

Lady Hale gives The Bryce Lecture 2015: The Supreme Court in the United Kingdom Constitution

Somerville College, Oxford

5 February 2015

It is fascinating to be delivering a lecture in memory of James Bryce today. He had a career which would surely be impossible these days – Regius Professor of Civil Law in this University (1870 to 1893), Member of Parliament for Tower Hamlets and then for South Aberdeen (1880 to 1907), ministerial office in three Liberal Governments, Ambassador to the United States of America (1907 to 1913), President of the British Academy (1913 to 1917) and serving at the Permanent Court of International Justice in The Hague. A lesser known fact about him is that he was also Professor of Jurisprudence at Owens College in Manchester (1870 to 1875), the forerunner of the University of Manchester. Another Oxford academic who taught at Manchester in the early days was Albert Venn Dicey, his great friend and almost exact contemporary, who held the Vinerian Chair of English Law in this University from 1882.

Both were constitutional lawyers, but Dicey is the better known to law students today. There were two major planks of our Constitutional Law as he saw it:

- (1) that Parliament is sovereign and can make or unmake any law; and
- (2) that everyone is subject to the same rule of law; this includes the Government and public officials, who must act within the powers which the law has given them.

In many respects, the Constitution which we have today would be easily recognisable as the same constitution which Bryce and Dicey knew. It is still unwritten. The legislature, executive, judiciary and head of state remain much as they then were. Dicey's two principles are still the foundation

of our Constitutional Law. But in many respects, the Constitution which we have today would have been unrecognisable to Bryce and Dicey. Some may think that this is the great virtue of an unwritten constitution – that it can change and develop with changing times. Others may think that there are some things which it should be rather harder to change than it currently is.

So what has changed since their day? In particular:

- (1) Where stands the sovereignty of Parliament, given the ceding of legislative competence both downwards – to the devolved Parliaments in Scotland, Wales and Northern Ireland – and upwards – to the law-making powers of the European Union?

- (2) Where stands the rule of law in this new world? To what extent have the courts gained power to rule, not only on the validity of acts of government, but also on the validity of our laws? The rule of law has always been the servant of Parliamentary sovereignty – the courts ensuring that public authorities stay within the bounds of the powers which Parliament has given them – but could it be that the rule of law is gradually taking over as the organising principle of our constitution?

Modern developments mean that the role of the courts, and the highest court in particular, is very different from the role of the courts in Bryce's day. This would be so whether or not the appellate committee of the House of Lords had been transformed into the Supreme Court of the United Kingdom but it certainly made that change more necessary. In a sense undreamt of in Victorian times, the Supreme Court has become a real constitutional court.

We are not, of course, a constitutional court on continental lines. Countries with legal systems based on the continental European model, such as most of continental Europe, Latin America and

parts of the Far East, all have constitutional courts which are separate from the ordinary law courts. These courts all have a power of what we call ‘abstract review’ – that is, a new or proposed law is referred to them, usually by politicians, to see whether it is consistent with the Constitution. Some also have what we call ‘concrete review’ – that is, the question can come up in the context of a real case involving real people. Some have exclusive jurisdiction, in the sense that they are the only court which can rule on the question. This is to preserve the democratic legitimacy of the laws – laws passed by Parliament cannot be called in question in the ordinary courts, but only in this separate body with its specialist expertise and political legitimacy. (Incidentally, these continental style constitutional courts all have more varied composition, including a healthy sprinkling of Law Professors, than our top courts tend to have).

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

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

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

issue comes before the ordinary courts of the land, not some separate body to which any constitutional question has to be referred.

When the United Kingdom Supreme Court was set up in 2009, there were some who wondered whether we might eventually evolve into a US or Canadian style Supreme Court. But of course we could never do that unless the organising principle of our constitution were to change and we acquired the power to strike down Acts of Parliament. As every law student knows, we were invited to do that, in the famous case of *R (Jackson) v Attorney-General*,² the first of three wonderful challenges to the Hunting Act 2004. This one was directed, not to the contents of the Act, but to its validity as an Act of Parliament. Luckily, no-one took the point that nine members of the House of Lords were being asked to adjudicate upon a bitter battle between the House of Commons and the House of Lords.

