The Bar Council of England & Wales sixth annual International Rule of Law lecture – Inner Temple 18th December 2012.

"The Rule of Law & Global Terrorism - an international problem from a Northern Irish perspective".

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Introduction

〔1〕 I am deeply honoured to have been asked to give this year's international Rule of Law lecture. I would like to thank Michael and Chantal in particular for the very kind invitation for which I am truly humbled. I would also like to express my sincere appreciation to Sarah Richardson and Natalie Darby from the Bar Council of England and Wales for all their very kind help and able assistance.

〔2〕 It was an Irish barrister of some renown, John Philpott Curran, MP and later Master of the Rolls, who provides the context for the theme of tonight's lecture on the International Rule of Law. At it's very heart – 'eternal vigilance'. For it was Curran, who, long before the phrase was attributed to Thomas Jefferson in 1838 or Andrew Jackson the preceding year, in a speech he gave in 1790 upon the right of election, extolled the virtue,

"It is the common fate of the indolent to see their rights

become a prey to the active. The condition upon which God hath given liberty to man is eternal vigilance ; which condition if he break , servitude is at once the consequence of his crime and the punishment of his guilt".

〔3〕 The UK threat level regarding terrorist attack is currently assessed to be 'substantial', meaning an attack is a strong possibility. Protection of the public is paramount, and 222 years on, 'eternal vigilance' remains the price of democracy and freedom. But the practical meaning of 'eternal vigilance' can be open to interpretation or some may even say, lost in translation, depending upon which arm of the State to which we are referring.

〔4〕 The Home Office quarterly update to June 2012, released just last week, shows that arrests for suspected terrorism offences rose by 60% in the last year.

〔5〕 The dichotomy between Executive and Judicial functions are at the very heart of our democratic system – whilst the Government may construe eternal vigilance to mean the protection of the public at all cost, the fundamental role of the independent judiciary is in

underpinning the necessity at the same time in maintaining and ensuring that the rule of law is observed by the Government in the measures that may be necessary in their eyes to bring terrorists to justice.

〔6〕 As once observed by Lord Judge, it is the judges 'who are the guardians of the rule of law'. That is their prime responsibility and in real terms, eternal vigilance by the judiciary means that they are steadfastly alert for the 'first incursion by the executive into propriety'.

〔7〕 This is the 6th lecture on the International Rule of Law – I am disinclined to give you its 6th interpretation - Joseph Raz in 'The Rule of Law and its Virtue' talks of the "promiscuous use" made in recent years of the expression the rule of law. This concept of promiscuity I must confess intrigued me …

'Berlusconi, Bunga bunga & the Rule of Law' – that's the 7th Annual lecture taken care of!

〔8〕 Certainly stripping it all away… no pun intended.. Joseph Raz, writing in 1977, states that a core principle of the rule of law is, 'the independence of the judiciary must be guaranteed', which remains as true today as it did then. This lies at the very heart of all we may consider this evening.

〔9〕 It is against the backdrop of eternal vigilance and the role of the judiciary that I will embark on our journey into 'Global Terrorism and the Rule of Law – an International problem from a Northern Irish perspective'.

〔10〕 The theme of this talk is to look at the rule of law and its application to the Government's response to terrorism both nationally and internationally and to see what lessons can be learned through the Northern Ireland experience, spanning over the past four decades.

i. This will examine the transition from the beginning of the troubles in 1969, the Government response through measures such as internment, Diplock trials, confession only convictions, the use of the supergrass system and

the allegations of collusion - up to and including the de Silva report.

ii. It will consider the vital role played by the legal profession in Northern Ireland, the work of the independent Bar and the constant threat endured by the judiciary.

iii. It will further consider the lessons to be learned underpinning the necessity of maintaining and ensuring that the rule of law is observed by the Government in the measures that may be viewed as expedient or necessary in dealing with terrorism in a national and international context.

iv. It will examine some of the cardinal principles that underpin the international rule of law in this context, the role of the European Court of Human Rights and address the criticisms of judicial decisions taken in recent high profile cases such as that of Abu Qatada by the media and Government.

v. Finally it will look to other legal jurisdictions to examine the lessons that can be learned in the transition to a 'post conflict society' and the necessity of a robust and independent legal profession and judiciary in getting to that point, thus ensuring the rule of law is observed into the future.

〔11〕 So let's go back to the past before we look to the future…

〔12〕 It was Winston Churchill, at the close of the Great War remarking on the entrenched views of those in Northern Ireland, spoke of how,

> *"…the whole map of Europe has been changed. The position of countries has been violently altered…but as the deluge subsides and the waters fall short, we see the dreary steeples of Fermanagh and Tyrone emerging once again. The integrity of their quarrel is one of the few institutions that has been unaltered in the cataclysm which has swept the world."*

〔13〕 The Great War a century later has now been replaced by a

global war – spanning the borders of Europe and beyond. The horrors of trench warfare have been replaced internationally with calls for 'holy jihad' and suicide bombings. The 9/11 report details countering terrorism as the top national priority, as we all know to be the 'War on terror'. Fought on both a national and international stage by the US and its allies.

〔14〕 How you may ask do the Churchillian dreary steeples of Fermanagh and Tyrone have anything to do with Al Qaeda, global terrorism and the international rule of law?

〔15〕 The response to terrorism whether nationally or globally must be viewed through the prism of the fundamental principles enshrined in the Rule of Law - the lessons to be learned in the modern day state's response to terrorism, its efficacy, lawfulness and effectiveness can be considered in the context of Northern Ireland, which provides for the ideal backdrop, given that 'the state has been in a condition of permanent emergency' since its inception' in 1921.

