The Brick Court Chambers Public Law Event 2014
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"Is it time for the common law to break free from Europe?"
A panel discussion with audience questions

Panel: Dominic Grieve QC MP, Lord Judge, Bella Sankey, Martin Howe QC, David Anderson QC
Chair: Shaun Ley, BBC
Introduction: Judge Fidelma Macken SC

Transcript of audio recording

FIDELMA MACKEN SC

Welcome everybody. It is quite an impressive turn out, so I hope you will all enjoy yourselves as much as I am sure I am going to. I have the great pleasure of being asked to do the introduction to the topic this evening and I follow on from Sir Sydney Kentridge who took this position last year when we had an equally wonderful public law forum sponsored and promoted by Brick Court, under the same chairman I might tell you, and for those of you who were there you will remember how fascinating the exchanges were and how entertaining and informative they were also. The topic this evening, which I find rather fascinating, it's a provocative topic "Is it time for the common law to break free?" without any additions or explanations underlying that and therefore if you wanted to be rather cynical you might say, that, well, break free from what? The common law court system as it exists in the United Kingdom? What my professor of property used to call the "continental foo faw" which was expressed by him in relation to changes in the Irish law relating to succession to get rid of the rules relating to primogenitor, that was his comment on it. Or, as I think we are going to be talking about, breaking free in some way from the alleged shackles of the European Convention on Human Rights by re-negotiating or re-casting the United Kingdom's relationship with the European Convention and more particularly with the European Court of Human Rights, and secondly by breaking free in some way from the group that mainly run us, that is the crowd in Brussels who legislate under the European Union and that other crowd, of which I was part for five years, namely the judges of the Court of Justice in Luxembourg. My own background is as a practicing barrister in Ireland. I have the pleasure and honor now of being part of the Brick Court family. But I spent five years as a judge in the European Court of Justice and I spent seven years in the Irish Supreme Court which although it is the court of final appeal is also, and always has been, a true constitutional court so I have a little bit of experience in the type of exchanges that are going to occur this evening and I have a couple of questions that I would like people to think about, particularly people

on the panel and I suppose in relation to the European Union, what I would like to know is, what exactly do the panel consider is the current common law of the United Kingdom? Or is the proposal in breaking free to go back to the common law as it was before the United Kingdom of Great Britain and Northern Ireland joined the European Union in the early 1970s with Denmark and the Republic of Ireland? Or is it the common law as it may be in 2015 or 2017 whenever you are going to have possible changes in government, political developments, referendum or whatever? Because it strikes me that if you are going to ask whether or not the common law should break free you need to know what it is you are asking to be de-coupled from what is the current position, and for example if you were looking at the common law and trying to suggest how it should be if you were breaking this common law free would you maintain any of the influences, for example, in the environmental area that have come from being part and parcel of being in the European Union? Or the public law developments that have come about by virtue of being part of the European Union, or how is it going to work? So that is certainly one question I would like to know.

On the convention side I think this is quite interesting from a constitutional point of view and for those who are going to be engaged or who are currently engaged in the debate about the drafting of a Bill of Rights or Charter of Rights. In Ireland we adopted a rather different approach to the approach adopted in the United Kingdom. We were signatories of the European Convention on Human Rights for many many many years but hadn't adopted it or ratified it and made it part of the national law, which is obligatory under our constitution. And when we did, we took a rather different approach, but a very constitutional approach which is common in many jurisdictions. We incorporated by virtue of a Human Rights Act, we granted people the right to look for a declaration that a particular activity was not in conformity with the convention on human rights, but we have a reservation, and the reservation is that the entire of the convention applies except in so far as it conflicts with provisions of our constitution and that might be something that would be the subject of comment or debate. We have run into trouble, or Ireland has run into trouble with the European Court of Human Rights, but it has never criticized that particular approach to being part of the convention or the manner in which the convention was adopted. On the other hand it is very interesting to see how the United Kingdom Human Rights Act has actually operated in practice and the reason I know something about this is because lots and lots of lawyers used to appear before the Supreme Court and cite many many cases from the House of Lords or subsequently from the Supreme Court on the basis that these cases were extremely relevant because they were cases concerning the convention on human rights. But if in fact some interested person who

wishes to carry out a doctoral program would like to analyse the way in which the United Kingdom's highest courts have applied the human rights act, I think you will find that in some cases it has been applied by the national judges in a way that is broader than the way in which the Court of Human Rights in Strasbourg adopts or interprets the same provisions, so I think that is quite an interesting thing. Now I am going to adopt at this stage, Sir Sydney's approach, which was stand up, say a little bit, and sit down as quickly as possible, so I am handing over now to the Chairman, Shaun Ley, who so wonderfully managed last year's event and being from the BBC I am sure is going to continue to handle tonight's event in a most entertaining, informative and very very pleasant way, so may I introduce, Mr. Ley. Thank you very much.

SHAUN LEY:

Fidelma thank you, all I can say is no pressure then! Fascinating, entertaining and informative. That sets a very high bar for the panel this evening but I think we can be reasonably confident that they are going to rise to the challenge. Let me introduce them to you for those who don't recognize them, although I am sure many of you will. Lord Judge was for five years the Lord Chief Justice of England and Wales. He retired at the end of September last year whereupon he made known his views about the European Court of Human Rights "it would make sense …" he told the Constitution Unit at UCL "for the Human Rights Act to be amended to express that the obligation to take account of the decisions of the Strasbourg court did not mean that our Supreme Court was required to follow or apply those decisions". Which is where Martin Howe comes in. He is a QC and one of the Conservative party's nominees for the Government's Commission examining the case for a new Bill of Rights. For the avoidance of confusion Martin's website says he "works to limit and reduce the excessive powers of the EU". It is just possible that his fellow Conservative Dominic Grieve might think some of his arguments a little 'puerile'. That was the assessment from the Attorney General for the plans announced last week by the Justice Secretary, Chris Grayling, for changing Britain's approach to the European Court of Human Rights and the convention it interprets. Dominic was Mr. Attorney for England and Wales as well as Advocate General for Northern Ireland for four years until he was re-shuffled out of the Government in July. It is not just cynically minded political journalists who think it was his opposition to those changes that did for him. If the Attorney General is ministers' impartial legal adviser inside government, David Anderson is the equivalent outside. For the past three years he has been the Independent Reviewer of Terrorism Legislation, which probably means he isn't always Teresa May's favourite lawyer. Practicing both

Human Rights and European Law he has appeared before the EU Court of Justice and the European Court of Human Rights. Back in July he warned that the definition of terrorism was beginning to catch people it was never intended to, adding, "foolish or dangerous journalism is one thing, terrorism is another". Perhaps you would let me have your card before you go, David, just in case. Or of course I could enlist the help of Bella Sankey. She is Director of Policy at Liberty, where she has worked for the last seven years. Also a barrister, her job at Liberty involves briefing parliamentarians on the human rights implications of draft legislation. Her campaigns against Government proposals include those of identity cards, 42 days pre-charge detention and the draft Communications Data Bill. All of three of which you will recall, in one way or another, were withdrawn. I think plans we are discussing tonight may well be in Bella's sights. Ladies and gentlemen, please welcome your panel.

Let's get right under way with our first question please which is from Paul Bowen QC of Brick Court Chambers:

PAUL BOWEN QC:

Q: Thank you, I hope everyone can year me. I am going to ask a question, to which I think I may know the answer, from each of the members of the Panel, but I may be surprised. My question is in view of the fact that we are going to remain parties to the Convention, and therefore the judgments of the European Court of Human Rights in Strasbourg will remain binding on us, is it legally coherent for us to limit those rights domestically? That is to everybody on the panel.

