



# HOUSE OF LORDS

Revised transcript of evidence taken before

**The Select Committee on the European Union**

Inquiry on

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

*Evidence Session No. 7*

*Heard in Public*

*Questions 68 - 78*

TUESDAY 26 JANUARY 2016

11 am

Witnesses: Professor Gordon Anthony and Professor Christopher McCrudden

## USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on [www.parliamentlive.tv](http://www.parliamentlive.tv).

Members present

Baroness Kennedy of The Shaws (Chairman)  
Lord Cromwell  
Baroness Hughes of Stretford  
Lord Judd  
Baroness Ludford  
Baroness Neuberger  
Lord Richard

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**Examination of Witnesses**

**Professor Gordon Anthony**, Professor of Public Law, Queen's University Belfast, and **Professor Christopher McCrudden**, Professor of Human Rights and Equality Law, Queen's University Belfast (via video link)

**Q68 The Chairman:** Good morning. It is very nice to see you both. I certainly know Professor McCrudden, and it is nice to see you, Chris. It is nice to see you too, Professor Anthony. Could you both introduce yourselves, and then I will formally welcome you?

**Professor Christopher McCrudden:** My name is Christopher McCrudden and I am professor of human rights and equality at the University of Oxford—sorry, the University of Belfast. I am formerly of the University of Oxford.

**The Chairman:** I still think of you as belonging to the University of Oxford, and certainly to the faculty.

**Professor Christopher McCrudden:** That is very kind of you, but I think my colleagues here might object.

**The Chairman:** We also have Professor Anthony. Which university are you based at?

**Professor Gordon Anthony:** I am professor of public law at Queen's and a practising member at the Bar in Northern Ireland.

**The Chairman:** Thank you very much. Welcome to this session. It is a public session. Indeed, we have a member of the public sitting in the room, and I am smiling in her direction. This is an oral evidence session, which will be heard via video conference, as you know. It is webcast, so it is going out live right now as an audio transmission, and it will then will be available on the parliamentary website. A verbatim transcript will be made of this session. A few days after the session, you will be sent a copy of the transcript to check for accuracy. If you can advise us of any corrections as soon as possible, we would be grateful. Can I make it clear that if, after this session, you wish to clarify or amplify anything, send additional evidence or have any additional points that on reflection you would like to make, you are of course welcome to submit them to us? We would be very happy if you did that. I think you have been sent a list of the members of this Committee. Not everyone is here today, but we have a good representation of the Committee.

I will take you straight to the questions that we seek to ask you. The first thing we want you to help us with is the extent to which the protection of human rights in Northern Ireland under the European Convention on Human Rights and the European Union charter is different from that of England and Wales? Is it different?

**Professor Christopher McCrudden:** We sent you our written evidence, in which we suggested that although the status and function of the Human Rights Act in particular in Northern Ireland is similar in many ways to that of Scotland, there are four critical differences that mark out the importance of the Human Rights Act as unique in the context of Northern Ireland. I hope, in explaining those four differences, that that will be an answer to the questions that you just raised.

The first difference is that the Human Rights Act, or more properly the domestic implementation of the European Convention on Human Rights, was a critical part of the peace agreement—I refer of course to the Belfast/Good Friday agreement—that has brought about greater stability and reconciliation than has been possible since the foundation of Northern Ireland in 1920. The repeal of the Human Rights Act, therefore, risks destabilising the peace agreement by removing a critical part of that agreement.

The second difference is that the Human Rights Act currently plays an additional role in Northern Ireland that is significantly different from that of the rest of the United Kingdom: namely, in addressing issues from the past that continue to dog the path to complete transition, such as the alleged complicity of security forces in paramilitary murders. The EU Charter of Fundamental Rights, for example, is no substitute for that.

Thirdly, the necessity of domestic incorporation of the ECHR in Northern Ireland is not only part of the peace agreement between the contending parties in Northern Ireland; it is also part of an agreement between the Republic of Ireland and the United Kingdom—an agreement that is, in our view, binding in international law. Therefore repeal of the Human Rights Act risks at least breaching the UK's legal obligations. We need at this point to enter an apology for unintentionally misleading the Committee in one respect in our evidence; we wrongly stated that the agreement had not been registered at the United Nations. It was in fact registered in 2000, but that point strengthens our argument that it is intended to be legally binding.

The fourth major difference, given the political difficulty of securing agreement between the parties in the Assembly in Northern Ireland, is that there is no guarantee that the Assembly would step in to fill the vacuum left by any repeal of the Human Rights Act in so far as it applies to Northern Ireland. There has already been a 17-year stand-off in implementing another part of the agreement, which envisaged the enactment of a Bill of Rights in Northern Ireland supplementing the European convention and the Human Rights Act. That has proved impossible to reach agreement on within the Assembly.

