



Revised transcript of evidence taken before

The Select Committee on the European Union

Justice Sub-Committee

Inquiry on

**THE POTENTIAL IMPACT ON EU LAW
OF REPEALING HUMAN RIGHTS ACT**

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Questions 12 - 22

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10.55 am

Witnesses: Aidan O'Neill QC, Rt Hon Dominic Grieve MP and Martin Howe QC

USE OF THE TRANSCRIPT

1. This is an corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Members present

Baroness Kennedy of The Shaws (Chairman)
 Lord Blair of Boughton
 Lord Boswell
 Lord Cromwell
 Baroness Eccles of Moulton
 Baroness Hughes of Stretford
 Lord Judd
 Baroness Newlove
 Lord Richard
 Baroness Shackleton of Belgravia

Examination of Witnesses

Aidan O'Neill QC, Rt Hon Dominic Grieve MP and Martin Howe QC

Q12 The Chairman: Welcome. It is very nice to see all of you. I want to thank you for making yourselves available to testify to this Committee. I should like to indicate a number of ground rules and explain how this will work. The session is open to the public and a webcast will go out live as a video/audio transmission. It will subsequently be accessible on the parliamentary website. There will also be a verbatim transcript of your evidence and this will be put on the parliamentary website too. A few days after this hearing you will be sent a copy of the transcript to see whether it is accurate. If you can, please advise us promptly whether there are any corrections that need to be made. If, after this session, you want to clarify or amplify any points and you feel that on further reflection you would like to submit further evidence, we would welcome your doing so. You can submit that to us in a written form. Some of these matters are complex and not all members of the Committee are legally qualified, although most come with a certain foundational knowledge, so I imagine that we will seek to engage with that fact. It would be helpful if you do not simply repeat what a colleague has said but distinguish the differences between your positions.

The first set of questions we wanted to ask concern the whole issue of prisoners' voting rights, which has become emblematic of the concerns that many people have and raise in the context of parliamentary sovereignty: how decisions ought to be made and whether we are seeing overreach by the judiciary. What do you think in respect of the strengths of enforcing human rights standards under the ECHR—the European convention—and the European Union charter in national courts in light of the decisions that have been made around these issues concerning prisoners' voting rights? You will all be familiar with the case of *Hirst* and cases in the UK, in our own Supreme Court, of *Chester and McGeoch*, and the Court of Appeal judgments in the cases of *Benkharbouche* and *Vidal-Hall*. More recently, there has been the decision in the case of *Delvigne* in the European Court of Justice. Could we elucidate that for both this Committee and those who are watching? Who would like to begin? We have our former Attorney-General here.

Dominic Grieve MP: Thank you very much. I will have a go. My response when I saw this question was that the EU charter and the ECHR perform different roles. As the Charter of Fundamental Rights has the capacity to have direct effect, it may therefore be more

effective than the convention, which can of course be disregarded by a Government; in a sense, that is the issue over prisoner voting. On the other hand, the Charter of Fundamental Rights is confined to matters within EU competence and therefore covers a much narrower range of issues than our subject of the European Convention on Human Rights. The big question—and I detect why you have asked us to come in—is to what extent EU competence is being expanded to the point where one might almost say that it is capable of applying large parts of the convention. That is ultimately an issue that depends on the extent to which the European Court of Justice decides to extend its competence in particular areas. The whole point about *Chester and McGeoch*—the reason why Aidan lost that case and I won it—is that I was able to persuade the Supreme Court that notwithstanding the fact that we were in clear breach of the convention in terms and they would not make a declaration of incompatibility, they did not consider that Article 40 of the charter conferred an individual right to vote that paralleled the European Convention on Human Rights. The EU was not concerned with voter eligibility—that was its snapshot conclusion.

Coming on to *Delvigne*, it is at least questionable whether that position may any longer be tenable in relation to voting in a European Union election. The way I interpret *Delvigne* is that if somebody were in the future to challenge their inability to vote in an EU election, either in our courts or ultimately at the European Court of Justice in Luxembourg, they might be successful if they were able to show that they came within a category that should have been entitled to vote, whereas the UK has a blanket prohibition. *Delvigne* upheld the French system, which has the ability to ask a court to give you back your civil rights. There is an example, I suppose, of potential creep by the European Court of Justice, certainly as the Supreme Court would see it in its previous judgment. I think that the Supreme Court judgment in *Chester and McGeoch* may now be, in that one particular, questionable.

As for the other cases that have been mentioned, *Benkharbouche* and *Vidal-Hall*, each of those shows the extent to which the charter is being used to expand—they use the word “horizontally”, although I have never quite understood that expression—the areas of competence of the European Court of Justice in the fields where it takes the view that there is a wider issue—in the case of *Benkharbouche* it is discrimination law—which allows it to go to places that people might not have previously expected European law to intrude, namely over issues of diplomatic immunity and trumping them. However, there are limits to this and it is slightly difficult to know where those limits are going to be found. The European Court of Justice seems repeatedly to insist that it will only go within areas where there is EU competence. The big question for me is: where are those limits? The point I have made in the past on prisoner voting rights is that the more the United Kingdom is repeatedly non-compliant with a convention right, the higher the risk that the Court of Justice in Luxembourg might decide that this is an interesting area in which to expand its jurisprudence. As there is a lot in the treaties that says that EU countries should be compliant with human rights norms, including specific reference to the charter, it seems to me to provide at least a toehold for the European Court of Justice to insist on observance of human rights norms if it were to choose to do so, although it could be argued that that is taking it outside the treaties.

Q13 The Chairman: Before I turn to other colleagues, I want to tease this out. Do you think *Delvigne* will be interpreted by the UK courts in the way that you suggest? If a British prisoner were to say, “I want to be able to vote in European elections”, *Delvigne* would seem to give a steer in that direction and cancel out Lord Mance’s position that the charter does

not provide a freestanding right to vote and say that that is not quite right. Can you imagine a successful application? Our last session heard evidence from very distinguished academics, but people do not seem to grasp the fact that the European Court of Justice does bind the British courts in the way that the European Court of Human Rights does not. If we are talking about powers, the European Court of Justice has greater powers. What do you think would happen if a case were brought invoking *Delvigne*?

Dominic Grieve MP: On the basis that we have not put our house in order—we could probably do so quite easily if there was the political will, but there is a political reluctance—I can see a risk that as we approach the next European elections someone will mount a challenge on the basis that they are refused the right to vote. I would be interested in the views of my two colleagues, because as I read *Delvigne* there is at least a reasonable prospect that they would be successful. The United Kingdom has a blanket prohibition, which, if you read *Delvigne*, is the thing that, looking at ECHR jurisprudence, the European Court of Justice has said it does not think is correct, even though in *Delvigne* it rejected a suggestion that the French system was wanting. A flag has been hoisted that says that this is an area in which, certainly on voting in EU elections, the court has competence.

The Chairman: Mr O'Neill, perhaps we could come to you. I do not know your position on this, but how would you see these questions around competence, the differences between the European convention and the charter of rights, the ways in which those two courts seem to be operating and the impact on our courts?