SHAUN LEY: Thank you very much. David Anderson?

DAVID ANDERSON QC:

Throughout the 20th century we were parties to the Convention, we ratified the Convention and we didn't give Convention Rights effect in our domestic legal order, although there were various cunning ways in which, particularly towards the end, people found ways of relying on them. So it might be a little harsh to say that by scaling back the degree of implementation we have, we descend immediately into incoherence. But when one looks at the specific proposals that are on the table it may be that that word is not entirely out of place. It seems to me that what it aims to address is either problems that don't exist at all, in particular, the threat or the supposed threat posed by the Human Rights Act to the sovereignty of Parliament, which the Human Rights Act is very careful to preserve, or problems that can't be solved. Mission creep on the part of the European Court, a lot of people think is a problem. But

it is not one that can be solved by meddling with or trying to reduce the nature of the domestic protection we have. And that is really what these proposals are about, as it seems to me. What they do achieve if they are given effect, is to reduce the protection that our own courts can give to our own rights or at least the rights of travelers, illegal immigrants, or people who might have suffered degrading treatment, and others that are singled out as possibly having too much protection at the moment under the national legal order. It does that by saying that only the most serious cases can be adjudicated by the national courts. Proportionality is said to be a political doctrine, very difficult to apply in the courts and it is suggested in some way that rights should be conditional on the proper discharge of responsibilities. It seems to me that the effect of all this is to empower the State against the people. It astonishes me that we are one of the few countries in the world who appear to have persuaded ourselves that rights that we have against the State are not a good thing.

MARTIN HOWE QC:

I am afraid there was an error in the premise of the question, in view of the fact that we are going to remain parties to the Convention. Now if you are referring to the Conservative Party policy announced at the party conference last week, that is not a fact. The policy is that either the Council of Europe accepts the proposals and agrees that they are in conformity with our obligations as members of the Council of Europe or the United Kingdom will give notice that it will withdraw from the convention and I mean, that seems to me a completely legally coherent proposal, whatever other views you might have on its merits or demerits. I would also say that the problem that these proposals are seeking to deal with, David referred to as "mission creep", I think that is really under stating it, it is far more than that. The fundamental problem is that we have a convention which is unobjectionable in its terms. We have a court at Strasbourg that has, not, interpretation is the wrong word, but has spent 60 years inventing entirely new doctrines not based on the wording of the convention, in many respects contrary to its express wording, and these have serious affects on this country. I do not agree that it does not impinge on the sovereignty of Parliament or on our democratic processes. This is an intolerable situation, I believe, and it has to be resolved in a clearer way.

DOMINIC GRIEVE QC MP:

Well, I have to say that there is, reading the paper, an uncertainty as to what is intended. Martin is quite right that one of the distinctions between this paper and previous utterances by some of my colleagues in the Conservative Party is that it is the first time that we have said that we would withdraw

from the Convention if the Council of Europe didn't accept our terms of membership. And the terms of membership are that the judgments in future would only be advisory on the United Kingdom whilst they would remain binding in international law on everybody else, which I think one moments scrutiny must incline one to the view, is impossible because it would destroy the convention system in its entirety and the ability of the Court in Strasbourg to get countries which are in fact frequently breaking human rights in a very clear way from respecting the judgments. But bizarrely the paper also includes such references as a passage saying that the ministerial code will need to be changed to say that Ministers must accept the sovereignty of Parliament. The only reason why the ministerial code ever crept into this debate is because on a number of occasions in the past, I have pointed out that to breach our international obligations is a breach of the ministerial code which says that the UK Ministers and civil servants must uphold our international legal obligations and the rule of law. So if Martin is right about the approach, I don't understand why that paragraph was kept in and this does seem to me, I have to say, to underpin the incoherence in this paper. It wants to change things, it claims that it wants to do is to give sovereignty back to UK courts to interpret the convention in its purest sense but it then actually says that what the convention will be is a convention minus because Parliament will micro-manage itself, the very thing it complains the court does, Parliament will micro manage the interpretation of the convention on crucial articles. All this in my view is a mistake in the approach. I would simply make this point about mission creep. I accept that there has been mission creep by the Court of Human Rights; partly I think it's the victim of its own success. It has become a final court of appeal for too many Eastern European Countries and it has started to impose a degree of uniformity but getting that changed can be done by diplomacy. Ken Clarke and I went to quite a lot of trouble in the Brighton Declaration to get change. One of the ironies was that even then the obstacle to getting change was that whilst many countries agreed with us, they go away and say we agree with you and two weeks later they come back and say well its terribly sorry but we can't do this because our NGO's tell us that you have sinister intentions towards the convention, which I have to say having read the latest paper would probably be correct. So no wonder that we didn't succeed in one of our aims which was to actually get the margin of appreciation in the text of the convention as opposed to in the pre-amble which was one of our diplomatic aims in the course of that negotiation. Because we are seen as coming with unclean hands to this particular debate. I have to say; I have spoken too long, time that I stop, I will just simply say this, the Convention has problems, but this paper is not the solution.

SHAUN LEY: Just to clarify when you talk about appreciation you mean a degree of discretion that individual states have and how far they apply decisions in the court?

DOMINIC GRIEVE QC MP:

Yes, which undoubtedly is something which the court needs to pay attention to and in one or two cases, ***Horncastle*** is one example, the political advertising case, they have begun to show a willingness to do. Long may it last. I am far from uncritical of the court's decisions.

SHAUN LEY: Bella Sankey you spend a lot of your time lobbying politicians and trying to get changes to draft Bills, what do you make of this one?

BELLA SANKEY:

I think the first thing to say is to reiterate the point that Martin made unbelievably that the premise of the question I think is slightly flawed because it is not clear that we would remain part of the Convention. In fact as Dominic has said if you take the paper at its word and then you also look at the response that we have already had from the Council of Europe, it would immediately bring about our exit from the Council of Europe if we were to implement the proposals that the Conservatives seek. So we would be withdrawing from the post-war Human Rights framework if we proceed along this path.

MARTIN HOWE QC: Sorry can I just make a slight correction, there is no proposal to withdraw from the Council of Europe, but just to withdraw from the Convention, they are different things.

BELLA SANKEY: To withdraw from the Convention which would probably bring about our withdrawal from the Council of Europe and perhaps even the EU while we are at it. But in any event it is legal nonsense what is laid out here in this Paper, for several reasons. If we diminish rights that are protected in domestic law it will only lead to more supervision from Strasbourg, the very thing that the Conservatives say they don't want to happen. Being the first country to de-incorporate the Convention is going to necessarily lead to the court to take a stronger look at the cases that would be brought there. It would become once again a Court of First Instance and the very sovereignty that the Conservatives say that they want to return to the courts and to Parliament will be hugely lost. It is also wrong to say, as is frequently cited in the paper that Strasbourg judgments currently usurp parliamentary sovereignty.

That is fundamentally wrong. You can see from the stalemate we have got to on the prisoner voting judgment that Parliament is indeed still sovereign and that has been not implemented now for almost 10 years. But apart from the legal contradictions and inaccuracies that you find in these proposals I think the bigger point, and the point that must be now widely aired in this debate, is the ethics of what we are planning on doing. We took a leading role in drawing up the Convention, signing it, ratifying it. We were the first to do so back in 1951. We have then sought to take principles, largely taken from our common law in the development over many years of rights principles by our judges here in the UK and we have sought to take a leadership role in the world in promoting those rights. We are already hearing at Liberty from those who seek to promote human rights in younger democracies around the world and more autocratic regimes, and they say that the proposals and the statements from our Prime Minister and senior politicians have already started to make their work harder in lots of countries around the world today.

