



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

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Witness: Professor Michael Dougan

USE OF THE TRANSCRIPT

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

Members present

Lord Richard (Chairman)
Lord Blair of Boughton
Lord Cromwell
Baroness Eccles of Moulton
Lord Judd
Baroness Ludford
Baroness Neuberger
Baroness Shackleton of Belgravia

Examination of Witness

Professor Michael Dougan, Professor of European Law and Jean Monnet Chair in EU Law, University of Liverpool

Q54 The Chairman: Good morning. It is good of you to come. Thank you very much indeed. I welcome you to the Committee. I think you know what we are engaged upon. We have had the opportunity to read your evidence, for which many thanks, and the article you wrote, which was comprehensive, interesting and demanded a certain degree of attention.

Professor Michael Dougan: Thank you very much.

The Chairman: I will deal with some formalities first. The session is open to the public. A webcast of the session goes out live as a video transmission. It is subsequently accessible via the Parliament website. A verbatim transcript will be taken of the evidence and will be put on the Parliament website. A few days after this evidence session, you will be sent a copy of the transcript to check it for accuracy. We would be grateful if you could advise us of any corrections as quickly as possible. If, after this session, you wish to clarify or amplify any points made during your evidence or have any additional points to make, you are welcome to submit supplementary written evidence to us.

The formalities having been concluded, perhaps we could start with the evidence. Do you want to make a brief opening statement or shall we launch straight into the questions?

Professor Michael Dougan: I am happy to launch straight into the questions.

The Chairman: The first question is from Lord Cromwell.

Q55 Lord Cromwell: Good morning. Obviously, a key area is the protection of human rights under the ECHR and under EU law. If the UK went ahead and repealed the Human Rights Act, would the EU charter and common law provide us with equivalent national protection or would there be gaps that a Bill of Rights could cover?

Professor Michael Dougan: It is probably worth exploring what the EU system of fundamental rights protection offers and how it might be affected by repeal of the Human Rights Act, and then the common law. On EU law, it is probably worth noting that there are limits to what the EU system of fundamental rights protection offers within the UK, as well as strengths. It is limited in its scope. It applies only to member state action within the scope of the treaties—that is a concept that we might talk about further. But there are also limits with regard to content to what EU fundamental rights protection offers. The Charter of

Fundamental Rights is often portrayed as being broader in scope than the ECHR, as containing better, more modern rights, but we should not forget that it still needs to satisfy the conditions to have direct effect before any one of its individual provisions is capable of producing an autonomous legal effect within a national legal system such as the UK's. There are provisions of the charter that may sound very nice, they may sound like they give a lot, but they do not actually have any autonomous application because they do not satisfy the criteria for producing the direct effect of EU law within the UK. The charter itself also contains an express limitation on the justiciability of some of its own provisions. It draws a distinction between rights and principles: rights are fully justiciable; principles are not. We should also bear in mind the *Melloni* decision and the idea that sometimes the charter is actually a ceiling on what member states can offer; it is not just a minimum standard.

If we accept that there are certain limitations to what the charter offers the UK, the main benefits are that it can take priority over national legislation in a way that the common law or the Human Rights Act do not automatically do—certainly not the Human Rights Act. Also, of course, its remedies are better: you can get compensatory damages for breach of EU law as of right, whereas that is not the case under the Human Rights Act—compensatory damages are discretionary—and it is certainly not true under the common law, where a mere breach of fundamental rights in itself does not create any right to damages; you have to show a tort as well. If we accept that that is the system that European fundamental rights protection offers—it has benefits, weaknesses and limitations—there is no reason in principle why that system should be at all affected by repeal of the Human Rights Act. That puts all of the onus on the common law to come up with any solutions to the gaps that might arise from repeal of the Human Rights Act.

For me, the problems do not really arise as regards particular substantive rights. We all know that the common law is “better” at some rights than others. We are very comfortable with freedom of expression. We are very good at the right to a fair hearing. Maybe historically we have not been quite so comfortable with privacy and family life and so on. The real problems are more structural than to do with particular substantive rights. For example, there is a long-running debate about the standard of judicial scrutiny under the common law. Traditionally we have used the *Wednesbury* principle of unreasonableness but increasingly, the common-law courts have moved towards a proportionality assessment, which is virtually interchangeable with the Human Rights Act or with EU law. We have seen in recent cases such as *Kennedy* and *Pham* that the common-law courts now effectively apply proportionality, almost explicitly, even in fundamental rights cases. Some of the structural issues that were a historical problem have probably been resolved.

The big one that remains, of course, is parliamentary sovereignty and the idea that the common law will not infringe upon the express intentions of the legislature. We know from cases such as *Evans* that sometimes the courts can push that doctrine right to its very limit, but in principle the common law reaches its limit when faced with an express statutory direction. That is where the problems will arise. I suppose the solution, depending on what the Bill of Rights might contain, will be that more cases will end up at Strasbourg.

The Chairman: So that I understand what you are saying, you seem to be indicating that the charter plus the common law will be broadly sufficient and we do not really need the Bill of Rights—is that right?

Professor Michael Dougan: That might be going a little too far. The common law is capable of covering many gaps that might arise from the repeal of the Human Rights Act but it is certainly not as clear and as reliable a substitute. We are putting a bit of faith in the idea that the common law is not quite the same as it was in 1998, before the Human Rights Act. The common law has developed quite considerably under the influence of EU law and the Human Rights Act. An optimist would say that the common-law courts could do an adequate job but that there would be quite serious limits, particularly when dealing with statutory schemes.

The Chairman: The Bill of Rights would be there, presumably, to fill in the gaps—is that the way in which you would put it? You have the charter, plus the common law, with the Bill of Rights filling in any gaps that may exist between that system and the one we have at present.

Professor Michael Dougan: At the moment, the way that the system operates in practice is that you have the EU system for situations governed by EU law and the Human Rights Act as the primary port of call for human rights disputes. The common law tends to be the second port of call in a fundamental rights dispute. Sometimes the courts tend to look interchangeably and tend not to draw a strict distinction between the two, or simply note that they are quite happy to reach the same result regardless of whether they would apply the Human Rights Act or the common law. With the Bill of Rights, we would probably have the same system: EU law takes priority for EU situations; the Bill of Rights would be the first port of call for human rights disputes, but the common law would still be there, able to do its job.