With those four differences we suggest that, along with similarities, there is a distinctness in the Northern Ireland arrangements that needs to be taken quite carefully into account in the current debate.

**The Chairman:** Gordon, would you like to add anything to what your colleague has just outlined to us?

**Professor Gordon Anthony:** No, not at this stage. Those are helpful gateway points for questions that the Committee might wish to raise.

**The Chairman:** Baroness Ludford has some questions that follow on quite easily from that.

**Q69 Baroness Ludford:** The second question to you both is: what do you consider to be the strengths of human rights protection provided in Northern Ireland by the European convention compared to the EU charter? Perhaps I could add that the European Communities Act 1972 is an entrenched enactment under the Northern Ireland Act 1998. What is the legal effect of this on the application of the EU charter in Northern Ireland?

**Professor Gordon Anthony:** The first part of your question was about the strength of the ECHR relative to the EU charter. In my view, the primary strength of the ECHR under the Human Rights Act is that it has a much broader reach than the EU charter. Under section 6 of the Human Rights Act, whenever public bodies make any decision they are bound by the provisions of the convention. That is not the case with the charter. The charter applies only whenever public bodies make decisions within the realm of EU law. This goes back to Chris's previous point that if the Human Rights Act were to be repealed and we were left with the EU charter, we would be left with rights that had a narrower reach, and our view is that that would not be a positive development.

On the question of the status of the European Communities Act 1972 as an entrenched Act, our understanding is that that simply places it at one remove from anything that the Assembly can do in relation to it.

**Baroness Ludford:** Okay, so it in no way changes the application of the charter in Northern Ireland compared to application in England and Wales.

**Professor Gordon Anthony:** That would not be my understanding. It factors in through the European Communities Act, and that is where it takes its starting point from.

**Q70 Baroness Neuberger:** In the case of Chester and McGeoch, Mr McGeoch was denied a right to vote in the European Parliament elections. What effect would the Court of Justice's decision in Delvigne have on a Northern Irish court if it was faced with a similar application for the next European Parliament elections?

**Professor Gordon Anthony:** We had a similar case on voter rights called Toner's application. Frankly, the Northern Ireland courts would be bound to follow the Court of Justice ruling by virtue of Section 3 of the European Communities Act.

**Baroness Neuberger:** So they have to do it anyway.

**Professor Gordon Anthony:** I imagine so, because the rules of precedent do not apply in the original, traditional form under the European Communities Act; the courts are bound by Court of Justice rulings, and I would anticipate that our courts would follow that.

**Q71 Lord Richard:** I want to broach the Sewel issue, which seems to be fundamental to any discussion that we are going to have about Northern Ireland and the Human Rights Act. Do you think that the Northern Ireland Assembly would need consent to replace the Human Rights Act with a Bill of Rights?

**Professor Christopher McCrudden:** This question, as we point out in our memorandum, which we supplied, is quite a difficult question for several reasons. We can take a very short answer, or we can take a more argued answer.

**Lord Richard:** The short one first please.

**Professor Christopher McCrudden:** I assume that it is the more argued answer that you want. One difficulty is that there is a broader interpretation of the Sewel convention in Northern Ireland and a more limited understanding of it. One question is how broad it is, and what it is with regard to the consent of the Assembly. The broader understanding is that all matters that significantly impact on devolved matters in Northern Ireland are subject to the convention, such that if the United Kingdom Parliament wishes to legislate in these areas, the agreement of the Assembly should be obtained. That is the broader understanding. But there is a narrower understanding, which we set out in paragraph 27 of our memorandum, whereby essentially such an agreement need be obtained only when it is intended directly to legislate in areas specifically devolved to Northern Ireland Ministers and the Assembly. This narrower reading would therefore apply the convention only when powers are taken by the UK Parliament in areas specifically for devolved purposes.

**Lord Richard:** Where does the “specifically” come from?

**Professor Christopher McCrudden:** The “specifically” comes from the UK Government's devolution guidance note 10, which says: “Consent need only be obtained for legislative provisions which are specifically for devolved purposes, although Departments should consult” the Northern Ireland Executive in this case “on changes in devolved areas of law which are incidental to or consequential on provisions made for reserved purposes”.

**Lord Richard:** So does that guidance note apply to all the devolved Administrations? It does not apply to Northern Ireland alone.

**Professor Christopher McCrudden:** It applies to Northern Ireland, but it also applies to the others. It was intended at the time to be a general guidance note on devolution arrangements and the operation of the convention in all the devolved Administrations. In other words, there is an argument, or a discussion at least, as to the scope of the convention with regard to devolved issues in Northern Ireland. That is one question that arises in general.

