"Civil Rights in an Age of Terrorism"
Address to the Brisbane Junior Chamber of Commerce
Stamford Plaza Hotel
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The Hon Paul de Jersey AC
Chief Justice of Queensland

> "There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live -- did live, from habit that became instinct -- in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized."

You may have recognised that as coming from George Orwell's "1984".[1]

Orwell penned those lines in 1949, in an edgy post-World War II society overhung by the spectre of the Cold War. Today, following the devastating terrorist attacks on the USS Cole, the Bali nightclubs, the Muscovite theatre, the 4 separate attacks on United States landmarks on September 11, and, only a few days ago, the attack on the Israeli-run hotel in Kenya, we likewise face an uneasy and suspicious society.

Gone are the days of the methodical pitched battles of Alexander the Great, where the time, place and opposition were pre-organised. Untenable is a former assumption, that military bases and operations are the most likely targets. The grim reality of the 21st century is that even civilians fall prey to this faceless, ruthless and borderless menace. Terrorism has plagued the world since the

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[1] G Orwell, *1984*, Penguin Books, London, 2000, pp 4-5

dawn of time. Remember Herod's massacre of the innocents. It is the method which has changed.

To counter this species of assault on democracy and freedom, governments around the world have begun implementing stricter security safeguards at borders, and within their territories. There is consequential curtailment or erosion of some fundamental rights: freedom of association, the right to free speech,[2] the right not to have surveillance devices planted around one's home or workplace.

That erosion of rights raises questions. Are such "rights" immutable? Does their enjoyment depend on the discharge of correlative responsibilities? Who determines the content of those responsibilities? If a government, unsurprisingly, believes its citizens are obliged to conduct themselves peaceably, may it, in derogation of a right of free association, ban associations expected to foment insurrection and disorder?

Of course, and that is in no way inconsistent with the rule of law. Those who quarrel philosophically with the current approaches of governments may overlook that the law, which rules, is largely as decreed by parliaments. But naturally, most of the critics fasten on whether in particular respects governments have gone, or are going, too far.

It must at once be acknowledged that their actions apparently command enormous public support; and also that if, on the contrary, they were felt to have got it wrong, there is the residual remedy of the ballot box.

[2] See, for example, R Bird and E Brandt, "Academic Freedom and 9/11: How the war on Terrorism threatens free speech on campus", 7 *Communication Law and Policy*, 431

To take from Jane Austen, it is a truth universally acknowledged that everyone has the right to certain fundamental freedoms - freedom from discrimination and harassment, freedom of speech, worship, association and a right to privacy. However, as noted, for example, by the House of Lords, and it is trite, the "exercise of freedoms carries with it duties and responsibilities".[3] Who ensures these freedoms and duties are kept in check? Courts may have a role, as with the High Court in determining the constitutionality of legislation, and other courts in reviewing administrative decisions. The primary responsibility, however, rests with the people's elected representatives. So far as courts may legitimately play a part, they may have to seek to achieve what has been termed elsewhere a "fair balance between the demand of the general interest of the community and the requirements of the protection of the individual's fundamental rights".[4]

Such a judicial balancing act could be performed reliably only by a truly independent judiciary. It is an independent judiciary which may be counted on to have recourse to the guiding principle of our system of justice: the rule of law. Maintaining the rule of law ensures a just legal system. The rule of law is premised on public confidence in the laws themselves, and in those who administer them. We are fortunate in this country to have a truly independent judiciary – by regrettable contrast with some neighbours.

We lawyers speak of the rule of law as the guarantor of civil society, what has been described as "the first engine of healthy social growth – the idea that no man can be above the law"[5] . Sir Arthur Watts has said that the rule of law

> "involves the existence of a comprehensive system of law, certainty as to what the rules are, predictability as to the legal consequences of

[3] D Pannick QC "What the world needs is a modern Moses", *The Times*, 12.11.02
[4] Ibid.

> conduct, equality before the law. The benefits of a state of affairs in which those elements are present are self-evident and exert a powerful positive influence. The rule of law represents a culture of order. In international affairs that culture has not yet been firmly established; nor, yet, has the international rule of law…"[6]

There are too many examples of modern collapses of the rule of law, most recently in Fiji, the Solomon Islands and Zimbabwe. The world struggles to bring, to international justice, leaders, including terrorist or fundamentalist religious leaders, who have committed, against "humanity", crimes of extraordinary gravity. Geoffrey Robertson tells us 160 million people died last century through war, genocide and torture[7]. The figure may yet rise this century.

