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NATIONAL SECURITY AND THE COURTS

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INTRODUCTION

1. In a memorable phrase some years ago, the then Foreign Secretary, now Lord Hurd, spoke of this country "punching above its weight". If one was to compile a list of factors which permit our country to punch above its weight, views might differ. The City, the arts, universities would be obvious candidates. But, any sensible list would, to my mind, include our armed forces, security and intelligence services, diplomatic service and our legal system. In all of these areas we stand tall in the world. Without security (and order) there can be no law as we know it; without our legal system, we would not have the society we value. Although some tensions between these institutions are unavoidable from time to time (on occasions perhaps even healthy), it is my theme that mutual understanding – without compromise to the needs of judicial independence, human rights or national security – should serve to reduce avoidable tensions, to the benefit of the country as a whole.

2. It is a great pleasure to participate in this Seminar and to address a subject made all the more interesting by Sir John Sawers' recent public speech to the Society of

Editors. I should make one matter clear at the outset; though in what I say I am necessarily mindful of my position as a serving Judge, the views I express are my own. The notion that the Judiciary has only one view on any topic, let alone a topic of this nature, is simply unreal.

3. In his recent *tour de force, Securing the State* (2010), Sir David Omand has suggested defining "national security" as follows (p.9):

> " ...a state of trust on the part of the citizen that the risks to everyday life, whether from man-made threats or impersonal hazards, are being adequately managed to the extent that there is confidence that normal life can continue."

It is impossible to do justice to the many strands of thought in this book; it suffices here to note the manner in which "normal life" is built into this definition. With "normal life" of course come the core values, at the heart of our free society. So, as it seems to me, national security cannot be pursued without regard to the values of the society, it is sought to protect.

4. The rule of law is central to our system of values in this country. What does "the rule of law" mean? We can take as a working definition that offered by the late (and much missed) Lord Bingham of Cornhill, in *The Rule of Law* (2010), at p.8:

> " The core of the ....principle is....that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."

An "inescapable consequence" of the rule of law is that ministers, officials and public bodies are successfully challenged in the courts, which, as Lord Bingham went on to

observe (p.65), does not endear the courts to those on the receiving end. But a moment's thought reveals that, as Lord Bingham put it:

> " There are countries in the world where all judicial decisions find favour with the powers that be but they are probably not places where any of us would wish to live."

HISTORICAL PERSPECTIVE

5. In striving to strike the right balance between the requirements of the rule of law and the needs of national security, never an easy matter, a sense of historical perspective may assist a measured debate – the current terrorist threat is not the first time that consideration of national security impacted upon the Courts. Three previous instances will illustrate the point:

i) At the height of World War I, the House of Lords considered that the internment of a person deemed by the Secretary of State to be "of hostile origin or associations" was valid – but not without a strong dissenting speech from Lord Shaw of Dunfermline, who put the matter in stark terms:

> " I am of opinion that the judgments appealed from are erroneous in law, and that they constitute a suspension and a breach of those fundamental constitutional right which are protective of British liberty. "[1]

ii) In World War II, a similar issue arose. In *Liversidge v Anderson*[2], where the House of Lords again considered the issue of internment, holding that a court of law cannot inquire as to whether the Secretary of State had reasonable

[1] R v Halliday [1917] AC 260 at 276
[2] [1942] AC 206

grounds for "believing a person to be of hostile associations". But in a remarkable and famous dissenting speech, given the charged and dark days of September 1941, Lord Atkin held that the Secretary of State had not been given a subjective and unconditional power of internment. Lord Atkin said this (at pp. 244 – 245):

> " I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive...
>
> .....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. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.
>
> I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister. To recapitulate: The words have only one meaning. "

That passage, one surmises, introduced a touch of frost in relations between Lord Atkin and his colleagues, who were all of a different view. What followed could have done nothing for collegiality:

> " I know of only one authority which might justify the suggested method of construction: 'When I use a word' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less'.

