

APPG on the Rule of Law

Meeting Report: The Death of the Human Rights Act, the Birth of a New Constitutional Settlement?

2 February 2016 17:00 – 18:20
Committee Room 19, House of Commons

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Format

17:05 – 17:10: Lord Pannick (Chair) Introduction

17:10 – 17:30: 4 x speakers

17:30 – 18:00: Questions and comment – MPs and Peers

18:00 – 18:20: Questions and comment – open to the floor

Attendance

Chair: Lord Pannick QC

MPs and Peers: The Rt Hon Dominic Grieve QC MP (APPG Chair), Lord Ramsbotham, Lord Woolf, Lord Judge, Lord Lisvane, Lord Phillips, Baroness O'Neil, Sir Edward Garnier MP, Andy Slaughter MP, Jesse Norman MP, Lord Judd, Lord Maclennan, Tom Tugendhat MP.

Others in attendance included: Nicole Piche, Christina Dykes, Sir Paul Jenkins, Nuala Mole, Angela Patrick, Lucy Wake, Dr Phillip Tahmindjis, Rebecca Elvin, Peter Moran, Oliver Sells QC, Mikolaj Barczentewicz, Professor Robert Hazell, Dr Jeff King, Colm O'Conneide, Graham Child, Jennifer Button, Swee Leng Harris, Justine Stefanelli, Jan van Zyl Smit, James Divecha.

Meeting Aim

To provide MPs and Peers with an opportunity to discuss rule of law considerations relevant to Human Rights Act reform proposals that could involve codifying the UK constitution, focussing on:

- The role and powers of the proposed Constitutional Court; and
- The proposed relationship between the UK Constitution, UK law and EU/ECHR law.

Background

A UK Constitutional Court as a 'Constitutional Longstop'

In The Rt Hon Michael Gove MP's evidence to the Lords Constitution Committee in December 2015,¹ Mr Gove raised the possibility that a British Bill of Rights could 'create a constitutional longstop similar to the German Constitutional Court'. Mr Gove described this as a challenge that the Prime Minister had 'passed directly' to Mr Gove.

In terms of what a 'constitutional longstop' means, Mr Gove noted that 'the German Constitutional Court can, in certain circumstances, say that rulings of the Court of Justice of the European Union may pose problems for their constitution.' Earlier in his evidence, Mr Gove emphasised the principle of parliamentary sovereignty, saying that although other countries defend individual rights by having written constitutions:

nevertheless parliamentary sovereignty and our traditions have been a more effective bulwark over time for individual rights than almost any other constitutional arrangement of which I can think. I am attached to the principle of parliamentary sovereignty, and I would not wish to see parliamentary sovereignty as we understand it at the moment undermined by any of the changes that we seek to make.

¹ Revised transcript of evidence taken before The Select Committee on the Constitution: Oral Evidence Session with The Rt Hon Michael Gove MP, Lord Chancellor and Secretary of State for Justice, (2 December 2015) <http://www.parliament.uk/documents/lords-committees/constitution/AnnualOralEvidence2014-15/CC021215-LC.pdf>

Nonetheless, in response to a question by Lord MacLennan of Rogart, Mr Gove confirmed his understanding that it is 'only countries with written constitutions that have constitutional courts.'

Professor Mark Elliott has observed that Mr Gove:

appears to envisage not that the Supreme Court should be given power to override Acts of Parliament that conflict with fundamental constitutional values or principles—which is what one would normally expect of a 'constitutional court'—but rather that the UK Supreme Court, in newly constitutional guise, should be equipped by a British Bill of Rights to stand up to *European Union law*.²

Professor Elliott therefore observes that Mr Gove's proposal could be regarded as codification of an approach already outlined by the Supreme Court in the *HS2* case, in which Lords Mance and Neuberger in a joint judgment said at [207]:

The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.³

There is a risk, however, that codification of an approach that allowed UK courts to not apply EU law in cases of incompatibility with the UK constitution could be viewed as a breach of EU law, particularly where such a proposal would be a kind of reverse-engineering of the constitution, rather than a country's pre-existing constitutional system.⁴

Potential Constitutional Roles of the Judiciary

In its 2014 Report, the House of Commons Political and Constitutional Reform Committee identified different options for the role of the judiciary, if there was to be a codified constitution.

² Professor Mark Elliott, 'The UK Supreme Court as a constitutional 'longstop': Michael Gove's evidence to the House of Lords Constitution Committee' Public Law for Everyone (2 December 2015) available at: <http://publiclawforeveryone.com/2015/12/02/the-uk-supreme-court-as-a-constitutional-longstop-michael-goves-evidence-to-the-house-of-lords-constitution-committee/>

³ *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324.

⁴ Tobias Lock, 'Human Rights and EU reform in the UK and the 'German question'', UK Constitutional Law Association (25 November 2015), available at: <http://ukconstitutionallaw.org/2015/11/25/tobias-lock-human-rights-and-eu-reform-in-the-uk-and-the-german-question/>

- Constitutional sovereignty – under such a model, the Constitutional Court has the power to undertake constitutional review of legislation, and usually to strike down legislation if it is not consistent with the Constitution. This is the case in Germany, for example.
- Parliamentary sovereignty – it is unclear what status the constitution would have if it could simply be amended by an Act of Parliament. Nonetheless, under such an approach, a Constitutional Court could perhaps have powers to make a declaration of unconstitutionality, which would follow a similar model to the Human Rights Act. Under such a model, there would not necessarily be an obligation on Parliament to repeal or amend unconstitutional legislation.⁵ If courts are not given the power to strike down legislation, is there a risk of an unintended consequence that they will interpret legislation in arguably radical ways in order to ensure that the legislation complies with the constitution?⁶

