HOUSE OF COMMONS

Political and Constitutional Reform Committee

Oral evidence: The role of the judiciary if there were a codified constitution, HC 802

Thursday 28 November 2013

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Written evidence from witnesses:

- Professor Anthony Bradley QC

Watch the meeting

Members present: Mr Andrew Turner (Chair); Mr Jeremy Browne; Tracey Crouch; Mark Dukan; Paul Flynn; Fabian Hamilton

Questions 38-67

Witnesses: **Professor Sir Jeffrey Jowell KCMG QC**, Director, Bingham Centre for the Rule of Law, **Professor Anthony Bradley QC**, Research Fellow, Institute of European and Comparative Law, University of Oxford, **Lord Lester of Herne Hill QC**, and **Professor Robert Hazell**, Professor of Government and the Constitution, and Director of the Constitution Unit, University College London, gave evidence.

Chair: Could I welcome you this morning and ask if any of you would like to start with a few words or if you are happier for us to go straight on to questions? Right, we are happy to go on to questions.

Q38 Tracey Crouch: Thank you very much. I do not know who would like to take the lead on this, but my first question is: could you briefly describe the judiciary's current role in interpreting primary and secondary legislation?

Lord Lester of Herne Hill: Do you want me to go first?

Professor Hazell: Why not?

Lord Lester of Herne Hill: It is the role of the judiciary under the rule of law to interpret and apply the law, not to make the law.

Q39 Tracey Crouch: Do you think that the judiciary has an important role in interpreting the law? Do you think that if Parliament were to make better legislation, the judiciary might need less time to interpret the law than it currently does?

Lord Lester of Herne Hill: No, in every democracy worthy of the name, where the rule of law is fundamental—including our system—it is the vital task of the independent judiciary to impartially interpret and apply the law, whatever the legislation or lack of legislation and whatever the constitutional context. That is fundamental in a democracy.

Professor Hazell: Can I add a brief rider? If Parliament does not like the interpretation that the judiciary have given to a law, it is open to Parliament to amend the law, and Parliament has quite often done that.

Professor Sir Jeffrey Jowell: Could I also add a brief rider? As Sir Sydney Kentridge once said in a judgment when he was a constitutional judge in the South African Constitutional Court, interpretation is not equivalent to divination. It is not for the courts to do anything other than interpret the intent of a parliamentary statute or subordinate legislation. In interpreting that, even in a country without a codified constitution, they will sometimes apply implied constitutional principles, such as aspects of the rule of law, access to justice, and so on. They will interpret the law but, in so doing, first of all they will bring to bear on that interpretation an indication of what Parliament meant to achieve through a particular statute; and, secondly, any underlying principles that are necessary in a democratic society and part of a democratic society. They will also assume that Parliament intends to uphold the equal dignity of people on whose behalf it legislates.

Q40 Tracey Crouch: Thank you. You make an interesting comment, which makes me reflect on the evidence that we heard last week about statute and then on some of the supporting documents behind the legislation in terms of guidance and various other things that are published alongside Acts of Parliament. When interpreting the legislation, how important is the guidance behind that legislation?

Lord Lester of Herne Hill: I once did a case called *Pepper v Hart*, which decided that courts were entitled to look at the parliamentary record of what Ministers say, in exceptional circumstances where the text is unclear or manifestly irrational on its face. I have often wondered whether I should be pleased about that victory, because it has changed the terms of engagement between Ministers, Parliament and the courts.

These days, we no longer have to look at the parliamentary record of what a Minister says at 3 o'clock in the morning. Instead, the explanatory notes to Bills are revised. As you know, before the Bill becomes a statute it is revised, and the explanatory notes provide a much more reliable source of interpretation. However, in my opinion, it is extremely important to the rule of law that one does not look for ambiguities and have recourse to extrinsic sources unless it is appropriate to do so, because that leads to legal uncertainty and legal costs, and John and Jane Citizen cannot tell from reading the statute what the law is, but have instead to go to the explanatory notes.

One of the vices of *Pepper v Hart* and its consequences is that quite often, when in this House or the House of Lords one is trying to get the Bill made absolutely clear as far as one can, Ministers will make a *Pepper v Hart* statement and say, "That is good enough." Often it is good enough and convenient for the Executive. All I am really saying is that the courts have rightly been cautious about having recourse to that kind of aid.

This is an entirely different subject—I am sure that Sir Jeffrey would certainly want to explain—from, say, judicial review. If one is dealing with judicial review and looking at a policy, rule or practice, then it is sometimes necessary to show the court the background to legislation in terms of its social and wider context. Again, that runs up against problems of parliamentary privilege, because there are some people—some in this House, I think—who believe that there is something improper, for example, in showing a judge the report of a Select Committee on the ground that it might lead to questioning proceedings in Parliament in breach of the Bill of Rights of 1688-89. I myself think that is rubbish, but that is a view that has been expressed. So far the courts have shown themselves very willing to read the Select Committee reports as background and not be deterred by threats that it violates Article 9 of the Bill of Rights of 1688.

Summing it up, in my view there is limited scope for looking at extrinsic sources and it has to be done in a disciplined and professional way.

Q41 Tracey Crouch: Are you saying that effectively *Pepper v Hart* has become less important now that explanatory notes are published alongside the statute?

Lord Lester of Herne Hill: Yes.

Q42 Tracey Crouch: If I was a mischievous backbencher seeking reassurances on a Bill and a Minister stands up and says, "I strongly believe that the intent of this Bill is to do XYZ and, therefore, I can reassure you," but the explanatory notes do not necessarily reflect that, then my concerns and those reassurances of the Minister are pretty meaningless.

Lord Lester of Herne Hill: That is a very good point and you are right. Of course, there is still scope to rely upon what Ministers say at 3 o'clock in the morning in giving reassurance to parliamentarians, but what I am saying is that the courts are attempting to impose some kind of discipline on the whole process. If you remember, or do not remember, in *Pepper v Hart* Lord Mackay of Clashfern dissented. He was the one dissenting member of the court and he was concerned about costs. It is true that if you start having a system in which members of the legal profession are paid to trawl through endless parliamentary debates on draft Bills and actual Bills, in order to advise and argue what the words of the statute mean, that is not really in the public interest. So there is a balance. In particular, Lord Steyn explained in a lecture his reservations about too extensive a use of such sources. I think it was Mr Justice Felix Frankfurter who criticised the use of extrinsic aids in the United States, on the basis that there is a tendency to rush to an ambiguity wherever you can, rather than the words of the statute. It is quite important that what we in both Houses enact is what represents the law, not what a Minister says at 3 o'clock in the morning.

Q43 Tracey Crouch: Effectively, what you are saying is we need to make better, clearer legislation so that there is less requirement or need for wider interpretation. It is in the public interest full stop.

