HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence (Virtual Proceeding): The Government's Independent Human Rights Act Review, HC 1161

Wednesday 27 January 2021

Watch the meeting

Members present: Ms Harriet Harman (Chair); Lord Brabazon of Tara; Lord Dubs; Baroness Ludford; Dean Russell; Lord Singh of Wimbledon.

Questions 1-9

Witnesses

I: Lord Neuberger of Abbotsbury, former President of the Supreme Court of the United Kingdom; Dominic Grieve QC PC, former Attorney-General for England and Wales.

Examination of witnesses

Lord Neuberger of Abbotsbury and Dominic Grieve.

Q1 **Chair:** Good afternoon and welcome to this evidence session of the Joint Committee on Human Rights. As our name suggests, we are concerned about human rights and we are a parliamentary committee, half of whose members are Members of the House of Lords, who are Peers, and half of whom are Members of the House of Commons. We are holding an inquiry into the Human Rights Act. This is because the Government themselves have established an independent review into human rights pursuant to a manifesto commitment to review the Act.

We are very pleased to have in front of us today to give evidence on the practical operation of the Human Rights Act two people who could hardly be better qualified. We have Lord David Neuberger, who, until he retired in 2017, was President of the Supreme Court and continues to practise in the law, and who therefore had huge experience of the judiciary during the passage of the Human Rights Act. We also have Dominic Grieve, who is a very experienced former parliamentarian, as well as former lawyer and former Attorney-General, and is currently professor of law, politics and human rights at Goldsmiths, University of London. You are very well placed, both of you. Thank you for coming to give evidence to us. We will make a report into the Government's independent review of the Human Rights Act on the basis of the evidence we receive.

I will start by asking both of you, based on your experience, about the impact of the Human Rights Act, for good or ill. What has been the impact, as you see it, on individuals, on agencies, on the courts and on government? I know that seems like a very big question, but this is the whole point of the review: the impact of the Human Rights Act and whether it has been a good or a bad thing and for whom. At least I am not asking you to reduce it to a tweet. You can have a few more characters than that. Perhaps I can start with you, Dominic Grieve.

Dominic Grieve: I think the impact has been entirely beneficial, and the people who have benefited most have been individuals and their rights against the executive actions of public authorities. It is worth bearing in mind that a whole lot of that has involved no litigation of any kind. What has happened as a result of enacting the Human Rights Act, and driving through the educational package for public authorities that went with it, is that public authorities had to pay attention to human rights in making decisions that particularly affected the old, the vulnerable, and children. I think it

has led to a consistent improvement in the standards that those groups have received as a consequence. I see that as rather more important than the litigation that has resulted. In the early stages, some of the litigation was about establishing some of the principles under which those public authorities then had to work. Indeed, that is reflected in the amount of litigation that concerns the actions of local authorities, health authorities and organisations, and indeed ministries on occasion.

Obviously, some quite important issues have gone to court and have probably caught the public eye more, but in trying to keep my answer short I would say that the single most important thing is that the way in which people, individuals, have been treated by public authorities has significantly altered. Before that, there was the protection of the European Convention on Human Rights, but in reality it was not enforceable in the same way, and the focus of the public authority would not have been of the same type.

Chair: Thank you very much. Can I turn to you, Lord Neuberger?

Lord Neuberger of Abbotsbury: I will not repeat what Dominic Grieve has said, for two reasons. First, I agree with it, very strongly. Secondly, he speaks with more direct experience of what happens outside court than I can, but I can confirm from what I have seen in cases involving local authorities and other public bodies that, since the advent of the Human Rights Act, consciousness of the human rights of individuals, these fundamental rights, has permeated local authorities and other public bodies in a beneficial way and in a way that had not happened before. Of course, you can say that it is not entirely beneficial, because it adds to the burden of decision-making in some respects, but I think most people would agree, bearing in mind the nature of these rights, that that is a very small price to pay for these rights being taken more seriously and being observed more scrupulously.

From the point of view of the judge of the courts, I think the Human Rights Act has injected a number of beneficial factors into the system. First, it has made judges—judges are inevitably and quite properly remote in a way, because that is what they have to be: detached—more aware of the ordinary, everyday concerns and problems of ordinary people, if I can call them this. They have to consider them more because of the human rights involved in those concerns.