〔16〕 Certainly the conflict in NI and the 'integrity of their quarrel' referred to by Churchill, was something of which I, like so many others

in NI, have been all too painfully aware…

〔17〕 I had been born in 1969, three months after British soldiers arrived onto the streets of Northern Ireland at the beginning of the Troubles. By the time I had started primary school; I had experienced an arson attack on our home, the murder of an uncle and had been caught up in a booby trap blast bomb which claimed the life of a young British soldier.

〔18〕 Northern Ireland was a place of paradox, tragedy and bitter irony on a par with any Greek tragedy. By way of brief example - One uncle, a civil servant had been murdered by the UFF – a paramilitary grouping loyal to the British state; his brother, a policeman by the IRA, as he emerged from Sunday mass in the shadow of those very same dreary steeples.

〔19〕 By the time I had attended primary school we had moved to Derry/Londonderry, as no-one can agree what it should be called - but that was the least of the city's many problems. At that point in the early 70s the city was still recovering from the events of Bloody Sunday which had witnessed the shooting of 26 unarmed civil rights protestors by paratroopers. Of those 26, some 14 in total were

killed. The burning sense of injustice stemming decades culminated in the Saville Inquiry, which resulted in Prime Minister David Cameron stating in the House of Commons, that,

"... What happened on Bloody Sunday was both unjustified and unjustifiable. It was wrong…. on behalf of the government – and indeed our country – I am deeply sorry."

〔20〕 Peter Taylor OBE, a BBC investigative journalist, has reported on terrorism for 40 years. Smoking guns, like conspiracy theories, he recounts, are eagerly hunted by journalists but seldom found. They lie hidden locked in Government vaults but there is 'the odd glaring exception'. One such exception he cites from the Bloody Sunday inquiry, being the secret memorandum revealed by the Inquiry in which Major General Robert Ford warned, that to restore law and order, it would be necessary "to shoot selected ringleaders amongst the young hooligans after clear warnings had been issued".

〔21〕 As Lord Saville concluded in the Report on the Inquiries findings,

> *"What happened on Bloody Sunday strengthened the Provisional IRA, increased nationalist resentment and*

hostility towards the Army and exacerbated the violent conflict of the years that followed."

〔22〕 The most recent targeted killings in Yemen, Gaza and Pakistan by drone strikes is something I will return to later in the context of this lecture.

INTERNMENT WITHOUT TRIAL

〔23〕 The unprecedented campaign of violence in Northern Ireland resulted in the Government responding with a series of Measures including the Special Powers Act, which had been previously relied upon at times of crisis in NI. Under the legislation, any man could be interned without trial on 'suspicion of acting in any manner prejudicial to the preservation of peace and maintenance of order'.

〔24〕 Mr. Justice Maurice Gibson, who I return to later, ruled that access to legal representation and right of an internee to be informed of the suspicion against him - were to afforded in every instance – pretty fundamental rights, and the latter still topical today post *Ward v PSNI, AF v Sec of State for the Home Dept., Al Rawi v The Security Service.*

〔25〕 On 22nd January 2009 two days after his inauguration, a much younger looking, President Obama gave a speech at the US State Department in which he promised to close the facility at Guantanamo Bay – the lessons of this however were learned too late. The harshness of the regime during the Bush era did nothing to convey a healthy adherence to the rule of law. Somewhat akin to the controversy surrounding internment, it came all too late and only after a number of innocent people had been incarcerated.

〔26〕 To be falsely accused and hold a feeling of injustice was recently summed up by Lord McAlpine on how it felt to be wrongly implicated in a child sex abuse scandal when he said:

> *"It gets into your bones … it gets into your soul and you just think there's something wrong with the world."*

〔27〕 The abolition of internment was replaced on foot of the recommendations by Lord Diplock in 1972. He concluded,

"That until the current terrorism by the extremist organisations of both factions of Northern Ireland can be eradicated there will be some dangerous terrorists against whom it will not be possible to obtain convictions in any form of criminal trial which we regard as appropriate to a court of law…"

〔28〕 Bear in mind, 1972 saw the worst year of civil unrest in Northern Ireland – 10,628 shooting incidents, 1853 bombs or bombing incidents and 476 people killed. As a direct consequence a number of the controversial measures introduced included, non- jury, judge only courts, to deal with terrorist cases. It was undoubtedly one of the most significant departures from the Common Law.

〔29〕 This "temporary measure" remains in place and in operation forty years later - we still have non-jury 'Diplock' trials to deal with terrorist related offences. An article written in the Modern Law Review by a Professor of Law and Transitional Justice, at QUB, recently criticised lawyers for working this system in an article entitled *'What did Lawyers do during the 'War' ?'*

〔30〕 Well I make two observations about that:

(i) the Bar adapted accordingly in contesting trials before a judge alone, by way of its presentation of cases, encyclopedic and forensic knowledge of the rules of evidence, procedures and precedents to cope accordingly. The late Richard (Dick) Ferguson QC is an exemplar from that era.

(ii) The role of the Bar as a bulwark to injustice remains vital to a true and independent system of justice. Sir Sidney Kentridge QC spoke at the World bar Conference recently of his experiences, working at the Bar under apartheid. He recalled:

> *"now there were critics outside of South Africa & academic critics in particular, who said that we at the Bar in South Africa who appeared in the political cases against the govt., ought not to be doing that and the reason that they gave was that by appearing in these cases we were giving a veneer of respectability to what was actually a distorted, unfair & unjust system...*
>
> *Well none of us I knew took any notice of that. We rather thought that it was the people at the sharp end, the accused in the criminal cases – in the terrorist cases – and so on , who had*

the first choice and oddly enough, no doubt because they were not as politically advanced as their critics, they on the whole preferred the chance of being acquitted rather than convicted. They preferred us to carry on....and carry on we most certainly did."

