HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: The Government's Independent Human Rights Act Review, HC 1161

Wednesday 24 March 2021

Watch the meeting

Members present: Ms Harriet Harman (Chair); Lord Brabazon of Tara; Ms Karen Buck; Joanna Cherry; Lord Dubs; Lord Henley; Baroness Ludford; Baroness Massey of Darwen; Lord Singh of Wimbledon, Lord Stirrup; Baroness Sugg.

Questions 54-68

Witnesses

I: Joshua Rozenberg QC; Helen Mountfield QC, Matrix Chambers; Richard Hermer QC, Matrix Chambers; Professor Graham Gee, Professor of Public Law, University of Sheffield.

Examination of witnesses

Joshua Rozenberg QC, Helen Mountfield QC, Richard Hermer QC and Professor Graham Gee.

Q54 **Chair:** Good afternoon and welcome to this session of the Joint Committee on Human Rights. As our name suggests, half our members are Members of the House of Lords and half are Members of the House of Commons, MPs. We are concerned with human rights. The Government, following their manifesto commitment, have established a review into the Human Rights Act and we are undertaking an inquiry to feed into and contribute to that review. We have heard from senior members of the police, the Crown Prosecution Service, the UK judiciary, the European Court judiciary and Parliament's authorities. This is our final panel and we are delighted to be joined by four very eminent witnesses to give evidence.

We have Helen Mountfield QC from Matrix Chambers, who specialises in equality law, law relating to terrorism and national security, education, social welfare and election law. They are all very germane to human rights. She is also principal of Mansfield College, which has the Institute of Human Rights. Thank you very much for joining us, Helen.

We have Joshua Rozenberg, who is a long-standing legal expert, legal commentator, journalist, Honorary Queen's Counsel, Honorary Master of the Bench at Gray's Inn and currently presenting—I say it myself—an extremely excellent "Law in Action" series on BBC. Thank you for joining us, Joshua.

We also have Richard Hermer QC, who has been involved in many of the major claims involving human rights emanating from the Iraq conflict, involving questions around the Ministry of Defence mistreatment of civilians, acting on behalf of injured servicemen, testing the issues around the principle of combat immunity. They are very germane issues to human rights. Thank you very much for joining us, Richard.

From Sheffield we have Professor Graham Gee. Thank you very much indeed for joining us. You will be particularly welcome in this session because of the work that you have done looking at the changing nature and character of the UK constitution and, of course, the Human Rights Act, which affects public authorities, Parliament, our courts and the rule of law.

Thank you all very much indeed for joining us. We are looking at what are the problems with the Human Rights Act. It is evident from the Government's review that the Government's starting point is that there are problems. So what are these problems? Are they

real or are they illusory? We look forward to hearing from our panel on that. Are there benefits of the Human Rights Act that we should be focusing on, recognising and highlighting?

So that we can understand the impact of the Humans Rights Act, I will start by asking about a before and after situation in terms of the enforcement of human rights. We are long-standing signatories to the European Convention on Human Rights, but what impact did the Human Rights Act have on people's ability to enforce their convention rights after the Human Rights Act was brought into force, compared to before we had the Human Rights Act? Joshua, perhaps you could start.

Joshua Rozenberg: The impact was huge. Before the Act came into force you had to go to Strasbourg to enforce your human rights. You had to take the United Kingdom Government to the human rights court and enforce your rights. The case that springs to mind is the one about gay service personnel. There was a rule that if you were known to be gay you could not serve in Her Majesty's Armed Forces and that was challenged by service personnel. They lost in the United Kingdom and it was known that if they took their case to the human rights court, they would win. They did and the Government changed the law—but they had to go to Strasbourg to win their case.

Chair: What is the situation now since the Human Rights Act has come into force?

Joshua Rozenberg: They simply bring an action in the domestic courts, the courts of the United Kingdom, and the human rights convention can be applied by judges in the United Kingdom. There is no need to go to Strasbourg. The consequence of that, of course, is that the UK loses very few cases in the human rights court—only two last year, proportionately the lowest number. That is because there is no need to take the UK to the Strasbourg court; you can simply take action under the human rights convention as applied by the Human Rights Act 1998 and bring your case in the domestic courts. If you have a right that the Government or the public authority are not protecting, you will win your case and there is no need to go to Strasbourg.

Professor Graham Gee: Joshua is right that prior to the enactment of the Human Rights Act convention rights were not enforceable in domestic courts. One of the aims of the Human Rights Act was to render it possible for individuals to be able to bring a claim in domestic courts without having to do that recourse to Strasbourg that Joshua outlined.

There is a danger, though, in focusing purely on convention rights. One is thinking about the protection of human rights more broadly before 1998, because there were protections through statute law, and through common law, as well as the courts being able to rely on or draw on Strasbourg case law. So it was a multi-layered approach. There was an intelligent case to be made for enacting the Human Rights Act to allow individuals the ability to rely on domestic courts and also to render it less likely, as Joshua says, that the UK would be held in breach of its international obligations.

But it is important to see the Human Rights Act as part of a larger matrix of how we protect rights in the UK. To take a bit of a blunt example, think about the right to life. It is not Article 2 that provides the practical expression of that right in our legal system. It is about the law on murder and all of the other legal regulations that regulate activities that might endanger life. I suggest that we have to see the Human Rights Act in that broader picture.

Helen Mountfield: Joshua is right to say that by bringing rights home, which was the statutory intention of the Human Rights Act, it made access to justice faster and cheaper. Of course there are lots of other sources of human rights in common law statutes like the Equality Act. All sorts of legislation contains rights, but what the Human Rights Act did, as well as making access to those rights more effective and broadening some of the rights that go beyond common law, was to make access to the convention rights more transparent and more legitimate. Those rights, which were known to some expert lawyers and were used to interpret other ambiguous legislation or to explain what the ambit of the common law might be or what the principle of legality meant, were there on the face of a statute that Parliament had chosen to enact.

The judges who were enacting them—there are differences between common law rights and convention rights—could do both: they could look at the common law, the statute, the convention and the interactions between them. These are judges who understand the common law tradition, they are close to the British context in which these rights are being applied, and they can do so in a way that is informed but not dictated to by the standards of the European Court of Human Rights. Consequently, that makes law more accessible, which is a fundamental aspect of the rule of law.

Q55 **Lord Dubs:** I want to talk about parliamentary sovereignty. In your view, has the Human Rights Act had any impact on parliamentary sovereignty, beyond that intended by Parliament? Has the Act, its use or interpretation by the courts, served to constrain Parliament in any way?

Joshua Rozenberg: The answer is that lawyers can argue that the Human Rights Act is some sort of constitutional statute and somehow harder to amend or repeal. You, as parliamentarians, know very well that the Overseas Operations (Service Personnel and Veterans) Bill is going through Parliament at the moment; it is in Committee in the House of Lords. If passed, that would amend the Human Rights Act and insert a new section into it, which we can discuss. There are two new sections, in fact, one dealing with derogation and the other dealing with time limits. This simply shows that Parliament remains sovereign and if Parliament wishes to amend or even repeal the Human Rights Act it can do so.

Richard Hermer: There is a very simple answer, which is no. The bad press that sometimes the Human Rights Act gets—that judges are entering into the realm of politics and overstepping the mark—is constitutionally incoherent. All the courts have been doing is that which Parliament has told them to do, which is to apply the Act. Any argument to the contrary just does not make legal sense.

On the first question, to give some context, understanding the Act has to be seen by way of a long view, as Graham was saying. Courts for centuries, since the 1760s at least, have been very keen to protect fundamental human rights. That is what courts do. That is their job and it is often protecting them from the Executive; that is what they do. What made the Human Rights Act remarkable is that it gave clear articulation to what those rights were. That has had a number of effects, one of which Joshua rightly identifies as reducing the number of times that lawyers need to go to Strasbourg.

It has had a more profound effect as well, because by clearly articulating what our rights are, it has helped change the culture of rights—sometimes with a backlash, but it has also had an incredibly positive effect, which is clear articulation of my rights: "These are my rights". It creates a culture in which people talk about their rights and they are able to identify what they are when they talk about them. It has meant judges become more conversant, politicians become more conversant and all of us become more conversant. Sorry, that is a very long way of answering your question, Lord Dubs.

Helen Mountfield: Perhaps I can just chip in as well. I just do not understand how it can be said that the Human Rights Act is a constraint on parliamentary sovereignty, because it is a vindication of it. Courts have always applied the principle of legality. Parliament is presumed to expect the Executive to act in compliance with fundamental rights. It is only if Parliament says in

express terms that you can do something that is against human rights that the courts will say that that is what Parliament wants to happen. That has always been the case. The Human Rights Act put that on the statute book and said, "Interpret legislation on the assumption that it is intended to comply with this set of rights—and if you can't, leave it to Parliament."

That is a bit of a gloss on what Joshua said in opening about the gays in the military example, that if it was in secondary legislation or in a policy and the court said that it was contrary to human rights, that would be the law. If it was in primary legislation, the court, under the Human Rights Act, would only be able to say, "This is contrary to the convention, we can't therefore give gay personnel the right to serve in the military, but we can tell you it's contrary to the convention. Over to you now, Executive, to decide whether to bring in an order seeking a remedial order, or alternatively for Parliament to legislate".

