extent of the commitment and the need to deal robustly with the problem in hand, like the 'War on Want' or the 'War on Crime' it is acceptable. But my worry is that 'War on Terror' is used not as a slogan but as a legal diagnosis. I have a real problem with that. This is quite a complex area of law. Those actually engaged in armed conflict on the battlefield of Afghanistan, before there was a legitimate government, will have fallen in some respects under the laws of war concerning the use of offensive military action and even, to a point, whether they could be detained as prisoners of an international conflict including in Afghanistan. But, you cannot then say 'War on Terror' justifies holding people without trial after the international armed conflict has come to an end until this amorphous 'War on Terror' has come to an end – and who is going to say when it has?

This is not a narrow academic question. It was precisely the argument put to me by the US administration in 2003 when I was negotiating about the detention of British nationals at Guantanamo. It was put to me that we in the UK should accept the philosophy of the "war on terror" and agree to hold any detainees released to us on the basis that they were "prisoners of war" and could be detained until the end of this "war". I refused. Indeed it went further because at one stage the administration lawyers and officials were saying that even if a detainee was acquitted before a military commission still they could, and indeed would, detain him until they deemed that the "war on terror" was over. It was deemed a concession to me to agree that this would not apply to British nationals as long as we allowed them to be tried by the military commissions. I regarded this proposal as outrageous and said so. It would have made a complete mockery of the military commissions the legitimacy of which I already have grave concerns about to find that the end result of a trial was not going to release or a definitive sentence. On the contrary it would have meant continued indefinite detention the length of which was in the decision of the Executive. Remember also that at this stage the Administration was saying and arguing with vigour that even the US courts did not have jurisdiction to determine the lawfulness of the detention, its circumstances or its length.

On this last point let me fast forward a little. There were a series of cases fought through the US courts ending in the Supreme Court which eventually decided in *Rasul v Bush* and other cases that the US courts could grant relief. Eventually it was held that they could grant habeas corpus. Even then the courts powers were said to be limited. In *Kiyemba* the issue arose what habeas corpus meant in relation to a group of Chinese nationals known as Uighurs who could not be sent back to China where they faced persecution but who had been cleared of terrorist activity. What does habeas corpus mean in such circumstances? The applicants argued it meant that they had to be relased into the USA. My firm and I actually drafted an amicus brief supported by over 300 parlieamentarians where with the help of historical research one of my associates, indeed an Australian, we demonstrated that the history of habeas corpus led to exactly that relief.

It was also only later, and particularly when I read the arguments advanced to the Supreme Court in cases like *Rasul v Bush* that I appreciated the significance that the term "war on terror" had in US jurisprudence on this issue. In particular, if the issues could truly be characterised as military then under the US doctrine of separation of powers they fell to the President as executive decision maker and as

Commander in Chief to make the decisions and not Congress or the courts.

There is another risk too of the expression. If you talk of the 'War on Terror' you risk dignifying the cause of the terrorists. You risk treating them as soldiers and not as criminals. I don't want people in British prisons to be treated as prisoners of war. This gives rise to a sympathy in outside and local communities.

So I return to the basic question: How do you then strike this balance? It cannot just be on the basis of numbers – simply denying the few basic rights in favour of the security of the many cannot be the answer. There needs to be a more principled approach.

And in this principled approach the law plays a critical role.

In part this is obvious. You need the law to deal with offenders and so it is correct that we have strengthened our criminal law to meet the conditions of modern terrorism; and that we have invested significantly in our frontline law enforcement agencies and security and intelligence services.

But it is also right to consider whether changes to existing laws are needed. Here the great and difficult question becomes how far you

can or should change existing laws which protect civil liberties now to protect human life.

Note here that even the great human rights instruments of the world, such as the Universal Declaration of Human Rights – in Article 29 – and the European Convention of Human Rights – in many individual articles and in Article 15 particularly – recognise that sometimes rights have to be adjusted, or exceptionally derogated from, in the interests of the community more widely.

But this does not give an unlimited licence to throw away our values for the sake of expediency. It can only be undertaken, as I say, in a principled way. I have suggested that there are three key principles.

