

His Royal
Highness Sultan
Azlan Shah
enjoys the highest
regard and
esteem amongst
the international
legal community.

His reputation as a truly
great lawyer, as a judge of
great distinction and as a
Chief Justice and Head of
State of immense wisdom
and courage extends
far beyond these shores.
His love of law and His
commitment to justice
have been His hallmarks.

Baroness Helena Kennedy QC

Legal Challenges in Our Brave New World
21st Sultan Azlan Shah Law Lecture, 2007



The Honourable Baroness Kennedy of The Shaws QC

Legal Challenges in Our Brave New World



Helena Kennedy
(b. 12 May 1950)

Baroness Helena Kennedy was born in 1950 and is one of Britain's most distinguished lawyers and active public figures. She has spent her professional life giving voice to those who have least power within the system, championing civil liberties and promoting human rights.

Baroness Kennedy is a leading barrister and an expert in human rights law, civil liberties and constitutional issues. She read law at the Council of Legal Education, London and was called to the English Bar by Gray's Inn in 1972. She was appointed Queen's Counsel in 1991, and is a member of Doughty Street Chambers in London. In her practice of law as a barrister, she has acted in many of the most prominent cases of the last 30 years including the Brighton Bombing,



the Michael Bettany espionage trial, the Guildford Four appeal and the bombing of the Israeli embassy.

In 1997, Baroness Kennedy was made a life peer in the House of Lords, where she participates in debates on issues concerned with human rights, civil liberties, social justice and culture. She has led the opposition to encroachments on the right to jury trial and was awarded the Spectator's Parliamentary Campaigner of the Year Award in 2000 for her courageous stand against the government.

Baroness Kennedy was a seminal force in promoting equal opportunities for women at the Bar. Ahead of her time, she was a singular voice in the seventies and eighties, writing and broadcasting on the discrimination experienced by women in the law, whether as lawyers or users of the law. She became a member of the Bar Council to champion women in the profession and called for research into the experience of women lawyers and particularly their absence on the Bench. This led to changes in policy in the Lord Chancellor's Department and codes of practice at the Bar.

Baroness Kennedy is the Chair of Justice—the British arm of the International Commission of Jurists. From 1992 to 1997, she was the Chair of Charter 88, the constitutional reform group which efforts led to the incorporation of the European Convention on Human Rights into British law via the Human Rights Act 1998, as well as a whole range of constitutional reforms, including reform of the House of Lords.

She was a Commissioner on the National Commission for Education 1991–1993, and then chaired the Further Education Commission into Widening Participation which produced the seminal report Learning Works (1997). As a result the sector created a trust in her name—the Helena Kennedy Foundation—



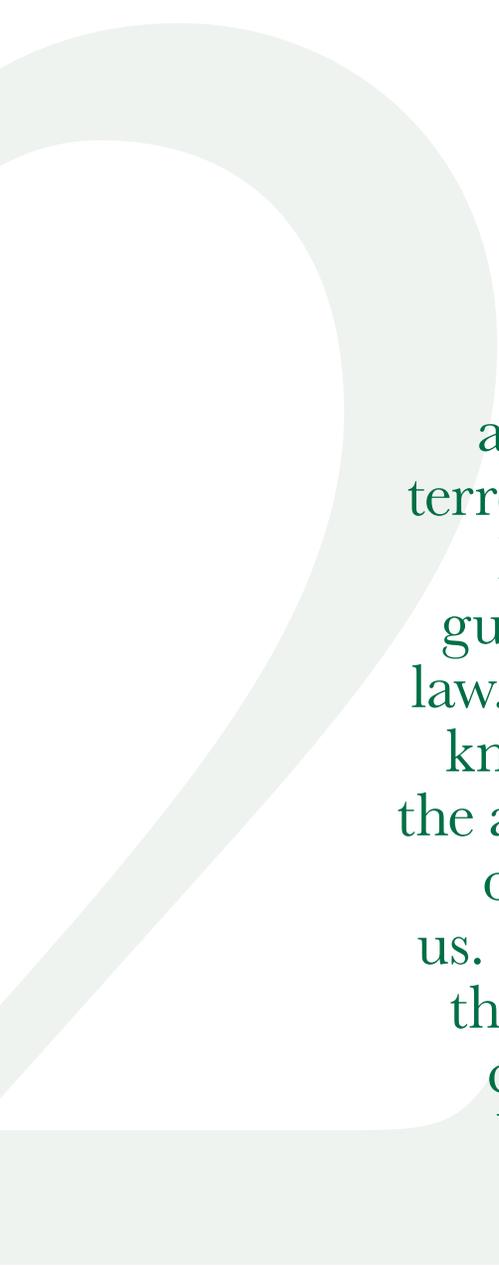
which provides bursaries to help the most disadvantaged in society move into higher education.

