Terrorism and the Constitution

Right, okay. As you can see, I'm not a great techno-person, but I am laden down with technology so you can hear me and film me today. I should point out that in law lectures, just for the warning of any of you law students, any mobile phone goes off, the person whose phone it is gets sent out of the lecture. We're very strict about that, we have rules.

Okay, so. Terrorism and the Constitution. This is a precis lecture of an article I wrote which was published last year in 2007 Current Legal Problems, which is the UCL law journal. So, any of you interested in following up on references and getting the details then please do so, feel free to do so. The purpose of the lecture is to examine the challenge to the courts from the wave of legislation – anti-terrorist legislation which the Government in this country passed in the post 9/11 'War against Terrorism' – the – if you like, the Governmental legal war against terrorism, except it isn't legal in many cases. And to see how the courts have coped with this legislation, given the challenges it poses for human rights and constitutional rights. But before looking at that, what I want to look at is an important development over the last 25 years or so in the United Kingdom, which, for want of a better term, we lawyers have generally called 'the New Constitutionalism.' And the New Constitutionalism is a mixture of events and developments which have come about in the last quarter century and which have created, in effect, an entirely new constitutional framework for the United Kingdom. And the first of these developments is the development by the courts, through principally a doctrine known as the Rule of Law, of a new set of common-law constitutional rights. Now, the Rule of Law is a term much-loved and abused by politicians, but to lawyers it has some very specific meanings. It means, first of all, the subjection of all state action to the principle of legality. That is, that the state must be able to point to a formal source of law if it wishes to take action against a citizen. So that, whenever the state takes action which harms, or has an impact – an adverse impact upon an individual, or a company, it must be able to point to a specific source of legal authority: a Statute, or a decision of the courts, or a regulation – that's a law passed by a minister under delegated authority. The first of the principles of legality, the first of the principles within the Rule of Law is the principle of legality, and that is that the state must have legal authority for anything it does: government of laws, not of men. Or women. It's an old principle, it actually goes back to ancient Greek – Aristotle talked of the government of law, not of men. The second principle is that we are all equally subject to the law irrespective of our gender, our race, our religion, our political beliefs, our sexual preferences in some cases. In other words, the non-discrimination rule that we are all equally subject to the law, no-one is above the law. No-one can say, 'I'm a Government official, therefore I have special privileges, I'm exempt from the law.' No-one can say, 'because I'm a rich person I'm above the law.' So we have the second principle, that of equality or non-discrimination, equality before the law: we are all equally subject to the law. And the third aspect of the rule of law is that whenever an individual wishes to challenge any action taken by the state or by any other person, he has the right of access to the courts: that the courts are the ultimate arbiters of the legality or illegality of any action taken by the state or by any other person against an individual or company. That the courts ultimately have the final say on whether or not an act is lawful or unlawful. The legality principle requires the right of access to the courts to determine the right of individuals – to determine the rights of individuals. Now, those three principles, the legality principle, the equality principle and the access to the courts principle, make up the Rule of Law. And, that's a fairly simplified version as you'll discover if you do constitutional law in full, but that's a reasonable accurate simplified version. And that principle – those principles within the Rule of Law have enabled the courts to develop a series of constitutional principles in recent years, what we call common-law constitutional principles. So the right of access to the courts, for example, has meant that a prison governor could not prevent a prisoner from writing to his lawyer when he was contemplating legal action against the prison governor and the Home Office. Because the right of access to one's lawyer, the right of communication with one's lawyer, is an essential corollary, or an essential part of, the right of access to the courts. Therefore, for the prison governor to exercise a general disciplinary power so as to censor prisoners' communications with their lawyers was unlawful, because it was in violation of the constitutional right of access to the courts. That's a case called ex parte-Leech. Equally, when the Lord Chancellor, who was then the head of the judiciary but is no longer, attempted to make the courts self-financing, the civil courts self-financing, by raising the fees for civil litigation to such a level that poor people, ordinary people, even moderately well-off people like myself, simply would not have been able to afford to take legal action – civil legal action – because of the cost under the new fees regime. This was held to violate two of the principles of the Rule of Law. The first was the right of access to the courts, because effectively he was barring access to the courts to a large portion of the population, but secondly the equality principle. He was effectively making the right of access to the courts available only to rich people. Or to rich corporations, wealthy corporations. Ordinary people, poorer people, even moderately well-off people, were going to be excluded from the courts because of the cost of going to law, the cost of taking civil legal action. So, the Lord Chancellor, who was exercising, again, a delegated power to make regulations, fixing the fees or setting the fees for civil litigation, was held to be acting in violation of a constitutional – common-law constitutional right. And it was held that his regulations were invalid, because they violated a fundamental constitutional principle. And there are a number of other decisions, which I don't really have time to go into, which reflect the same willingness on the part of the courts –