Lord Lester of Herne Hill: Yes. The Joint Committee on Human Rights, on which I serve, has repeatedly said that. In many of the reports it criticises Bills for lack of legal certainty.

Professor Bradley: I would like to add a comment. It is quite wrong to think that the best legislators in the world will manage without interpretation from a court. Could I repeat what

Anthony Lester said earlier? The whole idea of having a law made by the legislature is it is then for interpretation by the judiciary. That is unavoidable.

It is possible for there to be directions by Parliament to the judiciary. There is an Interpretation Act on the books, which says some simple things like: the singular may include the plural, masculine may include the feminine, and if a Minister has repealed something and then changes his mind it does not revive the earlier law. These things are mechanical things. The important things about statutory interpretation are not to be found in any Act of Parliament. I would say they go back for the life of the common law—centuries.

I know last week your attention was focused on a passage from Lord Simonds in a case. Could I read what I propose to say about that case, should I be asked it? This is a quotation from Mr Justice Byles in 1863 in the case of *Cooper v Wandsworth Board of Works*. This was a case where, on a strict reading of the legislation, the Board of Works had power to knock somebody's house down and they thought they were entitled to do it. Mr Justice Byles and the court said, "No, there is a right to be heard; this is unfair." Mr Justice Byles said, "A long course of decisions, beginning with Dr Bentley's case, and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature". That is my answer to Lord Simonds.

Q44 Tracey Crouch: Thank you very much. You remind me, Professor Bradley, I was reading some Lords Hansard yesterday and there was a rather interesting paragraph where the Minister explains that the scheme also means regulations and the regulations mean the scheme; therefore, the scheme will be applied under the regulations, of which the regulations mean the scheme, so I think it is—

Professor Bradley: I will not say it is a kind of paper chase, but it does come up in modern legislation and I think the courts are capable of dealing with it. We have talked of the explanatory memorandum. I have taken the view that the explanatory memorandum is trying to express it in simpler language for the benefit of administrators and officials who are dealing with the law, not really for the benefit of the High Court judge. He will read the Act and, if necessary, if there is ambiguity, go elsewhere, or to a Select Committee report. It would be a pity if our concern over the judicial role in interpretation led us to say, "We must beef up explanatory notes, so that they become a better source of information than the statutes themselves".

Q45 Tracey Crouch: Professor Bradley, following on from that, in your own written evidence you say, "The existing role of the courts need not change merely because a written or codified constitution is adopted". Could you explain why you think that? I would be quite interested to know what the other witnesses have to say.

Professor Bradley: What I meant to add to my previous answer is that, of course, the Human Rights Act has made an immense impact on the role of the judiciary because it authorises them—indeed, requires them—to take an approach in statutory interpretation that would never have been possible on their own volition. I am sorry, I did not quite catch the point.

Q46 Tracey Crouch: You said that the existing role of the courts need not change merely because a written or codified constitution is adopted. I wonder, firstly, if you could explain why not?

Professor Bradley: That is my view. It was a very wide question: what written constitution are we moving towards? There are some sorts of written constitution that would not affect the judiciary at all, because it would be consolidating or re-enacting existing laws. It would not necessarily reach the powers of the courts.

What might be different would be matters that were previously matters of convention, say, relating to the exercise of the prerogative. If they were to be written down, then you could have a constitutional Act with a clause at the beginning saying, "Judges, keep out!" but I think it would be rather unsatisfactory. The more you put into the written constitution, the more there would be for judges to interpret and enforce if necessary. What was really in my mind was that the fundamental constitutional question, which is that the judges interpret the law made by Parliament and cannot review the validity of laws made by Parliament. That would not change in this minimal constitution that I was thinking about.

Q47 Tracey Crouch: Do the other witnesses agree with that?

Professor Sir Jeffrey Jowell: I believe that the interpretation of a constitution is not different in kind from interpretation of a statute. The judge is still asking, "What is the meaning of the constitution? What is its purpose? What is its intent?" and the exercise will not change. What happens under a written constitution, more often than under a non-written, non-codified constitution, is that the judges will judge whether legislation is compatible with the constitution. They will be looking more at Parliament's laws to see whether that is compliant with the constitution. They are still fundamentally engaging in an interpretative exercise and you cannot have Parliament deciding those questions because it would then be judging in its own cause. It is often said that when judges look at the question of compatibility of a statute with a constitution, they are entering further into the political arena because they will clash more often with policymakers. However, the two roles are very distinct and courts are interpreting the law whether they are interpreting a statute or interpreting a constitution. The exercise does not involve policymaking as such. It still remains an interpretative exercise, which it is fit and proper for judges to do.

Lord Lester of Herne Hill: You are obviously asking a hypothetical question and it all depends on the constitution. The kinds of questions that courts are called upon to decide depend upon the framework of the constitution. Suppose that we replace the Human Rights Act, as one party has indicated it might do if it won power to do so. Suppose we replaced it with a written constitution, with a federal structure rather than a devolved structure and a constitutional Bill of Rights. Suppose that we retained the supervisory jurisdiction of the European Court of Human Rights, so that the British Bill of Rights would be anchored in international human rights law. Suppose all of that, then the kinds of questions that our courts would be called upon to decide would obviously be much more complicated and more policy-laden. For example, they would have to decide how to maintain a federal system of government. They have to decide that already within the devolved system but in a much more limited way. They would have to decide how far our written law and unwritten law were compatible with Strasbourg jurisprudence or other international human rights treaties. The question is very broad and it can only be answered by saying it all depends.

Q48 Tracey Crouch: One of the hypothetical options around codifying the constitution would be to have a consolidation Act. Obviously that could codify the major elements of existing constitutional law and practice but have no special status in law. I wonder what implications you think this would have for the constitutional role of the judiciary?

Professor Hazell: None. If you were anxious to preserve the status quo, then a written constitution or conceivably consolidating statute could provide, "Nothing in this constitution, this consolidating Act, changes the existing constitutional role of the judges."

Tracey Crouch: Professor Jowell, do you agree with that?

Professor Sir Jeffrey Jowell: Yes, absolutely. I totally agree.

Tracey Crouch: Professor Bradley?

Professor Bradley: Absolutely.

Tracey Crouch: Excellent, thank you.

Q49 Paul Flynn: Last week one of our witnesses suggested that if the courts were given a role in upholding a written constitution and they found that a piece of primary legislation was, in their view, unconstitutional, one way of dealing with it would be to issue what Andrew Le Sueur called "a declaration of incompatibility". He said this retains Parliament as the institution having the final say on whether the law should be changed. Do you think this declaration of incompatibility is the right way forward and will achieve that?

