

Gresham Lecture 8 June 2010

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There are some days that one never forgets. I am one of a diminishing number who remembers the day of Churchill's funeral and, of course, the day that President Kennedy was assassinated. I have occasion to add to those the day when it was announced that we were to have a Supreme Court. It was the 12 June 2003 – almost midsummer. I was staying at the Swan Inn at Minster Lovell, a delightful village on the edge of the Cotswolds. I was then Master of the Rolls. Staying with me were the Lord Chief Justice, Lord Woolf, the most senior judges of England and Wales, whom Lord Woolf described as the extended family, and the most senior members of the Lord Chancellor's Department. The Swan had, in fact, been tastefully converted into a conference centre and we were all there, at my suggestion, to have a strategic discussion about the administration of justice. Such an event had never taken place before and, so far as I know, has never taken place since.

As we were about to begin our discussions, word reached us of an announcement from Downing Street. The Lord Chancellor was to be abolished, to be replaced by a Secretary of State for Constitutional affairs, who would have no judicial functions.

Lord Irvine, the current incumbent, was standing down, to be replaced by Lord Falconer, who would hold the office of Lord Chancellor as a kind of night watchman until its abolition, while being at the same time the first Secretary of State for Constitutional Affairs. There would be a Judicial Appointments Commission to select judges, previously the prerogative of the Lord Chancellor, and, last but not least, the Law Lords would be abolished to be replaced by a Supreme Court.

No-one at Minster Lovell had had any inkling of these dramatic changes. There had been no consultation about them at all. It seems that not even the Queen had been informed of the imminent demise of the official who had, for a millennium or more, been the sovereign's most senior officer of State. The shadow leader of the House of Lords, Lord Strathclyde, described the proposed changes as "cobbled together on the back of an envelope".

For the next six years the chain of events that had led to the sudden decision to introduce these constitutional changes remained a matter of speculation, for those in the know, and in particular Lord Irvine, kept a discrete silence.

Then in July last year the House of Lords Select Committee on the Constitution, which was looking at the role of the Cabinet Office, took evidence from Lord Turnbull, who had been Cabinet Secretary in 2003. He described the way in which the changes had been introduced as “a complete mess-up”. There had been no consultation because the Lord Chancellor, Lord Irvine, had been strongly opposed to the changes and was not prepared to lead the consultation.

This provoked Lord Irvine to submit to the Committee a detailed paper giving chapter and verse of what had actually occurred. He had not been consulted about the changes. They first came to his attention when he read rumours of them in the Times and the Telegraph. He accosted the Prime Minister and when he learned what was proposed he submitted a paper to him, stating that the abolition of the Lord Chancellor was a massive enterprise, involving primary and secondary legislation, and that the whole process had been botched as a result of poor advice and the failure to involve himself and Hayden Phillips, his Permanent Secretary.

Lord Irvine pointed out that he was about to go out to consultation on a raft of important reforms, including the creation of a Judicial Appointments Commission.

He suggested that these should proceed and offered, after they had been completed, to pilot through the legislation necessary to abolish the office of Lord Chancellor and to create a new Supreme Court, leaving the Government when this legislation received Royal Assent. This offer was rejected by Blair, whereupon Lord Irvine resigned.

This account provoked a letter to the Select Committee from Tony Blair himself. The changes were all done on his initiative. He accepted that the process had been “extremely bumpy” and “messy”. He paid tribute to Derry Irvine, but said that because Derry was unsympathetic to the changes he had decided to make a change of person as well as a change of office.

I have some reservations about this simple explanation. It seems to me that the proposed abolition of the Lord Chancellor probably resulted from tectonic friction at Westminster.

As for the creation of a Supreme Court, this had long been advocated by some, including the Senior Law Lord, Lord Bingham, but it had certainly not been part of any Government policy.

In his paper Lord Irvine had referred to the creation of a Supreme Court as a necessary consequence of the abolition of the office of Lord Chancellor, but I do not see why the two necessarily went together. In the event, as Lord Irvine had predicted, it proved impossible to abolish the office of Lord Chancellor, though he was shorn of all his judicial functions. But the creation of a Supreme Court went ahead.

Opinions were strongly divided, both among the Law Lords and more generally in the House, as to the merits of this. What were the arguments in favour? It was argued that this was a necessary final step to the establishment of the separation of powers in the United Kingdom.

