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Constitutional Crisis: Special Report 5

The Crisis Deepens – and Widens

FRANCIS BENNION*

Introductory

Last August I began a series of reports on what I described as a developing constitutional crisis over whether our Judges will do what the Government tells them in the human rights sphere or retain their independence. I ended the last report in the series with the following:

> "Perhaps the so-called constitutional crisis is over, and I can make this the last of my articles on it. We shall see."[1]

Unfortunately it turns out that the crisis was far from over – hence the present article. The crisis has a central feature, which is largely unacknowledged. I must now spell out, in language as quiet and uninflammatory as possible, just what that feature is. Put very shortly, it is Jihad. Put less shortly, it is the worldwide threat posed by terrorist acts committed by Islamist extremists. It needs however to be stated rather more fully.

The Nature of Jihad

The internet search engine Google brings up much discussion of Jihad. I believe the following by Daniel Pipes is accurate:

> ". . . Jihad is 'holy war'. Or, more precisely, it means the legal, compulsory, communal effort to expand the territories ruled by Muslims at the expense of territories ruled by non-Muslims. The purpose of Jihad, in other words, is not directly to spread the Islamic faith but to extend sovereign Muslim power (faith, of course, often follows the flag). Jihad is thus unabashedly offensive

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> in nature, with the eventual goal of achieving Muslim dominion over the entire globe."[2]

Jihad in this sense is coupled with the twin religious belief that those who are not of the Islamic faith are to be despised as no-account infidels and that Muslims who die in the pursuit of Jihad are holy martyrs who as a reward will proceed straight to enjoyment of the delights of paradise.

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[1] For the previous reports see 169 JPN (2005) pp. 651, 812, 913 and 989. All these are on www.francisbennion.com.

[2] *New York Post*, 31 December 2002.

I hasten to stress that not all Muslims believe in Jihad in this sense. I surmise that only a very small minority of British Muslims do. Many of them emphatically reject it. Nevertheless it is appealing to some youngsters, and enough people embrace it worldwide to make it very dangerous to non-Muslims. That is why President Bush has declared war on the terrorism it induces, such as the 2001 9/11 outrages in the U.S. and similar (if less dramatic) incidents in the U.K. and elsewhere.

On the day after the London Islamist bomb outrages of July 7 2005 the Times published on its main editorial page an important article headed "London bombed - And this is why they did it" by the distinguished Iranian commentator Amer Taheri.[3] I shall now give you the gist of this article.

Taheri began with a reminder of Theo van Gogh, the Dutch film-maker who was shot by an Islamist assassin on his way to work in Amsterdam in November 2004. Van Gogh had begged for mercy and tried to reason with his assailant. "Surely we can discuss this," he kept saying as the shots kept coming. "Let's talk it over."

Van Gogh, who had angered Islamists with his documentary about the mistreatment of women in Islam, was reacting like BBC reporters did after 7/7, by assuming that the man who was killing him may have had some reasonable demands which could be discussed in a calm, democratic atmosphere. But it is not a case for talking, said Taheri. What the Islamist enemy wants is "to take full control of your lives, dictate every single move you make round the clock and, if you dare resist, he will feel it his divine duty to kill you".

Taheri said the ideological soil in which al Qaeda grows, along with the many groups using its brand name, was described by one of its original masterminds, the Pakistani Abul-Ala al-Maudoodi, more than 40 years ago:

> "When God created mankind He made all their bodily needs and movements subject to inescapable biological rules but decided to leave their spiritual, social and political needs and movements largely subject to their will. Soon, however, it became clear that Man cannot run his affairs the way God wants. So God started sending prophets to warn man and try to goad him on to the right path. A total of 128,000 prophets were sent, including Moses and Jesus. They all failed. Finally, God sent Muhammad as the last of His prophets and the bearer of His ultimate message, Islam. With the advent of Islam all previous religions were 'abrogated' (***mansukh***), and their followers regarded as 'infidel' (***kuffar***). The aim of all good Muslims, therefore, is to convert humanity to Islam, which regulates Man's spiritual, economic, political and social moves to the last detail."

