



HOUSE OF LORDS

Unrevised transcript of evidence taken before

The Select Committee on the European Union

Sub-Committee on Justice, Institutions and Consumer Protection

Inquiry on

POTENTIAL IMPACT ON EU LAW OF REPEALING HUMAN RIGHTS ACT

Evidence Session No. 1

Heard in Public

Questions 1 - xx

TUESDAY 20 OCTOBER 2015

11.15 am

Witnesses: Professor Steve Peers, Professor Sionaidh Douglas-Scott and Dr Tobias Lock

USE OF THE TRANSCRIPT

1. This is an uncorrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.
2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.
3. Members and witnesses are asked to send corrections to the Clerk of the Committee within 7 days of receipt.

Members present

Baroness Kennedy of The Shaws (Chairman)
Lord Cromwell
Baroness Eccles of Moulton
Baroness Hughes of Stretford
Baroness Neuberger
Lord Richard
Baroness Shackleton of Belgravia

Examination of Witnesses

Professor Steve Peers, Professor of European Union Law and Human Rights Law, University of Essex, **Professor Sionaidh Douglas-Scott**, Anniversary Chair in Law, Queen Mary University of London and co-director of the Centre for Law and Society in a Global Context, and **Dr Tobias Lock**, Lecturer in EU Law, School of Law, University of Edinburgh

Q1 The Chairman: Welcome. Thank you very much for joining us today. I am sure that your evidence will be invaluable to us in our consideration of these issues. Before we get under way, there are a number of things that I just wanted to say. This session is, of course, open to the public. There will be a webcast of the session, which will go out live as an audio transmission and will subsequently be accessible on the parliamentary website. A verbatim transcript will be taken of your evidence, and this will also be put on the parliamentary website. A few days after this session you will be sent a copy of the transcript to check for accuracy, and if you want to correct anything, please do so as quickly as possible, if you would not mind. If, after this session, you want to clarify or amplify any point that you have made during your evidence but which you think could be made more clearly, or you have any additional points to make, you are very welcome to submit them to us in a supplementary written form. We would be very grateful if you would introduce yourselves to us one by one. Then we will embark on our questions to you. Perhaps we should start from the left-hand side of the panel.

Professor Sionaidh Douglas-Scott: Hello. I am Sionaidh Douglas-Scott. I am Anniversary Chair in Law at Queen Mary College, London University, and was until very recently at Oxford University, which is where I am think I am still attributed in this Committee.

The Chairman: Yes, so you are formerly of Oxford but now of Queen Mary College, London University. Thank you.

Professor Steve Peers: I am Steve Peers. I am a professor at the University of Essex interested in EU and human rights law.

Dr Tobias Lock: I am Tobias Lock. I am a lecturer at the Edinburgh Law School and co-director of the Europa Institute.

The Chairman: Thank you very much. Before we start, I should say that there is a great temptation for everyone to give a slightly nuanced answer that is different from their colleagues'. I am anxious to make the best use of the time that we have available to us, as we have quite a lot of ground to cover, so if you feel that by and large an answer given by a colleague is more or less what you would say, please can we settle it at that, if you would not mind? I know that in the great world of academia, which I now have a foot in, it is in those small differences where important things often happen, but I am rather anxious that we get through the rather large number of issues that we want to engage you with and to have your great skills in tackling.

I will start by asking you the first question. What do you see as the relative strengths and weaknesses of the two European human rights protection systems? This has been thrown up recently by the case of Hirst, which dealt with prisoners' voting rights, which was decided in the European Court of Human Rights, and the case of Delvigne, which was decided in the Court of Justice—both of them considering the business of prisoners voting. That really does highlight this business of the differences between those two areas of human rights protections. What are those differences? Who would like to come in first?

Professor Sionaidh Douglas-Scott: I will make a start. I would highlight two major points. One concerns remedies and the other concerns scope. When it comes to remedies, when we are looking at EU human rights law under the charter, the remedy that would be available in English/UK courts would be much stronger in that the courts would have the power to set aside any conflicting national law—even an Act of Parliament, if it conflicts. On the other hand, when it comes to the European convention, there are no restrictions in the case that they restrict the applicable human rights within the scope of EU law. So the EU charter will apply only if EU law itself first applies. That is quite a large area; opinions differ as to how much national law derives from and is influenced by EU law. Some would say that it is well over 50%, which leaves a lot of scope for the EU charter to be applicable. But if it is not applicable, if national law is not within the scope of EU law, it is hard to argue that the charter applies. Those seem to me to be two really important points to pick out at first: a strength and a weakness in each case. From the litigant's point of view, both could be a disadvantage if it means that the very right that you want to rely on is not going to be enforceable and is not going to provide you with a remedy of the sort that you want in the national courts. That is a very general point to start with. There are many, many things that one could say, not least that

the charter covers many, many more rights than the ECHR does. That is very important too, of course, for human rights protection, but I am aware that colleagues may want to come in and amplify or make a distinction.

The Chairman: At this early stage I am going to bring in all of you. How do you see this? It is one of the things that is at the heart of our considerations.

Professor Steve Peers: I would answer the question by pointing to the twofold feature of the legal effect of the EU system as compared to the ECHR, and the different procedure that you go through for enforcing rights. On the legal effect, certainly the Court of Justice of the EU has said that the charter is supreme. It is assumed that it probably has direct effect, but it is by the Court of Appeal, in this country. In some cases at least, that means that you can set aside national law. We certainly know that you can invalidate EU law that violates the charter, and the Court of Justice has now done this on several occasions. Of course, as a system you have to go all the way to the ECHR; it does not give a ruling that has a direct impact in national proceedings in the same way that the EU court ruling does. It also means that you have a longer process in principle to exhaust all your remedies in the UK before you then go to the ECHR. The gaps between them would also have to be assessed differently if the Human Rights Act were replaced by a British Bill of Rights. Even with the Human Rights Act in place, there are some significant differences about the way you apply human rights law.