Lord Lester of Herne Hill: When you have an area where European Union law reigns—where there is a rule of EU law that governs in a particular area—obviously there, under the European Communities Act 1972, it is the function of our courts to read the domestic statute compatibly if they can. If they cannot, then they have the power to disallow or set aside the offending provision. For example, if you have the Equal Pay Act, which is too narrow to protect the rights of women workers if you just read it on its own, and if the EU rule demands a much wider and more generous interpretation, then either the court has a choice of reading and giving effect to the domestic statute compatibly or, if it cannot do so—if it cannot make black read white—then it has to give preference to the EU rule.

The question is whether such an approach is necessary in a non-EU context. When I introduced the first Human Rights Bill as my private member's Bill, I treated it just like that. The senior judges came to me at the time and said, "You will never get it through the House of Commons because the House of Commons would never consent to a weakening of their supremacy. Why can't you be more sensible and moderate?" So I introduced what became the declaration of incompatibility. Under the British system and in terms of what is possible, I still think that that is a good compromise. In one sense it is not nearly as bold as most other constitutions but one of the advantages of it is it is holistic. What I mean is it does not give complete power to the judiciary. It engages the political branches of Government, Parliament and the Executive, as well. For example, as you know, under section 19 of the Human Rights Act, Ministers have to say on the face of every Bill whether they think it is compatible with the European convention. Then we have the Joint Committee on Human Rights, which is the watchdog that chases Ministers to see whether that is really so and reports to both Houses.

The beauty of that very British and very parliamentary system is that it does not make the judges the sole guardians of basic rights and freedoms. It engages both Houses and the Executive. I like that system and, although I perfectly understand the intellectual argument for a strike-down power—for having exactly the same powers as the American Supreme Court or most of the other courts—I would not go to the stake on it myself. I think that a declaration of incompatibility is a good solution.

For those who are historians, there is a little book that Sir Hersch Lauterpacht, who became a judge of the International Court of Justice, wrote as long ago as 1944, which looked at how to solve the British problem. He said a declaration of incompatibility would be a way of doing it. However, if we had a full-blooded written constitution, I can see that we might need to do something like, say, the South African constitution, which is to give the power to the court to strike down, but also to make sure that the court has the power to adjourn the proceedings to give Parliament and the Executive the chance to put the matter right. That is very close to a declaration of incompatibility because—I am sorry to take so long—it is very important indeed to retain public confidence in the system. It is also very important that Parliament and the Executive have prime responsibility for making sure that the laws that are made are fully compatible with fundamental rights and freedoms. As I say, it is really a partnership. The court is there to interpret and apply, but then it is for the other two branches to decide what to do about it. One needs to build in mechanisms, such as the declaration of incompatibility or, as in South Africa, a strike-down power coupled with the right to adjourn the proceedings so that the other two branches have, say, six months in which to fix the problem, which is just like our Human Rights Act does when it has the remedial order procedure by subordinate legislation.

Q50 Paul Flynn: That is a very full answer. I am grateful for that. Will you be reluctant to seek advice from those who told you that the House of Commons is reluctant to give away any of their power, when recent years have shown that in many ways the Commons and the rest of Parliament have been very willing to give up a great deal of the power they have had?

Lord Lester of Herne Hill: During the 20 years in which I have been privileged to be in the other place, I have not noticed that the Commons is less jealous of its rights and privileges than it was when I began. On the contrary, things like the prisoners voting case indicated to me that the House of Commons is more jumpy about any encroachment on its political powers.

Q51 Paul Flynn: I think you misjudged this. When you say the House of Commons, prisoners' voting rights is regarded by most of us as an eccentric diversion and an expression of raw naked nationalism rather than something that is of any great significance. In my 26 years as a public representative, I have never known any one prisoner to come along and say they are concerned about the fact that they do not have rights to vote. I recently had a constituent in Murmansk prison for a while. The last thing about his conditions I was worried is whether he could vote or not. This is a piece of political nonsense that has come out, a bit of breast beating and so on.

Chair: Mr Flynn—

Paul Flynn: Yes, I will, Chair.

Chair: Yes.

Paul Flynn: I do not think it is a very good example. The problem is it has given power in devolution and to Europe over the years to an extraordinary extent.

Lord Lester of Herne Hill: The former President of the European Court of Human Rights gave a lecture two nights ago on this. I would very much recommend anyone who is interested to read it. He was attempting to deal with some of the remarks that are made about his court, but I think it is beyond the scope of this hearing to be considering that.

Q52 Paul Flynn: Yes. The courts that we are greatly concerned with, where there are terrible breaches of human rights, are the ones in other parts of Europe. We should be leading by example with our system, which is by far the superior one along with the Scandinavian ones. Anyway, I will return to the question. If the judiciary were given a role in upholding a written constitution with a higher status in law, do you think there are any other options other than the ones that we just mentioned? If a piece of primary legislation was unconstitutional, is there anything you would like to say? You gave a very full answer on this and the declaration of incompatibility we have discussed. Do you think there any other approaches that would apply?

Lord Lester of Herne Hill: I did not make this point, but if you strike down a piece of legislation, you create a gap in the system. If you make a declaration of incompatibility, there is no gap because the offending piece of legislation remains in force until it is struck down. In that sense, you have the advantage of continuity but an advantage that is flawed because the provision has been found to be defective, to be unlawful.

What we are really concerned about is whether one should include in the hypothetical system a judicial mechanism to strike down altogether, as happens in most democracies with independent courts—not that there are very many of those—or whether to leave it to the Human Rights Act solution. I would prefer the full-blooded constitutional solution, say, like the South African constitution, but coupled with the ability to postpone the strike down.

Can I give one other example and then I will shut up? In Canada, there was the problem that one province had not legislated in their state constitution to make sexual orientation discrimination unlawful. The Supreme Court of Canada kept handing down judgments saying—I think it was to Alberta—not only is it unlawful under the federal constitution but all the provinces should also make sure that it is unlawful under provincial law. Still Alberta would not do it. The court gave a warning in one judgment and eventually it was driven to say to Alberta, "We are now going to write into your constitution a non-discrimination provision". That was an extremely radical thing to do.

On the other hand, in a quite different case, our Judicial Committee of the Privy Council was faced with an offending provision somewhere in the Caribbean; Antigua I think. They decided that the right thing to do was to give the problem back to Antigua to remove the offending provision. I think there needs to be enough flexibility in the system for there to be a dialogue between court, Executive and Parliament in solving the problem. As long as there is the full range of weapons available and as long as it is sensitive to a holistic approach, I think it works okay.

Q53 Paul Flynn: That is very interesting. Professor Blackburn and Andrew Blick said in a paper that they wrote for this Committee, "A codified system could create more clarity around the contents of the UK constitution; and make more explicit what the judiciary could and could not do in upholding it. For these reasons it is arguable that a codified constitution is a means of preventing the inappropriate wielding of power by judges, rather than facilitating it". Do you agree with their point?

