

RIGHTS, FREEDOMS AND TERROR

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"I am going to keep this short and to the point because it's all been said before by far more eloquent people than me.

And our words have no impact upon you, therefore I'm going to talk to you in a language that you understand.

Our words are dead until we give them life with our blood....

I and thousands like me are forsaking everything for what we believe.

Our driving motivation doesn't come from tangible commodities that this world has to offer....

Your democratically elected governments continuously perpetuate atrocities against my people all over the world.

And your support of them makes you directly responsible, just as I am directly responsible for protecting and avenging my Muslim brothers and sisters.

Until we feel security, you will be our targets. And until you stop the bombing, gassing, imprisonment and torture of my people we will not stop this fight.

We are at war and I am a soldier. Now you too will taste the reality of this situation."

These words are even more chilling to read aloud than they were to hear as spoken by the thirty year-old Yorkshire man Mohammad Sidique Khan. Spoken and it would seem deliberately recorded some time in advance of his suicide and murder of six innocents in the Edgware Road Circle Line bombing in London on 7th July. But what is our answer? What has it been up to now and what should it be? What is the appropriate and effective philosophical, operational and social response to Khan's grandiose prayer before death? Surely, this question cuts to the heart of the nature of modern British democracy, society and perhaps the essence of humanity itself.

I don't rehearse this diatribe to shock and certainly not (to use a now fashionable term) to "glorify" the murderous suicide bomber, but in an attempt to ground a discussion of core principle within the reality of a current threat- something that politicians perennially accuse human rights' campaigners of failing to do. My concern is how we learn the lessons of the past whilst also being informed by new and developing threats to our lives and way of life.

Others will no doubt devote many years to studying the words and experiences of Qutb and Bin Laden and the geo-political twists and turns that made them possible or inevitable. There is no doubt value in that work, but I am wary of the ease with which we become mesmerised by distant, demonic, almost Bond-style villains, however charismatic. Their role in our consciousness both terrifies and lets us off the hook. If the threat is essentially from a far-away megalomaniac with some bizarre power of remote control over dark-skinned suicidal clones here in the United Kingdom, the prescription seems all too simple. Exceptional times call for exceptional measures: militarism abroad and martial law at home, until the arch-villain and his entire global network have been extinguished.

As individuals we need do little more than appreciate real danger and sign on the dotted line. We must give a blank cheque to Government and others charged with our security. Surely they must be unfettered by the normal constraints of our rights, freedoms and the rule of law at such a moment? This is the time for men of action not ideas. Let them get on with the job of destroying those who simply hate us, in the hope that at some point in the future, they will hand our open society back to us, a little bruised and battered, but essentially in tact.

My problem is not simply that I fear the side-effects of the antidote (though of course I do), but that I see the threat itself somewhat differently. I look not to far away places and global masterminds but closer to home, to the actions and motivations of Britons of my own

generation. I am neither a theological scholar nor a psychologist so please forgive some crude and lay observations upon Khan's statement:

Like many young men throughout history and the world, he believes he has found a cause greater than himself, and is now prepared or determined to give his life in its pursuit.

He has found an ideological or spiritual inspiration above and beyond more common tawdry concerns- "*tangible commodities that this world has to offer*".

But he feels an emotional as well as an ideological connection to his "*Muslim brothers and sisters*". He has found a "*people*" a "*we*" that is distinct and separate from his family, town and country.

Yet he does not speak like a radical cleric or a clone. Despite the obvious illogic of punishing innocent Britons for the suffering of others around the world, he attempts to plead injustice and ill-treatment (by our own democratic standards) rather than his ideological superiority.

Ironically therefore, both in his comments about "*bombing, gassing, imprisonment and torture*" and in his all-too predictable "*I am a soldier*" flourish, he does speak to us in a language that we understand. He takes both the dove's repugnance at gassing, torture etc. and the hawkish "war on terror" metaphor of Bush and Blair administrations and throws them back in our faces.

Now, once we get past an understandable revulsion at attempting even to consider Khan's remarks, it is easy to dismiss them as any real illumination of what makes him tick. They may well have been written by others. They are obviously designed to push our buttons and more importantly, those of a next wave of potential recruits.

