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THE SUPREME COURT IN THE UNITED KINGDOM

CONSTITUTION

The Supreme Court of the United Kingdom is not a constitutional court on continental lines. Countries with legal systems based on the continental European model, such as most of Europe, Latin America and parts of the Far East, all have constitutional courts which are separate from the ordinary law courts. These courts all have a power of what we call 'abstract review' – that is, a new or proposed law is referred to them, usually by politicians, to see whether it is consistent with the Constitution. Some also have what we call 'concrete review' – that is, the question can come up in the context of a real case involving real people. Some have exclusive jurisdiction, in the sense that they are the only court which can rule on the question, which therefore has to be referred to them if it comes up in an ordinary court. This is to preserve the democratic legitimacy of the laws – the laws passed by Parliament cannot be called in question in the ordinary courts, but only in this separate body with its specialist expertise and political legitimacy. In Germany, for example, the judges are nominated by the political parties in proportion to their popular support. (Incidentally, these continental constitutional courts all have a more varied composition, including a healthy sprinkling of Law Professors, than the top courts in common law countries tend to have).

Countries with legal systems based on the Anglo-American common law model, which is most of the English-speaking world as well as the Indian sub-continent and Israel, do not have separate constitutional courts. Almost all of them have written constitutions which provide, either expressly or by necessary implication, for judicial review of the constitutionality of the laws passed by Parliament. The Constitution of the United States of America, dating back to 1787, does not in so many words give the Supreme Court power to strike down Acts of the federal Congress, as opposed to Acts of the state legislatures. But the Supreme Court very soon held, in *Marbury v Madison,*[1] that this was a necessary incident of a constitution which limited the legislature's powers. More modern constitutions make this explicit. A few also have a version of continental style abstract review. In Canada and Ireland, for example, proposed legislation can be referred to the Supreme Court for an opinion on whether it would be constitutional. But most involve concrete review, where the issue of constitutionality arises in the context of a real case about real people; and it comes before the ordinary courts of the land, rather than a separate specialist body.

* I am very grateful to my judicial assistant, Penelope Gorman, for her help in preparing this lecture. The errors and opinions are all my own.

[1] *Marbury v Madison* 5 US 137 (1803).

When the United Kingdom Supreme Court was set up in 2009, there were some who wondered whether we might eventually evolve into a US or Canadian style Supreme Court. But how could we do that without a written Constitution against which the validity of the laws passed by Parliament can be judged? This is not to say that the United Kingdom does not have a Constitution. Of course it does. But it is not enshrined in a written document which has a special and superior legal status and cannot readily be changed. We constitutional lawyers were brought up to believe that there were two major planks in the United Kingdom's unwritten Constitution:

(1) The Queen in Parliament is sovereign and can make or unmake any law; and

(2) Both the governed and the governors are subject to the rule of law: just as individuals and private entities must obey the law, so ministers, officials and public bodies must act within the powers which the law has given them.

These two principles are still the foundation of our Constitution. But they have undergone some subtle changes since they were first articulated in the latter half of the 19th century. So, I want to ask:

(1) Where stands the sovereignty of Parliament today, given the ceding of legislative competence both downwards – to the devolved Parliaments in Scotland, Wales and Northern Ireland – and upwards – to the law-making powers of the European Union and to a lesser extent to the Council of Europe's machinery for enforcing the European Convention on Human Rights? To what extent have these given the courts the power to rule on the validity of Acts of Parliament?

(2) Where stands the rule of law today? The rule of law has historically been the servant of Parliamentary sovereignty. The role of the courts is to ensure that public bodies stay within the limits of the powers which Parliament has given them or, in the case of central government, within the limits of the royal prerogative. But what would happen if Parliament itself tried to take away or limit that role, in effect to license a minister or public body to act illegally? In those rare cases where the two organising principles of our Constitution might conflict, which will take priority? Might the rule of law, in fact, become the organising principle of our Constitution?

