KENT OPEN LECTURE

THE SUPREME COURT AND THE UK CONSTITUTION

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Famously the United Kingdom does not have a written constitution. But what is the significance of this? A constitution is a body of rules that defines the institutions of government and determines the relationships between those institutions and between the government and the people. Most countries have these rules written down in a single document. Such written constitutions often provide that the rules contained within them are a special category of superior law and that any law or actions in conflict with the constitution will be invalid. If so, the constitution will usually give power to a Supreme Court to decide whether a law is unconstitutional and to strike it down. The constitution of the United States of America, dating back to 1787, on the other hand, does not in so many words give the Supreme Court power to strike down acts of the federal Congress as opposed to the state legislatures. But the Supreme Court very soon held, in *Marbury v Madison,*[1] that this was a necessary incident of a constitution which limited the legislature's powers. And so it has been ever since.

Here in the United Kingdom we do not have such a document. The fundamental principle of our constitution is that Parliamentary is sovereign. This means that Parliament can make or unmake any law, constitutional or not. It also means that there can be no question of the UK Supreme Court striking down or ignoring or calling in question the constitutionality of Acts of the UK Parliament. But there is one important

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

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

qualification to this rule. Parliament itself can give us the power to do so, and this it has done, in rather different ways, in both the European Communities Act 1972 and the Human Rights Act 1998. Parliament has also given us the role, which is a necessary feature of a federal constitution, of ruling on the constitutionality of the acts of the devolved Parliaments and governments in Scotland, Wales and Northern Ireland. To that extent we have become a constitutional court.

Constitutional adjudication is a new animal for the Court. The House of Lords did not do it, except occasionally in a case from Northern Ireland raising questions under the Government of Ireland Act 1920 before direct rule took over in the 1970s. But the Law Lords also sat (and still sit) in the Judicial Committee of the Privy Council. This was the final Court of Appeal from the whole of the British Empire. As the colonies were given increasing degrees of independence, the Privy Council did from time to time have to decide constitutional questions. While appeals still came from federal states, such as Canada and Australia, there were cases about the distribution of powers between the federal and provincial Parliaments. But as all of the so-called 'old' Commonwealth countries and many of the newer ones have given up the right of appeal to the Privy Council, we no longer get such cases. But we do get cases about whether the acts of the national Parliament are compatible with their Constitution. These Constitutions were, of course, first written for them by the United Kingdom.

These cases can be fascinating. In one case from Jamaica, for example, we had to decide whether it was constitutional for the Jamaican Parliament to legislate by ordinary Act of Parliament to do away with the right of appeal to the Privy Council

and substitute a right of appeal to the Caribbean Court of Justice[2]. The right of appeal to the Privy Council was not entrenched in the Jamaican Constitution, so at first sight the answer seemed obvious. But the structure of the higher courts in Jamaica, including the independence of their judiciary, was entrenched. A special majority was required to change it. So, the argument ran, how can it possibly be consistent with the Constitution to provide for a court which had none of the constitutional protection of those courts to be able to overturn their decisions? Such a change could only be made by a constitutional amendment with the required special majority. Somewhat to our surprise, we accepted that argument. The result is that the Privy Council is still the final court of appeal in both Jamaica and Trinidad and Tobago. There is a move in both countries to replace us with the Caribbean Court of Justice, but at present they do not have the required majorities. We would, of course, be sorry to see them go, but it is a matter for them and not for us.

Another striking example came from Mauritius, although in the end it was something of a damp squib.[3] Mauritius has one of the most complicated electoral systems imaginable. It was carefully designed to ensure that each community - Hindu, Muslim, Chinese and the rest – was represented roughly in proportion to their share of the population, but at the same time to produce a clear mandate in Parliament so that a Government could be formed. This meant departing from 'one man, one vote'. It also meant that candidates had to declare to which community they belonged. Some people were reluctant to do this, either because they had no religion or because they did not want to associate themselves with any of the communities. They objected to

[2] *Independent Jamaica Council for Human Rights (1998) Ltd & Ors v Marshall-Burnett & Anor (Jamaica)* [2005] UKPC 3, [2005] 2 AC 356.

