



# HOUSE OF LORDS

Revised transcript of evidence taken before

**The Select Committee on the European Union**

Justice Sub-Committee

Inquiry on

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

*Evidence Session No. 8*

*Heard in Public*

*Questions 79 - 90*

TUESDAY 2 FEBRUARY 2016

11 am

Witnesses: Rt Hon Mr Michael Gove MP and Mr Dominic Raab MP

## 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 Blair of Boughton  
Lord Boswell of Aynho  
Lord Cromwell  
Baroness Eccles of Moulton  
Baroness Hughes of Stretford  
Lord Judd  
Baroness Neuberger  
Baroness Newlove  
Lord Oates  
Lord Richard

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### Examination of Witnesses

**Rt Hon Mr Michael Gove MP**, Lord Chancellor and Secretary of State for Justice, and **Mr Dominic Raab MP**, Parliamentary Under-Secretary of State for Justice

**Q79 The Chairman:** Secretary of State—Lord Chancellor, indeed—welcome to this session of the Justice Sub-Committee. I also welcome you, Minister; it is nice to see you back. I shall just explain what this Committee has been engaged in recently. The Government's manifesto stated their intention to scrap the Human Rights Act and replace it with a British Bill of Rights. It also promised to curtail the role of the European Court of Human Rights. Since then, we know that the Government have given much thought to what a Bill of Rights might contain and have undertaken to consult on it before issuing a draft, but we have still seen no consultation paper. The consultation was expected to be launched in the autumn but the timeline has slipped quite a bit. Here we are in February and still the date of the consultation is unknown. To some extent, that has impacted on our inquiry, whose purpose, as you know, has been to look at what the implications of withdrawal from the European Convention on Human Rights might be for our relationship with the European Union and with the European Court of Justice and that whole body of European Union law. It is very helpful to have you here today and we are very obliged to you for making the time in your diary.

I start by reminding everyone that this session is open to the public. A webcast is being made of it and it is going out live as a video-audio transmission. It will subsequently be available on the parliamentary website. We always have a verbatim transcript made of evidence and this, too, will be put on the parliamentary website. In a few days' time, once the evidence session has been transcribed, a copy of the transcript will be sent to both of you and can be checked for accuracy. If you want in any way to make corrections to it—I know that this is all familiar to both of you—you will be very welcome to do that. Following this session, if there is anything that you want to clarify or amplify, please take the opportunity to do so. Any additional points that you want to make, we will be very happy to receive as supplementary written evidence.

Let us turn to the purposes of this inquiry. We really are still baffled and a bit in the dark about the nature of the reforms that you have in mind in seeking to reform our involvement

with the European Convention on Human Rights and what you find unsatisfactory about its manifestation as the Human Rights Act. Perhaps you could explain that to us and then basically let us know the kinds of reforms that you have in mind.

**Mr Michael Gove MP:** Yes, of course, and thank you very much for the invitation to come here. Thank you also for allowing Dominic to come with me. One of the many disadvantages that I have in carrying out my role is that I am not a lawyer. As I am sure you know, Dominic is a superb lawyer, so if I should ever err on any point of detail, he will gently tug my elbow.

**The Chairman:** You have your legal adviser at your elbow.

**Mr Michael Gove MP:** And a very good one.

**The Chairman:** I always advise people to go with a lawyer.

**Mr Michael Gove MP:** Advice that I have learned to accept is that you go to the top, and Dominic is that.

**The Chairman:** It is why we think that legal aid is a good thing.

**Mr Michael Gove MP:** Exactly. I will pass over that but you may wish to return to it later. What are we trying to do? The first thing to say is that the Human Rights Act was one of a number of constitutional reforms that the Labour Government, elected in 1997, brought in, along with devolution to Scotland and Wales, and subsequently of course the Good Friday agreement, as well as, for that matter, the Freedom of Information Act. Since 1997, a number of those constitutional Acts have been revisited. For example, irrespective of the arguments about whether or not Scotland should be independent, all the pro-union parties have agreed that there should be, and indeed there has been, legislation to update the devolutionary settlement, and of course a Wales Bill is being prepared as well. Freedom of information is subject to review. It seems only right that we should look at the Human Rights Act in that context because—and this is no criticism of any predecessor of mine in this role—it was introduced at a fair lick. It was introduced as a major constitutional reform, albeit after quite an intense debate in civil society, with quite a short period of consultation and with relatively rapid progress through Parliament.

I think most people would agree that the basic rights outlined in the convention are admirable, and all the signatories to the convention interpret them in different ways—sometimes subtly different ways. Britain has in some respects been an exemplar, not only due to the fact that we played a leading role in setting up the convention rights in the first place—

**The Chairman:** We often have to remind people that it was Britain, British lawyers and indeed British Conservative lawyers who drafted it.

**Mr Michael Gove MP:** Exactly, yes—Lord Kilmuir. Not only did Britain play a leading role in establishing those convention rights but, through the medium of the Human Rights Act, we have those convention rights observed in a far more direct fashion than is the case in one or two other jurisdictions. But even though Britain played a role in establishing the convention in the first place, and even though Britain is, through its courts and its Parliament, determined to play a leading role in the protection of rights, human rights—it is a source of regret to us—have a bad name in the public square. Human rights have become associated with unmeritorious individuals pursuing through the courts claims that do not command public support or sympathy. More troublingly, human rights are seen as something that are

done to British courts and the British people as a result of foreign intervention, rather than something that we originally championed and created and seek to uphold. Therefore, part of the purpose of a British Bill of Rights or a UK Bill of Rights is to affirm the fact that things like a prohibition on torture or a right to due process and an appropriate trial before a properly constituted tribunal before deprivation of liberty or property are fundamental British rights.