But, said Taheri, what if non-Muslims refuse to take the right path? Here answers diverge. Some believe that the answer is dialogue and argument until followers of the "abrogated faiths" recognise their error and agree to be saved by converting to Islam. This is the view of most of the imams preaching in the mosques in the West. But others, including Osama bin Laden, a disciple of al-Maudoodi, believe that the Western-dominated world is too mired in corruption to hear any argument, and must be shocked into conversion through spectacular ***ghazavat*** (raids) of the kind we saw in New York and Washington in 2001, in Madrid in 2004, and in London on 7/7.

That the last-mentioned attack was intended as a ***ghazava*** was confirmed, said Taheri, in a statement by the Secret Organisation Group of al-Qaeda of Jihad Organisation in Europe, an Islamist group that claimed responsibility for the 7/7 atrocity. It said "We have fulfilled our promise and carried out our blessed military raid (***ghazava***) in Britain after our mujahideen exerted strenuous efforts over a long period of time to ensure the success of the raid." Those who carry out these missions are the ***ghazis***, the highest of all Islamic distinctions just below that of the ***shahid*** or martyr. A ***ghazi*** who also becomes a ***shahid*** will be doubly meritorious.

[3] See ***The Times***, July 8 2005.

There are, added Taheri, many Muslims who believe that the idea that all other faiths have been "abrogated", and that the whole of mankind should be united under the banner of Islam, must be dropped as a dangerous anachronism. *"But to the Islamist those Muslims who think like that are themselves regarded as lapsed, and deserving of death"*.

Taheri said that it is, of course, possible, as many in the West love to do, to ignore the strategic goal of the Islamists altogether and focus only on their tactical goals. These include driving the "Cross-worshippers" (Christian powers) out of the Muslim world, wiping Israel off the map of the Middle East, and replacing the governments of all Muslim countries with truly Islamic regimes like the one created by Ayatollah Khomeini in Iran and by the Taliban in Afghanistan.

How to achieve those objectives has, Taheri added, been the subject of much debate in Islamist circles throughout the world since 9/11. Osama Bin Laden has consistently argued in favour of further *ghazavat* inside the West. He firmly believes that the West is too cowardly to fight back and, if terrorised in a big way, will do "what it must do". That view was strengthened in 2004 when al-Qaeda effected a change in the Spanish Government with its deadly attack in Madrid. At the time bin Laden used his "Madrid victory" to call on other European countries to distance themselves from the United States or face similar "punishment".

Taheri ended by saying that Bin Laden's view has been challenged by his supposed No 2, Ayman al-Zawahiri, who insists that the Islamists should first win the war inside several vulnerable Muslim countries, notably Afghanistan, Pakistan, Saudi Arabia and Iraq. Until 7/7 it seemed that al-Zawahiri was winning the argument, especially by

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heating things up in Afghanistan and Iraq. But on 7/7, the bin Laden doctrine struck back in London.

Doves and Hawks

The present constitutional crisis in the U.K. has several aspects. The one I have particularly in mind when saying the crisis has deepened and widened relates to this question of Jihad, and its recent sudden rise. The crisis has deepened in that the dangers to our country and others have become graver. It has widened because some politicians of all parties have joined some Judges in resisting the strong measures that the Prime Minister Mr Blair and his supporters believe to be essential for the protection of our safety. It is convenient to label the former faction the Doves and the latter the Hawks.

The Doves, led by the recently retired lord of appeal Lord Steyn, do not believe that the threats posed by Jihad are a sufficient reason for dispensing, in relation to suspects, with civilised, hard-won safeguards such as habeas corpus, human rights concepts, and the rule of law. The Hawks, led by the Prime Minister, say that when the safety of the realm is so gravely threatened no risks should be run by allowing possible terrorists to be at large.

