

Lady Hale gives keynote address to the Constitutional and Administrative Law Bar Association Conference 2014

UK Constitutionalism on the March?

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I found it really hard to decide what to talk to you about today. You are a peculiarly expert audience. Worse still, you have some sensitive cases still awaiting judgment in our court, so it would be unwise of me to talk about them. I could not, for example, talk about proportionality in the clash between freedom of speech and national security, because we have not yet given judgment in the case brought by Lord Carlile and others, challenging the exclusion from the UK of an Iranian dissident leader whom an impressive list of distinguished Parliamentarians want to speak to them in Westminster Hall. Nor would it be wise for me to take up Nathalie Lieven's suggestion of whether a cultural background as a woman encourages a more rounded perspective of public law issues, much as I would like to do so, because judgment is still awaited in the benefit cap case. But I warn you that this is very much a topic for future debate – you may have seen Harriet Samuels' article in *Public Law* suggesting that the feminist legal method – whether used wittingly or unwittingly – has led to a distinctive approach to deference.¹

So I turned to my invaluable judicial assistant, Penelope Gorman, who has not only suggested an interesting theme which is emerging from recent decisions, mainly but not exclusively in the Supreme Court, but has also provided me with a great deal of help in preparing these remarks. Richard Clayton has characterised this theme as “The Empire Strikes back”² but I would prefer to broaden it into the “UK Constitutionalism on the March”. In other words, after more than a decade of concentrating on European

¹ ‘Judicial deference and feminist method’ [2014] *Public Law* 512.

² ‘The Empire strikes back: Common law rights and the Human Rights Act’, paper given at the Oxford University Public Law Discussion Group.

instruments as the source of rights, remedies and obligations, there is emerging a renewed emphasis on the common law and distinctively UK constitutional principles as a source of legal inspiration. Sometimes this expands the range of what is available, sometimes it may constrict it. But it seems to me to take us in some interesting directions, beyond the well-worn theme of “what’s wrong with the *Ullab* principle?”

Common law rights

One aspect of this resurgence has been the emphasis by the courts on the power and continuing primacy of common law rights. There has been a tendency to assume that after the enactment of the Human Rights Act 1998 the European Convention on Human Rights should be the first port of call. But, it is said, this is to misunderstand the relationship between the Convention and the common law in our domestic law, and to overlook the continued and developing protection offered by the latter. As Lord Cooke remarked in *Daly*³ ‘the truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, institutions, bills of rights and the like respond by recognising rather than creating them’. The common law may not offer a prescriptive list of rights but this does not mean that it is not a rich source of fundamental rights and values, nor that its development has been somehow arrested once the Convention was incorporated into domestic law. As Lord Toulson put it, in *Kennedy v The Charity Commission*,⁴ ‘it was not the purpose of the Human Rights Act 1998 that the common law should become an ossuary’.

It is true that no two lists of common law rights would be the same. Blackstone⁵ identified three primary rights: the right of personal security, personal liberty and private property, with auxiliary rights including importantly access to justice. Dicey argued that rights stemmed from remedies,⁶ which certainly puts access to the courts at the forefront

³ R (*Daly*) v Secretary of State for the Home Department [2001] UKHL 16, [2001] 2 AC 532 at [30].

⁴ [2014] UKSC 20, [2014] 2 WLR 808, at [133].

⁵ ‘Of the Absolute Rights of Individuals’, Blackstone’s *Commentaries on the Laws of England* (1765-1769).

⁶ *An Introduction to the Study of the Law and the Constitution*, 1965, Macmillan.

of rights protection. Many of the notable successful rights challenges in recent years have been based on the common law, including the rejection of the admission of evidence obtained by torture in *A (No 2)*⁷ (in which Lord Bingham observed that the English common law had regarded torture and its fruits with abhorrence for over 500 years) and the requirements of open justice highlighted in the *Guardian News and Media* case⁸. The recognition of the importance of these rights is accompanied by a principle of statutory construction – the principle of legality - which requires Parliament expressly to legislate to limit fundamental rights – and thus openly to confront the political controversy entailed.⁹ The very first case we heard in the Supreme Court was *HM Treasury v Ahmed*,¹⁰ where we held that the very general words of the United Nations Act 1946 did not authorise an order in council imposing a regime of financial control on suspected terrorists which was so intrusive as to render them effective prisoners of the state, such that it represented serious interferences with their right of property, their right of unimpeded access to the courts and their liberty and autonomy.