SHAUN LEY: Thank you very much. Lord Judge, you have talked about the sovereignty issue as one that needs to be resolved. Do you think that this is a coherent way to do that?

LORD JUDGE:

I am not going to answer that question, I am going to answer…if I may say so, there is a separate flaw in the first question that we were asked. I think the issue of what is binding on us and how anything binding is to be implemented is an issue which has been fudged, fudged from the very start of the Human Rights Act. I wrote an article recently in *Counsel* because I read the President of the European Court of Human Rights saying that, after careful introduction, "this has the consequence that in some situations the rule of law ..", by which he is referring to the European Court in Strasbourg, "trunks the majority view, even expressed to a democratic process" by which he means Parliament. Now I myself think that is a very open question. I don't agree with him. I can see the argument which says we have signed up to the treaty; Article 46 presents us with a binding treaty obligation. I understand that. But treaties have never bound Parliament and the Act itself makes it plain and the discussions before the Act was enacted makes plain, that the British Parliament was not giving the European Court at Strasbourg the same authority and jurisdiction which it gave to the European Court of Justice implementing the European Economic Community arrangements. There was a debate, I think if I am right, the Conservatives suggested they thought that the new arrangements should be that Strasbourg should have exactly the same authority over British Courts as the Luxembourg court did but the opposition, or

somebody, decided that wasn't a very good idea. It is funny how time goes by, circles turn but some circles do inevitably turn. But we do have to face the fact that we have never had to address this ultimate question. Are we really saying, and maybe we are, that if the Convention court says prisoners must have a vote and there are arguments you can display about that, hither and yon, as many as you like, and there are respectable arguments on both sides, that somehow or other the British Constitution has to enable somebody to force members of Parliament to vote to repeal the prohibition on prisoners having voting rights. Now this to me is a very strange constitutional arrangement. Parliament is sovereign and yet if this argument is right we are saying, well a court in Strasbourg, 17 members of the court, a majority of 8 will do, can tell our sovereign Parliament how the members should vote. I don't think they will. They may think it's a very good idea, fine. But they are not going to be forced and even the Ministerial back row and all those members who are members of the Government, even with them voting you are still not going to guarantee that at the end of it the wishes of Strasbourg are going to be implemented in the repeal or the passage of an Act of Parliament. That is why I say this has been fudged. We argue about treaty obligations. We argue about what the meaning is of taking to account and actually, if we ask ourselves this question, how can it be, if I may say so, how can it be, that in Ireland they can pass an Act that says yes, we are going to be parties to the Convention, of course we are. Who could be against a prohibition against torture, who could be against a public trial, who could be against no arrest without reasonable suspicion. I mean these are pretty basic things. Yet if the European Court at Strasbourg, if I have understood correctly what was said earlier, decides that something must be done which contravenes the constitution of the Republic of Ireland, that doesn't have to be done and I cannot see the Constitutional Court in Germany saying "Oh yes if Strasbourg says we must do it, we must change our Constitution for this purpose, we will do it". So I think there is a very big question for the Council of Europe to address. My ultimate point, if I may say so, is we do not know and we have never yet established what is actually binding. Where is sovereignty? That is the big question.

SHAUN LEY: Thank you very much. Anyone want to come back on that?

[?]**:** I will just come back on one point, because I don't, I should point out I don't disagree with Lord Judge's analysis. Ultimately I think Parliament is sovereign and if you are going to have a written constitution and it is quite clear that Parliament can refuse to do something, and if Parliament refuses to change primary legislation to meet a judgment

of the Court of Human Rights, Parliament refuses to enact primary legislation to do that. The question for me, I think over the last few years, has been the position of the Executive, which is I think distinct. The Executive, as servants of the Queen, in the Queen's name, sign up to international treaties. As long as we are signed up to international treaties it is our duty to observe their terms insofar as we are able, and that means that we should not connive at trying to prevent the implementation of the treaty obligation. Although it can mean if it is impossible to implement a treaty obligation because Parliament won't do it, that's a different matter. We also, I think, have to face up to our responsibilities, which we shouldn't breach treaty obligations and if we don't like a treaty we should pull out of it. Or we should try to re-negotiate it, we should do a number of things. But we should not breach our international legal obligations, because their lies anarchy and chaos in the international order. It is very simple and straightforward.

SHAUN LEY: Thank you all very much. Just before I move on to our second question, I should say they are a pretty robust bunch as you probably know on this Panel, so if you wish to clap, heckle or otherwise make known your views, please don't feel shy to do so. Let us move on to our second question and it is from Emma Fenelon, from The Odysseus Trust.

EMMA FENELON, THE ODYSSEUS TRUST:

Q: Thank you very much. I was wondering, and this is a question for everybody on the Panel, to what extent the legal profession has a responsibility to rebut wilful misinterpretation of the Court of Justice of the European Union judgments and judgments by the European Court of Human Rights by the press, but in particular by politicians?

SHAUN LEY: Thank you very much Emma, Martin Howe?

MARTIN HOWE QC:

Well no doubt it does. I also think the legal profession, or at least the individual members of it, have a duty to criticise judgments of these courts where they are not supported by the international treaties which they are purported to interpret and apply.

SHAUN LEY: Short and to the point. Dominic Grieve?

DOMINIC GRIEVE QC MP:

I certainly think that there is a duty on all of us to rebut, not just lawyers, politicians as well actually. To rebut the views which are expressed which are erroneous but this is a very difficult task. I remember once a conversation with the editor of The Sun in which I pointed out on two occasions on which The Sun had claimed that the European Convention on human rights had allowed individuals to have access to pornography in their prison cells and she was very upset about this, so upset that she cancelled the invitation to lunch which I was due to receive from the Board of The Sun a week later to show her displeasure, so politicians are certainly reminded by editors of the press when they disapprove of their remarks that the press might sometimes get it wrong.

SHAUN LEY: Bella Sankey?

BELLA SANKEY:

I think that is a fantastic question. I think there is a huge responsibility of members of the legal profession to do some myth busting and respond appropriately when you get these stories in the press that are dreamt up, fabricated and seeking to miss-inform. I think from Dominic's reference, it has been pretty clear for many years in this country that there has been an agenda on the part of certain newspapers, National newspapers, to present the Human Rights Act as a charter for criminals and terrorists and is something that is not a friend of the ordinary man, woman and child. Some Editors have been even quite explicit about where this agenda comes from. It is not necessarily just a political view but it is because the Act for the first time gives us a right to private and family life that has protected some of those naughty footballers and other celebrities from kiss and tell stories appearing in the Sunday tabloids so there has been a kind of profit reason for certain newspapers to take against the Act. Let us not forget the Human Rights Act really is in its infancy it only came into force in 2000. The Government that passed it didn't go to very many lengths to explain its implications to people in this country. There is no mechanism for its formal standard education in schools and as a result lots of people don't really understand what it is for, how it works and how they can use it. What has happened instead is that it has been explained to people through the medium of the press and as I say with some editorial lines being wholly opposed from day one. So there is a huge problem of mis-information. It is really disappointing when you see senior politicians seeking to exploit that mis-information for their own political purposes. It very much suits the conservatives, I think, to kind of toss the Council of Europe and

the Convention to those in their party that are saying that they should be dragged more in the direction of UKIP than to talk about withdrawal from the EU because lots of Conservatives understand the risk that poses to British business. So it has very much become a pawn in a dangerous political game in our view and the more that can be done by members of the senior judiciary and senior lawyers to refute some of the commentary that is so ill judged, the better.

SHAUN LEY: Lord Judge?

LORD JUDGE:

Well I am afraid that senior members of the judiciary and junior members of the judiciary and any member of the judiciary simply cannot comment on these issues. It is simply prohibited, we can't do it. Sorry I am not one anymore – they can't do it.