There will be some changes that we want to make to the legislation. Some of them have been prefigured, including by Labour politicians, who have made the case that Section 2 of the Act in particular might put the balance rather too heavily in Strasbourg's court rather than in our own when it comes to the interpretation of those rights. Both Lord Irvine and Sadiq Khan have said that it is worth looking again at that area. We propose to consult, and to consult widely, on other areas where we think change may be required. But the purpose of consultation is to find as broad a consensus as possible across the countries of the United Kingdom on the best way forward.

**The Chairman:** But has our own judiciary, because of the public debate about Section 2, not very much taken the lead in saying, "We take account of Strasbourg decisions, not follow them as if it is a court of appeal"? We have already seen the judiciary asserting that position, so now it is almost written as an accepted tenet.

**Mr Michael Gove MP:** I think two things. To be fair, both our judges and Strasbourg itself have recently accepted that there should be a proper margin of appreciation. If it is not inappropriate, I should say that the role played by my predecessors, Ken Clarke and Dominic Grieve, as part of the Brighton process in getting the court to realise that a margin of appreciation was important, has helped. However, as legal scholars say, what ebbs may flow. We cannot necessarily rely on a future court or future judges to take this approach. If we believe, and if there is a broad consensus among the judiciary and the public, that it is appropriate to revisit Section 2, then it would seem an appropriate safeguard to take. Certainly Lord Irvine, Lord Falconer and Sadiq Khan felt moved to intervene in the debate, because they felt that it was possible to revise the Human Rights Act in this way.

**The Chairman:** I just want to home in on whether that is really necessary now, and what derogations you would press for. As well as Section 2 and saying that we do not have to follow the European Convention on Human Rights—that is accepted—but that we take advice from it and certainly look to it, in which areas would you expect there to be derogations in any British Bill that we put through Parliament?

**Mr Michael Gove MP:** Again, I am not a lawyer so I will try to be careful with the terms, but there are two areas that I would point out as areas of concern that require to be addressed. One is when British troops operate abroad. There has been a widespread debate over months now, which has heightened particularly over the past few weeks, about whether the way in which room for troops to operate effectively in a conflict zone has been constrained overmuch by a variety of laws and treaties. One question—it is an open question—is whether reform of the Human Rights Act could clear up some of that concern in order to ensure that our soldiers stand on firm legal ground while of course still being subject to appropriate legal sanctions. That is one area. One thing that has been mooted, although we will have to wait for the consultation paper, is that there might be a derogation when British troops are engaged in conflict in the same way as France derogated from the ECHR to create a stage of emergency in the aftermath of the Bataclan atrocity.

Separate to that are what I might call glosses that could be put on the rights that are capable of being balanced. Some of the rights are absolute. Others are of course balanced by the courts, and different courts in different countries might balance them in different ways.

To take another case in point, I think it is probably accepted that in Britain we place slightly more emphasis on freedom of expression and slightly less emphasis on privacy rights than in continental jurisdictions. We have seen that in some data protection cases, for example. It might be appropriate for us to firm up and make clearer the importance of freedom of expression. That might include everything from better protecting journalists' sources—there has been an interesting argument about the Miranda case—to helping to ensure that some of the erosions of freedom of speech, about which not just the media but others are worried, can be fought back. Again, we will put forward in the consultation some propositions and ideas about how we might better protect freedom of speech, and of course we will pay very close attention to the responses that come not just from the media but from across the piece.

**Q80 Baroness Neuberger:** Secretary of State, good morning. I am not a lawyer either, although I am related by marriage to several. You have given us a hint, particularly with regard to interpretation in different courts in different countries, of where you might be considering some changes. If a British Bill of Rights were to derogate from any articles of the European convention as at present interpreted by the Strasbourg court, do you agree with our witnesses to this Committee that it could or would put the UK in breach of its legal obligations under the European convention? Would that be a problem?

**Mr Michael Gove MP:** It could be a problem, but we are not planning to derogate absolutely from any of the rights. At the moment, we envisage that all the rights contained within the convention will be affirmed in any British Bill of Rights, but where rights are subject to potential qualification, we may emphasise the importance of one right over another. Again, to be fair, in the coalition Government we passed an immigration Act in 2014 that made it clear that the right to a family life, which is important, had to be balanced against the public interest. The explicit definition of the public interest was outlined to include the deportation of people whose presence here was not conducive to the public good. Obviously, that Act is being challenged before the Supreme Court at the moment, but nobody would argue that we were in breach of international law obligations in passing that legislation.

**Baroness Neuberger:** We also had some witnesses who said that, should there be this derogation—here one is obviously talking about partial derogation—it could well lead, rather perversely, to more cases being taken by UK citizens to Strasbourg. Do you agree that that is a possible, if somewhat lengthy, process?

**Mr Michael Gove MP:** There is always that risk, or opportunity, depending on your point of view. The right of individual petitioners has existed for many years now and predates the Bill of Rights. But I think that Strasbourg would be less inclined to look indulgently on any petitioner if it could look at how UK courts had interpreted charter<sup>1</sup> rights. If UK courts had interpreted charter<sup>2</sup> rights in a way that was consistent with our constitutional traditions,

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<sup>1</sup> Subsequent to the oral evidence session, the Lord Chancellor revised his use of the term “charter” to “Convention”.

<sup>2</sup> See FN 1.

consistent with our jurisprudence and consistent with the plain meaning of the rights, then going to Strasbourg would be an expensive fool's errand.

**Q81 Lord Judd:** As I understand it, the Government are deeply committed to furthering the cause of human rights across the world.