We are told instances of so-called "hate crimes", crimes committed for reasons of ethnic, political, gender, religious or racial hatred, have since September 11 increased in the United States of America, particularly against people of Middle Eastern ethnicity or Islamic faith. Even before September 11, Middle Eastern immigrants to America had been exposed to unique immigration procedures as presumed "terrorists"[8]. But hate crime involving such people was rare. It is reported that following the attack, crimes in the United States involving a religious bias increased 1,600 percent: a jump of 28 in 2000 up to 481 in 2001.[9] Crimes directed against people because of their ethnicity (not including Hispanic or black

[5] R Lacy and D Danziger: *The Year 1000*, Little Brown & Co, London, 1999, page 198.
[6] Sir Arthur Watts, "The Importance of International Law" in M Byers ed., *The Role of Law in International Politics*, 2000, 5 at 7.
[7] *Crimes against Humanity*, 2000, Penguin Books Australia, page 454
[8] K Johnson "The end of "Civil Rights" as we know it?: Immigration and civil rights in the new millennium" 49 *UCLALR* 1481 at1488.
[9] FBI: Hate Crimes Report cited in FBI: Hate crimes targeting Muslims, Middle Easterners surged in 2001", CNN.com/law <http:/www.cnn.com/2002/LAW/11/25/hate.crimes.ap/index.html> accessed 21.11.02.

people) increased from 254 in 2000 to 1,501 in 2001. Many crimes do involve hate or anger, but "hate crime" is unique for its capacity to impair the self-esteem of parts of communities, inhibit integration and provoke discord. Such crimes, inciting suspicion and fear, gnaw at the threads which bind culturally diverse societies. Terrorist crime falls squarely into this "special" category, and accordingly, warrants special response.

The direct response of many Western governments to these heinous molestations has been to increase local security. Now it has been said that "along with life and truth, civil liberties are often the first casualties of war."[10] Consistently with what I said earlier, in emergent circumstances, the content of the "right" , and the responsibility which bears upon it, may change. It is distractingly dramatic to speak of civil liberties as a "casualty": what occurs is modification of the liberty – the people have the ultimate say whether that is justified, or whether the curtailment was an unwarranted, knee-jerk reaction to a problem of the moment.

It would be dangerously naïve to downplay the sinister shroud which presently burdens the people of this planet. Most of us will be affected practically in our daily lives in some way or other. Inevitably our "rights" also will be affected: whether they are to be regarded as lost, or on the other hand modified, is probably an unnecessary piece of semantics. There has to be some modification at least. The hope is governments will go far enough, though not too far.

During World War II, Britain incarcerated various foreign nationals, workers were prohibited from striking and news programming was controlled by the State.[11] In

[10] N De Marco "Can human rights survive the "war on terrorism"?" *The Lawyer* p.1
[11] Ibid.

the USA, following the bombing of Pearl Harbour, citizens of Japanese heritage were rounded up and herded into prisoner of war camps. Again, 50 years later in the last war against Iraq, Britain deported Iraqis on grounds some have questioned.[12]

Heightened security inevitably leads to incremental curtailment of freedom. The measures are, however, becoming increasingly stringent. Since September 11, governments have, with expedition, brought in substantial measures to aid investigating suspected terrorists and their organisations.[13]

The *USA Patriot Act* 2001 is a good example, augmenting surveillance and the collection of intelligence about alleged terrorist organisations.

I offer some examples of its reach. While Americans are afforded the right, under the Fourth Amendment, to be free from unreasonable searches and seizures by government agents, foreign intelligence searches have been regarded as a legitimate exception: foreign intelligence gathering is considered necessary because, obviously enough, it helps the executive branch to protect national security.[14] The US Supreme Court has laid down a test which must be satisfied before a warrant authorizing a search can issue. The court must be satisfied an "objectively reasonable police officer" would view the surrounding events as giving "probable cause" for the issue of a warrant. The *USA Patriot Act* removes, in the terrorist situation, the need to show "probable cause".

[12] Ibid.
[13] See, for example J Evans "Hijacking Civil Liberties: The USA Patriot Act of 2001" 33 *Loyola University of Chicago School of Law* 933.
[14] Ibid at 938.

