Note : *this draft is subject to final checking and correction.*

1. Introduction

It is indeed a great honour to be invited to deliver the third Magna Carta lecture in a college which has led the way in the higher education of women, the half of the civil community that was for millennia simply left out of the scope of human rights declarations and human rights legislation. Royal Holloway College, founded in 1879, was the younger sister of Bedford College which in 1849 uniquely in England opened its doors to women. They could not take degrees until the degree examinations were extended to women in 1878. Since then, the two colleges, now merged, have produced a stream of excellent graduates, many of whom have made a valuable contribution to their professions and to public life. It is a great honour too, to keep such distinguished company as that of your former lecturers, Lord Woolf and Professor Bogdanor, who have both made conspicuous contributions to the cause of liberty.

It is a timely moment for this lecture, as once again there is much speculation in political circles about yet another round of counter-terrorism legislation, the eighth since 1997. There has even been a suggestion from the redoubtable Home Secretary, John Reid, that the Human Rights Act of 1998, which incorporated the European Human Rights Convention of 1950 into British law, may have to be abrogated for the purpose, and this at the very time Northern Ireland is being brought back within those provisions. The Government's policies on terrorism have been characterised by instant

reactions, a pursuit of headline stories intended to show how tough the Government is, and a marked lack of consultation with Parliament, the judges and even the police. The new indications that the Government will now pursue a cross-party consensus based on extensive consultation before rushing into legislation is very welcome indeed, though it appears to be something of a death-bed conversion.

In this lecture, I shall look at the development of human rights law with particular reference to the Council of Europe and the European Convention on Human Rights. I shall also consider the role of the European Court of Justice with regard to those elements affecting human rights that occur in the European Treaties, which it is charged with monitoring and interpreting. Almost forgotten in its charming Luxembourg fastness after the ratification of the 1957 Treaty of Rome, the European Court of Justice roused itself in the 1970s, the decade often described as Eurosclerotic, to become an activist court much concerned with human rights matters. In the words of Judge Mancini, "reading an unwritten Bill of Rights into Community law is indeed the most striking contribution the Court has made to the development of a constitution for Europe".

I shall then look at the debate today in Britain, torn between demands for greater security against terrorism and passionate defence of traditional civil liberties, some of them originating in Magna Carta, in the hope of encouraging a serious and thoughtful debate. The need is to find the broadest and wisest possible consensus that can hold good over a long period in which governments may well change. Few suppose the issue of terrorism can be

dealt with by one or two draconian laws, not least because winning the support of the wider community is a vital – probably **the** vital – element in overcoming it. The most effective counter-terrorist measures, it is widely agreed, are intelligence-led, not intimidation-led, and for that the help of the wider community is indispensable.

2: Magna Carta and the Origins

If you access the internet for a modern version of Magna Carta, you will find it described as The Great Charter of English liberty, granted by King John at Runnymede on June 15 1215. That description is widely accepted in the world outside England. I remember forty years ago staying at a small hotel in the Carpathian Mountains in Romania, and handing the receptionist my British passport. The proud holder of a doctorate from the University of Vienna, which is why he had been exiled to this remote hotel, he looked reverently at my occupation on the visa, Member of Parliament. " Magna Carta Liberorum", he intoned.

As Professor Bogdanor pointed out in his lecture, quoting Christopher Hill, Magna Carta is not, and was never intended to be, a charter of English liberties. Rather it was a kind of treaty between the King and his barons, which sets out the terms on which their future relationship is to be based. Many of its 63 short articles are to do with the possession and inheritance of land and the obligations of landowners. But what is so remarkable about it, as Lord Woolf pointed out in his lecture, is the audience to whom it was addressed. " **We have also granted to all free men of our realm, for us and our heirs for**

ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs." The liberties guaranteed in Magna Carta were not limited to a privileged elite; they were the rights of all the free subjects of the King.

