

terrorismlegislationreviewer.independent.gov.uk

Tom Sargent Memorial Lecture for JUSTICE 24th October 2017 « Independent Reviewer of Terrorism Legislation

38-48 minutes

TOM SARGANT MEMORIAL LECTURE FOR JUSTICE 24/10/2017
**MAX HILL QC INDEPENDENT REVIEWER OF TERRORISM
LEGISLATION**

'Rights vs Security: the challenge engaged'

JUSTICE does me a great honour in asking me to speak this evening.

I am especially pleased to be coming home to JUSTICE, because this is an organisation which I know and love, having worked with Andrea Coomber and Jodie Blackstock in particular for several years. We know each other through my work on behalf of the Kalisher Trust, the charity for the criminal Bar which I have chaired for four years and counting. I am proud to say that Kalisher provides an annual internship to JUSTICE, a process in which I am pleased to play my part by interviewing the best of the candidates each year alongside Andrea and Jodie. Together, we have developed a growing cadre of exceptional interns who move into pupillage and tenancy at the junior Bar. I am delighted to report that

one of the recent Kalisher JUSTICE interns is currently undertaking her pupillage at Red Lion Chambers.

But I am here for a different purpose, and this kind invitation to speak follows my participation in JUSTICE human rights conferences in recent years, so it is a great pleasure if a little daunting to step up to deliver this lecture.

The UK, in fact England, this year has suffered the worst combination of terrorist attacks for many years. Since March 22nd 2017, we have all lived through the pain of witnessing murderous attacks at Westminster Bridge, Manchester Arena, and London Bridge followed by Borough Market. The attack outside Finsbury Park Mosque on 19th June marked the fourth in this short list of major terrorism events, and there was a serious attempted attack at Parsons Green a few weeks ago.

It came as no great surprise when the Prime Minister, speaking from outside Downing Street, declared that 'enough is enough' on 4th June, shortly after the London Bridge attack, going on to announce her intention that the Government should review the 'counter-extremism strategy', including a review of available legislation together with sentencing powers for terrorism offences.

Meanwhile, I had succeeded my distinguished predecessor David Anderson QC on 1st March 2017. Just in time to witness the horror that unfolded on Westminster Bridge exactly three weeks later, incidentally whilst I was sitting as a Recorder at the Central Criminal Court.

My task is to annually review our terrorism legislation, essentially the Terrorism Acts 2000 and 2006, together with the Terrorism Prevention and Investigation Measures (TPIM) Act 2011 and the

Terrorist Asset Freezing Act 2010.

The challenge engaged, to come to the title of this lecture, is the extent to which legislation in the interests of national security impinges upon rights which we hold to be fundamental. And a lecture in the name of the founding Secretary of JUSTICE strikes me as the perfect platform for discussing this challenge.

Whilst to my regret I did not know him, Tom Sargant campaigned tirelessly against miscarriages of justice and challenged the infallibility of the legal system. He had a lasting impact, despite not being a lawyer himself, and was memorably described by Peter Hill of 'Rough Justice' as 'Britain's court of last resort'. Some 25 victims of miscarriages of justice were freed as a result of his campaigning and as we all know JUSTICE continues today, as his legacy, to fight for a fair and just society.

Peter Hill said this 'Whenever an innocent prisoner had exhausted all avenues of appeal he could still turn to Tom, who would always listen – even when no one else would.'

Tom Sargant himself gave a farewell interview to the Observer in 1982, in which he said 'I have had absolute cooperation from judges and lawyers. Many of whom are my friends,' he said. 'Although some of them hate my guts, and think I'm a damn nuisance. They don't believe juries make mistakes. I take a more jaundiced view. I take all the casualties.'

He died in 1988, the year in which I defended in my first ever jury trial.

So let us all recognise that we enjoy a criminal justice system which enshrines fundamental freedoms we must uphold even in the face of terrorism, one of the most celebrated freedoms of course being

freedom of speech, Article 10. I agree with the letter written to the Times during the summer,¹ signed by the leaders of the legal professions as well as by Liberty and JUSTICE, which includes this: ‘Suggestions made before the general election, that human rights prevented the police fighting terrorism, are misguided. ...Human rights exist to protect us all. Weakening human rights laws will not make us safer. Terrorists cannot take away our freedoms – and we must not do so ourselves’.