Another example of the legal effect point is that you cannot disapply an Act of Parliament by relying on the Human Rights Act, but you can ask for a declaration of incompatibility. My students, ever since the Human Rights Act, have thought that that is what you do in EU law as well: you ask for a declaration of incompatibility. Of course, there is no such thing. If that is the remedy that you need, you potentially ask for the Act of Parliament to be disapplied. That is a much stronger remedy and could make a big impact in an individual case where the two overlap or interface with each other.

Dr Tobias Lock: I agree fully. The two cases that you mentioned, Hirst and Delvigne, demonstrate this quite nicely, because they say more or less the same thing in substance: that if someone is deprived of their right to vote, this has to be a proportionate measure. The Hirst case, of course, applies to all elections that are taking place in a country, whereas the Delvigne case was brought under EU law to the Court of Justice, and it applies only where the charter applies, which is elections to the European Parliament, so Mr or Miss Delvigne—I cannot remember which—will have no chance of relying on the charter when it comes to national elections, only when it comes to European Parliament elections.

The Chairman: This is interesting. What do you expect the consequences of the Delvigne decision to be for our blanket ban on prisoners' voting rights? Will it just mean that prisoners who want to vote in European elections might have a chance under that but it will not affect national elections?

Dr Tobias Lock: That is how I would understand it, yes. The next European elections are far away, but if someone brought a case in the run-up to them because they have been refused registration for the election, they would have a case, I think. Of course it depends on whether the Court of Justice agreed that the ban is disproportionate with Hirst, but there are some suggestions that it might.

The Chairman: Seeing that the charter of rights has more power, if you like, they could ask for the Act of Parliament to be disapplied with regard to European Parliament elections.

Dr Tobias Lock: Yes, or at least the exception to the right in the Act of Parliament to be registered.

Professor Sionaidh Douglas-Scott: I was just thinking about what Lord Mance said in the Supreme Court about disapplication in the case of Chester. He was talking putatively, because he did not think that there was a conflict then between national and EU law. If there were, he was rather cautious about the possibility of disapplying the relevant UK electoral law, because he felt that that would put the court in the position of having to come up with some sort of new administrative scheme. It would leave a gap, and the court would have great difficulty in doing that, so the suggestion then was that where disapplication of UK law results in that difficulty, the court may not be able to do that. There are certain situations that require positive action from the court to come up with an alternative, and Lord Mance thought that electoral law was one such case. So there could be a problem there.

Q2 Lord Cromwell: Good morning. You have touched on process and remedy. Could we drill a bit more on the scope? To what extent are the scopes of the convention and the charter distinct, to what extent do they overlap, and is there a process at work there?

The Chairman: Dr Lock, perhaps you would like to come in on that.

Dr Tobias Lock: The Court of Justice came up with the ingenious phrase that the charter applies where EU law applies, which of course begs the question. It would have to be decided on a case-by-case basis. We could say that there are situations in which a member state authority implements European Union law in the narrow sense—ie, they apply an EU regulation or they act on the basis of an Act of Parliament or statutory instrument that implements a directive. There are clear cases where you have an implementation of EU law and where the national authority would have to comply with the charter.

There is another set of cases where a member state derogates from an obligation under European Union law—for instance, on the free movement of goods or persons—and wants to restrict that. Say that a member state wants to restrict the free movement of a good for health and safety reasons, or to impose restrictions on somebody providing services in a member state because they do not have the requisite qualification. That, again, would trigger the charter. It is hard to come up with examples here, but there might be conflicts with the charter. If they do not let somebody into the country or want to expel them from it there might be an issue of family life, for instance, and that is where the charter would come in.

Professor Steve Peers: There is an interesting question of substantive law, because of course a lot of ECHR rights are in the charter but certain charter rights are not in the ECHR, such as some of the social rights—for instance, some of the rights pertaining to EU citizens and freedom of movement, although they cross over with the EU treaties instead. Some issues are potentially quite relevant, although they are not exactly in the charter: such EU general principles as the right to good administration where member states apply EU law, which has an impact on asylum or tax and so on. It is hard to pigeonhole that into the ECHR system. I suppose you would try to do it by Articles 6 and 13, but it is more directly applicable via the EU system. You have those two distinctions going on at the same time: first, substantive rights that are protected; and, secondly, different questions about the scope of the legal Act. Does it apply only to EU law or to all Acts of the member state?

Professor Sionaidh Douglas-Scott: Could I just add one thing? I totally agree with what my colleagues have said, but one important consideration is that the EU charter also applies to Acts of the EU itself, whereas it would be difficult in the case of the Human Rights Act to apply the ECHR where there was no national implementing Act. That is very important, because it is important that there be human rights constraints on what the EU itself can do. That makes the EU charter an important instrument.

The Chairman: I go back to something that you have just said, Professor Peers. You mentioned that the charter of rights might have things to say and rights conferred, for example in the area of asylum. As you know, many of the people who feel very strongly about the Human Rights Act and our involvement with the European Court of Human Rights do so around issues of immigration. I just want to tease out what you are telling us, which is that the charter of rights and European Union law may have things to say and may confer rights on EU citizens or people living in the European Union who have sought asylum and who would fit the definitions of those who should be protected. What does the charter give to them? Would they be able to make use of it?

Professor Steve Peers: Quite a lot of the case law on asylum in the EU court has referred to the charter. It has referred to different parts of the charter, some of which cross over with the ECHR. Non-removal to an unsafe country is based on the case law of the ECHR, but it is more explicitly in the charter. They have also mentioned the right to dignity in the context of an offensive approach to people claiming persecution on the grounds of their sexual orientation in credibility proceedings, or to asylum seekers who might be homeless as a family if they were not given private family housing of at least minimum quality, for instance. Some aspects of the freedom of religion and non-discrimination on grounds of sexual orientation are built in as well, which also build on ECHR case law. It is a mix of ECHR rights and non-ECHR rights.

