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JOINT COMMITTEE ON HUMAN RIGHTS

HUMAN RIGHTS JUDGMENTS

TUESDAY 15 NOVEMBER 2011

LORD JUDGE and LORD PHILLIPS OF WORTH MATRAVERS

Evidence heard in Public

Questions 62 -135

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Oral Evidence

Taken before the Joint Committee on Human Rights

Tuesday 15 November 2011

Members present:

Dr Hywel Francis (Chairman)

Baroness Berridge

Mr Dominic Raab

Baroness Campbell of
Surbiton

Richard Shepherd

Lord Dubs

Lord Lester of Herne Hill

Lord Morris of Handsworth

Examination of Witnesses

Witnesses: **Lord Judge**, Lord Chief Justice of England and Wales, and **Lord Phillips of Worth Matravers**, President of the Supreme Court.

Q62 Chair: Good afternoon. For the record could you introduce yourselves, please?

Lord Phillips of Worth Matravers: Yes, I am Lord Phillips of Worth Matravers and I am the President of the Supreme Court.

Lord Judge: I am Lord Judge. I am the Lord Chief Justice of England and Wales.

Q63 Chair: The acoustics are not brilliant in this room so please do not be afraid—if you wish to shout, please shout. Lord Judge, Lord Phillips, I welcome you on behalf of the Committee to this session on human rights judgments. We are very grateful to have you both before us. We also mindful of the fact that, given your positions, there are certain questions that you feel you cannot answer, and we respect that. I therefore ask honourable Members to make sure the questions they put to the witnesses are not considered to be political or otherwise inappropriate for the witnesses to respond to. I ask the witnesses in turn—mindful, Lord Phillips, of what you have said in the past about coming before parliamentary Committees—in the interest of explanatory accountability, to be as full and frank with the Committee as possible. This will assist us to get a clear legal understanding of some of the issues with which we as politicians have to wrestle. With that preamble/explanation/background, could I ask you both a very straightforward question: under the European Convention on Human Rights what, precisely, is the legal obligation on UK courts in relation to judgments of the Strasbourg court in cases against the UK, and also in cases against other states?

Lord Phillips of Worth Matravers: The statutory obligation on the courts is to take account of the jurisprudence of the Strasbourg court. That is jurisprudence across the board; it

would apply to decisions in relation to the United Kingdom or any other member of the Council of Europe. That “take account” obviously is a phrase that one could talk about a little, and I expect you would like us to.

Lord Judge: Yes, what Lord Phillips has said is obviously right. The really interesting question is the contrast between the way in which the courts are required to take account of Convention decisions in the European Court as compared with the arrangements under the European Communities Act of 1972—that is to say the economic community—where the courts are simply required to apply whatever decision the European Court of Justice may reach on those questions. I should say I think there is bound to be at least one case—probably more in the next few, maybe 12, months—where that issue is going to have to be addressed. If I may, I would like to give a plug to a most impressive article on this very issue, called, “Follow or Lead? The Human Rights Act and the European Court of Human Rights”, by Francesca Klug and Helen Wildbore. It is reported in the *European Human Rights Law Review* for 2010, which is a very carefully structured analysis of the way in which our courts here have been seeking to address that issue and the variable ways in which they have been addressed, depending on the circumstances. It is a far from straightforward question.

Q64 Mr Raab: I wonder whether I might direct a question specifically at you, Lord Judge, but obviously feel free, Lord Phillips, if you think it is germane to comment. In your Judicial Studies Board lecture in 2010, Lord Judge, you said, “As a matter of statute the decisions of the European Court of Human Rights in Strasbourg do not bind our courts ... What I respectfully suggest is that statute ensures that the final word does not rest with Strasbourg, but with our Supreme Court.” Yet, compared to that, in the Ullah case in 2004, Lord Bingham set the binding precedent that “the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less”. I wondered how you reconcile both of those and whether you think Ullah is ripe for, perhaps, reconsideration or, for us as legislators, whether Section 2 of the Human Rights Act could and should be made clear in that regard.

Lord Judge: There are a number of different questions you raise there. I do not think that what Lord Bingham said on Ullah is the last word. Indeed, the article to which I referred the Committee makes it plain that it is not; there have been further words since. I, myself, think that it is at the very least arguable that what Lord Bingham said in Ullah went too far. It is not finally binding on anybody, it is not finally binding on the Supreme Court and there will be occasions when it will fall to be considered; as I say, I think in the next 12 months there is a very strong likelihood of that. But if your question is, “Do we want the statute to make it clearer?” well, that is for you to say. If, at the end of this process when the whole question is re-examined—it is bound to be in the next few months—the end result is that the Supreme Court reaches a conclusion that does not command the support of Parliament, then Parliament can re-legislate and say, “What we mean by ‘take account of’ is ‘take account of’, ‘do no more, do no less’”, or, even, you could say, “It does not mean ‘is bound by’”. It would be a very simple piece of legislation to draft. That would then have to be argued out in both Houses.

Lord Phillips of Worth Matravers: I would like to add a word or two. Ullah actually reversed a decision of mine in the Court of Appeal. What Lord Bingham was talking about expressly was a settled line of Strasbourg jurisprudence; he was not suggesting that one would take an individual decision of one of the Chambers of Strasbourg and regard that as binding precedent in the way that an English court would regard a single decision of the Court of Appeal or the Supreme Court as binding precedent. If the wording “take account” gives a message at all, it is that we are not bound by decisions of the Strasbourg court as binding precedent. If there had been no reference in the Human Rights Act at all requiring British

courts to take account of Strasbourg jurisprudence, they would have none the less taken account of that jurisprudence automatically because it would be the proper course when trying to resolve issues relating to the meaning of the Convention. Without those words “take account of” we might actually be treating them as stronger precedent than we do.

Q65 Lord Dubs: What would be the legal effect of the Government refusing to be bound by a judgment of the Strasbourg court?

Lord Phillips of Worth Matravers: It would be a violation of the obligations of this country under international law. It would have no direct legal impact at all domestically. Indeed, Parliament is supreme in this area; it does not have to have regard, as a matter of domestic law, to decisions of the Strasbourg court. If we rule that a particular piece of legislation is not compatible with the Convention, that is the message we convey; what is done with that message is entirely up to the Government.

Q66 Lord Lester of Herne Hill: I should declare an interest as I am on the UK Bill of Rights Commission. What about the interpretation of common law and equity under Section 6? Suppose there were a case binding on the UK in international law, say about free speech and privacy, and then one had a case where one was interpreting common law and equity, would the English court then, under Section 6, in acting in a way compatible with the Convention, seek to give effect, let us say, to a binding international ruling against the UK in that area?

Lord Phillips of Worth Matravers: When we are applying our law, common law, or the Human Rights Act, we look at international conventions and at the obligations of this country under international conventions, and we try to make sure, if we can, that our law is compatible with the obligations of this country under its international conventions. Undoubtedly, one would take account, again, of a particular decision when looking at an issue of common law. I think the law of privacy is a very good example of this development.

Q67 Lord Morris of Handsworth: I preface my question by saying this is not about your effort to give a response to Mr Raab’s first question but about the issue around supremacy of the Supreme Court set against the European Court of Human Rights. I suspect it is an issue that might be troubling the man on the 36 bus who is not sure which is supreme, so which, in your view, is supreme? Is it the European Court of Human Rights or the UK Supreme Court?

Lord Phillips of Worth Matravers: The question “Who is supreme?” is not a very easy question to answer, because it depends on what you mean by supreme. In as much as we are not obliged to follow, as a matter of law, the Strasbourg jurisprudence domestically, we are supreme as a Supreme Court. But if you ask, at the end of the day, what really matters, I would say it is what the Strasbourg court says about the meaning of the European Convention on Human Rights. I say “at the end of the day” because there is scope for dialogue between our court, or any other domestic court, and the Strasbourg court before the end of the day is reached.