So far so obviously correct. But, and here is the balance, we remind ourselves of the words of Article 10(2) of the ECHR: ‘The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime...’

The question is, how far is it ever necessary to go?

I recently read ‘The History of Terrorism, from antiquity to ISIS’, by Gérard Chaliand and Arnaud Blin.² The concluding paragraph of the Preface to the 2016 updated edition reads as follows:

Thus much like old soldiers, terrorist movements, if they don’t crumble, tend to fade away. Generations of terrorists live and die, usually quickly, only to be replaced by new generations whose goals generally remain as unattainable as those of the generations that preceded them. The fact that terrorists do sometimes succeed probably offers a glimmer of hope to those who plan to try their methods. And while it may never be possible to completely eradicate terrorism from the face of the earth, it is certainly within our grasp to greatly reduce the effects that it may have on our lives

and our future'.

To expand a little on this theme at the outset, I would add the words of Richard English in his 2016 book 'Does Terrorism Work'.³

Thinking about the partially unintended consequences of the US and Western world response to 9/11 and Al Qaeda atrocities, he signals:

'the capacity of small numbers of terrorist zealots to change the world, but not entirely as they would have wished or anticipated'

To my mind, unintended consequences apply equally to national Parliaments as they contemplate their response to terrorism, as to which I go back to the words of Paul Wilkinson, in the 2010 third edition of his book 'Terrorism versus Democracy':⁴

'it remains a central argument of my book that (the) democracies should stay true to their basic values in their response to terrorism. The foundations of any operative democracy are the upholding of the rule of law, the protection of fundamental human rightsthe use of extreme draconian measures or 'terror against terror' is counter-productive as it serves as a recruiting sergeant and propaganda weapon for terrorists'.

I think the words I have taken from all three books are worth bearing in mind. On the one hand, terrorism has been around for a very long time, in various forms, and we cannot expect to eradicate it entirely. On the other hand, it is the way we deal with it now that can either have a positive or a negative effect on all our lives. We must strive for the positive.

After the General Election in early June, the Government counter-terrorism strategy review swung into action. At the same time, commentators noted that the Queen's Speech at the opening of the

new Parliament was largely devoid of intended new legislation, and in relation to ‘terrorism’ there appeared a reference to a ‘Commission for countering extremism’ – which I take to be a reference to non-violent extremism, where our current legislation generally deals with violent extremism – but nothing further.

The incipient Commission for countering extremism is nothing to do with me. I understand that the competition to select the principal or lead commissioner is ongoing, so we must all watch this space. No doubt one of the first tasks of the Commission must be to define its own territory, and that means to satisfy itself as to what extremism amounts to in this country today. As I say, nothing to do with me.

Why mention it at all then? Because there is an important division or fault line between what I do and what the Commission will do once it gets underway. I put it this way, the terrorism legislation which I review has to do with violent extremism. It encompasses all actions or violence within the definition of terrorism contained within section 1 of the Terrorism Act 2000. That means, put simply, that non-violent extremism is outside the purpose of our legislation.

We do not criminalise, we do not enact statutory offences designed to isolate non-violent extremism, only violent extremism in its various preparatory stages and when it develops into action, ie attacks such as those we have seen this year.

There may be another way of addressing this divide, and I offer it to you for consideration. We do not, and should not criminalise thought without action or preparation for action. Thought with steps towards action can be terrorism. Thought without action or preparation for action may be extremism, but it is not terrorism.

At least, this is where I hold the dividing line. Whether others agree

is a matter of debate. Before this year's Queen's Speech, we anticipated the roll out of a Counter Extremism Bill, in other words statutory intervention on the non- violent side of the divide. You will recall the proposals for Banning Orders, Extremism Disruption Orders and Closure Orders. If any or all of them make a re-appearance, that will be evidence, for me, of the creation of criminal sanctions, formal consequences which fall on the wrong side of the divide which I have tried to articulate. I take the announcement of the new Commission for countering extremism as an acknowledgement that policy- makers have thought better of this, but we wait to see.