One thing to point out, though, is that the UK has opted out of some of the EU's asylum legislation—most of the second phase, for instance. We are still bound by the first phase, but for us the scope of EU law is not quite as broad as it is for most other member states, having opted out of the second-phase legislation. Detention of asylum seekers, for instance, is regulated only in a very limited way for us, whereas it is regulated in much more detail for other member states. I imagine that we will see that particular issue litigated in the case law in years to come.

Q3 Baroness Neuberger: Some of that ties together with this question. If the UK were to repeal the Human Rights Act and withdraw from the European Convention on Human Rights, are there particular areas of national policy that would be subject to gaps in human rights protection? In other words, what does the common law protect? Presumably some of that would apply to asylum.

Professor Sionaidh Douglas-Scott: I am not an expert in asylum law, so I will leave that question to be fleshed out by my colleagues, but I have concerns about the view—you may not want me to go down this road right now—that the common law by itself could do an adequate job of protecting human rights. This view has been expressed in several different quarters. Certainly it was true in the early 1990s that there was a growth in the development of common-law constitutional rights, but we should remember that one of the reasons why it was felt important for Britain to incorporate the European convention in the Human Rights Act was that the common law was not doing an adequate job. There were many cases in which those rights could not be adequately protected at common law, and challenges were brought to Strasbourg.

Baroness Neuberger: Could you be specific, not only for the Committee but for the record, because that is quite important? Could we have a couple of examples?

The Chairman: Some of us will know what the cases were, but it would be helpful if you could give us a range.

Professor Sionaidh Douglas-Scott: There were cases on freedom of expression where freedom of expression was held to be a very important right that was recognised at common law. Cases concerning access to a court were also held to be very important. The important point is that the common law does not cover the spectrum of rights in the ECHR. When it comes to a right such as Article 8, the right to respect for one's private and family life, which is obviously important in the areas that we were talking about, a lot of the development has come through the case law of the European Court or national courts. It has not been developed at common law. When it comes to freedom of expression or access to a court and the right to a fair trial, the common law may not be doing a bad job, but there are other areas where it seems to be weaker, and areas where there is a focus in the case of repeal of the Human Rights Act as well, so even if something were to replace it, there would be a concern to give less protection in those areas.

The Chairman: You mentioned other areas. What would those be?

Professor Sionaidh Douglas-Scott: It would not just be Article 8 on private and family life but Article 3 on inhuman and degrading treatment and the extent to which that can apply to immigrants. There is an attempt to limit the effect of that. It is very difficult to say, of course, because we do not have concrete proposals on reform of the Human Rights Act, but from what one reads these seem to be areas in which there is an interest in reform. These areas have mostly been developed by the European Court of Human Rights, and its case law has then disseminated among member states. The common law has not been so active in those areas, so it would be quite hard to say that we have the full spectrum of protection, particularly in those areas of Articles 3 and 8.

The Chairman: Do any of you have anything to add?

Professor Steve Peers: On this question of the common law providing sufficient rights, there was a brilliant speech by Conor Gearty a few months ago. If you have not seen it, it is well worth a read. It goes through the details of the gap where the common law obviously did some good but did not do everything that the ECHR does on human rights protection. There would certainly be a gap in the specific instance of asylum. I do not think there is a very strong common-law right to asylum, if you could find any at all, or protection against removal to face torture. Other treaties that would still bind us, as well as EU law, might have an impact in asylum cases, but we are looking at the effect of the Human Rights Act and withdrawing

from the ECHR in isolation. There would clearly be a gap there in the case of removal to unsafe countries.

Dr Tobias Lock: Yes, and maybe I would just add the formal point that of course the common law cannot do anything against an express Act of Parliament, whereas under the Human Rights Act it can get a declaration of incompatibility with an expedited amendment procedure.

Q4 Lord Richard: I would quite like to ask about methods of enforcement under the two systems of the ECHR and EU law. From the point of view of the litigant, what are the pluses and minuses of each route? Which is the easier route for him to navigate in order to get what he really wants, which is an enforcement of basic human standards?

Professor Sionaidh Douglas-Scott: EU law clearly carries some advantages in terms of remedies, because very often litigants simply want a legal provision or something in an Act of Parliament not to apply in their case and to be able to get a remedy based on that. In the case of EU law, that can be a strong advantage—you can even go on and claim damages thereafter if you feel that you have suffered a loss as a result—whereas with the Human Rights Act, as we have already heard, unless the remedy can be in Section 3 to interpret national law in line with human rights obligations, the long-stop remedy is the declaration of incompatibility, which may not help the litigant much at all. EU law definitely carries those advantages if the courts are willing to set aside an Act of Parliament. It may not be an Act of Parliament that is at issue; it may simply be some provision of national law that is not statutory in form. But as we have already heard, there is the question of when EU law is going to be at issue. If we are talking about the Human Rights Act, eventually a case may have to go the whole way to Strasbourg, as it did in the Marper case and retaining the DNA samples of suspects. Most litigants would not want to face that long, long wait for their case to go all the way to Strasbourg, especially if the Human Rights Act were repealed. It would not help them very much in their case.

Lord Richard: So as a working proposition, the rights that a litigant would have under the convention are wider than the rights they might have under EU law. On the other hand, EU law is more directly enforceable and perhaps more easily enforceable.

Professor Sionaidh Douglas-Scott: The rights are wider or narrower depending, first, on whether the action falls within the scope of EU law. If it does, a much broader spectrum of rights could apply under the charter than under the European Convention on Human Rights. Secondly, yes, the remedies available because of the doctrine of the supremacy of EU law appear to be stronger than they do under the Human Rights Act.