I can sum up the dilemma in this way. Suppose the security services, using covert surveillance, have formed the view that a person (call him X) is a dangerous Islamist who, in the name of Jihad, is planning a bomb outrage in the UK. X cannot be charged and tried in the ordinary way because the evidence against him is secret, and cannot be revealed without compromising the network of informers and other essential security information. What is to be done? The Doves say you must leave X at large, while trying to keep him under surveillance. The Hawks say this is too dangerous and you must have a special law to enable X to be kept in custody even though he cannot be tried and it is not certain he is guilty of an offence. Which is right? I confess to lining up with the Hawks.

The Chief Hawk Tony Blair threw down the gauntlet as recently as April 23. This was in response to a new challenge by Lord Steyn, who has been criticised before in these reports.[4] In his Attlee Foundation lecture on April 11 Lord Steyn said that the Prime Minister's refusal to condemn the U.S. detention camp at Guantánamo Bay, where Taliban and al Quaeda suspects are being held without trial, is "shaming" and "feeble". He added:

> "While our government condones Guantánamo Bay the world is perplexed about our approach to the rule of law. But I hope the world also knows that if the matter was within the jurisdiction of British courts, our judges would unanimously condemn Guantánamo Bay. You may ask: how will it help in regard to the continuing outrage at Guantánamo Bay for our government now to condemn it? The answer is that it would at last be a powerful signal to the world that Britain supports the international rule of law."[5]

Lord Steyn said: "In an era when, since 9/11, international institutions and international law have been damaged, particularly by the actions of the United States and the United Kingdom, it behoves us to bear in mind the internationalist approach of Attlee. He took the view that excessive emphasis on national sovereignty encouraged aggression. Giving up part of that sovereignty to an international organisation was in his view the key to world peace." However, as we shall see, Attlee would not in fact have supported Lord Steyn's views, and would have lined up with the Hawks.

Lord Steyn, now chairman of the civil rights group Justice, accused Mr Blair's government of being prone to authoritarianism, which was a "creeping phenomenon" encouraged by absolute power. He said the government had introduced "wholly oppressive" legislation such as the Asylum and Immigration Act 2004, seeking to oust the jurisdiction of the ordinary courts in all but limited cases. This was "an astonishing measure" which attempted to "immunise manifest illegality". He added: "If such legislation is effective in this corner of the law - not even involving the endless war against terrorism - what are the portents for our democracy?"

Lord Steyn warned the government that Britain had arrived at the position where a fundamental "disturbance of the building blocks of our constitution" would not be permitted. The judges would be likely to step in if ministers tried to use the Parliament Act to tamper with the fundamental principles of our constitutional democracy, such as the role of the ordinary courts, the rule of law, and other such fundamentals. He added: "In such exceptional cases the rule of law may trump parliamentary supremacy."

Lord Steyn said ministers did not always understand the principle of the separation of powers as it affected the judiciary. The home secretary, Charles Clarke, had complained in a recent interview that he was "frustrated" that the law lords would not meet him for discussions "because of their sense of propriety". Mr Clarke "apparently fails to understand that the law lords and cabinet ministers are not on the same side," said Lord Steyn. "A cosy relationship between ministers and law lords would be a worrying development."

The Prime Minister's Reply

In his statement on April 23 Mr Blair said there was "a definite issue of contention" between the Government and Lord Steyn.[6] He said Lord Steyn's Attlee Foundation lecture "shows how far out of touch much of the political and legal establishment is today with the reality of people's lives". The practical effect of following what the Doves advocate would be a loss of civil liberties for the

[4] See 169 JPN (2005).

[5] Attlee Foundation lecture, 'Democracy, the Rule of Law and the Role of Judges', delivered by Lord Steyn at the Royal Over-Seas League, London, April 11 2006. The lectures are named after Clement Attlee, who was leader of the Labour Party and Deputy Prime Minister of the U.K. in the Second World War.