I shall of course leave extremism entirely to the new Commission. Terrorism is for me in the sense of the legislation I review, and for the Police and all others who deal with it, disrupt it, investigate and prosecute. Whilst we can all agree that there should be nowhere for real terrorists to hide, we should also agree that legislating in the name of terrorism when the targeted activity is not actually terrorism would be quite wrong.

I recently read Kenan Malik's book, first published in 2009 and updated this year, entitled 'From fatwa to jihad. How the world changed. From The Satanic Verses to Charlie Hebdo'.⁵ He wrote this in Chapter 5:

If we invite the state to define the boundaries of acceptable speech, we cannot complain if it is not just speech to which we object that gets curtailed. If the 20 years since the Rushdie affair have shown us anything, it should be that. Seven years on (he means this year, 2017) it is painfully clear that many remain deaf to that message; and the real beneficiaries of that deafness have been the authoritarian state and those who would like to suppress dissent".

When thinking about the national security limitations upon free speech enshrined in Article 10(2), and its conjunction with the current terrorism offences of collecting information likely to be useful to terrorists under section 58 of the 2000 Act and disseminating terrorist publications under section 2 of the 2006 Act, I was struck by this, also from Kenan Malik's book:

'There is usually no direct relationship between words and deeds. How people respond to words depends largely on the individuals themselves. They are responsible for interpreting the words and translating them into actions. Between words and deeds stands a human being, with a mind of his own, an ability to judge between right and wrong and a responsibility to face up to his own actions. It is not the words themselves that cause things to happen, but our estimation of the value and truth of those words. Words have consequences only if we choose to make them consequential. Free speech empowers the speaker. It also empowers the listener, placing a premium on his or her ability to weigh up the arguments and draw their own conclusions'.

I am on record, from when I first came into post as Independent Reviewer in March this year, saying that in general we don't need more terrorism offences, and there may be examples of redundant terrorism offences which time has proved are not as necessary as Parliament thought.

Careful study of the relevant section of the Crown Prosecution Service website reveals that a wide range of statutory offences were deployed in charging terrorism cases last year.⁶ A word of warning before I go on, this is one index or collation of statistics, which I am using because it emanates from the Counter- Terrorism Division of the CPS, in other words the prosecutors who are

actually responsible for placing these cases before our criminal courts. But they are not the only statistical source, there are other places to look including the Home Office website and statistical bulletins. So, I am using shorthand to make a point, which is that the offences charged last year included preparation of terrorist acts (section 5, 2006 Act), encouraging terrorism (section 1, 2006), belonging to a proscribed organisation ie ISIS (section 11, 2000, together with inviting support for such an organisation, section 12), funding terrorism (section 17, 2000), and disseminating terrorist publications (section 2, 2006). Interestingly, training for terrorism under sections 6 and 8 of the 2006 Act was not charged at all in 2015 or 2016. Inciting terrorism overseas was charged once in the same two-year period. Possession of articles for terrorist purposes under section 57 of the 2000 Act was charged once in 2015 and not at all in 2016. Some revision and trimming of the current legislation may therefore be possible, and that would be a good thing. In general, I would suggest that our legislators ie Parliament have provided for just about every descriptive action in relation to terrorism, so we should pause before rushing to add yet more offences to the already long list.

The latest proposal in this area emerged at the Conservative Party Conference at the beginning of this month, when the Home Secretary announced that ‘The government intends to change the law, so that people who repeatedly view terrorist content online could face up to 15 years behind bars. The proposed changes will strengthen the existing offence of possessing information likely to be useful to a terrorist (Section 58 Terrorism Act 2000) so that it applies to material that is viewed repeatedly or streamed online’.

