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TAKEN BEFORE

JOINT COMMITTEE ON HUMAN RIGHTS

HUMAN RIGHTS JUDGMENTS

TUESDAY 15 MARCH 2011

Dr Michael Pinto-Duschinsky

Lord Mackay of Clashfern and Professor Philip Leach

Professor Jeremy Waldron

Evidence heard in Public Questions 1 - 61

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Members present:

Dr Hywel Francis (Chairman)
Lord Bowness
Lord Dubs
Lord Lester of Herne Hill
Dominic Raab
Virendra Sharma
Richard Shepherd
Baroness Stowell of Beeston

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Examination of Witnesses

Dr Michael Pinto-Duschinsky, [Author of Policy Exchange briefing paper *Bringing Rights Back Home*].

Q1 The Chairman: Good afternoon and welcome to this session of the Joint Committee on Human Rights, dealing with human rights judgments. For the record, please could you introduce yourself?

Michael Pinto-Duschinsky: I am Michael Pinto-Duschinsky and I am a political scientist who has advised a number of Governments on constitutions.

Q2 The Chairman: Thank you very much. I have asked my Committee in private session to be succinct and to the point in their questions, and I hope that this will be the case throughout the evidence sessions this afternoon. Could I begin by asking you a straightforward question about human rights judgments and the role of the judiciary? Can you provide examples of why you consider that the judicial role assigned to domestic courts by Parliament in the Human Rights Act is not a legal exercise but a political one that Parliament should have retained?

Michael Pinto-Duschinsky: I would not do it in terms of judgments. I think the point is that under the Human Rights Act of 1998 if judges feel that the obvious meaning of legislation does not accord with the European Convention on Human Rights, they will reinterpret the meaning of the law. And so, in that sense, in quite a wide way, you might say that courts now have the last word on legislation, whereas if they have a declaration of incompatibility, then at least it goes back to Parliament to take a decision. But if it is merely a matter of interpretation of the statute, then it does not.

Q3 Lord Lester of Herne Hill: In your writings you have expressed concern about the principle of proportionality, which you say makes the judges political. As I understand it, the principle is that Ministers and others should not use their powers excessively. They should not take a sledgehammer to crack a nut. Why do you think that determination involves judges, whether here or in Europe, in being political rather than judicial?

Michael Pinto-Duschinsky: I am not sure if I used the term proportionality in my piece—maybe it is because I am not a lawyer and I do not use some of these terms—but I think that many people would have the view that there is a difference between what one might call core rights and the rather imaginative use of the language of rights in cases that would have very little apparent relevance to rights. I think I cannot do better than referring you to Dominic Raab's book, *The Assault on Liberty*, where he gives many examples of what would seem to be very trivial cases that are only connected with those core rights by a leap of the imagination.

So I think the problem that many people would feel is that the Convention, which was made to protect gross abuses of human rights, now has a catch-all character, and that by trying to do too much, the Court is actually lessening its authority in those areas where it should be acting.

Q4 Lord Lester of Herne Hill: I think you must have misunderstood or I put it badly. I was not asking you about the scope of the rights, but the judicial method in Strasbourg and here that involves deciding whether a given decision is proportionate or not. I had thought you were saying in your writings that that was a political exercise, and what I was asking you was whether in fact it is not a well-known judicial exercise to see whether the means employed are reasonably related to the aim pursued.

Michael Pinto-Duschinsky: Gosh. I hope you do not mind if I take a pass on that and maybe consider that carefully and write back to you on that.

Q5 Lord Lester of Herne Hill: That is fine. Could I then go on from that? Do you think, in a modern democracy like ours, it is a good idea that there is a code of ethical values on civil and political rights to guide each of the three branches of Government, Parliament, the executive and the judiciary, as we have at the moment in the form, in this case, of the European Convention? Do you think there needs to be a code of values so that the courts can interpret and apply the law within a code laid down by Parliament?

Michael Pinto-Duschinsky: I believe that the European Convention on Human Rights and the core values that it represents is something that I subscribe to, and I feel that virtually all of the country subscribes to, and that is not something that is in doubt here.

Q6 Mr Sharma: You have drawn a distinction between core human rights, which the judiciary should actively protect against interference by the executive, and other peripheral rights. Is there an objective way to make this distinction without undermining the universal and equal application of internationally agreed human rights standards?

Michael Pinto-Duschinsky: I think that is a very important but very difficult question. The problem is that if the general wording of a code such as the European Convention, or Bill of Rights in the United States, is left solely to a court, and if the court expands the meaning beyond what many people would feel legitimate—beyond the strict construction—then you could have a situation that I think is less acceptable to the polity. I certainly think that with the European Court there is a view, not only in Britain but I think within the Council of Europe itself, very strongly that the Court has somehow expanded way beyond its original intention.

The question we then have is, can you define a set of core versus peripheral rights? I believe that that is a very difficult question and I would not want to answer that, in fact, straight away. What I would want to do is to consult with people who have spent their careers on questions like this, such as Professor Waldron, who is here

today. In fact, some of us are going to be gathering together in an informal way with colleagues from the Court and the Council of Europe precisely to discuss this question. I think it is a key question, because if there is some reasonable and, as you say, objective way of defining a more limited scope for the Strasbourg Court, then I think some of the current conflicts will certainly be ameliorated. So it is an intellectual exercise that I think has to be taken very seriously. After that, I hope that in some months it will be possible to come back to you with an answer.

Q7 Lord Lester of Herne Hill: You have criticised the margin of appreciation, as it is called, used by the Strasbourg Court. Two points arise: one, can you give us examples of where you think the Court has exceeded its margin of appreciation? Secondly, what would you do about it?

Michael Pinto-Duschinsky: I think that clearly there is a question of how you can have a set of standards that is standard, but which then allows for differences in the culture and circumstances of different countries. That is what we are trying to deal with. It has been said, for example, that in cases where freedom of expression and privacy are in conflict that there are different traditions, say, in France, where you are not allowed to take photographs of people and privacy is protected, and in Britain, where we put freedom of expression in a more important way. Indeed, you have in your action on libel, which I would wish you pass quite soon, taken that view.

In other words, in that case I think you can imagine that the Court is saying that, if there are different traditions in the conflict of Article 8 and Article 10, we will allow a

larger margin of appreciation on that and try somehow to build that into some new arrangements. What happened, as far as I understand it, after 1998 was that the 1998 Human Rights Act did actually put some expressions of British priorities on freedom of expression in that Act, but it has not really been taken very seriously by the Court. I think it is worth looking very carefully at ways in which the margin of appreciation can be increased, so that in certain areas where rights are in conflict—I think it is the ones between 8 and 11 as far as I can tell—that more margin of appreciation is built into the system.

Q8 Lord Lester of Herne Hill: Leaving Europe aside altogether for the moment and just concentrating on our own courts, you are not a lawyer, but you may know that our courts for a long time have adopted what is known as an updating construction of statutes. That is to say they try as far as they can, when they are interpreting acts of Parliament, not to go back to what they meant in 1925, but where it is necessary give them an interpretation that is more compatible with contemporary values and conditions. In the way you approach the Strasbourg Court or our own courts, are you happy about that or are you saying that that is the wrong approach—that you should not be interpreting statutes and updating them, but interpreting them only literally according to what they meant when they were passed a long time ago.