I'll give you a third illustration, the – one of the aspects of the Rule of Law is that no-one can be punished except for a breach of the law, the state cannot punish an individual except for a breach of the law, and in that – within that principle there is also the principle of non-retrospective criminal law. That is, if my conduct is legal when I commit it, the state cannot subsequently make a law which says that my conduct was unlawful at the time I committed it. They cannot legislate retrospectively to make something which was lawful when it was done, a crime later. In other words, no retrospective application of the criminal law. Now, that principle is part of the rule of legality, the Rule of Law, was uphold in a case against the Home Secretary, a former Home Secretary, who was known, famously, for saying that 'prison works', when everybody knows that prison doesn't work, certainly not in terms of rehabilitation, maybe in terms of prevention by mere detention, but it certainly doesn't work as a form of rehabilitation. That Home Secretary wanted to prove for political reasons that he was tough on law and order, tough on crime. And he decided that instead of people serving the normal 13 to 15 years tariff, or period for retribution, before they became eligible for parole, or release on license - we're talking about serious criminals who get sentenced to life imprisonment. Life does not mean life, in almost all cases life prisoners become eligible for parole around about the – between the 13 to 15 year mark, after having served 13 to 15 years in prison, they will become eligible for release on liscense. Provided they've shown remorse, provided they've been good, model prisoners and not had any record of bad behaviour in prison, they are likely to be released on licence – they're still life prisoners and can be recalled at any time for misconduct, but they are released on license normally after a period of about 13 to 15 years. The Home Secretary – the then Home Secretary – decided that he was going to show how tough he was on crime, and so he started increasing the tariff periods for all these prisoners from 15 years to 25 years. People were going to have to serve ten years longer in prison for a life sentence than they had – had come to expect. But he did it retrospectively, or he did it long after the event, and Mr. Pearson, who had committed a murder, having served 14 years in prison on a tariff of 15 years which had been decided when he was sentenced to life imprisonment. It's normally decided immediately after sentencing how the long the tariff period will be. So, he'd served 14 years, he expected to get out in a year because that was what the judge had recommended and what the Home Secretary had agreed back at the time that he was sentenced. And now, with a year to go, he was suddenly told, 'no, you've got 11 years to go.' I think you can appreciate that's fairly unfair. That, for somebody to have been told what his sentence was, and how long – what period of his sentence he would actually have to serve before becoming eligible for parole. And then to change that at the end of that period, to add another ten years, is manifestly unfair, it violates a reasonable or legitimate expectation. But the courts, the House of Lords, held it also violated a fundamental principle of the Rule of Law, that you don't make decisions with retrospective effect. Once you've sentenced somebody you can't subsequently change that sentence, you can't turn around and say, 'ah, now we don't think that was long enough, we think you should serve longer.' That's not fair, it's against the – by analogy, it's against the rule of retrospective criminal justice. You can't retrospectively change somebody's period of sentence. So, the courts have been setting out these new common-law constitutional rights, just made-up by the judges from the fundamental constitutional principle of the Rule of Law. There's also been a fundamental change in the way in which both politicians and lawyers see democracy. That's the second of the developments. Democracy used to be thought of as majority rule. If you win a majority in an election you get installed in power for a period of however long the parliament lasts, four or five years or the term of office lasts, four years for an American president, five years for a British prime minister or five years maximum for a British prime minister 'cause that's the term of parliament, and you can do what you like because you've got a majority, so you can pass whatever law you like. And our parliamentary system, unlike a presidential system, and in a parliamentary system in an unwritten constitution as the United Kingdom has, a constitution which doesn't pose or impose any explicit restrictions on the powers of government, unlike, say, the American constitution which , with its Bill of Rights, has very strict limits on what Congress can do, what the legislature can do and what the president can do. In our constitution there are no such explicit written higher-order legal limits, and so a prime minister, a strong prime minister with a strong majority, can pass pretty much whatever legislation, can get whatever legislation they want, through Parliament, they can pass it through Parliament. So Mrs. Thatcher was able to pass the Poll Tax law, which was deeply unpopular, and which eventually led to riots in the streets of London, some of the worst riots we've ever experienced in central London. She was able to privatise the whole of British state industries: the railways, the electricity, the water, the telephones, the gas, the buses, virtually everything was privatised under Mrs. Thatcher. A radical government with a majority, with a decent majority, can pass any legislation it likes. There are no explicit constitutional safeguards on our system of democracy. There are only understandings that that's not the sort of thing you do, which are not very strong understandings, not very strong protections. But more recently, judges – so that sort of majoritarianism, that, the greatest happiness of the greatest number, means we can sacrifice individual rights for the greater good of the community at large. That sort of utilitarianism, or majoritarianism, used to be the way most British judges thought, or most British politicians thought, and most British judges thought, if they're elected then we shouldn't – and they pass laws, that we have no – we have no legitimacy, we have no authority to override the laws of elected parliamentarians, elected politicians. That attitude over the last quarter of a century has dramatically changed. And we have moved into a period when democracy is seen as having certain substantive and procedural values. As including protection of the rights of the minority from abuse by the majority, from preventing restrictions on freedom of speech. Freedom of speech in a democracy is the paradigm democratic right, because without it we can have no democracy. If you're not free to criticise the government, if you're not free to advertise your own political ideas and ideology and program, your manifesto, if you're not free to have access to the means of mass publication, the media, then democracy isn't going to work. So freedom of speech in a democracy is seen as a fundamental part, a fundamental value of democracy, which, even if you have a majority, that majority does not authorize you to violate the principle of freedom of speech. So there are some values and principles which restrict the power of government even if that government has a majority. So having a majority does not confer absolute power. And the courts have woken up to this as well and have started talking about fundamental democratic freedoms. And so in a landmark case in the House of Lords, called Derbyshire County Council against Times Newspapers, the courts held that freedom is a fundamental – freedom of