The German Model

Some view the German Court's decision regarding EU law and the German constitution in *Solange* as similar to the UK Supreme Court's reasoning in *HS2*.⁷ Accordingly, with regard to the relationship between EU law and the UK constitution, the current position may not differ greatly from the German model.⁸ Notably, to date, 'no EU act has ever been declared inapplicable in Germany'.⁹

Related Issue – Devolution

A further issue related to the Human Rights Act and UK's constitution is the issue of devolution. For example, issues around whether human rights are a devolved or reserved power, whether the Scottish Parliament ought to have legislative power in relation to the Human Rights Act, and what the Sewell convention means for changes to the Human Rights Act have been raised, discussed, and debated in the passage of the Scotland Bill through Parliament, and in Mr Gove's evidence to the Constitution Committee. It is envisaged that issues of devolution will not be discussed in depth at this meeting due to necessary constraints on the time available and hence appropriate scope of discussion, although devolution issues are obviously relevant to the topic of the meeting.

⁵ House of Commons Political and Constitutional Reform Committee, *Constitutional role of the judiciary if there were a codified constitution*, Fourteenth Report of Session 2013-14, available at

<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/802/802.pdf>, p13-18.

⁶ See e.g., Richard Ekins and Christopher Forsyth, 'Judging the Public Interest: The Rule of Law vs. the Rule of Courts' (2015), available at

<http://www.policyexchange.org.uk/publications/category/item/judging-the-public-interest-the-rule-of-law-vs-the-rule-of-courts>

⁷ See e.g. Tobias Lock, 'Human Rights and EU reform in the UK and the 'German question'', UK Constitutional Law Association (25 November 2015), available at: <http://ukconstitutionallaw.org/2015/11/25/tobias-lock-human-rights-and-eu-reform-in-the-uk-and-the-german-question/>

⁸ Mark Elliott, 'Constitutional legislation, European Union law and the nature of the United Kingdom's contemporary constitution'—forthcoming in (2014) *European Constitutional Law Review* available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2476941

⁹ Tobias Lock, 'Human Rights and EU reform in the UK and the 'German question'', UK Constitutional Law Association (25 November 2015), available at: <http://ukconstitutionallaw.org/2015/11/25/tobias-lock-human-rights-and-eu-reform-in-the-uk-and-the-german-question/> pp.18-19.

Rule of Law Questions

Rule of law questions that arise in relation to these ideas include:

- Certainty of law – s 3 of the HRA has been criticised for encouraging Courts to engage in judicial activism in their interpretation of the law thus undermining the certainty of law;¹⁰ would codification as proposed resolve this concern?
- International rule of law – would a UK constitution that asserted its supremacy over international law undermine the international rule of law?
- Protection of fundamental rights – what would be the Constitutional Court's role in ensuring that the law protects fundamental rights if it is not given strike down powers?
- The rule of law as a constitutional principle – the rule of law is one of the principles of the current UK constitution; assuming that it would form part of a written UK constitution, should parliamentary sovereignty be maintained such that Parliament can pass legislation that is contrary to the rule of law? Or should the principle be entrenched, and the proposed Constitutional Court be given strike down powers to protect the rule of law?

The Bingham Rule of Law Principles

The rule of law questions identified above are based on the eight rule of law principles that were identified by Lord Bingham, which can be summarised as:

1. The law must be accessible and so far as possible, intelligible, clear and predictable;
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
5. The law must afford adequate protection of fundamental human rights;
6. Means must be provided for resolving without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve;
7. Adjudicative procedures provided by the state should be fair; and
8. The rule of law requires compliance by the state with its obligations in international law as in national law.

¹⁰ See e.g. Prof Richard Ekins and Prof Christopher Forsyth, 'Judging the Public Interest: The rule of law vs. the rule of courts' *Policy Exchange* (3 December 2015), available at <http://judicialpowerproject.org.uk/judging-the-public-interest-the-rule-of-law-vs-the-rule-of-courts/>; Dr Jan van Zyl Smit, 'Promoting the rule of courts or resisting the misuse of courts? A response to Professor Ekins and Professor Forsyth', *Policy Exchange: Judicial Power Project* (15 December 2015) <http://judicialpowerproject.org.uk/promoting-the-rule-of-courts-or-resisting-the-misuse-of-courts-a-response-to-professor-ekins-and-professor-forsyth/>

Speakers' Summaries

The first three summaries were provided in writing by the speakers and have been supplemented using notes taken of their presentations at the meeting. Ms Rachel Logan kindly stepped in to speak at short notice, so the fourth summary is based on notes taken at the meeting.

Anthony Speaight QC, A U.K. Constitutional Court as an E.U. Constitutional Longstop?

Mr Speaight QC's paper is attached as an annex to this document, and includes the following points.