This is the first indication we have seen of the outcome of the

government's counter terrorism strategy review. There is much for legal and other commentators to consider. I have volunteered my own reaction in a posting on my own Independent Reviewer website,⁷ which is there for all to see, so I restrict myself to the headlines only:

Section 58 currently states that a person commits an offence if 'he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or he possesses a document or record containing information of that kind'. The House of Lords (sitting as our senior appellate court shortly before the creation of the Supreme Court) considered the meaning of these words in R v G, R v J [2009]UKHL 13, and held as follows 'that section 58(1) of the 2000 Act did not criminalise the possession of information of a kind regularly obtained or used for everyday purposes simply because it could also be useful to someone preparing an act of terrorism; that to fall within section 58 the information had to be of its nature designed to provide practical assistance to a person committing or preparing an act of terrorism' . I do not expect any change here. Whilst information does not have to be exclusively useful to someone preparing terrorism, nonetheless it must bear that meaning or the offence is not committed.

The possession offence (section 58(1)(b)) requires that the person knows what he/she has in their possession. This means that inadvertent or accidental collection or possession of information is not enough. This means in practice that prosecutors must be careful not to indict individuals based upon the content of the internet cache on their laptop computers. To take a simple but important example, clicking on a news website may cause multiple

news stories/images to be stored in the laptop user's cache, but it does not follow that the user has read every story/image, or even that he/she knows these items are there. Care must be taken to ensure that any extension to the section 58 offence does not expose internet users to prosecution in the absence of the proof that the House of Lords has identified.

We are told that 'The updated offence will ensure that only those found to repeatedly view online terrorist material will be captured by the offence, to safeguard those who click on a link by mistake or who could argue that they did so out of curiosity rather than with criminal intent'. I welcome this, but we must wait to see what the words 'repeatedly view' actually mean. Are two clicks on a link one too many, or will three clicks be required? Can an internet user be innocently curious twice, but not three times? These are matters for Parliamentary draughtsmen to consider, and I await the outcome with interest. I add here that in addition to safeguarding the curious from prosecution, we must surely be vigilant to ensure that those who view material in disgust, shock and disapproval do not find themselves on the wrong side of the law. There will have to be very careful work on the definitional side of this expanded offence, however modest the Home Secretary's announcement may appear.

Section 58, when enacted by Parliament in 2000, has an important statutory defence of 'reasonable excuse' under subsection 3. The Home Secretary is aware if it: 'A defence of 'reasonable excuse' would still be available to academics, journalists or others who may have a legitimate reason to view such material'. Here, our appellate courts have repeatedly considered this defence with care. In RvY(A) [2010]2Cr.A..R.15, the Court of Appeal put it this way 'The defence of reasonable excuse furnished the defendant with the

opportunity to say that he had an explanation for possessing the material which he asked the jury to say was objectively a reasonable one. That necessarily focused upon his reason for possessing the material and that reason would almost invariably involve him saying what his purpose was in possessing it... The more alarming or dangerous the information in the document or record the more difficult it was likely to be to advance a reasonable excuse for the possession of it but, unless the judge was satisfied that no reasonable jury could regard the defendant's excuse as reasonable, the matter had to be left for the jury to decide'. So, the question of reasonable excuse, once raised by a defendant, must be left to a jury to decide unless the judge can say that no jury could find the excuse to be reasonable. This is an important safeguard I suggest, and all the more so if the Home Secretary's recent announcement finds its way into draft legislation as is surely intended.

I propose to leave this matter there; though if you are interested please go to my website to read the parallel reasoning in relation to recent French legislation in the same area, which was struck down for lack of certainty.

A word about sentencing. Apart from the definition of the offence under section 58 of the Terrorism Act 2000, we are to understand that the government intends to increase the maximum sentence for this offence, as well as for the section 58A offence (introduced via the Counter-Terrorism Act 2008) of eliciting information about members of the armed forces. But where there are future cases prosecuted under section 58 or 58A, I think it important to stress that we are potentially seeing an uplift to the discretionary maximum sentence which judges may apply. That is very different

