9th September 2019

Changing Times, Changing Treason?

On "Who Do You Think You Are?", the comedian Jack Whitehall was distressed to find out that his ancestor, Thomas Jones Phillips, mayor of Newport in the 1830s, was responsible for the detection and arrest of John Frost. John Frost was a Chartist, a social reformer, and the last man in England to be sentenced to be hung drawn and quartered[1]. His offence? High Treason. The law report of the trial before Lord Chief Justice Tyndal contains the opening prosecution speech by the Attorney General. The prisoner at the bar is being tried under the Treason Act 1351, he explains to the gentlemen of the jury, which was passed under Edward III to clear up the law of treason, which until then had been "vague and unknown"[2].

So we are considering an issue - what should count as treason - that has been going on for well over 650 years.

I have chosen it as a subject for my first speech as Independent Reviewer of Terrorism Legislation, the I.R.T.L. or less grandly "irtl" as it is referred to in some parts of the Home Office, for two reasons. Firstly, it is an attention-grabbing subject for a first speech. One thing I have started to appreciate about this role is that it requires a public presence. My very distinguished predecessor but one, David now Lord Anderson QC was among many other things a superb publicist of the role ("@terrorwatchdog", one word). That public profile was boosted by my immediate predecessor Max Hill QC before he was appointed as Director of Public Prosecutions at the end of last year. Secondly, and more substantively, I would like to react to a serious proposal that has been made to reform the law of treason, and in so doing, to try and illustrate how I intend to approach my role and some of the issues that have already struck me since my appointment in May.

So to start with, treason is an old offence. The 1351 Act that was used to try John Frost is still on the statute book. If you search it up on legislation.gov.uk you will find it online with the Norman French text[3]. It involves not only obviously treasonous acts but - if it is not treasonous to say so – frankly archaic sounding acts of compassing the death of the Sovereign or heir and "being adherent to the Sovereign's enemies in her Realm giving them aid and comfort in Her realm, or elsewhere". But crucially, to be guilty of that offence you had to owe allegiance to the Crown. I will return to that issue.

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[1] In the event, his sentence was commuted to transportation for life: http://www.chartistancestors.co.uk/john-frost-1784-1877/.

[2] *R v Frost and others* 173 ER 771 at 140.

[3] http://www.legislation.gov.uk/aep/Edw3Stat5/25/2/section/II.

During the 19th Century some acts of treason were re-drawn as felonies (therefore not attracting the death penalty), and these included acts of compassing, imagining, inventing devising or intending to stir any foreigner to invade the United Kingdom or other country belonging to the Queen. At the beginning of this century, the then editor of the *Guardian*, Alan Rushbridger, brought a well-known legal action against a much more recent Attorney-General and objected that this new law made advocating republicanism a crime. The judges in the House of Lords objected to being asked to "spring clean the statute book" and refused to say very much about it[4]. Finally, during the Second World War the Treachery Act 1940 was introduced, but later repealed. This made it an offence to do certain acts with intent to help the enemy and was punishable by death. Importantly it applied to a much more tightly defined group (principally British subjects and those subject to military law), and did not depend upon any basis of allegiance.

So how much was the offence of treason used?

The answer is, increasingly rarely. In the 20th Century the 1351 Act was used to prosecute cases arising out of the First World War - Sir Roger Casement whose case on appeal turned on the punctuation found of the Norman French and who was famously "hanged by a comma"[5]. In the Second World War it was the turn of Lord Haw-Haw, the radio voice of "Germany calling"[6]. No doubt much to the horror of the prosecution, it transpired that Lord Haw Haw, real name William Joyce, was an American citizen: how could he then owe a duty of allegiance to the King, particularly when he was in Germany when he made the allegedly treasonous broadcasts? Well it turned out that he had with him a UK passport which he had obtained by false pretences. On that (rather slender) basis he enjoyed some protection from the Crown and was held to owe the crucial duty of allegiance. He was hanged.

There was a sense that this was all was getting a bit out of date. The offence of treason was reviewed by the Law Commission in 1977, it was mentioned as a possible topic for consideration by the Law Commission in 2008[7], and was considered by Lord Goldsmith QC in the same year[8]. In his report Lord Goldsmith presciently referred to the complexities in the concept of allegiance and to the difficulty of identifying the King's enemies.

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[4] *R v Attorney General, ex parte Rusbridger* [2004] 1 A.C.357.
[5] *R v Casement* [1917] 1 KB 98.
[6] *R v Joyce* [1946] AC 347.
[7] Law Commission, Tenth Programme of Law Reform (2008).
[8] *Citizenship: Our Common Bond* (Ministry of Justice, London, 2008) paras 4.39–4.41.

