



Political and Constitutional Reform Committee

Oral evidence: [The constitutional role of the judiciary if there were a codified constitution](#), HC 802

Thursday 30 January 2014

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Members present: Mr Graham Allen (Chair); Tracey Crouch; Mark Durkan; Paul Flynn; Fabian Hamilton; David Morris; Chris Ruane, Mr Andrew Turner

Questions 183 - 230

Witnesses: **Lord Phillips of Worth Matravers**, retired Supreme Court Judge, and **Lord Hope of Craighead**, retired Supreme Court Judge.

Q183 Chair: Lord Phillips and Lord Hope, welcome. Thank you so much for coming to the Committee today and we are looking forward to hearing what you have to tell us. Would you like to make any initial opening remarks?

Lord Phillips of Worth Matravers: Not for me, thank you very much.

Lord Hope of Craighead: I don't think so. I presume you know what our background is.

Q184 Chair: That would be helpful, just to get us warmed up.

Lord Hope of Craighead: I was a Lord of Appeal in Ordinary in the House of Lords from 1996 until we were told to leave in 2009. With Lord Phillips, I went over to the Supreme Court as the Deputy President and served there until the end of June last year, so I have had that experience. Of course, I should add I come from Scotland and have quite a lot of experience in the devolution system in Scotland and also quite recently in Wales, which is beginning to become rather important.

Chair: Indeed. Maybe we should invite you back to talk to us about those issues too. We are certainly very interested in how the devolution scene is unrolling into Wales, with the possibility, we would hope, of entering England as well, but that is fruit for another inquiry.

Q185 Tracey Crouch: Lord Phillips, I was being slightly mocked before you entered, because I confessed to being slightly star-struck by you sitting in front of me today, having read law at university, where it was always “Lord Phillips this and Lord Phillips that”. We have heard in previous evidence sessions that some forms of codified constitution, for example a Consolidation Act, would not necessarily change the judiciary’s current role. Do you both agree with that analysis?

Lord Phillips of Worth Matravers: I don’t think it would change it, but it might enhance some aspects of the judiciary’s role. In fact, I am sure it would. One would need to know precisely what the constitution said, but the object of having a constitution is to lay down rules that have to be complied with by the Executive and, depending upon what it says, by Parliament. Somebody has to decide where there is an issue as to whether the rules of the constitution have or have not been complied with in the particular situation. As far as I can see, the only people who can do that are the judges or a Supreme Court. If your constitution imposes restraints on Parliament as to what Parliament can do within the constitution, then it seems to me inevitably you are going to be inviting the judges on occasions to rule as to whether Parliament has or has not acted within the limits of the constitution.

What the judges have to do depends on what the constitution says. Some constitutions give judges power to strike down legislation, which is unconstitutional. So far as the Human Rights Act is concerned, we have a rather unusual arrangement where judges can declare that legislation is not compatible with the convention but leave it in force. That is another model that could be adopted. But whatever you are doing, I think you are going to give more power to the judges.

Lord Hope of Craighead: I would entirely agree with that. I think you should understand that we, in the Supreme Court, had quite a lot of experience in constitutions—to be accurate, sitting in the Privy Council—because one of the things that this country did was to confer constitutions on previous colonies, all of which gave a role to a court somewhere to deal with the constraints on the Executive and the legislature. I assume, but this is something you would need to consider, that the constitution you are talking about, or the consolidation you are talking about, would actually provide that certain things would have to be decided upon by the judges. We have a model for it in the devolution legislation because there is a limited competence on the legislatures in each of the three devolved jurisdictions, and the UK Supreme Court is provided for as the final right of appeal in deciding whether or not competence has been breached. So there is already a model there, which is quite useful to think about.

Q186 Tracey Crouch: I know we are going to come on to devolution in more detail a bit later on. In terms of the codified constitution, do you think it would be essential to have a bill of rights, for example? Do you think that is an essential part of having a codified constitution?

Lord Phillips of Worth Matravers: I think a bill of rights or a code of rights in some form or another is highly desirable. If you are going to have a bill of rights in your constitution, that is going to be something that judges will have to apply. Interesting questions arise: do you have a bill of rights that aims to give effect to the United Kingdom’s obligations under the European Convention on Human Rights? If you do, then judges are going to be looking at Strasbourg, just as they do now, when interpreting the bill of rights in the convention. Or is your constitution going to sweep away, somehow, Strasbourg and the European Convention on Human Rights? Are we going to pull out of it and replace it with a bill of rights? If that is the model, then again the judges are still going to have to be ruling on issues arising out of that bill of rights. To have a constitution without a bill of rights unless you have an alternative in place would horrify me.

Lord Hope of Craighead: I absolutely agree with that. If you look at some of the constitutions for the Caribbean states, for example, at the very beginning there are provisions there about the rights

and obligations, particularly the rights of individuals and the obligations of the state in return. They are absolutely the anchor of what the constitution is all about. It can either take the form of following what we have in the Human Rights Act here, or it can be redesigned—either a simplified or expanded version of what those rights are—but it should be at the forefront, because the individuals within the state are being protected by the constitution. It is designed partly to give powers to the Executive but also to give rights and protections to the people who live in the state. It is absolutely fundamental.

Q187 Tracey Crouch: A codified constitution with or without a bill of rights would not necessarily limit the interpretive role of judges that we have at the moment. You would not see that as—

Lord Phillips of Worth Matravers: I don't think it would limit it. In theory the constitution could have a provision saying that judges were not to pay any attention to what the European Court of Human Rights said, but unless it said that and so long as we were subscribers to the convention, you would find judges in their interpretive role looking for guidance to Strasbourg.

Q188 Tracey Crouch: We have had a lot of debate in previous evidence sessions about whether or not, if Parliament made better legislation in the first place, it would help judges when they were trying to interpret the law—what we think—in your courts, but that is for another day.

Lord Hope, going back to devolution, the Scotland and Northern Ireland devolution Acts have been described by you and others as constitutional statutes. However, in the case *Watkins v. Secretary of State for the Home Department*, the House of Lords made it clear that drawing a line between constitutional and non-constitutional statutes is a perilous exercise. What is the constitutional status of the devolution Acts?

Lord Hope of Craighead: I think one has to regard them as a kind of constitution because they set out all the things you would expect to find in a constitution. They define the powers of the legislature, they define the powers of the Executive, they incorporate human rights by adopting the convention rights as part of the limitation on the powers of those two bodies, and they give powers to the courts to supervise the system. It is a complete package that contains everything that you would expect to find in a constitution. It does not describe itself as that, but that is the practical reality.