First, we must respect the Rule of Law. That means adhering to our domestic and international legal obligations. These cannot simply be ignored or set aside. Respecting the Rule of Law also means subjecting executive action to the scrutiny of the democratic institutions and of the Courts. Judicial scrutiny is a key part of the Rule of Law. It was to us shocking that until the Supreme Court ruled otherwise in the *Rasul v President Bush* decision it was thought appropriate to assert that the legality of detentions in a US facility under US control could not be the subject of consideration by the US courts.

Second, it is essential to maintain the commitment to fundamental values and freedoms. That means that whilst there are some rights which are subject to adjustment to safeguard the rights of others – the right to privacy, for example, must allow for exceptions to help fight crime or preserve the legitimate rights of others - other rights are non-negotiable.

The third principle is that, in those cases where it is permissible to adjust the way in which rights are protected to meet a new challenge or even to derogate from them, changes should only be allowed when they are necessary to meet the new challenge – not merely desirable – and when they are proportionate to it.

When it comes to non-negotiable rights, in my view, the prohibition on torture is one such right.

Recent events have focused attention again on how far our abhorrence of torture may have been compromised during recent years and, whether, the United Kingdom itself might have been complicit. I refer particularly to the allegations made by the returning Guantanamo detainee Binyan Mohammad. He has publicly alleged that, although he was not tortured by UK officials from MI5, they were in effect complicit in his torture by orchestrating his questioning.

[I do not know the truth of this allegation but I do regard it as a very serious one. And I welcome the inquiry now announced. When I first began to negotiate about Guantanamo in the summer of 2003 the public did not know of the term "extraordinary rendition" or of "CIA black holes" or of people kidnapped for torture in those places. Nor I have to confess did I. It was only later that we heard of the complaints about Abu Ghraib and indeed Guantanamo itself. It was only later that evidence started to emerge of the black holes and the secret rendition flights. Now it is clear that a lot was going on. Indeed some who have investigated this suggest that the earliest secret rendition flight had already taken place in mid-October 2002 when a Gulf Stream 5 jet registration N-379P arrived in the dead of night in Karachi and took away a hooded and shackled detainee.]

I need not use my poor words to describe why torture is both one of the greatest affronts to human dignity but also an extremely unreliable method of obtaining evidence. Which are both the reasons why its admission in evidence is banned by the Convention against Torture. I am very clear that condoning torture was strictly contrary to the United Kingdom's stated approach and indeed contrary to what at least the law officers were being told was the position of the United Kingdom in practice. I very much hope that an inquiry into the allegations made will not reveal that, after all, we were misled and

secretly the UK was being complicit with torture programmes. I will return to this issue a little later.

The right to a fair trial is another non-negotiable right. In this respect my view of the original Military Commissions for those detained at Guantanamo Bay are well known. When British nationals were slated for trial I went to Washington to negotiate. My position was simple: put them on trial, a fair trial in accordance with international standards or release them. I considered the rules and regulations in detail over a period of months in the summer and fall of 2003. My clear conclusion was that the Military Commissions did not provide such guarantees. I advised that we should not allow our citizens to stand trial in such circumstances and insisted that they be returned to the UK – which ultimately they were.

Changes were later made. Congress passed the Military Commissions Act. Later some of the changes were welcome – such as the removal of the possibility that detainees would be convicted on the basis of evidence heard in secret which 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 there were major problems that remained: a law which treats aliens in a different way from American citizens; which still allows coerced evidence to be used in certain

cases; which excludes the application of habeas corpus; which allows evidence that would not be admitted normally to be relied on …. and others.

So I was greatly encouraged that President Obama as one of his first acts ordered the closure of Guantanamo but disappointed this has still not occurred.

In the denunciation of Guantanamo many have complained that this was not for an outsider to say. That this is America's decision. I do not agree. I should explain why.

The struggle against global extremism and terrorism is one that ultimately we will not win by conventional means alone. We will only win in the end if we can win the battle for ideas and values. We need to win this struggle at the level of values as much as force. In a major speech given in Los Angeles in the summer of 2007, Prime Minister Tony Blair said that to win the war of values we must show 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." Against an Al Qaeda narrative of 'all that the West does is designed to oppress Muslims' we must show that our values are actually those of justice, tough and fearless but fair, and of equality; of the democratic way of life; of the

Rule of Law and of freedom. The presence of Guantanamo makes it so much more difficult to do this for all of us.

