



# German Constitutional Law in the UK Supreme Court

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## Abstract

The outgoing tide of EU law will be Britain's most significant constitutional change in recent times. In an era of uncertainties, the UK Supreme Court proved to be a guardian of the constitutional role of Parliament. The case of *Miller*, decided in the UK Supreme Court in 2017, proved that point. The highest court in the UK has therefore gained an important place in the global community of Constitutional Courts. This global community finds its legitimacy in the recognition of common values as well as the recognition of national variations. This article analyses to which extent common values, and in particular those found in German law, have influenced decisions in the House of Lords and UK Supreme Court. To do so, the author analyses decisions by the House of Lords and the Supreme Court and extrajudicial speeches by the Justices of the Supreme Court for references to German constitutional law. It identifies and maps the themes that have attracted the attention of the justices of the Supreme Court. More recently, the UK Supreme Court has referred to judgments and extrajudicial writing by German Constitutional Court judges. This was in the context of constitutional questions relating to the tension between membership within the EU and national identity, a theme which has occupied German judges for some time. As well as that, the interpretation of the European Convention on Human Rights has sparked an interest in German jurisprudence, in particular in the principle of proportionality.

**Keywords** UK Supreme Court · Germany · Constitutional law

## Introduction

The outgoing tide of EU law will be Britain's most significant constitutional change in recent times. In an era of uncertainties, the UK Supreme Court proved to be a guardian of the constitutional role of Parliament. The case of *Miller*,<sup>1</sup> decided in

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<sup>1</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

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the UK Supreme Court in 2017 proved that point. The highest court in the UK has therefore gained an important place in the global community of Constitutional Courts. This global community finds its legitimacy in the recognition of common values as well as the recognition of national variations.

Departure from the EU poses the question as to how the UK Supreme Court will relate to common values shared across the EU.

This article analyses to which extent common values, and in particular those found in German law, have influenced decisions in the House of Lords and UK Supreme Court in the past and whether this will continue after Brexit. To do so, the author analyses decisions by the House of Lords and the Supreme Court and extrajudicial speeches by the Justices of the Supreme Court for references to German constitutional law. It identifies and maps the themes that have attracted the attention of the justices of the Supreme Court and attempts to predict whether the UK Supreme Court will continue to take an interest in German Constitutional legal thinking after Britain leaves the EU. More recently, the UK Supreme Court has also referred to judgments and extrajudicial writing by German Constitutional Court judges. This was in the context of constitutional questions relating to the tension between membership within the EU and national identity, a theme which has occupied German judges for some time. As well as that, the interpretation of the European Convention on Human Rights has sparked an interest in German jurisprudence. This article assesses whether German constitutional thinking will remain of interest to British judges after Brexit.

## Europeanization and Legal Cultures

The last words of Jean Monnet, founding father of the European Community, who died in 1979: “If I had to do the whole thing over again, I would start with the culture”.<sup>2</sup>

The lack of cultural understanding of each other was addressed in the 1990s to some extent with the introduction of the Erasmus University Exchange Programme which was aimed at young Europeans.<sup>3</sup> Young law students and academics took up this opportunity and learnt about differences in EU member states legal systems.

That increased cultural awareness is also a perceived need in UK institutions is indicated by the fact that the former Law Lords and the current justices of the UK Supreme Court have taken active steps towards understanding legal solutions found elsewhere. At the level of legal education and judicial culture, increased awareness of a world elsewhere and cooperation within the senior judiciary in Europe started to be the practice in the House of Lords since the mid-nineties and later in the UK Supreme Court. Lord Reed stated recently that “nowadays it is normal for judges to travel around the world to attend conferences, and to hold discussions with foreign colleagues. [...] In recent years, our most frequent and regular contacts have been with the German Federal Constitutional Court (*Bundesverfassungsgericht*), the French *Conseil d'État*, the Canadian Supreme Court and the United State Supreme

<sup>2</sup> Böckenförde (2017: 365).

<sup>3</sup> James (2016: 12).

Court.”<sup>4</sup> Understanding each other’s legal culture has also been at the heart of meetings between the highest courts in Europe, namely meetings of judges of the then House of Lords and the German Federal Constitutional Court.

Prominent British academics have analysed the influence of European principles on the common law: “The common law has, to put it bluntly, begged, stolen and borrowed. It is much richer for the European experience. That with respect is the common law’s strength. This ‘more principled’ approach would not have occurred without our exposure to European legal experience.”<sup>5</sup> Common legal problems, especially earlier on in areas such as constitutional law, have inspired British judges to review solutions found elsewhere. It is to this that attention shall now turn.

## Understanding Different Legal Cultures: Constitutional Law

Since the 1960s British courts have seen an increase in Judicial review cases and famously the principle of proportionality entered the British courtrooms.<sup>6</sup> Inspirations originally derived from German Law appear to have been drawn most prominently in the context of European Union Law and the protection of Human Rights since October 2010 under the Human Rights Act 1998.