Aidan O'Neill QC: I am more than happy to address that. I have to flag up that I do not want to be thought to be murmuring the judges, which is the old Scottish offence of scandalising the court, because in the case that Dominic Grieve has mentioned—*Chester and McGeoch*—I was against him and I lost. I put forward the EU law point that voting in the European Parliament had something to do with EU law, and that therefore proportionality might apply to that. I have to say that I was surprised that the analysis had nothing to do with EU law. *Delvigne* seems to back up the original argument that was presented.

The Chairman: Are you enjoying some schadenfreude now?

Aidan O'Neill QC: You might say that, but I could not possibly comment. On the question of whether *Delvigne* opens up the analysis that was rejected in *Chester and McGeoch*, I would say yes, it does. But Lord Mance's judgment had another part to it. He said that not only did voting in the European Parliament have nothing to do with EU law as such and was a matter for national competence, but that even if there were an issue of EU law, the question of the institutional competence of the court to do something about that would arise. The normal approach in EU law when there is an inconsistency between a national statute and the requirements of EU law is a disaplication: you do not apply the statute to the case in hand. We saw that in the case involving *Factortame*, the Spanish fishermen and the Merchant Shipping Act quite a number of years ago. If the Supreme Court or any lower court were to disapply Section 3 of the Representation of the People Act 1983, that would be seen to re-enfranchise everyone, no matter what their crime or circumstance, and might be seen to be a disproportionate response. The court's judgment, and certainly Lord Mance's judgment, was that there was no institutional competence within our constitution for us to do that. But I think that our constitution is a bit more flexible, as ever, not being written down, and that one of the things that is certainly already within the competence of the Supreme Court in devolution cases is that if it finds an incompatibility with fundamental rights and the primary

statute, it can say, “We think this is wrong, but we will suspend our judgment for a year”, say, and that will allow the legislature to come back with a proportionate response to the issue. That having been done, the ruling itself can be made to be prospective. That sets up what we might think of as an institutional or constitutional dialogue, which would allow fundamental rights to be realised while the democratic understanding was reached and the judges were not legislating. That is certainly the kind of argument that I might put forward if another prisoner is desperate to vote in the European parliamentary election.

The Chairman: There is bound to be someone out there, or in there, who does. Mr Howe, how do these matters strike you?

Martin Howe QC: Having not been involved in the case, I can comment as a neutral, although possibly not entirely impartial, observer. I think Dominic Grieve is to be congratulated on having persuaded the Supreme Court that individual rights to vote in European Parliament elections under the charter are restricted to a right for non-resident citizens of other member states to vote on the basis of equality with citizens of this country. I think that is a correct interpretation—indeed, the only reasonable one—of the charter, having regard to both its wording and its history. However, I was completely unsurprised by the decision of the Luxembourg court in the *Delvigne* case in effectively expanding the scope of this provision of the charter from its intended application, which is to do with the rights of citizens of other member states, into the internal relations of citizens of France with the French state and the electoral system. I think it is very poor legal reasoning—I do not want to expand on this—because under Article 39(1) of the charter, “Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State”, and even the Luxembourg court was unable to say that that paragraph applied. But it then said that an individual right to vote arises under Article 39(2), which says that, “Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot”—a paragraph that has absolutely no reference to the rights of individuals to vote. So I am afraid that I think this is another example of our being subject to a system where we have international courts by which we are bound by treaty obligations and which get it wrong, and they get it wrong in a systematic way by seeking to expand their jurisdiction.

Turning back to the broader question that you asked about the respective remedies of seeking to enforce rights under the charter as compared to rights under the Human Rights Act, undoubtedly the remedies are in principle superior because they include under the *Factortame* doctrine the ability of courts to disapply primary legislation, which makes it a very powerful instrument. That is coupled with Section 3 of the European Communities Act 1972, which requires our domestic courts to interpret European Union law in accordance with principles laid down by the Luxembourg court. There is no direct equivalent under the Human Rights Act and the Strasbourg court; it is merely taken account of.

So from my perspective it is a very bleak picture. There is the very important point, raised by Dominic, about how far the scope of European Union law extends. The leading case on that is, of course, the *Åkerberg Fransson* case, and I do not know whether this Committee has looked at it in any detail in the course of its deliberations. That was criticised by members of the German constitutional court, because it said that where European Union law provides for the collection of a tax—in that case, VAT—the procedural methods that the member state uses in its court system for the collection of the tax are subject to the charter, which is

a dramatic expansion of its width. I am afraid that my analysis of it is that the Luxembourg court is a power-hungry institution. It will not step back from its continuous process of expansion of the scope of European Union law.

Q14 The Chairman: Mr Howe, one of the things that puzzle observers is that here is this court, the Luxembourg court, which has much greater powers than the European Court of Human Rights, yet all the focus of those who are concerned about the powers of international courts, or courts beyond our own nation state, has been on the European Court of Human Rights, and it seems to be a diversion away from the much more powerful court, the European Court of Justice in Luxembourg. Can you explain why human rights have excited concern more greatly than the European Court of Human Rights?

Martin Howe QC: I cannot necessarily speak for other people. I have been concerned by both courts and their activities over the years and the way in which they are both activist and expansionary in their approach to jurisprudence and jurisdiction. Hitherto there has been a difference in the field of application. When it comes to fundamental rights, the Luxembourg court's reach has been perceived as being narrower. It might well expand further, because once there is a toehold of European Union law, such as directives on asylum, that lets the Luxembourg court into those areas.

One interesting issue, though, is that the Luxembourg court taking over the operation of fundamental rights is not necessarily good for rights. A key example is the *Melloni* case, (Case C-399/11 *Melloni v Ministerio Fiscal*, judgment Grand Chamber 26 February 2013) which is a European arrest warrant case. The Spanish constitution provided a safeguard against people being extradited to a country where they had been convicted of a criminal offence in a trial in absentia. The Luxembourg court in the *Melloni* case said that in the case of an extradition under the arrest warrant, only the conditions actually in the framework decision can apply and in effect that the Spanish constitutional guarantee of fundamental rights must be overridden. So the Luxembourg court is not necessarily just an expander of rights; it can in some circumstances reduce or suppress rights.

The Chairman: I would like us to hold on to that, because we are going to come to some of those issues as we take evidence from you.

I would like to go back to your colleagues. Listening to the position of Martin Howe, is there anything that either of you would like to reflect on or take issue with?

Aidan O'Neill: I certainly would. I am not going to get into a legal debate about the particular terms of the charter and the like, but it might be useful to stand back a bit and reflect on the question that the Chairman has mentioned: why is the anxiety at the moment focused on Strasbourg rather than on Luxembourg? It is certainly a shift. Ten years ago, the anxiety was very much focused on Luxembourg, and certainly the Maastricht treaty negotiations.

The Chairman: Is it because the European Court of Human Rights is low-lying fruit? Is that the real reason why?