Q68 Lord Morris of Handsworth: I ask the question because the point would be asked by this mythical man on the 36 bus: “What is the point in having a Supreme Court if it is subservient to the Strasbourg court?”

Lord Phillips of Worth Matravers: I would answer that we are not subservient at all. What we are doing is domestically addressing the same issues that can be brought before the Strasbourg court, but hopefully dealing with those issues as a matter of our domestic law so

that Strasbourg will not have to deal with them. There were some very interesting statistics given in a recent paper by Sir Nicolas Bratza that I expect some of the Committee have read; out of I think 1,200 applications to the Strasbourg court from this country, only 23 were admitted at all. In the majority those, the Strasbourg court agreed with the decision of our courts. I suspect that, of the enormous majority that they did not entertain, a lot of those they did not entertain because we had dealt with the problem and they thought we got it right.

Lord Judge: May I just interrupt for a moment? I am afraid I do not have the name of the case at my fingertips or at the end of my tongue, but I think you will find there have been occasions when the Supreme Court or House of Lords did not follow a decision of the European Court.

Q69 Lord Morris of Handsworth: How do we promote greater public understanding as to the stance of the two courts?

Lord Phillips of Worth Matravers: One of the objects of setting up the Supreme Court was that it should be transparent and open to the public. When we give our judgments we give a little summary that we hope any member of the public would understand. We have press releases; we try to explain as clearly as we can when we are following Strasbourg and when we are disagreeing with Strasbourg. An interested member of the public who follows this, I hope, would begin to get the idea. I am bound to say that the media does not always assist in painting the true picture of the relationship between our court and the Strasbourg court.

Q70 Mr Raab: On 19 October, you both gave evidence to the Lords Select Committee on the Constitution. Lord Phillips, you said of the tension between Strasbourg and the Supreme Court, “In the end Strasbourg is going to win ... As long as we have the Human Rights Act”. Lord Judge, you said, “I would like to suggest that maybe Strasbourg should not win and does not need to win.” I think some would find it remarkable that the President of the Supreme Court and the Lord Chief Justice take such very different views. I wonder whether you might both accept the common ground here that Section 2 of the Act has created serious legal uncertainty.

Lord Judge: All I would like to say for myself is that I said it was arguable. The reason I said that is that this is an issue that will have to be decided. At some stage, it is going to have to be finally decided by the Supreme Court, probably with a large number of members of the court sitting. That is my view; my view is that the issue is arguable. I do not change my view at all, and it will have to be resolved.

Lord Phillips of Worth Matravers: We have had this problem already with an issue that has gone to Strasbourg, come back to us, gone back to Strasbourg, more than once. In practice when, at the end of the dialogue, the Grand Chamber has made it quite plain that the Strasbourg court has considered the very issue and this is its considered decision on it, we have followed that decision. If we were not to do that, you would then get a whole lot of decisions of our courts that were manifestly at odds with what the Strasbourg court would decide. You would then have the litigants disappointed in our court, going to Strasbourg and being awarded compensation and having findings in their favour.

Q71 Mr Raab: What I wanted to suggest was, aside from the merits of the two different views—I think that they are different; I do not think there is any getting away from that—if the two most senior judges in the country do not agree on this, after so many years in force of the HRA, how can police officers, parole officers and other public servants on the front line be expected to know what human rights are with any degree of tolerable certainty?

Lord Phillips of Worth Matravers: I think they might be quite puzzled by this discussion because it is a fairly esoteric discussion. I do not actually think there is all that

much between Lord Judge and myself, at the end of the day. I am talking about what I see as a matter of practical reality. As a matter of law, as I have already said, Strasbourg does not rule the roost; we are not bound to follow their decisions. So far, at the end of the day we have. One could envisage a situation where Strasbourg would reach a decision that we were so unhappy about, even at the end of the day, that there would then be an issue. Are we going to accept this, notwithstanding the implications that it is going to have for our domestic system, or are we simply going to say we have to draw the line here? I think that is what Lord Judge had in mind: that such a situation could arise.

Lord Judge: If I may say so, I do not mean to sound discourteous, but this is your legislation; it is not ours. This is the legislation Parliament produced for the Human Rights Act of 1998. We know what was said at the time by the Lord Chancellor and those supporting the Bill, why the words “take into account” were included. The whole object of using those words was to preserve the sovereignty of Parliament, as to which I do not think there is any difference at all between Lord Phillips and myself. Ultimately, it is for Parliament to decide, and by Parliament I do not mean the Government or the Executive; I mean Parliament.

Q72 Lord Lester of Herne Hill: There are some who say, about Section 2 of the Human Rights Act and the “take account of Strasbourg jurisprudence”, that it is too narrow and that there should be a different kind of provision that should say, “take account of common law and case law in other common law countries like South Africa, Canada, Australia and so on”. My understanding is that you do it already so you do not need anyone to tell you to do it. Am I right about that?

Lord Phillips of Worth Matravers: Yes, you are.

Lord Judge: Yes.

Q73 Mr Shepherd: As to the “which is to be the master” question—Lewis Carroll is the only thing—clearly, we do not appear, as the public and as a member of the legislature, to be the master. You are not the master in the relationship; your own view is ultimately, etc. This was a hugely controversial development for the last Labour Administration in the late 40s, as to whether there should be a court along with the Convention on Human Rights. That is what is tripping us up now, it seems, as a Member of Parliament; take the prisoners’ voting rights, “a clear expression of view on” etc. I just wanted to revert to Mr Jonathan Sumption’s recent Mann lecture where he speaks of the expansion of simple rules, with which none of us disagrees in large—the principles of human rights in the Convention. What he says is, “The Strasbourg court has treated the Convention not just as a safeguard against arbitrary and despotic exercises of state power but as a template for most aspects of human life. These include many matters which are governed by no compelling moral considerations one way or the other. The problem about this is that the application of a common legal standard works breaks down when it is sought to apply it to all collective activity or political and administrative decision-making.” That would sum up my own instinct and my own judgment from instinct. I am not a lawyer but that is a central issue in the relationship, surely, between Parliament and the Acts that are brought forward.

Lord Phillips of Worth Matravers: It is interesting to read Nicolas Bratza on this because he does not agree with this. He would say most of the decisions that Strasbourg is taking are actually focusing on principle, not on the merits of an individual case where the domestic court has applied the right test but reached an answer that Strasbourg does not like. That is not true of every case, but I think it is true of a large number of them.

What happened, of course, is that it was agreed that individual applicants should have a right to petition the Strasbourg court for relief in their individual cases. I think it was that fact that was really the driver of the Human Rights Act, because there were all these

individual citizens going off to Strasbourg seeking remedies, and it was thought it would be much better that we should entertain their claims based on the Convention and deal with them ourselves. This necessarily involves looking at the nitty-gritty of individual cases. We have to do this because this is what Strasbourg does. There is a strong case for saying Strasbourg grinds much too fine and what is happening is there is this enormous backlog of cases built up because one court simply cannot approach appeals on the current basis. This is one of the areas of the court that I think this country is hoping to influence while it presides over the Committee of Ministers.

Lord Judge: May I just repeat something that you are all perfectly aware of? The Convention was written largely by British lawyers. It was reflective of the common law. If you took a common law book from 1950, it is all there. It was designed to try and avoid any repetition of concentration camps, the knock on the door in the night, the removal of the mother or father, man or woman from the home never to be seen again. It was to try to preserve family life, it was to avoid men and women being tortured and killed, which was what had happened—no trial process, nothing. That is what the Convention was written for. I cannot think there is anybody in this country who begins to be right thinking who would think that any of that is anything we would quarrel with. We embrace it; it is our own principles.