- Historically the Court of Justice of the European Union has played a valuable role contributing to certainty of law by developing the concept of an autonomous European law which all must accept. More recently, however, a rule of law problem has arisen because of a series of CJEU rulings, many of which are cases based on the EU Charter, which, far from reinforcing certainty of EU law, have introduced confusion.
- The German Federal Constitutional Court (FCC) has claimed the right to review EU acts *inter alia* as to whether they are within the scope of a power conferred to the EU, or for compliance with the principle of subsidiarity. At least six other EU countries claim a similar theoretical right. However, the FCC has never, in fact, held an EU act invalid.
- It would be perfectly compatible with the principles of UK law to confer on UK courts a function similar to that of the German Constitutional Court (FCC). Indeed, in the recent cases of *GI*, *HS2* and *Pham* there have been *dicta* of high authority suggesting that such a power may in any event exist.
- However, a situation of conflict with treaty obligations would arise if the UK courts ever, in fact, held an EU instrument or decision invalid and Parliament did not promptly legislate to override the court's decision.
- In practice the UK Supreme Court would probably exhibit the same reluctance as the FCC to go so far as to hold an EU act invalid.
 - This cuts both ways. On the one hand, the review power might be criticised as achieving nothing. On the other hand, it might be judged that the theoretical existence of the review in the hands of a court with so high an international reputation as the UK Supreme Court would act as a salutary warning to EU institutions to respect the limits of competence and subsidiarity.
 - It must be recognised that a grave political crisis might be triggered if the UK court were ever to be driven by intellectual logic to hold an EU act invalid.
- In short, amending the European Communities Act explicitly to enunciate such a review power would be to create a nuclear weapon.

Dr Tobias Lock, The German Constitutional Court and European Law

As is well known, the German Federal Constitutional Court (FCC) has the power of constitutional review and the power to strike down legislation incompatible with the constitution (the Basic Law/Grundgesetz). It is possible for individuals to access the FCC directly by way of a constitutional complaint

– provided that the complaint relates to an alleged violation of a fundamental right guaranteed in the constitution.

The German system is dualist in nature, i.e. international treaties such as the ECHR and the EU Treaties need to be ratified and ‘transformed’ into an act of Parliament before being applicable within the German legal order. Given that all exercise of state power (including that of the legislature) must be compatible with the constitution, international treaties cannot be used to override it. However, in the case of EU Treaties, this statement needs to be modified as they must be approved by a 2/3 majority in both houses (the same is required for amending the constitution itself), they merely need to comply with the fundamentals of the constitution: e.g. human dignity, democracy, popular sovereignty, federalism, republicanism, separation of powers, etc.

As far as the ECHR is concerned, Germany’s strong ‘home grown’ protection of fundamental rights means that it is not used very often in judicial practice. Where there is a disagreement over the interpretation of parallel fundamental rights contained in both the constitution and the ECHR, the ECtHR’s decisions must be used as ‘interpretative aids’ for the interpretation of German fundamental rights, so that the ECHR is employed to extend (an already extensive) protection of fundamental rights. There is no evidence in the case law of the Federal Constitutional Court that other concerns, such as a notion of national security independent of that under the ECHR, could be used to override the minimum standards of fundamental rights protection set by the ECHR.

Regarding EU law, three scenarios need to be distinguished: 1) the challenge of an EU measure because it allegedly violates fundamental rights; 2) the challenge of an EU measure because it was allegedly adopted *ultra vires* or violates constitutional identity; 3) the challenge of a new Treaty conferring new powers on the EU.

As for EU acts allegedly violating the fundamental rights contained in the constitution, the FCC held in 1986 that ‘as long as’ EU law (and the CJEU) *generally* ensures an effective protection of fundamental rights, any constitutional complaint brought against an EU act because it allegedly violates a fundamental right guaranteed in the constitution is inadmissible. In order to rebut this so-called *Solange* presumption, an applicant would need to show that the protection of fundamental rights in the EU legal order *as such* had become deficient – a feat that is nigh impossible in practice. Last Wednesday, however, the FCC decided that if human dignity is violated by EU law, then the *Solange* presumption does not apply. However in that case, the FCC found that the lower court had incorrectly applied EU law so that an incompatibility of EU law with German constitutional identity was not actually found.¹¹

The FCC’s *ultra vires* and identity reviews are based on a different line of thought: Germany can only be bound by EU law in so far as it has agreed to being bound by it. This means that from a German point of view, EU acts can only be binding on Germany (and thus applicable in the German legal order) if the EU stayed within the limits of the competences conferred upon it by the German legislator. A similar rationale underpins identity review.

¹¹ Order of 15 December 2015 - 2 BvR 2735/14. See also FCC Press Release No. 4/2016 (26 January 2016) <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html>; Eva-Maria Alexandrova Poptcheva, ‘At a Glance: The German Federal Constitutional Court’s ruling on the European Arrest Warrant’, European Parliament Think Tank (28 January 2016) [http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/573959/EPRS_ATA\(2016\)573959_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/573959/EPRS_ATA(2016)573959_EN.pdf). The FCC has referred the case back to the Higher Regional Court to make a final decision taking due account of the rights of the claimant under the Charter.

Finally, a new Treaty must not deprive the German state of its essential state functions, i.e. it must not lead to its *de facto* abolition – for this to happen the German people would have to agree in a referendum.

Professor Richard Ekins, Human rights law reform and the rule of law

I. Incorporation and codification

The UK's international legal obligations change the legal rights and obligations enforced by UK courts and binding UK subjects and officials only to the extent of their incorporation in domestic law. Parliament should choose the terms of any such incorporation aiming to protect the rule of law and parliamentary democracy and to advance good foreign policy. Notwithstanding the briefing paper, there seems to me no live proposal to codify the constitution or to create a constitutional court. No proposal of this kind would be consistent with the Westminster tradition of constitutional government.

II. The British Bill of Rights (BBR) and the ECHR

The HRA impairs the rule of law in important ways. The BBR would improve matters if it repealed section 3 of the HRA (which requires one to strive to interpret, and in practice often to rewrite, other statutes consistently with the ECHR), clarified the scope, meaning and application of particular rights, and otherwise limited judicial discretion. The BBR should also replace section 2 of the HRA (which requires Strasbourg judgments be taken into account), distancing us from the often inconstant and unprincipled judgments of the ECtHR. The ECtHR might still find the UK in breach of the ECHR. If the UK does not choose to exit the Convention it may nonetheless refuse to comply with some adverse judgments on the principled grounds that the ECtHR is fundamentally misconstruing the ECHR.