Aidan O'Neill: One always complains about the tabloids misunderstanding and saying "the European Court of Justice" instead of "the European Court of Human Rights", and people confusing Luxembourg and Strasbourg, but actually it is perfectly understandable. When you step back and look at it from a historical, philosophical, political point of view, they are both two sides of the same coin of a post-Nuremberg, post-Second World War approach to what a democracy has to be now, given the experience of democratic politics in Europe breaking

down in the democracies that were set up after the First World War. In the 1920s and 1930s, democratic politics did not work, and we ended up with the horror of Nazi Germany and an apparent legal and political system whereby that party got into power by democratic means. The response after the war to create what I call post-Nuremberg democracy was, “We have to have mechanisms that prevent the state waging war against its neighbours”, which is what the European Union is about. War becomes unnecessary, because all the economic levers that would otherwise count towards making war are no longer there, so waging war against one’s neighbours becomes redundant. War against its own citizens is what Strasbourg is for, it is what the European Court of Human Rights is for. It is to say that the state cannot be seen to be all-powerful, that it is called to account by universal standards, and that it cannot use its powers—its monopoly on violence—its ability to change the law, to oppress its own people, to wage war on its own people.

The best way to understand the European Convention on Human Rights is to see it not as some foreign importation but as a photographic negative—as a legal system that has gone completely wrong. It is a Nazi legal system, it is a negative of every one of those rights; it says that you have the right not to be tortured, because under the Nazi parody of a legal system you were tortured, you were subject to retrospective legislation, you were not permitted to act in particular professions, you had no private and family life, you had no freedom expression, you had no liberties. The European convention is a photographic negative, and it is a monument to where democracies and political systems, unchecked, can fail. So, as I say, they are two sides of the same coin. In post-Nuremberg democracies within Europe, war among the neighbours should be stopped by European Union law, war against its own citizens by human rights law. That is why they are both important. That is why they walk hand in hand.

The Chairman: Mr Grieve, former Attorney-General, I saw you nodding at some of that.

Dominic Grieve MP: I find myself a bit like the middle of a sandwich. Martin’s legal analysis of the way in which the court in Luxembourg is developing its jurisprudence I do not disagree with. Nor do I disagree with some of Aidan’s comments about the principles of why the convention was created. To do an analysis of what is going on, the first answer to your question whether the ECHR is low-hanging fruit is yes, it is a displacement activity. I spent my time in the past saying to colleagues, “Beware of leaving nurse’s hand for fear of something worse”. On this issue between the European Court of Justice and the European Court of Human Rights, it is quite clear to me that the European Court of Human Rights is a very benign institution, whereas I happen to think that the European Court of Justice in Luxembourg has predatory qualities to it that could be very inimical to some of our national practices, and Martin’s point about the *Melloni* judgment is perfectly reasonable. But the decision to concentrate on Strasbourg is because Strasbourg is the easier target, and it is; it is red meat while you cannot do something about the other place. For 70% to 80% of the population of this country, there is no understanding whatever of the distinction between the convention and the EU.

As for some of the other background issues, we are living, it seems to me, in an era of the death of parliamentary sovereignty. This subject is not discussed as much as it ought, partly because it is taboo because people like to pretend that it is still alive, whereas in fact its death seems to me to be all around us. Its death throws are also throwing up some very odd phenomena: namely, that instead of parliamentary sovereignty being the dominance of the Executive, as in the past, it is now the dominance of the universe by Parliament, in the way

in which it is sometimes expressed by some of my colleagues, which it was never intended to be. But the things that are destroying parliamentary sovereignty are undoubtedly globalisation; the EU undoubtedly plays a role, and the convention has played some role, but it is just part and parcel of a huge number of international obligations which the UK has signed up to in the past 200 years that ultimately fetter the way Parliament behaves. The truth is that the biggest destroyer of parliamentary sovereignty at the moment is devolution, yet nobody is really prepared to wake up to what has happened: that we have been shedding power irrevocably, short of referendums, to other parts of the United Kingdom and that we do not really have governmental and parliamentary structures that reflect these shifts of power or, indeed, a framework within which these different power centres can be moderated. Of course, all that emphasises the role of the judiciary, and if there is one thing that is the resonance behind all this it is the dislike of judicial activism. If you walk around this place, certainly to the other end—it might not be a phenomenon that affects you—you will pick up grumbling about judicial activism in its many manifestations. I sometimes think that when one is trying to understand what is going on and why there is this political tension, with judges performing the role of the European Court of Human Rights, it is partly because of this sense that the autonomy of Parliament and the Executive—because the two are linked—is being eroded.

Q15 The Chairman: To pick up on that idea of judicial activism, some people would suggest that the extent to which our judiciary is leading a charge against parliamentary sovereignty is grossly exaggerated. Our judges are very cautious about the way they engage with things that seem to be contrary to what Parliament wants.

Dominic Grieve MP: I do not disagree with that. Perhaps we are straying a bit off your topic, but clearly the *Evans* case is a very interesting example of the Supreme Court taking a view about legislation enacted by Parliament, finding it wanting and finding a hook on which to ignore it, perhaps for perfectly understandable reasons; it can be argued that the legislation was very poorly drafted and that a system by which you have an executive override of the superior court of record is not a good thing. But I have to say, having been in Parliament when we enacted it, that I have very little doubt that what Parliament intended was a sort of compromise to giving more powers on freedom of information. These things are not just confined to the EU and to the convention.

The Chairman: I am going to take us on to a whole new set of questions, but before I do I would like to give Baroness Shackleton an opportunity to ask about Britain's position, which was criticised by the European Court of Human Rights, on prisoner voting. Britain is one of the few places that has a blanket ban on prisoners being able to vote. France, for example—I should just make it clear that we are talking about the *Delvigne* case—allows people to vote unless they have been convicted of violent offences and they have a sentence of more than five years. Otherwise, they have access to a vote. Baroness Shackleton, you wanted to raise a matter in relation to the blanket ban.

Baroness Shackleton of Belgravia: Why does Parliament not empower the judges to have a discretion to remove a vote in much the same way as they can remove your driving licence? If your English driving licence is removed, you are not entitled to drive your car around Europe. You are bound by that decision. On a case-by-case basis, the blanket ban would be avoided and it would just be one other thing that the CPS could ask for when looking for its shopping list of committals.

Dominic Grieve MP: It could be done very easily. There are a whole number of ways in which the judgment in *Hirst* and in *Greens* and *MT* can be addressed, and that is one way. The other way in which it can be addressed is simply by saying that any prisoner in the last six months of their sentence is allowed to vote, which means that those sentenced to under six months do not lose the vote and the others get them back in the last six months. There are lots and lots of very minor ways in which the courts' concerns could be addressed. Why is it not happening? Because although the issue is largely symbolic—I am obviously talking as a politician now—it has a resonance, particularly down at the other end of the corridor, where, in a very widespread fashion across political parties, it is seen as an unwarranted interference in an issue where Parliament is viewed as having a role in articulating the right to prevent people who are convicted and sentenced to imprisonment to vote. It has become a talismanic argument. The truth is that it will not make any difference one way or the other; not very many prisoners will vote, although some may. There are very good arguments why you should give prisoners the vote anyway, and there are arguments why you should not, but it is seen as unwarranted judicial interference. If you want the answer as to why Parliament has not responded, that is the reason. Added to that is the fact that the Government are very hostile to doing anything.