In German law the principle of proportionality (*Verhältnismäßigkeit*) plays a very important role in reviewing the legality of discretionary decisions in the Administrative courts. Dating back to a decision by the Prussian *Oberverwaltungsgericht* in 1882 the *Bundesverfassungsgericht* has based it on the principle of the *Rechtsstaat* and the Basic Rights.<sup>7</sup> In 1911 Fleiner phrased it as “the police should not shoot a sparrow with a cannon ball”<sup>8</sup> which translates into the English equally simple metaphorical image of a nut that should not be cracked with a sledge-hammer. The principle is composed of a four step test. First, the state measure concerned must be legitimate. Secondly, the measure must be suitable for the purpose of facilitating or achieving the pursued objective. Thirdly, the suitable the measure must also be necessary, in the sense that the authority concerned has no other mechanism at its disposal, which is less restrictive of freedom. [...] Finally, the measure concerned may not be disproportionate to the restrictions which it involves a degree of balancing (*Zumutbarkeit*).<sup>9</sup> The principle enjoys constitutional status and has to be applied by all public authorities in the exercise of their powers.<sup>10</sup>

In one of its leading early judgments the Federal Constitutional Court confirmed the principle of proportionality in 1958 that an interference with the right to freedom to exercise one’s profession in Article 12(1) of the Basic Law has to be

<sup>4</sup> Lord Reed (201).

<sup>5</sup> Birkinshaw (2015, 2017).

<sup>6</sup> Birkinshaw (2006) and Schwarze (2006).

<sup>7</sup> BVerfGE 23, 127.

<sup>8</sup> Fleiner (1911).

<sup>9</sup> Manssen (2014).

<sup>10</sup> Künnecke (2007) with further references.

proportionate to the aim of regulating the profession of pharmacists (*Apothekenurteil*).<sup>11</sup> The German Court's judgment has been described as the birth hour of the principle of proportionality in its constitutional law form.<sup>12</sup> In this early decision the Court placed strong emphasis on the fourth condition of balancing (*Zumutbarkeit*). This fourth condition of the proportionality test which requires a balancing of the involved interests received a lot of attention in the decision of *Bank Mellat* in the UK Supreme Court in 2013. This ruling has become a blueprint for the application of the proportionality test in UK Human Rights cases.<sup>13</sup> The *Bank Mellat* case in 2013 raised the question whether sanctions imposed by the British Government on an Iranian bank suspected of involvement in the Iranian nuclear missile programme were a proportionate interference with the right under the ECHR to peaceful enjoyment of possessions. Lord Reed inquires 'whether the objective of the measure is sufficiently important to justify the limitations of a protected right, whether the measure is rationally connected to the objective, whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective and fourthly whether balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective to the extent that the measure will contribute to its achievements, the former outweighs the latter. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit for the impugned measure.'<sup>14</sup> Lord Reed's discussion of the concept of proportionality in that case, which has been cited in many subsequent cases, was influenced by discussions with Prof Dr Gertrude Lübbecke-Wolff, then a judge at the German constitutional court, at the meetings I mentioned earlier.<sup>15</sup>

Indeed, the German Federal Constitutional Court follows a similar pattern. In the case of *Ramelow*,<sup>16</sup> decided in 2013, the highest German Court had to assess whether the gathering of information about a politician of the German party 'Die Linke' was a disproportionate interference with Mr Ramelow's right to independence as a member of the German parliament as protected in the German Constitution.<sup>17</sup> It concluded that even though the observation was carried out in an open manner and not in secret, the measure was disproportionate. The Federal Constitutional Court applied the four stage test and reviewed whether the objective of the measure was legitimate, whether it was suitable, whether a less intrusive measure could have been used and it carried out an overall balancing of all arguments for and against the

<sup>11</sup> BVerfGE 7, 377 [1958].

<sup>12</sup> Möller (2012).

<sup>13</sup> An ABC on proportionality: with *Bank Mellat* s our primer, UKHRB, UK Human Rights Blog, 1 Crown Office Row.

<sup>14</sup> *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, para 74.

<sup>15</sup> *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, paras 68–76.

<sup>16</sup> BVerfGE 134, 141. [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/09/rs20130917\\_2bvr243610en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/09/rs20130917_2bvr243610en.html), last Accessed 15/02/2019.

<sup>17</sup> Article 38 Section 1 sentence 1 of the Basic Law safeguards communication between a member of Parliament and the voters that is free from governmental influence, as well as the member of Parliament's freedom from observation, supervision and oversight by the executive branch.

measure.<sup>18</sup> Recent German academic commentary and case law shows that this last part of the test, the balancing test leaves room for further refinement<sup>19</sup>: The balancing process should include the interests of a wide circle of people, not just in relation of plaintiff and the state. Further, the affected interests require a weighting, in particular constitutional values need to be paid attention to. Particular intense interference with a constitutional right need to be compensated. Another problem discussed under the heading of balancing under the fourth limb of the proportionality inquiry is the question of how to assess several cumulative measures which potentially interfere with a protected right. Further, a measure might affect several rights and this would need to be balanced at the final stage of the proportionality inquiry. Finally, it is emphasised that the affected interests require a value judgment, in particular with regard to constitutional values which require special protection.<sup>20</sup>