BELLA SANKEY: Former members of the Judiciary then, I correct myself.

LORD JUDGE:

Although I understand the argument, there are occasions when newspapers misreport in all sorts of ways, not just about the Convention and its application. Who is going to, in the legal profession, is going to be the voice that represents the legal profession. My experience of the legal profession is that for every five you meet you have five different opinions. And so although the idea sounds admirable, let's make sure newspaper reporting, and BBC reporting, is accurate and fair, the reality that there is no way in which the legal profession or the medical profession or any other profession can put their heads together and say on every occasion when something misleading is written, we will raise a chorus of concern, anxiety and repost to it. So fine, but I don't think in the real world it will ever happen, or could, which is the more important point.

BELLA SANKEY: I don't, if I may, it is not necessarily about just rebutting the stories that come along that are misleading. I think there is also a responsibility of former judges and senior lawyers to go on the front foot if they feel it is necessary in order to inform the public debate. Now Lord Judge I know that you were nothing to do with the Conservative party's press release of last week but I don't know if you know that your article that you referred to earlier was cited in it and a link was provided and the Justice Secretary then spent Friday going around the TV studios claiming your

support and misrepresenting your views and I think that is a very worrying state of affairs when politicians are so clearly seeking to mis-inform the public. I think there is an obligation on all of us to be very clear about what the Convention requires and as a matter of basic constitutional principle the fact that Parliament remains sovereign.

SHAUN LEY: David Anderson?

DAVID ANDERSON QC:

There are mechanisms for confronting journalists and others with misleading accounts of cases. In fact I think there is even a retired judge now who has taken over the Independent Press Standards Organisation. Perhaps she might be receptive to such complaints. And there are bloggers too, well known bloggers people like Adam Wagner at One Crown Office Row. Other bloggers perhaps even present in the audience who make a habit of this sort of thing and who draw attention to errors and who correct them, and of course they have a right to do that. The question is, is there an obligation to do it? And I must say that one I am going to have to think about. It never occurred to me I might be under an obligation of that kind. Perhaps I haven't read the right parts of the Code of Conduct but just in case I am under an obligation may I discharge it. And I know we have probably left the policy document of last week protecting, human rights in the UK, but may I correct a misleading statement in it.

[**SHAUN LEY:** You haven't brought this for Martin to autograph have you?]

DAVID ANDERSON QC:

It says in 2013 the Strasbourg Court ruled that murderers cannot be sentenced to prison for life and to do so was contrary to Article 3 of the Convention. Well that is not true. It didn't rule that and if this document really was passed by QC level lawyers, as I read in a press release, then they should be ashamed of themselves.

MARTIN HOWE QC: Can I respond to that? Not that that document is mine, but the Strasbourg Court in the ***Vinter*** case ruled quite clearly that you cannot, it is contrary to Article 3, in the opinion of that Court, to sentence someone to imprisonment for the rest of their life without the possibility of review.

DAVID ANDERSON QC: Those [ ] words omitted!

MARTIN HOWE QC: But that comes to the same thing.

[Response] No it doesn't, no it doesn't Martin.

MARTIN HOWE QC: It is exactly the same thing. You cannot commit someone in prison for their life. In the opinion of that Court.

SHAUN LEY: We will park that one there I think. Let's move on. I think it is one that might be taken up in the drinks afterwards.

LORD JUDGE:

May I say something. Just in case anybody thinks that I was involved in... I read the article by Dean Spielmann in the April edition of *Counsel*, I was asked if I would reply it. I did reply to it. My issue remains the same – where does sovereignty lie. It was with the publishers before the summer but the timing of the publication just happened to coincide with the meeting of the Conservatives. It might have been the meeting of the Labour Party, or the Liberals or even UKIP. But it had nothing whatever to do with me.

SHAUN LEY: There you go, we have cleared up a few misinterpretations. Whether they were intentional or not. Thank you all very much. Let's move on now to Ben Gaston from Hogan Lovells with your question.

BEN GASTON – HOGAN LOVELLS:

Q: My question is whether the panel can envisage the common law providing protection to human rights that is as good as, or better than the Human Rights Act or a British Bill of Rights?

SHAUN LEY: Thank you very much, that sort of touches a little bit on what Fidelma raised as one of her questions in her introduction a little earlier. Can the panel envisage the common law providing protection for Human Rights that is as good as or better than either the Human Rights Act or a British Bill of Rights? Lord Judge?

LORD JUDGE:

I see absolutely no reason why the common law cannot provide all the protections that we need. As was said at the very beginning, the reality was that the Convention was written for a concentration camp filled Europe. I am going to digress and tell a short story. I was talking to a lovely Judge from Belgium. I talked to her about how much I liked Belgium and how we honeymooned in Belgium and then quite by incidence I said and my father in law remembered being part of the relieving column into Brussels and silence descended. I had said something that had upset her. I apologised and I said I am very sorry I have obviously said something that has upset you, and she said you have, but of course it is not your fault. You see, I remember the British coming. I was a little girl of 5 and for the whole of my life I had wished they had come six weeks earlier, you see I am Jewish and my father was taken from us six weeks before the British arrived and we never saw him again. That is what the Convention was designed to address. This ghastliness of what had happened. Now the common law, if you look at the common law books of 1950, 51 and 2 – that is the Convention. The common law of course has to develop. It is developed not merely here, but in, among other places, Australia, Canada, South Africa, where they have had to develop a law following the dreadful business of getting rid of apartheid so the common law is currently very much alive and very much on the go. I don't think the common law would lack the protections or that the Judges in the Supreme Court would fail to provide the protections that are provided by the Convention.

SHAUN LEY: David Anderson?

DAVID ANDERSON QC

Well I agree the Convention had its origins in the common law, but if you look at the way that people sought to protect rights under the common law before the Human Rights Act came along, it's not difficult to find cases in which the common law simply didn't provide the protection that was needed. I will just give you two examples. Think of the ***Malone*** case in 1984 in which the Government argued that they were entitled to tap somebody's phone because there was no law prohibiting it and in this country as we know everybody is allowed to do anything that isn't prohibited by statute. This was the Government arguing this, and it took Strasbourg applying Article 8 to say, well yes you can do it, but you need a proper legal framework. The other much more recent example, the gays in the Military case, ***Smith v. Ministry of Defence*** looked at with anxious scrutiny by the Judges in this country, but it was necessary in the end to get to the Court that would apply the European Convention. Now of course the

common law is a flexible beast and it's resourceful and its judges are resourceful and we have seen examples of this in very recent years. I sometimes wonder if there is sort of a judicial Plan B developing in case we do withdraw from the Convention. You look at a case like ***Osborne and the Parole Board*** which I think was last year, in which Lord Reid I think, speaking from the Supreme Court says that this is an Article 5 case but we are not going to start with Article 5 we are going to start with the common law and within two or three paragraphs he was citing a dictum of 1748 in a case of 1863 and we got to the answer, according to the common law, and he then said it is therefore also a breach of Article 5 of the Convention. Now that is fine, but I would just say there are perhaps two difficulties with that approach, even if the common law is resourceful enough to do the trick, and the first thing, we haven't heard anything about this yet. Human rights are not just for lawyers and they are not just for the Court, they are for public authorities. I spent yesterday in a meeting with Intelligence people and we were talking about surveillance and Intercept and they really got the idea of necessity and proportionality. Now proportionality may not be a very good test for the courts, but for someone sitting in the administration i's a very very useful guide. These ideas are embedded in our public authorities. They are even embedded, if you believe it, within the Police. We have to be very careful before we chuck them overboard. And the second point, coming back to something Bella hinted at is international influence. No I see Ian Ross sitting near the back of the room. He was the first person that took me to unfamiliar parts of Europe to talk about how to modernise their legal system and since then with many other groups, the Slynn Foundation, BASEE, the European Commission and other groups, I have done the same thing. The European Convention is a vehicle for our values. You could call them British values if you wanted. We can lecture at these places. We can go to Albania with Sir Henry Brook who is also here and lecture them about the common law, but they want to know is a common language. They want the law expressed in something that applies across the continent and that they know they are subject to as well, or in the case of EU law they could become subject to. It is in a way, the last Imperial vehicle. The European Convention of Human Rights, it is a way of transmitting our values to the rest of the Continent. Sometimes even beyond. I don't think citing dicta from 1748 cases is going to be such a persuasive way of achieving that.