The Chairman: Lord Blair, you had a question about those sorts of electoral issues.

Lord Blair of Boughton: Yes, as a moment of levity, but it has a serious twist. Have any of our witnesses addressed the question of whether, in the case of a change in the law to lift the blanket ban and to allow some prisoners in the UK to vote, however that sum is defined, those votes will include the right of prisoners to vote for police and crime commissioners? With a low turnout, that might change the pattern of voting in, say, the Isle of Wight quite considerably. Answers on a postcard please.

The Chairman: The levity has been produced, and I think we can all see why that would be an amusing thought.

Lord Blair of Boughton: Or not.

The Chairman: Or not.

Dominic Grieve MP: I have always understood that if prisoners ever did get the vote, the intention was that they would vote in their last place of residence, otherwise the Isles of Wight and Sheppey would be—

Martin Howe QC: I think the arrangements for remand prisoners, who of course can vote, are that if they are not still registered at the home address, they vote in the prison constituency. That is the position with remand prisoners under section 7A of the Representation of the People Act 1983 as amended by the 2000 Act.

The Chairman: It is quite interesting, and I do not think the general public know that there are people in prison who vote, and they are people awaiting trial. So it is not that it is unworkable.

Lord Richard: But they had not been convicted of anything.

The Chairman: They have not been convicted of anything. That is right.

Aidan O'Neill QC: But the point about the loss of prisoners' voting rights was not because they had been convicted; it was by accident, because they were not able to get to the polling station.

The Chairman: That is right.

Aidan O'Neill QC: It was before we had postal voting generally, so people on remand lost their vote. People who are on licence after committing murder get the vote back. It was not connected to conviction. There was no real thought to it.

The Chairman: It was about the problem of having boxes taken into prisons and all that. That is often forgotten, and it is the answer to some of these questions.

Dominic Grieve MP: There was a very brief period when it was possible for convicted prisoners to vote by post when postal voting was introduced. It did not last very long.

The Chairman: Yes, that is right. Even that was considered too complicated.

Q16 Lord Cromwell: Good morning. Can I ask you two perhaps linked questions in the scenario of the Human Rights Act being repealed in the UK, were that to happen? Are you of the opinion that the European charter and common law would, in combination, give us equivalent national coverage, or would there be gaps that a Bill of Rights would need to plug? Clearly, any examples would be welcome.

Martin Howe QC: The answer is no, there would be gaps, because although the scope of EU law, and therefore the scope of the EU charter, is wide, it has no application outside that scope. Would the common law provide rights? Well, the common law provides some rights, but its weakness is that it cannot withstand any statute; even the most minor statutory instrument can override the common law. So the answer is that it would be possible to return to a scenario similar to that before 1998, where we were externally members of the European Convention on Human Rights but had no specific internal implementing legislation, but what is proposed is not simply repealing the Human Rights Act and leaving nothing in its place but replacing it with a positive statement of rights that would be broadly similar to the Human Rights Act but that would have a number of differences.

The Chairman: Thank you. Would anyone else like to come in on that question?

Lord Richard: What differences?

Martin Howe QC: I cannot answer that. I should say that I was involved in the preparation of the Conservative Party's proposals before the general election. I am not involved in the Lord Chancellor's and the Department for Justice's current work, so I simply cannot specify.

Lord Richard: What areas of difference do you think there would be?

Martin Howe QC: The key area, assuming that they follow the manifesto, would be removing the dominance of the Strasbourg court, the doctrine that was created actually by judicial decision rather than under the Human Rights Act itself.

Lord Richard: Who would enforce it?

Martin Howe QC: Our own domestic courts would be the ultimate interpreters of the rights.

Lord Richard: But the rights themselves do not differ very much one way or the other.

Martin Howe QC: No. It is important to distinguish between the European Convention on Human Rights itself, which as a text sets out a body of rights, 99% of which are respected across the entire political spectrum, and what has happened in the process of so-called interpretation of those rights over the years, particularly by the Strasbourg court, which has

resulted in a set of jurisprudence that is markedly different in a number of areas from the convention itself.

Lord Richard: It really comes back to what you said when you answered the first question. You said that they—I noted this down at the time—“get it wrong in a systematic way in order to expand their jurisdiction”. Do you really believe that that is what the Strasbourg court does?

Martin Howe QC: I most certainly do.

Lord Richard: You do?

Martin Howe QC: Yes, and I can give you examples, but—

The Chairman: Perhaps I will leave this and come to it later when we go over other areas. Does anyone else want to come in on this little point?

Dominic Grieve MP: I was only going to say that I am not privy to the Government’s proposals, but it has certainly been my understanding—it may be little more than gossip, but it seems to have been quite prominent gossip—that the intention is to take the convention text, incorporate it and make it the foundation of the Bill of Rights.

The Chairman: Is that not what the Human Rights Act does?

Dominic Grieve MP: It does, but on the other hand I think the intention was that in a number of areas the text was going to be glossed so as to lead to different interpretative outcomes from our own courts than those which you are likely to get in Strasbourg. All I can say is that 99.5% of the time I suspect that the outcomes are going to be identical. It is a huge amount of effort, on the evidence, for very little return and a lot of cost for very little benefit—Martin will probably disagree with me, but that is how I have begun to see this as emerging. I may be proved wrong; we will have to wait and see. In a sense, the point made by Martin has already happened, because the test in *Ullah* has already been departed from by the Supreme Court—about the extent to which it has to follow Strasbourg jurisprudence—and that has not required any change to the Human Rights Act.

Aidan O'Neill QC: I want to pick up something that Dominic Grieve said about “displacement activity” and the anxieties clearly felt by Martin Howe and those he speaks for. I do not think that we have bottomed out what those anxieties are. I think that is right in terms of judicial activism, but all that will happen if Strasbourg is somehow whipped into line, or we somehow move it back, is that the anxiety will then focus on the UK Supreme Court. It will then be seen as an activist court that is developing the common law—and it most certainly is at the moment. It is rather difficult arguing before it at the moment, because it says, “There’s a fundamental common law right”, and you’re thinking, “Where did that come from, because there is no text”. When you are told it is Magna Carta, you think, “We’re not really talking history here, are we?”. So in principle the idea that judges have a text of fundamental rights that they should stick by is important. The anxiety that is being expressed here is about England in the union. Devolution has caused and is causing major new ways of understanding our constitution, and I think we are beginning to understand that the United Kingdom is not a nation state but a state of nations. What has not been taken into account in that is England. Everyone else in the Union seems able to define who they are by not being English. The problem is that the English are now defining themselves by not being European. That is a retrograde step. I would be very keen on an English Bill of Rights—if one needs another Bill of Rights—as long as one leaves the Human Rights Act in

place because it keeps the union together, it is a uniform protection across the four nations of the union, and keeps us integrated in that broader, post-Nuremburg European project.