[6] For quotations given here see Mr Blair's statement as reported in *The Observer*, July 23 2006, pp. 20-22.

majority. He added that Londoners responded with extraordinary unity to what was done to them on 7/7 "but that doesn't mean they didn't also want action against those who do such terrible things". We now face "the new terrorism". In a passage extending more widely than the terrorist threat he said:

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> "The question for me is: whose civil liberties? Of course the offender has rights, but so has the victim. If the practical effect of the law is that people live in fear because the offender is unafraid of the legal process then, in the name of civil liberties, we are allowing the vulnerable, the decent, the people who show respect and expect it back, to have their essential liberties trampled on."

The F. A. Mann lecture

Lord Steyn has form, though he has not gone so far as Lord Hoffmann, whom I cited in the first of these reports as outrageously saying that the real threat to the life of the nation comes not from terrorism but from laws such as Mr Blair has provided to deal with it.[7] I will now look at some of the observations made by Lord Steyn in an earlier hard-hitting lecture, one in the series of F. A. Mann lectures.[8]

The views expressed by Lord Steyn in his F. A. Mann lecture are of great constitutional importance. They show that the crisis which is being dealt with in this series of reports has origins going as far back as the Second World War. Lord Steyn said:

> "The role of the courts *in time of crisis* is less than glorious. On this side of the Atlantic *Liversidge v Anderson* (1942) is revealing.[9] The question before the House of Lords was a matter of the interpretation of Defence Regulation 18B which provided that the Home Secretary may order a person to be detained 'if he has reasonable cause to believe' the person to be of hostile origin or associations. A majority of four held that if the Home Secretary thinks he has good cause that is good enough. Lord Atkin chose the objective interpretation: the statute required the Home Secretary *to have* reasonable grounds for detention. Lord Atkin said: 'amid the clash of arms the laws are not silent' and warned against judges who 'when face to face with claims involving the liberty of the subject show themselves *more executive minded than the executive*'. At the time the terms of Lord Atkin's dissent *caused grave offence to his colleagues*. But Lord Atkin's view on the interpretation of provisions such as Regulation 18B *has prevailed*: the Secretary of State's power to detain must be exercised on objectively reasonable grounds."

This is a lengthy quotation, but almost every word is vital as a clue to the roots of the constitutional crisis we are exploring. The italics have been added to highlight the most important words.

in time of crisis an inadequate description of the desperate condition of Britain when reg. 18b was implemented.

more executive minded than the executive the term "the executive" is here derogatively used by an unelected judge to describe the democratically elected government of a nation at war.

caused grave offence to his colleagues this was because his colleagues appreciated the grave danger facing the country and were affronted by Lord Atkin's cavalier attitude to them.

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[7] 169 JP 651.
[8] "Guantanamo Bay: The Legal Black Hole", 27th F.A. Mann lecture delivered in Lincoln's Inn Old Hall, November 25 2003.
[9] The correct reference to this case is [1942] AC 206.

has prevailed it has not prevailed: the decision remains law as applied to similar conditions of national peril.

Lord Steyn quoted in support of his views on *Liversedge v Anderson* a book by Professor A.W. Brian Simpson provocatively titled *In the Highest Degree Odious*. I am familiar with the views of Professor Simpson on the case; indeed I wrote an article refuting them as included in a lecture by him.[10] The following is an extract from my article:

> "Having spent nearly six years as an RAF pilot (1941-1946), and later having worked for some fifteen years on and off in Whitehall, I am equipped to detect that the lecture, like many academic statements on wartime internment under reg. 18b, ignores a basic factor. It assumes without proving that the defence of liberty and the rule of law require such measures as reg. 18b to be condemned. Thus Professor Simpson says that the imprisonment of persons under reg. 18b was 'in flagrant violation' of the rule of law, that reg. 18b was an 'infamous conception' amounting to the erosion of the rule of law, that its was a 'monstrous birth', and that the judges deciding cases under it lacked a commitment to civil liberties. The factor Professor Simpson fails to mention, but must surely be aware of, is that the defence of liberty may imperatively require measures such as reg. 18b in times of emergency, *and the rule of law allows for this.*"

I reported above Lord Steyn's claim that Clement Attlee would have supported his views. However Clement Attlee was Deputy Prime Minister in the wartime Government that enacted and enforced regulation 18b. There is every reason to suppose he agreed with the majority decision in *Liversedge v Anderson*.