Lord Lester of Herne Hill: I do not entirely agree with that. I think that a codified system would certainly clarify, for example, areas of what we call the prerogative and that probably needs to be clarified: things like the war-making power or the treaty-making power, matters of that kind. I do not think it is the function of the constitution to tell the judges what they must and must not do, except in terms of very poor principles that would leave great scope for discretion. I would not think it is right to think that a written constitution could do that.

As someone who has on the whole been sympathetic to the idea of a written constitution, the other thing I would just say is one has to be extremely careful about that exercise. For example, I find the way that the American Supreme Court or the Supreme Court of Ireland interpret their written constitutions is narrow, insular and cramped. For example, they do not regard it as appropriate to illuminate the constitutional choices they make by going beyond the words and texts of their written constitutions. They treat them as a kind of carapace, a rigid carapace. Other courts do not; not in South Africa, not in Canada. One has to be very careful about rigidity and inflexibility if you put it all in writing.

Paul Flynn: I am grateful for that. Thank you.

Professor Bradley: Very briefly, I would say that initially I thought the declaration of incompatibility as it was in the Human Rights Act was disappointing and a half measure. I am now persuaded that it was a rather clever solution. It was a compromise, as Lord Lester has said.

What has interested me—and I do pick it out in my paper and I will not repeat it—is that two distinguished American constitutional lawyers, Tushnet and Gardbaum, have written about what they call the new commonwealth model. Now, that is a misleading name; let us call it "the new model". The new model of judicial review is where there is a much greater sense of partnership. They are thinking particularly in terms of human rights. The first stage is that the Executive and Parliament must address the human rights implications of new Bills and must tell Parliament what they are; the second stage, if that is enacted, is that the courts may review it themselves and may issue a declaration of incompatibility; the third stage is it would then go back to Parliament. They give instances from Canada and with the express override, from New Zealand and from one or two jurisdictions in Australia.

I have to say that the British system of declaration of incompatibility under the Human Rights Act seems to fulfil this model. Whether it would work applied across the whole of a constitution I cannot say, but it is of interest that some American experts are beginning to think that we avoid some of the ideological and philosophical problems of why judges should be deciding these things and not elected politicians. It is a way of bringing in a balance, but it needs those different stages. I could imagine a situation in which a Government or a Parliament that totally disbelieved in any of the things that the court was doing would just reject every declaration of incompatibility that came along, and then one would be no better off.

Lord Lester of Herne Hill: Could I just add one further word because it is fun and important in a way? Where does the idea come from? Well, it comes in the following way. In New Zealand in the Bill of Rights Act there is a really boring provision that allows the Attorney General to certify whether she or he considers a provision to violate the international covenant on civil and political rights. When I was doing my private member's Bill, I sat down with Sir Kenneth Keith, who had been chairman of the New Zealand Law Commission, and we beefed up the rather weak New Zealand model. We looked at this provision and we both agreed it was intensely boring and of no real value. However, I shoved it into my private member's Bill and when the Government did theirs they made it slightly more sophisticated. The drafter of the Human Rights Bill told me that he found it the most boring provision in the Bill. He could not understand why it was there. We all found it extremely boring. Yet in my judgment it has been the most important provision in the entire Human Rights Act, for the reasons I have already given. It is because of the existence of the Joint Committee on Human Rights that it has been brought to life.

Professor Sir Jeffrey Jowell: I often have to try to explain our system to former countries in the Soviet Union and so on, and they are puzzled for the following reasons. First of all, they see a

constitution as providing clarity, a compass, a guideline, so that schoolchildren can know and understand who makes decisions in our society and not be as confused as they are now through our non-codified constitution. In addition, a constitution serves as a device for pre-commitment or self-binding. It has been described as a tie imposed by Peter when sober upon Peter when drunk. It is not so much that you all hand over power to judges. You decide, "We will not go into certain areas. Like, we will not ever pass a law that requires torture; we will not censor newspapers without very good reason." That is what you are doing through a constitution. It is a notion of pre-commitment. Obviously, since Parliament cannot decide any invasions on that pre-commitment in its own cause, it has to be the judges that do it. The judges do it in all countries. They make the decision as to whether you have crossed the line.

These East and Central Europeans say to us, "What if Parliament were to introduce torture or censorship? Why should the court simply say, 'I declare this incompatible'? Surely they should say, 'You have a pre-commitment in your country, in society. You have crossed the line. That is wrong. That is unlawful. It is invalid because it does not comply with the constitution.'" That is why most countries in the world simply say if you do cross that line, if you act in a way that is unconstitutional on the basis of that pre-commitment, somebody has to tell you that you are doing it, say it is wrong and that you have to stop doing it.

We have this elaborate compromise that has all kinds of advantage in our society now, particularly, as you so closely observe and guard, the notion of sovereignty of Parliament. I believe that if one does move to a written constitution, the notion of, perhaps not all but at least some constitutional principles being subject to strike down, should at least be considered for the reasons I have given. The South African way in this might be a way to go forward, which does not create that sort of gap. I will rest that there.

Professor Hazell: I will mention two things very briefly. One is there has been mention of the prerogative powers and whether they need to be codified. We should perhaps note that several of them have quite recently been codified in the Constitutional Reform and Governance Act of 2010, one of the last Acts passed by the last Parliament. Both the power to regulate the civil service and the treaty-making power are now codified and regulated by statute.

Secondly, you reminded us of some of the evidence from previous witnesses. From memory—summarising the quotation—it was that one of the arguments for a codified constitution is that it might clarify the role of the judges. I would only say I have heard many arguments for a written constitution. I think that is one of the feeblest.

Q54 Fabian Hamilton: Let me take you up on that, Professor Hazell. Last week one of our witnesses, Dr Blick, told us that in future, even without a codified constitution, judicial review could "develop a more clearly constitutional character" if judges were to use texts such as the Ministerial Code and argue that they created a legitimate expectation that certain procedures would be followed. To what extent, gentlemen, do you think that it is likely that judicial review could change in this way?

Professor Sir Jeffrey Jowell: In some respects I think it has already changed in that way. Judicial review does contain certain principles based on our constitutional values, which we do have even though they may not be written down. One of them is the rule of law. Dicey's genius, writing in the 19th century, when we were not terribly democratic, was to observe that not only parliamentary sovereignty or representative Government was a key constitutional principle. There was another. That was the rule of law, which contained the notion of legal certainty. Under that, the courts have developed a notion of legitimate expectation. Somebody has told the people that they ought to act

in a certain way; this is an expectation in society. If it is a clear promise and people base their conduct upon that promise, then that behaviour ought to be followed.

The notion of legitimate expectation is already within our judicial review and an accepted principle. Of course, if there is clear law to the contrary, then the courts have to observe that clear legislation. Of course, if there is ambiguity, then they may import those notions of constitutional principles such as legal certainty, such as the legitimate expectation.