SHAUN LEY: Martin Howe?

MARTIN HOWE QC:

I have a lot of sympathy with the idea of the common law providing adequate protection but if we actually look back at our Constitutional history, in fact we have had a combination of statutes and the common law which have progressively over the centuries enhanced our freedoms. Remember Magna Carta itself is a statue, and there are a number of other important statutes on the way, a number of which arose out of struggles such as the Petition of Right and the Bill of Rights of 1689 and not to forget Scotland, the Claim of Right the same year and what has happened is we have had statutes and common law, if you like, acting in tandem. Another important case ***Entick v. Carrington*** an 18th century case saying that the Secretary of State had no power to send messengers into search people's houses without a judicial warrant. So I see no problem with the common law and statute working hand in hand. What is proposed is that the words of the Convention would be put into Statute directly and therefore be available for development and interpretation by the Courts in exactly the same way as other statutes, and what a very important fundamental statute it will be. So I don't agree, if you like, with David's point about there being gaps that will not be possible to be filled by the Courts. Of course one important difference depending on where we end up, viz a viz the Convention, is that if the Judges interpret a statute in a way which Parliament doesn't agree with, at the end of the day, Parliament has the option of changing the law. That is as it should be and Parliament has to take the decision and the political heat for whatever changes in legislation it enacts.

SHAUN LEY: Bella Sankey?

BELLA SANKEY:

The common law did an incredibly good job for very many centuries of protecting our fundamental rights and freedoms but I think as is clear from many of the judgments you read from the early, mid, late 1990s it was becoming increasingly difficult for the common law to withstand the ever encroaching expanse of government action and actions by public authorities that crept into the lives of people in this country. That is why the enactment of the Human Rights Act was so timely because it has allowed people to argue for their common law, and common law plus rights in our domestic courts and not have to trudge off to Strasbourg. Of course the convention codifies a number of common law rights, but it also goes further in certain areas. The rights to respect of private and family life for example, or Article 10 the right to free expression. Our journalists wouldn't be able to claim the protection of their journalistic sources if it were not for the Convention and the way in which it has been interpreted both here and in Strasbourg and for the first time the Convention puts positive obligations on the part of the

State to protect people, people's lives, to protect people from inhuman and degrading treatment and this area of Convention litigation has borne enormous fruit for vulnerable women, vulnerable children, who are failed by the State in this country every day. For police forces that don't act when credible allegations of rape or modern day slavery or neglect and abuse by parents are made. So there is absolutely no doubt that the Convention goes further, it goes further in a way that is hugely welcome and has provided protection to some of our most vulnerable people. So anybody proposing that it can be replaced with the common law I think should look very seriously at that area of case law. Just finally, in the land of Magna Carta and Habeas Corpus it took the Convention in 2004 to put an end to the indefinite detention of foreign nationals under the counter-terrorism legislation that was passed after 9/11 so the idea that that great document can withstand without having any sort of higher status, like the Human Rights Act has, the assault of government of minority groups at moments of terror I think was put paid to by the House of Lords in the Belmash judgment.

SHAUN LEY: Dominic Grieve

DOMINIC GRIEVE QC MP:

I think that there is a long tradition in our DNA about the common law. Actually the common law is one of the defining pieces of what it is to be English and lots of people talk about the common law. My constituents write to me about the common law constantly extolling, no no, quite seriously, extolling its virtues in a completely abstract fashion. But of course as we know, the reason why we had Magna Carta and for that matter why we had Habeas Corpus and the Bill of Rights was that the common law was not sufficient, and we also know that until really quite recently, laws, including Magna Carta, for example, which provided for a framework, for example a child process when no punishment without due process at law, that might apply but getting a fair trial might be much harder. We have banned torture in this country since 1640, and probably rather earlier although the Kings were allowed to do it under special warrant until then. But actually I am afraid that people have been tortured in this country, or certainly beaten up in police stations, perhaps not put on the rack in the Tower of London, for rather longer than that, including to extort confessions which are then used in trials which are not fair. So I think we have to look rationally that we have lived under a wonderful set of principles, and indeed a legal system which is unique because of its continuity and because it has never been upset by revolutions and because whatever changes of regime, actually in a funny way the Judges are one of the great continuity in our history from the middle ages to today, and our courts, even under the Crown of the

Commonwealth, but notwithstanding that, adding and using statutes to remedy deficiencies in the common law is very sensible. And the Human Rights Act is such a statute. Now we can have a different a statute, we can have a Bill of Rights, and apparently it is going to incorporate the Convention, in which case it will be very similar to the Human Rights Act, apart from the subtractions that Martin has slipped in to his paper. The Convention is a different issue. The Convention is about an international legal obligation trying to do a wider good. This country probably could do without the Convention if we want to pay the price of our international status in not being adherent to it. But as the convention and the Bill of Rights or the Human Rights Act match up so closely the penalty to us to being adherent to the Convention doesn't seem to me to be so great or the cost as to outweigh the benefit that we convey elsewhere. But otherwise, yes, by all means, let us have a Human Rights Act or Bill of Rights, but not please the Human Rights Act minus, which I think has crept into this paper with quite insidious quality.

SHAUN LEY: Thank you all very much.

LORD JUDGE:

I don't see how you can work on the basis that those of us who adhere to the view that I have expressed in relation to the common law are somehow stuck like dinosaurs in 1950. The common law will develop if, and I am not advocating this and please nobody mis-quote me, but if for any reason we pulled out of the Convention the Judges in England and, sorry in the United Kingdom, would be looking at Europe to see what decisions they were reaching and this would influence their judgments just like the decisions of some other countries do. Judges here don't remain isolated in their own little embryonic shells. They look around the world for guidance and assistance and the other point, is it really thought that the existence of the Convention will stop policemen beating up somebody in a police station? It is against the law … [BELLA SANKEY: Yes]. The Convention will, the Convention, its existence will, I think if a policeman is going to beat somebody up he is breaking every rule in the book, he is breaking the Law whether it is in the Convention or in the common law or wherever it is. People behave badly whatever the rules are by which they are governed.

BELLA SANKEY: Our experience of the police and the Convention is that gradually over the time, as cases are brought to demonstrate to the police that they haven't acted in accordance with basic fundamental rights, they have improved their treatment of people whether it's the way that they handle people in the police station, whether it's the way they

choose to prosecute or investigate crime. There is a clear trajectory that has resulted from Convention litigation that has brought about an increase in standards, not just in this country, but on the Continent as well.

LORD JUDGE:

Well I would love to agree, but I think the presence of a nice camera and a tape recording machine has quite a lot to do with improved behaviour in police stations.

