

# The constitutional role of the Supreme Court in the context of devolution in the UK

## Lord Rodger Memorial Lecture 2016

### Lord Neuberger, President of the Supreme Court

14 October 2016

1. In the first Lord Rodger Baltimore Summer School Lecture<sup>1</sup> earlier this year, my colleague and his former colleague and Supreme Court successor, Lord Reed said that he “could devote an entire lecture to Alan Rodger”. Although I knew him for a much shorter period, so could I. I first came across him, albeit second-hand, in 1967. I was in my first year at Oxford and, although I was a scientist, the Regis Professor of Roman Law, David Daube, had rather taken me under his wing as he had been a childhood friend of my father. I distinctly remember Daube saying in his fairly marked German accent (which I will not try and imitate) that he was currently supervising the most brilliant doctoral student he had ever encountered, a Scot called Alan Rodger. This was quite an accolade as Daube was the pre-eminent Roman lawyer of his generation, and at the time he had chairs in three Universities, Oxford, Berkeley California, and Konstanz Germany. Alan went on to combine a first class academic career (recognised by his appointment as a Fellow of the British Academy in 1991) not merely with a stellar legal career (a Senator in 1995, Lord President in 1996, Law Lord in 2001, and Supreme Court Justice in 2009), but also with a career in politics (Solicitor General for Scotland in 1989, and Lord Advocate in 1992), and as a writer.
2. Some thirty years after I had first heard of Alan, I often came across him from time to time, again second-hand, through reading his numinous, scholarly, stylish and sometimes humorous judgments. Forty years after my conversation with David Daube, I finally met Alan, when I became one of his colleagues in the House of Lords. And what a privilege and what a pleasure that was. He managed to combine a passionate and scholarly interest in the law and impeccable intellectual rigour with a wicked sense of humour and a great interest in and rapport with the young. His scholarly and enlightened outlook was exemplified by

---

<sup>1</sup> Lord Reed, *Judges on their Travels*, 15<sup>th</sup> May 2016

an important work<sup>2</sup> on the 1843 Disruption<sup>3</sup>, and articles<sup>4</sup> on the famous case of *Donoghue v Stevenson*<sup>5</sup>. His sense of humour made him a very popular speaker, and it is reflected in his article *Humour and law*<sup>6</sup>. And his rapport with the young made him a great teacher as well as a great judge, and it was demonstrated by the way in which his judicial assistants in the House of Lords and Supreme Court worshipped him. His deep knowledge and love of Roman law, especially as it was combined with his interest in comparative law, gave him a particularly valuable insight into many legal problems.

3. It is an occasion for pride to be asked to give a lecture in his honour, but it also an occasion for sadness. It brings home to me that this wonderful man, outstanding scholar and remarkable judge was struck down far too early at the age of 67. It is some consolation that, by virtue of his commitment and hard work, he managed to contribute so much to the law, both academically and practically, and managed to make so many people, whether friends, colleagues, students, listeners or readers happy, well informed and intellectually stimulated. In a short and perceptive obituary<sup>7</sup>, Hector MacQueen described Alan as “the greatest Scots lawyer of his generation”. More specifically, he referred to Alan as having been “in the forefront in what has turned out to be the greatest challenge ever to face the courts, not only in Scotland but also in the United Kingdom as a whole: the impact of the Human Rights Act 1998 coupled with, in this jurisdiction, the Scotland Act of the same year”. The obituary rightly went on to say that “there can be no doubt of the rigour and vigour which he with others brought to what turned out to be an enormous and far-reaching task”.
4. This evening, I would like to attempt to discuss the constitutional aspects of that task in their wider context, conscious as I am of the very large and demanding, if thoroughly benevolent, shadow cast by the person in whose honour this lecture is named. I also am conscious that I address this topic after having been taken to task by some academic lawyers<sup>8</sup> for saying that the United Kingdom has no Constitution. My critics undoubtedly have a point. However, as so often with a disagreement, whether about law or some other topic, the issue turns out, in the ultimate analysis, to be one of definition. And in this case

---

<sup>2</sup> A Rodger, *The Courts, the Church and the Constitution: Aspects of the Disruption of 1843* (2008)

<sup>3</sup> A schism in the Church of Scotland

<sup>4</sup> A Rodger, *Mrs Donoghue and Alfenus Varus* (1988) 41 *Current Legal Problems* 1, and *Lord Macmillan's Speech in Donoghue v Stevenson* (1992) 108 *LQR* 236

<sup>5</sup> [1932] *AC* 562

<sup>6</sup> 2009 *SLT* (News) 202

<sup>7</sup> Hector MacQueen, *Lord Rodger of Earlsferry (18 September 1944-26 June 2011)*, *Scots Law News* posted 27 June 2011, <http://www.sln.law.ed.ac.uk/2011/06/27/lord-rodger-of-earlsferry-18-september-1944-26-june-2011/>

<sup>8</sup> see eg per Prof Mark Elliott, <https://publiclawforeveryone.com/2014/02/13/is-lord-neuberger-right-to-suggest-that-the-uk-has-no-constitution/> and <http://blogs.lse.ac.uk/constitutionuk/2014/03/26/the-uks-unusual-constitution/>

it may depend on whether the word “constitution” has an upper or lower case first letter. In one sense, a constitution (with a lower case “c”) may be no more than the collection of rules or conventions by which a state is governed. On that basis, the UK has, I accept, a constitution, much of which is in the form of unwritten conventions, such as the notion that the House of Lords will not oppose a bill which was promised in the elected government’s manifesto (the so-called Salisbury Doctrine<sup>9</sup>), and the rest of which is in the form of some statutes or statutory provisions such as the Bill of Rights 1688/9<sup>10</sup>.

