

The EU Court of Justice and the EU Charter: An Independent View

Speech at the Social Market Foundation
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INTRODUCTION

My talk this evening is entitled “The EU Court of Justice and the EU Charter: an independent view”. Let me open with a few words of introduction and explanation.

George Orwell once remarked that “Perhaps a lunatic is a minority of one”, and as you may know, I have taken a position on the current Brexit debate which is somewhat unusual among MPs. That is to be decided, but undeclared; to remain publicly neutral in order to assist wavering voters in my constituency and elsewhere to reach a decision in their own terms, with information and advice that are as impartial and independent as possible. A referendum is not an act of representative government, and I am not a minister, so my vote can properly be a private one. I am not being paid to exercise it, and of course it has exactly the same weight as any other. Rather to my surprise, this approach has very been widely welcomed by my constituents.

I approach the vexed issues of the ECJ and the EU Charter in that spirit. To some people, the Court and the Charter conjure up images of a silent takeover, and the gradual usurpation of the rights of the freeborn Englishman by shadowy continentals waving obscure protocols. To others, they signify the steady elaboration of a benign and consistent legal order anticipating a Kantian Perpetual Peace of trans-continental government. This makes for highly entertaining, or perhaps stultifying, political knockabout; but it does little to help the undecided voter. Of course, the truth must lie somewhere in between these poles, but just where, exactly—or inexactly? That is the question I will try to address.

Some people may take what I say here as tacitly advocating Brexit; others as offering arguments for the UK to remain, but within a reformed EU legal order. Just to be clear: I am doing no such thing, and I doubt any good decision on an issue as complex and nuanced as the EU Referendum could be taken on such specific grounds. Rather, my aim is to present these issues as neutrally as I can to anyone who may be interested. But in the event that the UK does decide to remain, I offer four fairly punchy proposals for reform at the end.

The third point is this. I am a Member of Parliament with a background in philosophy and history, not a lawyer. I have had no legal training whatever, and so I am entirely unequipped to offer any expert view of these issues, and have had to rely on a range of authorities and knowledgeable sources in relation to the

more fiddly bits. I will not incriminate them by mentioning their names here; but they know who they are, and to them I am very grateful.

I hope there is some value in this lay perspective. Public discussion of any even vaguely European matter is beset by partisanship, as I discovered when I co-wrote a pamphlet in 2009 called *Churchill's Legacy: the Conservative Case for the Human Rights Act*.¹ My goal, however, is not to stir up political feeling. It is to try to look, from the perspective of the British man and woman on the street, at the EU Charter and at how it interacts with the ECJ: to examine the facts, and see where, if anywhere, they lead.

THE EU CHARTER OF FUNDAMENTAL RIGHTS

For the sake of clarity, we first need to review the EU Charter and the wider context. Let us recall that we are dealing here with two separate legal structures. On one hand, we have the European Convention on Human Rights, created by the Council of Europe after the Second World War and subject to the aegis of the European Court of Human Rights in Strasbourg. On the other, we have the EU Charter of Fundamental Rights, recently brought into force by the Lisbon Treaty and subject to the aegis of the EU Court of Justice in Luxembourg. The names may be similar, but the Convention and the European Court of Human Rights predate, and broadly speaking have nothing to do with, the European Union, or its predecessors the EC, EEC, or European Coal and Steel Communities. Someone who dislikes the EU has no reason as such to dislike the European Convention, and *vice versa*; they are different things.

The EU Charter contains what it describes as 50 “fundamental rights” or freedoms, arranged under the headings or “Titles” of “Dignity”, “Freedoms”, “Equality”, “Solidarity”, “Citizens’ Rights”, and “Justice”. These cover a wide range of topics, including rights modelled after or repeating those of the Convention such as the right to life, freedoms of expression, religion and association, the right to a fair trial and the prohibition on torture. But they also include entitlements in areas such as biomedicine and eugenics, personal data, rights to engage in work and conduct a business, rights of the child and the elderly, and the rights to vote. And under Title IV they include rights of collective bargaining, a right of access to a free placement service, and rights to social security, healthcare, and environmental and consumer protection. These rights originally derive from the Community Social Charter 1989 and the Council of Europe’s Social Charter 1961; the effect of their inclusion is to upgrade them to the status of fundamental rights.

