

See also 13 Com L 5 (April 2004) 5. (Site map: 50.005)

The Terrorists Should not be Allowed to Win

Francis Bennion

Introductory

In this article I discuss some fundamental considerations relating to the trial of terrorist suspects in the climate of opinion following 9/11 and 3/11¹. In what follows I do not mean to undermine the principles of international law referred to in the recent article 'Terrorism and Human Rights: Finding the Balance' by Dato' Param Kumaraswamy² though I myself would put the balance more in favour of protecting the public. I also have misgivings regarding the human rights concept as relied on in that article, which relate to the unstable nature of that concept and the fact that it is rendered to some extent undemocratic because of its necessary reliance on judicial rulings.³

For suspected terrorists a recent letter in the London *Times* signed by members of the English Bar urged the desirability of still upholding three fair trial principles: (1) a public hearing by an impartial judge and jury of one's peers, (2) proof of guilt beyond reasonable doubt, and (3) the right to know the case against one.⁴ As another member of the English Bar (of 53 years' standing) I replied pointing out that impeccable fair trial standards can be preserved only in a peaceful, ordered society.⁵ Where national safety is gravely threatened, I said, these civilised standards may unfortunately need to be lowered. I recalled that this happened in World War Two with Regulation 18b, which allowed enemy aliens in Britain to be locked up without trial.

I went on to say that a new situation had now developed with the emergence round the world of determined terrorists prepared to sacrifice their own lives. In London the Houses of Parliament are currently disfigured by ugly concrete barriers designed to stop the approach of suicide bombers to the premises of the Mother of Parliaments. Once again we are no longer living in a peaceful, ordered society. Yet some people refuse to recognise this. Mr Richard Fleet responded to my Times letter with the following -

Mr Bennion comments, rightly, that law-abiding citizens think it frightening to have their lives threatened by suicide bombers. However, one of the prices we pay for a civilised society is the protection afforded to persons suspected of crime. There is a rule

¹ The atrocities in the United States committed on 11 September 2001 have been given the abbreviated name '9/11'. A letter apparently from the terrorist group Al Qaeda said that the Madrid bombing on 11 March 2004 which killed 201 people and injured more than 1,000 was timed for exactly two and a half years after 9/11. It is therefore appropriately referred to as '3/11'.

² *The Commonwealth Lawyer*, August 2003, pp. 25-30.

³ The misgivings are explained at length in my article 'Human Rights – A Threat to Law?' (2003) 26(2) UNSWLJ 418-441 and will not be further referred to here.

⁴ *The Times*, 7 Feb 2004.

⁵ *The Times*, 13 Feb 2004.

of thumb that it is better for ten guilty persons to go free than for one innocent person to be falsely convicted, and I believe we depart from this principle at our peril.⁶

The supposed rule of thumb is not truly that. In real life no such ten-to-one bargain is actually on offer. If the authorities had arrested ten people they genuinely suspected of plotting suicide attacks, the public would rightly expect those very dangerous people to be held in custody while the danger subsisted, trial or no trial. There should be effective checks on the genuineness of the information, but a public trial establishing guilt beyond reasonable doubt may well be a luxury the state cannot realistically afford. Yet there have always been people, even on our own side, who refuse to recognise this. At the height of the London blitz George Orwell wrote-

What has kept England on its feet during the past year? Partly, no doubt, some vague idea about a better future, but chiefly the atavistic emotion of patriotism . . . For the last twenty years the main object of English leftwing intellectuals has been to break this feeling down, and if they had succeeded we might be watching SS-men patrolling the London streets at this moment.⁷

The people whom Orwell dismissed as 'English leftwing intellectuals' have been described in various terms, such as bien-pensants⁸, bleeding-hearts liberals, *clercs* engaged in *trahison*, and otherwise. Their credo is expressed in the minority opinion of Lord Atkin in the wartime case of *Liversidge v Anderson*⁹. I shall spend some time on this case, because it is still instructive today – and still divides Orwell's targets from the rest of us.