5. But, if that is what is meant by a Constitution, then any state with a government has a Constitution virtually by definition, as without some rules, there can be no government; only anarchy. In other words, if “Constitution” is given this broad meaning, a government without a Constitution would pretty well be a contradiction in terms, or to put the same point another way, Constitutional government would virtually be a tautology. To be more precise, the only type of government which would not be under a Constitution would be wholly arbitrary or anarchic government – which to my mind suggests that this meaning of “Constitutional” government, in the sense of government in accordance with a Constitution, is no more than government through rule by law.
6. To me, at any rate, Constitutional government (at least with an upper case “C”), in that sense, means more than rule by law. It connotes government in accordance with a coherent written document which sets out the fundamental principles upon which the government is founded, a document which identifies the functions of various branches of government, as well as in relation to each other and in relation to citizens, and in particular identifies the limits of, and limitations to, those functions. I also question whether such a document can properly be called a Constitution unless it is incapable of alteration other than by something significantly more than a simple majority of the legislature, and unless, save in exceptional circumstances, it can only conclusively be interpreted by an independent judiciary.
7. The notion of an unwritten Constitution brings to mind the statement commonly attributed to Sam Goldwyn<sup>11</sup> that a verbal contract is not worth the paper which it is written on. On that basis, Goldwyn would not have thought much of the British constitution – although, to be fair, I would not put him forward as an arbiter in this dispute. It is a pretty odd

---

<sup>9</sup> <http://www.parliament.uk/site-information/glossary/salisbury-doctrine/>

<sup>10</sup> 1 Will and Mar (Sess 2) c. 2

<sup>11</sup> Now thought to be based on what Goldwyn said about a business colleague, namely ‘His verbal contract is worth more than the paper it's written on’ – P F Boller and John George, *They Never Said It* (1990), p. 42, and C Easton, *The Search for Sam Goldwyn* (1976).

Constitution if there can be disagreement as to what is included in it; yet uncertainty is inherent in the notion of a constitution comprising unwritten conventions and some statutory provisions which have not been formally identified as such. And in the UK any convention can be varied or removed by a simple majority in Parliament, and even provisions of the Bill of Rights have been amended and repealed by a simple Parliamentary majority without a murmur of protest. That is because, with no Constitution in the sense that I have used the term, the UK enjoys Parliamentary supremacy – albeit only by convention. Ultimately, Parliamentary supremacy means that a statute, an Act of Parliament, is, in constitutional terms, the last word. The judiciary cannot overrule a statute by a judicial decision<sup>12</sup>, but the legislature can overrule a judicial decision by a statute.

8. Because we have no Constitution in the sense in which I use the term, we have, as I have mentioned, the disadvantage of uncertainty but we have the concomitant advantage of flexibility. At the risk of being accused of caricature, it seems to me that the UK can make up or abandon its constitutional conventions as the mood takes it. Thus, the Salisbury Convention was conjured into existence in 1945<sup>13</sup>, and the Lascelles Convention<sup>14</sup>, namely that the monarch must dissolve Parliament if the Prime Minister so advises, was ended by statute in 2011<sup>15</sup>, and its precise delineation was first described in a letter written under a pseudonym to the editor of the Times newspaper<sup>16</sup>.
9. This flexibility is valuable, as it means that the rules under which we are governed can be altered relatively easily in order to accommodate changes in the needs or perceptions of society. And this is particularly significant in the 21<sup>st</sup> century where things seem to be changing very fast, in virtually every field - economically, politically, socially, technologically and commercially. However, the price of such flexibility is fragility and uncertainty, and I suggest that a constitutional system such as we have can only survive in a polity which is fundamentally robust, stable and cohesive. Great Britain has demonstrated that it has such strength by its survival intact for over 300 years – uniquely for any substantial country, without revolution, tyranny or invasion (although, during that period, it must be

---

<sup>12</sup> See *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & F 710, *Mortensen v Peters* (1906) 8 F (J) 93, *British Railways Board v Pickin* [1974] AC 765 and *Manuel v Attorney General* [1983] Ch 77.

<sup>13</sup> see footnote 9

<sup>14</sup> So-called because the Convention (and three exceptions to it) were described in a letter written by King George VI's Private Secretary, Sir Alan Lascelles, under the pseudonym *Senex*, to the editor of *The Times* newspaper, and published on 2 May 1950. The Convention may be traceable to a 20<sup>th</sup> century predecessor of Lascelles, Lord Stamfordham, whose advice to this effect was apparently acted on shortly after King George V came to the throne

<sup>15</sup> The Fixed-term Parliaments Act

<sup>16</sup> See footnote 14

acknowledged that, after union with Ireland in 1801, the major part of that island achieved independence in 1923).

10. Having said that, over the past twenty years, things have been very much on the move so far as the UK constitutional settlement is concerned. First, having domesticated EU law in 1972<sup>17</sup>, and signed up to the Lisbon Treaty<sup>18</sup> in 2007, the UK very recently voted in a nationwide referendum to leave the EU. Secondly, having been party to the European Convention on Human Rights since the early 1950s, the UK effectively incorporated the Convention into domestic law in 2000 through the Human Rights Act 1998. Thirdly, there has been devolution, which having been abandoned in Northern Ireland in 1972 after some 50 years, was in 1998 reinstated in that province and introduced into Scotland and Wales. Fourthly, there have been several statutory or parliamentary constitutional changes, including a tendency, albeit of a somewhat piecemeal nature, to formalise statutorily what were previously informal constitutional conventions. Fifthly, the courts have had to develop new constitutional jurisprudence as a result of these developments, but have also taken it on themselves from time to time to express constitutional views which would have been regarded as original at best and heretical at worst by previous generations of judges. Let me say a little about each of these developments.
11. The consequences of EU membership on the UK's constitutional settlement have been fairly clear – at least so far as the judiciary are concerned. UK courts have had to give effect to EU law, even if that means that they have to disregard primary legislation<sup>19</sup>; and while UK judges can and should determine points of EU law, they can (and in the case of the Supreme Court, they should) refer any uncertain points to the Luxembourg Court. The notion that a UK judge can refuse to apply a statute is revolutionary to traditional UK jurisprudence (as is the notion that the UK's top court should not determine a point of law). However, it is specifically mandated by Parliament through a statute<sup>20</sup>, which can be repealed<sup>21</sup>. To that extent, there is, in strict principle, no conflict with the notion of Parliamentary sovereignty, but some may think that there has been a *de facto* loosening of the notion. And the vote to leave the EU has already resulted in a case which may well have real constitutional significance<sup>22</sup>, with the judiciary being asked to decide on the relative

---

<sup>17</sup> By the European Communities Act 1972

<sup>18</sup> Or more properly the Treaty for the Functioning of the European Union,

<sup>19</sup> R (*Factortame Ltd*) v *Secretary of State for Transport* [1991] AC 603, and see Case 26/62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] CMLR 105, [1963] ECR 1

<sup>20</sup> The European Communities Act 1972

<sup>21</sup> As pointed out by Laws LJ in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151, para 59

<sup>22</sup> *Santos v. Chancellor for the Duchy Lancaster*, CO/3281/2016

functions of the legislature and the executive in relation to treaties, but, as I may have to deal with that issue judicially, I say no more about it.

