

Has the identity of the English Common Law been eroded by EU Laws and the European Convention On Human Rights?¹

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Introductory

1. At least to modern mainstream thinking, the two fundamental pillars of a civilised society are, first, democratically elected and accountable government and, secondly, the rule of law. At the risk of appearing to be somewhat jingoistic, it is a remarkable fact that, at least if one focusses on the last millennium, both democratic government and the rule of law can be traced back to 13th century England.
2. As we were all reminded last year, 2015 was the 800th anniversary of the sealing of Magna Carta, which of course contained the two famous royal assurances, which echo down the corridors of history and are still part of the law of the United Kingdom today. They bear repetition. “To no one will we sell, to no one deny or delay right or justice”² and “No ... man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing except by the lawful judgement of his equals or by the law of the land”³. Now, historians disagree as to the precise contemporary meaning and importance of these two declarations, some think they were very significant at the time; others are less convinced. But, whatever their significance eight hundred years ago, for the past four hundred years, there is no doubt that, initially to a large extent thanks to a retired English Chief Justice, Sir Edward Coke, they have been universally seen as what Lord Denning the great 20th century English judge described as “the foundation of the freedom of the individual against the arbitrary authority of the despot”⁴.
3. So England has a strong claim to having provided the foundation for the rule of law in the world. And half a century to the year after the first appearance of Magna Carta, in

¹ I am very grateful to Admas Habtleslasie for his assistance in preparing this talk

² Magna Carta, 1215 version (translated from the Latin), article 40

³ *ibid*, article 39

⁴ Denning LJ (as he then was) in a speech celebrating Magna Carta’s 750th anniversary

1265, England was the first substantial country to have a Parliament which has continued till today. It is ironic that it was a thoroughly bad King, King John, whose dishonesty and cruelty led to a rebellion which resulted in Magna Carta, while it was his son, King Henry III, a thoroughly weak King, whose ineptitude and vacillations led to the rebellion which resulted in the first Parliament. By the end of the 13th century it was clear that the King had to defer to Parliament on certain matters⁵, and over the ensuing seven centuries, the English (now the UK) Parliament became increasingly powerful and increasingly accountable to the whole population – ie increasingly democratic.

4. When one surveys the world in the early 21st century, it is clear that there are as many different models of democratically accountable governments as there are democratic governments. However, they all have the vital feature of citizens being able to remove a government through relatively frequent and completely fair elections conducted with universal suffrage.

5. So, too, the rule of law comes in different shapes and sizes. Most countries have a coherent written constitution, but some – notably the UK, Israel and New Zealand – do not. As the British Empire unravelled in the thirty years after the end of the Second World War, the UK bequeathed to many of its former colonies a fully thought out constitution, partly based on the constitutions of other former colonies such as Canada, Australia and New Zealand. Some may find that ironic given that the UK is a country which not merely has no written (or coherent) constitution, but which takes pride in this very fact. However, I would suggest that an even more important legal bequest given by the UK to its former colonies is the common law, that wonderful combination of pragmatism and principle, of experience and logic, which founds the basis of the UK's legal system and the legal system of so many other great countries.

The character of the common law

6. As Oliver Wendell Holmes, the great US judge, said of the common law,

⁵ RW Kaeuper, *War Justice and Public Order: England and France in the Later Middle Ages*. (1988, Oxford University press)

“The life of the law has not been logic; it has been experience... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics”⁶.

7. In that, the common law system can be contrasted with the civilian law system, which applies in most countries, particularly throughout mainland Europe. Francis Bacon, a Lord Chancellor more than 400 years ago, and a contemporary and something of a rival of Edward Coke, was a remarkable figure. Some think that he was the true author of Shakespeare's plays, he was a serious and influential scientific thinker, he wrote wonderful essays on science and philosophy and, less impressively, he was dismissed as Lord Chancellor for accepting bribes. In one of his essays, he drew a distinction between the ant and the spider in these terms:

“Those who have handled sciences have been either men of experiment or men of dogmas. The men of experiment are like the ant, they only collect and use; the reasoners resemble spiders, who make cobwebs out of their own substance.”⁷

Applying the metaphor to the law, the ant is the common lawyer, collecting and using individual cases, seeing what works and what does not work and developing the law on an incremental, case by case, basis. The spider is the civil lawyer, propagating relatively detailed and intricate, principle-based codes, which can be logically, but relatively rigidly, applied to all disputes and circumstances.

