

Europe's Gift to the United Kingdom's Unwritten Constitution – Juridification



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Abstract The United Kingdom constitution is the only uncodified constitution in Europe, and is described in the report as evolutionary, historical and predominantly political, responding piecemeal to developments through pragmatic solutions. A central concept is parliamentary sovereignty. The Supreme Court, replacing the Appellate Committee of the House of Lords, started its work in 2009; it can make a declaration of incompatibility with the ECHR, but has no power to annul legislation (although prior to Brexit, the courts were willing to disapply legislation which contravened directly effective provisions of EU law). Fundamental rights are predominantly protected by the Human Rights Act 1998, which incorporates the

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ECHR into UK law and the common law. A proactive role in raising fundamental rights issues, also in relation to EU law, is played by parliamentary scrutiny committees, NGOs and other institutions. These have contributed e.g. to the subsequent introduction of rights-based safeguards to European Arrest Warrant legislation and of a forum bar with regard to international extradition treaties. In terms of the main comparative influences, UK law is more likely to refer to the principles found in the common law of the US, Australia, Canada and New Zealand. Although European influences are present and have increased, it is unclear how far these influences will remain post Brexit. The report observes that membership of the EU and of the ECHR has helped to subject the UK constitution to juridification. In general, EU law has in many areas enhanced rights protection, e.g. as regards the right to privacy and the general principles of law; indeed, the latter were introduced into the UK through EU and ECHR law. The report does not address the Brexit process, although a brief post scriptum note has been added.

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presumption of innocence and review of evidence • Data Retention Directive and
the Data Retention and Investigatory Powers Act (DRIPA and the Investigatory
Powers Act 2016) • Fundamental rights and the rule of law • General principles of
law • Juridification of the constitution • Forum bar for international extradition
treaties • TTIP • Brexit referendum • *Miller*

1 Constitutional Amendments Regarding EU Membership

1.1 *Constitutional Culture*

1.1.1 The United Kingdom constitution is evolutionary, historical and predominantly political. Parliamentary sovereignty, as interpreted by Dicey, states that Parliament can legislate on any subject matter that it wishes; that the courts cannot question duly enacted legislation of the Westminster Parliament and that Parliament is unable to bind its successors as to the content or the manner and form of legislation. Understood in this manner, parliamentary sovereignty prevents the enactment of a legally entrenched Constitution.

However, recent developments question the accuracy of this account of UK constitutional culture. The UK's membership of the EU is one event influencing this change in attitude. First, the supremacy of directly effective EU law questions the accuracy of Dicey's conception of parliamentary sovereignty. Secondly, the way in which courts have modified English law to accommodate supremacy and direct effect may be evidence of a shift away from a political towards a legal

constitution based on constitutional principles of the common law – referred to as ‘common law constitutionalism’. This is reinforced by the Human Rights Act 1998 which incorporated the European Convention on Human Rights (ECHR) into English law. Thirdly, there are legal dicta supporting the claim that courts could, in exceptional circumstances, refuse to enforce legislation.

The constitution remains evolutionary in nature, responding piecemeal to developments through a series of pragmatic solutions to specific problems. Concerns over the role of Europe in the UK constitution may have prompted the ‘in-out’ referendum on Brexit, but to see the result as being solely due to these concerns, and the need for more control, fails to give a full account of the motives of those who voted to leave and the motives of those campaigning on the side of leave. It is probably not too far-fetched to claim even a few days after the result of the Referendum held on 23rd June, that the decision to leave (17,410,742 votes, 51.9%) as opposed to remain (16,141,241 votes, 48.1%) will have huge constitutional implications for the UK and for the rest of the EU.¹

1.1.2 Given its evolutionary nature, it is hard to pinpoint the key rationale of the constitution. Although it is often argued that parliamentary sovereignty is its key principle, the UK constitution also recognises the rule of law, human rights and civil liberties. All of these have importance in the UK constitution and the balance between them constantly evolves.

The principle of the separation of powers has played a much smaller role as regards the organisation of the UK constitution. A further key feature of the UK constitution is the partial fusion, in terms of personnel, of the executive and the legislature. The executive is formed from the political party, or parties, with the majority of seats in the House of Commons and governmental ministers are simultaneously members of the executive and members of the legislature. However, this does not mean that there are no checks and balances. The executive is held to account by the legislature through parliamentary debates, parliamentary questions and departmental select committees. Moreover, there is a firm regard for the principle of the independence of the judiciary² and an ever-growing role of the courts in holding the executive to account for its actions through judicial review.

¹ Given the timing of the referendum and the writing of the report, the potential impact will be dealt with in a postscript, written by A.L. Young and P. Birkinshaw. The main text was submitted on 30 June 2016, with the postscript added on 10 July 2016 and further additions inserted on 17 March 2017 and on 10 February 2018.

² See, in particular, the Constitutional Reform Act 2005.