The principle of the separation of powers, invented by Montesquieu, had only gradually become recognised as a vital feature of our unwritten constitution. This is how Lord Mustill, one of our most distinguished jurists, described it in *R v Home Secretary, ex parte Fire Brigades Union*¹:

“It is a feature of the peculiarly British concept of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain.

¹ [1995] AC 513 at p. 567

Parliament has a legally unchallengeable right to make whatever laws it thinks right.

The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws and see that they are obeyed.”

It was an extraordinary anomaly and anachronism that the final court of appeal of the United Kingdom should be comprised of Members of Parliament. How many of you, I wonder, know how this came about. Those who do must forgive me if I embark on a short, and somewhat simplified, history lesson for those who don't.

The King used to live in the Palace of Westminster in London. He would summon to Westminster his advisers. Initially these were noblemen, the Lords created by the King. Once the King had made a man a Lord, the title passed on his death to his heir, so there grew up a body of hereditary peers or Lords. Later the King also took to summoning to advise him representatives of the different regions of the country who were not Lords. These two bodies of advisers developed into the two Houses of our Parliament, the House of Commons and the House of Lords. They still sit at Westminster, although this is no longer the royal palace. They are the first arm of state, the legislature.

In the Great Hall at Westminster the King's judges used to sit to administer the law on his behalf. He appointed them and he could dismiss them. Their successors are the independent judiciary, of whom I am one. They are the second arm of state, the judiciary.

The third arm of state, the executive, consists of the Ministers and officials who control the ever more complex administration of the country. One again the power that they exercised was originally delegated to them by the King, who appointed them and who could dismiss them. They also are now independent of such control.

The Queen remains the constitutional head of state, She has to assent to Acts of Parliament before they can take effect as laws. She appoints the judges; the Ministers are her Ministers. But her powers are largely illusory. The ways that she exercises them are determined by others.

I now propose to describe the three arms of state in a little more detail.

Parliament

The most remarkable feature of the British Constitution is that Parliament is supreme. Parliament can make any laws that it chooses. The judges have to apply the laws that are made by Parliament.

There are no constitutional principles that restrict the law that Parliament has power to make. With one exception, to which I shall come, Parliament can make any laws that it chooses, including laws that alter its own composition and powers. The members of the House of Commons are all elected and there has to be an election every five years. The House of Lords is made up of 90 hereditary peers and about 600 peers who are appointed for life, on the recommendations of an Appointments Commission. Up to the 1st October of last year there were also 12 Law Lords, or Lords of Appeal in Ordinary, and I shall be saying some more about them in a moment.

It used to be the case that legislation had to be approved by both the House of Commons and the House of Lords before it could become law. Since 1948 the House of Lords can only reject proposed legislation for one year. After that the House of Commons can insist on it becoming law, even though the House of Lords remains opposed to it.

I said that there was one exception to the rule that Parliament is supreme. In 1972 Parliament passed the European Communities Act under which the United Kingdom joined the European Community. The effect of that statute is that those laws of the European Community that have direct effect take precedence over Acts of Parliament. The Courts have to give effect to community law, even if this conflicts with an Act of Parliament.

The same is not true of the European Convention on Human Rights. We ratified that Convention in 1953, but for nearly 50 years, Parliament did not make it part of our domestic law. Then, in 1998 Parliament incorporated the Convention into our domestic law by passing the Human Rights Act. That Act provides that if a court considers that an Act of Parliament is incompatible with the Convention it can make a declaration to that effect. In such circumstances, however, the court must still apply the Act of Parliament, not the Convention. Parliament remains supreme. What normally happens when a court declares that an Act of Parliament is incompatible with the Convention is that Parliament amends the Statute in order to make it comply with the Convention, but Parliament is not obliged to do so.

The executive

The executive consists of all the officers and officials who are responsible for the administration of the United Kingdom. The most important are the Ministers. The King used to appoint the ministers to whom he delegated his executive powers. The Queen still appoints her Ministers, but she does so on the recommendation of the Prime Minister, normally the leader of the party that has the majority in the House of Commons, where of course there is such a party.

By convention Ministers have to be Members of Parliament, so that Parliament can hold them responsible for their actions.