Liversidge v Anderson

The case concerned the interpretation of the wartime power conferred on the Home Secretary to intern certain persons if he had reasonable cause to believe that specified adverse circumstances existed in relation to them. The question was whether or not the existence or non-existence of such reasonable cause was a question of fact into which the court could inquire in the usual way. By four to one, the House of Lords held that the crucial words should be construed as meaning in effect 'if he *thinks* he has reasonable cause to believe . . .'. In a notorious dissenting opinion, Lord Atkin protested that this was 'a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister'¹⁰. The other law lords found that this strained construction gave effect to the purpose of the regulation, and held that applying it was justified. Viscount Maugham said that the regulation conferring the power should be approached with an intent to 'prefer a construction which will carry into effect the plain intention of those responsible . . . rather than one which will defeat that intention'¹¹. Lord Macmillan said-

The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time . . .¹²

⁶ *The Times*, 18 Feb 2004.

⁷ *Horizon*, Aug 1941.

⁸ The untranslatableness of this indispensable term is illustrated in Kwame Anthony Appiah, 'Battle of the Bien-Pensant', *The New York Review of Books*, 27 Apr 2000, where he even refers to 'some *soi-disant bien-pensant* – or at least *soi-pensant bien-disant* – quarters'.

⁹ [1942] AC 206.

¹⁰ P. 244.

¹¹ P. 219.

¹² P. 252.

Another reason the majority gave was that the question at issue was one ‘of which the Secretary of State must plainly be a better judge than any court of law can be’¹³. Lord Finlay L.C. had remarked in a case under the predecessor of reg. 18B that ‘no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law’¹⁴.

Judges and others in the bien-pensant camp have since lined up to decry the majority decision in *Liversidge v Anderson*. In *IRC v Rossminster Ltd*¹⁵, which concerned the formula ‘has reasonable cause to believe’ as stated in the Taxes Management Act 1970 s 20C, the House of Lords applied the literal meaning. Lord Scarman said that the ghost of *Liversidge v Anderson* cast no shadow on s 20C, adding: ‘And I would think it need no longer haunt the law’¹⁶. But it does still haunt the law, because in the circumstances of war it was rightly decided.

A lecture on *Liversidge v Anderson* by the bien-pensant Professor A.W.B. Simpson was printed in the annual *Denning Law Review* for 1988, accompanied by a protest I had felt obliged to deliver. The lecture was entitled ‘Rhetoric, Reality, and Regulation 18b’. I had been sent an advance copy of it, which I read with mounting dismay. It struck me as long on the first titular element, and lamentably short on the second. Had I been present at its delivery in the St Cross building in Oxford (where at the time I had a room in the university law library), I would have felt bound to utter a protest. The following is the gist of my riposte as published in the 1988 *Denning Law Journal*.

Having spent nearly six years as an RAF pilot (1941-1946), and later having worked for some fifteen years on and off in Whitehall, I was equipped to detect that the lecture, like many academic statements on wartime internment under reg. 18b, ignored a basic factor. It assumed without proving that the defence of liberty and the rule of law undoubtedly require such measures as reg. 18b to be condemned. Thus Professor Simpson said that the imprisonment of persons under reg. 18b was ‘in flagrant violation’ of the rule of law, that reg. 18b was an ‘infamous conception’ amounting to the erosion of the rule of law, that it was a ‘monstrous birth’, and that the judges deciding cases under it lacked a commitment to civil liberties.

The factor Professor Simpson failed to mention was that the defence of liberty may imperatively require the enactment of measures such as reg. 18b in times of emergency, and that *the rule of law allows for this*. Politicians of all parties grasp, as Paddy Ashdown MP (later leader of the Liberal Democrats) said, that ‘the first civil liberty is the ability to be safe and to live in peace’¹⁷.

As I vividly remember from the days of 1940-41, when as a 17-year old clerk I travelled daily by tube from Harrow to London to work in the City during the blitz, the liberty of all of us was dramatically threatened by the Nazis. That liberty was protected, not infringed, by reg. 18b, whether or not there were individual cases where in fact detention was not justified. Administrative arrangements cannot be expected always to work perfectly in a country under constant enemy attack. In dire necessity furthermore the executive must take over from the judiciary, which is why martial law is recognised in international law.¹⁸

The war against terror currently being waged has not got to the point where it calls for a declaration of martial law. It may never get to that point if those in charge of our affairs are

¹³ P. 291.

¹⁴ *R v Halliday* [1917] AC 260 at 269.

¹⁵ [1980] AC 952.

¹⁶ P. 1025.

¹⁷ *The Independent*, 24 Jun 1988.