Lord Richard: Is there any doubt about that?

Professor Sionaidh Douglas-Scott: Some people might argue that our courts, under Section 3, have been interpreting national law in line with European convention rights quite effectively in some cases in giving effect to applicants' rights.

Lord Richard: Do you think that our courts are reasonably quiescent as far as this is concerned? Is there much judicial activism going on, for example in the two cases of Benkharbouche and Vidal-Hall?

Professor Sionaidh Douglas-Scott: I see them as quite logically following from previous case law. I would not say that they are examples of judicial activism.

Professor Steve Peers: In the case of Vidal-Hall, many specialists in privacy and data protection law would have said that our national courts were previously almost scandalously reluctant try to enforce the law, and that what they did in Vidal-Hall was simply apply an ordinary approach rather than an activist approach and finally starting to apply and interpret the law correctly.

The one thing that I would like to point out about these cases, to add to what Professor Douglas-Scott said, is that they are both against private parties, whereas under the ECHR system you can bring a case against a private party, exhaust your remedies against them and then end up having to sue the state, which is slightly awkward. You can get a remedy against the state for something that it has done; perhaps it has failed to implement a positive obligation against the private parties. But it is certainly simpler if your real beef is with a private party—it may be a national law that is getting in the way, of course, in those two cases of a claim against a private party—and it is useful for the litigant to collect from the private party directly in vindicating their justice. In Benkharbouche, for instance, you had people saying that they were treated very badly by a consulate, which is deemed a private party since it is not an emanation of this state. In terms of the economics of law, it is very useful for the damages or whatever remedy is enforced to be enforced directly against the person who is infringing the law. Of course, they are only infringing the law because we have reinterpreted it in the light of EU law or given them an extra remedy in the light of EU law. Still, it is Google that ought to pay for these massive breaches of data protection that are alleged in the Vidal-Hall case, for instance, which is more or less accepted in parallel American cases. Anyone interested in the economics of law would say that the potential cost of breaching the law is the sort of thing they ought to consider before they consider breaching it. If that is somehow allocated to the state under the ECHR system, it is a rather ineffective way of enforcing the rules which the legal system is trying to enforce.

The Chairman: That is very interesting. Baroness Shackleton, perhaps I might draw you in. You had a question that you wanted to ask.

Q5 Baroness Shackleton of Belgravia: In what circumstances would a British Bill of Rights lead to the UK's withdrawal from the ECHR, and would you consider that the British Bill of Rights would have to kow-tow to EU law?

Professor Sionaidh Douglas-Scott: Okay, there are two parts to that.

Baroness Shackleton of Belgravia: I was not clever enough to devise the question. I am just asking it.

Professor Sionaidh Douglas-Scott: First, it would depend what was in the British Bill of Rights. Simply repealing the Human Rights Act and not having a Bill of Rights could be perfectly compatible. After all, Britain did not have one for many years before we had a Human Rights Act. So the obvious problem is more the question of what would be in it. Would it be incompatible with obligations that we have under EU law?

I would be slightly careful about the second point, because generally the doctrine of the supremacy of EU law requires national law to give way. But there are some exceptional circumstances where courts have made it clear that there might not be such an obligation if EU law conflicted with some very important constitutional principle of national law. The fairly recent Supreme Court HS2 case is some evidence for that. The Supreme Court said, obiter, that there are important national constitutional principles that should be borne in mind, and that if they conflict with EU law, EU law might not automatically take priority. So it depends very much on what they are. The court at that time was talking about parliamentary privilege, but one can imagine other principles that might come into play: rule of law principles and those sorts of things. So one cannot say that in every situation EU law would take priority over a British Bill of Rights if the content of that Bill of Rights was thought to be so important and so fundamental constitutionally.

The Chairman: I am going to give you an example of that. Jury trial is very much part and parcel of our constitutional arrangements. Although it does not involve giving an explanation of how a decision was reached, we accept it as being part and parcel of our system. I think what one is saying is that it is too deeply embedded in who we are for us to be expected to comply with European Union expectations that reasons are given, for example, for a verdict.

Baroness Shackleton of Belgravia: Who would decide this? On the ground, how would that work in practice?

Professor Sionaidh Douglas-Scott: It is partly a question of how this arises in the first place. Does somebody bring an action? Very often these issues come to light because somebody

brings a case. But I suppose that it could also arise at a political level. If there were negotiations in the EU political institutions, it would be for British Council members, or Commissioners possibly, to raise the issue and raise an objection. So there could be a chance earlier on, if it were an EU proposal to abolish trial by jury in certain circumstances, to deal with them at an earlier stage. Even such a situation is a bit complicated, because in Scotland the position with trial by jury is a bit different, so saying that it would be a fundamental constitutional principle might raise problems with Scottish constitutional lawyers. Until it actually arises, it is difficult to say.

Dr Tobias Lock: May I just add one thing that came to mind when I thought about this issue? There is one case in the Court of Justice called Maloney in which the Court of Justice imposed a lower standard of fundamental rights protection on a member state in an area where the charter applied. This is a bit odd. If the Bill of Rights were to guarantee a higher standard than is required by the charter or EU law, it might not be enforceable at least from the EU point of view. Whether we accept it here or not is a different question. Here it was about trial in absentia. A chap was subjected to a European arrest warrant after he had been tried in absentia, and the European arrest warrant contains an exhaustive list of conditions under which a trial in absentia can happen. This was the case; it had all been complied with. But the Spanish, who were the extraditing country, said, “No, we can’t do this. Our constitution doesn’t allow it”. Then the Court of Justice came in after reference had been made from the Spanish Constitutional Court and said, “No, you have to allow it. EU law takes primacy over your fundamental rights that are enshrined in the constitution at the highest possible level”. So there is something there.

