

## **United Kingdom Judges and European Integration.**

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*The British, specifically the English, are widely regarded as awkward partners in the European project. Much of the criticism has come from anti-European integration politicians. Now that the outcome of the 2015 general election for the United Kingdom Parliament is known the United Kingdom is likely to face a referendum by 2017 on exit (Brexit) from the European Union. The Conservative Party is also anxious to withdraw from the European Convention on Human Rights. Criticism of European influence on our law has also surfaced among senior judges but in a far more principled way than among politicians. In this article the author analyses the attitude of senior judges towards European law and integration. The judicial desire to establish UK constitutional space in the relationship with EU law has accompanied the emergence of a constitutional jurisprudence shaping the UK's modern unwritten constitution. Our constitution has become far more judicialised. Despite the criticism witnessed in recent case law, the UK judges are constructive and cooperative in our legal relationship with Europe.*

Sommario: 1. Attitudes to Europe; 2. Competences; 3. A Growing Circumspection; 4. Fundamental Rights; 5. Constitutional Identity; 6. Conclusion

### **Attitudes to Europe**

‘The English, the English, the English are best. I wouldn’t give tuppence for all the rest.’<sup>1</sup>

I hope to convince you that our judges do not share this sentiment although, sadly, rather too many politicians in England (sic) do. The antipathy is not shared

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\* An earlier version of this paper was delivered at the *Wissenschaftlichen Gesellschaft für Europarecht* Berlin November 28 2014. I am grateful to Professors Hatje and Muller-Graff for their kind invitation and hospitality.

<sup>1</sup> M.Flanders and D. Swann (1963) ‘A song of Patriotic Prejudice’ (tongue in cheek English humour) from *At the Drop of a Hat* (1963) cited by Lord Neuberger President of the UK Supreme Court in ‘The British in Europe’ <https://www.supremecourt.uk/docs/speech-140212.pdf> The entertainers were poking fun at the Irish, Scottish and Welsh, and also the English in a manner not deemed politically correct today.

in Scotland, Wales or Northern Ireland. Too many English politicians are making fools of themselves. If I may borrow from our great poet William Wordsworth ‘Churchill thou shouldst be living at this hour: thy country hath need of thee.’ We English lack leadership and direction on Europe.

Lord Neuberger, President of the UK Supreme Court, has written on Britain and Europe. Prediction he writes is very difficult – especially about the future!<sup>2</sup>

English judges used to be guided on extra judicial utterances by the Kilmuir rules, named after a former Lord Chancellor. This was to prevent publicity that might compromise their impartiality. Judges, Neuberger continues, must be wary of entering the political debate. But when the debate concerns the ‘legal system or rule of law’ there is a duty to speak out.

Neuberger accounts for England’s traditional grumpiness towards Europe. Unlike most European countries, Great Britain, he writes, has witnessed territorial integrity since the 13th century (his claim could not be true of the United Kingdom and the disputed claims over Ireland); there has been an absence of invasion, and an absence of revolution since the seventeenth century (for the United Kingdom there is, however, the Irish rebellion of 1916). England has had to come to terms with post imperial decline and we possess a national religion with the Monarch as its head – it is not a Catholic country. But we are not alone in not being a ‘Catholic country’. Indeed he believes that a good deal of English Euroscepticism emerges from anti-Catholicism, a view which personally I do not share.

We in the UK have placed greater reliance on the European Convention on Human Rights (ECHR) than have most other European Union countries. The Convention is deeply unpopular with large sections of the popular press and influential figures in the Conservative Party would like to see the UK leave the Council of Europe and replace the ECHR with a ‘domestic Bill of Rights.’<sup>3</sup> Indeed the Attorney General Dominic Grieve was sacked in the summer of 2014 because of his support for the ECHR.<sup>4</sup> On top of all these things there is a world of difference between the techniques of the common law – where judges make

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<sup>2</sup> See Neuberger above and also <http://supremecourt.uk/docs/speech-141009-lord-neuberger.pdf>

<sup>3</sup> See *Protecting Human Rights in the UK* (2014) <http://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document>

<sup>4</sup> See D.Grieve ‘Why Human Rights Should Matter to Conservatives.’ <http://www.ucl.ac.uk/constitution-unit/constitution-unit-news/031214a>

law but are not legislators - and civil law. Finally, there are our links with the USA and Commonwealth. For all these reasons, writes Neuberger,

‘it appears ... unsurprising that mainland European peoples, governments and media are more ready than their UK (sic) counterparts to join and to support institutions which involve trading a degree of national sovereignty or self-determination in return for closer mutual cooperation, inter-governmental coordination and supra national dispensation of justice.’<sup>5</sup>

He adds: ‘Our legal history is not one of splendid isolation but one of splendid synthesis!’<sup>6</sup> Our great constitutional historian, F.W. Maitland, relates how after the reign of Edward I English lawyers became more thoroughly ignorant of any law but the common law.<sup>7</sup> I might add in the year of celebration of Magna Carta (1215) that it was a French King who sealed the Charter and most of the Barons and Bishops who placed their name on the foundation document of our constitution were French. But this is not the era of Lords Scarman, Steyn and Bingham, all Europhile judges and internationalists.

We are a weird bunch, we English! We have no written constitution but one built on custom and practice and the common law, dualism in the relationship between international and domestic law, and a constitutional fundamental doctrine of Parliamentary Sovereignty. Our judges have been sedulously working out the parameters of the common law constitution and the implications for the rule of law. Much has to be unravelled in a very creative period.

Received wisdom is that English judges on the whole will do what Parliament tells them to do – that is their constitutional position. It is a part of Parliamentary Sovereignty. If ever they ‘controlled’ acts of Parliament it was through statutory interpretation, despite the famous, brave and clear words of Coke CJ in *Bonham’s* case in 1610.<sup>8</sup> At the end of this paper I add one possible qualification to the traditional view of sovereignty.

The 1972 European Communities Act, which laid the legal basis in domestic law for our accession to the (now) Union, says basically in s. 2(1) that we give expression and realisation to all rights, duties, liabilities etc that the Communities (now EU) and the Court of Justice of the EU (ECJ now CJEU) create. The Act states in s.2(4) that all future statutes must be interpreted in accordance with s 2(1) – a presumption against implied repeal. Furthermore, all

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<sup>5</sup> Para 19 note 1.