There is a second area of uncertainty relating to the Human Rights Act itself, which is of course more germane to your immediate concerns in the Committee. If the broader reading of the convention is adopted—that it applies generally to issues that are in the devolved sphere—repeal of the Human Rights Act as it applies to Northern Ireland would seem to require Assembly approval. There are a number of reasons for that. I will not go into the detail, but if the broad approach is adopted, we are pretty clearly of the view that the convention applies.

**Lord Richard:** Do you think the Assembly would give that consent?

**Professor Christopher McCrudden:** For reasons that we can come back to, our prediction is that the Assembly would not give that consent.

**Lord Richard:** Where does that leave the British Government's attempts to repeal the Human Rights Act?

**Professor Christopher McCrudden:** In our view, in some difficulty, not only in securing the legislative consent Motion but because of the international implications, to which you may want to return. I should preface any further answers with the point that if the narrower reading is adopted, for various reasons repeal of the Human Rights Act might not trigger the Sewel convention. That is because the Sewel convention would not be engaged, because repeal of the Human Rights Act would not entail the UK Parliament legislating with regard to

areas that are specifically devolved. The reason for that is because Section 7 of the Northern Ireland Act provides that the Human Rights Act constitutes an entrenched provision, meaning that it cannot be modified by an Act of the Assembly, and therefore the Human Rights Act is not a specifically devolved area. Therefore, the Sewel convention, if interpreted narrowly, would seem not to apply. I suggest, therefore, that there is a serious issue here about the definition of the convention before we get into the more complex questions of its actual application in the Northern Irish context.

**Lord Richard:** I have two other brief questions, if I might. You say that the Sewel convention might or might not apply, depending on which reading you have of it. Who would decide that? How would the law come to a view as to which was the right one?

**Professor Christopher McCrudden:** With respect, that is a very interesting question indeed. The issue is essentially how far, if at all, the convention might be thought to give rise to any legal implications. Is the convention simply operating at the political level, or does it also have legal implications? I should say that the usual approach that would be taken would be that these sorts of conventions do not have legal effect—that would be the orthodox approach. We have suggested in the memorandum that that may not fully explain the position and that there are, at least in one respect and possibly in two respects, ways in which the question might get into the courts. So we suggested—very tentatively, I should say, because the issue has not been litigated—that the issue might come before the courts because the Sewel convention might generate a legitimate expectation on the part of Northern Ireland Ministers, for example, or the Northern Ireland Assembly, that they would be requested to consent, and that the convention would, as a legitimate expectation, be enforceable against UK Ministers.

**Lord Richard:** But that is if UK Ministers decide that they want to ignore the convention and legislate irrespective of what the Northern Ireland Assembly wants to do.

**Professor Christopher McCrudden:** Correct.

**Lord Richard:** So in other words, if the UK Government decide to ignore the Sewel convention, or pretend that it does not exist, you think there is a possibility that that could be litigated.

**Professor Christopher McCrudden:** I think there is a possibility using a legitimate expectation argument. There is another approach, which we have not set out so far in the memorandum, which was the decision reached by the Canadian Supreme Court some years ago on a not dissimilar issue. The question, you might remember, was the repatriation of the Canadian charter of rights from the UK to Canada. You will remember that there was quite a lot of controversy at the time, because the question arose as to whether the provinces in Canada needed to consent to that repatriation under a convention operating for many years. That question was litigated before the Canadian Supreme Court, which decided that it would not decide the legally binding nature of the convention, but it would decide whether there was such a convention. In other words, the issue got into court and the Supreme Court decided that there was such a convention, and although that could not be legally enforced it clearly had very considerable political impact, which as I understand it led to the provinces being consulted after the decision. In other words, there are various potential ways in which to answer your question. Ultimately, there may be a judicial element in deciding whether there is a convention and, if so, whether it should be enforced.

**The Chairman:** It is right, is it not, Professor McCrudden, that the political context is all here, in that in Northern Ireland, if the Human Rights Act were to be abolished and a British Bill of Rights were created, it would have considerable opposition in Northern Ireland because of the way in which it would seem to be undermining the peace agreement. Is that not the reality?

**Professor Christopher McCrudden:** That is indeed the reality, yes.

**The Chairman:** Can we go to the next question, which is on the issue of the Assembly?

**Q72 Baroness Hughes of Stretford:** If the British Government were able to get through the quagmire of difficulty that you have just outlined to Lord Richard and repealed the Human Rights Act, what would be the position of the Northern Ireland Assembly competence to legislate itself for any gaps in human rights protection not covered by the Bill of Rights or the EU charter? You have helpfully explained this in your memorandum; you say that it does have competence in that area to pass an Act, but you identify two serious legal qualifications around that power, and the political issues between the parties in the Assembly and their respective views. Could you take us through that argument a little, and give us your conclusion?