But that, in a sense, is the whole point. In order to thrive, this latest totalitarian challenge, like others before it, must develop at the ideological and social as well as the operational level. And accordingly, the response must be on all of these levels as well.

In Britain at least, we should be capable of learning from past failings in anti-terror strategy and wary of seeing new threats as either entirely similar to or different from those of the past. Northern Irish paramilitaries were not all gentleman nor intellectuals nor monsters. Equally, it is as foolish as it is racist to over or under-estimate all those who fall into the new extremism as completely insane.

The past should warn of the dangerous counter-productivity of repression and injustice. It should also warn of the unintended consequences of over-broad repressive measures, way beyond the duration and extent of a terror threat.

However, it is also vital that those who seek to defend rights and freedoms should never fall into the trap of predicating their argument upon a non-existent or exaggerated threat. If our values are truly fundamental and enduring, they have to be relevant whatever the level of threat. Further and understandably, the business of intelligence (whatever its inevitable weaknesses), is the prerogative of governments rather than their critics.

We should be sceptical both of those who seem to promise the risk free society and of those who pretend it is already here. We should remember that the foundations of liberal democracy are not as some populist politicians would paint them, vague, noble but somehow naïve and open-ended notions of limitless tolerance to the point of moral relativism.

Modern ideas of democracy, human rights and the rule of law are not as the Prime Minister's speech writers would suggest; heirlooms of the permissive 1960s or distant nineteenth century. All those who came before us played their part, but in truth, if we owe our modern notions of liberal society and democratic world to any one generation, it is to those who lived through the holocaust and the blitz and designed the best framework possible for the avoidance of further such terrors.

Many totalitarians have confused our open liberal society with one devoid of all ideological or moral content. It is an easy enough mistake and one which many authoritarians and even some of the more liberal-minded amongst us help to perpetuate. All true democrats believe in liberty, equality, justice and the ultimate dignity and worth of every human being.

It is all too easy to caricature this as weakness or even decadence from within or without our society. It is so easy to blame crime on our system of justice or truancy on a lack of corporal punishment at home and school. It is even easier it seems, to blame every single societal ill on the various flows of migration that marked the end of Empire. Surely if unwittingly, every time that one of our politicians or other public figures denigrates progressive post-war values, they play a little more into the hands of those who think that we believe nothing, that ours is an amoral society in inevitable decline.

It seems to me therefore, that if we are to meet a significant threat on ideological, operational and social levels, it is not enough to establish that we are against suicide bombing, or dictatorship or religious fundamentalism (save in its more palatable western forms). It is time to rediscover what we actually believe and why. What is the code that we live by, our answer to Sidique Khan's diatribe? What is our entry in the competition of ideas, of visions capable of inspiring the young? What (to use a now notorious phrase), are the "rules of the game" that some are so keen on changing?

The ideology of post-war democrats is that of fundamental rights, freedoms and the rule of law. This is the legacy of Eleanor Roosevelt and yes, of Winston Churchill here in the United Kingdom- one of the greatest proponents of the European Convention on Human Rights (now contained within our Human Rights Act). Shame on aspirant Conservative Party leaders who make the convenient choice of forgetting this. Shame also, on New Labour politicians who behave as if our rights and freedoms were theirs to give and take away.

In this philosophy, democracy is more than simple majority rule. The rule of law, and in particular, a small but vital bundle of non-negotiable rights and freedoms protect individual human beings (and groups thereof) from each other and a majority that might otherwise descend into a mob. In the final analysis, by protecting free elections and speech, privacy and fair trials and so on, these rights and freedoms protect democratic society itself. For it is respect for these rights which distinguishes democrats from dictators. Our current batch of democratic politicians should cherish that distinction rather more than they do. It is also highly arguable that if any really valuable and universal notion of “terrorism” is ever to be achieved, it must target not all those who take up arms against a state (however oppressive) but those who abandon the human rights’ ethical framework in the process (by for example, indulging in inhuman and degrading treatment and torture).

Ultimately, just as there can be no enduring free markets without some regulation of the associated business dealings- enforceable criminal and contract law as a bare minimum, without core fundamental rights and freedoms, democracy is at best transient and at worst completely illusory.