It has also made the job of a judge much more interesting and worth while. It has, and I do not think this can be denied, drawn the judges more into policy issues than they were before, but only

to a limited extent, and provided that judges remember that they are not there to second-guess the primary decision-maker—the local authority, Ministers, executives, whoever it is—but merely to review their decisions if they call for a review, I do not regard that as a serious problem.

I think that the human rights thinking has also injected fresh thinking into the judiciary generally, into our law, which is always beneficial. There is a danger of stagnation in any system.

The disadvantage, looking at it in a very narrow way, is that, for a time, the common law, one of the great glories of this country, one of the great traditions of our legal system, was slightly put on the back burner, and judges, barristers and solicitors were a bit like a child with a new toy with the Human Rights Act and disregarded and forgot the common law. One of the beneficial effects of the past few years is that the common law has very much come back into its own and is there to benefit from human rights but also to improve human rights.

Q2 **Chair:** Thank you very much. Can I ask you a bit more about what the Human Rights Act saw our judges being drawn into? Is it not the case that sometimes our judges have been drawn in and the Human Rights Act has enabled them to be drawn in, but that without the Human Rights Act a judiciary would still have been drawn in; it would just be the European Court of Human Rights, not the English and Welsh or the Scottish judiciary?

Has it not been the case that, because we are signatories to the European Convention on Human Rights, at some point we would be adjudicated on in respect of our compliance with it? The question is whether or not something gets through to the European court and then we have a European Bench judging it, or whether we have an English Bench judging it. Is that the case?

Have you ever been involved in a case where you have thought, "This is a breach of the European Convention on Human Rights, but I as a judge cannot find in favour of the claimant because I am not allowed to directly apply the European convention. If this went to Europe, it would end up being found in favour of the claimant"?

I am trying to explore the issue of which court looks at it, because sometimes people think that no court will look at it, when in fact it is a choice between the European court or our own English and Welsh or Scottish Bench.

Lord Neuberger of Abbotsbury: If I may say so, that is a very important point.

I am no cricketer, but under the present system you could say that the national judges in England, Scotland, Northern Ireland and Wales are the wicketkeepers and they are the first point at which the ball arrives if it gets past the batsman, if something has gone wrong and the batsman misses—the local authority or whatever fails to take human rights into account or is alleged to have failed. If the court in this country decides that human rights have not been breached, there is still—carrying on with my analogy—the longstop of the human rights court in Strasbourg. You can still go there. The human rights court in Strasbourg sometimes disagrees with the court in this country, but very rarely.

If, on the other hand, you go back to the position before the Human Rights Act, then, as you rightly say, the judge in this country was not behind the wicket and could not, however much he or she wanted to, apply human rights because they were not part of our law, and the issue had to go straight to the Strasbourg court. That had two disadvantages—probably more than two. It was much more cumbersome and difficult for individuals to assert their human rights. It was worse for the Government, because they had to pay damages if human rights were infringed, whereas if the English court decided it, that then became part of our law.

The Strasbourg court also approached the question of the alleged infringement of human rights with a relatively open mind, as it were, simply on the basis of the arguments. If, on the other hand, under the present system you have a decision of a UK court, which has carefully considered the issues and has decided that human rights have not been infringed, while the Strasbourg court will not always agree—no further court always agrees with a previous court—it is much more likely to say, "We respect the UK judiciary"—and it does—"and we would think long and hard before disagreeing with them".

That is particularly important, because, as the Strasbourg court accepts, to some extent different countries have different traditions and therefore have to allow for that when deciding a case. It is to the benefit of this country, and indeed all arms of the Government, that they have the UK judges deciding the issue before the Strasbourg court in the very few cases that get to the Strasbourg court. It would be a much more open field for the Strasbourg court if we stood down the UK judges from deciding these points.

Chair: Thank you very much for that answer. Dominic, do have anything to add on that?

Dominic Grieve: The only thing I would add is that it is inconceivable that you could put the genie back in the bottle. First,

the actions of public authorities now impact on citizens in the UK in a way that just did not happen 100 years ago. It has grown exponentially, so the capacity of people to complain about the actions of public authorities has also grown. The situation, by the time we passed the Human Rights Act, was that the volume of cases going to Strasbourg was becoming quite burdensome and the volume of judgments against the United Kingdom was significant, whereas now the number of judgments against the United Kingdom in the Strasbourg court is infinitesimal. I think it is 0.2% of its total judgment load. Of course, people have an opportunity to get redress much faster, because the Strasbourg court takes years to get your case heard, except in absolutely exceptional circumstances.