Michael Pinto-Duschinsky: I think that I would rather sidestep that question, and answer it in another way, if I may. I think that I would be extremely respectful of judges, both in Britain and in Europe; but the power of judges is seen by many

people—and I think quite rightly—to have grown greatly. Therefore, we are in a new position where we are faced with a more powerful judiciary and there is an underlying question of where the boundaries are between the role of Parliament and the people, and the role of the judiciary. In a democracy, that is a very serious question.

I do not think that you can assume that the role of the judiciary can grow exponentially without some reaction from the Parliament to that. I would certainly agree with you that I would of course expect judges to use their discretion, but one also would not want that discretion to stray so far that Parliament feels its area has been invaded. I think we must take very seriously the feeling, not only of the UK legislature but numbers of others, that democratically elected representatives have somehow had decisions that ought to be theirs taken over too often by courts. I think that is such a strong feeling that it would be unwise to ignore it.

Q9 Lord Dubs: Is there any provision in either the European Convention on Human Rights or the Human Rights Act that prevents Parliament legislating in any way that it chooses?

Michael Pinto-Duschinsky: No, but if it legislates in a way that then leads to the Convention being contravened, then that legislation would be incompatible and there would be a declaration of incompatibility. To take it to an absurd example, if Parliament were to pass an Act saying that, in cases where a terrorist was suspected,

the Government must put thumbscrews on them, it would certainly be disallowed by the courts pretty soon.

Q10 Lord Dubs: If it were clear. It would have to be quite clear, would it not, for Parliament to be influenced in that way?

Michael Pinto-Duschinsky: Well, I am thinking of that example, which I hope is clear.

Lord Lester of Herne Hill: I think I have asked the question I was going to at this stage.

Q11 Lord Dubs: I think you have called for both Section 3 of the Human Rights Act and Section 10 of the Human Rights Act to be repealed. Could you give us examples of instances where, in your view, these powers have been used in a way Parliament did not intend when passing the Human Rights Act?

Michael Pinto-Duschinsky: The parts of Section 3?

Lord Dubs: Section 3 and Section 10—you asked for them to be repealed?

Michael Pinto-Duschinsky: Yes. I think the point is this: I do believe that if there is a declaration of incompatibility—in other words if there is a clash between Parliament and the courts—then Parliament ought to be able to reconsider the matter in full and there ought not be the rushed procedure. As far as I can tell, the fast procedure has been used very rarely, but the fact that it has been used very rarely I think is a good reason why it can be abolished without causing too much trouble to Parliament. I do

feel that it is wrong to have a Court decision that overturns, basically, a decision of Parliament without Parliament then being able to reconsider that in detail.

Q12 Lord Lester of Herne Hill: As you probably know, the European Convention obliges every Member State to give effective domestic remedies for violations of the Convention. Do you think that it is right, therefore, that our Courts should do what they can to provide effective remedies, subject always to the fact they cannot strike down Acts of Parliament? Subject to that, do you think it is right that they should interpret and apply our laws, as far as they can, to ensure that there are effective domestic remedies so that one does not have to go to Strasbourg, but one has the problem solved by British judges in British courts here?

Michael Pinto-Duschinsky: My view is that, while we remain subscribed to the European Convention on Human Rights and especially the European Court of Human Rights, we play the game. For example, I am not calling for us to disregard any judgment of the Court or the spirit of that judgment. For example on prisoner voting, I do not think we should just say to the European Court, "We are just going to take no notice of you," because there is no point in remaining under the jurisdiction of the Court if you are going to do that. So, my answer to you would be yes, but I do think that we need to mind out that the whole system then does not introduce elements that we are basically dissatisfied with.

In other words, if we found that the interpretations of the European Court on a number of important matters are so defective, or the operations of the Court are so

much to be criticised, then I think we should negotiate with the Court to see if remedies can be found within the organisation of the Court. Ultimately, if the conflict becomes too great, there is the option of withdrawal from the jurisdiction of the Court. Until we get to that point, I agree with you that we must play according to the rules.

Q13 Mr Shepherd: From what I understood there, you were actually saying that Strasbourg is the last word, but is it not a matter of fact under statute that it is not the last word—it is the Supreme Court here?

Michael Pinto-Duschinsky: Let us take prisoner voting. If there is a decision of the Strasbourg Court on prisoner voting, as far as I understand it, the British Supreme Court cannot say, "We are above the Strasbourg Court and we overturn the decision of the Strasbourg Court" Am I not right in saying that? So, in that sense, the rulings of the Strasbourg Court are in a generally superior way to British courts. I realise that we then get into some very complicated areas. Dr Eric Metcalf, for example, of JUSTICE, has written a very detailed paper on the relationships between those courts. At that stage, I am afraid I must withdraw from the argument; but in general we do have a situation where we accept the jurisdiction of an international court on a convention that can be understood very widely to apply to all sorts of things.

Q14 Mr Shepherd: I hope this will help a future witness. Lord Laws gave a—

Lord Lester of Herne Hill: Lord Justice.

Mr Shepherd: No, I meant Lord Judge gave us a Judicial Studies Board lecture in 2010, and in part of this he is looking at the relationship of courts, etc. He just says, if I may quote it, regarding why the Strasbourg decisions are taken into account: "What I respectfully suggest," he says, "is that statute ensures that the final word does not rest with Strasbourg, but with our Supreme Court". That was what was behind my asking the question, but maybe it is more appropriate that we will have someone else that will have a view on that.

Michael Pinto-Duschinsky: I think that is right. With a former Lord Chancellor here, why rely on somebody like me for that? All I can say is that, in a non-legal, common-sense way, it does seem that the Court in Strasbourg has very wide-ranging and increased powers, and that some of those powers are very unpopular not only with Parliament but also with populations in many other countries. This is not just because nobody likes a decision to go against one, but because the workings of the Court are seen to be rather defective. Of course, that is something for which there is a process of reform, and I think we should not ignore the extent to which the Court has come under criticism for defects of the way in which it is constructed and operates. I think it would be a mistake to ignore those.

Q15 Lord Lester of Herne Hill: Before Mr Shepherd asks his question, I would grateful just to get this clear, and I will not be asking you any other questions. Forget about Europe and the European Court altogether and concentrate, if you will, only upon the role of our own courts. Assume we do not have a Human Rights Act at all,

so we go back to 1997. We are bound by the European Human Rights Convention, among other things, and if we do not give an effective domestic remedy, the case will be shipped off to Strasbourg. Do you agree with the way the courts have been behaving before the Human Rights Act, which is wherever possible they tried to interpret our law, including the common law as well as statute law, to conform to our international treaty obligations? That is what they used to do before the Human Rights Act. I would like to know whether you think that was sensible or the wrong thing to do.

Michael Pinto-Duschinsky: I think that the trend of decisions in Strasbourg was such that their expanded understanding of what was the meaning of the European Convention on Human Rights would have meant that, if the British courts had followed that, even without a Human Rights Act, there would probably have been some clash with the judiciary. In other words, I think the power of the domestic judiciary has also grown in various areas that would bring it into conflict with Parliament. So the answer to you, I think, is yes.

Q16 Lord Lester of Herne Hill Yes what?