In these two cases, therefore, from both World Wars, in the event national security prevailed on the true construction of the measures in question. But – and it is something of which this country can be proud and few countries can emulate – in both these cases, at times of indisputable national emergencies, the importance of the liberty of the subject was vigorously canvassed.[3]

iii) My third example goes to terrorism or insurrection, not world war – the position of Sinn Fein over the period 1916 – 1923. In his detailed and absorbing account, *Revolutionary Lawyers: Sinn Fein and Crown Courts In Ireland and Britain 1916-1923* (2008), David Foxton QC outlines the approach to the courts used by Sinn Fein and its supporters. The Republican strategy was to deny the jurisdiction of the Courts – a stance maintained when the Republican in question lost – but to use favourable decisions of the selfsame courts as propaganda and in support of the Republican agenda, when the decisions were favourable. Mr. Foxton's account also highlights the role of sympathisers, apologists, fund-raisers and fellow travellers – so illuminating another feature of this particular landscape: cases involving national security or terrorism should never be viewed in isolation[4]. There is almost invariably a wider dimension, a matter of great importance for all concerned in this area;

[3] See, Lord Bingham, "Mr. Perlzweig, Mr. Liversidge and Lord Atkin", in *The Business of Judging (2000)*, at pp. 211-221.
[4] Likewise, the Judiciary is not naïve as to the study given to such proceedings by terrorist sympathisers.

in the battle for "hearts and minds", the public perception and portrayal of legal action against suspected terrorists is of the first importance, calling for exacting standards from those in authority.

AN ALTERED FRAMEWORK

6. As an outsider to the intelligence community, it would seem that there has been a sea change in the framework within which our security and intelligence services operate.

i) First, the SIS, the Security Service and GCHQ (collectively, "the agencies") all now operate within a statutory framework; in the case of SIS and GCHQ, the Intelligence Services Act 1994; in the case of the Security Service, the Security Service Act 1989.

ii) Secondly, the Regulation of Investigatory Powers Act 2000 ("RIPA") covers all intrusive surveillance and information gathering by the agencies, amongst others.[5]

iii) Thirdly, pursuant to s.10 of the Intelligence Services Act 1994, the Intelligence and Security Committee has been established, so providing parliamentary oversight for all the agencies.

iv) It follows from this - and it is water under the bridge – that the agencies now operate within and subject to a framework of law. As Sir David Omand has expressed it (*Securing the State*, at p. 254):

> "Intelligence and security agencies cannot escape back into the shadows, nor adopt a Cheshire Cat position of trying to appear when convenient and disappear when not, leaving only the grin behind.

[5] See, very recently, *Kennedy v United Kingdom* [2010] Crim LR 868, for a Strasbourg judgment approving secret surveillance under RIPA.

To be effective, and even to begin to match up to the public expectations of what secret intelligence can deliver by way of public security, the work of the intelligence community must remain shrouded in secrecy, particularly regarding its sources and methods. For past generations that was not much of a dilemma, merely a set of tricky practical problems of how to keep secrets. However, the old view of secret intelligence as a small, unacknowledged, well hidden and highly specialised extra-legal function of the state at its highest level of national power is no longer tenable. This poses a paradox.

We now need to have acknowledged, democratically accountable, independently overseen government intelligence agencies while at the same time expecting their intelligence officers' agencies to penetrate to the heart of the threats we now face and to engage in effective secret action to disrupt those behind the threats."

v) Apparent inhibitions, however, may also be strengths. As Sir John Sawers put it:

" Torture is illegal and abhorrent under any circumstances, and we have nothing whatever to do with it.....

Other countries respect our approach on these issues....

SIS is a service that reflects our country. Integrity is the first of the service's values."

In short, these values are a strength and not simply a restraint.

vi) A distinct but not unrelated consideration is that the close (and to my mind most valuable) cooperation in this country between the agencies and the police, together with the nature of current anti-terrorist operations, have brought the agencies much closer to the sphere of law enforcement and, hence, the courts.