Q74 Mr Shepherd: That is the burden of the argument by Sumption.

Lord Judge: We have to be very careful not to treat the Human Rights Act as encompassing or bringing into operation through the European Convention something that we, as a society or community, do not all actually believe in; we do believe in these things. It is when you come down to what Lord Phillips described as the nitty-gritty. Human rights tend to be blamed for lots of things that are not done; you cannot do something because human rights say not—it is the public perception about it. In the end, actually most of these important rights are things that we would all espouse and where we are actually in dispute—so that there is room for argument about whether this particular thing is a breach of a right or that particular thing is a breach of a right—I am afraid in the end you have a court system, and under the Act you have given us, the European Court of Human Rights is the final court that decides what the European Convention means. You cannot get around that.

Q75 Mr Shepherd: It does not know its genesis entirely in the way that you put it; it was a clarification of principles that resonate through our history. I have no problem with that at all. The problem arises through living instruments and then this expansion, as Mr Sumption points out, into what Lord Phillips said was the nitty-gritty. That was all I was trying to establish: that this is now to many people intolerable. It is not because they disagree with the great principles of a free society. After all, we have struggled for that for two centuries. That was the point I was trying to make and trying to ascertain.

Lord Judge: Yes.

Q76 Mr Raab: Lord Judge, again to pick up on your JSB lecture, you said that “Australian colleagues (and those from other common law countries) seem to be claiming bragging rights as the custodians of the common law. We are allowing the Convention to assume an unspoken priority over the common law.” I wondered whether there is any reason why Section 2 could not be amended, in theory at least—in terms of providing a workable canon of interpretation—to allow common law jurisprudence formally to be taken into account, in the way I think Lord Lester has already hinted may be happening as a matter of practice but perhaps not as consistently as the Strasbourg jurisprudence is.

Lord Judge: The answer to those questions is yes and yes. Yes, the Australians still claim bragging rights. I had bragging rights claimed when I gave a lecture in Sydney this very

summer. Somebody stood up and said, “Well, we are the repository of the common law, you are not anymore because you are being influenced by the European Court of Human Rights.”

As to amending the statute, I have no difficulty with that. As I have already said, I do not think it is very difficult to make a provision, if this is what you wish to do, saying “not bound by”, “modified” or “take into account everything”. I would not have thought we need an Act of Parliament to say “take into account everything”; we tend to. We will decide whatever conclusion we come to on the law as it stands; you will have to address the question of what you want the law to be. Ultimately, as I said earlier, you decide that; we do not.

Q77 Mr Raab: I wondered whether you believe that, having looked at the common law jurisdiction and knowing what comes down from Strasbourg, there is any material difference in the continental approach to rights with all the influences that that has had over the years, compared with the common law approach to rights. There is intellectually, certainly, a strong difference between the approaches. I wondered whether in jurisprudential terms you would accept that there is maybe a subtle difference, but one that over time is material.

Lord Judge: I do not know, is the answer to that.

Lord Phillips of Worth Matravers: I will have a go. There has been a massive difference in relation to trial process. Our trial process has been hammered out over centuries in a way that we believe protects the defendant and produces a fair trial. It has all sorts of principles, including, now, that you ought to have the assistance of a lawyer, you ought to be told you do not have to answer questions—these kinds of rules we have built in to prevent abuse. The Strasbourg court has actually been borrowing from us and imposing these rules on some of the civil law countries that had a quite different approach to the criminal trial process. They have gone a long way. One hears squeals from these countries: “This is Strasbourg muscling in on our territory telling us how to run our criminal process in the interest of a fair trial.”

Q78 Mr Raab: Do you not feel there are examples of that working in the other way as well? It would be odd if there was not.

Lord Phillips of Worth Matravers: It has come home to roost in Horncastle, the case that everyone cites, which we have sent back to Strasbourg and said, “We do not think you have quite appreciated why we do things in this way, please think again.” That is the end of a process that has been producing much more significant changes in the way the civil law countries carry on their criminal process.

Lord Judge: I am sorry; my answer to your question was not directed to the criminal justice system, as to which I entirely agree with Lord Phillips. I thought you were asking a much more general question about approach. The Horncastle case is important, if I may say so, because we are expecting the result of that—we have been waiting for it a very long time—any moment now, under the name of Al-Khawaja. When that is decided, and we have no idea what it will decide, if it goes one way it could actually call into question whether the European Court of Human Rights Grand Chamber can in effect require us, or the Supreme Court, to disapply the Criminal Justice Act of 2003. As I say, I do not know what the answer will be from the Grand Chamber, but Al-Khawaja could have a potentially huge constitutional implication. This discussion, when we get Al-Khawaja, may be much more enlightened because all these issues will have to be decided on one result.

Q79 Lord Lester of Herne Hill: Am I right that when we were younger the common law did not recognise, as positive rights, rights like free speech, even perhaps the rights to liberty and access to justice, and that one of the effects of belonging to the system has been

that the courts have been able to discover in the common law more positive rights than perhaps when we were younger?

Lord Judge: If you are addressing that question to me, I am afraid I do not agree with you. I am a great believer in the common law. I think the common law has produced some very, very important and precious rights—maybe not written down. As I said earlier, in 1950 when the Convention was written, it was the common law written out in simple language. I do not think we have learnt about some of the basic principles we all believe in as a result of the Convention.

Q80 Lord Lester of Herne Hill: I was not asking about principles; it was purely a technical question about the positive rights rather than liberty. May I pass on to something perhaps more practical about the doctrine of precedent? Suppose that it turns out that there is a common law principle that needs adjustment because of a Convention case, or that that argument is raised in a lower court, is it the position that the lower court is empowered to give effect to the Convention principle, or should one go to the Supreme Court in terms of precedent, such that only the Supreme Court can overrule a prior decision, let us say, under old common law? I put it very badly.

Lord Phillips of Worth Matravers: The latter I think: if there is a clear decision of the Supreme Court, or even the Court of Appeal, on the point, it would not be right for a judge at the first instance to say, “This cannot stand now, having regard to this particular Strasbourg decision.” It has to follow, as a matter of precedent, what the Supreme Court has said. There was one case in the Court of Appeal where I did not do that, because I said that the premise underlying a decision of the House of Lords had simply been swept away. But that was not applying the jurisprudence of Strasbourg; that was just saying things have changed.

Lord Judge: I do not think there is any doubt about it: the only court that can overrule itself is the Supreme Court. Indeed, if the Court of Appeal has a choice to make between what appears to be a Supreme Court or House of Lords decision, or indeed one of its own earlier decisions, and a decision of the European Court that appears to be clean contrary to it, we must follow our own Supreme Court. The only court that can then say its own decision has to be relooked at is the Supreme Court. The authority for that is well established.

Q81 Lord Lester of Herne Hill: Professor Otto Kahn-Freund once said when we joined the Common Market that we should approach European law through our system, not round our system, by which I think he meant have respect for our statutes and common law before you, as it were, rush out to European principles in the Common Market. Do you think that, broadly speaking—how can I put this neutrally—our courts have been too strict in following Strasbourg case law and it might have been better to adopt a slightly looser approach? How would you respond to that general question?

Lord Judge: You are addressing me, are you? I suspect we both want to answer it. Would Lord Phillips like to go first?