It is an absolute vindication of parliamentary authority and it seems to me that often when people are saying the judges are taking up too much power or there is some change in the relationship between the three limbs of the constitution, really what they are talking about is the supervision of the Executive, not the power of Parliament. That is a really important distinction in a constitution such as ours where the Executive often are the majority in Parliament.

Professor Graham Gee: It is an important question and I agree with much of what has been said, although I differ in parts. I certainly agree that the Human Rights Act was designed to be, and in broad terms remains, consistent with parliamentary sovereignty, in so far as none of its provisions, as a formal technical legal matter, directly touches on Parliament's legally unlimited law-making capacity. Indeed, some of its provisions implicitly reaffirm that principle, such as Section 4(6) saying that declarations of incompatibility will not affect the validity of the legislative provision in respect of which that declaration has been issued.

I agree with Sir Patrick Elias, the former Court of Appeal judge, who said that the basic structure of the Human Rights Act leaves the principle of sovereignty in place, although he added a caveat, with which I agree—"albeit just".

Where my worry lies, and where I probably disagree with the rest of the panel, is on the extent to which the Act could be said to warp the operation of other important constitutional principles, notably the rule of law, by at times introducing Section 3, substantial uncertainty as to the meaning of legislation, and warping the

separation of powers, again notably through Section 3 by obscuring the distinction between the judicial and the legislative function in so far as Section 3 can be used as a powerful tool of practical law reform, and to some extent in the way it could be said to warp democratic self-rule in so far as the combined effect of Sections 2, 3 and 4 might be said to curb Parliament's ability, and indeed willingness, to exercise appropriate political responsibility over controversial questions of public policy.

I absolutely agree with the panellists that, to the extent that courts sometimes find themselves in the difficult position of having to make political judgments on controversial matters, in respect of which they might be said to lack the requisite level of institutional competence and legitimacy, it is by virtue of a policy choice that Parliament made in 1998. I certainly agree with that.

Q56 **Chair:** I will follow up on that, Professor Gee. Are the issues that you have referred to, the warping that you have described, a function of the fact that we are a signatory to the European Convention on Human Rights rather than the Human Rights Act? How does the Human Rights Act do this warping in a way that was not done before by the European convention?

Professor Graham Gee: It is a good and important question. There is certainly an intelligent case for why the Human Rights Act was enacted. We mentioned before the issue of bringing rights home and allowing individuals greater access to justice, and also to render it less likely that the Strasbourg court would find the UK in breach of its international obligations under the convention. Some of the saving grace for those who are critics of the Human Rights Act is that its structure was designed to minimise the political role of domestic courts. There is a critique that at times domestic courts have not always kept within their lane on some cases, and we might explore some aspects of that in the context of Section 2 and Section 3. There is also a concern that is more nebulous, but I think it is important that the Human Rights Act is an important accelerant in a changing judicial culture. It is not the only one, but it is an important one none the less.

That is a changing judicial culture that I think has been alluded to by some of your previous witnesses. Some judges welcome it, but others view it with regret and alarm. Twenty years on is probably enough time to reflect on where the Act secures some really good changes. We have talked about raising public awareness and a changing culture of rights, but are there some reforms that would help keep an appropriate separation of powers, which would also insulate the courts themselves from the dangers of politicisation and the criticism and political pushback that could come from that?

Chair: Could you give some examples of cases where you feel that the judiciary have not kept in their lane and cases that you feel have represented politicisation of the judiciary such that people might disapprove of it—including, as you suggest, other members of the judiciary? Which cases are you thinking demonstrate that?

Professor Graham Gee: As members of this committee will know but people watching may not, under Section 2 of the Humans Rights Act the courts are able to take into account the case law of the Strasbourg court. Early in the life of the Act Lord Bingham articulated the so-called "mirror principle", which suggested that the domestic courts would generally follow the case law of Strasbourg. That was much criticised, but there was a rationale for it. It was in line with the Act's goal of trying to decrease the likelihood of the UK being found in breach by Strasbourg, but it also minimised the role for the domestic courts, so they were to follow the interpretation of convention rights favoured by the Strasbourg court rather than advancing their own novel, creative understandings of convention rights.

Although that mirror principle was articulated by Bingham, one of the ways it has been qualified is by the willingness of some senior judges to move beyond Strasbourg and to advance interpretations of convention rights that go beyond what is in case law. Examples would include Nicklinson, where some senior judges indicated that the ban on assisted suicide was incompatible with the convention, although they were not required to so by the Strasbourg case law. There was also the 2018 case from Northern Ireland on the ban on abortion. Those are a couple of examples in the context of Section 2 where I think some senior judges went beyond what was appropriate and beyond what was envisaged by the Act as it was originally conceived.

I add that we might agree with the substantive outcomes in those cases, or we might not. There is scope to disagree about questions of rights. My concern is whether the courts were adhering appropriately to the constitutional means in those instances.

Richard Hermer: I understand what Graham is saying, but I am not sure I agree with him that these are examples of judges not keeping in the lane. First, Section 2 does not require domestic courts to always adhere to decisions of Strasbourg. It has to have regard to them, and generally it will. There are a range of reasons why it will follow what Strasbourg says. But I do not see the cases and examples that Graham gives as examples of judges straying out of their lane on the opportunities where they have gone further. That is entirely consistent with the European convention, as a human rights instrument, being one that evolves.

It is perfectly proper, I think, and entirely consistent with obligations under the Act—it is entirely consistent with the way that judges approach law here and often in civil law countries—that you take a teleological, purposive approach. You may be faced with scenarios that the Strasbourg court has never been faced with and you ask yourself, "What is the convention-compliant argument?" That will apply absolutely established, uncontroversial tools of judging, completely consistent with the tradition of judging in this country and the way the courts apply law. I really do not see it as an example of judges failing to keep in their lane.

Helen Mountfield: Professor Gee talked about the potential problems of breach of the rule of law, because there might be uncertainty about what legislation meant, and potential problems about the separation of powers—the keeping in your lane issue. On the rule of law, it is inevitable that there are statutes where there is uncertainty about their meaning, otherwise you would not need judges at all. The issue is, where there is that uncertainty, whose view prevails? In our constitution, it was decided in the 17th century that it is the judges and not the Crown who decide what the law is in a case of uncertainty. It is very important that we keep that. That is the rule of law—otherwise it is the rule of might, it is Executive power that is overweening here.

On the second question about the separation of powers, I just do not agree that judges think they can or do in fact use Section 3 of the Human Rights Act as an instrument of practical law reform, as Professor Gee puts it. There is a good early example, Re S, about a care plan, where there were seen to be problems in the way that devising care packages for looked-after children was done. I think it was the House of Lords, before the Supreme Court, that said, "We can't. We can see the need for a staging post, because this policy doesn't work, but we can't do that because that would be judicial legislation and we can't do that, so the best we can do is make a declaration of incompatibility and indicate where the problems are, because it is not appropriate or possible for us as judges to put in place practical reform. We can just tell you that what you have here breaches human rights."

So I think the judges are incredibly—in fact sometimes overly—conscious of their constitution role. The real problem we have faced, in the last five or 10 years certainly, is Executive overreach, and I find it worrying.

Joshua Rozenberg: I agree with Helen. I take Graham's point that some people think that the Supreme Court went too far in Nicklinson. Lord Sumption certainly thinks so. The most that the five judges in the majority felt they could do was to make a

declaration of incompatibility, and three of the five decided they should not even do that. They left this up to Parliament. Graham, I am sure, thinks that there was a bit of an implied threat that, if Parliament did not intervene on the issue of assisted suicide, the judges would. Well, that may be so, but they have not.

There is a feeling sometimes that the judges are rescuing Parliament because some issues are just too difficult for Parliament to deal with. So I do not think that this is an example of activism. More broadly, if the Human Rights Act had not been enacted, the judges would be using the common law in exactly the same way. That is the crucial point. The judges are developing the law, some are more activist than others, but they always develop the law and they use whatever tools are available to allow them to do that.

Q57 **Chair:** Professor Gee, on your question about uncertainty, if there is uncertainty until the UK courts have decided something, why is that any worse than uncertainty waiting until a Strasbourg court has decided it? Is the uncertainty not even worse if you have to wait and have a set of European judges decide what the law is and what is or is not a breach of the European convention in action within the UK? Why does pushing that back out again to Europe make it less uncertain? It seems to me, on the face of it, that it would make it more uncertain.

Professor Graham Gee: There is a lot of uncertainty, which is a part of the problem. There is often significant uncertainty about the meaning and effect of convention rights. The structure of the Human Rights Act to some degree compounds that uncertainty. For example, in Section 3 there will be uncertainty about whether a rights-compatible reading is possible if the legislative provision is before the court. Then in turn there will be uncertainty about what such an interpretation might be. All of this, to my mind, compromises legal certainty and the rule of law.