Just casting my mind back to my position as Attorney-General, I have to say that if we had not been adherent to the Human Rights Act, the job of the Attorney in dealing with the volume of cases that might have been trotting off to Strasbourg and making sure that we were represented, and everything that went with it, would have been very considerable. I agree with everything that Lord Neuberger has just said about the advantage of having had a national court pronounce on the issues.

Chair: Thank you very much. That leads us very neatly to Dean Russell's question.

Q3 **Dean Russell:** I am the Member of Parliament for Watford and I would like to ask about the effectiveness of the Human Rights Act. I want to get a sense from your individual perspectives of whether you feel that the Human Rights Act has been effective in enabling individuals to enforce their human rights. May I start with you, Lord Neuberger?

Lord Neuberger of Abbotsbury: From the point of view of the courts and the justice system, the big problem for people enforcing their rights under the Human Rights Act is the same as the problem for individuals enforcing any right, or defending themselves: access to justice. And it is not merely the difficulty in getting access to courts because of the cost of employing a lawyer but the really quite frightening consequences of having to represent yourself in court. It is easy for a judge who has spent years of his life as a barrister and then as a judge to think that court is unfrightening, but for the average person it is pretty terrifying. If you cannot afford a lawyer, you either give up your rights or you have to go to court yourself.

However, there is an anterior problem, which is access to advice about your rights. With legal aid in its present state, what

distresses me—this is a general point—not only about human rights but about everything, is the difficulty people have in getting access to legal advice, and then access to courts. To my mind, speaking very much as a judge or an ex-judge, that is the big problem in people getting access to their rights.

I cannot speak more generally than that, other than to go back to a point I made earlier, having made a negative point just now: that respect for human rights in institutions in this country, thanks to the passing of the Act and its enforcing, has meant that there is generally a respect for human rights, and when they are not observed it is normally due to oversight rather than anything else.

Dean Russell: Thank you. Mr Grieve, what are your thoughts on the Act's effectiveness with regard to enabling individuals to enforce their human rights?

Dominic Grieve: Again, I endorse what Lord Neuberger said. No justice system is perfect, and I certainly agree with him that ours is labouring under very considerable difficulties at the moment with respect to access to justice generally. That will affect people's ability to enforce their human rights as much as anything else, although it is probably right to say that it is an area that may be slightly less badly affected than others because of the availability of legal aid.

As to whether it has been effective, I think it has. I mentioned in my first answer that public authorities are more respectful. In addition, if you look at the early cases, there are lots of things like how children should be treated in foster care and whether elderly couples should be separated and put into different care homes against their wishes.

I think our eyes would pop out of our heads just reflecting on some of the things were being done in a rather cavalier fashion right up to the 1990s. When you look at those things, that is when you start to realise that, rather than what I would call the high-profile cases, people are in fact being enabled to assert rights, usually when it is public authorities that are bullying them into doing something that is wrong or disregarding their gender, their sexual orientation.

These are all areas which we now rather take it for granted should be properly taken into account but which all too often came via some court cases that laid down the benchmarks. To that extent, I think it has been very effective, and it strikes me that it will continue to be so as society changes. From that point of view, it has been very beneficial.

Q4 **Dean Russell:** Thank you. I appreciate that full answer. I suppose that leads to the question of getting the balance right. Do you think that the Human Rights Act currently strikes the right balance between enabling individuals to enforce their rights and effective government? In particular, I would be interested in your views on whether the enforcement of rights under the Human Rights Act could be improved upon. Are there areas that could be made better?

Dominic Grieve: It could be speeded up, but that is something you could always ask for. Justice, in this country and in most countries, is very slow, and that is a measure of its care, but sometimes the length of time must be a source of anxiety. That is the thing that I worry about the most, as well as accessibility, although, as I have said, human rights claims tend to have the necessary support for them to be brought.

On the question of effective government, I had four years and a few months as Attorney-General. Did I ever feel that government was being rendered ineffective by Human Rights Act claims? No, I did not. Of course, it can sometimes be irksome, and there is a cost to the Government. There is no escaping that.