She was also the Chair of the Human Genetics Commission from 1998 to 2007 and the British Council from 1998 to 2004. She also chaired the Power Inquiry, which reported on the state of British democracy and produced the Power Report in 2006. In 2004, she was Chair of the Inquiry into Sudden Infant Death for the Royal Colleges of Pathologists and of Paediatrics, producing a protocol for the investigation of such deaths. She was the British member of the International Bar Association Task Force on Terrorism.

In 1992 she received the Women's Network Award for her work on women and justice and in 1995 added to it the UK Woman of Europe Award. For her work on equal rights she was recognised by the National Federation of Women's Institutes in 1996 who presented her with their Campaigning and Influencing Award—Making a World of Difference. In 1997 *The Times* of London gave her their Lifetime Achievement in the Law Award for her work for women and the law, and *The Spectator* made her Parliamentarian of the Year 2000.

Baroness Kennedy has received honours for her work on human rights from the governments of France and Italy and has been awarded more than thirty honorary doctorates. She is a Bencher of Gray's Inn and was President of the School of Oriental and African Studies, University of London from 2002 to 2011. She was elected the Principal of Mansfield College, Oxford University and began her tenure as Principal in Autumn 2011.

She is married to Professor Iain Hutchison, one of the world's leading oral and maxillofacial surgeons and founder of charity the Facial Surgery Research Foundation.



Judges have a vital role in guarding the Rule of Law in times of social change and in times of terrorism. We too have to be the guardians of the law. If any people know that law is the autobiography of a nation it is us. We also know that some of the chapters make better reading than others.

We who work with the law, who understand law's importance, who love the law have to be its defender. We must be the protectors of those who are vulnerable to abuse. We have to stand up and be counted. We have to protect the things that make our nations great. We also have to protect brave judges who act with courage and defend the Rule of Law. We have to raise the alarm call when we see our systems of law being eroded. We have to believe that the world can be a better place.

21

Legal Challenges in Our Brave New World

Baroness Kennedy of The Shaws QC
Life Baroness, United Kingdom Parliament
President of the School of Oriental and African Studies, University of London

Your Royal Highness Sultan Azlan Shah, the Sultan of Perak; Your Royal Highness Raja Nazrin Shah, the Raja Muda of Perak; Your Royal Highness Tuanku Zara; Honourable Ministers; the Honourable Menteri Besar of Perak; Your Excellencies; Judges; Pro-Chancellors; distinguished guests; ladies and gentlemen.

It is a great pleasure to be here today. His Royal Highness Sultan Azlan Shah enjoys the highest regard and esteem amongst the international legal community. His reputation as a truly great lawyer, as a judge of great distinction and as a Chief Justice and Head of State of immense wisdom and courage extends far beyond these shores. His love of law and his commitment to justice have been his hallmarks. When I was asked to deliver this lecture I was filled with delight and a sense of humility to receive such an honour. The Sultan Azlan Shah Law Lectures is one of the most prestigious lecture series of the common law world. But I was also thrilled to have the opportunity to come and meet this great man.

*Text of the Twenty-
First Sultan Azlan
Shah Law Lecture
delivered on 17 July
2007 in the presence
of His Royal Highness
Sultan Azlan Shah*

It is precisely when there is high political fever that the controlling power of the judiciary becomes so important.

The judges have to curb governmental excess; they are the guardians of the Rule of Law and it is crucial that they do not allow themselves to be co-opted by the Executive.

I have called this lecture “Legal Challenges in Our Brave New World” because I think that the global challenges facing us in these times do present legal systems with complex problems. Conundrums are puzzling questions and within the law we are often confronted with precisely that—puzzling questions. As a lawyer practicing in the fields of crime, public interest and constitutional law, I have settled on those puzzles which are closest to my own field of work:

- How do we balance security and liberty when we are confronted with international terrorism?
- How do we deal with international crime of all kinds when legal systems around the world are so different? Can synergies and modalities be created between legal systems—for the reception of evidence or for the extradition of accused—when standards and values and indeed rules of evidence within systems are at such odds?
- In such uncertain times, are our societies becoming increasingly risk-averse and willing to lower legal standards to combat crime and anti-social behaviour?
- As the general population within our nations become better educated, less deferential and more individualistic, are we seeing a shift in expectations concerning law? Is the increasing resort to litigation, the demand for a greater say for victims, more vocal

“Just as the big idea
of the 20th century
had been democracy,
so I believe that
the big idea of
the 21st century
would be
human rights.”

criticism of judges a reflection of these social changes and what impact is it having on our systems? Are we seeing a loss of trust?

- And finally, whilst the rhetoric of human rights is on the lips of politicians everywhere, is the international commitment to human rights advancing or receding?

As the millennium dawned I had thought we were embarking on a new era. Just as the big idea of the 20th century had been democracy, so I believed that the big idea of the 21st century would be human rights.

It is illuminating to think of the origins of human rights in two distinct waves. The first wave was in the 18th century with the American and then the French revolution after which Tom Paine's ideas about the rights of man—liberty, equality and fraternity—became the basis of new constitutions and fuelled political change even within parliamentary monarchies like our own. The second wave came in the aftermath of the Second World War when the horrors of the Holocaust instigated the creation of the Universal Declaration of Human Rights. The idea that law had been subverted in Nazi Germany for ethnic and social cleansing shook confidence in the Rule of Law. Judges had sought to defend their own conduct with the excuse that they were only administering the laws which had been passed democratically.