**Professor Gordon Anthony:** Again, the evidence is tentative, but it seems that the Assembly would have an option in terms of legislating in relation to public decision-makers within Northern Ireland and making them responsible in accordance with the convention. More difficult is the question of the Assembly itself and executive authority. As we understand it, the Assembly would have significant difficulties in binding itself with reference to the Convention, because under paragraph 22 of Schedule 2 to the Northern Ireland Act the legislative powers of the Assembly are an excepted matter. Section 24 deals with executive authority, and currently binds it with reference to the Convention. That would also appear on a reading of Schedule 2 to be an excepted matter. So the Assembly can legislate with relation to other bodies in Northern Ireland, such as the police and local authorities, but it is more complex in relation to the Assembly and the executive authority itself within Northern Ireland.

Probably the most controversial issue—and Chris referred to this in his opening comment—would be the position of UK public authorities. I give the example of the Ministry of Defence. In dealing with the past in Northern Ireland and mobilising arguments about the convention, Article 2 of the European convention has been central to a lot of cases involving state actions during the conflict; if the Human Rights Act were to be repealed, that would pull Article 2 from play. If the Northern Ireland Assembly tried to enact legislation, it is not clear to us that it could be made to apply to a UK public authority, to use that rather clunky phrase. In fact, we would say that it would not be able to apply. That is where some of the difficulties would probably manifest themselves, in dealing with the past and the role of human rights standards in the context of what is called the Northern Ireland transition.

In the memorandum, we touch upon the possibility that an Act of the Northern Ireland Assembly may allow the Secretary of State for Northern Ireland to designate UK bodies as bodies to which any Northern Ireland human rights Act might apply. But under paragraph 1 of Schedule 3 to the Northern Ireland Act, the Secretary of State may have to consent to any such provision in the Northern Ireland legislation.

**Baroness Hughes of Stretford:** Exactly.

**Professor Gordon Anthony:** It would be quite interesting to hear a Secretary of State of a Government who had repealed the Human Rights Act then say that they would consent to one coming back in another form.

**Baroness Hughes of Stretford:** If that were to pertain, we might be in a similar impasse to the one that you described to Lord Richard but in reverse, in which the consent of the UK Secretary of State was required to allow the Assembly to proceed in that regard.

**Professor Gordon Anthony:** Yes, to proceed in that regard as relates to UK public bodies.

**Baroness Hughes of Stretford:** Yes, I understand that.

**Professor Gordon Anthony:** I know that that is a particularly difficult issue in the courts at the moment.

**Professor Christopher McCrudden:** I turn to the second part of your question, which relates to the political difficulties in legislating. Leaving aside the legal questions of jurisdiction, the question is whether the Northern Ireland Assembly would be able politically to muster sufficient votes to pass a Bill of Rights. In that context, there is the specific provision for issues of controversy to raise what is called a petition of concern in the Assembly. We sketched out the fact that a petition of concern can be mobilised by a certain proportion of the Assembly. It might be useful to know that a petition of concern can be brought by 30 or more Members of the legislative Assembly. Where a petition of concern of that kind is generated, a weighted majority applies, which is necessary to pass legislation that is subject to the petition of concern, requiring at least 40% of each of the two major blocs—the unionist bloc and the nationalist bloc—to consent: that is, it needs concurrent substantial minorities in both blocs. That means—and this was the intention behind the devolution arrangements—that either major bloc can prevent legislation that is controversial. Essentially, you need the agreement of both major blocs. The Bill of Rights issue in the past, and indeed at the moment, has been an area of considerable controversy between the parties. It is therefore unlikely that a petition of concern would not arise. My prediction would be that a petition of concern would be generated. If that is the case, it would require 40% of each of the blocs to approve. That is quite a high proportion needing to approve. At the moment, the indication seems to be that one of the major parties—the Democratic Unionist Party—is less sympathetic to particular approaches to the Bill of Rights than, for example, Sinn Féin would appear to be. So there is already political controversy between the parties on these types of issues, which would come into play when the Assembly asked or wanted to try to replace any human rights Act with an alternative.

**Baroness Hughes of Stretford:** Thank you. That is very helpful.

**Q73 Lord Cromwell:** Good morning, gentlemen, and thank you for your help today and for your very interesting memorandum. Before I go any further, you may have noticed that my name is Cromwell. I just wanted to make clear that I am in no way related to the one you may be familiar with.

Moving to my question, if a Bill of Rights were to limit the scope of the ECHR, as interpreted by the European Court of Human Rights: first, should the UK remain a party to the ECHR; and, secondly, to the extent that you have not touched on this already, what political and legal impact would this have on the Good Friday agreement?



