'LANGUAGE OF FEAR IS DIFFICULT TO BEAT'

Professor **Conor Gearty** is the Director of the Centre for the Study of Human Rights at the London School of Economics and is a founder member of Matrix Chambers where he continues to practice. Professor Gearty has published widely on human rights law and terrorism and in this interview with **Cate Briddick** he discusses the place of the Human Rights Act in the British constitution, the Government's legal response to the war on terror and the need to recast 'national security' as 'human security'

After the 9/11 attacks in America and the 7th July attacks in London the Government argued that British anti-terrorist legislation needs to be updated to enable it to respond to the "new" threat that the UK faces. Is the threat posed by terrorism motivated by Islamic extremism so different from threats to national security that the UK has encountered in the past?

Well. it is obviously different at one level, the descriptive one. But at another level it is not: the state has had to deal with violent threats to its integrity before, and these have invariably been presented as uniquely threatening to the fabric of the nation. So at this level of generality there is a lot of repetition. Of course there is a risk of mass destruction but actually that risk has been there for longer than people allow. Similarly, whilst the techniques of killing are different – through the use of suicide bombers for example, the use of semtex and dynamite were also "new" in their day, as was (more recently) the use of remote controlled explosions.

Hazel Blears has argued that criminal law in the UK is not suitable for dealing with terrorism because it is reactive; concentrating on the proceedings that occur after a crime has taken place. By contrast, she argues, anti-terrorist legislation aims to prevent terrorist acts from occurring, something that the criminal law is not equipped to do. Do you accept this justification for the need for legislation that deals with terrorist offences differently to "ordinary" crimes?

No, I don't. The criminal law now has a range of crimes that can deal with pre-substantive offences, for example: attempt, incitement, conspiracy, and solicitation to murder. Good police investigative work can be done via the ordinary criminal law which empowers them to act in a number of ways before a crime is committed through arresting, stopping and searching and entering and searching property. Consequently it is a mischaracterisation of the criminal law to describe it as only "reactive".

Why have Governments historically deployed anti-terrorism legislation if the criminal law regime is able to deal with terrorist threats?

After a bad atrocity I think governments like to be seen to be doing something new. To be fair, there is pressure on the government to act

in a fresh way and not just say "we are using the old law to catch these bad guys" – that sounds weak even though it isn't. And security agencies like to be able to say "we would have stopped that atrocity if only we had had law x". So the two combine together to create a momentum for the perpetual expansion of the law.

You argued against the creation of a Human Rights framework in the UK that usurped Parliamentary authority by giving judges the same powers as their American colleagues to "strike down" legislation. However, in the last two years we have seen the House of Lords reject the use of evidence obtained by torture and declare that the detention of terrorist suspects without trial incompatible with the UK's human rights obligations. Do any of these cases make you question whether the balance that the Human Rights Act struck between Parliament and the judiciary is the right one?

On the contrary, these cases persuade me that the balance struck by the Human Rights Act is exactly right. The torture case raises no issue of parliamentary sovereignty: Parliament had not authorised the use of torture, so the case does not trump parliament. The Belmarsh detention case is powerful precisely because the ultimate responsibility was – rightly in my view – left with the legislative and executive branches. I think the judges drew a kind of strength from the knowledge that their speeches in the Lords were part of a discussion rather than conclusive statements of overriding declarations of law. The government had to address the issue head-on and not release the detainees whilst blaming the judges for having had their hand forced. This is exactly as it should be in a democracy.

At the Fabian Conference on Britishness which took place on 14th January 2006 philosopher Julian Baggini argued that debates on the concept of liberty which focus exclusively on infringements to negative liberty are routed in the ideology of the libertarian right. In contrast the Labour movement has traditionally understood that freedom is more complex, and through the creation of the welfare state has recognised the need for freedom from poverty, disease and ignorance. Do you think that the UK would benefit from a rights charter or constitution which gave citizens "economic and social rights?"