<sup>6</sup> Ibid Para 52.

<sup>7</sup> F.W.Maitland *The Constitutional History of England* (1955 reprint) p. 21. This is certainly true of English land law although other areas of the common law did witness a Roman law influence.

<sup>8</sup> (1610) 8 Co Rep 114 (Common Pleas).

matters of EU law and rulings of the CJEU are treated as matters and rulings of law and binding on domestic judges and not as questions of fact to be proved (s 3). It must be emphasised that for domestic judges their primary focus is on the Act of Parliament and its interpretation, not the EU treaties. This dualistic approach is given emphasis in s 18 European Union Act 2011. However, the treaties will be referred to as an aid to consistent interpretation with, and application of, EU norms (s.3 above).

I am not sure that any English judge conceived in 1973 that the CJEU might get it wrong or that Europe might do dreadful things until Sir John Laws in the *Thoburn* judgment (below) posited the limits of what the 1972 Act may authorise. In doing so, he suggested limits to what Parliament itself may authorise as well as limits on Parliament's own powers under the common law! Pandora's box was opened!

The theme on which I write has moved from ignorance of the European enterprise – as witness the Lord Chancellor in 1967 stating that EEC law 'only affected institutions and corporations'; it had no effect on individuals!!<sup>9</sup> to a call to engagement from judges and lawyers by Lord Denning in 1973 – lawyers and judges have to learn the new and strange system and new methodologies<sup>10</sup> to an attitude based on outright hostility. Witness the Lord Chancellor (Secretary of State for Justice) but no longer a judge nor head of the judiciary: 'My views on matters European are well known. ... I will not tolerate, the idea of us becoming part of a Europeanised justice system.'<sup>11</sup> It gets worse politically.

## Competences

The UK record on consistent construction, sovereignty of EU law, direct effect and Art 267 references has, on the whole, been good and Euro friendly. I set this out in my chapter in the *festschrift* dedicated to Jurgen Schwarze.<sup>12</sup> In relation to Art 267 TFEU references, there have been signs of growing questioning from the Supreme Court as we shall see.

In the beginning, that is after 1973, the approach was constructive and enterprising and never better expressed than by Lord Denning (above).

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<sup>9</sup> House of Lords, 8th May, 1967; Vol. 282, c. 1203, Lord Gardiner.

<sup>10</sup> *Bulmer v Bollinger* [1974] 2 All ER 1226 at 1232 b

<sup>11</sup> House of Commons Reports, Column 93, 7 April 2014: Justice Secretary Grayling.

<sup>12</sup> P. Birkinshaw 'The United Kingdom in Europe and Europe in the United Kingdom – an Indelible Influence' in *Verfassung und Verwaltung in Europa* eds U Becker, A Hatje, M Potacs, N Wunderlich, Nomos Baden-Baden pp 19-42 (2014).

*Factortame No 2* (1991)<sup>13</sup> was the first occasion on which the impact of EC sovereignty became apparent – after initial reluctance – and compelled British courts to acknowledge the full implications of the new legal order that the UK had signed up to and voluntarily agreed to. The government had passed through Parliament legislation in 1988<sup>14</sup> to undermine the Common Fisheries policy in a manner that was blatantly discriminatory under EU law. The use of primary legislation was also deliberately chosen to prevent judicial challenge. Not only did the House of Lords Judicial Committee disapply parts of an Act of Parliament – for the first time ever. It also fashioned relief against the secretary of state as an officer of the Crown by way of injunction which the top court had never done before but which it soon extended to litigation not concerned with EU law.<sup>15</sup> The Law Lords refused to give relief against the Crown in right of the Department for Transport, Home Office etc because of sensitivities about impleading the Crown directly.<sup>16</sup> The relief operated against the ‘officer of the Crown’ on the public law side.

But the analysis of what the new order meant constitutionally and how it impacted on Parliamentary sovereignty only came up for judicial analysis and clearer, but far from final, elucidation in *Thoburn* in 2002.<sup>17</sup> This case concerned the Metric Martyrs. These were market traders who sold their vegetables in imperial weights and not metric ones as required by then EC law. The actual legal *ratio* was narrow and technical and turned on the rejection of the argument that a later statute had impliedly repealed the 1972 Act in its relevant provisions and regulations made thereunder. The traders were rightly convicted.

The judgment given by Sir John Laws argued *obiter* that EU law was not entrenched in our law, as argued by prosecuting counsel, because EU law could not do what a statute could not do – entrench itself. EU sovereignty (primacy) was operative because the statute said so; but no statute could give away *overriding* sovereignty because that was not in Parliament’s gift. It was in the gift of the common law and the common law would not condone such a thing. Laws, and most other commentators are not clear in what they mean by the ‘common law’. It means at least six things.<sup>18</sup> Laws judgment gave an enormous fillip to the

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<sup>13</sup> Case C 213/89 *R v Secretary of State for Transport ex p Factortame Ltd (No 2)*. [1991] 1 All ER 70 (CJEC & HL). And see *Equal Opportunities Commission v Secretary of State for Employment* [1994] UKHL 2.

<sup>14</sup> The Merchant Shipping Act 1988.

<sup>15</sup> *M v Home Office* [1994] 1 AC 377.

<sup>16</sup> See S. Sedley *Ashes and Sparks: Essays on Law and Justice* (2011) ch 28.

<sup>17</sup> *Thoburn v Sunderland City Council* [2002] 4 All ER 156.

<sup>18</sup> The system of government, governance and law introduced by the Normans who adopted Anglo-Saxon methods; the procedure of the common law ie trial by jury, adversarial process etc; common law as opposed to equity; reasoning by precedent and *stare decisis*; common law as opposed to statutory law; common law as a common system and not divided between public

common law constitution interpreted and controlled by the judges. The case also supported a higher status 'constitutional statute' which could not be subject to implied repeal, only express or unmistakably unavoidable (ie express) repeal. This was a legal novelty. Laws' views have recently been given judicial approval by the Supreme Court.

We move on. What is apparent from 2011 onwards is that the judiciary are reflecting more circumspectly on the national/EU legal and judicial edifice. More has been written by English judges on the CHR at Strasbourg – a good deal of it critical – than on the EU. The attacks on both the ECHR and the EU have focused on the enervating effect of the ECHR on national democracy and democratic debate.<sup>19</sup> Sir John Laws has accused the EU and ECHR of enfeebling the Catholicity of the common law.<sup>20</sup> My own belief is that those influences have added to the strength of the common law. That Strasbourg does not understand the common law has been a frequent criticism.