What leaps out from Magna Carta's arcane text are two principles, those of justice and proportionality. Justice was made possible b y the appointment of judges to regular county assizes held at a fixed place. It was assured under Article 39, **"No free man shall be taken or imprisoned or disseized or outlawed or exiled or in any way harmed – nor will we go upon him or send upon him- save by the lawful judgement of his peers or by the law of the land"**, the basis of trial by jury. The nine hundred year old Charter stands foursquare in the way of detention without trial, and even today confronts Home Secretaries with the dilemma John Reid presented to the House of Commons last week: – what do we do if we suspect the possibility of an act of terror, yet have insufficient evidence to bring charges under our legal system?

Then there is another obstacle to arbitrary arrest, in article 38. **"No bailiff, on his own simple assertion, shall henceforth subject any one to his law without producing faithful witnesses in evidence".**

Proportionality, the second principle, was laid down in Article 20. **"For a trivial offence, a free man shall be fined only in proportion to the degree**

of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood". Then here is the declaration eschewing bribery and corruption: **"To no one will we sell, to none deny or delay, right or justice".**

Despite many of the pledges made by the King never being delivered, and in some cases never intended to be delivered, this was a remarkable document for its time. Within it are the very foundations of the rule of law.

Universal Rights

The idea of individual rights, even of democracy, goes back to ancient times, to the civilisations of Greece and Rome. Citizenship carried with it rights as well as obligations. Democracy meant that citizens could and should actively participate in the government, either directly or through a representative chosen by the citizens. Yet these rights were not inclusive. Some part, usually the major part, of the human race was excluded from them. Magna Carta was no exception, since serfs, slaves and women did not enjoy the rights of free men. But it was unusual in including all those who were free men. The idea of universal rights has been a very long time coming. Indeed it is only in the past century in our own country that the rights Magna Carta promised have been extended to women and in the previous century to slaves.

The long story of English liberty has been a story of incrementalism, to use Macaulay's wonderful phrase, "broadening down from precedent to precedent," building brick by brick on the verdicts of the Courts and the

statutes of Parliament. Its milestones, from Magna Carta to the Civil War, the Bill of Rights and the Act of Settlement have marked out the changing relationship between the king and Parliament, with effective power passing from one to the other. It has, however, been much less concerned with individual rights than with the evolution of the concept of Parliamentary sovereignty. Ours is not a rights-based constitution though we are moving in that direction.

Because Magna Carta was so remarkable for its time, the high Middle Ages, it became the source of an English narrative, a narrative about individual liberty and the rights of Englishmen. John Locke's two Treatises of Government advanced that narrative with the idea of a social contract between sovereign and subject nearly a century before the American Constitution was written. The Act of Settlement cast that contract into one between King and Parliament. The sovereignty of Parliament and the idea of fundamental rights began to converge.

It was not until the nineteenth and twentieth centuries that the issue of exclusion was seriously addressed in what by then had become Great Britain. In the nineteenth century, as we have all been reminded, first the slave trade and then slavery itself were abolished. In the first half of the twentieth century, women at long last won the right to vote and to be treated in law as responsible citizens. Even today, the long struggle against unequal rights and discrimination still goes on, though the main battles are thankfully behind us. It is thought-provoking to read that when, soon after the Declaration of the

Rights of Man, the women associates and friends of the leaders of the French Revolution of 1789 marched upon Versailles to call for a declaration of the Right of Women, they were ridiculed and rejected by the all-male National Assembly.

It is no longer the divine right of Kings that should trouble us; it is the almost unlimited power of the Crown in Parliament, or in more modern words, of the executive that controls Parliament. Where control of Parliament moves between parties every election or so, as in the 1960s and 1970s, there is a rough balance, a kind of self-correcting mechanism. Where Parliament remains in the control of one Party for more than two administrations, the dangers of an overweening executive become apparent. The late Sir Francis Pym lost his post in government for unwisely pointing out that large majorities were bad for democracy, but his comment was absolutely correct.