In the 2015 case of *Pham*,<sup>21</sup> such a constitutional right, the right to British citizenship was at stake in the UK Supreme Court. The Court reviewed the principle of rationality under English administrative law and discussed the principle of proportionality in great detail. After *Pham*, it seems that proportionality has gained a strong position in English Administrative law irrespective of whether there is an EU or ECHR context.<sup>22</sup> The judgment contains reference by Lord Mance (who speaks German fluently) to comments made by the German judge Gertrude Lübke-Wolff<sup>23</sup>: “In short, proportionality is as Professor Dr Lübke-Wolff (former judge of the *Bundesverfassungsgericht* which originated the term’s modern use) put it in *The Principle of Proportionality in the case-law of the German Federal Constitutional Court* (2014) 34 HRLJ 12, 1-17 – ‘a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction’, ‘just a rationalising heuristic tool’.”<sup>24</sup> Lord Mance held in his speech that for the application of the principle of proportionality it was context that was important and not the question whether the case is concerned with EU, ECHR or common law. Lord Mance described citizenship as a constitutional right that is “as fundamental at common law as it is in European and international law”.<sup>25</sup>

Another area where German Constitutional Law has had an influence is the relationship between national constitutional law and EU law. The concepts of judicial co-operation<sup>26</sup> national constitutional identity<sup>27</sup> and *Gerichtsverbund*<sup>28</sup> coined in

<sup>18</sup> BVerfGE 134, 141.

[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/09/rs20130917\\_2bvr243610en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/09/rs20130917_2bvr243610en.html), last Accessed 15/02/2019.

<sup>19</sup> Manssen (2015: 99) and Möller (2012).

<sup>20</sup> Manssen (2015: 100).

<sup>21</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1592, para 96.

<sup>22</sup> Elliott, Mark, <https://publiclawforeveryone.com/2015/04/17/proportionality-and-contextualism-in-common-law-review-the-supreme-courts-judgment-in-pham/m> last Accessed 15/02/2019.

<sup>23</sup> Lord Reed (2017).

<sup>24</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1592, para 96.

<sup>25</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1592, para 97.

<sup>26</sup> BVerfGE 89, 155 < 175 > – Maastricht.

<sup>27</sup> BVerfG, Urteil des Zweiten Senats vom 30. Juni 2009 – 2 BvE 2/08 – Lisbon.

<sup>28</sup> BVerfG, Urteil des Zweiten Senats vom 30. Juni 2009 – 2 BvE 2/08 – Lisbon.

German Constitutional Law cases were referred to in 2014. In the *HS2* decision<sup>29</sup> the UK Supreme Court decided that established principles enshrined in the British constitution could not be ignored when they conflicted with EU law. The case was brought by objectors to the HS2 high-speed rail link. They had claimed that the decision-making process was failing to comply with the environmental assessment directive. The judges dismissed the claims. The principle in question was the long-established constitutional principle governing the relationship between Parliament and the courts, as reflected in article 9 of the Bill of Rights 1689. In their judgment, the justices referred to German Constitutional legal thinking. This openness to foreign constitutional jurisprudence may be explained by the changing nature of the British constitution.

For some time, the British Constitution has been characterised by gradual change and reform and the current position in British Constitutional Law has been described as “unsettled”<sup>30</sup> and the opinions of the political elites are shaped by deep “anxieties dressed up in the language of “sovereignty””.<sup>31</sup> Concerns about loss of sovereignty at national level and the fragmentation of statehood in a European system that lacks political and cultural union have been raised in Germany too. Ernst Wolfgang Böckenförde, former president of the German Federal Constitutional Court wrote as early as 1998 about this.<sup>32</sup> His recently published writings, translated into the English language, tackle the question that the EU law making process is “distant and foreign” form the citizens and that there is no sense of a “European people”.<sup>33</sup>

Böckenförde is fully aware of the deficiencies of EU integration and warned that ‘banking on the market-economic approach as the vehicle and motor of Europe’s integration will not lead to greater unity, but to greater separation and a dead end’.<sup>34</sup> Those voices in Britain who argued the case for Brexit might find vindication in some of his work. However, Böckenförde, calls for more efforts into shaping a European people by encouraging more integration in the field of education and culture. This would include the obligatory teaching of three foreign languages and the setting up of European schools and universities,<sup>35</sup> implying that we can overcome loss of national sovereignty with the means of education and the establishment of an educated European people. Further and rather different to the ideology of the supporters of Brexit, Böckenförde sees the protection of all citizen’s rights through the jurisprudence of the Court of Justice as a sufficiently effective process which remedies the lack of political participation. So legal protection through an institution which safeguards the markets citizen’s rights, is seen as a satisfactory means of counterbalancing the loss of national sovereignty.

By contrast, “The [UK] constitution is no more and no less than what happens.”<sup>36</sup> Constitutional adjudication as provided for in the German constitution and also in

<sup>29</sup> *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3.

<sup>30</sup> Walker (2014) and Gee and Young (2016).

<sup>31</sup> Gee and Young (2016).

<sup>32</sup> Böckenförde (2017: 341).