That is why I disagree with Helen Mountfield, who mentioned Re S, which was a case where the courts approached Section 3 in a more prudent fashion. But there are cases where the courts have been much more expansive in their use of Section 3, and in ways that have increased uncertainty by upending policy choices made by Parliament. The examples that spring to mind are the 2001 case of R v A, where a majority of the Law Lords used Section 3 when they were interpreting Section 41 of the Youth Justice and Criminal Evidence Act 1999. Section 41 had provided in rape cases that, in almost all cases, evidence relating to the prior sexual history of a complainant, the rape victim, would be excluded. The courts, using Section 3, found it possible to arrive at a convention-compatible interpretation that said that such evidence would be admissible, in

effect, wherever it was required to vindicate the Article 6 right to a fair trial. That upended Parliament's policy choice in a way that was very surprising and not consistent with legal certainty and at odds with our traditional canons of statutory construction.

Chair: Could that not have been done by the European court anyway?

Professor Graham Gee: Part of the argument I was making previously was that one way to insulate our domestic courts from too much criticism is to encourage them to follow the line of Strasbourg case law in line with the mirror principle and to try to manage the levels of uncertainty as far as possible, recognising that, when you have an international treaty dealing with general abstractions about rights, there is going to be an unusually high level of uncertainty. Helen Mountfield is certainly right when she says that uncertainty is an inherent part of any time you try to draft a legal rule, but many people observe that there is an unusually high degree of uncertainty in any statutory Bill of rights and in a statutory Bill of rights that is overseen by an international court that has the living instruments interpretive approach that Richard Hermer mentioned earlier.

Chair: I hope that we are going to deal with the problems in Section 41 of the Youth Justice and Criminal Evidence Act in the police Bill that is currently before the Commons. We will go to our next question, from Baroness Massey.

Q58 **Baroness Massey of Darwen:** Thank you. I am Doreen Massey, a Labour Peer, and question 6 is mine. The independent review asks whether any change is required to how courts and tribunals deal with provisions of subordinate legislation that are incompatible with convention rights. Do you consider that the current system is problematic? What would be the advantages and disadvantages of any changes? I will start with Helen.

Helen Mountfield: Yes, again I do not see any problem with this. It seems to me that it is a vindication of parliamentary authority. Parliament has said that we put on a statutory footing the presumptions that already existed that all law should be interpreted in a rights-compatible way. It is only if Parliament says, "We know these are the international obligations and we still want to legislate in in this way" that the courts do not have role, because Parliament is the ultimate determiner of the law.

When Parliament gives the Executive power to put forward subordinate legislation with the idea of saving parliamentary time by the shape being put forward by Parliament and the subsequent rule of having a lesser degree of scrutiny, it does that on the

assumption—the express assumption, again in the Human Rights Act—that those rules will comply with convention rights and that, if they do not, they are not within the authority that Parliament gave the rule-maker to put the rules forward.

So it makes perfect sense to say those rules then should simply be disapplied. That is something that we can all understand. Again, as Professor Gee says, there is always the question of what rules mean, and sometimes that can create problems for anyone who is trying to apply rules: do we know what these rules mean? But that strikes me as constitutionally unproblematic, and I am not really aware of any cases where it has created a practical problem.

Richard Hermer: I agree with Helen. The position before the Human Rights Act was that courts applying something called the principle of legal certainty would look at subordinate legislation whose effect was to infringe human rights and ask whether or not that had been sanctioned by Parliament through primary legislation. If it was not express in primary legislation that the rights were to be infringed, the subordinate legislation would be deemed unlawful and ultra vires. So there is nothing remarkable at all in courts reviewing it. Under the Human Rights Act, as you will know as parliamentarians, by Section 19, when a Bill comes up for Second Reading, the Minister of the Crown has to provide a statement saying that the Bill is compatible with the convention. So the idea that subordinate legislation will be reviewed to see if it does that which Parliament intended that it does is utterly unremarkable.

Joshua Rozenberg: Certainly I am not aware of any problems with the way in which courts and tribunals deal with subordinate legislation. But I was trying to work out what was behind this question, and what is behind the question from the independent review. You saw last week the Government's response to what you might see as a parallel inquiry, the Independent Review of Administrative Law chaired by Lord Faulks. The Government are considering either a presumption that remedies will be prospective only in relation to statutory instruments or even a requirement that remedies in such cases should be prospective only unless there is an exceptional public interest requiring a different approach.

The advantage of that from the Government's point of view is that secondary legislation that people have previously relied on would not be overturned. The disadvantage from the claimant's view is, as the Government seem to accept, that the successful claimant would not get any benefit from winning the case. It occurs to me that this may inform the Government's thinking about the Human

Rights Act; that they want to at least consider changing the remedies that are available under a successful Human Rights Act claim in line with their proposals for judicial review. It looks to me as if the Government must be planning a Bill in the autumn on both judicial review and human rights, because I think the two issues are very closely connected.

Professor Graham Gee: Perhaps I could add something briefly. Sometimes litigation under the Human Rights Act aims at secondary legislation and, as we have heard, the courts are able, under the Act, to quash it if they find a rights incompatibility. We have heard many defend this on the grounds that it does not constitute an undue interference with Executive law-making. Those arguments tend to rest on two main limbs. Secondary legislation is subject only to limited light-touch parliamentary scrutiny, so any scrutiny that the courts can provide through judicial review is welcome.

The second point, which we have heard this afternoon, is that courts only very infrequently quash delegated legislation. In this respect I commend to the committee a blog post by Dr Joe Tomlinson and others published on the UK Constitutional Law Association website last month. They pointed to a seven-year period between 2014 and 2020 where they found only 14 pieces of delegated legislation that were quashed under the Act. This is obviously low in absolute numbers, and especially when you take into account the thousands of statutory instruments made each year.

So I, too, am untroubled for the most part by this part of the operation of the Human Rights Act. For completeness I should note that there are some critics of the Act who point to the importance of legal certainty in the context of secondary legislation as well as primary legislation. Some critics are concerned that the courts seem a bit too quick at times to undercut secondary legislation, without paying sufficiently close and careful attention to the terms of the empowering statute to see whether it is convention compatible.

That has led to critics such as Professor Richard Ekins at Oxford University and the Judicial Power Project, writing with John Larkin, the former Attorney-General for Northern Ireland, submitting evidence to the independent review arguing for a change to the Human Rights Act. They have proposed revising Section 21's definition of primary legislation to be legislation so as to encompass delegated legislation and immunise it from the possibility of being quashed. Alternatively, they have proposed that something akin to

a Section 4 declaration of incompatibility should apply to delegated legislation as well as primary legislation. For completeness, I think it is important to note that there are critics who are proposing those sorts of reforms.

Q59 **Chair:** Perhaps I can come back to Joshua's very interesting speculation that it might be that what the Government are hoping to do is something similar to what they are hoping to do on the judicial review. If they do that on the Human Rights Act—make it no longer a remedy for past breach but just about prospective action—what impact would that have on the workings of the Act and enforcement of human rights in practice?

Joshua Rozenberg: It picks up the point that Graham Gee has just made, which is that people rely on secondary legislation and if it is overturned, if it is declared void rather than voidable, this is disruptive, it needs putting right and people's rights need rearranging—all sorts of things go wrong. That is the thinking behind not only saying that the remedies should apply in the future but that there should be a presumption that they should apply in the future, or maybe even a requirement. So in one sense it would make things very orderly, but in another sense people who win their cases simply would not get any benefits from so doing. They would have the warm feeling that they had persuaded the Government to change the law—except, of course, the Government would not have to change the law if they can persuade Parliament to rewrite the law in some way that enables them to do what they wanted to do.

So what the Government are seeking to do, or at least are proposing to put out for consultation, would undermine the existing benefits of judicial review and presumably, if they can apply that to the way in which the Human Rights Act deals with subordinate legislation, that would apply in that case, too.

Chair: Would that have a big effect on whether people would take cases, if they could not get the remedy that they wanted and that was motivating them to take the action? If they were only wanting to put something back to Parliament again for future consideration, what would be the point of them going to court with a Human Rights Act claim in those circumstances?

Joshua Rozenberg: Good question. The campaign groups would no doubt want to draw attention to errors in the law, and there is a public interest in getting the law right and getting the law to say what it means and do what it says. There is some advantage in that and, of course, the Government may well accept that they have taken the wrong approach in the past and agree with the

campaign groups that bring cases and say things should go in a different direction in the future.

So it is not a complete waste of time. People say, of course, that they are not in it for the money, they are not seeking to get compensation, they would not get compensation anyway, they are simply trying to put things right. There would still be challenges, but it would be much easier for the Government if they did not have to take judicial review cases and pay compensation to people who had been wrongly deprived of some benefit for many years in the past.

Chair: If they were going to do that with the Human Rights Act, would people in those situations simply end up going to Strasbourg again, like they did before the Human Rights Act, to get their breach of rights recognised with compensation and whatever action?

Joshua Rozenberg: It depends on whether the Government, in putting the law right, enabled people to enforce their rights or not. Certainly if the Government, in regularising the law, put themselves in breach of the human rights convention, people would take it to Strasbourg. But it might be possible to find a way of rewriting a statutory instrument, secondary legislation, compatibly with the human rights convention, I suppose.

Q60 **Baroness Ludford:** To some extent the subject of this question has been discussed in other questions. Do you think the Human Rights Act strikes the right balance between enabling individuals to enforce their rights and effective government? The Government may find it inconvenient, but do you think, in your professional opinion, that the Act interferes with the effectiveness of government?