DAVID ANDERSON QC:

Can I come in? In support of that last point there was a decision of the European Court of Human Rights last Friday in a case against Spain which had been brought by several people who had been kept in communicado in police custody for 14 days. Now the effect of the Court's judgment will be to require the Spaniards to install cameras, to allow somebody to be told of the whereabouts of that detainee save in exceptional circumstances and to require the presence of a lawyer. Now it is not going to happen tomorrow, but the Committee of Ministers will be on Spain's case and they will be nagging them and asking them for progress, wanting to see the codes of practice, wanting to see the complaints to the authorities in Spain. That is how these things happen. It doesn't happen immediately. That is why they call International law the "gentle civiliser of nations". They don't send in bailiffs but by the force of persuasion and by the shame culture of the other Member States in the Committee of Ministers, they do reach results.

SHAUN LEY: Thank you all very much. Let's move on to Marie Demetriou QC from Brick Court Chambers.

MARIE DEMETRIOU QC – BRICK COURT CHAMBERS

Q: Thank you. I would like to ask the Panel this please. Would repeal of the Human Rights Act lead to arbitrariness in circumstances where the European Convention on Human Rights will still be applicable in the English Courts in the wide range of areas which fall within the scope of EU law?

SHAUN LEY: Gosh that is quite a technical one! Let us start with the former Attorney General, if anybody ought to know.

DOMINIC GRIEVE QC MP:

Without giving away State secrets, I spent quite a lot of my time as Attorney General worrying about the expansion of the European Court of Justice's jurisprudence, and this is a big issue. Dare I say it in terms of national sovereignty I think rather a bigger issue than anything which comes out of Strasbourg, and there is no doubt that one of the areas in which they have dabbled their toes has been issues surrounding justice and home affairs. And on the whole the United Kingdom's policy has been to try to keep the European Court of Justice out of it. That after all is what the case of ***Chester*** and ***McGeoch*** on prisoner voting rights invoking European Union law was all about in our own Supreme Court which I went to argue last year. I do think that the European Union membership makes pretty clear that we have to be adherent to the Convention norms as part of our membership. What then happens if in fact we have a situation where we are not observing Convention norms, I think the risk to us is it is a green light to the European Court of Justice in Luxembourg if we are still members of the European Union to start to expand their areas of competence into this sphere, which I don't think is desirable. In fact I think it is extremely undesirable so I think that there are already, as you have highlighted, areas in which this conflict might exist. I think it is something which can't be ignored and the more we are not observant of, what I would call, the Convention norms, I think the greater the risk arises that this will happen. Of course, some people may welcome it. People wish to have a mighty clash with the EU resulting in our departure then this may be a mechanism which is precisely the casus belli that they wish to bring forward. But if one is trying to, which is usually the Attorney General's lot in life, to try and have quiet government, it is not necessarily the best route forward.

SHAUN LEY: Martin Howe?

MARTIN HOWE QC:

Well you are quite right to raise this point, because of course quite apart from the Convention, and on international obligations under the Convention we are of course as EU members subject to the EU Charter of Fundamental Rights. Part of which contains provisions which are parallel to those in the Convention, and the EU Charter has surprisingly wide scope, and in fact I think I was not necessarily "the" first but one of the first cases in the Supreme Court which applied the Charter directly, where the Supreme Court applied the Charter directly to the making of a Court Order which involved the disclosure of personal information. So it's very broad. I don't actually think that the Luxembourg Court needs any encouragement to further expand its scope. There is a case, again which you are probably familiar with

called ***Ackerberg Fransson*** about Swedish tax laws and the scope of what is within the scope of EU law for the purposes of the Charter which has so angered the German Constitutional Court that there is a major row developing between the two courts. I mean in a way one can say well, you know, one day's work is enough as it were. If we can try and get the convention problem solved, there is then an EU problem to be solved.

SHAUN LEY: Lord Judge?

LORD JUDGE:

At least in the context of the European Court of Justice there is no fudge. Our law is entirely clear, our courts are bound by the European Communities Act 1972, and the European Court of Justice can tell us what to do. Some people don't like it, some people are perfectly happy with it, but that is a clear Act of Parliament and there is no arguing with it until, if there is a referendum and the referendum has a particular result then it all gets unstitched again and Parliament says well we deferred our sovereignty for a few years, but we are now taking it back. I think that we return to the issue which I think is the most important issue which has been the fudge. Where does sovereignty lie? We know where it lies in the context of the European Court of Justice. If the European Court of Justice develops jurisprudence which impinges on what are traditionally, using that to mean a short period, Convention rights, we are going to be stuck with the decisions of the European Court of Justice. That is what it is for. So I don't have an answer beyond saying at least with what comes out of the European Court of Justice there can be no argument, at least no argument until there is a referendum, and a vote, and then assuming there is a vote, then removal from the European Union.

SHAUN LEY: Bella Sankey?

BELLA SANKEY:

The EU Charter raises real problems for the anti-ECHR brigade because all the things they claim about the Convention are actually much more true of the EU and the Charter. So while they raise certain expectations about what can be achieved with their reforms to the Convention and the Council of Europe, meanwhile you have the progression of EU law and jurisprudence which as Lord Judge has said, does do what it says on the tin. So this is a real issue, I think, particularly for the Conservative party that it hasn't really addressed because I said earlier it is much more convenient at this stage, to toss the

Convention to the wolves, than to deal with a much more complex matter of the EU. But just on this issue of fudge while we are back on it again. I don't think there is a fudge. It is perfectly clear as a matter of international law that we are bound by the treaty that we have signed up to, and Strasbourg cannot impose or require the UK Parliament to do anything that it doesn't want to do. As a matter of Parliamentary sovereignty, as a matter of Constitutional Principal Parliament is sovereign. But even if there has been a fudge all this time, it is very unclear why now is the moment that this has to be revisited in academic articles, or debate, when the objectives of the Conservative Party are very much clearer and they are not about this academic issue. Parliament has not actually said that it doesn't want to grant prisoners the vote. Three parliamentary committees have looked at this issue and all of them have concluded that a small number of prisoners in this country should be granted the vote. So there is no clash as things stand. The clash is one of political opportunism and it seems totally bizarre that this is being brought unnecessarily to a head when Parliament has not actually been given a chance to look at reforming legislation and to speak.

SHAUN LEY: David Anderson.

DAVID ANDERSON QC:

Well yes you are at an advantage if you have a Euro cause of action. In fact seeing Lord Clark in the front row I blush to remember a case some years ago in which I had locus to challenge the Hunting Act because my client was a breeder of hunting horses in Ireland and therefore had European rights. Had he been breeding them in Scotland or England we wouldn't have got anywhere at all and of course the gap would be greater still were we to remove our domestic human rights protection. Perhaps the common law could fill the gap or could fill some of it but there would certainly be a difference. Now what happens when you have a difference of that kind. It seems to me it is on principle pretty undesirable and really it goes one of two ways. You either equalise up or you equalise down. I remember after the ***Factortame*** case, a long time ago now, an injunction was granted suspending an Act of Parliament, or rather indeed initially even just an injunction against a public authority, that was the remarkable thing legally at that stage. And then it was said, well how come Spaniards can get injunctions against Secretaries of State and British people can't. So the next case that came along ***M v. Home Office*** [1993] you can get injunctions against Ministers. I saw a very good example of equalising up in Jordan and we go back to the European Court here. I went out to have a look at how Abu Qatada and a fellow detainee were getting on out there when they were placed on trial and I talked to the Governor of the Prison

where one of them was being held and I was checking that they had done everything they should have done with the agreement that had been signed between the UK and Jordan and one of the elements of that was that he shouldn't be hooded when he was taken to court for his trial. Because they were in the habit of hooding extremist prisoners and he assured me that Abu Qatada wasn't hooded when he went to trial and he said "but you know it seemed to us very unfair that just because he came from England, he didn't have to wear a hood, so I ordered that all the extremists in my prison would not be hooded". So that is a good example of equalising up. Also a good example of Strasbourg having some minor impact even outside the boundaries of Europe. The other way it can go of course is nastier and it is equalising down and people say we are fed up with these Europeans having rights, let's get out of that one too, and I wonder in fact if that is partly what this is about.