So I think it is fair to summarise in this way: it has a long history, and a long history of being difficult to use. It has been used, but not much. It has remained a subject of fascination even though it has now long fallen into disuse as a criminal charge.

The most recent proposal for reform - which I want to particularly consider in this talk - originates in a paper published in 2018 by the think-tank Policy Exchange, called 'Aiding the Enemy'. This paper was written by a distinguished group of authors including two MPs from each of the main parties (if it is not too old-fashioned to speak of "main parties"), one of whom had served in the armed forces before he entered politics. When you exclude the picture of Mohammed Emwazi or "Jihadi John" brandishing a knife on the title page, it is 57 pages long. It is a thoughtful piece of work, looking at the history of the existing offence of treason, listing the arguments in favour of its reform, addressing some counter-arguments and ambitiously containing a draft of what the offence might look like on the statute book. It is quite probably this paper that then Home Secretary Sajid Javid had in mind in his speech at New Scotland Yard in May, when he said he'd asked his officials to consider the case for updating treason laws, if not for terrorism, then at least to respond to the threat of hostile state activity or spying[9].

As it happens, I was appointed the same day as that speech. One of my chief motivations as Independent Reviewer is to help ensure that the terror laws used by the police and the Home Office are up to scratch. That means that they are necessary, consistent with our values, and that they are effective. It follows that there can be no *in principle* objection to the introduction of new counter-terror laws, particularly since better targeted and clearer laws may lead to more respect for fundamental values. As the recent enactment of the Counter Terrorism and Border Security Act 2019 shows, Parliament does have an appetite to adjust our existing laws to meet what it perceives as – and what in fact are - new challenges to security. Further, it would be wrong to think that the UK's laws are perfect, having developed piecemeal as is the nature of our political process. It is possible to locate anomalies in our legislation. So, as part of their analysis, the Policy Exchange authors rightly observe that it is an offence to *invite* intangible support for a proscribed organisation[10] but not actually to provide it. This might relevant to those who go to live in Da'esh-controlled areas not to fight but to give moral support to that group.

Having made those positive points, let me add one note of caution: any new law needs to be considered carefully because of what I call the ratchet effect. Once a law is introduced – perhaps to meet a particular threat of the moment - it is

[9] Rt Hon Sajid Javid MP, *Keeping our country safe*, 20 May 2019.
[10] Section 12(1)(a) Terrorism Act 2000 as explained by the Court of Appeal in *R v Choudary and another* [2018] 1 WLR 695 at [45].

unlikely to be repealed. It will be in the jargon of police and security officials a 'tool in the toolbox' and experience suggests that it is very difficult to surrender tools once they are in that toolbox. There is also a risk that the use to which the tool may be put can evolve beyond its original purpose. If a law is going to go onto the statue book, it must be a good one.

So what did the authors of the paper say? The premise of their argument is that the law of treason helps to secure and maintain the moral foundations of a political community. It is argued that citizenship entails a duty of allegiance, which means that the citizen has a duty not to betray his country by aiding its enemies. It is also argued that non-citizen residents are bound by the same duty, since, whilst they live here they enjoy the protection of the Crown, the law and the courts. Whilst it may be a stretch, as the case of Lord Haw-Haw demonstrates, to say that citizens and non-citizens are bound by an identical duty[11], one can well understand why the authors make this point - it is to provide a foundation for a criminal offence that applies to all those who live in the UK and enjoy its freedoms and protections.

Recognising and denouncing such acts of betrayal as serious wrongs is important, the authors say, to vindicate the trust that members of society ought to be able to have in one another. Trust, it is argued, is the foundation of decent, free social order. Criminal law offences such as a new offence of Treason will contribute to community cohesion, helping assure citizens that they may trust other citizens, who, whatever else may divide them, will not betray the country they jointly share.

Pausing there, it would not be a fair criticism to say that this is necessarily an antiquated and therefore outmoded view of society. As recently as Sept 2018 the Court of Appeal[12] described the modern right to nationality as deriving from feudal law "…where the obligation of the liege was to protect, and the obligation of the subject was to be faithful". In 2010 the Court of Justice of the European Union in an unusually purple passage referred to "…the reciprocity of rights and duties, which form the bedrock of the bond of nationality"[13]. The authors of the paper are therefore entitled to argue that there is such a thing as loyalty and such a thing as betrayal.