12. The effect of the Human Rights Act 1998 can fairly be described as requiring UK judges to give effect to a modern bill of rights, albeit in a characteristically quirky fashion. The 1998 Act enables, indeed it requires, the judiciary to give effect to specific fundamental rights which are bestowed on all citizens as against the state, and to invalidate any executive act or decision (including any statutory instrument) to the extent that it infringes such rights<sup>23</sup>. However, it enables, again it requires, a judge to inform Parliament when a statutory provision infringes such rights<sup>24</sup>; but, consistently with parliamentary sovereignty, it is then up to Parliament, not the courts, to decide whether, and if so how, to deal with the infringement. And, before deciding to make a declaration of incompatibility, a judge must try, within limits, effectively to recast the provision so that it does not infringe<sup>25</sup>. This latter duty is constitutionally rather revolutionary although it has been less commented on; it means that a judge should give an effect to a statutory provision which was not the effect intended by Parliament when it was enacted. It seems to put the judiciary above the legislature, but its apparently revolutionary effect can fairly be said to be negated, at least in theory, by the fact that it is a duty imposed by the legislature.
  
13. Devolution can be said to have the effect of converting what was a unitary state into a polity which is in some respects a federation of states. Devolution has also involved giving the courts power to override statutes – although only statutes passed by the devolved legislatures; UK Parliamentary sovereignty remains untouched. Indeed, the devolution statutes all include, for the first time, as far as I am aware, a statutory statement affirming Parliamentary sovereignty – at least as between the Westminster Parliament and the devolved legislatures. Thus, the statutory provision<sup>26</sup> which empowers the Scottish Parliament to legislate for Scotland includes a specific qualification which states that “[t]his section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland”<sup>27</sup>, and the Welsh and Northern Irish devolution legislation each has a similar provision<sup>28</sup>.

---

<sup>23</sup> Human Rights Act 1998, sections 6ff

<sup>24</sup> *Ibid*, section 4

<sup>25</sup> *Ibid*, section 3

<sup>26</sup> Section 28 of the Scotland Act 1998

<sup>27</sup> *Ibid*, subsection (7)

<sup>28</sup> Section 93(5) of the Government of Wales Act 2006 (replacing an earlier provision in the Government of Wales Act 1998), and section 5(6) of the Northern Ireland Act 1998

14. The devolution statutes demonstrate, at least by international standards, a remarkable degree of flexibility (if one is kind) or inconsistency (if one is unkind). First, the three devolution statutes provide for differing degrees of legislative powers for the three devolved Parliaments. Some clue can be found in the names: although all three states have ministers and a government, Scotland has a Parliament, whereas Wales and Northern Ireland have Assemblies. Secondly, even the models are different; in very general terms, the Scottish Parliament can legislate on all but “reserved” matters<sup>29</sup>; the Welsh Assembly can, by contrast, only legislate on “devolved” or “conferred” matters<sup>30</sup>; the Northern Irish Assembly can legislate on all but “excepted”<sup>31</sup> or “reserved”<sup>32</sup> matters. Thirdly, the extent of devolution is very much of an ongoing issue; Wales has seen one substantial change to its devolution settlement in 2006<sup>33</sup>, and another is on its way following the reports of the Silk Commission into Welsh devolution<sup>34</sup>; amendments have also been made in Scotland, and more major changes are currently anticipated following the 2014 independence referendum. Fourthly, there is what has fairly been called a “black hole” in the UK’s devolution settlement<sup>35</sup>, namely the absence of any exclusively English Parliament or government. Apart from being inherently peculiar, at least to an outsider, this leads to an obvious imbalance, in that Scottish, Welsh and Northern Irish MPs at Westminster could vote on purely English laws, whereas English MPs cannot vote on devolved issues. This problem, often known as the West Lothian question<sup>36</sup>, led to various proposals, none of which involved having an English Parliament (although English regional assemblies were mooted in the late 1990s, but the idea foundered after a referendum in the north-east). And we now have a slightly clunky system of English votes for English laws in the UK’s House of Commons<sup>37</sup>.
15. Turning to other statutes, there have been significant, if somewhat piecemeal, statutory changes and entrenchments of constitutional convention or retained it but in formal statutory form. I have already referred to the Fixed-term Parliaments Act of 2011, which introduced an entirely new statutory rule which replaced a well-established but informal

---

<sup>29</sup> Scotland Act 1998 section 29(2) and Schedule 4

<sup>30</sup> Government of Wales Act 1998, section 22, and Schedules 2 and 3, as subsequently amended in 2006 and 2011. The statute does not use words such as “devolved” or “conferred” in this connection

<sup>31</sup> Northern Ireland Act 1998, section 4 and Schedule 2

<sup>32</sup> *Ibid.*, section 4 and Schedule 3

<sup>33</sup> See the Government of Wales Act 2006

<sup>34</sup> Reports of the Commission on Devolution in Wales (2012) and (2014)

<sup>35</sup> per Brice Dickson, in *The Changing Constitution* (8th ed, 2015), ed J Jowell, D Oliver, and C O’Cinneide, Chapter 9, *Devolution*

<sup>36</sup> Because it was first raised politically by the then MP for West Lothian, Tom Dalyell

<sup>37</sup> On 22 October 2015 the House of Commons approved Standing Order changes to exclude Scottish and Northern Irish MPs from voting on bills which only relate to England and Wales, albeit with exceptions - <https://www.parliament.uk/about/how/laws/bills/public/english-votes-for-english-laws/>

convention. And the so called Ponsonby convention<sup>38</sup>, whereby most international treaties had to be laid before Parliament 21 days before ratification, was replaced by statutory provisions in 2010<sup>39</sup>.