Joshua Rozenberg: I will answer very briefly on that. I do not see the two as alternatives. If we are governed effectively, individuals can enforce their rights, and if they cannot enforce their rights then something must be wrong with the way we are governed.

Richard Hermer: I agree with Joshua. I have no doubt that being forced to comply with legal obligations has been an occasionally irritating and burdensome annoyance for Governments for centuries, but I am not sure that the Human Rights Act itself has altered the balance, or that the Human Rights Act itself has made legitimate governance more difficult or less effective. Certainly in my experience I cannot think of a single case in which that is the case and in which one could not turn around and say, "Well, that's the price of the rule of law".

Professor Graham Gee: I agree with Joshua and how he summarises effective government. I disagree with Richard on the balancing point. It is certainly the case that an effective system of constitutional government requires appropriate relationships, balanced relationships, between judges, Ministers and parliamentarians. There is a reasonable argument that the Act has contributed to the unbalancing of those relationships—not the only driver but an important one.

Here it is important to acknowledge the extent to which the Act changes, and some critics would say subverts, the type of reasoning required of our domestic courts. That reasoning today extends to questions about how to understand convention rights, how the sometimes vague and opaque—critics would say unprincipled and poorly reasoned—case law of Strasbourg is to be brought to bear in a concrete case, whether particular legislative or executive actions amount to a proportionate limitation on a general interest, whether legislation is compatible with convention rights and, if not, whether to declare it out of line.

That strikes me as changing the relationships between our key institutional actors. Some will welcome those changes, others will not. I note that judges acknowledge that the Human Rights Act has increased their role on the constitutional stage, and, again, people will have different views on whether that is a good or appropriate thing. I am keen to emphasise that the rule of law is a vital ingredient for effective government.

Yet I think there is a case to be made that the Human Rights Act compromises the rule of law in a number of important ways that I do not expect my fellow panellists to agree with. But it does so by introducing into domestic law convention rights that are framed with a greater degree of uncertainty than we see in much ordinary law. It does so by heightening the case law of the Strasbourg court, which is informed by that living-instrument approach to interpretation, which licenses the Strasbourg judges to rewrite the terms of the ECHR beyond that which was agreed by the signatories.

The content of the rights themselves then rests on a changeable body of case law that is rife with judicial decisions about matters that are highly political in nature, arguably not the proper subject of judicial decision, including matters that were previously deemed non-justiciable in our constitutional tradition: that is, not subject to a judicial decision because it is not possible to apply legal principles to them in an intelligent fashion. Critics would say that all of this undermines effective government.

Helen Mountfield: I am in agreement with everyone. It is very important to appreciate that effective government is government in which the rights given to people by Parliament or by the common law can be vindicated. Effective government is not absolute government, in my view, in a democracy governed by the rule of law.

It is right to say that the process of reasoning that has been introduced by the Human Rights Act for some rights and the use of the concept of proportionality has extended in some ways and broadened the way that judges look at whether somebody, a public body, is acting within its powers. Bear in mind that before the Human Rights Act the standard that was used was unreasonableness: have you taken into account all relevant considerations? Who decides what is relevant?

This is always an art and what the proportionality standard has done is to make it more transparent and set out the process of traditional reasoning in a way people can see. People such as Lord Sumption himself have said that the difference between the concept of Wednesbury unreasonableness or irrationality in law and proportionality is not so different. It is just a question of saying: what are the factors you take into account here, how far is that something for the judge to decide and how far is it something for the decision-maker?

It is a constitutional conversation and the fiction that pre the Human Rights Act the law was maths and it was all very easy, that Parliament said what the law was and then there was nothing for judges to do, is just not true. The Human Rights Act has enabled people to articulate their rights and make the law more accessible, and that is a good thing for effective government and for individual rights. I do not think there is an opposition between them.

Chair: I must say, listening to what you have said, Professor Gee, and remembering that I was a Minister in the Cabinet before the Human Rights Act, making decisions, and also a Minister in the Cabinet after the Human Rights Act, making decisions, I do not remember any sense that there were suddenly incursions from the judiciary on us and that we could not govern in the way that we felt right and that was supported by Parliament. But I feel there was more transparency, as Helen Mountfield has said, about the process of decision-making in terms of its compliance with the European Convention. Having been one of those people, I did not have that sense that suddenly the wings were clipped and we were knuckling under to judicial adventurism. But, bearing in mind I am supposed to be chairing this committee rather than giving evidence

to it, I think perhaps I had better move on.

Richard Hermer: I will follow up on that, if I may. I think one of the many positives of the Human Rights Act is the requirement that Parliament has placed on the Executive that, when the Executive seeks to bring legislation before Parliament, thought must be given to its compliance with human rights that builds in human rights. That is effective government; not just good government but effective government. Ministers, and all levels of government, must have regard to human rights when they are making decisions, because Parliament has told them that is what they have to do. Again, I do not think that is just good government, I think that is effective government.

Chair: We would have had to do that anyway before—or at least we should have been—because otherwise we would end up in the European Court with findings against us, so in a way it protected us.

Richard Hermer: You also have a general public law duty. People were told they had a judge looking over your shoulder, and that was a good thing for decision-makers because it promoted good and effective government. I think the Human Rights Act, as Helen said, helps codify that, because it articulates the thought process that has to be gone through. Again, I think that is not just about good government and not just about promotion of human rights. It is effective government, because Governments that comply with human rights tend to be effective Governments.

Q61 **Baroness Massey of Darwen:** Do you think that the requirement under Section 2 of the Human Rights Act to take into account European Court of Human Rights jurisprudence makes it easier for individuals to enforce their rights in the domestic courts? Richard, would you like to start on that?

Richard Hermer: I think it makes it clearer. It helps identify the target. It also serves one of the fundamental aims of the Act, which is bringing the rights back home, funnily enough, because if we fail to give effect to Strasbourg decisions, people would be going off to Strasbourg to enforce their rights even though they had been dealt with by the domestic courts.

As Graham touched on earlier, although the principle is that you will have regard to, and often close regard to, Strasbourg rights, that has not prevented the courts here from taking their own views in clearly defined circumstances.

Professor Graham Gee: I have touched on Section 2 already but before I get to your question, I would like to pick up that

conversation at the end there and the prior question, because I think those are really important points. Parliamentary and judicial scrutiny of executive action is essential for the rule of law and effective government. I am a constitutional lawyer and I would not depart from that.

But I think it is important for us to acknowledge that there is room for good-faith disagreement about where we draw the lines, and particularly for this committee, given the balance of evidence that you have received so far, to be aware that there is that good-faith disagreement. The critique I am trying to offer today to inform your committee has a very long lineage that transcends or traverses the political spectrum.

This idea that there is a belief in the existence and persistence of moral disagreement over rights is to be found on both the left and the right, and that shapes the institutional apparatus that people think about. What is the best way to protect rights? We all want to protect rights. We will probably disagree about which rights, what weight to put on them, how they should relate to each other and ultimately what are the appropriate conditions in which to limit rights and who should have the say in determining whether that is right or wrong. So we are all agreed on the same broad enterprise. We are just disagreeing about how to do it.

I also agree there are parts of the Human Rights Act that are very positive. Section 19, on ministerial statements, I can well believe has had an important role in raising awareness of rights inside the Executive, making officials brief Ministers in a very careful way, and on the role of this committee in raising rights awareness—and you have already heard from other public authorities about the way the Human Rights Act has raised awareness.

I do not think that should make us think that the Human Rights Act is a static statute that is not possible to improve. I am making a set of arguments to improve it in one way. People might want to argue for it to be spruced up to make it an even more powerful statute Bill of Rights.

Apologies, Baroness Massey—I will now return to your question. I have already suggested that there are a couple of reasons to be concerned about Section 2. One is where judges in our domestic courts seem to have gone beyond the Strasbourg court to offer their own novel understandings of how to interpret convention rights. A second concern is how the Strasbourg court itself interprets convention rights. I know that some people will say that the courts have self-corrected over the course of the last 20 years on how they approach Section 2. Self-correcting can always be

uncorrected, so I do not think that in itself removes the need to consider whether to reform Section 2.

One option would be to repeal Section 2, but this would amount to de facto authorising domestic courts to decide freely how to receive Strasbourg case law into domestic law and how they should approach the interpretation of convention rights. A better approach might be to amend Section 2 to make it clearer that the courts can have regard to the Strasbourg case law, but subject to the proviso that they should interpret those convention rights within the terms of the ECHR, understood as an international treaty rather than as a living instrument.

Helen Mountfield: If that were to be the case, we would ignore Strasbourg judgments on issues such as the use of the internet, Big Brother Watch and all sorts of things that have arisen since the 1950s and say that we will take on only interpretations that would have passed muster in 1949 and that anything that has happened since 1949 is irrelevant as far as British judges are concerned.

I am curious that Section 2 is so very clear that you can take these judgments into account but you are not bound by them. That is about as clear as it can be. There was a recent judgment, but I forget the name of the case. A firm of solicitors was trying to get legal aid for taking cases to Strasbourg and the judge, Mr Justice Kerr, said that it could not because Strasbourg was not part of the UK, England and Wales legal system, which is what the legal aid system was set up to cover. Convention rights and the Human Rights Act are the rights as they apply in the UK, so you can get redress for these cases in the UK courts.