What therefore is the relationship between the protection offered by the Human Rights Act 1998 and the protection offered by these common law principles? This issue came to the fore in three cases in the Supreme Court in the past year, in which the claimants based their claims on specific rights under the ECHR. But these were the rights to a fair trial, to open justice and to freedom of speech, core rights in the common law which are also reflected in the Convention. The Court has taken the opportunity in these cases to underline the view that the natural starting point in any dispute should be domestic law – albeit not always unanimously. The Convention may then be used as a check to see if any further development of the common law may be required

The first of these cases was *Osborn v Parole Board*.¹¹ The question was whether the Parole Board had acted unlawfully when it made decisions to continue to detain or to recall to prison three prisoners without affording them an oral hearing. We found that this had

⁷ *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221.

⁸ *R (Guardian News and Media Ltd) v City of Westminster Magistrates Court* (2012) EWCA Civ 420, [2013] QB 618.

⁹ *R v Secretary of State for the Home Department (ex parte Simms)* [2000] 2 AC 115, 131.

¹⁰ [2010] UKSC 2, [2010] 2 AC 534.

¹¹ [2013] UKSC 61, [2013] 3 WLR 1020.

indeed been an unlawful breach of common law standards of procedural fairness. The claim however had primarily alleged a breach of article 5(4) of the Convention. In the sole judgment, Lord Reed stated strongly that this approach did not properly reflect the relationship between our domestic law and the rights under the Convention. The Human Rights Act “does not supersede the protection of human rights under the common law or state, or create, a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Human Rights Act when appropriate”.¹²

In his summary of his conclusions at the outset of the judgment, Lord Reed stated that his finding of a duty on the Board to hold an oral hearing in these cases also fulfils the Board’s duty under s 6 of the Human Rights Act 1998 to act compatibly with the prisoners’ rights under article 5(4) of the Convention. In other words analysis of the Convention right comes later and is used to check whether compliance with article 5(4) may require anything additional to the common law obligation to hold an oral hearing. But it is clear that the common law may go further than the Convention and should be developed if required. Lord Reed gave his view in his recent Lord Irvine Human Rights lecture at Durham University thus:¹³

“Where the existing common law or statute falls short of what is required to meet Convention requirements, the courts should respond by developing the common law or interpreting the relevant statute in the light not only of Strasbourg judgments but also the law of other common law jurisdictions, such as Canada and Australia, so that our own law meets the necessary standards.”

A similar approach was adopted by Lord Mance in *Kennedy v The Charity Commission*.¹⁴ The Charity Commission had refused to disclose to Mr Kennedy, a journalist,

¹² At [57].

¹³ ‘Is the Supreme Court supreme?’ Lord Irvine Human Rights Lecture, 28 February 2014.

¹⁴ [2014] UKSC 20, [2014] 2 WLR 808.

information relating to an inquiry it carried out as part of its statutory functions, on the ground that the information fell within the absolute exemption in section 32 (2) of the Freedom of Information Act 2000 (FOIA). Mr Kennedy had sought disclosure via a Freedom of Information request and argued that that section 32(2) should be interpreted in a way which did not give rise to a breach of his right to receive information protected by article 10 of the Convention.

The majority rejected this claim. It had been made and was argued on the basis that section 32 could and should be read down to have a meaning which was contrary to that which Parliament had clearly intended¹⁵. There was furthermore no basis for a declaration of incompatibility in relation to article 10, which did not (yet at least) protect the right to receive information from the state. The minority strongly disagreed. The article 10 jurisprudence was clearly developing towards the recognition of such a right – it could reasonably be foreseen that if the case went to Strasbourg the right would be recognised. Section 32 could be read down to give effect to this.

However, the majority of the Supreme Court pointed out that the effect of section 32 was only to take the information out of the scope of the compulsory disclosure regime under the Freedom of Information Act. It did not determine the underlying question of whether the information could and should be disclosed. That was governed by other rules of statute and the common law. In this case the duties placed on the Charity Commission under the Charities Act were underpinned by a common law presumption in favour of openness in judicial proceedings and were to be interpreted in the light of this presumption. Construed without reference to article 10, the Charities Act should be read as putting Mr Kennedy in no less favourable a position regarding the obtaining of disclosure of information than he would be on his case that article 10 by itself imposed a general duty of disclosure of information.¹⁶

¹⁵ At [42].

¹⁶ At [101].