The Act authorises the interception of communications to gain evidence about chemical weapons, terrorism offences and computer fraud. Law enforcement agencies may now disclose to, say, the CIA, information relevant to foreign intelligence which emerges from a domestic criminal investigation. No precedent court order is required. The dissemination of such information is intrinsically risky. The FBI recently revealed it had "lost control" of a specially created list of persons wanted for questioning after the September 11 attacks. The list had been distributed to law enforcement agencies and some businesses, including car rental companies. The FBI admitted some people were using the list to make background checks on potential employees.[15]

The powers of the Director of the CIA have been increased, allowing him intimate involvement in domestic security surveillance, and decreasing the role of the courts in overseeing searches and seizures.[16]

The Act limits judicial supervision of telephone and Internet surveillance and enables voice mail messages to be seized with a warrant. Judges are now able to issue a warrant in blank as it were – not naming the place or person to be searched, leaving the discretion to "fill in the blanks" to the law enforcement agency.[17] Roving wiretaps are permitted, subject to the obtaining of a warrant, provided a "significant purpose" of the surveillance is to gather intelligence information. Previously, the court had to be satisfied that was the "sole or main purpose". The FBI may also now obtain permits from the apparently less-transparent Foreign Intelligence Surveillance Court.

[15] K Arena, US watch list has "taken on life of its own", FBI says. CNN.com/law <http:/www.cnn.com/2002/LAW/11/19/fbi.watch.list/index.html> accessed 20.11.2002
[16] *USA Patriot Act* ss 206, 216 and 218.
[17] 18 *USC* s 3123 (a)(1)(1994.

Unsurprisingly, some have criticized these sorts of initiatives. It has been argued the wiretapping and surveillance provisions inappropriately diminish the role of the courts in ensuring wiretapping is conducted lawfully, and raise the spectre of undue invasions of personal privacy. The removal of the requirement to show "probable cause" for a warrant is also criticized: no longer is an objective standard, applied by an independent arbiter, required to keep the agency in check.

Other initiatives are far-reaching. The grand jury procedure under the Fifth Amendment involves a closed hearing which may lead to indictment. This Act now authorises the dissemination of information disclosed to the grand jury to law enforcement and intelligence agencies. Non-citizens accused of terrorism have lost their right to indictment by a grand jury.[18] Privileged communications between lawyer and client may now be monitored by intelligence agencies. Suspected terrorists are to be tried by military tribunals without a jury. The Sixth Amendment right to counsel[19], legal professional privilege and trial by jury[20] are removed in these cases.

Britain, likewise, has enacted restrictive legislation. In 2001, its Parliament enacted the *Anti-Terrorism, Crime and Security Act* 2001, described by one commentator as "surely the most draconian legislation Parliament has passed in

[18] J Whitehead and S Aden "Forfeiting 'Enduring Freedom' for 'Homeland Security': A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives', 51 *American University Law Review* 1081 at 1113-1115.
[19] See for example, *Coalition of Clergy v George Walker Bush and ors* 9th US Circuit Court of Appeals in San Francisco, 02-55367, 18 November 2002: http://www.ca9.uscourts.gov/ca9/newopinions.nsf/25E4F7A3153B514E88256C72007864B3/$file/0255367.pdf?openelement (accessed 29 Nov 02). The application was refused on the ground that the petitioners/appellants had no legal right to sue on behalf of "unwitting strangers" (they lacked "next or best friend standing" and were not close enough to the prisoners to seek their release (third-party standing): at p.19 of the judgment.
[20] Whitehead and Aden op cit n. 18 at 1116-1126.

peacetime in over a century".[21] Its provisions include power, vested in the Secretary of State, to "certify" a suspected international terrorist if he (a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects the person is a terrorist. A "suspected terrorist" may appeal against certification to the Special Immigration Appeals Commission. The Commission must cancel the certificate if it considers there are no reasonable grounds for the relevant belief or suspicion, or if, for some other reason, it should not have been issued.[22] The Act allows removal from the United Kingdom if in the public interest.[23] No court may examine the Secretary of State's decision or action in connection with certification,[24] though an appeal on a point of law under section 7 of the *Special Immigration Appeals Commission Act* is retained.

Australia also has enacted legislation in response to the terrorist attacks and the October 1999 United Nations Security Council resolution on international terrorism. That resolution calls on member States to take appropriate steps to:

> "prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism; deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition; [and] take appropriate measures, in conformity with the relevant provisions of national and international law, granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts…"[25]

[21] Tompkins, *Legislating against terror* [2002] PL 205
[22] Section 25.
[23] Section 33.
[24] Section 33(8)
[25] SC resolution 1269, 19 October 1999.