Lord Lester of Herne Hill: When I came to the Bar 50 years ago, I am afraid the common law was ethically aimless. That is to say, apart from the right to liberty, which was weakly protected by habeas corpus, there were no clear principles guiding the common law about ethical matters. For example, there was no common law right to equality without race discrimination; astonishing but true. There was no common law positive right to free speech legally; astonishing but true.

What has happened, for example—partly through parliamentary leadership in the non-discrimination legislation, or the Human Rights Act, and a new generation of judges who were much more enlightened in these matters than their Victorian predecessors—is that the modern generation of judges have recognised out of the common law a series of ethical principles. As Professor Jowell has said, for example, they recognised a principle of legal certainty, but they have also recognised a constitutional right to equal treatment that is mentioned in Sir Jeffrey Jowell's leading textbook on the subject. They have developed that out of the common law. They have developed a constitutional right to free speech out of the common law. When they carry out judicial review, they are animated by these basic values even without the benefit of a written constitution.

The Human Rights Act itself requires the courts, in interpreting legislation or developing the common law, to do so in a way that is compatible with the European convention, which is our substitute for our own written constitutional Bill of Rights. The whole nature of judicial review has been transformed and that will continue. It is extremely beneficial provided that the courts respect separation of powers, which they do.

Fabian Hamilton: Does anybody else wish to comment?

Professor Bradley: I would simply add an example to what Professor Jowell said about legitimate expectation: the practice of consultation before certain decisions affecting the public or sections of business are taken. Consultation is a good thing. The courts began to deal with complaints that a particular authority had not gone through proper consultation and, after a while, the Cabinet Office decided it would be in the interests of Central Government if it issued a statement of what they would expect a Central Government department to do if they went in for consultation. If that is not followed, why should the court not say, "This is a bad decision because of bad procedure"? It is not contained in an Act of Parliament—it could be—but that is an example of something that has developed out of the needs of modern society. The courts are responding to a power of Government and, in a sense, are asking for it to be exercised in a reasonable way. You could give plenty of other examples, particularly from the immigration field when the Home Secretary or the Home Office or the Border Agency say, "This is the policy we are going to follow" and then they do not. Can you complain if the judges say they should have followed the policy they announced?

Q55 Fabian Hamilton: If the judiciary were given a role in upholding a written constitution, one possible approach would have to be a system of pre-enactment review whereby the judiciary gave a view on the constitutional validity of Bills before they became law. Professor Bradley, in your submission to us, I believe you suggest that one disadvantage of pre-enactment review is that the political opponents of a Bill may turn their opposition into a legal attack on the Bill by seeking

political support from the courts. What other advantages or disadvantages would there be to a system of pre-enactment review?

Professor Bradley: I was thinking from the position of very much an outside observer of what I believe happens in France with the French constitution, or in Germany. I think the difficulty is it is going to be abstract consultation without the knowledge of how the public agency is necessarily going to use these powers. Something that may on a superficial reading be fine may, in fact, be capable of use in a very different way. Now, if you have pre-enactment consultation, do the parties that might be affected by future use of the Bill have to wrack their brains to think of every possible way in which this might be used and, therefore, are they for it or against it? Does the court have to consider all the possible ways?

If it were a strict matter, and one thinks perhaps of a devolution issue: does the Scottish Parliament have power to legislate on a referendum? Then that is very much a self-contained question that could be the subject of a pre-enactment question, but so many issues, particularly those involving human rights, would not be suitable for pre-enactment. I have a certain distrust of judges being asked to do what they would normally not be doing; that is, consider these questions in the abstract with a view to should the legislation be desirable. My colleagues may wish to add.

Professor Hazell: May I add one thing? Lord Lester made the point earlier that in looking at any system of constitutional review you need to do so holistically. You need to look at the whole system. In our system, in effect, we already have some pre-enactment review by Parliament itself through two very important specialist committees. Lord Lester has mentioned one, the Joint Committee on Human Rights. They scrutinise every Bill for its compliance with human rights obligations. In the Lords, there is the House of Lords Constitution Committee, which also scrutinises every Bill. Professor Bradley was formerly one of their legal advisers. There is a quite close pre-enactment review by both Houses of Parliament and, therefore, I would just question whether we need a further cog on that particular wheel.

Lord Lester of Herne Hill: I am firmly opposed to the idea that is exemplified in the Republic of Ireland where the President can refer a Bill to the Supreme Court before it is finally law for an opinion about its compatibility with the constitution. I will give one example that illustrates the vice and that will certainly appeal to some of you. There was an Equality Bill that was referred by the President to the Supreme Court and was held by them to be unconstitutional because the disability discrimination provisions imposed excessive burdens on employers. That was a clear policy-laden decision. With all the interest groups lobbying, the Irish Parliament had decided that it was vital that disability discrimination should be dealt with in that way. Yet it was struck down without there being any concrete cause or controversy. In my view, that is a bad system and I prefer the common law system.

This was all thought about with the Human Rights Bill because it was said, "Should we have a similar power?" The reason why the then Government and the supporters of the Bill took the view they did was precisely to avoid hypothetical issues being raised on Bills without the benefit of full arguments on the basis of a concrete case. It was decided to follow the American model, which insists there be what they call a cause or controversy before the Supreme Court can be involved at all. I think that is really important. I extend it further. Some have suggested in Strasbourg that there should be a power for our courts to seek advisory opinions from Strasbourg halfway through a case. Again, I am not very keen on that, but that is a different matter.

Q56 Fabian Hamilton: Thank you. Gentlemen, if there were to be a fully written constitution, which I assume would have a much higher status in law, how do you think that would affect parliamentary sovereignty? I suppose what I am getting at is that in our system Parliament is supreme. It is the source of all constitutional and legal authority to the courts and not necessarily wisdom. In a system like the United States, which has a written constitution, the constitution itself becomes the source of authority. Therefore, one assumes Parliament is inferior to that written document.

Professor Bradley: The short answer is that parliamentary sovereignty ceases. The constitution becomes sovereign but possibly—to be more exact—the amendment procedure for changing the constitution is what becomes sovereign, because that is the ultimate thing one can do short of revolution. I believe I indicated in my paper that to go through the whole exercise of preparing a complete constitution and leave Parliament able to make laws on any subject, whatsoever, at any time without any special procedure, would be a great waste of time.