〔31〕 Sir Sidney - recently 90 years of age–deserves congratulations – is the epitome of what the Bar stands for and a true servant of the rule of law.

Other measures of expediency in NI included confession only convictions and supergrass trials...

THE USE OF CONFESSION EVIDENCE

〔32〕 In the days long before PACE, confessions made by an accused would be admissible evidence in cases involving paramilitary type offences, unless obtained by torture or inhuman or degrading treatment. By November 1977, the then Secretary of State for Northern Ireland, was informed by a number of solicitors, working in this field - including some referred to in the de Silva report, that

"Ill-treatment of suspects by police officers with the object of obtaining confessions, is now common practise."

〔33〕 One recent case of note is that of McCartney and McDermott, convicted on confession evidence of multiple offences of murder and membership of the IRA. Both spent several years in prison. Recently, our Court of Appeal quashed the convictions, declaring it felt a deep 'sense of unease' as to their safety. Raymond McCartney, is now the Vice-Chairman of the Justice Committee and a member of the devolved Stormont government.

One of the most controversial measures that came to the fore in the 1980's was

THE USE OF SUPERGRASS EVIDENCE

〔34〕 Some of the efforts deployed to curb terrorism in Northern Ireland during the Troubles must now be seen for the disasters they were. The use of the supergrass system is one such example. By the late 80s there was a marked decrease in the rates of successful convictions and by the late 80's the frailties of the system were easily exposed under the rigours of an adversarial system.

〔35〕 As the 80s wore on, Northern Ireland witnessed the IRA hunger strikes, the loyalist violence in the wake of the signing of the Anglo-Irish Agreement, and this year is the 25th anniversary of an IRA bomb exploding in Enniskillen at a remembrance day ceremony, not far from the same twin steeples of Fermanagh referred to by Churchill several decades before.

〔36〕 It was against this backdrop that barristers in Northern Ireland went about their daily business objectively, independently and professionally in the many trials, adhering to the cab rank rule, that invariably followed on from these and other similar events.

〔37〕 The year after the Enniskillen bombing I took up my place at law school. Not long after that, Northern Ireland witnessed the murder of prominent Belfast solicitor, Pat Finucane, less than four weeks after Douglas Hogg MP, during a Committee Stage debate on the Prevention of Terrorism (Temporary Provisions) Bill stated,

> *"I have to state as a fact, but with great regret, that there are in Northern Ireland a number of solicitors who are unduly sympathetic to the cause of the IRA."*

〔38〕 Allegations of state collusion in the murder continue and there have been several calls for an independent public inquiry from a number of bodies, including the US House of Representatives and Amnesty International compounded by the report produced by retired Canadian Supreme Court Justice, Peter Corey.

〔39〕 The report issued last week by Desmond de Silva QC, triggering an apology from David Cameron to the Finucane family, makes for chilling reading & I only touch upon his principal findings here –

As a result of his review Sir Desmond found,

i. that the threshold for a finding of collusion had been met;
ii. he was left in significant doubt as to whether Pat Finucane would have been murdered had it not been for the involvement of elements of the state;
iii. he was left in no doubt that agents of the State were involved in carrying out serious violations of human rights up to and including, murder, and in the aftermath of the Mr Finucane's murder there had been a "relentless attempt to defeat the ends of justice."
iv. Although he concluded there was no "over-arching" State

conspiracy, he was unequivocal,

> *"The abiding impression of this period in Northern Ireland must be of an extremely dark and violent time in which a lawyer could so callously and tragically be murdered as a result of discharging his professional legal duties."*

〔40〕 It was against this backdrop that I began my career at the Bar in the early 90's...

〔41〕 The heavily fortified High Court, home of the High Court bench and Bar, had been bombed in the early 80s and had come under rocket attack in 1990's - with the never ending melody of the constant buzz of helicopters overhead.

〔42〕 Health and safety at work took on a whole new meaning....

〔43〕 During these years at the height of the Troubles, the Bar of Northern Ireland had a vital role to play in the administration of justice. Political views and sectarianism played no part in the role of the professionalism of a barrister in Northern Ireland... a robust, independent referral Bar and by extension an impartial and

independent tribunal – to borrow the phraseology of Article 6 of the Convention - must be a sine qua non in any society facing such challenges.

〔44〕 It was during my early years at the Bar that I had been passed a bail application for a high profile republican that I first worked with the solicitor, Rosemary Nelson. Her client was one Colin Duffy, and she had gained notoriety when he previously had his conviction quashed in the Court of Appeal in Northern Ireland for the murder of a part time soldier, when post conviction , it had come to light that the key prosecution witness was later arrested in Scotland for gun running on behalf of loyalist paramilitaries.

〔45〕 Tragically, the same notoriety resulted in the murder of Rosemary a few years later…

〔46〕 Amongst cases in which she was involved was that of Sam Marshall. Marshall and two others, including Colin Duffy, were leaving the police station in Lurgan, Co. Armagh, having signed their bail – the details of attendance were known only to the police, the men and their solicitor. Shortly after leaving the station, within a few hundred yards of the police sangar, two men approached from a nearby

vehicle and fired sixty eight shots, killing Sam Marshall - the two other men escaped. In a recent report from the Historical Enquiries Team, it seems the three men were under surveillance by the Security Service... up to moments before the shooting... the family maintain State collusion.