Lord Bryce would, as a staunch Liberal, have been a supporter of the Parliament Act 1911, forced through the House of Lords by the threat to create enough new peers to secure a majority. (Strange that their Lordships thought that the dilution of their membership was a worse fate than the dilution of their powers.) A Bill which the Commons had passed in three successive sessions, and the Lords had rejected, could be presented to the King for Royal Assent and become an Act of Parliament, as long as there was at least a two year gap between its second reading in the first session and its passing the Commons in the third (because the Government can, of course, manipulate the length of the sessions, as we saw with the first session of the current Parliament). The quid pro quo was to reduce the maximum length of a Parliament from seven to five years. To get through under this new procedure, a Bill would have to start its passage quite soon after a

² [2005] UKHL 56, [2006] 1 AC 262.

general election, when the Commons still had a democratic mandate from the people. But a Bill to prolong the life of a Parliament beyond five years could not be passed in this way.

The Parliament Act 1949 reduced the timetable in the 1911 Act from three sessions to two and the minimum gap from two years to one. It was passed under the 1911 Act procedure. So it was argued in *Jackson* that the 1911 Act had delegated the power of Parliament as lawfully constituted – King, Lords and Commons – to the King and Commons alone. Legislation passed by the modified body was delegated rather than primary legislation. A delegate cannot use his delegated powers to enlarge those powers unless expressly authorised to do so. He cannot pull himself up by his own bootstraps. And the courts can strike down delegated legislation.

None of us had much difficulty in rejecting that argument. The 1911 Act did not delegate power. It created a new way of passing Acts of Parliament. The language was quite explicit: Bills passed under that procedure would become Acts of Parliament. The legislature had redefined itself. A distinction has to be drawn, as Lord Steyn put it, between what Parliament can do by legislation and what Parliament has to do to legislate.

But are there *any* limits to what can be done under the Parliament Act procedure? The Court of Appeal thought that it could not be used to make fundamental constitutional changes to the relationship between Lords and Commons, such as abolishing the House of Lords.³ None of us agreed with that. The 1911 Act had been passed in order to do two very fundamental things – to establish home rule for Ireland and to disestablish the Church in Wales. But most of us (apart from Lord Bingham) thought that it would not be possible to get round the prohibition on using the Act to prolong the life of a Parliament by passing two Bills – one amending the Parliament Act

³ R (*Jackson*) and Ors v HM Attorney General [2005] EWCA Civ 126, [2005] QB 579.

to remove the prohibition and then one to extend the life of Parliament. An Act designed to reinforce democracy by preventing the unelected House from thwarting the will of the electorate ought not to be used to enable the elected House to do so.

The case is more interesting to law students for the speculations about whether there might be other limits to what Parliament can legislate about. Lord Steyn wondered whether ‘even a sovereign Parliament acting at the behest of a complaisant House of Commons’ could abolish judicial review or the ordinary role of the courts.⁴ There are some words in brackets in my own opinion to similar effect.⁵ And Lord Hope was prepared to say that:

‘The rule of law enforced by the courts is the ultimate controlling factor upon which our constitution is based . . . the courts have a part to play in defining the limits of Parliamentary sovereignty.’⁶

Lord Bingham later commented, in his book on the rule of law, that there was no authority for these propositions, which he regarded as heretical. In his view, the judges did not invent the principle of Parliamentary sovereignty, which was the product of the constitutional upheavals of the 17th century, and it was not open to the judges to change it.⁷

Of course, these arguments have nothing to do with the Parliament Act and the battle between the Commons and the Lords. If the rule of law were eventually to take precedence over Parliamentary supremacy, it would not matter whether the offending legislation had been passed with or without the consent of the House of Lords.

⁴ At [102].

⁵ At [159].

⁶ At [107].

⁷ Tom Bingham, *The Rule of Law*, 2011, Penguin Books, p 167.

However, devolution has given the Supreme Court a new role in ruling upon the validity of legislation. This was always the case under the Government of Ireland Act 1920, which set up the Northern Ireland Assembly with its own legislative powers. But this did not generate much litigation.⁸ We have had much more since the devolution settlements of 1998. We now have to rule upon whether the actings (to use a delightful Scottish term) of the national Governments and Parliaments of Scotland, Wales and Northern Ireland are within the scope of the powers which the UK Parliament has given them. This jurisdiction was originally given to the Judicial Committee of the Privy Council, because it was thought that the battles would be between the UK and the devolved Parliaments, so it would not be right for a committee of the House of Lords to decide them (so they were given to exactly the same judges, but sitting in a body which was used to handling constitutional questions from the Commonwealth). Now that we have a Supreme Court, that is no longer a problem, so the jurisdiction has come to us.