Of course one has to bear in mind that, for the present at any rate, the devolved states were devolved subject to the overriding scrutiny of the UK Parliament. Technically the UK Parliament can change anything in these devolution systems, and has already done in Wales, because the original Wales Act was superseded by the 2006 Act that expanded the powers of the Assembly. It is a flexible thing, as opposed to constitutions, which, on the whole, are intended to last for a long time and probably can't be changed without a majority vote of two thirds or three quarters. They are meant to be stable and not subject to change.

Tracey Crouch: Thank you. I think I understand that.

Q189 Mr Turner: If we go beyond what has happened here in the UK, were there no occasions when things were handed over to other parts of the Empire or the Commonwealth and then brought back?

Lord Hope of Craighead: I can't recall any. The way it worked, I think, was if you take, for example, Trinidad and Tobago, initially there was a constitution that was designed for it while the

Queen was Head of State. Then a decision was taken that Trinidad and Tobago would become an independent state with its President and so on, and so it was given a fresh constitution. It was not really taking anything back. At the request of that state, it was expanding and changing the powers to give effect to the altered constitutional position: the Head of State was changed, and instead of being an overseas territory, as I suppose it was, it became an independent state in its own right. The UK has been able to do that kind of thing, but I don't think it has ever conferred a constitution on one of its overseas territories and taken it back, or conferred it on an independent country and taken it back. I don't think that is conceivable.

Q190 Mr Turner: I see. I was thinking of Anguilla.

Lord Hope of Craighead: I can't put my finger on any feature of that. You probably know more about it than me.

Q191 Mr Turner: Should the Government specify that certain Acts should be regarded as constitutional?

Lord Phillips of Worth Matravers: The Government?

Mr Turner: Yes.

Lord Phillips of Worth Matravers: I would have thought that would be rather bizarre. The concept of a constitutional Act seems to me a valid one. The Parliament Act, for instance, was plainly a constitutional Act. Parliament can alter its own powers for the future. It can say, "In this or that area you are going to require a two-thirds majority before a law is binding". If it passes that kind of Act, it alters its own powers, and that is plainly a constitutional statute. One can identify some Acts—the Parliament Act, for instance—as being plainly a constitutional Act. In other areas, there may be scope for debate as to whether you properly describe it as constitutional statute or not. What you are considering is passing a constitutional statute that will create a constitution. That will be done by an Act of Parliament, if it is done.

Q192 Mr Turner: Do you suggest that apart from decisions of Parliament, there is no responsibility for Government to do so?

Lord Phillips of Worth Matravers: I don't see how Government can, simply by expressing a view or making a statement, alter the effect of Acts of Parliament.

Q193 Mr Turner: Should there be a special procedure for amending these constitutional processes, however they become constitutional?

Lord Phillips of Worth Matravers: Part of the object of a constitution is to fetter Parliament and the Executive through Parliament by making those kinds of requirements in certain areas. I would have thought almost inevitably that is what you are going to do, and you would say you need a two thirds majority to alter it, otherwise it does not achieve very much because Parliament can simply alter it at will.

Lord Hope of Craighead: A feature of the Caribbean constitutions, and that of Mauritius and others, is that there is that fetter on changing the constitution. It has a practical result, because both Jamaica and Trinidad and Tobago want to end the right of appeal to the Privy Council, but they are required to pass a two-thirds majority to achieve that and they can't achieve it because the

Opposition party and the Government party are more or less equally balanced, so each time there is an election, you end up with a stalemate.

The problem I have with all of this is that our basic principle is that no Parliament can bind its successor. I think of it more as a political exercise—you have a statute that really one would not think of repealing. Take the European Communities Act; it is quite difficult to think of that being altered now, but it could be, by a referendum followed by a political decision. It is for Parliament to lay down what it wants to do and, as far as the judges are concerned, they would look to what Parliament has enacted.

Q194 Mr Turner: Parliament is saying you would require a two-thirds majority, but the next Parliament could change that, if you like by fiat, without a two-thirds majority?

Lord Hope of Craighead: It could simply repeal the section that says it is a two-thirds majority and replace it by the words “simple majority”, but it would be a huge political gamble as to whether it could get away with it.

Q195 Mr Turner: I am just making it as clear as I can. You are saying you could change it by a simple majority? You abolish the two-thirds majority by passing a simple majority?

Lord Hope of Craighead: Yes. I think Lord Phillips may have been involved in this. We had to consider the position of the Parliament Act in relation to extending the life of a Parliament. Do you remember that?

Lord Phillips of Worth Matravers: I don't think I was involved in that.

Lord Hope of Craighead: Perhaps you were not in that. There is a provision in the Parliament Act that provides that Parliament cannot extend its life. As we know, you can do it by legislation to provide for a fixed Parliament, but the intention was you could not, having got a majority, simply remain in power indefinitely. One of the things that we considered was whether it would be open to the courts to insist upon that provision and enforce it. It could, of course, be got round by Parliament, after a referendum of some kind, changing the rules. Going back to Lord Phillips' point, we would regard the Parliament Act as such an important and crucial element in the constitution that we would expect its provisions to be observed and, if necessary, enforced.

Q196 Mr Turner: I can understand why, but I am trying to distinguish between that sort of legislation and where two thirds has been put in an Act and the next Government changes it via Parliament in a simple majority.

Lord Hope of Craighead: Technically it could be done, but the political reality would be that it would be very dangerous for the Executive to try to persuade the Parliament to do that, and of course you have the House of Lords, which may well object to what the House of Commons is attempting to do. There are political constraints in changing something as fundamental as that.

Q197 Mr Turner: But it could work both ways. If you are part of the minority in a Government, you become the majority, but not a large enough majority to get two thirds of people in; but nonetheless you believe that that is what the people voted for.

Lord Hope of Craighead: Yes; you would have a mandate, you would say.

Mr Turner: Yes.

Lord Hope of Craighead: Yes, indeed. That is why I think the idea of a constitutional statute is rather elusive—because of this feature of our political life that you have just been touching on. A Government with a mandate can put through legislation that may alter what has been thought to be fixed before.

Lord Phillips of Worth Matravers: But let's take an absurd example. Imagine that Parliament legislated that in future all legislation must be passed by a two-thirds majority. If it did that, I find it hard to see how Parliament could do anything about it thereafter. It would have fundamentally altered the manner in which legislation was created and fettered itself in the future. It could not set that aside by a simple majority.

Tracey Crouch: But it has done that with the royal charter: it put a two-thirds limit on changing the royal charter on the press, which caused constitutional debate within the House of Commons, albeit limited.

Q198 Chair: But it did not impose a two-thirds majority on further changes to any legislation, so Andrew's point is valid, which is that Parliament can amend any Act and pass any Act that it wishes on a simple majority, even those that contain extended provisions about two thirds or anything else. It can do that. It is within its power.