**Professor Christopher McCrudden:** The question whether the UK should remain a party to the European Convention on Human Rights links into the second part of the question about the implications in the Northern Ireland context. Whether or not the UK should be a party to the ECHR is a political question over which we would clearly have our own personal views, but they are no better or worse than any other political views that will be expressed, so I will concentrate more on the implications question.

We have already sketched out what the implications might be, such as creating political controversy within Northern Ireland and the extent to which it might be seen to undermine a key element of the peace agreement. The other issue that we have not really touched on that is perhaps central to your question is what the external effects are likely to be of the repeal of the Human Rights Act and of exit from the convention, were there to be exit from the convention. That would have considerable implications for relations between the United Kingdom and Ireland. This is where the point of major importance comes in, in that the requirement of the United Kingdom under the agreement of the Republic of Ireland is that as far as Northern Ireland is concerned the ECHR should be incorporated into domestic law in Northern Ireland and be enforceable. That seems to us to be quite clear in relation to the agreement. Agreements are sometimes fudged. In this case, the terms are quite clear, in our view. From that point of view, if the United Kingdom were to exit the European Convention on Human Rights and not, therefore, permit Northern Ireland to enforce it domestically, it would seem to be in breach of an international law agreement with the Republic of Ireland.

What, if anything, can be done about that, either legally or politically, is a different question, and a complex one, but that there would seem to be a breach of the agreement seems to us to be relatively clear.

**Lord Cromwell:** Do you want to venture on to the complex ground of what should be done about it?

**Professor Christopher McCrudden:** Gordon perhaps has an additional point to make.

**Professor Gordon Anthony:** One point that I would like to make is not necessarily one that either of us would subscribe to, but it is about what some people would regard as the folly of leaving the ECHR if the UK were to withdraw. I am working on the perhaps fantastic assumption that the UK would also remain in the European Union. If the UK were to remain in the European Union but for some reason withdraw from the ECHR, that may give rise to questions about EU membership. We touched on the obligations of EU membership in the memorandum. Also, the point about folly is that if one withdraws from the European convention, which if you like draws a sovereign line around aspects of UK human rights law, but remains a member of the European Union, the Charter of Fundamental Rights of the European Union overlaps significantly with the European convention, so the convention would still permeate UK law through the medium of the European Communities Act and charter, albeit with the narrower reach that we flagged up at the start of our submissions.

**Professor Christopher McCrudden:** You ask us to venture into what might be done about it. My central point is that the types of complexity that we have sketched out—and I do not think that any of the points that we made were fanciful—indicate to us that these types of issues have not yet been seriously engaged in in debate in the rest of the United Kingdom. On the question of what to do about it, the minimum, we suggest—Gordon will contradict me if he disagrees—should be that these types of issues are seriously considered in Whitehall in a way that I fear has not been the case up to now.

**Lord Cromwell:** Thank you. That is very helpful.

**Q74 The Chairman:** If the UK changes the rules governing the rules of the protection of human rights principles, does that in any way threaten our continuing participation in European Union justice and home affairs policy?

**Professor Christopher McCrudden:** We have not specifically sought to deal with that question in the Northern Irish context. One of the interesting questions that I cannot be tempted to try to address, because I think you might want to take further evidence on it, is the exact role of the Human Rights Act and the European convention in day-to-day arrangements between, for example, the Republic of Ireland and the United Kingdom in areas that are governed by justice and home affairs-type issues. In other words, to the extent that issues between the Republic of Ireland and Northern Ireland are within the ambit of justice and home affairs issues and are facilitated by their being members of the European Union, the question would be: does the European Convention on Human Rights play a role in enabling that arrangement to be worked successfully? The simple answer is that I do not know at the moment. Those issues are very likely to be subject to confidential, or at least very secret, discussions between the two Governments. I suggest that the Republic of Ireland may be the appropriate place to ask for those, but I do not think that either of us are competent in that area.

**The Chairman:** Not even to guess that there is likely to be? All right, we will move on.

**Baroness Neuberger:** I think my question has been covered.

**Q75 Lord Judd:** We are interested in having your perspective on whether repeal of the Human Rights Act by the UK would put the UK in conflict with other areas of European Union law. Where would this become particularly acute, and what is the Irish dimension on this?