III. The BBR and the EU: the 'German option'

It is open to Parliament to amend the ECA 1972 so that EU law has to be consistent with the BBR to take effect in the UK (see also the Supreme Court dicta in HS2). This would make the continuing force of EU law in the UK turn in part on the reasoning of judges about the scope, meaning and application of the rights set out in the BBR. It would be problematic for the rule of law if UK judges were in effect to cancel otherwise clear EU law in the course of adjudicating particular disputes. There are reasons to limit over-bearing norms of EU law but this rule of law cost is real (as is the risk of unforced diplomatic crises).

It is also open to Parliament to legislate to limit the incorporation of the CJEU's misreading of EU law. One should be reluctant to encourage the Supreme Court itself to place the UK in breach of EU law (as found by CJEU). An alternative would be to empower the Supreme Court to declare that the CJEU has acted in excess of jurisdiction and/or that EU law is inconsistent with fundamentals of the UK constitution. This declaratory jurisdiction might support Parliament in exercising its existing power to choose to limit the incorporation of problematic EU law. The existence of jurisdiction might help chasten the CJEU. However, the scheme would place on the Supreme Court an improper legislative responsibility for evaluating the terms of the UK's incorporation of EU law.

IV. The EU Charter of Fundamental Rights

Human rights law reform cannot reasonably ignore the Charter. Its scope is vague but expanding and its effect can be radical. The UK does not have an opt-out: protocol 30, which purports to limit its effect, is a dead letter. It would not do much good to reform the HRA only to find that the BBR has been overtaken by the Charter. Ideally, the UK would secure a proper opt-

out. It is open to Parliament in any case to privilege the BBR and to limit the reach of the Charter in our law, amending the ECA 1972 to rule out the incorporation of the latter. To be clear, the problem is not so much the Charter's restraint of EU organs, but its restraint of and on member states.

Rachel Logan

Ms Logan provided the perspective of Amnesty International on the points in discussion.

Ms Logan first analysed the question of why the idea of a constitutional court is on the agenda. The government has been trying to 'square the circle' of the incoherent and unworkable proposals in its election manifesto to repeal the Human Rights Act (HRA), introduce a British Bill of Rights (BBR), and have greater separation from the European Court of Human Rights (ECtHR). In practice, replacing the HRA with a BBR that was incompatible with the European Convention on Human Rights (ECHR) whilst remaining a member of the ECHR would not be possible under international law, and hence the government's plans have been delayed. It is not possible as a member of the ECHR to codify the ECHR so as to ensure that the UK has less rights protection than other countries in the Council of Europe, but the evidence is clear that this is the aim of the government. The evidence that suggests that this is the government's aim includes discussion of 'contingencies' or 'responsibilities' upon rights, the suggestion of codifying specific rights to roll back interpretations of the ECtHR and purported plans to make inroads into universality through limits on article 8 rights in relation to deportation rights.

If the UK replaces the HRA with a BBR that is incompatible with the ECHR while remaining within the Convention, the inevitable outcome is that more cases will be taken to the ECtHR against the UK, and the UK will lose those cases. The UK is obliged by Article 46 of the ECHR to abide by rulings against it from the ECtHR, like all member states. This means that there will be greater foreign influence on UK law, not less, or if the UK does not comply with those rulings it will be in further and further breach of international law.

Second, Ms Logan explained why it does not look likely that the UK is moving towards a codified constitution. If the UK were truly moving in the direction of a codified constitution, then the proposals for a constitutional court would include the courts having strike down powers. Such a change in the constitutional settlement, which arises directly from the proposals to repeal the HRA, would be for the sole purpose of trying to find a legally coherent way to narrow human rights and reduce rights protection. By contrast, if the aim of this was to add rights or expand rights protection, this would be possible under the current arrangement. As to the question of whether there would be benefits to the rule of law in terms of certainty from a codified constitution, fixing the interpretation of ECHR rights in a codified constitution would ossify the 'living instrument' that is the ECHR. This inherent flexibility in the ECHR has allowed advances in, for example, LGBT rights and digital rights.

Finally, international rule of law would be undermined. Inevitably, there would be more ECtHR decisions against the UK, and the UK's not following these decisions would be a clear challenge to the rule of law on the continent. It would undermine the human rights regime. For example, Russia is currently following the UK's lead, with a new law to assert Russian sovereignty over ECtHR and other international human rights court rulings having recently been put on the books. The UK is giving licence to other countries not to follow international law, including international human rights law. The UK cannot think it is acting in isolation — its actions have an impact overseas on the behaviour of other countries, not just on the UK's international reputation. These proposals are a fig leaf for a dangerous policy of rights reduction that will have significant repercussions at home and abroad.

Key Points from the Discussion

There were questions and some discussion during and following the expert speakers' presentations. The following paraphrases and summarises this discussion based on notes taken at the meeting, but should not be considered verbatim quotes.

Previous rejection of EU law by a national court

Dr Lock explained that of the countries in which courts had asserted an ability to reject EU law, there was only one Czech case in which a court had in fact rejected an EU law.¹² That case was two years ago, and was a complicated case concerning pension rights for Czech pensioners who had been working in the Slovak half of Czechoslovakia but were now living in the Czech Republic — the question was whether their pensions had to be determined according to the Slovak social security system — as foreseen by an agreement between the Czech and Slovak republics — resulting in lower pensions for the persons affected. The context was a disagreement between the Czech Administrative Court and the CJEU¹³ on the one side and the Czech Constitutional Court as to whether the question was determined by the Czech-Slovak agreement or by EU law. Dr Lock observed that this was a very unique case involving a unique set of circumstances, and was unlikely to be repeated. Lord Pannick likewise observed that national courts generally refer *ultra vires* questions to the CJEU, so it would be rare for there to be a disagreement between a national court and the CJEU on an *ultra vires* question.