8. The fact that the common law is flexibly developed by judges through real cases, rather than by reference to some academically constructed set of rules, is a particular strength in the 21st century. As I said in a recent case, “it is one of the great virtues of the common law that it can adapt itself to practical and commercial realities, which is particularly important in a world which is fast changing in terms of electronic processes, travel and societal values”⁸. Apart from the common law's inherent flexibility, there is another reason for its practicality when compared with the civilian systems. Unlike most of their

⁶ OW Holmes, *The Common Law* (1881), p. 1

⁷ Francis Bacon, *Novum Organum Scientiarum*, 1620

⁸ *Starbucks (HK) Ltd v British Sky Broadcasting Group PLC* [2015] UKSC 31, [2015] 1 WLR 2628, para 49

civilian system colleagues, hardly any common law judges are career judges: they have not spent their whole professional life since University in a judicial cocoon. Most of them will have been successful, professional lawyers with direct, deep and memorable experience of the problems, whether commercial, family, criminal or other, which individuals in the real world have to face. The late entry judiciary which the common law systems enjoy valuably reinforces the practicality attributable to the inherent flexibility of the common law.

9. In the commercial field, the dominance of the common law system can be traced back to the development of English commercial law in the second half of the 18th century by one of our greatest Lord Chief Justices, Lord Mansfield. A little more than 200 years later, business law was singled out as a specialised category of judicial work with the creation of the Commercial Court in England and Wales in 1895. And, more recently, in 2011, in the new Rolls Building, there is now in London the biggest group of specialist business judges – commercial judges, chancery judges, and technology and construction judges – in the world providing services across the board in the area of commercial dispute resolution. Not standing still, last year a specialist group of judges was formed to hear cases involving technical financial cases – the financial list – was formed.
10. The strength of the common law, attributable to its flexibility and practicality, is apparent from its popularity in choice of law clauses in international trade and financial agreements across the globe. A disproportionate number of international contracts choose common law, most frequently English law, as the law governing the parties' relationship, both procedurally and substantively. And they frequently select a common law jurisdiction, as their arbitration forum. And, of course, it is not just in London where the common law is demonstrating such strength, confidence, and contemporary relevance to the business world. Here too in Singapore, you are providing a very high quality commercial dispute resolution with excellent common law judges producing excellent common law judgments. It is no coincidence that three of the world's four largest arbitration centres – Hong Kong, London and Singapore (alphabetical order) – are in common law jurisdictions.
11. Recently, a network of common law commercial courts has been set up, inspired by your Chief Justice, Sundaresh Menon, and the Chief Justice of England and Wales, John Thomas. This serves to underline the international outlook of the common law systems,

and it also serves to underline the importance of common law judges in different jurisdictions working together. Because the common law develops by reference to judicial decisions, judicial experience and practicality, we common law judges should learn not merely from other judges in the same jurisdiction, but from other judges in other common law jurisdictions – particularly in an increasingly global world – and also particularly in a world where common law jurisdictions are in a minority.

12. UK judges have been anxious to emphasise the importance of this co-ordination. Thus, last year in a case⁹ which involved application of modern electronic communications to the law of passing off, I said that “it is both important and helpful to consider how the law has developed in other common law jurisdictions – important because it is desirable that the common law jurisdictions have a consistent approach, and helpful because every national common law judiciary can benefit from the experiences and thoughts of other common law judges”. In that case, which involved the law of passing off, the UK Supreme Court derived particular assistance from a decision given here in the Singapore Court of Appeal¹⁰. And UK Supreme Court Justices have said much the same in cases involving proprietary interests¹¹ and, only last month, illegality¹² about Australian jurisprudence. And we have recently drawn from Canadian¹³ common law jurisprudence on equitable compensation.