**Mr Michael Gove MP:** Yes

**Lord Judd:** If a British Bill of Rights were to derogate from any articles in the ECHR while the UK remained a state party, could this undermine the way in which other state parties applied the principles behind the ECHR and everything it stands for? Secondly, what effect would that have on the perception internationally of the United Kingdom? Would the perception be that we were dedicated to a fight for the enhancement of human rights, or could it—if perhaps I was being kind inadvertently—lead to a sense that human rights are a bit on the defensive now?

**Mr Michael Gove MP:** The first thing to stress is that, as I mentioned to Baroness Neuberger, it is not our intention, although the Prime Minister has ruled nothing out, to say that any individual right within the convention no longer applies in the UK. We are going to consult on how some of those rights might be interpreted and weighed against each other, but that is a separate thing. The rights contained in the convention are undoubtedly admirable and set a very high standard, and one would wish to see as many states as possible cleave as closely as possible, consistent with their own traditions, to the values contained within the charter, but I do not think that it is absolutely necessary for any country to be viewed as a human rights exemplar to be a signatory to the charter. To take a country of which I am very fond—a random Canada—I do not think that anyone would say that Canada lacked the ability to be both a powerful voice for human rights on the international stage and a model common law jurisdiction, even though it happens not to be a signatory to an explicitly European treaty.

**Lord Judd:** But would you not agree that a very proud chapter in the UK's history was the role that it played after the Second World War in getting established the whole cause of human rights and indeed the institutions that have flowed from them?

**Mr Michael Gove MP:** Yes.

**Lord Judd:** Would it not be fair to say that that champion of human rights, as we appeared to the world then, seems to be somewhat tarnished now? We seem to be a bit defensive about defending human rights.

**Mr Michael Gove MP:** I do not think so. Of course, at different times, Britain has chosen to play a slightly more or slightly less assertive role on the world stage. In the period from the establishment of the convention to the Human Rights Act being adopted, or to the legislation being introduced as a result of the Blair Government being elected in 1997, I do not think you could say that between 1948 and 1997 Britain was a shrinking violet on the world stage and did not stand up for human rights. This was a period when we supported the establishment of human rights behind the Iron Curtain. This was a period when we led the world in showing how decolonisation should take place and helped to establish democracies and the rule of law in countries that we had previously administered. There was a period when we did not have a Human Rights Act but nevertheless set a good example, certainly compared to other countries I think, in human rights terms. Of course, the

convention is an admirable document, but it is not the only way in which a country can press the cause of human rights internationally.

**Lord Judd:** If—

**The Chairman:** Sorry, Lord Judd, we have to move on because we are 20 minutes into our session and I am rather anxious.

**Lord Judd:** Just one last point. You made quite a strong point about wanting to be in a position in which human rights were acceptable in society, because judgments were seen to be in tune with what people wanted. Do we have to stay with where people wanted, particularly if it seems to be a diminishing of where we were? Do we not actually have to make a stand for human rights and argue for their relevance?

**Mr Michael Gove MP:** I certainly do not think that we should have a referendum on each right or direct democracy applying when judges make decisions, but I do think that we can make changes that ensure that people recognise that these rights spring from our traditions, these rights are our patrimony and these rights can be given effect to in the courts in a better way and a more British way. If we manage to do that, it would be a gain for human rights domestically and internationally.

**The Chairman:** You described how, in your view, prior to 1997, Britain was still in the world and seen as a force for good in terms of human rights. Just to deal with it more domestically, would you agree that our law has been enriched by the fact of having, if you like, a new set of legal principles entering into our legal world? Do you feel that there has been an enrichment as a result of that?

**Mr Michael Gove MP:** Certainly over the last 60 years or so human rights have become more and more part of the warp and weft of the way in which lawyers think, judges judge and politicians legislate.

**The Chairman:** It has changed the mindset of lawyers and judges, and hopefully citizens are coming on board with this too. It is not just about people on criminal trials who benefit from human rights.

**Mr Michael Gove MP:** True, but importantly—and I say this as someone who comes from Scotland but has come to admire English common-law traditions hugely—as Lord Bingham pointed out in his book on the rule of law, if you go back to Coke and Blackstone, and if you consider Lord Mansfield and his rules, you can see the roots of an understanding of what human rights are about, the idea that the Executive should be subject to judicial review, that there are certain rights inherent in an individual. Lord Mansfield pointed out that when a slave was washed up, or rather was the subject of litigation in British courts, the air of England, or of Britain, was too pure for any slave to breathe; he was making a point about intrinsic human dignity and intrinsic human rights then. It is important that we should see it as a continuum and not suddenly say that pre-97 all was darkness and post-97 all was light.

**The Chairman:** No, and there is an evolution but we will return to that. Baroness Hughes.

**Baroness Hughes of Stretford:** I just want to pick up on Lord Judd's question about the potential impact of those changes on our international reputation. You have stressed that in a British Bill of Rights all the key rights in the ECHR would be reaffirmed and it would be a case of putting in place a UK interpretation and some prioritisation of those rights. You implied therefore that our commitment to the key rights would not be diminished, but do

you not think that enshrining a particular interpretation and prioritisation would be seen by other countries as a qualification by the UK on the principles in the ECHR which other countries will still be subscribing to?

**Mr Michael Gove MP:** No I do not, because each country has its own way of taking the convention rights and applying them domestically.

**The Chairman:** Within a very clear framework. I mean, we do not have Russia saying, “We want to interpret things in our way”, and being given the licence to do that. They are criticised greatly. I want to move us on; I had Lord Richard coming through with a number of questions.