1.2 *The Amendment of the Constitution in Relation to the European Union*

1.2.1 The lack of a specific procedure for constitutional amendment makes it difficult to pinpoint a clear amendment of the UK constitution in relation to EU membership. Nevertheless, the UK has enacted legislation in relation to EU membership which has later been regarded by the UK courts as ‘constitutional’. See, for example, *Thoburn v. Sunderland City Council (Thoburn)*³ and *R (HS2) v. Secretary of State for Transport (HS2)*.⁴ It is also now clearly recognised that leaving the European Union is a ‘fundamental change in the constitutional arrangements of the United Kingdom’, implying in turn that the UK’s membership of the European Union was also a fundamental constitutional change.⁵

The European Communities Act 1972 incorporates European Union law into UK law. Its key provisions are as follows:

Section 2

- (1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ‘enforceable EU right’ and similar expressions shall be read as referring to one to which this subsection applies.
- (2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision
 - (a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
 - (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

And in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid.

In this subsection ‘designated Minister or department’ means such Ministers of the Crown or government department as may be specified by Order in Council.

...

- (4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained

³ *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin).

⁴ *R (HS2) v. Secretary of State for Transport* [2014] UKSC 3.

⁵ *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, para. 78.

in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council or orders, rules, regulations or schemes.

1.2.2 The UK has no specific constitutional amendment procedure. Constitutional amendment occurs through ordinary Acts of Parliament, the common law and constitutional conventions. In 2011, the Constitutional Committee of the House of Lords recommended that a different legislative procedure be used for constitutional legislation, including, by implication, legislation amending constitutional provisions.⁶ This was rejected by the Government.⁷ *Miller* recognised as a fundamental principle of the UK constitution that 'far-reaching change to the UK constitutional arrangements' cannot be 'brought about by ministerial decision or ministerial action alone'.⁸

1.2.3 The European Union Act 2011 could be considered as a recent reform of the UK constitution. This was not prompted by a change in EU law, but rather by a change in politics, recognising a shift towards greater Euro-scepticism. The Act, discussed in more detail below, governs future transfers of sovereignty from the UK to the EU.

1.2.4 There have been no constitutional reform packages in the light of EU membership that did not come to fruition.

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1 Originally, there were no specific rules relating to the transfer or delegation of power to the EU. Nevertheless, the practice was to enact an Act of Parliament approving of the delegation or transfer of powers to the EU following Treaty revision or amendment. This emerging constitutional convention was placed on a statutory basis by Sect. 5 of the European Union (Amendment) Act 2008, requiring all amendments to the Treaty enacted through the EU's ordinary revision procedure to be approved by an Act of Parliament.

The mere requirement of legislation has now been replaced by a complex series of measures found in the European Union Act 2011 (EUA 2011). This Act now includes three possible forms of procedure for the transfer or delegation of powers to the EU. First, they may require approval by an Act of Parliament and a

⁶ Constitutional Committee of the House of Lords, *The Process of Constitutional Change*, 15th Report, 2010–2012 Session, HL 177.

⁷ The Government Response to the House of Lords Constitutional Committee Report 'The Process of Constitutional Change' CM 8181, September 2011.

⁸ *Supra* n. 5, para. 81.

referendum. Secondly, they may be required to be approved by an Act of Parliament. Thirdly, only parliamentary approval may be required, where a motion is passed in both the House of Commons and the House of Lords approving the transfer of power. The type of procedure required depends upon the subject matter and nature of the measure. However, given the principle of parliamentary sovereignty it is still possible to only use an Act of Parliament to transfer powers to the EU, this later Act impliedly repealing a referendum requirement in the EUA 2011. Whether this implied repeal would succeed or not may depend upon whether the EUA 2011 is classed as a constitutional statute. If so, clear and specific words will be required to repeal the referendum requirement. The European Union (Withdrawal) Act 2018 expressly repeals the European Communities Act 1972, in section 1, and the European Union Act 2011, in Schedule 9, these repeals taking effect on exit day.

A referendum and an Act of Parliament would normally be required to replace the Treaty on European Union (TEU) or the Treaty on the Functioning of the European Union (TFEU) or to amend either of these Treaties through the ordinary revision procedure set out in Arts. 48(2) and 48(5) TFEU. Section 2 of the EUA 2011 provides a precise list of amendments which would require approval by referendum, its main theme being areas which extend the competences of the European Union or which remove limits on the current competences of the Union. Where Treaty amendment or replacement does not increase the competences of the European Union, the referendum requirement is removed. In a similar manner, Sect. 3 of the Act requires any amendment of the Treaties by the simplified revision procedure under 48(6) TFEU to be approved by a referendum and an Act of Parliament, where this would expand the competences of the EU. There is the possibility that the referendum requirement could be avoided, where the expansion of powers of the European Union requires the ability of the EU to impose new obligations on the UK, or to impose sanctions on the UK, where these obligations or sanctions are 'not significant' (Sect. 3(4)). A referendum and an Act of Parliament would also be required, were the UK to sign up to the European Public Prosecutor's Office, to adopt the euro or to remove border controls (Sect. 6). In addition, a referendum and an Act of Parliament would be required to ratify the use of some passarelle clauses (Sect. 6), and certain measures of enhanced co-operation (Sect. 6), whilst their use in less contentious areas would only require an Act of Parliament. An Act of Parliament is required to expand citizenship rights (Sect. 7).