Contemporary European influences on English common law: introductory

13. Now a point which has been raised more than once is whether England and Wales can now properly claim to be common law jurisdictions in the light of the influence of European civilian law systems following two events. First, the United Kingdom’s accession to the European Union in 1973, and its acceptance of the dominance of EU law in the European Communities Act 1972; secondly and, more recently, the bringing into UK law of the European Convention on Human Rights through the Human Rights Act 1998. As you will almost certainly know, these two lines of argument each represent

⁹ *Starbucks (HK) Ltd* op cit, para 50

¹⁰ *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide Inc* [2013] SGCA 65, [2014] 1 SLR 911 – see *Starbucks (UK) Ltd* op cit, para 45

¹¹ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250, para 45

¹² *Patel v Mirza* [2016] UKSC 42, para 183

¹³ *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503

something of a moving target. In a referendum on 23 June this year, the UK voted by 52% to 48% to leave the EU after more than 40 years of membership. Quite where this will lead remains to be seen, but it may well mean that the influence of EU law will be a 50-year blip on the near thousand years of the life of the common law. So, too, the government has suggested that it may bring forward proposals to repeal and replace the 1998 Act. Again, what this will mean is unclear, but it could result in the European Convention influence being no more than a twenty year bliplet on the life of the common law.

14. As a serving judge, it is not for me to comment either on whether these developments are good or bad, or on what the best outcomes would be for the UK and the world. And, as a person with no special powers of foresight, I am not in a position to predict where and when the UK will end up in its relationship with the EU or with the Convention. So I propose to discuss the issue on the basis of the current position as it is in law: the future will look after itself, whether it consists of known knowns, known unknowns, unknown unknowns – or, who knows, even unknown knowns¹⁴.
15. So, let me begin by setting the scene in relation to the EU and the Convention. The EU, originally known as the Common Market, was formed by the Treaty of Rome, which was signed in 1957 by six states, and it was principally aimed at creating a single market in much of Europe. Over the subsequent 60 years a number of new states have joined, and, particularly over the past 20 years or so, there has been an increasing degree of political union, with successive treaties, the most recent of which is the 2007 Lisbon Treaty. The EU now has 28 member states. The UK joined in 1973, and the domestic legislation which brings EU law into UK law is the European Communities Act 1972 (“the 1972 Act”).
16. The effect of EU membership (and the 1972 Act) is that the UK has to observe the requirements of the EU treaties, and of any Regulations and Directives issued by the EU. The UK government and the UK courts have also to apply and follow the decisions of the Court of Justice of the EU in Luxembourg. The effect of the 1972 Act is thus that

¹⁴ With an acknowledgment to Donald Rumsfeld, whose perceptiveness, at least in relation to this statement in a US Defence Department Briefing on 12 February 2002, was quite wrongly greeted derisively by the contemporaneous press

Parliament requires all UK courts to give primacy to EU law. The main areas in which EU law applies include social and market regulation, free movement of workers, competition and single market, the environment, VAT, data protection, and extradition.

17. The Council of Europe is a much looser organisation than the EU. It has 47 members, including all the EU member states, and also, for instance, Turkey, Switzerland and Russia. The Council's most important and best-known achievement is the Convention. Signatory states, which included the UK from the start, are bound in international law to observe the terms of the Convention and to abide by the decisions of the European Court of Human Rights in Strasbourg.

18. Until the Human Rights Act 1998 ("the 1998 Act") came into force, the Convention was not part of our domestic law, so decisions of the UK courts were made without taking the Convention or the Strasbourg jurisprudence into account, save in terms of providing general guidance as to what was going on internationally. That all changed on 2 October 2000, when the 1998 Act effectively made Convention rights part of UK law, so that a UK judge could give effect to such rights. When it comes to statutes, judges must try their level best to interpret them (or "read them down") so as to render them Convention compliant, but, if that is impossible, then we cannot overrule them: we have to declare them incompatible with the Convention, leaving it to parliament to deal with the point¹⁵. The 1998 Act also enjoins all UK courts to "have regard to" decisions of the Strasbourg court.

19. The Luxembourg court and the Strasbourg court each have a representative judge from each of the member countries. That means that there is a mass of different traditions represented in those courts. The UK, together with Ireland, Cyprus and Malta represent the common law system, but the other countries represent the civilian law system.