Government is a major litigator, and the government legal service has to handle a great deal of work, but when you factor that against the Government's total expenditure, it is a drop in the ocean. Ministerial colleagues were sometimes understandably irritated by some of the consequences of judgments, or, indeed, by the litigation surrounding them. It is a question that you have to ask: is this a price worth paying for trying to maintain the standards contained in the convention?

Obviously, and we may well come on to this later, occasionally there are decisions where politicians feel the courts have gone too far, or the courts are applying the law in a way that they do not think is justified or is intruding into areas of policymaking that they do not think is appropriate.

The point I am trying to make is that you have to balance that against what I would call the ordinary human rights litigation that is taking place, which I think ultimately leads to better governmental decision-making. It should not be seen as adversarial. It is part of that coming together of a process in a democratic society by which you try to improve the standards of governance. An adverse court decision, as I always used to say to my colleagues, is helpful, or should be seen as something to help better governance, not an impediment to it.

Dean Russell: The same question to you, Lord Neuberger. I will repeat it so that it is fresh in your mind. I want to get a sense of whether the Human Rights Act strikes the right balance between enabling individuals to enforce their rights and effective government, but in particular whether there are areas of the Human Rights Act that could be improved upon, especially the enforcement of rights.

Lord Neuberger of Abbotsbury: Again, rather boringly I am afraid, I find myself in agreement very much with what Dominic Grieve has said.

What I would say about unpopular or criticised court decisions on human rights is that, when you refer issues to court, particularly if they are high profile and go to appeal, they are often the more difficult points, and there will always be disagreement, sometimes quite strong disagreement, about difficult points.

There will also be times when the courts get a decision wrong. I know that I have got decisions wrong in my time, and any judge who thinks that he or she has never got a decision wrong is not fit to be a judge, because we all make mistakes. The danger is that the controversial decisions on which people can strongly disagree, or the odd decision where the courts got it wrong, get very strong and often very critical headlines, and can give a very distorted picture of the operation of the Human Rights Act, which, as Dominic Grieve has said, operates normally at a much less high-profile level in relation to people going about their business and daily lives, both on a personal level and on a commercial and administrative level. One does not see the result, and even if there are court cases, you do not read about them.

How could things be improved? The main point that has to be made is the one that Dominic Grieve has made about the difficulty of getting to court and the delays. As he rightly says, and if I gave an opposite impression I should correct it, legal aid is generally available for human rights claims, unusually in a civil area, and to that extent they are better served than others.

Apart from that, an important aspect, if it can be achieved satisfactorily, is communications between the various branches of government on a relatively general level so that judges can appreciate what the Executive's and Parliament's concerns are. Obviously, discussing individual cases is inappropriate, but mutual understanding can have its advantages.

If the courts are getting things wrong and there are areas where they are deciding cases in a way that makes government difficult—

like Dominic, I am unaware of any such cases—the judges should be told in open court about the problems so that they can take them into account. Ultimately, if there is a problem that cannot be solved in court, Parliament has the last word under our system. Parliament can change the law. At the moment, at the risk of being accused of being complacent, and willing as I am to think about other possibilities, I think the system is working pretty well.

Chair: In a way, your answers have made me think, particularly Dominic's when he said that he encouraged ministerial colleagues to reflect on court judgments when those were found to be breaching the Human Rights Act, rather than to blame the courts.

We have a bit of a tradition, have we not, that when an Executive, a Government, are thrown out, by and large they do not blame the voters and say, "The voters have got it completely wrong. We were a marvellous Government". They say, "We must have done something wrong, so the voters have kicked us out. Therefore, we'll reflect on it and renew ourselves and come back and be in good favour".

Somehow that approach to the constitution when it comes to the courts does not work, and Governments, instead of reflecting on what they might have done wrong, just find it easy to criticise the judges in a way they would not criticise that other part of the constitution, which is the voters. What do you think about that, Dominic?

Dominic Grieve: I agree. It is true that politicians may sometimes blame the voters privately, but blaming the voters publicly tends to be a rather counterproductive activity. We have adversarial politics in our country, of course, and one of the consequences of that is that if you get an adverse judgment, which may in reality be a very good thing and a steer towards better governance, the poor old Minister is likely to be criticised by others in the House of Commons, even though he or she may have had very little to do with the original decision.