SHAUN LEY: Thank you very much. Now look we have got about another 15 or 16 mins. We have two more questions to get through so I am going to plead with the Panel to be reasonably succinct if they can with these next two. Let us move on to Merris Amos from the University of London, is the QMW? You will have to explain that for me. Forgive me. Queen Mary. It is the W that threw me.

MERRIS AMOS - QMW UNIVERSITY OF LONDON

Q: Thanks. My question is about judicial appointments and will there be a demand for more democratic input to judicial appointments. Should, as being proposed, the European Court and the European Convention have less influence in our system and British Judges be making Human Rights Law and perhaps decide something that is not popular.

SHAUN LEY: Thank you very much. Bella Sankey?

BELLA SANKEY:

That is another elephant in the room in these proposals. If we are not talking about greater entrenchment, then no I don't imagine that there will be a desire for Judges to have strike down powers and the politicisation that I think your question refers to. But another great, sort of myth that is spun when our human rights obligations are discussed, the idea that our Judges have more power than other democratic states. The reality is the exact opposite. In democratic countries around the world, in the US to Commonwealth countries and so on, Judges are given a huge amount of power and are able to, at some point, to encroach on the democratic mandate and to make policy decisions that perhaps go

beyond what is ideal in a democratic society. Our system is not like that and we have a very finely balanced unique system which allows a genuine conversation to develop between Parliament and the Judges under the Human Rights Act and indeed between our judges and the Strasbourg Court and our Parliament as the present arrangements allow, but this is something that is completely left out of the debate again and it is instead a positive that our Judges have perhaps more power than you would find elsewhere and that is frankly not the case.

SHAUN LEY: Dominic Grieve.

DOMINIC GRIEVE QC MP:

Well I am not in favour of having more democratic input to Judicial Appointments. I love my democracy, I enjoy Parliament hugely but I don't think that Parliament is necessarily a good forum for determining judicial appointments and the current system seems to me to work very well. The only situation where I can see that we might have pressure for it is if we did move towards some sort of written constitution where there was a judicial supremacy over the way in which the constitution operated. It's the US model and one can see why in the United States they have the system they do including scrutiny of judicial appointments. But we don't and I would much prefer us not to move in that direction because I think that our system is currently very flexible and works well. But if we were radically to change our constitutional arrangements, then it might arise but at the moment I don't see a need for it.

SHAUN LEY: Lord Judge, given the Parliament is sovereign would it be so unreasonable for senior judicial appointments at least for them to go and chat to a committee at Parliament?

LORD JUDGE:

You are moving the question, but may I begin by saying, I agree with Dominic on this point and have nothing to add. You told us to be short.

SHAUN LEY: Martin?

LORD JUDGE:

The answer to your question to me is that we must not have political involvement in judicial appointments, any more than we must have or allow, or even contemplate political involvement in judicial decision making or anything whatever to do with the process of the administration of Justice.

SHAUN LEY: More public monologue. Is it possible to have, the question talks about democratic input, doesn't necessarily have to be voting or something formal?

LORD JUDGE:

The form it would take would be the sort of absurdity we have, we have witnessed for ourselves in the American Supreme Court and its selection and election of people to that court which I think is demeaning to the judiciary and damaging to the public face of the judiciary as an independent body, independent of the Senate.

SHAUN LEY: Martin Howe?

MARTIN HOWE QC:

Well I agree. I think that the problem is if you move political decisions into the Courts rather than under our constitution, keeping the ultimate say on political decisions in Parliament, but if you moved political decisions into the Courts, particularly if you give judges entrenched powers, you then face an inevitable demand for politicisation of the judiciary and that indeed we have seen. The paradigm example is the United States because the constitution there is so firmly entrenched and because the enormous powers of the Supreme Court and kinds of issues it feels itself competent to decide, you get this process where Republican Presidents want to appoint Conservatives to the court, Democrat Presidents want to appoint Liberals and you just get political voting amongst 9 people instead of amongst 200 million Americans.

SHAUN LEY: Although often the judges who are chosen don't turn out the way the Presidents thought. David Anderson?

DAVID ANDERSON QC:

I think it depends on where you are. In Strasbourg ironically you do have elected Judges. They have to be elected by a committee of the Council of Europe and a very serious and very legal committee it is too. It is just turned down all three Slovak candidates for the second time and I think perhaps some sort of

scrutiny if only to see if they have any idea of what they are talking about in an institution like that is quite a good idea where otherwise Member States could just nominate anyone they want. In another East European country indeed one of the nominees was the mistress of the Minister of Justice. Which was unearthed under questioning. Now I don't think that we are at the stage where we need to do that here. I agree with the other speakers. I don't think we do. But I do sometimes think it is just a little bit of a shame that all the people appoint to the Bench are sort of Vestal Virgins, who have lived in Courtyards and practiced at the Bar and although I think the creation of the Supreme Court was probably the right way to go I do think we lost something through doing that as well. When you had very senior judges, chairing committees of the House of Lords for example on European institutions and meeting people through that work, bringing that expertise into their judicial work, I think that was rather a good thing and although I certainly wouldn't elect them, I do wonder if there isn't some way of perpetuating that breadth of expertise that we have had in the past.

SHAUN LEY: Thank you all very much. Let us move on to our sixth and final question which is from Kate Harrison from Harrison Grant.

KATE HARRISON – HARRISON GRANT:

Q: How would members of the Panel suggest selling Human Rights to a sceptical public and a sceptical press?

SHAUN LEY: Lord Judge?

LORD JUDGE:

I think that when you talk, as we have done all evening, about Human Rights there is a sort of slightly befogged umbrella above my head keeping the rain off and fog in here. But as I said earlier if you actually ask people to address what I suspect every single person in this room would regard in this room as a human right and you identified it, you would have no difficulty getting across to the public that these things matter. Are there many citizens of this country who don't support the idea of open justice? A fair trial? No arrest without reasonable grounds for suspicion? No torture? Family life? If you are specific about the rights they have a very much more direct impact on John and Jane Citizen. But if it is sort of vague and slightly woolly, because it's the Human Rights Act and a lot of publicity adverse to it. Lot of things blamed on the Human Rights Act which the Human Rights Act has no responsibility whatever, then you are not going to win the argument. But if you say "look we actually want open

justice, we want a level of private life, we want a free press", most people would agree. So I think if you are trying to sell rights, you have got to sell the specific and not the general and the general has got completely bogged down in political argument which we are having today and which most of our discussion today has been about. I think that is a pity. That is what I want to say.

SHAUN LEY: Thank you. David Anderson?

DAVID ANDERSON QC:

Well, not being entirely facetious. I think you stop and search them, or you tap their phones. And in that connection I was very interested to compare two Times leaders. One I think on Friday when the Conservative proposals were announced which The Times thought rather a good thing, and then in their leader this morning, they formed a belief, whether it is true or not, I have no idea, that the police were examining their communications data in order to see which sources they had been talking to for a rather sensitive political story they were running and they thunder about how dreadful that was and they actually referred to the case law of the European Court of Human Rights in order to make the point. So I think you really appreciate the value of these things when they come after you.

SHAUN LEY: Bella Sankey?