Some interesting insights into the attitude towards ECJ judges have come from extra-judicial writings of two judges from the UK Supreme Court, Lords Mance and Neuberger. For Mance 'The common law has been a world force. But it is a *minority* influence within Europe. But I believe that it has been loyal and effective in applying European law.' The relationship must be based on mutual respect.<sup>21</sup>

The second paper by Mance on the 'Interface between National and European Law' is more of a nuts and bolts analysis of the relationship between the ECJ and English judges. He raises concerns about accession to the ECHR by the EU. At present the UK judges can enter a dialogue with Strasbourg and attempt to get a change of direction in Strasbourg. It has done so on several notable occasions. However, after EU accession, will ECJ judges engage in over-egging to 'play safe' ie go further than they may have done in the past? Both sides should be allowed to take an ECJ judgment to Strasbourg. A particular problem he addresses is Art 267 references and the *acte clair* doctrine and *Köbler* liability and manifest errors of EU law by national judiciary.

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and civil law. On the latter, public law is now an established part of English law: see Schwartz *Festschrift* note 12. If we add common law as opposed to canon law that makes seven.

<sup>19</sup> Lord Sumption 'The Limits of Law' (2013) <http://supremecourt.uk/docs/speech-131120.pdf>

<sup>20</sup> Sir John Laws 'The Common Law and Europe Hamlyn Lectures III (2013) <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/laws-lj-speech-hamlyn-lecture-2013.pdf>

<sup>21</sup> 'The Rule of Law' At <http://supremecourt.uk/docs/speech-131001.pdf>

English courts dealt with the latter in *Cooper v Att Gen*<sup>22</sup> a Court of Appeal decision on liability of national courts under *Köbler*. *Cooper* establishes manifest errors to ground judicial liability are most unlikely to be established in relation to England.

Mance also criticises the EU legislator for an absence of certainty and predictability. His particular targets are the cases of *Mangold* and *Ass Belge Test Achats*.<sup>23</sup> He refers to the German judicial criticism of the ECJ's ruling in *Fransson* for giving an expansive interpretation to the Charter of Fundamental Rights Art 51(1).<sup>24</sup> I will point out, however, that in the *Rugby Union Football* case the Supreme Court endorsed a broad interpretation to 'implementing EU law' and gave a generous accommodation to 'within the sphere of Union law'.<sup>25</sup>

Neuberger has stated that whatever approaches the UK adopts in relation to the EU and ECHR two twin tenets of British constitutionalism must be respected: democracy and the rule of law.<sup>26</sup>

But democracy in the form of representative government is being supplemented by participatory forms of plebiscites and, one might add, for instrumental political purposes. In the case of the European Union Act 2011 there have to be UK plebiscites for future treaty changes to ensure, basically, that there is no significant revision of the EU treaties. Whole rafts of additional EU initiatives are caught by the requirement for legislative approval or a vote in approval of both Houses. Our constitution has been changed. 'Oh what a tangled web we weave when first we practise to deceive!'

The first challenge under the 2011 Act to attempt to get a ruling from the High Court that the Act had not been complied with by the Government came in *Wheeler* and concerned approval of the EAW without a referendum.<sup>27</sup> The judge, who rejected the application in its entirety, was Leveson LJ who had conducted a lengthy inquiry into press culture and who highlighted in his report the scandalous untruths told by large sections of the UK press about Europe.<sup>28</sup>

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<sup>22</sup> [2010] EWCA Civ 464.

<sup>23</sup> Case C-144/04 *Mangold v Helm* & Case 236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*

<sup>24</sup> <http://supremecourt.uk/docs/speech-130201.pdf>

<sup>25</sup> [2012] UKSC 55 and CFR Article 51(1) at para 28.

<sup>26</sup> <http://supremecourt.uk/docs/speech-141010.pdf>

<sup>27</sup> *Wheeler v Prime Minister* [2014] EWHC 3815 (Admin) – Leveson LJ <http://www.bailii.org/ew/cases/EWHC/Admin/2014/3815.html>

<sup>28</sup> *An Inquiry into the Culture, Practices and Ethics of the Press* (2012)

<http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp>

Democracy must be accompanied by the separation of powers, which I add, is far from fully implemented within the UK, and protection of human rights and minorities.

On the rule of law, Mance, as other eminent judges, has emphasised the *substantive* quality of the rule of law. That includes access to justice, protection of fundamental rights and arguably the supremacy of law over political and economic power – the ability of law to act as a neutral brake on social and arbitrary power. Europe has helped us in that regard. But this is derided by much of the popular British press. Mance’s paper came at a time when the Justice Secretary (Lord Chancellor) is launching an all-out attack on judicial review – an attack that was defeated in the House of Lords in October 2014; the successful counter-assault was spear-headed by Lord Woolf, a former very eminent judge.<sup>29</sup>

### **A growing circumspection**

In *Walton* the Supreme Court – without hearing argument on the point – expressed the view that technical breaches of EU law (the Structural Environmental Assessment Directive) might not be awarded public law relief in UK courts.<sup>30</sup> Such relief is discretionary under domestic law and why should there be a difference between domestic law and EU law?

A whole raft of cases have shown Supreme Court judges to be less inclined to refer matters to the ECJ – *HS2* [2014] is the most interesting case (below); *Walton* above was not referred. *X v Mid Sussex CAB*<sup>31</sup> – no reference made on whether Directive 2000/78/EC applied disability protection to a ‘volunteer’ and not an employee. *HMRC v Aimia Coalition* – no further reference after initial reference drafted by one side’s legal team, with seemingly little input from the other side, and then a decision not to accept the ruling of the ECJ on a first reference which was made without full consideration of relevant facts and issues the Supreme Court ruled! The Supreme Court declined to follow the classification of the ECJ.<sup>32</sup> The ECJ ruling was not ‘dispositive of the UK Supreme Court’s decision’ although the ruling would provide guidance when the full facts were considered by the domestic court.<sup>33</sup> *Home Office v Tariq* – no reference because the position was determined by the Strasbourg jurisprudence

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<sup>29</sup> HL Debs 27 October 2014 cols 952 et seq.