A bit more maturity at a political level might help the Executive and Ministers to accept some of these judgments, rather than just seeing them as another problem because there will be an adverse headline in a newspaper the following morning. Privately, one has often come across colleagues who have had adverse judgments who are much more sanguine and accepting of them in private than they are in public. That is just one of the issues one has to grapple with.

Look at the sorts of issues that come up. They are often clarifications of areas of ambiguity that the Minister already knew about. The Government may very properly advance a case and in truth be quite willing to adopt a new approach if there is an adverse judgment against them. I do agree. I think that in a mature political environment, there should be a greater understanding of this interplay between the courts looking at the rights package and explaining its impact, and Ministers should be seen as being much more productive and less confrontational.

Chair: Thank you very much indeed. Can I now turn to Lord Singh for the next question?

Q5 **Lord Singh of Wimbledon:** I am a Cross-Bench Member of the House of Lords.

This question is for both witnesses. Do you think that the Human Rights Act takes the right approach to balancing the separation of powers between Parliament, the Executive and the courts?

Dominic Grieve: Yes, I think it does, broadly. Having said that, I will come up with something that most of you will not be aware of, which is that when we enacted the Human Rights Act I expressed concerns about remedial orders. I said at the time that, with a declaration of incompatibility, I was not completely persuaded that Parliament should not go through the process of enacting primary legislation, and that once you brought in shortcuts those shortcuts would start to be seen as ways in which, with an incompatibility declaration, you automatically proceeded to remedy it, just like that. We may discuss that later this afternoon.

That said, in the early days, if there had not been remedial orders, there might have had to have been quite a lot of primary legislation. Now, several decades down the track, I am not so sure that that is any longer the case.

As for the main balance, I do not think there is any problem at all. The Executive have always been subject to the scrutiny of the courts, and if they cease to be subject to the scrutiny of the courts we will be living in a very, very bad environment indeed, because Parliament cannot do that on its own. It never has been able to and never will.

Is the balance between Parliament and the courts correct? When the enactor, Lord Irvine, created this piece of legislation, it was a masterpiece of respect for parliamentary sovereignty. In so far as Parliament, even on the point I have just made, has decided that there can be remedial orders, that is a matter that Parliament decided to have. Ultimately, as you will be aware, the Human

Rights Act will not undo primary legislation. It will simply flag up where there is that incompatibility.

As for secondary legislation, the courts have already always had the power of scrutiny of secondary legislation and the power in certain circumstances to override it.

As for the reading down provisions that we will look at, the courts have been reading down legislation and reinterpreting it outside the ambit of the Human Rights Act and through common law principles for many decades, so I do not see that as some kind of constitutional novelty.

I accept that there may have been one or two cases in the past 20 years that one could highlight where you may say that the courts have overstepped the mark, but that is inevitable anyway. Lord Neuberger said more easily than I could that the judges are not infallible. All human justice systems will have occasions when mistakes may be made or there may be some overreach but, generally speaking, I think it has maintained that balance extremely well.

Lord Singh of Wimbledon: I like your point about judges not always being infallible, which applies to the rest of us.

Dominic Grieve: It does, yes.

Lord Singh of Wimbledon: Lord Neuberger, would you like to comment on that?

Lord Neuberger of Abbotsbury: I am trying to find something to disagree with or add to what Dominic Grieve has said, because I think I would be repeating everything he said. It sounds as though I have not thought about it, but I entirely agree that the balance has been very well respected. Our constitutional balance has not been interfered with by the Human Rights Act, and the notion of the declaration of incompatibility going to Parliament and Parliament deciding whether to act on it, albeit in a somewhat fast-tracked way, was a brilliant way of ensuring that the judges and courts were able to give their view, make a decision and produce an order and that only Parliament could correct or alter a statute.

As for the reading down point, Section 3 of the Act, as Dominic Grieve has said, enshrines a principle that is applied generally, but it ensures that judges are able to do their utmost to enable a statute to comply with the Human Rights Act. There is, of course, the protection of Section 4, the declaration of incompatibility, if it does not. In the end, I am not adding anything to what Dominic Grieve said. I think it is a very cleverly drafted piece of legislation.

Q6 **Lord Singh of Wimbledon:** Do you think that the Human Rights Act strikes the right balance between the rule of law and parliamentary sovereignty? Perhaps you can carry on, Lord Neuberger.