Having Ministers who are members of the legislature is strictly in conflict with the pure doctrine of the separation of powers. Parliament makes the laws and the Ministers have to apply them, but when one party has a large majority in the House of Commons Parliament will normally enact the laws that the Ministers wish to introduce, so that the separation of the legislature from the executive is far from total. Apart from Ministers there are literally millions of officials who run the country subject to its laws. In the United Kingdom these officials are subject to the supervision of the same judges who deal with all other legal disputes. Let me now say something about those judges.

The judiciary

The King was the source of justice in England, but he delegated the administration of justice to his judges. It was their task both to try those accused of committing crimes, or breaches of the King's peace, and to resolve disputes between the King's subjects. From the second half of the 13th century the practice developed of publishing reports of the decisions of the King's judges and the reasons for those decisions.

These were treated as precedents that had to be followed in subsequent cases and there thus developed a body of law made by the judges. This is known as 'the common law' and much of it is still in force today. For instance, most of the law of murder in the criminal field and most of the law of negligence in the civil field is common law that has been made by the judges.

Although the judges were appointed by the King and exercised powers delegated by the King, they soon acquired a fierce independence. This was underwritten by Parliament in 1700 when it passed a statute, the Act of Settlement, which provided that judges should be appointed for so long as they should be of good behaviour and could only be removed if both Houses of Parliament agreed that they should be. In the whole of our history no High Court Judge has been removed from office. The independence of the judiciary is critical to the rule of law.

Because our laws and our political institutions had evolved peacefully we never had the revolution that would have resulted in the drawing up of a written constitution. And the evolution from an all powerful King, to the sharing out of his powers among the three arms of state did not result in a situation where the separation of powers was all that obvious. Let me deal first of all with the Lord Chancellor.

His is one of the oldest offices of state and it used to be the most important. He was the King's right hand man and adviser. As such he used to hear petitions and administer justice in his own Court. In recent times the Lord Chancellor retained both his administrative and his judicial duties. He was appointed by the Prime Minister, so that his office became a political office. He was the most important member of the Prime Minister's Cabinet. So he was a leading member of the executive. He had particular responsibility for the administration of justice and the upholding of the rule of law. One of his most important duties was recommending who should be appointed as judges. But he was also an important member of the legislature, for he presided over the legislative business of the House of Lords. He was, in effect, the speaker of the House of Lords. Nor was that the end of it. The Lord Chancellor retained his judicial functions. He sat as a judge – the most senior judge in the land, and so he was head of the judiciary. He was the very antithesis of the separation of powers. He was the combination of powers.

In my time in the law, and that is nearly 50 years, the Lord Chancellor always performed his judicial duties in a manner that was impartial and free from any political bias. When he sat as a judge, he was careful to see that it was in cases in which the Government did not have an interest.

When he made judicial appointments he consulted widely, taking in particular the views of the senior judiciary, and the appointments were made on merit.

I said that the Lord Chancellor sat as a judge, but I did not say where he sat. Where he sat was in the House of Lords, and the judges who sat with him, under his presidency, were also members of the House of Lords.

This calls for a little explanation. From the time of its creation Parliament would entertain petitions from citizens, sometimes brought directly and sometimes by way of appeal from decisions of the courts. In the eighteenth and early nineteenth century the House of Lords sat in the morning to do judicial business, which consisted largely of appeals from the courts. Peers who had no judicial experience could vote on the result of appeals. In defiance of the doctrine of the separation of powers, legislators were acting as judges.

This did not guarantee a very high standard of justice. One appeal involved a Bishop. The Lords Spiritual packed the Chamber and the Bishop won his appeal by a narrow majority. Even if the House was not biased, it boasted few who were learned in the law, and would sometimes invite the judges to come and advise it.

The transition from this state of affairs to that prevailing at the start of the 21st century is a complicated and confusing story. The turning point was 1876, when the Appellate Jurisdiction Act provided for professionally qualified judges to be made members of the House of Lords in order to transact its business as, in effect, the final court of appeal of the United Kingdom. They were called Lords of Appeal in Ordinary and from then on only they, and peers who had held high judicial office, were permitted to sit and vote on judicial appeals that were made to the House of Lords. The number of these so called 'Law Lords' was increased from time to time until it reached the number of 12.