Lord Lester of Herne Hill: It is an illusion to think that Parliament has absolute sovereignty now, of course. We have shared sovereignty. For example, we share sovereignty with the European Court of Human Rights. Think about what Parliament did in 1968 when they took away the right of 200,000 British Asians to enter and live in their country of citizenship in the Commonwealth Immigrants Act 1968, one of the worst things that has ever happened in my lifetime in Parliament. The European institutions then say that that violates Article 3 of the European convention because it is inherently degrading to single out some of your fellow citizens for worse treatment because they are brown. In theory, Parliament could have decided to disregard that. Then it would have gone to the Strasbourg court and they would have ruled and then there would have been no alternative but to comply with the judgment of the European court or leave the European institutions. In 1966, when the Wilson Government decided to allow individuals to take their cases to Strasbourg, some parliamentary sovereignty passed to Strasbourg, as it did with the rest of Europe when they did the same thing. It is a question of shared sovereignty. A written constitution would set a fence around basic rights and freedoms that could not be crossed by Parliament or by anybody else. To that extent, undoubtedly we would become a constitutional system of Government rather than a parliamentary system.

Professor Sir Jeffrey Jowell: To add to that, recently there has been a very respectable line of comment that parliamentary sovereignty may not be our prime constitutional principle any longer and that, in certain circumstances, the rule of law might take over that place. Some of our highest judges have said it in and out of court. The argument goes that there are certain fundamentals in any democratic society and that, if Parliament were to invade those fundamentals and defy them, then the courts would be able to say in a democratic constitution, "You simply may not do this." For example, if Parliament were to abolish all judicial review, any challenge to any law, any challenge to any official Act or in a particular area, or to introduce torture or to postpone elections for five years, one just hopes that Parliament would never do that in our society. It probably would not, but theoretically there are those who say that in that case today courts could be in a position to say, "You have crossed the line," a line that in any properly democratic society should not be crossed.

Q57 Fabian Hamilton: Based on what Lord Lester has just said, does a written constitution then protect the sovereignty of a nation as far as other nations are concerned? In other words, would a written constitution be the answer to those that are concerned that so much of our sovereignty is now shared with the European Union? Would a written constitution protect us against that or would we

have to write into that constitution our membership of the European Union and, therefore, embed it permanently subject obviously to the amendment procedure?

Lord Lester of Herne Hill: Without a written constitution, one of the disadvantages the United Kingdom has is that there is nothing that our negotiators can point to in Brussels that represents fundamental constitutional values. If the German Government or the French Government or the Italian Government is bargaining with officials in Brussels or in the Council of Ministers they can say, "Very sorry, we have a basic law, which is our constitution, and there are basic principles that have to be respected or we cannot proceed". But what can a British negotiator say? They can talk about parliamentary sovereignty but that is a busted concept because Parliament can do what it likes, including give effect to European policy. So in that sense there is no doubt that we have a weaker bargaining power.

Sir Jeffrey has also touched on this, that it is true that if you are concerned about something called British values—whatever that means—which is what I remember Gordon Brown was very concerned about, in the absence of a written constitution with a set of values codified, for example, it is very hard to explain what it is that newcomers are meant to subscribe to. What are these basic principles? If you have someone violating free speech, all you can do is point to Article 10 of the European Convention and the Human Rights Act. Whereas, a written constitution would deepen understanding of what are the principles of a democratic society that British citizens should respect. So these are some of the advantages of having a written constitution.

Professor Hazell: Two points if I may. I agree that it is one of the better arguments for a written constitution that it can help to preserve national sovereignty. On more than one occasion we have seen the Constitutional Court of Germany being a very effective defender of German sovereignty against the European institutions. But if you have a concern to try to protect as much as possible parliamentary sovereignty under a written constitution, again it might be possible to provide in that constitution, "Nothing in this constitution affects the existing principle of parliamentary sovereignty." So the constitution could try to enshrine parliamentary sovereignty, if that is a principle that you want to preserve.

Professor Bradley: Very briefly, I think the question raised the point of whether a written constitution would need to provide for the place of international law. I believe it would. It would not necessarily change the present position, which is that the Executive can make treaties, but they only change the law of the country if Parliament legislates to do that. That could be stated. It might be desired to give a different status to international law in general, and it would probably be necessary—as Denmark and the Republic of Ireland found in 1972—or desirable for us also to say something about the European Union.

Fabian Hamilton: Let me just conclude by saying that if you want to know what some of the British values are, go to Leeds Town Hall, which was opened in 1858, because they are written all the way round the top of roofline inside the building; quite extraordinary.

Q58 Mr Browne: Good morning. I do not say this with first-hand experience because I became an MP in 2005, which is the same year as the Constitutional Reform Act was passed, but, for the purposes of our deliberations, what effect has that Act had on the communication between the judiciary and the Executive? You draw on considerable experience. Was that a watershed moment when life changed or was it a blip?

Professor Hazell: If I go first on this because as it happens we have done quite a lot of research on this in the last three years in a research project called the Politics of Judicial Independence funded by the AHRC. One of the particular things we have looked at has been the communication between the judges and Parliament. One of the big changes effected by the Act was the creation of the new Supreme Court, which was established in 2009. Until then the Law Lords—who were in effect the Supreme Court sitting in the Appellate Committee of the House of Lords—did contribute to debates in the House of Lords. They did so with diminishing frequency in the last 10 or 15 years of the House of Lords as the top court, because of a self-denying ordinance where they recognised that it was wrong for them to express views on legislation that might subsequently come before them as judges and they might be required to interpret it. That was not a wholly hypothetical fear because occasionally one or more of the Law Lords did have to recuse themselves as they were compromised because of views they had expressed in parliamentary debate. Lord Hoffmann is one example. I think he had to recuse himself in three different cases for that reason. The contributions of the Law Lords were rather random in terms of scrutinising Bills and sometime idiosyncratic. For example, on the Hunting Bill, two of the Law Lords, Lord Scott and Lord Hoffmann, expressed their opposition to the Bill and again had to recuse themselves when the Hunting Act was legally challenged.

I think there is now much more systematic and constructive engagement between the judiciary and Parliament, mainly through parliamentary Select Committees. The position has been transformed partly because some of these committees have been created only in the last 10 years or so. We have already mentioned the Joint Committee on Human Rights, the House of Lords Constitution Committee and in the House of Commons—again it is a newish committee—what started in 2003 as the Select Committee on the Lord Chancellor's Department and is now the House of Commons Justice Committee. There are now many more forums in Parliament through the Select Committees that can engage on judicial and legal matters and the judiciary have engaged very fully with those committees. We have done an analysis of judges being invited to give evidence to parliamentary Select Committees and I was very surprised at how frequent it is. Since 2006 when the Act came into force, there have been about 120 judicial appearances before parliamentary committees by serving judges. If you add in retired judges and international judges, it comes to 280 judicial appearances.

Q59 Mr Browne: So there has not been a diminution of the contact between the judiciary and the legislature.

Professor Hazell: Far from it.

Mr Browne: It could be the opposite

Professor Hazell: In a long-winded answer—

Mr Browne: You say there is a much wider range of exposure.