Lord Neuberger of Abbotsbury: Those two principles, parliamentary sovereignty and the rule of law, are probably the two most important bases on which our whole system rests. Therefore, you are certainly right to ask that question. The answer must be yes, essentially for the reasons Dominic Grieve has given. We have a remarkable system in this country, so much of it unwritten and so much of it built on experience.

The Human Rights Act has codified some legislation, rights and obligations, but it has done it in a way that respects our system. Therefore, if you accept, as I do, that our system represents a very good balance between the rule of law and parliamentary sovereignty, that has been continued by the Act and, I hope and believe, reinforced by the Act.

Dominic Grieve: I have nothing to add on this. I partly answered it in my first answer, and I agree with what Lord Neuberger has just said. I think that it completely strikes the right balance, and perhaps the question is this: if it is not the right balance, then what is? I cannot think how you could have a better balance between an obligation that you have accepted in international law and which you wish to see to be accessible to your own citizens and parliamentary sovereignty.

Ultimately, if Parliament decides that it does not wish us to adhere to the European Convention on Human Rights, we can leave it, although there would be terrible consequences, and it is not part of the Government's current proposals. On the assumption that it is there and that, therefore, we wish to see its terms respected and interpreted by our own courts, which is important to its continuing development where our courts make a significant and important contribution to that happening, then we have crafted something, thanks to Lord Irvine, that I think is exceptional in trying to maintain that balance and do it correctly.

Q7 **Lord Singh of Wimbledon:** Thank you. Can I address my next question first to Lord Neuberger? The review's terms of reference include considering whether the domestic courts are being unduly drawn into areas of policy as a result of the Human Rights Act. However, Lord Dyson recently told us that often when judges are criticised for their decisions in cases brought on human rights grounds, they are not taking political decisions but, rather, decisions with political implications, and that they are well aware

that there are no no-go areas. Would you agree? Can you give any examples of cases where the courts were unduly drawn into policy-making?

Lord Neuberger of Abbotsbury: Of course, "political" has two meanings. One is party political and the other is policy political. By definition, judges steer as clear as they can of anything to do with party political issues, and that is no different for human rights cases as for other cases.

When it comes to policy politics, judges have greater involvement in policy as a result of the Human Rights Act than before, provided that judges remind themselves of two things. First, they are not the policymakers but are merely reviewing policy and should heavily respect the people who make the decisions, both as to policy and as to the individual decisions being reviewed. Secondly, there are some areas in which judges are particularly ill-suited to step, and they should be very sure indeed before they do anything to question a decision. National security, military and foreign affairs are obvious examples, but so are fundamental economic issues such as the allocation of resources.

I do not like discussing cases that I have been involved with, either because it sounds self-congratulatory or because I undermine my own decisions, neither of which is desirable. However, I have been involved in two cases, one involving a diplomatic type of decision, and another involving the allocation of resources where the court was quite concerned about the nature of the decision and how it had been arrived at. It was in an area where the courts were particularly ill-suited to judge, so we decided not to interfere with the decision, and I think that is the right approach.

Dominic Grieve: I agree with what has been said. I was trying to think of Human Rights Act matters and instances where I thought the courts had strayed into areas of political decision-making. The only case that sprang to mind—and, in fairness to the court, it backed off doing it—was Nicklinson and assisted suicide and the Suicide Act 1961. The Court of Human Rights had said in the Pretty case that this was a matter for national legislatures because of the sensitivity of the moral and ethical issues involved, and when the harrowing case of Nicklinson came before them they declined to act but read the riot act to Parliament to say that Parliament should jolly well do something about this pretty quickly, because otherwise they might well come back and do it themselves.

I confess that left me slightly uneasy, because by its very nature the question is whether you should allow assisted suicide or not. Admittedly, there was already guidance and guidelines as to

whether people were ever prosecuted for this. I had to grapple with this when I was Attorney-General, along with the then DPP, and they were difficult issues, but I thought we had resolved them quite well.

I did feel that if ever there was an issue to be decided by legislature it is whether it is permissible to assist somebody to commit suicide. It goes to the very heart of people's moral and ethical beliefs, and it probably ought to be resolved within the democratic medium of debate. As you will be aware, some European countries now allow it—indeed, some countries now essentially allow euthanasia—and there are other countries that do not and will not. I thought afterwards that I would not have minded if the court had simply flagged it up and said that it was a matter to which Parliament might wish to come back.