<sup>33</sup> Böckenförde (2017: 341).

<sup>34</sup> Böckenförde (2017: 363).

<sup>35</sup> Böckenförde (2017: 365).

<sup>36</sup> Griffiths (1979).

the CJEU is a mechanism that does not sit easily with the British constitutional identity. Some have argued that “such readings of the constitution occupy no single clear position, but an indistinct spectrum of possibilities.”<sup>37</sup> These references create the impression that the constitution is a blank canvas and famously very flexible. However, it should not be overlooked that Britain’s political culture has long been hesitant to resolve constitutional matters in the courts. Despite the flexibility of the British constitution, judicial power is not limitless and the UK Supreme Court’s role after Brexit is not easy to predict. The 2016 Referendum on EU membership transformed the British constitution, in the words of Neil Walker, into an “area of raw, political competition”.<sup>38</sup> This kind of realism remained almost unconstrained until the Supreme Court in the *Miller* judgement<sup>39</sup> in 2017 clarified that Parliamentary involvement was constitutionally required in triggering Article 50. Developments in British constitutional law even before 2016 have been described as follows: “The message is one of a slow burn of reforms, followed by a marked increase in the constitutional temperature. [...] The assault comes from many quarters. It comes from the rival legal supremacy claim of an ever more judicially assertive and jurisdictionally encroaching EU...”<sup>40</sup> The EU referendum 2016 can be seen as the political and legal thermometer having reached boiling temperature. This heated moment will serve as a catalyst for an increased need to redefine constitutional principles and institutional roles. Withdrawal from the European Union immediately posed the constitutional question as to who was to trigger Article 50. The Supreme Court, in its concise *Miller* judgment<sup>41</sup> addressed the question of Parliamentary Sovereignty in great detail. Further, the Withdrawal Bill itself raises constitutional questions, such as whether Henry VIII clauses might contravene the rule of law.<sup>42</sup> Henry VIII clauses are added to a Bill to provide the Government with a mechanism to amend it once the Bill has become an Act of Parliament. This ensures that primary legislation can be amended by subordinate legislation without having to pass through parliamentary scrutiny.

These provisions are known as Henry VIII clauses and they derive their name from the Statute of Proclamations 1539 which granted King Henry VIII power to legislate by proclamation.<sup>43</sup> It will give the government power to amend all EU derived primary and secondary derived EU law without the usual parliamentary

<sup>37</sup> Walker (2014: 538).

<sup>38</sup> Walker (2014: 532).

<sup>39</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>40</sup> Walker (2014: 535).

<sup>41</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>42</sup> Anthony (2017).

<sup>43</sup> <http://www.parliament.uk/site-information/glossary/henry-viii-clauses/> Accessed 29th December 2017.

checks required for amending legislation and this could raise constitutional concerns.<sup>44</sup>

The question remains, to which extent can German constitutional reasoning be of use to the UK Supreme Court? German constitutional reasoning has a long tradition and is often described as having a “high level of conceptual sophistication”.<sup>45</sup> Discussing German and Austrian constitutional thought, Andras Jakab observes that the “two Germanic styles are clearly distinct from the French and British styles of constitutional reasoning. On both sides of the Channel, different conceptions of the role of legal scholars and the lack (or late affirmation) of constitutional review have both contributed to a lower level of sophistication in constitutional reasoning.”<sup>46</sup> As to the style of German constitutional doctrine, it “still employs many basic terms from the period of constitutional monarchy.”<sup>47</sup>

Research into the language used by the German Constitutional court notes that some of the concepts and terms used are not strictly legal terms but often in the form of compound nouns “and somewhat mysterious”.<sup>48</sup> The concepts of judicial co-operation and *Gerichtsverbund* introduced in the Lisbon judgement by that court fits neatly into this category. The descriptive and flexible nature of these concepts allows for an element of discretion in the interpretation of the meaning which makes them fit for use in other jurisdictions.

Evidently, the idea of a co-operative relationship with the European Court of Justice as developed by the German Constitutional Court was never used by the German Court to defy European Union Law. However, the lack of clarity in this concept encouraged the UK Supreme Court to adopt it in its *HS2* decision.

### The UK Supreme Court as Neutral Guardian of Constitutional Principles

In more recent decisions, the UK Supreme Court has focused on constitutional principles which require protection. In the *HS2* decision<sup>49</sup> the UK Supreme Court decided that established principles enshrined in the British constitution could not be ignored when they conflicted with EU law. The principle in question was the long-established constitutional principle governing the relationship between Parliament and the courts, as reflected in article 9 of the Bill of Rights 1689. The UK Supreme Court found inspiration in German Constitutional jurisprudence:

The Supreme Court in paragraph 111 cited the German Court’s ruling in the German language:

“There is in addition much to be said for the view, advanced by the German Federal Constitutional Court in its judgment of 24 April 2013 on the Counter-

<sup>44</sup> European Union (Withdrawal Bill) HC Bill 147, [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0147/cbill\\_2017-20190147\\_en\\_2.htm#pb3-11g7](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0147/cbill_2017-20190147_en_2.htm#pb3-11g7) last Accessed 29th December 2017.