England and Wales, Northern Ireland and Scotland each have their separate jurisdictions and judiciaries, but from all these jurisdictions an appeal could be brought to the House of Lords, with the one exception that no appeal in a criminal matter lay from Scotland. The Law Lords were full members of the House of Lords. They were permitted to take part in the legislative business of the House, and sometimes did so although, by convention, not when that business was political in character. The Law Lords functioned very much like any other appellate court, usually sitting in a constitution of five, so two panels could sit at the same time. They were independent of any political influence and enjoyed a high reputation.

The Law Lords performed one other judicial function. Appeals from the courts in the British Colonies had always lain to the King or Queen. The monarch decided these appeals in accordance with advice that she received from members of her Privy Council. These members were none other than the Law Lords, with some additional members, sitting as the Judicial Committee of the Privy Council. On obtaining independence some of these Colonies retained the right of appeal to the Privy Council and these were heard in a special, and very elegant, court in Downing Street.

This then was the position in 2003. The Lord Chancellor was the highest judge in the land. Under his presidency the 12 Law Lords sat in Parliament as the final court of appeal of the United Kingdom. And they also sat as the Judicial Committee of the Privy Council. For members of the public this was a confusing picture and few understood what it meant when a decision of the Court of Appeal was appealed to ‘the House of Lords’. Certainly those outside the United Kingdom found our system hard to understand.

This was the position when I was made a Law Lord about ten years ago. The nature of the Law Lords, what they did and why, was not understood by the man on the Clapham omnibus and certainly baffled the man on the Paris Metro.

The announcement that we were to have a new Supreme Court received a mixed reception. Many thought that it was high time that the most senior judges in the land were removed from Parliament, so that their independence from the legislature was clear to all and their role properly understood.

Those opposed to the creation of a Supreme Court argued that it was unnecessary and undesirable. It was unnecessary because the Law Lords already functioned in practice as a fiercely independent final court of appeal. No one sought to exert political influence over them. Their judgments showed no improper deference to Government. Law Lords by convention no longer took part in the legislative business of the House. They made, however, a valuable contribution by chairing apolitical Committees.

It was also valuable for them to rub shoulders in their working environment with the wide range of personality and experience represented in the House of Lords, rather than retreating into an ivory tower. Furthermore the ivory tower was likely to be extremely expensive. The expenditure could not be justified.

I was one of those in favour of a Supreme Court. Judges should not only be independent but they should be seen to be independent. Nor could justice very readily be seen to be being done by members of the public, when hearings took place in a remote Committee Room in the House of Lords and judgments were delivered on the floor of the House in a ceremony that might have been designed to bemuse anybody who happened to be there to observe it. Working conditions were not ideal in the Law Lords' corridor, even if they were the envy of other members of the House and our Judicial Assistants had to be housed in an attic, their numbers restricted by constraint of space. The time had come to sever our links with Parliament. With hindsight I think that it proved to be a pretty good time to go.

It took, of course, six years to make the move. Most of this time was taken in identifying and making ready the building that was to be the new courthouse.

We were not, like the American Supreme Court upon its creation, content to conduct our business in a tavern until more suitable accommodation could be found. Not that everyone was at first persuaded that this building, old Middlesex Guildhall, was a suitable building to be transformed into the Supreme Court of the United Kingdom. Its position was ideal, facing the Houses of Parliament and flanked on one side by Westminster Abbey and on the other by the Treasury. But the merits of the building were not immediately apparent.

This is how it was described in an official publication:

“Designed by JS Gibson and built in Portland stone, it is a typical late gothic revival building – simple and largely unpretentious, apart from the windows and the central porch.”

Such pretensions as the building had were hidden under the grime of ages, so that it would not even have been noticed by the average passer-by.

That is no longer the case. The building has been skilfully converted to provide us with the facilities that we need. We are all delighted with what has been achieved. Cleaning has disclosed gleaming white stone without and has produced a light and airy building within. We have three courtrooms. The largest can accommodate nine justices on the bench, the others five.

One of the smaller courts is dedicated to appeals to the Judicial Committee of the Privy Council.

Not many appreciate that as much as one third of our sitting time is spent in hearing appeals to the Privy Council from some of the smaller members of the Commonwealth. The other smaller court, my favourite, is modern in design and has tall windows that look across to Westminster Abbey.