<sup>30</sup> [2012] UKSC 44. See also *Sustainable Shetland v Scottish Ministers* [2015] UKSC 4 and the Birds Directive (2009)/147/EC). However, see *Commissioners for HM R&C v Marks and Spencer plc* [2014] UKSC 11 on support for the full effectiveness to EU rights in domestic law.

<sup>31</sup> [2012] UKSC 59.

<sup>32</sup> *HMRC v Aimia Coalition* [2013] UKSC 15. See Lord Reed note 66 below.

<sup>33</sup> See note 66 at p 15.

(sic) which was clear;<sup>34</sup> *R (Chester) v SoS Justice*<sup>35</sup> & *Stott v Thomas Cook*<sup>36</sup> – no references made on prisoners’ right to vote under EU law, and EC disability rights’ provisions for air transport passengers and preclusion of damages by virtue of the Montreal Convention. However, in *R (Client Earth) v Secretary of State for the Environment etc*<sup>37</sup> & *Test Claimants*<sup>38</sup> – references were made. The cases concerned the Air Quality Directive and effectiveness of relief under domestic law respectively.

In 2012-2014, four references were made by the Supreme Court to the ECJ; twenty-six were not referred because the Supreme Court refused permission to appeal from the Court of Appeal. From 2001-2013 there were 242 references to the ECJ from the UK courts *in toto*.<sup>39</sup>

## Fundamental Rights

Fundamental and constitutional rights were protected by historical heritage; they were not always the same as legal rights.<sup>40</sup> Without a written constitution and a constitutional court and no domestic jurisprudence on human rights we had no focal point to launch a critique as in *Solange* etc. The ideals of security, liberty and property resonate throughout our constitutional history, as does the concept of ‘fundamental law’ but in the courts our record on protecting what we today term human rights has not been admirable, until recently. Sometimes the writ of habeas corpus produced startling examples of security and liberty but for an example of a lonely voice seeking to uphold legality in the face of executive discretion I can do no better than point you to Lord Atkin’s lonely dissent in *Liversidge v Anderson* [1942]<sup>41</sup> in the midst of the second world war. The dissenting judgment is a *tour de force* against unbridled executive powers and executive detention. The majority interpreted statutory powers in a manner that recalled the Court of King’s Bench under Charles I and its acceptance of the sweeping powers of the Crown. Our law has concentrated on writs not rights – said Maitland – others say it has concentrated on ‘rites’ (traditional obeisance) not writs.

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<sup>34</sup> [2011] UKSC 35.

<sup>35</sup> [2013] UKSC 63 paras 72-74.

<sup>36</sup> [2014] UKSC 15.

<sup>37</sup> [2013] UKSC 25 and [2015] UKSC 28.

<sup>38</sup> [2012] UKSC 19

<sup>39</sup> See , <http://www.supremecourt.uk/docs/annual-report-2013-14.pdf> and <http://www.supremecourt.uk/docs/annual-report-2012-13.pdf> and <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf>

I am grateful to Alison Young for these points.

<sup>40</sup> See J.W.Gough *Fundamental Law in English Constitutional History* OUP (1955).

<sup>41</sup> [1942] AC 46.

I don't think it would have occurred to all but one or two British judges in 1972 that the EU (EC etc) could have presented a human rights issue before British courts. The first indication is Laws in *Thoburn* (2002) discussed above. It has become more apparent under Charter of Fundamental Rights (CFR),<sup>42</sup> Justice and Home Affairs<sup>43</sup> and the European Arrest Warrant (EAW).<sup>44</sup>

Judges have accepted that the CFR applies to the UK – even if the exact parameters have not been defined.<sup>45</sup> Blair's *soi-dissant* 'opt-out' is no such thing. The insulting comparison of one of Blair's ministers to the CFR being the equivalent to the '*Beano*' (a children's cartoon magazine in the UK) in its legal status was ridiculous.<sup>46</sup> Although the legal status of the CFR is accepted, there have been critical comments on its status by English judges. In *AB*<sup>47</sup> Mostyn J wrote of the CFR as a part of UK law and being far wider than the ECHR in terms of shocked surprise.

But this response is very composed when compared with the House of Commons EU Scrutiny Committee report in April 2014 – the major recommendation was to remove the CFR from our law by UK legislation! It is a recommendation coloured by ignorance and discrimination.<sup>48</sup>

The CFR has featured in a very important domestic case involving Prince Charles and access to his correspondence held by government departments.<sup>49</sup> The prince had been lobbying Ministers for 'causes'. The information was sought under the Freedom of Information Act 2000 (a domestic measure) and the Environmental Information Regulations (SI 3391/2004 implementing Council Directive 2003/4/EC). Under both legal regimes the Attorney General may issue a veto

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<sup>42</sup> See *Rugby Football Union* note 25.

<sup>43</sup> S. Peers *EU Law Analysis* 'The UK opts back into the EAW and other EU Criminal Law' 1 December 2014:

<http://eulawanalysis.blogspot.co.uk/2014/12/the-uk-opts-back-in-to-european-arrest.html>

<sup>44</sup> *Assange v Swedish Prosecution Authority* [2012] UKSC 22.

<sup>45</sup> In relation to Art 1(2) Protocol 30. See Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* (21/12/2011) and *EM (Eritrea) v. Secretary of State for the Home Department* [2012] EWCA Civ 1336 paras 43–48. Note *Benkharbouche etc v Embassy of Sudan* [2015] EWCA Civ 33 and the horizontal direct effect of Art 47 EUCFR paras 76–85.

<sup>46</sup> The Minister was Keith Vaz; see '*Beano No More*' K. Beal and T. Hickman (2011) *Judicial Review* 113.

<sup>47</sup> *R (AB) v Secretary of State for the Home Department* [2013] EWHC 3452 (Admin).

<sup>48</sup> EU Scrutiny Committee HC 979 (2013–14).

<sup>49</sup> *R (Evans) v Att Gen* [2014] EWCA Civ 254. The original tribunal decision is [2012] UKUT 313(AAC).

overriding decisions by the Information Commissioner and an independent tribunal allowing access to the information. The Information Tribunal had ruled in favour of disclosure because the Prince had been lobbying Ministers and was not engaged in being prepared for monarchy – the later would have been protected by confidentiality. The public interest required disclosure. This decision was vetoed.