There are some situations where the common law has an added value, even on top of the Human Rights Act; for example, the definition of standing to bring judicial review under the common law is much wider than the definition of a victim under the Human Rights Act. If a non-governmental organisation or a pressure group wants to bring a fundamental rights challenge before the UK courts, it would be relying on the common law to do that rather than on the Human Rights Act because it would not be classified as a victim for statutory purposes.

The system is pretty complicated. Good lawyers know how to work the system, but there is a sort of order of priority and I do not think that that order of priority would change very much if there was a Bill of Rights.

Lord Cromwell: You talked about being an optimist. Of course, a pessimist says that things cannot get worse; an optimist assures you that they can. Are you saying that one function of the Bill of Rights could be to clarify the potpourri of different places, whether you go to common law or the charter? I had not thought of this before, but it might even have a clarifying role in doing that.

Professor Michael Dougan: It could do if it wanted to do that explicitly. I am not sure how much it would actually change things but it could have a useful clarifying role.

Lord Cromwell: Almost to guide the citizen, rather than introduce new law.

Professor Michael Dougan: Sure.

The Chairman: It is not really bringing rights home, is it?

Professor Michael Dougan: The Bill of Rights?

The Chairman: Yes.

Professor Michael Dougan: I suppose it depends a little on its content but from what I understand from the press coverage anyway, it would effectively be a replication of the Human Rights Act but with certain limitations on the full domestic recognition of certain aspects of the jurisprudence of the European Court of Human Rights in Strasbourg. To that degree, it feels like it would be a Human Rights Act with a few minus points, but it would not fundamentally change the idea that if you are not satisfied with what you get under your domestic legal system, you would still have to bring a case to Strasbourg—assuming that we would remain a member of the European Convention on Human Rights, of course.

Q56 The Chairman: Thank you. Perhaps we can move on to some of the cases of the European Court of Justice. I have three questions to ask you, together. I want you to look at the boundaries between the provisions of the charter and the provisions of the Human Rights Act and, from the point of view of the case law of the European Court of Justice, can you explain—in lay man’s terms, please—the meaning of, “the provisions of the Charter are addressed to the Member States only when they are implementing European Union law” in Article 51? That has clearly caused you a great deal of thought, and I think it will cause this Committee a great deal of thought as well. Perhaps you could expand on that first.

Professor Michael Dougan: Sure. I would probably tell a lay person that there are two useful things to bear in mind when reading and understanding that phrase in the charter. First, it does not really mean what it looks like it means. The provision has had quite a complicated drafting history. It has got a lot of lawyers quite agitated. Originally, before the charter came along, fundamental rights as a matter of EU law were protected as part of the EU’s common law, as it were—the unwritten principles of the EU. We call them the general principles of Union law. They were said to apply whenever the member states were acting within the scope of EU law. There were a lot of cases that defined what was within the scope of EU law. When the member states decided to adopt the charter into the framework of the EU, they codified a lot of those fundamental rights in a written form into the provisions of the charter, but they decided to use a different phrase to describe its scope of application. They said it would apply only when implementing Union law.

For several years, no one really knew how those two sets of fundamental rights law—the written and the unwritten—related to each other. Were they the same thing or did they have a different scope of application? We now know, thanks primarily to the judgment in *Fransson*, that they do mean the same thing: the idea of acting within the scope of Union law is the same as implementing Union law. There is a historical continuity in the case law, going back for 30 or 40 years now. What this phrase means—the idea of acting within the scope of Union law, which is probably the more accurate description, rather than the one in the charter—is that there are two situations when a member state has to respect EU fundamental rights in addition to or even instead of its own fundamental rights regime. The first is when the member state is implementing Union law in the sense of applying Union law within its domestic legal system, as a legislature, an Administration or even a judicial system. The second situation is when the member state is seeking to derogate from EU law. It has an EU obligation, it does not want to have to respect that EU obligation fully, so it wants to take advantage of a derogation. In both those situations, EU fundamental rights will apply—the written and the unwritten; it is important to remember that the unwritten fundamental rights are still there as well. The basic rationale is that if we let the member states apply

their own standards or different fundamental rights standards, it could undermine the effective application of EU obligations within each member state, and it could lead to a very differential application of EU law across the different member states, particularly if discretionary powers are subject to different standards of judicial review, depending on the member state where the dispute happened to arise.

Q57 The Chairman: I think that is all right—unless anybody else wants to come in. I think I understand it. Can you give us some examples of where the European Court of Justice has either accepted or refused to accept that the charter applies? How has it actually worked in the courts?

Professor Michael Dougan: This is probably the main finding that came out of my research project this year, which led to the publication in *Common Market Law Review*. It sounds quite difficult in the abstract, partly because the court does not really use an abstract test when it comes to these disputes. It does not have a generalised set of criteria that it uses that mean something in the abstract. They tend to be very case-by-case, quite pragmatic, quite forensic. Nevertheless, they make a lot of sense. The case law is surprisingly consistent. But it is best understood by reference to case-by-case examples.

If we take some examples of situations where the court has said that EU fundamental rights law applies, in the sense of implementation, that would cover a situation where, if a Union directive says that the member states must achieve a certain result within their national legal systems, it leaves them a range of options about how they might want to achieve that in practice. When it comes to designing the national implementation legislation, exercising those legislative discretions, adopting one of those options, EU fundamental rights will be available as a ground of judicial review. When a national public authority, an executive body, is actually applying EU law or national law derived from EU law practice—for example, if we are making payments under the common agricultural policy or executing a European arrest warrant—that type of executive implementation of Union obligations would also count as an implementation for the purposes of EU fundamental rights law. The implementation situations tend to be quite intuitive. They tend to be quite common-sense, on the whole.

