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## Justice and the Rule of Law

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# Justice and the Rule of Law<sup>†</sup>

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Holding the office for over six years, I was the longest serving Labour Attorney General. I was hugely privileged to hold the position. It had a wide portfolio. I was responsible for all the public prosecutors and their prosecutions where a large part of my agenda was to reform the public prosecution services and to enhance their independence and standing.

The Attorney General also has responsibilities as the chief legal adviser to Government as guardian of the public interest. This meant trying to protect the administration of justice by responding to prejudicial press reporting and investigating potential miscarriages of justice. On the latter, for example, I caused to be reviewed nearly 300 convictions for infant homicide after concerns had been expressed about the expert evidence on which these convictions had been obtained. I also had responsibilities in upholding the rights of charities and in public interest areas relating to family law and guardianship. I also personally represented the Government in important cases in our Courts and in European and International Courts—going back to an older tradition of the Attorney General personally appearing in Court in important trials.

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

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<sup>†</sup> This paper is based on various addresses which Lord Goldsmith has made on 'Justice and the Rule of Law'—most particularly his addresses to the Fall Meetings of the American Bar Association Section of International Law in 2007 in London and in 2008 in Brussels

\* Lord Goldsmith read law at Gonville and Caius College, Cambridge and was called to the Bar in 1972. He was appointed Queen's Counsel in 1987 and was elected as Chairman of the Bar Council of England and Wales in 1995. He was Co-Chairman of the Human Rights Institute of the International Bar Association from 1998 to 2001 and was the Attorney General for England, Wales, and Northern Ireland from 2001 to 2007. He is now a partner in Debevoise & Plimpton LLP and based in their London Office.

We had to face and are still facing what is the greatest challenge for the democratic countries based on the Rule of Law: how to balance the issue of the protection of the lives of our citizens—national security if you will—and the basic values and fundamental freedoms on which our societies are founded: civil liberties and fundamental values. It is in finding that balance that this shared common heritage, this shared set of values of justice and the Rule of Law, is so relevant. And so it was much in mind as I confronted with Cabinet colleagues and others these issues. And so it was I went through debates and counter-debates about the right powers to tackle terrorism and the legislation we needed. And so it was we passed two new Acts and debated others. And so it was I had the experience of dealing with these issues from within Government.

I believe, and have long asserted, that Governments have an obligation to protect both our national security and our fundamental human rights. Our societies are based on these values: on commitment to liberty and to the Rule of Law; to our democratic way of life; to freedom of expression and thought; freedom from arbitrary arrest and to fair trial. These liberties were hard fought by our ancestors over the years: from Magna Carta at Runnymede; in the Declaration of Independence and on the fields of battle of the Second World War. They are actually freedoms and liberties and values which the terrorists would destroy. This makes it all the more important that we continue to hold them dear and preserve them. Yet striking this balance is not easy for the threats from terrorism are large.

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

But from that moment on, these questions kept coming back; the legal and policy issues we were faced with in Government became greater and greater. Domestic legislation and international cooperation. Debate inside and outside Government. I had to think a great deal about these issues. My ideas crystallised as events changed. . . as events continued. . . as initiatives, which we thought could be the solution, did not live up to their original promise. And because we continued to be faced with very difficult issues I came to the view—I came to it when in Government—that we need a new approach, an approach which takes much more account of the messages we are putting out in the battle of ideas and values, if we are ultimately to succeed in stemming the tide of extremism with which the world is increasingly faced.

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

Let me clear two propositions out of the way. The first is that actually nothing has changed, that terrorism has always been here and that you do not need to make any changes. This proposition therefore says: 'leave the law as it is'. Having seen the extent of

the terrorist threat, the number of active plots which our intelligence agencies have identified, I am clear that although Osama Bin Laden did not invent terrorism, things have changed: in scale, in the methods and aspirations of the terrorist and in the way that terrorism is conducted with modern technology and with suicide bombs. These have all changed the landscape of terrorism.

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

It is the expression. As a slogan to demonstrate the extent of the commitment and the need to deal robustly with the problem in hand, like the 'War on Want' or the 'War on Crime' it is acceptable. But my worry is that 'War on Terror' is used not as a slogan but as a legal diagnosis. I have a real problem with that. This is quite a complex area of law. Those actually engaged in armed conflict on the battlefield of Afghanistan, before there was a legitimate government, will have fallen in some respects under the laws of war concerning the use of offensive military action and even a degree of detention. But, what I have a problem with, is then saying 'War on Terror' then justifies holding people without trial after the international armed conflict has come to an end until this amorphous 'War on Terror' has come to an end—and who is going to say when it has? And secondly, it has a powerful impact on legal questions, like whose job it is to deal with. My perception reading U.S. Supreme Court decisions is that calling it 'War on Terror' is designed to give to the Executive powers without the control of Congress because as military action it falls to the President as Commander-in-Chief to make decisions.