A further four articles state, among other things, that member states must “respect the rights and observe the principles”—principles being wider and more aspirational statements of potential right. They also state that the Charter rights do not establish any new powers for EU institutions, apply “only when

¹ with Peter Osborne; Liberty, 2009

implementing EU law”, and that where they correspond to Convention rights they are to be read as having the same meaning, and at least the same scope, as those rights.

The Charter’s rights are generally drafted more emphatically and in a less qualified way than the Convention rights.² For example, both the Article 7 right to a family life and the Article 11 freedom of expression are unqualified rights in the Charter, while their Convention equivalents are carefully qualified. And the Charter rights are not self-standing: they must be read alongside a set of accompanying Explanations, which set out how they are to be interpreted and applied. This combination of rights, freedoms and principles, and their relation to the Explanations provided, is very far from clear. An authoritative recent survey has concluded that “No consistent or legally relevant distinction is... drawn in the Charter between the concepts of right and freedom”, and that “In the absence of precise guidance, the distinction between right and principle, though important, seems set to remain obscure and unpredictable.”³

The Charter itself began life in at the Cologne European Council meeting in 1999, after the ECJ held in 1996 that the EU treaties did not permit the EU’s accession to the European Convention on Human Rights. The Charter was then described as a “solemn proclamation”, and was designed to strengthen the EU’s political legitimacy, containing rights and freedoms “derived from the constitutional traditions common to the Member States, as general principles of Community law,” as well as strengthening the rights of individuals and constraining the actions of EU institutions. It may also have been intended to assist EU processes of federalization, and to remove the perceived embarrassment in some quarters that EU states were subject as regards human rights law to the separate Council of Europe and European Court of Human Rights.

The Charter was originally a political and not a legal document—though drafted with possible incorporation in mind—and was published as such by the Commission. Its rights were quickly referred to, by Advocates General and in due course the full Court. It was part of the EU Constitution, and when that was withdrawn following its rejection in referenda by the French and the Dutch, a modified version of the Charter was attached to the Lisbon Treaty. The Lisbon Treaty was then rejected by the Irish, but accepted after the agreement of several key opt-outs. The Charter became a binding legal authority when the Treaty finally entered into force in December 2009.

² “Beano No More: The EU Charter of Rights After Lisbon”, Kieron Beal and Tom Hickman, Blackstone Chambers, *Judicial Review*, June 2011, Vol. 16 Issue 2

³ David Anderson QC and Cian C. Murphy, “The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe”, *EUI Working Paper* 2011

THE POSITION OF THE UNITED KINGDOM

However, the Charter was contested from the start by the UK. The UK opposed its creation, sought to prevent its recognition as a legal document, and tried to dilute its effect by the inclusion of the Explanations. It worked unsuccessfully to prevent its attachment to the Lisbon Treaty, and then to limit its effect by reference to national laws. The UK's concern was both general, as to the wisdom of the Charter, especially given the existence of the separate European Convention; and it was specific, as to the potential impact of the Title IV socio-economic rights on UK law. Finally, the then government negotiated Protocol 30 alongside Poland, in an effort to clarify, and so protect the UK from, the application of these rights.

In June 2007 Tony Blair aptly summarised public concern by saying in Parliament: "We wanted to ensure... that there would be no question whatever of our being in a position where either the European Court of Justice or our own UK courts could use the Charter of Fundamental Rights to extend or expand UK law, particularly in the labour market or the social sphere." He then referred to Protocol 30 by saying that "It is absolutely clear that we have an opt-out... from the Charter." And then, "With the greatest respect, it is important that people actually pay some attention to the facts when mounting their argument..."⁴

The press reaction to news of the opt-out was highly positive. The *Daily Mail* opined that "Mr Blair's final appearance on the European stage produced a clear negotiating success as Britain won a legally-binding opt-out from the controversial charter," and this view was shared by other papers including the *News of the World*, and the *Daily* and *Sunday Express*.