On the derogation side, again, the cases are relatively predictable. Most of them involve restrictions on the right of free movement. It might be a restriction on the free movement of goods. A member state might say, “We are restricting the availability of a certain category of goods on our market”, and the EU might reply, “That is fine but make sure that you respect freedom of expression; for example, commercial expression, if you are restricting advertising or you are not allowing certain types of publications”. Similarly, if a member state says, “We want to expel a Union citizen from our territory because they have committed certain particularly serious crimes”, the EU would say, “That falls within the scope of Union law. It is derogating from a fundamental freedom under the treaties. You have to respect the right to private life and the right to family life in that situation”. So we have really quite predictable categories of cases where the court will apply EU fundamental rights.

The situations that fall outside the scope of EU law tend to be the converse of that. The great majority of the cases that are handled by the ECJ are just a little odd. They tend to be references from relatively minor tribunals, often in new member states, where the court basically looks at the dispute and says, “We have no idea what this has to do with EU law. There is no EU legislation. There is no treaty provision. We are not sure why you are asking us this question”. Many of these disputes arise out of a fundamental misunderstanding on

the part of some relatively minor national judge about the difference between the ECHR and the EU, I suppose.

However, there are much more legitimate disputes where there is genuine uncertainty over the dividing line. But again, they tend to be relatively predictable. For example, if you have a directive which harmonises the composition of a certain type of good—there are hundreds of directives like that—and you have a national measure which restricts the marketing and the sale of that good, rather than regulating its composition, that national measure on marketing or sale will fall outside the scope of the directive; it will not be amenable to judicial review on EU fundamental rights grounds. Similarly, if you have a third country national who is not one of the protected family members of a Union citizen—a second cousin rather than a spouse or a child—they cannot rely on EU fundamental rights protection when it comes to their expulsion from the territory because they are simply not within the scope of the relevant EU legislation and the member state is not derogating from any EU obligation if it decides to expel them from its territory.

The situations are pretty clear in practice. There are a few exceptions. For me, a couple of more generic lessons came out of the massive case-law analysis that I conducted. First, the scope of EU law is incredibly difficult to describe in the abstract. It depends on an interpretation of particular EU measures and particular national measures in the context of a particular dispute. It is a very complex interaction between two different legal systems. Secondly, the scope of EU law is very dynamic. It changes all the time. Every time that EU law changes and every time that national law changes, those complex dynamics reconfigure themselves, and you might find that some things have fallen outside the scope of the EU law that used to be within and other things have been brought within the scope of EU law that were not there before.

The third main lesson was that the scope of EU law differs from member state to member state, especially for a member state such as the UK. We do not participate in a lot of the area of freedom, security and justice measures adopted by the EU. So what would be within the scope of EU law in a country such as France or Germany is not within the scope of EU law in a country such as the UK. It is pretty complicated.

Q58 The Chairman: Well, yes. Let us take it a little further. I understand what you have been saying so far about implementation and derogation—at least I think I do—but a feeling seems to have grown up recently that the court is going outside that and is beginning to think of extending its tests for defining the scope of EU law. You referred to that in your evidence and in your article. Can you expand on that? How serious is this tendency, if it a tendency?

Professor Michael Dougan: If I am being honest, it is the job of an academic to take relatively minor developments in the case law and analyse them to the nth degree, and that is probably what I did—

The Chairman: Politicians as well, actually.

Professor Michael Dougan: I will try to put it more into perspective for practical purposes. I have just mentioned that by and large the court's approach to the scope of EU law is pragmatic, forensic and case-by-case, and the court has traditionally avoided trying to articulate very generalised or abstract criteria, partly because they would just not be that useful—

The Chairman: How entrenched is the system of precedent?

Professor Michael Dougan: It is very easy for a common lawyer educated in the English common-law tradition to be an EU lawyer as well because the two systems operate, from a case-law point of view, in very similar ways. European Court of Justice case law operates almost like the common-law system. Although there is no formal doctrine of precedent, in practice the European Court of Justice treats its own judgments with the same degree of care, distinguishing and precedents as the English courts would. The introduction of the charter probably put the court under a bit of pressure that it did not feel before because suddenly the question of the scope of EU law was elevated almost to the level of a constitutional debate. It had not really been of that nature before in the public or political eye. It was for lawyers, of course, but it did not have the same prominence until the charter gave it a much more prominent position within EU politics and EU public discourse. I suspect that the court may have felt under pressure to try to come up with a more generalised formula or a more abstract set of criteria that could capture the case law which had developed over 30 to 40 years.

It did not help that the Charter of Fundamental Rights, in its explanations, which the courts are obliged to take into account when they are interpreting the charter, gave a few examples of the cases that should act as a reference point for the court in interpreting the scope of Union law. One of the cases chosen was an obscure, very peculiar common agricultural policy case, which startled most people when they saw it listed as one of the constitutionally significant cases of EU law. It is not surprising that the court, to a degree, has tried to come up with something to try to capture the case law in a more generalised way. These are cases such as *Siragusa* and *Hernández*. In these cases, the court has set out some more abstract criteria that try to describe its case law and the scope of Union law; for example, whether the nature of the national legislation is such that it pursues the same or different objectives from the EU legislation, or whether there are specific EU rules on the matter that are capable of affecting it.

The Chairman: These are huge steps if they are implemented, are they not?

Professor Michael Dougan: This is what I tried to explore in the article. There were two major reservations about taking this particularly seriously. First, this is only a tiny number of cases. They are from chambers of the court; they are not endorsed by the Grand Chamber, and, for me, this comes across as a bit of an experiment: “We think we might have to develop some general criteria. We have been told we must take account of this strange common agricultural policy case. We are doing our best to come up with something that sounds plausible”. That is not unusual in a complex court such as the ECJ. We see this in a lot of fields, where the chambers of the court will experiment with different formulations of an idea, which may never make it through to the Grand Chamber or become an accepted part of the common law of the EU.

The second problem is probably the more interesting one. It is just not clear that in practice these abstract criteria are changing anything about the court. The few cases where they have been used have all been clearly outside the scope of EU law. There is no evidence that these cases have in any way expanded the field of national measures that fall within the scope of EU law. In addition, the criteria themselves are incredibly ambiguous. They are really quite banal, almost. What does it mean that there is a rule of EU law that is capable of affecting something? It is a very strange formulation.

