



HOUSE OF LORDS

Revised transcript of evidence taken before

The Select Committee on the European Union

Inquiry on

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

Evidence Session No. 5

Heard in Public

Questions 44 - 53

TUESDAY 8 DECEMBER 2015

10.45 am

Witness: Rt Hon Lord Goldsmith QC

USE OF THE TRANSCRIPT

1. This is a 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 Cromwell
 Baroness Eccles of Moulton
 Baroness Hughes of Stretford
 Lord Judd
 Baroness Ludford
 Baroness Neuberger
 Baroness Newlove
 Lord Richard
 Baroness Shackleton of Belgravia

Examination of Witness

The Rt Hon Lord Goldsmith QC

Q44 The Chairman: Lord Goldsmith, welcome. We are very happy that you could find a time in your busy diary to come to this Committee. Before we start, can I just explain the following? You sit on other Committees, or you have done, and so you know the form, but this is going to be an open session and the webcast of the session is going to go out live. That will be done as a video-audio transmission and it will subsequently be accessible on the parliamentary website. A verbatim transcript will be made of that and it will be put on the parliamentary website, too. A few days before that, after this evidence session, you will be sent a copy of the transcript and, if you want to correct anything on it, then please do. You can check it for accuracy. If there is anything you feel you would like to amplify because it is not clear, again, take the opportunity to do that. We would greatly welcome it.

Lord Goldsmith: Thank you.

The Chairman: You understand that this investigation is to look at whether repealing the Human Rights Act has any impact on our membership of the EU and on EU law, so who better to ask than you, given your role in the charter of fundamental rights? I am going to kick off by asking you about that. Why was it thought necessary at the time that the EU should have a charter of fundamental rights?

Lord Goldsmith: It was a political decision by the member states, recorded in the conclusions of two Council meetings. I think there was some uncertainty among some people as to just what the point was. I was clear—and I believe that this was what ultimately carried the day, in the sense that this was the basis upon which the charter was drawn up and put together—that the purpose was this. Most member states are subject, either through their own law or through

application of the European Convention on Human Rights and other instruments, or both, to constraints on the way they operate, but the EU was not. At least, in its initial conception as an economic community, it was not subject to that. Now, over a period of time, the Court of Justice started to say that the Community—and then the Union—must itself be subject to the provisions of certain fundamental principles in the way it carries out its job. Ultimately, that was reflected in the treaty itself.

The point, therefore, behind the charter was to make it clear that, when EU institutions are acting—the Commission, the Council and the things that they are doing—they are bound by just the same sort of fundamental rights and obligations as member states are. That gave rise to one issue: what about the member states? When it comes to what the member states do, this is why it says that the member states are also bound, but only when they are implementing Union law. Then they are acting as agents for the EU and, therefore, they should be bound by the same rules. That is the basic purpose.

The Chairman: There is almost an automatic question that follows that: why is there talk now about the EU signing up to the European Convention on Human Rights? I am going to save that until later. At this moment, I would like to press on. What were the reservations at the time? When you were negotiating this, reservations were expressed by some people here in the United Kingdom as to whether this charter was needed. Why were they saying that they thought it was not necessary?

Lord Goldsmith: There was a worry among some people that the charter would upset our national legislation in certain sensitive areas, including particularly areas of social and economic rights, areas of trade union rights and that sort of thing. People were worried that it would create new rights that were not what we signed up for. That was the idea. There was quite a lot of, I thought, misinformation in a number of quarters, in some newspapers, about what the charter was going to do. That is why one of the red lines we had was that the purpose of the charter was not to create new justiciable rights. There were a number of techniques that we tried to use to get us in that position. That was the fundamental reservation.

The Chairman: Were there concerns that the European Court is more powerful even than the European Court of Human Rights and that, therefore, this was going to embody rights much more deeply into the European Court of Justice?

Lord Goldsmith: I cannot recall, at that stage, that being a particular issue. Indeed, in the newspapers and the commentary at the time, there was, as I note there still is from time to time today, complete confusion as to the difference in any event between the two courts.