Professor Hazell: Much more communication and I would suggest more effective communication, partly because it is now with both Houses—there is a lot of communication with the Commons, particularly through the Justice Committee—and partly because Parliament is hearing from a much wider range of judges, not just the Law Lords. Depending on the nature of the Committee's inquiry, it can hear from a district judge or a circuit judge if it wants to hear about the criminal law in the lower courts.

Q60 Mr Browne: What about interaction between the judiciary and the Executive? We have a Secretary of State with no legal background, who is in the House of Commons. Does that matter?

Professor Hazell: Again, there is very regular communication. The Lord Chancellor has a monthly meeting with the Lord Chief Justice. This is a fairly recent development but the Lord Chief Justice now has regular meetings with the Prime Minister. So there is quite of a lot of traffic between the judiciary and the Executive.

Q61 Mr Browne: You would not regard it as diminished?

Professor Hazell: Far from it.

Q62 Mr Browne: The opposite, if anything?

Professor Hazell: The opposite, again and again with multiple actors. Many other senior members of the judiciary in leadership roles meet with different parts of the Executive depending on the business being discussed. If we are talking family law, it is not just officials in the Ministry of Justice but they will meet with officials in the other Whitehall departments.

Q63 Mr Browne: We are assuming that this greater interaction is a good and healthy thing. Am I right to assume that? The more interaction the better?

Professor Hazell: It is always open to the judiciary to say, "I am sorry. I cannot meet to discuss that particular subject because it might come before me in court and I do not want to be compromised". The judiciary have been very constructive and willing actors and they see the advantage in engaging with both the Executive and with Parliament.

Lord Lester of Herne Hill: Nothing I am about to say disagrees with what Professor Hazell has said but I want to add a few things as an insider. First of all, I have no doubt that creating a separate Supreme Court was wholly beneficial. I do not want to go into some dirty linen at this point, but I can assure the Committee that in the old days there was an unfortunate contamination between people like myself and serving Law Lords because they were in the same chamber. They enjoyed it very much and we did too, but it was not very healthy. I do not want to go into examples of it but there were several and, in my view, the separation of powers between the judicial branch and the political branches is vital. That has happened and it is a good thing. It has stopped the really bad practice, which Robert Hazell has referred to, where serving judges took part in debates and voted in debates and did so on matters that they would have to consider later as judges. I can think of two examples where something happened that was completely wrong, which has nothing to do with Lord Hoffmann but others separately.

What have we lost? One of the things that we have lost is having senior jurists able to take part in the scrutiny of legislation in the way that used to happen or, for that matter, serving on committees in the House of Lords, for example, the European Union Committee where someone like, say, Lord Slynn, who had been a judge in the European Court of Justice, chaired one of the committees. That can still continue with retired Supreme Court judges if they become Members of the House of Lords. But there is no doubt that the legal expertise of the House of Lords is too dependent upon a handful of legally qualified Members of the House, for example my colleague Lord Pannick on the

cross benches who does overtime in the work that he does. In the old days there was more sharing of that responsibility. So for example Lord Wilberforce or Lord Simon of Glaisdale, just to name two, or Lord Slynn, would play a more significant part. This is all part of what is happening to the House of Lords more generally than simply creating the Supreme Court, but I am troubled that our expertise in that area is weaker than it was and this very much goes to appointments of the House of Lords and not to the Supreme Court. Summing it up, I think that having a separate Supreme Court is wholly beneficial.

Finally, on the links between us the judges, I agree with Robert Hazell that it is much better that that is done through a committee system than in some surreptitious way. It is much better that there is transparency in dealings between the senior judiciary and the legislature. I think it is much more transparent now, although there are some matters where we cannot be transparent in our dealings. But it is very, very important. To give one example of sensitivity, when the Justice and Security Bill was going through—I think last year—the Joint Committee on Human Rights was concerned about suggestions of backdoor conversations taking place, between serving judges and the Executive, about the content of the Bill and that concern was raised. It is very important that there is true separation and proper formalised systems of consultation.

Professor Hazell: I would like to add some figures about the legal expertise in both Houses. There are more than a handful of distinguished lawyers in the House of Lords. As it happens, we did an analysis for the House of Lords Appointments Commission. I think that was in 2009-2010, at the time when the Law Lords had just left the House of Lords. After the departure of the Law Lords, 94 lawyers remained in the Lords—this is in October 2009—of whom from memory 25 were former judges. The number of former judges may diminish in future if Supreme Court justices are not put into the House of Lords on retirement. We do not know yet what the convention is going to be in that regard but both Houses have a lot of legal expertise. The House of Commons elected in 2010 has 90 lawyers in it. So there are plenty of guardians of legal values in both Houses, apart from the judges.

Chair: We are going to have to move on quite swiftly now. We have until 11.30am.

Lord Lester of Herne Hill: There is an assumption there that because someone is called a lawyer, they will be a guardian.

Q64 Mr Browne: I thought you were going to say knowledgeable about the law.
Very briefly, and perhaps a brief answer, the implications of the Constitutional Reform Act. What process of consultation would we expect the Government to undertake with the judiciary in the light of the changes that have taken place, as you have just described, as a result of that Act were the Government to move towards a codified constitution, and would that be hugely complicated by having different legal jurisdictions in different parts of the United Kingdom, assuming that the Scots do not go their own way?

Lord Lester of Herne Hill: There would have to be wide consultation in each of the countries of the United Kingdom. That would include the judiciary and the public and everybody else. I think that is all one can say. Obviously it would be a massive thing and it would require enormous consultation.

Professor Sir Jeffrey Jowell: I would agree. As Professor Bradley said in his written evidence, I think it is inappropriate for judges to give an opinion on political matters and on the policy of moving towards a written constitution, but the nuts and bolts of a new constitution is something

that might interest them in different respects. For example, when we introduced the Human Rights Act in 1998, the judges felt that the Act ought to come into effect only after two years. So during that time they engaged in a very comprehensive system of training of judges, lawyers, tribunal heads and so on, and this might be needed in this situation. That is the kind of issue I think that you ought to be able to comment on.

Mr Browne: I suspect the Executive will be extremely grateful for your wise insights rather than seeking to marginalise people in the process.

Professor Bradley: I would just add that the training of judges was not done by the Government. It was done by a panel of senior judges and included a lot of people who, like myself, did not know much about it.

The point on consultation: if there is general consultation on something as wide-ranging as this, then bodies like the legal profession, the Law Society, the Bar Council, the university world, they will include many people who can work out the implications for the legal system of what to do if proposed.

Q65 Mark Durkan: If we had a written constitution, from everything that has been said, it would seem that it would just go with the territory that the judiciary would have a role then in interpreting it and be called upon to uphold it. Would that require a distinct constitutional court or is the Supreme Court, as we know it, capable of putting on that cape when required and discharging the judicial consideration?

