Detaining Fanatics Without Trial

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Constitutional Crisis: Special Report 3

FRANCIS BENNION*

Introductory

This is the third of my special reports on the crisis over the Government's desire to give instructions to the Judges on their interpretation of the European Convention on Human Rights (the Convention) and the Human Rights Act 1998 (the HRA).[1]

The constitutional crisis has deepened with the current row over clause 23 of the Terrorism Bill, which as introduced allowed detention without trial for up to three months. On 9 November the Government was defeated in the House of Commons when the period was reduced to 28 days. On this matter Lord Woolf, the recently retired Lord Chief Justice, has severely criticised the Government. Before dealing with that and other judicial interventions I need to revert to an earlier matter.

More on a difference of view

I began the last report with a note on my difference of opinion with the editor as to the social value or otherwise of the Convention and the HRA. I suggested that our law is in a tangle because a straightforward provision enacted by Parliament is often 'read down' by Judges applying vague human rights provisions with no exact meaning.

Since writing that I have come across a reported case which illustrates the point. It is the *Denbigh High School Case*,[2] where a Muslim schoolgirl represented by Cherie Booth QC won the right to wear the jilbab (which conceals the shape of the wearer's arms and legs) even though it infringed the school's policy regarding uniforms. The Court of Appeal found for the pupil because, although the school might have succeeded if they had dealt with the matter as the law required, they approached the relevant issues from the wrong direction.[3]

The school's complaints committee complained in their turn that they did not have the legal knowledge needed to interpret the complex legislation governing the matter.[4] Brooke LJ said 'one is bound to sympathise with the teachers and governors of this school when they have to try and understand quite complex and novel considerations of human rights law in the absence of authoritative written guidance'.[5] Mummery LJ said-

> 'I agree with Brooke LJ on the need for teachers and governors to be given

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* Francis Bennion is an author, constitutional lawyer and draftsman of state constitutions. A former UK Parliamentary Counsel, he is currently a member of the Oxford University Law Faculty and a Research Associate at the Oxford University Centre for Socio-Legal Studies.

[1] For the previous reports see pp. 651 and 812 *ante.*

[2] *R (on the application of SB) v Governors of Denbigh High School* [2005] EWCA Civ 199, [2005] 2 All ER 396.

[3] See para. [88].

[4] Para. [58].

[5] Para. [82].

> authoritative written guidance on the handling of human rights issues in schools. There are many issues that members of the staff, parents and

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> pupils could raise under [the HRA] in respect of most of the articles in the Convention. Head teachers and governors of all kinds of schools need help to cope with this additional burden. They need to be made aware of the impact of [the HRA] on schools. They need clear, constructive and practical advice on how to anticipate and prepare for problems, how to spot them as and when they arise and how to deal with them properly. It would be a great pity if, through lack of expert guidance, schools were to find themselves frequently in court having to use valuable time and resources . . .[6]

This is tantamount to saying that every school needs its own legal adviser – or indeed its own legal department. It is a remarkable reflection on the obscure state of our law. Yet it is established that the Convention requires the law to be clear and certain.[7] This is a curious and disquieting paradox.

Back to Lord Woolf

On 31 October Justice Aharon Barak, President of the Israeli Supreme Court, delivered a lecture on 'Terrorism and Human Rights' at University College London (UCL). In the chair was Lord Woolf, who retired as Lord Chief Justice earlier in the year. Lord Woolf warned of the gradual erosion of 'what is acceptable' in the Government's efforts to combat terrorism. He said-

> 'Every time you move the goalposts, you are accepting a different level of what is acceptable. That then becomes the new starting point, whereas before it was the last point. And that is the case with the length of time one can hold people in custody without charge.'

In his lecture Justice Barak said judges must 'protect democracy both from terrorism and from the means the state wants to use to fight terrorism'. I will return to this highly questionable statement.[8]

This is not the first time Lord Woolf has associated himself with Justice Barak. Two years ago Lord Woolf delivered the 50th Lionel Cohen memorial lecture at the Hebrew University in Jerusalem, when he quoted his Israeli counterpart with approval. Barak, he stated, had been right to say that no democracy, old or new, could take it for granted that the institutions protecting our freedoms were inviolate, and that it was up to the judges to safeguard them.