Unfortunately Mr Blair's salutary injunction about the need to pay attention to the facts also applied pre-eminently to Mr Blair himself. For in fact he and the Government were quite aware at the time that Protocol 30 was not an opt-out. Rather, as ministers quickly confirmed, it was intended to be a clarification that the Charter did not extend the ECJ's powers, and specifically that the Title IV socio-economic rights did not apply in the UK or Poland except insofar as provided for in national law. In the words of Lord Goldsmith, who helped negotiate the Protocol, it was "An explicit confirmation that in relation to the UK and UK law, the limitations and constraints on what it is and what it will do will be strictly observed."

So what was going on? According to one academic analysis, in 2007 the Blair government was struggling to secure support for the Lisbon Treaty, in the face of its clear commitment two years earlier to hold a referendum on the previous, similar Constitutional Treaty. It wished to placate opponents, while at the same time reassuring other EU member states and the trades unions, who had threatened to oppose the treaty. It therefore briefed the eurosceptic press that Protocol 30 was an opt-out, turning opposition into valuable support, while

⁴ Hansard, 25 June 2007

CHECK AGAINST DELIVERY

telling “informed” audiences that it was merely clarificatory. As Professor Catherine Barnard has put it, “The perception of an opt-out, and certainly the existence of the Protocol, helped the UK Government make the case that the Lisbon Treaty was different... and there was no need for a referendum.” In short, “The Protocol to the Charter was an exercise in smoke and mirrors.”⁵

However this may be, the status of Protocol 30 was not contested by the incoming Coalition government. Indeed, the legal position was made absolutely clear by the Home Secretary in 2010, in the case of *NS*. Arguing against the judgment of Cranston J that Protocol 30 meant that the Charter did not have direct effect in UK law, the Home Office pleadings specifically stated “Contrary to the Judge’s holding, the Secretary of State accepts, in principle, that fundamental rights set out in the Charter can be relied upon against the United Kingdom, and submits that the Judge [in the High Court] erred in holding otherwise. The purpose of the Charter Protocol is not to prevent the Charter from applying to the United Kingdom, but to explain its effect.”⁶ As has been remarked, “There can no longer be any real doubt that the Charter has legal effect in UK law and that it can be relied upon by litigants here as a source of human rights protection.”⁷

This is perhaps surprising, since the Conservative party had pressed the Government hard in opposition on both the Charter and the Protocol. In 2009 David Cameron had stated unequivocally: “We will want a complete opt-out from the Charter of Fundamental Rights.” In November 2015, he said as Prime Minister instead that “We will enshrine in our domestic law that the EU Charter of Fundamental Rights does not create any new rights”, though it was not clear either why this was legally necessary, or what beneficial effect such a move could have. On the wider issue, the Foreign Secretary said in testimony to the European Scrutiny Committee in the same month that “The Charter of Fundamental Rights is enshrined in the European Union architecture. We have no proposals in the package we have put forward that would disengage from that.”⁸

Finally, the *Draft Decision of the Heads of Government* of the EU—part of the Prime Minister’s Referendum deal in February of this year—simply repeats the reference to Protocol 30, adding that “The references to an ever closer union

⁵ Catherine Barnard, “The ‘Opt-Out’ for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?”, in *The Lisbon Treaty*, Springer (2008), Volume 11, pp 257-283

⁶ *R (on the application of NS) v Secretary of State for the Home Department (Reference to ECJ)* [2010] EWCA Civ 990, para 8

⁷ Beal and Hickman, op. cit.

⁸ *The application of the EU Charter of Fundamental Rights in the UK: a state of confusion*, European Scrutiny Committee, HC Paper 979, 26 March 2014

among the peoples of Europe do not offer a basis for extending the scope of any provision of the Treaties or of EU secondary legislation.” But it is not clear that the Government made any attempt during the negotiation to convert Protocol 30 into a genuine opt-out.