to imposing a mandatory minimum sentence, examples of which we have seen in other areas of criminal offending, including gun and knife crime as well as repeat offences of burglary. I for one am pleased that the government shows no intention of following suit in terrorism sentencing. I have noted before that terrorism trials are presided over by senior and experienced judges who should be entrusted with wide discretion to sentence appropriately for the offence and offender in question. In fact, further guidance in this area will be coming next year in the form of sentencing guidelines for terrorism offences, which the Sentencing Council is currently formulating. For the sake of the Council, I hope that any changes to discretionary maximum sentences are considered fairly soon. I suspect that we will see proposals to lift the discretionary maximum in a number of what might be called second-tier offences. What do I mean by that? A prime example of a first tier offence is the preparation for terrorism offence under section 5 of the 2006 Act, which carries discretionary Life imprisonment. Second-tier offences mean those for criminality falling short of fully developed attack-planning, which is what triggers discretionary Life in the higher Levels identified by the Court of Appeal in the guideline case of Kahar, which it would be natural to assume will have informed the Sentencing Council in respect of their guideline drafting for section 5.

There are two questions to ask: the first is whether, in the case of second-tier terrorism offences, they are capable of commission in what might be called escalating seriousness; in which case I can see some force in elevating the discretionary maximum perhaps from 10 years to 15 years. The Sentencing Council is now amidst a 6-week consultation exercise on their draft guidelines, but this is on

the basis of the statutory maximum sentences as they are, not as they may soon become.

The second question therefore, is whether wider pre-legislative consultation or scrutiny will reveal a robust evidence-based analysis that justifies increasing the statutory maximum for many offences from 7 or 10 years up to 15. As all practitioners and judges know, the headline terrorism offences, those at the top of the pile, have seen dramatic increases in the sentences imposed during the last 15 years. The first terrorism case in which I appeared as junior prosecution counsel, the Real IRA mainland bombing campaign of 2001, met with determinate sentences of 22-24 years. By the end of the decade, when I was part of the team prosecuting the 21/7 2005 bombers, their sentences were Life Imprisonment with a minimum tariff of 40 years. So there has been rapid change. I do not contend that this was an unnecessary shift, in relation to the most serious cases, but it begs the question whether in more modest or middle- ground terrorist offences there is a real need – as opposed to a political desire – to mark the offenders with far longer terms in jail.

I conclude this section of my remarks with the important rider that in every case, wide discretion must rest with the experienced judiciary who try these cases. If we are to see increased sentencing powers, I cannot see any basis on which our judges should be so fettered that they are required to impose minimum terms. Sentencing must fit the offence, but it must also be flexible according to the characteristics of the offender.

I think that is all that I can say for now on sentencing, which is at an interesting juncture both in terms of powers and guidelines.

So, returning to offences, where do we go next? It seems to me, thinking about the range of statutes in use by prosecutors as shown by recent cases, that we do not lack for legal powers to bring these cases to court. We do need to encourage investigators and prosecutors to use the full range of current powers at their disposal; which is not to say that they are ignorant of what Parliament has provided, but we do need to see the use of financial, identification, fraud, firearms, public order, offences against the person, and conspiracy offences being added to the indictment, in order to capture the full range of criminality represented by future cases. These offences are all tried and tested, they sit solidly within the mass of general crime statutes, and terrorism neither deserves nor requires special treatment in the name of identifying criminal activity and bringing it before our courts. There should be nowhere safe for terrorists to hide, but there are already many ways of catching them and their criminal activity. In fact, statistics from the CPS Counter Terrorism Division reveal that terrorism-related cases charged in the year ended December 2016 totalled 56 Terrorism Act offences, and 62 non-Terrorism Act offences, in other words where other criminal statutes were used. More of this is the way forward. The Government review will doubtless focus on these matters.

Could we expand our focus for a moment now?

My work as Independent Reviewer takes me to all corners of the UK (I am responsible for reporting on the legal provisions of Schedule 7 of the 2000 Act which empower officers to stop travellers at border controls nationwide, together with pre-charge detention under the 2000 Act, whether in Northern Ireland or Scotland as well as our familiar legal jurisdiction encompassing England and Wales). I am trying and shall continue to try to take

account of all facets of British society. I am grateful for the welcome wherever I travel, but I note in particular a general view often expressed to me, namely that there is ‘one law for Muslims, and another for the rest’. In discussion, I often find that many are confused as to the reach of our legislation, and find it hard to accept that legislation is intended for all citizens and not for one or more segments of society.