<sup>45</sup> Jakab (2009: 953).

<sup>46</sup> Jakab (2017: 608).

<sup>47</sup> Jakab (2009: 953).

<sup>48</sup> Jakab (2009: 954).

<sup>49</sup> *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3.

Terrorism Database Act, 1 BvR 1215/07, para 91, that as part of a co-operative relationship, a decision of the European Court of Justice should not be read by a national court in a way that places in question the identity of the national constitutional order (“Im Sinne eines kooperativen Miteinanders zwischen dem Bundesverfassungsgericht und dem Europäischen Gerichtshof... darf dieser Entscheidung keine Lesart unterlegt werden, nach der diese offensichtlich als Ultra-vires-Akt zu beurteilen wäre oder Schutz und Durchsetzung der mitgliedstaatlichen Grundrechte in einer Weise gefährdete..., dass dies die Identität der durch das Grundgesetz errichteten Verfassungsordnung in Frage stellte”).” And further, in paragraph 202 the Supreme Court continues: “In a not so dissimilar context, the German Federal Constitutional Court noted in its judgment of 24 April 2013—1 BvR 1215/07, (para 91)—that decisions of the European Court of Justice must be understood in the context of the cooperative relationship (“Im Sinne eines kooperativen Miteinanders”) which exists between that Court and a national constitutional court such as the *Bundesverfassungsgericht* or a supreme court like this [the UK Supreme] Court.”

When taking a closer look at the concept of ‘co-operative relationship’ as applied in the case of *HS2* it becomes evident that the Supreme Court is using the reference to German constitutional reasoning in order to defy European Union Law. “Comparative law and comparative legal scholarship assumes an intriguing dual role in these processes (Europeanisation). Traditionally, comparative law has been portrayed as the positive ally and a bit of a servant of EU law. Through comparative analysis, EU law and EU law scholarship generates common principles, the common law of Europe [...].<sup>50</sup> In mutual horizontal exchanges or studies, comparison of national laws is not a tool for creating commonality, but for the re-affirmation of diversity.”<sup>51</sup> The non-Europeanization of some areas of national law is then again a commonality between national legal systems which are developing a stronger national identity.[

More recently, the German Constitutional Court has confirmed and refined the cooperative relationship with the European Court of Justice. In the Outright Monetary Transaction (OMT) judgement<sup>52</sup> which was decided 2 days before the EU referendum in the UK, the German Court held that the OMT decision of the European Central Bank did not violate German Constitutional Law.<sup>53</sup>

As Andreas Voßkuhle, the president of the German Federal Constitutional Court had emphasised, the Court confirms in the OMT decision that Article 267 TFEU is the expression of a shared responsibility in a co-operation between national and European law.<sup>54</sup>

Justice Voßkuhle acknowledges that it is a difficult balancing act between European integration in the sense of taking EU-friendly decisions as well as living up

<sup>50</sup> See for instance Schwarze (2006) and Künnecke (2007).

<sup>51</sup> Von Bogdandy and Huber (2017: 672).

<sup>52</sup> (2 be 13/13) unreported 21 June 2016 (BVerfG (Ger)).

<sup>53</sup> Frenz (2017: 577).

<sup>54</sup> Voßkuhle (2015).

to the task of safeguarding national constitutional identity.<sup>55</sup> The German Constitutional Court is trying to avoid a loop-sided approach. One solution to this dilemma is the stronger integration of the national parliaments in the European decision-making processes.<sup>56</sup> This reminds of the position taken by both the High Court and the Supreme Court in the case of *Miller*.<sup>57</sup> The democratic process as expressed by the democratically legitimised members of the House of Parliament was upheld in this decision and it was the Supreme Court which established an orderly process within constitutional parameters.

### The UK Supreme Court and the Fragmenting Political Community

Böckenförde's thesis on how to relieve the tension between Globalisation, Europeanization and Individualization suggests the "recognition of diversity: solution to the problem through a federal layering is possible and appropriate. This relativizes and defuses initially unresolvable dissent that exists among people by granting them a creative cultural-political sphere of their own. The recognition of diversity thus allows the otherwise fragmenting political community to stay together after all, to integrate itself anew."<sup>58</sup>

The UK Supreme Court's role in deciding devolved matters, for instance, might be of increasing relevance in the coming years. Surprisingly, no cases with regard to the Scottish referendum for independence or Northern Irish devolution arrangements have been heard yet. The core devolution case law from these jurisdictions has come from challenges brought by private parties, such as *AXA*, *Imperial Tobacco*, the *Scotch Whisky Association* and, most recently, the *Christian Institute and the Family Education Trust*.<sup>59</sup> It remains to be seen to which extent the historical hesitance to resolve matters in the courts will change in the times of constitutional change. Clause 9 of the EU Withdrawal Bill, for instance, allows for delegated legislation to amend constitutional statutes. This power is problematic and it has been argued that this Henry VIII clause could be unconstitutional.<sup>60</sup>

Recent plans in agreeing on a deal for exiting the European Union include a degree of "regulatory alignment" between Northern Ireland and the Republic of Ireland.<sup>61</sup> The exact meaning of this term was hotly debated at the time of writing and it remains to be seen what exactly is meant by that. The agreement promises to ensure that there will be no hard border and to uphold the Belfast agreement. It clarifies that the whole UK including Northern Ireland will be leaving the customs union. However, how the open border will be secured and how 'full alignment' with

<sup>55</sup> Voßkuhle (2015: 15).