The purpose of the Declaration was to create a template of universal values against which all laws should

The conventions spawned by
the Universal Declaration
of Human Rights sought
to recognise that people
could be persecuted not
just by the state but
by their neighbours and
the state had
a duty to protect
everyone within
its jurisdiction
—and not just
its citizens.

¹ *R (on the application of Al-Skeini) v Secretary of State for Defence*
[2007] UKHL 26.

be tested. These values are in fact very much common law values. The conventions spawned by the Universal Declaration of Human Rights sought to recognise that people could be persecuted not just by the state but by their neighbours and the state had a duty to protect everyone within its jurisdiction—and not just its citizens.¹ Human rights conventions acknowledged that certain rights derived not just from citizenship but from our very humanity. At the core of this new conception of human rights there was also the idea of balance and proportionality. Sometimes rights conflicted. Freedom of speech may at times have to be curtailed to preserve the right to life. Freedom to bear arms may be curtailed in the interests of community safety. In this new disposition, the role of the judiciary as independent arbiters often having to reconcile individual rights and the needs of the larger community becomes ever more vital.

By the end of the 20th century there were 119 electoral democracies in the world. On the human rights front we had just had the decision of the House of Lords in the *Pinochet* case which had established the principle that a former Head of State could be extradited to another country for crimes against humanity. There had been international tribunals created to try egregious offences against humanity in the aftermath of the horrifying events in Bosnia and Rwanda. Human rights standards were beginning to operate as a set of principles against which all our systems would be tested. With the spread of democracy a real dialogue about the meaning of human rights became possible.

Human rights
conventions
acknowledged that
certain rights
derived not just
from citizenship
but from our
very humanity.

At the core of
this new conception
of human rights
there was also the
idea of balance and
proportionality.

But the new century really started on 9/11, 2001 when to use the words of the great Irish poet William Yeats “all changed, changed utterly”. The terrible events in the United States on that day, which caused the death of several thousand people, were the prelude to a whole series of cataclysmic responses and counter responses—the invasions of Afghanistan and Iraq; the counter insurgency in both those countries; the bombings of Bali, Madrid, London; an attempted firebomb now in Glasgow, my home city; the creation of the legal black hole that is Guantanamo Bay; the shameful treatment of prisoners in Abu Ghraib prison. The horrors are countless; and while threats and atrocities were occurring well before 9/11, the register of violence has moved up in scale. As a result, human rights advances have not just stalled but in relation to torture have gone into reverse gear.

The phenomenon of terrorism is not new to the British; we have had our own dark experiences all too recently over the Irish troubles.² Terrorism is one of the great challenges to the Rule of Law. In the face of such provocation the temptation to erode civil liberties is great but this is precisely the repression terrorists seek to stimulate and if great care is not taken, emergency measures to combat terrorism end up undermining the very freedoms we value and eat into the fabric of our societies.

I want to start by asserting the obvious—law matters. Law and democracy are described as the twin pillars of our nations but, in fact, law has to come first. As we saw in the



“The role of the judiciary as independent arbiters often having to reconcile individual rights and the needs of the larger community becomes ever more vital.”

aftermath of the disintegration of Yugoslavia and in Iraq, if there is a legal vacuum after a conflict, however brief, crime and mayhem will occupy that space.

Law is the bedrock of a nation; it tells us who we are, what we value. It regulates our human relationships one to the other and our relationships as citizens with the state. Law is cultural. It comes out of the deep wellsprings of history and experience within a country. For you, it was your fight for independence, your struggle with the legacy of colonialism and your struggle, too, for a constitutional settlement that respected the different peoples who inhabit your nation. For us our law is rooted in early struggles to contain the power of the King, the aristocracy and the State. Deep wounds have existed in Britain around religion and the persecutions connected to those religious conflicts. Law depends on principles, forged in the fires of human experience, which should not be abandoned when our democracy is being challenged. Like all the senior judges in Britain, I firmly believe that there can be no black holes like Guantanamo where law's writs do not run. Law must be ever present. And we have to be alert to the echoes of Guantanamo within our own systems.

In our modern world, globalisation is providing many benefits, with access to goods and commodities from every corner of the globe. The opening up of global markets has provided huge opportunities for wealth creation within our nations. But the very developments that make global markets work—electronic transfer of money,

Human rights standards
were beginning to operate
as a set of principles
against which
all our systems
would be tested.

With the spread
of democracy
a real dialogue
about the
meaning of
human rights
became possible.

telecommunications (the mobile phone, the internet, the web, email), ease of travel, the softening of borders, deregulation, offshore banking—all equally facilitate markets in other commodities like drugs, arms, explosives, fissile material, people—women and children for sexual purposes, babies for childless couples—as well as human eggs and human organs. International crime and terrorism are the underbelly of globalisation.

