Written evidence from Lord Mance (HRR0002)

QUESTIONS NOT ADDRESSED IN ORAL EVIDENCE SESSION ON 26 JANUARY 2022

The Committee Specialist has identified the following questions falling under this head.

Q1 (Q4 in the original list).

> "The Government have taken issue with the "living instrument" interpretation of the Convention, which requires case law to be interpreted in the light of changing social, ethical and political conditions. Do you think this has led to, as the Government says, an "inflation of rights without democratic oversight and consent"?
>
> a. Do you think the application of the margin of appreciation has been applied in a way that provides sufficient respect to the unique constitutional and legal traditions of the UK when giving effect to Convention rights?"

Answer to Q.1:

I touched on the subject in my oral answer to Q7. I add this. Any instrument addressing rights (or responsibilities) must be read in the context of circumstances and attitudes as they change from time to time. *Tyrer v United Kingdom* (1978) (App. No. 5856/72) (caning in the Isle of Man) is a case where it was legitimate for the European Court of Human Rights ("ECTHR") to have regard to changed social understanding and attitudes.

There have in the past been some decisions where the living instrument doctrine may be said to have been carried outside its proper sphere. The Government's paper refers extensively (paras 101-106) (and with some justification in the light of the travaux préparatoires) to *Hirst v UK* [2004] 38 EHRR 40 - though without, I note, reference to the subsequent case of Scoppola v Ital7 (No 3) (App No 126/05), in which the ECtHR very considerably limited the obligation to give some (particularly short-term) prisoners the vote.

Other examples given include (at para 100) *Othman (Abu Qatada v UK* (2012) 55 EHRR 1, where the ECtHR recognised that extradition of a suspected terrorist to face a well-founded fear of an unfair trial could be impermissible, on the same basis as extradition to face torture or inhuman treatment. It is true that the same principle extends to other risks of persecution, for example homophobic persecution - as the House of Lords itself (not the ECtHR) held in *HJ (Iran) (FC)* and *HT (Cameroon) (FC) v. SoS for the Home Dept* [2010] UKSC 31. Would we wish the contrary? And, if we would and we legislate in some way to force a different legal approach domestically, what do we do about the consequence that more claimants will necessarily have to challenge the UK in Strasbourg? Will the UK then refuse to honour the inevitable decisions of the ECtHR against it?

Another example given by the Government paper (para 107 and footnote 54) is the potential reach of privacy and family life. This, as recognised in Strasbourg, can enable review of

decisions in the area of "environmental policy", where personal interests are sufficiently seriously and disproportionately impacted. The Government paper refers in this connection to *Hatton v UK* (2003) 37 EHRR 28 and *Powell and Rayner v UK* (1990) 12 EHRR 355. There are both decisions relating to Heathrow. But the paper does not mention that the ECtHR held in *Powell and Rayner* that it had no jurisdiction and that it dismissed the claim in *Hatton* on the ground that there had been a proper balancing of interests.

Footnote 54 goes on to say that "subsequent litigation under the Convention has argued for an even wider inclusion of environmental policy in Article 8", citing the Dutch Supreme Court decision of *Urgenda v Staat der Nederlanden*[1] and an ongoing application by six Portuguese complainants against all EU Member States in *Duarte Agostinho v Portugal* (App No 39371/20). But what is decided in The Netherlands[2] or argued in Strasbourg is no guide to what the ECtHR would decide.

There are, inevitably, areas where the scope of Convention rights, as elucidated in Strasbourg or indeed domestically, may be open to criticism. An example is the ECtHR's expansion of the jurisdictional scope of the Convention so as to require an Article 2 investigation into respect of Iraqi civilian deaths involving British soldiers - *Al-Skeini v United Kingdom* (2011) (App No 55721/07). That was a matter of jurisdiction, the scope of which (it can fairly be said) should depend on what the States parties to the Convention must have contemplated and intended. The ECtHr could in some areas have been more restrained - for example when it extended the Article 2 and 3 ancillary duties to investigate outside the sphere of situations where state actors may have been involved: see e.g. *Commissioner of Metropolitan Police v DSD (the Warboys case)* [2018] UKSC 11.