16. In the Constitutional Reform Act 2005 in England and Wales, the Courts (Scotland) Act 2008 and the Northern Ireland Act 2009, there is, for the first time, statutory confirmation of the rule of law<sup>40</sup>, judicial independence<sup>41</sup>, and the rights of senior judges to make representations to Parliament<sup>42</sup>. The 2005 Act not only sets out formally for the first time the functions of the Lord Chancellor in England, Wales and Northern Ireland<sup>43</sup> but it radically changes the previous conventions in that connection. Similarly, the three Acts formalise and radically change the way in which judges are to be selected for (and removed from) the Supreme Court<sup>44</sup> and the courts of England and Wales<sup>45</sup>, Scotland<sup>46</sup> and Northern Ireland<sup>47</sup>. And, of course, the 2005 Act abolished the Judicial Committee of the House of Lords and replaced it with the Supreme Court. In addition to that, there has been legislation which for the first time entrenches statutorily an impartial civil service, with recruitment on merit<sup>48</sup>. There have also been statutes which provided for referenda to decide whether to change the voting system<sup>49</sup> and whether to remain in the EU<sup>50</sup>. And there has been legislation to change the membership of the House of Lords<sup>51</sup>, to reduce the size of the House of Commons and to equalise constituencies<sup>52</sup>.
17. The Courts have inevitably been involved in the developments brought about by EU membership, the Human Rights Act, devolution and other statutory changes. However, senior judges have also expressed novel constitutional views. In particular, in the 2005 *Jackson* Hunting Bill case<sup>53</sup>, Lord Hope observed that “Step by step, gradually but surely,

---

<sup>38</sup> Named after Arthur Ponsonby, the Parliamentary Under-secretary for Foreign Affairs who announced this convention on 1 April 1924 in the House of Commons (the Convention was, with normal British insouciance for these things withdrawn by the subsequent government but reinstated in 1929).

<sup>39</sup> Constitutional Reform and Governance Act 2010, sections 20-25

<sup>40</sup> Constitutional Reform Act 2005, section 1(a)

<sup>41</sup> *Ibid*, section 3(1) and Judiciary and Courts (Scotland) Act 2008 section 1

<sup>42</sup> 2005 Act, sections 5 and 6, 2008 Act, section 2(2)(c)

<sup>43</sup> 2005 Act, sections 2, 10, 15, 17-21 (which have been modified in relation to Northern Ireland by Northern Ireland Act 2009)

<sup>44</sup> *Ibid*, sections 25-30

<sup>45</sup> *Ibid*, sections 67-97 and 108-121

<sup>46</sup> Judiciary and Courts (Scotland) Act 2008, section 9-27 and 35-41

<sup>47</sup> Northern Ireland Act 2009, section 2

<sup>48</sup> Constitutional Reform and Governance Act 2010, sections 2 to 18

<sup>49</sup> Parliamentary Voting System and Constituencies Act 2011

<sup>50</sup> European Referendum Act 2015

<sup>51</sup> House of Lords act 1999

<sup>52</sup> See footnote 49

<sup>53</sup> *Jackson v. Her Majesty's Attorney General* [2005] UKHL 56, [2006] 1 AC 262



the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified”<sup>54</sup>. More specifically, Lord Steyn said<sup>55</sup> that while “the supremacy of Parliament is still the general principle of our constitution”, it “is a construct of the common law”, and “it is not unthinkable that circumstances could arise where the courts may have to” depart from it. He then gave the example of “an attempt to abolish judicial review or the ordinary role of the courts”, which he said the courts “may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish”. These observations from two highly respected and experienced judges would have been regarded as revolutionary by our judicial grandfathers<sup>56</sup>.

18. Less revolutionarily, but more authoritatively, as a result of some decisions of the Court of Justice of the EU, Lord Mance and I (with our colleagues’ agreement) suggested in the 2014 HS2 case<sup>57</sup> that some statutes were “constitutional instruments” which “contain fundamental principles”, and that the provisions of such statutes may be entrenched in our system at least to the extent of being more difficult to displace than ordinary statutory provisions, a view reiterated a year later by Lord Reed in the *Pham* case<sup>58</sup>. Quite how far this goes remains to be seen, but, according to Laws LJ in an earlier, and typically bravura, judgment in the so-called metric martyrs case in relation to the European Communities Act 1972, it would seem to mean at least that the normal rule that subsequent inconsistent legislation impliedly repeals earlier statutes does not apply to the 1972 Act as it is entrenched or has a special constitutional status<sup>59</sup>.

19. The notion of statutes with a special constitutional character has, inevitably, been reinforced by the Devolution Acts. Thus, echoing what Laws LJ had said earlier about European Communities Act, Lord Hope (with whom the other members of the Court agreed) in *H v Lord Advocate*<sup>60</sup> described the effect of the Scotland Act 1998 as involving a “settlement” which had a “fundamental constitutional nature”, and which “render[ed] (that statute]

---

<sup>54</sup> *Ibid*, para 104

<sup>55</sup> *Ibid*, para 102

<sup>56</sup> See the cases cited in footnote 12. Albeit not by every judicial ancestor: Coke CJ in *Dr Bonham’s case* (1609) 8 Co Rep 107, 118a stated that “when an Act of Parliament is against common sense right and reason, or repugnant or impossible to be performed, the common law will control it, and adjudge such Act to be void”. However, not only was that statement made before the Bill of Rights, but it would seem that Coke changed his mind – see J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999), p 112

<sup>57</sup> *R (on the application of HS2 Action Alliance Ltd) v The Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, para 207; and see the penetrating discussion of Laws LJ in *Thoburn* (cited in footnote 21), paras 58-70

<sup>58</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, para 82

<sup>59</sup> see per Laws LJ in *Thoburn* cited in footnote 21

<sup>60</sup> [2013] 1 AC 413, para 30

incapable of being altered otherwise than by an express enactment”. This has been condemned by some academic legal commentators<sup>61</sup> as wrong in principle, but that is the fate not only of decisions which are wrong, but also of decisions which take the law forward. It remains to be seen whether the notion of entrenched legislation with special constitutional status (and even entrenched common law principles with special constitutional status) is correct, and, if it is, how far it goes.

20. The point made by Lord Hope may in fact be no more than an extension of the principle of legality. The effect of that principle is that the courts will not accept that a statute has adversely affected fundamental rights unless the wording of the statute to such effect is “crystal clear”<sup>62</sup>, so that “[i]n the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual”<sup>63</sup>. This has important constitutional ramifications, not least because, as Lord Hoffmann has explained: “In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document”<sup>64</sup>. And, it may be said therefore that the characterisation of certain statutes as entrenched is not particularly novel as it means no more than that they cannot be varied or repealed save by subsequent statutory provisions which are “crystal clear” that they are intended to have that effect.
21. As I have explained, the constitutionally novel notion that a court could refuse to apply primary legislation first became reality as a result of the European Communities Act 1972. The devolution statutes go further, in that they require the court to cut down primary legislation if it is outwith the power of the devolved legislature concerned. This can be said to be a revolutionary power for a UK judge to have, but its revolutionary nature is diluted once one appreciates that it is a power which has been conferred by the UK Parliament<sup>65</sup>, and that it is a power limited to legislation enacted by the devolved legislatures, not by the UK Parliament.