These issues were addressed by the appellate committee of the House of Lords (which was the apex court of the United Kingdom before the Supreme Court

was set up in 2009) in the famous case of *R (Jackson) v Attorney-General*.[2] This was the first of three wonderful challenges to the Hunting Act 2004. It was concerned, not with the content of the Act, and whether it contravened either the European Convention on Human Rights or the law of the European Union,[3] but with its validity as an Act of Parliament. Luckily, no-one took the point that nine members of the House of Lords were being asked to adjudicate upon a bitter battle between the House of Commons and the House of Lords, but the case was enough to persuade the then Lord Chief Justice of England and Wales of the need for a Supreme Court separate from both Houses of Parliament.

In *Jackson*, the argument was that the Parliament Act 1911, in providing that in certain circumstances a Bill might become law without the consent of the House of Lords, had delegated the power of Parliament as lawfully constituted – King, Lords and Commons – to the King and Commons alone. Legislation passed by the modified body was delegated rather than primary legislation. A delegate cannot use his delegated powers to enlarge those powers unless expressly authorised to do so. He cannot pull himself up by his own bootstraps. And the courts can strike down delegated legislation. The Parliament Act 1949, passed under the 1911 Act procedure, had modified the circumstances in which such a Bill might become law and made it easier to pass legislation without the Lords'

[2] [2005] UKHL 56, [2006] 1 AC 262.

[3] See *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719; see also *Friend v United Kingdom* (2010) 50 EHRR SE6.

consent. Hence the argument was that it was invalid, as was the Hunting Act 2004, passed under the procedure as modified by the 1949 Act (as were the three other Acts of Parliament passed in the same way).

The appellate committee of the House of Lords had little difficulty in rejecting that argument. The 1911 Act created a new way of passing Acts of Parliament. Its language was quite explicit: Bills passed under that procedure would become Acts of Parliament. The legislature had not delegated power to a lesser body. It had simply redefined itself. A distinction has to be drawn, as Lord Steyn put it, between what Parliament can do by legislation and what Parliament has to do to legislate.

But are there *any* limits to what can be done under the Parliament Act procedure? The Court of Appeal thought that it could not be used to make fundamental constitutional changes to the relationship between Lords and Commons, such as abolishing the House of Lords.[4] None of us agreed with that. The 1911 Act had been passed in order to do two very fundamental things – to establish home rule for Ireland and to disestablish the Church in Wales. However, the quid pro quo was to reduce the maximum length of a Parliament from seven to five years. To get through under the 1911 Act procedure, a Bill would have to start its passage quite soon after a general election, when the

[4] *R (Jackson) and Ors v HM Attorney General* [2005] EWCA Civ 126, [2005] QB 579.

Commons still had a democratic mandate from the people. So the 1911 Act also provides that a Bill to prolong the life of a Parliament beyond five years cannot be passed in this way. All the members of the appellate committee (apart from Lord Bingham) thought that it would not be possible to get round this prohibition by passing two Bills – one amending the Parliament Act to remove the prohibition and then one to prolong the life of a Parliament. An Act designed to reinforce democracy by preventing the unelected House from thwarting the will of the electorate ought not to be used to enable the elected House to do so. (This might be thought illogical, as the 1949 Act had made it possible to force legislation through some years after a general election, and there has never been any requirement that the measure in question be promised in the party's manifesto.)

The case is more interesting to law students for the speculations (wholly unnecessary to the decision and therefore *obiter dicta*) about whether there might be other limits to the legislative powers of Parliament. Lord Steyn wondered whether 'even a sovereign Parliament acting at the behest of a complaisant House of Commons' could abolish judicial review or the ordinary role of the courts.[5] There are some words in brackets in my own opinion to similar effect.[6] And Lord Hope of Craighead was prepared to say that:

[5] At [102].
[6] At [159].