This confusion extends to strong views on the use of the Terrorism Acts to bring criminal charges in some instances but not in others. Many feel that charging the killer of Jo Cox MP with Murder, rather than a specific terrorist offence, was evidence of ‘one law for some, another for the rest’. Of course I always point out that the Islamist, or to use better terminology Al Qaeda- inspired (it would be ‘Daesh-inspired’ now) extremist killers of Fusilier Lee Rigby were also charged with Murder. Here, I cite one of my Special Advisers, Professor Clive Walker QC (Hon), to whom I am grateful for his comments on an early draft of this lecture. In the 2014 third edition of his book *The Anti- Terrorism Legislation* (chap 6):⁸

‘The criminalisation approach seeks to avoid treating terrorist offenders or prisoners as bearing special status. In consequence, many offences applied to terrorists are not in the anti-terrorism legislation but comprise homicides and offences under the Explosive Substances Act 1883. Even an offence of terrorism has been resisted’.

As set out in the Forward Thinking ‘Building Bridges’ report,⁹ published in July and detailing my meetings within Mosques and community centres around England, there is an undeniable strength of feeling around the lack of meaningful engagement from central or local government in the communities I have visited.

Admittedly this came at a time of high emotions during the Spring and Summer of 2017, but it should not be ignored.

Another matter worth highlighting is the call to ‘do more’ to fight extremism which remains prevalent. Many in the Muslims communities are already doing a great deal and if they could be doing ‘more’, no one appears to have made clear what that means. Failure to do so can lead to further alienation, frustration and perhaps even withdrawal for many in spheres where we need them to remain engaged. That said, I found the government response to the Finsbury Park mosque attack was singularly highlighted as positive, with calls for similar steps to be replicated in the future.

The need to address the feeling of lack of engagement within these communities needs urgent attention. A more proactive role ought to be taken by government at all levels to address wider concerns, and not just to engage with these communities when things have gone wrong. A wider net should be cast in the groups and communities engaged, even if that means you do not agree with those with whom you’re speaking. Involvement is the only way to overcome mistrust. Many have spoken about the failure to be seen as part of the solution rather than the problem. If we do not address this, where would that take us? I therefore look forward to further country-wide engagement, starting with a Parliamentary roundtable on Thursday chaired by Dominic Grieve QC, which is intended to follow up on the Forward Thinking report I have mentioned.

In all of this, and in the understandable heat of the moment caused by the atrocities we have witnessed on our streets this year, what is it that we must we avoid at all costs?

In ‘The good immigrant’,¹⁰ a paperback published in the last year

by Unbound, Kieran Yates wrote this about her grandfather's migration from Punjab to the UK:

'The Britain that accepted him, the place I call home, is now experiencing a period of rejection. The last year has seen a depressing attack on many immigrant communities, as the aggressive rhetoric of adhering to 'British values' has catapulted itself into political and social policy. Cameron specifically targets Muslim women for their poor language skills, the tabloid media demonises refugees on a daily basis, and the rhetoric encouraging us to prove our allegiance to the country's best interests, makes the place I call home feel less safe for people who, largely, look like me.'

These are not my words, but I am sure they resonate with many whom I have met around the country, and more whom I am yet to meet.

Applying this to an analysis of our laws, we as lawyers here this evening recognise that the law is fit for all, it catches all who transgress, it is not targeted only at one or more sections of the community, rather it is targeted at criminals from wherever they may emerge. But we need to be watchful.

Terrorism legislation in the UK, to date, has been generated often in reaction to major events and in haste. The Explosive Substances Act 1883 is one good example, passed by a late Victorian Parliament in record time and in relation to the Fenian dynamite campaign in England, which lasted from 1881 to 1885. The Terrorism Act 2006, admittedly passed in longer time with steerage by Charles Clarke's Home Office, is another example which we all remember was in relation to the atrocity on 7/7 the previous year,

though the statutes which intervened between the Terrorism Acts 2000 and 2006 were both quick-time, passed in haste, namely the Anti-Terrorism, Crime and Security Act 2001 and the Prevention of Terrorism Act 2005. Of course, the legal regime introduced by the 2001 Act led to *A and others v Secretary of State for the Home Department* [2004] UKHL 56 in the House of Lords in which Lord Hoffman (albeit in a dissenting speech as to the extent of incompatibility) memorably said the following: ‘The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.’