The Chairman: We see that all the time.

Lord Goldsmith: All the time, and among some politicians from time to time as well. I do not think that was the point, although you are right to say that there are important differences between the powers of the two courts, which can impact on some of the areas I know you are concerned about.

Q45 Baroness Neuberger: Why do you think the charter changed—perhaps you do not think it did, but it seems to have done—from being a political declaration to becoming a legally binding document? How did all that happen?

Lord Goldsmith: It was always going to. I thought it was inevitable that it was going to, although we took a very hard position at the time that it was not going to be and that it was simply a political statement. You could rely on the conclusions of the previous Councils, which talked about making rights more visible, to say—indeed, as the Commission said in one of its explanatory notes—that this is an exercise in revelation, not an exercise in creation of rights.

I think it was inevitable it was going to, but when it came then to drafting it—because it seemed to me that it was likely to happen—I tried to be careful to ensure that, if it became legally binding, it was not going to go further than we were intending it to go. The President of our Commission, President Roman Herzog, also started off his guiding and leadership of the convention by saying that we should draft it as if it were going to be a binding document. That did not always help in the debate because one would say, from time to time, in arguing about particular clauses, “Of course, we have to draft this carefully because it may be binding”, to which some people would respond by saying, “But it is not. It is only political, so we can say it as broadly as we like”. That was a challenge.

Baroness Neuberger: Can you play that through a little more? Was there a dispute as the negotiation was taking place over it?

Lord Goldsmith: There were huge disputes as to how it was going to take place. There was quite a standoff at one stage—not a standoff; it was all done very diplomatically and politely—between, as you will not be surprised to know, the French on one side and us on the other. People were taking varying views, sometimes depending upon their political positions. Some people wanted to be seen—and I understood why—as advocates of human rights. Therefore, they wanted to be seen to be taking an expansive approach. That was a perfectly legitimate position, but I just did not think the charter was the right place to do it.

If I may give you one example, we drafted something that said that everyone has the right to strike. I spoke to some of my colleagues and said, “Well, in your country, do the police have the right to strike?”. “No, they do not.” “Do the armed forces have the right to strike?”. “No,

they do not”. “Well, how can we say everyone has the right to strike?”. The answer from one very distinguished continental lawyer was, “Do not worry, the courts will know”. That is a bit of a difference between our approach to how you draft legislation and, to some extent, theirs. That is why—sorry, you may or may not want to get on to this—the explanations are there, which are often forgotten about when one looks at the charter. They were subsequently published and they are required to be had regard to; there was a big fight about that. Those explanations are intended to tie back the charter articles to the law, whether it is the European Convention on Human Rights or some other law that creates those rights. There were debates and fights about how we should proceed, but eventually we found, through the use of a number of devices or mechanisms, the way to compromise those.

Lord Judd: I find fascinating this debate and discussion of what was going on here, because it seems to be very central to the issues with which we are faced at the moment. Would you agree that there has been a good deal of what might almost be called wilful misunderstanding of what the European Union is all about? It almost seems to me, as somebody who was in my formative years at the time, that the pioneers of the common market were not just about a common market; they were about a real political objective of peace and security in Europe. They saw the coal and steel community as a practical means of building towards this. Is this not just an ongoing debate, really, within the European Union?

Lord Goldsmith: I agree with you entirely that that was a fundamental purpose of the Community. It started from relatively small beginnings, but became an enormously important engine for peace, which I believe it has been—at least, peace in Europe. Certainly, at the same time, people also had other political aspirations—I am sorry, I am making a general political point that will be enormously well known to every single member of this Committee—in seeing the need for ever increasing expansion, federalisation and closeness between member states. Quite a lot of that was an undercurrent of the debates we were having.

On the other hand, we were engaged in a legal exercise, trying to draft the articles of the charter in such a way that, as I believed, they would be applied legally at some stage, but, in any event, they would be of considerable persuasive force, so it was important that we should get them right.