The majority also considered that judicial review would offer an adequate remedy in the event of a decision by the Charity Commission to withhold information in breach of the common law principles of accountability and openness. In situations where such constitutional principles were in issue the court would apply a very high standard of review which would resemble the protection afforded by a proportionality review under article 10. Lord Mance agreed with the current edition of de Smith's *Judicial Review* that

“it is inappropriate to treat all cases of judicial review (or, I add, all cases of proportionality review) together under a general but vague principle of reasonableness, and preferable to look for the underlying tenet or principle which indicates the basis on which the court should approach any administrative law challenge in a particular situation”.¹⁷

The same considerations of weight and balance would be applied to the same factors, albeit not as part of the same formulaic exercise required when assessing proportionality.

Lord Toulson, whose decision in *Guardian News and Media* was the inspiration for this approach, stated specifically that

“If there is a challenge to the High Court against the refusal of disclosure by a lower court or tribunal, the High Court would decide for itself whether the open justice principle required disclosure”.¹⁸

That is a very strong statement, but it is consistent with the approach of Lord Reed in *Osborn*, that the task of the court was to decide what fairness required, rather than to review the reasonableness of the Parole Board's decision.

¹⁷ At [55].

¹⁸ At [132].

Interestingly, however, Lord Carnwath – whom some will regard as Lord Brown’s natural successor as the expert public lawyer on the Court – did not agree. He saw a clear difference between a human rights judicial review claim, where full merits review would be available, and a conventional judicial review claim, where it would not.¹⁹ My guess is that it is this aspect of the case which will prove the most fruitful but also the most controversial, however sympathetic we may be to the majority view on the common law right to transparency.

The majority regarded it as most unfortunate that Mr Kennedy’s request for disclosure was based solely on FOIA – Lord Toulson regarded it as another example of the ‘baleful and unnecessary tendency to overlook the common law’²⁰. Lord Mance took the opportunity to reassert the proper relationship between the common law and Convention rights:

“Since the passing of the Human Rights Act 1998 there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights. But the Convention rights represent a threshold protection; and, especially in view of the contribution which common lawyers made to the Convention’s inception, they may be expected, at least generally, even if not always, to reflect and find their homologue in the common or domestic statute law. ... In some areas the common law may go further than the Convention, and some contexts it may also be inspired by the Convention rights and jurisprudence (the protection of privacy being a notable example). And in time, of course, a synthesis may emerge. But the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights without surveying the wider common law scene. ... Greater focus in domestic litigation on the domestic legal position might also have the incidental benefit that less time was taken in domestic courts seeking to interpret and reconcile different judgments (often only given by individual

¹⁹ At [244 – 255].

²⁰ At [133].

sections of the European Court of Human Rights) in a way which that court itself, not being bound by any doctrine of precedent, would not itself undertake.”²¹

As to this last point, it is clear to me that the European court greatly appreciates our detailed analysis of their jurisprudence, carried out in the common law tradition, which the courts in other countries do not undertake!

The last of my trilogy of cases under this head is *A v BBC*²² in which the sole judgment was given by Lord Reed. Here the question was whether it was lawful for a court to direct that the claimant, a convicted child sex offender, should be referred to merely by his initials in judicial review proceedings to challenge his deportation, in order to avoid the risk of ill treatment on his return, contrary to his rights under article 2 and 3 of the Convention. His anonymity was challenged by the BBC on the basis that it interfered with the media’s rights under article 10. On the facts we held that the lifting of anonymity would have destroyed the very basis for effecting his lawful deportation and thus was a necessary exception to the open justice principle. Lord Reed emphasised, as he had in *Osborn*, that the starting point should be the common law and not the Convention. The open justice principle, and the qualifications permitted, would normally meet the requirements of the Convention ‘given the extent to which the Convention and our domestic law in this area walk in step and bearing in mind the capacity of the common law to develop’.²³

If this is seen as a renaissance of UK constitutional rights, it is important not to overstate its reach. As Richard Clayton has observed,²⁴ the impetus for many of the rights being protected in these decisions is access to the courts, which has a strong history of protection under the common law. Identification of less well-established common law

²¹ At [46].

²² [2014] UKSC 25, [2014] 2 WLR 1243.

²³ At [57].

²⁴ *Loc cit.*

rights is more difficult – any list is ‘inherently contestable’. He also warns of the precarious status of common law rights: they may be protected by the principle of legality but this does not preclude the possibility that the presumption can be rebutted by a clear Parliamentary intention in a subsequent statute (as, of course, it instantly was in *Abmed* and also in *Al-Rawi*²⁵).