The Justices are well accommodated in spacious rooms, albeit that most of these are in the attic. There is excellent open plan office space for our secretaries and judicial assistants. We have a handsome library, carved out of the middle of the building, a well proportioned dining room and a sitting room. The grandest accommodation has been allocated to the lawyers, consisting of a suite of panelled rooms that run across the front of the first floor.

What difference has the move made? Its primary object was to make clear to the public the nature of the final court of appeal of the United Kingdom, the independence of that court, and the work that it was doing.

All our proceedings are recorded by permanent cameras and it is open to the media to request any part of this record for broadcasting purposes.

When a judgment is delivered, a press release will be prepared for distribution explaining what has been decided. In addition, the judge delivering the judgment will prepare a short oral statement of its effect.

Where the case is one of general public interest this is likely to be broadcast as part of the news, so that we have a valuable opportunity to give an accurate explanation of what the case has been about.

You have, however, to condense the judgment into a statement about 30 seconds long. I have become quite good at this and am at risk of turning into a TV personality. Some have suggested that we should adopt a similar approach to the length of the judgments themselves.

We have, of course, our own web site. The information on this includes details of the cases that we are to hear, judgments that we have delivered, together with the press releases relating to them and our new procedural rules. In the first few months the site had over 158,000 visitors.

On our front door there is a notice saying that we are open to the public, and the public have been visiting us in quite large numbers. In a normal week we get about 900 visitors. The number is greater if we have an appeal of particular public interest.

When we do have such an appeal, there is only limited room for observers in the court, but we have a close circuit television link with our exhibition centre in the basement. Here visitors can learn about the Court – and these normally include 3 or 4 school or university groups a day.

One of the things that a visitor can do is to pretend to be a Supreme Court Justice. A touch screen offers a variety of cases that we have decided and the operator can learn the facts of the case and the issues raised and then key in the way in which he would have decided it, before going on to find out whether we got it right or not.

To run our Court we have our own Chief Executive, Jenny Rowe, who answers to me not to any Minister, and our own mini civil service, which answers to her. The Lord Chancellor negotiates with the Treasury on our behalf for our budget, but the manner in which we spend it is up to us.

When we moved to the Supreme Court we resolved that there were some aspects of our procedure that we were not going to change. We liked the relative informality of the Committee Room, so we designed the Courts with the advocates and the Justices on the same level. The Law Lords wore no gowns, and my colleagues were adamant that they did not wish to wear them as Justices.

So we sit in court in ordinary suits, although we have some very grand black and gold gowns that we wear on ceremonial occasions, such as the State opening of Parliament.

When I started practising as a barrister about 50 years ago a large part of the work of the Law Lords was resolving commercial disputes. These were disputes between companies who could afford the cost of taking a case right up to the Lords. But legal aid had just been introduced, so quite often individual citizens would take a case to the House of Lords. But by and large the disputes that came before the Lords were disputes between individuals or companies. These are known as disputes of civil law.

Today there has been a big change. The complexities of modern society have resulted in ever increasing regulation of the individual by the State. And there has been an ever increasing tendency for the individual to challenge executive action in the courts. Public officials are under a duty to exercise their powers rationally. They must have regard to material considerations and not be influenced by anything that is not relevant to their decision. The citizen can challenge their decisions on the ground that they have not done this. Ruling on such challenges is called “judicial review”. They raise issues of public law, not civil law.

The power of judicial review is one that judges invented in order to make sure that State officials comply with what we call the “rule of law”. 50 years ago judicial review cases were very rare, but now they are the most important part of the diet of the Supreme Court.

One thing that the courts were not allowed to review were Acts of Parliament, for no one could challenge the lawfulness of an Act of Parliament. That has now changed. As I explained, when we joined the EEC, Parliament passed a statute that gave precedence to Community law. So the Supreme Court can, and indeed must, refuse to give effect to an Act of Parliament that is contrary to EC law. That does not happen very often.

More common are human rights challenges and these now constitute a major part of our diet. The European Convention on Human Rights is not an EC treaty. It is a treaty that binds the much wider membership of the Council of Europe. Inhabitants of any Member State who consider that their human rights have been infringed can make a claim against their government before the European Court of Human Rights at Strasbourg. Before the Human Rights Act was passed in 1998 those in this country could not base a claim in the courts of this country on infringement of their human rights. They had to go off to Strasbourg.