How the Strasbourg principles that apply to all member states apply to our specific system is ultimately something where of course the judges have to say that they look at the general conspectus of convention law as interpreted by the Strasbourg court about what these principles mean. But here we have the British criminal justice system. How does it apply here? What does the presumption of innocence mean here? Can you use hearsay evidence even if the only live witness has been killed here?

It seems to me inevitable that our judges would of course look at what the Strasbourg court said when they were trying to decide what convention rights in precisely the same language meant in British law. But they would not regard themselves as bound by it and they do not at the moment—and the Human Rights Act makes it totally clear that they do not have to, either.

Joshua Rozenberg: I endorse what Helen says. I think she was referring to a case called Horncastle, a judgment from the Supreme Court at the end of 2009 about the admission of evidence in a criminal trial from a witness or witnesses who were not available for cross-examination. The appellant, the convicted criminal, relied on a Strasbourg decision called al-Khawaja but the Supreme Court said that Strasbourg had got it wrong.

That case, I noticed, is cited in a submission to the independent review by the Society of Conservative Lawyers, which supports the outcome of that. The point that case makes is that the British judges must take into account decisions of the Strasbourg court, but they do not have to follow them. If they think Strasbourg has got it wrong or has misunderstood how our system works, or something like that, they can say so, and Strasbourg often backs down and says, "Yes, you were right, we were wrong, we did not really understand", and decides the next case differently. So I do not think there is a problem. I do not think that "must" in paragraph (i) of Section 2 of the Act needs to be amended to read "may".

Q62 **Lord Henley:** I want to come in from the other point of view. Do you think that seeing the reasoning of the UK courts in human rights cases helps the European Court of Human Rights to understand our own laws, and does this have an impact on the likelihood of an adverse finding against the UK? Perhaps the practitioners could start first.

Richard Hermer: I think it undoubtedly helps the Strasbourg court, for the reasons that Joshua just gave, because it gives a reasoned analysis as to the position here, which will always help Strasbourg and inevitably does. Absent that, the United Kingdom is likely to find itself in more protracted, more complicated litigation before the Strasbourg court and also more likely to lose.

Helen Mountfield: The reasoning in the British cases often helps Strasbourg say that it has changed its mind. In a case involving Ernest Saunders, the Strasbourg court said that evidence could not be used because it was self-incriminatory. The British courts did not like it. Lord Bingham said that he did not understand it. Lord Steyn said that it was wrongly decided. Next time a self-incrimination case came to the Strasbourg court, which was about road traffic offenders, it said that it was wrong and now understood the position, having read the reasoning in the British cases, and changed its mind because it had not understood enough about the British system.

There is a really intelligent and useful constitutional dialogue where European judges get to understand the British legal system more and they have the benefit of the close reasoning that happens in our domestic courts. Even if a case goes to Strasbourg, they see where the British judges are coming from and their reasoning. That is why, as Joshua said, the British Government have a disproportionately high success rate when cases go to Strasbourg because things have been ironed out in our own courts first.

Professor Graham Gee: An example along similar lines a relatively recent case of Hutchinson v UK, where Strasbourg revisited the UK's life sentencing regime and in so doing reversed its earlier decision in Vinter. It was influenced in part by the reasoning of the Court of Appeal in a case called McLoughlin. In McLoughlin, the Court of Appeal had held that Vinter had misconstrued, misunderstood, a part of the Crime (Sentences) Act 1997 and the manual that oversees life sentences.

That is a useful way in which the reasoning of the domestic courts can help to shape the Strasbourg understanding of the complexities of domestic law. Whether that amounts to anything we could meaningfully describe as a dialogue is a bit more dubious, remembering that the Strasbourg court is an international court overseeing a treaty with upwards of 50 contracting parties. Can there really be a meaningful discussion dialogue with top courts in all those different contracting parties?

I mention Hutchinson, because there is a question that we want to reflect on: was that an example of an interjudicial dialogue or, as one of the dissenting judges in the Strasbourg court hinted at in Hutchinson, was it an example of the Strasbourg court taking into account the political sensitivities in the UK on the back of the prisoner votes saga, the criticism of the Strasbourg court by some Ministers in recent years, and in the shadow of Brexit? One of the judges on that Hutchinson case in the Strasbourg court issued a withering dissent when he spoke about this decision being owed to the current political environment, and he was worried about the systematic implications of that sort of approach.

That example shows the political character of the Strasbourg court. Some might want to laud the fact that there was the court responding to some political sensitivity and showing some political acumen in reversing its approach to life sentencing, but I think we would be concerned if our domestic courts were to take political considerations into account in such a fashion.

Joshua Rozenberg: I agree with Graham that the Strasbourg court is politically sensitive, and possibly more sensitive than a

court would be in the United Kingdom. But the answer to that is that a court in the United Kingdom does not have to follow a decision from Strasbourg and only has to take it into account.

Another example that you will remember from when Lady Hill gave evidence to your committee a few weeks ago was the Animal Defenders International case about apolitical advertising on television. As she said to you, Lord Bingham's opinion in the House of Lords was clearly influential on this knife-edged decision in favour of the British Government by the Strasbourg court.

Q63 **Lord Brabazon of Tara:** I am a Conservative Member of the House of Lords.

Given that we are looking into the review of the Human Rights Act, are there any reforms of the Act that any of you would like to see, either within the review's terms of reference or otherwise? Could we start with Professor Gee?

Professor Graham Gee: Thank you for that question. I have already suggested some reforms on Section 2. I do not think we have discussed Section 3.

Chair: Could you imagine that you were not so much drafting the legislation but being very practical about what you are saying, rather than just talking about the ambit of Section 2? What would the specific things be?

Professor Graham Gee: I suggested trying to add some wording to Section 2 that would encourage the courts to take into account Strasbourg case law that has a very close relationship with the terms used in the convention itself. I think there is an argument in Section 3.

Chair: Sorry, you have lost me there. Can you say that again? I am not clear what you are saying.

Professor Graham Gee: I expressed two concerns about Section 2. One is that from time to time the judges in our domestic courts have seemed to be willing to go beyond the Strasbourg case law. To the extent that that concerns me and does not concern others, there could be an argument to amend Section 2 to provide some direction that the courts should not go beyond the Strasbourg case law in developing some novel understanding of our convention rights. If you do not accept the premise that this is a concern, you presumably would not want to amend Section 2 in those terms.

Another concern is to try to think about how to address the living instruments interpretive approach, which critics find concerning

because it licenses, in our view, judicial lawmaking that goes beyond the terms of the convention itself. Some language that talks about courts having regard to the Strasbourg case law but subject to the proviso that convention rights should be interpreted consistently with the language used in the terms of the convention itself.

Helen Mountfield: I did not think—indeed, I put my name to the Oxford Public Law Lawyers' submission to the independent review saying that we did not think—that we needed any changes to the Human Rights Act. I have read the Bar Council response, and in paragraphs 97 and following it has what I think is a very productive suggestion that when a declaration of incompatibility has been made and a remedial order is put before Parliament by the Executive, Parliament has the choice of saying yes, we will have that remedial order or, no, we do not like your remedial order, in which case they cannot do anything unless they can bring forward primary legislation.

Given that the objective is to have parliamentary scrutiny of what legislation there is to promote human rights, I think there is a lot to be said for the Bar Council's suggestion that when an order is put before Parliament under Section 10 of the Human Rights Act, Parliament has the option not only to say yes or no but to propose amendments. That is the occasion when remedial legislation can be made with a higher degree of parliamentary input. That is a small, but I think useful, proposal.

Chair: Did it give any examples of where it would have been better had that been the case?

Helen Mountfield: I cannot think of one immediately, but there have only been 43 declarations of incompatibility in the nearly 21 years since the Human Rights Act has been in force.

Chair: I have heard that argument before, but without an example of where it has given Parliament a problem, it is hard to see that it is justified. It might be intellectually justified, but if in practice it is not a problem—

Helen Mountfield: I cannot think of one immediately. If I do, I will write in and let you know. If what we are talking about is a concern that Parliament's role has somehow been taken away by the judges, that is a good way of putting it back. If there is a problem, it is not just a chat between the Executive and the judges.; it is if Parliament has a proper role in it, or a stronger role. I just saw the intellectual force of it.

Lord Brabazon of Tara: Does anyone else have any ideas about reforms?

Joshua Rozenberg: I am very much against the idea of the originalist approach, which is what I think Graham Gee is calling for, of going back to the wording of the convention. On the other hand, Judge Eicke, the British judge at Strasbourg, told us on "Law in Action"—you very kindly mentioned that, Chair, at the beginning—that the court is considering what to do about attempts to make climate change come within the provision of the convention, which of course was not mentioned when the convention was drafted 70 years ago.

People are bringing challenges under Article 2 on the right to life and under Article 8 on the right to respect for a person's private and family life, and we will see what the Strasbourg court does on this. I think there will be critics if the Strasbourg court reads into those articles rather more than was ever imagined by the people who drafted those particular provisions. On the other hand, you can see that these are important issues and the courts may well need to provide remedies.

The other point I wanted to refer to was Section 3 of the Human Rights Act. This is the interpretation of legislation: "So far as it is possible to do so, primary legislation and subordinate legislation must be … given effect in a way that is compatible with the Convention rights".

