



HOUSE OF LORDS

Revised transcript of evidence taken before

The Select Committee on the European Union

Justice Sub-Committee

Inquiry on

POTENTIAL IMPACT ON EU LAW OF REPEALING HUMAN RIGHTS ACT

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Questions 23 - 33

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11.05 am

Witnesses: Sir David Edward KCMG, QC, PC, FRSE and Rt Hon Lord Woolf CH

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 Cromwell
 Baroness Eccles of Moulton
 Baroness Hughes of Stretford
 Lord Judd
 Baroness Ludford
 Baroness Neuberger
 Baroness Shackleton of Belgravia

Examination of Witnesses

Sir David Edward KCMG, QC, PC, FRSE and Rt Hon Lord Woolf CH

Q23 The Chairman: Welcome to both of you. It is a great honour for the Committee to have two such distinguished former judges with us. We really appreciate your having given time to the Committee. Can I mention one or two things about this evidence session? It is a public session, which means that it will be televised. There will be a webcast of the session and it will go out live, by video and audio transmission, and it will subsequently be accessible via the parliamentary website. A verbatim transcript of your evidence will be taken. This will be put on the parliamentary website, but a few days after today a copy of the transcript will be sent to you to check for accuracy. If you have any corrections, please let us know. If there is anything that you would like to supplement, where you feel, on reflection, that your answer did not express adequately what the position is, we would welcome anything in writing to add to the transcript. I am really grateful to see you both.

As you know, this Committee is a European Union Justice Committee. The purpose of the inquiry is to see whether there is any impact on, for example, our membership of the European Union or our obligations as members of the European Union as a result of any prospective repeal of the Human Rights Act. Our first question for you is, would the European Union charter, combined with the common law, provide equivalent national protection to the Human Rights Act, or would there be gaps that a new Bill of Rights would have to cover? If so, what are those gaps? Who would like to answer that first? David Edward, as a former judge who sat on the European Court of Justice as the British member, perhaps you would like to tackle it. Would there be gaps if we repealed the Human Rights Act?

Sir David Edward: The hypothesis is that the Human Rights Act is repealed but we remain bound by the convention?

The Chairman: That is right.

Sir David Edward: The EU charter applies to acts of the EU institutions and acts of the member states when applying EU law. Where not applying EU law, you would have to rely on the common law. The generally held view is that the common law does not give protection equivalent to all of the Human Rights Act, so there would be a gap.

The Chairman: The purpose of a British Bill of Rights would be to try to fill the gaps that would be in existence. What sort of gaps do you imagine? Where are the shortcomings that you see?

Sir David Edward: The most obvious for us as lawyers is the right to a fair trial—the various procedural provisions of the common law, the right to be confronted by your accusers, the right to know what the evidence against you is, and so on. All those things are in the common law and are impliedly in the Human Rights Act, but they are not in the EU charter as such, because the EU charter does not normally apply to the application of criminal law.

The Chairman: For example, it is often said that victims' rights are one of the things that have been developed as a result of the Human Rights Act and our status as a signatory to the European Convention on Human Rights. Do you take the same view—that victims' rights have been supported by having the Human Rights Act?

Sir David Edward: As has been said, the use of the expression "victims" is perhaps tendentious. The word "victim" does appear in the convention, but refers to somebody "claiming to be the victim of a violation"; that is what it says. You will remember that when we were on the Commission on a Bill of Rights, a number of people, in various parts of the country, said that their rights to decent care, for example, were enhanced by the Human Rights Act, and that would not come within the purview of the common law and of the EU charter.

The Chairman: Yes. Lord Woolf, is there anything that you would like to add in this area?

Lord Woolf: I endorse what Sir David has said, as you would expect. What I would like to add is this. The great difference would be that we now have incorporated by the Human Rights Act a Convention that is part of our domestic law. As I understand what is proposed, that would cease to be the situation. That leaves the common law, which was behind your question. My very strong feeling is that the common law always expands to fulfil a need. If that happened, the common law would evolve, over a period of time—do not ask me how long—to fill the gaps; it is quite capable of doing that. That is one of the very important things about our present position. We do not have these gaps. We have the advantage that we have a Bill of Rights, founded in Europe, and we have our law, which makes it part not only of the international field but also of the domestic Law.

