Written Evidence to Joint Committee on Human Rights
Derogation from the ECHR
March 2017
JCHR Enquiry derogation from the ECHR

Introduction

The Law Society (‘the Society’) is the professional body for solicitors in England and Wales, representing over 160,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

Executive Summary

- The Government announced, in a Written Ministerial Statement by the Secretary of State, its intention to derogate from the European Convention on Human Rights (ECHR) before embarking on significant future military operations\(^1\). The rationale was that litigation against the British troops or the Ministry of Defence (MoD) risked “seriously undermining the operational effectiveness of the Armed Forces.” The Law Society welcomes the Joint Committee on Human Rights (JCHR)’s call for written submissions on the Government’s announced intention.

- There is no doubt that the procedural failings of the Iraq Historical Allegations Team (IHAT) inquiry and the misconduct of a specific solicitor have created difficulties for the Ministry of Defence and members of the armed forces. There is also no doubt that the MoD has paid out tens of millions of compensation, in hundreds of cases, to Iraqi and Afghan nationals for mistreatment by the armed forces. This is compelling evidence that the MoD has accepted the merit of these cases. The failings of IHAT or of an individual solicitor cannot be a reason to bar any future legitimate claim against the armed forces.

- Aside from IHAT, there is little evidence to support the Government’s view that the legal system has been abused “on an industrial scale.” The legal costs involved reflect the scale and length of the conflict that British armed forces are involved in. The amount of money spent by the MoD on inquiries could have been dramatically curtailed if its internal investigations had proved effective. Inquiries into the conduct of British forces arose because other legal avenues had failed.

- It is extremely doubtful that the Government’s stated aim – reducing vexatious claims against soldiers – would be achieved by derogating from the ECHR. Other than in relation to “lawful acts of war” the right to life cannot be derogated from. Freedom from torture, inhuman and degrading treatment are in all cases non derogable. If a State is bound to investigate allegations of mistreatment or unlawful killing – the results of which might subsequently give rise to a civil claim – derogation from the Convention could not prevent such investigations or claims. Many of the

\(^1\) [http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2016-10-10/HLWS169](http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2016-10-10/HLWS169)
investigations into soldiers, and resultant civil claims, have related to allegations of mistreatment or unlawful killing.

- We have seen no clear evidence that the extra-territoriality of the ECHR undermines the operational effectiveness of the armed forces. Many of the decisions that have been subject to court cases have not been about combat, but rather procurement in peacetime or training conditions. No one has attributed blame to the frontline commanders in those cases - in fact the courts have been at pains not to do so.

- It is far from certain that a future conflict such as the one in Iraq or Afghanistan would fall within the remit of Article 15. Until the precise circumstances of the derogation become clear, however, it is impossible to make a definitive judgment on this issue.

- The Ministry of Defence should be cautious when considering derogating from the Convention. If the UK was to derogate from any future conflict as a matter of policy, simply to avoid legal costs and damages, this would set a damaging precedent for other European countries which might be involved in military operations abroad.

- In its attempt to close out ‘vexatious claims’, the Government's approach would inevitably close the door on meritorious ones. Were such limitations on human rights to be imposed, British soldiers (and their families) would also be unable to hold the Government to account should they suffer treatment that amounts to a violation of their human rights.
What evidence supports the Government's view that "our legal system has been abused to level false charges against our troops on an industrial scale"?

1. There is very little evidence of this. The Ministry of Defence has spent just over £100 million on Iraq-related investigations, inquiries and compensation since 2004. This averages to under £10 million a year, a tiny fraction of the UK’s annual military expenditure of £55 billion. It has also paid out over £25 million to Iraqi and afghan civilians in compensation claims, in 326 different cases, a total which is likely to rise in the future as the remaining investigations conclude.

2. This cost reflects the scale and length of the conflict that British armed forces are involved in. The amount of money spent by the MoD on inquiries could have been dramatically curtailed if internal investigations had proved effective.