7. The agencies thus find themselves operating within a framework regulated by law, perhaps encountering the Courts more than either they or the Judiciary might until recently have anticipated. Moreover, the context in which these encounters take place is challenging in the extreme – neither accommodating terrorism cases within the "ordinary" framework of criminal law nor the devising of special regimes (such as control orders) to deal with terrorism, is straightforward. Nor too are the questions going to the treatment of sensitive material, whether in actions taken by the state against individuals, civil actions brought by individuals against the state, inquests or inquiries.

TERRORISM AND THE LEGAL SYSTEM: A BALANCING ACT

8. Allow me to outline a number of areas where the agencies and the courts are both involved in balancing the needs of national security with the rights of the individual. As a distinguished US Appellate Judge and jurist has observed:

> "....when cases are difficult to decide it is usually because the decision must strike a balance between two legitimate interests, one of which must give way."[6]

[6] Richard A. Posner, *"How Judges Think"* (2008), at p.246.

9. It is instructive – and I think comforting – to appreciate that problems of this nature are not unique to this country. Much the same ground has been traversed in the US, where the same tension between the criminal justice system – and its disclosure requirements – and intelligence work has been encountered.[7] As a US writer with relevant experience has observed:

> " The basic conundrum for intelligence is that it requires secrecy to be effective, but widespread government secrecy in a Western liberal democracy is generally undesirable."[8]

10. Thus fortified, I turn to the balancing acts required, in this country in particular

11. *(1) The Criminal Justice system:* On the footing that the United Kingdom's policy is to deal with the problem of terrorism through prosecution[9], and that terrorism is to be treated as crime rather than war, a number of challenges are met:

12. The first concerns *intelligence, evidence, suspicion and proof*. The typical terrorism trial will likely follow intensive investigation and surveillance, possibly involving the agencies as well as the police. A good deal of *intelligence* may have been gathered, leading to *suspicion* of the suspect/s.

13. In the criminal justice system, however – and rightly so – there is a difference between *intelligence* and *suspicion* on the one hand and *evidence* and *proof* on the other. Intelligence is not or not necessarily evidence; and suspicion does not necessarily translate into proof. The *intelligence* forming the basis of *suspicion* must

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[7] See, Fred F. Manget, former Deputy General Counsel of the CIA, *"Intelligence and the Criminal Law System"*, Stanford Law & Policy Review, Vol. 17, 2006, Issue 2, at pp. 415-6, where he writes tellingly of the "intersection between intelligence and the criminal law system" and of the mere mention of discovery sending "shivers" through intelligence officers.

[8] Again, Fred F. Manget, *"Another System of Oversight: Intelligence and the Rise of Judicial Intervention"*, In Loch K. Johnson and James J. Wirtz, eds., *Intelligence and National Security: The Secret World of Spies,* 2nd ed., (Oxford U. Press 2008), ch. 29, at p.384.

[9] Not, of course, to the exclusion of other counter-terrorist action taken by the executive.

be supported by *evidence* that is usable and adduced in court. The Crown must make the jury sure of a defendant's guilt; mere suspicion will not be enough.

14. It is in the context of converting intelligence into evidence that acutely controversial – and difficult – questions arise concerning the use of intercept evidence which have given rise to familiar firm and strongly held contrasting views, about which I shall say no more here.[10]

15. A second challenge concerns the need to *strike early*. The dilemma is that if terrorism is to be fought by prosecution, then criminal offences must be broad enough to catch potentially lethal activity early; the challenge is to avoid unattractively widely drafted offences, so as not to depart more than is necessary from traditional notions of criminality.

16. The context is the notable feature of one of the current terrorist threats —perhaps better described as *takfiri* rather than *jihadi* terrorism[11] - that of suicide bombing. Necessarily, this tactic puts a premium on the timely arresting or disrupting of would-be suicidal murderers. With this end in mind, recent legislation[12] has created a number of "preparatory" and "pre-preparatory" offences, going beyond the normal range of inchoate offences such as conspiracy, incitement and attempt. The combination of these offences and a very widely drafted definition of terrorism[13], means that the net is cast wide. While there are good reasons for doing so – and it is perhaps unavoidable to do so if a prosecution strategy is to be followed – it does give rise to a number of less desirable consequences.