[3] *Dany Sylvie Marie and Dhojaven Vencadsamy and others v The Electoral Commissioner, The Electoral Supervisory Commission and The State of Mauritius* [2011] UKPC 45.

the residual 'other' category because in practice it was understood to mean the Christian creoles. So they argued that the electoral system, which was set up in the Constitution itself, was inconsistent with the first section of the Mauritian Constitution, which declares Mauritius to be a sovereign democratic state. After hearing some fascinating argument, however, we declined to decide the question on procedural grounds.

I mention these cases because they are good examples of what constitutional adjudication in the United Kingdom is *not*. We are not concerned with whether Acts of the UK Parliament are compatible with the UK Constitution, because we do not have one written down. As the late Lord Bingham, senior Law Lord from 2000 until 2008, commented extra-judicially, it is ironic that we bequeathed a codified system to most of our overseas territories before granting them their independence, 'while continuing to regard such provision as unnecessary for ourselves'.[4]

However, as every Law student knows, we did have one case in the House of Lords, in which we had to grapple with whether an Act of the UK Parliament was a valid Act of Parliament. I refer, of course, to *R (Jackson) v Attorney-General*,[5] which concerned the validity of the Hunting Act 2004. The first curiosity was that the whole saga had involved a bitter battle between the House of Lords and the House of Commons. The challenge was directed, not to the contents of the Act, but to the manner of its passing. How could nine members of the House of Lords decide this? Were they not being judges in their own cause? Luckily, no-one took the point. Perhaps, as promoters of the Constitutional Reform Act 2005, which was to set up the new Supreme Court, the

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4 '*A Written Constitution*?' Judicial Studies Board Annual Lecture 2004.

5 [2005] UKHL 56, [2006] 1 AC 262.

Government were glad of a cast-iron demonstration of how necessary it was to separate us from Parliament.

The Parliament Act 1911 provided that if a Bill passed through the Commons in three successive sessions, and was rejected three times by the Lords, it would be presented to the King and become an Act of Parliament on receiving the royal assent, so long as two years had elapsed between its second reading in the first of those three sessions and its passing the Commons in the third. But a Bill to prolong the life of a Parliament beyond five years could not be passed in this way. Part of the reform package was to reduce the maximum length of a Parliament between elections from seven to five years. To get through under the new procedure, a Bill would have to start its progress in the Commons quite soon after a general election, so the Government would still have a democratic mandate.

The Parliament Act 1949 reduced the timetable in the 1911 Act from three sessions to two and the minimum delay from two years to one. It was passed under the 1911 Act procedure. So the argument was that 1911 Act had delegated the power of Parliament as lawfully constituted – King, Lords and Commons – to the King and Commons alone. Legislation passed by the modified body was delegated rather than primary legislation. It is a general principle that a delegate cannot use his delegated powers to enlarge those powers unless expressly authorised to do so. He cannot pull himself up by his own bootstraps.

None of us had much difficulty in rejecting that argument. The 1911 Act was not delegating power. It was creating a new way of passing Acts of Parliament. The

language was quite explicit: Bills passed under that procedure would become Acts of Parliament. The legislature had redefined itself. A distinction has to be drawn, as Lord Steyn put it, between what Parliament can do by legislation and what Parliament has to do to legislate.

But are there any limits to what can be done under the Parliament Act procedure? The Court of Appeal had thought that it could not be used to make fundamental constitutional changes to the relationship between Lords and Commons, such as abolishing the House of Lords.[6] None of the Law Lords agreed with that. After all, the 1911 Act had been passed in order to do two very fundamental and very controversial things – to establish home rule for Ireland and to disestablish the Church in Wales. But most of us (apart from Lord Bingham) thought that it would not be possible to get round the prohibition on using it to prolong the life of a Parliament by passing two Bills – one amending the Parliament Act to remove the prohibition and then one to extend the life of Parliament. An Act designed to reinforce democracy by preventing the unelected House from thwarting the will of the electorate ought not to be used to enable the elected House to do so.