A blog on the UK Constitutional Law Association website was published today and gives an analysis of how Section 3 is applied in practice. It is by two young lawyers at the human rights organisation JUSTICE. They say that it is "a well-crafted interpretative tool that is rarely relied on by the courts, but when it is used, the courts have done so to protect Convention rights in a way which maintains the constitutional separation of power".

JUSTICE identified only 34 cases where Section 3 was used, by going through the law reports, and said that in many of those cases the courts simply used it to deal with technicalities and legislative wording to bring certain factual circumstances within the ambit of a statute, which might not have otherwise have been provided for, for example a parental order in respect of a child born following a surrogacy agreement when the biological father had unexpectedly died. So in the case of unexpected circumstances, the courts have used Section 3 to apply the legislation in the way that Parliament presumably intended.

So I think that the concerns that have been expressed about the Human Rights Act needing a thorough reform are perhaps overstated.

Richard Hermer: On Lord Brabazon's question, I have a general point and a particular point. On the general point, I entirely agree with Graham that having a review of any piece of legislation is a good thing. Talking about rights is a great thing, and it can be absolutely done with people with different views in a completely respectful way.

However, stepping back, I have a fear about playing around with that. "If it ain't broke, don't fix it", because if you start playing around with things it has all sorts of unintended consequences. In the context of an Act, and the import of the Human Rights Act, that has some real dangers. That is my general point.

I have a very particular concern about one of the proposals that Graham moots, which is that somehow we enshrine the convention as fixed at the time of drafting and not to be moved without the express say-so of the Grand Chamber. That is just not how human rights instruments work. You see all the sorts of difficulties that you get into when that school of thought is applied to the American constitution. It is not how human rights instruments work. They change as societies change, as human rights issues change. They become defunct if they cannot do that.

Q64 **Lord Dubs:** We have touched on this a little bit, but the question is this. Previous Governments have established views of the Human Rights Act that have not led to credible proposals for reform. Do you think that a further review is necessary at this point? Is there any reason to think that it will lead to reform this time?

Joshua Rozenberg: I do not think it is necessary, but I do think there is reason to believe that it will lead to reform, because the Government have committed to reforming the administrative law more broadly for judicial review. Their proposals last week have a very quick response time of six weeks and presumably they will push ahead with legislation in line with the proposals they put out. I would have thought that the Government were equally determined to legislate on human rights.

Professor Graham Gee: I agree that 20 years on it is timely to have a comprehensive review of the Human Rights Act. One can quibble with some of the terms of references of the earlier reviews and whether they were designed in a way to allow constructive conclusion from the efforts that were undertaken. It is important to acknowledge that there has been concern about the Human Rights

Act since its introduction, with one major party, which is now in power, having critiqued the Act since its enactment, and I do not think it is helpful for those who are supporters of the Act to deny that political fact.

Helen Mountfield: I think the reason for the attack on the Human Rights Act is part of the "E" word attack—the attack on Europe in general. Even those who have attacked the Human Rights Act because it has "European Convention" in its long title do not need to worry any more. Brexit has happened, and we do not need a reason not to be in the EU. These are rights that we could perfectly easily list as rights and say, "Here they are", and perhaps in retrospect it might have been politically better just to do that.

I am with Lord Bingham: which one of these rights do we not want to have? What is wrong with any one of the rights? We can talk about how they get interpreted in individual cases and whether we agree or disagree, but these are rights that every human being would want for themselves or for their family. Facing a global pandemic in particular brings home to us that we have some fundamental human needs and frailties and they ought to be protected equally. It is a statement.

The problem with the Human Rights Act was that it was very quickly attacked by sections of the press who did not like some of the people who used the Act and it made good stories to say, "Look at this dreadful person who is arguing that he has a human right to get pornography in prison" or something, completely omitting to note that that sort of claim almost never succeeded and the fact that these are rights that apply to everyone: they apply to children, to people in care homes, to us all. It is very important that we argue for these as universal human entitlements.

There was an Amnesty opinion poll recently that said that, I think, 69% of people thought that you needed these rights as a backstop. We just need to make the case for universal rights and fair access to the law for everybody, which does not mean to say that bad people get the same rights as good people; they do not. There are limits on people's rights to protect other people, but let us have that conversation within a framework of equal dignity and respect before the law.

Richard Hermer: I agree entirely, but they are not just universal rights, they are British values. I know it is popular at the moment to have Zoom calls with Union Jacks behind you, but there is an important point to make here. These articles reflect centuries of common law tradition. This country was outlawing the use of evidence from torture centuries before our continental

counterparts. The rights to a fair trial are deeply ingrained in our common law. It was Conservative politicians at the close of the Second World War who were at the forefront of trying to promote the convention, because they represented our values. We should never lose sight of that.

Q65 **Joanna Cherry:** I am the Scottish National Party Member of Parliament for Edinburgh South West.

I want to ask the review's question about designated derogation orders. The review asks what remedies should be available to the domestic courts when considering challenges to designated derogation orders. Is this an issue that has caused any problems to date? What would be the effect of limiting the courts' ability to grant relief in respect of any such challenge?

Professor Graham Gee: I should begin by saying that I am not an expert on derogation orders. I am not a public international lawyer, and I know that Richard Hermer is a very experienced professional in that area.

Section 14 provides the domestic legal framework for derogation. That is the provision that provides expression for the UK right under Article 15 to derogate in times of emergency. My understanding is that in practice the Act has shaped significantly how derogation works in practice. It has created the scope for domestic courts to review a derogation and presumably also to arrive at a decision about validity. That might differ from what the Strasbourg court could do. We have seen examples of that, like in the Belmarsh case about indefinite detention for international terrorist suspects after 2001, where the Law Lords quashed a derogation order for discriminating between nationals and non-nationals.

I do not have a view on this myself, but I am aware that there are critics of the Human Rights Act who argue that the Act should be amended to limit the scope for such challenges. Those critics assume that other challenges to future derogation orders are likely. Again, Ekins and Larkin have made such an argument. They have suggested amending Section 6(3), which will provide that a derogation order should not be treated as a decision of a public authority. They have alternatively proposed that Section 21 should be revised in its definition of legislation so that it includes derogation orders, which would immunise them from the possibility of being declared incompatible under Section 4.

They recognise, of course, that derogation orders could still be challenged by way of ordinary judicial review, so they have also called for the Human Rights Act to be amended to include an ouster

clause, which would say that it is for the Minister to determine whether the Article 15 threshold has been met. That would be controversial and also likely to be tested in the courts.

I hope that has sketched out some of what some critics are saying.

Joanna Cherry: That is very useful, thank you. Could I turn to Richard on this one?

Richard Hermer: I agree with Graham's overview. The committee should be deeply concerned by any suggestion of ouster clauses when it comes to the court's ability to review fundamental rights, let alone to review a derogation and the basis of a derogation. None of it would prevent the United Kingdom being brought before the Strasbourg court to justify a derogation under Article 15 of the convention.

My view is that this is potentially very troubling in respect of the domestic implications, but it may be thought potentially futile in respect of our accountability before Strasbourg.

Helen Mountfield: I may be wrong, but I think the Belmarsh case was the only occasion in 20-plus years in which a derogation has been struck down. It is really important to understand why the court struck it down. The court said, "National security is something we keep really hands-off". But if you are going to lock up a suspected international terrorist if they are not British but not if they are British, that is discrimination. What is the reason? It cannot be, "Can you send them back to where they came from?", which was the argument. What is the reason? If we were to say that we were going to immunise derogations, even discriminatory derogations, and simply say that those are beyond the scope of the law, we would be undermining the fundamental basis of the Human Rights Act, which is that everyone has equal dignity and worth.

Yes, individual rights are sometimes restricted, and perhaps in quite draconian ways, to protect the rights of others; we can think of control orders and things like that. Sometimes that happens, but it must be on the same basis for everyone. If you start to say that there are different rules for British nationals and non-British nationals in relation to who can be locked up on a precautionary basis—different rules perhaps for Muslims and non-Muslims or for right-wing terrorists and left-wing terrorists—you have a recipe for undoing the whole universal basis of human rights, and it is very dangerous.

Joshua Rozenberg: It would not be surprising if the Belmarsh case was the only challenge to a derogation, because we have not

had any derogations in force for many years. There are none in force at the moment. There is one reservation, which goes back to 1952 and relates to the right to education. That does not seem to have caused any problems.

It is also important to understand—you, Ms Cherry, understand this very well—that the Human Rights Act does not give the UK Government, any Government, the right to derogate. The convention gives a Government a right to derogate and in very limited circumstances. There has to be a time of war or other public emergency threatening the life of the nation. Then the Government can derogate from their obligations only to the extent strictly required by the exigences of the situation and provided that such measures are not inconsistent with their other obligations under international law.

The question is: what is going on here? We know, because I have mentioned this already, that the Overseas Operations (Service Personnel and Veterans) Bill is going through Parliament at the moment. This will put new Section 14A into the Human Rights Act that will say, "In relation to any overseas operations that the Secretary of State considers are or would be significant, the Secretary of State must keep under consideration whether it would be appropriate for the United Kingdom to make a derogation".