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[10] See, *Privy Council Review of Intercept as Evidence* (30 January 2008, "Chilcot"), at para. 12.
[11] Why concede to the enemy the *jihadi* status he craves? See, Kilcullen, *The Accidental Guerilla* (2009), at pp. xviiii-xix; see too, *Securing the State* (*op cit)*, at p.103.
[12] See *The Terrorism Act 2000, The Anti-Terrorism, Crime and Security Act 2001, The Terrorism Act 2006* and *The Counter-Terrorism Act 2008*, all as discussed in a paper produced by Calvert-Smith J, the Terrorism Case Management Judge.
[13] See, s.1 of *The Terrorism Act 2000*, as amended.

i) First, where the evidence is essentially circumstantial, it is difficult to avoid straying into time consuming and potentially distracting "mindset evidence". In dealing with such evidence, it is important throughout to make it plain that, in this country, no one is tried or convicted for views and opinions, however unpalatable. Where convictions are sought for matters such as the encouragement of terrorism (going beyond the traditional territory of incitement, attempt and so on), it must be desirable to underline the particular justification for doing so.

ii) Secondly, so far as it is possible to do so, legislation against terrorism should approximate as closely as possible to the "ordinary" criminal law and procedure.

17. *(2) Control Orders:* This "bespoke" regime is unusual for this country, replete as it is with special advocates[14], closed hearings and the like before the Special Immigration Appeals Commission ("SIAC"). It is a sobering thought that had European decisions precluding deportation to countries where the deportee was at risk not taken the turn they did[15], control orders might never have come into existence. Be that as it may, they are here now, applicable to citizens and aliens alike - and the task for the judiciary, if I may say so, excellently "led" by Mitting J (the President of SIAC), is to fashion a coherent, realistic and fair system, taking into account the jurisprudence of the European Court of Human Rights.

18. I cannot, of course, enter into the current political debate as to the future of control orders.

[14] See, *R v H* [2004] UKHL 3; [2004] 2 AC 134, esp. at [18] *et seq*.
[15] See, *Chahal v United Kingdom* (1996) 23 EHRR 413 and subsequent decisions to the same effect.

19. I can say that even this "bespoke" regime does not result in a straightforward legal position[16]. It throws up, as Lord Hope expressed it in *AF (No. 3)* an "acute tension" between:

> "...the urgent need to protect the public from attack by terrorists and the fundamental rights of the individual... [17]

20. At issue in *AF (No 3)* was the individual's procedural right under the ECHR to a fair trial, the use of closed material, and the impact of Strasbourg jurisprudence. Practical questions of great difficulty arise, involving the need to balance (1) giving sufficient disclosure for the trial (or proceedings) to be fair while (2) not compromising the sources from which the information is derived. There are no easy answers.

21. *(3) Disclosure, allegations of torture and intelligence sharing:* For reasons already canvassed, here and elsewhere in the common law world, disclosure is both a fundamental part of a fair trial and the source of profound concern to the agencies. For the avoidance of doubt, I obviously express no view whatever on ongoing proceedings.

22. To an extent, the difficulty can be addressed by our Public Interest Immunity ("PII") procedures – but only to an extent. Faced for instance by civil claims, a department of state can claim PII; but its successful raising of PII to exclude sensitive material may leave the department without a defence to the claim. Moreover, as the law stands, there is no statutory (or other) basis for closed proceedings, special advocates and the like in civil cases.[18] Suffice to say that I am aware of a Green Paper in this regard and the Supreme Court's forthcoming consideration of the issue, so will say no more.