Andrew, just before you go on, we started to touch on the 1911 Act. That Act protects an easy extension of Executive power of a Government term by allowing the second Chamber to veto such a thing. We have been looking at the 1911 Act in one context: we have toyed with the idea of local government's rights, if they were distinct and separate legal entities from central Government, being protected behind the 1911 Act, if you like adding another clause, clause 1 being no extension of the Parliament and clause 2 being no change to the fundamental rights of local government. Could you see this also perhaps being used in a sort of quasi-constitutional way to protect things like a bill of rights or a written constitution? It is perfectly feasible, surely, to put those things behind the protection of the 1911 Act also.

Lord Phillips of Worth Matravers: I don't see why that should not be done in theory. As Lord Hope says, once you have done that, the question of whether or not Parliament chooses to undo it is a hot political issue. In practice it is going to be very difficult to undo something like that.

Lord Hope of Craighead: My starting point would be to look at the provision and construe it, and try to understand the intention of Parliament behind the words that it used, and our function would be to give effect to that intention. It is something we have to do all the time, to construe legislation, and it is particularly sensitive in the legislation of the kind you are suggesting. We had occasion in relation to a provision in Scotland to consider a suggestion that a measure dealing with—I think it was banning smoking. I forget the precise detail, but the question was whether that can be set aside simply because it is irrational. It was not said to be incompatible with the powers of the Parliament. It was simply said to be irrational. We refused to take that approach. We said we have to have respect for the democratic function of the Parliament, and it would require a very extreme case for us to go behind what the words actually said, provided they were within competence. An enormous amount depends on the words used and the intention that can be taken from them.

Chair: Sorry, Andrew, for interrupting you.

Mr Turner: I think I have finished asking questions for now.

Q199 Mark Durkan: In the event of a codified constitution, which courts, if any, should have the power to declare legislation unconstitutional or registered as being incompatible with the provisions of the constitution?

Lord Phillips of Worth Matravers: I think that that question really means: do you set up a special constitutional court to do that, or is it something that can be left to the Supreme Court? That is assuming that your constitution is giving a court the power to strike down legislation. My own view on that would be that that is something that the Supreme Court could do. It is something that the members of the Supreme Court, wearing their Privy Council hats, have to do from time to time when looking at appeals. There is a limit on judicial talent, and you might be spreading it a bit thin if you said we have to have a completely separate court to deal with constitutional issues.

Lord Hope of Craighead: I entirely agree. I think the exercise that the judges would be doing is exactly the same as the exercise it does in dealing with any other statute. You construe the wording. Of course, because it is the constitutional kind, it has a special aspect to it, but it is basically construing language and trying to understand the intention behind it. I think because you have people who do that all the time anyway, they are the people who should exercise that function.

There is a choice, of course, as to whether it has to be the Supreme Court or whether it could be lower courts as well that would be able to hear these challenges. I think that is a choice for whoever designs the legislation. It could be that a challenge could be mounted in the High Court, and then the advantage for the Supreme Court would be that there would be judicial decisions in the High Court and the Court of Appeal that would tend to focus the issues, rather than coming to the Supreme Court at first instance, which is something strange. At the moment the Supreme Court is an appeal court, and it only deals with appeals that justify their attention in the Supreme Court. The great advantage is that the facts have all been determined in the court below and the issues narrowed down, so that there is a very concise and accurate point to which you direct attention in the court. I would rather be in favour of it being something that the High Court could deal with and work its way up the system.

Lord Phillips of Worth Matravers: That does raise a problem, because let's say the High Court declares a piece of legislation unconstitutional: what happens in the interim? The more courts you have involved in the process of reaching an ultimate decision, the longer the delay in sorting out what the answer is.

Lord Hope of Craighead: That happens in the devolutionary system already and is provided for by saying that you can suspend operation of the judgment in the meantime. Lord Phillips raises a very important point, because money would be expended on the assumption that the legislation was beyond challenge, and then you find that somebody challenges it. There has to be some mechanism for protecting people against the business of having to spend money while this cloud is hanging over the legislation.

Q200 Mark Durkan: From one who was a suspendee, as opposed to a suspender, in the context of the devolutionary system in Northern Ireland, I know exactly what you are talking about there.

In his written evidence, Brice Dickson—again, specifically in the particular context of Northern Ireland—has said that if the judiciary in Northern Ireland were to be involved in interpreting a codified constitution, judges may be accused of being politically biased. What consideration do you think would have to be given to the particular situation of Northern Ireland, in respect of its own judicial arrangement? You may not want to comment on it too much, but there have been a number of cases already taken in the courts where Ministers have taken other Ministers to court. Recently the Finance

Minister took the Agriculture Minister to court, alleging breach of the ministerial code, and the court found with the Finance Minister. Previously my party colleague, the Member for South Down when she was Minister for Social Development, similarly had a case taken against her in the name of the Finance Minister for withdrawing funding for a particular group, again on the grounds of the ministerial code. There is also the question, if these cases are taking place in Northern Ireland, and Northern Ireland then finds its place also in the Supreme Court: what are the potential implications for the Supreme Court in dealing with cases coming from Northern Ireland, given the particular constitutional status that is deemed to attach to the Northern Ireland Act?

Lord Hope of Craighead: We have the advantage of a justice from Northern Ireland, which is very important, because he gives us a feel for how things really are. You raised the issue as to whether judges would be thought to be political. Of course we are talking from our own position, but we don't engage in politics, and we deliberately don't do that. The whole point is that we are not elected; we are appointed, and we have security of tenure, and there is no reason why we should become engaged in politics at all. It is the best system we can devise, I would have thought, to maintain a complete independence of the judiciary so that political issues can be argued out, but the judges who decide them will decide them from a completely independent position, without any advantage to be gained one way or the other by the result.

Q201 Mark Durkan: I would make the point that some of the cases in the main, of course, have not been to do with legislation that has been enacted by the Assembly or using ministerial regulatory powers. One of the cases that did go in those days to the House of Lords, and was essentially a political case, was *Robinson v. the Secretary of State for Northern Ireland*, which affected me, because it was about my joint election as Deputy First Minister. I never gave evidence at any stage in that case, and if I had, it would not have been helpful to the Secretary of State, actually. In that situation, where those sort of political issues are making their way in, how easy would it be in the context of a written constitution to avoid the courts, as well as possibly being brought in to test whether or not legislation was compatible with the constitution, and specifically to question whether or not Ministers, in the exercise of their legislative powers under powers of regulation, were acting on the right side of the constitution? That starts to make it even more political, because then it is not just Parliament; it is the actions of Ministers.

Lord Phillips of Worth Matravers: Courts would have to do that, but hopefully would do it in an apolitical way. Judges don't like having to deal with issues that look as though they are political issues, but if you are dealing with a question of whether Minister A has acted within his powers or not, and Minister B is challenging that, or maybe a member of the Opposition is challenging that, it gives a political complexion to what is ultimately a question simply of asking what the scope is of a particular statute and whether that has been exceeded. I think it is very desirable that judges should not be seen to be political, that people should not even know what political attitudes judges have. I never knew what the politics of my colleagues were at any stage of my time on the bench.