Michael Pinto-Duschinsky: That there would have been a conflict and that it would not have been wholly accepted in those hypothetical events that you described. That is why I give some proposals about making the British judiciary more accountable. Any time you get a branch of government that becomes far more powerful, questions about the limits of its powers will then be likely to arise.

Q17 Mr Sharma: You have recommended renegotiation of the Convention by the UK and its Council of Europe partners because you consider that the European Court of Human Rights is undemocratic. Why negotiate to withdraw from the jurisdiction of the Court rather than to increase the democratic legitimacy of the Council of Europe?

Michael Pinto-Duschinsky: I think that I am not recommending a negotiation to withdraw from the Court. What I am recommending is that we negotiate making the Court work better, but I am saying that in order to go into that negotiation, we must bear in mind our ultimate right to withdraw from the Court if those negotiations do not go properly. If things become intolerable, rather than being in but ignoring their decisions we ought to take the honourable decision of going out. We ought first to negotiate; I think there are good grounds for negotiation.

My contacts who are friendly with senior members of the Court suggest that many of our concerns are shared within the bureaucracy of the Council of Europe itself and are shared within other countries. I think there is a willingness within the Council of Europe and the Court itself to look very carefully at its operations and that starts with the Interlaken Process—there is a forthcoming meeting in İzmir—and then one can take that further. I am looking into going into negotiations that are quite sincere but business-like as well.

The democratic problem of the Court is that it comprises 47 countries and 800 million people, and it is very difficult to devise a form of political accountability that takes

account of that huge territory and range of persons. For example, the Parliamentary Assembly of the Council of Europe is unlikely to become a really effective control body and our input into the parliamentary assembly, as one of 47 countries, is going to be relatively small. It is inherently a difficult problem to provide democratic accountability for a Court that has such an expanded range of countries who are its members.

Q18 Lord Bowness: My questions really follow on from what Mr Sharma has said. Can I just ask you, by way of supplementary, about this observation that you have just made and you made in your evidence to the House of Commons? You said we can withdraw from the Court but not the Convention. Where would that actually lead us in practical terms?

Michael Pinto-Duschinsky: If we said, "We do not like the way in which the European Court works", for the various reasons that I think the House of Commons has put forward very strongly, "but it is not that we want to torture people or deny the right to family life or freedom of expression; we will incorporate that in British law"—exactly the same convention or a British Bill of Rights that includes all of the Convention rights and maybe more—the effect would be that they would be judged before British courts and not before an international court. I think that is also an option.

Q19 Lord Bowness: Is that not tantamount to withdrawal from the Convention then?

Michael Pinto-Duschinsky: No. If you withdraw from the European Convention it means that you withdraw from the provisions of that Convention—that you say, "We will torture". I am not recommending that any of those articles of the European Convention on Human Rights is in question. I do not think anybody questions them. What is in question is the implementation method, and we do have a choice as to whether or not we want that Convention implemented by an international court. That depends a lot on the operation of that international court.

The Chairman: Could I allow Mr Shepherd a supplementary there?

Lord Bowness: Yes, I will return to the script after that Chairman; I am sorry.

Q20 Mr Shepherd: This Convention was very tightly drawn by the British input into it back in the very beginning—very tightly drawn. What we have had is a couple of court cases, and we have seen the European Court of Human Rights take upon itself the role of a living instrument, so it interprets as it goes along. The division that strikes Parliament, and clearly came up in the case of the prisoners thing, is that this extension went far beyond how the original drafters on the British side drafted it, and as was reflected in the original charter. That is where it lies. The argument then moves on that they have taken upon themselves a role through *Golder* and through *Tyrer* that makes them a living instrument and they therefore extend this, using all manner of instruments to do it. Who is supreme in this equation? Is it Parliament? Is it our Supreme Court? Who?

Michael Pinto-Duschinsky: When you say that it was drawn up tightly, I think you are referring possibly to the intentions of those who—

Mr Shepherd: No I am not. I am talking to the original articles—the original articles—not the protocols added on subsequently.

Michael Pinto-Duschinsky: But if, for example, you have the freedom of expression or privacy, or the others, they can be drawn tightly, but the very nature of any Bill of Rights is that it is drawn up in general terms. That is the character of these documents. As I recall, Lord Jowitt, who was the law officer in the Labour Government—

Mr Shepherd: He was Lord Chancellor.

Michael Pinto-Duschinsky: He said at the time, "Look, if we subscribe to this there will be some unforeseen effect", because however tightly your intention is, the very nature of these general documents is that they open the door to very broad interpretations. That I think is the core problem of bills of rights in generalised terms—that you can mean torture to mean torture, but then with the *Tyrer* case and others judges can expand them beyond their original meaning. Once they are expanded well beyond their original meaning, we find that we are in a system that had not been anticipated, with judicial power in a far broader range than would have been there before.

Mr Shepherd: This is a monumental constitutional change, the setting up of a court beyond the jurisdiction of these islands—so, that of itself. So they had no way—the

Jowitt and the Attlee Government—of anticipating how this court and an entirely different legal system based on civil law would operate. That is the only background point that I would really make on that.

Michael Pinto-Duschinsky: I agree.

Q21 Mr Shepherd: They were mindful though that it had to be drawn extremely closely, hence why it is that we came to vote on the Floor of the House of Commons in respect of prisoners. This has nothing to do anywhere with any of the pieces of paper associated with the Court until it starts making its judgments—the Strasbourg Court—on these matters. That is the only point that I was trying to get and therefore clarify in my mind how you saw the relationship and the order of these. Judges may extend, but that is a very fraught and very argued case in our legal system—the common law system; the English system, the Welsh system and Irish system. This is very deferential to how judgments have been made.

The Chairman: Mr Shephard, you have made your point.

Mr Shepherd: Sorry, I have made the point.

The Chairman: Would you wish to respond?

Michael Pinto-Duschinsky: I think I completely agree with that point—that we have something now that is far wider and more important than it seemed when it was created. I am mindful of a seminal article written in 1984 on public law by Lord Lester on the circumstances in which individuals were allowed to make a reference to the European Court directly. At that time, I think nobody could have possibly dreamed

that the matter would be of such importance as it is now. As I understand it, it never even went to the Cabinet when the decision was taken. And so, I think we have come into a new system of judicial power that was not anticipated, and we are now facing the consequences and have to look very carefully at the relationships between different branches of Government within the UK and our relationships with the Council of Europe. I hope that that can be done in a constructive, intellectually valid and friendly way, but we are faced with a major new situation and a changed constitution, and we have to realise that.

The Chairman: We have three short, succinct questions for you—from Lord Bowness, Mr Raab and Lord Lester—and they will have to be questions and not statements.

Q22 Lord Bowness: Very briefly. The Secretary of State for Justice has said he intends to use our presidency of the Council of Europe to initiate reform of the Convention and the Court. Can you indicate what you think the priorities would be? Who shares our/your enthusiasm for that process? How realistic is it that we would achieve it? Have you asked the FCO for their views on your proposals?

Michael Pinto-Duschinsky: Those are leading questions. The answer is that I have asked for at least one authoritative opinion from within the FCO. It is, I think, for them to talk rather than me, if that is appropriate. I have spoken to senior people in the Council of Europe; I have spoken and will speak with them. My impression is that there is, as they have told me, an open door because it is realised within the Court itself, and certainly within the bureaucracy of the Council of Europe, that everything is

not right. As one person told me, the fed-upness has become much greater and I was told, "It is not only you, but various other countries". Three other countries in Western Europe were named to me and I would rather not go into that.