20. Thus UK law currently includes EU law and Convention law, and UK courts are bound by decisions of the Luxembourg court on EU law issues and must have regard to

¹⁵ Sections 3-5 of the Human Rights Act 1998

Strasbourg court decisions on human rights issues. It is therefore unsurprising that English judges, professional lawyers and legal academics, have been affected in their approach to cases by European legal thinking and by civilian law concepts. That is not just true when it comes to issues of EU law or human rights; it is also true more generally. And that is inevitable when you think about it. The law should not develop in silos, in water-tight departments: ideas and concepts which are useful in one area should at least be considered for use in other areas, and that is what has happened in relation to European concepts and thinking in English law as a result of judges and other lawyers reading and applying decisions of the Luxembourg and Strasbourg courts.

European influences on the common law

21. Harold Potter (the real life legal historian, not the fictional boy wizard) once described English law as being,

“ like a river. The channel widens and deepens as it flows throughout the course of years and tributaries join it from time to time. It was first fed by the springs of the common law, but the fountain of equity and the wells of the law merchant and ecclesiastical law have increased the waters of the growing current. And upon the tide is borne the ship which is the soul of England”¹⁶.

22. The most famous 20th century Master of the Rolls, Lord Denning, adopted similar imagery soon after the UK's accession to the EU by signing the Treaty of Rome, when he described the effect which Community law was beginning to have in England. He said this:

“[W]hen we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.”¹⁷

23. Four years later, Lord Denning warmed to his theme, observing that:

¹⁶ Potter's *Outlines of English History* (5th ed) (Kiralffy ed.) (London) (1957) at 1 cited in van Caenegem, *The Birth of the English Common Law*, (2nd ed) (CUP) (1988) at 99.

¹⁷ *H. P. Bulmer Ltd. and Another v J. Bollinger S.A. and Others* [1974] Ch. 401 at p 419.

“[T]he flowing tide of Community law is coming in fast. It has not stopped at high-water mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much so that we have to learn to become amphibious if we wish to keep our heads above water.”¹⁸

Lord Denning’s metaphors articulate the notion that the common law of England is no longer quite what it was; that it has been contaminated by continental learning and ideas. That it has lost its purity.

24. Despite the fact that Lord Denning was one of the three or four most influential common law judges of the 20th century, it seems to me that that notion, like his memorable image of the common law being submerged by an inexorable tide of European law, rests, I suggest, on a misunderstanding. As Potter’s original description makes clear, the common law is the product of many different sources, and all the better for that. It has always developed as a synthesis, or, if you prefer, as a discriminating magpie, picking up and often improving the best from other legal systems. The development of the common law, in the light of its recent reception of EU and European Convention law is therefore entirely in keeping with its historical traditions.

25. The very term, “the common law” is continental in origin. It is, as Maitland put it, “a phrase . . . borrowed from the canonists – who (used) ‘jus commune’ to denote the general law of the Catholic Church”¹⁹. England did not merely borrow the name; it also borrowed the system which the name described. It was brought to England by William the Conqueror, the descendent of Scandinavians and a liegeman of the King of France. Indeed, according to Professor van Caenegem, the common law operated with “equal vigour in the Duchy of Normandy.”²⁰ It was as he put it, a “species of continental feudal law developed into an English system by kings and justices of continental extraction.”²¹ It was 20 years after the Norman conquest that William the Conqueror’s half-brother Odo, Bishop of Bayeux (of tapestry fame) summoned and presided over the first recorded 12 man jury, or freemote²². At the earliest, the common law could only be said to have

¹⁸ *Shields v E Coomes (Holdings) Ltd* [1978] 1 WLR 1408 at p 1416.

¹⁹ Maitland, *Equity: a course of lectures*, (Cambridge) (1909, 2011 reprint) at p 2.

²⁰ van Caenegem (1989) *op cit* at p 57.

²¹ van Caenegem (1989) *op cit* at 110.

²² *Textus Roffensis*, Turner, *History of Manners*, cited in Stanley *op cit*, p 114

become truly English after the loss of Normandy by William's great great grandson, King John – he of Magna Carta fame.