Lord Hope of Craighead: The basic position a court adopts is that it is there to deal with disputes that are raised that are within its jurisdiction. It can't turn a case away that is within its jurisdiction. It has to deal with it. Some issues are very sensitive. You may remember the case of Mr Chaytor, who was accused of an offence within the boundaries of Parliament. I think Lord Phillips wrote the judgment in that. We had to decide whether or not he could be prosecuted in the ordinary courts of the country, or whether it was a matter for Parliament to decide within its own jurisdiction. You could say that was a very sensitive political issue, but we decided it as an issue of law, and I don't think politics entered our minds at all, did it?

Lord Phillips of Worth Matravers: No.

Q202 Mark Durkan: If the scope of judicial review were to be restricted so that it did not run potentially all over the place, what role do you think that pre-enactment review might play in providing some insulation against all sorts of potential contentions and difficulties, both for the courts and for Parliament?

Lord Hope of Craighead: We have one example already from Wales, and there is another case from Wales going to be heard in about two or three weeks' time by the Supreme Court. It is a very useful mechanism. The position is that all the devolution statutes have a pre-enactment mechanism. I think within a given time limit after the Bill has passed it can be challenged by one of the Law Officers. There is quite an interesting debate between the Attorney-General of England and Wales and the Government in Wales as to the extent of the competence of the Welsh Parliament. There have been two measures that have been challenged. I think I have got a note here to say what they are. The first was the Local Government Byelaws (Wales) Bill, which was examined by the Supreme Court in 2012 and was held to be within competence. There is a challenge in February this year against the Agricultural Sector (Wales) Bill, again by the Attorney-General.

The great advantage is that these issues will be resolved before the Bill is enacted and before anybody does anything. It is far better that these challenges, if they are to be mounted, should be put right at the front before the thing becomes law rather than have somebody challenging the measure after it has become law. The mechanism is there and, much to my surprise, it has never been used in Scotland. There has never been that dispute between the UK Government and the Scottish Government about the legislative powers of the Scottish Parliament, but the Welsh structure is rather different and rather complicated. These are difficult issues that I think are being dealt with very sensibly by a pre-enactment review.

Q203 Chris Ruane: Why do you think it has not been used in Scotland but has been used in Wales? You said you were very surprised. Why were you surprised?

Lord Hope of Craighead: There are two reasons. One is a political one, in that until recently the political Governments were the same. The Labour party was in power here for much of the early years of devolution and it was a Labour majority in the Scottish Parliament. The second thing is a convention that allowed, with the agreement of the Scottish Parliament, measures to be enacted in the UK Parliament on behalf of the Scottish Parliament. It is called a Sewel convention, after Lord Sewel.

Q204 Chris Ruane: With respect though, Wales has been more Labour since devolution than Scotland. How does that work out?

Lord Hope of Craighead: There is another feature. It is partly because of the mechanism that was used for devolution for Scotland. What it did was devolve everything to Scotland except certain reserved powers, whereas the Welsh structure is quite different. It identified powers and everything else was for Westminster. The complication is trying to identify the meaning attached to the definition or the description of the powers that are being exercised by the Welsh Assembly. I think I am right in saying that the Welsh would quite like to change their devolution structure so that it follows the Scottish structure, which has survived remarkably well without these challenges being brought. It is all to do with the way you design your constitutional measure. But the point I was really making to Mr Durkan is that it is very useful to do this before the legislation is enacted, because who knows who is coming out of the woodwork to say that this legislation is beyond competence.

Chair: I have always wanted to say to a senior judge, “That is a very leading question”, particularly with two Welsh members on the Committee. Mark, have you finished?

Q205 Mark Durkan: On that very point, I can recall, again when I was acting as Deputy First Minister, we had an argument, exactly along the grounds of Sewel, with the then Secretary of State, now Lord Reid, who was basically saying that the legislation that we were preparing in the Assembly to establish a Northern Ireland children’s commissioner was interfering with non-devolved powers and was coming into his territory, and he was threatening all sorts of stuff around that. Legal advice was sought, but it ended up essentially as being a political resolution that had to be got in that situation. It was a response where he was fundamentally challenging the scope of the legislation that we were preparing in the devolved scheme.

Lord Phillips of Worth Matravers: Pre-enactment review could work well in that scenario. I am much more doubtful about it if you are dealing with an issue that might involve a particular factual scenario, because it is not always easy to decide issues in isolation from particular facts. I was rather interested in your question. You started saying, “If judicial review were restricted, would there be a case for prior review?” It is a big “if”.

Mark Durkan: If it was judicially reviewed in respect of the status of the legislation, as opposed to Executive action.

Chair: I would like to welcome our newest member—so new, David, that we have not asked if you have any interests to declare that we ought to know about.

David Morris: I have no interests to declare.

Chris Ruane: Chair, is he newer than me?

Chair: You were here from the very beginning. David only just arrived, so he is even newer than you. As history goes by, Chris, you could become the father of this Committee, because we have a turnover of many. David, welcome, and we throw you in at the deep end with two very distinguished senior judges. I understand you have a couple of questions for them.

Q206 David Morris: I have, and apologies for being late. Good morning. If the UK were to have a codified constitution, what would be the advantages and disadvantages of employing a declaration of incompatibility, if legislation were held to be unconstitutional?

Lord Phillips of Worth Matravers: That is an enormous issue—I think largely a political issue. A declaration of incompatibility preserves the supremacy of Parliament, because all it does is make a declaration. It does not have any legal effect. If you have the kind of constitution that gives a constitutional court or a Supreme Court the power to strike down legislation, then you are passing the ultimate power from Parliament to the court.

Q207 David Morris: The Constitution Society report, *Judicial Review and the Rule of Law*, states that “It would be unwise for the Government and Parliament to assume, simply because the judiciary in this country have so far not purported to review primary legislation for its compliance with constitutional principles, that this is a fixed constitutional arrangement”. In what circumstances can you envisage the judiciary reviewing primary legislation for its compliance with constitutional principles?

Lord Hope of Craighead: There are quite a few elements to the debate about this. I am perhaps a little bit more adventurous than most of my colleagues. I think Lord Neuberger, if I can speak on his behalf, is firmly of the view that Parliament is absolutely sovereign and beyond any question everything it says must be enforced, whatever it may be. I think Lord Bingham was precisely the same. He said that the sovereignty of Parliament is the bedrock of our constitution, and that has been certainly understood ever since Dicey in the last century, or the century before that.