The Human Rights Act has changed all that. Citizens can now claim compensation from the Government in the English courts if their human rights are infringed. And it is the duty of the courts to take account of the decisions of the Strasbourg Court when we are dealing with human rights claims. The consequence of our doing so is that we sometimes have to rule that Government action is unlawful, or even that Parliamentary legislation is incompatible with the Human Rights Convention. This has caused the Government a considerable problem when trying to deal with terrorism.

Let me explain the nature of the problem. In 1996, in a case called *Chahal v United Kingdom*, the Strasbourg Court ruled that it is contrary to the Human Rights Convention for us to deport an illegal immigrant if he will be at risk of torture or inhuman treatment if he is sent home, however great a risk that he may pose to this country. But at the same time the Strasbourg Court has ruled that you cannot lock up an illegal immigrant without a trial just because you have grounds to suspect that he is a terrorist. If you want to lock him up you have to prove that he is a terrorist.

There is an exception to this. The Convention permits a country to derogate from the prohibition of detention without trial, but only “to the extent strictly required by the exigencies of the situation ...in time of war or other public emergency threatening the life of the nation”. Those words are important.

After 9/11 the British Government decided that the threat of terrorism in Britain was such as to amount to a public emergency threatening the life of the nation and purported, on that ground, to derogate from the Convention. It did so only in respect of “foreign nationals present in the United Kingdom” who were suspected of being concerned in terrorism. Relying on this derogation, Parliament then passed the Anti-Terrorism, Crime and Security Act 2001. This permitted an alien to be detained indefinitely if the Home Secretary reasonably suspected that he was a terrorist and believed that he was a threat to national security but was unable to deport him because he would be at risk of inhuman treatment in his own country. The Home Secretary immediately exercised this power by locking up a number of aliens. He made it plain to them that if they wanted, voluntarily, to go back to their own countries, they would be free to do so. They did not. Instead they appealed to the Court that their right to liberty under the Human Rights Convention had been infringed.

They challenged their detention on two grounds. First they argued that there was not “a public emergency threatening the life of the nation. Secondly they argued that the derogation was unlawful because it went beyond what was “strictly required by the exigencies of the situation.”

Their challenge to their detention went up to the House of Lords, which sat nine strong rather than the usual five to hear the case, and they were successful. *A v Secretary of State for the Home Department*². The majority of the House of Lords held that there was a “public emergency threatening the life of the nation” so that the derogation from the Convention was permissible. Lord Hoffmann disagreed. He said:

“The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.”

Where all the Law Lords agreed was in holding that the terms of the derogation and the provisions of the Act were unlawful in that they went beyond what was “strictly required by the exigencies of the situation”.

² [2004] UKHL 56

In so holding they dismissed a submission by the Attorney General on behalf of the Government that it was not for the Courts rather than the Government to assess the proportionality of anti-terrorism measures. This is what Lord Bingham said:

“...the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself”

It was Parliament that had given the Courts the task of protecting human rights and that was a *“very specific, wholly democratic mandate”*.

There were three reasons why the Law Lords held that this legislation went too far. The first was the importance that the United Kingdom has attached, since at least Magna Carta, to personal liberty. The second was that the measures applied only to aliens. There were plenty of terrorist suspects who were British subjects. How could it be necessary to lock up the foreign suspects without trial if it was not necessary to lock up the British suspects? Finally, the measures permitted those detained to opt to leave the country. If they were so dangerous how could it be appropriate to leave them free to continue their terrorist activities overseas? So the House of Lords quashed the Derogation Order and declared that the relevant provisions of the Act were incompatible with the Convention.

Parliament's reaction to this judgment was to rescind the legislation and pass a new Act – the Prevention of Terrorism Act 2005. This among other things empowers the Secretary of State to place restrictions on the movements and activities of terrorist suspects by making them subject to Control Orders. The restrictions must not, however, be so severe as to amount to deprivation of liberty, or once again they will run foul of the requirements of the Human Rights Convention. It is not an easy question to decide where you draw the line, and that question is ultimately one for the courts, and it is one that has been keeping the courts busy.