The Prevention of Terrorism Acts late last century provide continuous examples of emergency legislation, intended to be in force only for one year at a time, but circumstances required annual renewal for a long period during the Irish Republican era prior to the 1998 Good Friday agreement. Legislation has been rather more settled since the Terrorism Act 2000, though with some notable examples I have just given, and we must be vigilant against any future instances of ‘knee-jerk, something must be done’ lawmaking.

Moving over the Channel for a moment, we have a prime example of what the French declared to be a continuing state of emergency ever since the Bataclan attack in Paris, almost two years ago in November 2015. The French decision was understandable I suppose, who am I to say otherwise, but I believe it was not correct. In fact it is corrosive to require a national population to live under a state of emergency for a long period of time. I shall return to the French experience in a moment.

In the UK, we know that the national threat level is assessed and maintained not by government, but by JTAC, the Joint Terrorism Analysis Centre. Their work is part reactive, part proactive, and their quarterly worldwide threat level assessments are fascinating. How they do it is not the subject of this lecture, nor am I the right person to explain. However, it is notable that the UK threat level has only reached ‘emergency’ or Critical twice this year, namely for a period of approximately 48 hours very shortly after the Manchester Arena attack, and for 48 hours or less immediately after the Parsons Green incident. The level of sophistication to the Arena attack – a large improvised explosive device, assembled from parts which were gathered over time and stored ready for use – and perhaps to a lesser degree the Parsons Green explosive device, these facts justified an assessment which was absent after Westminster Bridge, Finsbury Park and even London Bridge, the first two of which were lone actor attacks, and the third albeit multi-handed was rapidly contained by the Metropolitan Police.

So we in the UK have avoided a state of emergency this year, though I hasten to add that we did derogate (I’ll come back to derogation in a moment) after 9/11, in fact from 2001 to 2005, so there is a real sense in which other Western democracies have caught up with, even adopted some of the UK legislative measures in recent years. However, for the last decade including this year, we have striven as far as possible to avoid a sense of rising panic amongst the populace through derogation from normative laws and adherence to rights. I do not mean to say that all French citizens are panicking, but our current position is surely preferable. I hope we keep it that way.

The relevance of all of this to my role is because the government’s

counter terrorism strategy review can be expected to consider whether difficult times call for difficult measures. Put another way, one explanation of the PM's 'enough is enough' speech is that it begs the question whether the UK in 2017 will move towards a set of laws in use during 'situation normal', but a different set of laws during a state or states of emergency.

Let's examine what a declared state of emergency actually means in law. Back to the French experience. Article 15 of the ECHR, permits derogation from rights, except those which are absolute eg Articles 2 right to life, 3 freedom from torture and 7 freedom from retrospective penalties. A margin of appreciation to nation states is permitted by the European Court.

What does this mean in practice? I turn to the Defender of Rights, whom I had the honour of meeting in Strasbourg at a Council of Europe conference last month, and whose office published a pamphlet this year entitled 'Counterterrorism and fundamental rights in France'.¹¹

I quote 'The state of emergency is an exceptional regime which, in the event of immediate danger resulting from serious breaches of public order, enables the authorities to take such administrative policing measures as restrictions on freedom of movement, administrative searches during the day and at night, house arrests, closing of meeting places and places of worship, prohibition of parades, identity checks, searches of baggage and vehicles, and dissolution of associations'. This is what it means to trigger Article 15, which France did two years ago by informing the Secretary General of the Council of Europe.

Once in a declared state of emergency, how does one get out?

France is currently considering exactly that, and many observers hope that the state of emergency will finally lift at the end of this month I believe, next week. But, and this is a stark warning identified by the Defender of Rights from whom I quote again ‘in order to exit the state of emergency, the government decided to present a bill widening the scope of the special measures implemented to counter terrorism and incorporating a number of measures relating to the state of emergency into common law’.