But what are some of these rights and freedoms and how (apart from providing the framework of democratic ideals), do they guide appropriate responses to threats such as that posed from terrorism?

Article 2 of the European Convention protects the all-important right to life. In Convention terms it is the ultimate reflection of the crucial Human Rights value in the sanctity of each individual life. It is perhaps the mirror image of utilitarian creeds in which individual life is cheap in furtherance of the greater good and where (as in Mohammad Sidique Khan’s statement), the ends justify the means.

Crucially therefore, the development of this provision by the Strasbourg Human Rights Court has required more than restraint from signatory States. It binds them with a positive obligation to protect the lives of people (not just their own citizens) within their jurisdiction. In the wake of the London bombings, senior police officers and Government Ministers were quick and right to cite this provision repeatedly. Sadly, they rarely seem to read much further. It also requires the highest standards by way of independent investigation and adjudication whenever someone dies at the hands of or in the care of the State.

Interestingly, this right (like most of the others), is not absolute. Unsurprisingly (in the light of its genesis), this is not a pacifist doctrine. Deprivation of life does not breach the right in a narrow set of circumstances and where the force used is no more than “absolutely necessary”. Further “derogation” (or special exception) is permitted in relation to lawful acts of war.

Absolute necessity is of course the principle relevant to the use of lethal force in the context of suspected suicide bombers. It is against this stringent standard that those holding and directing police firearms must be scrutinized. It is this principle that must guide those investigating the death of Jean Charles Menezes. Are internal police instructions and manuals adequate in this regard? How adequate was the relevant intelligence and surveillance operation? What safeguards are in place to lessen the risk of fatal error? How adequate is and was the relevant operational chain of command?

As is so often the case, the Convention provides neither magic solutions nor unreasonable straightjackets for those charged with safeguarding the public interest. It does provide an appropriately rigorous framework for the scrutiny of the use of power at legislative, policy and operational levels.

Article 3 contains the injunction that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. It enjoys special status as one of the very few absolutes in the Convention framework. It contains no qualifications or exceptions whatsoever. Even the doctrine of derogation (or special exception or opt-out in time of war or public emergency threatening the life of the nation) does not apply.

In a philosophy of so few absolutes, it is worth pondering this one a little. Why is the intentional ending of another human life sometimes permissible but torture never, even in the hackneyed and infamous ticking bomb scenario? In the light of the Convention’s historical context, it takes little imagination to understand why those who had seen fresh images of concentration and death camps and heard testimony from Japanese prisoners of war might find particular abhorrence in acts of torture and inhuman and degrading treatment.

A further clue perhaps lies in the choice of the word “inhuman”, a suggestion that some acts of cruelty cross a line beyond which they debase perpetrator, victim and wider society- even to the point of robbing us of some of that which makes us human.

In truth, we will all die one day and aspire to a range of possible quick, painless and dignified ends. Some of us even seek autonomy over the manner and moment of our death, at least in preference to lingering pain and suffering. Others find human existence so mystically precious that they believe whatever the temptations, one should not seek to choose even the moment of one’s own death. Most of us can imagine last resort scenarios where we might justify taking life in self-defence or defence of others.

To take human life (whether in war or other scenario) is rightly, the gravest rational choice imaginable. It means to choose the moment of another's death - in a sense, quite literally to "play God". But when we subject another to torture or to inhuman or degrading treatment, we play a somewhat darker role- torturer, tormentor. The political or legal system or society that directs or permits this action, is the very heart of darkness that Churchill's generation was seeking to avoid.

So the rule against torture is an absolute even in war time. This is reflected, not simply in our Human Rights Convention but a range of Constitutional and international instruments reflecting the same ideals around the globe. Very simply, it is inconvenience or article of faith depending upon your belief in fundamental rights and freedoms. In any event, it has relevance to several questions of responding to present and future threats.

As part of an international anti-terror response, is it sometimes permissible to receive intelligence that may have been obtained by torture and place it in evidence before a British court concerned with the liberty of a suspect or accused person?