Viewed as a whole, however, the Convention and its jurisprudence are a force for good internationally and domestically - a view which the Government is not understood to challenge, since it does not intend any fundamental change at either level. Presumably the basic aim of the Human Rights Act remains, as far as possible to assimilate ECtHR and domestic jurisprudence, and to avoid the UK being challenged in Strasbourg for its inability to implement or non-implementation of rights recognised by the ECtHR. If so, the reality is probably that any points of friction can only be forestalled or addressed to the extent that this can be achieved by working with the ECtHR, as the Brighton/Copenhagen process has done, and influencing the ECtHR, as UK domestic court decisions undoubtedly do,

As to Sub-question (a), I answer unhesitatingly that the ECtHR has in recent years been punctilious in its recognition of the importance of subsidiarity and of the margin of appreciation: see the first paragraph of my oral answer to Q4.

The Government paper also recognises this in paras 180-181. This makes it doubly questionable whether it is necessary or sensible to propose any radical legislative intervention at the domestic level, which would either mean nothing in view of the ECtHR's more sensitive current approach to subsidiarity and the margin of appreciation, or, if the

[1] Which can be found at https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf

[2] Netherlands law also appears to recognise far wider tortious responsibility than exists under the "neighbourhood principle" which applies in English law: see *Milieudefensie et al v Royal Dutch Shell* https://en.wikipedia.org/wiki/Milieudefensie_et_al_v_Royal_Dutch_Shell

intervention sought to restrict even further the possibility of successful review in Strasbourg, would, once again, open up gaps between ECtHR and domestic outcomes.

As concrete examples of the ECtHR's restraint, see:

> *Austin v UK* (2012) (Apps 39692/09, etc) (police kettling upheld),
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> *Animal Rights Defenders v UK* (2013) 57 EHRR 21 (ban on political advertising upheld - a case which is also a very good example of the influence in Strasbourg of UK court decisions and reasoning - i.e. of fruitful dialogue), and
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> *McDonald v UK* (2014) 60 EHRR 1 (local authority entitled to withdraw funding for night time carer).

Q2 (Q8 in original list|

> "Would the Government's draft clauses amending section 2 impact the UK's obligation to give effect to and abide by the final judgments of the Strasbourg court in Article 46(1) of the Convention?
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> a. The Government is also proposing changes to how the UK Government involves Parliament in responding to adverse Strasbourg judgments generally. It would seek to have a better system for informing Parliament of adverse judgments, and would potentially organise motions within Parliament. Do you think the process is in need of reform? If so, how? How could such a system be devised without offending Article IX Bill of Rights 1689?"

Answer to Q2:

The obligation to give effect to and abide by final judgments of the ECtHR is and takes effect as an obligation at the international legal level only. So it would not be affected. What the Government's proposals may intend, and might cause, is a greater gap between the domestic and the international legal positions, meaning that there would be more circumstances in which the two would, as with prisoner voting, remain apart.

As to Sub-question (a), it would seem sensible for Parliament to be kept au fait in relation to adverse judgments of the ECtHR against the UK, to monitor the Government's proposed response and, in an appropriate case, maybe also to be able to call for a debate if and when the Government did not react to change domestic law, when it was domestic law that was found wanting in Strasbourg.

I do not see an Article XI Bill of Rights problem here.

Q3 (Q9 in the original list):

> "The IHRAR Panel considered, but did not recommend, clarifying in statute matters that fall outside the institutional competence of the UK courts – however the

> Government is seeking views on this proposal. Do you think there is a case for replacing the doctrine of judicial restraint with a statute clarifying matters that would fall outside the institutional competence of the UK courts? What would be the risks and unintended consequences of such an approach?"

Such a case was for good reason rejected by the IHRAR Panel. It is revived in a brief paragraph - number 201 - of the Government paper, but this does not make clear precisely what is in mind. The Government paper cites in a footnote para 32(d) of Chapter 3 of the IHRAR Panel report, which addresses the Supreme Court decision in *R (Nicklinson) v Minister of Justice* [2014] UKSC 38 (assisted dying), where the writer was one of the members of the Court. In para 32(d) the IHRAR Panel speaks in extremely positive terms about the "care", "restraint" and "careful focus …. on institutional competence" demonstrated by the Supreme Court in *Nicklinson*. That itself suggests a picture which needs no legislative attention.