> 'The rule of law enforced by the courts is the ultimate controlling factor upon which our constitution is based . . . the courts have a part to play in defining the limits of Parliamentary sovereignty.'[7]

Lord Bingham later commented, in his book on the rule of law, that there was no authority for these propositions, which he regarded as heretical. In his view, the judges did not invent the principle of Parliamentary sovereignty, which was the product of the constitutional upheavals of the 17th century, and it was not open to the judges to change it.[8] Lord Hope might retort that the sovereignty of Parliament is a peculiarly English principle and it is by no means obvious that it survived the union of the Parliaments in 1707.

Of course, this argument has nothing to do with the Parliament Act and the battle between the Commons and the Lords. If the rule of law were eventually to place limits upon the legislative power of Parliament, it would not matter whether the offending legislation had been passed with or without the consent of the House of Lords. Nor should we forget that the principles of statutory construction – how the courts interpret legislation - can in practice place limits upon the scope of legislation. In certain circumstances, the courts will not construe legislation to have the meaning and effect which at first sight it might appear to have. I'll come back to that.

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7 At [107].

8 Tom Bingham, *The Rule of Law*, 2011, Penguin Books, p 167.

However, devolution has given the Supreme Court a new role in ruling upon the validity of legislation. This was always the case under the Government of Ireland Act 1920, which set up the Northern Ireland Assembly with its own legislative powers. But this did not generate much litigation.[9] We have had much more litigation since the devolution settlements of 1998. We now have to rule upon whether the actings of the national Governments and Parliaments of Scotland, Wales and Northern Ireland are within the scope of the powers which the United Kingdom Parliament has given them. This jurisdiction was originally given to the Judicial Committee of the Privy Council, because it was thought that the battles would be between the UK Parliament and the devolved Parliaments, so that it would not be right for the appellate committee of the House of Lords to decide them (although they were given to exactly the same judges, but sitting in a separate body which used to be the apex court for the whole of the British Empire and still hears appeals, sometimes on constitutional questions, from a number of smaller Commonwealth countries). Now that we have a Supreme Court, separate from the UK Parliament, that is no longer a problem, so the jurisdiction has come to us.

Devolution questions take two main forms and can come before us in two different ways. Most cases allege that a devolved Parliament or government has

[9] But see *Gallagher v Lynn* [1937] AC 863.

acted incompatibly with the rights contained in the European Convention on Human Rights. The devolution statutes say that they must not do this. These challenges normally arise in a real, concrete case, which comes to us by way of an appeal or, in Scottish criminal cases, a compatibility issue.[10] In this way, aspects of Scottish criminal procedure may be challenged in the Supreme Court, even though there is no ordinary right of appeal in Scottish criminal cases. This has, to say the least, proved controversial in Scotland.[11]

An example of a human rights question coming to us on an ordinary appeal is the *Axa Insurance* case.[12] The Damages (Asbestos-related Conditions) (Scotland) Act 2009 provided (with retrospective effect) that pleural plaques, pleural thickening and asbestosis constituted actionable harm, reversing the effect of a recent decision of the House of Lords which had held that they did not.[13] The insurance industry (yes, insurance companies do have human rights) complained that this was an unjustifiable breach of their property rights, protected by article 1 of the First Protocol to the European Convention. The Supreme Court agreed that this was an interference with their property rights, but held that it was justified as a proportionate means of achieving a legitimate aim. The court recognised that this was a matter of social and economic policy

[10] Criminal Procedure (Scotland) Act 1995, ss 288AA(1) and 288ZA(2), inserted by the Scotland Act 2012.

[11] In particular, the decisions in *Cadder v HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601, and *Fraser v HM Advocate* [2011] UKSC 24, 2011 SCL 582.

[12] *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868.