That is fine. There is nothing wrong with the Secretary of State keeping this under consideration. But if the Government intend to make a derogation in relation to any overseas operation that may be conducted in the future, they will no doubt be challenged. The Government are presumably anticipating a challenge to Article 15(1) of the convention, because people will say that some overseas military operation does not threaten the life of the nation.

The question then is what happens if there is a challenge to an order made under Section 14 of the Act that simply puts the derogation into effect in domestic law. The answer is that maybe the courts will refuse relief, assuming that the courts were to decide that the ouster clause was valid. The consequence of that would be that the UK would probably be found to be in breach of the convention if the case went finally to Strasbourg.

To sum up, I think that what is behind this is that if there were to be a limit on the ability of the court to grant relief in such challenges, the consequence would be that the Government might win the day in the domestic courts of the United Kingdom but would lose in Strasbourg.

Q66 **Joanna Cherry:** I will move on to my next question, which is not

completely unrelated to what we have just been talking about.

It is now settled case law that the convention can have extraterritorial effect in exceptional circumstances. In circumstances where it is not possible to comply with specific rights in overseas military operations, the Government can derogate in accordance with Article 15, and you just mentioned what they are planning to add to that in the Bill currently going through at the moment.

In light of that, is there a case for further limiting the ability of individuals whose human rights have been breached to have their cases determined by the UK courts? What would be the advantages and disadvantages of such a move? I will stick with you, Joshua, because it very much follows on from what you have just been saying.

Joshua Rozenberg: I think the Government are thinking of the al-Skeini case, which concerned the killing of six Iraqi civilians by British soldiers in southern Iraq. In 2007, the House of Lords held that the Human Rights Act did not apply to the soldiers' actions unless they were on base. The Grand Chamber of the human rights court decided subsequently that the UK Government have a duty to conduct an effective investigation into the deaths of all civilians killed by British soldiers, whether or not they were on base. That was because the UK had assumed responsibility for the maintenance of security in southern Iraq and was exercising control and authority over Iraqi civilians.

Leaving aside whether circumstances of that nature are likely to occur again, if they were to, the Government would have an obligation to conduct an Article 2-compliant investigation into the use of lethal force by soldiers: in other words, were they entitled to open fire; were they acting in self-defence?

You asked me whether there is a case for limiting the rights of individuals to have their cases determined by the UK courts. The question then is: if they are not going to be able to bring their case before the UK court, where will they bring their case? They must be able to bring their case in some way before the British Government. There must be some way in which they can enforce the right, which the Strasbourg court has said they have, to make sure that there is a proper inquiry into any abuse of powers even under a derogation.

The advantages of it being decided by UK courts is that we can be in control of it. The disadvantage is that if we lose control of it, Strasbourg will presumably find against the UK Government in the future, as we have been saying throughout this evidence session.

Joanna Cherry: I suppose there is also possibly a problem with what is called the optics of Strasbourg rapping the British Government over the knuckles rather than our domestic court.

Joshua Rozenberg: That may be behind the Government's thinking. It is one thing for the UK courts to rule against the UK Government. That is harder for a UK Government to get round. It is much easier for a UK Government to blame what is perceived to be a foreign court for reaching exactly the same decision.

Joanna Cherry: Despite the fact that there is a British judge in the court.

Joshua Rozenberg: Exactly so.

Joanna Cherry: And sometimes in the past a Scot. Helen, would you like to add anything to what Joshua has said on this particular point?

Helen Mountfield: I agree with Joshua. The point is that it is exceptional for there to be extraterritorial jurisdiction. It only happens where British forces or agents or officers are exercising jurisdiction beyond the territory of the UK, which is unusual. But if state power is exercised by agents of the British Executive, it seems to me that it ought to be supervised by agents of the British legislature, because where there is an action there should be a legal remedy. It makes sense for that remedy to be the same wherever state power is exercised.

Richard Hermer: Can I give a slightly elaborate answer? For good or bad, I have spent a large chunk of the last 10, 15 years doing most of the cases in the domestic courts arising out of it, representing people who are victims of things that have gone wrong—sometimes horribly wrong in Afghanistan and Iraq—and servicemen and the families of service men and women.

There are two parts to your question, as I see it. First, could there be an effective derogation under Article 15? It is difficult to see how it could be said that the conflict in Iraq and Afghanistan presented threats to the life of this nation such that there could be a lawful derogation. I have some pretty clear views on whether, even if it did, it would be a good thing to derogate on.

I think it would be a deeply retrograde step, for a number of reasons. First, it would be somewhat redundant. Say that, for one element, common law or the Human Rights Act does that. All the mistreatment and false imprisonment claims that have been brought overwhelmingly successfully by victims in Afghanistan and Iraq have all been done under the common law, often together with

the Human Rights Act. That would continue irrespective of whatever happens in the Human Rights Act. To a large degree it is redundant.

The one area where the Human Rights Act adds something is that under the Article 2 case law, the obligation is not simply to protect life but where life has been taken in circumstances that give rise to a suspicion that it might have been unlawfully taken there is an obligation to investigate. That whole line of cases has led to the courts ordering investigations. There have been two high-level ones, both of which serve an exceptionally important public service.

The first was Baha Mousa, who was the young man who was tortured to death by British troops, and the courts ordered an inquiry. That very detailed inquiry was obviously extraordinarily powerful in giving victims a voice, but it was also, I would suggest, extremely helpful for the armed services in understanding where they went wrong and how they could ensure it did not happen again. It also reiterated, as part of their evidence as to what happened, the importance of the Human Rights Act, because it showed evidence that at the time in Iraq there was a discussion as to whether or not the Human Rights Act applied and the decision was taken, wrongly, that it did not. Many of the military personnel thought that made a difference.

The other inquiry was the al-Sweady inquiry, which had a lot of publicity because it resulted in findings that many of the allegations were untrue and that there was wrongdoing by one of the lawyers involved. That also formed an exceptionally important public service, because it led to the clearing of the names of service personnel. Had there been no Human Rights Act to enforce an investigation, it would have all been left to rumour in the press hanging over these personnel for probably the rest of their lives. But the Article 2 investigation provided real public vindication, and that was doing what the Human Rights Act does.

So in those senses it performs an enormous public service. There have also been ongoing investigations under a judge into fatalities, which I am sad to say have produced some shocking findings but which again have been an opportunity not only for victims to have redress but for the armed services to learn lessons. There are many people at the top leadership in the Ministry of Defence who want to learn the lessons, who do not see this as a bad thing.

As Joshua has alluded to, the other really troubling consequence, if we were to tinker with the extent of the territorial jurisdiction, is that this would just go to Strasbourg rather than be dealt with by our own courts. Even more troubling, not least I think as perceived

by many senior military personnel, is that this, taken in tandem with the overseas operation Act, will mean not simply scrutiny of our cases before the Strasbourg court but British soldiers at risk of being dragged to the International Criminal Court in The Hague

The Human Rights Act would provide the mechanism for this country to show that we have properly investigated, which would mean that the ICC does not have jurisdiction, absent that our troops are going to be placed at risk of being dragged to The Hague. That is a cause of grave concern to all of us, but I know it is a concern for senior military personnel.

Joanna Cherry: It is a concern not just for the reputational damage for the United Kingdom but to service men and women and the military authorities.

Richard Hermer: Yes, most of whom are proud to be promoting human rights and to whom the notion that they would behave in a way incompatible with human rights is utterly repugnant. But they know not only that the standards in place, including those under the Human Rights Act, reduce the risk of those incidents arising, but that when they do, or when there is a suspicion of it, particularly if there is an unjustified suspicion of it, there is protection for those personnel.

Joanna Cherry: Thank you, that is a very full and helpful answer. Graham, can I come to you finally on this last point? Is there anything you would like to add, or would you like to take an alternative view on it? It would be helpful to hear from you.

Professor Graham Gee: I simply acknowledge that Richard Hermer's answer there is very powerful. It is strongly persuasive and I listened closely to what he said. It is important that my role on this panel is to offer the alternative views. It is important to note that we have seen over 20 years the judicial expansion of the extraterritorial application of the Act in ways that I think would have surprised people if we were to turn the clock back to 1998.

Joshua Rozenberg mentioned the al-Skeini litigation. It is important to note that Lord Bingham, a very esteemed jurist, was in the minority in the House of Lords on that: he reasoned that the Act should not have any extraterritorial effect at all because of the presumption that statute should only apply within the UK. That shows, and I would suggest that it is an argument of authority, that there is a respectable intellectual argument there to explain why the position in 1998 was a sound one within our legal tradition, although I note the points that Richard said about common-law alternatives.

I have read the two that suggest some senior military have concerns about the Human Rights Act through this extraterritorial application displacing the law of armed conflict in regulating our armed servicemen overseas. I have heard an argument made according to those military people that the law of armed conflict is a better suited legal regime for providing the rule of law over our overseas operation. There were concerns that the Human Rights Act might encourage a culture of risk aversion and undermine fighting capacity. I am not in a position to speak to whether those arguments are sound or whether they are widely shared, but I have certainly read materials on how people make those arguments.

Q67 **Lord Singh:** Good afternoon. I am a Cross-Bench Member of the House of Lords.