This new world has also brought increased levels of anxiety. These sources of anxiety are different in different countries but what is shared is a widespread and unfocused sense of insecurity. There is a feeling that powerful forces beyond the nation state—supranational institutions and international corporations—seem to have more power than our own governments or at least power that cannot be constrained effectively by our own governments.

In Britain there is now much greater insecurity in work—flexible employment brings the risk of being sacked tomorrow because cheaper labour is available elsewhere in the world. We are also seeing the rolling back of the welfare state. Changed demographics mean there are fewer young people to support the aged. People enjoy longer lives but how well are they supported? There are fears about inadequate pensions.

There are greater gaps between rich and poor. The arrival of new immigrants in our midst provides ready scapegoats to explain everything from stretched public



The horrors are countless;
and while threats and
atrocities were occurring
well before 9/11,
the register of violence
has moved up in scale.
As a result,
human rights
advances have not
just stalled but
in relation to torture
have gone into
reverse gear.

resources to crime. In popular nightmares, the threatening stranger is not just at the border but at your front gate. In this uncertain, frightening world it is easy to seek out strong government and for government to read this as a licence to authoritarian laws.

I have spent most of my professional life giving voice to those who have least voice within our legal system. My clients' experience and pain have been the best point of entry into understanding why our legal protections matter. As Oliver Wendell Holmes, the American Supreme Court Justice said of his career: "The life of the law has not been logic. It has been experience." Experience has taught us that rights are indispensable to democracy.

However it is not always simple to make the arguments for the presumption of innocence, the high standard of proof before conviction, the rules as to the inadmissibility of certain evidence. Legal safeguards restrain the State from enforcing some majority preferences.

The general public often maintain that the courts are too soft on crime, that criminals are inadequately punished and that the guilty are going free. There are some accused whose alleged crimes are so abhorrent that many would be happy to see them forgo a trial. There is nothing new in the public holding those views. But the risks attached to following the majority are precisely why protections and safeguards have to exist.



Terrorism is one of
the great challenges
to the Rule of Law.

In the face of such provocation
the temptation to erode civil liberties
is great but this is precisely
the repression terrorists seek
to stimulate and if great care
is not taken, emergency measures to
combat terrorism end up
undermining the very freedoms
we value and eat into
the fabric of our societies.



As nations we have stopped telling the stories of why the Rule of Law came into being and why legal safeguards are democracy's lifeblood.

Knowledge of the abuses of the past and the historic battles for rights and liberty gives us the power to say "no" and the ability to give reasons for the rejection when governments seek to pass oppressive laws. If we do not understand our own history of past struggle we are much more likely to be taken in by new-fangled dogma. In order to renew or reform effectively, you need to understand the old. If the urgently evanescent—tomorrow's headline, the next poll or the next vote—is all that matters, discernment drops away.

We should have learned from history that in the long run abuses by the State are far more dangerous to liberty and democracy than individual criminal conduct, dangerous and disturbing as that is.

The Rule of Law is one of the tools we use in our stumbling progress towards civilising the human condition: a structure of law, with proper methods and independent judges, before whom even a government must be answerable. It is the only restraint upon the tendency of power to debase its holders. As we know, power is delightful and absolute power is absolutely delightful.

History is dogged by the tragic fact that whenever individuals, political parties or countries become too



“Law and democracy
are described as
the twin pillars of
our nations but,
in fact,
law has to
come first.”

powerful they are tempted to refuse to subordinate that power to wider and higher law. I am afraid we have seen it recently with the United States picking and choosing when to apply the Geneva Convention.

The important thing for all of us to remember is that the Rule of Law is not simply what a government says it is: obeying rules that you have formulated yourself is no great discipline. Many a totalitarian government has sought to maintain that passing laws and requiring people to adhere to them is the Rule of Law. In the modern world the Rule of Law in the area of crime means having clearly defined laws, circumscribed police powers, access to lawyers, an open trial process, rules of evidence, the right of appeal and an onerous burden of proof shouldered by the State. The accused is presumed innocent. In international dialogue adherence to such due process is urged upon every nascent democracy.

After the London bombings on 7 July 2005 the British Prime Minister Tony Blair declared that the rules of the game had to change; by that he was referring to the way in which the criminal justice system operated. He was saying in stronger terms what he had long felt and repeatedly reiterated in preceding years—that the legal system was predicated on principles that needed revisiting. In 2003 he had claimed that the criminal justice system had been “a vital step of progress when poor people were without representation unjustly convicted by corners cut”. Then he said “but today in Britain in the 21st century it is not the

“ Law is the bedrock of a nation;

it tells us who we are, what we value.

It regulates our human relationships

one to the other and our relationships

as citizens with the state.

Law is cultural.

It comes out of the deep
wellsprings of history and

experience within a country.

For you, it was your fight
for independence,

your struggle with

the legacy of colonialism

and your struggle, too,

for a constitutional

settlement that respected

the different peoples

who inhabit your nation.”

innocent being convicted. It's too many of the guilty going free. Too many victims of crime and always the poorest who are on the front line."