I think that in England, the idea of pre-political negative liberty was initially a progressive one, enabling the propertied to defeat the King, but that it became reactionary when through the gradual democratisation of (what had become) the UK a gap grew up between the propertied / wealthy and the voters. To the former, pre-political property rights and other negative liberties outside politics became attractive excuses for denying the power of the (now increasingly democratic) legislative branch. It was out of this latter, democratic tradition that the Labour party emerged, and with it a suspicion of human rights that lasted for decades. Instead, Labour has historically used its control of the sovereign parliament to deliver social and economic rights in the form of positive legislation which the judges were not able easily to destroy (though which they could damage via hostile statutory interpretation). I think this is the right approach. I still don't think that promulgating a written constitution with or without a social and economic rights component is the right way forward. Why rely on judges and courts when the way to effect change is through precise and strongly argued for legislation? Having said that there may be room for a social and economic bill of rights on the model of the Human Rights Act – the key would be that it should not be able to "strike down" other legislation, that it should be subject to exactly the same restriction that currently applies to the Human Rights Act.

On 24th January, the Council of Europe reported that it is "highly likely" that European governments are aware of the "extra-ordinary rendition" of up to 100 prisoners through Europe to third countries where they may face torture. Alan Dershowitz, author and Harvard University law professor, has argued that if torture is going to be "administered" as a "last resort in a ticking bomb case to save enormous numbers of lives" it should be done "openly, with accountability, with approval by the president of the United States or by a Supreme Court justice" through the is-

suing of a "torture warrant". Are there any circumstances where the use of torture is justified?

No, definitely not. It is a measure of how decayed the culture has become that it can seriously be argued that we either need to torture people or that because there is so much of it already happening it is time to regularise the behaviour under cover of a judicial warrant. People don't say, "Ah, the police are shooting more and more people" so let's regularise it with homicide warrants: why should this be said about torture?

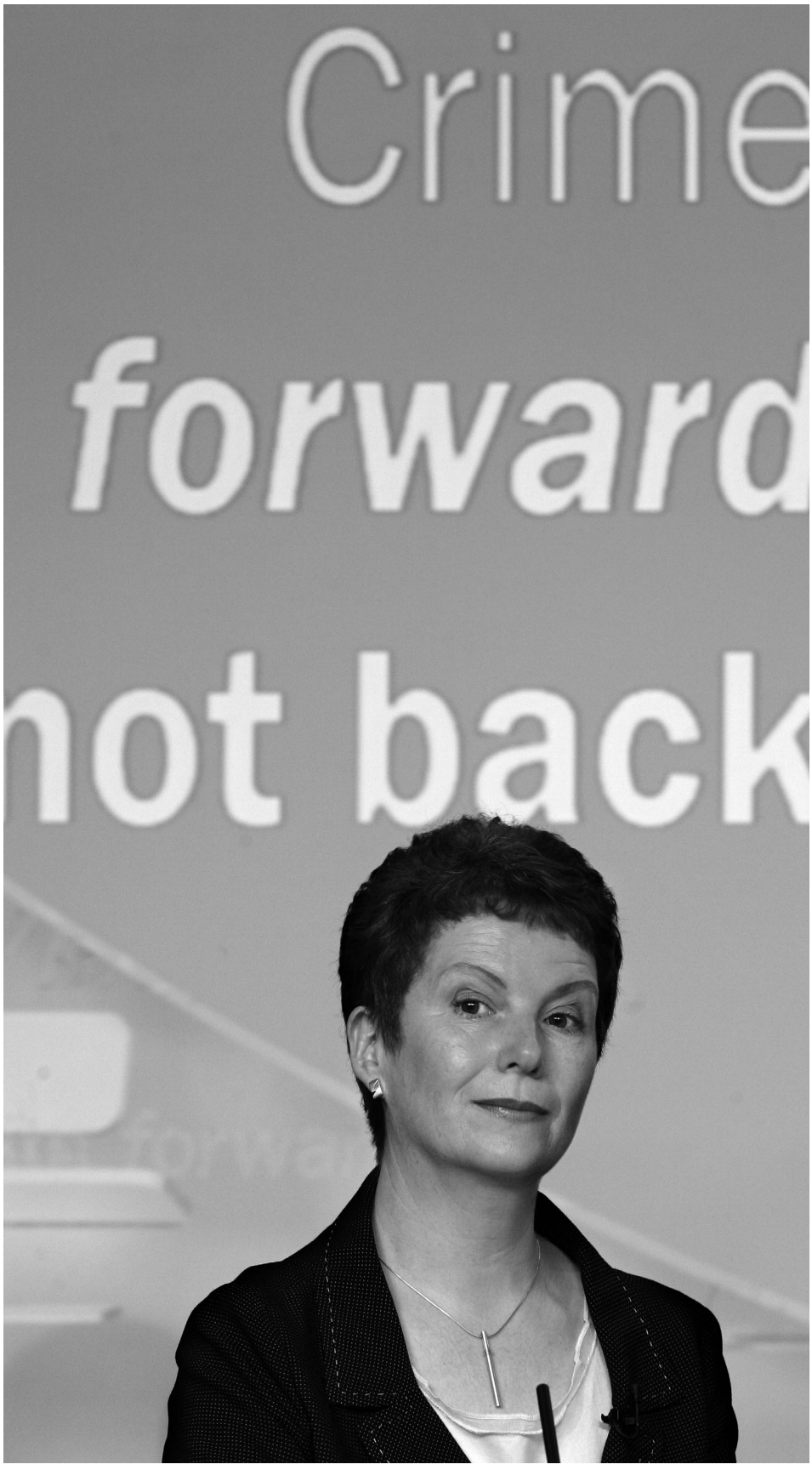
Any official involved in torture should be prosecuted. If I were on a jury I would vote to convict regardless of the circumstances. Hopefully my fellow jurors would as well. Naturally people argue a hypothetical case against, the ticking-time bomb and so on, just as they argue hypothetical disaster as a reason for draconian terror laws. It is interesting how so much of the justification for brutality lies in hypothesis rather than fact.