Q23 Lord Bowness: May I interpose there just hopefully to take things on? I understand that you may not wish to be specific, but are they countries that you might describe as long-established democracies—

Michael Pinto-Duschinsky: Absolutely, yes.

Lord Bowness: And they are members of the Council of Europe, or is it ones that might have an interest in—

Michael Pinto-Duschinsky: No, I mean highly developed Western European democracies where the rule of law is part of their established system. The scope of the Court and the operations have so expanded that I think it has reached a boil-over point because, really, it is doing too much now. The realisation that we need to look for a court that is fitter but leaner is there. Virendra Sharma's question as to how that can be achieved intellectually is to me the key question, which is why there is keenness within the Council of Europe, as well as over here, to explore the difficulties of the question he asked about how one differentiates between core and periphery. But I do think there is that will.

Q24 Mr Raab: I think some of us feel that there is an issue here about separation of powers arising from the living instrument and the idea of judicial legislation. The key issue, at least as I see it, is the question of democratic accountability over the

Strasbourg case law. You have two options, it seems to me. The common law is quite creative in and of itself—one only has to think of tort law—but has direct accountability through being overridden by statute and the will of Parliament. Or you can go down the US approach, whereby you have democratic accountability through the nomination of judges. We seem to have neither of those democratic checks, and yet there is this erosion of the legislative function. As a political scientist, are you aware of any other jurisdiction that has judicial legislation but neither of those democratic checks? I am thinking of a mature democracy.

Dr Pinto-Duschinsky: I would have to take advisement on that question as well, but I think I can answer what is beneath it. As far as I can see, in prisoner voting only 3% of members of the lower House voted in favour of the decision taken in the European Court. That means that there is an underlying clash, and, when you have that, the decision of our elected legislature is something fundamental and must be taken extremely seriously. Therefore, however we explore the next steps, we must look very carefully at ways in which democratic accountability can be made compatible with this increased judicial role. I would rather set out the question today than give a premature answer, because what has happened so far is that people have not realised there is a crisis brewing, and now it has come out in the open and we realise there is something we need to deal with. I think that is what your book and various other developments have brought to the fore. Therefore, a slow and deliberate answer to your question is what we now need.

Q25 Lord Lester of Herne Hill: Would you agree that the following is correct: first, that the right to vote in Article 3 of the First Protocol came in because the Churchill Government, unlike the Labour Government, accepted that protocol signed by Anthony Eden? Second, would you also agree that it was after the end of the Cold War that all the Member States of the Council of Europe decided on a binding obligation to accept the jurisdiction of the European Court? Third, is it also not right that under Article 46 of the Convention every state has a binding international obligation to abide by a final judgment of the Strasbourg Court?

Dr Pinto-Duschinsky: I can easily answer yes to those questions. I think we do have an obligation now, but if the existence of that obligation is so intolerable to the vast majority of our legislature then we have a situation that we have to take seriously into account. One cannot just say that we are obliged to obey if Parliament is dead set against this and, therefore, the will of Parliament is merely ignored. It is a crisis and we have to solve it in some sensible way.

Q26 The Chairman: Thank you very much for your evidence today. You were most succinct.

Dr Pinto-Duschinsky: It has certainly been one of the most difficult pieces of evidence I have had because of the technicalities. If there are any follow-ups to questions that I have not answered properly, please let me know. I shall be more than grateful to put in a written answer.

Examination of Witnesses

Rt Hon Lord Mackay of Clashfern KT, [former Lord Chancellor], and **Professor Philip Leach**, [London Metropolitan University].

Q27 The Chairman: Good afternoon. For the record, could you introduce yourselves, please?

Lord Mackay of Clashfern: I am James Mackay, Lord Mackay of Clashfern, a Member of the House of Lords, and I have been, as has been referred to, Lord Chancellor for a while.

Professor Leach: I am Philip Leach from London Metropolitan University.

Q28 Lord Dubs: I would like to ask both of you this question. In your view what would be the practical impact of the refusal of the United Kingdom to implement the Court's decision in the *Hirst* case for the Council of Europe?

Lord Mackay of Clashfern: So long as we are members of the Council of Europe, having subscribed to the European Convention on Human Rights, we are in breach of a binding obligation as a state by not observing and giving effect to a final judgment by the Court in a case to which we are parties. That is the practical effect of it. We are in breach of an international obligation. Until now our nation has treated international obligations with some seriousness, for example bringing us into a great war.

Professor Leach: It is very clear that there was a binding legal obligation to comply, so we are in breach. What it will mean practically is that a series of steps will be taken by the Committee of Ministers, which has the formal role under the Convention to supervise the implementation of judgments. The principle is very clear. The Committee of Ministers may also consider taking infringement proceedings. There is a new mechanism available to the committee—it was introduced only in the summer under Protocol 14—where a state fails to comply with a judgment. Because of the *Greens* decision making direct reference to the failure to implement *Hirst,* we may well see infringement proceedings and the Committee of Ministers taking the state back to the Court. It has not yet been used so we have to wait and see.

Q29 Lord Dubs: It has been suggested that any wider international diplomatic impact of the actions of the United Kingdom on the membership and efficacy of the European Convention on Human Rights is outweighed by the overriding need to protect the sovereignty of Parliament from judicial interference. What do you think?

Lord Mackay of Clashfern: So long as we as a nation have subscribed to this treaty—there are always options—we are bound to give effect to it. That is the way I see it, and that is a matter of obligation, not a matter of looking to see what punishment you might expect to follow. It is a question of doing what is the right thing to do in terms of our international obligations at the present time.

Professor Leach: The issue of sovereignty is carefully nuanced within the Human Rights Act in the domestic system. Even at Strasbourg level the traditional approach

of the European Court, having found a judgment, is to leave to the state precisely how compliance should be taken forward. It has done that in relation to the prisoners' voting right case. It leaves to the state how to do that. That is where Parliament should and must have a role in precisely how to respond to *Hirst* and *Greens*. Strasbourg is becoming more directive and interventionist in my view because of the problem of systemic, repeated human rights violations across Europe that are not being sorted out. Those problems are coming back to Strasbourg. I think that in this situation if states do not comply Strasbourg will get more interventionist, but their principle is to leave it to states to decide how to comply.

Q30 Mr Sharma: Professor Leach, is conflict between judgments of the European Court of Human Rights and national parliaments rare? Can you give us any examples of how the Committee of Ministers has approached these conflicts in the past?

Professor Leach: It is very rare to have such direct conflict. I would preface that by saying that the implementation of Strasbourg decisions can be problematic. In my view there are two primary areas where implementation is problematic across Europe: first where there is a long-standing interstate political controversy, of which northern Cyprus is one example; the other context would be where there are fundamental structural, endemic problems, such as the failings of court systems, for example in Italy and countries like Ukraine, as to the non-implementation of domestic court decisions. So there are problems of implementation but they usually have those kinds of backgrounds.