However, it is not in itself a criminal wrong to have or voice strong ideological objections to the UK state, its policies and to what are, or are said to be, British

[11] Cf the "somewhat complicated rules for deciding whether allegiance is owed or not" following *R v Joyce, supra*, Law Commission, Working Paper No.71: Treason, Sedition and Allied Offences (London, 1977) at [43].
[12] *Pham v Secretary of State for the Home Department* [2019] 1 W.L.R. 2070 at [49].
[13] *Rottman's case [2010] QB 761* at [51].

values. Freedom means the freedom to dissent. Moreover, as the acquittal of the civil servant Clive Ponting is sometimes argued to show, juries may object to charges brought where there may be a betrayal but apparently not much harm[14]. No doubt it is for this reason that the authors propose that only a limited range of betraying acts should be criminalised as treason.

This leads to the central conclusion of the paper which is that there should be - in the context of assisting states or groups attacking the United Kingdom - a specific offence to mark "the distinct wrong of betrayal" in this context, because current law "understates the gravity" of such offending. This would be a modern offence of treason carrying, save where it would be manifestly unjust, a sentence of life imprisonment. The authors argue that this offence would signal the particular gravity of the wrong when a citizen or resident helps an enemy who is engaged in attacking the UK.

The force of the duty of non-betrayal is particularly obvious, it is said, when one's country is engaged in an international armed conflict. But the complexities of modern conflicts cannot be ignored. So, importantly, the authors argue the duty of non-betrayal – the duty not to aid the enemy – should apply in non-international armed conflict just as much as in international armed conflict. It is argued that no citizen ought to serve with groups whom British forces are fighting whether or not they are state forces or in the parlance, non-state actors[15].

The motivation for this new offence is not hard to discern. The Government estimates that about 900 people have travelled from the UK to engage with the conflict in Syrian and Iraq[16]. Whilst it is impossible to be precise about numbers, this cohort will include what I have learnt to call foreign terrorist fighters. They are not soldiers fighting for a state with whom the UK is at war, but they are willing and able to attack UK interests in the Middle East and by projecting their threat back home, to plan and inspire attacks on UK soil. It is clear *why* the authors felt that an offence should apply those aiding non-state actors such as Da'esh, in addition to those helping hostile states in traditional armed conflict with the UK. The rise of so-called Islamic State – that disturbing shift in the nature of the terror threat – has set the scene.

It is I think widely acknowledged that counter-terrorist legislation should avoid reacting too quickly to specific events. Although the UK's record is not unblemished, on the whole that is something of which UK legislators are aware.

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[14] https://www.telegraph.co.uk/news/newstopics/mps-expenses/mps-expenses-rebuilding-politic/6231381/MPs-expenses-whistleblower-prosecution-acquitted-Clive-Ponting-The-Observer.html.

[15] It is already an offence to do so under section 5 Terrorism Act 2006, given extraterritorial effect by s17, noting the very wide definition of terrorism explained in *R v Gul* [2013] UKSC 64.

[16] Contest (2018, Cm9608) at paragraph 48.

Other comparable jurisdictions have reacted more frequently. Australia, for example, has been described as a world leader in passing the most anti-terror and security laws in the liberal democratic world. Researchers have calculated that a new counter-terrorism law was passed every 6.7 weeks by the federal Australian Parliament between 2002 and 2007 [17].

Of course one of the risk in reacting to the pressure of events may be that the need for a new law has in fact disappeared by the time the law comes to be deployed.

Whether that proves to be the case will no doubt be asked of one of our new laws, borrowed from the Australian statute book: the new offence of entering or remaining in a designated area. The 2019 Act has given the Home Secretary power to designate an area if satisfied that it is necessary, for the purpose of protecting members of the public from a risk of terrorism, to restrict United Kingdom nationals and United Kingdom residents from entering, or remaining in, it. If a person enters or remains in such an area he or she commits an offence punishable by up to 10 years[18]. The Home Secretary has yet to designate an area but it is not hard to see that once again the inspiration for this offence was the travel of so many British nationals and residents to Syria and Iraq. What remains to be seen is the utility of this designation power now that the Caliphate has fallen and so-called Islamic State has reverted to a more traditional clandestine terrorist group operating through networks of individuals rather than through occupation of territory. It is to be noted that the Australian authorities having designated al-Raqqa province in 2014, de-designated it in late 2017[19].