Our highest court will consider this issue next week. But I must contend that if we truly believe in the absolute nature of the rule against torture, we can not feed a justice system or find someone a "terrorist" or remove his liberty for any significant period of time with the fruits of this poison tree.

Is material gained by torture reliable? As someone with a relatively low pain threshold, I would say no. Others say that it can sometimes be (a strange answer to the charge of unreliability). Ultimately, it is hard to see how democratic governments can plead the case against torture (whether perpetrated by terrorists or dictators), if they indulge in the complicity of reliance upon its product.

The challenge often put in retort is whether one simply closes one's ears and mind to all intelligence from dubious sources or indeed from all non-democratic governments. My answer is this. If I were, a Prime Minister or Home Secretary or Chief Constable who receives a phone call warning of an imminent attack, I would take proportionate preventative action first and ask difficult questions later. However, it is one thing to evacuate part of a city or even to arrest a suspect on intelligence from unscrupulous sources. It is quite another to build significant and enduring decisions about life and liberty upon possible torture.

Whatever the rights and wrongs of recent foreign policy, recent events and even comments by Dame Eliza Manningham-Buller, should have reminded us of the vital distinction between secret intelligence and proper evidence. Both have a role in a democracy and sometimes one may be hardened into the other.

The only reason that the House of Lords Appellate Committee must now venture into the murky waters of material gained by torture, is that Government has sought in recent years, to build a parallel system of quasi- justice on secret intelligence and suspicion rather than charges evidence and proof. This is not so much the "battering of the criminal justice system" that the Prime Minister boasted of in his recent party conference speech, but the complete circumvention of it.

In the longer term, this continual blurring of traditional constitutional distinctions, a recurring theme of the last eight years, whilst producing short-term fixes for the politician of the moment, should cause intelligence and legal communities equal concern. Over-burdening intelligence and circumventing or bending justice presents serious risks to the long term integrity of both systems.

The next aspect of undermining the absolute prohibition upon torture lies in the question of deportation. For nearly a decade, the Strasbourg Court has maintained that a signatory state “subjects” someone to torture by sending him to another jurisdiction where he faces that real risk. This, in my view, is an obvious extrapolation of both the absolute prohibition in Article 3 and the principle that human rights belong to all human beings rather than a country’s own citizens.

Our Government would like to deport some people within its broad discretion to deal with those foreign nationals who are “non-conducive to the public good”. The problem arises where there is a significant risk that such a person might be tortured if returned home. This of course is the conundrum that resulted in the now discredited policy of detaining such people indefinitely without trial.

The latest approach is two-pronged and strangely contradictory. On the one hand, the Government is negotiating so-called “memoranda of understanding”- bilateral agreements with countries whose record on torture might make it difficult for domestic and international courts to stomach deportation. The agreements will contain assurances from the countries concerned that they will not mistreat an individual returned under such an arrangement. The assurance is designed to persuade a court that notwithstanding a country’s repeated breaches of multi-lateral international human rights’ instruments, this individual will not be tortured or killed.

Can such a specific assurance be believed in the face of countervailing evidence of past and continuing bad practice? Presumably, this is a matter of case by case analysis for the Courts. However, our Government itself seems to lack sufficient faith in these assurances, to leave the question of their credibility to the independent judiciary in London or Strasbourg.

At the same time as negotiating these documents therefore, the Government is pursuing a legal strategy of attempting to overturn the absolute nature of Article 3 protection in deportation cases. The argument as I understand it, is that in the context of a deportation pursuant to national security, the risk of torture to the suspect must be balanced against the risk that he is said to pose to public safety. The absolute right becomes qualified.

I can see only three ways in which such an argument may be advanced:

1. This fundamental and universal right only extends to a state's own citizens. This type of analysis was of course advanced by the Attorney General and roundly rejected by the House of Lords last year- the Belmarsh argument.
2. A State is somehow not quite responsible for torture that happens after it sends someone (whatever the anticipated risk), beyond its jurisdiction- the "see no evil" argument.
3. The rule against torture is not as absolute as it appears and can somehow be trumped by national security concerns.