The instances of parliaments being seen to suggest that there should not be compliance are extremely rare. Before I came here I took a very quick and informal poll. I contacted a senior official in the European Court, a senior person in the Committee of Ministers secretariat and a senior person in the Parliamentary Assembly. The one example that they came up with was a case 20 years ago: the case of *Belilos v Switzerland* from 1988. In that case the Swiss had entered a reservation which was then declared invalid by the Court and the Court went on to find a violation of Article 6: the right to a fair hearing. There was then a vote in Parliament proposing to withdraw from the system but it was defeated. That is the one example of which I am aware. Usually, there are problems where there is political conflict like the northern Cyprus situation, the situation in Moldova: the *Ilaşcu* case relating to the treatment of people illegally in Transnistria. Those kinds of endemic political problems create great problems, but the instances of parliaments promoting refusal, as it were, are very rare as far as I am aware.

Q31 Mr Sharma: After the introduction of the Human Rights Act 1998, have domestic judges adopted an increasingly political role that marginalises Parliament?

Lord Mackay of Clashfern: I do not think so. Certainly, Parliament is not marginalised in our domestic system because the Human Rights Act made it clear that judgments of the Court in relation to Acts of Parliament were to be in the form of declarations of incompatibility, leaving it to the sovereign Parliament to take account of these declarations and the responsibilities that Parliament has under the

international obligations to which we referred. That balanced carefully the situation of Parliament and the courts. As far as the Strasbourg Court is concerned, our courts are under an obligation to have regard to the judgments of the Strasbourg Court. They are not obliged to follow them but you have to take account of the fact that if the court in Strasbourg has decided a particular case, and the Supreme Court is dealing with exactly the same case, the Supreme Court will be under the Strasbourg obligation to give effect to the judgment of the Strasbourg court. As far as I know, no judgment of the Supreme Court here has conflicted with a final judgment of Strasbourg in a case to which we were parties.

Professor Leach: I do not want to add anything.

Q32 Mr Raab: Professor Leach, what is your understanding of the interpretation of the Convention as a living instrument? You will be aware from *Hirst* that there was a substantial minority of the court that dissented. The reason they gave was, "It is essential to bear in mind that the Court is not a legislature and should be careful not to assume legislative functions." I wonder whether you feel that the legislative instrument doctrine had eroded the separation of powers.

Professor Leach: I do not think so. The living instrument doctrine has always been a fundamental part of the European Convention and it is inevitably so in relation to a broadly-based set of principles. You set out rights that are broadly phrased: the right to privacy and right to freedom of expression and so on. Of course you must have judges interpreting those rights. The living instrument principle means that when you

interpret, for example, the right to private and family life, home and correspondence it is a question of trying to work out what that means today, not what it meant to those who drafted the Convention in the 1940s.

I do not take it at all to be a question of judicial interpretation. I think that the Court is quite a conservative body; it moves slowly and gradually. What it has done is develop areas of law that have led to the protection of some of the most vulnerable people across Europe, for example the Roma. In very recent years it has developed areas such as human trafficking, domestic servitude and sexual violence cases that have provided protection for some of the most difficult cases. It has done that by applying, for example, the concept of positive obligations that are not necessarily written into the Convention. The Convention is typically phrased in negative terms, for example that a state shall not kill or torture, but from those negative principles there are, as we know, positive principles. The judges of the Court have developed those carefully. It is a conservative body in many ways and moves slowly. I think it is an inevitable and important part of the system.

Q33 Mr Raab: To follow up one point, you mentioned that it had always adopted the doctrine of a living instrument. I believe that was first introduced in *Golder* in 1975. You have also talked about developing the doctrine of positive duties. That was something that came in very much through judicial legislation or development of the case law. I thought you put it very eloquently; the Convention really talks about negative liberty or rights. What we have seen is the development of positive rights.

This is a creative function. I want to ask you whereabouts in the Convention the doctrine of a living instrument is set out. I think Article 32 talks about the interpretation and application of the Convention, and it strikes me that, whether you like it or not, the court has taken a much more creative role than perhaps you give it credit for. Of course, the judges talk about this and openly admit, in fact celebrate, the fact that they engage in a creative role.

Professor Leach: But if you are to consider what the right to life or the right to private and family life means now you have to take account of society's views about those fundamental concepts, so it cannot be frozen in terms of the way the drafters conceived those rights in the 1940s. I give one example from cases in which we have been involved in the Russian context. Take environmental cases. There is no mention in the Convention of the environment; there is no mention of health rights as such, but the Court has developed under Article 8 a series of cases about severe environmental pollution. I think that is absolutely right and justifiable. If there is severe environmental pollution it affects your right for respect for your private and family life in the home. I do not see a problem. I do not see that the European Court has developed this too far at all; it has been a very slow, gradual process.

Q34 Mr Raab: With respect, Professor, you do accept that they have developed it creatively but it is not borne out in the strict letter of the Convention. The second limb of this is you are aware, under the Vienna Convention on the Law of Treaties, that as a matter of treaty interpretation if the text is not clear on the face of it you

should go to the negotiating record—the travaux—which makes it very clear, for example, on prisoner voting that it was not intended. I just wondered whether you thought the Court was right to step outside the bounds of normal international treaty interpretation.

Professor Leach: I do not think it is doing that. It is interpreting the Convention in the way that has always been anticipated, so I do not agree with that proposition.

Q35 Lord Lester of Herne Hill: Is it not right that in the *Golder* case the Court had regard to the Vienna Convention, which says that you can have regard not only to literal interpretation but to the object and purpose of a treaty? Is that not what the European Court has done and what British courts have done too?

Professor Leach: Yes, I agree.

Lord Mackay of Clashfern: It is very hard to envisage a court that would not do that if it was going to make sense. If you are to read a document, you have to have regard to its purpose and object if it is to be a genuine interpretation. A purely literal interpretation would not I think meet the aspirations of most people who expect the law to be reasonably administered and applied.

Q36 Baroness Stowell of Beeston: Lord Mackay, perhaps I may come back to the issue about which Mr Shepherd and Dr Pinto-Duschinsky talked earlier: the position of the UK Supreme Court and whether the suggestion that it is subsidiary to the European Court of Human Rights is accurate under the Human Rights Act.

Lord Mackay of Clashfern: In my view, the Supreme Court under the Human Rights Act 1998, like all other courts in the United Kingdom, must have regard to the judgments of the Strasbourg Court, but when it comes to a case that is decided in Strasbourg by a final judgment by reference to the treaty itself, that is binding on the Member States, and of course the Supreme Court would give effect to that. The Supreme Court is dealing with the Strasbourg convention only indirectly by testing the statutory position in the United Kingdom by reference to Strasbourg jurisprudence. All it does is to say, if it concludes that there is a difference between Strasbourg jurisprudence and the Convention and the statutory law here, that the statutory law here is incompatible with the Convention. It is then left to Parliament to do what is required in the way of bringing our law into conformity with the Convention.