**Professor Christopher McCrudden:** That is quite a complex question because of the following point. Gordon has rightly pointed out that in so far as the United Kingdom remains a member of the European Union and the EU Charter of Fundamental Rights continues to apply, quite a lot of the types of human rights issues that arise under the European convention would still apply through the EU charter in so far as the UK was implementing European Union law. In other words, to put it more succinctly, in the context of European Union law, repealing the Human Rights Act is likely to have relatively little effect in so far as the EU charter applies very similar principles enforced by the European Court of Justice rather than the European Court of Human Rights. To that extent, repealing the Human Rights Act is unlikely to have major effects. What I am unclear about—this, again, is an area for future evidence—is whether the European Convention on Human Rights plays an additional role over and above the EU charter in certain areas of the operation of European Union law. Gordon is shaking his head too; neither of us is certain about that. So, again, I would be cautious about venturing a view, except that, in the main, repeal of the convention would have relatively little effect on the implementation of European Union law,

**Lord Judd:** Is not it true that what law does is establish a legal framework? The interpretation and operation of that law and public attitudes towards that law involve winning the hearts and minds of people in relation to the objectives of the law. It could be argued that if you had a Bill of Rights that was properly and imaginatively drafted and the rest, you would be able to demonstrate over time that what you were achieving for human rights was as great as or greater than anything that could be achieved under the Human

Rights Act. Is it not true that the repeal of the Human Rights Act will have immense emotional, political and public opinion consequences for the whole system of law in its operations in the European context? Either we are driving towards human rights or we are driving backwards, and this would be a very serious signal in the wrong direction.

**Professor Christopher McCrudden:** You are raising a very important point. I answered the question initially thinking that it was a technical question. Technically it probably would not have that much effect. Your point is about the wider political effect, leaving aside the technicalities. In that context, I absolutely agree with the thrust of your question. This takes us beyond the Northern Irish context, of course, and is a general point, but we both spend quite a lot of time in other countries in Europe and it is clear that there is a debate about the European convention, for example, in other countries as well—Hungary is one of the notable examples. It seems absolutely clear to me that to the extent that the UK withdrew from the European convention, that would be likely to have a larger weakening effect on the convention as a whole. Therefore the effect of withdrawal would very definitely affect the general context in which law in general is understood in the European theatre. That I agree with, but Gordon may have other views.

**Professor Gordon Anthony:** No, I agree entirely with Chris's comments. On the question of European union, one can sometimes think of aspects of the treaties as very proud declarations of shared European values. Of course, human rights and the rule of law are included in the Treaty on European Union, and it would perhaps be an uncomfortable lunch for UK Ministers if the UK withdrew from the convention and therefore raised questions about the seriousness and depth of its commitment to human rights and the rule of law within the EU framework.

**Professor Christopher McCrudden:** I have one more point that perhaps links these issues. New members coming into the European Union are of course expected to be party to the European convention. My understanding is that that is a requirement for new member states, but it certainly raises questions as to the European Union's expectation of existing member states, because, of course, it is quite difficult to argue that new member states should be members of the European Convention on Human Rights if existing member states are not members. That is my first point.

The second point relates again to a more technical issue. There are of course provisions in the treaties for trying to reel in what we can call renegade states that are consistently and persistently in breach of human rights. There is a mechanism for dealing with that—the so-called rule-of-law mechanism. The question is therefore—this is pure speculation—whether the repeal of the European Convention on Human Rights might at some point in the future be seen as part of an issue of whether the United Kingdom was in compliance with the rule of law obligations under the treaty. I say that very tentatively, because I would be unconvinced that in the absence of major violations that mechanism would be mobilised, but were it to be mobilised in the face of egregious violations, I suspect that the absence of the UK being a member of the convention would play a role and would be brought into the debate.

**Q76 Lord Judd:** I think many people will find the last part of your answer very powerful. Would you agree that we are, without overegging it, still in a strategic battle over whether we believe in a society based on human rights or whether we do not? Would you not agree

that so much of the pressure to which politicians are responding over the repeal of the Act is coming from people who are not a bit interested in a society based on human rights?

**Professor Christopher McCrudden:** Gordon will want to come in on this as well. I try to take a more nuanced view of the current debate. It seems to me in part to be a question of what type of human rights are involved and our conception of human rights and of human rights in a particular jurisdiction as related to the international and the European. In other words, it is in part a question of what you mean by human rights and how far you think they are related to the international and European theatre. So I would not go so far as to agree with your point that it is a question of who is in favour of human rights and who is against. Rather, I think the debate is over conceptions of human rights. I agree with you, in so far as I am able to understand your position from your question—always a dangerous thing, perhaps, to do. I agree with you that it would be a retrograde step for the United Kingdom to take to exit the convention, but I would not go so far as to say that those who are in favour of exit were necessarily against human rights. They may be in favour of an understanding of human rights that is different from ours.