Q6 The Chairman: That is interesting. I want to go back to Baroness Shackleton’s original question and tease out the scenario in which a British Bill of Rights would lead to withdrawal from the European convention and the European Court of Human Rights.

Professor Steve Peers: The previous Justice Secretary released a paper last year in which he seemed to suggest that we would draft the Bill and then, in a way, wave it in the face of the Council of Europe institutions and dare them to accept it or not accept it. I do not really think that that is a process which the Council of Europe system allows for. Obviously it allows for the enforcement of judgments if they go against the UK, but somehow trying to provoke an argument and some ad hoc procedure seems to be unnecessary.

The Chairman: Our new Justice Minister might have a very different way of wanting to do business.

Professor Steve Peers: Of course. Mr Gove may very well do things differently and will not proceed down that route, so there would be no reason why a Bill of Rights would as such lead to withdrawing from the ECHR. It might mean more cases that are unresolved in British courts and more losses in Strasbourg, but that is no reason as such why that should lead us to leave the ECHR. Of course, there are many parties to the ECHR that, even though they might have stronger human rights protection on paper, have more fundamental problems in human rights protection in national courts and lose more cases before the ECHR, and they are not required to leave. Only in the circumstances of some kind of coup, or whatever, does the Council of Europe have a process of suspending a state. There is nothing, as far as I know, to suspend participation in the ECHR separately from the Council of Europe. That seemed to be a manufactured argument that we do not need to have, to be honest, and I imagine that—

The Chairman: I can see that, but what is being described is the possibility of there being a British Bill of Rights that by and large contains within it all that is within the European Convention on Human Rights but with explicit restrictions on what the meaning of those rights should be. For example, Article 8, the right to family life, would not apply in circumstances where people had committed serious crime and a court felt that they should be deported to a place with which they have a connection. It is about trying to put a limitation on judicial discretion or discretionary interpretation of the rights. That, I understand, is what the plan would be for this British Bill of Rights. How would that play with our membership of the European convention, the European court, and the whole tapestry of our engagement with the Council of Europe?

Professor Steve Peers: It would simply be likely to lead ultimately to more cases in which someone did not get satisfactory remedy in the national courts because of the British Bill of Rights and then went to the ECHR system. In the case of a gap between the Bill of Rights protection and ECHR case law, the court in Strasbourg would rule that there was a breach of the ECHR. I assume that the Government would pay damages and costs that might be awarded against them, but they might then resist the broader obligation under the ECHR to undertake to comply with the rulings of the court by changing international law. You would have a longer and longer queue of cases like *Hirst*, which we have already of course and which some other countries have too, in which we do not comply with the convention in the sense that we have not changed our national law to comply with the convention, but I do not see why that necessarily means that we should somehow leave or be forced out of the system.

Baroness Hughes of Stretford: Going a bit further down the road in these what-if scenarios, if the UK withdrew from the European Convention on Human Rights and/or repealed the

Human Rights Act, what impact on EU membership, if any, might there be for the UK or its relationships with other member states?

Professor Steve Peers: I wrote on this at one point last year, I think. Formally speaking, if you read the EU treaties, there is no formal requirement on each member state to be a party to the ECHR, but there is an assumption that they are all parties to the ECHR. It is referred to in the charter and in the general principles of EU law. The EU itself is required to accede to it. It is frequently referred to in preambles to legislation. There are lots of references to it in the case law of the EU Court of Justice. So it is very awkward to have a member state of the EU that is not a party to the ECHR, particularly given the extension of what the EU does into many non-economic areas compared with 30 or 40 years ago. But what would you do if we did leave the ECHR, because there is also no procedure as such to throw a member state out, to require it to leave? There is a procedure to suspend a member state for continuing major breaches of human rights law, but we might denounce the ECHR and have a British Bill of Rights and perhaps a lesser level of human rights protection but not of sufficiently low standard to constitute that kind of significant and continuing breach. You see a reluctance to punish Hungary in this way, and I cannot imagine that we would get down to or below that level, although who knows, in the next few years at least. That would not even constitute an expulsion but a suspension, in which case I imagine the British public would vote to leave anyway. Any member state subject to that would probably want to leave.

So I cannot imagine the scenario in which we would somehow be required to leave because we had not ratified the ECHR, but it would cause enormous difficulties in practice and immense friction, so it may de facto lead to or exacerbate a process of leaving the EU, even if there is no explicit legal requirement to do so. Perhaps a second referendum on the EU, for instance, even if we had had one already, would be more likely to appear on the horizon.

Baroness Hughes of Stretford: Could you expand very briefly on the kind of difficulties that you foresee that might prompt that process?

Professor Steve Peers: One of them is in the next question about mutual recognition and, I suppose, mainly criminal law. If the UK started to expel EU citizens and their family members to other member states for crimes that were not very serious or that did not justify removal under the EU's citizens' rights directive on EU citizens, that would be a breach simultaneously of EU law and of the ECHR. If there were other breaches of the ECHR, even removals to unsafe countries that did not fall within the scope of EU law, there would be a lot of misgivings on the part of other member states as to whether they ought to co-operate with us more generally or whether it was appropriate to have a member state that is part of the EU

without signing up to the ECHR. That would be seen as flagrantly unacceptable in terms of the values which the European Union ought to stand for, even in the absence of a particular complication because it related to asylum, the European arrest warrant or whatever else.

Baroness Hughes of Stretford: I was going to move on to question 7. I do not know whether there are any further questions under question 6.

The Chairman: We have almost had an answer to question 7, because Professor Peers has moved on to it. Does anyone have anything to say about question 7? Baroness Hughes, perhaps you would like to describe the detail of that question.

Q7 Baroness Hughes of Stretford: I just wanted to pick up on one point. As you know, we wanted to ask specifically about mutual recognition, and given its importance to so much of the justice and home affairs co-operation on a whole range of policies and practices, if we in the UK significantly changed the rules and possibly the level of protection of human rights and associated principles here in the UK through a Bill of Rights, would this threaten our continuing to participate in those areas of EU co-operation?