speech is a fundamental democratic right, a common-law constitutional right as well as one protected by the European Convention on Human Rights, and that therefore no public authority could have the right to sue for libel against a newspaper, or against anybody else for that matter, because free discussion, free public discussion of the activities of public authorities, whether they be government ministers, local authorities, members of parliament or whoever. It's a bit like the public figures defense, the absolute defense for libel against public figures in the United States, but not quite, this is really only to public authorities, couldn't have the right to sue in a democracy.

So, we see the triumph of democratic values and rights over majoritarianism. We also see, similarly, similarly inspired, the European Convention on Human Rights. Now, this was passed as a result of the atrocities – or this was agreed to, ratified, joined in by all the nations of Europe, as a consequence of the atrocities of the totalitarian regimes in Germany, and to a lesser extent Italy, and to some extent Spain, during the course... – hello, we've lost our projector, I didn't do anything, didn't touch anything, let's see if we can get it back. Yes. Oh a bit further on. Right – so, as a response to the horrors of World Was II, the Holocaust, concentration camps, the killing of millions of people, the genocide of particular racial groups, Jews, Gypsies, Slavs, homosexuals, anybody whom the Nazis didn't like, the nations of Europe got together and created a body called the Council of Europe. And the first act of the Council of Europe was to create this incredible convention on human rights, which has real teeth because unlike other conventions on human rights like the United Nations Covenant on Civil and Political Rights and the United Nations Universal Declaration of Human Rights, they have no enforcement machinery, they're empty phrases because they maybe sound wonderful but they have no means of enforcement. The European Convention has means of enforcement, it has a court, it has a – it had a commission, it doesn't have a commission any more, it has a Council of Ministers and it has a court, and the court makes enforcable findings against nation states, members of the Council of Europe who are signatory to the Convention, and those findings are invariably followed and carried out by the member states, by the signatory states. Britain, for example, has one of – or had, until recently, one of the worst records because we didn't have the convention as part of domestic law, and so we had a high number of cases taken to the European Court of Human Rights in Strasbourg, which the Government lost. But in every single case the Government not only complied with the findings and the judgement of the court and paid whatever compensation was necessary, but also changed United Kingdom domestic law to take into account, to enforce the rulings of the Court of Human Rights, upholding the Convention. Now, what really made a big difference – we were signatory to the Convention from 1950 onwards and from 1966 onwards we accepted the compulsory jurisdiction of the European Court of Human Rights and the right of individuals to petition that court. But in 1998 the new Labour government passed the Human Rights Act, which incorporated the European Convention on Human Rights into English domestic law. And that has meant that individuals don't have to waste huge amounts of money and years of time going off to Europe to try and get their remedies before the European Court of Human Rights, because they can ask the courts to enforce the Convention within the United Kingdom domestic courts, and that has had a huge impact on United Kingdom domestic law. Sometimes not always to the liking of the tabloid press, so there have been some cases where the human rights of terrorists have been respected and protected by the courts, or of hijackers, the Afghan hijackers case, quite rightly have been protected by the courts, but the ignorant tabloid newspapers in this country have whipped up a campaign against the Human Rights Act as if to say it's something that's alien and foreign to our legal system and we shouldn't have it. Well, actually, the European Convention on Human Rights was drafted by two British lawyers, the then Home Secretary and the then Attorney General, Sir David Maxwell Fife and Sir Hartley Shawcross, a wonderful wonderful name. He was one of the prosecutors in the Nuremburg Trials, so he knew what he was talking about when he drafted the convention. It is, in fact, representative and reflective of English law, but a lot of English law is unspoken and unwritten; this sets it out very clearly, what our freedoms are. Equally, the new Labour government made a further dramatic transformation in our constitution by creating devolved forms of government for Scotland and Wales. The importance of this is not so much that they got new parliaments or assemblies, the importance is that powers were divided between Westminster and local centres, and courts were given jurisdiction to decide whether or not the laws passed by the national assembly in Wales, the Welsh Assembly, or by the Scottish Parliament in Edinburgh, and also whether laws passed by Westminster Parliament, were within the powers which were shared out, allocated to different bodies, under the devolution settlements, under the Scotland Act and the Government of Wales Act. So courts had – were given greater power to decide on the validity of legislation, something which had never occurred in the United Kingdom before. Equally, the Freedom of Information Act meant that the government became much more transparent, government became less secret, we can find out everything, there's been great scandal within the last year because newspapers have been able to find out all about members of parliament's expenses, and the fact that some – one member of parliament was paying his son and his son's boyfriend to do absolutely nothing, as research assistants, and paying them a large amount of money, and that various people have been fiddling their expenses left, right and centre, has been of enormous amusement to the popular press, but it's also meant that government is very much more open and people are far less deferential to government as a consequence of the opening up of government, and as a consequence challenges to government are more likely, resulting from the Freedom of Information Act. We've also seen the reform of the House of Lords, and one of the most important aspects of the reform of the House of Lords in addition to the abolition of the hereditary principle – that you can inherit a seat in the House of Lords simply by birth – that can no longer be the case, although there is a remaining rump of 92 hereditary peers still in the House of Lords. They will disappear soon because there are more steps – it was sort of an incremental reform, they didn't want to get rid of all of them, so we had an election amongst the hereditary peers for the 92 that would remain during this transitional period. But, the most important point about the reform of the House of Lords is that the – the court, the judicial committee of the House of Lords which is our highest court, has been reformed and will commence, as soon as its new building is completed, on one side of Parliament Square, the opposite side of Parliament Square from the legislative building, it will become the new Supreme Court. We are removing the judicial element of the House of Lords, which is one of the – which is the upper legislative chamber, of course