Lord Steyn thought that there might be other limits to what Parliament can legislate about:

> 'In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether

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

> this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.'[7]

There are some words in brackets in my own opinion to similar effect.[8] And Lord Hope was prepared to say that:

> 'The rule of law enforced by the courts is the ultimate controlling factor upon which our constitution is based. The fact that your Lordships have been willing to hear this appeal and give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliamentary sovereignty.'[9]

Later on, Lord Hope appeared to accept that there might be other implied limits on the use of the Parliament Act, as did Lord Carswell, but not the one which the appellants proposed. Lord Bingham later commented, in his book on the rule of law, that there was no authority for these propositions, which he regarded as heretical. In his view, the judges did not invent the principle of Parliamentary sovereignty and it was not open to the judges to change it.[10]

But, as I have already said, it is open to Parliament to change it. When the UK entered what was then the EEC in 1973, it had already been established that (within its sphere of competence, which was at that time comparatively narrow), the community legal

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7 At [102].
8 At [159].
9 At [107].
10 Tom Bingham, *The Rule of Law*, 2011, Penguin Books, p 167.

order was a higher legal order than those of the member states. It was necessary to the functioning of the common market that community legislation be interpreted and applied in the same way throughout the community. So the final courts of the member states have an obligation to refer to the Court of Justice in Luxembourg any question of community law which is relevant to the case before them, has not been authoritatively ruled upon already, and is not 'acte clair' – that is, that the answer is so obvious as to leave us in no reasonable doubt that this is how the law would be interpreted by the court and the other member states.[11] But once the answer comes back from Luxembourg, it is for us to apply it to the facts of the individual case. The coercive power of the state to make determinations which are binding upon the government and the people of the United Kingdom remains with us. A neat solution.

At the same time, the courts were given the duty by Parliament to give priority to Community law. Section 2(1) of the European Communities Act 1972 provides that all rights and obligations arising under the treaties are, without further enactment, to be given legal effect as an enforceable right in the United Kingdom. Section 2(4) makes it explicit that any provision of an Act of the UK Parliament has to be construed and have effect accordingly. Thus whenever there is any inconsistency between our law and community (now EU) law, the latter has priority. We do this in two ways. The first is by 'conforming interpretation'. Wherever possible UK laws have to be interpreted in conformity with EU law. It is amazing how much can be done in this way. But sometimes it is simply not possible. So if the EU law in question is one which has direct effect, in the sense of giving the citizen rights against the state, then the inconsistent UK legislation has simply to be ignored. If

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

fundamental rights are concerned, we may even have to do this in disputes between private persons.[12]

Even where EU laws are not directly applicable or effective, there is still a presumption that Parliament intends to legislate compatibly with our obligations in international law. A recent example is the case of Julian Assange.[13] Under the EU Framework Decision on the European Arrest Warrant[14] and the Extradition Act 2003 which transposed that Decision into UK law a warrant has to be issued by a 'judicial authority'. Was the Swedish prosecutor such an authority, given that she was a party to the case, and so lacked the independence and neutrality inherent in the word 'judicial'? The Framework Decision is not covered by our duties under the European Communities Act 1972 and so (unfortunately perhaps) we could not refer the question to the Luxembourg court for its opinion.

It was by no means clear what view the Luxembourg court would have taken had it had jurisdiction to give an opinion, but given the special status of prosecutors in many European countries and the accepted practice of many member states both before and after the Framework Decision, it probably was intended to include them. The majority held that therefore the term used in the Extradition Act had to be so construed. Two of us thought that in the circumstances the interpretative obligation was not so strong as to entitle us to disregard the clear assurances which had been given to Parliament that our courts would only have to enforce arrest warrants which were issued by a magistrate, a judge or a court.

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

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

14 2002/584/JHA.