26. The common law was, of course, invigorated and complemented by equity. But equity did not start in England: it was a product of Roman and ecclesiastical – hence civilian – law and learning. Discovery (or as we now call it in England, disclosure) may seem essential to our common law approach to litigation, but it was borrowed from ecclesiastical procedure.²³ The same is true of the writ of subpoena. And admiralty law, whose contribution to the common law cannot be underestimated, has long been seen as a very English construct: indeed, it is difficult to see how England could have developed as a great trading and seafaring nation without it. Yet, admiralty law is a true European *ius commune*²⁴ and a product of civilian law.
27. Equally, the development of English commercial law, of which the UK is, as I have implied already, so justly proud, owed much to the civilian law of the *lex mercatoria*, a European instrument which has been around from the Middle Ages onwards.²⁵ We should not be surprised then that, as it evolved under the expert tutelage of Chief Justice Coke and then Lord Mansfield, the common law absorbed the *lex mercatoria*, from which, as Professor Goode has pointed out, Mansfield fashioned English commercial law.²⁶
28. Given his central role in the birth of English commercial law, insurance law, and restitution, it is particularly significant that Lord Mansfield drew his influence from far and wide – from the 6th century Byzantine Justinian²⁷, to more contemporary civilian learning. In Professor Goode's words, Mansfield combined “a mastery of the common law with a profound knowledge of foreign legal systems and a deep insight into the methods and usages of the mercantile world”²⁸. All this serves to underline how the evolution of the common law has been a product of imaginative synthesis.
29. Examples of civilian and continental influence could be multiplied, but the central point is this: the common law is a product of many sources, and it is not the pure, home-grown

²³ Coing, *English Equity and the Denunciatio Evangelica of the Canon Law*, (1955) 71 LQR 223

²⁴ Van Caenegem, *European law in the past and the future*, (Cambridge) (2002) at pp 20-21.

²⁵ Goode, *Commercial Law*, (London) (2004) at pp 3ff.

²⁶ Goode (2004) op cit at pp 6ff.

²⁷ Oldham op cit at pp 2, 99.

²⁸ Goode (2004) op cit at p 7

product of the British Isles – let alone of one part of the British Isles. Indeed, the most senior English judges are and have long been exposed to civilian law: the Law Lords and now the Supreme Court, of course, hear Scottish appeals, and from time to time, when they see something the Scots do which we do not, or something the Scots do differently, they have been known to adapt the common law to incorporate the Scots, i.e. the civilian, version. And, for the same reason, it is right to add, Scots law learns from English law.

30. Thus, the strength and flexibility of the common law over the centuries has stemmed from its ability to incorporate good principles and concepts from many different sources. If we close our minds to other sources of inspiration, we reject the very attitude which made the common law such a successful system of law, which has taken root and flourished across the world. Rather than dwelling on the idea that English law was being submerged by a torrent of European law, Lord Denning would have been nearer the mark if he had focussed on how the common law might be invigorated by yet another external influence in a thousand years of external influences. That is not, of course, to say that all foreign influences are good: judges can and should only adopt (and where appropriate adapt) ideas from abroad when we consider them to be appropriate to our, notions of justice and to our legal system, based as it is on the common law and parliamentary sovereignty.

The influence of EU jurisprudence on the common law

31. When we drill down a little and consider how English law, and in particular the common law in England, has been affected by EU and Convention law, I think that it can be safely said that the direct influence of EU law has been significantly less than the direct influence of Convention law. The EU law cases which come to the UK courts involve the interpretation of EU Treaties, Directives and Regulations and of UK statutes intended to give effect to EU Directives. So the issues are essentially interpretational in nature, and they normally involve close perusal of fairly detailed documents, as EU Regulations and Directives are normally fairly fully expressed. It is true that, consistent with the civilian law, the Luxembourg Court's approach to interpretation is less literal and more purposive than the normal common law approach, and some commentators have suggested that this may have had some influence on UK court's approach to interpretation when it comes to domestic statutes, although I am not convinced that it has made much difference.

Furthermore, if an issue of EU law is not clear, then it ultimately must be referred to the Luxembourg court for an EU-wide determination rather than being determined by the UK court.