Magna Carta's great contribution to liberty lay in the establishment of the rule of law, without which no free society can survive for long. The law had to be even-handed, incorrupt and independent of the Crown. This concept went far beyond these shores, to other countries in the common law tradition, and influenced the constitutions of countries as diverse as the United States and India. In our own times, we can see clearly the difference between states without the rule of law, those (like Russia) struggling to establish it, and those where it broadly operates albeit with occasional lapses. The period immediately following the departure of Mr Gorbachev as leader of Russia was a time of chaos between the abandonment of the old state-decreed Communist

law, and the advent of a market system without a structure of law. What emerged was a kind of jungle capitalism in which only financial and political power counted.

The Council of Europe

The horrors of the Second World War, in particular the Holocaust but also the use of weapons of indiscriminate mass destruction fed a deeply committed dedication among its survivors to establish a world in which the rule of law would obtain and individual rights would be respected. It began with Nuremberg. Nuremberg, where the trials of the Nazi leaders were conducted before a military tribunal after the war in Europe ended, was victors' justice. No high official or general from the Allied ranks was put on trial there. But it was at least a kind of justice. The Charter of the Nuremberg tribunals asserted that the claims of national sovereignty could not override responsibility for crimes against humanity. The argument that "I only did it under orders" was not enough to exonerate the perpetrators. National sovereignty was no longer absolute.

The architects of the post war world, politicians and lawyers among them, set out to build not only an international rule of law, but also a world of respect for human rights. At the founding meeting of the United Nations at Dumbarton Oaks in 1944, respect for human rights and fundamental freedom was listed as one of the new body's secondary objectives. The 1948 Universal Declaration of Human Rights, which owed so much to the tireless efforts of Eleanor Roosevelt, spelled out that objective. It was, as its title declared, about

Universal Human Rights. It was, of course, only a declaration. There was no mechanism of enforcement. But the sheer boldness of its aspiration was such as to influence the constitutions and governments of many of the countries achieving independence from colonialism, or emerging from the nightmare of tyranny and occupation so many had endured during the war.

Being men and women of experience as well as idealism, the architects of the post-war world in Europe did not find declarations enough. They went on to create mechanisms that would turn ideals into realities on the ground. In the Council of Europe and through its European Convention of Human Rights, adopted in 1950, they hammered out the instruments they needed. The Council of Europe, established on May 5, 1949, built its membership around respect for human rights. It supported education and training programmes for judges and lawyers, for Court officials and others, to train them in the ways of democracy and in commitment to the rule of law. It started with ten members and now has 47. The condition of membership is accepting the European Convention on Human Rights; the ultimate sanction is to be thrown out of (or never allowed into) the European club.

The European Court of Human Rights at Strasbourg in France is one of only two human rights courts in the world that entertains petitions from an individual against a state. These individual cases are carefully considered to ensure that every possible remedy available at national level has been pursued. The Court will not consider a case where this has not been exhaustively done. But once in the world of law that lies beyond the national level, the Court has to rely on its historic standing and its moral force to ensure that its verdicts are

complied with. For the members of the Council of Europe, compensation for compliance lies in the right of each to appoint a judge to the Court, and of course also in the right of each to bring its own cases against other states or agents.

The European Court of Justice

The European Court of Justice is a European Union institution sited in Luxembourg. Its verdicts are binding on all member-states with regard to matters falling under the European treaties, but not in areas beyond the Union's jurisdiction. It has no direct links with the European Court of Human Rights, but in recent years it has taken into account the jurisprudence of this Court in cases concerning human rights matters. The E.C.J. now has a considerable history of cases with human rights implications, many of them arising from articles in the European Treaties. Among the most fruitful articles in terms of upholding human rights have been Article 48 and 52 of the Treaty of European Union about freedom of movement and freedom of establishment, which forbid discrimination on national grounds, and Article 119, which forbids discrimination on grounds of gender. Because European law is supreme on matters within the European Union's jurisdiction, member-states have had to change their own laws to bring them into compliance. A good British example was the ruling on the 1979 U.K. Equal Pay Act, which obliged the British government to include and recognise work of equal value.