Our relationship with the European Court of Human Rights in Strasbourg is quite different from our relationship with the Court of Justice of the European Union in Luxembourg. The European Convention on Human Rights does not introduce a higher legal order which has to be enforced in the United Kingdom courts even in the face of incompatible UK legislation. The Human Right Act 1998 translates the rights guaranteed in the Convention into rights in United Kingdom law. It is unlawful for a public authority to act in a manner which is incompatible with those rights. That includes the courts.

So what are we to do when confronted with UK legislation which is inconsistent with those rights? As with European Union law, the Human Rights Act imposes upon us a duty of 'conforming interpretation'. Wherever possible, legislation has to be read and given effect compatibly with the convention rights.[15] This can take us a long way. In *Ghaidan v Godin-Mendoza*,[16] for example, a majority of the Law Lords felt able to interpret 'living together as husband and wife' (in the Rent Act provisions about succession to statutory tenancies) to include a same sex couple. It was the nature and quality of the relationship, rather than the complementarity of gender, which was the essential characteristic.

But sometimes it is not possible to do this. And in that case we have power to make a declaration that the statutory provision in question is incompatible with the convention rights.[17] This does not affect its validity in UK law or the validity of things done under it. The Government has three choices. First, it can promote a fast track remedial order to put things right. This is appropriate when it is a relatively simple

15 Human Rights Act 1998, s 3(1).
16 [2004] UKHL 30, [2004] 2 AC 557.
17 1998 Act, s 4(1).

matter. In fact, the Government used it to provide a way in which sex offenders could apply to be removed from the register, after we had declared that the inability ever to be taken off it was incompatible with the right to respect for private life.[18] They did so even though the prime minister questioned the sanity of our ruling. Second, it can promote an Act of Parliament to put things right. This is appropriate for a more complicated matter where policy choices have to be made. Examples are the Gender Recognition Act 2004 which responded to the declaration of incompatibility in *Bellinger v Bellinger*;[19] and the control order regime introduced by the Prevention of Terrorism Act 2005 in response the declaration of incompatibility in the 'Belmarsh' case.[20] Thirdly, however, they can do nothing. This is what has happened in the case of prisoners' voting. Even though both the Strasbourg Court of Human Rights and a Scottish court have found the 'blanket ban' on prisoners' voting incompatible with the convention rights,[21] it remains the law of the United Kingdom unless and until Parliament does something about it.

This being the case, the big question for us is how much notice we should take of the Strasbourg case law. The whole purpose of the Human Rights Act was to 'bring rights home', so that UK citizens would not have to go off to Strasbourg to have their rights vindicated. So we have generally taken the view that if there is a clear and constant line of Strasbourg case law on a particular point, then we should follow it unless there is a very good reason not to do so. As the late Lord Rodger put it in a case about the meaning of a fair trial in control order cases, 'Even though we are dealing with rights under a United Kingdom statute, in reality we have no choice. *Argentoratum locutum,*

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18 *R (F) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331; see Sexual Offences Act 2003 (Remedial) Order 2012.

19 [2003] UKHL 21, [2003] 2 AC 467.

20 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

21 *Hirst v United Kingdom* [2006] 42 EHRR 41; *Smith v Scott* [2007] CSIH 9.

iudicium finitum – Strasbourg has spoken, the case is closed.[22] I do not think that he was pleased.

Just occasionally, if we think that Strasbourg has gone too far, and has not taken sufficient account of local conditions in the United Kingdom, we might refuse to follow a decision of Strasbourg court. In the *Horncastle* case,[23] about the use of hearsay evidence in criminal trials, we refused to follow a chamber decision in the case of *Al-Khawaja*, in the hope of persuading the Grand Chamber to reconsider it. This they did and produced a more nuanced answer with which, I think, we can all live.[24] The story has been hailed as an example of 'dialogue' between us and the Strasbourg court, which they say they welcome. But it is the only one.