The Chairman: You mentioned how the explanations were very specific in trying to bind the rights and that the purpose of this was not to create new rights over and above by over-interpreting. I just wondered what other mechanisms there were, as well as the explanations, to tie down what was in mind when the charter was created.

Lord Goldsmith: There were probably three or four. First of all was the wording of the articles. The charter is not perfect in that respect. One of the other debates we had related to people wanting to rewrite, for example, European convention rights in more modern language. The danger with that, of course, is that, if you cast a particular right in different words, then able lawyers will think, “There must be a difference”, and will use that as a basis for expanding or interpreting further. We had a debate in which I was not entirely successful in keeping the language back. The text was part of it. There are a number of provisions in the text and in the preambles that demonstrate it is not intended to create new rights, for example. Secondly, the explanations were a critical part of that. If I can add one further word on that: why did we need to put the explanations separately? There were many people who wanted a poetic statement of rights. Again, for reasons I can understand, you do not want a declaration of human rights that starts off with a whole lot of exceptions and qualifications. You also want it to be a living document. That is the reason we separated the explanations. Thirdly, the horizontal articles were very, very important in the application of the rights and principles in the charters.

Fourthly, there is a slightly difficult concept, which is that certain of these were identified—I have to confess that they are not necessarily very well signposted—as principles. At its most basic, the point about the principles was that they were intended to be aspirational, but it was then left to member states or the EU to implement them and start to put detailed provisions in place in relation to the aspirational aims. Those were mostly social and economic. Finally, of course, when it came to it, there was Protocol 30, which was a way of trying to guarantee some of the things we believed we had achieved.

The Chairman: We will come to that in a moment.

Q46 Lord Richard: I would like to come back to the implementation test of the gateway into this. I can understand the argument that the original idea was that you were trying to impose similar obligations to those in the convention on the institutions of the Community. Then, by extension, you have said that, as far as the member states are concerned, when they are implementing, they are acting as if they are the institutions, or acting on instructions almost vicariously from the institutions, and they should be bound. I am wondering about the test of implementation. Do you think the Court of Justice has done this in the right way?

Lord Goldsmith: From time to time, they have used an expression that is not quite the same as implementing. They talk about whether things are within the scope of EU law. Reading the cases, I am not sure—and I do not pretend to be absolutely on top of each of them—that they are actually saying anything different. For example, if I look at the *Fransson* decision, I think

they are saying the same thing. Of course, one has to understand that implementation also includes derogation because, if a member state has the right to derogate from a provision, when they come to derogate, equally, they should be bound by the same principle: that they should not, for example, discriminate or infringe people's fundamental rights when they are doing that.

It can lead to confusion. There was one English case that led to confusion because I do not think the judge fully understood what the purpose behind the charter was. To that extent, there may well be a difficulty inherent in it, but, on the whole, "within the scope of" is intended to reflect, as I understand it, the concept of implementation of EU law.

Lord Richard: From the point of view of an individual who has a grievance, in a sense, you have created new rights for that individual, and not just vicariously. You have given him the right to go to the court and have his grievance aired, looked at and, indeed, judged on.

Lord Goldsmith: I do not think so. There is a question, which it is right to touch on, about the enforcement, because of the differences between the enforcement of convention rights and the enforcement of EU rights. But, in terms of the content of the substantive right, particularly if you have regard to the explanations, every single thing that appears as a right in the charter is tied back to a right that derives from either the convention or other international instruments. It is sometimes thought that the charter is intended to deal only with the convention rights. That is not the case. There are other important rights—for example, the refugee convention being one—that are international obligations already binding on member states, and those are reflected.

When they go to court, I have no doubt that people may rely upon the charter, because why ever not? But as to whether they need to, I have not yet seen a case—it may that there are such cases; I do not know—in which all the difference in the right has come from the fact that it is reflected in the charter and the original right from which it is drawn does not actually give that remedy, or give that substantive right, I should say.