---

<sup>61</sup> see eg per F Ahmed and A Perry, *The Quasi-Entrenchment of Constitutional Statutes* (2014) 73(3) Camb LJ 514

<sup>62</sup> *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 159, per Lady Hale

<sup>63</sup> *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131E-F, per Lord Hoffmann

<sup>64</sup> *Ibid*

<sup>65</sup> Indeed, the legislation giving the power declares such devolved legislation which is ultra vires. Section 29(1) of the Scotland Act 1998 declares that “An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament”

22. So far as the devolution legislation is concerned, the power can be exercised in limited circumstances. In particular, devolved legislation is invalid<sup>66</sup>: (a) if the devolved legislation purports to apply outside the devolved territory<sup>67</sup>, (b) it is incompatible with Convention rights or EU law<sup>68</sup>, or (iii) if the devolved legislation (a) “relates ... to reserved matters” (in Scotland)<sup>69</sup> or “deals with excepted matters” (in Northern Ireland)<sup>70</sup>, or does not “relate ... to one or more subjects” identified as a devolved matter (in Wales)<sup>71</sup> and (b) it does not “breach ... any of the restrictions”, as set out in the relevant statute (in Scotland or Wales)<sup>72</sup>. For ease of reference, I will refer to the principle on the basis that devolved legislation may not relate to excluded matters.
23. These statutory powers to strike down a statute are novel for a UK court, but they represent an almost inevitable constitutional development: once the UK Parliament has decided to create devolved Parliaments, there has to be an allocation of law-making powers between the national legislature and devolved legislatures. The rule of law, as I see it at any rate, mandates that (i) the terms and extent of the allocation are determined by the national legislature and are clearly laid down in a publicly available document which would normally be a Constitution, but in our system can only be a statute, and (ii) in the event of uncertainty or a dispute as to the meaning or effect of that document, the issue must be a matter for determination by the courts.
24. Before turning to these statutory limitations on the powers of the devolved legislatures, there is the important point that they are not the end of the story. In the 2011 *AXA* case<sup>73</sup>, the Supreme Court held that the courts can also strike down statutes enacted by devolved legislatures if they “abrogate fundamental rights or ... violate the rule of law”, as Lord Reed put it<sup>74</sup>. On the one hand, as Lord Hope explained<sup>75</sup>, the devolved legislatures do not have “unconstrained” power and sovereignty remains with Westminster, and it therefore follows

---

<sup>66</sup> In addition, in Scotland the Lord Advocate cannot be removed and in Northern Ireland legislation cannot discriminate on religious or political grounds – the Scotland Act 1998 section 29(1)(e), and Northern Ireland Act 1998, section 6(2)(e)

<sup>67</sup> Scotland Act 1998, section 29(2)(a), Government of Wales Act 2006, section 108((4)(b) and (6)(b), Northern Ireland Act 1998, section 6(2)(a)

<sup>68</sup> Scotland Act 1998, section 29(2)(d), Government of Wales Act 2006, section 108(6)(c), Northern Ireland Act 1998, section 6(2)(c) and (d)

<sup>69</sup> Scotland Act 1998, sections 29(2)(b) and 30 and Schedule 5

<sup>70</sup> Northern Ireland Act 1998, section 6(2)(b)

<sup>71</sup> Government of Wales Act 2006, section 108(4)(a) and Part 1 of Schedule 7

<sup>72</sup> Scotland Act 1998, section 29(2)(c) and Schedule 4, Government of Wales Act 2006, section 108(6)(a) and Part 2 of Schedule 7

<sup>73</sup> *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46

<sup>74</sup> *Ibid*, para 153

<sup>75</sup> *Ibid*, para 46

their statutes are amenable to judicial review (and interestingly he made reference<sup>76</sup> to what he had said in the *Jackson* case<sup>77</sup>). On the other hand, as he went on to say<sup>78</sup>, the devolved Parliaments are elected by universal suffrage and have democratic legitimacy, so the judiciary should exercise its power of intervention “only in the most exceptional circumstances”; in particular, it would not be right for the courts to strike down devolved legislation “on the grounds of irrationality, unreasonableness or arbitrariness”<sup>79</sup> – ie the normal, so-called *Wednesbury*<sup>80</sup>, judicial review, test.

25. Having been given a new and important constitutional role by the legislature, the Supreme Court has thus extended it, albeit modestly. I would suggest that the extension is entirely appropriate. On the one hand, the extension is one which, by definition, is in accordance with what many people may think is the courts’ fundamental duty, namely upholding the rule of law. On the other hand, the extension is very limited in its effect, applying only in extreme circumstances, which is consistent with a proper sense of judicial self-restraint.
26. I turn now to address the three statutory limitations on the powers of the devolved legislatures which I summarised earlier. The territorial limitation is unexceptionable, but it can lead to difficulties, particularly in relation to Wales. For instance, some Welsh hospitals and schools serve some English residents and vice versa, and this is catered for in the legislation. However, those difficulties do not, at least so far, appear to be of much constitutional significance, although they are yet another example of the theoretically unsatisfactory but sensibly pragmatic nature of the UK constitutional arrangements.
27. The invalidation of devolved legislation which infringes Convention rights can be said to underscore the constitutional character of the 1998 Human Rights Act. It has been successfully invoked in the courts to invalidate devolved legislation. Thus, in the *Welsh Asbestos* case<sup>81</sup>, the legislation proposed by the Welsh Assembly would have imposed liability for NHS treatment of victims of “asbestos-related diseases” on persons who are liable to pay compensation to those victims. That proposed legislation was held to infringe article 1 of the first protocol of the European Convention (“A1P1”, the so-called right to property) because of its retrospective nature<sup>82</sup>. It was accepted that retrospectivity was not absolutely

---

<sup>76</sup> *Ibid*, para 51

<sup>77</sup> See para 13 above and footnote 53

<sup>78</sup> *Ibid*, para 49

<sup>79</sup> *Ibid*, para 51

<sup>80</sup> *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

<sup>81</sup> *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill (Reference By The Counsel General For Wales)* [2015] UKSC 3