Of course, one very much respects that position, but I have been brought up in the Scottish tradition, which is always a little suspicious of this, partly because we have an Act of Union, which is an enactment of the pre-union Parliament. We are always worried that there may be provisions that are enacted in Westminster that undermine the Act of Union, for example the position of the Scottish courts that is written into the Act of Union. Technically Parliament could simply abolish the separate position of the Scottish courts and subject all Scottish cases to the review of courts in England, which would be a fundamental breach of the treaty. We were taught as students that this was such a fundamental provision in the legislation that set up this Union that it could not be altered.

I have always had a feeling that there might be something that is so fundamental that Parliament simply could not do it. The great protection is politics, because what I am talking about is politically just inconceivable, and there are other things that are just so absurd that one would not like to do it. But it is a kind of nuclear option that is there at the back of one's mind, that there could be something so extreme, so absurd that the judges would have to intervene and say, "You simply can't do that".

Q208 David Morris: Just to come back on that point, I can remember a case in here—obviously I am a newly elected MP; I came in in 2010—where one of my colleagues put an amendment to a Bill that said he would like to see sovereignty of the nation protected. However, as the debate unfurled, we saw that sovereignty was not actually written down anywhere, so the European Union could challenge that in the courts, and if that was the case, it could open a can of worms constitutionally. Is that what you are referring to in your answer? I know we were talking about the Union, but talking—I hope I am right in saying this—from an external source, meaning Europe, would that throw any different light on any different procedure?

Lord Hope of Craighead: I don't really think so. I am talking more about the common law concept, which is not written down anywhere, but we as judges are simply taught that it is the bedrock of the way we exist. It has an enormous amount to be said for it. It places great responsibility on Parliament to conduct its procedures responsibly, which is good for everybody and everybody understands that legislation has this characteristic. All I have been saying is that one has to be a little cautious in saying that everything that it does, even with the most extreme steer from the Executive, could be regarded as enforceable. I can't conceive of that ever happening as a reality, but it is something that one would like to remind civil servants about somewhere behind the scenes. You have to be a little careful what you do because sovereignty is such a privilege; we want to hang on to it and we mustn't abuse it.

Lord Phillips of Worth Matravers: One would be considering a constitutional crisis before you could envisage the courts purporting to strike down primary legislation. Before you got that, the courts would say, "Parliament couldn't possibly have meant that because—" and therefore would have given an interpretation to the legislation that it, faced with it, couldn't bear it, but would have chucked the gauntlet back to Parliament, saying, "We have pulled you back from the brink. Are you really going to persist with this?" That is what the House of Lords did as the Privy Council in *Anisminic*. They threw down the gauntlet and it was not taken up. Judges do have ways of finessing the intention of Parliament from time to time.

Lord Hope of Craighead: There is a wonderful phrase by Lord Hoffman, exactly on the point that Lord Phillips has made. His point was if you really want to be as extreme as that, spell it out in precise language and accept the political cost of doing so. It is coming back to the idea that there is a political constraint on what Parliament is doing, but if it is absolutely upfront and makes it absolutely clear that that is the political decision, then the judges have to construe what they are given. That was the way he approached it.

Chair: That is very helpful.

Q209 Fabian Hamilton: Can I move back to the issue of devolution? Do you think devolution has changed the way in which judges think about parliamentary sovereignty?

Lord Hope of Craighead: I don't think so. We were tested in a case called *Axa*, which was a Scottish case about the problem of patches on lungs. Do you remember that? There was a great debate about whether people who have pleural plaques on their lungs should have a right of damages. The House of Lords had held that because the medical advice was there was no loss, no damage that could be measured, there simply was not a claim for damages. Politically that is very open to question, and although in England and Wales, particularly England I think, there is now a system for a lump sum payment—or perhaps it has not got that far—in Scotland the Scottish Parliament decided to pass an Act that simply said in terms that these pleural plaques do give rise to a claim of damages, and that was challenged by the insurers. That was the case I was envisaging when we were asked to consider whether that was so absurd that it could not be enforced. That was a sovereignty point really, because the view we took was that this was a democratically elected Parliament that was dealing with a real issue of real interest to the public, where it had taken a decision with its democratic mandate, and subject, of course, to what the devolution structure provided about the legislative powers, which were not breached, it was for the Parliament to decide. You could say that is really saying that they are sovereign, except insofar as this Parliament has limited their powers.

Q210 Fabian Hamilton: Sorry, Lord Hope, you took the view that it was because the Scottish Parliament had passed certain legislation that was different from the United Kingdom Parliament's, rather than because the Scottish legal system perhaps gave more scope for people with pleural plaques to claim compensation.

Lord Hope of Craighead: There was not a conflict between the Parliaments. This was a matter of private law, which is devolved, so it is entirely for the Scottish Parliament to decide what to do about it, and it took a decision to provide a remedy. The question was, "Could we set that aside?" and we said no. It was not technically a sovereignty of Parliament issue, because the devolved Parliaments are not sovereign, but we were saying pretty well the same thing—that if you are faced with a democratically elected legislature, giving effect to what it believes to be in the public interest, it is not for judges to interfere with that.

Q211 Fabian Hamilton: Lord Phillips, do you want to come in on that?

Lord Phillips of Worth Matravers: I don't think so. I was rather interested in that particular case because I gave the judgment in the Court of Appeal, which was upheld by the House of Lords, saying that pleural plaques gave rise to no right to damages because they did not have any effect on you. If it was on your face, then it would have an effect, but inside where no one could see, it did not do anything. But that was basically a decision of common law. There is nothing irrational in altering the law to say that most people who have these plaques would think that there is some

disadvantage in having them. It is not a nice thing to have, even if you are told it does not make any difference to you, so why shouldn't you have a bit of compensation? There does not seem to me anything irrational about that.

Q212 Fabian Hamilton: Thank you. That is a very interesting example. The Scottish courts have seen fit to use their powers of constitutional judicial review only in relation to two very narrow statutory provisions. I am thinking of the power in section 29 of the Scotland Act to declare an Act of the Scottish Parliament not to be law. What explains the seeming reluctance of judges to use that power? I know we have touched on it, the reluctance of judges to enter the political arena and make political decisions. Is that the sole explanation?

Lord Hope of Craighead: It isn't reluctance of the judges so much as a feature of the cases that have been brought before them. I have been surprised about the course this has taken. I was in the House of Lords when the Scotland Bill was being debated, and we assumed that the great issue was going to be about legislative competence and whether or not the reserved powers were going to be encroached upon. In fact, almost all the devolution cases that have come before us have been criminal cases where the prosecutor has been said to be in breach of convention rights. I think there have been only two or three where legislation has actually been challenged. We can't do anything about that, because we simply deal with the cases that come before us, and I think they have all survived challenge. My memory may be defective there. For example, there was a change to the sentencing powers of sheriffs. We said, by a majority of three to two, that the measure was within competence. There was an earlier one about releasing mental patients from the state hospital and what was going to happen to them when released, and that passed competence as well.