The UK has accepted a legally binding obligation "to secure to everyone" within its jurisdiction the rights protected by the convention and has undertaken to provide an effective remedy in cases of a breach. Do you think it would be possible to place territorial limits on the application of the Human Rights Act in a way that was compatible with these commitments? If not, would a separate system of enforcement be required for those whose human rights have been abused by the state overseas? Would there be any advantage in this approach? Helen, could you to start us off?

Helen Mountfield: I do not think there would be an advantage. It is because of that principle of universalism that, if there is exercise of state power, it usually will be within the territory of the UK. But if it is not, it is still exercise of British state power. It seems to me that the remedies that the British Parliament has said should apply ought to apply wherever that power is used. You could put in place separate legislation. I do not think it would be very attractive. If you do not, you have all the problems that Richard has just talked about. I do not think I can improve on what he said about that, which I thought was spot on.

Joshua Rozenberg: I do not think it would be possible to place territorial limits on the application of the Human Rights Act in the light of the judgment we have just been talking about. Let us imagine these bereaved Iraqi civilians wanting a proper investigation into the death of their sons. The question is: would a separate system of enforcement be required for those whose human rights have been abused by the state overseas? The answer to that is, no. There is no reason why there should be a separate enforcement. I agree with Helen.

Would there be any advantage to this approach? I can see practical advantages to this approach, provided it was possible for victims, or in this case the families of victims of British troops, to establish whether or not their loved ones had been lawfully killed. If it was possible to set up such a system in the location where these families lived, so that they do not have to travel to the UK or they do not have to rely on lawyers in the UK, I can see a practical advantage. In other words, if you export the court to the place where the breaches of the human rights convention may have occurred, I can see that as an advantage. But it is absolutely essential that you are exporting the law in exactly the same way as it is applied within the United Kingdom—you export the judges and the lawyers, and you simply do this locally in accordance with the human rights convention.

If you are providing the same quality of service, the same standards, the same outcome to people in their own countries, that may have an advantage. It might even save taxpayers' money in the long run. But it must not be any diminution in the rights that these people are entitled to.

Lord Singh: Would both options be of advantage to the complainant?

Joshua Rozenberg: Do you mean whether they would be able to choose whether to take their case to the UK or whether it could be dealt with locally? I can see that, from the complainant's point of view, that would be good, because some may think that they will get justice only in the UK and their cases would not be covered by the media if they were enforced locally. Others would see the advantage of not having to travel and being able to come along with their families to a court hearing locally and be able to do so more easily and cheaply. So, yes, giving the families an option would be an excellent idea. I agree.

Richard Hermer: I do not disagree with anything that has been said. Can I give you an insight, having worked on those cases, most of which, I should say, do not involve people coming over here? Most of these cases were about people who were unlawfully detained, and a system was put in place with the MoD and solicitors acting for them whereby the strength or weaknesses of the case could be ascertained and they were all dealt with without people needing to come over. Where people did come over it was for the most serious cases of allegations of torture and mistreatment.

Watching the experience of people come to court, be listened to, tell their version to a judge who was listening, seeing witnesses

from the other side have to come and give evidence and be cross-examined, and to receive reasoned judgments, which, as it happens, vindicated their right, and seeing the reaction of Iraqis to that—Iraqis who had suffered at the hands of the British—I found a deeply patriotic moment, because it vindicated the rule of law in this country. They came out of this experience with an immensely positive view of this country, despite everything that they had been put through. I just felt exceptionally proud to have been part of that. It is a human element as to what the Human Rights Act is capable of bringing and what the rule of law does through it.

Professor Graham Gee: That is quite a powerful comment and I do not have anything else to add.

Q68 **Ms Karen Buck:** I have a round-up question, and thank you for your very strong evidence this afternoon. On the basis of the evidence that we have heard as a committee in these hearings, most people—not everybody—would back the idea that the Human Rights Act has worked well in practice. Can you reflect on the extent to which there is a problem with perception, and that the way the Government are now proceeding is in part shaped by perception of problems with the Human Rights Act rather than its substantial operation? Might it be better to devote some attention and resource to challenging the perceptions of the Act rather than amending it? Could you just give a general reflection on that as we come to a conclusion?

Joshua Rozenberg: I think that what your committee has done is challenge the misperceptions or misconceptions of the Human Rights Act. The interesting question is where those misconceptions are to be found.

Chair: What is the answer? Who is driving these misconceptions?

Joshua Rozenberg: Could it be 102 Petty France? I could not possibly comment.

Chair: Sorry, I lost you there. There was a bit of an echo.

Joshua Rozenberg: I was just being very rude about the current Government. I was saying that there are misconceptions.

Ms Karen Buck: I was just speculating, as you were, where that might originate from.

Chair: Could the people not speaking go on mute, because we have a lot of feedback? Thank you.

Helen Mountfield: One of the great successes of the introduction of the Human Rights Act was the enormous programme of official

and judicial education about the Human Rights Act. The Judicial Studies Board trained every immigration adjudicator and every employment tribunal chair. It was an enormous mass exercise, and that was really helpful.

However, it perhaps led us to the perception that this was all about judges and lawyers, because the other people who needed to be educated were children and community groups. It needed to be advanced in the way that the vaccination programme has been, as something for all of us: when you need it, this is where it is. If you are an elderly person and you cannot be put in a care home with your life partner, the Human Rights Act might be able to say, "This is a breach of your human rights". If there is a social security rule that has been drafted for general policy reasons, or there is a Government who want to cut housing benefit, that is a political choice which an elected Government are entitled to make. But if they have not realised that if you have a lot of disability-related equipment you may not be able to share a bedroom with your spouse and may need a separate bedroom, that is a human rights argument. These are things that apply to everybody. It is not just about difficult people. It is for everybody in moments when they need it.

If we had been able to feel proud of the Human Rights Act in the way that people are proud of the National Health Service, there would be no question of wanting to tinker with it or do away with it or seeing it as some left-wing plot to subvert the current Government. It just is not. You can disagree with some judgments, you can argue about whether all judges understand it properly, but it really should be seen as a universal thing.

It is very sad that it is not. If there were some programme of public education, we would be in a much better place and we would be able to start to talk to one another about when we limit our own rights and duties to protect those of others. I really do not see that as a party-political project. It is very sad that it appears to have become one.

Professor Graham Gee: I agree that there has been a problem of perception probably since the inception of the Act. I agree with Helen Mountfield's comment earlier about some of the press coverage of people in society who are deemed to be undesirable or undeserving. I absolutely agree with Helen Mountfield about human rights being for all. That is partly why people who come from the intellectual position that I am standing in are concerned about the fact that rights are contestable and who try to understand or think about institutional responses that will enlarge the opportunities to

debate rights in political arenas, and therefore are concerned about institutional developments that seem to be expanding the judicial role and confining the role for political authorities.

Part of the reason for this committee's consensus might be because there is an increasingly dominant mindset among lawyers and judges that is different from the sort of arguments I have tried to put today.

I will close by saying that my concern, from the cold perspective of an academic constitutional lawyer, who is not a practitioner and is not in a public authority or in a territorial human rights commission, is how we secure the durability, effectiveness and legitimacy of our constitutional arrangements over the long haul. What will the position be in 20, 30, 40 years' time? Starting from the position that we all pretty much signed up to the same vision, or the vision of the common good, how do we secure that in a way that keeps our constitution intact? That is the position that some people who share my concerns are thinking about: what is the place of the Human Rights Act in our constitutional system? How can we improve it in ways that secure that durable constitutional order?

Richard Hermer: I agree with much of what has been said. We all acknowledge that there are huge misconceptions, one of which is tied up with Europe and the European debate of the last 20 years. The number of people who confuse the European convention with the European Union—friends of mine, who I always thought were quite well-informed, journalists or politicians, who said, "Now we're leaving Europe it must mean that we're leaving the Human Rights Act". There is real confusion over it in the minds of lots of people. That has not helped.

There is a second confusion. Every time, if I am chatting to people and I tell people what I do, I will get a litany of cases: "What about this? What about that?" Either they are cases that have nothing to do with the Human Rights Act or they are cases where the courts have refused the application. There is a lot of misinformation about it.

As Helen said, the idea that as a collective community we are proclaiming these rights as the rights we all have should be a cause for celebration. It should be a positive thing. As Helen also said, campaigns that show what this means to all of us would be a very powerful way of entrenching the core British values that lie at the heart of the European convention.

Chair: To be fair, as well as hearing from lawyers and judges we

have also heard from those at the front line on the Human Rights Act, including the police, the Crown Prosecution Service, NHS mental health trusts. We have been looking at the people who have to act within the Human Rights Act as well as those who are applying it in the court.

This has been a very interesting evidence session and I am very grateful to all four of our witnesses here today. We have had the opportunity of shining a light, with your very considerable expertise, on the very particular questions that need to be addressed. We can all agree that it is worth respecting the views of those who come to a different conclusion, but our job is to look at the evidence which those conclusions are based on. I do not think that this committee will back up or respect the judgment of people who come to a different view with no evidence to support their view. Our job is to drill down and look at what generalised concerns and prevalent fears might be based on and whether the remedy is that which has been put forward. Having said that, we will proceed, with the assistance of your evidence and all those who have given evidence to this inquiry, to give our report to the independent human rights act review. Thank you for your contribution this afternoon.