The Judicial Supremacists

There is a further lesson to be drawn from Lord Steyn's F. A. Mann lecture. He says it is the duty of British judges to hold governments to account and stand between the government and individuals. They must never surrender these constitutional duties placed on them. Placed on them, one is bound to ask, by whom? The answer must be "by themselves", for no one else has done it.

This takes us into the realm of what have been called the judicial supremacists. Richard Ekins, in his recent article "Judicial Supremacy and the Rule of Law"[11], says:

> "Orthodox Westminster constitutional theory provides that Parliament is sovereign. It is therefore surprising that in recent times certain leading judges and academics, including Lord Woolf, Sir John Laws and

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> Trevor Allan, have challenged the legal supremacy of the legislature. These 'judicial supremacists' have argued that the moral significance of the ideal of the rule of law provides justification for judges to reject legislative supremacy and institute judicial supremacy."

We must add Lord Steyn to the judicial supremacists. We must also add Baroness Kennedy of the Shaws QC, who on April 27 delivered yet another lecture, this time titled "Liberty: the first Casualty in the War on Terror".[12] I will content myself with just one quotation from it:

> "We have always operated from certain preferred truths in Britain. The preferred truth that

[10] 'Defending *Liversedge v Anderson*' (1988) Denning L.J. See http://www.francisbennion.com/word/fb/1988/1988-007-liversidge-v-anderson.doc
[11] (2003) 119 LQR 127.
[12] http://www.city.ac.uk/journalism/download_files/cameronlecture2006.pdf

> an accused person is innocent; the preferred truth that a person who is here actually belongs here. The state has to prove otherwise. We the people have the assumption on our side. All that is disappearing and it will qualitatively change our lives. A retreat from the rule of law, human rights and civil liberties is shortsighted. Yet such a retreat is precisely what is taking place. A quiet and relentless war is being waged."

In that last sentence Lady Kennedy is not referring to the Islamists' grim war of Jihad, which seems to have escaped her mind. She is referring to what our Prime Minister is striving to do to protect us from the dangers of Jihad, which are as great as any we have faced in our long history.

I have not always supported Mr Blair. Some years ago I published a book whose title speaks for itself: *The Blight of Blairism*. But things in the world have changed since I was prompted to write that book.

NOTE ON *LIVERSIDGE v ANDERSON*

After the above was published I came across the following in the judgment of the Divisional Court in ***R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*** [2006] EWHC 1038 (Admin).

135. We turn to ***Zabrovsky v the General Officer Commanding Palestine*** [1947] AC 246. The appellant had sought an order in the nature of a writ of ***habeas corpus*** claiming that his son was being unlawfully detained. His son, a Palestinian citizen, was arrested in Palestine pursuant to an order made under the Emergency Regulations of 1936 and was subsequently removed to Eritrea, where he was detained under military custody. Eritrea was, at that time, held by the British under the control of a Chief Administrator and was not subordinate to the Palestine government.

136.The Privy Council upheld the order in so far as it related to the appellant. By virtue of the 1922 Palestine Order in Council as amended provision was made for the administration of Palestine by a High Commissioner with authority to make ordinances for the "peace, order and good government" of Palestine. Lord Wright said that the appellant had to show not just that there had been an interference with the liberty of his son but that also that that interference was illegal. He continued:

> "In the troublous times of war and in the chaotic post-war conditions the scope of legal and permissive interference with personal liberty has been extended and restraints have been legalised by the legislature which would not have been accepted as legitimate in normal times. Thus in England, in what are called the Reg.18B cases, ***Liversidge v. Sir John Anderson*** and ***Greene v. Secretary of State for Home Affairs***, the House of Lords upheld the legality of a detention of the applicants by the Executive without trial and also held that the Executive could not be compelled to give its reasons for the detention. The Executive was, in these respects, exercising an emergency power vested in it by the legislature. There was a restraint outside the ordinary course of law, but it was not illegal because it was justified by the terms of the Statutory Regulation which gave the power and imposed the duty for the purpose of securing the defence of the realm during the world war which has recently ended . .
>
> In these and many similar cases the restraint or confinement was held not to be illegal, and the effect of the decisions is to vest a plenary discretion in the Executive, affecting liberty of the subject and pro tanto to substitute for the judgment of the court, based on ordinary principles of common law right, the discretion of the Executive acting arbitrarily in the sense that it cannot in substance be inquired into by the court. This is a serious interference with the liberty of the subject, but it is not illegal so long as the detention conforms to the

requirements of the statute or order on which it is based. It has sometimes been said that the remedy of habeas corpus is suspended during these temporary and emergency laws. But that is not so. There is no occasion in such cases for its suspension because, as was pointed out in the House of Lords in *Greene's* case there is not illegality. The British nations have borne these temporary encroachments on their common law freedom because they were necessary for the safety of the country and were required by the paramount need of preserving its peace and good government."

137. Lord Wright later said (page 262):

> "The Palestine court has accepted the legality of the orders of deportation, which are clearly within the competence of the Palestine Government. While the deportation order stands and its legality is not overruled its effect is that Eliezer (the appellant' s son) is required to leave and remain thereafter out of Palestine. Such an order is not ultra vires of a limited territorial power like Palestine, nor are the further or ancillary powers of providing a place to which the deportee may proceed (see *Attorney General for Canada v Cain*, recently followed and applied by this Board in *The Co-operative Committee on Japanese Canadians v The Attorney General of Canada*)."

138. Mr Howell placed much reliance on these cases (and others) to show that the words "peace, order and good government" do not, in any way, fetter the power of the legislator, who may, amongst other things, exile citizens who, like the wives and children in the Japanese Canadians case, have done no wrong.

139. As Sir Sydney pointed out, *Liversidge v Anderson* has hardly stood the test of time. In *Reg.* v. *I.R.C., ex p. Rossminster* [1980] AC 952, at 1011 Lord Diplock said:

> "For my part I think the time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right."

In the same case Lord Scarman said, at 1025, that: "The ghost of *Liversidge v. Anderson* [1942] A.C. 206 . . . need no longer haunt the law."

140. Lord Scarman in *Reg. v. Home Secretary, Ex p. Khawaja* (H.L.(E.)) [1984] AC 84, at 110 said:

> "The classic dissent of Lord Atkin in *Liversidge v. Anderson* [1942] A.C. 206 is now accepted (*Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd.* [1980] A.C. 952, 1011, 1025) as correct not only on the point of construction of regulation 18 (b) of the then emergency Regulations but in its declaration of English legal principle."

See also Lord Reid in *Ridge v. Baldwin* [1964] AC 40, at 73, who described *Liversidge v. Anderson* as "a very peculiar decision".

141. The reliance on *Liversidge v Anderson* in *Zabrovsky*, itself relied upon by Mr Howell, brings to mind the dissenting judgment of Jackson J in *Korematsu vs. United States*, 323 U.S. 214 (1944) (not cited in argument). The case concerned an order interning Japanese Americans:

> ". . . Once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

142. Mr Howell accepts that there is no precedent on all fours with the present case. The power to legislate for the "peace, order and good government" of a territory has never been used to exile a whole population. The suggestion that a minister can, through the means of an Order in Council, exile a whole population from a British Overseas Territory and claim that he is doing so for the "peace, order and good government" of the Territory is, to us, repugnant. The ***Japanese Canadians*** case and ***Zabrovsky*** both demonstrate the wisdom of the passage from the judgment of Jackson J in ***Korematsu***. They are the "loaded weapons" to which he refers. Notwithstanding Mr Howell' s criticisms of ***Bancoult (1)*** we would be minded to follow the conclusions reached by Laws LJ in paragraphs 55-57 and indeed it may well be that we are bound by them. In the words of Laws LJ: "Peace, order and good government may be a very large tapestry, but every tapestry has a border."