3. It is the very nature of any justice system that not all claims that are lodged will be successful. This does not mean that they are vexatious: some will fail on merit, some may be inaccurate or fail to follow procedure correctly, and some may be false. The legal process is designed to identify and remove these, so as long as these are filtered out at some stage, then the system is working as intended. This situation exists in all other areas of law.

4. Inquiries into the conduct of British forces arose because other legal avenues had failed. The death of Baha Mousa in British Army custody in Basra in September 2003 is a case in point. In 2004, an application before the High Court for a judicial review into the investigation of Baha Mousa’s death was made on behalf of the family. Five other cases (involving alleged killings of Iraqis either on the streets of Basra or in their homes) were brought at the same time in what became known as the Al Skeini litigation.

5. The Ministry of Defence’s legal response was that there was no state obligation to apply the Human Rights Act to actions of HM Forces outside UK jurisdiction, and no duty to investigate any breaches of the right to life or the right not to be ill-treated by state agents. When the Al Skeini case reached the House of Lords in the middle of 2007, the MoD agreed that Baha Mousa was an exception – his death had occurred on a British base and thus technically within UK jurisdiction. Otherwise, the government maintained that no public inquiry was needed: the Army could investigate itself. The challenge to the government’s position was described (at paragraph 141 of the judgement in the Court of Appeal) by Brooke L.J as follows:-

“All that it is then necessary to say before leaving this appeal is that in my view the claimants’ lawyers, and particularly their solicitor Mr Phil Shiner, have rendered a valuable public service in bringing forward their clients’ claims and prosecuting them with such conspicuous skill and vigour.”

2 Nicholas Mercer, the Guardian, 3/10/16
His comments were endorsed by Sedley L.J.

6. The product of the internal investigations was a succession of failed courts martial. Despite clear evidence of sustained and collective ill-treatment of Mousa and the nine other detainees, the trial of seven British soldiers in 2006-7 resulted in six acquittals of all charges and only one accused convicted, Corporal Donald Payne, who had already pleaded guilty to inhumane treatment. He was sentenced to a year in prison and dismissed from the Army. No one else was found responsible for the killing.

7. Following the Al Skeini House of Lords' judgment, the MoD opened an inquiry into the death of Baha Mousa. This was therefore not the result of an over-enthusiastic legal industry, but because of the failings of the MoD’s own internal procedures.

8. The Al Sweady inquiry was opened because of similar reasons: an inability by the MoD to conduct effective internal investigations. At a hearing in 2009 to assess whether the duty to properly and fully investigate the Al Sweady allegations had been fulfilled, the High Court encountered considerable resistance by the government when asked to disclose documentation. The Court held that the investigation by the Army into the allegations was ‘not thorough or proficient’ and ordered that a proper investigation should be undertaken.

9. Both inquiries provided an opportunity for considering not only the circumstances surrounding the allegations, but also the training and standard procedures used by the Armed Forces when taking people into detention.

10. The Baha Mousa Inquiry report was a devastating indictment of those involved in the killing and the interrogation techniques apparently adopted generally by the Army and were contributory factors in Mousa’s death. The use of hooding and ‘conditioning’, techniques to weaken the resistance of detainees prior to interrogation through stress positions, sleep deprivation, limited food and water, was reminiscent of practices used in Northern Ireland in the early 1970s. Those had supposedly been banned by Edward Heath and the then Conservative administration. A ‘corporate memory loss’ was the Inquiry’s findings. None of this would have come to light without an inquiry.

11. There is, therefore, a line of substantiated cases. The Baha Mousa Inquiry (which revealed a host of individuals across ranks involved in abuse), the Nadhem Abdullah death, the Camp Breadbasket photographs, Ahmed Ali’s drowning, and the payment of millions of pounds in compensation by the MoD, all tell us this.