If the Human Rights Act were to be repealed, which is implicit in your question, it would leave a gap, certainly for a substantial time. How great the gap was and for how long would depend on what action the Government took to fill it; but that action would be needed is, I would have thought, beyond controversy. The matter has come up from time to time, at least in questions to the present excellent Minister of State, who represents the Ministry of Justice, and he has always made it clear that their intention is to have something that would give protection to the citizens of this country equal to what they enjoy at present. If that be so and if we get to that situation, I would be happy. I would still have reservations. My reservations would be not so much for the citizens of this country as for the message that it would give internationally on our commitment to a Bill of Rights. That is something that has to be taken into account.

It would be a constitutional change of the greatest significance. I always hope that in this country, when we are making really significant constitutional changes, we try as far as possible to do it in a way that has consensual support. I hope, therefore, that what replaces

it will fall into that category. Whether that is the track that we feel we have to go down seems to me to be a political question, which even a very long-retired judge, such as myself, should keep fairly quiet about.

The Chairman: We are usually quite happy to hear from you, because there is wisdom in your experience. I ask Baroness Ludford to take this on.

Q24 Baroness Ludford: Thank you very much, Lord Woolf and Sir David. I want to ask a question about the scope of the charter, as interpreted by the case law of the Court of Justice. From that case law, what do you understand to be the nexus required between EU and national law before the EU charter can be invoked? Do you think that has been made clear, or are there still open questions?

Lord Woolf: Sir David is the person—

The Chairman: Sir David, you are the obvious person to come to first on this.

Sir David Edward: It is explicit in Article 51 of the charter that the provisions of the charter “are addressed to the institutions and bodies of the Union”—including, be it said, the Court of Justice—“with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”. The question is, in any given case, are you in this respect implementing Union law? Does Union law have some bearing on what you are doing? Then, the charter applies.

Baroness Ludford: Has that been spelled out in fine detail by judgments of the court? Is there any fuzziness around the edges, or have the limits of EU law and its implementation been made crystal clear?

Sir David Edward: I cannot claim to have read all the jurisprudence on that topic. It seems to me that it is bound to be a matter of appreciation in the individual case whether the member state is, as the charter puts it, “implementing Union law”. Bear in mind that when the Court of Justice is invited to discuss this—leaving aside direct action against member states for failure to comply with EU law—it is always in the context of a reference from a national court. The national court will already have considered whether there is a potential nexus. The other institutions—the Commission, the Council and the Parliament—as well as all the member states, are entitled to intervene, and frequently do, to argue whether or not there is a relevant nexus. It is argued fully, but in a given case it is bound to be a question about which side of the line it falls.

Q25 Baroness Neuberger: Some of the witnesses we have heard from have described the Court of Justice as somewhat predatory or expansionist. Others, hardly surprisingly, have disagreed quite strongly. What is your view on that? Particularly, what is your view in relation to its interpretation of the scope of the application of the charter?

Sir David Edward: Another question in the list is specifically about the case of *Delvigne*, but let us leave that aside. In my experience, when I was there, the idea that there would be 13 or 15 men and women sitting round to accumulate jurisdiction is preposterous. The great example frequently given of this alleged desire to accumulate jurisdiction is the very early case of *Van Gend en Loos* in 1963. Because of leaks and various things, we now know that that was a 4:3 decision.

The Chairman: Sir David, people listening would not know what that case was about. Could you briefly—

Sir David Edward: It was about the direct effect of, in those days, EC law. Take a very specific case in which 1 was involved - *Unión de Pequeños Agricultores and Jégo-Quéré*. There the British advocate-general and the Court of First Instance urged the Court of Justice to interpret the treaty in such a way as to give greater individual access to the court. The court said no. It said, “This is a matter for the member states. If they want to enlarge access to the court, they should do it by amending the treaty”. My experience was that there is no conspiracy, so to speak, to enlarge jurisdiction. On the other hand, when it comes to fundamental rights, if the Charter of Fundamental Rights is addressed to you and it is emphasised in the charter that it is important that the EU should act in a way that is compatible with the rights set out in the charter, I do not see that it is an arrogation of an unlawful jurisdiction to apply it. That seems to me to be what judges are about.

I think that I have covered this already, but let me say it again. There is no individual right of access to the court.

The Chairman: That makes it very different from the European Court of Human Rights.

Sir David Edward: Absolutely. You can sit in Luxembourg longing to pronounce some extension of court jurisdiction, but if the case never comes, the case never comes.

Baroness Neuberger: There is nothing you can do. Lord Woolf, do you want to add anything to that?