Devolution questions take two main forms and can come before us in two different ways. Most cases allege that a devolved Parliament or government has acted incompatibly with the rights contained in the European Convention on Human Rights. The devolution statutes say that they must not do this. These challenges normally arise in a real, concrete case. Both civil and criminal cases can come to us on an ordinary appeal from the courts in Wales or Northern Ireland and civil cases can come on an ordinary appeal from the courts in Scotland.

An example is the *Axa Insurance* case, about the Damages (Asbestos-related Conditions) (Scotland) Act 2009.⁹ This provided (with retrospective effect) that pleural plaques, pleural thickening and asbestosis constituted actionable harm, reversing the effect of a recent decision of the House of

⁸ But see *Gallagher v Lynn* [1937] AC 863.

⁹ *Axa General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868.

Lords which held that they did not.¹⁰ The insurance industry complained that this was a breach of their property rights, contrary to article 1 of the First Protocol to the European Convention. The Supreme Court agreed that this was an interference with their property rights, but held that it was a proportionate means of achieving a legitimate aim. In doing so, it recognised that this was a matter of social and economic policy in which weight should be given to the judgment of the democratically elected legislature as to how the balance between the various interests should be struck. The wider grounds for judicial review of administrative action, which can be used to attack the decisions of local government, did not apply to the decisions of the Scottish Parliament.

There is no ordinary right of appeal from the Scottish courts in criminal cases (there was no right of appeal in criminal cases when the Acts of Union were passed in 1707 and unlike England and Wales and Northern Ireland none has been enacted since). But the actions of the Scottish Parliament or Ministers in the field of criminal justice can come before as compatibility issues. Hallowed practices of the Scottish criminal justice system have proved irreconcilable with the European Convention. This has, to say the least, proved controversial in Scotland.¹¹ Nevertheless, compliance with the European Convention is an integral part of all three devolution settlements, to which it appears that the people of Scotland, Wales and Northern Ireland are attached.

Human rights apart, Acts of the devolved Parliaments may be invalid because their subject matter is outside the powers which the United Kingdom Parliament has given them. Under the Scotland Act 1998, every subject which is not reserved to the UK Parliament is devolved, whereas currently under the Government of Wales Act 2006, every subject which is not devolved to the Welsh Assembly is reserved to the UK Parliament. But, as was recognised in the Privy Council long ago

¹⁰ *Rothwell v Chemical and Insulating Co Ltd* [2007] UKHL 39, [2008] AC 281.

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

in cases from Canada and India,¹² it is not possible to divide ‘devolved’ and ‘reserved’ matters into precisely defined watertight compartments: some degree of overlap is inevitable. So, when deciding whether a statute ‘relates to’ a particular subject, the court has to divine what it is really about.

*Martin v Most*¹³ concerned an Act of the Scottish Parliament¹⁴ which increased the sentencing powers of Sheriffs trying cases summarily (that is, without a jury) from six to 12 months’ imprisonment. This applied to all offences, whatever their subject matter. But the effect was to increase the maximum penalty on summary (non-jury) conviction for driving whilst disqualified from six to 12 months’ imprisonment. This was contrary to the UK Road Traffic Act, which provides a maximum penalty of six months on summary conviction. Road traffic is a reserved area. So did this ‘relate to’ a reserved area? This is to be determined by reference to the purpose of the legislation, having regard to (among other things) its effect in all the circumstances.¹⁵ The Supreme Court held that it did *not* relate to a reserved area. Its purpose was to relieve pressure on the higher courts in all kinds of criminal cases.

But an Act of the Scottish Parliament cannot modify a rule of Scots private or criminal law insofar as that rule is ‘special to’ a reserved matter.¹⁶ Lord Hope (in the majority) thought that the rule of Scottish law being modified was a rule of procedure and this was not ‘special to’ the reserved matter of road traffic. Lord Rodger (in the minority) thought that the rule of Scottish law being modified was the rule about the maximum sentence on summary conviction for driving whilst disqualified. This in his view was clearly ‘special to’ the reserved matter of road traffic.

¹² *Russell v The Queen* (1882) 7 App Cas 829; *Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580; *Profulla Kumar Mukherji v Bank of Commerce Ltd, Kbulna* (1947) LR 74 Indian Appeals 23.

¹³ [2010] UKSC 10, 2010 SLT 412.