12. The importance of ensuring that the British Armed Forces conduct themselves to the highest of standards, and are seen to do so, should not be jeopardised because of the failings of a particular inquiry. IHAT was beset with difficulties in terms of recruitment, procedures, and case load. The failings of IHAT are well documented. As the Defence Select Committee noted:

“The catalogue of serious failings in the conduct of IHAT’s investigations points to a loss of control in its management. Service personnel and veterans have been contacted unannounced—sometimes years after service—despite assurances that this would not happen. Covert surveillance appears to have been used on serving
and retired members of the armed forces. IHAT investigators have impersonated police officers in order to gain access to military establishments or threaten arrest.3

13. Even in this instance, however, some of the claims it considered had merits and are now being investigated by the Royal Navy Police. Not every claim that ultimately turns out to be without merit can be said to be vexatious. Indeed, the potential for abuse exists for any kind of legal claim, not simply those relating to the armed forces. This is not a reason for removing the remedy for all similar cases, many of which will have substantial merit.

14. While there is no doubt that some armed forces personnel have found the experience distressing, this should be a case for improving the standards and procedures of inquiries, especially in how they deal with Armed Forces Personnel, rather than preventing any legal scrutiny into the armed forces’ conduct.

15. It is also clear that the issue of derogation, or other broad reforms of the justice system, should not be driven by proven misconduct on the part of one solicitor. This is an issue for the Solicitors Regulation Authority and should be dealt with accordingly. Access to the courts for legitimate cases should not be denied simply to prevent a relatively small number of vexatious or spurious claims.

16. Finally, it is extremely doubtful that the Government’s stated aim – reducing vexatious claims against soldiers – would be achieved by derogation. Many of the investigations into soldiers, and resultant civil claims, have related to allegations of mistreatment or unlawful killing. But except in the case of “lawful acts of war” the right to life is non-derogable and freedom from torture, inhuman and degrading treatment are always non-derogable rights. So, if a State is bound, under the procedural aspects of Articles 2 or 3, to investigate allegations of mistreatment or unlawful killing – the results of which might subsequently give rise to a civil claim – derogation from the Convention would not in all cases prevent such investigations or claims, because in many instances Article 2 is non-derogable and Article 3 is in all cases non-derogable.

*What evidence supports the Government’s view that the extra-territorial applicability of the ECHR undermines the operational effectiveness of the Armed Forces?*

17. We have seen no clear evidence that the extra-territoriality of the ECHR undermines the operational effectiveness of the armed forces. Armed Forces Personnel are currently protected from prosecution by the doctrine of Combat Immunity. It extends to all active operations against the enemy in which service personnel are exposed to attack or the threat of attack, including the planning and preparation for the operations in which the armed forces may come under attack or meet armed resistance. The rule was endorsed and enhanced in Mulcahy4.

18. Many of the decisions that have been subject to court cases have not been about combat, but rather procurement in peacetime or training conditions. No one has attributed blame to the frontline commanders in those cases - in fact the courts have been at pains not to do so.

3 https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/10903.htm
4 Mulcahy v Ministry of Defence [1996] QB 732
The recent Supreme Court judgement in Rahmatullah (No 2) (Respondent) v Ministry of Defence\(^5\) demonstrates that the judiciary well understands the distinction between "second guessing" military decisions, and ruling on matters which are within scope of the courts.

19. The extra-territoriality of the Convention is not absolute. An important distinction must be drawn between two concepts extra-territoriality. Whenever British forces exercise effective control over an area outside the national territory of the UK, Article 1 imposes a duty on the UK to secure the entire range of substantive rights set out in the Convention within that particular geographical area (for example, a British military base, or a detention centre).

20. By contrast, where the extra-territorial applicability of the Convention is triggered by the exercise of control over an individual, a member state is required to secure only those rights which are "relevant to the situation of that individual." In such cases the scope of the duty to secure Convention rights seems to depend on the nature and level of control exercised by a contracting party over the individual in question.

21. As the House of Commons’ Defence Committee noted in its report on Armed Forces Personnel and the legal framework\(^6\), “there is no personal civil liability for individual battlefield commanders: they may only have personal criminal liability under international humanitarian and criminal law, for example, for ordering or allowing the commission of war crimes”.