We are demand-led as an institution. We can't create issues for ourselves because that is not the way the courts function.

Q213 Fabian Hamilton: Some of the major challenges to the Acts of the Scottish Parliament have come from big business. Do you think that there is a danger that the existence of judicial review of primary legislation allows those with deep pockets to delay or defeat the implementation of legislation in the courts?

Lord Hope of Craighead: I think you are probably right that there is a risk of that. Take the insurance industry, for example, which was behind the Axa case. They complained that their pockets were being invaded by the change to the rules, and I could see them doing exactly the same thing if there was primary legislation that was open to that kind of challenge. You can't prevent people bringing cases. That is a feature of our life. It could be said that there is no case to answer or they have no interest, but if they can point to some pecuniary disadvantage, then it is very difficult to turn them away and say they are not entitled to be heard.

Q214 Fabian Hamilton: Can I come back to something that Mark Durkan raised, because he was affected by this, the case of *Robinson v. the Secretary of State for Northern Ireland*, as Mark said, in which the House of Lords was asked to decide whether the election of the First Minister and Deputy First Minister more than six weeks after the restoration of devolved government was actually valid. Arguably that came about through codifying the rules for setting up the Northern Ireland Assembly. Do you think it is more likely there could be other cases like that if the UK had a codified constitution, in other words the judges deciding whether a particular election was valid or not and constantly being challenged, the judges taking a political role?

Lord Hope of Craighead: I come back to the point I made a moment or two ago, that if somebody can demonstrate that they have a genuine interest in raising the issue then the courts would find it very difficult to turn them away. It is not the judges taking the initiative; it is the individuals, and it is not difficult to imagine somebody who can point to some disadvantage or some particular interest in the issue bringing the case to the court, and it would then have to be dealt with. Of course we have various filters as you go up the system. The Supreme Court will only hear it if it is of general public interest. It may be that the point is seen to be not worth discussing any more because of the decision taken at the lower court and it won't occupy the time of the Supreme Court, and it may be resolved quite quickly. It is a feature of the legal system that the courts are there to decide cases that are competently brought before them, and it is their duty to deal with these cases. You could say there is a public interest in making sure these issues are resolved in a court and not by some other rather less conventional means.

Q215 Fabian Hamilton: As a general rule, though, in legal terms is it the case that the more codification there is—the more a constitution is written down—the more likely it is that the judiciary will be asked to interpret and therefore perhaps take an increasingly political role, whether they want to or not? What can we learn from other written constitutions? I am not suggesting either of you is an expert in other nations' written constitutions, but as you said earlier, the Privy Council was asked to look at the constitutions of countries that were becoming independent—former colonies and Commonwealth countries—so you would have some understanding of that argument.

Lord Hope of Craighead: I recall a case where somebody in I think it was Trinidad and Tobago put his car in the wrong place and got a parking penalty notice on his motor car, and he said that was unconstitutional. Under the mechanisms in that country, he got a quick route up through the constitutional avenue to have this thing dealt with. I think we poured cold water on the idea that you could raise issues of that kind, and we said it was a matter for the lawyers and stop taking silly points. We hoped by saying that kind of thing we chased that absurd case away. There is a certain amount that can be done in the court to make it clear that an issue of that kind has to be of real importance before it can properly be brought. It may be the first instance court will have to take it on, but it will brush it aside and say that this is not a matter that the court need bother with.

Lord Phillips of Worth Matravers: Your use of judges taking political decisions reflects the concept that if you have a written constitution, where issues arise in relation to that constitution, they may very often be party political. There will be one party challenging another and the judge then has to resolve that issue. In that respect you can say it is a political issue, but the judge has to hold the ring fairly in relation to those kind of issues, just as in relation to any other kind of issue, once you create the possibility of such an issue by having written rules.

Q216 Fabian Hamilton: Is it generally the case, though, that writing down a constitution, codifying a constitution, as the majority of countries in the world do, effectively transfers power from the political legislature, which is made up of elected politicians, to the judges, whether they are appointed or elected?

Lord Phillips of Worth Matravers: I think it does. We are almost unique in not having a written constitution. The almost unique feature of our constitution is that Parliament is supreme, but the minute you have a written constitution that is going, to some extent, almost inevitably impose restrictions on what Parliament can properly do. Then that opens the door to judges being asked to rule on whether or not Parliament has acted properly within the framework of the constitution.

Lord Hope of Craighead: I think one can see that phenomenon by contemplating the effect of the Human Rights Act. We all know that the European Convention was drafted largely by ideas from

this country as to what we thought was understood as the rights that everybody had in this country anyway, but you didn't get human rights challenges in the way that you do now where it is all written down and people can say, "Look at article 3", article 5, or whatever it is, and identify a particular bit there that you say is being breached. I think it is a phenomenon of rule-making that people will ask themselves, "Has this rule been broken?" whereas before people would live in a world that was not quite as precisely focused and the issue probably didn't cross anybody's mind.

Q217 Fabian Hamilton: Finally, let me ask you, if I may, a leading question: do you think that it is a bad idea to transfer the political power that is vested in the sovereignty of Parliament to the judges and therefore that is a good reason for not codifying our constitution or moving towards a written constitution?

Lord Phillips of Worth Matravers: It is really a political question and not one for me as a judge. Personally, I am pretty happy with things as they are. If I had still been a judge, I don't think I would have welcomed having added responsibility for scrutinising legislation in that way.

Lord Hope of Craighead: I would adopt exactly the same approach. It does raise issues about who the judges are, enormous questions about how you choose the judges. I think at the moment I would regard our situation as being as satisfactory as one can reasonably devise, and it is rather better to leave it as it is, but that is a personal position. I am not speaking as a judge now.

Fabian Hamilton: I was asking you for your personal opinion. Thank you very much.

Chair: You have raised so many questions; I am going to resist, other than to say that the definition of what is political is something that people should always consider. The assertion that there is parliamentary sovereignty, for example, rather than government sovereignty, is a highly charged and political assertion, and I will not allow myself, let alone Members, to chase after that, because we have so many other things that we need to ask you today. Andrew, are you going to break my edict? Are you going to be in contempt of the Select Committee?

Chris Ruane: I hope so.

Chair: Please go ahead, Andrew.

Q218 Mr Turner: What you seem to have done in answering my colleague is talk about what you think is too trivial to bother about, such as a parking ticket; equally, there are things that we may regard as trivial—whether somebody is allowed to get themselves a right to vote when they are in prison. The question is what things are irrelevant and minor. For my part, I think it is relatively minor that somebody who is in prison wants a vote.

