Secret courts are an affront to our liberty

by Lord Woolf Last updated at 21:24pm on 14th October 2006 Mail on Sunday.

Lord Woolf wants an end to secret trials

he former Lord Chief Justice of England and Wales has called for the Government to abandon secret tribunals for terror suspects.

Writing exclusively in the Mail on Sunday, Lord Woolf says that such proceedings "must be held in public whenever possible", ideally in front of a jury.

His comments will be interpreted by many politicians as a thinly veiled attack on the Government's amti-terrorist policy. Read them below.

It is the Government's responsibility to look after our security.

But even when MPs have given the Government and the security forces extraordinary powers, this task remains extremely difficult.

These special powers include the detention of suspects for long periods without charge.

At the same time, Parliament has tried to protect the rights of the individuals who are detained.

It has given those detained the right to appeal to a special tribunal, presided over by judges of the High Court.

The Special Immigration Appeals Commission (SIAC) deals with appeals from people the Home Secretary wants to deport on the grounds of national security.

A suspect detained indefinitely under the terms of the 2001 Anti-terrorism, Crime and Security Act can request a hearing, which takes place behind closed doors, in front of three judges.

The detainees are not told the charges made against them.

The recent cases before SIAC, when an MI5 agent apparently gave conflicting evidence at two different hearings, provides a vivid example of what can go wrong.

The error came to light only through a fortunate coincidence. The same special advocate was appearing in both cases, spotted the conflict and the mistake was corrected.

But such coincidences cannot always be relied upon to happen.

In this country we rightly possess a healthy prejudice against special tribunals.

We like our freedoms to be protected. When necessary, those freedoms should be guarded in public, through the ordinary court process.

We are particularly against members of the public being detained without charge and without trial before a jury.

There is a very good reason for this. Over the centuries, we have learned that we should insist on any detention being justified in the ordinary courts.

This has historically proven to be the best way of protecting our liberty.

That is perfectly understandable. But what is to be done if the security services have some evidence that they believe shows an individual is likely to commit a serious terrorist act?

What if the suspect is planning to explode a bomb in a place where it could kill and maim innocent bystanders but the security services have insufficient evidence to charge that individual in the ordinary way?

Or what if the security services fear that disclosing certain evidence would reveal the nature of counter-terrorist activities, putting the life of an undercover agent at risk?

In those types of situation, it cannot be right for the security services not to have the power to take some action.

But what action? And for how long should the individual be detained?

In this country, the answer depends on the powers that Parliament has seen fit to give the security services.

The individual suspect is also afforded protection by the Human Rights Act and common law.

Even when our safety is threatened by terrorist activities, it remains of critical importance that these safeguards are able to protect the individual from unlawful actions by either the Government or its security services.

This position is a fundamental part of the rule of law. Safeguarding this protection is the very serious responsibility of every judge in the country.

Both I and my colleagues must take a judicial oath that reflects these very principles.

So how can we defend the individual while also tackling the terrorist threat? My personal opinion is of little value. But, for what it is worth, I would not use a special tribunal.

I would use the ordinary courts but I would give them the widest discretion to go behind closed doors when this were deemed necessary to protect the confidentiality of covert security activities.

If required, evidence would have to be kept from an individual who was complaining about his detention. In some cases, we would also use special advocates, as does the SIAC.

However, two principles would have to be observed by the courts at all times. First, proceedings must be held in public whenever possible and when there is no threat to national security.

Secondly, the person detained should be charged and tried whenever this is a realistic possibility.

If this is not possible, the detention should be limited to the period that was absolutely necessary and, in any event, it should be subject to a limit laid down by Parliament.

Unless there are circumstances in which privacy is essential for justice to be done, court hearings held behind closed doors are undesirable.

Generally, the fact that the proceedings are subject to public scrutiny encourages the continued observance of proper standards.

It would also be desirable if there were a provision for trial without jury, in cases where the protection of confidential information made this necessary.

Jury trial is, of course, one of the greatest protections we have for the rights of the individual.

But if there is to be a choice between a detention without trial or a trial without jury, I would support the latter.

There is no need to take my word for it. Why not listen to the views of the detainee?

The judge could be given the power to dispense with a jury when he considers this necessary, or when the detainee asks for this.

Look, for a moment, at the example provided by Northern Ireland.

The so-called "Diplock Courts' were established in 1972 in order to address the problem of paramilitary violence through means other than internment.

These courts attempted to overcome the widespread jury intimidation associated with the Troubles by trying suspects in front of a judge alone.

The Diplock Courts contributed to the provision of justice in the most difficult of times. Unlike the secret tribunals, they are open to public scrutiny.

In my experience, a little ingenuity enables us to protect confidentiality in the great majority of cases, while at the same time allowing for a just trial to take place.

The problem with special tribunals is that once they are set up there is a natural desire to use them even when their use is not essential.

My final suggestion is that the courts should be allowed to rule on the lawfulness of any new Government proposal that might seriously affect the rights of the individual.

Crucially, this ruling would be made before any such procedure is introduced.

Thus, the courts would be able to provide an advisory declaration on the lawfulness of what is proposed.

Normally, courts are busy enough with their current caseload to want to rule on any future action. But as we are facing unique problems in the area of national security, an exception to the usual policy could be made.

The advantages would be considerable.

The Government would then know beforehand whether what it proposed did indeed comply with the law. The detainee would avoid illegal detention.

And even if this suggestion were turned down, a crisis would be avoided in which a decision is taken in haste

but repented at leisure.