Q47 Lord Cromwell: Can we return to Protocol 30? We started out with principles that you called poetic and aspirational. Then the UK and Poland got Protocol 30 bolted on. Why the UK in particular? What did it achieve and are other people going to want to join the party?

Lord Goldsmith: I will choose my words carefully. This took place at a particular moment in the political history of this country, at the moment of the change from Mr Blair to Mr Brown, so Mr Brown was going to inherit whatever the consequences of the charter being incorporated into law were. That led to a focus on what it was trying to achieve. I believed, as I think did officials, that we had achieved what we set out to do, which was: no new rights, no

justiciable rights, not extending the competence of the EU. None the less, it was desirable to guarantee that by incorporating what are really three points into Protocol 30, which is what Protocol 30 does. I take the view that it was not necessary because the charter already worked in that way.

Lord Cromwell: Belt and braces.

Lord Goldsmith: For the avoidance of doubt—or however one wants to express it—it helps. There is one qualification to that, which is that the protocol, in my view, has this effect: if it turned out that we had not achieved what we intended to achieve in the drafting of the charter and it went further than we intended, then, as far as the UK and Poland are concerned, Protocol 30 would come in. It would be legally binding and it, therefore, would tie that back to what it says in Protocol 30, even if other member states were in a different position.

Lord Cromwell: Is there pressure from other countries to also have the benefit of this?

Lord Goldsmith: I do not know if there is. I have not heard, but I would not necessarily hear. I am no longer in the diplomatic circles, so I would not know what people are saying. **Baroness Eccles of Moulton:** Would it be all right if I expanded the question a bit? It will remain a question; I am not going to make a speech.

The Chairman: Yes. I am sure that Lord Goldsmith, after all his legal experience, will be able to deal with an expanded question.

Q48 Baroness Eccles of Moulton: I think we have arrived at the moment that the Chairman referred to right at the beginning because the question is whether it was thought necessary for the EU to accede to the ECHR. Now, the thing is that the EU court, I think for the second time round, said that the agreement was not compatible with EU law, which sounds as if it does not like the idea very much. There is also a sense in Strasbourg that the Council of Europe does not like the idea very much either, for completely different reasons. Do you agree that it is necessary for the EU to accede to ECHR? What about the fact that both sides do not seem to be very keen about it?

Lord Goldsmith: There are two strands to that. So far as whether it is necessary, I do not think it is. In one sense, at the time that the charter started, there was a debate saying, “Instead of having a charter, why do we not just have the European Union accede to the convention? That way, it will be bound in the same way as every member state by everything that is there—by freedom of speech, fair trial, et cetera”. In a sense, it was one or the other, although, in fact, the charter went beyond the convention, so it would not have been enough to have done that. The charter being there, I am not personally convinced it is necessary for the EU to accede to the convention.

As to your second point, which was about why there was disagreement, as I understand it, the question that has arisen as far as the Court of Justice is concerned is whether the EU is competent, whether it is within its powers, to accede to this additional obligation, inherent in which is also the fact of submitting itself to the judgments of another court. The consequence of the EU acceding to the European Convention on Human Rights would be that the court in Strasbourg would have the right to—

The Chairman: Binding judgments.

Lord Goldsmith: Exactly. I know the two courts communicate quite frequently, but it obviously gives rise to an issue if one of the courts is unable to, as it were, appear to overrule—although it does not quite do that—the decisions of another court when they are both interpreting perhaps the same principles. I do not want to describe it as a power struggle between two courts because that would be far too demeaning for the courts, but it may be a matter.

Baroness Eccles of Moulton: As far as the parliamentary assembly was concerned, the delegates there thought that having the 28 members of the EU also part of the same whole meant that they would have an advantage, because they would have a double vote if it came to voting. This was probably rather a simplistic reaction, but it seemed to carry some weight.

Lord Goldsmith: Thank you. I was not aware of that.