THE PRESENT POSITION

So where, then, does this leave the UK? Many would argue that there is little cause for concern, on several grounds. Non-specialists may welcome the Charter as a valuable expansion of the legal basis for human rights, and those on the political left may especially welcome the classification of the Title IV socio-economic rights as fundamental rights. Those who follow these matters closely may concur with the report last week of the House of Lords’ European Union Committee, which concluded that the Charter had narrower legal application than the Convention, and that the evidence presented did not suggest that the ECJ is using the Charter to expand the reach of EU law over member states.⁹

On the other hand, however, from a specifically UK perspective one can without difficulty identify six grounds of potential concern.

The first is that the Charter was not adopted by what we might normally consider an adequately legitimate process. Of course, this is hardly a necessity: after all Magna Carta itself was the product of threats, coercion and attempted manipulation on all sides. We are not demanding here the procedural genius of a James Madison, who, having steered the US Constitution through the 1787 Convention, then realised that the new Constitution needed the substantive protections of a Bill of Rights, and then persuaded the Thirteen States to adopt one. But consider: the creation of the Charter was rushed and inept; it was drafted and published as a political not a legal document; and it was originally part of the EU Constitution, which was specifically rejected at the ballot box by France and Holland, and then the Lisbon Treaty, which was rejected by Ireland and had to be resubmitted for later ratification. Far from being derived from the constitutional traditions common to the Member States, as was claimed, many of its rights are alien to UK constitutional tradition and legal practice. Specifically, to UK legal eyes its Title IV socio-economic rights are not so much fundamental rights as, clearly, political claims that are still contested.

Second, the Charter itself appears to be manifestly unsatisfactory by the standards of UK jurisprudence. The ECJ itself laid down what one should expect, in the *Intertanko* case: “The general principle of legal certainty, which is a fundamental principle of Community law, requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly.” Yet as we have seen, the Charter is itself vague and muddled in places in its treatment of rights, freedoms and principles. In the words of Lord Goldsmith, who took part

⁹ *The UK, the EU and a British Bill of Rights*, HL Paper 139, 9 May 2016

in the negotiations, “I believe the Charter lacks the precision of language necessary to allow it legal force.”¹⁰

Third, the Charter has created significant additional uncertainty and ambiguity in European rights law. Following its introduction, people living in the EU are governed by four overlapping and potentially conflicting bodies of human rights law: domestic law, pre-existing general EU principles of law, the European Convention, and now the EU Charter. The EU could have used the Charter when it was adopted to supersede relevant pre-existing principles, but it chose not to. Our own Government said in its recent Balance of Competences Review that its position is “That the rights in the Charter have the same meaning and scope as the general principles they reaffirm; they are not two distinct groups of rights in EU law that are potentially subject to disparate interpretation.” But this feels like an assertion, rather than an argument; no reason is given why they could not diverge. Finally, the ECJ has arguably itself compounded this uncertainty by again blocking the EU’s accession to the European Convention in December 2015, thereby allowing itself to be dragged further into a jurisdictional turf war with the European Court of Human Rights.

Fourth, there is clear evidence that the influence on our law of ECJ human rights rulings under the EU Charter is expanding. In theory, the Charter applies primarily to the institutions of the EU itself. In relation to the member states, the key phrase is that the Charter applies “only when implementing Union law”. But this has turned out to include measures that come in any way within the scope of EU law. The *Fransson* case concerned a domestic prosecution for tax evasion over VAT in Sweden. Yet despite the fact that the EU legislation had not been adopted into EU law, the ECJ found that the Charter nevertheless applied simply on the grounds that VAT was originally an EU tax. This elicited a sharp rebuke from the German Constitutional Court, that the Charter should not be relevant in such incidental cases. Perhaps surprisingly, the UK had not sought to intervene in the case.