¹⁴ The Criminal Proceedings (Reform) etc (Scotland) Act 2007.

¹⁵ s 29(3).

¹⁶ s 29(2)(d) and Schedule 4, paras 2(1) and (3).

These were real cases involving real litigants, coming up from the lower courts in the usual way. But the Law Officers in each part of the United Kingdom can refer Bills, after they are passed by a devolved Parliament but before they are sent for Royal Assent, to the Supreme Court, for us to rule upon whether or not they are within the scope of the Parliament's powers. This sort of abstract review is very new to us. We have had no such references from Scotland. This may be because the officials have been able to sort thing out to the satisfaction of both the Scottish and the UK governments. It might also be because a reference by the UK government would be seen as a hostile act by the Scottish government and Parliament. Curiously, however, there have been no less than three references¹⁷ since the Welsh Assembly obtained full legislative powers in 2011.

Two of these have been brought by the Attorney General on behalf of the UK government. The first was to the very first Bill to be passed by the Welsh Assembly, the excitingly named Local Government Bye-Laws (Wales) Bill 2012. The Supreme Court held that it was within the scope of the Assembly's powers.¹⁸

More important was the second, about the Agricultural Sector (Wales) Bill 2013. This reinstated for Wales a system of controlling minimum agricultural wages which had been repealed by the UK Parliament. Did this relate to 'agriculture', which is devolved, or to employment and industrial relations, which is not mentioned at all in the lists in the Government of Wales Act? We held that it did relate to agriculture, and that it did not matter whether it also related to employment and industrial relations, and so the Bill was within scope.¹⁹

The third reference is by the Counsel General for Wales (the Welsh Attorney General). It relates to a private member's Bill making employers and their insurers pay the cost of NHS treatment for

¹⁷ Government of Wales Act 2006, s 112.

¹⁸ *Local Government Byelaws (Wales) Bill – Reference by the Attorney-General for England and Wales* [2012] UKSC 53, [2013] 1 AC 792.

¹⁹ *Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43.

asbestos-related diseases caused by the employers' breach of duty. The Counsel General thinks that it is within scope, but the Association of British Insurers think that it is not, partly because it interferes retrospectively with their convention rights to property and partly because they say that it does not relate to 'funding for the NHS in Wales' which is devolved matter. We have not yet given judgment, but it is safe to say that we are not unanimous²⁰.

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

'It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts protecting the interests of the individual. . . . The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.'²¹

Lord Reed reached the same conclusion by a different route. The 'principle of legality' means that the UK Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words. There is a rule of statutory interpretation to that effect. Parliament has to be specific and face up to the political consequences.²² Nor, therefore, can it confer upon another body, by general or ambiguous words, the power to do so. The UK Parliament could not be taken

²⁰ Judgment was given on 9 February 2015: [2015] UKSC 3

²¹ At [51].

²² *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 539; *Ahmed v Her Majesty's Treasury* [2010] UKSC 2 and 5, [2010] 2 AC 534.

to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.²³

So much for devolving power downwards. What about ceding it upwards? When the UK entered what was then the EEC in 1973, it had already been established that (within its sphere of competence, which was at that time much narrower than it is now), the community legal order was a higher legal order than those of the member states. It was necessary to the functioning of the common market that community legislation be interpreted and applied in the same way throughout the community. So the final courts of the member states have an obligation to refer to the Court of Justice in Luxembourg any question of community law which is relevant to the case before them, has not been authoritatively ruled upon already, and is not ‘acte clair’ – that is, the answer is so obvious as to leave us in no reasonable doubt that this is how the law would be interpreted by the court and the other member states.²⁴ Once the answer comes back from Luxembourg (usually two years later), it is for us to apply it to the facts of the individual case. The coercive power to make decisions which are binding upon the government and the people of the United Kingdom remains with us: a neat solution.²⁵

The European Communities Act 1972 requires the UK courts to give priority to Community law. We do this in two ways. The first is by ‘conforming interpretation’: wherever possible UK laws have to be interpreted in conformity with EU law, whether or not this was what Parliament originally intended (under the Human Rights Act 1998, the same rule applies to compatibility with the European Convention). It is amazing how much can be done in this way. Thus, for example, Regulations giving effect to the Part Time Workers Directive had to be interpreted and applied so

²³ At [153].

²⁴ *C.I.L.F.I.T. v Ministry of Health*, Case 283/81 [1982] ECR 3417.