Lord Lester of Herne Hill: I am very strongly opposed to creating a constitutional court rather than a Supreme Court. Again this was thought about with the Human Rights Bill. Across Europe and in countries like South Africa there have been needs for a constitutional court for all kinds of reasons but I do not think those reasons obtain here. Once you have a constitutional court, first of all, you are separating something called constitutional issues from ordinary law. I believe that constitutional issues are not so specialised that they require a court specially appointed to deal with them. You cannot be a good public lawyer or constitutional lawyer if you cannot interpret a contract. It is very important that the judges who are interpreting the constitution know and understand about general law, about tort or contract law, criminal law and so on, and bring all that knowledge and experience to interpret the constitution.

We see in South Africa at the moment one of the great disadvantages of a constitutional court. In the first generation of judges, when the old ANC lawyers were being brought in to replace the older apartheid generation of judges, it was a way of bringing in a whole new generation in the independent constitution. That was very important. My perception of what is happening in South Africa is that that court is now under pressure because of what are basically political appointments, which will sap its strength if they are not careful.

I much prefer there to be a single Supreme Court—if necessary with separate divisions dealing with particular topics—and not having two courts that may even conflict with each other. I think it is much better to keep it that way, which is what we did with the Human Rights Act. Of course, there are devolution issues that go up to the Supreme Court in a different way—that is a separate question—but I would not fragment the apex courts.

Professor Hazell: I strongly agree. It is generally in the common law tradition to have a single Supreme Court.

Professor Sir Jeffrey Jowell: Agreed.

Professor Bradley: Agreed.

Q66 Mark Durkan: Perhaps that is one case where you could say the Irish example is worth following, having the Supreme Court ambidextrous over the constitution and all other areas of law as well.

The question is then, if there is not a separate or distinct court, if the Supreme Court were seen arguably to have this stronger, added role because of a written constitution, would that create any further issues around its composition or make-up, including with regard to things like devolution and other things? Does it start to create issues of constituency around the Supreme Court in the future?

Lord Lester of Herne Hill: Speaking for myself I would hope not. Obviously the final court must have the confidence of all the legal systems and all the peoples that make up the country. For example, if Scotland remains within the Union, and they have a separate legal system, it is vital that that is respected within the constitution and the composition of the court. It is vital that the judges of the court represent both halves of the human race and not only the male half, for example. We do not want a representative judiciary; we do not want a kind of United Nations judiciary. All the judges are there as individuals to interpret and apply the law without fear or favour. What we do need is a well-qualified and expert judiciary. I believe that that is what we have right now. I believe that right now we have the best senior judiciary anywhere. It is not representative and there are things one would like to improve but, in terms of the quality, it is excellent that so many able lawyers have been prepared to sacrifice incomes at the Bar, to change career and to serve as judges. What would worry me very much is if we did not continue to recruit the best people for the bench.

I would like to say one more thing on that. It is appalling that we cannot persuade any senior judges to serve on either of the European courts at the moment. That is deplorable and terrible. We will not go into why it has happened but it is terrible. If that message were to apply to senior lawyers who decide no longer to go the bench and go to the Supreme Court, that would be appalling. So we are extremely lucky in the quality of what we have now. What we need to do is build on that.

Professor Sir Jeffrey Jowell: I would totally agree with that. I was a member of the Bowman Committee, which was set up to look at what was then known as the Crown Office List, which is now known as the Administrative Court, in advance of the implementation of the Human Rights Act. We were advised by the then Lord Chancellor's Department that there was going to be a flood of cases—the word "flood" was used—on human rights to the courts, so the new Administrative Court was provided and extra judges were put on it. That flood never happened because of all the reasons that Lord Lester mentioned earlier: the restraint within Parliament among the Executive; among other officials. People would consider before taking action or passing laws whether it would infringe Convention rights. So the flood of attacks never happened.

But two other things did happen. First of all, our judges showed themselves extremely competent in a very short time with this very new way of interpreting human rights. Their judgments are probably now among the best in Europe, and are recognised as such by the European Court of Human Rights.

The same was true in respect of European Union law. Initially it was strange to our existing judges. They soon grasped it and got stuck into it. They now give the most considered, comprehensive and intelligent judgments on that subject than anywhere else in Europe. I agree with Lord Lester that our judges are highly competent and able to consider these matters—they already deal in

constitutional issues around the Human Rights Act, European and devolution matters and many others—and I think they would take to the task without too much difficulty.

Chair: Thank you. We are going to finish at 11.30am.

Professor Bradley: One sentence. There would need to be legislation about what the powers of the lower courts would be. The powers of the Supreme Court is one thing but one does not want every district magistrate striking down, or pretending to strike down, provisions of the constitution, and provision of that kind to get the issues further up would be inevitable.

Professor Hazell: Briefly, on the appointment of judges to the top court and going back to the things Lord Lester said earlier about the need to engage all three branches of government. It was little noticed but one of the changes in the Constitutional Reform Act 2005 was to create an independent Judicial Appointments Commission. It is highly independent and the Executive now has very little choice in the selection of judges. I would argue that for the top courts the Executive should have more choice and, if there were concern about that, it should be subject to parliamentary scrutiny.

Q67 Mark Durkan: That was the question I was going to ask in terms of the House of Lords Constitution Committee. Their report on the judicial appointments said no legislative involvement in terms of pre-appointment hearings or, indeed, post-appointment hearings. So how would you provide for a parliamentary input of the kind you describe without starting to politically colour the senior judiciary?

Professor Hazell: In the same way that Select Committees have very effectively used the new power to hold pre-appointment scrutiny hearings into lots of other senior public appointments. They have done so very responsibly. They have no right of veto but they scrutinise the decisions made by the Executive.

Lord Lester of Herne Hill: I strongly disagree. What I was saying before about incentives to become a judge, I cannot think of a stronger disincentive than to have to face a political committee that would question not your ability to decide cases but what you have done in the past. The American Senate Committee and its consequences has been appalling and I would fight against anything like that.

Professor Sir Jeffrey Jowell: I agree with Lord Lester. This has led to the diminution of quality in the South African Constitutional Court, as Lord Lester mentioned earlier. The fact that politicians have a very prominent role in scrutinising the judges through their Judicial Appointments Commission in South Africa has led to the unfortunate slide in that country.

Professor Hazell: Chairman, the more important limb of what I was arguing is that the Executive should have more choice in relation to senior judicial appointments. That is the thing that has been lost. They are presented with a single name and so far the Lord Chancellor has not felt able to reject a single name. Effectively, judges are now being appointed through an independent system over which there is very little political control.

Chair: Professor Hazell, Professor Bradley, Sir Jeffrey, Lord Lester, thank you very much indeed for coming.