There are other disadvantages. Outside the structure of the Human Rights Act the courts lose the particular and in my view very valuable form of dialogue with Parliament which is afforded by declarations of incompatibility – something which has gained particular prominence in the light of our recent decision in the assisted suicide cases.²⁶ So there are undoubtedly limits, both to the scope of and to the protection afforded to common law rights, compared with their Convention equivalents.

The UK constitutional order and EU law

It is not just in the realm of fundamental rights that the Supreme Court has recently had to consider deep rooted constitutional principles. At the end of last year we had the *HS2* cases, challenging, on the basis of European Union environmental law, the decision of the government to proceed with plans for a high speed rail link between London, the midlands and eventually the north of England. This brought into play the constitutional relationship between Parliament and the courts, and the extent to which this relationship might have been implicitly qualified or abrogated by the European Communities Act 1972. Remarkably, this point was not (or not fully) appreciated until the hearing in the Supreme Court itself.

²⁵ *Al-Rawi and others v The Security Service and others* [2011] UKSC 34, [2011] 1 AC 531, where the court decided that the common law did not and should not permit a closed material procedure in civil claims. The Government moved quickly to introduce a statutory procedure in the Justice and Security Act 2013.

²⁶ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

The *HS2* cases²⁷ sought judicial review of a government White Paper, *High Speed Rail: Investing in Britain's future – Decision and Next Steps*.²⁸ This set out the process by which the government intended to obtain development consent for HS2 through two hybrid bills in Parliament. A hybrid bill shares certain characteristics of a public bill and those of a private bill, and involves an additional select committee stage at which objectors whose interests are directly and specifically affected by the bill may petition against it, although they cannot challenge the principle of the bill, including the business case for HS2, or propose any alternative routes for Phase 1.

The claimants argued that in order to comply with EU environmental law, the Command Paper should have been preceded by a Strategic Environmental Assessment under Directive 2001/42/EC and that the hybrid bill procedure would not comply with the procedural requirements of the Environmental Impact Assessment (EIA) Directive 2011/92/EU. It was troubling to me (as it had been to Lord Justice Sullivan) that this process – a non-binding proposal in a Command Paper followed by development consent contained in legislation – appeared to avoid the need for a strategic environmental assessment which would have been required had the Government followed the procedures provided in the Planning Act 2008 or the Transport and Works Act 1992. But the conclusion was that they could do this.

However, it was the second limb of the case which gave rise to the constitutional issues. Article 1(4) of the EIA Directive disapplies the Directive in the case of ‘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’. On the face of it, the proposed hybrid bill would appear to fall squarely within this provision as a specific act of national legislation. However, the European Court of Justice had interpreted the word “since” in article 1(4) as meaning “provided that” (an evolutive interpretation about which Lords Neuberger and Mance expressed their

²⁷ *R (Buckinghamshire County Council) v Secretary of State for Transport* and linked appeals [2014] UKSC 3, [2014] 1 WLR 324.

²⁸ Cm 8247, 10 January 2012.

concern). Hence, it was suggested that the legislative process would require scrutiny by the courts to ensure that the objectives of the EIA Directive had in fact been met.

The complaint was that the whipping of the vote by the political parties at the second and third readings, the limited opportunity provided by a debate in Parliament for the examination of environmental information, and the limited remit of the select committee following the second reading all conspired to prevent the effective public participation required by article 6(4) of the EIA Directive.

The difficulty was that the scrutiny of the Parliamentary process required to assess the justice of these complaints would directly conflict with an entrenched UK constitutional principle. Described by Lord Neuberger and Lord Mance in their joint judgment as “one of the pillars of constitutional settlement which established the rule of law in England in the 17th century”, article 9 of the Bill of Rights 1689 precludes the impeaching or questioning in any court of debates or proceedings in Parliament.²⁹ So we were being asked in *HS2* to consider the extent of the supremacy of EU law over a “provision of the highest constitutional importance”.³⁰

The effect given to EU law by Parliament in the European Communities 1972 Act was in accordance with the dualist approach to international law adopted by the common law. The EU Treaty did not become part of our domestic law until legislation was enacted. The application of the doctrine of EU law supremacy over national law depends on the 1972 Act. Thus the conflict fell to be resolved by our national courts as an issue arising under the constitutional law of the UK. As Paul Craig has pointed out, other European countries have also considered the supremacy of EU law as a matter of their own constitutional arrangements.³¹

²⁹ At [203].