In my 2015 paper, I explore the possibility that these cases could lead somewhere. In particular, I suggest that they could lead to a modest extension of the scope of EU law to cover a few types of national rules, which, even though they are not strictly implementation or derogation, directly threaten the primacy of EU law within a national legal system. That is an exploration. There is no evidence for it in the case law. This is me having a thought experiment, almost, as an academic researcher. I think it is just as likely that this will become a recitation which is wheeled out in the case law every now and again but I do not think it is actually going to change the practice of the court. There is certainly no evidence that it has changed the practice of the court.

The Chairman: That is good to hear, because if it were to develop rapidly and extensively, the legal effects would be great but the political effects would be even greater.

Q59 Baroness Neuberger: To a very large extent you have answered this question but we have had witnesses who have said that the European Court of Justice is predatory and expansionist. You have just said that it is really moving very slowly. Others have strongly disagreed. You have more or less said that it is moving slowly but you think there might be an extension. Do you want to say anything more on that?

Professor Michael Dougan: On the predatory and expansionist criticism, there probably are a few words that are worth saying. It is one of those projects. Working on the scope of EU law, I think every academic has mixed emotions because on the one hand, as a public lawyer, you want the system to work well; on the other hand, as a researcher, you want to make some wonderful discovery and bring it to the world's attention. It was a funny research project to work on because my basic conclusion was: this is all working pretty well. It is clear, it is predictable, it is constitutionally justified, and I did not find any evidence of any serious problems. As a public lawyer, that is a very good conclusion. As a researcher, I may have felt a little disappointed.

Baroness Neuberger: That is very honest.

Professor Michael Dougan: In a way, I found no convincing evidence of a predatory or expansionist court at work. I can give a couple of examples that have been cited for that, and why they are not very convincing evidence.

Baroness Neuberger: That would be quite useful.

Professor Michael Dougan: The main example of the court being predatory and expansionist that has been cited, and which has received a surprising degree of support, is the *Fransson* case. *Fransson*, in case we need a quick reminder, involved criminal proceedings in Sweden against a Swedish national who was accused of VAT fraud. He wanted to argue that the double jeopardy rule came into play. He had already been punished through administrative sanctions for his VAT fraud. He did not think that he should be double-punished with criminal sanctions for his VAT fraud. He wanted to rely on the European Charter of Fundamental Rights as the basis for his double jeopardy claim. The European Court of Justice was asked, "Is a criminal proceeding for VAT fraud within the scope of EU law?". The court's answer was, "Yes, the member state has an explicit obligation to pursue financial fraud against the EU's financial interests and, in general, to adopt effective sanctions against people who breach their obligations under EU law, which can include criminal sanctions". *Fransson* has provoked a storm of protest, and in Germany even the quite senior courts accused the ECJ of almost overstepping the limits of its own jurisdiction. I must admit that

when I heard this I was a bit flabbergasted. It has been clear since at least the 1970s—and if it was not clear since the 1970s, it has certainly been clear since 1989 and the Greek maize case—that every time a member state adopts sanctions, remedies or procedures which happen to be used in the enforcement of EU law, they do not need to be specifically adopted for the purposes of EU law. It can be part of your general legal system for enforcement of rights and obligations, whether national or European, but in any given dispute where you are using the national legal system to enforce an EU obligation, it is within the scope of the treaty, and the general principles, and now the charter, will also apply. *Fransson* is one of a thousand cases so I found it rather strange that the German senior courts reacted in this way. I cannot read German so I do not what their rationale was. But it is certainly not a convincing example of an expansionist or predatory court.

Q60 Baroness Shackleton of Belgravia: I want to ask you about prisoners’ voting rights. Do you think the European Court of Justice in *Delvigne* was right to conclude that there is a right to vote in European Parliament elections under EU law, and that to remove that right indiscriminately is in breach of the EU charter?

Professor Michael Dougan: That is a very difficult question. It is important to clarify what the court did and did not say in *Delvigne*. I would probably add a little observation that I do not think that the right to vote was necessarily crucial to the outcome of the case, but I will explain that later. Basically, there were three issues in *Delvigne*. In this regard, structurally and intellectually it is no different from any other fundamental rights dispute. Did the situation fall within the scope of EU law? If so, what were the member states’ obligations? How could the member state justify any breach of those obligations? Every EU fundamental rights dispute is reasoned on the same grounds.

When it came to the scope of EU law, I think *Delvigne* was absolutely right. Primary law specifically says that the definition of the franchise for the European Parliament elections is for the member state, but it also imposes certain obligations on the member state: it has to be universal suffrage and it has to be a free and secret ballot. The European Court of Justice, in case law such as *Eman and Sevinger* and the *Spain v UK* case, had already said that that discretion has to be exercised in compliance with Union law; it is within the scope of the treaty. As a matter of principle and of case law, the court was right to say that the French rules in *Delvigne*—and national rules in general defining the franchise for the European Parliament—are within the scope of EU law.

The next stage in the inquiry was to establish which obligation the member state had breached. The court could have done this in two ways. It chose to do it by identifying a right to vote, and it based that reasoning on Article 39(2) of the charter, which is oddly phrased. It does not refer explicitly to a right to vote. It says: “Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot”. As a matter of legal interpretation you can take two views on that provision. You can adopt the view of the UK Supreme Court in *Chester* and say, “This may well be a statement of what the franchise should be but it does not create any individual rights. It may create obligations for the member state but it does not create rights for the individual”. The alternative interpretation is to say that by imposing obligations on the member state as regards universal suffrage, you inherently and conversely create certain rights for the individual, which come out of it. They be limited, they may be conditional and you cannot qualify them but that provision does create individual rights, and that is essentially what the European Court of Human Rights

decided in the *Hirst* case. The wording of the ECHR is a bit different but the idea is the same: it is an obligation rather than explicitly a right.