The Court has not been the only instrument to compel member-states to

comply with human rights. At least as effective have been the Copenhagen criteria, drawn up at the European Council summit meeting in 1994. The summit adopted a number of criteria, in practice conditions, for future members of the European Union. They were compelled to lay down such conditions following the applications of Sweden, Finland and Austria. The Council could see, lining up behind these respectable neutral countries, a queue of former Eastern European members of the Soviet bloc, about whose democratic *bona fides* they were much less confident. To join the Council of Europe, a country had to agree to comply with the European Convention. To become an acceptable candidate for European Union membership, the same country could point to its membership of the Council.

This combination has proved extraordinarily effective, in extending respect for human rights in the newest democracies. Some have had to revise their treatment of minorities, or to remove discrimination against women. Turkey, an aspiring candidate country, has revised its rules about prisoners. The "soft power" of the Courts and of the Council of Europe has been far more successful in embedding human rights and democratic practices than the "hard power" of the Americans and British in Iraq and Afghanistan.

Hard Cases

The European treaty that most radically extended the supranational power of the European institutions was the Single European Act of 1986, which was directed at completing the European market, and which turned the

European Community into the European Union. Its preamble referred to the 1983 Stuttgart Solemn Declaration on Human Rights, and also to the European Convention. Curiously this treaty raised far less controversy in Conservative ranks than did the later Maastricht Treaty, for all that it extended qualified majority voting much further. The fact that the S.E.A. had Margaret Thatcher as its advocate, while Maastricht was put forward by John Major, seems to have had something to do with it. In any event, the Court's jurisdiction under the S.EA had little to do with human rights and much to do with competition policy.

Certain judgements by both the European Courts have been very unwelcome to governments in the United Kingdom. During the Maastricht negotiations, Britain was able to limit the E.C.J's jurisdiction over herself by refusing to be part of the common "zone of freedom, security and justice" without internal borders. In opting-out of the Schengen Agreement, Britain maintains its own border controls against its European neighbours. Britain also stayed out of the transfer under the *passerelle* system of visas, asylum and immigration policy to the first, Union, pillar. They remain for Britain part of the third intergovernmental pillar of Justice and Home Affairs, for the rest of Europe (except Ireland) they fall within the first, European Union pillar. The effectiveness of this divided and clumsy arrangement viz a viz terrorism, people trafficking and organised crime is a subject that deserves careful examination, but one politicians in Britain are reluctant to engage in.

The UK Government has managed to swallow down many of the rulings of the two European Courts. I have already mentioned the ECJ verdict on equal

pay. I might mention too the ECHR's ruling on prisoners' private correspondence, which required the Home Office to rewrite its prison rules, and on the unlawful detention of a person no longer suffering from mental illness, where it demanded he be compensated. But the Government has strongly objected to verdicts that prevent counter-terrorist actions that the Courts hold to conflict with the European Convention, just as it has taken issue with domestic courts that have found detention without charge to be unlawful, and that have resisted the deportation of terrorist suspects to countries where they may be tortured.

The domestic courts and the European Court of Human Rights are nowadays usually at one on these issues, particularly since the incorporation of the European Convention on Human Rights into British law in 1998. The same cannot be said for the British Government. One crucial verdict dates from before the incorporation of the ECHR, the 1994 ruling in the Chahal case. The Home Secretary Dr. John Reid was so upset by this ruling that he recently suggested there might have to be a derogation from Article 3 of the Convention on this issue.