Lord Phillips of Worth Matravers: Maybe we have had a tendency sometimes to be too strict. That is the way we have been brought up. We have a common law system; the common law system works on the basis of precedent so we pay great attention to decisions and the reasoning of the higher courts. That is what we are used to doing, and that is what we do with Strasbourg. Sometimes, maybe, we do it too much, particularly if you have a single Chamber of Strasbourg giving the judgment. We really sometimes analyse it with too much detail as though we were dealing with a decision of the Supreme Court.

Lord Judge: I agree with great emphasis. Over the years we have approached a lot of the decisions of parts of the European Court system, i.e. the Commission or whatever it is, in a way that we would have approached a decision of a higher court. We have not been

sufficiently flexible about it. We have not always appreciated—I think we do much more now—that most of the decisions are, in fact, fact-specific decisions. They are not deciding any point of principle. They are saying, “Here are the facts, this is the answer.” That actually is not a precedent for anything. There has been a tendency to follow much more closely than I think we should. What is more, I think there is a realisation of that and I think that judges generally—I am only speaking generally—are aware of this and are examining decisions of the European Court that much more closely to see whether what you can spell out of it is a principle or just a fact-specific decision.

Q82 Lord Lester of Herne Hill: On the other hand, the fact that you do approach the case law so closely gives you more clout in Strasbourg than other countries, since our own courts have been so careful in their analysis. I do not think you are suggesting the analysis should become less careful.

Lord Judge: Oh no, the analysis has to be close but you have to discover whether you are actually finding a principle or whether you are finding a factual decision.

Q83 Baroness Campbell of Surbiton: Are there any good examples of a dialogue taking place between UK courts and the Strasbourg courts?

Lord Phillips of Worth Matravers: Horncastle is one good example. There have been cases where Strasbourg has actually accepted that they had misunderstood the way we worked. There was a case on the law of negligence. Under our system, one identifies very often a preliminary point and deals with that, first of all, and if you rule against the claimant on the preliminary point, you do not hear anything else. Strasbourg mistakenly thought that this meant we were not giving a fair trial to the claimant. When it was explained to them precisely what was involved in this approach, they then expressly said they had misunderstood.

Q84 Baroness Campbell of Surbiton: Has the Strasbourg court’s interpretation of the ECHR been influenced in any way by the UK courts’ interpretation of the ECHR?

Lord Phillips of Worth Matravers: They certainly have. I really would recommend Nicolas Bratza’s article because he cites a number of cases. There was one in which I think 40 paragraphs of the speech of Lord Bingham in the House of Lords were set out verbatim. They pay a lot of attention to our jurisprudence. They find it very helpful. It was very interesting; Nicolas Bratza was regretting that they had not insisted that any case comes right up to a challenge to the compatibility of our legislation with the Convention before it goes to Strasbourg so that they could have the benefit of our views on that issue. They have a rule that Strasbourg is the court of last resort, but they have not applied that to applications for a declaration of incompatibility.

Q85 Lord Lester of Herne Hill: We are in a minority of common law countries among the 47. In those rare cases when there is a disagreement between Strasbourg and ourselves, are there ways in which a message can be sent—not exactly a right of rebuttal, but in an effective way—in cases perhaps like whatever Horncastle is now called, or other cases, so that we are able to uphold the integrity of our own legal system while respecting the Strasbourg system?

Lord Phillips of Worth Matravers: I think the most effective way of getting a message across is, when the next case comes up, raising the same point; we respectfully do not follow the Strasbourg decision, and explain in detail why we have not done so. That means it is almost automatically going to have to be considered with care by Strasbourg. We do have

informal relations with the Strasbourg judges and we can quietly express concern informally as well.

Q86 Baroness Berridge: Gentlemen, what do you understand by the principle of subsidiarity in the law of the European Court of Human Rights?

Lord Phillips of Worth Matravers: The principle is that there are some areas of what one might call minor detail—it depends what you mean by minor detail—where it should be left to the individual domestic courts to apply the principles of the Convention on Human Rights in their own way and Strasbourg should not interfere.

Lord Judge: That is particularly important where what is under consideration is an Act of Parliament. If you have an Act of Parliament being considered by our senior courts, the European Court of Human Rights should regard itself as having a subsidiary role, at most a supervisory role, to make sure that none of the basic principles of the Convention have been interfered with. Actually we do not interfere with basic principles of the Convention because actually I think they are rather sensible—no torture, no killing and so on and so forth. That is the principle; the practice is another question.

Q87 Baroness Berridge: Leading on to the practice, concerning the margin of appreciation that has been applied by the Strasbourg court, do you think the court has given sufficient weight to the views of national courts and national parliaments when applying the doctrine of the margin of appreciation? Do you think there are examples where they have been actually too narrow in that application?

Lord Phillips of Worth Matravers: I think if you read Nicolas Bratza’s article he accepts that there is a case for saying just that.

Lord Judge: If the decision in *Al-Khawaja* is that that particular defendant had an unfair trial, then the answer to your question will be, “There is a very good example of the margin of appreciation simply not being followed.”

Q88 Baroness Berridge: Can I just relate you back to one of the previous comments, when we were talking about trial process, that other European jurisdictions have been “squealing”? What has been the domestic response in those countries? Have they then enacted domestic legislation and changed their processes?

Lord Phillips of Worth Matravers: I was thinking particularly about France, and the answer is yes, they have.

Q89 Mr Raab: You deftly referred to Mr Bratza’s article. I am very conscious of not asking you things that are sub judice. What about *Osman v UK*, which rewrote the law on negligence as it applies to the police, and which was criticised in very strong terms by Lord Hoffmann extrajudicially? I wondered whether you thought that was something that rode roughshod over the margin of appreciation.

Lord Phillips of Worth Matravers: That in fact was the case I had in mind where Strasbourg accepted that they had actually got it wrong and had not appreciated the way that we did things. They drew back from that decision.

Q90 Lord Lester of Herne Hill: In regard to subsidiarity, do you think it is also part of that principle that the prime responsibility of all public authorities in each member state is to secure and give effect to Convention rights, whether it is judicial, executive or legislative, and that the Strasbourg court only comes into play with what they call European supervision when the domestic systems fail to honour the principle of subsidiarity in that way?

Lord Phillips of Worth Matravers: Yes, I think that is precisely what the principle should produce, and it should be left to the individual member states in the first instance to apply the Convention in their own countries.

Q91 Lord Dubs: The UK's chairmanship of the Council of Europe will give us an opportunity to bring about some reforms. Reform of the European Court is one of our priorities. Which reforms of the court do you consider would most help you to perform your judicial functions in the UK?

Lord Phillips of Worth Matravers: Do you want to have a go at that?

Lord Judge: The first thing it should do is to have a system, as we have going to a higher court here, that you should have to have permission to do so. I would not like to be quoted on the figure, but I think that as I speak they have something like 160,000 cases outstanding from all over Europe. Lots and lots of countries send cases in. That, inevitably, makes for an incredibly inefficient system. After all, if the litigant has had a chance in his own municipal court, an appeal in his own municipal court, well, that is two bites of the cherry. It might go to the Supreme Court; that is three bites of the cherry. Should he really have an automatic right to go to the European Court without there being some process of saying, "Hang on, this is just a litigant who can go on for ever and ever," or, "This is a mad litigant who has no point at all but wants to go to the European Court because it is the final resting ground"? I personally think that, like the Supreme Court here, they should only take cases that involve issues of principle, because the principles by which the Convention should be addressed are part of that court's remit. The factual cases they should not do. The problem is that, in the civil jurisdiction, you have a right to appeal to the highest court in the land without permission. So they took that on as their process when they started, but that is what I would do to make it more efficient.

Q92 Lord Dubs: How many would that cut out?

Lord Judge: I think hundreds of thousands.