²⁵ Eg *O’Brien v Ministry of Justice*, questions referred to Luxembourg by the Supreme Court: [2010] UKSC 34, [2011] 1 CMLR 36; answered by Luxembourg: [2012] ICR 955; decided by the Supreme Court: [2013] UKSC 6, [2013] 1 WLR 522.

as to include part time judges even though they were expressly excluded.²⁶ That was easy because it was in Regulations and not an Act of Parliament. But sometimes a provision which cannot be interpreted away is in an Act of Parliament. If the EU law in question is one which has direct effect, in the sense of giving the citizen rights against the state, then it has simply to be ignored. Thus, for example, in the *Factortame*²⁷ litigation, the House of Lords ruled that provisions of the Merchant Shipping Act 1988, restricting the right of foreign-owned ships to fish in UK waters, had to be disapplied: according to Lord Bridge

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

If fundamental rights are concerned, we may even have to do this in disputes between private persons.²⁸ Even where EU laws are not directly applicable or effective in this way, there is still a presumption that Parliament intends to legislate compatibly with our obligations in international law.²⁹

We have, however, recently had to consider whether there are limits to the primacy accorded to EU law by the 1972 Act. The *HS2* cases³⁰ sought judicial review of decisions contained in a government White Paper, *High Speed Rail: Investing in Britain’s future – Decision and Next Steps*.³¹ The government intended to obtain development consent for HS2 through two hybrid bills in Parliament. A hybrid bill is a mixture of a public bill affecting everyone and a private bill affecting

²⁶ *O’Brien v Ministry of Justice*, *supra*.

²⁷ *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] AC 601.

²⁸ *Kükükdeveci v Swedex GmbH Co KG*, Case C-555/07, [2010] ECR I-365.

²⁹ *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 2 WLR 1275.

³⁰ *R (Buckinghamshire County Council) v Secretary of State for Transport* and linked appeals [2014] UKSC 3, [2014] 1 WLR 324.

³¹ Cm 8247, 10 January 2012.

individual private interests. It involves an additional select committee stage at which objectors whose interests are directly and specifically affected may petition against it, although they cannot challenge the principle, including the business case for HS2, or propose any alternative routes. It was argued that this procedure would not comply with the requirements of the Environmental Impact Assessment Directive (2011/92/EU).

Article 1(4) says that the Directive does not apply to ‘projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive including that of supplying information, are achieved by the legislative process’. So far so good, but the Luxembourg Court of Justice has boldly interpreted the word ‘since’ to mean ‘provided that’.³² So it was argued that we would have to scrutinise the Parliamentary process to ensure that it achieved the objectives of the Directive. The effective public participation, required by article 6(4), would be prevented, it was argued, by the political parties’ whipping the vote at the second and third readings, the limited opportunity for examining the environmental information, and the limited remit of the select committee hearing petitions against the Bill.

But this sort of scrutiny of the Parliamentary process would directly conflict with ‘one of the pillars of constitutional settlement which established the rule of law in England in the 17th century’.³³ Under Article 9 of the Bill of Rights 1689, freedom of speech and proceedings in Parliament are not to be impeached or questioned in any court or place outside Parliament. So we were being asked to consider whether EU law could prevail over a ‘provision of the highest constitutional importance’.³⁴ Curiously, no-one had raised this point until we did so ourselves in the Supreme Court. It was, we all agreed, a matter for the constitutional law of the United Kingdom, not a

³² *Boxus v Region Wallone*, Cases C-128/09, C-131/09, C-135/09 [2012] Env LR 14; *Solvay v Region Wallone* Case C-182/10 [2012] Env LR 27; *Nomarchiarchi Aftodioikisi Aitolokarnanias* [2013] Env LR 27.

³³ As Lords Neuberger and Mance described it at [203].

³⁴ As Lord Browne-Wilkinson described article 9 in *Pepper v Hart* [1993] AC 593 at 638.

matter for the Luxembourg Court. As Paul Craig has pointed out, other European countries have also considered the supremacy of EU law to be a matter of their own constitutional arrangements.³⁵

It all depended upon what the 1972 Act provided. The question was whether the 1972 Act had, as Lord Reed put it, written the EU institutions a blank cheque,³⁶ or whether it was still subject to the general rules of statutory interpretation. Just as fundamental rights can only be abrogated by express statutory provision, is there a principle that constitutional statutes cannot be impliedly repealed by inconsistent EU law?