At his political party conference in 2005, Prime Minister Blair said:

For eight years I have battered the criminal justice system to get it to change. And it was only when we started to introduce special anti-social behaviour laws, we really made a difference. And I now understand why. The system itself is the problem. We are trying to fight 21st century crime—anti-social behaviour, binge drinking, organised crime, terrorism—with 19th century methods, as if we are still living in the times of Dickens.

The whole of our system starts from the proposition that its duty is to protect the innocent from being wrongly convicted.

Don't misunderstand me. That must be the duty of any criminal justice system.

But surely our primary duty should be to allow law-abiding people to live in safety. It means a complete change of thinking. It doesn't mean abandoning human rights. It means deciding whose human rights come first.

Now many of us can sympathise with some of those sentiments. Indeed it is also a miscarriage of justice if

“ Law depends
on principles,
forged in the fires
of human experience,
which should not
be abandoned when
our democracy is
being challenged.

There can be no black holes
like Guantanamo where
law’s writs do not run.

Law must be ever present.
We have to be alert
to the echoes of Guantanamo
within our own systems.”

guilty people can play the system to their own advantage and secure acquittals. But in my experience that does not happen in Britain with great frequency.

Victims of crime are justified in complaining about a system that treats them merely as witnesses, does not afford them respect and is insensitive to their experience. Citizens today complain with greater vehemence than ever before because people are better educated and better informed. They are more demanding of their civic institutions. There is a tension between the rights of victims and those of defendants but it is within that tension that justice is defined.

When Prime Minister Blair referred to his experience of reform relating to anti-social behaviour (such as unruly behaviour in streets by gangs of youths or the neighbours playing loud music into the night or dumping rubbish on the street) he was referring to the creating of civil orders with criminal sanctions attached. An anti-social behaviour order allows the banning of an individual from an area on hearsay evidence to the police without a court hearing. Breach of the order carries imprisonment.

This new order had its roots in the inventiveness of women's organisations to find mechanisms to deal promptly and effectively with domestic violence. It taught many of us lessons about the law of unintended consequences. The success of bypassing normal criminal procedures in the domestic violence arena did not escape the notice

The whole notion of
contemporary
human rights
is to reach beyond rights
vested in us as citizens
and to recognise
rights vested in us
by virtue of
our common
humanity.

of ministers—here was a speedy process which avoided contested court hearings and the time consuming task of gathering admissible evidence.

Extrapolating from it, the government has now invented control orders for terrorism and are now looking at similar orders to deal with professional criminals. The attractiveness of avoiding traditional processes is what stimulated our former Prime Minister to advocate wholesale reform of the criminal law. For him and many others, the old standards create too high a hurdle for the State.

Clearly the law has to be fine-tuned to fit a changing world. If law is completely out of touch with public sentiment it will be held in contempt.

Law has a central role to play in any new landscape and legal systems must learn to adapt or they will lose the confidence of the public. Law in democratic societies receives legitimacy from the consent of the people. However, the challenge is how to adapt to new circumstances without abandoning essential tenets. Any process of reform must take place against a backdrop of principle: retreat from the Rule of Law, human rights or civil liberties is short-sighted and should be unthinkable but it is the remedy within easy reach when politicians are faced with intractable problems.

Important debates are now taking place across the common law world about reform and a central conundrum is what aspects of our law should be non-negotiable.



“ There is a feeling that powerful forces beyond the nation state—supranational institutions and international corporations—seem to have more power than our own governments or at least power that cannot be constrained effectively by our own governments.”

The argument I would make is that distinctions have to be made between process reform and substantive reform. There are qualitative differences between the two which seem to escape some politicians and even some lawyers. Process reform which is about procedure is of much less consequence, while substantive changes can have disturbing implications for other parts of our carefully knit checks and balances. The law is not just an instrument; it is a fabric. Pulling it too fiercely in any direction can cause it to unravel.

One of the outcomes of the anti-social behaviour orders which seemed so attractive as a solution to low level youth crime is that far larger numbers of young people are ending up in prison for trivial breaches of the orders and, as we know, prison is the best school for more serious crime. We are also seeing a crisis in our prisons because of the huge increase in the prison population.

Terrorism is of course at the other end of the scale from the irritations of unsociable conduct. It presents our societies with the fraught problem of balancing security and liberty. One of the primary purposes of government is the protection of citizens. The rhetoric of all governments who reduce rights is that they are doing so in the interests of the people and to counter disruptive elements in society. Citizens can easily feel that the measures are all about the “other”, someone unlike them. Decent people have nothing to fear, they are told. The notion is that other people’s liberty is being traded but liberty is not divisible in this way.

The arrival of
new immigrants
in our midst
provides ready
scapegoats
to explain everything
from stretched
public resources
to crime.

³ Human Rights Act 1998 (operative from 2000).

⁴ *A & Ors v Secretary of State for the Home Department*
[2004] UKHL 56; [2005] 2 AC 68.