Lord Phillips of Worth Matravers: They would need the machinery to do that exercise. In practice I suspect it has been done to quite a large extent with cases they rule are not admissible. They simply say, "There is nothing in this." I agree with the basic point being made by Lord Judge; what they ought to be focusing on are cases that raise issues of principle. One of the ways that would help relates to the fact that, if we give a decision that is then taken off to Strasbourg, it cannot be implemented until Strasbourg has ruled. When they have a big backlog, two years may go by. Two years can change the factual basis upon which our judgment was given; at the end of two years it may look very different. That is highly unsatisfactory.

Lord Judge: If I may follow it up, if we are waiting two years, as we now have for the decision in *Al-Khawaja*, that is two years where our entire court process, and the way in which the hearsay provisions of the Criminal Justice Act 2003 work, has in effect been in abeyance. We do not know what Strasbourg will say and we do not know what the Supreme Court will then say when it hears what Strasbourg has said. It makes for a very protracted process.

Q93 Lord Dubs: If the European Court were able to roll a lot of these cases up into a smaller number of class actions, would that have a similar effect to your suggestion?

Lord Judge: I doubt it, but I do not know enough about it to give you a confident answer.

Lord Phillips of Worth Matravers: Class action is a difficult concept, but they could say, "We have already decided this very point in relation to Country A." I will not name any

specific countries, but there are some that do not take much notice of Strasbourg decisions; they go on offending and more and more applications go to Strasbourg raising exactly the same complaint that Strasbourg has already dealt with. They really need some kind of a system saying, “We have ruled on this one already.”

Q94 Lord Dubs: Proceeding along the same lines, strengthening national implementation of the Convention is also a priority of our chairmanship of the Council of Europe. What are the most obvious ways of strengthening implementation of the ECHR in the UK?

Lord Phillips of Worth Matravers: The Human Rights Act aims to do just that and, to a very large extent, does it. Where we make a declaration of incompatibility, it is for Parliament to take the necessary action, but I do not think this country is really open to very much criticism for failing to implement the Convention. There are one or two well-known cases in which it might be said that so far we have not had regard to our international obligations, but very few.

Q95 Mr Raab: To both of you: Article 3 of Protocol 1 of the Convention sets out an obligation to hold free elections. I wondered whether, bearing in mind the Hirst case and the Greens case, you thought this was an example of the doctrine of the living instrument in practice, because a right to hold free elections has been turned into a right to prisoner voting.

Lord Judge: I think you are asking a very political question, if I may say so.

Q96 Mr Raab: Let me try to rephrase it to ask a constitutional question. Do you think, if you look at Article 32 of the Convention—the obligation on the Strasbourg court to interpret and apply the rights set out in the Convention—this is an example where they have not just interpreted and applied but perhaps expanded the scope of the right, bearing in mind the travaux?

Lord Phillips of Worth Matravers: I am not going to answer that question because, although you may have phrased it as a matter of nice, pure constitutional law, this is one of the most hot political issues of the moment.

Q97 Mr Shepherd: Is it not lawyers that give us constitutional law?

Lord Phillips of Worth Matravers: It is Parliament that gives us constitutional law, if I may say so.

Q98 Lord Lester of Herne Hill: I want to come at this slightly differently. First of all, on the problem you address of the gap in time when you want an answer from Strasbourg, one of the ideas that has been canvassed, which I personally find difficult, is that you should have the same power or duties under European Union law of being able to refer questions to Strasbourg either as a preliminary question of law or as an advisory opinion, so that halfway through a case you can say, “Let’s go and ask Strasbourg what the answer is.” Of course, the disadvantages of that, at least as I see them, would be that it is a way of deferring too much to Strasbourg on fundamental issues of fact and principle, and it would be better if our own system decided the matter first. That, therefore, seems to me in ethical questions to be a bit problematic, but it has been suggested by the European Court itself, which is why it is proper to ask you whether you have had to think about that.

Lord Judge: I have. I do not think it is a good idea. First, there is a huge difference between the European Court of Justice and the European Court of Human Rights, if my view is right. The European Court of Justice is binding; it is an economic treaty, if you need an answer to an economic question of “If so and so, does such and such apply?” That applies

clean across the entire European Community; it might as well go straight to the Community. With a Convention issue, it is much better for the European Court of Justice to be properly informed by our own court's view—what our view is and why we adhere to it—so that when they come to consider it they have at least the advantage, I assume it is one, of knowing what we think. I think it is really a very crucial difference.

Q99 Lord Lester of Herne Hill: Thank you. If I may, one more: a question that my colleague Dominic Raab was asking you—

Chair: Do not ask the question again.

Lord Lester of Herne Hill: I am not asking the question again, certainly not. As a matter of common law judicial method, it is my understanding that we adopt what we call an updating interpretation of statutes, so that we do not simply go back to questions of original intent but, ever since cases like *Quintavalle*, *Lord Wilberforce*, *Lord Bingham*, we try to make sure that our legal system keeps up to date in the way we interpret. That, as I understand it, is the living instrument doctrine in Strasbourg. Is there any real difference between the living instrument notion, the dynamic interpretation, and the common law way in which we update statutes in our interpretation?

Lord Phillips of Worth Matravers: I think they are very similar.

Q100 Mr Shepherd: You do get such contradictions. Doesn't common law build on common law, but doesn't Strasbourg in fact, through the living instrument, actually make law? Take prisoners' voting rights, for instance; there is no trigger that I can see within the Convention that leads you to the conclusion that you may make a judgment on such a matter.

Lord Phillips of Worth Matravers: The common law undoubtedly moves incrementally—usually, not always.

Mr Shepherd: No, I accept that.

Lord Phillips of Worth Matravers: The decision in relation to the case of mesothelioma was a very big jump.

Q101 Mr Shepherd: It did not jump to giving prisoners the vote.

Lord Phillips of Worth Matravers: No, but by and large Strasbourg also moves incrementally, and there it was given a discrete issue of interpretation, and it reached this particular decision. When Strasbourg does so, what it tends to do is look around and see if there is a general consensus in Europe in relation to a particular topic. I think that is one topic where they found that there was generally a consensus.

Q102 Mr Shepherd: That is customary in our legal process, is it?

Lord Phillips of Worth Matravers: Yes.

Q103 Mr Shepherd: Yes? They look around.

Lord Phillips of Worth Matravers: Well, we always look around and see what we can learn, but we do not necessarily follow the consensus.

Q104 Lord Lester of Herne Hill: Sometimes it is said of the Strasbourg court, and indeed of our Supreme Court, that the judges are guilty of a crime called judicial activism, by which I think is meant acting beyond their proper powers, usurping the powers of other political branches of government, and so on and so forth—the opposite of activism presumably being passivity, I do not know. Is there any proper way that I can ask the question that does not ask you to answer in a political sense—because I am not seeking that—how you as judges would respond to the charge of undue activism, either by Strasbourg or yourselves?

Lord Phillips of Worth Matravers: I can start with ourselves. It is one of the most difficult areas for any judge: how far it is legitimate to advance the common law in an area and when you should stop and say, “No, this really should be left to Parliament.” We had precisely such an issue very recently in the Supreme Court as to whether, as a matter of common law, we could introduce into civil proceedings some form of closed evidence. That is a good example of that; it is very difficult to know quite how far you should go.

Strasbourg no doubt has the same problems. The Strasbourg court has in some areas reached decisions that have differed quite strikingly from decisions reached by the House of Lords or the Supreme Court, particularly in relation to issues of territorial jurisdiction.

Lord Judge: Is the answer not that, if the legislature takes the view that the judicial activism has gone too far, then—although I know it is not straightforward—it is open to Parliament to say, “We disagree, the judges here have gone too far,” or “not gone far enough”—they might be saying that, too.