[13] *Rothwell v Chemical and Insulating Co Ltd* [2007] UKHL 39, [2008] AC 281.

in which weight should be given to the judgment of the democratically elected legislature as to how the balance between the various interests should be struck. Significantly, it recognised that the Scottish Parliament was not to be regarded in the same light as a local authority. The wider grounds for judicial review of administrative action, which can be used to attack the decisions of local government, did not apply.

Human rights apart, Acts of the devolved Parliaments may be invalid because their subject matter is outside the powers which the United Kingdom Parliament has given them. Under the Scotland Act 1998, every subject which is not reserved to the UK Parliament is devolved, whereas currently under the Government of Wales Act 2006, every subject which is not devolved to the Welsh Assembly is reserved to the UK Parliament (although the Welsh would like to convert to a reserved powers model). Northern Ireland is like Scotland, in that everything which is not reserved is devolved, but some reserved matters can be devolved by delegated legislation or Ministerial consent, making it easier to add to the Assembly's powers. But, whichever way round it is, as was recognised in the Privy Council long ago in cases from Canada and India,[14] it is not possible to divide 'devolved' and 'reserved' matters into precisely defined watertight compartments: some degree of overlap is inevitable. So, when deciding whether an Act of a devolved Parliament 'relates to' a particular

[14] *Russell v The Queen* (1882) 7 App Cas 829; *Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580; *Profulla Kumar Mukherji v Bank of Commerce Ltd, Khulna* (1947) LR 74 Indian Appeals 23.

subject, whether reserved or devolved, the court has to divine what it is really about.

Martin v Most[15] concerned the Criminal Proceedings (Reform) (Scotland) Act 2007. This increased the sentencing powers of Sheriffs convicting people summarily (that is, without a jury trial) from six to 12 months' imprisonment. This applied to all offences, whatever their subject matter. But the effect was to increase the maximum penalty on summary conviction for driving whilst disqualified from six to 12 months' imprisonment. This was contrary to the UK Road Traffic Act, which provides for a maximum penalty of six months on summary conviction. Road traffic is a reserved matter. So did this 'relate to' road traffic? The question is to be determined by reference to the purpose of the legislation, having regard to (among other things) its effect in all the circumstances.[16] The Supreme Court held that the Act did *not* relate to a reserved area. Its purpose was to relieve pressure on the higher courts in all kinds of criminal cases.

But an Act of the Scottish Parliament cannot modify a rule of Scots private or criminal law insofar as that rule is 'special to' a reserved matter.[17] Lord Hope (in the majority) thought that the rule of Scots law being modified was a rule of

15 [2010] UKSC 10, 2010 SLT 412.
16 Scotland Act 1998, s 29(3).
17 s 29(2)(d) and Schedule 4, paras 2(1) and (3).

procedure and this was not ‘special to’ the reserved matter of road traffic. Lord Rodger (in the minority) thought that the rule of Scots law being modified was the rule about the maximum sentence on summary conviction for driving whilst disqualified. This in his view was clearly ‘special to’ the reserved matter of road traffic. He did not mince his words.

These were real cases involving real litigants, coming up from the lower courts in the usual way. But the Law Officers in each part of the United Kingdom can refer Bills, after they are passed by a devolved Parliament but before they are sent for Royal Assent, to the Supreme Court, for a ruling on whether or not they are within the scope of the Parliament’s powers. This sort of abstract review is very new to us. We have had no such references from Scotland. This may be because the officials have been able to sort things out to the satisfaction of both the Scottish and the UK governments; or it may be because a reference by the UK government would be seen as a hostile act by the Scottish government and Parliament. (Whether the politics of this will remain the same after the recommendations of the Smith Commission have been implemented remains to be seen.) Curiously, however, there have been no less than three references[18] since the Welsh Assembly obtained full legislative powers in 2011.

[18] Government of Wales Act 2006, s 112.