<sup>82</sup> *Ibid*, paras 53, 57, 65-69

barred by A1P1, as indeed the Supreme Court had held in the *AXA* case<sup>83</sup>, when upholding somewhat different legislation from the Scottish Parliament in relation to asbestos-related disease. In the *AXA* case, a 2009 Scottish Act<sup>84</sup> provided that certain physical conditions which evidence exposure to asbestos, but which do not constitute or contribute to actual disease, constitute personal injury actionable in Scots law. The Scottish 2009 Act was passed to reverse the effect of a very recent Supreme Court decision<sup>85</sup>, and it was challenged by insurance companies on the ground that it was retrospective in its effect and therefore infringed A1P1. The fact that the 2009 Act did not reverse what would have been understood to be the settled law when the insurance policies were entered into was a significant factor in the court's thinking<sup>86</sup>. However, that point did not apply in the Welsh case, where it was explained that retrospective legislation needed "special justification"<sup>87</sup> which could not be found in that case.

28. In Northern Ireland, legislation<sup>88</sup> which precluded adoption of children by couples who were unmarried was held by the House of Lords in the *re P* case in 2007<sup>89</sup> to infringe article 14 of the Convention (the anti-discrimination provision) on the ground that "[i]f being married is a status, it must follow that not being married is a status"<sup>90</sup>, and that the discrimination could not be justified, even though "at a macro level", "[t]he state is entitled to take the view that marriage is a very important institution and that in general it is better for children to be brought up by parents who are married to each other than by those who are not"<sup>91</sup>. This was because a "bright line rule ... is quite irrational", and the question whether an unmarried couple should be allowed to adopt a child should be considered on a case-by-case basis<sup>92</sup>.
29. A very recent example where a Convention challenge to legislation succeeded in the Supreme Court was the *Christian Institute* case<sup>93</sup>. The Scottish Parliament's legislation in that case<sup>94</sup> required a "named person" to be assigned to all children for their protection, and this involved compulsory sharing of private information with the named person. This legislation

---

<sup>83</sup> *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 86

<sup>84</sup> The Damages (Asbestos-related Conditions) (Scotland) Act 2009

<sup>85</sup> *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] AC 281

<sup>86</sup> [2012] 1 AC 86, paras 40, 81, 95-96, 129-131

<sup>87</sup> [2015] UKSC 3, paras 50, 53, 61 and 66

<sup>88</sup> Article 14 of the Adoption (Northern Ireland) Order 1987 (SI 1987/2203(NI 22))

<sup>89</sup> *Re P & Ors (Northern Ireland)* [2008] UKHL 38, [2009] 1 AC 173

<sup>90</sup> *Ibid*, para 8 per Lord Hoffmann

<sup>91</sup> *Ibid*, para 13

<sup>92</sup> *Ibid*

<sup>93</sup> *The Christian Institute v The Lord Advocate* [2016] UKSC 51

<sup>94</sup> The Children and Young People (Scotland) Act 2014

was struck down on the grounds that it fell foul of article 8 of the Convention (the right to respect for privacy) on the grounds that it was not “in accordance with the law”, because the provisions were difficult to access and provided for insufficient safeguards<sup>95</sup>, and also because it was disproportionate, owing to the absence of protective provisions and of clear guidance<sup>96</sup>.

30. The striking down of legislation because it relates to excluded matters (in Scotland to reserved matters) raises what is probably the most difficult issue, namely whether an Act or Bill “relates” or does not “relate” to a specific topic or matter. The Scotland Act 1998 gives some, but pretty limited, assistance: the question whether a provision of an Act ... relates to a reserved matter is to be determined ... by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances<sup>97</sup>. A similar provision may be found in the Welsh devolution legislation<sup>98</sup>, but not, so far as I can see, in that of Northern Ireland. Further guidance has been given in Scottish and Welsh devolution cases as to how to interpret devolution statutes<sup>99</sup>, most recently in the Welsh *Agricultural Wages* and the Scottish *Christian Institute* cases<sup>100</sup>. When considering this question, the fact that the statutes themselves are of great constitutional significance is not in point, but, it is proper to have regard to the purpose of the statutes, namely “to achieve a constitutional settlement”, albeit “in fairly general and abstract terms”<sup>101</sup>.

31. A measure will not “relate” to a matter if it only has “a loose or consequential connection” with that matter<sup>102</sup>. Further, if a devolved Act or Bill relates to two matters, it may be that it does indeed relate to both, or, on analysis, it may transpire that one of the matters is “subsidiary” or “incidental” to the other matter, in which case the Bill will be treating as relating only to the other matter<sup>103</sup>. The most recent treatment by the Supreme Court of whether or not an Act relates to a reserved matter is in the *Christian Institute* case<sup>104</sup>, where

---

<sup>95</sup> [2016] UKSC 51, paras 83-85

<sup>96</sup> [2016] UKSC 51, paras 93-95

<sup>97</sup> Section 29(3)

<sup>98</sup> Government of Wales Act 2006, section 108(7)

<sup>99</sup> *Martin v Most* [2010] UKSC 10; 2010 SC (UKSC) 40, paras 44-53, *Imperial Tobacco v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153 paras 7-15, and *Local Government Byelaws (Wales) Bill 2012 – reference by the Attorney General for England and Wales* [2012] UKSC 53; [2013] 1 AC 792, paras 78-81.

<sup>100</sup> *Agricultural Sector (Wales) Bill (Attorney General for England and Wales, Ref)* [2014] UKSC 43, [2014] 1 WLR 2622, paras 5-6 and *Christian Institute and Others v The Lord Advocate* [2016] UKSC 51, paras 29-32

<sup>101</sup> *Local Government Byelaws (Wales) Bill 2012 – reference by the Attorney General for England and Wales* [2012] UKSC 53; [2013] 1 AC 792, para 80 and *Agricultural Sector (Wales) Bill (Attorney General for England and Wales, Ref)* [2014] UKSC 43, [2014] 1 WLR 2622, para 6(iii)

<sup>102</sup> *Martin v Most* [2010] UKSC 10; 2010 SC (UKSC) 40, para 49, followed in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, para 16 and *Christian Institute* [2016] UKSC 51, para 29

<sup>103</sup> *Welsh Byelaws* case [2013] 1 AC 792, para 83

<sup>104</sup> [2016] UKSC 51, paras 63-65

the discussion shows that “the ultimate aim” of the legislation is relevant, as is “the central aim of the provisions in the Scotland Act concerning reserved matters”, namely that “that matters in which the UK as a whole has an interest should continue to be the responsibility of the UK Parliament”. In that case, the legislation was not cut down on this ground.