Lord Hope of Craighead: The point with the parking ticket issue is that the individual was choosing the wrong avenue. No doubt there are mechanisms for challenging a parking ticket and there is some right of appeal somewhere, and if you use that procedure, that is fine. I am not saying it is trivial—people can be very annoyed by this—but it was wrong to dress it up as a constitutional issue. That was our point. There was an advantage in saying it is constitutional because you had a particular procedure that was advantageous. I hope that answers your question. There are lots of things that may be thought to be very trivial but are extremely irritating, and one would like to see that there are ways of resolving these somehow without people having to get involved in some kind of alternative remedy. That is the way a civilised country deals with these things.

Chair: I am going to move us on, not least because a number of colleagues are very keen to be on the Floor, because there is quite an interesting Bill coming forward shortly. So I am going to just press on a little bit.

Q219 Paul Flynn: Lord Hope, you have mentioned two Bills from the Welsh Government that were challenged—the local authority one and, more interestingly perhaps, the Agricultural Wages Board one—for political reasons. There is a strong political divide between Wales and Westminster on this, and it was challenged. I think the Welsh Government's view was supported by the five judges involved. But other Bills have been challenged and there is likely to be one on the organ transplant Bill that is coming along. Who decides to make the challenges? Is it a political decision by Government, or who does make the challenge?

Lord Hope of Craighead: The way the Act is designed is that any of the Law Officers can challenge a measure, and in each of these two cases it has been the Attorney-General for England and Wales who presumably is taking a view on behalf of the UK Government.

Q220 Paul Flynn: On this question, devolution for Wales was seen as a grudging gift. There were people asking for a Parliament for Wales and people opposing a Parliament for Wales, but no one was actually asking for half a Parliament for Wales, which is what they got. Do you think there is room for having new legislation on Wales to clear the definitions of where it is and whether Wales can do something? The procedure seems to be that legislation is passed in Wales, for political reasons objected to by the Government if it is not a progressive Government, and then the decisions on how Wales is run are taken by the Supreme Court.

Lord Hope of Craighead: The position was altered by referendum, as you may recall, and the powers of the Parliament were significantly advanced so that it can now make primary legislation, which has created this issue. I would suggest that one possibly should allow a little more time to elapse—because it is only quite recently that the Welsh Assembly has had this power—and just see how it works out. The First Minister probably would like to alter the structure and make it the same as Scotland has, and that is a matter for the UK Parliament in negotiation with the Welsh Government. I am not in a position to express a view about that. As far as the Supreme Court is concerned, one sees the pre-legislative scrutiny mechanism working and it is a means of getting these issues sorted out as quickly as possible.

Q221 Paul Flynn: As a member of the Supreme Court, do you see the point that what should be a political decision in Wales and what laws are passed are in fact going through this filter of the Supreme Court? I presume they have to be framed to make sure they get past the judges, rather than those who have been elected by the people of Wales.

Lord Hope of Craighead: It has to be that way because there is a decision taken by the elected Members of the Assembly in Wales and a decision taken by a Law Officer in England on behalf of the UK Government, and there is a dispute and it has to be resolved. It is a dispute that turns on the language of the schedule in the Government of Wales Act. There is no other way of resolving a dispute about that except by having a court look at it and reach a decision. I think the system is working. The question really is whether the design of the devolution powers is one that can live for much longer, and that is a matter for discussion, I think.

Q222 Paul Flynn: That is very much our fault. I did write a book about the devolution of power to Wales called *Dragons Led by Poodles*. We made the mess, the politicians.

Looking forward, if there is a set-up of a codified constitution and we move to that position, the judiciary are more likely to be engaged in overtly political decisions. Do you think there is a situation then where there will be more political appointments, or is there a mechanism that can keep them politically neutral? It is rather like the American situation.

Lord Hope of Craighead: There aren't any political appointments. That is not how it is done. The Appointments Commission, which Lord Phillips chaired while he was President, is entirely non-political. It is deliberately designed to make absolutely clear that this is a decision taken by people who are looking at the qualities of the individual, the ability to act as a judge, an awareness of public issues and so on.

Q223 Paul Flynn: In terms of what is likely to happen in the future if we have this codified constitution, will we have a situation in Wales where they will think, "Who is on the Supreme Court? Are they likely to favour what the Labour, Plaid Cymru and Liberals are doing in Wales or are they likely to go along with the Conservative Government?" We already have that now, in that Wales has a political imperative to see that the right people are on the Supreme Court. Isn't that likely to develop with a codified constitution, where again there will be a strong influence with the judiciary?

Lord Hope of Craighead: I think what would be for consideration is whether there should be, which there is not at the moment, a judge with particular knowledge of the laws and practice of law in Wales. There is a provision in the Constitutional Reform Act 2005 that requires the judges of the Supreme Court to have knowledge of all parts of the United Kingdom. So far this issue has not arisen because until very recently the Welsh Assembly has not had power to enact primary legislation, but I think it is for consideration as to whether steps should be taken to make quite sure there was somebody with awareness of the issues of Wales. It is a matter ultimately for the ad hoc commission that appoints people to the Supreme Court, but they are very much aware of this issue now.

Lord Phillips of Worth Matravers: But there would not be a judge who was batting for Wales. The concept of having judges predisposed to particular parties or particular parts of the United Kingdom is completely contrary to our system.

Q224 Paul Flynn: Indeed, but we have a situation now where the Government of Wales has been for 100 years, and is likely to be, Labour inclined, a Labour majority and so on, with the changing powers here. That element is there now. We had a debate in Parliament about the way that the Government were interfering with Welsh legislation, and they were. It was the point that you were saying: they had given some devolution but they want to take it back. They still want to hold the power strings, and the decisions are taken by judges, not politicians. Politicians are heard in the Supreme Court but Supreme Court members take those judgments.

Lord Hope of Craighead: You could say that they are to defend the devolution system. I think very much they look to see what was given to the Welsh Assembly and are protecting it.

Mr Chairman, I am to speak in a debate in the House of Lords and the rules say that I have to be there at the start of the debate, which is at 11.30am.

Chair: I think we will definitely conclude by then.

Q225 Paul Flynn: I will skip the next question, shall I? If you have time, we do appreciate it. How should Parliament consult with the judiciary on the content of any codified constitution and any changes in the judiciary's role that would result from it?

Lord Phillips of Worth Matravers: That is quite an interesting question because the judiciary tend to be a bit coy about expressing views in relation to proposed legislation that has a political aspect. But if you go out to consultation generally, then I would expect the judges to put in their response to consultation, as they tend to do. If you want to get individual judges coming and talking to you, they may be more reluctant.

Lord Hope of Craighead: I would go further than that. We have had experience of a case of somebody who was in the House of Lords as a Scottish Law Officer expressing a view about legislation. When he sat as a judge, his position as a judge was challenged and the judgment he was sitting on was set aside. The point is there is a principle called apparent bias and if you are involved in the very legislation that is being considered by the court you simply can't sit on it. I think that judges would be very reluctant to become involved in anything that would give rise to risk to their judicial independence, so they would rather leave it to you to deal with that. There might be technical issues that they have to comment on, but the substance would be entirely for you.