Data retention is another whole area which seems to be being brought under EU law by means of the Charter, as witness the *Digital Rights Ireland* case, and the case presently lodged by my colleagues David Davis and Tom Watson against DRIPA 2014, now before the ECJ. This falls in an area long seen as the exclusive province of Parliament.¹¹

The presently pending UNISON case is perhaps a further case in point. In challenging employment tribunal fees, UNISON failed in relation to Article 6 of the European Convention on Human Rights, which guarantees a right to a fair

¹⁰ Quoted in European Scrutiny Committee, op. cit.

¹¹ For discussion of these cases, the important *Schrems* judgment and the wider effect of the Charter, see Marina Wheeler QC, “Cavalier with our Constitution: a Charter too far”, UK Human Rights Blog, 9 February 2016

trial. Because many employment tribunal cases concern rights derived from EU law, such as over working time and discrimination, they were also able to run an argument under Article 47 of the EU Charter, which guarantees an effective remedy. The Court of Appeal rejected this argument, but the Supreme Court has granted leave to appeal. Even if the appeal fails, a similar one might well succeed, and a benchmark thereby established on the basis of fundamental rights in an area of employment law that is still politically controversial.

More broadly, the “scope” interpretation means that the Charter can apply to measures that do not implement, but actually derogate from, EU law. As David Anderson QC and Cian Murphy have pointed out, citing a string of cases, its “application becomes potentially extremely broad”, especially given “The remarkable range of national activity falling within the scope of the “four freedoms” – particularly the free movement of goods and the freedom to provide services.” It is perhaps not surprising that the former Attorney General Dominic Grieve, a man very widely respected for his nuanced understanding of human rights, recently described the European Court of Human Rights as “a very benign institution”, while noting “predatory qualities” in the ECJ “that could be very inimical to some of our national practices.”¹² Though the ECJ rejected the suggestion by Advocate-General Sharpston that it extend its powers of review over any area of material EU competence, even if unexercised, this may be a sign of things to come.

Fifth, Protocol 30 gives some protection against the application of Title IV socio-economic rights, but does not go far enough. It is sometimes forgotten that the EU has conceded important Treaty exemptions to other nation states by protocol. These include the UK-Ireland security exemption, Protocol 32 protecting ownership of land in Denmark, and Protocol 35 protecting the Irish constitution on rights of the unborn child. As one legal commentary has remarked, “Had the Protocol wished to state that national measures could only be challenged on the basis of rights already expressly recognised as fundamental rights under EU law, it could—and should—have said so.”¹³ It is notable that the present Government has not sought to push beyond Protocol 30, either in the case of *NS* or in the recent pre-Referendum negotiations.

Sixth, in constitutional terms, as matters stand we are more or less legally defenceless against a further extension of ECJ powers via the Charter. In the words of Lord Mance, commenting on the Charter, “Parliament by the European Communities Act 1972 stipulated that all rights, powers, liabilities, obligations and restrictions arising by or under the European Treaties ‘are without further enactment to be given legal effect or used in’ the UK. This gives rise to a paradox. Having so stipulated, no explicit constitutional buttress remains against any incursion by EU law whatever... There are therefore few

¹² Quoted in European Union Committee, op. cit.

¹³ Beal and Tom Hickman, 2011

limits to the dominance of EU law.”¹⁴ Against this, it has been argued by Professor Piet Eeckhout, a leading authority on EU law, that there is no cause for concern here, because the ECJ has behaved with a degree of circumspection both as regards the application of socio-economic rights and the potentially expansive scope of the Charter.¹⁵ However, this simply concedes the point: it underlines the extent of the ECJ’s latent powers, without any description of how these powers are being or might be genuinely constrained, and ignoring the question whether it should have those powers in the first place. But discretion is no substitute for law; quite the contrary. As Lord Shaw of Dunfermline remarked over a century ago, “To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.”¹⁶

The current position of the UK is therefore this. As a result of the EU Charter, our human rights are now subject to the direct effect of a rights instrument, and indeed a style of law, which in parts is historically foreign to UK legal practice, and which the UK made serious efforts to prevent. The Charter has created significant additional uncertainty in European human rights law, and its influence within our law is steadily expanding. Protocol 30 gives some protection, but not enough, and the present Government has not acted to fill the gap. Constitutionally, the UK has few if any safeguards against future expansion of Charter rights by the ECJ.