I should perhaps mention in that connection that that seems to me to be a very reasonable system. Long ago I was counsel for the United Kingdom in cases involving corporal punishment in school. The Court held that the education authorities in the United Kingdom had to give effect to the philosophical as well as religious beliefs of parents. Therefore, if a parent was against corporal punishment for his or her child, the public authorities would not be able to administer it. That could have been met by some kind of statute here that perhaps envisaged that. Those of you who are old enough will remember that there were various attempts to do that. Ultimately, Parliament decided that the way to implement the Strasbourg convention and judgment on the Convention was to abolish corporal punishment in

schools altogether. That is something that the Supreme Court here with all its powers could not have done; it was not in existence at that time, but there are options in conforming with Strasbourg. That is why it is left to Parliament to decide. But I do not think that the framers of the Human Rights Act thought that one of the options was to refuse to do anything about it at all. I feel pretty certain it was expected that something would be done but the precise options would be very open. In relation to prisoners' rights, for example, it has to be remembered that that was a protocol right. It came out of a protocol, not the original convention. The conclusion was that deprivation of prisoners' rights was not something that automatically flowed in relation to the Strasbourg convention in the same way as, for example, liberty. You can refuse liberty as a result of conviction. That was the Strasbourg judgment, but the way in which it should be implemented is very open.

Q37 Lord Bowness: Lord Mackay, I refer to the *F and Thomson* case and the judgment of the Supreme Court that registration as a sex offender indefinitely was disproportionate without some opportunity for independent review. The Home Secretary explained to the House of Commons that she was disappointed and appalled by the judgment of the court, and I think there were similar strident comments from the Prime Minister at Question Time on the same subject. In your opinion does criticism by Ministers of judicial decisions under the Human Rights Act have implications for the independence of the judiciary?

Lord Mackay of Clashfern: I think the backs of the judiciary are broad enough to bear that kind of criticism. Whether it is wise is a matter for the people who use these expressions. But I must say that the judgment of the Supreme Court in that connection is based on the fact that after a long period of time some people might be able to demonstrate that they had improved. It may not happen to very many but that is the basic reasoning. There does not seem to me to be anything very extraordinary about that.

I may say that when an amendment to that effect was proposed in a recent Bill in the House of Lords, a Lady Peer, a Liberal Democrat, proposed an amendment to the same effect and I supported it. The Home Office at that time—it was during the last Administration—declined to have anything to do with it. I certainly thought it was a perfectly reasonable thing to do. Many people who transgress can improve. There is a lot of scientific evidence, shall I say, about people who abuse children and so on. I think the chances of retrieval are often quite small, but if they exist I do not think they should be entirely ignored, and that was what the Supreme Court in effect said. It seems to me to be highly reasonable, although it can strike different people in different ways depending on how they approach it.

Q38 Lord Lester of Herne Hill: Is it not right that 11 British judges came to that conclusion in the court of first instance, the Court of Appeal? The five Supreme Court judges pointed out, first, that the threshold for a review would be high, and, second, that there were lots of other countries like the United States, Australia, Canada,

France and so on which had some form of review, so the judgment they gave was in fact unanimous and quite narrow?

Lord Mackay of Clashfern: As I said, I am glad to know that all the judges who took part reached the same conclusion, but it seemed to me that when I supported my colleague's amendment tabled in the House of Lords it was a very reasonable point of view. I am not surprised that 11 judges came to it. I had better not say anything more.

Q39 Mr Sharma: Do you think that judges would retain their functional and perceived independence if they were ultimately appointed by Parliament?

Lord Mackay of Clashfern: I do not know that it would make very much difference. In our country the number of people who are eligible to be judges at the top level is not huge, but there is a huge element of choice. If you look at the process in the United States, I am not sure that it adds much to the qualifications that we have. A long time ago now I debated with the Chief Justice of Canada and Chief Justice of the United States at that time the appointment of judges and that sort of thing. I ventured to say that in the United States judges are appointed for their opinions, whereas in the United Kingdom they are appointed for their ability to form opinions after they have heard a full argument in the case. The Chief Justice of the United States said he thought that was true.

If you look at the hearings for persons appointed that take place in the Judicial Committee of the Senate hearings, they are all about their opinions and what they

said in an Article 10 years before and so on, whereas here I think we look for independence of mind and an attitude that is able to differ from an opinion that one has held before when one hears good argument to the contrary.

Q40 Mr Shepherd: Professor Leach, one of the things that slightly surprised me about the *Golder* judgment was that you said that it was well established, as I understood it, in the thinkings and workings in the European Court. Is that right?

Professor Leach: What is well established?

Q41 Mr Shepherd: The principle of the living instrument.

Professor Leach: Yes. It has been applied for 35 years since *Golder*.

Mr Shepherd: You said from the beginning. As I understand it, the *Golder* judgment was in 1975.

Lord Lester of Herne Hill: It was only the second judgment ever given by the court.

Q42 Mr Shepherd: Indeed. But in that judgment our counsel in front of the court argued that, "The United Kingdom had no intention of assuming, and did not know that it was expected to assume, an obligation to accord a right of access to the courts," that being the subject of whatever it was. The UK judge, Sir Gerald Fitzmaurice, also issued a strong dissenting judgment in *Golder*. He argued that the ECHR had broken entirely new ground internationally, making heavy inroads into some of the most cherished preserves. He went on to say that "such considerations

must be said not only to justify but positively demand a cautious and conservative interpretation, particularly where extensive constructions might have the effect of imposing upon the contracting states obligations they have not really meant to assume, or would not have understood themselves to be assuming." I am just trying to get my head round this because it seems to me this is the central conflict within our traditional view of law: assuming international obligations through a treaty obligation and then doing an act, which I think Lord Mackay's successor would say the English judges had not used as he had thought they would use it, by building on their own case law in respect of these matters.

Professor Leach: I think that if you have a broadly based set of fundamental principles like the European Convention or any fundamental rights system—

Q43 Mr Shepherd: But they were not broadly written.

Professor Leach: They are broadly written. You have to have a process of judicial interpretation. The living instrument principle has been applied consistently since *Golder*, the second judgment of the court, and I think quite cautiously. We can all have different views about individual decisions. Of course, sometimes the Grand Chamber is split nine/eight, so there is room for different views, but in my view the living instrument principle has been cautiously applied since *Golder*.

Q44 Mr Raab: Lord Mackay, we talked about judicial independence in the previous question. Less than half the judges in Strasbourg had any prior judicial experience

before assuming the Bench, if you review their CVs. Do you think that is a threat to the perceived credibility of the judicial independence of an international court?

Lord Mackay of Clashfern: Personally, I have always thought that judicial experience is pretty important in the authority that a judge carries, but the Strasbourg Court system allows for people with a somewhat wider background. You may know that there is a fair amount of feeling sometimes in this country that more academics should be involved in senior levels of the judiciary. For my part, as you will know by looking at the appointments, I did not feel able to do that unless the academic had judicial experience as well, partly because I felt that if people had borne the burden and heat of the day as a trial judge, it is slightly unnerving to find somebody who has no such experience suddenly to come in on top of them in the Court of Appeal or the House of Lords, but that is not a universally agreed principle. It is true that the Strasbourg situation is a little different. On the other hand, there are vetting procedures in the Council of Europe for the people who go on the Strasbourg Court and so on, and in a way that is rather like what Mr Sharma referred to earlier. They have a vetting procedure. I just hope that the vetting procedure always works. No human instrument is always perfect, but we have to hope that it works.

The Chairman: Thank you both for your evidence today; it has been most instructive.

Examination of Witness

Professor Jeremy Waldron, [Chichele Professor of Social and Political Theory, University of Oxford, and Professor of Law, New York University].

Q45 The Chairman: Good afternoon and welcome to the Joint Committee on Human Rights. For the record, could you introduce yourself?