Two of these have been brought by the Attorney General on behalf of the UK government. The first concerned the very first Bill to be passed by the Welsh Assembly, the excitingly named Local Government Bye-Laws (Wales) Bill 2012. The Supreme Court held that it was within the scope of the Assembly's powers.[19]

More important was the second, concerning the Agricultural Sector (Wales) Bill 2013. The UK Parliament had abolished the system of controlling minimum agricultural wages in England and Wales, and this Bill reinstated something very like it for Wales. Did this relate to 'agriculture', which is devolved, or to employment and industrial relations, which is not mentioned at all in the lists in the Government of Wales Act? We held that it did relate to agriculture, and that it did not matter whether it also related to employment and industrial relations, as these were not expressly excluded, and so the Bill was within scope.[20]

The third reference was by the Counsel General for Wales (the Welsh Attorney General).[21] It concerned a private member's Bill making employers and their insurers pay the cost of NHS treatment for asbestos-related diseases caused by the employers' breach of duty. The Counsel General thought that it was within scope, but he knew that the Association of British Insurers proposed to

[19] *Attorney-General for England and Wales v National Assembly for Wales Commission* [2012] UKSC 53, [2013] 1 AC 792.

[20] *Re Agricultural Sector (Wales) Bill, Attorney General for England and Wales v Counsel General for Wales* [2014] UKSC 43, [2014] 1 WLR 2622.

[21] *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016

challenge this, so he made the reference rather than wait for a case to trundle up through the courts in the usual way (as the *Axa* case had done). The challenge was partly on the ground that the Bill was a retrospective interference with their property rights and partly on the ground that it did not relate to 'funding for the NHS in Wales' which is a devolved matter. The majority held that it was outside scope on both grounds. The Lord Chief Justice of England and Wales, who was asked to sit in the Supreme Court on this occasion because he is a Welshman, held that it did relate to funding for the NHS; it was unjustifiably retrospective in it effect, but this could easily be cured by amending the Bill before submitting it for Royal Assent. (I agreed with the Lord Chief Justice.) The majority were noticeably less respectful of the decisions of a democratically elected legislature than the court had been in the *Axa* case.

In the *Axa* case, both of the Scottish Law Lords thought that there might be other limits (other than those set out in the devolution statutes) upon the powers of the devolved Parliaments. After pointing out the power which a government elected with a large majority has over a single-chamber Parliament, Lord Hope returned to the point he had made in *Jackson* (the Hunting Act case):

> 'It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts protecting the interests of the individual. . . .

> The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.'[22]

Lord Reed reached the same conclusion by a different route. The 'principle of legality' means that the UK Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words. This is one of the rules of statutory interpretation to which I referred earlier. If Parliament wants to interfere with fundamental rights, it has to be specific, so that Parliamentarians understand what they are voting for and can face up to the political consequences.[23] This principle, which dates back at least as far as the famous 18th century case of *Entick v Carrington*[24] is an important limitation on the legislative powers of the UK Parliament. If Parliament cannot itself take away fundamental rights by general words, then neither can it confer upon another body the power to do so. For example, in the very first case to come before the UK Supreme Court, we held that the very general power in the United Nations Act 1946, to make Orders in Council so as to comply with our obligations under the United Nations Charter, did not empower the Treasury to provide for draconian asset-freezing orders against individuals without due process of law.[25]

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22 At [51].

23 *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 539; *Ahmed v Her Majesty's Treasury* [2010] UKSC 2 and 5, [2010] 2 AC 534.

24 (1765) 2 Wilson KB, 95 ER 807.

25 *HM Treasury v Ahmed* [2010] UKSC 2, [2010] 2 AC 534.