Both those interpretations are possible and perfectly reasonable. I am sure that people who feel very strongly about it would call upon various deep conceptual ideas to try to justify their position. As an EU lawyer, I can make a couple of observations. First, under EU law that decision is for the European Court of Justice. It is the court's job to interpret the treaties and EU law, and the court chose its interpretation. Was it right to choose that interpretation? Strictly speaking, yes, because it is its prerogative to make that choice. It is a reasonable interpretation, even if we do not necessarily like it. But we could go even further and say that the European Court of Justice did not have much choice here. Given that the ECHR is meant to be the minimum standard by which EU law is judged and EU law has to meet the standards set out in the ECHR, the Strasbourg court had already said in *Hirst* that there is a right to vote and you have to respect that right to vote. It would have been very difficult for the European Court of Justice in *Delvigne* to not recognise the right to vote under EU law as well. In a way, we could say that that choice had already been taken away from the European Court of Justice by the *Hirst* case.

My perspective might be slightly different, though, because I wonder whether the right to vote was really that crucial to the outcome of the case. If we accept that defining the franchise for the European Parliament is within the scope of EU law, member states then are bound by the charter and by the general principles of EU law. The general principles include the principle of proportionality. Every time a member state adopts legislation in implementation of obligations under EU law, it has to respect the principle of proportionality. You do not need to relate that to an individual right. It could have been a right to equal treatment or a right to vote; it could be just an obligation of the state, it still is subject to judicial review for compliance with the principle of proportionality. In a way, whether you say it was a right to equal treatment, a right to vote or just an obligation for the state, in principle judicial scrutiny was going to be the same in that case regardless of the particular right or obligation that you decided it had to be reasoned through. From that point of view, I did not find the case particularly surprising. Once we reached that stage, it was almost inevitable. Did the French have a legitimate reason for wanting to restrict the franchise? It could have been age, residency or prisoners. Did they have a legitimate reason to restrict the franchise and was that reason proportionate? We know that the French rules were found to be proportionate in *Delvigne*.

Q61 Baroness Shackleton of Belgravia: Bringing it to the domestic, given the Supreme Court's conclusion of the relevance of EU law in *Chester and McGeoch*, how do you think that *Delvigne* will be interpreted by our courts here?

Professor Michael Dougan: An even more difficult more question! We should probably divide the answer into two parts. First, on the substance of the dispute, are the UK limitations on the franchise as regards prisoners for European Parliament elections compatible with EU law? I think that answer is relatively easy and I will explain that in a second. Much more complicated is what consequences we draw from that finding.

On the first question, assuming that the UK courts are willing to accept the outcome of and the analysis in *Delvigne*, the franchise for the European Parliament is a national competence but that national competence falls within the scope of EU law. As such, it is bound by the Charter of Fundamental Rights and the general principles. That includes a right to vote; even

if you do not like that, it still includes the principle of proportionality. You have to conduct a proportionality assessment of those rules. In *Delvigne* the French rules were found to be compatible but of course they were very different from the UK rules. They applied only to certain categories of criminal, not all criminals, and there was the opportunity for judicial scrutiny in individual cases at the prisoner's request. Obviously, the UK's blanket ban goes a lot further than that but again we could say that the judgment in *Hirst* from the Strasbourg court has effectively told us what the answer should be under UK law. Again, it is a minimum not just for the ECHR but the EU, so if the UK rules were found to be disproportionate in *Hirst*, they should really be found to be disproportionate in this European Parliament context as well. So in principle, I think the UK rules would be found to be disproportionate.

The real difficulties come when we think, what do we do with that consequence—what do we actually do if the Supreme Court decides that the European parliamentary franchise rules are disproportionate? The Supreme Court, in the Chester case, basically said, “We should really disapply these rules if we think they're disproportionate, but we shouldn't do that in practice because it is a complex parliamentary scheme that requires the creation of a new franchise, and that is really something that Parliament has to do. So we won't offer the remedy of disapplication. You might think about bringing a damages action against the state for member state liability under *Francovich*, but you don't really stand a chance of winning that case”.

As a matter of EU law, that position is probably defensible, but it is a bit more complicated. There is one major judgment which the UK Supreme Court in the Chester case did not discuss but is very relevant here. The general situation under EU law is that you should disapply national legislation that is incompatible with an obligation under EU law. We should remember that disapplication is not the general invalidity of national legislation; it is merely a remedy in an individual case. If I bring a dispute to a national court and it finds that that national legislation has infringed my EU law rights, that legislation is disappplied in practice for me as an individual, but it remains fully valid and fully on the statute book. It remains applicable to anyone else who does not benefit from exactly the same protection as I have benefited from, so it is a remedy rather than an invalidity.

But the usual position is that supremacy and disapplication should take effect, even if it would create a regulatory vacuum, and even if it would lead to the undue benefit of certain individuals who probably would have been governed by the same sorts of rules anyway, even if these particular national rules were not set aside. We see that all the time: for example, in the free movement disputes, where you often have a national rule that just—but only just—infringes the principles of free movement. It nevertheless has to be set aside, even though a very similar national rule will probably be enacted very quickly by the member state to replace it.

So in principle, regulatory vacuums are something that the principle of supremacy creates under EU law. The main question, which was dealt with in the *Winner Wetten* case, is whether national courts should be recognised as having a power temporarily to uphold incompatible national legislation, so as not to create a vacuum which would endanger the public interest and basically give the national Parliament time to react to an adverse judgment before the legal effects of that judgment kick in.

The Court of Justice considered this question in the *Winner Wetten* case and it did not rule it out as a matter of principle. The court said: “In principle, we might accept that national

courts have the power temporarily to suspend the principle of primacy for EU law". But it did say that that, in practice, it would expect the criteria for that power of suspension to mirror the conditions under which the Court of Justice itself has the power to limit the temporal effects of its own judgments. The Court of Justice does that all the time when it comes to the interpretation of Union law for itself, but it usually does it only under very restricted circumstances—when there has been extraordinary legal certainty about the outcome of a case, and where there are strong interests to protect the legitimate expectations of a third party who might have relied upon existing legislation against their interests. The court said, "If those conditions aren't satisfied, you shouldn't be upholding national legislation; you should be disapplying it".