Dominic Grieve MP: Of course, as the Committee will be aware, one reason why the Government will have great difficulty doing anything is that it is quite clear that the devolved Administrations will refuse to sign up to a British Bill of Rights. That then opens a complete can of worms. This all comes back to my point about parliamentary sovereignty: yes, Parliament here could do what it liked, but the fall-out consequences of doing that without a Sewel Motion from Scotland and Wales would be politically very damaging. So there is this difference between theoretical concepts and practical political reality.

Q17 Lord Judd: I hope the Chairman will not rule me out of order, but I am fascinated by this evidence. I am an older politician. I remember in my formative years being tremendously influenced by Eleanor Roosevelt and that whole struggle for the Universal Declaration. It seems to me that what is highly pertinent to the real political world in which we are living is that the purpose of these international agreements was exactly to establish principles that applied to all mankind. If I look at direct working with which I have been involved—in Russia and the Caucasus, for example—would our coming out of the European Court of Human Rights advance the cause of these objectives to which we are all committed and indeed repeated commitments by different Governments to international justice and the rule of law? Would this be helped by our beginning to move away from the concept of international solidarity on these matters?

The Chairman: Martin Howe, I think this question is being addressed to you. Is there not a bigger picture in this, which is that the role Britain plays in championing human rights and so on could be damaged by our playing this cat-and-mouse game over the European Convention on Human Rights and that we will damage the huge influence that Britain has in trying to raise standards in the bigger tapestry of Europe?

Martin Howe QC: As I see it, our fundamental problem is that while it is right to say that human rights principles are universally recognised, you cannot say the same about their detailed interpretation. We now have an international system in Europe. At its heart is a court that in my view has gone beyond its remit in the way in which it interprets the rights. In addition, it has moved away from the original post-Nuremburg purpose of guaranteeing a fundamental basic set of rights.

The Chairman: Where have those departures taken place? Obviously, we could talk about this for most of today and our time is limited, but where do you see the departures that really incense you?

Martin Howe QC: Prisoner voting is a prime example.

The Chairman: We have dealt with that.

Martin Howe QC: What we perhaps have not dealt with is the basis of the Strasbourg court's claim to interfere with voting rights of prisoners. It is founded on Article 3 of the First Protocol, which contains no provision giving an individual right to vote. It has been conjured judicially out of thin air. Other, more important areas—

The Chairman: But is not part of that about wanting to encourage those post-Soviet countries and so on to engage with embedding real democracy? Therefore, that interpretation has expanded to deal with the changes that have taken place: for example, as

a result of the end of the Cold War. Is there not a role to be played in strengthening democracy in those parts of the world?

Martin Howe QC: The fundamental problem that we face is that as a nation we signed an agreement that appears to mean one thing. There is then a body, this court, that interprets it into something completely different.

The Chairman: But has the law not always done that, in that it evolves to deal with the way in which societies change? It tends to be reflective of change. We would not want law to be static and stuck in how it was in the 1950s when the European convention was drafted.

Martin Howe QC: But there is a fundamental difference between the roles of legislators and those of judges. Legislators, whether on a national or international plane, are democratically elected and accountable; it is their job to change and develop the law over time as conditions change. It is not the job of judges simply to invent new doctrines because they think society has changed if they are not doctrines that are expressed.

The Chairman: I just want you very quickly to tell us where else. We know about prisoners' voting rights; we know about your concern that that has been expanded beyond the writ. Where else have you seen these terrible things taking place? Your anxiety is not shared by everybody and I want to understand where we should be looking.

Martin Howe QC: My anxiety may not be shared by everyone, but I am sure it is shared by a lot of people. Other important areas include the extraterritorial extension of the convention. The convention as originally written absolutely clearly applied only to and within the territories of its member states. The Strasbourg court has made a series of extensions that resulted, for example, in it holding that British forces in Basra during a period of temporary occupation were subject to the convention, resulting in the application to a near-war situation of a text that was never intended to apply in that situation.

The Chairman: So you think that the *Baha Mousa* decision, where a man died as the result of physical ill treatment, should not have been made.

Martin Howe QC: There are laws that apply. I am arguing against the application of the European convention. Killing people in custody is unlawful, but it does not have to be under the convention.

The Chairman: Extraterritoriality is one of your concerns. What else?

Martin Howe QC: The other very major area is the implication into the convention of a right of asylum. There it is quite clear that the convention itself contains no right to asylum. This is no accident or oversight; asylum was dealt with in parallel and at approximately the same time by the Geneva Refugees Convention, which was developed by an almost overlapping group of states and expressly dealt with the issue of asylum. The problem that has come about is that the European court at Strasbourg has grafted on to the convention an asylum doctrine of extremely uncertain scope. It is based mainly on Article 3 but it can wander into Article 6, according to the *Abu Qatada* case, in the case of a particularly serious threatened breach of the right to a fair trial. In addition, the scope of Article 3 itself has been greatly extended by the court's jurisprudence, which has created enormous practical problems.

The Chairman: I am very mindful that our Committee is very much concerned with the European Union. We are a justice sub-committee concerned with matters to do with our

belonging to the European Union, so I want to take us on. Baroness Eccles, you had a set of questions that you wanted to ask about your concerns.

Q18 Baroness Eccles of Moulton: The next questions are written down on the documents that you have received, and they are to do with the relationship between the UK and the ECHR. I am a delegate to the Council of Europe, so I have tangled a bit with the ECHR in certain respects. There is a main question and supplementary question that is linked to the main question, so I will ask them both at once.

Can you see a scenario in which a British Bill of Rights would lead to the UK's withdrawal from the ECHR? If a Bill of Rights departed from clear principles established by ECHR case law, what could the purpose in remaining a state party to the ECHR be?

The Chairman: Which of you would like to come in on that? I have taken up a lot of Martin Howe's time, so perhaps one of the others would like to answer.

Aidan O'Neill QC: Very briefly, if the purpose behind this British Bill of Rights is to allow one to withdraw from the European Convention on Human Rights, that would be very problematic for one's continued membership of the European Union, which I think is what we are concerned about, in the sense that they are, as I have said, two sides of the same coin. Since 1970 and the like, and changes in the treaty, the European Union is imbued with the notion of respect for international law and for fundamental rights. If Britain were to withdraw from the European convention, it would be very difficult. You would be hobbled in your interrelationship with the European Union as a whole, and it was never envisaged that that would happen, so it would be incredibly problematic. But as you say, if the intention behind the British Bill of Rights is to allow one to depart from Strasbourg while remaining in the European convention, all that will do is increase the number of cases going to Strasbourg, because all our lawyers are now aware of the Strasbourg jurisprudence and are ready to understand and argue fundamental rights issues. So it will exacerbate the problem, because you will get more Strasbourg judgments against the United Kingdom.

The Chairman: I just want to tease that out. Baroness Eccles' question is really saying two things. One is that if your British Bill of Rights did not have all the rights that are in the European Convention on Human Rights, there could be a problem. But suppose it is more a question of what Mr Grieve described as a gloss that is put on it: that this new British Bill of Rights is essentially the European Convention on Human Rights but with a gloss, saying that you are perfectly entitled to deport someone to Kingston, Jamaica, if they have committed crimes in this country, even if they have lived here since they were six years of age—that it is perfectly within the rights of the British courts to do that. A gloss is put on it and we withdraw from the jurisprudence. This is what I hear: that it is the jurisprudence that people do not like. Therefore, stick with the European convention but really as it was drafted in the 1950s and let us be pure about our interpretation of it.