Under the EU EIR the judgment of the Court of Appeal was emphatic in rejecting the Attorney General's veto under the EU implementing regulations on behalf of the Prince. Basically, the case for His Royal Highness was defeated by the requester's rights to access to justice under Articles 47 & 52(3) CFR and Article 6 ECHR.

The Court of Appeal judgment was upheld by the Supreme Court (*R (Evans) v Attorney General* [2015] UKSC 21) both in relation to domestic law under the Freedom of Information Act ((FOIA) five judges from seven) and under the EU Directive (six judges). The court did not consider it necessary to refer to arguments about the EU Charter. The judgment of Lord Neuberger (with whom Lords Kerr and Reed concurred) considered that an executive veto under FOIA undermined the *binding* nature of judicial decisions and that an executive decision must be reviewable by a court of law. The FOIA veto was not clear enough to override a decision of a judicial tribunal or a court. The scope of a FOIA veto was confined. Lord Mance (with Lady Hale) agreed on the outcome but on the narrower ground that the Attorney General had not begun to address the Upper Tribunal's cogent reasons for disclosure. Under EU law, Art 6(1), (2) and (3) of the Directive required a binding judicial determination and a full merits review which a judicial review of the veto could not achieve. This has a very wide ambit. The veto was therefore incompatible with the Directive in relation to environmental information. The decision of the Upper Tribunal ordering disclosure therefore stands under both domestic and EU law. For Lord Neuberger, the decision was one upholding the rule of law.

The interesting development has come with the common law of human rights and the influence, reaction to, the ECHR. We in the UK have to rely upon the ECHR much more than you would in Europe to advance human rights. We have no written constitutional protection for human rights. The Convention and the Human Rights Act resonate throughout our courts.

The emerging common law of human rights is a history without a beginning. It emerged, but did not commence, with three very important cases in the 1960s (themselves inspired by 17<sup>th</sup> century case law) and developed in the 1980s with growing insistence on extension of jurisdictional grounds to protect individuals.

It becomes clearer in the 1990s.<sup>50</sup> It is added to by the Human Rights Act 1998 implementing much of the ECHR into domestic law but that legislation fomented a domestic judicial reaction to give clearer identity to a common law of human rights.<sup>51</sup>

The most interesting and dramatic recent example of the common law of human rights came in *Kennedy v Charity Commission* (transparency)<sup>52</sup> following *HM Treasury v Ahmed* [2010] (legality, access to justice, property rights).<sup>53</sup> The latter was overruled by legislation. EU human rights cannot be overruled by UK legislation – unless the UK determined to leave the EU. A referendum on such an exit has been promised by the Conservative Party who will be bolstered in Euroscepticism by any United Kingdom Independence Party MPs after May 2015 – depending upon election results.

## Constitutional Identity

The leading discussion on ‘identity’ comes with the litigation concerning what is known as *HS2* and the patriation of constitutionalism. *HS2* concerns the development of the high speed train routes from London to the Midlands and then onto the North of England.<sup>54</sup> It is the most ambitious project on land use development by the UK government since the Channel Tunnel and the most ambitious infrastructure project since the building of the railways in nineteenth century Britain.

The government decided that because of the complexity of the decision and the necessity otherwise for planning permission through infrastructure projects’ procedures a hybrid bill procedure would be adopted. On introduction in the House of Commons, the Bill will be given a First reading. This is a formality, and no debate takes place. The principles of the Bill are debated at Second reading and then a special Select Committee of Members of Parliament (MPs) also established.

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<sup>50</sup> Note the seminal *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534, *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115, *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 on freedom of speech, privacy, legality and access to justice.

<sup>51</sup> See eg *Osborne v Parole Board* [2013] UKSC 61 and *Kennedy v Charity Commission* [2014] UKSC 20.

<sup>52</sup> [2014] UKSC 20

<sup>53</sup> [2010] UKSC 2 & 5.

<sup>54</sup> *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3. See *Pham v Secretary of State for the Home Department* [2015] UKSC 19 below and further patriation of constitutional questions.

The Select Committee hears objections (called ‘petitions’) against details of the scheme by those directly affected by its proposals, which are made following Second reading. The Select Committee can recommend changes to the scheme based on petitioner concerns.<sup>55</sup>

A Public Bill Committee of MPs then reviews the Bill and may make further amendments, after which the Bill enters the Report stage and subsequently receives its Third reading.

A similar process is followed in the House of Lords. The Bill returns to the Commons for consideration of amendments made in the Lords and following this receives Royal Assent, thus becoming an Act of Parliament.

This Act of Parliament would provide the powers to construct and maintain Phase One of HS2 between London and the West Midlands.<sup>56</sup>

Two issues emerged in this litigation. The first was whether the government policy Command paper *High Speed Rail – Investing in Britain’s Future – Decisions and Next Steps* (2012) setting out the proposals in outline required a Structural Environmental Assessment (SEA) under EU law because the paper had a *constraining* influence on the decisions to be taken. The Supreme Court ruled that the Command paper (CM 8247 January 2012 the *Decisions and Next Steps*) was not a *constraint* on decision-making requiring a SEA under Directive 201/42/EC. Despite a lack of clarity in ECJ case law, and a vigorous dissent in the Court of Appeal and doubt in the mind of Baroness Hale, the case was not referred to the ECJ and followed *Walton* (above) in this respect.