**Q82 Lord Richard:** I am a bit lost, actually, Mr Gove, this morning. As I understand it, the real criticism, what he is really saying to us, is, “Yes, we agree with the rights in the convention. Yes, we want to keep the rights in the convention. Yes, we have one or two qualifications, such as the troops issue and the emphasis on freedom of expression in this country as opposed to privacy”. What on earth do you want to repeal the Act for then?

**Mr Michael Gove MP:** In order to ensure that we can make the changes that I have outlined.

**Lord Richard:** Surely you can do that through the courts. Indeed, in this country the courts are moving in that direction, are they not?

**Mr Michael Gove MP:** We need to ensure that we uphold parliamentary sovereignty, which, to be fair, the Human Rights Act affirms, and make Parliament’s view clear on these issues.

**Lord Richard:** Parliament’s views are fairly clear on these issues, are they not? If your Government say that you approve of these things, of the rights that are in the convention—the Opposition certainly approve of those rights—then Parliament’s views are fairly clear, are they not?

**Mr Michael Gove MP:** I would hope that the passage of the Bill will be as smooth as you suggest.

**Lord Richard:** I am not suggesting that the passage of the Bill will be at all smooth. I do not understand the purpose of the Bill. That is the point.

**Mr Michael Gove MP:** You summed it up brilliantly, I felt, as indeed did Baroness Hughes.

**Lord Richard:** Limiting the effects of the EU charter is not one of the four objectives that the Prime Minister set himself in the renegotiations, is it?

**Mr Michael Gove MP:** In his letter to Donald Tusk I think he mentioned—he certainly mentioned it in a speech that he gave around that time—the importance of giving effect to Protocol 30.

**Lord Richard:** It is not one of the four, then?

**Mr Michael Gove MP:** There are four baskets, and I think this fits into the sovereignty basket. Here we are: “Third, I want to see the EU’s commitments to subsidiarity fully implemented”—this falls within the section on sovereignty—“with clear proposals to achieve that. As the Dutch have said, the ambition should be ‘Europe where necessary, national where possible’.



In addition, the UK will need confirmation that the EU institutions will fully respect the purpose behind the JHA Protocols in any future proposals dealing with Justice and Home Affairs matters, in particular to preserve the UK's ability to choose to participate”.

**Lord Richard:** Okay, but there is nothing there about the charter.

**Mr Michael Gove MP:** The reference to the charter was explicitly in the speech that the Prime Minister gave the day before he wrote the letter to Donald Tusk, when he referred to the importance of giving effect to Protocol 30 in domestic legislation.

**Lord Richard:** If it is not one of the four objectives, surely we can presume that a Bill of Rights will not, therefore, address the impact of the charter?

**Mr Michael Gove MP:** There are two things there. The four areas in which the Prime Minister wants to see change include sovereignty. This is clearly an issue of sovereignty. He made it clear in the speech that he gave at Chatham House, outlining what Britain's negotiating asks were, that he wanted to see change in this area, and one of the things that I had an opportunity to discuss with your colleagues in the Constitution Committee is the possibility of using the British Bill of Rights as a means of giving effect to the protections that that protocol is meant to secure.

**Lord Richard:** Do you agree that, as some of our witnesses have said, a UK Bill of Rights would be subject to the requirements of the EU charter when the UK is acting within the scope of EU law?

**Mr Michael Gove MP:** To take them separately, I think the Charter of Fundamental Rights codifies rights that the European Union believe are congruent with European Union law, and anyone can seek to invoke the charter when European Union law applies.

**Lord Richard:** That is not quite the question that I asked you. I asked you whether you agree that a UK Bill of Rights would be subject to the requirements of the charter when the UK is acting within the scope of EU law. In other words, does it change the position?

**Mr Michael Gove MP:** I am not sure that I quite understand the question. The point about the Charter of Fundamental Rights is that it is engaged when European Union law is engaged, and the evidence that has been presented to this Committee has outlined that European Union law as applied by the European Court of Justice is applied according to pragmatic but nevertheless clear principles as to whether or not this would affect the British Bill of Rights per se. It would be a question of whether or not any of the rights contained in a British Bill of Rights had any bearing on European Union law or the implementation of it through the domestic legislation that gives effect to a directive of the European Union.

**Lord Richard:** Perhaps I am being very dense this morning, but I did not follow that at all. It is a simple question: do you think that a UK Bill of Rights—a new one—would be subject to the requirements of the EU charter in the same way as happens at the moment?

**Mr Michael Gove MP:** I do not understand the question. I do not understand what—

**Lord Richard:** A mutual misunderstanding.

**Mr Michael Gove MP:** Yes, but it is important to try to clarify this. What do you think the Charter of Fundamental Rights does to our rights architecture in the Human Rights Act?

**Lord Richard:** It depends on whether they are in conflict or not.

**Mr Michael Gove MP:** But what would be in conflict, and how would you define it?

**The Chairman:** Secretary of State, can I try to help to elucidate? I am sure that Mr Raab will be able to assist. The charter of rights relates to European Union law, which we know, in the end, trumps law in this country.

**Mr Michael Gove MP:** Absolutely. Because of the direct effect.

**The Chairman:** Yes, and therefore, when bringing in a Bill of Rights in any circumstance where any kind of contradiction or conflict existed with the European Union charter with regard to our relationship to the European Union, precedence would be given to the European Union charter over any British Bill of Rights. It would trump the British Bill of Rights by the very fact that being part of the European Union means that European Union law—in this area, with regard to rights—would inevitably have primacy.