So too in relation to other areas of our activity. We must show that our values of democracy, tolerance, acceptance of diversity and justice are strong. This battle for ideas and values is then of the greatest importance for our future. It means that our basic freedoms and values should not be seen as obstacles to protecting us, as things to be worked around, but ultimately a part of the solution.

So my basic point is that law plays a hugely important part in working out the key issues confronting democratic countries today. It plays a huge part in determining what are the correct measures which can help us both protect our freedoms and our security. Yet it cannot be divorced from our basic values – one reason why the Rule of Law is not jsut about rule by law.

This is why insistence on the rule of law and promotion of the Rule of Law is so important.

One of the key areas for the Rule of Law is determining the boundary between executive decisions and legal review, that is to say finding the line of demarcation between what judges decide and what ministers should decide – and these difficulties are growing. This issue and conflict has been sharpened in the UK by the Human Rights Act

brought in by the Labour Government. Traditionally in the UK the parliamentary model has been a particular one where parliamentary power was unlimited and beyond review by the Courts. The great constitutional lawyer Dicey said that parliament could do anything except make a man a woman – though we proved him wrong even on that by passing a law allowing transgender individuals to change their birth gender. Traditional judicial review was limited – excluding review of primary legislation at all – only construction; and limiting merits review to those exceptional cases where a decision of a Minister or subsidiary body could be shown to be Wednesbury unreasonable - a decision no reasonable minister etc could have taken.

The Human Rights has changed that because it has made many decisions reviewable on grounds which are close to indistinguishable from merits review e.g. whether the decisions are proportionate; whether they have been shown to be necessary in a democratic society and so on.

This has led to greater conflict between the courts and the judiciary. This has extended even to harshly worded judgments from some courts and strident public rejection of judicial decisions from Ministers. I can assure you that some of private criticism of the judges went beyond strident.

This uneasy balance between courts and ministers has given rise to conflict. I would go to court myself to argue many of the most important such cases (in the UK there is no similar animal to the professional and non-political Solicitor General as in Australia). The AG traditionally would appear in court – this had fallen largely into disuse in more modern times – the unkind say the change happened when AGs started to receive a salary as a minister and ceased to be paid a brief fee for each case they argued. So my predecessors had appeared very infrequently, if at all, and so indeed my successor. But I appeared many times in the national courts and the international. This issue therefore of how far the courts could and should intervene in the decisions of the democratically elected Parliament and executive was a common issue.

This is most visible in the field of national security because these are high profile cases where some will hope that judges will take a different view on national security. The position generally established in this field has been expressed in a number of decisions of high authority; for example. In *SSHD v Rehman* where Lords Slynn of Hadley and Steyn made clear that the Secretary of State was in the best position to judge what national security required; as Lord Hoffman explained under our constitution issues of national security are issues of judgement and policy for the Executive branch of the

State and not for judicial decision and a court should not differ from the opinion of the Secretary of State on such an opinion provided there is an evidential basis for that opinion. But in other cases the Courts have been bolder, as the House of Lords was in A v Secretary of State when they used the Human Rights Act to declare incompatible with human rights obligations the provisions of a law passed after 9/11 which enabled the Executive to deny non-nationals who were a security risk the right to enter the country – which meant either they left and went to another country or, if they were not welcome or not safe anywhere else, they were detained.

But this principle of judicial restraint or deference to the decisions of ministers is not limited to the issue of national security but will apply too, and has been applied, to other areas where the availability of methods of assessment of policy choices, the availability of expertise, information and advice to minsters which is not available to judges, means that as a matter of common sense (as Lord Hoffman said) rather than constitutional impotence judges will pay especial respect to the conclusions of ministers. As the law reports and the newspapers show of course that still leaves plenty of room for judicial intervention and – which is as important – the possibility of intervention which focuses attention at the time of ministerial decision making on whether it will withstand a legal challenge. There were

many occasions where policies were rejected because advice was that they would not withstand a legal challenge.