Mr. Chahal contended that he should not be deported to a country where there was a serious risk that he might be subjected to torture or inhuman or degrading treatment. The United Kingdom had submitted to the European Court of Human Rights a proposal for a balancing test, setting the risk presented by permitting the suspected individual to remain against the risk that he might be tortured or ill-treated if deported. The Court vigorously reaffirmed

its commitment to Article 3 of the European Convention, which prohibits torture or cruel, inhuman or degrading treatment. In doing so it followed in a long tradition of international law. In its preface to the 2—4/5 General Report, the European Committee for the Prevention of Torture put the case in uncompromising terms: . *"Like the prohibition of slavery, the prohibition of torture and inhuman or degrading treatment is one of those few human rights which admit of no derogations.....Democratic societies must remain true to the values that distinguish them from others."*

Apart from the central philosophical debate on security versus liberty, there is another, political, one. What would be the effect on Muslim communities of such a derogation? Would the Muslim community, and particularly young Muslims, be alienated if suspected jihadist terrorists were deported to countries where they might be tortured? In Northern Ireland the British Government breached the Convention, not to say Magna Carta, when it introduced internment in August 1971. In his autobiography, *The Course of My Life*, Edward Heath himself recognised that interment had seriously alienated the moderate Catholic community. The RUC's intelligence had been hopelessly out of date; many of those arrested had not been active in the IRA for decades. Furthermore, as one might expect, and as Heath had feared, internment was used disproportionately against Catholics, undermining their trust in the law and their willingness to co-operate with the authorities. Before long it was abandoned in favour of a system of judge-only trials, the so-called Diplock Courts.

These issues are more complex than at the time of Magna Carta, because the world now impinges on national laws. In the case of the United Kingdom, a complicated solution was found to reconcile the sovereignty of Parliament with the incorporation of the European Convention of Human Rights into British law. It involves a complex mechanism in which the Government states whether or not a Bill is compatible with the European Convention before introducing it.. If a declaration of compatibility were to be challenged, the matter would go to the domestic courts, which could determine whether or not the legislation was in its judgement compatible, but could not strike it down. At least to the innocent layman's eye, it is sometimes hard to discern the alleged compatibility, but few have the stomach to question this rather shaky compromise..

The Government has appealed against a series of Court decisions affecting control orders, which were themselves introduced only after the decision of 16 December 2004 by the Law Lords ruling indefinite detention without charge to be incompatible with the right to liberty. The Law Lords took a similarly uncompromising line a year later that evidence that might have been obtained by torture was inadmissible in UK Courts. Parliament, for its part, while generally complaisant on terrorism legislation, dug in its collective heels over proposals to extend detention without charge beyond fourteen days, finally reaching a compromise on 28 days. Government plans to hold lecturers and librarians responsible for material which might be used by terrorists were amended in the House of Lords to require evidence that they had acted

recklessly or with intent. But many amendments in the Lords to protect civil liberties in counter-terrorist legislation have been lost in the Commons. Fear of being thought "soft" on terrorism has been a significant factor.

The emphasis by the Home Secretary in his recent statement on counter-terrorism on trying to find a consensus is welcome. Some of the proposals that most trouble the champions of liberty are likely to be dropped, among them police powers to stop and question without reasonable suspicion, about which the police themselves are concerned because of its highly negative consequences for their co-operation with Muslim and other minority communities, and a further attempt to extend pre-charge detention beyond 28 days. The Government will instead try to agree with the other main political parties on the legal right to question a suspect after he or she has been charged, and on the admissibility of evidence drawn from intercepted communications in terrorist cases. On this latter proposal, the Government has suggested that a committee of Privy Councillors consider the issue and make recommendations.

Something similar – a form of Parliamentary oversight – should be considered with regard to proposals for putting extended sharing of personal data by the intelligence agencies, and for greater access to the DNA data base, on a statutory footing. Data retention and data-sharing are not issues that arouse great concern among the wider public, but they can be vital for the protection of privacy and individual freedom. I would argue that these are matters that should be overseen by a commissioner or ombudsperson

answerable to an appropriate committee of Parliament. The present Security and Intelligence Committee is answerable only to the Prime Minister.

How we strike the balance between security and liberty in the early months of the Brown administration will determine how far Britain can claim to be a democracy based on the human rights of its citizens. What began with Magna Carta could end in a state that has lost its commitment to liberty. If that were to happen, terrorism would indeed have been successful.