you can see the violation of separation of powers there. We're removing it and creating a new and completely separate Supreme Court. The existing members of the House of Lords judicial committee will transfer over, but they will then become known as Justices of the Supreme Court. So, it will have a greater identity and authority as the Supreme Court of the United Kingdom, and I suspect just the change of title and also the separation from the legislature will mean it will feel itself more free to carry out some fairly radical constitutional decisions. Lastly, the Constitutional Reform Act of 2005 sets up a new system for appointing the judges. All our judges will now – they've always been independent, but they were actually appointed by the Lord Chancellor or, technically by the Queen, on the recommendation of the Prime Minister, on the recommendation of the Lord Chancellor. So, in effect, the Lord Chancellor, who was a member of the cabinet, speaker of the House of Lords, and head of the judiciary. Which is one of the worst violations of the separation of powers that you could imagine. But he was a political animal, he was a party appointee. As from last year – the year before last, 2006, the Judicial Appointments Commission, the JAC, which is made up of independently appointed, non-political, non-partisan people, some judges, some academics and some lay people, will now, in effect, make judicial appointments. They have to make – for every judical appointment they have to make two recommendations, they can make a first recommendation and a second choice. The Prime Minister must appoint one or other of those two. He can decide not to accept the first recommendation, but he must make the second recommendation. So, in effect, judges are now completely independently appointed with no political input into the process at all. They're appointed for their quality as lawyers and judges, and not because they happen to have a particular view on abortion or a particular view on capital punishment, as American judges are.

So, that's the series of constitutional changes which have taken place which we call the New Constitutionalism. Now, let's turn back to the legislative response to 9/11, because what we're going to see is how well the new constitutionalism has stood up to what happened post-9/11. We already had – Parliament and the United Kingdom has already legislated against terrorism. From 1974 onwards, we had the Prevention of Terrorism (Temporary Provisions) Act of 1974 following the Birmingham pub bombings by the IRA. But, as the threat of IRA terrorism faded with the settlement in Northern Ireland – the Good Friday Agreement – the disarming of the terrorist groups, other terrorist threats appeared as we saw in 2001 and the Government passed even more stringent anti-terrorism legislation, and we have the Terrorism Act 2000, the Anti-Terrorism, Crime and Security Act of 2001, and the Prevention of Terrorism Act 2005 in response to 9/11 in America and 7/7/2005 here in the UK, just across the road in one case, the bus was blown up in Tavistock square which is only 150 yards away from here. So it brought home to Britain what the threat of terrorism could be in the modern age. So what steps, what measures does this new legislation bring about? Well, the first and possibly most extreme step was that where we had foreign nationals suspected of terrorist activities or terrorist affiliations, but whom we could not deport because if we deported them back to their home countries they would be subjected to persecution, torture, inhuman or degrading treatment, and therefore would violate Article 3 of the European Convention, which is part of British law. So we couldn't – the British Government could not, therefore, deport, as a result of a number of decisions in the European Court of Human Rights holding that we were responsible even for foreign nationals, even for maltreatment by third parties in foreign countries outside the scope of the European Convention, if we deported them to that country. So we can't deport these people. So what can we do? Well, the Government thought up the bright idea, instead of prosecuting them for crimes, of just locking them up and throwing away the key. Indefinite detention, without trial, for no crime, simply on the basis of untested suspicion as to their terrorist affiliations or possible terrorist activities. So, this was an extreme measure, one which was used very unsucessfully against the IRA in Northern Ireland and led to martyrs going on hunger strikes; indeed one, Bobby Sands, died as a consequence of his hunger strike and I believe there's a movie being made about him, or has been made about him just recently. And it turned people into martyrs for the cause, it was highly unsuccessful as a policy. So indefinite detention, despite its unfortunate history, was adopted. Secondly, the Government decided that it would use, before the Special Immigrations Appeal Commission, which is the body which decides whether or not people can be deported, or sent home, the Government would use evidence which may very well have been obtained by torture, which was almost certainly – certain to have been obtained by torture because of the regimes who were supplying it: foreign state agencies, of foreign governments. So they decided – the Government decided they would admit such evidence before the Special Immigration – oops – Appeals... right. Another way of dealing with terrorists is a favourite method used in South Africa during the Apartheid years, namely, let's just lock people up in their homes. Lets put them under house arrest. Or better still, lets find special homes for them where we place them under house arrest, because then we'll have them under surveillance, we'll have their phones tapped, we'll know where they are. They won't be able to live with their families. And so what – that's what they decided to do, and they call them Control Orders. And under Control Orders, under the 2005 Act, a person can be held in virtual incommunicado house arrest. Under an 18-hour curfew, that's the longest curfew period that is operated under Control Orders. Some are as little as 12 hours, some are 14 hours, some are 16, there doesn't seem to be any rime nor reason to the length of the curfew period. No internet access, no visits by anybody unless there's been consent obtained for the nominated person whose identification and bone fides has to be proven to the Home Office before they can be allowed to visit. No mobile phones, and also even once you're out of the curfew period, when you're free to leave the home, you have to be tagged with an electronic tag and you're not allowed to go beyond a certain very limited geographical area. So, it is, in effect, a form of imprisonment. In effect it's more resrictive than the sort of prisons we have for white collar crime. We have open prisons for those convicted, not of crimes of violence, but fraud, white collar crime, various offences. Lord Archer, for example, who committed perjury, never committed theft or burglary or an assault or murder. Although what he wrote in his books is often pretty much murder of the English language – but nonetheless, he wasn't a violent or dangerous criminal, so he was put on an open prison, which meant that he could go out and have a meal in the evenings, he just had to report back by a certain time. In fact, open prisons are less restrictive than Control Orders. So, that's the second step. Another step which they took, which the Government took, was to create extraordinary stop and