The second, and more important point concerned the fact that development approval was to be given via a hybrid bill procedure in Parliament (above). This would involve an opportunity for those affected by the bill to make representations to the especially appointed select committees of MPs and Peers to make their views known. The argument in short for the claimants was that the internal process within Parliament would not give an appropriate examination of all the evidence for the proposal required by EU law in the Environmental Impact Assessment Directive (2011/92/EU [2012] OJ L26/1). The government did not intend the principle behind the bill (the policy) to be challenged within proceedings unless required by Parliament after the second reading to do so. Furthermore, the government would use a three-line party whip (the means of

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<sup>55</sup> More information on how to petition can be viewed on the UK Parliament website at: [www.parliament.uk/business/committees/committees-a-z/commons-select/high-speed-rail-london-west-midlands-bill-select-committee-commons](http://www.parliament.uk/business/committees/committees-a-z/commons-select/high-speed-rail-london-west-midlands-bill-select-committee-commons)

<sup>56</sup> The stages of a Bill’s passage through Parliament can be viewed on the UK Parliament website at: [www.parliament.uk/about/how/laws/passage-bill](http://www.parliament.uk/about/how/laws/passage-bill)

enforcing party discipline within Westminster) to pressure MPs on the government side to vote for approval of the bill. It may be of interest to note that the Government exercised a veto over a decision to disclose unpublished papers relating to the HS2 project under the Freedom of Information Act (the Information Commissioner noted that the EIR should have been used).<sup>57</sup>

The claimants argued that these proceedings would not allow effective public participation as required by Art 6(4) of the 2011 Directive. Art 1(4), however, exempted projects adopted by specific act of national legislation since this entailed achievement of the objectives of supplying information through a representative democratic process.

The claimants countered that the ECJ had ruled that two requirements had to be met to achieve compliance with Art 1(4). There must be an examination in *substance* and not merely a formal one; secondly that those participating had to be *properly* informed. Furthermore, MPs, the claimants argued, had to be given a free vote and should not be ‘whipped’ by political party enforcers. Additionally, national courts, the Advocates General argued, had to review the adequacy of the internal procedures to ensure full and proper examination of the issues.<sup>58</sup> The courts would have to undertake a ‘hard-look’ review of internal Parliamentary procedures.

The Supreme Court ruled in favour of the government in refusing to quash the decision by the government to proceed with the bill in Parliament. In Lord Reed’s judgment for the court, procedures, he ruled, are controlled by *Parliament* not the government. The internal process would be a substantive appraisal as required, there was a super-abundance of information available and MPs could vote to amend the bill – I add many might be pressured by their constituents to do so. Party or governmental influence was not incompatible with Art 1(4). The court was satisfied that a procedure would be adopted that complied with the Directive. There was no need to make an Article 267 reference despite uncertainty as to the lack of clarity in EU law.

But it was the ruling in relation to review of Parliament’s internal proceedings that seems to emphasise a domestically dominated constitution. The discussions raised important points in the relationship between the national constitution and the European Union and sovereignty. It revisited and moved on from *Factortame No 2*. Like *Thoburn*, what follows is *obiter*.

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<sup>57</sup> See [www.parliament.uk/briefing-papers/sn05007.pdf](http://www.parliament.uk/briefing-papers/sn05007.pdf)

<sup>58</sup> Advocates General Sharpston in Case C-128/09 *Boxus v Regione Wallon* and Kokott in Case C-43/10 *Nomarchiaki Aftodioikisi Aitolokarnanias etc v Ypourgos Perivallontos etc*

Basically, Art 9 of the Bill of Rights 1688-89 prohibits questioning the proceedings of Parliament 'in any other place', in particular the courts. As we know, supremacy in most member states is dealt with under national constitutional provisions such as Art 23 of the Basic Law of Germany or Arts 55 and 88 of the French constitution. We have no written constitution. Would EU law require a judicial investigation into Parliamentary proceedings as the claimants argued to ensure compliance with the Directive?

In the UK, EU supremacy was provided for under s 2(1) EC Act 1972 (above). The UK voluntarily accepted the supremacy of EU law, we saw in *Factortame*. But *Thoburn* ruled that Parliament could not give away its *ultimate* sovereignty because that was not a gift of Parliament; it was the creature of the common law. The common law would not allow Parliament to give away its ultimate sovereignty to European law. The constitutional relationship between the Union and our national constitution was ultimately determined by the common law. I quote at length from Lord Reed for a unanimous court.

'Contrary to the submission made on behalf of the appellants, that question cannot be resolved simply by applying the doctrine developed by the Court of Justice of the supremacy of EU law, since the application of that doctrine in our law itself depends upon the terms and interpretation of the 1972 Act. If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom. Nor can the issue be resolved, as was also suggested, by following the decision in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603, since that case was not concerned with the compatibility with EU law of the process by which legislation is enacted in Parliament. The *Factortame* case was concerned with the meaning and effects of legislation passed by Parliament and their governance by EU law.' [Para 79]

Against this background, it appears unlikely that the Court of Justice intended to require national courts to exercise a supervisory jurisdiction over the internal proceedings of national legislatures of the nature for which the appellants contend. 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-Terrorism Database Act*, 1 BvR 1215/07, para 91, that as part of a co-operative relationship, a decision of the 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"). [111 Lord Reed]

Come what may, this is an assumption by Lord Reed. Can it really be argued that this assumption represents *acte clair* and did not require a reference?

Lords Mance and Neuberger (reflecting the unanimity of the court) wrote as follows. They were concerned that the Advocate Generals had read 'since' in the directive of 2011 Art 1(4) to mean 'provided that' Parliament undertakes and if I may add *is seen to undertake* a full substantive review. The European Court of Justice was itself careful to use a general formulation, invoking the 'objectives' of the Directive, when it re-interpreted 'since' to mean 'provided that' in article 1(5). The Court did not say that the Directive or its provisions applied to a specific legislative act. Rather,

It said that it was a condition of their disapplication that their "objectives" were met by the legislative process. The Court was careful not to endorse the very wide formulae, used by the two Advocates General in *Boxus* and *Nomarchiaki*, which suggested close scrutiny by national judges of the legislative process to see whether "the people's elected representatives" had been able "properly" to examine and debate the proposal or had "perform[ed] their democratic function correctly and effectively". [Para 201]

There was, they wrote a good general reason for this.

Whatever other adjustments in meaning it might make by way of interpretation, the Court was here concerned with the fundamental institutions of national democracy in Europe. It was concerned with a provision which deliberately distinguished projects approved by legislative process from projects approved by the ordinary planning process. It is not conceivable, and it would not be consistent with the principle of mutual trust which underpins the Union, that the Council of Ministers should, when legislating, have envisaged the close scrutiny of the operations of Parliamentary democracy suggested by the words used by Advocates General Sharpston and Kokott. The Court will also have been well aware of the principles of separation of powers and mutual internal respect which govern the relations between different branches of modern democracies (as to which see, in the United Kingdom context, *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262, (para 125, per Lord Hope of Craighead).<sup>59</sup> The Court cannot have overlooked or

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<sup>59</sup> I write on this case in 'The United Kingdom in Europe and Europe in the United Kingdom – an Indelible Influence' in *Verfassung und Verwaltung in Europa* eds U Becker, A Hatje, M Potacs, N Wunderlich, Nomos Baden-Baden pp 19-42 (2014).

intended to destabilise these. 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 Court.