<sup>56</sup> Voßkuhle (2015: 16).

<sup>57</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>58</sup> Böckenförde (2017: 337).

<sup>59</sup> Tomkins (2017).

<sup>60</sup> Anthony (2017).

<sup>61</sup> <https://www.theguardian.com/politics/blog/live/2017/dec/05/theresa-may-struggles-to-rescue-brexit-deal-as-dublin-says-it-wont-back-down-politics-live?page=with:block-5a26a3f183311a066ae8add5#block-5a26a3f183311a066ae8add5>; Accessed 5/12/2017; see also Scoutaris (2017).

the rules of the customs union and the single market will be guaranteed remains unclear. It was agreed that no new regulatory barriers will be introduced between Northern Ireland and the UK. This would have to be permitted by the Northern Irish executive Stormont in order to secure the Good Friday Agreement.<sup>62</sup> With little substance found in the current agreement, the Irish Border issue remains a topic for further negotiations. It will be interesting to see whether these differences will be evened out during the political debates and negotiations in passing the Withdrawal Bill or whether the UK Supreme Court will play an increased role in securing the devolved region's positions.

## The UK Constitution: Consolidation on the Inside and Assertion Against the Outside

Böckenförde's theme whether democracy and statehood are able to withstand the pressure exerted by globalisation, Europeanisation and individualisation has never been more relevant than at the current time. Britain is approaching a constitutional moment which will have implications for the economy, the legal relations between European states, and the type of rights people living in Britain will have. Böckenförde, in assessing the pressures on constitutions remarked long before the constitutional changes in the UK could have been anticipated: "Two aspects, in particular, must be considered in this regard: consolidation on the inside and assertion against the outside."<sup>63</sup>

Consolidation on the inside will be an important theme in terms of Realpolitik as well as legal and institutional safeguards. The aim of this article was to show that the UK Supreme Court has increasingly taken on the role of a Constitutional Court. It has shown openness to engage with different legal cultures in and found inspiration in German Constitutional jurisprudence. The question remains whether the UK Supreme Court will develop into an even stronger actor within the British institutional framework. The success of the Supreme Court will depend on its acceptance on the inside. In other words, the people in the United Kingdom need to gain increasing confidence in this Court as the Guardian of constitutional principles. The UK Supreme Court received significant criticism in the popular media in 2017 after it handed down its decision in the case of *Miller*,<sup>64</sup> which required Parliamentary involvement in the triggering of Article 50 TFEU. More will be said about acceptance of constitutional adjudication in a later part of this article.

*Miller* has been described as the most important constitutional case the UK Supreme Court has ever decided: "and it boils down to this: the government requires the authority of primary legislation before it can change the laws of the UK constitution. It is a reminder of the function of a constitution and of the rule of law. It is

<sup>62</sup> <https://www.theguardian.com/uk-news/2017/dec/08/main-points-of-agreement-uk-eu-brexit-deal>; Accessed 8/12/2017.

<sup>63</sup> Böckenförde (2017: 337).

<sup>64</sup> [2017] UKSC 5.

a testament to the independence of the judiciary at a time when it has come under pressure from the media and some politicians. It is a re-statement of the obvious when all the other questions surrounding withdrawal from the EU are uncertain. The legal and procedural issues have now been resolved.”<sup>65</sup>

*Miller*<sup>66</sup> is an important case because it deals with the question of how “British lawyers understand their constitution, in particular, how to accommodate constitutional innovations such as EU membership, referendums and devolution.”<sup>67</sup> It clarified that the sovereignty of Parliament had to be upheld in the light of a powerful executive, ironically the very part of British constitutional law that the opponents of the judgments wish to rescue from corrosion by EU law.

As discussed earlier, the Supreme Court has an important role in defining the constitutional identity of the country. In *HS2*<sup>68</sup> the UK Supreme Court “embraced the idea that the primacy accorded to EU law by the European Communities Act 1972 might not be absolute. “Most notably it aligned itself with the rulings of the German Federal Constitutional Court (*Bundesverfassungsgericht*) and rejected the notion of “unqualified primacy over national law”.”<sup>69</sup>

Another question that is currently unanswered is what kind of role the CJEU will play in the British judicial landscape. Theresa May has made it clear that the CJEU should seize to have jurisdiction over the United Kingdom.<sup>70</sup> The EU27 however, have made it clear that they envisage a continuing role for the CJEU in respect of the UK, not least because the withdrawal deal itself may raise legal issues concerning citizens’ rights and disputes with regard to the enforcement of the withdrawal agreement.<sup>71</sup> In the document agreed by Theresa May to conclude the first phase in the negotiation, the Court of Justice will maintain the role of safeguarding the rights of EU citizens for 8 years after the withdrawal from the EU.<sup>72</sup>

The UK Supreme Court would continue in its strong role as guardian of British constitutional principles and express the need for the CJEU to refine its reasoning as well as to respect constitutional limitations based in the British constitution.<sup>73</sup> The UK Supreme Court’s relationship with the CJEU will remain a topic for many years to come.