It is precisely when there is high political fever that the controlling power of the judiciary becomes so important. The judges have to curb governmental excess; they are the guardians of the Rule of Law and it is crucial that they do not allow themselves to be co-opted by the Executive.

The American and British response to the atrocities of 9/11 was to immediately introduce the wartime measure of detention without trial for non-citizens. That is one of the advantages of calling the response to these crimes a “war on terror”. It is not just rhetoric. It allows for the suspension of habeas corpus and the introduction of very tough measures unacceptable in times of peace.

Although our detention without trial was not quite Guantanamo Bay, it was a disavowal of the human right to due process before the removal of liberty. What was perplexing was that this was done so soon after introducing a Human Rights Act into British law.³ To do this he [Prime Minister Tony Blair] had to declare a public emergency threatening the life of the nation, thereby enabling the United Kingdom to derogate from the European Convention of Human Rights. No other country in Europe felt the need to do this.

Our derogation led ultimately to the famous Belmarsh detainee case where the judges in the House of Lords on 16 December 2004⁴ held that such detention without trial contravened human rights because it was unjustifiably discriminatory, directed as it was at aliens. It created a

In this uncertain,
frightening world
it is easy to seek out
strong government
and for government
to read this as
a licence to
authoritarian laws.

hierarchy of the value to be attached to certain human beings, when the whole point of human rights, as I have indicated, is to see the value in our common humanity.

The whole notion of contemporary human rights is to reach beyond rights vested in us as citizens and to recognise rights vested in us by virtue of our common humanity. When we said “never again” after the Second World War we were rejecting registers of difference when it came to basic rights. We were making that shockingly principled statement that even terrorists have rights. It is stated clearly by Thomas Paine much earlier: “He that would make his own liberty secure must guard even his enemy from repression.” The judges in our highest court were holding the line at a very difficult time.

The government could have ignored the judgment as judges in the United Kingdom have no power to strike down legislation; they make a declaration of incompatibility if they believe a particular statute cannot be reconciled to the European Convention of Human Rights. Our Human Rights Act is not entrenched and does not have the status of a written constitution. We retain the formal conviction that the sovereignty of Parliament is sacrosanct but in reality we have accepted a body of principle or higher law with which Parliament should comply.

The government therefore accepted the ruling, albeit ungraciously, but brought in sweeping powers to make control orders⁵ providing for deprivation of liberty

The risks attached
to following the majority
are precisely why
protections and
safeguards have
to exist.

As nations we have stopped
telling the stories of why the
Rule of Law
came into being and why
legal safeguards
are democracy's
lifeblood.

without charge or trial and applying to citizens and non-citizens alike. The control orders limit liberty and impose swingeing restrictions on fundamental freedoms: placing tight restrictions on movement, allowing people out of doors for a few hours a day with a tagging device in place, banning unauthorised access to friends and relatives, barring the use of telephones and computers.

These are Executive orders made by the Home Secretary on the basis of secret intelligence and amount to “house arrest” but they do not require a derogation from the European Convention. They can be renewed indefinitely so they are indeterminate. There is judicial oversight in that those made subject to the orders can apply to the courts for their removal but the hands of the judiciary are largely tied because it is deemed that those best placed to determine whether there is a threat to the public are government ministers.

The Royal College of Psychiatrists has petitioned Parliament to have in mind that “indeterminate detention, lack of normal due legal process and the resultant sense of powerlessness, are likely to cause significant deterioration in detainees’ mental health”.

The standard of proof for control orders is that there must be reasonable grounds for suspicion of involvement in terrorism and a belief that it is necessary to protect the public from risk, so the standard is lower than the balance of probabilities. The intelligence is unavailable to the detainee

Knowledge of
the abuses of the past
and the historic battles
for rights and liberty
gives us the power to say “no”
and the ability to
give reasons for the rejection
when governments seek
to pass oppressive laws.
If we do not
understand
our own history
of past struggle
we are much more
likely to be taken in
by new-fangled
dogma.

or his lawyer. (Even the standard of proof for refusing bail is higher in that it is “substantial grounds to fear breach”). Sixteen people are currently subject to such orders but appeals are working their way through the system.

As I said at the commencement of this address, when very different systems try to work in conjunction, new problems can emerge. Statements can be produced from other jurisdictions, which raise questions about admissibility. Was the witness paid or offered other inducements such as a reduced sentence or impunity? Have efforts been made to determine whether he or she has reason to lie? Has someone been interrogated in circumstances and using methods that would be unacceptable in the United Kingdom?

In 2005, in *A & Ors v Secretary of State for the Home Department (No 2)*,⁶ the House of Lords judges were asked to determine whether detention could be based on evidence which may be the product of torture. Much of the intelligence in relation to suspected terrorists derives from intelligence agencies in other countries where torture is endemic. There is nothing new about the use of intelligence. The use of intelligence was a common start in Irish terrorist trials but it was the springboard for the hard work of traditional policing with evidence-gathering from surveillance, from eavesdropping, questioning witnesses and suspects and forensic analysis. When completed, good, old-fashioned trials followed. The judges in the case of *A* again fearlessly upheld the prohibition on torture and the uses of the product of such conduct, restating the

“We should have learned
from history that
in the long run
abuses by the State
are far more
dangerous to liberty
and democracy
than individual
criminal conduct,
dangerous and
disturbing as that is.”

unreliability of such evidence and asserting strongly the importance of not colluding in it.