Aidan O'Neill QC: You cannot repudiate the jurisdiction of the court and stay within the European Convention on Human Rights. We are getting into fantasyland. The European Court of Human Rights enforces the European convention. Within its very architecture, it is compulsory that one accepts the jurisprudence of the court. Britain was the first to ratify the European convention and took up the right of individual petition in 1965. In any event, as part of being part of the European Convention on Human Rights, if you breach the law other member states can bring cases against you. That happened in *Ireland v the United Kingdom*.

So if the idea is that we will not allow our individuals to go to Strasbourg, it still does not solve the problem. As I say, that is why the problem is something else. We have had a lot of displacement here, and I would like to know what it was.

The Chairman: This has to be fairly quick, Mr Grieve.

Dominic Grieve MP: Being cynical for a moment, of course the question is right: if we have a Bill of Rights that largely conforms to the European convention, in many cases there may be no conflict. The problem will arise if there is a series of cases that start going from our own Supreme Court under the interpretation of our Bill of Rights up to Strasbourg and show a consistent line of reasoning where we are in breach. On that basis, it becomes rather pointless staying in the convention. The Government clearly do not want to leave the convention; the Prime Minister has said so on a couple of occasions. The cynic in me says that there are certainly some people around who in the past have said, “Well, the way the convention works, you just ignore the judgments that you don’t like”, just as we have been doing with prisoner voting. But of course that has the consequence of ruthlessly undermining the effectiveness of the convention in so far as it applies to other places around eastern Europe with poor human rights records. Ultimately it would make the convention unworkable, because the United Kingdom has always been seen as one of the principal architects and supporters of convention principles, which also means observing Article 46 and implementing judgments.

Q19 Baroness Hughes of Stretford: Taking this a little further, if the UK were to change the way it protects human rights principles in the way we have talked about—repealing the Human Rights Act, bringing in its own Bill of Rights et cetera—whether or not left the ECHR, what impact might those changes have on Britain’s membership of the EU and its working relationship with other member states?

Aidan O'Neill QC: Again, I think there would be problems. As Dominic Grieve has said, the Lisbon treaty is replete with references to the fundamental values which a member of the European Union is expected to adhere to, a common standard set down, and the principles inspired specifically by the European Convention on Human Rights are set out in Article 6(2) of the Treaty on European Union. So we are already, as it were, engaged specifically in the European Convention on Human Rights and its Strasbourg jurisprudence through our membership of the European Union. As you say, our interrelationship with other members presupposes that also. The European arrest warrant, for example, goes on the presumption that all other member states have fundamental rights-compliant systems for the prosecution and imprisonment of offenders, and the European Union has said that that is a basic principle of the mutual trust that we have to have on fundamental rights grounds. But if we are changing things and saying, “Yes, but not the European Convention on Human Rights”, that is throwing a bit of a spanner into that understanding.

Dominic Grieve MP: As a matter of political practice, it is quite clear that you cannot now become a candidate member and be admitted to the EU if you are not adherent to the European convention. On the other hand, it is also right to say that there is nothing in the treaties that says that you have to be. But the practical consequences of our leaving the convention while remaining in the EU, as I said earlier, would be that if we started to be shown to be in breach of what was regarded as fundamental norms, the treaty would then be invoked, either politically—“We can’t have the UK as a partner”—or, indeed, it might be the green light to the Court of Justice in Luxembourg to say, “Well, in these exceptional

circumstances, it must be our duty to see that these articles of the convention are being observed, even if they fall outside the treaty norms". That would be a massive jurisprudential expansion. I cannot say that I could entirely rule it out, but we would be in a situation of some chaos.

The Chairman: May I introduce Lord Boswell, who has joined us and is the Chair of the overall Select Committee on the European Union? He wanted to hear this session because he knew that we had such distinguished visitors today giving testimony.

Lord Boswell of Aynho: I am very grateful, Lord Chairman, and for the evidence that I have heard. Can I extend the point that has been made? In the event, which of course is hypothetical at the moment, of a British exit from the European Union but the subsequent conclusion of an association agreement under Article 8 of the Lisbon treaty, is it the view of the panel that the human rights principles, which are enshrined in the Lisbon treaty, would continue to have effect into any such subsequent association agreement? That is, we could not escape without totally dissociating ourselves.

Aidan O'Neill QC: I would agree with that. The notion of association agreements, notably with Turkey but also with other non-EU countries, is precisely to spread the fundamental rights agenda, good governance and the like. It is very much the norm that issues around the conclusion of association agreements with third countries have a fundamental rights element. We have a Fundamental Rights Agency within the European Union, which requires the institutions to act in a manner that is fundamental rights-compatible as well. So one will not get away from fundamental rights; they permeate European Union law, not just in the jurisprudence of the Court of Justice but in the activities of the institutions.

Martin Howe QC: I will comment on this, because with respect to my colleagues I think there is a rather wrong perspective on this issue. If a withdrawal from the European Convention on Human Rights happens, not because we are a country like the Greek state under the colonels but because we disagree in a principled way with aspects of the interpretation placed on the convention by the Strasbourg court, that is a completely different political scenario from either a Greek colonels situation or the situation that arose in Austria when the Freedom Party got into government and provoked boycotts and so forth. I am afraid that I think there is excessive alarmism on this point. An association or trade-related agreement that might be negotiated following any exit from the European Union would not bind us to particular human rights mechanisms. I can see that, generally, trading partners might want to see respect for human rights, but trade agreements are concluded with countries all over the world, many of which are not in systems that bear any close resemblance to the particular European regional system for fundamental rights. So I would regard the prospect that somehow we are entrained in all this even if we were to exit the European Union as fanciful, with respect.

Lord Cromwell: Could I go back to my question on the Bill of Rights and the gaps that it might try to cover? I was not sure that I quite got an answer, in the sense that it was Martin who said, yes, there are gaps. What I seemed then to hear was that it is not so much that there would be gaps, because it would largely copy the wording of the convention; it is more that it is almost bringing it onshore so that it could be interpreted in our own way here, which, as Dominic went on to say, could bring us into conflict with Strasbourg. Is that what it is really about: bringing it local rather than it being a different set of rights?

Dominic Grieve MP: It all depends on what they decide to do. The more you gloss the text, the more the text can become different from what is intended. When the Conservative Party paper was published this time last year, bluntly it would have driven a coach and horses through Article 3.

The Chairman: Is that the document that Martin drafted?

Dominic Grieve MP: No, I do not think Martin had anything to do with it; I would be very surprised if he did. It was a rather polemical piece that was put out by the Conservative Party in mid-October. It is the only document that has set out a detailed view of what was intended, but since then there has been quite a lot to indicate there have been some second thoughts on a number of aspects of it.