search powers. The police, within designated areas – and they get to designate what those areas are – can stop and search persons and vehicles without reasonable cause; indeed, without having to suspect anything. So, unlike other search powers where they have to have reasonable cause to suspect you're in possession of drugs, or firearms, or offensive weapons, or proceeds of crime, or instruments for the commission of crime; in terrorist search powers they can just stop and search you. Without reason. They can just say, 'Prevention of Terrorism Act. I want to stop and search you.' And they have a right to do so within a designated area. And, of course, London is a designated area. So the police have the right to stop anybody anwhere within London, within the Greater metropolitan London area, and search them without having to have reasonable cause to suspect. That's what we call an extraordinary stop and search power. It can be used randomly. They can just stop and search everybody, or select whom they want. There's no – doesn't have to be a rime nor reason to it. They don't have to give reasons other than prevention of terrorism. The Government also created a huge range of offences, including speech offences and support offences. Including non-speech offences, non-communication offences. If you know that somebody is planning some terrorist activity and you fail to report it to the police, you are guilty of an offence. Even if that person is your husband, your brother, your wife, your son or daughter. If you do not report known terrorist activities, you too are guilty of an offence. And recently, a young woman who failed to report on her husband's terrorist activities was jailed for several years. He was one of the bombers who were planning on bombing a number of aircraft with liquid explosives, and one of them was married and his wife knew about it, and although she didn't participate in any way in the activities, she knew about it. Her failure to tell the police was an offence which gave rise to a serious sentence of imprisonment. Far less is required than for the normal offences of attempting or inciting or procuring or counselling or aiding and abetting, which require some form of act of encouragement or participation in the criminal activities, or in the preparation for the criminal activities. Mere knowledge and failure to report that knowledge is sufficient to make you guilty of an offence. Worse still, there is an offence of 'glorifying terrorism.' And people who write – who write poetry about jihad, for example. There's a young woman working, out of all places, at Heathrow Airport, who wrote poetry in support of young jihadist suicide bombers, and she was sentenced to imprisonment, simply for writing poetry. Not for doing anything. Fortunately the courts ultimately held that that legislation was too vague and uncertain, and her conviction was quashed. Otherwise it would be a severe violation of freedom of speech. Unless she was actually exhorting somebody to go out and kill somebody, as distinct from merely glorifying terrorist activities, then it seems inappropriate to make it an offence.