FOUR PROPOSALS FOR REFORM

I end with four proposals for reform. If the UK were to leave the EU after June 23rd, then obviously the legal landscape would change profoundly. At some point this country would no longer be subject to EU treaties, the Charter or the ECJ; and the specific concerns I have raised would fall away, perhaps to be replaced by others.

But if UK remains in the EU, then—whatever one’s politics, or view of the EU—I would suggest these proposals deserve very careful consideration.

Proposal 1: Focus on the real issue

The Conservative party has long been committed to the repeal of the Human Rights Act, and its replacement by a British Bill of Rights. This was a manifesto

¹⁴ “Destruction or Metamorphosis of the Legal Order?” Speech by Lord Mance at the World Policy Conference, Monaco, 14 December 2013

¹⁵ P. Eeckhout, ‘The Real Record of the EU Charter of Fundamental Rights’, UK Constitutional Law Blog, 6 May 2016

¹⁶ *Scott v. Scott* [1913], AC 417, 477

commitment in both 2010 and 2015, and it now appears certain that legislation to introduce such a Bill will feature in the Queen's Speech this coming Wednesday.

In the meantime, the Home Secretary has set out her own views of the legal position. In a wide-ranging speech last month, she argued that the UK was seriously hampered by human rights law. The solution she advocated was to remain in the EU, and so subject to the ECJ and the EU Charter, but to withdraw from the European Convention of Human Rights, which she said "can bind the hands of Parliament", and which had among other things delayed for years the extradition of Abu Hamza (to the USA) and almost stopped that of Abu Qatada (to Jordan).¹⁷

But this is a very curious line of thought indeed. First of all, these words were *obiter dicta*, which plainly do not reflect government policy. In effect, the Home Secretary was using the present suspension of ministerial collective responsibility over the EU Referendum, not to argue for or against Brexit, but to make a point about her view of human rights.

Secondly, her remarks were factually inaccurate. For one thing, quite regardless of the European Convention, the removal of a prisoner to a place where they would be at risk of inhuman and degrading punishment, as was the concern with the deportation of Abu Hamza, or of torture, as was the concern with Abu Qatada, has not been tolerated under English law for some 350 years. After all, one of the articles of the impeachment of Charles II's Chief Minister, the Earl of Clarendon, in 1667 was that he had sent persons to "remote islands, garrisons and other places, thereby to prevent them from the benefit of the law". Furthermore, if the UK had not been subject to the European Convention, it is not hard to imagine a similar appeal being lodged under the UN Convention against Torture, to which the UK has been a signatory since 1988. This has happened in Canada, and the Canadian courts have allowed deportation given assurances, as the European Court of Human Rights did with Abu Hamza.

But, more seriously still, the European Convention does not "bind the hands of Parliament", as the Home Secretary suggested. At the national level, it is an instrument of indirect effect, which can at most give rise to a declaration by a UK court of incompatibility with the Convention. It is then up to Parliament to rectify the incompatibility, or not. In some cases, moreover, as with prisoner voting, there may be no such declaration, in which case an adverse judgment by the European Court of Human Rights can be left hanging. The Convention—as given effect by the Human Rights Acts—thus respects the sovereignty of Parliament.

So, thirdly, the Home Secretary's position amounts to this. She considers two broad instruments of human rights, the European Convention and the EU Charter. Of these, the Convention was carefully drafted by British jurists; came

¹⁷ Published on Conservative Home, 25 April 2016

into force over 60 years ago; has a vast body of associated jurisprudence; is independent of any individual nation state or polity; and is almost entirely limited to rights drawn from the English common law. It has only indirect effect on our domestic law; respects the sovereignty of Parliament; and falls under a specialist human rights court which is not legally superior to our own Supreme Court.