Lord Judd: This Committee is made up of lawyers and non-lawyers; I am very much a non-lawyer. It seems to me, from my own experience in politics and around politics as a Minister and a Back-Bencher, that if you look at crime—particularly cybercrime—terrorism, migration or any of these mammoth issues that now confront us, you see that international co-operation is essential. Not one of these problems can be solved on our own. If that is the truth, we need institutions on an international basis that recognise these realities and operate within the context of that obvious truth.

Martin Howe QC: With respect, why does it follow that we have to be part of an international system for the determination of our fundamental rights? Many major countries of the world decide the interpretation of their basic rights themselves without oversight from an international body such as the Strasbourg court—for example, Canada, New Zealand, Australia and the United States.

Dominic Grieve MP: Yes, and look at the problems we have in extraditing people to the United States.

The Chairman: I am going to restrain the debate to concentrate on the European Union, reminding us of our remit.

Q20 Lord Blair of Boughton: I want to distinguish between what Mr O'Neill said and Mr Howe said. Mr O'Neill began to get into the area of the European arrest warrant, as did Lord Judd. Mr Howe said that trade arrangements will not be affected by what might happen if we change the rules governing the UK's protection of human rights principles. In practical terms, in the field of justice and home affairs, the principle of mutual recognition is fundamental. I wonder whether you would care to comment on what would happen to the level of practical co-operation to which Lord Judd referred and that is encapsulated in the European arrest warrant if we went down this route.

Aidan O'Neill QC: The justice and home affairs pillar in the Maastricht treaty—the third pillar—has been incorporated into the Lisbon treaty. As we know, there is the Protocol 36—sorry, is this sounding terribly lawyerly—opt-out and opt-in.

The Chairman: We need it, I am afraid.

Aidan O'Neill QC: So there was the opt-out/opt-in in the justice and home affairs measures that had been taken, but those measures had arisen through member states' co-operation without Commission involvement precisely because of the matters which Lord Judd raises, in that crime and security know no borders. Therefore, it was seen to be an appropriate matter for the European Union to be involved in with regard to the standardisation of procedures

and of the substance. These matters go to the very heart of what we understand fundamental rights to be, so it is not enough for Martin Howe to say, “Well, we’re just here with a trade agreement and what has that to do with fundamental rights?”. The European Union is not just a trade agreement; it has not been for a very, very long time. We have an area of freedom and justice and security That requires, as I say, a common standard, a common approach to fundamental rights, and that is determined ultimately because it is within EU law, by the Court of Justice of the European Union. It is not overstepping its remit in doing so; it is following what the treaty gives it jurisdiction to do.

Dominic Grieve MP: I agree with that, and I would add only this. We would be in difficulty the further we departed from ECHR norms. That would make the co-operation that is normally run within the field of justice and home affairs more difficult. We complain at the moment in justice and home affairs that it shackles us to practices in countries that are signatories which we have severe concerns about at times. The point I made to Baroness Shackleton about the United States is the same issue: that the United States’ rights norms are significantly different from our own in the way it approaches a number of issues around penal policy, which causes difficulty. All I can really say is that if the consequence of our pulling out of the ECHR or being non-compliant is that we are departing from the norms, certainly, of the western European countries with which we co-operate most closely, it would make this particular field more difficult to operate.

The Chairman: Does it not cause you any alarm that it is likely to interfere with that incredible co-operation that is so essential, given the cross-border problems that our countries are facing?

Dominic Grieve MP: It would bother the Government, because despite their concerns about the way in which home affairs and justice operate, they nevertheless opted back in to a large number because it was felt by many, including the Home Secretary, that it was essential to do so. Of course, there are some in my party who take a different view and oppose this, and say that we should not have this level of co-operation.

The Chairman: Are you of that view, Mr Howe, that we should not have this level of co-operation?

Martin Howe QC: I remain deeply concerned about the European arrest warrant, for the very reason that it is built on a presumption that standards of justice in all member states are the same. Frankly, that is a diplomatic fantasy, not a reality.

Lord Judd: Would a British Bill of Rights have to be subject to the supremacy of EU law?

Martin Howe QC: If we remained a member of the European Union, yes, it would.

The Chairman: You all agree. I think that is the answer and it is consistent with the evidence that we heard last week from academics. Baroness Eccles, you had a concern that you wanted to pick at and I want to give you that opportunity.

Baroness Eccles of Moulton: I had better ask the question through you, Chairman, because it is not on the list, but I think it is relevant. It is on the views of the panel on the efficient functioning and outcome of the cases that go to the court. The information that we have received is that the composition of the court is unbalanced.

The Chairman: Are you talking about the Court of Human Rights?

Baroness Eccles of Moulton: I am talking about the Court of Human Rights. The way it operates is inefficient in that it has 100,000 cases waiting to be heard. But the question might not be appropriate for this session.

The Chairman: It is very specifically a European Court of Human Rights question. There are concerns about the fact that it has such a huge case load, and efforts are being made to deal with that. However, I am anxious that we concentrate our minds on the fact that we are exploring whether changing our relationship with the European Court of Human Rights will impact on our relationship with the European Union. I do not want simply to go down the European court route.

Baroness Eccles of Moulton: Maybe sometime we will discuss it.

The Chairman: Sometime we will discuss it in this Committee. I want to give Lord Richard an opportunity to come in.

Q21 Lord Richard: We may have answered the question already in the previous discussion.

If there is some kind of British Bill of Rights—in other words, if a new structure is put into place—and the rights in it are broadly the same as those in the present law, do you think that would that bring us into direct conflict with EU law, and if so, in what particular areas?

Martin Howe QC: If we retained the current European Communities Act 1972, then no conflict would arise, because under Section 2(4) of the 1972 Act, all subsequent Acts, including the Bill of Rights, are interpreted and have effect in the light of the 1972 Act. So they are subordinated. A potential conflict would arise only if we adopted the German system, where the German basic law is supreme within Germany over external laws such as European Union laws.

The Chairman: Can I make a suggestion? What if a Bill of Rights contained a provision disapplying the European Communities Act? What would happen then?

Martin Howe QC: Then we would be in the same position as Germany.

Dominic Grieve MP: I disagree. I am not an expert on German constitutional law—you would have to ask a German constitutional lawyer—but my limited understanding is that the ability of the German constitutional court to fend off decisions is very limited. In fact, I am not sure that it really exists as a bottom line.

Aidan O'Neill QC: And you would be in breach of membership of the European Union if you said that the European Communities Act was disapplied, because that is how we comply with the requirements under EU law.

Baroness Newlove: I am quite a novice in this area. Listening to the three of you, can I say that there is not a ripple of sweat? So I bow down to you because the knowledge that all three of you have is quite fascinating, and it has been a rollercoaster ride listening to some of it. If the Human Rights Act were repealed, would we see an increase in the number of references to the Court of Justice of the EU?

Aidan O'Neill QC: Basically, everybody is now habituated—certainly litigators before the courts—to understanding things in fundamental rights terms. EU law has an incredibly broad sweep. We mentioned the case of *Akerberg Fransson*, which said that if EU law has any kind of connection with the issue you are dealing with, fundamental rights issues can be prayed in

aid. I would think that clever and imaginative lawyers might try to push matters somewhat, and the Court of Justice might get more references from national courts.