Now, how have the courts responded? I'll have to do all of this fairly quickly. First of all, the Belmarsh decision. Indefinite detention was held by the courts to be both disproportionate and discriminatory. The courts held that it failed to achieve its target, its objective, because it applied only to foreign terrorist suspects, indefinite detention applied only to foreign terrorist suspects, where as at least as much of the threat: indeed, thus far, almost all of the threat from terrorists within the UK, has come from UK-born, UK-national terrorists. And so the courts held it was disproportionate in the sense that it was ineffective, because the law on proportionality says that not only must it not be any more than necessary to achieve the legitimate aim, but a measure taken by the government must be rationally connected and able to achieve, capable of achieving the legitimate aim. Well, if the legitimate aim is the prevention of terrorism by detention, then merely detaining foreign national – nationals who are suspected of terrorism isn't effective. You have to detain both domestic – UK nationals and foreign nationals if you're going to make it effective. It was also discriminatory in violation of Article 14, so it was – it was not only in violation of Article 5, freedom from arbitrary detention, but it was also a violation of Article 14 of the European Convention, now part of United Kingdom law, because it discriminated on the basis of nationality. Which was expressly forbidden by the – Article 14 of the convention. So it was both disproportionate and discriminatory. What the courts were unwilling to do, except for one judge in the House of Lords, Lord Hoffmann, was to decide whether or not there was a state of emergency justifying derogation from the Convention rights in the first place. And one judge said, 'well, I don't think there is a state of national emergency.' It's not like Northern Ireland where we had an armed force actually threatening the sovereignty of the United Kingdom over a part of its territory, where it was seeking to displace the United Kingdom Government as the government of that territory. That's not what we've got under the present terrorist threat. What we have is a threat to blow up – it's a serious threat, and it's likely to cause harm and loss of life, but it's not a threat to the life of the nation, which is what is required by the European Convention. An emergency threatening the life of the nation. And Lord Hoffmann said that that wasn't the case here. It's important to point out that since the wave of Islamic terrorist – extremist terrorism against the United Kingdom and United States was started, the United Kingdom has lost 52 lives due to terrorist activity. There have been a number of terrorist activities which have been prevented by good intelligence and police work, and there might have been – potentially there might have been a greater number of lives. But we kill 3000 people a year on our roads. We don't ban the motor car, we don't lock up indefinitely drivers who drive carelessly or who threaten our lives by drunken driving. We may sentence them to a criminal offence, sentence them to prison for a short period, but we don't use extreme measures such as indefinite detention. In the seven year period since 9/11/2001, over 20,000 people have been killed on the UK roads, only 52 have been killed by terrorism. I think, in terms of risk assessment, the measures that the Government have taken have been quite extreme, and the courts, unfortunately, with the exception of Lord Hoffmann, weren't willing to question the Government's declaration of a state of emergency justifying derogation from the convention. Equally, in another decision, the Habashi decision, the United Kingdom courts held that the Foreign Secretary had a duty to make representations to the United States Government to release a United Kingdom citizen from unlawful detention in Guantanamo Bay. And that's what our courts called it. Our courts were the first, in fact, to declare that the indefinite detention without charge for criminal offences in Guantanamo Bay was unlawful. And they expected – the Court of Appeal specifically said they expected the United States courts to uphold the legality – to uphold the illegality of Guantanamo Bay detention. And they expected the United States Government to release – it couldn't order the United States Government, the United Kingdom court can't order the United States Government to do anything. But that decision is a public condemnation by the courts of an allied country of the United States' detention of suspects – or in many cases, not

even suspects – in the Guantanamo Bay. Equally, the courts held that no court in the United Kingdom could ever accept evidence which had been obtained or which probably had been obtained by torture. Not only is it a violation of fundamental values of international law, but it's also unreliable. People who are tortured will confess to anything just to stop the torture, so it's highly unreliable. In one or two cases they have suggested that there might, perhaps, be a kind-of catastrophic defence: you know, you know where the – you know where the atomic bomb is and you know that there is a – or you know – you've got a prisoner in your custody who knows where the atomic bomb is planted in the centre of London and has the code to turn it off, to switch it off. Alright. Do you torture that person and violate his or her fundamental rights or do you allow the bomb to go off and kill 12 million people? We sometimes refer to it as the Jack Bauer exception, for fans of 24 hours you'll know what I'm talking about. Do you allow the bomb to go off or do you commit unspeakable acts against the perpetrators in order to save a greater number of people? The courts, though, in practice have absolutely refused and rejected any admission of evidence obtained by torture. Control Orders have been held to violate not only Article 5 of the European Convention on Human Rights, the right to liberty, but also to the extent that people are detained in accommodation away from their families, in communities which they don't know and have no contacts. The right to private life under Article – private and family life under Article 8 has also been held to be violated. So, Control Orders have been held to be unlawful in violation of the Convention. Not only that, but the courts have held that the procedure whereby the Special Immigration Appeals Commission, in deciding immigration cases and in deciding Control Orders, has a procedure which enables them to tell a Special Advocate the evidence against the accused, but the accused is not allowed to know the evidence against himself. Right, it's a wierd procedure. So the court appoints the Commission or – yes, the Commission appoints a Special Advocate: he's a senior barrister, and he's told the evidence against the suspect but he's not allowed to communicate that evidence to his client, to the suspect. And the suspect doesn't have the right to know what the evidence is so he can't rebut it. So the barrister has to work in the dark, he can't get any answers from his client. The courts have held that that violates the right to a fair trial and is an unlawful and invalid procedure. You cannot have a system whereby a person is, effectively, convicted or subjected to a Control Order without knowing what the case is against him, without being able to ...