Q49 Baroness Ludford: My apologies for not being here right at the beginning. I wondered if you could tell us your view on the respective strengths of enforcing human rights standards under the convention and the charter in national courts. There have been two Appeal Court judgments: *Benkharbouche* and *Vidal-Hall*. I have had a chance to learn a little about the second. I do not know whether it has gone to the Supreme Court yet, but it is a data protection case, where the Appeal Court said that the domestic law—the Data Protection Act—did not comply with the charter and that the charter gave the right of redress under EU law. I wonder if you could compare the respective strengths of the two systems in terms of enforcement.

Lord Goldsmith: The major difference is that a contravention of the convention, which in our national courts means a contravention of the Human Rights Act, does not give rise to the ability of the court to strike down the offending legislation. It can read it down; it can deal with subsidiary legislation; but it cannot strike down the primary legislation. One is left with a declaration of incompatibility and the ability of Parliament to fast-track amendments to the legislation in the light of the judgment of the court. Under EU law, ever since the decision in *Factortame* at least, it has been recognised that EU law is supreme. Therefore, if there is a contravention of EU law, even by Parliament itself, its sovereignty has to give way to the

European law, and then the courts can, in fact, strike down the primary legislation. For me, that is the major difference, which is why I was hinting before about the differences in enforcement.

The Chairman: We have covered that well and we have now come to understand the distinct differences between the powers of the two courts, which are so often not understood by not just the general public, but by the political class as well. All this fire is directed at the European Court of Human Rights and, in fact, the court that has real power is the European Court of Justice.

Lord Goldsmith: Yes.

Baroness Ludford: With or without whatever is going to happen to the Human Rights Act and a Bill of Rights, does that make the charter avenue increasingly tempting?

Lord Goldsmith: It probably does, except that, even then, there is a question about whether at least our courts will still find reasons not to give full effect to striking down a piece of legislation. I have in mind questions about whether, for example, when it comes to prisoners' rights, the courts will say, "That is all very well and good, but we cannot actually substitute the right system, so we are simply going to shy away from exercising our powers to the full". Subject to that, I think you are right.

Lord Judd: Again, this is highly relevant to our present debates. Is there not also an argument that, if we are genuinely committed in foreign policy to the extension of the rule of law, it is not just a matter of whether it is necessary for the European Union to join; it is also a matter of what joining could contribute to the strength of the struggle for the extension of human rights in the world. Is there not a danger that, if we all start seceding and having our own arrangements, that enables regimes that are not at all committed to the extension of human rights and the rule of law as we understand it to start saying, "Well, that is okay. We have our interpretation". I am really quite worried about that and I would like to know your view.

Lord Goldsmith: I absolutely agree with you. Lord Judd, your history, if I can put it that way, is in precisely this area: the role that certain countries have in setting an example. Rightly or wrongly, in some areas at least, the United Kingdom has been regarded as setting this example. If we were to secede and move away from the European Convention on Human Rights, personally, I think that would send a terrible message to many other countries about the importance to be attached to human rights. However it is dressed up as something else, it would still amount to removing some of the protection for human rights and it could give other countries who we know often follow their obligations under the European convention

grudgingly and sparingly encouragement and comfort to continue in a way that does not follow—

Lord Judd: But does that not relate to this? In this context, we might say, “Yes, but we want to accede as a Union because this will demonstrate that we are not trying to set up our own interpretation”.

Lord Goldsmith: I see that. It gives an additional statement. The fact that the European Union has to abide by the charter in what it does gets you quite a long way. Of course, it is very clear from the charter and its explanations that the obligations in the European convention are there and, indeed, are there in the same form. On the fundamental point as to the statements being made politically about the importance of fundamental rights, with respect, I agree with you, Lord Judd.

The Chairman: Lord Goldsmith, you mentioned there the issue of prisoners’ voting rights. I know that Baroness Shackleton would like to ask some questions relating to that.

Q50 Baroness Shackleton of Belgravia: You have touched on the innate conflict and the application of the law by us here. Do you think the Court of Justice judgment in *Delvigne* provides a new legal avenue for a UK prisoner to challenge the blanket ban on prisoner voting, despite our Supreme Court’s conclusions on this in *Chester and McGeoch*?