Lord Woolf: I think that this is a non-issue, actually, because it seems to me that whatever benefits we get out of the charter now will not be affected by the repeal of the Human Rights Act or the introduction of a new UK Bill of Rights. The position is that that is a separate layer. Although I do not think that it is important now, if in fact we were to repeal the Human Rights Act it could become more important. It would not affect what is already provided by the charter. However, what is provided by the charter is extremely limited, for the reasons just given by Sir David—it operates only within the Union context—whereas the great thing about the European convention is that it operates so as to give benefit to the citizens of this country and of other countries. The fact that we would still have what is left after the repeal should not be a comfort to us, because that certainly would not be sufficient.

The Chairman: Baroness Shackleton, would you like to pursue some matters?

Q26 Baroness Shackleton of Belgravia: Sir David, you mentioned the case of *Delvigne*, which concerns prisoners’ right to vote. Do you think that in that case the Court of Justice was right to conclude that there is a right to vote in European Parliament elections under EU law and that to remove that right indiscriminately is in breach of the EU charter?

Sir David Edward: There are two questions. First, is there a right to vote in European elections? The answer is that Article 39 of the charter, on the right to vote, which was specifically referred to by the French court referring *Delvigne*, states, “Every citizen ... 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”. Every citizen has the right to vote—that is where you start. The question is, what limitations can you put on it?

On the second part of your question, the Court of Justice did not at any point in its judgment say that you could not have an indiscriminate ban. The court limited itself very carefully to the case before it—namely, a French law, pre-1994, that specifically provided for taking away the right to vote in very serious cases. It said that that law was not—

The Chairman: Changed.

Sir David Edward: It was not inconsistent with the charter. As was emphasised before, that is the issue that was posed by the court of the member state—does Article 39 apply? Let me just check what it asked specifically. Is Article 39 of the charter applicable to elections of a member state, and is it “to be interpreted as precluding the Member States ... from making provision for a general, indefinite and automatic ban on exercising civil and political rights”? The court did not answer that question in its broad terms. It answered it very specifically in terms of the French law.

Lord Woolf: It just confirmed the approach we have been talking about so far. I do not think that we need to be worried, so far as what is now proposed. We should be worried about what will be done at the same time as we repeal the Human Rights Act. As far as Europe is concerned—the direct effect on Europe and the European Union, because it applies only to elections to institutions of the European Union—that case stands. It is dealing with the facts before it.

Q27 Baroness Shackleton of Belgravia: How do you think *Delvigne* will be interpreted in our courts, given the Supreme Court’s conclusions on the relevance of EU law in *Chester and McGeoch*?

Lord Woolf: I do not see the conflict. They would read it and have a look at it. This was a preliminary issue in *Delvigne*. Really, they came to the conclusion that there was nothing that caused trouble in the facts before them, which were pointing to only one side. I do not think that our courts would be at all worried about the decision in *Delvigne*. The decision the Supreme Court came to is one we need to pay attention to, but it is not affected by this.

The Chairman: I want to be clear, Lord Woolf. Your view is that our Supreme Court would say, “The decision in *Delvigne* really does not impact on the situation here”. Suppose that a prisoner in a British prison said, “I want to be able to vote in European elections. At the moment, I am precluded from doing so altogether, because of the blanket ban”. You do not think that the Supreme Court would look to the European Court of Justice ruling in *Delvigne*.

Lord Woolf: If a case was put forward that was concerned with that, I think that—as Factortame showed—our courts would say that European law, quite apart from human rights, overrides domestic law and they would want to see that European law was complied with, so far as elections to the European Parliament are concerned.

The Chairman: I am trying to tease this out. When it comes very specifically to someone’s complaint that they are not able to vote in European elections by virtue of being imprisoned, and the ban on prisoners’ voting rights here in Britain, do you think that the *Delvigne* decision will override, and that our Supreme Court will feel required to allow prisoners to vote in European elections as a result of *Delvigne*?

Lord Woolf: *Delvigne* never got to the situation of the sort of ban that we have in this country in respect of prisoners’ rights to vote in European elections.

The Chairman: The decision does not go far enough to be of assistance to anybody here in Britain.

Lord Woolf: They might say—I do not know—if a case was brought, that the provisions concerned with European law are of direct effect, and must be given direct effect by British courts. If that view was taken by the Supreme Court, they would do so. There might still be arguments, because they might say that the court can look at the individual's situation. They might sidestep the broad question that you are putting to me and say, "Looking at the individual who is making the complaint, having regard to the nature of his crime and the consequences to him, it is perfectly reasonable to say that he should not have a vote". If that be the situation, we are not going to try to legislate for all other prisoners because of a single case. Again, I bow to Sir David's greater experience, but that could be a way that European law moved forward. They would not want to give a sweeping—

Baroness Shackleton of Belgravia: Lord Woolf, do you think that it would be good to empower the judges or the judge who was hearing the criminal case with the ability, akin to removing your driving licence, to remove the right to vote at that stage, to avoid the problems that this case obviously provokes?