Q105 Lord Lester of Herne Hill: But not with Strasbourg. There is no equivalent mechanism to overrule a judgment. Some would say there ought to be some such mechanism.

Lord Judge: That is why you have to consider, if you are not happy with it, amending Section 2.

Q106 Lord Lester of Herne Hill: The convention?

Lord Judge: No, of the Human Rights Act—the “take account of” provision.

Q107 Lord Lester of Herne Hill: I am sorry to ask a further question. If there is a case where Strasbourg says black and English law is white, there is a binding judgment saying “black wins” and we have a duty to abide by it, and Parliament then says that we will not, which goes back to Strasbourg, and we are in breach of international law, there is no European mechanism of overriding through the political process a judgment in Strasbourg. In that sense you cannot have what is misleadingly called a democratic override in Europe. You can in Britain.

Lord Phillips of Worth Matravers: A democratic override means that the Member states that signed up to the Convention say it is going too far.

Q108 Lord Lester of Herne Hill: That is being suggested, that is the argument.

Lord Phillips of Worth Matravers: I think as a matter of international law it would be legitimate for all the member states to say, ultimately, “We would like to have some control over the court that we have created.” But it is quite difficult to contemplate as a matter of practicality.

Lord Judge: In the end, whatever the process, there ends up being a decision of our own court. If Parliament takes the view that that decision is not acceptable, then Parliament can overrule the decision of our court. It is protracted, and you have to get the view of our Supreme Court about what they think about the European decision; then, if you do not like that, Parliament can legislate. There is no final barrier, there is no full stop, there is no final jurisdiction in the European Court to produce a law that our Parliament disagrees with.

Q109 Lord Lester of Herne Hill: There is a duty under Article 46 of the Convention to abide by their final judgments, so if Parliament did that they then would be—

Lord Judge: That is an international treaty problem that Lord Phillips was referring to earlier. Incidentally, if I may, Mr Chairman, I have a couple of cases where the House of

Lords refused to follow Strasbourg: one called Animal Defenders, to do with Article 10—freedom of expression—where our House of Lords declined to follow Strasbourg jurisdiction on decision; and one called Spear, where the House of Lords declined to follow Strasbourg jurisdiction in relation to courts martial. They were two examples of the sort of thing I was talking about at the very beginning.

Q110 Mr Raab: Turning to the issue of the judicial role under the Human Rights Act, I will not use the ugly word “activism” but I think there is a legitimate question about the separation of powers and the effect that the HRA has had in the same way we have asked, at the international level, in relation to Strasbourg. I wondered in relation to Article 8 of the European Convention—the right to family life and in other contexts the right to privacy—whether that is an example where the scope of the right has over time been expanded, even more so since the Act came into force. For example, if you look at the number of cases coming through—although I will not refer to any of the individual ones, as some are still subject to final determination—they are quite a good example of the expanding scope of Article 8 against the public interest, both of which find expression in Article 8 in relation to deportation cases. We now have a rate of 400 cases a year where deportation of foreign national criminals or prisoners has been frustrated on human rights grounds. I wondered whether that is a legitimate example where we are dealing with the creative role of the judiciary in relation to the Act and the Convention.

Lord Phillips of Worth Matravers: If we start with Strasbourg, Lord Walker gave a talk a couple of days ago on what he called “The Indefinite Article 8”. It is an article that Strasbourg has developed very significantly over the years, particularly over recent years. We have been following Strasbourg down that path; some would say—and they would be right in one or two cases—that we have gone a little bit ahead of Strasbourg in relation to Article 8 cases. It is one of the most difficult areas for a judge; I can tell you that we are doing our best to do our job, which is to apply Convention rights. Article 8 is one of the most difficult areas that we happen to be faced with. If there is any area where points can be made of the nature that you are making, I think Article 8 is that area because it is so very difficult to pin down what is meant by the Article 8 rights. Very often it is those very people who say we should not be paying too much attention to Strasbourg who complain that we are going beyond what Strasbourg has done in relation to Article 8. You cannot have it both ways.

Q111 Mr Raab: With respect, Lord Phillips, you can, can you not? You can say, in some contexts, Strasbourg has gone too far; in other contexts, judges at a domestic level have also gone too far. That is not entirely irreconcilable.

Lord Phillips of Worth Matravers: You have to start paying attention to what Strasbourg is doing before you go to the second step.

Q112 Mr Raab: I have a final point on this, in relation to the Act. I was reading the RB (Algeria) (FC) v Secretary of State for the Home Department case in 2009, where Lord Hope makes this point: in relation to some of the deportation cases in Article 8, the UK court has gone further than Strasbourg. Given the wording of the legislation, which has been effectively eroded or eclipsed, and given what you said about the Strasbourg case law, what is driving the judicial interpretation at a domestic level to go further and expand the interpretation of Article 8 at the expense of the public interest in deportation?

Lord Phillips of Worth Matravers: I do not think we are setting out to do that. It has happened in one or two cases. This is a familiar pattern with the law; you get a case of extreme facts where the consequences for the individual, if they are sent back to their own

country with mother or daughter or whatever, on the facts of that particular case, are really horrific—

Q113 Mr Raab: But the consequences of the precedent are also extremely far reaching.

Lord Phillips of Worth Matravers: That is right. That is of course where the problem lies. It is a phenomenon not just in relation to human rights but right across the board. Sometimes you get a case of extreme facts that produces a very understandable result, and then people try to feed on this as setting a precedent of principle when the answer is that they should not.

Q114 Mr Raab: Do you mean litigants or claimants?

Lord Phillips of Worth Matravers: Claimants, and the lawyers. We have a lot of good lawyers in this country.

Q115 Mr Raab: Isn't the exceptional point about the human rights context of this—of course creativity in the law and the common law goes on elsewhere—this problem of democratic oversight because of the way the HRA is framed, and the ability to recalibrate if we think the UK courts or Strasbourg have gone too far? Is there not a problem at the UK domestic level as well? Of course we could address that by amending the Human Rights Act, but what about within the parameters of the Act?

Lord Judge: I am being very reticent about this and deliberately so, because I know that in the Court of Appeal at the beginning of January—I am not sure whether I shall be sitting on it or not—we have got a case called *Kotecha* where we are going to be considering this entire question, so you will not get an answer from me.

Lord Phillips of Worth Matravers: The Convention in Article 8 requires you to balance two such completely different things. How do you balance the importance of immigration control against the personal consequences of somebody's family life in one individual case of being deported? That is a very difficult task for any judge.

Q116 Mr Raab: Would that not mitigate in favour of intervening in what Parliament said slightly more reticently than perhaps has been the case so far?

Lord Phillips of Worth Matravers: It might.

Q117 Lord Morris of Handsworth: My point is directed to both of you because you will notice that the Human Rights Act has dominated the debate. Some would even indicate that it has gone a bit catty, recently. However, my question is: what has been the biggest impact of the Human Rights Act on judicial decision-making and to what extent has it changed the constitutional functions of our courts?

Lord Phillips of Worth Matravers: The biggest impact was one of the early dramatic cases, the case of *A* in relation to the detention of aliens who were suspected of terrorist activity. That was the most dramatic effect of the Act, and it has effected a significant constitutional change in that, for the first time, English courts are required to scrutinise legislation to decide not whether the legislation is lawful or constitutional but whether the legislation is compatible with some other legislation, if you like, or with the Convention. We have never had to do this before—at least, not until we joined the European Union.