BELLA SANKEY:

That is absolutely right and a similar thing happened back in 2008 when the Court ruled on the DNA database and that the retention of innocents DNA was unlawful. The Daily Mail, which was already running its anti-Strasbourg campaign had a front page "Big Brother Humbled". A lot of the detail of how Big Brother had been humbled was very much left to page 10 or 11, but it is interesting and I absolutely agree with Lord Judge and David Anderson that when people find their own rights being diminished by public bodies, whether it is their free speech or their privacy they very easily are able to see its importance to them. Incidentally, Liberty has polled members of the public consistently for the last five years on the Articles in the Act in the Convention and whether they think it is important that there is a specific law in the UK that protects these and our results come out over 80% and 90% for each of them. So the British people do love their human rights despite what you might read in the newspapers and we don't think that they are going to give them up without a jolly good fight.

SHAUN LEY: Thank you very much. Martin Howe?

MARTIN HOWE QC:

Well, I think my literal answer to the question is I wouldn't. In other words I wouldn't be seeking to persuade members of the public to love human rights. On the other hand I would wish to persuade members of the public that it is worthwhile to protect the fundamental rights that we have protected in this country for the longest continuous period of any country in the world. That we should build on our own tradition of the protection of those rights. That we should nurture that tradition and that we should get the necessary protections put into statute but within the context of our own framework laws and not within the context of a framework involving a foreign court.

SHAUN LEY: Dominic Grieve, you might have to be doing this I suspect in the next few months.

DOMINIC GRIEVE QC MP:

When I was Attorney General it was my regrettable lot that I had from time to time to bring contempt proceedings against national newspapers and I would often also discuss the topic with the Society of Editors who represented them, and of course on each occasion the defence to the contempt was always the freedom of expression allowed by the Convention and that of course included the Daily Mail, I seem to recall on one occasion, who most of the time is a newspaper that is very happy to rail against the Convention. I think that is probably the right word to describe it. So far as people are concerned, I agree with what Lord Judge has said. If any of you listen to the Conservative Party Conference, I am sure you have a better life to spend than listening to the speeches, but every time in the hall there is a mention of the Human Rights Act or the Convention in a sort of pejorative way you will get a tremendous round of applause. But these are the same people who I know, because I have spent the last 14 years going around addressing their associations, I have often dwelt on this theme because, although I have tried to avoid being a single issue obsessional it seems to come back to haunt me, and I can promise you that when rights are explained in plain language and also one has a sensible discussion about the advantages and drawbacks of the different ways in which it can be delivered including the failings of a Convention and my own judgment, some of the failings of the court, one ends up with people who broadly speaking think that human rights are a very good thing and certainly think that a framework of rights is absolutely essential in the modern age to provide us with protection where the state impinges so much more on our lives than it did a 100 or 150 years ago when we were so much

more lightly governed. So rights are here to stay and actually when they are explained you will succeed in getting any sensible audience in agreeing that there has to be such a framework and willing to take an interest in how it's best to live it.

SHAUN LEY: Thank you very much. I have a hand raised. I think I have time to take it. A last thought.

CARL GARDNER – Head of Legal blog

Q: Thanks very much, my name is Carl Gardner, I am a law blogger. This is directed at Martin Howe really. Interested about the emphasis on getting agreement from the Council of Europe for these proposals that the adequate protection. Two parts, really. How can people in Strasburg agree that when our internal law is no concern of anyone's in Strasbourg? And secondly in what form do you want this agreement to come? Are you expecting a resolution of the Parliamentary Assembly of the Council of Europe or some other public statement? Does there have to be a public statement that this is good?

MARTIN HOWE QC:

Well I think it is a political question. Really what would happen is we would present effectively the Council of Ministers with a situation in which it was up to them to choose. If they are not willing to agree that our arrangements are appropriate, then we would withdraw from the Convention. I mean, it does seem to me rather strange some of the furore this creates. There are other countries, perfectly civilised countries in the Commonwealth, for example Canada and New Zealand who have Bills of Rights. They don't seem to need to be members of an International Court to make those systems of rights work effectively, and why in this country we are so different from them that we desperately need to have an international court involved in our affairs, particularly this court with its history is something of a mystery to me.

SHAUN LEY: Okay, there we are, Martin thank you very much. Oh I have one more hand. I will take one more and that is it then, because we will be out of time. Stand up if you would. Ah well there you go, there is a familiar face.

LORD ANTHONY LESTER:

Q: Anthony Lester. I spent 30 years getting the Human Rights and I wonder if I could just say a couple of things about this debate. I only look at this really from a point of view of remedies against the misuse of power by public bodies, including Parliament. In 1968 Parliament passed the Bill to take away from brown British Citizens the right to come and live in their country of citizenship. The only remedy we had because of the Sovereignty of Parliament was

to go to Strasbourg. And because we went to Strasbourg we were able to get a ruling that Parliament had passed a racist law in violation of the Convention. Now I guess my question above all to Lord Judge would be this, or Martin Howe, Martin is a different kettle of fish, I think from this. Igor, what I would like to ask you is this. Do you really think that the old Common law, the law which wouldn't strike down race discrimination, the law that wouldn't treat women as persons, the law that I grew up with and you did too before we had any modern public law, do you really think if we only had the common law and we didn't have a super national authority we would be strengthening or weakening the rights of minorities and individuals in this Country? And do you really think if we did that we would strengthen or weaken cohesion within the United Kingdom in keeping the different countries together as the Convention now does? That was the question I put into the Politburo here. That is the question I was not allowed to ask because they were concerned that Igor was too sensitive to answer it, but Igor is perfectly capable of answering it. That seems to me to be the question.

SHAUN LEY: Well he has the right, whether or not he [applause]… I think he has the fundamental right to decide whether or not he wants to answer it.

LORD JUDGE:

It would be a great comfort to me if you hadn't all supported the question on the basis that my answer was bound to be wrong. The answer to the question is that all those examples that Lord Lester has given reflected the world that we lived in when we were younger. The world has come on, the common law is developing, has developed and if returning to the question that we had to answer that none of us did, the idea that if, and again I emphasise that I are not advocating that we should, but if we left the Convention we would revert to 1950 standards is, with great respect, absurd. We would have a huge body of law already available for our judges to interpret and move forward. I still think the question is being begged by Anthony, if I may say so. Fine, why don't we have an Act of Parliament that says as with the decisions of the European Court of Justice, the decisions of the European Court of Human Rights in Strasburg will be binding. If we have that then there is your answer. But we don't. We have a muddled piece of legislation. And my constant complaint, and I want everybody to understand, I am not for or against Europe in this, I am not for or against the Human Rights that we have talked about. But we do need to have a clear understanding, a certainty, of where we end up. Who decides. And that is something that everybody still goes on fudging. That is my answer. Now what about a round of applause for my answer [applause]… I am very sorry to notice that those of you sitting near Anthony are intimidated and are not.

SHAUN LEY: That is a very good point on which to thank you all very much for coming this evening. To say two very brief things, then there will shortly be a small reception at the back, which I think will be

an opportunity to pursue some of these points more informally. For those of you bloggers or otherwise who are interested in what the Panel have had to say this evening and want to know about the audio recording of this evening's event, Nikki is the best person to speak to. Can I ask you all though to find it in your hearts to make one more round of applause, not for particular answers or questions, but for our Panellists this evening? Thank you very much.

HELEN DAVIES QC, JOINT HEAD OF BRICK COURT CHAMBERS:

Ladies and gentlemen, just very briefly, before we break for a drink. Fidelma did indeed set the bar high with a promise of a fascinating, enjoyable and entertaining evening. But as our Chairman anticipated, and I am sure everyone here will agree, our Panel lived up to and indeed moreover exceeded that target tonight, so I would be grateful if you could all join me again for one last round of applause, not only to thank our Panel, but also our Chairman for keeping the peace, Fidelma for her introduction and Nikki Pitt for all her organisation in bringing together this evening. Thank you everyone.

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