Professor Steve Peers: I think what would happen in practice is that every time we sought to enforce a UK criminal law decision or civil law judgment in the national courts of another member state, anyone with the remotest argument—perhaps not even a good argument—would go into the courts there and say, “You can’t enforce that judgment against me”. Even if it was for a criminal fine or civil law damages action, or more obviously a European arrest warrant, the British citizen who has fled to another country—the Jeremy Forrest, or whoever it is—would say, “You can’t enforce that against me, because there is no guarantee of sufficient human rights protection in the UK”. Then you would get an assessment of whether the British Bill of Rights would be enough, in general or in that particular case. Quite apart from EU law, there might be national constitutional requirements in other member states that pointed you to a requirement, or something that you could invoke as a requirement, that the European arrest warrant was not to be executed or the civil or criminal law judgment was not to be enforced against you. That, I think, would be a very frequent occurrence, but whether all those cases would win remains to be seen. Sooner or later, hopefully at an early point, they would be sent to the Court of Justice to assess properly whether that argument was valid.

I would add that the Court of Justice is relatively unwilling to let human rights arguments succeed as a ground of refusal for enforcement in mutual recognitions. It is a little willing in civil law cases such as *Krombach*, but it has been very unwilling to do so for the European arrest warrant. The *Aranyosi* case, which is now pending, has pointed it to the most obvious example: if there are terrible detention conditions in another member state, is that a ground for

refusal? The court has avoided or consistently seemed to refuse the argument until now, but that is in a scenario where all the states have constitutional human rights protection and are parties to the ECHR. If the UK ceased to have either the Human Rights Act or ECHR participation, I imagine it would have a British Bill of Rights instead, but would that be good enough for mutual recognition? I am certain that there would be challenges and that it would tie up proceedings for a while. You cannot really be certain in the abstract whether they would be successful, but I imagine that some would be. It would certainly add to the complications of applying mutual recognition, for a while at least.

The Chairman: Professor Peers, you seem to be saying that at the moment the Court of Justice has held back, which might not be the case if the whole situation changed and we were reliant on a British Bill of Rights rather than on our Human Rights Act, which incorporates the convention.

Professor Steve Peers: Yes. Also, of course, the national courts are involved, and they might be more reluctant to execute a European arrest warrant, for instance in respect of the UK, if there is an argument that there is a lack of human rights protection in the UK. It would then ultimately be for the Court of Justice to decide. To get back to the case of *Maloney*, which Dr Lock mentioned, the Court of Justice said, “You can’t have too much human rights protection in mutual recognition scenarios”. If the German courts had said that you cannot surrender someone to a state that does not ratify the ECHR, would that be an example of too much human rights protection in Germany or not? If that scenario plays out, the real conflict is then between the EU Court of Justice and the German constitutional courts. But it is having a big impact on the UK. It is making it difficult for us, at least until all that gets resolved to everyone’s satisfaction, to apply the mutual recognition mechanisms.

Q8 The Chairman: I am going to take you back to a question posed earlier but which I do not think we heard from you on. Would a British Bill of Rights have to be subject to EU law?

Professor Steve Peers: As long as we are a member state of the EU and have the European Communities Act, that would be the predominant rule. But then we have the European Union Act 2011, which says that if Parliament clearly legislates otherwise, we have to give effect to an Act of Parliament. Presumably the British Bill of Rights would be an Act of Parliament. Then you would have the question in our courts of whether it was sufficiently clear that Parliament had intended to legislate contrary to EU law, including the charter. In that case, our courts would feel constitutionally obliged to give effect to what Parliament had decided. So in part there is a question of drafting and interpretation, and in that case the national courts would not even ask the Court of Justice the question. But you would still have that kind of

action or complication going on, perhaps in places such as Germany, if we were trying to implement a European arrest warrant. You would still have people complaining to the European Commission, and the possibility that the Commission would in individual cases—or perhaps because of a more general gap in protection—bring an infringement action against the UK, saying that it was infringing EU law because of some human rights rule linked to EU law that was no longer being enforced because the national courts were giving effect to the British Bill of Rights and explicitly then refusing to give effect to EU law.

So are we bound by EU law? The answer actually differs depending on whether you ask it as a domestic law question or an EU law question. The EU court would say yes, potentially. The national courts or constitution would say no.

The Chairman: Then I will ask you this, although I think you are already answering it. Are you saying that if the Government repeal the Human Rights Act, they would put the UK in direct conflict with EU law in certain areas? The potential for that is great and you have expressed it in relation to the European arrest warrant. Can you think of other areas where we might see it?

Professor Steve Peers: In the specific case of the removal of EU citizens and their family members, I imagine that that could be an infringement of both the EU citizens' directive and Article 8 of the ECHR if the crimes were not serious enough to justify removal.

The Chairman: Let me give you an example. Suppose that you had a young man who commits robberies—so not insignificant crimes but significant ones—and after the serving of a sentence there is an issue with deportation back to Jamaica, from whence his family originally came, but he has lived in this country since he was six and is now in his early 20s. Suppose that the new Bill of Rights specifically says that people who do not behave properly should not be protected by the right to family life. This young man's family—his mother, father, brothers and sisters—are in Britain, he has had a baby by someone here, and he has had his education and been socialised here, given that he spent most of his growing-up life here.

Professor Steve Peers: That would in principle fall outside the scope of EU law and therefore the charter, unless he had a link to an EU citizen—if the baby is with a German lady or is a French citizen because of descent—or unless he has some asylum claim, perhaps because he is gay. That would be the sort of claim where you might have a chance with Jamaican cases.

The Chairman: Is he not an EU citizen by virtue of the fact that Britain is still a member of the European Union?