As a result of upholding the Rule of Law, our judges have had to shoulder the brickbats of the ill-informed. Some politicians and elements of the media accuse the judiciary of being out of touch with public opinion. The debate which has ensued in Britain revolves around whether we are too purist in an impure world. It is claimed that the standard of proof is too high when dealing with some of the challenges of new times. It is argued by government ministers that the protection of citizens and the prevention of crime may involve abandoning traditional methods. These are also arguments currently made in the United States to justify their interrogation methods and their policy of extraordinary rendition, whereby suspects are flown to other countries for interrogation.

In the United Kingdom currently there are 80 cases of alleged Islamist terrorism waiting to be tried. Most allege conspiracy to cause explosions, or the possession of articles for the purposes of terrorism, or failure to inform the authorities about terrorist-linked matters. The evidence is largely generated by technology—bugging of houses and cars by MI5, the penetration of computers which produces evidence of clever email systems of communication (the saved draft system as a dead letter drop), and the electronic hoarding and then sharing of jihadist material of a highly inflammatory nature (beheadings, torture, films of suicide bombers glorifying their acts of terrorism); the latter are

The Rule of Law

is one of the tools we use
in our stumbling progress
towards civilising
the human condition:

a structure of law,
with proper methods
and independent judges,
before whom even
a government must
be answerable.

It is the only restraint
upon the tendency of power
to debase its holders.

As we know,
power is delightful
and absolute power
is absolutely
delightful.

shared like pornography, passed between young men as part of an induction into militant groupings.

So it is not just the evidence that is computer generated; this is crime which is computer generated. Boys sit alone in their bedrooms and become inducted and groomed for *jihad* through email, through the Internet, without their parents having the slightest clue. The connections are international; the combining feature is usually a profound sense of hostility to western hegemony and dominance. These young men are increasingly prepared to participate in suicide bombing missions.

What is the answer to such frightening vistas? Let me deal first with what is not the answer. It is not the answer for any of our countries to level down by reducing our own system's standards in order to create systems of co-operation with other countries. Because other jurisdictions—particularly those with civil justice systems—accept evidence which is based on hearsay and even hearsay upon hearsay, this is no reason for introducing the same relaxed rules in our own courts. It may work perfectly well within the inquisitorial system but is inimical to the common law adversarial process. Legal transplants have all the same problems as medical transplants. The immune system is usually not geared to accept the new arrival and the side effects can be very damaging to the body legal just as to the human body. Other legal systems have different checks and balances and we should be ever mindful of that.

History is dogged
by the tragic fact that
whenever individuals,
political parties or
countries become
too powerful they are
tempted to refuse to
subordinate that
power to wider
and higher law.

The second warning I would give is not to imagine that new anti-terror laws will be temporary—they are invariably around for a very long time and often become permanent. Nor can they be vacuum packed so that radical new proposals will confine themselves exclusively to terrorism. Once the police and the courts are given a swathe of new powers, paradigms shift, as do the cultures within legal systems.

In Britain the special procedures introduced for dealing with Irish terrorism meant we had a whole swathe of miscarriages of justice derived mainly from the extraction of false confessions by the police. However, within the police forces involved in those cases there followed a succession of other wrongful convictions unrelated to terrorism but caused by the corruption of the policing culture. It was like a poison in the system. If certain bad practices seemed to work in terrorist case why not in other cases too?

So how do we proceed if we are not going to give in to terrorism? Any legal modification should be tested against the concept of proportionality. Do the new laws reflect pressing social need? Are the reasons necessary and sufficient? Could alternative methods be used which are less abusive of civil liberties and require fewer departures from the ordinary legal arrangements? Is the deleterious effect proportionate to the value to the security forces?

Some extension of detention prior to charge may well be permissible in dealing with alleged terrorists, where so



“Many a totalitarian government has sought to maintain that passing laws and requiring people to adhere to them is the Rule of Law. In the modern world the Rule of Law in the area of crime means having clearly defined laws, circumscribed police powers, access to lawyers, an open trial process, rules of evidence, the right of appeal and an onerous burden of proof shouldered by the State. The accused is presumed innocent.”

much evidence is coming from computers which need to be disembowelled, from documents in other languages which need to be translated, from foreign police agencies. But safeguards must exist to ensure that any such extension is consistent with human rights; habeas corpus must be available after a stated number of days. In Britain such detention can now be for up to 28 days. There is also talk of extending it to 90 days, which in my view is excessive.