The judges wrote of the interpretation given to the European Communities Act 1972, which requires United Kingdom courts to acknowledge that European law requires them to treat domestic statutes, whether passed before or after the 1972 Act, as invalid 'if and to the extent that they cannot be interpreted consistently with European law' and they cite *R v Secretary of State, Ex p Factortame Ltd (No 2)* (above).

[*Factortame*] was a significant development, recognising the special status of the 1972 Act and of European law and the importance attaching to the United Kingdom and its courts fulfilling the commitment to give loyal effect to European law. But it is difficult to see how an English [I add 'sic'] court could fully comply with the approach suggested by the two Advocates General without addressing its apparent conflict with other principles hitherto also regarded as fundamental and enshrined in the Bill of Rights. Scrutiny of the workings of Parliament and whether they satisfy externally imposed criteria clearly involves questioning and potentially impeaching (i.e. condemning) Parliament's internal proceedings, and would go a considerable step further than any United Kingdom court has ever gone. [202]

They then make the following crucially significant statement:

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. [207]

They do not express a view as to whether Article 9 of the Bill of Rights would be one such constitutional provision (the author's view is that it would be such because of its protection of the UK's version of the separation of powers). The point was not argued and was raised by the court itself, not counsel. They refer to the 'important insights' and '*penetrating discussion*' by Sir John Laws in *Thoburn* (paras 58-70) on the belief that constitutional statutes may only be repealed expressly or by 'irresistible wording'. But it is contestable that there are in addition to constitutional statutes constitutional principles of the common law such as those developed by the courts and which we referred to above: legality, transparency, access to justice, freedom of speech and so on. The courts have accepted that these principles may only be overridden by express, clearly worded statutes. Parliament must then face the consequences.<sup>60</sup>

*HS2* makes it clear, it certainly strongly suggests, that UK law is likely to balk at directly effective provisions of EU law overriding basic constitutional instruments, constitutional statutes or constitutional principles of the common law. Subject to that, the contractual/voluntary basis of supremacy, the arguments from functionality, equality and analytical models will give supremacy to EU law as Craig explains.<sup>61</sup> We await the views of the ECJ on such matters although its case law would indicate a contrary opinion to the Supreme Court justices.<sup>62</sup> Such occurrences are going to be extremely rare – *HS2* is the first case on such a question in almost 42 years in the UK. It should be recalled that in *Factortame*, the ruling of which the Supreme Court endorsed, the House of Lords found that liability under the ECJ ruling had been established and damages had to be paid to the victims by HM government.<sup>63</sup>

The decision in *Pham v Secretary of State for the Home Department* ([2015] UKSC 19) gave an early opportunity for the Supreme Court to revisit arguments about national constitutional space being a matter for *domestic* constitutional law. Lord Mance, with whom Lords Neuberger and Wilson and Lady Hale agreed – from a court of seven- argued that questions of national citizenship were a matter of constitutional law and fell within the rubric of national constitutional law despite the possibility of contingent EU citizen rights. In a nutshell what Mance argues is that an Act of Parliament (the 1972 Act) cannot be taken to have signed away *complete* sovereignty. *HS2* recognised 'jurisdictional limits' on the extent to which an Act of Parliament could confer on the EU ECJ competence to adjudicate

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<sup>60</sup> See Lord Hoffmann in *Simms* note 50 above.

<sup>61</sup> P. Craig (2014) *Public Law* 373.

<sup>62</sup> The decision in Case C-399/11 *Melloni* (26/02/2013) would seem to support the classic jurisprudence of the ECJ on EU law supremacy or primacy as now referred to in Declaration No 17 of the Lisbon Treaty and see opinion of the Council Legal Service (11197/07 (JUR 260, 22 June 2007)).

<sup>63</sup> *R v Secretary of State for Transport ex p Factortame Ltd* [1999] 4 All ER 906 (HL).

on 'fundamental features of the British constitution'. The TEU he argues in Arts 4 and 5 recognises conferral of competences with limitations, respect for fundamental national constitutional structures in Art 4(2) and principles that govern use of Union competences. Like *HS2* the relevant passage is *obiter dicta*. The relevant paragraphs (75-83) do raise difficult questions about where national constitutional space begins and EU primacy ends. What if there are twenty-eight different answers?

This is the point addressed by Advocate General Cruz Villalón in his Opinion in Case C-62/14 (14 January 2015) concerning the reference by Germany's Constitutional Court to the CJEU on the legality of outright monetary transactions. That case concerned the not inconsiderable difficulty of subjecting EU law's validity to the 'unalterable core content of the national constitution' (para 34). While making an Art 267 reference, the national court does not wish to relinquish 'its own ultimate responsibility to state what the law is with regard to the constitutional conditions and limits of European integration so far as its own state is concerned' (para 49). The ECJ has long worked with a category of 'constitutional traditions common' to all member states and in establishing a culture of rights for the Union – a constitutional culture. He continues

'That common constitutional culture can be seen as part of the common identity of the Union, with the important consequence, to my mind, that the constitutional identity of each Member State, which of course is specific to the extent necessary, cannot be regarded, to state matters cautiously, as light years away from that common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States.' (para 61).

Sincere cooperation, trust and, one may add, tolerance are the key factors in constitutional co-existence and ultimate convergence as he sees the position. We should recall however that in its Opinion on accession to the ECHR the CJEU has emphatically confirmed the autonomy and exclusive nature of EU law and over which the court is the mandated and sole interpreter (Opinion 2/13, 18 December 2014).

In response to claims that the UK agreed to the treaties and these were ratified by domestic constitutional processes, it must be recalled that treaties do not change the law of the UK and the courts' focus is on their implementing measures although treaties may be referred to to aid construction. The court's attention is on what the 1972 Act has authorised; it is not focused upon a written constitution because there is no such thing in the UK. It is not focused on what the government has agreed to by way of treaty. The discussion on

constitutionality in *HS2* and *Pham* is strictly *obiter dicta* because in *HS2* the court ruled that there had been compliance with the EIA Directive despite the interpretation of the Advocates General and in *Pham* it was not necessary to determine the constitutional issue.