**Mr Michael Gove MP:** Yes, that is a statement of the law. It is a bald statement of what everyone understands by the law. European law, as a result of the European Communities Act, has direct effect, so when the European Union legislates, that means that any domestic legislation that is contrary to it is knocked out, as it were. There is a clear difference between what the European Court of Justice can do and the European Court of Human Rights—and, indeed, British courts when they are applying convention rights. British courts can say that any legislation that Parliament passes is inconsistent with the ECHR. It can issue a declaration of incompatibility. Parliament has the capacity to fast-track changes to that legislation, but if Parliament wishes to carry on in wilful denial of this declaration of incompatibility, it can. What Parliament cannot do, under current legal frameworks, is to say, where European Union law is clear, that it will not apply it. That is the situation now and it will be the situation in the future, so far as I know, unless there is some treaty change to the European Union.

**The Chairman:** All I think Lord Richard was wanting to confirm with you was that no British Bill of Rights is going to change the fact that, when it comes to any conflict, the trump card would be with the European Court of Justice and its decision in interpreting the charter of rights as basically having primacy over any British Bill of Rights.

**Mr Michael Gove MP:** Yes, but I think it is also important to say that Protocol 30, from which both the United Kingdom and Poland benefit, some might argue suffer, from makes it clear that the charter should not be viewed as creating new rights. It is also the case that the application of European Union law, as a number of your witnesses have pointed out—Lord Denning said that it was a tide that flowed up the estuaries and through the rivers—does not cover everything in the United Kingdom. But I invite Mr Raab to elucidate.

**The Chairman:** I am anxious about time. All Lord Richard was pointing out, I think, was that a British Bill of Rights would still, as British law, be subject to that primacy of European Union law and the Court—

**Mr Michael Gove MP:** That is true, but ultimately—and it is important to stress this—European Union law only applies in the United Kingdom because of the European Communities Act. Ultimately, Parliament is sovereign. Also, there is a very interesting point that is worth bringing out.

**Lord Richard:** You would repeal the European Communities Act.

**Mr Michael Gove MP:** No. I am merely stating facts.

**Lord Richard:** I know. That is what I was trying to do, actually.

**Mr Michael Gove MP:** As a result of this dialogue, I am sure that we are all better informed.

**Lord Richard:** We are agreed.

**Mr Michael Gove MP:** Well, I do not know what you think, so I do not know. You can agree with me if you like, and I would be most pleased about that.

**The Chairman:** I think we are agreeing that the European Communities Act creates that relationship with the European Union where there is primacy when it comes to European Union law, and that a British Bill of Rights will fall under that spell in the same way as every other piece of legislation.

**Mr Michael Gove MP:** There is a big “but”.

**The Chairman:** What is the big “but”?

**Mr Michael Gove MP:** The big “but” is what the Supreme Court itself has said. In the HS2 case, Lords Mance and Sumption have argued that when Parliament passed the European Communities Act, it could not have envisaged that by passing that Act it would have deliberately sacrificed certain basic constitutional principles. In stating that, they were stating a principle that finds embodiment in the German constitutional court, which is there to safeguard the basic law. Were the European Union to legislate in a way that the German constitutional court felt was contrary to the basic law, the constitutional court could express an opinion. Therefore, there is a live question—it is a complex area, as I think this conversation has brought out—as to whether or not our Supreme Court should be encouraged, facilitated, legislated, to become a constitutional court similar to the German constitutional court, and therefore have the capacity to say that in certain areas the European Union’s legislation ran counter to certain basic British freedoms.

**Lord Richard:** But Germany has a constitution.

**Mr Michael Gove MP:** We have a constitution as well.

**Lord Richard:** Write it down.

**Mr Michael Gove MP:** It is written in many, many documents, Lord Richard. Actually, we played a large part in writing Germany’s constitution, I should say, but ours is much older.

**The Chairman:** Let me just say that one thing that has been raised at different times before this Committee is the idea of looking to Germany, where Germany’s constitution would seem to have primacy over anything to do with European Union law in the end. In fact, it is not the view of the president of the German constitutional court. I am not going to distract us at this moment, but I will refer you to a lecture given by the president of the German constitutional court in October 2013, here in Britain, in which he said that European Union law is accorded primacy over national law in Germany, too, and that included their own constitutional law. I will let you have a copy of this lecture that he gave. He is very clear that the constitution of Germany does not allow Germany to claim that it is not obliged to follow European law. It is a view that is also taken by academics here. I will let you have those documents, because I am anxious that everybody is given time.

**Mr Michael Gove MP:** Academics, as we know, can divide, and, indeed, presidents of courts can take different views at different times.

**The Chairman:** I think he is more likely to know German law than anybody here, and his view, as the president of the constitutional court of Germany, is that they are bound by European Union law.

**Mr Michael Gove MP:** It is certainly the case that the constitutional court has not struck down European Union law at any point, but I think it is a moot point as to whether it has the ability to do so. In the same way, I think that Lord Mance and Lord Sumption made in clear in their judgment that if they felt that any point the European Union law ran counter to what they considered to be basic constitutional principles, the court would seek to assert itself.

**The Chairman:** They may find that they are not in agreement with a whole set of other judges in the very same court.

**Mr Michael Gove MP:** That is precisely my point. In these matters good men and women can differ.

**The Chairman:** I am going to ask Lord Oates to ask some questions.

**Q83 Lord Oates:** Good morning. Following on from your answers to Lord Richard's questions, do I understand from those answers that you would accept that the EU charter, where it applies, provides a more powerful remedy than the Human Rights Act, given that it allows the courts to disapply inconsistent national legislation?

**Mr Michael Gove MP:** Yes it is more powerful. Whether that is a good thing is open to democratic debate.

**Lord Oates:** My next question is rather more specific and is in relation to the blanket ban on prisoner voting. Will the legislation on that blanket ban have to be amended before the European Parliament elections, given the decision of the Luxembourg court in the Delvigne case?