In the *Axa* case, Lord Reed took the view that the UK Parliament could not be taken to have intended to establish a body, the Scottish Parliament, which was free to abrogate fundamental rights or to violate the rule of law.[26]

So much for devolving power downwards. What about ceding it upwards? When the UK entered what was then the European Economic Communities in 1973, it had already been established that (within its sphere of competence, which was at that time much narrower than it is now), the community legal order was a higher legal order than those of the member states. It was necessary to the functioning of the common market that community legislation be interpreted and applied in the same way throughout the community. So the final courts of the member states have an obligation to refer to the Court of Justice in Luxembourg any question of community law which is relevant to the case before them, has not been authoritatively ruled upon already, and is not 'acte clair' – that is, the answer is not so obvious as to leave us in no reasonable doubt that this is how the law would be interpreted, not only by the court but also by the other member states.[27] Once the answer comes back from Luxembourg (usually two years later), it is for us to apply it to the facts of the individual case. The coercive power to make decisions which are binding upon the government and the people of the United Kingdom remains with us: a neat

[26] At [153].
[27] *C.I.L.F.I.T. v Ministry of Health*, Case 283/81 [1982] ECR 3417.

solution.[28] (A similar solution now applies to compatibility rulings of the Supreme Court in Scottish criminal cases: they go back to the High Court to decide what to do.)

The European Communities Act 1972 also requires the UK courts to give priority to Community law. We do this in two ways. The first is by 'conforming interpretation': wherever possible UK laws have to be interpreted in conformity with EU law, whether or not this was what Parliament originally intended. It is amazing how much can be done in this way. Thus, for example, the UK Regulations giving effect to the Part Time Workers Directive had to be interpreted and applied so as to include part time judges even though they were expressly excluded.[29] That was easy because these were Regulations and not an Act of Parliament, so the non-conforming provision could simply be ignored. But sometimes a provision which cannot be interpreted away is in an Act of Parliament. If the EU law in question is one which has direct effect, in the sense of giving the citizen rights against the state, then again we must simply ignore it. Thus, for example, in the *Factortame*[30] litigation, the House of Lords ruled that provisions of the Merchant Shipping Act 1988, restricting the right of

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[28] Eg *O'Brien v Ministry of Justice*, questions referred to Luxembourg by the Supreme Court: [2010] UKSC 34, [2011] 1 CMLR 36; answered by Luxembourg: [2012] ICR 955; decided by the Supreme Court: [2013] UKSC 6, [2013] 1 WLR 522.

[29] *O'Brien v Ministry of Justice, supra.*

[30] *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] AC 601.

foreign-owned ships to fish in UK waters, had to be disapplied: according to Lord Bridge

> 'it was the duty of a UK court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law'.

Even where EU laws are not directly applicable or effective in this way, there is still a presumption that Parliament intends to legislate compatibly with our obligations in international law.[31]

We have, however, recently had to consider whether there are limits to the primacy accorded to EU law by the 1972 Act. The *HS2* cases[32] sought judicial review of the decisions, published in a government White Paper, *High Speed Rail: Investing in Britain's future – Decision and Next Steps,*[33] to obtain development consent and compulsory acquisition powers for HS2 through two hybrid bills in Parliament. A hybrid bill is a mixture of a public bill affecting everyone and a private bill affecting individual private interests. It involves an additional select committee stage at which objectors whose interests are directly and specifically affected may petition against it, although they cannot challenge

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31 *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 2 WLR 1275.

32 *R (Buckinghamshire County Council) v Secretary of State for Transport* and linked appeals [2014] UKSC 3, [2014] 1 WLR 324.

33 Cm 8247, 10 January 2012.

the principle, including the business case for HS2, or propose any alternative routes. It was argued that this procedure would not comply with the requirements of the European Environmental Impact Assessment Directive (2011/92/EU).

Article 1(4) says that the Directive does not apply to 'projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive including that of supplying information, are achieved by the legislative process'. So far so good, but the Luxembourg Court has boldly interpreted the word 'since' to mean 'provided that'.[34] So it was argued that we would have to scrutinise the Parliamentary process to ensure that it achieved the objectives of the Directive. Effective public participation would be prevented, it was argued, by the political parties' whipping the vote at the second and third readings, the limited opportunity for examining the environmental information, and the limited remit of the select committee hearing petitions against the Bill.