It is very difficult to see how a situation such as prisoner voting would fulfil those criteria. There is no huge legal uncertainty surrounding this issue. It has been fairly clear for a while what the likely outcomes are, so it is not a shock to anybody. Of course, it is difficult to argue that anyone has relied on the absence of prisoner voting to their own detriment—some people have not had the right to vote—so it is difficult to see how the *Winner Wetten* principle might help the UK Supreme Court to uphold the existing rules.

That leaves us with a whole range of possibilities. Do we respect the ECJ's judgment and follow it? Do we basically say to Parliament, "You need to adopt legislation if you want to restrict prisoner voting, but in the meantime, we are going to set it aside"? Do we say we will ignore this judgment and face the consequences? That is for the Supreme Court to decide.

Baroness Shackleton of Belgravia: Or Parliament.

Professor Michael Dougan: Or Parliament, of course.

Q62 Baroness Eccles of Moulton: This is a "what if" question relating to the Bill of Rights and the possibility of UK withdrawal. If the Bill of Rights departed from clear principles established by the Strasbourg court's case law, would the UK's withdrawal from the Strasbourg convention be inevitable?

Professor Michael Dougan: Inevitable, no, from a legal perspective. I am not an enormous expert, I should hasten to add, on the law of the European Convention on Human Rights; I know enough to get by, as an EU lawyer. It is quite a separate system. My understanding is that, legally, it is perfectly possible for a state which is party to the ECHR to be in pretty continuous breach of its obligations in various respects. That means you will just have a lot of adverse judgments from Strasbourg and a lot of money to pay in damages as a consequence, but legally speaking, I do not see why this should lead to the UK's withdrawal from the ECHR.

Politically, the position is quite different, but we should distinguish between the political costs of non-compliance with Strasbourg case law for the UK, and for the ECHR as a whole. Although some people have suggested that it could really damage the UK's international standing and credibility, it all depends on what the Bill of Rights does and just how far it goes. To be honest, if we end up disagreeing with the Strasbourg court over prisoner voting rights or the expulsion of certain migrants, I do not think our standing in the international community will be enormously damaged as a result.

More worrying is the damage it could inflict in the longer term on the authority of the Strasbourg court and the status of the ECHR itself. We already know—there have been newspaper reports recently—that there are certain parties to the European convention who

would rather not be entirely bound by many of its obligations and would quite happily see the authority of the Strasbourg court undermined. If one of the leading member states of Europe adopts a position formally that we are going to enter into a sort of semi-permanent derogation from Strasbourg case law, what incentive does it give to Russia or to Turkey not to do the same? So, the damage to our own credibility would probably be fairly limited; but the damage to the credibility of the ECHR as a system which is there to benefit the whole of European society could be much more considerable.

Baroness Eccles of Moulton: Did you mention earlier that you had been to a conference on the new Bill of Rights?

Professor Michael Dougan: No, I did not.

Baroness Eccles of Moulton: I obviously misheard you. I was going to ask you whether you had any clues as to the sort of line it might be going to take.

Professor Michael Dougan: I am relying mostly on the newspapers for my knowledge of the new Bill of Rights.

The Chairman: Don't do that!

Q63 Baroness Ludford: Moving to EU justice and home affairs, the principle of mutual recognition is very relevant there. Indeed, there are moves, particularly under pressure from the European Parliament, to insert criteria about the non-observance of human rights and denial of mutual recognition—for instance, in the European investigation order. Do you think changes to the rules governing UK protection of human rights could threaten the UK's continuing participation in EU justice and home affairs co-operation, and if so, can you give any examples?

Professor Michael Dougan: My starting point would be that I know that there are changes afoot in the legislative field potentially, but we should first ask what the available case law tells us about the expectations of a member state that wants fully to participate in the system of mutual recognition. The main case here is the NS case, which was a UK and Irish case. That case law tells us a couple of very useful things when it comes to making these types of judgment about participation and mutual recognition. NS is about when other member states suspect that a given member state—let us use the UK as a convenient example—does not meet the EU's minimum fundamental rights standards. How do they react when they are faced with a mutual recognition request or a mutual recognition interchange with the UK? The Court of Justice said in the NS case that mutual recognition is built around the assumption that all member states meet the EU's minimum standards for fundamental rights protection. The court also recognised the possibility that any given member state can fall below those expected standards but said that infringements in individual cases are irrelevant—the mere fact that you breach fundamental human rights every now and again or in individual disputes does not exempt anyone from the mutual recognition obligations. Really, what the court said is that you have to have substantial grounds to believe that there are systemic problems in a member state that are leading to a systematic infringement of fundamental rights. If that arises, mutual recognition effectively can go into suspension between that member state and the other member states.

If we try to use that case to judge what might happen if the UK were to change the fundamental rights regime that is applicable in the UK, we can say that it is partly a matter of the interpretation of the relevant Union legislation—how much discretion does it give and

what presumptions does it apply? If we set aside the issue of having to interpret the actual Union legislation, the question is: would simple repeal of the Human Rights Act and replacing it with the Bill of Rights be sufficient to trigger the NS case? I suspect that the answer is no. Let us suppose that the Bill of Rights changes happen in the end to be relatively minor—they just qualify certain aspects of the Strasbourg jurisprudence—and the UK continues fully to respect EU fundamental rights within the scope of application of the treaties. The court would probably expect something much more concrete; it would expect systematic abuses of fundamental rights with evidence to substantiate that.

Much more difficult questions would arise if the UK were to leave the ECHR. That would raise the question: does non-membership of the ECHR in itself constitute the type of systemic problem that would trigger the NS case? I can imagine an argument that, even though the individual substantive rights might not be infringed on a regular basis, simply the lack of external oversight that the Strasbourg system is meant to bring—the idea that you do not just define fundamental rights for yourself with no external oversight and that you need that external body to check your fundamental rights compliance—would in itself amount to a systemic problem with the UK's fundamental rights regime. It would then be up to the Court of Justice to ask: "Is that enough or will we still ask for concrete evidence of systematic abuses in individual cases before we would say that the UK's participation is compromised?". I think it is unclear, but it probably boils down to that question: would leaving the ECHR, in itself, rebut the presumption that the UK fulfils the minimum requirements for participation and mutual recognition?

Q64 Lord Judd: Could the repeal of the Human Rights Act put the UK in direct conflict with other areas of EU law? If you think it could, would you illustrate where?