Following September 11, UN Security Council Resolution 1373 was passed, resonant with the themes of the earlier resolution, but imposing a binding obligation on "all States" to achieve those ends.[26]

Australia's legislative response has been considerable, with no fewer than six major pieces of legislation this year:

- *The Security Legislation Amendment (Terrorism Act) (No 2)* 2002
- *The Suppression of the Financing of Terrorism Act* 2002
- *The Criminal Code Amendment (Suppression of Terrorist Bombings) Act* 2002
- *The Border Security Legislation Amendment Act* 2002
- *The Criminal Code Amendment (Anti-Hoax and Other Measures) Act* 2002
- *The Telecommunications Interception Legislation Amendment Act* 2002.[27]

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, which will give ASIO powers of arrest and detention like those of police officers, is yet to be enacted. It is the most radical of our legislative initiatives post-September 11 and Bali. Some critics claim the bill will metamorphose ASIO into a "secret police organisation".[28] ASIO, with the Attorney-General's consent, would be entitled to seek a warrant in relation to a person suspected of a terrorist act. The subject of the warrant may then be interrogated in private, and required to answer questions. The subject will, save

[26] See G Goodwin-Gill "Terrorism and the Rule of Law": paper prepared for the workshop on "Terror and the Liberal Conscience" held at All Souls College, Oxford, England, 28-29 June 2002 p.5
[27] Dr J Renwick "The War Against Terrorism, National Security and the Constitution", paper presented to the Centre for Comparative Constitutional Studies at Melbourne University Law School, Melbourne, Australia, 19 November 2002 pp 5-6.
[28] "ASIO bill is still a threat to freedoms", Sydney Morning Herald, 16 September 2002.

for exceptional circumstances, be given access to a lawyer. Some of the more thorough-going provisions of the original bill have been removed. They allowed:

- the person issuing the warrant to deny the subject access to a lawyer;
- children from the age of 12 years to be detained;
- the warrant to be extended for considerable time periods; and
- the responses given by a subject to be available for use in evidence against the subject.[29]

I have expressed doubt the courts will become much involved with such legislation. Of course if the occasion arises, the courts will uphold the rule of law.

It is interesting, historically, to recall Lord Atkin's celebrated dissent in *Liversidge v Anderson*[30] in 1942, a case concerning the lawfulness of the Secretary of State's detention of Mr Robert Liversidge, in Brixton Prison, as "a person of hostile associations". His Lordship said :

> "In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

On the other hand is Lord Denning's observation three decades later in a case concerning the deportation of an investigative journalist who had breached

[29] Renwick op cit n 27 at pp 11-12.
[30] [1942] AC 206 at 244.

national security: when the "state itself is endangered, our cherished freedoms may have to take second place...Time after time Parliament has so enacted and the courts have loyally followed.'[31]

Courts post September 11 have, in the UK, USA and Canada respected the will of Parliament, as no doubt would the courts of this country.[32] Pondering the possible position here, one recalls the Communist Party case analysis of the defence power. What the defence power under s 51(vi) of the Constitution enables "the Parliament to do at any given time depends upon what the exigencies of the time may be considered to call for or warrant"[33]. The extent of the power increases with war and decreases in times of peace. This case in 1951 dealt with the banning of the Communist Party during the height of the Cold War because considered a threat. Dixon J said

> "I think that…it is futile to deny that when the country is heavily engaged in an armed conflict with a powerful and dangerous enemy the defence power will sustain a law conferring upon a minister power to order the detention of persons whom he believes to be disaffected or of hostile associations and whom he believes that it is necessary to detain with a view to preventing their acting in any manner prejudicial to the public safety and the defence of the Commonwealth."[34]

As we know, the Commonwealth failed however in banning the Party, as its legislation was considered outside the scope of the defence power.

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[31] *ex parte Hosenball* [1977] 1 WLR 766 at 778.
[32] see *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, *Suresh v Canada (Minister of Citizenship and Immigration*) (2002) SCC1 and *In re Sealed Case* No 02-001 <http://www.cadc.uscourts.gov/common/newsroom/02-001.pdf> accessed 19.11.02.
[33] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 195.
[34] Ibid.

Recent ugly events have spawned problems for which the world was unprepared. It is hardly surprising some people from comfortable, peace loving democracies replete with freedom will criticize these governmental responses as too radical. But how to counter an enemy who will not even show his face? As I have said, inevitably our rights must be affected. The extent will be determined, as it should be, by the parliament; with court involvement, as it should be, limited by legislation. That is the rule of law.

As recognised by third paragraph of the preamble to the 1948 *Universal Declaration of Human Rights*: "It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

The noted English commentator David Pannick QC points out the system was simpler in biblical times – as per Exodus Ch 18 verse 26, "And they judged the people at all times; hard cases they brought to Moses, but any small matter they decided themselves". We lack Moses. But I am confident we will nevertheless not fall prey to the slogans of the Party in Orwell's *1984* "War is Peace. Freedom is Slavery. Ignorance is Truth." My own view is that our legislatures are acting responsibly, and that if they must be involved, our courts will simply do what is committed to them – render justice according to law.

It is the rule of law which ultimately guarantees our freedom, a freedom which some seem inexplicably so intent on destroying.