Lord Phillips of Worth Matravers: There are ways of finding out how judges think. You could have maybe a discussion under Chatham House rules, to which judges are invited. I went to one very recently run by the constitutional department of University College London, at which the Lord Chief Justice was present talking about relations between judges and Parliament. You can perhaps get UCL or somebody to set up a discussion under Chatham House rules to which judges are invited, which gives you some indication of how judges would feel about proposals.

Q226 Paul Flynn: Future members of the Supreme Court won't necessarily be Members of the House of Lords. Is that a bad thing? Is it important to have the judicial voices in the House of Lords?

Lord Hope of Craighead: Having been in both positions, it does not affect in any way the way in which you deal with cases. The position at the moment is as you rightly say. The new justices are not made Members of the House of Lords and I don't think that affects their position in the slightest. I was disqualified, as Lord Phillips was, when I went to sit in the Supreme Court and we didn't come over here, and we continued to do really the same job as we had done in the House of Lords. It is an issue for the Government ultimately to decide whether they should come back after, on retirement, and there are reasons for thinking that might be quite a good idea, but that is a different issue. As for those actually serving as judges, I think it does not matter one way or the other, frankly, because the judges are not involved with the business of the House anyway.

Lord Phillips of Worth Matravers: I would go a little further and say that the whole object of moving the judges out of Parliament into a Supreme Court was to make the separation of powers transparent. If you were to make all members of the Supreme Court Members of the House of Lords, that would tend to defeat that object. It is much better to have a convention under which any member of the Supreme Court who wishes to take part in parliamentary business would be given a life peerage on retirement.

Chair: We did talk about the very onerous journey from Parliament to the Supreme Court. It is all of 150 yards across Parliament Square. I think some colleagues feel that a journey to a Supreme Court in another country might be more efficacious, but we are making sure that every member here meets with the current President. We also spoke to Lord Neuberger about some form of programme and getting Members of Parliament—I know it is not far—literally to visit and understand the workings of the court. If the traffic went in the other direction, I think we would all be very happy about that too.

I am now going to call the oldest of our new members, Chris Ruane.

Q227 Chris Ruane: Before I give my question, just a follow-up from when Paul Flynn mentioned representation from Wales on the Supreme Court. I am new on the Committee; I know very little about constitutional issues. I am prepared to learn. Is the Supreme Court drawn from a small gene pool, geographically, socially, culturally? Is there a need to expand it? In the age of devolution with Northern Ireland and Wales—Scotland probably has that judicial input, because it has its own separate institutions going back hundreds of years—is there a need to expand that? I will just give you an example. Some years ago, I put down a question for the ambassadors for the UK asking what proportion went to Oxford and Cambridge and private schools. The answer came back: “50%, but there is an independent body that appoints these.” So then I put down a follow-up question: what percentage of the independent body that appoints these went to Oxford and Cambridge and private schools? It was 60%. It was a self-selecting oligarchy. I am not suggesting that was the case, god forbid, for the Supreme Court, but is there a need in the age of devolution to expand that, to widen the net?

Lord Hope of Craighead: Geographically, the position under the statute is that the justices, as a body, must contain people who have knowledge of the laws of all parts of the United Kingdom. The present position is that we have one judge from Northern Ireland, two from Scotland, and that has been the position for many decades. We have dealt with the question about Wales, as Wales begins to develop Welsh law, which was not a feature some time ago but is becoming a feature, and that is something for the—

Q228 Chris Ruane: Are there any from Wales at the moment?

Lord Hope of Craighead: There is not at the moment, but there are judges who—

Chris Ruane: So there is one from Northern Ireland, two from Scotland, but none from Wales?

Lord Hope of Craighead: No. The structure is different. The judge from Northern Ireland is a former Chief Justice of Northern Ireland. The judges from Scotland are former judges in the Scottish courts. There is no Welsh court. The courts of England and Wales operate as a unit, but you can find people who have practised in Wales and understand the position in Wales, and in time I suspect we will find that the Judicial Appointments Board will be finding people to fill places in the Supreme Court. The stage has not yet been reached, and that is not a matter on which we can say any more than we have said already, but it is a matter for consideration, shall I put it that way.

Q229 Chris Ruane: I will rush through this, so that you can get across to the House of Lords before 11.30 am. One final question: in the German case of Solange 1, the German Federal Constitutional Court ruled that in the hypothetical case of a conflict between Community law and the guarantee of fundamental rights under the German constitution, German constitutional rights prevailed over any conflicting European Community law. If the UK adopted a codified constitution, would it be able to take a similar position with regard to Community law?

Lord Phillips of Worth Matravers: The short answer is yes.

Chris Ruane: Will the short answer do, Chair?

Chair: I would like a slightly longer answer, because this is of real interest to members. I think there is an undercurrent, which I share, that our Supreme Court should be our supreme court, and only in the most exceptional circumstances should we entertain influence from outside. It is a precious institution to us, and we would like to defend it. I think that is the gist of the question.

Lord Phillips of Worth Matravers: The reality is that if a group of countries get together and enter into a treaty, a convention, a contract and the subject matter of the contract is the way that they behave in their own countries, and they all get together and agree that they will all behave in the same way in their own countries in admirable respects, that is not going to be worth anything unless there is some supranational arbiter of whether they are or are not keeping to their contract. That is the reality. If you agree to set it up, as we did with the Strasbourg Court, and then say, "But we are not going to take any notice of it", then for my money you are disregarding the rule of law because you are simply tearing up the agreement you have made. You can withdraw from it; that is perfectly legitimate.

Q230 Chair: But the emphasis in Germany is stronger on the national Constitutional Court than in other countries, and I think where Chris' question is aiming is: could we be closer to the German interpretation than to some of the other Constitutional Court/Supreme Court interpretations?

Lord Hope of Craighead: It is difficult for us because, as Lord Phillips has been saying, in effect we have entered into treaties. I think the Solange case was a case in the European Court of Justice. Is that not right? It was a European Communities case. This is a great problem in dealing with the EU: is there is some sort of German position that is different from that of everybody else? That is quite awkward to live with in a situation where everybody is bound by the same treaty. I find it quite difficult to envisage a situation where we would be able to say, as the Germans do, that we have a basic law that simply can't be entrenched by a treaty that this country has entered into. I find that very difficult, frankly.

Chair: It is an issue that we would like to explore further, but I think time is against us; it is certainly against Lord Hope, who must run down the corridor to their Lordships' House. Lord Hope and Lord Phillips, thank you so much indeed for your time today. It was very instructive and has given us lots of food for thought. Thank you, colleagues, very much indeed for your contributions.