Professor Waldron: I am Jeremy Waldron. I hold two positions. I am newly appointed Chichele Professor of Political Theory at Oxford and in the autumn I am a Professor of Law at New York University.

Q46 Lord Lester of Herne Hill: I should declare an interest, Professor Waldron, because I learnt my law at Harvard Law School. As you have heard from the previous evidence, the first judgment has thrown into sharp relief the legitimacy of judicial review of legislation, on which you have written extensively. Can you tell us briefly why you think that judicial review of legislation is democratically illegitimate?

Professor Waldron: I should preface my remarks. Much of the argument I have made about judicial review of legislation relates to strong judicial review, whereby a court can refuse to apply a statute that it judges is incompatible with, say, a bill of rights or a constitutional provision, as opposed to weak judicial review, which still leaves the ball in Parliament's court and does not allow the court to override a statute or strike it down.

Briefly, I think the argument, which has been talked about all afternoon at these tables, is that it is Parliament that has democratic legitimacy. It is true that in some countries there are shreds of democratic legitimacy in the appointment of judges but, compared with the legitimacy of an elected legislature, the position of the courts is quite deficient. I make two points. One is that we live in communities where there are great disagreements about fundamental issues of justice and rights. We disagree about the detail and interpretation of many of the rights. When those disagreements arise there is some thought by those of us on the democratic side that, if these disagreements have to be resolved by majority voting, then they have to be resolved by majority voting among elected representatives rather than majority voting among judges.

The second point very briefly is simply that I believe in our tradition, and in most of the advanced democracies of the world, legislatures have shown themselves capable of dealing responsibly and thoughtfully with issues of rights, bearing in mind that people will disagree sometimes with the decisions both of the courts and the legislatures.

Q47 Lord Lester of Herne Hill: I listened very carefully. As I understand your answer, your strictures apply particularly to what you call strong judicial review—the strike-down power of the United States Supreme Court—but they would not apply with the same force in our parliamentary democracy, where our courts, almost alone

in the common law world apart from New Zealand, have no power to strike down Acts of Parliament. Am I right about that?

Professor Waldron: That is exactly the distinction I would want to make. Of course, weak judicial review in this sense is a matter of degree and it can vary from a situation where a declaration of incompatibility may be issued and as a matter of convention is almost always complied with or responded to affirmatively by the executive or Parliament, all the way through to, say, a New Zealand situation, where there is no formal provision for a declaration of incompatibility, although such declarations have from time to time been issued.

Q48 Lord Lester of Herne Hill: What room is there in your legal philosophy for a situation where the legislature, parliament, is responsible for what John Stuart Mill called the tyranny of the majority? Let me give you a concrete case in which I was once involved. In 1968 our Parliament passed a law that deprived British citizens of East African Asian descent of their right to come to this country, held by the European Commission—on the basis of American case law as a matter of fact—to be an inhuman or degrading treatment or punishment because it was based on race. In your philosophy that is a situation where the legislature has expressed its view in accordance with the wishes of the majority. What room is there in your philosophy for the courts being countermajoritarian and protecting the fundamental rights of individuals or vulnerable minorities?

Professor Waldron: I certainly accept that there has to be such a role. The question is: exactly how is it to be performed? The first thing to remember is that nothing tyrannical happens to me merely by virtue of the fact that a view with which I disagree is made law pursuant to a fair decision. We have to be looking at very specific cases where reasonable people would say there had been a serious act of oppression by a majority. First, I think we have to be very, very careful not simply to use the words "tyranny of the majority" as a bad loser's riposte to a defeat in the Commons or somewhere else.

Second, everything depends on the mechanism by which the Court can act as a safeguard in these matters. In the United Kingdom, under the Human Rights Act in the scheme of the European Convention on Human Rights, the courts act to issue very important warnings effectively to the polity that, in their opinion, the limits are being transgressed or approached and it should pause and take it very seriously, and there are remedies available for implementing that. That seems to me to be an important function, coupled with the other functions laid down in the Human Rights Act, whereby the Attorney-General is required to give assurances that legislation conforms to the human rights provisions and so on. It is a spectrum of warnings. Sometimes the warnings are politically effective; sometimes they become effective by virtue of a convention of the constitution that declarations will always be affirmatively responded to, but it does seem to me to be a further matter to say that the courts should have the power, either by law or custom, to remove statutes from the statute book or strike down legislation.

Q49 Lord Lester of Herne Hill: That is very helpful. Our system is what you might call holistic, as you know, in that all three branches of government, judicial as well as the political, are bound to give effect to human rights. This Committee acts as a kind of buckler of the system in scrutinising compliance, questioning Ministers and reporting to Parliament, so our system is not judge-based in the sense that the United States system is judge-based. As I understand it, what you are saying is that that would accord broadly with your own theory, but could you explain how you would describe the different functions of the legislature from those of the courts in a case involving the tyranny of the majority in, if you like, one of those clear cases like the Nuremburg laws?

Professor Waldron: Indeed. We set up legislatures. First, we do not just take a quick poll among the members of an elected chamber on some issue; we set up enormously intricate procedures of legislation. Second, we insist that legislatures have a bicameral structure. Most advanced democracies have a second chamber. Noble Members present know from their experience that the House of Lords, the second Chamber, acts to scrutinise legislation with this sort of thing in mind along with others, such as issues of public policy as well as issues of justice and rights. You set up committee structures, such as this Committee, to address these matters. All of these are ways whereby the representatives of the community, elected and unelected, can address real concerns that may attend any piece of legislation.

That may become worrisome if legislation is rushed through or the deliberate slow procedures of Parliament short-circuit it, as they do sometimes—I have to say to my shame—in New Zealand where the unicameral legislature often legislates under urgency without the safeguards we are talking about. I believe that the process of scrutiny is important. I know that committees have no power to impose their will on Parliament, but certainly the second House can hold up legislation. I believe that the traditions of a parliament can certainly involve ways of checking and ensuring that, if there is any question about fundamental rights being abused, those questions are properly addressed.

Lord Lester of Herne Hill: I hope you persuade the Government and Parliament of the country you come from to adopt a committee like this one.

Q50 Lord Dubs: Does the current debate in the UK about whether to repeal the Human Rights Act and withdraw from the European Convention cause you to question whether we have a stable commitment in this country to the idea of rights?

Professor Waldron: I have certainly been astonished by the way the debate has flared up in relation to the issue arising out of the decision in the *Hirst* case. I had not realised there was that amount of resentment bubbling up beneath the surface of the administration of fundamental rights in the United Kingdom, so I am a little shaken by this. I had assumed—it was one of the things I grew up with—that the British Parliament had shown itself throughout the 1960s and 1970s capable of legislating and deliberating very carefully and thoughtfully on issues of rights. That was before

the Human Rights Act and they were addressing capital punishment, issues related to abortion and the decriminalisation of homosexuality. I go back and read those glorious debates and they show a Chamber that appears to recognise what it is like to debate issues of rights, to take a right seriously, to be profoundly aware of the interests that may be at stake and the interests that it is inappropriate to put in play against rights, to be aware that popular prejudice is not a reason for limiting a right and to be aware of the genuine interest that may sometimes have to be appealed to in order to limit a right. You read those debates and get a sense of that shared awareness in the Chamber. It would be a very sad thing if that legislative ethos of taking rights seriously were to be shaken. I hope that the wild proposals about withdrawing from the Council of Europe are not evidence of that, but I fear they might be.