Lord Woolf: If there was such a power, by a judge, it would be a different ball game. In that situation, if the matter came before the European court, the probability is that it would say, "That is perfectly in order".

Sir David Edward: Could I add one thing to what we have just been discussing? Let us suppose a case where somebody has been put in prison for three months, and the three months overlap the period of an election. The election is going to take place three days before he or she is released.

The Chairman: A European election.

Sir David Edward: A European election. If that were the case, I do not know, first, what the Supreme Court of this country would say about excluding such a person entirely from the right to vote. If the national court sent a reference to Luxembourg, I suppose it is conceivable, given the jurisprudence of the court in Strasbourg, which the Luxembourg court respects, that the Luxembourg court would say, "That is not a justifiable restriction on the right to vote", in those circumstances.

The Chairman: Yes, reflecting on what Lord Woolf was saying, a rather different view might be taken if someone was a multiple murderer.

Sir David Edward: Exactly. That is exactly the case of *Delvigne* and the case of *McGeoch and Chester*—both of them.

The Chairman: Yes. Lord Cromwell, perhaps you could take this discussion a bit further.

Q28 Lord Cromwell: If a British Bill of Rights departed in some way from the principles established in the case law of the ECHR, what would be the eventual outcome of that? Would it be, for example, that the UK would withdraw from the ECHR?

Sir David Edward: There is an international obligation on the United Kingdom to comply with the provisions of the convention. Repeated refusal to comply with the convention is already characteristic of a considerable number of countries that are member states of the Council of Europe. If the UK consistently and repeatedly acted in violation of the convention, I think

that in this country we would say, “Look, you cannot do that. You have to make up your mind. Are you part of this or are you not?”. That would be a political issue. There is plainly no legal obligation to withdraw from the convention if you are in violation of it, but there are potential sanctions if you are in violation.

Lord Cromwell: Are you saying, therefore, that the European view, if I could put it that way, might be that they would put up with it, whereas our view here in the UK, also as part of Europe, would nevertheless be more binary?

Sir David Edward: The Council of Europe and its member states have to put up with repeated violations of the charter by a number of member states.

The Chairman: We are talking here about places such as Russia and Moldova. We would like to imagine that we are rather more committed to the rule of law than those places.

Sir David Edward: Italy repeatedly violates—

The Chairman: On delay.

Sir David Edward: —the requirement of a fair trial within a reasonable time. There are a number of member states who simply do not comply for one reason or another. The Council of Europe, being an intergovernmental organisation, plainly does not take the view as a body that it should put member states outside because of repeated violations. As you say, it is perfectly legitimate to say that the situation would be quite different in the case of the United Kingdom, because people here would say, “If you are repeatedly violating the provisions of the convention—torturing people, putting them in prison without trial and so on—you really cannot in honesty continue as a member of the Council of Europe and an adherent to the ECHR”.

Lord Woolf: I hope that that situation would never arise in this country, irrespective of what happens. In relation to Lord Cromwell’s specific question, perhaps I could draw attention to the fact that it was in 1998 that we had the Human Rights Act. Until 1998, we had managed to carry on quite happily with the position in law of the common law and our international obligations under the convention, operating on Government. I am afraid that the consequence was that a number of cases were taken to the European Court of Human Rights, and in a number of cases the results were, unfortunately, adverse to this country. That was not a good thing for this country, as we pride ourselves on being a leader in complying with the rule of law and we seek to help countries who are seeking to move forward to a situation where they comply with the rule of law. There are considerations of that sort. On the question that you asked, the situation is that we could go back to where we were pre the Act. I would be deeply saddened if we did that, but there we are.

Q29 Lord Judd: Many people in this country feel passionately about the critical importance of sovereignty in our constitution. We have heard witnesses who stressed that very strongly. Looked at objectively, does this indicate that there is an incompatibility about the relationship between sovereignty and international courts? How far can international courts prevail, if sovereignty is central?

Sir David Edward: If I may say so, we have to be clear about what parliamentary sovereignty is. As defined by Dicey, it is the legislative sovereignty of Parliament. That is to say, the laws duly passed by Parliament are bound to be applied by the courts. That is the limit of the doctrine of parliamentary sovereignty as enunciated by Dicey. Later in life, he rowed back

from that position, but leave that aside. That is what parliamentary sovereignty formally means. It does not mean the sovereignty of the House of Commons. It does not mean the sovereignty of Ministers—the Government—still less of individuals who are Members of the Parliament. Parliament is sovereign as a legislator.