Professor Steve Peers: Yes, but there is no link to EU law in that scenario. As I say, unless he had a child or a family member who was a citizen of another member state, removing a UK or Jamaican citizen to Jamaica would not normally be within the scope of EU law.

Professor Sionaidh Douglas-Scott: Add a British spouse or living in another country and the situation might become different. There is case law on that, but that is the problem with the charter: sometimes the action does not fall within its scope.

The Chairman: But having a British spouse would.

Professor Sionaidh Douglas-Scott: Perhaps it would be better to have a French spouse living in the UK.

The Chairman: I can see the advice that is being given to clients already. Can I invite Lord Cromwell to come in?

Q9 Lord Cromwell: I would like to come back to the direction of travel and ask you a two-part question. First, if the Human Rights Act is repealed, are you expecting that we will therefore see increased references to the European Court of Justice? Secondly, does that mean that the charter rights will start getting more and more broadly interpreted as a result? Dr Lock, do you want to have a go?

Dr Tobias Lock: Yes, maybe. If we did not have a Human Rights Act and had no other human rights guarantees at the national level, I would imagine that creative counsel in courts will invoke the charter as much as they can. If you get an increase of charter references, you would probably get a higher number of references overall. I suppose that would be logical. At the moment, I think that counsel will invoke the Human Rights Act if it suits them, because they, and judges, are familiar with it, so it is easier to get your case through. Would the charter be interpreted more broadly? That depends on by whom, because we have two potential interpreters of the charter. We have the Court of Justice, but only for references made, and we have the national courts, which might feel that they have to give a remedy. That, of course, is just speculation. They might just interpret the charter generously, at least, if they felt like it.

Professor Sionaidh Douglas-Scott: If I could add one point, I totally agree with everything Dr Lock has said, but one disadvantage of the charter compared to the Human Rights Act is that very often the human rights points are not central but rather tangential, because the main point is an argument of EU law. That means that the way the case is argued comes out a little differently and is sometimes not as obviously a human rights claim, so you have to bring that to bear. Particularly if the case goes to Luxembourg, it does not look so obviously a human rights case in the way it would if it went to Strasbourg. Because of that, it might be a bit

difficult to predict which way the charter will be developed. Sometimes references would have to go to Luxembourg. The European Court of Justice in Luxembourg is not a human rights court; it does not just specialise in human rights, so its take on things is sometimes quite different from one.

Lord Cromwell: Might it almost de facto become one, however? You are highlighting artificiality, but is that the direction of travel?

Professor Sionaidh Douglas-Scott: It is difficult to predict.

Professor Steve Peers: I do not think that a charter would necessarily be interpreted differently, but it would be more relevant. It would be invoked in more cases, because there would be a bigger gap between what you would get by invoking the charter and by relying on national law. Depending on exactly what the British Bill of Rights is substantively and how it is enforceable, the gap is likely to be bigger than what you have already with the Human Rights Act and therefore more attractive to rely on for litigants.

Q10 Baroness Neuberger: You have all three hinted that the charter can be interpreted in very different ways. Are there any instances you could cite of where it is already being interpreted in different ways in different countries within Europe, and is that an indication of the direction of travel? It may be an impossible question, but I just wondered.

Professor Sionaidh Douglas-Scott: One case that comes to mind is that of the German constitutional court concerning its reaction to the Fransson case, which has been mentioned. Some people said that in Fransson the European Court of Justice interpreted the scope of the charter fairly widely. Not everybody would agree that it was the right interpretation, but the German constitutional court then seemed to be giving out a warning, saying, “We don’t agree with this and might not apply it”. You might say that that was one court taking a more cautious approach to the charter.

Baroness Neuberger: It was flagging up a warning.

Professor Sionaidh Douglas-Scott: Yes, in that case.

Baroness Neuberger: That is very helpful. Thank you.

The Chairman: If no one else wants to come in on that, we will go to Baroness Eccles.

Q11 Baroness Eccles of Moulton: This is along rather a different line, but it is obviously very pertinent to what we are talking about. It is about the EU acceding to the ECHR and stems back to the Lisbon treaty. I think that the appeal for an opinion from the EU court was the second attempt by the Commission to put forward a proposal, and it said that it was still incompatible with EU law. I suppose this is interesting because it shows how powerful the treaties are. There are lots of ways that one can think of whereby a group of 28 member states

become part of a convention that already has those 28 member states as part of it, but one could wonder whether there is any possibility of the EU court ever finding it compatible. I wondered what your views were on this conundrum and whether you see a time when the EU could accede to the convention.

Professor Sionaidh Douglas-Scott: If I could respond to your last point about the 28 member states already being members, it is very important to remember that the EU itself is not bound by the ECHR in such a way that litigants can currently bring actions before it in the ECHR. That is the main reason why there is a real need for this. The EU is the one public authority in the whole of Europe that is not susceptible to that action, which is why it is very important. I have separate views about the opinion of the court in 2/13. I disagree with quite a lot of what it said, particularly about the autonomy of EU law. Some of the things the court gave in its reasoning were too indicative of the federal approach to EU law. Although the court said that it did not see itself as a state in asserting the autonomy of EU law, it seemed to be seeing EU law in that way, and I find that quite troubling. That is a very general answer to your question.

The Chairman: Are you saying that you would like to see the EU acceding to the Convention?

Professor Sionaidh Douglas-Scott: Yes. It is important that its actions be—

The Chairman: Challengeable.

Professor Sionaidh Douglas-Scott: Challengeable by an outside body, yes.

The Chairman: And that they could be responsible for discriminatory practices and so on, just like anybody else, and they should be challengeable for that.

Professor Sionaidh Douglas-Scott: Yes. It is interesting that the first comment given by the then Lord Chancellor in the last Government about Opinion 2/13 was that he saw the Court of Justice as having a reaction rather similar to his: that it wanted to be top court and not have a body above it. From one perspective, Opinion 2/13 could be seen in that way: that the European Court of Justice wants to preserve—

The Chairman: Its own authority.