〔47〕 Some twenty years on, I recently appeared before the Coroner in Belfast - an inquest into this murder has now been scheduled – one of a number to arise by reason of several challenges brought to the European Court of Human Rights grounded upon the positive obligations of the State arising under article 2 of the Convention.

〔48〕 During the 1990's we saw Sinn Fein publicly entering talks with the British Government and Unionist parties. Gerry Adams, who once had charges of IRA membership quashed by Lowry J , who refused to allow 'speculation to take the place of inference' – now led his delegation into Castle Buildings, at Stormont.

〔49〕 In essence, this culminated in the power-sharing government which continues to operate today.

〔50〕 Mo Mowlam, the then Secretary of State aptly described it at

the time, 'the peace we have now is imperfect, but better than none'.

〔51〕 Five days after, a huge bomb ripped through Co. Armagh, and a new breed of dissident republicanism emerged.

〔52〕 Despite this, the Good Friday Agreement was signed on 10th April 1998. The British and Irish Governments resolved their historical differences through the general and mutual acceptance of the principle of consent.

〔53〕 But the killings in Northern Ireland unfortunately did not end there and I shall return to that in due course but before I do, I wish to say something about the independence of our judiciary and the vital role they played during that time.

THE INDEPENDENCE OF THE JUDICIARY

〔54〕 At least 18 Republican attacks were carried out against the judiciary, resulting in the murders of two magistrates, two county court judges and Lord Justice Maurice Gibson who had ruled on the Special Powers Act, I mentioned earlier. One of those judges is the late Billy Doyle, an uncle of Brian Kennedy QC, my pupil master, here

this evening.

〔55〕 One of core principles of the Rule of Law referred to by Raz is the independence of the judiciary which he felt 'must be guaranteed'. The judiciary in Northern Ireland is independent in every sense of the word – by the way, that includes jurisdictionally from the rest of the United Kingdom.

〔56〕 Presently in NI we still have Diplock trials, emergency legislation, and a judiciary and some members of the Bar who require personal protection officers at their side, accompanying them through their working day and beyond.

〔57〕 Our peace remains fragile as demonstrated in 2009 with the murder of two soldiers on the eve of their deployment to Afghanistan and more recently the murder of a prison officer on his way to work.

〔58〕 Arising out of both incidents I have appeared as part of the legal team for the one client in no less than three extended detention hearings under schedule 8 of the Terrorism Act relating to both incidents - debating the law on closed hearings, the power to grant bail, the right to disclosure, and the evidential basis of arrest.

In addition two judicial reviews before the Divisional Court concerning the compatibility sch 8 of the Terrorism Act and the Convention, (known as *Duffy no1 & 2*), a judicial review arising from the refusal by prison authorities to provide an assurance my consultation was not being covertly monitored (that's another story) and a six week non-jury trial for two counts of murder and 5 of attempted murders.

David Bentley BL & Paddy O'Connor QC from Doughty Street Chambers, who I know are here this evening, also appeared in that trial for the co- accused. In January this year, the trial judge Sir Anthony Hart returned 'not guilty' verdicts on each of the counts against the client for whom I had appeared together with Barry Macdonald QC, observing 'suspicion could not take the place of guilt'. I should add, that during that trial, Barry was also involved in a high profile loyalist trial and I was involved in the representation of a police officer. The cab rank rule lives strong.

〔59〕 Just last month, I found myself back in Antrim serious crime suite and after a hearing spanning late Saturday and all of Sunday, her Honour Judge Loughran declined an application by detectives for a further 7 day detention period, ordering the client's release having

considered, inter alia, the principles enunciated in his previous cases of *Duffy no.1 & no. 2* by the NI Divisional Court and also having considered *AF & Ors* before the Lords, and *Al Rawi & Ors* before the Supreme Court.

〔60〕 Demonstrative perhaps, that despite the pressures under which the judiciary in Northern Ireland continue to carry out their tasks and responsibilities in dispensing justice, they do so with an unyielding independence of mind that ensures that justice is done and seen to be done.

〔61〕 It is not just in N. Ireland however that the independence of the judiciary when dealing with terrorist cases has been demonstrated – we need only look back as far as the decision of Mr. Justice Mitting, in the most recent round of litigation between Secretary of State for the Home Department and Othman or Abu Qatada, as he is better known. David Blunkett, once described Abu Qatada as the 'most significant extremist preacher in the United Kingdom' and like Abu Hamsa, has become a hate figure in the popular press.

〔62〕 There was evidence at the first trial (where Abu Qatada was tried in absentia) from lawyers, medical examiners and relatives of the

defendants who actually stood trial, showed visible signs of torture. One of these defendants, Abdul Nasser Al-Hamasher in his confession had stated that Abu Qatada had provided encouragement for the terrorist attacks. This was the principal evidence against Abu Qatada on that trial and Al-Hamasher maintained during his trial that his confession in which that evidence was contained had been procured by torture.

〔63〕 Now, as I understand, in Jordan the State does not have to prove that a statement made to a Public Prosecutor was made voluntarily. On the contrary, a defendant must not only prove that the confession was the result of oppression, he must also show that it was the consequence of illegal coercion to force him to confess to things which he had not done. The State Security Court in Jordan held that the defendant Al-Hamasher had failed to discharge that burden.