22. It should be noted also that there are obligations upon the UK to carry out effective investigations of alleged violations of rights protected by the Convention under the international law of armed conflict which cannot be avoided by derogation from the Convention. The UK is also under an obligation to prevent violations as well as suppress violations which have happened.\(^7\)

*Are the substantive requirements of Article 15 ECHR likely to be satisfied in the circumstances in which the Government intends to derogate?*

23. Article 15 of the Convention states that:

1. *In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

2. *No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision.*

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\(^5\) [2017] UKSC 1 and [2017] UKSC 3

\(^6\) https://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/931/931.pdf

\(^7\) For a full analysis see “An Investigation of Alleged Violations of the Law of Armed Conflict” by Professor Francoise Hampson Israeli Yearbook of Human Rights 2016, available at https://books.google.co.uk/books?redir_esc=y&id=WyhoDQAQQBAJ&q=hampson#v=snippet&q=hampson&f=false
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

24. Derogation measures must therefore be specifically justified and narrowly tailored. The government’s press release on the subject states that the intention is to derogate from the ECHR “if possible in the circumstances that exist at that time.” This is an acknowledgement of the crucial analytical step which determines whether, and the extent to which, derogations are justified by circumstances on the ground.

25. The Court is empowered to rule on whether the States have gone beyond the “extent strictly required by the exigencies” of the crisis. In making such a determining, the Court will give appropriate weight to factors such as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation. This involves the Court considering matters such as:

- whether ordinary laws would have been sufficient to meet the danger caused by the public emergency;
- whether the measures are a genuine response to an emergency situation
- whether the measures were used for the purpose for which they were granted
- whether the derogation is limited in scope and the reasons advanced in support of it
- whether the need for the derogation was kept under review
- any attenuation in the measures imposed
- whether the measures were subject to safeguards
- the importance of the right at stake, and the broader purpose of judicial control over interferences with that right
- whether judicial control of the measures was practicable
- the proportionality of the measures and whether they involved any unjustifiable discrimination and
- the views of any national courts which have considered the question: if the highest domestic court in a Contracting State has reached the conclusion that the measures were not strictly required, the Court will be justified in reaching a contrary conclusion only if it is satisfied that the national court had misinterpreted or misapplied Article 15 or reached a conclusion which was manifestly unreasonable.

26. Article 15 specifically applies to “times of war or public emergency threatening the life of the nation”. Derogations are therefore not permitted in respect of all forms of armed conflict. Rather, it is only those wars which “threaten the life of the nation”. It is unclear whether this would apply to recent armed conflicts in Iraq and Afghanistan. As Lord Bingham said in the Al-Jedda case:

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8 Brannigan and McBride v. the United Kingdom, § 43; A. and Others v. the United Kingdom [GC],§ 173
27. "It is hard to think that these [derogation] conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw. The Secretary of State does not contend that the UK could exercise its power to derogate in Iraq (although he does not accept that it could not). It has not been the practice of states to derogate in such situations, and since subsequent practice in the application of a treaty may (under article 31(3)(b) of the Vienna Convention) be taken into account in interpreting the treaty it seems proper to regard article 15 as inapplicable."9

28. The Court has acknowledged that "although there have been a number of military missions involving Contracting States acting extraterritorially since their ratification of the Convention, no State has ever made a derogation pursuant to Article 15 of the Convention in respect of these activities. The derogations (…) have been rendered necessary as a result of internal conflicts or terrorist threats to the Contracting State"10

29. It is therefore far from certain that a future conflict such as the one in Iraq or Afghanistan would fall within the remit of Article 15. Until the precise circumstances of the derogation become clear, however, it is impossible to make a definitive judgment on this issue. The Court has in any event found that states have the ability to invoke the law of armed conflict in international armed conflicts without the need to derogate from Convention rights. In Hassan v UK (op cit) the Court in effect used the law of armed conflict as a framework to determine what was lawful in war. The Convention was used to enforce the law of armed conflict. It is difficult to see how it can be argued that this framework impaired operational effectiveness.