**Mr Michael Gove MP:** I do not believe that that is necessarily so, but I will refer to Mr Raab, who is the Commons' leading expert on prisoner voting.

**Mr Dominic Raab MP:** I do not think it would.

**Lord Oates:** Can you expand on why you do not think it would?

**Mr Dominic Raab MP:** First of all, I think that, as a matter of principle, the right, or the assertion of the right, to prisoner voting is not within the convention or the protocol. It was a creature of the living instrument doctrine articulated and developed by the Strasbourg court. Our position has been, as a constitutional issue as much as a criminal justice issue, that on this issue, and frankly on legislative matters more generally in relation to human rights, it is for Parliament to decide whether to ease the ban. We have maintained that position very clearly domestically within the UK courts. I went over to the Committee of Ministers of the Council of Europe in September to explain why the domestic climate, including the views of Parliament, make it unlikely—or unrealistic—that the ban will be lifted in the foreseeable future. We want to have that debate about the right boundaries for protecting our constitutional democratic prerogatives while respecting our international obligations. We will keep engaging constructively with the Committee of Ministers, but I do not sense an appetite on either side for a tectonic clash over this, so I do not think that this it will be necessary.

**Lord Oates:** Does this decision not relate to EU law? We are talking about the Luxembourg court rather than the Strasbourg court. Do we not have to apply its judgment?

**Mr Dominic Raab MP:** In the case of *Delvigne*, the French ban was upheld, so I do not think that there is any imminent risk of litigation. But it is certainly right to say that there is a measure of legal uncertainty in relation to that issue as a matter of EU law, and many other areas of fundamental rights.

**Lord Oates:** But it was upheld on very specific grounds, was it not, that it was proportional and was not a blanket ban. I do not quite understand how this does not apply.

**Mr Dominic Raab MP:** All sorts of rather esoteric facts applied in that case that are different from the situation in the UK. We do not have any UK cases before the CJEU—and long may that continue.

**Lord Cromwell:** Secretary of State, just before I ask my main question, may I go back to the issue of perception that we touched on in some of the earlier questions? Would you accept that there is, in some quarters, a perception that the repeal of the Human Rights Act is a dilution, or will lead to a dilution, and would you acknowledge that there are some countries that may wish to play that back to us to excuse their own behaviour?

**Mr Michael Gove MP:** I think that once our consultation document has been published, while there might be people who will perfectly legitimately criticise some of the provisions and ideas within it, I do not think anyone would see it as a retreat from proclaiming the importance of human rights. In fact, we will make the case that human rights are better and more sensibly protected as a result.

As for the impact on other countries, I think that this argument can sometimes be overstated. I do not think that Vladimir Putin's hand is stayed by the fact that Britain does anything in particular with respect to its domestic legislation. It is a good thing that occasionally the Strasbourg court and the Council of Europe can exercise some countervailing pressure against Russia, but countries like Russia and leaders like Putin operate above and beyond the law, and that is a brute fact of international relations.

**The Chairman:** Lord Cromwell, I would like you to move on.

**Q84 Lord Cromwell:** I would love to spend more time on that, but time is against us.

Many of the witnesses who have come to speak to us have predicted that if the Human Rights Act is repealed there will be a greater reliance on the EU charter, and that consequently more cases will be referred to Luxembourg. Do you agree, and is that an improvement?

**Mr Michael Gove MP:** No. I would not consider it an improvement. My colleague Dominic Grieve referred to the Court of Justice of the European Union as—I cannot quite remember—voracious, or hungry, or aggressive, or whatever.

**Mr Dominic Raab MP:** Predatory.

**Mr Michael Gove MP:** Predatory—the image of it is as a sort of raptor. Having met Baron Koen Lenaerts, its president, I do not think that he is a predator, but I do think that, for the reasons we explained earlier, the Court of Justice of the European Union can play the ace of trumps at the moment. It can say, “Sorry, European law prevails”. For that reason, as a

believer in parliamentary sovereignty, I think it is preferable if the British Parliament and British courts can decide on these matters wherever possible.

**Q85 Baroness Newlove:** Good morning, Secretary of State. After listening to what you have said in answer to other Members, whether they agree, disagree or are confused, my concern is that in repealing the Human Rights Act there would be a negative impact on our relationship with other EU members.

**Mr Michael Gove MP:** I do not think that there will be, no. We are obviously going through a renegotiation of our membership of the European Union. Some issues have caused concern among other nations, but I think that the Prime Minister is doing his very best to reassure those nations that these changes are for the good of the European Union collectively. I certainly have not found in my dealings with other EU Justice Ministers that our plans to reform our rights architecture is an issue of concern. They have views about whether or not Britain should remain in the European Union and the consequences of that, but they do not, certainly to me, express strong views about this.

**Baroness Hughes of Stretford:** I am just thinking in particular about the principle of mutual recognition that underpins EU co-operation in justice and home affairs. I assume that the Government would not want to weaken their commitment to that principle and dilute that co-operation. Is that assumption correct, and, if so, what assessment have you made of the effect that the changes that the Government are proposing in relation to human rights might have on that co-operation in those areas?

**Mr Michael Gove MP:** I am keen on the principle of mutual co-operation, but in the last few weeks one concern—and it has been brought forward by some of the witnesses here—is the way in which some individual member states may offer their citizens or the people in those states stronger protection than the European Union itself offers. The Melloni case, I know, has been discussed with this Committee. As I understand it, in that case a European arrest warrant was issued. Spain wished to offer the person who was the subject of the warrant a higher degree of protection than European Union law would offer. Nevertheless, the arrest warrant went through. Therefore, it is possible that this Government or a future Government might wish to institute protection for citizens or residents in the UK that was of a higher standard than in the European Union, and that would pose an interesting question as to whether or not our commitment to mutual recognition trumped our desire to provide greater rights protections for any individual.