The situation in this country until the passing of the Human Rights Act was that the Court of Human Rights had jurisdiction, under the provision for individual access to the Court of Human Rights, to declare whether or not acts of the United Kingdom—not Acts of the United Kingdom Parliament, but acts of the United Kingdom as a state—violated the rights of an individual. That does not seem to me to be an inconsistency with parliamentary sovereignty. Likewise, in the case of the EU, the European Communities Act avoids that problem, because it says that the organs of the United Kingdom are bound to comply with EU law. There is a statement in the European Act 2011 that reasserts parliamentary sovereignty, but it does not seem to me, as a lawyer, that formally speaking there is any inconsistency with the position of either the Strasbourg court or the Luxembourg court in relation to the doctrine of parliamentary sovereignty.

The Chairman: Lord Woolf, would you take that very legalistic position? Many people, of course, see parliamentary sovereignty as something wider than that which this distinguished former judge of the European Court of Justice has described.

Lord Woolf: I would take a rather more measured approach to that. The reality is what we have to face up to. That is why, no doubt, this Committee is considering the matter so carefully. You can legally reconcile the doctrine of the sovereignty of Parliament with the European Convention on Human Rights. You cannot do that with regard to the European charter, because the position there is that the European charter can trump a statute. Even then, lawyers would say, “As we have given the European Union that right, it is not inconsistent. We could always withdraw from the European Union”. I suppose that is technically correct. Looking at it from a pragmatic point of view, the consequences are that if you enter into a convention of any sort you are voluntarily giving up a certain amount of your sovereignty. With regard to your own home, if you live in some isolated part of Scotland—perhaps one of the islands that are not otherwise occupied, in outer Harris—you pretty well retain sovereignty of that piece of land entirely, but if you live in Edinburgh or London you have to give and take, because you have neighbours. Living requires you to do that. Realistically, I would say that those who are talking about sovereignty are using it as a flag to fly. When you come down to examine it, it breaks into technicalities, where what is done is your own voluntary act and you cannot really complain if it has the consequences that are inevitable when you do that. We all live in communities of different sorts. At the moment, we live in a community of Europe.

Q30 Lord Judd: Following that point, and something that you said earlier, which I was very struck by, could it not be argued that if you are looking to the well-being, in terms of law as well as the practical dimensions of life, of the British people, we have to recognise in everything, including law, that we are totally interdependent with the world in many vital spheres and that therefore it is a priority to build up genuinely the rule of law internationally. Is not perhaps the biggest single danger in what is being done that the next morning, goodness knows who—I do not want to pillory them, but it may be Putin—will say, “That is very good. We have our interpretation of rights”, and we will have started an

erosion of the commitment that has been there since 1948 to build up a global system, which we have not fulfilled but to which we all aspire?

Lord Woolf: If I may talk about a personal experience, I happened to have the opportunity to ask a question of President Putin shortly after they became a member of the Council of Europe. My question was, now that you are a member of the Council of Europe, what is your view about capital punishment? My understanding—probably faulty—is that you cannot reconcile capital punishment, which up till then had been deployed extensively in Russia, with being a member of the Council of Europe. He looked up at the cameras, because he was on television, as we are today, and said, “I deplore and have no time for people who commit the sort of crimes that result in their being executed in Russia. However”—I am paraphrasing what he said—“now that we are members of the Council of Europe, there will be no more capital punishment in Russia”. I have been told, although I have never checked, that in fact legally there has been no more. There you see the beneficial effects to which you are referring. It goes back to what Sir David said. If we really believe in the rule of law, as I think we all do and as people in this country do, whatever we put in place must be something that is not a sham but is a reality and reflects the legal obligations of this country, both in international law and in domestic law.

Sir David Edward: I assumed that the question related specifically to parliamentary sovereignty. Lord Woolf is widening the discussion, if I may say so, to national sovereignty, which strictly speaking is a quite different thing.

Lord Woolf: It is indeed.

Sir David Edward: I was trying to answer the legal point about parliamentary sovereignty. On the wider point, just consider the single market. There is no conceivable way in which the single market could have become anything like a reality without the Court of Justice. Repeated attempts by member states, including this member state, to restrict freedom of movement of goods, persons, services and capital have been declared incompatible with the treaty by the Court of Justice. Perhaps the problem is that the EU has moved into wider territory. None the less, the protestations about the Court’s attempt to gather jurisdiction to itself were there right from the beginning. You must make a choice: do you want this system to be enforced or do you not?