Current relationship between UK courts and ECtHR

There was discussion of whether UK courts had themselves inferentially undermined the ECHR in their decisions. The response offered by a former Supreme Court judge was that the UK courts had not been undermining the ECHR, rather, they had indicated when they would have taken a different approach to the ECtHR. The UK courts had not rejected the authority of the ECtHR. The UK courts' approach had contributed to a process of dialogue between UK courts and the ECtHR.

Nature of a possible Constitutional Court and its power

Mr Speaight observed that there were different bases on which a UK court could hold that EU law was inconsistent with the UK constitution. One would be that the EU act was outside conferred competences; another was the question of subsidiarity, i.e. that something is within a conferred power, but better dealt with nationally. However, there was a third option that had received less attention, which was compatibility of EU law with the EU Charter.

A cautionary observation was made that establishing a constitutional court was not like renaming the House of Lords the Supreme Court. Constitutional courts in other countries are based on complicated systems of a written constitution that include the powers of the court. The establishment of a constitutional court would be taken to be a more significant move towards a constitutional system.

The possibility of legislation trying to give the UK Supreme Court all of the powers of the European courts was raised. However, it was thought that this would be counter to parliamentary sovereignty, and suggested that if the

¹² PI ÚS 5/12, 31 January 2013 (Slovak Pensions XVII [Holubec]). See also Ivo Šlosarčík 'EU Law in the Czech Republic: From *ultra vires* of the Czech Government to *ultra vires* of the EU Court?' 9 *ICL Journal* 417 (3/2015) https://www.icl-journal.com/download/45f501ed9bf5da8ed7e3df757458ff79/ICL_3_Slosarcik.pdf.

¹³ See Case C-399/09 *Landtová* ECLI:EU:C:2011:415

Supreme Court was given supreme power, the Court would make the kind of judgements that the government does not want.

A question was raised as to how the judges of a constitutional court would be appointed.

A Constitutional Court and EU/ECHR law

In answer to a particular query, Dr Lock expressed his view that if Parliament decided that the Supreme Court had 'competence competence' to determine whether EU law was in breach of UK Constitutional principles, this would breach EU law.

It was observed that implicit in Professor Ekins' presentation was that the UK might simply refuse to comply with its obligation under art 46 of the ECHR and not comply with ECtHR judgments. This would go against a central tenet of UK law that the UK complies with international law, and would be contrary to UK foreign policy. A system in which the UK denies its obligations without withdrawing from the ECHR would be novel in terms of UK constitutional law in relation to international law. Professor Ekins replied that the UK constitutional position was already that international law takes effect in UK law only insofar as it is incorporated, which is for Parliament to decide. There are very often good reasons for the UK to conform to the decisions of international courts, but, as Lord Mance made clear in *Pham*, different considerations apply when such a court exceeds the jurisdiction conferred on it by treaty.¹⁴ The underlying question is which institution (national, international, parliamentary or judicial) should be determining how to protect human rights.

The rule of law concern was emphasised by a number of attendees: the UK cannot pick and choose which international law obligations it complies with, it cannot subscribe to international treaties and then not comply. If the UK does not want to be bound by the ECHR, then it should just leave.

Discussion of possible government proposals on human rights

There was some speculation as to what the government might propose in its consultation document, particularly in light of The Rt Hon Michael Gove MP's evidence that day to the House of Lords EU Justice Sub-committee. The anticipated proposals included clarification that UK courts are not bound by ECtHR decisions, and perhaps an attempt to carve out claims about the overseas operations of the armed forces. It was suggested there might be mere tinkering in the Bill, as the government will not be able to achieve the real change they want, so the Bill would contain gestures instead.

The Rt Hon Michael Gove MP had stated that he wanted to place a British gloss on the ECHR rights, but it was argued that there was reason for concern as to the colour of this British 'dualist dulux' — would it be the same purest white of the ECHR, or a different colour altogether that would put the UK in breach of its international law obligations. Furthermore, if the UK can put a British hue on human rights, then so too can Russia put a Russian hue on human rights, and similarly other countries. The key issue here is really the rule of law and maintaining the rule of law. This debate is not in fact about a bright new constitutional dawn, and risks resulting in something less than the current level of rights protection.

A further concern was whether the government proposed to roll back the common law that has evolved in the last few decades under the influence of ECtHR decisions. Even if future ECtHR decisions would not be enforceable, it raised questions as to whether past influence be rolled back, and if so how. This kind of uncertainty might be interesting for academic study, but would not be good for the law.

¹⁴ *Pham v Secretary of State for the Home Department* [2015] UKSC 19 at [90], per Lord Mance.

Speakers' Biographies

- (1) **Professor Richard Ekins**
St John's College, Oxford; Director of the Judicial Power Project at Policy Exchange

Professor Richard Ekins is a Tutorial Fellow in Law at St John's College and an Associate Professor in the University of Oxford. He holds a fractional appointment at the TC Beirne School of Law at the University of Queensland and is leading Policy Exchange's new Judicial Power Project. He received his BA, LLB (Hons) and BA (Hons) degrees from The University of Auckland, before going on to read for the BCL, MPhil and DPhil at Oxford. He has published widely in leading scholarly journals and his books include *The Nature of Legislative Intent* (OUP, 2012) and the edited volumes *Modern Challenges to the Rule of Law* (LexisNexis, 2011) and *Lord Sumption and the Limits of the Law* (Hart, 2016, forthcoming; with Nick Barber and Paul Yowell).