Q51 Mr Sharma: In your writings you describe the right to participate in the democratic process as a right of rights. What do you mean by that?

Professor Waldron: It is a phrase from a tract written in 1829 by William Cobbett, *Advice to Young Men*. He said that we had rights of all sorts: property rights, personal rights and rights of liberty but they all depended on law and the right of rights was the right to have a say in the making of the laws. It is a right that conditions all the others and gives them their democratic flavour. I think that is an important insight. The phrase is not mine; it is his, but it is supposed to indicate that this is a kind of meta-right, a right that underpins the other rights. It is a little like the right of access

to the courts, or the right of access to law or representation generally. It is a systemic right and is important for the relationship between a person and a legal system.

Q52 The Chairman: You gave examples of Parliament taking rights seriously in its debates back in the 1960s and 1970s. If you scroll forward, are there any other examples you can think of in more contemporary times?

Professor Waldron: There you catch me out. I have been living in the United States for 25 years now and I have not followed recent debates on these matters. I would hope there were, Dr Francis, but I am not sure.

Q53 Mr Raab: I wanted to ask you to answer the same question. First, I am just curious as to whether you have read the debate in the House of Commons on prisoner voting. The thrust of the concerns related less to prisoners getting the right to vote and the issue of judicial legislation, which might arguably be an example of the adage you just quoted about access to law-making. The President of the Supreme Court has said openly that it is open to that court to refuse to follow Strasbourg rulings and send them back to Strasbourg. If that is the case on a matter of interpretation of law, thinking back to your explanation of hard and soft judicial activism, surely it ought to follow also as a matter of principle that where you have judicial legislation, Parliament and the elected lawmakers can say the same thing.

Professor Waldron: The constitutional position, as I understand it, is that in the end Parliament has control over the legislation that prevails in the country. The executive has entered into a number of obligations, which will affect how Parliament can

discharge that task. I read the debate in the House of Commons. It was a very lengthy one, as you know, and very interesting. It is worth remembering a couple of things. It was not a legislatively focused debate, and I think that is very important. It was an excellent debate as far as it went but it was not legislatively focused, whereas the debates I was talking about relating to the Bill on the medical termination of pregnancy and the measures for the repeal of capital punishment and so on were all focused. They were Second Reading and Committee stage debates on matters of legislation. I believe that the procedures for legislation are very important.

Perhaps I may make one other point about something I found missing from the Commons debate on prisoner voting. The position that I defend, the misgivings I have about judicial review and the democratic basis that I embrace as a foundation of that position run into their deepest challenge when the majoritarian institution is actually addressing the basis of its own electoral credentials. It runs into the deepest challenge where the parliament is actually addressing the right to vote and the integrity and continuance of the electoral and democratic process. In the United States—this is not a position to which I subscribe but a great many people do—it is said that the strongest argument for judicial review, or a judicial check on legislative activity, is when the legislature is somehow messing with the basis of representation, because that means the legislature itself is beginning to call into question the only basis of legitimacy that it has in these matters. Parliament's legitimacy and supremacy in our constitution is not based upon history and is not an abstract proposition; it is based on the fact that the leading part of Parliament has electoral

credibility. Parliamentary decision-making and legislation is legitimate because people have the right to vote, not the other way round. Parliament is a guardian of that.

Q54 Mr Raab: I think the matter that activated a lot of people was that this was a new right in the sense it was not in the Convention. It was clear from the travaux that it was not intended and it arose even under *Hirst* in 2005. Therefore, I do not think Parliament felt it was tinkering with the electoral system but the other way round. I wonder whether that affects or influences your perspective.

Professor Waldron: It is a fair point. We are also bound by the International Covenant on Civil and Political Rights, Article 25 of which requires in much clearer terms than the ECHR protocol the individual right to vote. The United Kingdom signed and ratified that treaty. So, it should have come as no surprise to them that, as a democracy and a signatory to this great worldwide human rights instrument, it was bound to respect the right to vote.

Q55 Mr Raab: Do prisoners vote in the US?

Professor Waldron: In some states they do and in many they do not.

Q56 Mr Raab: So, the US is in flagrant violation of the ICCPR.

Professor Waldron: There is no doubt about that, although the US almost certainly entered a reservation when it acceded to that treaty. The reservation itself might be dodgy, but you are absolutely right.

Q57 Lord Lester of Herne Hill: To be precise about it, it was the first protocol to the Convention that introduced what is called the political democracy guarantee, from which the right to vote has been interpreted. As you say, in 1976 when we ratified the ICCPR we built upon that. But is it not right that under our constitutional system, as in New Zealand as well, we have an international obligation binding upon all three branches, including Parliament, to abide by our treaty obligations? Therefore, although we talk about parliamentary sovereignty that must be exercised in a way that is also compatible with the law of the land; it is part of our international legal obligations.

Professor Waldron: Yes, I agree with that entirely. Part of the point of being a sovereign is that you take on obligations. Both the ICCPR and the European convention are obligations. Certainly, the ICCPR is and always has been quite explicit about the right to vote.

Q58 Lord Dubs: I wonder whether I might stay with the prisoners' right to vote case. I know you have talked quite a lot about it. In your personal view do you think there can be any restrictions on a prisoner's right to vote in a democracy, or should there be?

Professor Waldron: As a personal matter, I think not. This is such a fundamental right, the right of rights, that the grounds for limiting it would have to be very serious indeed; so the issue of proportionality looms very large. I know people differ on these matters, but since we believe that the most fundamental rights should remain with

prisoners even during their incarceration, the notion that we can take this one way just because it seems easy to do it is, I think, a serious mistake.

Q59 Lord Dubs: Therefore, you think that Parliament should accept the *Hirst* judgment.

Professor Waldron: I think Parliament should accept the content of the *Hirst* judgment. If it were up to me, this is something that Parliament would arrive at by its own motion.

Q60 Lord Dubs: You mentioned that you read with interest the debate in the Commons, although you did say it was a debate about opinion rather than a debate leading to legislation.

Professor Waldron: Yes.

Q61 Lord Dubs: What do you think the courts should do if Parliament held a full and conscientious debate leading to a legislative position, but decided by a majority to uphold the current ban on the right to vote?

Professor Waldron: The current blanket ban on the right to vote?

Lord Dubs: Yes.

Professor Waldron: Presumably it would do so pursuant to a Section 19 assurance by the Attorney-General that it was compatible, or not? What would you have in mind?

Lord Dubs: Presumably, yes.

Professor Waldron: The first thing is to imagine what the Strasbourg Court would and should do. I imagine that Court would hold that that was unsatisfactory and rule against us again. The British courts would be bound to take notice of that ruling and might themselves reach the judgment, even independently of Strasbourg, that this was incompatible with the protocol. It seems to me that then you would have a very serious confrontation on this issue. The role of the Court, at the very least in these circumstances, would be to alert the public that this was not a trivial matter but a hugely important one, and not a right to be taken away lightly and have that warning. To move to a system where no such warnings were countenanced within the constitutional system—this is where I am in agreement with Lord Lester—would, I think, be a grave mistake.

The Chairman: Thank you very much for your evidence.