Any of these arguments (if successful), could be used to legitimise the practice of "extreme rendition" which is thought to be adopted by some Governments- notably the United States. All of these arguments completely undermine positive notions of seeking to wipe out torture from the face of the Earth. The third approach would open up the way for some of the "torture light" arguments conducted in the United States after September 11th to be entertained here in the United Kingdom and elsewhere. In reality, all three arguments are variations on a theme of diluting Article 3's absolute protection and sending the according signal to dictators, terrorists and their sympathisers around the globe.

Articles 5 and 6 of the Convention respectively, protect us from arbitrary detention and provide the right to a fair trial including the presumption of innocence in the context of criminal charges. On the Government's own contention, Article 5 was breached by the Belmarsh internment policy. That is why it attempted a derogation which was eventually found wanting by the House of Lords.

In the words of the Council of Europe's Human Rights Commissioner, at least some of the new anti-terror control orders (made under the first Terror Act of this year), are likely to breach Article 6- not surprising as they amount to some quite significant interferences with liberty without charge or trial.

The latest attack upon our traditional ideas of due process comes in the form of a policy contained in the Government's new Terrorism Bill, but borne of a press release from the Association of Chief Police Officers in the wake of the July bombings. The Government is seeking to extend the period of pre-charge detention for terror suspects from fourteen to ninety days- the limit being just four days in any other criminal case, however complex. By contrast, Article 5 demands prompt information of the reasons of your arrest and any charges against you. As Lord Steyn remarked as part of the BBC's "Panorama" programme on Sunday night, it is hard to imagine periods of more than the present fourteen days constituting a "prompt" charge. Lord Lloyd- another former Law Lord rightly described the policy as yet another form of internment.

The profound fear is that this new mutation of internment, like previous versions, will be disastrously counter-productive to each of the ideological, social and operational counter-terror efforts. One has of course to imagine, not those eventually charged with terror-related offences, for they would be detained for several months pending trial in any event. Instead imagine those released after eighty nine or ninety days.

They return home, quite possibly to areas with a high proportion of British Muslims, having served the equivalent of a six month prison sentence without ever having been charged with anything. Members of extremist groups (quite possibly now underground groups- as the Government also seeks to ban extreme non-violent organisations), have been visiting the detainee's family during his absence. The extremists say that they have been protecting the family from the press and vigilantes during that extended period.

Ultimately, "so-called British justice" is denigrated as a discriminatory sham. It is contrasted with the comforting protection of one's "own people". If one reflects upon the Northern Irish experience for more than a few seconds, it is difficult to imagine how this policy can possibly prevent more terrorists than it recruits.

Even where people are not actually recruited into extreme or violent groups, it is unlikely that they will have much appetite for reporting genuine suspicions to the police, much less joining police and security services in anything like the numbers that they should during the years ahead. Ultimately it is more and better intelligence, not more and worse laws that will deliver Britain and its people from the present threat.

Article 10 of the Convention guarantees the right to freedom of expression. It is (like many others- including respect for privacy and freedom of conscience) a qualified or balanced right, which may be subject to restrictions that are necessary and proportionate (e.g. to the interests of national security) and prescribed by law. It is nonetheless the very oxygen of democratic society and restrictions should be approached with according grave caution.

In a move once more reminiscent of the Northern Irish experience, the new Terrorism Bill attempts to address the threat by curtailing speech. Its original draft contained a speech offence (glorifying, exalting or celebrating terrorism), so broad that it came with a twenty year

watershed requiring the Home Secretary to decide which earlier acts of politically motivated crime around the world, should count as terrorism rather than freedom fighting.

Mercifully, this provision has now been scrapped as a discrete offence. However the broad and vague concept of glorification is now collapsed into the remaining speech offence of “encouraging terrorism”. Crucially, and in contrast with traditional offences of incitement, you can commit this offence (which attracts a seven year maximum sentence) without intending that anyone should be encouraged into acts of terrorism. It is sufficient that you “had reasonable grounds for believing” that some members of the public are likely to understand your words as encouragement- whether they are in fact encouraged or not.