However the matter goes further. The Supreme Court's most recent judgments in *R (AB) v SoS for Justice* [2021] UKSC 28 and *R (Elan-Cane) v SoS for the Home Dept* [2021] UKSC 56[3] mean that it is much less likely now that a case such as *Nicklinson* could in future reach the Supreme Court. That is because those two recent judgments now hold that it is not open to domestic courts to treat conduct, if it would be regarded as within the margin of appreciation by the ECtHR in Strasbourg, as conflicting with the Convention rights as enacted domestically.

In consequence, Chapter 3 of the IHRAR Panel report - which is very positive about the prior jurisprudence represented by the statements in *re P* (or *re G*) *(Adoption: Unmarried Couple)*[4] may be regarded as history. Other examples of issues which would now be less likely to come before the courts following the Supreme Court's recent judgments include adoption by unmarried couples (i.e. *re G* itself) or abortion (*In re Northern Ireland Human Rights Commission* [2018] UKSC 27).

The other paras of the IHRAR Report cited by the Government paper are paras 62-64, where the IHRAR was considering but rejected the possibility of "codify[ing] the current principles that the UK Courts apply". It said that the meaning of any such principles might well have to be specified at a standard of generality which would be too high to be beneficial.

The IHRAR's reasons are compelling. Judicial restraint, or the recognition of the institutional competence of the other organs of the State, responds to the particular circumstances of each case. An attempt to codify by statute in advance and without being able to envisage and cater for all the many different circumstances or sets of fact that may arise would fetter the exercise by the courts of their basic role of elucidating the common law and adjudicating upon the merits of disputes in the light of their particular facts. Such a statute, if it had any effect at all, would prevent the courts from giving effect to what would, apart from the statute, have been the law.[5]

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[3] Rejecting statements by Lord Hoffmann, Lady Hale and the writer in *re P (or re G) (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173.

[4] Including by the writer: see footnote 3 above.

[5] The writer discloses that he has lectured and expressed views in the present area of discussion, under the general heading of Justiciability: see e.g. the 40th Annual F A Mann lecture given in 2017 to be found at https://www.supremecourt.uk/docs/speech-171127.pdf

Paragraph 201 of the Government paper refers to "areas such as national security, diplomatic relations, resource allocation or where there is no social consensus" and to a statute "clarifying the matters that fall outside the institutional competence of the UK courts". If that is canvassing the possibility of passing of a statute stating simply (for example) that "any court before which there comes a matter of national security, diplomatic relations, resource allocation or where there is no social consensus shall decline jurisdiction", that would be a crude instrument, capable of generating both arguments as to the scope of its application and injustice. It would be the opposite of a nuanced or balanced measure., It would in all likelihood give rise to repeated and successful challenges in Strasbourg on grounds that it restricted access to justice..

It would also freeze the law, and undermine its role, which is (as the very existence of the common law itself witnesses) to respond to situations and perceptions as they change. Take for example the situation in the 1970s, when there was a strong argument that the royal prerogative, particularly in the area of national security, should, as such, be an entire "no-go area" for courts. Had that been enacted in statute, the House of Lords would have been unable to hold that the Government's decision to ban trade-union membership or to take any other action in relation to GCSQ employees was potentially judicially reviewable. In the event, the House of Lords held that the royal prerogative was and is, in appropriate circumstances, reviewable: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. But, having taken this now uncontroversial step, it went on to recognise the importance of GCSQ for national security, and upheld the ban in that light. That is a sound illustration of how mutual institutional respect operates.

Or take a famous dictum (by only one of the members of the House: Lord Roskill) in the *Civil Service Union* case, suggesting "as at present advised" various types of exercise of the royal prerogative, where judicial review might still be inconceivable. He said:

> "But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another."

Had Lord Roskill's view regarding the prerogative of mercy been the last word, enshrined in a statute, *R v Secretary of State for the Home Department (ex p Bentley)* [1994] QB 349 could not have been decided as it was. The Court of Appeal would not have been able (as it did) to correct the error of the Home Secretary who had concluded that Bentley should not have been hanged, but had refused a posthumous pardon under the mistaken belief that such a pardon was not legally possible.

A statute purporting to establish a bright line prohibition on judicial activity in certain areas, such as foreign policy, could well also affect the established ability of the courts to engage,

cautiously, with issues involving individual rights or well-being at an international level: see e.g.