The EU Charter, by contrast, was hurriedly pulled together from many legal and political traditions; came into force seven years ago; has a smaller body of accrued jurisprudence; is—formally at least—linked to the political goals of the European Union; and adds to the Convention rights a host of other rights and entitlements, including socio-economic rights which the UK has consistently opposed. It has direct effect on our domestic law; can be used to overturn or disapply an Act of Parliament immediately; and falls under a court which does not specialise in human rights, and which is legally superior to our own Supreme Court.

The conclusion, I would suggest, is evident. Both intellectually and constitutionally, the Home Secretary's position is, unfortunately, wholly unsustainable. On every single one of these points, the European Convention is preferable to the EU Charter. And on every single one of these points, it is preferable on specifically conservative grounds.

Proposal 2: Include the Charter and the ECJ in the forthcoming consultation on a British Bill of Rights

To prepare the way for the proposed new British Bill of Rights, the Attorney General recently announced an “intention to consult on the future of the UK's human rights framework both in this country and abroad.”¹⁸ This follows a Bill of Rights Commission in the last government, which issued two consultations of its own but was unable to reach a commonly agreed conclusion, and failed even to elicit a formal response from government.

According to the Justice Secretary, the consultation paper will “contain a series of open-ended questions, the aim being to secure the broadest possible consensus behind whatever change is considered desirable.”¹⁹

Now there may be useful scope to tighten up the jurisprudence that has developed around the Human Rights Act. But the Government faces a serious potential dilemma here if it tries to go further than this. On the one hand, it is hard to see how any new British Bill of Rights can be a genuinely substantive piece of legislation. The Government has, rightly, made clear its unwillingness to withdraw from the European Convention on Human Rights, and since the point

¹⁸ Hansard, 26 April 2016

¹⁹ Quoted in European Union Committee, *op. cit.*

of any such Bill is to bring Convention rights into British law this implies no change—or virtually no change—to the substance of the rights themselves. On the other hand, however, a Bill which is not genuinely substantive raises the question of what its point is. All the more so when so much has been promised over ten years and two party manifestoes.

And, with an effective Government majority of 18, the politics of such a Bill are no less problematic. Substantive change will alarm Tory moderates, while superficial change is likely to elicit a severely negative reaction from those, including in parts of the media, who have campaigned for a new Bill of Rights in the desire and belief that it would roll back the scope of rights in this country.

So here is a proposal. The forthcoming public consultation on human rights should include not just a British Bill of Rights, but the EU Charter. The Charter rights, their relation to the ECJ, their direct effect in our law and our lack of constitutional protections are the real elephant in the room here. It would be absurd and arbitrary to have a consultation which does not address these issues. But, I suggest, it would also be politically wise to include the Charter. Those who worry, with some justification, that the Convention may be pushed aside over time by the Charter would be reassured; but so would those who fear the Charter as a source of rights inflation.

Proposal 3: Take a sovereign remedy

I turn now to the question of remedies. The genius of our constitution is not that it is unwritten—much of it is in fact written down, in statute, rules of procedure etc.—but that it is unentrenched. We have no fundamental laws, and no constitutional court charged with checking to see if legislation is compliant with them. Rather, our constitution is in large part an extension of the methods of the common law to the practice of governing. It is provisional, and any aspect of it can in principle be revised or repealed. The result is to keep our constitution in a perennial dynamic tension with political consent and consensus. The narrow rulebook stays connected with what one might term, à la Montesquieu, the spirit of the nation.

The existence of a constitutional court in the ECJ, which is superior to our own Supreme Court and whose judgments have direct effect in our law, thus poses a serious potential challenge to our constitutional arrangements. Outside the area of human rights, this first became obvious in 1991 in the *Factortame* case, when the Law Lords decided that a domestic statute should be disapplied in the event of conflict with EU law, thereby partly overturning the doctrine that a later statute implicitly repealed an earlier one.