**Professor Gordon Anthony:** I would just add that there are various layers of complexity to the debate. Of course, one argument in favour of repeal, although I think it is misguided, is about too much power being accrued in the hands of judges in making decisions about rights at the expense of the legislative power. That has become an aspect of the debate, although it is not necessarily one that I share. I do not share it because, in my view, the Human Rights Act through the declaration of incompatibility mechanism strikes an appropriate balance between the powers of the judiciary in relation to the legislature. But that is one of the concerns that people can legitimately voice—whether the balance is correctly struck in relation to who makes decisions and when, and where responsibility for decisions should ultimately fall. Other than that, I agree with Chris's points about the European and the contextual settings to the nature of the rights.

**Lord Judd:** Can the chair indulge me on just one point in response to your very helpful answer? While certainly some of those who are in favour of the repeal of the Act are great believers in human rights and believe that they can be achieved in other ways, my question was whether in fact this was not a response to too much pressure from people who do not believe in a society based in any meaningful sense on human rights.

**The Chairman:** We have to move on. Perhaps we can do so rather quickly, because I have to bring in Baroness Ludford before we finish our hour.

**Professor Christopher McCrudden:** My point was going to be that to some extent the debate that we are now having is a replacement for the debate that perhaps we should have had much more extensively when the Human Rights Act was first introduced. I am in no way against debate on the role, status and operation of the convention. That is a healthy thing in a democracy. I know where my answer would lie, but the fact that there is a debate is in itself a healthy thing.

**Q77 Baroness Ludford:** Can I wind back to the discussion about the EU and the rule of law mechanism? Perhaps I can make my position clear. The UK's position in the EU would be weakened, but the EU's set of standards and values would also be weakened if the EU pulled out of the convention. Would it inhibit the EU from invoking the rule of law mechanism against other member states if the UK had withdrawn from the convention? For instance, at

the moment it is being raised in respect of Poland; I do not know whether in future it might be raised in respect of Hungary. Do you think that Brussels would hesitate because it would have undermined the validity of invoking the rule of law mechanism against other member states?

**Professor Gordon Anthony:** As a matter of political reality, it would have to upset the equilibrium within the European Union if the UK were to repeal the Human Rights Act and row back from the convention. In terms of the European Union's historical objective and the pursuit of human rights, peace and stability in conjunction with the Council of Europe, it would have to be regarded as a retrograde step.

**Lord Cromwell:** Briefly, if the Human Rights Act were repealed, are we going to see in Northern Ireland's courts an increased reliance on the EU charter? I think you indicated earlier that we would. Does that mean, therefore, that we are going to see a great increase in references from Northern Ireland to the Court of Justice?

**Professor Christopher McCrudden:** I think the answer to that has been partly foreshadowed by Gordon's earlier discussion. We suspect that there would be an increase in references to the European Court of Justice. Whether there would be a massive increase is perhaps questionable. A lot of the human rights issues that are currently before the courts in Northern Ireland relate to areas that would probably be outwith the scope of the EU charter, in so far as the EU charter, as Gordon says, applies in the implementation of EU law, whereas in many of the areas where human rights currently come before the Northern Ireland courts it would be a stretch to argue that they involved the implementation of EU law. No doubt arguments of that kind will be made, and there will be attempts to stretch the question of what is involved in the implementation of EU law—for example, in relation to equality issues. But with some of the examples that Gordon gave, such as dealing with complicity and the Ministry of Defence, they would be unlikely to fit neatly within an EU charter context.

**Professor Gordon Anthony:** One interesting thing that may happen in addition to any reliance on the charter, if the Human Rights Act were to be repealed, would be the extent to which the Northern Ireland courts, taking the lead of the Supreme Court, would wish to develop the common law and common-law standards for the protection of rights. As with anything, one can point to the rulings of the Supreme Court that suggest a very robust development of the common law—and one can point to other rulings that suggest a less expansive development of the common law. But it would be interesting to see how far the common law filled any gaps that were left that were perhaps not filled first of all by the charter. We did not touch on that in our memorandum and it was not raised in the questions, but it is a very important point about rights post the Human Rights Act, if it happens.

**The Chairman:** One of the arguments that is made is that we should proudly return to our common-law roots, and we should be much more committed to the use of common law. Would you agree with the argument that the Human Rights Act has been very powerful in the hands of victims, and that victims were never protected in quite that way under the common law? It is argued that that has been one of the developments, so that by using the Human Rights Act victims now have a voice in the system much more effectively today.

**Professor Christopher McCrudden:** There is a particular Northern Ireland dimension to this question. It will not have escaped your attention that issues of equality and human rights prior to 1968 were issues of great contention in Northern Ireland. It is also pretty

uncontroversial that ordinary existing common-law British methods of dealing with those issues prior to the Human Rights Act were notably unsuccessful in addressing the problems in Northern Ireland. So we already have a test case of pretty substantial allegations of human rights violations not being successfully addressed for many years in Northern Ireland. The fact of the Human Rights Act and of the equality jurisdictions coming in has revolutionised the position. The idea that you would want to deal with problems in the Human Rights Act by repealing it and leaving victims, as you said, remediless seems to me an extraordinary development to undertake at the moment.