Professor Michael Dougan: I mentioned before that I do not see why the repeal of the Human Rights Act in itself should affect the UK's obligations under EU law within the scope of the treaties, assuming that the UK courts continue fully to accept the idea that, within the scope of the treaties, they are bound by EU fundamental rights and they respect them. *Delvigne* might be a testing case for that, but assuming that that happens we are really asking the question: would changes to the UK's system of human rights protection outside the scope of EU law have an impact on its membership or relations with the EU system? We have mentioned mutual recognition, which is probably the most obvious area in which problems could arise—a situation outside the scope of EU law but which could affect participation in EU measures. Besides that, there are probably three areas where potential effects could be identified. The first is membership of the EU itself, although I do not think that that is particularly an issue. We could repeal the Human Rights Act and we could probably even leave the ECHR and that would not affect our membership of the EU—not legally speaking. There is no formal requirement for a member of the EU to be a continuing member of the ECHR, even though it is assumed widely that that will be the case, and there is no method for expelling a member state that decides to do something in the EU—you cannot expel a member state from the EU against its will. Strictly speaking, when it comes to membership, from a legal point of view repeal of the HRA or indeed withdrawal from the ECHR would not oblige the UK to leave the EU. What it could do—and this is marginally more likely—is trigger the system of sanctions under Article 7 of the TEU. This is the idea that other institutions and member states can decide that you have entered into a persistent and serious breach of the values of the EU, which then allows them to impose punitive sanctions. You could suspend that member state's voting rights. You could suspend their participation

in mutual recognition, which could be a political decision, not just a judicial one. Again, that raises questions about whether simply leaving the ECHR, for example, would amount to a serious and persistent breach of the EU's values. I doubt it; I certainly doubt that simple repeal of the HRA would in itself qualify for Article 7 sanctions. So I do not think that membership need be affected and I do not think that Article 7 sanctions need necessarily be triggered. I think that the real issue is about political costs in terms of our leadership, our authority and our credibility as a member of this organisation.

Lord Judd: On the point that you made earlier about those who saw developments in this area in the EU as a way of strengthening the struggle for human rights and the rule of law across the world, it would undermine all that.

Professor Michael Dougan: Certainly. To be a little more selfish about it, I think it would reinforce perceptions. This is where the debate about the Human Rights Act and the ECHR links up with the debate about EU membership, renegotiation and the referendum. I think that the more we as a country move ourselves away from the centre of leadership and influence within Europe as a whole, whether the EU or the Council of Europe, the more we have to question what we understand to be the national interest and the future direction of the country. In that regard, there is a very strong link between debate about EU membership, EU terms of membership and HRA, ECHR and so on. They are not legally linked together very closely but politically they raise similar issues about what we understand our national interest and our national future to be.

Lord Blair of Boughton: Professor, I am sorry that I was slightly late, but I have listened to you with real interest. You just said something that triggered a memory. Were sanctions applied to the Government in Hungary? Am I right? Is it that kind of persistent breach?

Professor Michael Dougan: They have never been used, in fact. The threat has been raised a couple of times. The threat was used in relation to Austria, when the Freedom Party came into a coalition Government there. It was used repeatedly in Italy, when the Berlusconi Government were accused of undermining press diversity by having excessive control of various forms of media within Italy. Now, of course, the threat is being used very vocally in respect of Hungary for the various rule-of-law and democracy problems that the Hungarians seem to be experiencing. It has never actually been put into practice. The threshold for triggering these sanctions is very high, but the threat is there.

Baroness Eccles of Moulton: I hope it will be all right, Lord Chairman, if I ask a supplementary that is rather outside the general theme. It is more of a political question. You said that we hold an influential position within Europe—a semi-leadership position. Do you think that it will be possible in future to retain that kind of reputation and respect and yet resist ever closer union?

Professor Michael Dougan: Yes, definitely. On ever closer union—

Baroness Eccles of Moulton: That is the phrase that Cameron is always using.

Professor Michael Dougan: Ever closer union is one of these funny ideas that may have acquired a political salience that is well beyond its actual importance.

The Chairman: Clause IV.

Professor Michael Dougan: Ever closer union is one of those nice little phrases that was kept over at the end of the Lisbon treaty, probably primarily for emotional reasons, but it is not

an obligation, it is not a requirement, it is not really anything. It plays no appreciable role in the functioning of the EU as a legal system, as a constitutional order. Many member states, not just the UK, think the point of integration has been reached and that it should go no further, in a constitutional sense: that the EU has reached the end state of what the EU will be like for its member states. There are mechanisms by which other countries that do want to integrate further can proceed to do that, such as the enhanced co-operation provisions, but constitutionally this is as good as the EU constitutional order is ever going to get. That is generally accepted by many of the member states and by many of the people who work in the field. There is no inherent reason why the UK cannot continue to be one of the leading member states of the EU while standing aside from initiatives in the eurozone or in the area of freedom, security and justice. I do not happen to think that the euro is the most important thing in the EU. It is not as important as the single market. I do not happen to think that criminal co-operation is as important as environmental protection, where the UK remains a key player.

It is a very large organisation with a very diverse set of portfolios. We should be able to decide that some of them are not for us without sacrificing any sense of leadership ourselves, let alone in the perception of others. This is our club and we are a fully paid-up member.

Q65 Baroness Eccles of Moulton: That is very comforting, thank you. I return to my proper question, which, again, is about the Bill of Rights. Under national law, would a British Bill of Rights be subject to the supremacy of EU law, or could an exception be made?

Professor Michael Dougan: This is one of those issues where an EU lawyer will tell you one answer and a national lawyer will tell you another, because the two perspectives are quite different, although equally legitimate. An EU lawyer will tell what the position is under EU law. In principle, EU law takes priority over conflicting national law within the scope of the EU legal system. By the way, it does not matter whether it is EU law as in a directive or a regulation or whether it is EU law as in EU fundamental rights. In principle, EU law will take priority over a conflicting provision of national law within the scope of the EU system.