More controversial has been the question of whether we should go further than the Strasbourg court has yet gone. In the famous case of *Ullah*,[25] Lord Bingham said that it was the task of national courts to keep pace with the Strasbourg jurisprudence as it develops over time: 'no more, but certainly no less'. To what extent does that also mean 'no less, but certainly no more'?

There are cases where in my view we have certainly done more. In *Limbuela*,[26] for example, the House of Lords held that it was inhuman and degrading treatment, contrary to article 3 of the Convention, deliberately to reduce some asylum seekers to utter destitution by denying them both any state benefit and the right to work. In other

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22 *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269, at [98].

23 *R v Horncastle and Ors* [2009] UKSC 14, [2010] 2 AC 373.

24 *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23.

25 *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, at [20].

26 *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

cases, we have been more cautious. In *Al-Skeini*,[27] for example, the House of Lords held that Iraqis shot by British soldiers while we were the occupying power in southern Iraq were not 'within the jurisdiction' of the United Kingdom for the purpose of the Convention. A person detained by the British forces, on the other hand, was within our jurisdiction. In the case about Private Smith[28] a majority of the Supreme Court held that a British soldier serving in Iraq was only within the jurisdiction while he was on a British base (as Private Smith was when he died of heat-stroke). Then Strasbourg decided that the Iraqis in *Al-Skeini* were within our jurisdiction after all.[29] So what effect should this have on the British soldiers? The lower courts in the United Kingdom are bound by our decisions unless and until we change them in the light of developments in Strasbourg (another difference between the two European regimes). So there is another Smith case wending its way to us and in the meantime Strasbourg has stayed an application to that court in a similar case to see what we do.

In *Al-Skeini* we thought, wrongly as it turned out, that Strasbourg had drawn a line in the sand. So it is not surprising that we were reluctant to go further. But there are many cases which have not come before Strasbourg yet, and are perhaps unlikely ever to do so. So we really have no choice but to make up our own minds about what the Convention rights entail. And there are some who say that we should feel no inhibitions about developing a distinctively British view of the convention rights, as this is what Parliament always intended that we should do.[30] Furthermore, by making

27 *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153.
28 *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29. [2011] 1 AC 1.
29 *Al-Skeini v United Kingdom* (2011) 53 EHRR 18.
30 Lord Irvine of Lairg, *A British Interpretation of Convention Rights*, lecture for the Bingham Centre for the Rule of Law, hosted by the UCL Judicial Institute, 14 December 2011.

them ‘British’ rather than ‘European’, they might become more acceptable to the British public.

So that is a very brief sketch of our relations with the two European jurisdictions which require us to rule upon the compatibility of Acts of the UK Parliament (and other public bodies). This may drag us into areas where traditionally the UK courts have been reluctant to tread. But as Parliament has told us to do it, we have no choice.

What of our relations with Scotland, Wales and Northern Ireland, where we have to rule upon whether the acts of their national Parliaments and governments are within the scope of the powers which the UK Parliament has given them? Such questions were at first given to the Judicial Committee of the Privy Council because it was thought that they would mostly involve demarcation disputes between the UK and the national Parliaments. It would not be right for the Law Lords, as members of the UK Parliament, to adjudicate. This was, Lord Bingham thought, another of the reasons for setting up a Supreme Court separate from Parliament. Since 2009, however, they have come to us in the Supreme Court. In fact, demarcation disputes between the Parliaments are rare.

Most devolution cases involve the compatibility of acts of the devolved Parliaments and governments with the Convention rights. This sort of challenge normally arises in a real, concrete case. Some-one will say that his Convention rights have been violated as a result of an Act of, say, the Scottish Parliament. If such a case arises in Wales or Northern Ireland, it would come up to us as an ordinary appeal. We have not, so far, had any case challenging the Acts of the Welsh or Northern Ireland Assemblies on

this ground. But we have, of course, had cases challenging the compatibility of existing laws with the Convention rights. Perhaps the best-known example was the ban on joint adoptions by unmarried couples, which persisted in Northern Ireland after being abolished in England and Wales and Scotland.[31] The Northern Ireland Government knew that it ought to do something about it, but found it politically very difficult to do so, because of opposition from the churches, in particular to adoption by same sex couples. We held that the blanket ban (a common phrase in Convention jurisprudence) was unjustifiably discriminatory, so the couple had to be allowed to present their joint application.