〔64〕 Abu Qatada was again tried in his absence in 2000. On this occasion the main evidence against him was again supplied by a co-defendant, this time one Abu Hawsher. During an appeal against his conviction, Abu Hawsher claimed to have been tortured during 50 days of interrogation and had in consequence made a confession to

police. The Court of Cassation which heard his appeal dismissed this claim, finding it irrelevant because the State Security Court had not relied on it but had relied on a subsequent confession to the Public Prosecutor.

〔65〕 The legal, common, moral and political issues that Abu Qatada has provoked in Westminster must be viewed against the backdrop of the strict observance of the rule of law.

〔66〕 From the protracted jurisprudence I touch upon two of particular note in the context of this evening -

(a) At the initial stages of the deportation hearing upon appeal to the Court of Appeal, Buxton LJ, cited the ECtHR judgment of *Jalloh v Germany 44 EHRR 32* which held that incriminating evidence-whether in the form of a confession or otherwise- obtained as a result of acts of violence, brutality or other forms of treatment which can be characterised as torture - should never be relied on as proof of the victim's guilt, irrespective of its probative value.

The court continued that any other conclusion would only serve to legitimise indirectly the sort of morally reprehensible conduct which the

authors of Art.3 of the Convention sought to proscribe or, as it was put in the US Supreme Court's judgment in Rochin:

'to afford brutality the cloak of law'.

(b) At the subsequent proceedings post Lord Philips and the Lords, the Strasbourg court agreed with the observations of Lord Bingham in re A no. 2, - torture evidence is excluded because it is

'unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.'

〔67〕 The Court felt that 'experience has all too often shown that the victim of torture will say anything – true or not – as the shortest method of freeing himself from the torment of torture'. It continued

> *"More fundamentally, no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law.*

Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself."

〔68〕 I recently attended a symposium, aptly entitled 'The Supreme Court comes to Belfast' to hear Lords Kerr, Clarke, Dyson and Wilson, speak on a whole host of issues including that of Abu Qatada. Lord Kerr made the striking observation,

"The Strasbourg court has made it clear that it and national courts should set their face against the admission of evidence produced by torture and that conclusion must resonate strongly with all who subscribe to the notion, that we should not require those who are entitled to look to the state for the protection of their fundamental rights, to accept a lesser standard of justice than we consider is the irreducible minimum of a fair trial".

〔69〕 It was against this backdrop that the decision of the Special Immigration Appeals Commission concluded that it had <u>not</u> been

satisfied, despite whatever assurances had been obtained by the Secretary of State that there would be a fair trial.

〔70〕 The Sun Newspaper's headline read *"Hate preacher Abu Qatada goes free as top judge sparks outrage".*

I must remember to renew my subscription for 2013…

〔71〕 But it didn't stop with the press – some of whom called on the powers to be removed from the judiciary. Next came the politicians …

〔72〕 First we heard from Nick Clegg, the Deputy Prime Minister …

> *"We strongly disagree with the court ruling, we're going to challenge it, we're going to take it to appeal. We're absolutely determined to see this man get on a plane and go back to Jordan."*

〔73〕 Then it was the turn of David Cameron, the Prime Minister exhorting a similar view - 'we're all fed up' or words to that effect … and finally, the recipient of the '2012 two fingers to the Rule of Law award' goes to the Right Honourable Peter Bone M.P. who addressed

the Commons as follows,

"You", (meaning Teresa May I assume)

"You want to deport him, the Shadow Home Secretary wants to deport him, the Supreme Court says he can be deported, the British people say he should deported. Just deport him and worry about the consequences after".

Perhaps a word about …

THE JUDICIARY AND THE GOVERNMENT

〔74〕 In the 1880s WS Gilbert suggested that when in the House of Commons, MPs had *"to leave their brains outside and vote just as their leaders tell them to"*. Indeed, across the Irish Sea things were no different at times - the story is told of former Taoiseach Charles J Haughey, dining with the members of cabinet, when asked by the waiter, "and the vegetables, sir…?"

"They'll have what I'm having", came his reply.

〔75〕 The relationship between the judiciary and the Government was a theme touched upon by Lord Judge at the 16th Commonwealth conference in Hong Kong, when the issue then was one of Control Orders under the Prevention of Terrorism Act. Some may recall a former Home Secretary publicly criticise the "total refusal" of the Law Lords to discuss the issues of principle involved in these matters.

〔76〕 The former Home Secretary, felt it was time "for the senior judiciary to engage in a serious and considered debate about how best legally to confront terrorism in modern circumstances".

〔77〕 As the Irish comedian Jimmy Cricket would say, 'but wait there's more…' I defer to Lord Judge in the recouting,

'Accordingly he suggested that some "proper discussion" would be very helpful between the Law Lords and the Home Secretary, "in effect for the Law Lords to advise him about what steps might or might not be struck down".

〔78〕 As Lord Judge observed

"Such discussions would have represented one of those tiny first

steps of which we should beware. When this issue was ventilated before the House of Lords Select Committee…the Committee considered it essential that the members of the court "should not even be perceived to have pre-judged an issue as a result of communications with the executive".

A blind man on a galloping horse could immediately see the potential for damage to public confidence in the independence of the judiciary – my thoughts, by the way, not those of Lord Judge!

〔79〕 McCloskey J speaking recently at the Bar Council conference in Belfast on 'Challenges to the Rule of Law in the 21st Century'- asked rhetorically,

> *"What does the rule of law require of all of us in the 21st century? The basic dogma is no different than before. The primary meaning of the rule of law is that everything must be done according to law…*
>
> *Thus every Government Minister who, or Government agency which, purports to act in any given field must justify the action in question as authorised by law…*

Acts of governmental power routinely affect the legal rights, duties and liberties of the individual. All such acts must be shown to have a strict legal pedigree.