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[16] Consider too the extensive work undertaken on "deportation with assurances" with which there is not time to deal today.
[17] *Home Secretary v AF (No 3)* [2009] UKHL 28; [2009] 3 WLR 74, at [76]
[18] See, *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 3 WLR 1069; *Bank Mellat v HM Treasury*[2010] EWCA Civ 483; [2010] 3 WLR 1090

23. The common law has a long and, to my mind, entirely praiseworthy history of abhorrence to torture – a history traced by Lord Bingham in *A v Home Secretary (No 2)* [2005] UKHL 71; [2006] 2 AC 221, at [10] and following. As expressed in the head note to that decision:

> " ....evidence of a suspect or witness which had been obtained by torture had long been regarded as inherently unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles on which courts should administer justice..."

That the executive may act on such information was one thing; its admissibility into evidence was another. As Lord Bingham observed, at [46] – [48], in balancing practical common sense and protecting the individual against unfair incrimination, the "common law is not intolerant of anomaly".

24. This reference to torture assists in introducing the context in which *R (Mohamed) v Foreign Secretary (No 2)* [2010] EWCA Civ 65; [2010] EWCA Civ 158; [2010] 3 WLR 554, came before the courts. As this and related litigation continues, there is little I can or should say by way of comment, however, in any discussion of this case, it seems to me that there are a number of features to be taken into account in order to maintain perspective:

25. First, the dispute involved allegation of complicity in torture on the part of the agencies. I have already highlighted that torture is a "flashpoint" for the common law.

26. Secondly, the Court of Appeal underlined the importance of intelligence sharing between (in this case) the agencies and the intelligence services of the USA, on the basis of the control principle[19]: see, for instance at [10] and [43] – [44]. Nothing said

[19] As explained in *R (Mohamed)* at [5], the "control principle" is an understanding of confidentiality governing the working relationships between intelligence services of different countries; confidentiality is vested in the

in the judgment was to be seen as "devaluing the importance of the confidentiality principle": [50]. As Lord Judge CJ expressed it:

> " 43. The effective combating of international terrorism involves mutual cooperation and intelligence sharing.
>
> There is no obligation on the intelligence services of any country to share intelligence with those of any other country. The relationships cannot be considered in contractual or commercial terms. The process is entirely voluntary. The arrangements are not permanent, and they are not set in stone. Either country can end the relationship, or alter it, for good reason or for none.....the first responsibility of any intelligence service is the safety of the country it serves.
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> 44. ... it is integral to intelligence sharing arrangements that intelligence material provided by one country to another remains confidential to the country which provides it and that it will never be disclosed...
>
> directly or indirectly, by the receiving country without the permission of the provider of the information. This understanding is rigidly applied to the relationship between the UK and USA. However, although confidentiality is essential to the working arrangements between allied intelligence services, the description of it as a 'control principle' suggests an element of constitutionality which is lacking. In this jurisdiction, the control principle is not a principle of law: it is an apt and no doubt convenient description of the understanding on which intelligence is shared confidentially between the USA services and those in this country, and indeed between both countries and any

country of the service which provides the information; it *never* vests in the country which receives the information.

> other allies. If for any reason the court is required to address the question whether the control principle, as understood by the intelligence services, should be disapplied, the decision depends on well understood PII principles. As the executive, not the judiciary, is responsible for national security and public protection and safety from terrorist activity, the judiciary defers to it on these issues, unless it is acting unlawfully, or in the context of litigation the court concludes that the claim by the executive for public interest immunity is not justified. Self evidently that is not a decision to be taken lightly. "

As Lord Judge CJ continued, the Foreign Secretary's views in the context of public safety were entitled to the "utmost respect", albeit that they could not "command the unquestioning acquiescence" of the court [46]. . In the event, however, having regard to the absence of damaging content of the (very few) redacted passages in issue and in all the circumstances of the case, PII could not be maintained in respect of those passages. In this regard, it is to be noted that the Foreign Secretary did <u>not</u> contend that the control principle was absolute; it was subject to the qualification that it could be set aside – in this country and it appeared to the court in the USA as well – if the court considered it in the interests of justice to do so: see, at [46]. Standing back from the decision, while there can (as always) be debate about the application of the principles to the particular facts, the underlying principles were not seriously in dispute. The court acknowledged the importance of the control principle; the Foreign Secretary did not contend that it was absolute. In *Securing the State (op cit),* Sir David Omand has said this (at p.274) of the conclusion of Lord Judge CJ:

> " ....it reinforces the longstanding view of the Courts that it is for the executive not the judiciary to say what is in the interests of national and public security. "

It may be added that in the, no doubt, rare cases where the court will override the views of the executive on such matters, it will not do so lightly, as the litigation in *R (Mohamed)* itself demonstrates.