Why has the Government chosen to depart from normal laws and due processes? Well, there are the reasons: Difficult to obtain admissible evidence because of the need – because of the very secrecy of terrorism, and also because much of the evidence is second-hand, hearsay, and you can never get the informants to testify. Intelligence works that way, unfortunately. Secondly, you might reveal your sources and it would put informants' lives at risk. That's why you never produce informants in court. It might run the risk of revealing methods of investigation such as tapping of telephones, interception of internet, interception of radio, mobile phones etc. It could enable terrorists to find other means of communications and thus evade detection. And it's also difficult to protect witnesses and juries from intimidation. In Northern Ireland, for example, we had to have [...] courts, courts which were judges only without juries, because of the risk of jury intimidation.

What are the downsides of such powers? Well, search powers for exampe, are almost always applied in discriminatory fashion. If you are young, male, and look middle-eastern, you're almost certainly going to be stopped and searched. At tube stations, on the streets, wherever. Because you're the target community, as it were, you're the people – the Islamic fundamentalist terrorists that – you look like them, you are that community and therefore the police will target those groups – quite rationally, will target such groups. But, because it applies in a discriminatory fashion, it's going to alienate the terrorists' host community, it breeds new recruits, it also gives sympathy for such people and it means that that community is likely to shelter and harbour such persons. And are unwilling to come forward and give them up, betray them – betray them. It's likely to lead to a risk of miscarriages of justice through unreliable evidence not being properly tested by normal trial procedures. If we're just relying on the suspicion of intelligence agencies – we went to war in Iraq on the forty-five minutes weapons of mass destruction, remember? Where were they? They were nowhere, they didn't exist, and that was the intelligence upon which we relied to go to war. Well, putting people in jail on the strength of intelligence as weak as that is not really an appropriate way of dealing with criminal justice. It will also involve the violation and abandonment of our most fundamental values of democracy, rule of law, constitutional government and equality.

What are the solutions? Instead of having these extraordinary powers, well, we could prosecute terrorist suspects for normal criminal offences. And indeed we are doing so. We have done so. Numerous of the bombers or the attempted bombers have been through our courts and are now serving long sentences of imprisonment. We don't need to have new offences because we've got offences such as incitement, counselling, procuring, aiding and abetting, harbouring offenders etc. We could use intercept evidence in court. All European and American and Australian and New Zealand and Canadian courts accept as admissible, and we accept it as admissible, it's just that the Government won't use it, evidence from telephone taps, wire taps etc. We could have some trials in camera, that is, in secret. As we do for some trial – for some spying cases, for example, if it's necessary to protect secrecy, necessary to protect the identity of informants or agents. We could protect the identity of witnesses, as we already do in some trials where witnesses are from the security or military services and we have their identities hidden and voice scramblers and they're behind a screen and their identity is not disclosed. We could have a witness protection program, as the American jurisdictions do. We could sequester juries and we could anonymise juries' identities to protect them from intimidation. So there are a whole series of methods by which we could secure proper trials instead of having these extraordinary methods. That's it. Sorry to have gone on a little longer. Any questions? Yes?

[question] You said that freedom of speech is the most fundamental value of democracy, right?

One of the most fundamental values of democracy, some – some commentators call it the paradigm value of democracy.

[question] About two years ago there were some Muhammad cartoons published in Denmark, right? And the result was that a lot of Muslim [...] and so on, and finally this leads to that for example the German Government apologised for publishing these cartoons in our – in German media. How do you evaluate this behaviour?

Right. Freedom of speech obviously carries responsibilities as well as rights. I think people ought to be careful before they publish things, but the idea of a government stepping in to stop somebody or apologise for somebody's publishing a satirical cartoon, no matter how much it gives offence. I mean, we had a film – I don't know if you've ever seen the Life of Brian? It's a film parodying the life of Christ, and it's very funny, it's extremely funny, even thinking about it: 'always think on the bright side of life' as you're hanging on the cross. You know, it's a remarkable parody. Extremely offensive to devout Christians, I'm sure. Well, tough. Religion is something that, you know, you choose, it's a belief, it's a personal belief, you've got to be expected to be subjected to criticism, hostility from others. I think personally, as an atheist, that religion is, you know, what did Marx refer to it? The opiate of the masses. It's a crutch for the inadequate, you know. Now, people in this room might be very offended by that but, you know, that's my freedom of speech. I don't believe, as a rational being, in a supernatural creator. I believe in science, in rational proven things. I don't believe in what I can't prove. So I may ridicule Christian belief, what's so special about Muslim belief? It's just another religion. That's the attitude that most in the United Kingdom would take to freedom of speech. There would be no attempt to apologise, no attempt to suppress. Now, if it however incited hatred, if it explicitly incited hatred against a religious group or a racial group, then yes, we would prohibit it. There are limits to freedom of speech. It's not an unlimited absolute freedom. We do have, you know, incitement to hatred. We have anti-hatred laws. If I go out and start inciting hatred against Muslims, that's different. Merely ridiculing them or – it had Muhammad in a turban with rockets – nuclear rockets or something in his turban – now, given that Iran was in the process of obtaining nuclear weapons, it wasn't far off the truth. And it was, you know, for a supposedly peaceful religion, it was commenting on the rather war-like nature of one of the few Islamic theocratic states. I wouldn't – and our government would not have – our authority would not have banned it. And certainly neither – nor did the Danish, it was first published in Denmark, and they didn't ban it either. And I doubt if the German Government would have banned it...