The first batch of Control Orders imposed by the Home Secretary required the suspects to stay confined within small apartments for 18 hours a day, and placed stringent restrictions on where they could go and whom they could see in the remaining six hours. These Orders were challenged and a division of the Court of Appeal over which I presided ruled that they were unlawful in that the restrictions that they imposed amounted to deprivation of liberty.

The Home Secretary immediately imposed modified Control Orders in place of the old ones. These were not nearly as restrictive and, in contrast to the old ones, were specially tailored to meet the circumstances of the individual suspect.

The curfew periods were reduced to 14, or in some cases, 12 hours a day. These in their turn were challenged in the courts, but were held not to amount to deprivation of liberty.

Subsequently the issue of when a control order amounts to deprivation of liberty was considered by the House of Lords, together with another issue that I am going to come to. The House upheld our decision that an 18 hour curfew amounted to deprivation of liberty. Lord Brown suggested that 16 hours was the maximum permissible curfew period. There was some, inconclusive, discussion as to the extent to which other restrictions, when added to a curfew period, could tip the scales when deciding whether there was a deprivation of liberty *MB and others*³.

That question reared its head again in the latest control order case, in which the Supreme Court has yet to deliver judgment. [**Set out facts**]

Meanwhile the imposition of Control Orders had been attacked on another front. They can only be imposed where the Home Secretary has reasonable grounds for suspecting that the suspect has been involved in terrorism and that the control order is necessary to protect members of the public from terrorism. Article 6 of the Human Rights Convention guarantees the right to a fair trial.

³ [2007] UKHL 45

This means that the suspect must have a right to challenge the control order in the courts and the procedure adopted by the courts must be fair. This raised a problem. The Secretary of State was often not prepared to disclose his reasons for suspecting that a person was involved in terrorism, for to do so might prejudice ongoing security operations. How could there be a fair trial in such circumstances? The same problem sometimes arose in the case of immigrants whom the Home Security wished to deport on security grounds.

Parliament came up with an ingenious answer. It created a special court called SIAC. SIAC sat in public to hear evidence that did not have security implications. Where, however, evidence could not be made public, SIAC would sit in private to hear it, and the suspect himself would not be allowed to be present. Instead he would be represented by a Special Advocate, who had security clearance. The Special Advocate would argue the suspect's case in relation to the secret evidence, but he would not be allowed to communicate that evidence to his client.

Suspects challenged this procedure on the ground that they could not have a fair trial if they were not allowed to know the details of the case against them. The Government argued that the suspect's right to a fair trial would be satisfactorily protected by the Special Advocate procedure.

The case went up to the House of Lords. It is the one to which I have already referred when discussing the length of control orders. Each member of the House gave his or her own opinion. These raised great problems for the lower courts, because they were unable to agree on precisely what the Law Lords had decided. They agreed that in most cases it would be possible, in one way or another, to give the suspect a fair trial.

But what if the security services were not prepared to disclose to the suspect the essence, or gist, of the case against him, so that he was left completely in the dark as to why he had been made subject to a control order. At least one member of the House, Lord Brown, suggested that if the case against the suspect was so strong that no challenge could conceivably succeed, then there was no need to tell him even the gist of the case against him. It was not clear, however, whether Lord Brown was out on a limb on this, or whether the other Law Lords agreed with him.

So, you can guess what happened. Three more control order cases came up to the House of Lords *AF and Others v Secretary of State for the Home Department*⁴.

⁴ [2009] UKHL 28

The suspects subject to the control orders complained that they had been told nothing of the cases against them and that their human rights had been infringed because they had not had a fair trial. The Government relied on the speech of Lord Brown in the previous case and argued that if there were overwhelming grounds for believing that the suspects were involved in terrorism, it was not unfair to impose the control orders, even if the suspects could not be told the case against them.

I was presiding on this appeal. Before we could hear it the Grand Chamber of the Strasbourg Court gave a judgment which dealt quite categorically with the point : *A v United Kingdom*⁵. They said that where the Secretary of State's decision was based solely or decisively on material the gist of which was not disclosed to the suspect, the suspect did not have a fair trial.

We felt that we had no option but to follow this decision of the Strasbourg Court, although it is fair to say that the majority of us thought that the Strasbourg Court was right.

⁵ [2009] ECHR 301

So we ruled that if the Secretary of State was not prepared to tell those subject to the control orders the essence of the case against them, he had to lift the control orders. In a number of cases he has chosen to do just that.