The influence of Convention jurisprudence on the common law

32. By contrast, human rights issues arising under the Convention are more wide-ranging both in terms of the issues which are covered and in terms of the nature of the role of the UK courts. The Convention sets out a number of fundamental rights in fairly short form, and it is left to judges to develop and sometimes to update those rights. Furthermore, if any human rights point is raised in a case before a UK court, that court has to decide the point: however difficult the point of human rights law is, it is for the domestic court to decide it, and only then can the issue be taken to the Strasbourg court. When we are called on to decide a human rights law point, we will always look to see whether the Strasbourg court has had anything to say on the topic. But, again unlike an EU point decided by the Luxembourg court, a UK court is not bound by a decision of the Strasbourg court on a human rights point.

33. The extent of the reach of the Convention, through the medium of the 1998 Act, has been of such width and of such novelty that the experience of more than fifteen years applying the Convention, coupled with considering, following, disagreeing with or distinguishing decisions of the Strasbourg court, has had a significant (and I believe a generally beneficial) effect on to the approach of UK judges when deciding cases. Convention law has introduced us to new legal rights such as privacy and freedom of expression and new concepts such as proportionality, and they have therefore inevitably helped to change, or as I prefer to see it, to refresh and develop our common law.
34. Thus, a quarter of a century ago, the Court of Appeal held²⁹ that the common law did not recognise any right to privacy, so that a TV star lying unconscious in hospital after a near-fatal accident, had no right to complain about a newspaper publishing photographs of him taken by a paparazzo who managed to trespass into his room and photograph him. Following the passing of the Human Rights Act, there was a very different result in the *MGN* case when a newspaper published photographs secretly taken by another

²⁹ *Kaye v Robertson* [1991] FSR 62, approved subsequently by the House of Lords in *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406

paparazzo, of a model entering a rehab clinic³⁰, or a magazine published unauthorised photographs of the wedding of a couple of film stars taken secretly³¹. And, of course, the common law has not just had to accommodate respect for privacy and family life; it has also had to accommodate a positive right to freedom of expression, freedom of religion, freedom to marry, and the right to respect for family life – and much more besides.

35. When I say that UK law has changed as a result of our European involvement, I am not just referring to the inevitable fact that the courts have had to adapt to and apply new principles arising from EU and Convention law. Studying and sometimes applying the reasoning of the Strasbourg court has led the UK courts to take a more principled and structured approach to decision-making in some areas than in the past. This is scarcely surprising: as already mentioned, the common law has tended to be pragmatic and therefore some times more instinctive as well as being ready to incorporate good ideas from other systems. And, as I have already indicated, we judges should ensure that, in applying or adopting any principles from the Strasbourg court, we do not undermine the essential characteristics of our constitutional system, based on the common law and parliamentary sovereignty.
36. Unsurprisingly, there have also been tensions and developments in relation to Convention law. There were, I suppose, two connected, although apparently conflicting, problems. The first was how to accommodate Convention rights and common law rights, and the second was that, with the excitement about human rights being introduced into UK law, lawyers and judges rather lost interest in the common law.
37. In the *MGN* case³², the claimant's privacy rights were held to be infringed, on the basis that her article 8 Convention rights could be recognised by extending the existing common law right of confidence, or confidentiality, so as to incorporate privacy. In a later case³³, Lord Phillips referred to the Convention right to privacy being “shoehorned” into the existing law of confidential information. Many people might think that it would have

³⁰ *Campbell v MGN Ltd* [2004] UKHL 22, [2004] AC 457

³¹ *Douglas v. Hello! Ltd* [2007] UKHL 21, [2008] AC 1

³² *Campbell op cit*

³³ *Douglas op cit*

been better to have accepted that, profiting from the Convention, the common law should embrace a free-standing right of privacy.

38. The question whether a traditional common law right existed, or even whether the common law should independently be developed to accommodate such a right, was effectively overlooked. We were all so excited about the new toy that we left the old one in the cupboard.
39. In *Kennedy v Charity Commissioners*³⁴, the Supreme Court struck back on behalf of the common law. Lord Mance approved an earlier statement by Lord Toulson that “[t]he development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition”. In the same case, Lord Toulson himself said³⁵ that “[t]he growth of the state has presented the courts with new challenges to the common law to meet current needs. This has always been the way of the common law and it has not ceased on the enactment of the Human Rights Act 1998, although since then there has sometimes been a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.”
40. The facts of *Kennedy* were as follows. The Charity Commission, which is responsible for the administration of UK charities, carried out an investigation into the affairs of two charities run by a well-known character, and refused to give a journalist a copy of the report. He contended that he was entitled to the report under article 10 of the Convention, which asserts the right to freedom of expression. The majority of us were not convinced that article 10 extended to a right to demand information. However, although the point was not argued by the journalist, we held that there was a strong arguable case that in common law public law, he was entitled to see the document, because the common law principle of openness should be applied to statutory inquiries³⁶.