**Baroness Hughes of Stretford:** I can see lots of complications going down that route, but thank you very much.

**Mr Michael Gove MP:** There are. I will not take a view on it; I am just saying that it is a possibility. But, overall, judicial co-operation across Europe and indeed with other countries generally serves the interests of justice.

**The Chairman:** I sympathise with the view that the Secretary of State has just expressed—that it is about raising standards and not lowering them—

**Mr Michael Gove MP:** Wherever possible, yes.

**The Chairman:** —and that should be very important for us. On many issues we do have higher standards and we should maintain them across Europe and not lower them to create a common way of working.

**Mr Michael Gove MP:** Exactly.

**Q86 Lord Cromwell:** We have had evidence, as you would perhaps expect, on the critical role of parliamentary sovereignty within the UK's constitution. To what extent do you think that international courts are incompatible with, or not to be trusted with, parliamentary sovereignty?

**Mr Michael Gove MP:** It is a huge field. Nations willingly submit themselves to international tribunals and international courts. It is obviously open to a nation to disregard the judgment of an international court or tribunal and to bear the consequences—and the consequences are almost always reputational. There is a difference with the European Union, because Parliament chose deliberately to legislate to give European Union law direct effect. That is different from the membership of the European Court of Human Rights or indeed any other international court. Parliament can always choose, without amending the fundamental constitutional statute that is the European Communities Act, to ignore or flout what an international court or tribunal might decide. As a general principle of international law, I think that states should abide by the decisions of tribunals unless they are inconsistent with a higher constitutional principle or fundamental right which Parliament considers important.

**Q87 Baroness Eccles of Moulton:** Secretary of State, this is a new sort of question. It is about the fact that the Lisbon treaty provided for the EU itself to become a party to the ECHR. That has stalled because the outline agreement was rejected by the court—not for the first time. It rejected it in December 2014, and I think that it also did so about two or three years earlier. It is quite difficult to see why the court is so reluctant for this to happen, but it is not difficult to see that the ECHR might not be all that keen about it either. Do you have a view on this? Which way do you think it should go?

**Mr Michael Gove MP:** I am conflicted because, on the one hand, we signed the Lisbon treaty—funnily enough, as a politician I campaigned against it—as an international treaty and it is now in force, and it was clear what the member states of the European Union committed to. On the other hand, the European Court of Justice is, for want of a better word, the supreme court of the European Union. If the Court of Justice says that the member states want X but X is illegal, outside the treaties and outside the interpretation of the treaties, then we have to abide by that court. That also causes me some heartburn and unease at times, but the law is the law. Ultimately, whatever I might consider desirable or undesirable, I have to accept that, under the current rules, if you are a member of the European Union and the Court of Justice of the European Union says that A must prevail, then A must prevail.

**Baroness Eccles of Moulton:** The other people who are obviously involved are the member states that do not belong to the European Union, of which there are about 19.

**Mr Michael Gove MP:** Yes, exactly.

**Baroness Eccles of Moulton:** Can they have a view?

**Mr Michael Gove MP:** Yes, they absolutely can, and that has to be borne in mind as well. Even if the European Court of Justice were to have no problem with it, obviously other countries would have to agree before the European Union could itself become a party to it. But it comes up against the brute fact, as I say, that whether or not one thinks that it is

predatory, the European Court of Justice is capable of playing the ace of trumps at the moment.

**The Chairman:** Secretary of State, one of the trickiest issues in these discussions is connected to devolution. I am going to ask Lord Blair to pick up on this issue with you.

**Q88 Lord Blair of Boughton:** Secretary of State, some of the evidence that we have received from members of the devolved Administrations has been really quite surprising and quite striking. One person in particular whom I will quote is the Member of the Scottish Parliament, Mr Biagi. He made it absolutely clear to the Committee that, in his opinion and in the opinion of his party, human rights legislation is not a reserved power. As far as I can see, it is either a reserved power or it is a devolved power. I do not think that is the position that you took when you appeared in front of the Constitution Committee in December, and it is not the position taken by those who are taking the Scotland Bill through the House. None of us, I think, can understand how it can be neither reserved nor devolved. It is like saying that you feel a little bit pregnant; it is just not possible. It is either reserved or devolved. So my question to you is: do you agree that the consent of the devolved Parliaments would be required for the introduction of a UK Bill of Rights to the devolved regions?

**Mr Michael Gove MP:** It is neither reserved nor devolved. Any reform or change to the Human Rights Act is a matter for the Westminster Parliament, but the application of human rights is a matter for Scots courts and, indeed, for the Scottish Government. If you can imagine a state of permanent pregnancy, then that is what we have. As to consent, we will consult on what we think is the best way of involving all the constituent parts of the United Kingdom in understanding the case for rights reform. However, I would not want to prejudge at this stage exactly how we might do so.

**Lord Blair of Boughton:** Do you think there is a risk that there will be not a UK Bill of Rights but an English Bill of Rights? What impact would that have on our discussions with the devolved institutions?

**Mr Michael Gove MP:** I would hope that there would be a UK Bill of Rights, but the one thing I will concede is that, while I have many friends in, and there are many people whom I admire in, the Scottish National Party, nevertheless the leadership of the Scottish National Party might want—if you can imagine such a thing—to view this exercise through a party-political lens, certainly in the run-up to the Scottish parliamentary elections. However, I hope that we can encourage them to resist that temptation.