The courts are the arbiters of whether the necessary legal pedigree exists".

〔80〕 With the Justice and Security Bill, back today before the Commons , having suffered a defeat last month in the Lords on the closed hearing material provisions - the Government may find its legal pedigree being tested in due course before the Courts, if it continues in it's current form.

〔81〕The Sunday Times in a very telling editorial a few weeks back made the observation;

'If this Bill were to become an Act in its current form, those feeling that they had suffered a grave injustice at the hands of the Government would feel they had suffered another at the hands of the Courts'.

〔82〕 Lord Bingham's seminal treatise, springs to mind, when he outlined his core principle of the rule of law,

> *"That all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect in the future and publicly administered in the courts."*

〔83〕 The rule of law and the independence, impartiality and transparency of the judiciary and judicial thinking are inseparable elements of a modern constitutional democracy. Plainly, the rule of law cannot function properly and effectively unless adjudication upon the legality of governmental acts is carried out by judges who are independent of the executive.

〔84〕 Raz, when speaking of judicial independence, the method of appointing Judges, the security of tenure, the way of fixing salaries and other conditions of service – is all designed to guarantee that the judiciary will be free from extraneous pressures and independent all of authorities save that of the law. They are, he concludes, essential for the preservation of the rule of law.

〔85〕 Judicial independence, is an internationally recognised value of longstanding. See, for example, the Resolutions of the General Assembly of the United Nations. In short, 'the independence of the judiciary derives from, and is an integral feature of, two seminal principles or doctrines: the first is the rule of law and the second is the separation of powers'.

〔86〕 Looking beyond these shores...

In the last number of weeks a presidential decree granting President Morsi, Egypt's Islamist leader, sweeping new powers was condemned by the country's top Judges as an unprecedented attack on the independence of the judiciary. The constitutional amendment issued by Morsi recently, granted him absolute power and immunity from judicial oversight until a new constitution is in place.

The decree insisted that the President's laws and decisions could not be challenged and many feel that the decree was a deliberate attempt to undermine Egypt's Judges, who have been at odds with the presidency since they dissolved the Muslim- brotherhood dominated parliament last June.

Just today the prosecutor general has submitted his resignation after 100's magistrates organised a sit in outside his office. I wonder has Michael Turner QC & the Criminal Bar been speaking to these guys??

〔87〕 In many ways the challenges facing our judiciary, the barracking from certain sections of the press and the, (at times) strained relationship with Parliament – has prompted the JAC to revise the job spec as follows…"Wanted Judge with integrity, independence and skin as thick as rhino hide".

〔88〕 This was taken up by Sir Sidney Kentridge QC:

> *"… one aspect of the rule of law, on which we would certainly all agree, is the independence of the judiciary. It is secured, in part, by laws which give the judges security of tenure and in part by ensuring as far as possible that they are persons of integrity, appointed on merit rather than by reason of political connection …*
>
> *There is a particular threat to judicial independence which should concern us. That is the growing tendency for politicians and the press to attack in intemperate and even vituperative terms judges who have given decisions*

with which they disagree. Newspapers all too often respond to an unpopular decision with personal attacks on the judge concerned. Judges must accept strong criticism, even unfounded criticism …

One of the attributes we expect of an independent judge is the moral courage to make decisions which will be unpopular with politicians or the media or the public …"

〔89〕 Nevertheless the onslaught of criticism that does arise in contentious cases, must at times, be difficult to ignore, especially when headlines in the Daily Telegraph poll read, 'Should the Government Ignore the ruling and send Abu Qatada to Jordan' 93% of readers voted "Yes".

〔90〕 In many ways the same thick skin applies to posts judicial, foreign as well as domestic. I speak of course of…

THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS

〔91〕 In the early days of the Troubles the Irish Government complained that a number of individuals persons had been subjected

to torture, inhuman and degrading treatment and punishment within the meaning of Article 3 ECHR. In particular 5 interrogation techniques were complained of, including covering detainees' heads with hoods, sleep deprivation and loud noise.

The European Commission concluded that the 5 techniques amounted to 'torture and inhuman treatment' contrary to Article 3. The matter was thereafter referred to the ECtHR. The Court, in contrast to the Commission, held that the techniques did not amount to torture. However the Court still found that the techniques did amount to inhuman and degrading treatment in (see *Ireland v United Kingdom* 82 EHRR 25).

〔92〕 According to Professor Brice Dickson, of Queen's University Belfast, he states damage was done to the credibility of the Convention by this finding, falling short, by the Court on the question of what constituted 'torture'.

〔93〕 According to Dickson, unless the Court is bolder and less deferential than it has been to date regarding the protection of human rights during times of severe societal unrest, it will lose credibility as the foremost standard bearer for human rights in the world today.

〔94〕 With respect I don't agree & feel one need only look to the jurisprudence in recent times in particular relating to Northern Ireland for example the Article 2, Article 5 & 6 cases & in recent weeks the *MM* case on article 8, successfully taken by the Bar pro bono committee - as well as the wealth of jurisprudence throughout the UK and beyond.

〔95〕 To cite Lord Kerr when speaking of the role of the Court in the domestic context:

> *"…we need to get a better balance, a more mature perspective on our relationship with ECtHR and that we, as lawyers and judges, have our part to play in achieving that sense of steadiness. It is, I think, necessary to remind ourselves that the relationship between national courts, particularly UK courts and the Strasbourg court is in its historical infancy*."