³⁴ [2014] UKSC 20, [2015] AC 455 para 46

³⁵ *ibid* para 133

³⁶ See per Lord Toulson at paras 121-130

In other words, we indicated that, far from lagging behind the Convention, the common law is often ahead of it.

41. A few months later, in the subsequent case of *Osborn*³⁷, Lord Reed explained the interrelationship between common law rights and Convention rights; he said that the 1998 Act does not “supersede the protection of human rights under the common law or statute, 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 Act when appropriate.” And a little later³⁸, he observed that:

“the error in the approach adopted on behalf of the appellants in the present case is to suppose that because an issue falls within the ambit of a Convention guarantee, it follows that the legal analysis of the problem should begin and end with the Strasbourg case law. Properly understood, Convention rights do not form a discrete body of domestic law derived from the judgments of the European court”.

42. In other words, the common law in England is now developing of its own accord as it should and as it always has done, as part of, and within the confines of, our unique constitutional system. And in doing so it will incorporate human rights bearing in mind the contents of the Convention, but equally importantly also bearing in mind that the development of the common law should not be limited or controlled by the scope of the Convention, or decisions of the Strasbourg court.

The Convention and judicial review

43. Another important development attributable to the Convention is in relation to domestic judicial review, an area where the judiciary performs the vital role of protecting citizens against excesses of the executive. The traditional common law position is that, provided relevant matters were taken into account and irrelevant matters were not, and there was no legal or procedural error, an executive decision must be either irrational in nature or impermissible in purpose before the court can overturn it. When a Convention right is interfered with, the court’s approach is more structured and its right to overturn the decision is sometimes rather greater. Thus, the court can overturn a decision which

³⁷ *Osborn v The Parole Board* [2013] UKSC 61, [2014] 1 AC 1115, para 57

³⁸ *Ibid* para 63

interferes with a Convention right, if the interference is disproportionate, and the court must form its own view on proportionality, while giving appropriate weight to the fact that the executive is the decision-maker.

44. The Convention approach has, I think, helped a tendency on the part of the courts to adjust the strict “irrationality” approach to common law judicial review. Thus, in *Kennedy*, Lord Mance said that “[t]he common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable” and that “[t]he nature of judicial review in every case depends on the context”³⁹. Lord Toulson expanded that by suggesting that where the issue was whether the report of a statutory inquiry should be disclosed, the nature of the issue was such that the court should review the refusal to disclose by forming its own view⁴⁰.

45. In the subsequent 2015 Supreme Court case of *Keyu*⁴¹, a sustained argument was advanced to support the proposition that we should now discard the traditional irrationality test in judicial review altogether and replace it with the more structured and nuanced proportionality test, so that human rights and common law judicial review are subject to the same judicial approach. We held that it was unnecessary to decide the point, but it will inevitably come up again.

46. While dealing with proportionality, and to support my thesis that there is not a sharp division between the common law in the UK courts and in other common law jurisdictions, it is worth referring to what Lord Reed said in the *Bank Mellat* case⁴². In relation to proportionality, he said this:

“From its origins in German administrative law, where it forms the basis of a rigorously structured analysis of the validity of legislative and administrative acts, the concept of proportionality came to be adopted in the case law of the European Court of Justice and the European Court of Human Rights. From the latter, it migrated to Canada, where it has received a particularly careful and

³⁹ *Kennedy*, *op cit*, para 51

⁴⁰ *Ibid*, para 132

⁴¹ *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2015] 3 WLR 1665, and see also *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] WLR 1591, paras 59ff

⁴² *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39, [2014] 1 AC 700

influential analysis, and from Canada it spread to a number of other common law jurisdictions”⁴³.