Dershowitz argued that the issue of "torture warrants" is preferable to allowing "low level" people to torture or sending terrorist suspects to countries such as Syria or Jordan for questioning. Such arguments seem to be based in the idea that if a certain procedures are followed (evidence given and a torture warrant issued) then the outcome (an individual being tortured) is acceptable. The law, from this position, appears to be entirely procedural with their being little room for substantive rights, such as the right to be free from torture, inhuman and degrading treatment. What do you think of this attempt to "proceeduralise" the law?

Well it is a transparent attempt to circumvent the basic rules against cruelty. Human rights is not just about due process. It is about substance and the torture prohibition is about as substantive as it gets. The motive behind all this torture talk is two-fold. It is firstly to get people to concentrate on this terrible conduct and therefore make it more credible than before; talking about this taboo helps normalise it, make it less scary and horrifying. This is a way of dealing with Abu Ghraib: it wasn't that bad really, why we were only talking about regularising torture the other day. Second, when you put torture at the centre of the stage, all the other things (inhuman and degrading treatment, internment, denial of due process) seem tame by comparison. It diverts moral energy away from these targets.

Finally, political debates about terrorism and national security have set up a dichotomy between human rights and civil liberties on the one hand and national security and safety on the other. Why is national security used to undermine rights in this way and what can be done to reframe the debate so that rights and safety are not always seen in opposition?

There have been two discourses in the democratic era, the first based on hope has concentrated on democracy and human rights. The second rooted in fear has focused on security and danger. The second once spoke through the language of real wars and the cold war. Now it speaks through the 'war on terror'. To reframe the debate proponents of human rights need first to recast national security as human security and then to show that human rights is about the rights of everybody and not just this or that minority clique. But the language of fear is difficult to beat as horror is always a better, or more compelling story than happiness. ■



● Professor Gearty's current book, *Human Rights Adjudication,* is available from all good bookshops.

● For more information about the Centre for the Study of Human Rights visit www.lse.ac.uk/Depts/human-rights. Thanks to Matrix Chambers, www.matrixlaw.co.uk for the use of the photograph of Conor Gearty.