27. Thirdly, and central to the decision of both Lord Neuberger MR and Sir Anthony May P [20], was the fact that Judge in a United States district court had, in an open judgment, published prior to the Court of Appeal's consideration of the case, found as a fact that the claimant's evidence as to his mistreatment and torture (while in the control of the US authorities) was true. Accordingly, the information in the redacted paragraphs was no longer capable of being intelligence material in the control of the United States Government and intelligence services so that its publication would not infringe the control principle. Had the position been otherwise, both Lord Neuberger MR and Sir Antony May P would have upheld the stance taken by the Foreign Secretary and would have ruled that the redacted passages should be excised.

CONCLUSIONS

28. I have sought to outline, I hope with perspective and in context, a variety of areas where national security impacts on the courts. There is no immediate prospect of issues of this nature going away – even though both the agencies and the courts have a great many other pressing concerns. If that is right, then encounters between the agencies and the courts are likely to continue, posing challenges for both as they each perform their vital roles. Neither a magic wand nor an instant solution is available. I therefore return to the theme expressed when I began - the benefits of mutual understanding. With this aim in mind, what are the challenges facing the agencies and the courts?

[20] As clearly summarised in the head note, at p. 556

29. So far as concerns the agencies and so far as it is for me to comment, the challenge is to fashion an approach which *preserves*[21] the essential secrecy that is fundamental to their operations, while recognising that they do now operate (for better or worse) outside the shadows, within a legal framework. To my mind, Sir John Sawers was plainly right when emphasising:

> " Secret organisations need to stay secret.....Secrecy is not a dirty word.....Secrecy plays a crucial part in keeping Britain safe and secure."

Those are essentials but they have now to be addressed within in a changed environment. In that legal environment, it must be accepted that the agencies, no matter how greatly respected generally, will in individual cases be treated no less favourably but also no more favourably than any other litigant; that is not because of any hostility or lack of understanding on the part of the judiciary – it is the essential ingredient of our judicial oath and of the rule of law. The courts, it is to be remembered, have a traditional role of protecting the Human Rights of the individual against state authorities. Moreover, words such as "always" and "never" are difficult for lawyers – there is always the exceptional case.

30. The courts must of course strive to do justice in each individual case. That goes without saying. But, subject always to the need to do justice without fear or favour in every individual case, it seems to me that there are challenges for the courts in this area, upon which it is worthwhile to focus.

31. First, there is a need to address and in a practical sense, the reality of the operational dilemmas of which Sir John Sawers and others[22] have spoken. As Sir John put it

[21] At the risk of adding a "5th P" to the UK security strategy!
[22] See, *Securing the State (op cit)*, at pp. 276-7, on the impossibility of "shunning" the rest of the world, even those countries with dubious standards, if the agencies wish to manage the risks to UK citizens at home and when abroad.

"……..These are not abstract questions for philosophy courses or searching editorials. They are real, constant, operational dilemmas. "

32. Secondly, when weighing competing legal solutions to national security issues and seeking to do practical justice, if at all possible, the reality of the demands on the agencies' resources should be taken into account.

33. Thirdly, it is incumbent on the courts to proceed with caution when intervening in this area, so as to guard against (however unintentionally) the impact of the law on the agencies producing an unduly risk (or litigation) averse cast of mind – to the detriment of all concerned.

34. There is here, work to be done, both by the agencies and the courts. That should not distract either of us from the fact that we both have much of which to be proud – whether it is the vital work done by the agencies in the national interest or the internationally acknowledged strength of our legal system. Confidence in our laws, values, traditions and institutions, including both the agencies and the courts, is amply justified and essential in dealing with the current threat of terrorism.