47. Another striking example of the extended public law role of the courts following the 1998 Act is the appeal in relation to assisted suicide, which is statutorily criminalised in the UK⁴⁴. The Strasbourg court has held that, although this engages article 8 of the Convention (which includes a right to life), it is a matter for each state to decide whether its law on assisted suicide infringes the right. In other words, it is within each state’s margin of appreciation. That does not mean, even with Parliamentary supremacy, that the UK courts simply leave it to the legislature. As we indicated when the issue of the lawfulness of the present state of the law came before us in the *Nicklinson* appeal⁴⁵, it is for the courts to decide whether the state of the law complies with its view of article 8. Two of us thought the statute non-compliant, four thought it very unlikely that they would interfere with Parliament’s decision, and three of us considered that, if Parliament failed to address the issue properly in the near future, we may well be prepared to declare the statute non-compliant. An exercise which involves deciding, after a statute has been passed, whether the judiciary can effectively determine the lawfulness of the statute, and, if so, whether the judges should effectively declare it unlawful, would be an unthinkable function for a UK common law court fifty years ago. We have travelled a very long way.
48. I have concentrated on the effect of European law on English law, but it would be wrong not to emphasise that this has been a two-way process. The recently retired President of the Strasbourg Court, Dean Spielmann, has paid tribute on more than one occasion to the influence of the UK courts on the Strasbourg court. Thus, he has explained that the UK and Strasbourg “have developed a jurisprudential dialogue of the highest standard, as well as an informal dialogue through regular meetings”. And he said that “[c]ertain important principles, entrenched for centuries in the British legal culture, have strongly influenced the case-law of the European Court of Human Rights.”⁴⁶ And, while UK judges may well initially have been too readily prepared to follow decisions of the Strasbourg court, we are now more ready to refuse to follow, or to modify or finesse, their decisions, as we become more confident in forming our own views about Convention rights.

⁴³ *Ibid.*, para 68

⁴⁴ Suicide Act 1961, section 2 (as amended)

⁴⁵ *R (Nicklinson) v Secretary of State for Justice* [2014] UKSC 38, [2015] 1 AC 657

⁴⁶ Dean Spielmann, UCL Graduation Ceremony, Honorary Doctorate of Law, 6th July 2016

The future

49. I have referred to the past, and have not so far looked into the future, not least because, as already mentioned, I claim no special expertise in predicting the future. I make no apology for that. The common law is based on experience, pragmatism, and reason. Each of those three factors suggests that we cannot predict the future, and that we should develop the law as the cases which come before us, and as social and technological developments, suggest. Therefore, we should look closely at the past, and, while we should not be prescriptive or dogmatic, we can try and draw some general conclusions from it.
50. Experience shows that the common law is part of the fabric of our society, and that we ignore it at our peril. It is also clear that the common law remains as capable as it always was of absorbing new ideas and new principles, always subject to constitutional constraints including parliamentary sovereignty. It is also apparent that, while the common law should not be too ready to accommodate every new fad and fancy, it must respond to longer term trends and demands. Furthermore, it is important that different common law jurisdictions learn from each other.
51. The great gift of the English-speaking people to the world is, I suggest, the rule of law, most widely exemplified by Magna Carta, 800 years old last year, but at least equally importantly as exemplified by the common law. It is no coincidence that, of all the countries that existed 300⁴⁷ years ago, only the UK⁴⁸, with its common law tradition and principles, has come through without an invasion⁴⁹, without a revolution⁵⁰ and without a tyranny.
52. Thank you very much indeed.

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⁴⁷ 350 years, if you consider that the so-called Glorious Revolution of 1688 was hardly a revolution in any real sense

⁴⁸ The UK includes Scotland, which is not a common law country in the same way, or at least to the same extent as, as England, Wales and Northern Ireland, but I do not believe that it undermines my point.

⁴⁹ I do not count Bonnie Prince Charlie's march as far as Derby in 1745 or Hitler's attempts in 1940 as invasions.

⁵⁰ I accept that the loss of most of Ireland in 1923 can be said to be something of a revolution, but it did not involve a revolution, and Ireland only became part of the UK in 1801