He later opines in phraseology, no doubt acquired during his time at the Bar in Belfast,

> *" If ever an institution deserves to be ′cut some slack′, it is surely ECtHR. That is not to say that we should view its de-*

cisions with an uncritical eye but we need to be clear-sighted about what we can reasonably expect from such an institution."

〔96〕 My own unswerving view is that the Strasbourg court has contributed massively to the raising of human rights standards in our country.

Turning to,

GLOBAL TERRORISM AND THE RULE OF LAW

〔97〕 The threat from global terrorism remains prevalent - to adopt the US phraseology 'enemies foreign and domestic' shall continue as long as there remains a US & UK presence outside of its own borders. The risks remain high and the methodology deployed in curbing the terrorist threat within the confines of the legal and moral maze are not always easy to reconcile.

〔98〕 President Elect Barrack Obama, prior to taking up office, received a detailed briefing from Mike McConnell, Director of National Intelligence.

It was only 2 days after his historical election in 2008 and he came away literally with the weight of the world on his shoulders – he made the observation -

> *"I'm inheriting a world that could blow up any minute in half a dozen ways, and I will have some powerful but limited and perhaps even dubious tools to keep it from happening."*

〔99〕 The depth and fortitude of the global problem was disconcertingly reflected the following year by Khalid Sheikh Mohammed, the mastermind of 9/11.

> *"Your end is very near and your fall will be just as the fall of the towers on the blessed 9/11 day".*

〔100〕 But the 'dubious tools' referred to by Obama, in many instances inherited from his predecessor, developed in the War on Terror' which has seen an increase in ;

〔101〕 the use of covert action including drone strikes - initially authorised by President George Bush to target the Al Qaeda leadership in Pakistan. Fearing tip offs , Bush decided not to give prior

notice to attacks upon individuals in another Sovereign State, his attitude typified when he said:

> *"OK, we're going to stop playing the game. These sons of bitches are killing Americans. I've had enough."*

〔102〕 Perhaps no-one brought to his attention the comments of Supreme Court Justice Sandra Day O'Connor

> *"A state of war is not a blank cheque for the President."*

〔103〕 Guantanamo Bay, was recently described by Lord Steyn on delivering the Clement Atlee memorial lecture , as 'a stain on American Justice '.

〔104〕 The Bush Administration's top secret memoranda authorising the CIA to carry out interrogation techniques on selected terrorist suspects show that abuse of those in detention was institutionalised. Their controversial release in 2010 was ordered by President Obama who wished to herald a new beginning by closing Guantanamo within a year of coming into office and bringing out into the open what the

CIA had been authorised to do in America's name… yet drone strikes do continue & Guantanamo still remains open for business.

〔105〕 It is the view of at least some commentators, that the experience of being locked up in Guantanamo for years on end has only hardened the ideology of Al Qaeda. Many of the remaining detainees are regarded as the hard-core that no-one wants as well as high value detainees. Much like IRA and loyalist prisoners in the Maze, the detainees have a command structure and are organised on military lines, as, like the IRA, they see themselves as carrying on the fight in prison.

〔106〕 The shocking images of Abu Ghraib prison in Iraq shook the world. Donald Rumsfeld in his memoirs says he didn't know of the humiliations unfolding at the prison. The revelations of torture and abuse he said "left me feeling punched in the gut".

〔107〕 According to Professor Colin Campbell, elements in the US security apparatus have employed interrogation techniques in Iraq and in the wider war it bears striking resemblance to methods employed early on in Northern Ireland.

〔108〕 The investigative journalist Peter Taylor, writes:

'governments in the firing line justify their responses in the name of defending democracy and protecting the freedoms that Al Qaeda seeks to destroy, but in the process they handed the enemy incalculable propaganda opportunities'. Taylor observed,

> *"I watched these abuses in the decades since 9/11 as I had over 3 decades in Northern Ireland. Such are the dilemmas that Governments inevitably face in countering terrorism, as the British found in fighting in the IRA". He continued, "I reported on Bloody Sunday interment without trial and the abuse of detainees – all measures designed to crush the IRA – in fact had the opposite effect and only succeeded in creating more support for it."*

〔109〕 The reality of terrorist atrocities and the ruthlessness of their perpetrators are sometimes lost in the propaganda war that is the offspring of violent conflict", Taylor forewarns.

Certainly the headlines in the weeks after 9/11 speak volumes... to quote one or two:

""British to brief US on experience with IRA", (Daily Telegraph, 8th November 2001)

and

"Britain shares its lessons of terrorism", (Washington Times, 14th February 2002.)""

There are many lessons to be learned in the context of the International Rule of Law…

〔110〕 The role of the UK Government, both foreign and domestic, in dealing with the legal problems that arise in the course of fighting terrorism ,whether on the streets of Kabul, Belfast or Finsbury Park must be ever vigilant to the simple fact that as Raz points out, the deliberate disregard for the rule of law violates human dignity.

〔111〕 To look to a living, breathing example of this in our context we need look no further than the headlines in the Times last Friday;

'Britain to pay 2.2 million to family in Libya rendition'.

〔112〕 The Government has agreed to pay 2.2 million to the family of

a 'Libyan dissident' who claimed that Jack Straw and MI6 played a part in their kidnap and forced return to Tripoli in 2004. Jack Straw is quoted as saying,

" *At all times I was scrupulous in carrying out my duties in accordance with the law."*

〔113〕 The 'Libyan dissident', Sami al-Saadi, has been quoted as saying:

> *"I started this process believing that a British trial would get to the truth. But today with the Government trying to push through secret courts, I feel that to proceed is not best for my family. I went through a secret trial once before in Gaddafi's Libya. In many ways , it was as bad as the torture. It is not an experience I care to repeat."*

〔114〕 The 8th principle defining the rule of law, according to Raz, being the crime preventing agencies should not be allowed to pervert the law.