The separation of powers is a fundamental aspect of most if not all of the constitutions of the member states of the European Union. Lord Reed thought there was much to be said for the view of the German Federal Constitutional Court that a decision of the Luxembourg Court should not be read by a national court in a way which placed in question the national constitutional order.³⁷ That is the counterpart to the principle they had earlier developed that national laws will be interpreted consistently with EU law, so long as this does not conflict with fundamental constitutional principles.³⁸

Lord Neuberger and Lord Mance considered that ‘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’ which had been suggested by the Advocates General in the Luxembourg Court.³⁹ In their view article 1 (4) was intended to avoid the particular issue of Article 9 of the Bill

³⁵ “Constitutionalising constitutional law: HS2” [2014] *Public Law* 373.

³⁶ *Loc cit.*

³⁷ *Counter Terrorism Database Act* case, Judgment of 24 April 2013, 1 BvR 1215/07.

³⁸ In the ‘solange’ cases: *Internationale Handelsgesellschaft*, 2 BvR 52/71 [1974] 2 CMLR 540; *Re Wünsche Handelsgesellschaft*, 2 BvR 197/83 [1987] 3 CMLR 225.

³⁹ At [202].

of Rights and the European Court had accordingly decided not to endorse their approach. Thus we could hold that the hybrid bill procedure would meet the objectives of the Directive – it was obviously a substantive legislative process and appropriate information would be available to members of the legislature - and that there was nothing in the case law to suggest that the influence of political parties or the Government over voting was incompatible with article 1(4).

So the conflict did not in the end arise. But it had raised the possibility of a future conflict between EU law, applied in accordance with the 1972 Act, and other constitutional measures: in other words, not the conflict between a ‘constitutional’ statute and an ‘ordinary’ statute, which was considered by Lord Justice Laws in the ‘metric martyrs’ case, *Thoburn v Sunderland City Council*,⁴⁰ but the conflict between two ‘constitutional’ statutes:

‘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. . . . 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.’⁴¹

⁴⁰ [2002] EWHC 195 (Admin), [2003] QB 151.

⁴¹ At [207].

In other words, there could be no implied repeal of such a fundamental principle merely by virtue of the supremacy given to EU law by the 1972 Act. But it would, of course, be a matter for the courts to decide.

Looking at the list in *HS2*, I cannot resist referring to a very similar list in a recent speech by the former and much respected Attorney-General, Dominic Grieve.⁴² In his view, the ten key rights in the European Convention on Human Rights were (apart from article 8)

‘part of an entirely distinctive national narrative, embodying the Common Law; its confirmation through Magna Carta and its numerous reissues in the Middle Ages; the outcome of the conflict of authority between King and Parliament in the 17th century . . . ; the abolition of Star Chamber and the prohibition of torture; Habeas Corpus and the Bill of Rights of 1689; Lord Mansfield’s ruling on slavery in *Somerset’s case*; and the Commentaries of William Blackstone.’

He even went on to say that this ‘national narrative’ has been so powerful that it has acted as ‘an almost mythic restraint’ on successive governments trying to curb freedoms. (Some may question whether current approaches to the teaching of history mean that this will continue to be the ‘national narrative’.)

It has been noticed that, along with the renewed emphasis on UK constitutionalism in the *HS2 case*, has gone a renewed emphasis on the common law and distinctively UK constitutional principles as a source of fundamental rights and freedoms. In *Kennedy v The Charity Commission*,⁴³ for example, while holding that there was no Convention right to the disclosure of the report of a

⁴² ‘Why Human Rights should matter to Conservatives’, University College London, 3 December 2014.

⁴³ [2014] UKSC 20, [2014] 2 WLR 808.

Charity Commission inquiry into a charity set up by George Galloway MP, the Supreme Court held that the duties of the Charity Commission under the Charities Act had to be construed in the light of the common law principles of accountability and openness and that judicial review would enable the courts to decide whether the open justice principle required disclosure.

I mention this, not because I wish to be drawn into debate about the future of the Human Rights Act, but because it is another example of the interesting ways in which the relationship between the courts and Parliament is developing. It has always been the role of a constitutional court to protect fundamental rights, within the framework of the law and the constitution, and that is what an independent judiciary will continue to do to the best of its ability. The quid pro quo is that we must stay true to our judicial oath, 'to do right by all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will'. We are not making it up as we go along, but building upon the centuries of law and jurisprudence which make up our national narrative.