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

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

It is correct that we have strengthened our criminal law to meet the conditions of modern terrorism, and that we have invested significantly in our frontline law enforcement agencies and security and intelligence services. It also correct that the threat that we face cannot be ignored.

It is also right to consider whether changes to existing laws are needed. Indeed even the great human rights instruments of the world, such as the Universal Declaration of Human Rights—in Article 29—and the European Convention of Human Rights—in many individual articles and in Article 15 particularly, recognise that sometimes rights have to be adjusted, or exceptionally derogated from, in the interests of the community more widely. But this does not give an unlimited licence to throw away our values for the sake of expediency. It can only be undertaken in a principled way. I would single out three principles.

First, we must respect the Rule of Law. That means adhering to our domestic and international legal obligations. These cannot simply be ignored or set aside. Respecting the Rule of Law also means subjecting executive action to the scrutiny of the democratic institutions and of the Courts. Judicial scrutiny is a key part of the Rule of Law. It was to us shocking that until the Supreme Court ruled otherwise in the *Rasul v. President Bush*

decision it was thought appropriate to assert that the legality of detentions in a U.S. facility under U.S. control could not be the subject of consideration by the U.S. courts.

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

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

The prohibition on torture is one such right on which I would say we should not compromise—one reason why Common Article 3 of the Geneva Conventions is such an important part of a civilised world. The right to a fair trial is another. In this respect my view of the original Military Commissions for those detained at Guantanamo Bay are well known. When British nationals were slated for trial I went to Washington to negotiate. My position was simple: put them on trial, a fair trial in accordance with international standards or release them. I considered the rules and regulations in detail over a period of months in the summer and fall of 2003. My clear conclusion was that the Military Commissions did not provide such guarantees. I advised that we should not allow our citizens to stand trial in such circumstances and insisted that they be returned to the UK—which ultimately they were.

I am aware of the changes that were made, following the Military Commissions Act being signed into law. I welcomed some of the changes—such as the removal of the possibility that detainees would be convicted on the basis of evidence heard in secret which they had not seen or had a chance to contradict; and the amendments made in the Senate to exclude evidence obtained by torture—though there remain some definitional questions of importance. But there are major problems that remain: law which treats aliens in a different way from American citizens, which still allows coerced evidence to be used in certain cases, which excludes the application of habeas corpus, which allows evidence that would not be admitted normally to be relied on. . . and other problems.

Even then in the summer of 2003 we were not aware of the practice of “extraordinary rendition”, a euphemism for kidnapping people to send them to black hole prisons where they could be tortured and subjected to extreme interrogation techniques. This practice can only be described as shameful and in gross breach of international law.

But, it would be misleading if I did not further record my own view. I have previously stated my view that Guantanamo Bay is unacceptable and should close. It is a symbol of injustice that the long tradition of American justice and liberty ought to see removed at the earliest moment. I have not changed my view. The changes made are too little and too late. There remain fundamental problems with this system of detention and the symbol remains.

In stating this, I am conscious that some will say that this is not for an outsider to say. That this is America’s decision. I have increasingly been of the view that this is not so. I should explain why.

The struggle against global extremism and terrorism is one that ultimately we will not win by conventional means alone. We will only win in the end if we can win the battle for ideas and values. We need to win this struggle at the level of values as much as force. In a

major speech given in Los Angeles in the summer of 2007, Prime Minister Tony Blair said that to win the war of values we must show that “our values are stronger, better and more just, more fair than the alternative” and that “we are even handed, fair and just in our application of those values to the world.” Against an Al Qaeda narrative of ‘all that the West does is designed to oppress Muslims’ we must show that our values are actually those of justice, tough and fearless but fair, and of equality; of the democratic way of life; of the Rule of Law and of freedom. The presence of Guantanamo makes it so much more difficult to do this for all of us.

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

Above all we must uphold, and be seen to uphold, the Rule of Law. This, if I may say, is what ultimately the motto of the American Bar Association “Defending Liberty and Pursuing Justice” is upholding.

### Editor's Note

*Since Lord Goldsmith delivered this paper President Obama has become the new President of the United States of America and by his Executive Order of 22 January 2009, has mandated a review of the detention of all detainees at the Guantánamo Bay Naval Base, directed that the detention facility be shut down within the year and sought to suspend the proceedings of the Guantánamo Military Commission. Moreover the last British Subject detained at the Guantánamo Bay Naval Base has been released and flown home to the United Kingdom. Thus a major objection to the policy of the United States, as strongly voiced by Lord Goldsmith, is being met. It remains to be seen whether other objections voiced by Lord Goldsmith—the practice of ‘extraordinary rendition’, the use of torture and other breaches of the Rule of Law—will similarly be terminated by the Obama Administration.*