Civil cases come up from Scotland in the same way. So, for example, we held that the restricted rights of unmarried fathers to take part in hearings about their children's care were incompatible with their Convention rights.[32] The Act of Union of 1707 (if you are English) or 1706 (if you are Scots) did not affect the right of Scottish litigants to petition the House of Lords in civil matters. But at that time there was no such right in criminal cases. The English, Welsh and Irish were eventually given one by statute but the Scots were not. So in ordinary circumstances we have no jurisdiction over the criminal law and procedure of Scotland. Then came devolution and the Privy Council now had power to rule upon whether acts of the Scottish Ministers and Parliament in the field of criminal justice were compatible with the Convention rights. This has, to say the least, proved controversial in Scotland.

Mostly these cases have attacked, not an Act of the Scottish Parliament, but the conduct of a prosecution by the police and procurators fiscal. Sometimes they have

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31 *In re G(Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173.

32 *Principal Reporter v K and others (Scotland)* [2010] UKSC 56, [2011] 1 WLR 18.

challenged long-established aspects of Scottish criminal procedure, such as the practice of not disclosing initial police statements and other information to the defence,[33] or most notoriously, the power to detain and question a suspect for up to six hours without a solicitor being present.[34] There was, held the Supreme Court, 'not the remotest chance' that Strasbourg would find this compatible with the article 6 privilege against self-incrimination. This did not stop the Scottish Ministers from denouncing us.

But if the challenge is to an Act of the Scottish Parliament, should we be respectful of the choices made by the elected legislators? As it happens, the first Act of the Scottish Parliament was challenged for incompatibility with the Convention rights. The Scottish Parliament was formally opened on 1 July 1999 and met to conduct business for the first time on 1 September. The Mental Health (Public Safety and Appeals) Bill was introduced on 31 August and passed so swiftly through the Parliament that it received the Royal Assent on 13 September. It dealt with the long-standing problem of mentally disordered offenders who had been sent to hospital rather than prison: what was to happen if the hospital had no treatment to offer them but they were still considered a danger to the public? The Act required a sheriff (and the Secretary of State) to refuse to discharge a restricted patient if satisfied that the patient was then suffering from a mental disorder 'the effect of which is such that it is necessary, in order to protect the public from serious harm, that the patient continue to be detained in a hospital, whether for medical treatment or not'. In *Anderson v HM Advocate*[35],

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33 Examples are *McInnes v HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601 where the appeal was dismissed, and *Fraser v HM Advocate* [2011] UKSC 24, 2011 SCL 582, where the appeal was allowed, to considerable consternation in Scotland.

34 *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43, [2010] 1 WLR 2601.

35 *Anderson, Doherty and Reid v The Scottish Ministers and the Advocate General for Scotland* [2001] UKPC D5, [2003] 2 AC 602.

three patients argued, unsuccessfully, that this was incompatible with their right to liberty under article 5(1). In the Scottish High Court, Lord Rodger made some remarks about the general approach which the courts should take to such a challenges.[36] The whole Convention was about striking a fair balance between the interests of the community and the fundamental rights of the individual. In deciding whether the Scottish Parliament had struck a fair balance between the need to protect the public from serious harm and the patients' right to liberty, 'it is right that the court should give due deference to the assessment which the democratically elected legislature has made of the policy issues involved'.

The Law Lords later took the same approach to recent Acts of the United Kingdom Parliament. Thus the ban on hunting of certain animals with hounds was upheld,[37] because Parliament had decided that the prevention of cruelty to animals was sufficiently important to justify any interference with the right to freedom of association. Strasbourg later agreed with us.[38] And Parliament had thought that the need to place limits on election expenditure, so as to avoid elections being decided by those with the deepest pockets, was sufficient to justify a very broad ban on political advertising in the broadcast media.[39] Strasbourg has heard the case, but we do not yet know the result.