This is an offence of loose talk or negligent speech which would permit those who have or would have been criticised in the past for say, expressing some level of sympathy with Palestinian suicide bombers or their families, to face prosecution in the future. Classic political arguments about the circumstances in which taking arms against a State is justified, could land participants in jeopardy. It is important to remember that the relevant definition of terrorism is incredibly broad and covers politically motivated crimes against non-democratic Governments around the world.

It may no longer be lawful to express the view that the Zimbabwean people will only enjoy democracy after the overthrow of Robert Mugabe. Further, musing upon how many lives might have been saved by a timely assassination of Saddam Hussain, might reasonably be seen as possible encouragement to terrorism in the face of other dictators.

The draft law is plainly dangerous but in the deft hands of the DPP, how might it help the anti-terror effort? Incitement to murder has long been an offence at the common law and in 2000 the Government created a specific statutory offence of inciting terrorism . Deliberate

intention on the part of the speaker is quite properly required by these offences and it seems that avoiding this vital component was a major factor in the design of the new measures.

This is of course quite unacceptable. It is highly likely that the new offence would constitute both a disproportionate interference with the right to free expression and one that is not sufficiently narrowly defined to be in accordance with the law.

Once more the danger is not merely of the long-term constitutional consequences of an over-broad speech offence, but of significant counter-productivity in the face of the current threat. Banning unpopular, distasteful or even offensive speech in the current context risks criminalising hundreds and thousands of people in the current context.

Instead of isolating the terrorists and their supporters, the Government will place many currently law abiding people upon the other side of the line on the basis of views rather than actions. At a time when there is greatest need to openly take on the ideological discourse, this proposal will drive it underground- out of cross-cultural public meetings into colleges, out of colleges into mosques, out of mosques and into living rooms and other private spaces where it may fester unchallenged.

Article 15 of the Convention is important to the present discussion- not least because it provided the standard applied by the Law Lords in the Belmarsh case. Those who find our Human Rights Convention of little relevance in dangerous times should reflect upon the drafters' decision to provide a safety valve or derogation, or special exception provision for possible use in moments of greatest national peril:

“In time of war or other public emergency threatening the life of the nation...” special exception is permitted from most of the Convention rights “ to the extent strictly required by the exigencies of the situation.”

The duality of the test for derogation is important. In a society founded upon the rule of law, the test of strict necessity rightly guides those who govern, even at the moment of greatest national crisis.

But when does that moment arise. Since the Belmarsh decision of last year, and subsequently since the atrocity of July, there has been much political scoffing at the one Law Lord (Lord Hoffmann), who found that the public emergency limb of the derogation test had not been met by the current threat.

In a now historic passage of his speech, Lord Hoffmann remarked of the policy of interning foreign national suspects that “The real threat to the life of the nation comes not from terrorism, but from laws such as these.”

In August of this year the Prime Minister publicly and confidently doubted “that those words would be spoken now.” But is that right or instead a complete misunderstanding of the essence of civilised society- “the life of the nation”?

We certainly know that this country faces a grave and possibly unquantifiable threat from those who would spend their own lives on the prize of taking many others. Mohammad Khan provides a clear, chilling and public reminder. We fear and even expect that more of our lives will be taken before this particular breed of totalitarianism is defeated.

But is “the life of the nation” equivalent simply to a certain level of risk to a large number of people? Alternatively does it relate to supplies of water, food, fuel, medicine and to the functioning of the democratic state itself? I prefer the latter view, not through a lack of care for loss of life- far from it.

It simply seems to me that a state of “public emergency” of indefinite length is as dangerous as the unending “war on terror” which allows the murderer to call himself a soldier. A limitless state of emergency is a contradiction in terms. It is no longer a temporary departure from the proper and normal order of society for as short a period as possible in order to re-establish means of existence, government and law. It is instead a new state of being. A state of constitutional poverty without the ethical framework that we most need in times of greatest difficulty.

Loss of the human rights framework would also deprive us of the very inspiration that is the ultimate antidote to the threat. There has been in my view, far too much public hand-ringing about what it means to be British and what the ties that bind us should, or ought to be. I am as certain in my core beliefs as any of those who challenge them, and my values are as British as they are even-handed and universal.

Those in permanent search of new codes for living would be well-advised to remember those we already have. Surely there has never been a nobler or more rational system designed by man.