Lord Judge: I agree with that. It seems to me that for a court to examine a piece of legislation to see whether it is compatible with the Convention is a very dramatic change. In the end, if the court finds it is incompatible, there is nothing the court can do; we simply send

it back to Parliament to consider. Nevertheless, instead of looking to see exactly what the Act says, we are seeing what the Act says and saying, “Well, if it says this then it may not be compatible with the Convention.” In that case, the incompatibility declaration has to be made. It is significant that the jurisdiction to make an incompatibility declaration is reserved to the Court of Appeal and the Supreme Court. A judge sitting at first instance cannot make that declaration.

Lord Phillips of Worth Matravers: I have observed a rather more subtle constitutional effect: where you are faced with an issue of whether legislation is incompatible, an approach to the interpretation of the legislation has been, if at all possible, to give it an interpretation where it is compatible with the Convention. That has been taken to the length of doing something even though it is quite plain that this is not what Parliament had intended by that particular provision. You do not do it if the provision is the heart of the Act, but if it is around the periphery you give an interpretation that makes the legislation compatible. This is usually something that Ministers who are appearing before the courts urge the courts to do, so that both sides want the court to reach the same answer in relation to the particular piece of legislation.

Q118 Baroness Berridge: Coming on from that point, about the scrutiny of the legislation, although powers are still separate do you sense there is any kind of judicial discomfort with the fact that you are being nudged closer from the judicial function? Do you think there is any discomfort with that function you have now been given?

Lord Phillips of Worth Matravers: We do what we are asked to do. There can be some discomfort if this leads to apparent friction and if it leads to judges being attacked for what we would say is simply trying to do our job. It obviously makes the relationship between Parliament and the judiciary of greater public interest, and in some instances more controversial.

Q119 Baroness Berridge: Do you think that the European jurisdiction give more weight to our cases now that we have incorporated the Convention by way of the Human Rights Act?

Lord Phillips of Worth Matravers: Unquestionably.

Q120 Baroness Campbell of Surbiton: Are Parliament’s views on human rights issues more or less important under the Human Rights Act?

Lord Phillips of Worth Matravers: You have a go at that.

Lord Judge: We can only take your views from what you give us. I am quite serious about that. It is all very well for us to be shown what the Minister for this said, what the opposition Minister for that said, what 27 Members of the House said and what 27 Members of the other House said, but in the end we can only actually go, save in the rarest of cases, by what you tell us. That is the Act of Parliament; we try and discover its meaning, I must say, in the criminal justice system, occasionally with considerable difficulty. I do not think that is a Convention issue; that has always been the case. As long as the legislation is clear, that is Parliament telling us what the law is and what Parliament intends. Our problem is that we look at the language, decide this is what it means, and half the people in Parliament thought they did not mean that when they agreed to it, which is a constant problem for us.

Q121 Lord Lester of Herne Hill: This just occurred to me, if I may: the work of this Committee in drawing attention to Convention and other human rights issues has been commended within the Parliamentary Assembly of the Council of Europe as a model for the other states. Your courts have been prepared to look at our reports, obviously simply as

background. Is it the case that, unlike some countries, ours is not entirely judged on a case base, but we try to be holistic in engaging the political branches in the same way, so that it is, in that sense, holistic; it is not just dependent on judges and cases, it also depends on a better-informed Parliament making and scrutinising laws. I am thinking of Section 19, the Ministers' declaration of compatibility on the face of Bills, the work of this Committee in scrutinising, reporting to both Houses, debates on our reports and so on. It is not just a judicial process that is engaged anymore.

Lord Phillips of Worth Matravers: That is a fair comment and I think actually what is taking place this afternoon is to some extent an illustration of that.

Lord Judge: If I may return to your question, I do have a slight concern. I would put the relationship arising between the judiciary and the legislature as "so far, so good" in this context; however, it is something we need to keep an eye on. I have said this before: I do not think it is a particularly good idea for judges to constantly be coming down to talk to Committees of either House, or both Houses. It never happened until about 1991 when that extraordinary act, the Criminal Justice Act, was passed, which said, "You don't take account of the defendant's previous convictions when deciding a sentence", which was very quickly appreciated by Parliament to be rather a strange provision. That happened once, but it is gradually happening more and more often. Now, a debate of this kind is fine and, if I may say so, Chairman, you have obviously all appreciated the concerns that we both have about engaging in a political discussion, or in a discussion involving cases that we may have to decide. It is actually quite delicate territory; you would much rather, I am sure, be able to ask us directly, "Well, what do you think of this and what do you think of that?" We just have to be careful about it; "so far, so good" would be my response to your question.

Q122 Mr Raab: Looking at Section 3 of the Act, and trying to look at this in a constitutional way, primary legislation has to be interpreted by the courts in a manner that is compatible with Convention rights unless it is impossible to do so. That is quite a strict test in practice, I would say, but some may disagree. Would it at least be possible, for example, to replace the impossibility test with an object and purpose test, so the courts cannot interpret Convention rights to undermine the object and purpose of a piece of legislation but would need to make a declaration of incompatibility at that point? I could see it would create more case work, but that would be the price of stronger democratic oversight. Would that at least be a model that would be workable in theory?

Lord Judge: The problem is that the Minister has to say, about every piece of legislation, that it is compatible. That is part of the statutory process now, so you would have to look at that provision as well.

Lord Phillips of Worth Matravers: You certainly were addressing the point I made a little earlier that we do go a very, very long way in giving legislation an interpretation that may seem at odds with the natural meaning of its language, if this is something around the periphery, in order to render it compatible. One could have an approach that did not go that far. If you look at the debate when this particular provision has been discussed, you will find it was considered that we would only adopt this approach where there were two possible meanings that could naturally be attached to the language. We have gone a long way beyond that. One could draft some legislation that would take us back to saying, "Only where there is ambiguity of language should the particular provision be given an interpretation that complies with the Convention."

Q123 Mr Raab: Finally, on the same issue, that is one way of doing it, but there was an article in the *Sunday Telegraph* on 29 October saying the Government might ask Parliament to back a Motion calling on judges to take more account of the public interest in

human rights cases. In the absence of primary legislation, would that have any effect when it came to judicial interpretation?

Lord Judge: It should not.

Q124 Lord Dubs: Can I turn to the relationship between the Strasbourg court and the Luxembourg court, to which I think some reference has already been made. I think you, Lord Judge, expressed in a recent lecture concern about the impact of the UK opting in to the jurisdiction of the Luxembourg court on criminal matters. Do you think there will be conflict or tension between the Strasbourg and Luxembourg courts as a result of accession to the ECHR by the EU?

Lord Judge: I do. It is a very interesting and difficult situation. It is a very political question, but I will go this far; I just alert you of the fact that this is a political question that you are going to have to address. Do you mind if I go back to the beginning? The Convention is not the product of the European Communities legislation or of the European Union; it is the product of the Council of Europe, which is a different body. The relationship between the Luxembourg court, the Court of Justice, and the Strasbourg court, the Court of Human Rights, is going to undergo some significant changes because the Lisbon treaty commits the EU to accede to the Convention. That is an interesting proposition. The EU accedes to the Convention, and then the basis on which it will accede to the Convention is a political question for member states and for the Council. I am sorry, but this is the stage which we have to go at. The Strasbourg court has some significant role already in EU decision-making because it was decided that, when the EU accedes to the Convention, the rights specified in the European Charter of Fundamental Rights, which corresponded to the European Convention rights, should be given the same scope and meaning as the Convention rights as explained by the European Court of Human Rights. If this is difficult, believe me, I am finding it so too.

The end result is this and I think it is a serious question for our legislature: because of our complete adherence, our complete requirement, to adhere to Luxembourg case law, it is possible that we may find ourselves equally bound by Strasbourg law if the European Court of Justice, the Luxembourg court, says, “We are always going to enforce the European Convention as decided by the European Court of Human Rights.” We could find ourselves in this situation.