<sup>65</sup> Murkens (2017); In a less spectacular manner the case of *Thoburn v Sunderland City Council* [2002] 3 WLR 247, [2002] EWHC 195 (Admin), [2003] QB 151 in the High Court had raised the issue of constitutional statutes and displayed features of German constitutional reasoning.

<sup>66</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>67</sup> Daly (2017: 91).

<sup>68</sup> [2014] UKSC 3.

<sup>69</sup> Arnull (2017: 41).

<sup>70</sup> Arnull (2017: 44).

<sup>71</sup> XT 2016/17 ADD 1 REV 2.

<sup>72</sup> [https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf).

<sup>73</sup> Arnull (2017: 44).

## Acceptance of Constitutional Jurisprudence

Acceptance in the population of the courts is a crucial aspect to secure the liberal state. Constitutional values cannot be protected fully through institutional protection, the judgments of the courts have to find acceptance in order for the law to function as a peacemaker.<sup>74</sup>

However, uncertainty over the role of the judges has been expressed recently by the former president of the UK Supreme Court, Lord Neuberger.<sup>75</sup> He expresses concern for one of the fundamental constitutional principles in the unwritten constitution: “The Rule of Law in UK [is] at risk after Brexit”. Four senior judges warned that the process of leaving of the EU lacked in detail and could overwhelm the Supreme Court as well as place strain on the independence of British judges. They express concern about the uncomfortably wide discretion left to the judges”.<sup>76</sup> This indicates that there is concern about the acceptance of judgements by the UK Supreme Court.

Whilst the UK Supreme Court gave some of its strongest judgements in terms of resisting the pressures stemming from membership within the EU, in 2016 Lord Neuberger and Lord Mance were both named as the most euro-friendly judges, which in the then political climate was not seen as a compliment by members of the public who had voted for Brexit.<sup>77</sup> The *Miller* litigation which upheld the principle of Parliamentary Sovereignty cast a populist light on the highest judges in the land and this raises the question whether British courts, and in particular the UK Supreme Court are too distant from the people to enjoy acceptance and instil faith in the population to act as the guardian of constitutional principles in uncertain times. By contrast, the German Federal Constitutional Court, whilst suffering from a lack of acceptance in the early days, was usually supported by the German media.<sup>78</sup> A notable exception from the supportive response in the media was the “Soldiers are murderers” decision by that Court in 1994 when it ruled that that statement was covered by freedom of speech.<sup>79</sup>

It has been argued, more generally that the courts interfere too much and that sometimes annoy the people. However, “the courts ensure that this ‘dissatisfaction’ can be channelled into the political system and that the citizens have an outlet for their grievances. Much as we may lament individual decisions and judgements, it is difficult to see who else could perform this function.”<sup>80</sup>

The real question is, how do courts maintain their acceptance. Some might think that the courts are too elitist to put up with the current stream of populist politics in the world. Ultimately, the courts need to find acceptance in the population, they

<sup>74</sup> Limbach (1999: 165).

<sup>75</sup> Lord Neuberger (2017).

<sup>76</sup> Lord Neuberger (2017).

<sup>77</sup> Daily Mail 3 December 2016.

<sup>78</sup> Lamprecht (2011).

<sup>79</sup> BVerfGE 93, 266 - 312 I. Senate Soldiers-murderers 1 BvR 1476, 1980/91 and 102,221/<https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=620>. Accessed 10/12/2017.

<sup>80</sup> Qvortrup (2015).

need to be accessible, explain what they are doing and it needs to be made clear that they are acting in the people's interest.<sup>81</sup> It is therefore timely that Lady Hale, President of the UK Supreme Court, announced on 27th November 2017 that it will hear two full Human Rights law cases in Belfast in 2018 at the Inns of Court Library at the Royal Courts of Justice in Belfast.<sup>82</sup> Further, Lady Brenda Hale, the President of the UK Supreme Court has shared her advice to would be lawyers and wrote in the Guardian about her career and the need for diversity in the legal profession.<sup>83</sup> It is a sign that the highest court in the country is aware of its unifying function in the British constitutional arrangement and that it has to be transparent and open to local people. This is a new trend. Only once the UK's highest court has sat away from Westminster when it heard a case in Edinburgh in early 2017, and a hearing in Cardiff is planned for 2019.<sup>84</sup> Hale explained the decision thus: "My colleagues and I strongly believe that the experience of watching a case in person should not be limited to those within easy reach of London. This is the second time that the court has sat outside London." It shows that the court wants to promote its openness and accessibility and in hearing a controversial Human Rights case in Northern Ireland its visibility as a unifying and neutral institution is heightened. This is an important step towards securing a more visible role for the Supreme Court.