Lord Goldsmith: In relation to European elections, I see that. In relation to national elections, I think not. This takes us back to the question in relation to the implementation of Union law and national elections. Elections for our Parliament, or indeed our local political arrangements, do not fall in that area. We would still be in the same position in relation to prisoners’ voting rights except in relation to European elections.

Baroness Shackleton of Belgravia: Should we be seeking to change the drafting of a clause that would make that more clear?

Lord Goldsmith: I have not in mind the terms of the clause.

Baroness Shackleton of Belgravia: If you are making an exception for domestic elections and it is not clear in the law, should we not be correcting it at that level rather than simply not enforcing it?

Lord Goldsmith: There is a big question about whether we should be standing on where we have got to in relation to prisoners’ voting rights. I do not actually think that we should. That is my view of the law and of the political reality, but that is a different question. Obviously, it is desirable that the law should be clear; otherwise it just gives work to lawyers. Forgive me, Baroness Shackleton, I have not looked at the specific drafting. I am sure you are right, but I cannot confirm it.

Q51 Baroness Hughes of Stretford: We have heard from a number of witnesses, Lord Goldsmith, their views as to the possible consequences for the UK of repealing the Human Rights Act and withdrawing from the ECHR. Can you tell us what you think? In particular, do you foresee an increase in the references from the UK courts to the Court of Justice and do you, as a result of that, think the charter might become interpreted more widely?

Lord Goldsmith: That must be very possible. At the moment, I do not really know what is precisely intended to be put in place of the Human Rights Act and therefore quite what all the difficulties are that that would give rise to. Baroness Hughes, you are right that, if people feel the remedy they have under what is then the so-called British Bill of Rights is less than they were used to, they will look at other routes, and the charter must be something they look to in order to get to the European Court of Justice.

In any event, arguably, they do not even need the charter to do that because it is now recognised that the European Union has obligations—indeed, so do the member states—to comply with the general principles. It is now generally accepted that those general principles include, for example, the European Convention on Human Rights. Even without the charter, one may get to that point. I, personally, am unclear how you continue with all the obligations that exist under the treaties relating to the EU yet move away from the Convention on Human Rights. I do not know how you do that.

The Chairman: One of the ways might be to use the very mechanism that you have described being used for the charter, of having explanations. Sometimes what we have heard is that a British Bill of Rights would, in a way, incorporate many of the rights—or probably all the rights—that are in the European Convention on Human Rights, but that there would be a gloss describing how these should be interpreted by our courts, so that a limitation is put on any expansionism of rights. What do you make of that as a suggestion?

Lord Goldsmith: It ultimately depends upon what is said to be the gloss. When I was in office, we constantly had the debate in which we would ask our opposite numbers, “Can you tell me, please: which is the right in the European convention you do not want?” There was never the answer that there was any right they did not want. The starting point is: do all the rights that are there need to be in a British Bill of Rights? If anything, continentals complain that the convention was drafted too much with the British system in mind. It was, of course, largely drafted by British lawyers and some of the concepts are a bit unfamiliar. For example, in relation to the right to fair trial, they do not do things the same way.

So I am not sure what the gloss would be. It may be in some of the areas such as right to family life, I suspect. That is probably where one would see it. Following the decisions of the

courts, which seem to be moving a little in any event, I wonder what overall difference that would make.

Q52 Baroness Newlove: Among all the witnesses we have had, you are very clear. I am following it and it is not my area at all. I appreciate the difficulty with all the things that are going around. We have yet to see what the publication of the Government's Bill of Rights will look like, but would a British Bill of Rights be subject to the supremacy of EU law, including the EU charter?

Lord Goldsmith: The country would be subject to the supremacy of EU law, unless somehow we—I do not know how we would do this—get away from that. The European Communities Act, which is an Act of the UK Parliament, requires us to follow and to comply with EU law. That now includes, through the general principles but also through the charter, many of the fundamental rights we are talking about. Yes, I think we would be obliged still to follow it, but the method of enforcement may be different and that would have an impact.