There was no need for a reference under Art 267 TFEU in *HS2* despite the lack of clarity in the ECJ decisions and Advocate Generals opinions. Failing to make Article 267 references has been a prominent development in Supreme Court case law in recent years, even to the point of arguing that the ECJ has been in error in its analysis (*Aimia Coalition* n 32 above).

I do not think the Supreme Court is simply being ‘rebellious’ in this. They are far more active in judicial interpretation of the constitution than was thought possible in 1972. Problems of interpretation have been identified as the common law process develops.

Arguably, if courts in the UK are determined that they resolve basic matters of UK constitutional law and ultimate sovereignty they may be prepared to go further and issue a declaration of unconstitutionality against provisions in a UK statute affecting domestic law only which denied human rights and which were *in extremis*.<sup>64</sup> Courts may possibly refuse to enforce such provisions. This would not make them legislators. They are too respectful for that and know that is not their role in the UK constitution. They would not invalidate primary legislation. Relationships between the courts and Parliament are generally cooperative and constructive. The scenario of such judicial action would be indicative of something going dreadfully wrong. But it would make the judges respecters and upholders of fundamental rights if rights were subverted at the legislative level. Constitutional statutes and constitutional principles of the common law are a higher order of law. The common law says so.<sup>65</sup>

## Conclusion

Lord Reed has observed in the Thomas More lecture in October 2014<sup>66</sup> that

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<sup>64</sup> See Political and Constitutional Reform Committee House of Commons HC 802 (2013-14) on the role of the judiciary in the UK in a codified constitution. This would extend beyond the remedies available under the Human Rights Act 1998.

<sup>65</sup> P. Birkinshaw and M. Varney ‘Britain Alone Constitutionally’ in P. Birkinshaw and A. Biondi *Britain Alone! The Consequences and Implications of UK Exit from Europe* (2015) forthcoming Kluwer Law International.

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[http://www.lincolnsinn.org.uk/images/word/education/euro/EU\\_Law\\_and\\_the\\_Supreme\\_Court.pdf](http://www.lincolnsinn.org.uk/images/word/education/euro/EU_Law_and_the_Supreme_Court.pdf)

Thomas More was a great European. He did not accept the King (Henry VIII) as head of the Church, an act of treason for which he was beheaded.

‘One of the greatest challenges currently facing courts at the apex of national legal systems throughout Europe is to understand their role in an era when law is permeated by rules and principles falling within the domain of supranational courts at Strasbourg and Luxembourg and to establish a successful working relationship with those courts. It is a challenge not because of any lack of goodwill or effort on either side, but because it inevitably takes time for everyone involved to adjust to such a major change [41 years the author adds!] particularly during a period when the EU is undergoing development and it is uncertain where the development will lead.’

The ECJ cannot micro-manage, he argues. Its role must be interlocking with national courts but it must be based on mutual respect and a common understanding of their respective roles. He clearly sees a role for diminishing resort to the Art 267 reference procedure. But says Lord Reed, ‘I do not wish to argue that the arguments put forward by the ECJ on primacy of EU law are anything other than ‘relevant and important’.<sup>67</sup> But that does not ‘entail that every rule of EU law has to take priority over *basic* rules of national constitutional law.’<sup>68</sup>

A 267 reference in *HS2* would have involved investigation into national constitutional law and the possibility that Art 9 Bill of Rights should be overridden – then Parliament (as distinct from government) would very likely have sought relief that the ECJ judgment should not be enforced.<sup>69</sup> Furthermore, too often he feels, the ECJ has not respected the democratic intent of the EU legislature breaching legal certainty and failing to respect the compromises and concessions that are an inevitable feature of democratic decision-making. He echoes the points made by Lord Mance set out above.

In sum there is a need for more ‘Judicial Discourse’. We have seen this in relation to the CHR and our national courts in subjects such as the English law of negligence, banning of political advertising on TV, convictions based on hearsay evidence and what is interpreted as a concession to the UK strength of feeling on prisoner voting rights.<sup>70</sup> There are regular meetings with Supreme Court and senior justices and counterparts in top courts in Europe and regular citations of

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<sup>67</sup> Ibid P 8.

<sup>68</sup> P 9.

<sup>69</sup> P 10

<sup>70</sup> *Firth v United Kingdom* (12 August 2014 CHR 4<sup>th</sup> Section) on the latter. See *R (Haney etc) v Secretary of State for Justice etc* [2014] UKSC 66 and refusal to follow parts of *James v United Kingdom* [2012] EHRR 399 on Article 5 ECHR.

national case law in our courts. There has to be fostered a true spirit of cooperation and joint endeavour.

But the emphasis has to be on a two way process; not one way traffic. UK judges are suspicious of what they see as over-strained interpretation of EU laws by the ECJ and interpretations which fail to respect the democratic legislator's intentions, undermine legal certainty and which 'fail to respect the compromises and concessions between different interests which have to be respected in a stable European Union.'<sup>71</sup> It makes agreement in the legislative process more difficult, and consequently more difficult for courts to apply the *acte clair* doctrine.

I will conclude by expressing my belief that our judges are sincere in their desire for constructive cooperation; this surely lies at the heart of Art 4(2) and (3) TEU. Lord Mance in his judgment in *Pham* that we examined above spoke of the 'spirit of cooperation' on constitutional matters shown by both the *Bundesverfassungsgericht* and the UK Supreme Court. (Para 91).

UK judges respect and cooperate with the ECJ; but they are also conscious of their new-found responsibility to uphold and interpret 'our constitution'. As I said, they have been sedulously establishing the extent of the common law constitution. They acknowledge they are part of a *Gerichtsverbund*. It is not on the whole with our judges that Euroscepticism lies. It lies with many politicians who despise the European enterprise. Neuberger makes a telling point:

'Studying judgments of the CJEU and CHR has led to the courts of this country [UK] taking a more principled approach to decision-making than in the past. This is scarcely surprising: .... the common law has tended to be pragmatic and therefore very ready to incorporate good ideas from other systems.'<sup>72</sup>

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. My book *European Public Law* [2014] is dedicated to understanding this phenomenon.

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<sup>71</sup> P 11.

<sup>72</sup> Note 1 above para 46.