In order to secure acceptance, the German Constitutional Court was located in the rather unspectacular city of Karlsruhe in Southern Germany, far away from Bonn or Berlin. The somewhat modest building was designed by Berlin architect Paul Baumgarten. The open structure symbolises democratic transparency and forms a modern contrast to the 19th-century style palaces of justice.<sup>85</sup> Today the German Federal Constitutional Court has a very special position in modern Germany. Since 1951 it has played the important role in guarding the constitution in the name of the people.<sup>86</sup> It is difficult to assess the future development of constitutional adjudication in the UK Supreme Court but the tasks ahead with a view to new trade agreements, interpreting case law by the Court of Justice of the EU, border arrangements and devolution issues indicate that the role of this Court could become more political than in the past. It is important that it can carry out its functions free from pressure and that it secures the acceptance of its rulings in the population.

Some may argue that the constitutional identities of Germany and Britain are historically different and that the UK Supreme Court's role is unlike. The identity of

<sup>81</sup> McIntyre (2017).

<sup>82</sup> Website of the UK Supreme Court, <https://www.supremecourt.uk/news/uk-supreme-court-bound-for-northern-ireland.html> accessed on 1/12/2017.

<sup>83</sup> The Guardian, 15th February 2018.

<sup>84</sup> <https://www.theguardian.com/law/2017/nov/27/uk-supreme-court-to-sit-in-northern-ireland-for-the-first-time>; Accessed 8/12/2017; One of the cases is the *Lee v Ashers Bakery Company Ltd* which related to the question whether a bakery discriminated against a customer when it refused to add the slogan "Support Gay marriage" on the ordered cake.

<sup>85</sup> [http://www.bundesverfassungsgericht.de/EN/Gebaeude/gebaeude\\_node.html;jsessionid=9C83F1D43971BD0DE96E3ACBB94BBF55.2\\_cid394](http://www.bundesverfassungsgericht.de/EN/Gebaeude/gebaeude_node.html;jsessionid=9C83F1D43971BD0DE96E3ACBB94BBF55.2_cid394); Accessed 8/12/2017.

<sup>86</sup> Böckenförde (2017: 186).

the British constitution is indeed different and it has been referred to as “invisible”<sup>87</sup> as opposed to its Germanic counterpart. The British constitutional model has been described as locating the ultimate source of constitutional legitimacy in the people and that “parliament is the true representative of the people”.<sup>88</sup> The principle of Parliamentary Sovereignty is historically grown and not contained in a codified document but there is debate on what the nature of Parliamentary Sovereignty is. If it is characterised as a principle of the common law as asserted in *Thoburn, Jackson* and *Axa* then courts could modify the principle like other common law principles.<sup>89</sup> Common law constitutionalism in this vein poses a threat to the traditional notion of Parliamentary Sovereignty and upholds the rule of law. However, it clearly has to be born in mind that this is a much more understated and almost invisible form of scrutiny compared to the powers of the German Federal Constitutional Court. It remains to be seen whether common law constitutionalism will be energised after withdrawal from the EU or not.

## Conclusion

For several decades the UK Supreme Court (former House of Lords) has forged links with continental judges as well as judges trained in other common law jurisdictions. More recently the broader constitutional questions raised by membership within the EU have led to an interest in solutions found in the German Constitutional Court. It is not suggested that the transparent German Constitutional Court model suits the British constitutional landscape. The role of the UK Supreme Court and its legitimacy to resolve constitutional conflict is different from the elected German counterpart. However, this article has shown that the problems faced by these two countries are not dissimilar. The UK Supreme Court has, for quite some time now, developed its role in protecting the common law and its less visible principles.

Inside the United Kingdom new challenges are already taking shape in the form of demands for regional autonomy and potential changes to citizen’s right under EU law.

On the outside, there will have to be a new arrangement with the EU in how to trade and how to relate to the EU institutions, most notably in how to relate to the CJEU. These challenges will have to be addressed soon and it appears as if Brexit has served as a catalyst for a clearer articulation of what the United Kingdom Common Law Constitution mean to the people. It will require an assertive institution to protect this reaffirmed constitution.

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<sup>87</sup> Rosenfeld (2012: 767).

<sup>88</sup> Rosenfeld (2012: 767).

<sup>89</sup> Gee and Young (2016: 12).

Like membership within the EU, departure from the European Union, might generate a more legalistic reassessment of what the UK constitution contains.<sup>90</sup> In the words of the former president of the Israeli Supreme Court Aharon Barak Comparative Law is “an experienced friend”.<sup>91</sup> It is hoped that all the highest courts in Europe will continue sharing their experiences.

## Compliance with Ethical Standards

**Conflict of interest** All the authors declare that they have no conflict of interest.

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<sup>90</sup> “Oral Evidence Session with Rt Hon Michael Gove M.P., Lord Chancellor and Secretary of State for Justice” (The House of Lords Select Constitution Committee, 2 December 2015, question 9, page 14, 15. <https://www.parliament.uk/documents/lords-committes/constitution/AnnualOralEvidence2014-15/CC021215-LC.pdf>).

<sup>91</sup> Barak (2005).

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