In his Jerusalem lecture Lord Woolf said that a written constitution may be needed to protect judges and citizens from the Government's 'disturbing' legal changes. He was no longer sure that our present unwritten constitution was up to the job. This was the occasion when Lord Woolf notoriously said that Lord Falconer, who holds the dual roles of Lord Chancellor and Constitutional Affairs Secretary, has a split personality, comparing him to Robert Louis Stevenson's character Dr Jekyll and his evil counterpart Mr Hyde.

Commenting on these remarks the respected legal correspondent Joshua Rozenberg said-

> 'Judges and politicians do not normally criticise the British Government from foreign soil. It is a sign of Lord Woolf's concern that he felt moved to make his remarks while lecturing abroad, although he drew parallels with Israel, which also has a largely unwritten constitution and has also had to face the challenge of terrorism . . . The Lord Chief Justice is clearly worried that the Government's changes will go through by

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[6] Para. [89].
[7] See ***R v Rimmington*** [2005] UKHL 63 at [33]-[35].
[8] The above citations of remarks by Lord Woolf and Justice Barak are taken from ***The Observer***, 6 November 2005.

default, leaving the judiciary "more exposed to the attacks of politicians".'[9]

Lord Woolf's successor

Lord Woolf's successor as Lord Chief Justice, Lord Phillips of Worth Matravers, has carried on in the same vein. The government should not attempt to browbeat judges over its new anti-terrorism laws, he warned. Judges are not in conflict with the government, but it would be 'wholly inappropriate' for a politician to try to put pressure on them.

This was said by Lord Phillips in his first media briefing since taking over from Lord Woolf. Lord Phillips made plain that he will support senior judges who insist it is their job, not that of ministers, to interpret the law. He added-

> 'Occasionally one feels that an individual politician is trying to browbeat the judiciary, and that is wholly inappropriate. We are all trying to do our job to the best of our abilities, I'm taking up this office at a time when it is said in various quarters that judges are in conflict with the government. They are not. Judges are in conflict with no one. The judiciary has a clearly defined role, which is to apply the law as laid down by parliament.'[10]

Other judicial views

Lord Ackner, a former law lord, said last month that there is a contradiction between the Government's efforts to separate Parliament and the judiciary through the creation of a supreme court, and its instinct for directing judges how to behave. He cautioned against 'meddling' by politicians in the way the courts operate. He said-

> 'I think it is terribly important there should not be this apparent battle between the executive and the judiciary. The judiciary has been put there by Parliament in order to ensure that the executive acts lawfully. If we take that away from the judiciary we are really aping what happened in Nazi Germany.'

Lord Ackner added that the Government's proposals to hold terrorist suspects for three months without charge were 'overblown'. He said: 'The police have made a case for extending the two weeks but to extend it to three

months is excessive'.[11]

Lord Carlile of Berriew QC, a deputy High Court judge, warned against the whittling away of historic civil liberties.

> 'We have to be acute about protecting what is taken for granted as inalienable rights. In the United States the Patriot Act included a system whereby a witness to a terrorist incident can be detained for up to a year. This is in the land of the free.'

Lord Carlile, who holds the official appointment of Independent Reviewer of the Terrorism Act 2000, remarked that judges had now replaced MPs as the defenders of basic human rights.

> 'People used to look to their MPs as the first port of call to deal with any perceived injustice by the executive. Now there is an increasing tendency for people to look to the judges to protect their liberties.'[12]

Much misconception

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[9] The above is taken from *The Sunday Telegraph* (online edition), 6 November 2003.
[10] Taken from a report by Alan Travis, *The Guardian* 12 October 2005. If the judiciary would stick to this role all would be well.
[11] Taken from a report by Marie Woolf, Raymond Whitaker and Severin Carrell, *The Independent* 16 October 2005.
[12] Ibid.