**The Chairman:** But, Secretary of State, is it not inevitable that this will be seen as yet again Westminster taking a kind of English view of things and not taking sufficient account of devolved nations—the way in which they do business and the things that matter to them? It is not just Scotland; Northern Ireland is also expressing some concern. I am mindful of time, but have you thought through the constitutional consequences of this, which, even from your own description, is about putting on a gloss rather than making a radical change?

**Mr Michael Gove MP:** The flip side is whether or not the changes that we bring forward are marginal, radical or something in between. Folk will make up their own minds. However, the implication of your question is: on the one hand, is it not unravelling the constitutional knitting for very little—

**The Chairman:** That is what it seems like.



**Mr Michael Gove MP:** —and, on the other hand, if one believes that it is very little, why should Scottish nationalists or other politicians be in high dudgeon about it? If it is very little, it cannot really threaten the constitutional architecture in the way they say. I suspect that one thing that has characterised the development of the British constitution throughout its long history has been a spirit of compromise, occasional moments of partisanship and then progress.

**The Chairman:** But your description is that all the same rights will be there, save for a few bits of tweaking, and essentially a gloss will be put on things. You do not accept that it would involve dilution or some of the things that my colleagues have mentioned.

**Mr Michael Gove MP:** Yes.

**The Chairman:** I am tempted to sing to you the song from “Guys and Dolls”, “Sit down, sit down, sit down, you’re rocking the boat”. It feels like the swaggering of centralised power to tell the devolved nations that they need this when the changes are so minimal.

**Mr Michael Gove MP:** Taking up your challenge from “Guys and Dolls” —

**The Chairman:** Are you going to sing to us?

**Mr Michael Gove MP:** No, I am just going to say that, far from being swaggering, the approach of Her Majesty’s Government is “nicely, nicely”.

**The Chairman:** Well, nicely, nicely or not, Lord Richard, does it seem nicely, nicely to you?

**Q89 Lord Richard:** Rather more “Luck be a lady tonight”. I want to make one point on this. The Scottish Government have a clear view that you are not entitled to legislate for them on this without a Sewel Motion. I am not sure what the Northern Ireland Government say, but there is very strong evidence that some Northern Ireland academics are saying much the same thing, and the situation in Wales, as I understand it, is identical. However you look at it, you are going to have a major constitutional row between the centre and the three devolved Administrations as to whether you can do this. Is that not bound to give rise to, first, a great deal of political unrest, if I can put it in that way, and, secondly, legal challenges to your constitutional right to do it? There is bound to be a series of judicial reviews, appeals to the Privy Council and heaven knows what else. Would you agree with that?

**Mr Michael Gove MP:** The first thing I would say is that there may well be judicial reviews, but if government were never to act on the basis that something might be judicially reviewed, we would never get anything done.

**Lord Richard:** I totally agree with that. However, the real point that I am making is: is it really worth having all that legal eruption and political row in order to achieve what the Chairman has called a gloss?

**Mr Michael Gove MP:** I would say several things. First, 51% of people across the United Kingdom voted for parties in favour of change to the Human Rights Act. Secondly, depending on how you ask the question, there is strong support for human rights reform in Scotland, as there is across the United Kingdom. Thirdly, if we put forward a reform that some around this table might consider measured but others might consider modest and then the Scottish National Party, in high doh, says, “This is outrageous and a constitutional outrage”, I think people might say “Hold on a moment. It’s the UK Government that is proceeding in a

sensitive fashion and others seem to be overreacting". But that is to pre-empt what civil society will say about our consultation document.

**Lord Richard:** This is not just a Westminster/Scottish argument; it is also a Westminster/Welsh argument and a Westminster/Northern Ireland argument.

**Mr Michael Gove MP:** That is true.

**Lord Richard:** You cannot say that the parties in Wales, for example, are going to act in the same way in which the Scottish National Party is likely to act.

**Mr Michael Gove MP:** Who is to say? I cannot predict, although I can guess, how individual politicians will react. More broadly, a majority of politicians in Northern Ireland would certainly like to see change. The fundamental principles of the convention are also, of course, there to protect individuals, and there are also minorities in Northern Ireland who look to that protection. It is not our intention to dilute that protection, and when people see the consultation document, people's fears may well prove to be phantoms.

**Q90 The Chairman:** That takes me to the final question, which is: when can we expect the consultation paper?

**Mr Michael Gove MP:** Soon.

**The Chairman:** Oh, Secretary of State, you can do better than that.

**Mr Michael Gove MP:** I am at the mercy of the Prime Minister and he has to be happy with the consultation document before it is released. He has, understandably, a lot on his plate at the moment. What he has seen so far makes me confident that there will not be too long to wait.

**The Chairman:** Thank you. I will ask one last thing. It is a question that I put to Mr Raab the last time he was here. We have waited nearly a year for the Government's reply to our report on their opt-in policy.

**Mr Michael Gove MP:** On the JHA?

**The Chairman:** Yes, so we are really concerned that we have not heard from you. It is over a year. Can we look forward to receiving a response to that?

**Mr Michael Gove MP:** Absolutely. It is in the process of being drafted now. The one thing I would say is that of course, as I mentioned earlier, this is also subject to revision, so anything that we would send to you might be subject to revision. The other thing I would say is that I recognise that it is necessarily unsatisfactory for you collectively to question me without the consultation document. Once it is published, I shall be delighted to return to the Committee, and then there will obviously be more meat on the table to pick over.

**The Chairman:** We will look forward to it. Thank you very much for coming today. I am really grateful.