**Baroness Neuberger:** That is a very strong argument, but can I just pursue that. Even if one did go down the route of saying, “We’ll use common-law remedies”, or, “We’ll reinvent or invent some common-law remedies”, would not the time lag be absolutely huge, because it takes such a long time to get to that position, and is that not another argument, albeit a lesser one, against doing this?

**Professor Christopher McCrudden:** There would certainly be an extensive time lag. How quickly that might be filled by the courts one can only speculate on, but there is another dimension to the common-law point, which is that it would be very difficult to conceive of the type of detailed approach that we now have to human rights currently being developed under the common law, however expansive it was. The point is that everything would then be thrown into renewed controversy, with the effect that there would be more litigation rather than less.

**Baroness Neuberger:** Quite.

**Professor Christopher McCrudden:** So rather than withdrawing the issues from the courts and trying to prevent the courts from litigating, it seems to me a recipe for uncertainty, and uncertainty in this context is clearly bound to breed litigation.

**Professor Gordon Anthony:** You mentioned the time lag and Chris answered the point. A very good example to illustrate your point may be in relation to the law of privacy, because under the Human Rights Act, particularly under the influence of Section 12 of that Act, we have moved from the position of common law where there was no recognisable tort of privacy towards a system where we now have a tort of misuse of private information. I suspect that it would take a Supreme Court ruling to decide definitely whether or not the tort of misuse of private information, which is nested in Section 12 of the Human Rights Act, would survive the repeal of that Act. That may be one example of how there would be an unfortunate time lag. I imagine there would also be questions about general principles of law—the role that proportionality plays, for instance. The Supreme Court in the recent case of *Keyu* rowed back from resolving that definitely, so I, too, can see your point about a time lag.

**Professor Christopher McCrudden:** You should understand that we are both practising barristers, so the idea that we would not want litigation and that we are pointing to the disadvantages is very much an argument against self-interest, and therefore, I hope, all the stronger.

**Baroness Neuberger:** We took that point. Thank you very much.

**Q78 Baroness Ludford:** I have a question for our final minutes. We have been discussing whether there would be a greater reliance on the EU charter if the UK withdrew from the convention. I was intrigued that in paragraphs 20 and 21 of your memorandum you referred

to cases where the charter is being relied on now: one about gay men donating blood and the charter's non-discrimination provisions, and the other a custody case. I was a bit intrigued as to why the charter was being relied on already, even given the limitation of our implementation of EU law. Is it regarded as a better bet by litigants than the HRA and the convention? I found that quite interesting.

**The Chairman:** Would either of our witnesses like to answer that question? Why has that little development been taking place? Do you know?

**Professor Gordon Anthony:** My view is that arguments are developed and pleaded in accordance with the context of the case, and it might look as though the charter will give you a stronger reference point. I suppose if you are relying on the charter, you bring all the exotic language of the supremacy and primacy of EU law, and in the background there is the diminution of sovereignty that follows. It might appear very strong in a particular case, but I do not think it is necessarily a magic dust. I imagine that the argument is being positioned because it lends itself to an argument with reference to the charter.

**Professor Christopher McCrudden:** The other point, of course, is that in both the cases that are mentioned in paragraphs 20 and 21 where the EU charter was invoked, issues of the implementation of EU law were involved. In other words, it is not a particularly surprising development that the EU charter would be used in those cases, because EU law in general was in play in both those cases, as I understand it.

**Professor Gordon Anthony:** The real issue with EU law is what is meant by implementation of EU law. If the Human Rights Act were to be repealed, I suspect there would be quite a bun fight about what the implementation of EU law means and people would be looking for as expansive an approach as possible. At the moment, I think it is relatively fluid.

**The Chairman:** As a practising lawyer, it gives you the advantage that it is a trump card. In a Court of Justice case, it is of course more powerful in the end because we are required to follow the decisions. We have probably all been involved in having to make those decisions ourselves. I remember back in 1992 taking a transgender case to the European Court of Justice on employment discrimination rather than going to the European Court of Human Rights, although other transgender cases followed after the victory in the European Court of Justice. For strategic reasons, you can do it that way.

**Professor Christopher McCrudden:** Yes, it is more powerful in its effect but more limited in its scope.

**The Chairman:** Thank you both very much. It was really wonderful and helpful to have two such distinguished lawyers, academics and practitioners before us. It was also very helpful to give us the context of Northern Ireland, which is very particular but so important to understand over here.