But it is right that we should acknowledge the role of the democratically elected bodies here. The rule of law is not the exclusive domain of lawyer; lawyers do not have the monopoly of what is right and just. And the more we lawyers act as if it is, the less our ministers and parliamentarians may see this as something where they have a critical responsibility. I would go further: the Rule of Law will not be maintained, nurtured and strengthened without a genuine and robust commitment to it by our political leaders. Maintenance of the rule of law should start with the political process and the courts should be only a long step defence. (I hope it has been noticed that I have avoided all cricketing metaphors to date.)

So the rule of law is not the rule of lawyers, as Lord Hoffman also put it.

And rule of law should not just be lawyers' arguments about the application of this or that provision of national law or of an international convention. Are the values we associate with the rule of law – the core values of our society, the values which distinguish us from the Saddam Hussein's or the Taliban of this world sufficiently in

the centre of policy-making? My experience was that they were not enought in the centre of policy making. But they should be.

This means placing a greater value on liberty and freedoms in the balance to determine the right policy to face difficult problems. It does not mean that everything must remain as it was in the 18th or 19th centuries. The world has changed; it produces different threats and our responses to those may need to be different. But the principle should be to hold tight to the values underlying our society.

In the UK the so-called 90 and 42 days debates are illustrations of that principle. This concerned the attempt first of Tony Blair and later of Gordon Brown to extend the period of detention before charge. Blair it may be recalled attempted to extend it to 90 days – the equivalent because of our early release system of a 6 month jail sentence without charge let alone conviction. He was defeated in Parliament – fortunately for me before it reached the House of Lords as I would have to resign so as to refuse to follow the Government whip to vote for it. Gordon Brown revived the debate with a 42 day proposal. He too failed when the measure was defeated in the House of Lords (by this time I was no longer a member of government and could speak against)

The demand for 90 days was wrong not least because it was not supported by evidence showing it was necessary nor proportionate to the threat. But it was at least something that the police had requested – it was at least something that a law enforcement agency was saying they wanted better to protect the public. But the second attempt to extend the time for pre-trial detention – which became the bewildering proposal for 42 days - was no such thing. It was under debate for a long time but there was never a clear demand for it from law enforcement officials and the police appeared in the end as against the proposal as many others if only because its complexity and unworkability.

The proposal got into that position through a some would say cynical need to appear to be tough on terrorism rather than through realising that these liberties are only adjusted, if they are at all, because of a clear and urgent need for that change. The failure to treat the freedom from detention without charge as one of our key values and liberties and to bring that value to the centre of the policy debate was at the heart of that failure.

So, the 42 days proposal failed to recognise that the terrorists are seeking to take away our freedoms and liberties in many different ways and we must not therefore destroy those freedoms ourselves.

Before I conclude with my final point I want to go back for one moment to my opening examples: and the international dimension. The Kimberley process in relation to the despicable blood diamond trade shows the importance of international cooperation to find a practical solution to a rule of law issue; MI6' s issues with torture show the challenges of international cooperation especially with countries who are less fastidious than ours in dealing with suspects.

International cooperation and exchange of ideas is therefore a key ambition too. I do not know how far ROLI has aspirations for international debate and cooperation. It would be a very good direction to take – and I am happy to make an offer to assist.

My final point: And there is the further compelling reason for looking beyond lawyers that we will not win the struggle against terrorism by bullets and police powers alone – the history of the world shows that – ultimately you need also to win hearts and minds.

I can recall many examples of policies which were amended or even disappeared because of advice that they would not be upheld by the courts. What I find more difficult to recall is policies being scrapped because they were not the "right thing to do" because they infringed on fundamental freedoms. These arguments tend to be dismissed as liberal thinking lawyer speak. A new approach – the new approach I

would like to see – would cast away embarrassment about these points - would see Cabinet and Parliament tackling these issues head on. Just because something can be done lawfully does not mean it should be.

Bringing our values and liberties back into the centre of the policy debate means above all a recognition that our liberties and freedoms are not an obstacle to securing our safety, they are not an obstacle to be overcome and got round, they are part of the very strength which secures that safety.

So my concern, in summary, is that law on its own is not enough. Political judgment and a sense of what is right and wrong are necessary. Law and lawfulness is a necessary condition before we take the action we do but not in itself sufficient.

Lord Goldsmith QC

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