This is alarming. A state of emergency is declared, under which normal rights- compliant legislation is suspended through Article 15 derogation. Two years pass, followed by an attempt to in effect normalise the derogation by enshrining it in non-emergency statutes. I have already addressed the modest proposals which emerged courtesy of the Home Secretary’s Party Conference speech. Although requiring rigorous scrutiny in the ways I have suggested this evening, this is no state of emergency. But it does fall to commentators, and even to reviewers like me, to ensure that none of us forget that the struggle for national security must not be used as a stick to beat down the rights we hold dear. If that were to happen, terrorism would have prevailed.

May I show you what I mean, by taking an example from the literature of the recent past.

Gérard Chaliand and Arnaud Blin, in ‘The history of terrorism, from antiquity to ISIS’, set out to encapsulate the terrorists dream if you will, by quoting from Carlos Marighella’s 1969 ‘Minimanual of the urban guerrilla’,¹² in which he wrote about the intended result of terrorist campaigns. Marighella was a Brazilian writer, politician and guerilla fighter, whose words inspired student leaders and other revolutionaries in countries around the world. His own South-

American context is not the UK, nor is it France, but just listen to the principle:

The government has no alternative except to intensify repression. The police networks, house searches, arrests of innocent people and of suspects, closing off streets, make life in the city unbearable. The military dictatorship embarks on massive political persecution. Political assassinations and police terror become routine...

The people refuse to collaborate with the authorities, and the general sentiment is that the government is unjust, incapable of solving problems, and resorts purely and simply to the physical liquidation of its opponents'

Chilling words, albeit from half a century ago. And they perhaps remind us from where modern terrorism has emerged. We all understand terrorism today, namely the actions of a small number of radical and radicalised extremists who turn to violence in order to terrify the state and its people. We as a nation must not be terrified, nor must we allow our Parliament to enact measures that might make things worse not better.

So here I am, on the very night of my 30th anniversary of being called to the Bar, it was 24th October 1987, and you could say I am right back where I started in the late 1980s, when I vividly remember the excitement of being instructed to sit in a criminal trial with a 'watching brief' on behalf of a defendant who had already pleaded guilty and who awaited sentence pending the trial of the co-defendants. Three decades on, I am privileged to hold a watching brief for whatever comes next in the tension between rights on the one hand, security on the other. I shall do whatever I can to help secure the right answers, for us all.

- 1 <http://www.lawsociety.org.uk/news/letters/human-rights-law-and-the-police/>
- 2 Chaliand, G. and Blin, A. (2016). *The History of Terrorism, from Antiquity to ISIS*. 2nd ed. California: University of California Press.
- 3 English, R. (2016). *Does Terrorism Work*. Oxford: Oxford University Press.
- 4 Wilkinson, P. (2011). *Terrorism versus Democracy*. 3rd ed. Oxford: Routledge.
- 5 Malik, K. (2017). *From Fatwa to Jihad: How the World Changed From the Satanic Verses to Charlie Hebdo*. 2nd ed. London: Atlantic Books.
- 6 https://www.cps.gov.uk/publications/prosecution/ctd_2016.html
- 7 <https://terrorismlegislationreviewer.independent.gov.uk/law-tightened-to-target-terrorists-use-of-the-internet/>
- 8 Walker, C. (2014). *Blackstone's Guide to the Anti-Terrorism Legislation*. 3rd ed. Oxford: Oxford University Press.
- 9 http://www.forward-thinking.org/?post_documents=community-roundtables-a-report-on-the-aftermath-of-the- terrorist-attacks-in-london-and-manchester-foreword-by-max-hill-qc-independent-reviewer-of-terrorism-legislation
- 10 Shukla, N. (2016). *The Good Immigrant*. London: Unbound.
- 11 <https://ipcan.org/publications/counterterrorism-and-fundamental-rights-in-france>
- 12 Marighella, C. (1969). *Minimanual of the Urban Guerrilla*. ISBN: 1-894925-02-5.