Some members of the court had a pretty clear view of what Parliament ought to do, and I thought that on that occasion they had probably gone further than I think they should have. However, that is the only case I can think of where I felt that about a Human Rights Act issue, as opposed to feeling very clear about where the court was coming from and why it had done something, which illustrates that I do not think this is a serious problem.

Q8 **Lord Singh of Wimbledon:** I have a short supplementary question. Listening to both of you talking about the Human Rights Act, there is the phrase, "If it ain't broke, don't fix it". Do you feel that about the Human Rights Act?

Dominic Grieve: Yes, I do. I realise that you will look at a range of issues this afternoon. There are some changes that you could probably make to the Human Rights Act without affecting its basic effectiveness, but they are of a very minor character. I find very hard to see how the main structure of the Act can be improved.

The irony of this is that we have been around this process on many occasions. In 2006, when I was shadow Attorney-General, David Cameron asked me to review the operation of the Human Rights Act, and I set up a commission to do it. I produced a report to him that pointed out that as long as we were adherent to the European Convention on Human Rights, the wriggle room to do anything was extremely limited and gave rise to the question of whether it was worth while. I do not think he much cared for it. He put it in the bottom drawer and it was never published.

Then we had the commission by Leigh Lewis and others that divided along ideological lines in a way but did not come up with anything. Then David Cameron went back and did another one—he

sacked me first before he did the second review—which led absolutely nowhere.

We are now, in that sense, on probably the third iteration, and the issues remain very much the same as they were previously. I will not suggest that you cannot do anything, but unless you want to put the country in a very difficult position with regard to its adherence and respect for the ECHR, which the Government clearly wish to adhere to, what you can do is likely to be quite small.

Lord Neuberger of Abbotsbury: Overall, there are two points. First, as a general proposition, looking at the Act in the round, "If it ain't broke, don't fix it" is a very good summary of my view. Secondly, no statute, no contract, no arrangement exists that cannot be improved in some ways, and I have no doubt that people can come up with ideas as to how an amendment there or a change here could improve things. Complacency is always dangerous, and to that extent I suspect that improvements could be made, but they are very much on the boundary, on the edge, as Dominic Grieve has said.

Chair: Can I follow up briefly on those two points? Dominic Grieve, would you feel able to submit to us as evidence the report you prepared for David Cameron? Perhaps you could ask his permission to allow the report to be considered as part of our evidence.

Secondly, Lord Neuberger, you mentioned a couple of cases on economic and diplomatic issues where you felt that the courts had acted in a self-denying ordinance. Can you name those cases so that we can look at them and consider them for our evidence?

Dominic Grieve: I can certainly ask. Before giving evidence today, I rooted around to find my copy of it and I could not, so I do not know. There must be some copies around, as it was circulated within the Conservative Party. It is worth bearing in mind that it touched on issues that you are not concerned with, such as whether we should have a Bill of Rights and what might go into it in substitution for the Human Rights Act. There was an argument that if you want to have a Bill of Rights that added to the Human Rights Act, there were one or two things that you could possibly put into it.

Certainly, the report was quite clear that there was very little that you could do to change the way the convention impacted or should impact and the way it should be accessible to people. I will go away and see if there is a copy around. I would be happy to share it, but whether I can get permission and whether I have a copy of my own is slightly doubtful.

Chair: Thank you. We look forward to receiving from Lord Neuberger the names of those cases.

Lord Neuberger of Abbotsbury: I can tell you them now. The diplomatic one is R (Carlile) v Secretary of State. The economic one is Rotherham v Secretary of State. I think they are both 2015 or 2016. If my recollection is correct, Rotherham does not involve a human rights point, but it illustrates the importance of courts not wanting to get involved in allocation of financial resources, even in a case where we were not impressed with the way it was done.

Chair: Thank you very much. Dean Russell has the next question, on declarations of incompatibility and the issue of primary and secondary legislation.

Q9 **Dean Russell:** There are two parts to it. The first is about the practicalities, again. Does the obligation on courts to give effect to legislation in a way that is compatible with convention rights, in so far as it is possible to do so, cause any problems in practice? Similar to the last question, could you give any examples of where courts have been given an unduly strained interpretation to legislation in order to read it compatibly with the convention?