**Are there alternatives to derogation which would achieve the Government’s objective of protecting the armed forces against unfounded legal claims?**

30. Armed forces personnel need to know the legal framework in which they operate. The House of Commons’ Defence Committee noted in its report on Armed Forces Personnel and the legal framework11 noted that “should take steps to provide Armed Forces personnel with appropriate assurances and adequate training to illustrate where personnel are not personally liable. It should also offer its support when Armed Forces personnel come before the courts to testify in coroners and other courts where the MoD is being challenged”

31. The MoD should also identify the lessons from the legal issues arising in Iraq and Afghanistan and ensure that in all future operational deployments, the Armed Forces are clear about the legal status of the deployment.

**Are there any wider implications of the UK derogating from the extra-territorial application of the Convention in military operations, such as effects on other countries or on the European system for the collective enforcement of human rights?**

32. The ECHR’s preamble states clearly that the purpose of the ECHR was “to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration . . . .” The ECHR is intended to be a regional, binding agreement. The ECHR

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9 Judgments - R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)
10 Hassan v. the United Kingdom [GC], § 101
11 https://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/931/931.pdf
bound the contracting members to live by the rights enumerated in it. The Preamble’s reference to “European countries which . . . have a common heritage of political traditions, ideals, freedom and the rule of law . . . .” indicates that one of the ECHR’s intentions is to delineate and embody the political and ethical culture of contracting parties.

33. The notion of the collective guarantee is essentially a reciprocal agreement by states, embodied in the Convention and its machinery of supervision, that each of them and their peoples has an enduring interest in how fundamental rights are being protected in other states.

34. As an international court serving 47 European states, the decisions of the Court have had a significant impact across the continent. The decisions that the UK takes with regards to derogation will therefore have an impact on how other contracting parties view their own obligations. Former Attorney-General, Dominic Grieve (2011), has recently recognised the importance of compliance with the Convention to the UK’s ability to hold sway at the international level:

“It is only by setting an example at home that the UK is able to exert influence in the international arena and retain the moral authority to intervene and to enforce international law as we did successfully to protect the civilian population in Libya and to allow Libyans to pursue their aspirations for a more open and democratic government12”.

35. The UK government should therefore be cautious when considering derogating from the Convention. If the UK was to derogate from any future conflict as a matter of policy, simply to save itself legal costs and prevent the award of damages in meritorious claims, this would set a damaging precedent for other European countries who might be involved in military operations abroad. This could result in a gradual erosion of human rights protection around the world. These proposals, if hastily implemented, could therefore have the potential to damage not only the reputation of the UK internationally, but also profoundly to impact on the European system of human rights protection and the protection of human rights in Europe as a whole.

36. The purpose of Article 15 is to enable states to safeguard the “life of a nation” in times of emergency or war. It cannot be invoked to reduce legal costs or prevent legitimate claims for damages where the rights of civilians have been violated. Any derogation which falls short of such a standard would undoubtedly harm human rights protection around the world, and would serve as a precedent for other countries keen to limit their financial liabilities in times of armed conflict.

37. This is not to say that derogation is harmful in any circumstances. If the UK was engaged in a war that threatened its population or its integrity as a state, derogation would be justified. This decision should however be taken by Parliament, be strictly limited and defined, and should be the focus of regular reviews.

Should the derogating measures be contained in primary legislation?

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38. The procedural requirements contained in Article 15 do not call for primary legislation, but simply for a notification to “keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed”.

39. Nonetheless, because of the importance of ensuring that any derogation is justified and legal, we believe that Parliament has an important role in scrutinising the reasons for any proposed derogation and the precise terms of the derogating measures.

*Is it appropriate for the Ministry of Defence to have lead responsibility for a policy the purpose of which is to protect the MoD from legal claims?*

40. There is a clear conflict of interest in the MoD having responsibility for creating a policy which would protect it against legal claims.