- (2) **Dr Tobias Lock**
Lecturer in EU Law; Co-Director Europa Institute University of Edinburgh

Dr Tobias Lock is a lecturer in EU law and co-director of the Europa Institute at the University of Edinburgh. He received his legal education in Germany and most of his research deals with interlocking legal orders, such as the EU and the ECHR; or EU and ECHR law and national law. His work has been published widely in leading law journals.

- (3) **Rachel Logan**
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Rachel Logan is Amnesty International UK's Law & Human Rights Programme Director, providing technical expertise and helping lead policy development and strategic advocacy and campaigning work. She is also a Barrister, remaining in practice as an Associate Member of Matrix Chambers. Rachel specialises in public and commercial law, both international and domestic. Her public law practice encompasses all areas, but focuses on human rights and humanitarian law, with a particular specialism in Articles 3 and 8 ECHR.

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Barrister in practice at 4 Pump Court. Member of the Government Commission on a UK Bill of Rights (2011-2012). Rapporteur of the Society of Conservative Lawyers working party on Devolution. Past Deputy Chairman of the Conservative Group for Europe. Past Chairman of the Political Committee of the Carlton Club. Bencher of Middle Temple."

Annex

The following annex is the note by Mr Anthony Speaight QC entitled 'A U.K. Constitutional Court as an E.U. Constitutional Longstop?' in full.

A U.K. CONSTITUTIONAL COURT AS AN E.U. CONSTITUTIONAL LONGSTOP?

All Party Parliamentary Group on the Rule of Law

2nd February 2016

Michael Gove's remarks to the House of Lords Constitution Committee should properly be understood as following on directly from the Prime Minister's Chatham House speech on 10th November 2015 in which he said¹:-

“We need to examine the way that Germany and other EU nations uphold their constitution and sovereignty. For example, the Constitutional Court in Germany retains the right to review whether essential constitutional freedoms are respected when powers are transferred to Europe. And it also reserves the right to review legal acts by European institutions and courts to check that they remain within the scope of the EU's powers, or whether they have overstepped the mark. We will consider how this could be done in the UK.”

Is there a Rule of Law problem?

Although eurosceptics complain about the development by the Luxembourg Court of the concept of an autonomous supreme European law², this has, in truth, been strongly in the UK's interest.

The creation of remedies for non-implementation of EU single market directives has saved countries which implement diligently, like the UK, from the unfairness of others not bothering to do so. The alternative to a supreme EU law is countries deciding for themselves what EU instruments mean, which is a recipe for uncertainty and ultimately chaos.

What has changed attitudes towards the Luxembourg Court have been rulings, in many cases based on the EU Charter, which, far from reinforcing certainty of EU law, have introduced confusion:-

- In *Test Achats*³ the Court produced the outcome of a ban on the use of gender in the setting of insurance premiums, even though the Council had wanted to produce the opposite outcome, and there would have been no obligation on the EU to do anything at all as to insurance.
- In *Mangold*⁴ the Court discovered that there was already a general rule of European law against age discrimination in 2003, even though a directive had just been passed allowing

¹ In this paper I am not considering another part of the PM's proposal, namely to limit the role in our domestic law that the EU Charter of Fundamental rights – which I welcome -- since it does not involve a “constitutional court” role.

² *Costa v ENEL* [1964] ECR 1

³ *Association Belge des consommateurs Test-Achats v Conseil des Ministres*, [2012] 1 WLR 1933

⁴ C-144/04 *Mangold v Helm*

Germany until 2006 to address age discrimination.

- In *Digital Rights Ireland*⁵ the Court at a stroke ripped up an entire directive, which had been perfectly properly passed by both the Council and Parliament, and which underpinned procedures vital to national security.
- In *Google Spain*⁶ the Court announced that there was after all a “right to be forgotten”, notwithstanding that the legislative institutions had been unable yet to agree on the terms of any such new law.
- In *Akerberg Fransson*⁷ a trader, who had previously suffered an administrative penalty, was prosecuted for a VAT fraud. He claimed that the prosecution must be dismissed as in breach of the EU Charter which contains a right not to be punished twice for the same offence. The prosecution and administrative penalty were pursuant to Swedish municipal law, and not part of the transposition of the EU requirement of VAT. Despite that, and contrary to the arguments of the Advocate-General, the European Commission and several member states, the CJEU held that the Swedish laws were in the “implementation of Union law” and subject to the Charter.

These are not just Tory grumbles. In a recent lecture Professor Derrick Wyatt QC said:-

“There is no doubt that some judgments of the Court of Justice lack any obvious textual or other legal basis, are policy-driven, and have expanded the scope of EU competence under a fairly thin guise of interpretation.”⁸

All this erodes Sir Thomas Bingham 1st characteristic of the rule of law:-

“The law must be accessible and so far as possible intelligible, clear and predictable”⁹

What does the German Constitutional Court actually do?

The Federal Constitutional Court (“FCC”) in Germany has said that it regards its self as having competence to review the constitutionality of legal acts of EU organs in several different ways¹⁰:-

- (1) **Rights review.** In 1974 the FCC said it would review whether EU acts accord

⁵ C-293/12, C-594/12 *Digital Rights Ireland Ltd v Minister for Communications*

⁶ Case C-131/12 *Google Spain SL v Agencia Espanola*

⁷ C-617/10 *Åklagaren v Åkerberg Fransson*

⁸ Lecture at Durham European Law Institute on 17th November 2015 para 56.