Lord Judd: In terms of what you both said earlier, a tremendous amount also depends upon the real driving purpose of what is being proposed. That is what has to be examined and faced fairly and squarely. Are we trying to enhance human rights or, in effect, are we opening the door to eroding human rights?

Sir David Edward: I would entirely agree.

Lord Judd: You agree with that.

Sir David Edward: That is the issue.

Lord Judd: I say in all friendliness to the Lords who have been giving evidence that I heard very clearly what Putin said, even if paraphrased. But speaking as somebody who has dealt a tremendous amount with Russia and its affairs, there seems to be a very large difference between judicial and extra-judicial killing.

The Chairman: The secretariat of this Committee sent through to both of you a piece that had appeared in the *Sunday Times*. I do not know whether you both saw that. It was

apparently a leak from the Justice Department, and it indicated the way in which a British Bill of Rights might create some distance from the commitments under the European Convention on Human Rights—certainly from some of the decisions of the court. It was described as “the most radical shake-up of human rights law in two decades”, in which “judges will be told they will not have to follow rulings of the European Court of Human Rights in Strasbourg slavishly”—I was not aware that they were being slavish—and that “Instead they would be able to rely on the common law—the body of judicial rulings built up in Britain over centuries—or rulings by courts in other Commonwealth countries such as Australia and Canada, when making their judgments”. Our witnesses would probably agree that the judges have been doing that anyway, so it is a statement of what has already been happening. One thing that the piece seemed to say was that there would be a limit on extraterritorial protections, for people who might suffer at the hands of British soldiers, for example. May I ask what you made of this leak? If the British Bill of Rights takes this form, what are the implications of that, as you see it?

Sir David Edward: My first attempt to see the article through the link that was provided by the secretary was unsuccessful, because in order to access it I would have had to subscribe to the *Sunday Times*. However, I managed to see it. I take from what you said that the proposition is that the convention would be deemed not to apply to acts outside the territory of the United Kingdom.

The Chairman: Yes.

Sir David Edward: Now I am being a lawyer. The obligation is on the member state. The preamble of the convention refers to the need “to take ... steps for the collective enforcement of ... rights stated in the Universal Declaration” of Human Rights. This is in the context not just of Europe but also of the United Nations. It seems to me to be difficult to argue that Governments are off the hook once they act outside their territory—that the state is off the hook, because it is the state that is bound and the state that violates. As a lawyer, I find myself in difficulty in saying why that should not apply to the acts of the servants of the state outside the territory.

The Chairman: It is probably limited to what happens in the barracks—certainly not on the battlefield.

Sir David Edward: Yes. This is a dangerous dividing line. Simply to say that the obligations of the convention do not apply outside the territory, even if the acts are acts of the servants of the state, is a difficult proposition in law.

Lord Woolf: I endorse that. We talked before about the common law. There is a celebrated case where someone was flying from South Africa to somewhere else. The British Government managed to organise that he was to be diverted to Heathrow, quite unnecessarily for the journey upon which he was required to travel, because they had not been able to extract him from South Africa by legal means. I am glad to say that the House of Lords, I think, said that that was unlawful. Without relying on an international convention or anything else, they said that is something you cannot do. They said that a trial would be abuse of process, and the trial never took place. Quite frankly, it is very dangerous to take too seriously what can be extracted, even if you are a subscriber to the *Times* and that allows you to read the *Sunday Times*, from what appears in that newspaper.

The Chairman: Thank you very much, Lord Woolf. Could I have Baroness Eccles, please? I know that she wanted to ask some questions.

Q31 Baroness Eccles of Moulton: The next two questions are on the ramifications of repeal of the Human Rights Act for UK participation in EU legislation. There may be thought of unintended consequences here, which is probably very much in our minds as we go through this whole exercise. The first question is aimed at the area we are particularly concerned with and the second question widens it. If it is all right, I will ask them both together, which will make it more condensed.

Given the significance of the principle of mutual recognition to the field of Justice and Home Affairs, would changes to the rules governing the UK's protection of human rights principles threaten the UK's continuing participation in this area of EU co-operation? Secondly, could repeal of the Human Rights Act put the UK in direct conflict with other areas of EU law and, if so, in what particular areas? If you felt like giving us some examples, that would be very helpful, but it is quite a question anyway.

Lord Woolf: I have no difficulty in agreeing that it is quite a question anyway. Giving you the answer is more of a problem. Really it all depends on how it is done. It would be an extreme position. Whatever happens as a result of the present initiatives, I hope that we would not get ourselves in the situation where we produced unintended consequences and that if indeed we produced unintended consequences we would seek to put the matter right.