I hope this is not what people have in mind, but we know—my Lady Chairman will remember so well—that, before we had the ability to go to the English courts in relation to breaches of the European convention, there was a great delay and inhibition and we often could not get there at all to vindicate those rights.

The Chairman: Six or seven years, yes.

Lord Goldsmith: I hope people are not thinking, “Let us just make it jolly difficult for people to vindicate their rights”, rather than saying, “These are important rights and people should be able to enforce them”.

Q53 Lord Blair of Boughton: Lord Goldsmith, you presumably had some involvement in the drafting of the Good Friday agreement.

Lord Goldsmith: I did not, actually.

Lord Blair of Boughton: Right, okay. I was going to ask for your general opinion.

Lord Goldsmith: I rather wished I had at one point.

Lord Blair of Boughton: The Good Friday agreement is deeply based on the European Convention on Human Rights and I wondered whether you had any view on what would happen, if we altered the Human Rights Act, in relation to the Province of Northern Ireland?

Lord Goldsmith: It is not just the Province of Northern Ireland, but Scotland as well, because the European convention has a different place in the constitutional framework as far as Scotland is concerned. Certainly, yes, this was a part of the Good Friday agreement and getting rid of it, therefore, would give rise to political controversy at the very least. I am not sure quite what legal controversy it would give rise to, but no doubt there will be the

possibility of that. Scotland was enforcing the European convention domestically before we were, because it was a key part of the devolution settlement that the institutions in Scotland should follow the European convention. In both cases, it would cause a problem.

The Chairman: I am going to pick up on that. One suggestion now in the air is that the Government, recognising somewhat late that there could be some serious constitutional problems around the idea of a British Bill of Rights, are talking about the Supreme Court becoming a constitutional court and having a very specific constitutional role in addition to its traditional roles in relation to other law. How do you think that might resolve some of the high-level constitutional problems that having a British Bill of Rights might create with regard to the devolution settlements in parts of these isles?

Lord Goldsmith: Forgive me for not having considered that question at all before. Sitting here, the first question that crosses my mind is: what is the right to go to that court going to be and what are the powers of that court going to be? If it is no more than saying that our apex court, to use that language, is in a position to judge whether what institutions do is in compliance with the law, that is what happens already, although it is not labelled as a constitutional court. On the other hand, if there were—for example, as there is with some courts like the Indian Supreme Court—a right for individuals to go directly to the top court to raise petitions of right, including in this area, that would make a significant difference to the way that these things get enforced, because, in all likelihood, there would be more occasions when those matters came before the courts.

The Chairman: One reason that this is somewhat attractive or being pressed as a possibly attractive notion is that Germany, having a constitutional court and a written constitution, is invoked as being capable of resisting some of the decisions that come from European courts by invoking its constitution and saying, “Our constitution has heavier weight”.

Lord Goldsmith: Ah, yes.

The Chairman: That might be one of the reasons.

Lord Goldsmith: I understand; I had not appreciated that. I have to say that I have never quite understood how this works in Germany. There were famous decisions called the “solange” decisions—“so long as”—which was the German constitutional court saying, “Yes, you can follow this, so long as it does not contravene our constitution”. I have not studied how they have managed in circumstances where they took the view that there was a conflict between the two; nor do I know quite how that would fit in with an obligation, for example, under the European convention, to which we are a party, to comply with a decision of the European

Court of Human Rights where it has given a judgment against this country. I do not quite know how it would work, but, thank you, I do understand now what the idea behind it is.

The Chairman: It is something we may have to address once we have greater knowledge of what the Government have in mind. Lord Goldsmith, it has been really helpful having you here to fill in some of the background. It has been incredibly useful. Thank you so much. We know that it was hard to make the time, but we are grateful to you for it.

Lord Goldsmith: Thank you for arranging it at my convenience. I wish you well and I look forward very much to reading your report.

The Chairman: Thank you.