⁹ “The Rule of Law” Tom Bingham (2010) Allen Lane, page 37. First suggested principle of the meaning of the rule of law.

¹⁰ I am adopting with gratitude the analysis of Dr M Payandeh in his article at CMLR 48 (2011) 9

with fundamental rights guaranteed by the German Basic Law¹¹. Subsequently, however, the FCC appears to have said that it no longer needs to carry out this function in view of the recognition of fundamental rights in EU law.

- (2) **Vires review.** In 1993 the FCC held that one of the reasons why the Maastricht Treaty was compatible with the German constitution was because, if the EU were to act beyond the powers conferred, the FCC would hold such acts to be non binding in Germany¹². Similarly in 2009, when the FCC upheld the constitutionality of Germany adhering to the Lisbon Treaty, part of the reasoning was this possibility of the FCC: the FCC added that (whatever EU instruments might seem to say) the EU institutions did not have competence to decide on the limits of their own competence¹³.
- (3) **“Constitutional identity” review.** A further limb of possible review identified by the FCC in the *Lisbon* case was whether EU acts were compatible with the constitutional identity of the German Constitution: this seems to mean that a treaty establishing a full federal European state would not be compatible with the German constitution.

The FCC has never actually exercised its power to declare EU acts invalid for Germany, and when refusing to do so in later cases has suggested that the power would be exercised only in extreme circumstances¹⁴. But that does not necessarily mean that the claim to possess such theoretical competence has been pointless: the development of EU rights law culminating in the EU Charter has been attributed to a desire to head off FCC “rights reviews”.

Would it be compatible with UK membership of the EU to confer on UK courts a function similar to that of the FCC?

My answer is: it would not be incompatible for UK courts to possess such a function under UK domestic law, but a situation of conflict with arise if the UK courts held an EU instrument or decision invalid and Parliament did not promptly legislate to override the court’s decision.

The FCC does not see its function as peculiar to Germany:-

“Member States courts with a constitutional function may not, within the limits of the competences conferred on them – as is the position of the Basic Law – be deprived of the responsibility for the boundaries of their constitutional empowerment for integration and

¹¹ *Solange I* (1974) BverfGE 37, 271; reported in English at [1974] 2 CMLR 540

¹² BverfGE 89, 155; reported in English as *Brunner v European Union Treaty* [1994] 1 CMLR 57

¹³ BverfGE 123, 267; reported in English as *Re Ratification of the Treaty of Lisbon* [2010] 3CMLR 13

¹⁴ *Re Honeywell* [2011] CMLR 33, and *EURO Bailout* decision of 7th September 2011 discussed in article by B Zwingmann at ICLQ 61 (2012) 665

for the safeguarding of the inviolable constitutional identity.”¹⁵

Nor is Germany the only country in which the courts have claimed to possess such a review competence. Others which have include the Czech Republic¹⁶, Italy¹⁷, France, Spain, Denmark and Poland¹⁸.

On the other hand, the treaty obligations of the UK under the Lisbon Treaty and associated EU instruments extend to implementation of all EU instruments and decisions, not merely those which we may consider to be within jurisdiction. For countries, such as the UK, which have “dualist” systems, it is a matter for us how internally we achieve compliance with a treaty obligation; but somehow the obligation is to do so.

Would it be compatible with the principles of UK law to confer on UK courts a function similar to that of the FCC?

The short answer is: yes.

In fact, it has on several recent occasions been suggested with high judicial authority that such a function may already exist:-

***R (GI) v Home Secretary* [2013] QB 1008**

GI, who had been born in Sudan, became a naturalised British citizen. The Home Secretary deprived him of his citizenship and then ordered that he be excluded from the country on the ground of terrorist activities. He was already out of the UK, as he had skipped bail. He brought judicial review of the exclusion order on the ground that it was unfair to exclude him, and so deprive him of the advantages of being in the country for his appeal against the citizenship decision.

He relied on an ECJ decision *Rottmann v Bayern* [2010] QB 761 which held that citizenship of the EU was the “fundamental status of nationals of member states”; and so that member states must when exercising powers in the sphere of nationality have due regard to EU law. Therefore, GI claimed the benefit of anti-discrimination rights in EU law.

Laws LJ rejected all this. *Rottmann* had no relevance to a case with no EU-cross-border element. He had “some difficulties” with *Rottmann* since under the treaties EU citizenship is merely parasitic on citizenship of a member state. But in any event, even if it had been an EU-cross-border case, he doubted whether an English court was bound to follow it:-

¹⁵ *Lisbon Treaty* at [312]

¹⁶ Czech Constitutional Court judgment of 26th November 2008 file reference P1 US 19/08, Treaty Amending the Treaty on EU, para 139

¹⁷ per Professor Guglielmo Verdirame at <http://blogs.new.spectator.co.uk/2015/10/a-british-bill-of-rights-would-protect-our-liberty/>

¹⁸ See list of judgments by courts in these countries provided by Cruz Villalon A-G in *Gauweiler v Bundestag* [2016] 1 CMLR 1.

“[43] The conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation state. They touch the constitution; for they identify the constitution's participants. If it appeared that the Court of Justice had sought to be the judge of any procedural conditions governing such matters, so that its ruling was to apply in a case with no cross-border element, then in my judgment a question would arise whether the European Communities Act 1972 or any successor statute had conferred any authority on the Court of Justice to exercise such a jurisdiction.”