32. By contrast, proposed legislation was struck down in the earlier Welsh *Recovery of Medical Costs* case<sup>105</sup>. Legislation is within the competence of the Welsh Assembly if it “relates to” the “organization and funding of national health service”<sup>106</sup>, but the majority of the Supreme Court considered that the proposed charging of insurance companies for the NHS treatment of victims of asbestos-related diseases did not fall within that expression, not least because, if such charges could be levied “it would be difficult to see any real limit to the persons on whom or basis on which such charges might be imposed”<sup>107</sup>.
33. The potential difficulties thrown up for the courts when determining whether legislation is competent are rather highlighted by the fact the Supreme Court split 3-2 in *Martin v Most*<sup>108</sup>. In that case, the question was whether a section of a Scottish Act<sup>109</sup> which increased the maximum sentence for driving while disqualified on a summary conviction to bring it into line with the maximum sentence for the same offence on indictment. The Supreme Court held that this provision was within the Scottish Parliament’s power as it did not “relate to” the reserved matter of Road Traffic legislation, as examination of the evidence showed that its purpose was “to contribute to the reform of the summary justice system by reducing pressure on the higher courts”<sup>110</sup>. The Supreme Court also held (by a 3-2 majority) that the law modified by the provision was not “special to a reserved matter”.
34. I referred earlier to the fact that there is a marked difference between Scottish Parliament’s powers which are defined by identifying matters on which it cannot legislate – a reserved system - and the Welsh Assembly’s powers which are defined by reference to matters on which it can legislate – a conferred system. One of the Silk Commission’s recommendations was that Wales should change from a conferred system to a reserved system – ie that instead of the Welsh assembly having power to legislate on matters which are specifically identified as conferred by the devolution statute, it should be entitled to legislate on any matter save

---

<sup>105</sup> *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3

<sup>106</sup> Government of Wales Act 1998 section 108 and Schedule 7

<sup>107</sup> *Recovery of Medical Costs for Asbestos* [2015] UKSC 3, para 26

<sup>108</sup> *Martin v Most* [2010] UKSC 10; 2010 SC (UKSC) 40

<sup>109</sup> section 45 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007

<sup>110</sup> 2010 SC (UKSC) 40, para 31

one which is specifically reserved to the Westminster Parliament by the statute. This proposal undoubtedly reflects the general perception that a reserved system effectively bestows more power on the devolved legislature than a conferred system. However, consideration of the reasoning towards the end of the judgments of Lord Reed and Lord Thomas in the Welsh *Agricultural Wages* case<sup>111</sup> suggests that matters may not be quite so simple.

35. The 2006 Government of Wales Act<sup>112</sup> sets out specific “subjects” in relation to which legislation falls within the competence of the Welsh assembly, together with specific “Exceptions”. In that case, the relevant subject was “Agriculture. Horticulture. ... Fisheries ... Plant health ... Rural development”<sup>113</sup>. The issue was whether a Bill regulating agricultural wages fell within this provision. Having held that it related to “Agriculture” because “its purpose was to regulate agricultural wages so that the agricultural industry in Wales would be supported and protected”<sup>114</sup>, the Supreme Court then had to consider whether the Bill nonetheless was outside competence because, in addition to relating to Agriculture, the Bill also related to “employment and on industrial relations”<sup>115</sup>, which were not devolved matters. The Supreme Court held that this did not invalidate the Bill, saying: “Provided that the Bill fairly and realistically satisfies the [statutory] test [ie it relates to Agriculture] and is not within an exception, it does not matter whether in principle it might also be capable of being classified as relating to a subject which has not been devolved”<sup>116</sup>. It may be said that, under a reserved system, employment and/or industrial relations would have been expressly reserved matters, which could have rendered the Bill invalid. As Lord Hope said in the Scottish *Imperial Tobacco* case<sup>117</sup>, “if the provision in question has two or more purposes, one of which relates to a reserved matter ... the fact that one of its purposes relates to a reserved matter will mean that the provision is outside competence”.

36. There are other distinctions between the Scottish and Welsh devolution cases which have come to the House of Lords or Supreme Court. First, there have been significantly more Scottish cases, and they have tended to come earlier. We have had three Welsh cases in the

---

<sup>111</sup> *Agricultural Sector (Wales) Bill (Attorney General for England and Wales, Ref)* [2014] UKSC 43, [2014] 1 WLR 2622

<sup>112</sup> In Part 1 of Schedule 7

<sup>113</sup> see the *Agricultural Sector Bill* case (footnote 111), para 31

<sup>114</sup> *Ibid*, paras 52-54

<sup>115</sup> *Ibid*, paras 55-56 and 65

<sup>116</sup> *Ibid*, para 67

<sup>117</sup> *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153, para 43



Supreme Court, one in 2012<sup>118</sup>, one in 2014<sup>119</sup> and one in 2015<sup>120</sup>, whereas there have been quite a few more Scottish cases, the earliest of which<sup>121</sup> came well before the Law Lords transmogrified into Supreme Court Justices. This is probably explicable by the fact that the population of Scotland is twice that of Wales, and, more importantly, the devolved powers of the Scottish Parliament are more extensive than those of the Welsh Assembly.

37. What may be harder to explain is the marked difference in how the devolution cases came before the Supreme Court. All three Welsh devolution cases involved the Counsel General (on behalf of the Welsh devolved government) was contending that a Bill (not yet an Act) would be within the competence of the Welsh government, and in two of those cases, it was the Attorney General (on behalf of Westminster) who was the opposition<sup>122</sup>, and in the third case, the Attorney General was the respondent, but he adopted a neutral stance, and the opposition was put forward by insurers, who were joined as interested parties<sup>123</sup>. By contrast, no Scottish devolution case has involved a Bill; all cases involving challenges to the validity of Scottish devolved legislation have been brought by non-governmental (normally commercial) entities against Acts which have actually been passed by the Scottish Parliament: the most recent example is the *Christian Institute* case<sup>124</sup>.