There is a difference between Lord Phillips and me about “take account of”, but let us forget that for a moment and let us assume for the moment that I am right—if you would not mind. We have the European Court of Justice that we are bound by; whatever happens, you have told us we are stuck with it. We have the European Convention on Human Rights, which, if I am right, we take account of. But, if the European Court of Justice says that it will apply the European Convention on Human Rights as declared by Strasbourg, then down the line we will find ourselves being forced to at least consider—not worrying about “taking account” of the Convention—that we are obliged to follow it because Luxembourg is following it. That is a very important political question and, if I may say so, you need to be alert to it.

Q125 Lord Dubs: It seems to me a complete muddle.

Lord Judge: Actually, it is either a muddle or very simple.

Lord Phillips of Worth Matravers: The question then arises, if in a piece of litigation a human rights point is raised, in the European Union context, do you have to send it off to Luxembourg to get the answer in a reference before you proceed with the hearing? These are questions that have not been thrashed out, but it is a very complex concept to have the Union subscribing to the Convention.

Q126 Lord Dubs: I think you are being very kind to the whole thing.

Lord Judge: May I put it this way? The way in which you decide that Lisbon and Maastricht should be worked out is for you, not for us, but I am pointing out what I think is a potential consequence of the current situation. As I said, we will have to apply the law we find.

Q127 Lord Lester of Herne Hill: Fools rush in where angels fear to tread, so I am now a fool. Is it the position that, when the EU accedes as though it were a state to the Convention, the Luxembourg court becomes an effective remedy that must be exhausted before you go to Strasbourg, and that ultimately the apex court remains the Strasbourg court on any question of interpretation? Suppose there was some dodgy directive that was being said to be violating free speech under Article 10, and the Strasbourg court is the ultimate determinant of what Article 10 means, with the Luxembourg court being subordinate. It would be like a local court for that purpose. Therefore, the position in this country would remain as it is, I think. We would not have to give direct effect to the Luxembourg court's interpretation since, in the end, it would be up to the Strasbourg court. I said I was a fool and perhaps I should not have asked the question.

Lord Judge: If I may say so, it is a perfectly legitimate question not asked by a fool or an angel. It is an example of the sort of issue that has got to be addressed. If you made that submission you might well be right, but the opposite submission would be attractive too.

Q128 Mr Raab: Just very briefly, I wondered whether you think that the triplication of the interpretation of human rights law at those three different levels would create less or more legal certainty for the UK.

Lord Judge: Much less legal certainty.

Q129 Lord Dubs: Just a quick point about the same area: you referred to the EU Charter of Fundamental Rights, but is there anything else you would like to add about the human rights remit of the Luxembourg court under the Charter of Fundamental Rights?

Lord Judge: No, I do not think so. I am afraid it was a bit complicated but I think I have said what I want to say about that. I have tried to alert you to a point that I think needs to be addressed.

Q130 Baroness Berridge: Returning to the topic of public confidence in the judiciary, obviously your legitimacy is really rested in public confidence. Do you think that some of the recent cases that have been perceived to go too far in terms of human rights have affected public confidence in the judicial function in our country? I might draw into that the fact you have also had, playing in the background, super-injunctions coming in; I do not think the public fully understood that judicial intervention there.

Lord Phillips of Worth Matravers: I am always amazed at how much confidence the public seem to have in judges, considering the slating we are constantly getting from some areas of the media. It makes very good copy to make it look as though a judge has given a stupid decision or a ridiculous sentence. You cannot open *The Sun* newspaper without finding at least one or two examples of that every single day, and yet when there is something that needs an inquiry, what is the cry? Let us have a judge doing it. It is quite surprising, really.

Lord Judge: I think it would be happier if it was clearly understood that the judge was applying what he or she thought the law was; that, if the judge has got the law wrong, there is a right of appeal. I hope I am not fooling myself that most citizens understand that, but of course judges also do foolish things. They are like everybody else; they make mistakes.

Obviously, a mistake by a judge does not improve public confidence. A mistake by a surgeon does not improve public confidence. A this-via-that does not improve public confidence. There is the mistake element—they are there and we make them—and there is the publicity element. Sometimes I feel as though judges are being criticised for just applying the law, if I may say so—I have said it more than once to you now—which you or your predecessors provided us with.

Q131 Baroness Berridge: Do you have any mechanism to monitor public confidence in you? I do not want to talk about political mechanisms like opinion polls, but do you have any mechanism that you use to monitor confidence in you?

Lord Judge: We just read the opinion polls produced by other people, and so far it is all right.

Q132 Lord Lester of Herne Hill: One of the problems of course is that judges cannot answer back. They cannot answer back to misleading political speeches or stuff in the media as part of a campaign of one kind or another, but judges can give lectures and do give lectures. As a believer in free speech, I am not about to suggest that judges should no longer give lectures, as used to happen under the old principle, but I do notice that when judges do give lectures they are then ammunition in various political quarters—one side or the other quoting Lord This and Lord That and Mr Justice So-and-So, back and forth. Is that not the problem: the moment you get out of the ivory tower, give lectures and participate in general discussion, it can so easily be used for the wrong purposes and actually mislead the public when your object is the opposite?

Lord Judge: The point is a very good one. It is simply not part of the way in which our system is run that politicians should criticise judges for their decisions. They should appeal them, and appeal them further if they are still unhappy, without comment. There is a quid pro quo about this, though, that judges should not be making speeches or giving lectures about political questions. I agree with you.

Q133 Baroness Berridge: There was a statement recently given by the Judicial Communications Office following controversy around a case that had been in the media recently. Is this a sign that there is going to be a more proactive approach to ensuring the public get a clear message? Another case of which I was personally aware, the Johns case, was a very controversial adoption case recently. I was flabbergasted personally to read the case from start to finish, and then the media coverage of that case. Are we seeing the start of that, and will it be applied in other situations, where I came to the view that much of the newspaper coverage of that case was inaccurate?

Lord Judge: There is a Judicial Communications Office and we do have half a dozen or so—it is five actually—judges who have agreed to make themselves available, not to justify a decision, but to explain to the media and, if they wish to print it, therefore to the country at large, what the parameters were within which the judge was working. We cannot have judges justifying other judge's decisions. The strict rule is that judges do not comment about each other's decisions, save and except when there is an appeal and you give a judgment—you agree or you disagree. There are occasions when the criticism is unfair and unreasonable, and there is nothing to be done except let the judgment speak for itself. There are other occasions when the criticism is unfair and unreasonable because it is simply based on a complete misunderstanding of the parameters within which the judge had to work—for example, in a sentencing decision, which is a frequent source of criticism, that the maximum sentence available for the offence was two years, and therefore you cannot really criticise the judge for imposing a sentence of two years, less what the statute requires, which is a discount

for the guilty plea of about one-third, and so on. For that sort of misleading reporting, judges are available to explain the parameters, but not to justify the decision. We do not think that that would be right.

Q134 Baroness Berridge: In a situation where something is rolled out there that is inaccurate, and the public are then relying on inaccurate reporting of a judgment, who acts?

Lord Judge: In the ultimate analysis, if Lord Phillips will forgive me, ignoring the Supreme Court for this purpose, that is my responsibility. For what it is worth, I get press cuts every morning; they form part of my morning diet. If I see a case being reported where it looks as though there may be one of the problems that I have identified, then I speak to the Communications Office and they decide what should be done.

Q135 Chair: Thank you very much for the comprehensive way in which you have answered our questions. It has been extremely productive and helpful. It has been a minor triumph of my enthusiastic Committee in framing their questions in such a way, with one exception, as to elicit a response from you.

Lord Phillips of Worth Matravers: We are very grateful for that.

Lord Judge: Thank you very much.