Taken in conjunction with the independence of the judiciary, it is

designed to ensure that the legal machinery of enforcing the law, should not deprive it of its ability of supervising conformity to the rule of law and also provide effective remedies in cases of deviation from it.

Control orders, deportation orders, house arrests, extraditions, interrogation techniques, closed hearings and the increase in the prevalence of anti-terror legislation at every turn, all merit discussion in the context of the international rule of law…

〔115〕 It was US Supreme Court Justice Marshall who famously said in *Skinner –v- Railway Labour Executives Association* 489 US 602 1989:

> *"History teaches us that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure… when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it."*

〔116〕 The question for any State to address, is that posed by Lord Neuberger …

"Q. how best to secure freedom through security, without security undermining freedom, but also without freedom undermining security?"

In an age of insecurity, in time of war or when the State faces a threat of domestic or international terror, this question as we know becomes all the more pressing.

〔117〕 The balance that has to be struck in maintaining the credibility and integrity of the Executive whilst ensuring the protection of all its citizens, is a high wire act. The war on terror may have many pluses however as the modern day face of terrorism is not so easy to identify or define, the delineation between black and white, friend or foe can be obscured in the mist of atrocity, tragedy and the need for retribution.

〔118〕 It is the judiciary and lawyers that play a vital role in all of this. Perhaps the words of John F Cash have a particular meaning for us all in the legal profession & justice system…

'I keep my eyes wide open all the time…because your mine, I

walk the line.'

〔119〕 Strict observance of the separation of powers is an important guarantee in any democratic society to ensure the government also 'walk the line'. In a seminal Harvard Law Review article published after the attacks of September 11, 2001, President of Israeli Supreme Court, Barak J. defended a major role for judges in policing executive measures during times of crisis:

"Since its founding Israel has faced a security threat. As a Justice of the Israeli Supreme Court, how should I view my role in protecting human rights given this situation? I must take human rights seriously during times of both peace and conflict. I must not make do with the mistaken belief that, at the end of the conflict, I can turn back the clock".

Barak J. drew explicitly upon Lord Atkin's celebrated wartime dissent in *Liversidge v Anderson* 〔1942〕 A.C. 206 at 245 in which he championed the role of the judges in standing 'between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.'

Well what of the future… in terms of terrorism on a global perspective ?

〔120〕 In the last week, it was reported that growing numbers of young Saudis are joining the the fight against President Assad in Syria. Hugh Tomlinson, the Times reporter, observed former members of al-Qaeda, also leaving Saudi Arabia to join the fray. After a decade of struggling to bring the terrorist group to heel, there are fears in Riyadh that the mistakes of the past are being repeated, as the kingdom faces a fresh backlash from the battle-hardened jihadists when the fight for Damascus is won.'

〔121〕 Tomlinson observes, 'Al-Qaeda in Saudi Arabia is quietly back in circulation' or to put it in more colloquial terms closer to home …

"They haven't gone away you know…"

We all hope that the lessons from the past help carve out rather than cloud our future in Northern Ireland & so - perhaps to end on a positive note ;

〔122〕 Those dreary steeples came back into view earlier this year

when the Queen visited Enniskillen - Northern Ireland and the peace process has been steeped in symbolism for as along as the process has existed – the most recent scene recently played out - as she crossed the street from her service of thanksgiving at St. Macartans Protestant church to enter St. Michaels Roman catholic church – a first for a British Monarch - the crossing of the Rubicon from the past to the future.

The second came the next day with the handshake with the Queen and Martin McGuinness, a former IRA Commander.

〔123〕 Internment without trial, a supergrass system and the murders of lawyers are hopefully consigned to the past – in no short measure, due to the retention and maintenance of a truly independent referral Bar - an essential aspect of ensuring the rule of law is maintained. We have managed to do so by reason of our independence, our strict adherence to the cab rank rule and a collegiate library system that has served us well.

〔124〕 In no short measure the same can also be said of the judiciary, many of whom hail from the Bar. I feel we should have nothing but admiration for their unstinting dedication, commitment and

professionalism, and above all, true independence that has ensured the embodiment of our system of justice.

Clearly in no short supply this side of the Irish sea as well…

At a time when the Bar has been under the cosh of swingeing cuts in the areas of publicly funded work, only ensures those who have represented their clients without fear or favour, are at risk of leaving the profession. By extension, the diversity of the pool of talent open to future generations of the judiciary shall be lost. The maintenance of the rule of law, I fear may suffer as a consequence in future years – that is perhaps, another talk for another day.

〔125〕 The central lesson if ever there is one when dealing with global terrorism, an international problem from a Northern Irish perspective, is this…

〔126〕 A democracy must defend itself from terrorism whilst striking the delicate balance between liberty and security – the rule of law denotes that fine line, that enunciates and underpins the necessity to uphold the principles central to our system of justice, which must remain true at all times, no matter how dark the day or even the hour.

〔127〕 The transition from conflict to conciliation, the world over, is made that much easier, in a system where the Rule of Law has been respected. The rule of law is a fundamental cornerstone in any democratic society and any turning of a blind eye, any breaking of the rules or digression from the core values, comes at a cost that can take generations to overcome…

Mark Mulholland QC

Bar Library

Belfast

8th December 2012