Sir David Edward: I find it extremely difficult to envisage at the moment, in abstract, a situation that might arise about the Justice and Home Affairs field. In so far as one is actually in that field, one is probably in the field of implementation of EU law and, therefore, in the field of the charter. In any event, it is difficult to envisage which rules governing the UK's protection of human rights would impinge on that.

It is not obvious to me what you would need to do. For example, one of the things mentioned in the *Sunday Times* article is to cut down the compensation for violation of the convention. That does not seem to me to impinge upon EU Justice and Home Affairs at all. It would depend precisely on how it was done, because there are two aspects. One is the giving of damages in the UK courts. The other is the provision in the Strasbourg convention which enables the Court to "afford just satisfaction" which may include an award of compensation. I do not see how the UK could remain within the convention and deny the obligation to comply with a judgment of the Strasbourg court and pay compensation. If it is simply a case where a violation of human rights is found in the UK courts and damages are claimed, it is not obvious to me how limiting those damages would affect the UK in the field of Justice and Home Affairs. I do not really see how those stack up, I am afraid.

The Chairman: Baroness Ludford wants to come in.

Baroness Ludford: I want to follow up on the question about mutual recognition in Justice and Home Affairs. I used to be in the European Parliament. One of the more recent criminal justice measures was the European investigation order, which is a parallel to the European arrest warrant, but for evidence. Under pressure from the European Parliament, that has a clause that allows the executing state to refuse the request if it is a breach of human rights. The clause refers not only to the charter but to Article 6 TEU, which is a cross-reference to the convention. I am not entirely sure myself what the reference to the convention would add to the charter, but potentially it would allow a member state to say, "The UK is no

longer in the convention. Is there a breach of the convention that allows us to refuse an incoming request for evidence under the European investigation order?”. The European Parliament also wants the same measure in the European arrest warrant in future, but it has not happened yet. I wonder whether that could store up some problems for the future about the recognition of UK requests for evidence from other member states.

Sir David Edward: The previous question referred to rules governing the UK’s protection of human rights. Your question seems to presuppose that we have withdrawn from the convention. Then there is plainly a difficulty. If it is simply a procedural rule, there may be difficulties, as you say, but it is not easy to see a list of the ones that would actually occur until one knows what the change in the rules is going to be.

The Chairman: It is difficult to anticipate. Can I take us on to Baroness Hughes, who has some questions?

Q32 Baroness Hughes of Stretford: I want to continue to explore your thoughts on the possible ramifications if we changed the position here, repealed the Human Rights Act and brought in a British Bill of Rights. Lord Woolf, earlier you said in response to Lord Judd that currently the situation is that the EU charter can trump statute, because all the member states have signed up to that position and that is the status quo. If we were to change our arrangements in the way that has been outlined, would a British Bill of Rights still be subject to the supremacy of EU law or are there some loopholes? Could an exceptional situation be brought into play where that was not the case? The second question follows on and, like Baroness Eccles, I will put them both together. If that were the case and those changes were made, could another consequence of repealing the HRA be increased references to the Court of Justice from our courts?

Lord Woolf: If the position was that it could properly be argued that, because of the situation we had created in this country, an individual’s rights were affected in an area covered by the European Union, there would be uncertainty. In general, when we are engaged in a process of the sort that we are undoubtedly engaged in at present—thinking of replacing what exists at present with something else—you have to try to foresee situations whether there will be disadvantages. As I understand it, the members of the Committee have been engaged in trying to identify those. Again, it depends on what is done and how it is done.

Generally, one matter to be taken into account in going down the route we are now taking is that any change of a substantial nature as is now proposed will create positions of uncertainty. Since the Human Rights Act was passed, there has been an untold number of cases in this country and in Strasbourg, and we have the benefit of those decisions. They enable people to identify what the rights of individuals are and what the limits on those rights are, because the decisions provide clarity. Once you produce an entirely new situation, that whole game has to restart. Lawyers will think of ways of creating all sorts of areas of dispute that will then have to be clarified in our own courts, in the Court of Justice or in the European court, unless you have taken away the right to apply to the European court. One thing that should be taken into account, and I hope has been, before we determine what we are going to do is the dangers that are inevitably involved. There is expense. There is uncertainty. There is anxiety to litigants. All sorts of people will be affected by it, and for what? I hope that is being asked. What counterbalances that?

Baroness Hughes of Stretford: Would your message to the Government be, first of all, “Don’t do it”? Secondly, if they are hell-bent on doing it, are there any bottom-line provisions or components of a new British Bill of Rights that you feel would give us some safeguard and greater certainty going into this new set of arrangements?