But an Act of the Scottish Parliament or Welsh or Northern Ireland Assemblies may also be invalid because its subject matter is outside the scope of the powers which are

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36 2001 SC 1.

37 *R (on the application of the Countryside Alliance and others) v Attorney General and Anor* [2007] UKHL 52, [2007] 1 AC 719.

38 *Friend and another v United Kingdom*, App Nos 6072/06, 27809/08, Admissibility decision of 24 November 2009.

39 *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312.

delegated to them. Under the Scotland Act 1998, everything which is not reserved to the UK Parliament is devolved, whereas under the Government of Wales Act, everything which is not devolved is reserved to the UK Parliament. But this can lead to some tricky questions of demarcation and overlap.

Martin v Most[40] concerned provisions in the Criminal Proceedings etc (Reform) (Scotland) Act 2007. The object was to relieve pressure on the higher courts by increasing the sentencing powers of Sheriffs hearing cases summarily from six to 12 months' imprisonment. This was done across the board for all offences, whether or not they fell within the reserved areas. Road traffic is a reserved area. The UK Road Traffic Act provided that the penalty for driving while disqualified was up to six months on summary conviction and up to 12 months on conviction on indictment. So the effect of the 2007 Scottish Act was to increase the maximum penalty for the offence laid down in a UK Act of Parliament after summary trial. Was that within the powers of the Scottish Parliament? Three Justices thought yes and two thought no, with a Scot in each camp.

Did the subject matter relate reserved matters?[41] This is to be determined by reference to its purpose, having regard to (among other things) its effect in all the circumstances.[42] All the Justices thought that the Scottish Act did *not* relate to a reserved matter. Its purpose was to relieve the pressure on the higher courts in all kinds of criminal cases, not only or even mainly in those relating to road traffic or any other reserved matter. But an Act of the Scottish Parliament cannot modify a rule of

40 [2010] UKSC 10, 2010 SLT 412.
41 Scotland Act 1998, s 29(2)(b).
42 s 29(3).

Scots private or criminal law insofar as it is 'special to' a reserved matter.[43] Lord Hope thought that the rule of Scottish law being modified was a rule of procedure and this was not 'special to' the reserved matter of road traffic. Lord Rodger thought that the rule of Scottish law being modified was the rule about the maximum sentence on summary conviction for driving whilst disqualified. This in his view was clearly 'special to' the reserved matter of road traffic. He did not mince his words.

Just last month the Supreme Court was asked to rule on whether the National Assembly for Wales had exceeded its authority when enacting the first Act under its new powers to legislate without getting Westminster approval.[44] It came before the Court, not in a concrete case, but as pure constitutional review. The Attorney-General (or other Law Officer) has four weeks from the date when the Welsh Assembly passes a Bill to raise an objection and refer it to the Supreme Court.[45] If he does not do so, it would be open to a person who was later affected by the Act to complain that it was not law, because it was not within the Assembly's powers. But if the Attorney General does make a reference, the result will (presumably) be conclusive either for or against. This is, as far as I know, the first case in which we have been called upon to rule upon the validity of an Act of a devolved Parliament in the abstract. This is something which constitutional courts in continental Europe are frequently required to do. We are not used to deciding cases in the abstract, without reference to a particular set of facts. This may not be a problem in this particular case, which was all about whether the new procedures for making bye-laws on certain subjects in Wales took away powers from the Westminster government and if so whether this was merely

[43] s 29(2)(d) and Schedule 4, pares2(1) and (3).

[44] *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General for England and Wales*

[45] Government of Wales Act 2006, s 112.

incidental to or consequential on something which was within the competence of the Welsh Assembly, as local government is. Even if the subject-matter is something of a storm in a tea-cup, the principles are very important for all the devolved Assemblies. Judgment in the case, in which I was not sitting, has not yet been handed down.