I have been describing to you a number of cases in which the action taken by Government to deal with terrorist suspects has been held to be unlawful by the House of Lords or the Supreme Court. They are only examples. They have led some sections of the media to attack the Human Rights Act, or even the judges who have to apply it. Charles Clarke, when Home Secretary, when giving evidence to a parliamentary Committee protested:

“The judiciary bears not the slightest responsibility for protecting the public and sometimes seem utterly unaware of the implications of their decisions for our society”

Charles Clarke failed to appreciate that it is the duty of the judiciary to apply the laws that have been enacted by Parliament. It was Parliament that decreed that judges should apply the Human Rights Convention and, when doing so, to take account of the judgments of the Strasbourg Court.

Having said that I should add that, in my opinion, the enactment of the Human Rights Act by the previous administration was an outstanding contribution to the upholding of the rule of law in this country and one for which it deserve great credit. Because it requires the Courts to scrutinise not merely executive action but Acts of Parliament to make sure that these respect Human Rights, the Act has given the Supreme Court some of the functions of a Constitutional Court. Drawing the right line between protecting the rights of the individual and respecting the supremacy of Parliament is, I believe, our greatest challenge.

I would like to end by reading a passage from the speech of Lord Hope in a case which was concerned with whether it was safe to send terrorist suspects home to their own countries: *RB and Another v Secretary of State for the Home Department*⁶:

“209. Most people in Britain, I suspect, would be astonished at the amount of care, time and trouble that has been devoted to the question whether it will be safe for the aliens to be returned to their own countries.

⁶ [2009] UKHL 10

In each case the Secretary of State has issued a certificate under section 33 of the Anti-terrorism, Crime and Immigration Act 2001 that the aliens' removal from the United Kingdom would be conducive to the public good. The measured language of the statute scarcely matches the harm that they would wish to inflict upon our way of life, if they were at liberty to do so. Why hesitate, people may ask. Surely the sooner they are got rid of the better. On their own heads be it if their extremist views expose them to the risk of ill-treatment when they get home.

210. That however is not the way the rule of law works. The lesson of history is that depriving people of its protection because of their beliefs or behaviour, however obnoxious, leads to the disintegration of society. A democracy cannot survive in such an atmosphere, as events in Europe in the 1930s so powerfully demonstrated. It was to eradicate this evil that the European Convention on Human Rights, following the example of the Universal Declaration of Human Rights by the General Assembly of the United Nations on 10 December 1948, was prepared for the Governments of European countries to enter into.

The most important word in this document appears in article 1, and it is repeated time and time again in the following articles. It is the word "everyone". The rights and fundamental freedoms that the Convention guarantees are not just for some people. They are for everyone. No one, however dangerous, however disgusting, however despicable, is excluded. Those who have no respect for the rule of law - even those who would seek to destroy it - are in the same position as everyone else.

211. The paradox that this system produces is that, from time to time, much time and effort has to be given to the protection of those who may seem to be the least deserving. Indeed it is just because their cases are so unattractive that the law must be especially vigilant to ensure that the standards to which everyone is entitled are adhered to. The rights that the aliens invoke in this case were designed to enshrine values that are essential components of any modern democratic society: the right not to be tortured or subjected to inhuman or degrading treatment, the right to liberty and the right to a fair trial. There is no room for discrimination here. Their protection must be given to everyone.

It would be so easy, if it were otherwise, for minority groups of all kinds to be persecuted by the majority. We must not allow this to happen. Feelings of the kind that the aliens' beliefs and conduct give rise to must be resisted for however long it takes to ensure that they have this protection.”

To this I would add this comment. The so called “war against terrorism” is not so much a military as an ideological battle. Respect for human rights is a key weapon in that ideological battle. Since the Second World War we in Britain have welcomed to the United Kingdom millions of immigrants from all corners of the globe, many of them refugees from countries where human rights were not respected. It is essential that they and their children and grandchildren should be confident that their adopted country treats them without discrimination and with due respect for their human rights.

If they feel that they are not being fairly treated, their consequent resentment will inevitably result in the growth of those who, actively or passively are prepared to support terrorists who are bent on destroying our society. The Human Rights Act is not merely their safeguard. It is a vital part of the foundation of our fight against terrorism.