³⁰ As Lord Browne-Wilkinson described article 9 in *Pepper v Hart* [1993] AC 593 at 638.

³¹ “Constitutionalising constitutional law: HS2” [2014] *Public Law* 373.

The 1972 Act could be repealed by Parliament like other legislation. But unless and until such time, it does appear to provide that EU law will trump existing and future legislation passed by Parliament insofar as it is not in accordance with that law. The full impact of this became apparent when the House of Lords ruled in the *Factortame*³² litigation that provisions of the Merchant Shipping Act 1988, which restricted 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”.

The question for the Supreme Court in *HS2* was whether the 1972 Act had, in the words of Lord Reed, written the EU institutions a blank cheque,³³ or whether it was still subject to general rules of statutory interpretation such as the need for express authority for violations of fundamental rights or of fundamental constitutional principles, and so subject to implied limitation. 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. We considered it unlikely that the Court of Justice when interpreting the EIA Directive had intended to require national courts to exercise a supervisory jurisdiction over the internal proceedings of national legislatures of the nature for which the appellants contended. Lord Reed thought there was much to be said for the view of the German Federal Constitutional Court on the Counter-Terrorism Database Act³⁴ that as part of a cooperative relationship, a decision of the Court of Justice should not be read by a national court in a way that placed into question the identity of the national constitutional order. The principle in the Counter-Terrorism Database case is the converse of the principle developed in the earlier *Solange* cases that

³² *R v Secretary of State for Transport ex p Factortame (No 2)* [1991] AC 601.

³³ *Loc cit.*

³⁴ Judgment of 24 April 2013, 1BvR 1215/07.

national laws will be interpreted consistently with EU law, so long as this does not conflict with fundamental constitutional principles.

All the same, our interpretation of the European Court’s judgments on the meaning of article 1(4) of the EIA Directive needed to differ markedly from the opinions of Advocates General Sharpston and Kokott, on which they were based, if the impact on the separation of powers was to be avoided. 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 suggested by the words used by’ the Advocates General.³⁵ In their view article 1(4) was intended to avoid the particular issue of Article 9 of the Bill of Rights, and the European Court had accordingly decided not to endorse the approach of the Advocates General. 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 problematic 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 considered by Lord Justice Laws in *Thoburn v Sunderland City Council*³⁶ but one between two “constitutional” statutes. On this question, further argument would obviously be required in the light of these observations in the judgment:

“The United Kingdom has no written constitution but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right

³⁵ At [202].

³⁶ [2002] EWHC 195 (Admin), [2003] QB 151.

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 the United Kingdom law and courts to decide) 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.”³⁷

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.

Lord Mance and I had expressed somewhat similar concerns in our minority judgments in the *Assange*³⁸ appeal. There we were construing an Act of the UK Parliament authorising the coercive power of the state to deprive an individual of his liberty. The challenge to the natural meaning of the words ‘judicial authority’ in the Extradition Act 2003 derived from an EU Framework Decision which fell outside the scope of the ‘treaties’ referred to in the 1972 Act. In these circumstances, although the longstanding presumption that Parliament intends to give effect to the UK’s obligations in international law (in this case, to implement the Framework Decision) was in play, we thought that it was not determinative where the liberty of the person was at stake. I would have applied the clear intention of the UK legislature to restrict the meaning of ‘judicial authority’ to a court rather than the unclear meaning of the same term in the EU instrument.

³⁷ At [207].

³⁸ *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 2 AC 371.

Conclusion

What these cases show – both those focused on constitutional rights and those on the relationship between EU law and our constitutional order – is a growing awareness of the extent to which the UK’s constitutional principles should be at the forefront of the court’s analysis. The judgments in HS2 raise the issue that it does not follow from *Factortame* that the 1972 Act necessarily requires our courts to give primacy to EU law over all domestic law, regardless of its constitutional importance. And litigants (or more importantly litigators) have been reminded that they should look first to the common law to protect their fundamental rights: radical suggestions have been made about the power of judicial review to protect them. Whether this trend is developing as a response to the rising tide of anti-European sentiment among parliamentarians, the press and the public, whether it is putting down a marker for what might happen if the 1998 Act were repealed, whether it is a reflection of distinctive judicial philosophies of the judges who are at the forefront of this development, or whether it is simple irritation that our proud traditions of UK constitutionalism seemed to have been forgotten, I leave it to you and to the academics to decide.