Lord Neuberger of Abbotsbury: The idea of the declaration of incompatibility, as we have discussed, is a very elegant way of getting the courts to be free to do their job of deciding whether a statute is inconsistent with human rights, but then paying proper regard to parliamentary sovereignty by saying that it is over to Parliament to decide what to do about it.

Picking up Lord Singh's point, it demonstrates very well both the rule of law, with the courts deciding a point of law, and parliamentary sovereignty, with Parliament deciding what to do about it. It could be said to be slightly cumbersome, but it has worked very well, and only in relation to prisoners' votes, as far as I am aware, has Parliament not reacted appropriately to what the courts have decided.

Dean Russell: With regard to that, is the mechanism provided by Section 4 of the Human Rights Act, whereby the courts can give declarations of incompatibility but not strike down primary legislation, effective in maintaining parliamentary sovereignty?

Lord Neuberger of Abbotsbury: Yes, I think it is, because it means that the courts cannot undermine or reverse a statute passed by Parliament. They can pass the baton back to Parliament and say, "We don't think this complies with the Human Rights Act". Having obtained the benefit of a judgment explaining why, Parliament can decide that it will change the law and can decide

precisely how to change the law. It may decide, having read the judgment, that it can tweak it very slightly, and that is all it wants to do, or it can decide on a much more substantial change. But that is up to Parliament, not the judges.

As for the judges reading down a statute, I looked at a few cases in anticipation of this interview. There is an interesting one in 2004 in the House of Lords, as it then was, where the House had to decide whether a provision in the Rent Act enabled somebody's wife or husband to succeed to a tenancy where the person concerned had died. Four Members of the House of Lords decided that they could read "wife or husband" as meaning a person of the same sex. But Lord Millett, who dissented, said this: "Mathematically, there are four possibilities: 'his wife', 'her wife', 'her husband' and 'his husband'." Then he said, "two of these are nonsense. A man cannot have a husband, and a woman cannot have a wife". He dissented, and that was a difficult decision in those days.

It illustrates a point that Dominic Grieve made very well earlier: that the idea that a man could not have a husband and a woman could not have a wife were obvious to a very eminent Law Lord 15 years ago, whereas today we treat it as completely acceptable and, indeed, to say otherwise is thought to be unacceptable. I think the Human Rights Act and the philosophy, thoughts and decency it has engendered have a lot to do with that significant change over such a short period.

Dean Russell: That is an excellent example. Thank you. Can I ask you the same question, Mr Grieve? Let me know if you want me to repeat it, because I know it was rather long.

Dominic Grieve: No, I have the gist of it. Again, I find myself in agreement with Lord Neuberger. If you look at the cases of reading down, including the one we were just looking at, which funnily enough sprang to mind before this hearing, so I made a note of it, I suspect that the majority of the House of Lords in that case—I do not know; it is speculation—were probably aware even then of the extent of the societal changes taking place in this area and already reflected in other legislation being enacted by Parliament that had equality. For those reasons, they felt able to read down. Baroness Hale once said, quite outside the Human Rights Act, "Statutes are always speaking". The way you would interpret a statute in the 1920s can be reinterpreted to apply differently in the 2000s. I think that most of them are explicable in those terms.

It is also worth bearing in mind the occasions when the court has been unwilling to do it. R v Anderson was a case about the Home Secretary's right to override the Parole Board in respect of the tariff

for the life sentence, and it was at a time when this was shifting. The court correctly said that this was in breach of the convention. Then, Lord Bingham was absolutely clear in his judgment that the court should make a declaration of incompatibility, because this was a matter that had to go back to Parliament because of the awareness and sensitivity that, if it was dealt with by the judges just saying that they would read the statute differently, it would lead to a serious sense of irritation at a parliamentary level that this had simply been brushed under the carpet.

There are some good examples of where the courts have been quite reticent. I may have missed an example; I am not encyclopaedic on this, and someone could come up with an example where they thought that the read down was wholly unjustified. However, most of the read downs seem to me to have a very clear explanation behind them.

Chair: At this point, I thank you both very much for your evidence. The fact that you have agreed with each other a lot does not minimise it at all, because it shows that, from the point of view of the courts on the one hand and Parliament on the other, among people who have had a great deal of experience and reflected on this a lot, there can still be the same conclusion but from different perspectives, and I find that invaluable. Thank you very much for coming at the same time to give your evidence to us. I hope you might continue to help us as we proceed with assembling our evidence to the review. Thank you very much indeed.