But this sort of scrutiny of the Parliamentary process would directly conflict with 'one of the pillars of constitutional settlement which established the rule of law in England in the 17th century'.[35] Under Article 9 of the Bill of Rights 1689, freedom of speech and proceedings in Parliament are not to be impeached or

[34] *Boxus v Region Wallone*, Cases C-128/09, C-131/09, C-135/09 [2012] Env LR 14; *Solvay v Region Wallone* Case C-182/10 [2012] Env LR 27; *Nomarchiarchi Aftodioikisi Aitoloakarnanias* {2013] Env LR 27.

[35] As Lords Neuberger and Mance described it at [203].

questioned in any court or place outside Parliament. So we were being asked to consider whether EU law could prevail over a 'provision of the highest constitutional importance'.[36] Curiously, no-one had raised this point until we did so ourselves in the Supreme Court. It was, we all agreed, a matter for the constitutional law of the United Kingdom, not a matter for the Luxembourg Court.[37]

The question was whether the 1972 Act had, as Lord Reed put it, written the EU institutions a blank cheque,[38] or whether it was still subject to the general rules of statutory interpretation. Just as fundamental rights can only be abrogated by express statutory provision, a statute of fundamental constitutional importance, such as the European Communities Act itself, cannot be impliedly repealed or amended by a later ordinary statute. It has to be done expressly. Thus, in the 'Metric Martyrs' case, the Weights and Measures Act 1985, which allowed the use of imperial weights and measures, had not impliedly repealed the power contained in the European Communities Act to make delegated legislation so as to conform our law to an EU Directive requiring the use of metric measures.[39] But could the same apply as between two statutes of constitutional importance,

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[36] As Lord Browne-Wilkinson described article 9 in *Pepper v Hart* [1993] AC 593 at 638.

[37] Other European countries take the same view: Paul Craig, "Constitutionalising constitutional law: HS2" [2014] *Public Law* 373.

[38] *Loc cit.*

[39] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

so that the European Communities Act 1972 had not provided for the implied repeal of such a fundamental principle as article 9 of the Bill of Rights?

Lord Reed thought that there was much to be said for the view of the German Federal Constitutional Court that a decision of the Luxembourg Court should not be read by a national court in a way which placed in question the national constitutional order. [40] That is the counterpart to the principle they had earlier developed that national laws will be interpreted consistently with EU law, so long as this does not conflict with fundamental constitutional principles.[41] In the end, the problem did not arise, because we held that the proposed Parliamentary procedure would meet the requirements of the Directive. It was obviously a substantive rather than a fictional legislative process, appropriate information would be available to members of the legislature and there was nothing in the case law to suggest that the influence of political parties or the Government over voting was incompatible with article 1(4).

The other way in which the UK Parliament has ceded power upwards is through the Human Rights Act 1998. But this is a much weaker concession than that in the European Communities Act. The 1998 Act does impose upon the courts a similar duty of 'conforming interpretation' so that all legislation has, so far as

[40] *Counter Terrorism Database Act* case, Judgment of 24 April 2013, 1 BvR 1215/07.

[41] In the 'solange' cases: *Internationale Handelsgesellschaft,* 2 BvR 52/71 [1974] 2 CMLR 540; *Re Wunsche Handelsgesellschaft,* 2 BvR 197/83 [1987] 3 CMLR 225.

possible, to be read and given effect in a way which is compatible with the Convention rights.[42] This was always intended to be the principal means of curing statutory provisions which turned out to be incompatible. So the UK courts have simply applied the techniques with which they were already familiar as a result of EU law. In the leading case of *Ghaidan v Godin-Mendoza*,[43] for example, the majority had little difficulty in reading 'living together as husband and wife' to include a same sex couple. We did not even see the need to read in the words 'as if they were', although that might have gone some way to assuaging the dissenter, who thought that 'husband' and 'wife' had necessarily to mean a man and a woman.