As I have noted, the ECJ has not generally flexed its muscles in relation to our domestic law since the Charter came into force. But the fact remains that, if it chooses to do so in a way contrary to statute, our constitution appears to afford us virtually no protection against such a judgment, which would take immediate and direct effect in our law. In the *Benkharbouche* case, for example, Article 47 of

the EU Charter was used to disapply a UK statute—the State Immunity Act 1978, in a diplomatically sensitive area of law—automatically in the relation to the employment rights of two women sacked by the Libyan and Sudanese embassies—and used precisely because the Convention and the Human Rights Act were less effective. If as seems likely, this process—whether or not promoted by the ECJ itself—continues, then its impact over time will be to push Convention and the European Court of Human Rights increasingly out of the picture. From a UK perspective, that is a very unattractive prospect.

Can we do anything about this? The German Constitutional Court has long used the concept of “solange” or “so long as” law: that so long as the EU effectively safeguards fundamental rights, it will decline to exercise jurisdiction in relevant cases. That is, it reserves its position, and will not be drawn into a conflict of constitutional laws. Here, then, is my third proposal: that Parliament should amend the European Communities Act 1972 to insert a similar “solange” clause: that the UK will abide by EU treaties *so long as* these do not conflict with a UK constitutional instrument.

There is an obvious and immediate possible objection: how can we do this when there is no such thing in our law as a constitutional statute? And if there were, wouldn't this destroy the balance of the constitution? Actually this is far from clear. In the *HS2* case of 2014, the Supreme Court criticised the approach taken by two ECJ Advocates-General, who had demanded close judicial scrutiny of the legislative process by which MPs had evaluated the construction of HS2. This, Lord Reed pointed out with the unanimous support of the six other judges, would put judges in breach of Article 9 of the Bill of Rights—that is, the actual Bill of Rights 1689, which states that “The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court of Place out of Parliament.”²⁰

In a further judgment, supported by their colleagues, Lords Neuburger and Mance listed other instruments that the court took to be similarly fundamental, including Magna Carta, the Petition of Right 1628, the Act of Settlement 1701 and the Act of Union 1707. Certain common law principles might also qualify. As they remarked, in my view correctly, “There may be fundamental principles... of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.”

From this and other cases, it is clear that the legal space is developing for my British “solange” proposal. It might be thought to be subject to an EU action for infringement of the treaties, with potentially substantial fines. But the politics is against this, for such an action would almost certainly be staunchly resisted by a Germany keen to protect the status of its Constitutional Court.

²⁰ *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*, 2014, UKSC 3

Proposal 4: Get serious about the ECJ

My final proposal is a more general one. This is that if the UK does not leave the EU, it should get far more serious about the EU Court of Justice. The Court is a very substantial institution, with an annual budget some seven times that of the European Court of Human Rights. It is ever more influential, not just in our jurisprudence but in our lives, and its influence is growing for the reasons I have discussed, and especially now that the Charter has taken it into the hot-button issues of human rights. But in its origins, procedures and culture the Court remains some way removed from the UK. It is telling, for example, that its *lingua franca*—the language in which its court deliberations and judgments are couched—remains French, while the rest of the EU institutions converse in English. This, it would appear, gives a specifically French cast to its jurisprudence. Separately, there are real concerns that the technical skills of some ECJ judges—especially from newly acceded countries—are not as good as they should be for such a role, perhaps due to political patronage.

Unfortunately the UK as a country is not paying the ECJ the attention and respect it deserves. The court should be recognised as a destination of choice for ambitious young lawyers, and it is not hard to think of ways in which both the public and private parts of our legal system could be encouraged to engage better with the Court. At the same time, the UK should lend its support to more robust processes and expert independent scrutiny of ECJ judicial appointments before they are made. All courts make law, to some degree; this is part of their function, and provided that function is exercised modestly and under properly legitimate authority, rightly so. But just as it has been the case for the UK with the European Court of Human Rights, the creation of closer ties and greater legal dialogue with the ECJ can be a highly important informal protection for us against the dangers of immodest judicial law-making.

Thank you very much indeed.