One of my jobs will be to report to Parliament on the operation of this new law. If an area is designated, will it be useful in deterring individuals from travelling, bearing in mind it is already an offence to travel in order to fight[20]? Will it help the CPS prosecute individuals who are already out there and who fail to leave? It has been said – quite correctly - that there is a difficulty in gathering battlefield evidence, making it difficult to prosecute foreign terrorist fighters, whereas it is said this new offence will be easier to prove. Will it? Does it create a risk of unfairness which was not foreseen and which is not catered for by the numerous defences that Parliament has enacted? It is not possible to evaluate the efficacy of the power until it has been exercised but it is clear that any decision to designate an area requires shrewd judgment. The issues are not just necessity, and any impact on individuals who might reasonably want to travel there. But what signals will designating a particular area as a terrorist hotspot send to the

[17] K.Hardy and G.Williams in Counter-Terrorism, Constitutionalism and Miscarriages of Justice (Oxford, Hart, 2019).
[18] Section 58B(9) Terrorism Act 2000.
[19] Under section 119.3 of the Criminal Code Act 1995.
[20] Section 5 TA 2006.

international community? What message would it send to the government of that country, or to allies who may have a different view about the threat posed by that territory? What if things are in a state of flux and shift decisively on the ground? I should say that one of the benefits of my job is to see at first hand how sensitive officials are to these sorts of considerations. These are plainly not easy decisions. For what it is worth, I suspect that designating an area will be more relevant in terms of deterrence than in terms of prosecution.

I should quickly add that every new counter terrorism law risks coming into contact with another law: the law of unintended consequences. Let me give one example. As my predecessors have all reported, aid agencies are hampered in conflict zones because their work brings them, their employees, their agencies workers, into direct or indirect conflict with proscribed groups, and with individuals or entities who are subject to economic sanctions. There is the possibility that money or goods or food will find its way into the wrong hands. This gives rise - as one consequence - to banks becoming nervous that if they provide banking services to aid organisations they, the banks, will commit a terror funding offence. That leads to banks holding up transactions or in extremis closing accounts.

This so-called de-risking phenomenon has been going on for many years because of the law on terrorist *groups*. There is no easy solution because obviously it is in the public interest for terror groups to be starved of funds. The new offence will create terrorist *areas*. It is to be hoped that banks do not form the view that merely transferring monies to anyone in a designated area would involve them in criminal liability. These are real possibilities, and risk causing unintended harm not just to aid agencies in those areas, but to family members here remitting monies home.

Considerations about genuine utility would be acutely relevant to the proposed Treason offence.

The authors recognise that it will not always be clear whether the UK is engaged in armed conflict with a state or organisation, and therefore whether aiding that state or organisation might amount to treason. Their solution is proclamation - a new power for the Secretary of State to proclaim that a state or organisation is engaged in attacking the UK. This would be different from merely being a proscribed organisation under Terrorism Act but a higher tier of group[21]. If a citizen or resident aided a group that was proclaimed, then there would be a

[21] Some distinctions are already drawn between groups in Northern Ireland, with reference to those whose supporters are not holding to a ceasefire and are therefore ineligible for early release under the Northern Ireland (Sentences) Act 1998: see the Northern Ireland (Sentences) Act 1998 (Specified Organisations) Order 2008/1975.

rebuttable presumption that they knew that the state or organisation was hostile to the UK. But what messages would proclaiming a group as an enemy engaged in an armed attack against the UK send? International humanitarian law, or the law of armed conflict, is based principally around conflict between states. Whilst there are some rules that apply in conflicts that are not between states, there is a natural and obvious reluctance to accord members of armed groups the same status as soldiers or combatants of a foreign state, for example, by treating them as prisoners of war rather than criminals.

One would need to consider very carefully whether by proclaiming a group as engaged in armed conflict against the UK it would risk conferring on that group a special status or cachet. It is notable that the members of the IRA and other republican groups were not, with some minor exceptions, prosecuted for treason during the Troubles[22]. Instead, they were charged with murder, violent crimes, and terrorism offences. It is not hard to see why the authorities would have wanted to avoid 'state trials' for treason, pitting the British government against an official rebellion.

The same considerations apply at individual level. The authors of the paper recognise this and correctly note that a terrorist might welcome the risk of prosecution for treason as a badge of honour. Whether the mere existence of a law of treason might encourage actual terrorist attacks is debatable. But surely Islamic State would savour the opportunity to say that true allegiance is owed to them, not to the United Kingdom.

We are in are deep waters, yet in my view these are objections which are insufficiently answered to justify a new offence. I note that when a member of the House of Lords sought to introduce treason during a debate on the recent legislation, the security minister in the House of Lords Baroness Williams explained:

"…prosecuting terrorists for treason would risk giving their actions a credibility…glamour and political status that they do not deserve. It would indicate that we recognised terrorists as being in some formal sense at war with the state, rather than merely regarding them as dangerous criminals."[23]

It is hard not to agree with those sentiments.