Professor Sionaidh Douglas-Scott: Its own authority, yes.

Professor Steve Peers: The judgment is highly problematic, legally speaking. Much of the court's reasoning is, with respect, utterly unconvincing. It does not seem to have a grasp of the fundamentals of what an international human rights treaty is there to respect, particularly in the areas of justice and home affairs, and foreign policy. But that really relates to the answer to the second part of the question: what is the prospect of the EU acceding? I think the court was doing everything it could to throw a spanner in the works. It was throwing the

kitchen sink at this whole idea, disliking it intensely and trying to think of any reason it could. I counted 10 different reasons, some a little better than others and some more solvable than others. Ultimately, taken as a whole, it was a very difficult collection of problems to resolve.

I would even argue that some of what the Court of Justice said, at least about having no jurisdiction for the human rights court over foreign policy actions, is incompatible with the nature of the ECHR. Even if you made a reservation, it would be inadmissible. The human rights court can of course strike down reservations; it has done so a few times without it ever being struck down, which would create a real legal conflict. That would be my answer: it is a deliberate attempt at wrecking the whole process.

While the rule of law has to be observed, and I suppose that there is a legal requirement for the EU to sign up to the ECHR, I cannot imagine it happening in the medium term—and nor should it on the basis which the Court of Justice has set out. I entirely agree with Professor Douglas-Scott that it is a good idea in principle for the EU to be subject to external supervision, but it should not be so subject with all the gaps that the Court of Justice wants to create in its opinion. If anything, the process should go forward only by another treaty amendment, saying, “Notwithstanding the court’s judgment in Opinion 2/13, the EU should become party to the ECHR”, or having some other way of overruling some of the key aspects of the judgment. That would be the only basis on which it should be welcomed that the EU would now accede.

The Chairman: Dr Lock, do you have anything to add to that?

Dr Tobias Lock: I agree in substance. The process is quite arduous. You need all 47 Council of Europe countries to agree. You need the Court of Justice to agree, because if there is a redrafted agreement it will go back to Luxembourg. If the agreement were redrafted in a way that the Court of Justice would accept and that would exclude mutual recognition and the common foreign and security policy entirely from review, I imagine that some countries in the Council of Europe would say, “I’d like to have the same or similar privileges”—and some of them are more likely to go on expeditions to Syria, for example. So I cannot see that happening very soon.

Baroness Eccles of Moulton: These are very interesting answers, because when discussion takes place among member states in Strasbourg, they take the opposite view. They see this as an imposition. They do not see why the EU should become part of the convention, because they would see the EU as having far too much control over what happens. Your argument is that this puts more control on the EU, which is a very interesting slant on a subject that is debated from a rather different point of view in Strasbourg.

Dr Tobias Lock: Maybe for the member states it would create some sort of relief, because at the moment they can be held responsible, instead of the EU, when an EU measure has had to be adopted, even against the member state's vote in the Council. That measure has to be implemented by the member state and, if it falls foul of human rights laws, the member states may have to pay a fine.

The Chairman: What Baroness Eccles is saying is that the member states do not seem to have clocked the fact that this could be an advantage to them, rather than a disadvantage, and that they are all resistant to it. We have very little time left, so I want to go back to an issue on which I felt that I had a clear answer from Professor Peers but on which I am not sure that we gave Professor Douglas-Scott and Dr Lock enough opportunity to answer. If we were to withdraw from the European Convention on Human Rights and repeal the Human Rights Act, what would be the impact on our relations with member states? Would it threaten our continuing participation in European Union co-operation on issues such as justice and home affairs?

Professor Sionaidh Douglas-Scott: Yes, there are definitely political issues. Although there would be no clear legal objection against the UK doing that, de facto it would give rise to all sorts of problems. I am thinking about the Commission's current rule of law initiatives, where it is spending quite a lot of time working out programmes on the rule of law for countries such as Hungary. The legitimacy of the Commission or the states together saying, "This is action that we find unacceptable from other members", is threatened if one country appears to have removed itself from as important a convention as the ECHR. I think that politically it makes it difficult not only for the UK but for an institution such as the Commission to do something in the name of the EU.

Dr Tobias Lock: I agree with that. To an extent, to mitigate the effects within the scope of EU law, the charter would still apply, so there would be cases in which there was human rights protection and, from an EU perspective, it would all be hunky-dory, but there might be other cases, as Professor Peers mentioned, where other member states would refuse to co-operate. That would certainly be detrimental to the UK's membership of the EU; it could even make it untenable.

The Chairman: I want to thank all three of you for coming. I beg your pardon, but Lord Richard has something to say.

Lord Richard: I just want to follow up on what you just said. Having listened to all the evidence that you have given, I think that what you are really saying is that the precise effect of the repeal of the Human Rights Act, and how we apply EU law in this country, is unclear

but dangerous, clouded and extraordinarily complicated, and that it is probably better not done.

The Chairman: Is that view shared by all three of you? I do not want to put words into anybody's mouth. Lord Richard is, like me, a cross-examiner, and we know that it is sometimes good to get agreement to a general statement. Are you content with the view that this is a very complicated route to go down and one that is fraught with difficulty?

Professor Sionaidh Douglas-Scott: Yes.

Dr Tobias Lock: Yes.

Professor Steve Peers: Yes.

The Chairman: Thank you. I just want to re-emphasise something that I mentioned earlier. If you feel that there were things that you would like to have said or clarified, please put them into writing to us. Please take the opportunity to do that if you feel that there is something that you would have liked to have spelt out in a way that you felt might have been clearer. I am grateful to all three of you. It was a very stimulating session. It was informative and invigorating and I want, with others, to show our appreciation to you.