> *R (Abassi) v Secretary of State for Foreign Affairs* [2002] EWCA Civ 1598 (the Foreign Office's discretion as to whether it would make representations to the USA regarding a British citizen held in Guantanamo without trial or habeas corpus: held potentially reviewable, but on the facts held that, since the Foreign Office had duly considered the position and had discussions with the US Secretary of State, there was nothing more that the court could or should require in this context.
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> *R (Sandiford) v The Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 (Foreign Office's policy relating to legal representation of British citizen sentenced to death abroad considered, but held not irrational and so justifiable.)

A statute of the sort contemplated might also have made non-justiciable cases like *Belhaj v Straw and others* [2018] UKSC 33 (alleged involvement of British government member and/or civil servants in forced rendition of a political opponent back to Colonel Gaddafi's Libya). Such a statute might also have precluded either or both of the *Miller* decisions. For example, the first such decision *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 might have been said to involve the "making" or at least the "unmaking" of a treaty.

What even this brief overview of a complex field illustrates is that there could and would be wide ramifications to any statutory intervention. Either it would, as the IHRAR said, have to be at the level of general principle, which would be unlikely to add value to, and might detract from, the present multifactorial approach. Or, if some blunt form of limitation of the court's jurisdiction were proposed, that would be a mistake. Parliament would be being asked to decide that what would otherwise be the law should not be - and to do so in advance and without being able to foresee the precise implications in a wide range of areas and for a wide range of individuals and cases. A mere disagreement with the outcome in one or two cases is not a basis for radical intervention into the ordinary exposition and administration of the law on a case by case basis with due respect for institutional competence and in the light of the particular, sometimes novel, circumstances of individual cases, which is the present approach.

Q4 (Q10 in original list):

> "Has the obligation in section 3, which requires courts to interpret legislation compatibly with Convention rights "so far as it is possible to do so", shifted the role of the judiciary, as the Government states, from "their normal function in the interpretation of legislation into judicial amendment?"

The oral Answer to Q8 touched on this. The test in section 3 undoubtedly extends existing common law principles of interpretation, to enable courts to reword legislation, to bring it into conformity with Convention rights, so long as in doing this the court does not go against the grain or core intention of the legislation. The Government paper rightly recognises *re A (No 2)* [2001] UKHL 25 as probably the high-point of an expansive approach to section 3. Such an approach was long ago cut back very significantly by the qualification just mentioned which was identified in *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

The reality is also that there are other relevant interpretive principles which go in the same direction as section 3, albeit not quite so powerfully - particularly the presumption that Parliament has legislated consistently with (a) fundamental common law principles, such as the presumption of innocence, the privilege against self-incrimination and the right of access to court, as well as with (b) the United Kingdom's international obligations, where it has set out to implement these.[6]

It may be questioned therefore how far repeal of section 3 would have a very broad effect, though it would certainly affect the outcome of some cases, leading to some more declarations of incompatibility and differences between domestic and ECtHR outcomes.

Q5 (Q 12 in original list):

> "The courts are currently able to quash secondary legislation that can't be read compatibly with Convention rights. Should they be limited to making declarations of incompatibility in those circumstances – a possibility raised in the Government consultation? How would the impact of such a change be affected if section 3 were scrapped or amended as proposed?"

Answer to Q5:

I refer to the points made orally by Dr Tyrrell in her answer to Q9 (page 28 of transcript), by Professor Young in hers to Q10 (transcript, page 32) and by myself also in answer to Q10 (transcript pages 32-33).

Delegated legislation is substantially administrative and does not receive the same Parliamentary debate or scrutiny as primary legislation. There have in this context been very forceful recent criticisms by House of Lords committees regarding the expansion of delegative legislative powers. The expressed purpose of the Government paper is to reinforce and underline Parliamentary sovereignty. It would run contrary to that aim and to the proper separation of powers to put secondary legislation on the same plane as primary legislation. It would, as Professor Young observed, also lead to the bizarre result that the legislation of the devolved administrations, each with its own parliament or assembly, had an inferior status in relation to domestic secondary legislation.

Q6 (Q14 of original list):

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[6] See *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33, where Lord Hoffmann said: "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. ….. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

> "The Government has proposed revisiting the obligation on Ministers to make a statement of compatibility under section 19 HRA in respect of Bills they introduce into Parliament. Do you think there is a case for change? What would improve this arrangement?"

Answer to Q6:

The present procedure appears to be a useful means of confirming that due attention has been given to the implications in the relevant context of the Convention rights as enacted domestically; and enables the Government to make clear when it intends to depart from such rights or their Strasbourg interpretation, in the very rare case that that occurs.