[22] For details see Walker C., *Terrorism and the Law* (2011, Oxford) at 5.174.
[23] Hansard (House of Lords) vol.793 col.1382 31 October 2018.

The idea of proclaiming groups as involved in attacks on the UK has much in common with the power to proscribe a group as a terrorist organisation[24]. This is an area of interest to me and has been to my predecessors for reasons I will explain. Proscription is a well-established part of our law and has been used to proscribe obviously violent groups such as Al Qaeda and Da'esh, as well as groups that glorify and encourage terrorism rather than being directly involved in violence such as Al Muhajiroun. Its origin lies in the proscription of Northern Irish groups. It is an important area of the law because Parliament has held that doing something for the benefit of a proscribed group should be considered an act of terrorism. The impact of proscription is perhaps wider than has been appreciated – something I am going to expand upon in my first Annual Report. The difficulty with this area of the law, and you will recall my reference to the 'ratchet effect', is that there is no duty to de-proscribe a group even if it has long ceased to be concerned in terrorism. Whilst an application process does exist – that is, a process whereby an individual can apply for the de-proscription of a terror group – it is an imperfect mechanism, and it has long been recommended by Independent Reviewers that there ought to be a duty on Government to keep all groups on the terror list under review. This would bring it into line with the duty of review that applies in the case of sanctions, and which applies where an area is designated under the new power.

There are a number of further reasons why, it seems to me, the proposed treason offence should be rejected. The core of the offence is that it should be treasonous to aid a group which is attacking or intending to attack the UK. But, as the authors themselves recognise, there is a risk of over-breadth if, as they suggest, an attack means an operation that results not just in death or injury but damage to property. Nor is it clear, once one moves outside the paradigm of armed conflict, what distinguishes between intending an attack on the UK itself, as opposed merely to an attack on individuals or property *in* the UK. It is even suggested that it would be treason to help build morale for a proclaimed group, or carry out propaganda activities, an exceptionally wide category. There would not even be a requirement for the defendant to coordinate his or her activities with the group – it would be enough that a person acted to aid the objectives of the group. Lack of definition or clarity is an objection that is often raised at terrorism legislation, with some force. It seems to me that this would be particular objectionable for an offence carrying an automatic life sentence.

Incidentally, the Government has now denoted a wider range of activity as terrorism, specifically violent right-wing extremism. It is obviously right to treat this as terrorism alongside violent Islamist extremism and Northern Ireland Related Terrorism. But a 'threat-neutral' approach to terrorism does bring hidden

[24] Under section 3 Terrorism Act 2000.

dangers. There is a much wider range of ideologically inspired violence out there, but I wonder if the public has given its consent for counter-terrorism powers deployed against extreme environmental groups or animal rights groups, by way of example.

But returning to the proposed treason offence. Let us suppose that its ambit could be limited to UK citizens (and avoiding difficult distinctions between settled and non-settled residents); and confined to aiding state groups rather than non-state groups. Even then the proposed Treason offence would risk politicising and complicating criminal prosecutions with arguably limited benefits. Australia has however taken the plunge, and has recently updated its laws[25]. The relevant provision in its Criminal Code is entitled "Treason - assisting an enemy to engage in armed conflict" and applies to armed conflict involving the Commonwealth or the Australian Defence Force. What I think this illustrates is that the pull to label an act as Treason is an enduring one. Interested observers will be watching, as will no doubt my Australian counterpart, Dr James Renwick whose official title - the Independent Monitor of National Security Legislation - is even less snappy than mine.

That takes me back to where I began. As Reviewer there is much to do and many topics to cover outside criminal offences. These include: powers to detain suspected terrorists for up to 14 days; the treatment of electronic data when individuals phones are examined at airports and seaports; Northern Ireland; and what are called executive measures – taking away passports and imposing administrative controls on suspects. But in a talk about treason perhaps I should end on a patriotic note. It is right to keep a close eye on how our friends and neighbours are legislating to deal with the threat of terrorism and to learn from them. But the United Kingdom is considered a leader, and the laws passed by Parliament and the executive actions taken by the UK's police and other authorities are held in high esteem. This means the standard of our laws, and of the debate to which I hope to contribute as the new Independent Reviewer, must be high.

JONATHAN HALL QC
INDEPENDENT REVIEWER OF TERRORISM LEGISLATION

[25] By the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018.