R (Buckingham CC) v Secretary of State for Transport (“HS2”) [2014] 1 WLR 324
Lords Neuberger and Mance, with whom 5 other Justices agreed, said in the context of the rule in art 9 of the Bill of Rights precluding a court from questioning proceedings in Parliament¹⁹,

“[207] It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.”

Pham v Home Secretary [2015] 1 WLR 1591

P, who was born in Vietnam, acquired British nationality. The Home Secretary made an order depriving him of his British nationality on the ground of involvement in terrorism.

He claimed that the Vietnam government would not comply with its obligation under Vietnam law to restore his Vietnamese nationality. So he claimed he would be rendered stateless.

P sought to rely on the EU law. He argued that *GI* was wrong.

Lord Mance, with whom 4 other Justices agreed, rejected the argument in a lengthy passage from [68] to [92]. Whilst, like Laws LJ, he expressed no final view, his dicta are of great interest:-

“[76] Laws LJ's remarks in *G1* recognise, correctly, that the question he raised is for a United Kingdom court, ultimately one of construction of a domestic statute, the European Communities Act 1972 . That follows from the constitutional fact that the United Kingdom Parliament is the supreme legislative authority within the United Kingdom. European law is part of United Kingdom law only to the extent that Parliament has legislated that it should be.

....

[82] The breadth of sections 2(1) and 3(1) of the 1972 Act is notable. On one reading, they leave the scope of the Treaty within the sole jurisdiction of the Court of Justice as a question as to its “meaning or effect”. Nevertheless, this court in *R (Buckingham County Council) v Secretary of State for Transport* [2014] 1 WLR 324 , paras 207–208 recognised the potential which exists for jurisdictional limits on the extent to which these sections confer competence on

¹⁹ To similar effect were remarks of Lord Reed in his Thomas More lecture 2014 page 8.

the Court of Justice over fundamental features of the British constitution. Questions as to the meaning and effect of treaty provisions are in principle capable of being distinguished from questions going to the jurisdiction conferred on the European Union and its court under the Treaties: compare in a domestic context, the decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 . The principle that the orders of a superior court of record are valid until set aside is not necessarily transposable to an issue of construction concerning the scope of sections 2(1) and 3(1) of the 1972 Act or the Treaty provisions and conferral competence referred to in those provisions.

....

[90] A domestic court faces a particular dilemma if, in the face of the clear language of a treaty and of associated declarations and decisions, such as those mentioned in paras 86–89, the Court of Justice reaches a decision which oversteps jurisdictional limits which member states have clearly set at the European Treaty level and which are reflected domestically in their constitutional arrangements. But, unless the Court of Justice has had conferred on it under domestic law unlimited as well as unappealable power to determine and expand the scope of European law, irrespective of what the member states clearly agreed, a domestic court must ultimately decide for itself what is consistent with its own domestic constitutional arrangements, including in the case of the 1972 Act what jurisdictional limits exist under the European Treaties and on the competence conferred on European institutions including the Court of Justice.”

I do not find these Delphic passages entirely easy, but I think the inference is that careful attention has to be paid to the words in s.2(1) ECA,

“All such rights, powers ... created or arising by or under the Treaties ...”

Does that mean all powers which the EU institutions say arise under the treaties? or all the powers which the UK courts find arise under the treaties? Whilst, of course, UK courts will pay great respect to EU institutions, there must be a well arguable case for the latter option.

In *Anisminic* the Foreign Compensation Act 1950 had enacted that a “determination” of the Commission should not be called into question in any court. However, the House of Lords held that a decision which purported to be a determination of the Commission would not actually be a “determination” if the Commission had misconstrued its powers. So in the same way one can regard, say, a directive purporting to be within powers conferred not a directive at all if in the opinion of the UK court the EU institutions have misconstrued their competences.

Less easy to dispose of is s.3(1) ECA,

“... any question as to the meaning or effect of any of the Treaties shall ... (... be for determination ... in accordance with ... any relevant decision of the European Court.)”

If Parliament says that UK courts must follow decisions of the ECJ, surely the only route to avoid doing so would be to hold that a decision such as *Rottman* is not actually a decision of the ECJ at all. Which is hard.

Therefore, it would do no violence to UK legal principles, and arguably would be to perfect and enhance them, if Parliament were to amend ss.2, 3 ECA to clarify that the domestic courts are not to enforce EU instruments and decisions if they find them to be outside EU competences, and that ECJ decisions as to whether acts are within or without competence are to be no more than persuasive authority.

It may be observed that such provisions could be regarded as opening up to review by the UK courts not only whether EU acts are within the scope of competences conferred, but also both (a) whether they are in accordance with the EU Charter, and (b) whether they are in compliance with the principle of subsidiarity.

So would such a power of review in UK courts be a good idea?

In practice the UK Supreme Court would probably exhibit the same reluctance as the FCC to go so far as to hold an EU act invalid. This cuts both ways. On the one hand, the review might be criticised as achieving nothing. On the other hand, it might be judged that the theoretical existence of the review in the hands of a court with so high an international reputation as the UK Supreme Court would act as a salutary warning to EU institutions to respect the limits of competence and subsidiarity.

It must be recognised that a grave political crisis might be triggered if the UK court were ever to be driven by intellectual logic to hold an EU act invalid. The Treaty on the Functioning of the EU art 258-260 contains a range of enforcement measures, leading to heavy financial penalties. The UK court's decision would be no defence.

The route to a quick fix by Parliament enacting primary legislation to restore compliance might be too politically unpopular to be adopted; and, depending on the topic, might even run into the circumstances where the European Union Act 2011 requires a referendum.

So for good or ill the enactment of an unambiguous power of the UK courts to conduct a competence review on EU acts may be to create a nuclear weapon.

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