Q7 (Q15 of original list):

> "The Government consultation states that "the application of the principle of proportionality by the courts has created considerable uncertainty and impinged on the ability of elected lawmakers to balance individual rights with due respect for the wider public interest." Do you agree with that assessment?"

Answer to Q7:

I do not agree with that assessment. Proportionality is a structured attempt to reflect the various, albeit necessarily sometimes over-lapping, considerations that a sensitive decision-maker ought to have in mind. It is intended to be a tool, not to introduce a uniform standard of review. The standard of review may be more or less relaxed, taking into account the nature of the issues and relative institutional competence to address them. National security or public expenditure are, for example, areas where courts will be correspondingly respectful of governmental decisions.

I discussed the flexibility of proportionality and its sensitivity to considerations of institutional competence in *Nicklinson*, at paras 166-170.[7].

Proportionality is in any event a fundamental tool of the Convention as applied by the ECtHR and in other members of the Council of Europe.

The Government paper and Professor Tomkins in his oral evidence on Q8 (transcript page 22) have focused on *DPP v Ziegler* [2021] UKSC 23. I confirm my own oral response on this case (transcript pages 25-26) and will write separately on the point on which Professor Tomkins and I disagreed. On re-reading the transcript and the case itself, I do not in fact see any substantive point to correct in what I said about the case (contrary to my statement on page 23 that "I stand corrected").

Q8 (Q17 in original list):

[7] Also in *Pham v Secretary of State for the Home Department* [2015] UKSC 19,,para 96, where I approved its description as "a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction".

"The Government is proposing changes to section 6 of the Human Rights Act, which makes it unlawful for a "public authority" to act in a way which is incompatible with a Convention right. Is the law sufficiently clear for bodies to determine when they are exercising functions of a public nature for the purposes of section 6? Should Parliament seek to clarify the definition of public authorities in legislation, or should this be left to the courts?

a. Is there any justification for broadening the defence available in section 6(2) to provide that wherever public authorities are clearly giving effect to primary legislation, then they cannot be found to be acting unlawfully?"

Answer to Q8:

Whether a body ought to be regarded as a "public authority" for the purposes of the Human Rights Act is a multifactorial judgment of a kind which courts are probably best placed to undertake on a case by case basis in the light of all the case's characteristics. Parliament can always reverse a particular decision that a body is (or is not) a public authority under the Act - as it did following *YP v Birmingham City Council* [2007] UKHL 27, when it reversed the House of Lords majority decision that a health care company contracted by the local authority was not a public authority.

As to sub-question a), there is no justification for any such "broadening of the defence available in section 6(2)".

If a local authority is both clearly and actually giving effect to primary legislation, it is already protected.

What I believe may be being suggested is, however, that a local authority which is not in fact giving effect to primary legislation, but believes wrongly that it is, should be immune. That would mean there were two laws: the actual (but unenforceable) law and the local authority's "personal belief law" which, if established (presumably by evidence from the relevant local authority's officers), would render it immune and deprive a claimant of the protection of the actual law. The rule of law would then be replaced by the rule of personal belief.

Q9 (Q18 of original list):

"Do you think requiring public bodies to actively take steps to protect Convention rights, known as "positive obligations", has led to courts deciding questions of public policy? Is there any case for introducing legislative changes to limit the scope of "positive obligations" on public authorities?"

Answer to Q9:

That there has been an expansion of, for example, the Article 2 and 3 ancillary duties to investigate beyond situations where state actors may have been involved is a matter on which I commented in *Commissioner of Metropolitan Police v DSD (the Warboys case)* [2018] UKSC 11. I understand the cost and administrative burden involved in giving effect to some

of such duties, e.g. in the context of deaths which may have occurred many years ago in Northern Ireland.

I do not however feel in a position to comment on the case for any legislative change, beyond noting again that any change that put the United Kingdom at odds with what the ECtHR has held to be required would have consequences in terms of increased challenges to and potentially awards against the UK in Strasbourg.

I also note the statement in para 138 of the Government paper that neither the Government nor the devolved administrations "have established a comprehensive means to record the volume of, or rise in, domestic human rights litigation after the enactment of the Human Rights Act". Any proposal for legislative change in this area not supported by the IHRAR report should be the subject of separate evaluation.

Rt Hon Lord Mance

16/02/2022