But sometimes it is not possible to read a legislative provision compatibly. If it is in subordinate legislation, it can simply be ignored. This happened, for example, with the provision in the Northern Ireland Adoption Order limiting joint adoptions to married couples only.[44] But if it is in an Act of Parliament, it cannot be ignored. The most we can do is make a declaration of incompatibility.[45] This has no effect on the validity of the provision, or of anything done under it. It is left to Parliament to decide what, if anything to do about it. It has three choices: it may either approve a fast track remedial Order

42 Human Rights Act 1998, s 3(1).
43 [2004] UKHL 30, [2004] 2 AC 557.
44 *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] AC 173.
45 Human Rights Act 1998, s 4.

in Council[46] putting the matter right; or enact a whole new legislative scheme; or wait to see what the Council of Europe's enforcement machinery decides to do.

It is greatly to the credit of government and Parliament that, with one notable exception, they have so far respected the decisions of the courts on these compatibility issues. There is, as far as I know, no case where Parliament has legislated to reverse one of our more adventurous conforming interpretations, although it clearly could do so. Indeed, it has been our impression that, if we find a provision incompatible, the government would usually prefer us to cure the matter for them, rather than make a declaration of incompatibility which puts the ball in their court.[47] There have been to date, I believe, some 20 declarations of incompatibility which have survived the appellate process.[48] All of those that needed action have been put right, with one exception. The government has still not promoted legislation to give any sentenced prisoners the right to vote.

[46] Under Human Rights Act 1998, s 10.

[47] Lord Phillips of Worth Matravers, 'The Art of the Possible: Statutory Interpretation and Human Rights'. The first Lord Alexander of Weedon lecture, 22 April 2010.

[48] The declaration made in *R (Reilly (no 2) and Heuston) v Secretary of State for Work and Pensions* [2014] EWHC 2182, against the Jobseekers (Back to Work Schemes) Act 2013 is still under appeal.

We await with interest what the government proposes to do with the Human Rights Act. We will, of course, continue to do whatever Parliament tells us to do.

But one noticeable effect of the Human Rights Act (because it has prompted claims which might not previously have been made) has been an increased emphasis on the common law and distinctively UK constitutional principles as a source of fundamental rights and freedoms.[49] In *Kennedy v The Charity Commission*,[50] for example, while holding that there was no Convention right to the disclosure of the report of a Charity Commission inquiry into a charity set up by George Galloway MP, the Supreme Court held that the duties of the Charity Commission under the Charities Act had to be construed in the light of the common law principles of accountability and openness and that judicial review would enable the courts to decide whether the open justice principle required disclosure. There has been a noticeably increased reliance on common law arguments in cases since then.[51]

I mention this, not because I wish to be drawn into debate about the future of the Human Rights Act, but because it is another example of the interesting ways in which the relationship between the courts and Parliament is developing. It has always been the role of a constitutional court to protect fundamental rights,

[49] Some may speculate that this trend has also been prompted by the threat to the Human Rights Act, but this is not for me to say.

[50] [2014] UKSC 20, [2015] AC 455.

[51] Eg *R (Bourgass) Secretary of State for Justice* [2015] UKSC 54, [2015] 3 WLR 457.

within the framework of the law and the Constitution, and that is what an independent judiciary will continue to do to the best of its ability. The rules of statutory interpretation play an important part in this. The rule of law is something more than the mere servant of Parliament. The quid pro quo is that we must stay true to our judicial oath, 'to do right by all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will'. We are not making it up as we go along, but building upon the centuries of law and jurisprudence which make up our national narrative.[52] It is a narrative which I believe is shared by all four nations which currently make up the United Kingdom.

[52] A phrase borrowed from Dominic Grieve, QC, MP, 'Why Human Rights Should Matter to Conservatives', lecture at University College London, 3 December 2014.