As I mentioned, there are lots of qualifications to that in practice. We have to assume that the dispute is within the scope of the treaties. We have to assume that there is an incompatibility. Often, that is simply not the case; sometimes it is merely a matter of interpretation and compatibility. Importantly, we have to make sure that EU law has direct effect. EU law needs to be translated into national law, as it were, by fulfilling certain criteria. If it does not fulfil those criteria, it remains purely at the level of the EU legal system. It produces no autonomous effects within a national legal system. There are a range of situations where the Court of Justice has accepted that even if there is a conflict between national and directly effective EU law, national law can stay in place—for example, if you have a reasonable limitation period and somebody has not exercised their rights quickly enough, if you have a judicial decision that acquires the force of *res judicata* and you have not challenged it, or even if you have had the opportunity to challenge it but it has still become *res judicata*.

Subject to all those conditions, an EU lawyer will tell you that, yes, EU law takes priority over national law. Of course, at the national level the question is: how far do we accept that EU law takes priority over national law? In that regard, the answer to the question is that yes of course we could make an exception if we wanted to. That exception could be parliamentary.

If Parliament wanted to say that EU law will not take priority over certain provisions of the Bill of Rights within the scope of the treaties, even if it regards a dispute where EU law should, that is for Parliament to do. It is an exercise of parliamentary sovereignty, and the UK courts would follow it.

The other route, of course, is that judicially the UK Supreme Court decides that it will recognise limits to the degree to which EU law will take priority over national legislation, including, for example, a Bill of Rights. We have already had indications in cases such as *High Speed 2* and in the *Pham* case that the UK Supreme Court is prepared to play with the idea of jurisdictional limits—a very nice phrase—to EU law. It specified a couple of situations where it might be prepared to consider qualifying respect for the principle of supremacy in practice. It has not done it yet, of course, but it speculated about when it would.

As a matter of UK law, can the Bill of Rights be made an exception to the principle of supremacy? Yes, it certainly can—definitely by Parliament, possibly by the courts. The real question, just as with *Delvigne*, is: what might be the consequences of doing that? There are the short-term consequences: you could have *Francovich* actions for damages against the member state; you could have Commission proceedings against the UK for ignoring its treaty obligations; you could have Article 7 sanctions against the UK for a clear and persistent breach of EU values. But in the long term, just like with leaving the ECHR, it is more a political judgment about the costs of refusing to respect the rules of the game, both for the UK—our credibility, our leadership; the sense that we are a leading member of the EU—but also for the authority of the EU as a whole. If one member state starts to take the view that it is not bound by the principle of supremacy, what is to stop the other 27 taking the view that they are not bound by the principle of supremacy? Then we would end up with something more like the United Nations than the European Union.

Q66 Lord Judd: In your view, would there be increased references to the European Court of Justice from the UK courts if the Human Rights Act were repealed?

Professor Michael Dougan: It is difficult to foresee. If we accept that the EU system already has certain advantages over the Human Rights Act and the common law, if we take away the Human Rights Act from the three available systems of fundamental rights protection within England and Wales, the EU system automatically becomes even more attractive. You would then be faced with a choice between the EU system, with its disapplication of statutes and damages actions, and the common law, with its respect for parliamentary sovereignty and no inherent right to damages for breach of a fundamental right. Of course, if I were a practising lawyer, I would want the best for my clients and I would try to fit a case into the EU system as best I could. Would there be more litigation? Almost certainly. Lawyers would advise their clients to try to fit into the EU regime rather than the common-law regime. If there are more cases, there could well be more references.

Would it actually mean any difference in outcome? I think the answer there has to be no. Would it actually mean that the European Court of Justice changed its definition of the scope of EU law? No. The scope of EU law is a concept that has been developed for all 28 member states. Just because one member state, such as the UK, might encounter difficulties with its own domestic fundamental rights regime for situations outside the scope of EU law, I cannot imagine any situation in which the European Court of Justice would reply by changing the rules for all 28 member states. That is just not a plausible outcome. Would there be more references? Perhaps. Would it actually change the rules? No.

It is much more likely that it would really draw attention to the discrepancies between the benefits of the EU system and the limitations of the common-law system, because every time there was a case, people would say, “If I were subject to EU law, I would get this amount of legal protection. When I am outside the scope of EU law, I get a lesser degree of legal protection”—for example, statutory limitations. It would merely increase the pressure on the common-law courts to accelerate the development of the common law to try to close those gaps as best they could. We have seen that already with the principle of proportionality effectively replacing *Wednesbury* on reasonableness as the general standard of review for fundamental rights cases under the common law. We EU academics call it the spillover effect: EU law spilling over from the realm of EU law into the realm of domestic law and effectively levelling domestic law up to reach the standard of the EU itself. I can imagine that the pressure for spillover might accelerate. It would still reach its limits with a doctrine such as parliamentary sovereignty unless the courts were willing to go the whole hog and qualify that particular principle. Does that answer the question?

Q67 Lord Judd: Yes. If the Chairman will allow it, for me—very much a non-lawyer—it opens up the wider issue, which you have been very cautious not to let take control of your argument but to which you have made reference. Some of us think that the misunderstanding about the whole approach of the European Union is to say that it did not have a political objective. Of course it had a political objective: to establish peace and stability in Europe. The European Iron and Steel Community at the beginning was a way of building something practical towards that. What some of us who are not lawyers get very despondent about is this point of yours, that if we are all struggling towards a world in which there is more justice and more rule of law, our innocent preoccupation with our domestic affairs may be doing untold damage to the momentum, if there is any still, towards that objective.

Professor Michael Dougan: I do not disagree with that at all. There are two perspectives. There is the perspective of the collective damage that can be done, the damage to the whole system that keeps international affairs civilised and restrained, and promotes the rights of individuals and of groups. But there is also the damage that you can do to yourself as a player in that international system. I do not disagree with the former but it is important not to lose sight of the latter. It is usually a lose-lose situation.

The Chairman: Thank you very much indeed for your evidence. I learned a great deal. I think I am more informed now than I was at the beginning. You have explored and revealed the delicate complexity of many of these issues. We are very grateful to you. Thank you very much indeed.

Professor Michael Dougan: You are very welcome. Thank you very much.