38. These differences no doubt reflect the particular circumstances in which each of the devolution settlements operates. Whereas the current Welsh settlement is relatively tramelled, more subject to change, and characterised by so far rather ill-defined categories of “conferred” powers, the Scottish experience is one of relative clarity, stability and legislative freedom. The different experiences may also reflect an important historical distinction between the two states. Scotland has, of course, always had its own legal system, both in terms of both law and judiciary, whereas, after more than 400 years of being part of a unitary system, Wales has only now started to develop its own legal identity, although if course there has been a Welsh independence movement since at least the 1850s<sup>125</sup>. Welsh devolution has therefore been operating from a standing start, whereas Scottish devolution has not.

---

<sup>118</sup> *Local Government Byelaws (Wales) Bill 2012 - Reference by the Attorney General for England and Wales* [2012] UKSC 53

<sup>119</sup> *Agricultural Sector (Wales) Bill (Attorney General for England and Wales, Ref)* [2014] UKSC 43

<sup>120</sup> *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill (Reference By The Counsel General For Wales)* [2015] UKSC 3

<sup>121</sup> *Anderson v. Scottish Ministers & Anor (Scotland)* [2001] UKPC D5, [2003] 2 AC 602 (in those days, devolution cases came to the Judicial Committee of the Privy Council)

<sup>122</sup> see footnotes 118 and 119

<sup>123</sup> see footnote 120

<sup>124</sup> *The Christian Institute v The Lord Advocate (Scotland)* [2016] UKSC 51

<sup>125</sup> *The Welsh Academy Encyclopedia of Wales*, ed J Davies, N Jenkins, M Baines and P Lynch (2008)

39. The use of the Scotland Act 1998 by commercial litigants to constrain devolved legislative power is reflected in the recent challenge to Scottish legislation using European Union law in the *Scotch Whiskey Association* case<sup>126</sup> may be said to indicate that the enjoyment of a more established and fully fledged constitutional arrangement can inspire bolder challenges to devolved legislation. In this way, the limits of the UK's flexible and soft-edged constitutional rules are tested, and, consistently with our constitutional experiences over the past 350 years, we can reasonably expect that pragmatic solutions can be found to the problems which will inevitably arise.
40. As is appropriate in our system, the nature and extent of devolved powers will continue to be developed by the Westminster Parliament, as a result of democratic and political processes, in legislation which will then be implemented and applied by the devolved legislatures, and both the Westminster and the devolved legislation will be interpreted by the courts, whose decisions will then inform future developments in Westminster. Over time, and given the significant constitutional questions presently on the judicial horizon, we may be able to hope for a greater degree of certainty in spite of the absence of a formal written Constitution, and the challenge of the pace of change of our surroundings.
41. In the light of the developments I have been discussing in this talk, in particular the increasing amount of constitutional legislation and the increasingly complex and increasingly questioned constitutional arrangements, there is undoubtedly a case for saying that the time has come for the United Kingdom to adopt a formal written coherent Constitution. However, in that context, the typically British and pragmatic argument "if it ain't broke don't fix it", has obvious resonance. Having said that, there are some people who feel that it is broke, and others who feel that there is a duty to act before it gets broke. But, even those people must accept not merely that the grass always seems greener on the other side of the fence, but also that experience shows that the fact that a particular arrangement works well in one country, even in most countries, does not necessarily mean that it will work here. And that may have particular resonance for the UK, with its very unusual constitutional history and its very fortunate political history over the past 350 years. There is much to be said for standing by the proposition that the United Kingdom has pragmatic and flexible constitutional arrangements, which, despite their flaws, are suitable for a country in the position of the UK both internally and in the context of the world in the first half of the 21<sup>st</sup> century.

---

<sup>126</sup> (Case C-333/14) EU:C:2015:527 EU:C:2015:845

42. However, if we are not to adopt a written constitution, then there is a strong case for saying that it would be necessary to consider a more coherent and principled approach to devolution across the UK. A very good starting point for anyone engaged on such a project would be to read the May 2016 Report of the House of Lords Select Committee on the Constitution *The Union and devolution*<sup>127</sup>, although I readily accept that there will be many people who may disagree with some, even most, of its recommendations. The Report identifies the current strengths of the Union, and recommends steps to together with a strengthening of the Union<sup>128</sup>. It also identifies the risks to the Union from various aspects of devolution policy including in particular *ad hoc*, unstrategic and unprincipled devolution laws. Interestingly, rather than calling for a written constitution, the Report calls for “flexible framework, based on appropriate principles, as a guide to future action within which any further demands for devolution can be considered in a coherent manner”<sup>129</sup>, although the Committee rejects the proposal for a new Charter of the Union<sup>130</sup>.
43. Finally, I revert to the courts. It is plain that the constitutional role and responsibility of judges in the UK has increased to a marked extent as a result of the developments over the past 20 years which I have been discussing. And, unsurprisingly, this is more true of the UK’s top court than of any other court. The replacement of the Law Lords by the Supreme Court was not intended to change the powers of the UK’s top court, and I do not think that it has done so. However, the Supreme Court has been conceived, born and brought up at a time of constitutional changes which have required the judges in the UK, and particularly its top court, to have an ever-increasing constitutional role. We judges have not asked for this change, but we have accepted it with, I hope, an appropriate attitude of commitment and independence. Our concern to ensure that we maintain the rule of law without inappropriately expanding our role is, I think, well demonstrated by the decision and reasoning in the *AXA* case which I discussed earlier<sup>131</sup>, and I trust that this attitude will continue.
44. So far as the institutional aspects of the courts are concerned, the United Kingdom is like all common law countries in having a single Supreme Court, which is supreme for all judicial

---

<sup>127</sup> HL Paper 149, published 25 May 2016, <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/149/149.pdf>

<sup>128</sup> *Ibid*, recommendations 32ff

<sup>129</sup> *Ibid*, recommendation 24

<sup>130</sup> *Ibid* recommendations 40ff

<sup>131</sup> See paras 24 and 25 above

purposes, and I would strongly argue that this should remain the position. The growth of constitutional cases does not justify the expense and confusion of creating a new Constitutional Court, such as one finds in all civilian law countries, any more than the growth of judicial review cases has not justified the creation of a new Supreme Administrative Court, such as one finds in most civilian law countries. Furthermore, particularly in an era where so much is changing, it seems to me that there is strong argument for saying that the current simple courts structure in all parts of the UK should be largely maintained, and an overwhelmingly strong argument for saying that that structure should never be made more complex.

David Neuberger

Glasgow, 14 October 2016