There is much misconception here. Lord Woolf was wrong to talk of moving the goalposts in relation to detention without trial. Justice Barak was wrong (at least in the British context) to say that judges must protect democracy from the means the state wants to use to fight terrorism. If Lord Woolf is right that Judges are now more subject to the attacks of politicians it is because Judges are interfering in the political role. Lord Phillips is right in saying it is inappropriate for politicians to put pressure on Judges only if the Judges stick to their job of interpreting and applying the law (which nowadays they do not). It is not for Lord Ackner to say that three months is excessive: he is straying into the political field. Lord Carlile is wrong to allege that judges have replaced MPs as defenders of human rights. Both have their function.

The basic error that is now being made by the Government's opponents on terrorism is a failure to recognise that the situation has fundamentally changed since Lord Woolf's goalposts were first erected. It takes much longer to investigate terrorist crimes than it used to do when Guy Fawkes tried to blow up Parliament. The truth was extracted from him by torture on the rack; now kid gloves are required. Science has produced many delaying complications (for example the need to examine possibly enormous quantities of CCTV footage). Air travel means that vast distances may be involved in rounding up conspirators. Internet and email communications multiply the number of criminal participants.

There is one further element that is having catastrophic effects.

The suicide bomber

The human rights concept looks back to the earlier concept of rights under what was called natural law. In his book *The Concept of Law* the distinguished jurist H. L. A. Hart suggested that former notions of natural law concentrated on the need for survival in adverse conditions, and that this is still relevant. However he made an assumption which is no longer universally applicable. His words on natural law deserve careful attention.

> 'We are committed to it as something presupposed by the terms of the discussion; for our concern is with social arrangements for continued existence, not with those of a suicide club. We wish to know whether, among these social arrangements, there are some which may illuminatingly be ranked as natural laws discoverable by reason, and what their relation is to human law and morality. To raise this or any other question concerning how men should live together, we must assume that their aim, generally speaking, is to live.'

This is very significant. Hart thought that in modern conditions it was unthinkable to treat any human society as a suicide club. We must assume that a society's aim is *to live*. That is because to live was thought to be a universal human desire and aim. Not any more.

Hart's argument continues-

> 'From this point the argument is a simple one. Reflection on some very obvious generalizations – indeed truisms – concerning human nature and the world in which men live, show that *as long as these hold good*, there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control. With them are found, both in law and morals, much that is peculiar to a particular society and much that may seem arbitrary or a mere matter of choice. Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the *minimum content* of Natural Law, in contrast with the more grandiose and more challengeable constructions which have often been proffered under that name.[13]

[13] H L A Hart, *The Concept of Law* (1961), pp. 188–9 (first emphasis supplied, second emphasis in

Hart said that, although people differ from one another in physical strength and intellectual ability,

> '. . . it is a fact of quite major importance for the understanding of different forms of law and morality that no individual is so much more powerful than others that he is able, without cooperation, to dominate or subdue them for more than a short period. In this individuals are crucially different from nations. It is one of the facts of international life that there are vast disparities in strength and vulnerability between states.'

In an observation whose importance can scarcely be

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exaggerated Hart went on to point out that this inequality between the units of international law has imparted to that system a character very different from municipal law and limited the extent to which it is capable of operating as an organized coercive system.[14]

As we have seen, Hart states that our concern is with social arrangements for continued existence, 'not with those of a suicide club'. Later he says that our view of law and morality is conditioned by the fact that 'men are not devils dominated by a wish to exterminate each other'. He continues:

> 'But if men are not devils, neither are they angels; and the fact that they are a mean between these two extremes is something which makes a system of mutual forbearances both necessary and possible. With angels, never tempted to harm others, requiring forbearances would not be necessary. With devils prepared to destroy, reckless of the cost to themselves, they would be impossible.'[15]

But Hart, writing in the mid-20th century, did not foresee the worldwide rise of Islamist suicide bombers – even though they had been foreshadowed by Japanese kamikaze bombers in World War II. What everyone concerned with anti-terrorist measures needs to grasp, though many do not, is that the arrival on the scene of suicide bombers transforms the situation. They are the ones who have moved the goalposts.

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original).

[14] Ibid pp. 190–1.

[15] Ibid pp. 191–2.