Any detention without trial should be resisted. Proceeding to trial is the best way to deal with terrorism. While we may accept some actions that involve incursions into our liberty to investigate or prevent acts of terrorism, no change in our legal regime should be countenanced which involves detaining people without charge and without the right to judicial review. Nor should we accept the lowering of standards when seeking to establish guilt. Sometimes we have to draw back from steps which may seem reasonable in the interests of security because of what it will do to the system as a whole. Occasionally we may have to release a person we think might be guilty because we know that to do otherwise will destroy something of greater value.

Legislation which departs from the normal rules must be highly specific and targeted, with inbuilt sunset clauses declaring the lifespan of such law. Targeting the wrong people is worse than futile. It does nothing to protect the public, damages innocent people and destroys confidence in the government in the end because the very

“It is a miscarriage of justice
if guilty people can play
the system to
their own advantage
and secure acquittals.”

“There is a tension
between the rights of
victims and those of
defendants but
it is within
that tension
that justice
is defined.”

communities which could provide support and intelligence about terrorists in their midst become so alienated from the State.

Extradition procedures must also be improved but that should not mean the kind of streamlining that removes any opportunity at all for a court to examine the quality of evidence against an accused. We have to remain alert to the ways in which states can abuse extradition procedures.

In 2003 Russia sought the extradition from Britain of the former deputy Prime Minister of Chechnya, Ahmed Zakayev. The allegations included terrorism, armed rebellion and assorted crimes, which had been examined meticulously by the Danish authorities when he was living there and deemed to be unfounded. Much of the Russian evidence was based on hearsay and the central allegations came from a Chechen colleague of Zakayev, who eventually testified to the English court that he had given false information to the Russians only because he was tortured. It was manifest to the court that the extradition request was political and it was not granted. Zakayev's crime is that he was a persuasive champion of non-violent Chechen self-determination.

This kind of example shows how wary we must be of international agreements for easy handover when there are terrorism allegations.

The new Eurowarrant—the European-wide arrest warrant—is all about ease of handover. It makes no habeas

While we may accept
some actions that involve
incursions into our liberty
to investigate or prevent
acts of terrorism,
no change in
our legal regime
should be
countenanced
which involves
detaining people
without charge
and without the right
to judicial review.

corpus provisions and means a British citizen can be arrested in Manchester for actions, which are not criminal under English law, on an arrest warrant issued in another European country. And this is not confined to terrorism. The ostensible purpose was to create collaborative processes for combating serious crime. The only role for a British court is to establish that the documentation is correct. Fears that we are seeing a slow shift towards a “*corpus juris*” for Europe, which will iron out systemic differences, sends shudders through the hearts of committed common lawyers.

On 31 March 2003, David Blunkett, the then British Home Secretary, signed an extradition treaty with the United States. Its effect is to remove the need for a prima facie case before removal of suspects to the United States. There was no consultation or warning and it was assumed that it was linked to “the war on terror”. As the date will indicate it was within days of the Iraq invasion.

The new process will simply involve determining identity and procedural compliance. There is no reciprocity in the treaty. American citizens will not be handed over to Britain in the same way because to do so would contravene a United States citizen’s constitutional rights. Already three British businessmen have been extradited to Texas not for anything to do with terrorism but for links with the Enron fraud. They argued vociferously that the evidence would not have borne out the allegations and in any event they should have been tried in a British court.

Clearly the law
has to be fine-tuned
to fit a changing world.
If law is completely
out of touch with
public sentiment
it will be held
in contempt.

The concern which I share with you today is that we may be making legal sacrifices in our brave new world which we will come to regret. Globalisation means the nation state is being redefined. In the new world national sovereignty is receding. Whatever the advantages which accrue to our nations in this new deregulated world, a downside is becoming apparent. As multinational corporations have gone in pursuit of international markets, insisting upon the dispensing of inhibitory rules or law which might get in the way, so international criminals have swum in their wake taking advantage of the same freedoms. Terror networks like Al Qaida and other international criminal organisations make use of all the same advances in communications, swift transport and money transfer.

In this vista it is important to protect human rights and the standard within the common law.

Creating a world that is respectful of human rights, respectful of law, is a journey, which sometimes feels utopian. But our only hope is a world governed by law and consent. Judges have a vital role in guarding the Rule of Law in times of social change and in times of terrorism.

So what is the role of the rest of us—we who are the lawyers, academics and practitioners?

Well, we too have to be the guardians of the law. If any people know that law is the autobiography of a nation it is us. We also know that some of the chapters make better reading than others.



Any process of reform
must take place against
a backdrop of principle:
retreat from
the Rule of Law,
human rights
or civil liberties
is short-sighted
and should be
unthinkable
but it is the remedy
within easy reach
when politicians are faced
with intractable problems.

We who work with the law, who understand law's importance, who love the law have to be its defender. We must be the protectors of those who are vulnerable to abuse. We have to stand up and be counted. We have to protect the things that make our nations great. We also have to protect brave judges who act with courage and defend the Rule of Law. We have to raise the alarm call when we see our systems of law being eroded.

We have to believe that the world can be a better place. 