Dominic Grieve MP: Aidan is undoubtedly a creative and imaginative lawyer, so I think we can guarantee that there will be more references invoking EU law. There is clearly a pattern here—I saw it when I was Attorney-General—of looking at the rights in the convention and then asking, “Can we invoke them as convention rights, but could we also look at them as rights under charter?”. That is what *Chester and McGeoch* was all about. It was a two-pronged approach to a problem to see whether you could get the solution that Aidan wanted for his client by alternative means. This has now become very well established.

Martin Howe QC: I would say very briefly that, yes, there will be increased references to the Court of Justice whether or not the Human Rights Act is repealed. I do not think that repealing the Human Rights Act will make very much difference to the level of it—we will get them anyway.

The Chairman: You know that there are discussions just now on the European Union itself acceding to the European Convention on Human Rights: that as a body it should not be above challenge, too. What do our witnesses think about that? Do you think it is necessary that the EU be party to the European convention?

Aidan O'Neill QC: It is a treaty requirement. That the EU shall accede to the European Convention on Human Rights is what Article 6 of the Treaty on European Union says. The Court of Justice in an opinion at the end of December 2-14 produced a judgment that invented all sorts of incredible difficulties which nobody had previously realised were difficulties. At some levels, it is a highly political judgment. I know that you have heard academics who were highly critical of it. I certainly wrote critically of that judgment, because in effect it stopped the European Union acceding to the ECHR, the result being that the Luxembourg court is not subject to the Strasbourg court. At some levels you can see this as a bit of a judicial “Who’s boss?” kind of argument. At some levels, you think, “Well, gosh, really one ought to be sticking by what the treaties say. All the member states agreed the EU should accede and the Court of Justice should just knuckle down and accept Strasbourg’s jurisprudence”. From a litigator’s point of view and a human rights point of view, which will dismay Martin Howe no doubt, by not acceding you now have two human rights courts, which to an extent will vie with each other to show who is the more “human rights” of them all. We have seen this slightly already with the various privacy and data protection judgments coming out of the Court of Justice, where the Court of Justice for the first time is striking down EU legislation rather than national legislation on grounds of its failure properly to take account of data protection, which is a fundamental principle under Article 8 of the charter.

Dominic Grieve MP: I wonder whether people had actually fully thought through what the implications of Article 6 of the Lisbon treaty were going to be. My impression—perhaps I am wrong about this—was that it was designed to ensure that the EU, particularly its institutions, became subject to the ECHR. But what has been flagged up, whether mischievously by the Luxembourg or not, is that bringing the Luxembourg court into subjection to the court in Strasbourg has potential implications, particularly for any area within EU competence. Just to give an example—it is purely hypothetical and perhaps I am wrong about this—one can envisage a situation where if a country were not observing a judgment of the Court of Human Rights, the court might say to the Court of Justice of the

European Union that it should get on with the job of coercing that country by direct effect through its own judgments. Some of those aspects might not have been fully thought through. My impression was that some of the background arguments—there was the court’s argument but there was also a political argument going on—were trying to define the scope of EU law that would then become subject to the ECHR. It has genuinely proved to be a problem area, although the court’s decision is a slightly different issue and seems to me to have much more to do with the Luxembourg court’s status than anything else.

The Chairman: Does it fill you with alarm and despondency, Mr Howe?

Martin Howe QC: Certainly not. I agree with the substance of Aidan O’Neill’s analysis; I think I might express it slightly differently. The judgment, or rather the formal opinion, of the European court on the accession agreements between the EU and the Council of Europe is a prime example of an institution protecting its own prerogatives and powers, even though the member states have expressed their will in the treaty that the EU should accede in order to subject the institutions, including the Luxembourg court, to ultimate adjudication by Strasbourg. However, judicial activism strikes; they do not like it, and they have thought up 143 different reasons why they claim there are objections in the detailed membership agreement. It is very hard to see how that can be rewritten to satisfy the Luxembourg court, so this project is probably off the current time horizon politically. I am not unhappy about that, because it could have malignant effects. One of the worst features of the system is the so-called double reference procedure, where on a reference to the Luxembourg court from a national court where a human rights issue arose there could be then a further reference from Luxembourg to Strasbourg, expanding the two-year delay that you get on a reference to six years by the time Strasbourg has chewed it over. It is one of those things that sounds theoretically like a good idea—to subject the European Union institutions to external monitoring of rights norms—but in practice it is not so great.

Q22 The Chairman: One final question that we thought of was whether repeal of the current Human Rights Act might affect the current renegotiations which the Government are seeking to make with the European Union?

Martin Howe QC: I cannot see that they would. I would like to see in the renegotiations some curbing of the charter to take further the UK and Poland protocol, which is completely ineffective—I gave evidence to this very Committee about 10 years to that effect before it was adopted.

(<http://www.publications.parliament.uk/pa/ld200708/ldselect/lddeucom/62/6209.htm> at para 5.93)

The Chairman: If member states know that the UK is thinking about possibly ignoring the jurisprudence of the European Court of Human Rights and is sceptical about all that, do you think, Mr Grieve, that it might affect our power?

Dominic Grieve MP: This is a political issue, but I find it difficult to believe that the issue of our membership and what we are doing at the moment and planning to do to the Human Rights Act is not a topic that is being raised by a number of European countries that are key partners in our renegotiation. I am clear in my mind that this is happening frequently.

The Chairman: So you think it is detrimental to any renegotiation that this is sitting there boiling away on one side?

Dominic Grieve MP: I cannot see how it is helpful to our renegotiation, because it is a peripheral issue on the side that calls into question the norms under which we intend to operate in future. I would have thought that the Government's main task was to persuade our European partners that we want concessions in certain areas—I should make it clear that I am very supportive of our reform—while respecting the underlying ethics under which the EU is supposed to operate and the ethics of our relations with fellow member states. It calls into question an area of our foreign policy, which is disturbing without conferring any benefits.

The Chairman: It is really an essentially political question, but is there anything you would like to say on that, Mr O'Neill?

Aidan O'Neill QC: Purely from a legal point of view, if we stay within the European Convention on Human Rights while modifying the Human Rights Act in some way, that should not be a problem. As Martin Howe has said, different constitutional courts have different ways of protecting fundamental rights. We have the potential of the common law and the charter. Simply modifying the Human Rights Act while staying within the convention and the jurisdiction of the Court of Human Rights should not be a problem in negotiations.

The Chairman: It would only be if one went beyond that.

Aidan O'Neill QC: Yes, then there would be a big problem.

Dominic Grieve MP: I agree with Aidan. The anxiety would be if we are going towards the exit of the Council of Europe.

The Chairman: Unless anyone else has any further questions, I want to thank all three of you. It was a very stimulating session and really helpful to us all. It was debate and discussion of a very high level, and I thank all three of you for your contributions and for giving up your time this morning. It has been very helpful to the Committee.