¹⁸ For further details of the controversy surrounding *Liversidge v Anderson* see G. Lewis, *Lord Atkin* (1983), pp. 132–157.

sufficiently resolute. Can we still have what we are accustomed to think of as impeccable fair trials when the person tried is a suspected terrorist suicide bomber? Lord Falconer of Thoroton, Lord Chancellor and Secretary of State for Constitutional Affairs, said no in a speech to the Law Society on 17 February 2004¹⁹. He said the country's safety comes before a terror suspect's human rights, and that there are 'no options we should refuse to consider'. He added: 'Lives are at stake. The safety of the people is the first concern of any Government.'

A Canadian academic

Mass murder is the description attached by Henry Laycock to the nuclear destruction of Hiroshima. In a letter in the London *Times* Mr Laycock, writing from the Department of Philosophy, Queen's University, Kingston, Ontario, equates that act by President Truman to the Madrid bombing on 3/11. The latter attack, he says, was 'brilliantly successful' because it seems to have effected a change of government in Spain. He goes on-

Historically mass murder – the deliberate killing of civilians – has chiefly been an instrument of state policy. The examples are sadly legion; perhaps the most dramatic in living memory is the nuclear destruction of Japanese cities. It is of course not easy for governments to acknowledge such parallels; but unless and until this takes place, a fully coherent and credible denunciation of such acts of murder is simply impossible.²⁰

What are those words supposed to mean? Apparently President Bush is being advised from a Canadian philosophy department to acknowledge a parallel between Madrid 2004 and Hiroshima 1945. What is supposed to be the nature of that parallel? That they were both acts of 'mass murder'? Apparently, but this would be wholly untrue. Hiroshima was not mass murder, but a justified act of war which had the effect of saving an incalculable number of lives on the Allied side. Mine was probably one of them; hence my personal revulsion at the Laycock doctrine.

I know nothing of Mr Laycock except what he writes in his *Times* letter. Judging from that I would guess he is another of the bien-pensants who love Hiroshima because they think it gives them a stick to beat their own side with.²¹ They overlook and never mention the hundreds of lives lost when the Japanese committed without warning the atrocity of Pearl Harbor, the thousands killed by Japanese brutality and torture in the jungle and elsewhere. The civilians of Hiroshima paid the price for the iniquities of their own government and their own armed forces. In the last resort civilians, even including children, always must pay that price. They cannot free themselves from responsibility for the official acts of those who act in their name.

An annual season has been developed by the bien-pensants when so-called peace groups stencil human shadows on public pavements in memory of people instantly vapourized at Hiroshima. This carries me back more than forty years to my own humble role at that time. A Royal Air Force pilot aged 22, I was nervously awaiting posting to a jungle station in Malaya. By treacherously attacking the fleet of a friendly nation at Pearl Harbor, the Japanese had brought the United States into the war on our side. The trouble was, the Japanese did not fight sensibly. Like the Iranian Revolutionary Guards in the 1980s, and the worldwide Islamist fanatics today, they had the Kamikaze or suicidal outlook. This we young Britons did not share, being anxious to get back home in one piece and belatedly begin living our lives.

I will always remember that astonishing moment of relief when I heard on the radio that the Allies possessed the hitherto unsuspected atom bomb. I saw at once that for me it meant

¹⁹ *Daily Mail*, 18 Feb 2004.

²⁰ *The Times*, 17 Mar 2004.

²¹ Love is not too strong a word here: remember the film *Hiroshima Mon Amour*.

release from the nagging fear of Japanese butchery in the Malayan jungle. Instead of dragging on as we expected for years, with the loss of millions more lives, the war with Japan was over.

Conclusion

The successful Diplock courts in Northern Ireland demonstrated that the civilised right to trial by jury may not survive uncivilised behaviour by terrorists. The answer can only be pragmatic in the particular circumstances. Have things got so far that it is impracticable to enrol twelve jurors whose impartiality can be counted on, and who are not put at risk of punishment by the criminals they are asked to try – or their supporters?

As for the doctrine of the open court, I am a fervent supporter of that. Its foes are not always terrorists, as those currently campaigning against the secrecy of Family Court proceedings will testify. Secret justice is a second best, but whether it can be avoided again depends on circumstances. An impartial judge we must always be able to supply.

The standard of proof is problematic. If a court or tribunal has before it a person who seems to it, on the evidence available, to be more likely than not to be an intending terrorist, I would guess most members of the public would want him or her to be locked up in these frightening times.

Finally, of course one should have the right to know the case against one. But one does not necessarily have the right to know the names of informers or espionage agents, if that might endanger their security.

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