[question] [...]

sorry? Well, they didn't ban it, they apologised for it.

[question] [...] they betrayed...

...their own constitutional values, yes. Because freedom of speech is upheld in German basic law. Yes, it's one of the important constitutional rights. Yep. I do think that freedom of speech is of vital importance. You know, I may hate what you say, but I will defend to the death your right to say it – [...], not me. Okay, anything else?

[question] [...]

Aha! Trying to explain the doctrine of the separation of powers in the United Kingdom is very very difficult. We are moving in that direction. The Lord Chancellor is no longer the Speaker of the House of Lords, for example, he's – we now have a separate Speaker. The House of Lords – well, how do you explain separation of powers in a parliamentary system? Where every Government Minister is a member of the legislature. We – you know, it's a fusion of legislature and executive. The House of Lords, given as a judicial body, was the worst example because it was a court within the legislature. And judges did – members of the House of Lords, the judicial member of the House of Lords, did actually participate in legislative debates on some issues, on law reform issues, which is a bit tough: you have judges making the laws and then they have to administer them, I mean there's a real violation of separation of power. That obviously will be resolved by the creation of the new Supreme Court. Which, I mean, it exists already, it just won't come into effect until the new court building is ready. But the Supreme Court – the act was passed in 2005 and the moment the building is ready it will become, by ministerial order, it will just become the Supreme Court. Separation of powers is not something which we have ever observed terribly strictly in our constitution. But we are beginning to make some important distinctions, particularly between the judiciary and the politics. I mean, the Lord Chancellor is a member of the judicial committee, Speaker of the House of Lords and a member of the Cabinet. That was apalling, I mean to have a political member of the Government actually sitting in court cases as the most senior judge in the land was extraordinary. Yeah, very odd. One which we have now rectified. Anything – any other questions, 'cause we are running out of time, but one last question? Yes?

[question] [...]

Right. Governments, in times of emergency, threats, have to be seen to be doing something. Otherwise they're afraid that the people will say, 'why aren't you protecting us? Your most fundamental duty is to protect the people from attack. To defend the people of the United Kingdom.' And governments feel that if they don't – if they aren't seen to be doing something, then they will lose electoral support. Now, governments know perfectly well that indefinite detention without trial is unconstitutional, is a violation of Article 5. They knew that, so they derogated from the convention. But even their derogation was unlawful, because it was discriminatory and disproportionate. So governments do these things because they are cynical, because they know that it will too – remember, that Belmarsh people were held in prison from 2001 to 2004, for

three years before their case finally got to the House of Lords, and even after the Belmarsh Decision decided that they were illegally detained, they were held for another eight or twelve weeks before the Government passed the new legislation setting up Control Orders, and as soon as they were released they were placed under Control Orders, under house arrest. One or two of them still are, most of them have actually absconded. Most of them have disappeared. Because the one place they are allowed to go to, in order to respect their religious freedom guaranteed by Article 9 of the Convention, is a mosque. And when they get to the mosque, they have disappeared. They have absconded. I think there are now only about two or three of the originals still – the original Belmarsh people still under Control Orders, the rest have absconded – disappeared, let's say, they may well have left the country, or they're in hiding. So, why do governments do it? Why do legislators do it? Well, legislators are members of parliament, and they know that votes count, and to be seen to be soft on terrorism means they might lose votes in the next election. Judges fortunately don't have to be elected. They don't have to decide these things on the basis of, 'god, if I don't do this I not going to get re-elected.' They can say, 'I'm going to do this because this is the right thing to do. This is the principled, proper, legal thing to do.' Where as governments don't have quite the same freedom to act because of political considerations. Judges have freedom to act because they have no political considerations. Governments have always legislated in panic, we legislated for the First World War, for the Second World War, we had terrible legislation. You know, every single person who came from Germany to this country was interned – was detained without trial on – in, effectively, concentration camps, on the Isle of Man. The only good thing that came out of it was the Amadeus Quartet, four wonderful German Jewish musicians who fled Germany, were detained on the Isle of Man and they got together and formed a string quartet, which became one of the world's greatest string quartets, the Amadeus Quartet. The British Government has done this before. We've had detention of aliens before, and every time it's been either struck down as unlawful or been seen as a serious black mark on our human rights record. Governments do this because they're afraid of not being seen to be doing something, being strong against terrorism. That's the sad thing, they always panic and do this. That's it, I'm afraid, we've run out of time 'cause it is now twenty past, in fact I've gone over my time, I apologise. Thankyou very much for listening.