Lord Woolf: Perhaps being an optimist, I understood that Lord Faulks, in answer to a question that I put to him in the House, had indicated that in general the policy of the Government is not to detract from the individual rights of the citizens of this country in consequence of what the Government is about, if they continue with this. I hope that is right and that I was not being unduly optimistic. It is inevitable that we will lose the benefits that we have in clarity and certainty via the huge number of cases that have already been dealt with.

The Chairman: Lord Woolf, that is very helpful, because I do not think that we have heard it expressed as clearly by anyone that there could be a cost. If we are looking at cost-benefit, there is a cost in uncertainty and in terms of what this will do in any interim in having to build up new case law. The creativity of lawyers will mean that inevitably, there will be as many challenges as before. Perhaps one should have those things in mind when giving consideration to this.

Lord Woolf: One reason why I believe that we are embarking on this process is the concerns that there are. There is justification for those concerns. At the present time, lawyers are bringing cases that they should not be bringing and that really do not justify it. There is an industry going on. If that is the concern, the best way of fuelling it is to embark on a wholly new scenario, because there will undoubtedly be great scope for lawyers in anything that can possibly be done.

The Chairman: Sir David, I want to press home with you the question that Baroness Hughes raised. If a British Bill of Rights is created, when it comes to matters concerning the European Union, will European Union law still trump the British Bill of Rights?

Sir David Edward: Let us be clear. Almost every other member state, in one fashion or another, has a Bill of Rights or rights included in the national constitution. It has been consistently said by the Court of Justice that these are national provisions and that the obligation of the state to comply with EU law cannot be refused on the ground of any provision of national law, including constitutional law. That is clear, as a matter of EU law. At the moment, there are a number of cases going on where constitutional courts of the member states have challenged that proposition—notably, over the years, the German Constitutional Court. The reality is that in each case they have tended to retreat. It is an argument that is still going on, and that just illustrates yet again the opportunities for litigation.

Baroness Eccles of Moulton: Is this inscribed in a treaty, which means that it is something you just have to do?

Sir David Edward: No. It is drawn from the principle of international law that you must comply with your obligations.

The Chairman: Your treaty obligations,

Sir David Edward: Your treaty obligations.

Baroness Eccles of Moulton: So it is a treaty.

Sir David Edward: The treaties, including the European treaties, are treaties between states, so the state has to comply with the obligation.

Baroness Eccles of Moulton: There is no escape.

Sir David Edward: Not as a matter of EU law. As I say, this is a battle that is being joined, by the Czech Constitutional Court as well as the German.

Q33 The Chairman: Do you think that it is necessary for the European Union to accede to the European Convention on Human Rights?

Sir David Edward: There are two arguments. One, which I have heard, not in public but in a discussion with a member of the court—not a judge, but an advocate-general of the court—is that there is a danger in giving the impression that the EU is a state, and that it is dangerous to define what the identity of the EU is. There is a good political argument for saying that it is dangerous to go down the line of saying that the EU has some form of statehood, as might be implied by separate accession to the convention. That said, there is the contrary argument that it is not acceptable that the member states should all be subject to the convention and to its constraints and penalties, and that the EU institutions can act outside the convention. The answer to that, in one form, is no, because the EU is the sum of the member states; therefore, the EU cannot do what the member states cannot do. But it is much simpler and better that the EU should formally be committed to comply with the convention and be subject to its constraints.

The Chairman: Those are the two views. What is yours?

Sir David Edward: Opinion 2/13 of the Court of Justice is criticised, and I think there is justification for the criticism. The advocate-general, in her Opinion, took a milder position but none the less said there were difficulties. There are serious difficulties about definition of scope and application. There is also the serious problem of time. The idea that you can have a kind of judicial ping-pong between Luxembourg and Strasbourg, until you discover what the law to be applied in a definite case is, could be said in itself to bring about a breach of Article 6—that proceedings should proceed in a reasonable time. I think there are more serious difficulties about accession than have been recognised by its proponents.

Lord Judd: In crude political language—I am obviously not a lawyer—are you not in fact saying that we should face the reality that the European Union is a confederation, not a federation?

Sir David Edward: It is not a state.

The Chairman: Lord Woolf, do you have any view on this?

Lord Woolf: No.

The Chairman: I thank both witnesses for attending today. I am really grateful. I know that the whole Sub-Committee is grateful to you. Your wisdom has been listened to with great care. I thank you sincerely on our behalf.