So we have human rights devolution cases and we have subject matter devolution cases. Both of these stem from the devolution statutes themselves. But is there a third category of case, where the legislation may on the face of it be within the devolved Parliament's powers but is 'not law' for some other reason? Do the general principles of judicial review of administrative action, which apply to the making of bye-laws by local authorities, also apply to the Acts of the devolved Parliaments? Are the devolved Parliaments simply grand and glorified local authorities or are they something different?

The issue was raised in the *AXA case* last year.[46] The background is asbestos. The House of Lords had held that asymptomatic pleural plaques resulting from exposure to asbestos were not actionable damage.[47] In England and Wales, the Government's response was to set up a modest compensation scheme from public funds. In Scotland, the Government's response was to make the insurance companies pay. The Damages (Asbestos-related Conditions) (Scotland) Act 2009 provided (with retrospective effect) that pleural plaques, pleural thickening and asbestosis constituted actionable harm.

46 *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868.
47 *Rothwell v Chemical and Insulating Co Ltd* [2007] UKHL 39, [2008] AC 281.

The insurance companies argued that this was a violation of their property rights under article 1 of the first protocol to the European Convention. They failed. The Supreme Court agreed that the interference was a proportionate means of achieving a legitimate aim. In doing so, it recognised that this was a matter of social and economic policy in which weight should be given to the judgment of the democratically elected legislature as to how the balance between the various interests should be struck. So the Scottish Parliament was being treated like a Parliament, in the same way that the UK Parliament had been treated, for example in the hunting and political advertising cases.

So far, this was nothing new. But the insurance companies had also challenged the Act on the grounds of irrationality – in other words, applying the ordinary principles of judicial review of administrative action to an Act of the Scottish Parliament. By the time the case got to the Supreme Court, they had accepted that if the interference with their property rights was legitimate and proportionate, they could not succeed in arguing that it was irrational. So the issue did not strictly arise. Nevertheless, both of the Scottish judges sitting in the Supreme Court dealt with it at some length. Both agreed that Acts of the Scottish Parliament were not amenable to judicial review on grounds of irrationality, unreasonableness or arbitrariness. However, neither of them ruled out the possibility that they might be subject to review in exceptional cases on grounds other than non-compliance with the terms of the Scotland Act.

Lord Hope reasoned that the Scottish Parliament was not sovereign and section 29 of the Scotland Act did not purport to be an exhaustive list of the limitations upon its powers. Because the Parliament was not sovereign, he did not have to grapple with

how the conflicting views about the relationship between the rule of law and the sovereignty of the UK Parliament (which had emerged in *Jackson*) might be reconciled. As he had said in *Jackson*, 'the rule of law enforced by the courts is the ultimate controlling factor upon which our constitution is based'. So, after pointing to the power which a government elected with a large majority has over a single-chamber Parliament, he continued:

> 'It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.'[48]

Lord Reed reached the same conclusion by a different route. The 'principle of legality' means that the UK Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words. It has to be specific. Nor, therefore, can it confer upon another body, by general or ambiguous words, the power to do so. The UK Parliament could not be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.[49]

But as long as they keep within the express limits of their powers, the devolved Parliaments are to be respected as democratically elected legislatures and are not to be

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48 At [51].
49 At [153].

treated like ordinary public authorities. In carrying out our role as the Supreme Court of a federal state, and indeed our roles under the European legislation, we will, of course, give great weight to the judgments made by a democratically elected Parliament. But in the end we have to decide whether those judgments are in accordance with the law.

One final point. The new constitutional roles which we have been given by the United Kingdom Parliament underline how essential an independent judiciary is in a democratic state. We may be unelected but we are not undemocratic. We are the watchdogs who ensure that the elected politicians stay within the powers which Parliament has given them. We are fortunate to live in a country where it is taken for granted that governments will respect and abide by our rulings, no matter how much they disagree with them. In return, the politicians and the people must be able to take it for granted that we will abide by our judicial oaths, to 'do right to all manner of people, after the laws and usages of this realm, without fear or favour affection or ill-will'. We are not making it up as we go along.