Section 2 of the European Communities Act 1972 and Sect. 18 of the EUA 2011 govern the supremacy and direct effect of EU law. Sects. 2(2) and 2(4) of the European Communities Act 1972 require that all legislation, passed or to be passed, is to be read and given effect subject to the directly effective provisions of EU law. Section 18 EUA 2011 states that

[d]irectly applicable or directly effective EU law (that is the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the

European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

UK law accepts that executive decisions are overridden by directly effective EU law. It is also clear that directly effective EU law overrides legislation enacted by the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly.⁹ The more difficult issue concerns the extent to which directly effective provisions of EU law override Acts of the Westminster Parliament. *Factortame II* granted an interim injunction suspending the application of the Merchant Shipping Act 1988 the provisions of which contravened directly effective EU law.¹⁰ The principle that directly effective provisions of EU law can disapply primary legislation of the Westminster Parliament was confirmed in *Thoburn*¹¹ and more recently in *HS2*.¹² In addition, the High Court and Court of Appeal have recently ordered that legislative provisions be disapplied in situations where they conflict with rights found in the EU Charter of Fundamental Rights (Charter). In *Benkharbouche v. Embassy of the Republic of Sudan*¹³ the Court of Appeal concluded that the State Immunity Act 1978, which granted immunity from legal regulation of the employment regulations of some embassy staff, effectively meant that an applicant could not plead the applicability of provisions of EU law to any employment law dispute. This was seen to be contrary to Art. 47 of the EU Charter. Consequently, the Court of Appeal issued a court order to disapply sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978. Similarly, the Court of Appeal issued a court order disapplying provisions of the Data Protection Act 1998 which restricted the recovery of damages for breach of data protection provisions to pecuniary loss. The Court of Appeal concluded that Arts. 7 and 8 of the Charter, read in combination with Art. 47 of the Charter, required the ability for individuals to also obtain damage for distress caused by breaches of data protection provisions. Therefore, the provisions of the 1998 statute could be disapplied.¹⁴ In *Davis* the High Court issued an order, the effect of which was suspended until 1 April 2016, to disapply provisions of the Data Retention and Investigatory Powers Act 2014.¹⁵ The Court of Appeal initiated a preliminary reference under Article 267 in order to determine the extent to which EU law contradicted section 1 of the Act.¹⁶

⁹ Scotland Act 1998, Sect. 29(2)(d); Governance of Wales Act 2006, Sect. 81; Northern Ireland Act 1998, Sect. 6(2)(c).

¹⁰ *R v. Secretary of State for Transport ex parte Factortame II* [1991] 1 AC 603.

¹¹ *Supra* n. 3.

¹² *Supra* n. 4.

¹³ *Benkharbouche v. Embassy of the Republic of Sudan* [2015] EWCA Civ 33.

¹⁴ *Google v. Vidal-Hall* [2015] EWCA Civ 311.

¹⁵ *R (Davis) v. Secretary of State for the Home Department* [2015] EWHC 2092 (Admin). Discussed in Sect. 2.4.1 below.

¹⁶ *Secretary of State for the Home Department v. Davis* [2015] EWCA Civ 1185.

There are, arguably, limits on the extent to which the supremacy of directly effective EU law over legislation has been accepted in UK law. First, the decision in *Factortame II* concerned a conflict between directly effective EU law and a later Act that only repealed the European Communities Act 1972 (ECA 1972) by implication and not expressly – i.e. there was no provision in the later Act expressly repealing the ECA 1972 or stating that the provisions of the later Act were to take effect regardless of the provisions of directly effective EU law or of the ECA 1972. As such, it is arguable that, were legislation to be enacted that expressly repealed or specifically contradicted the ECA 1972, whilst the UK remained a member of the European Union, UK courts would apply the provisions of this Act of Parliament as opposed to the directly effective provisions of EU law.¹⁷ Paul Craig would argue against this conclusion. He argues that the ECA 1972, as interpreted in *Factortame II*, shifted the rule of recognition defining UK law, such that UK law is not ‘law’ unless it is compatible with directly effective provisions of EU law. Craig would argue that directly effective EU law would prevail even if an Act of Parliament expressly repealed the provisions of the ECA 1972.¹⁸

Secondly, *HS2* makes it clear that *Factortame II* only applies to conflicts between substantive provisions of directly effective EU law and UK legislation and not necessarily to situations where directly effective EU law requires certain procedures to be adhered to by decision-makers. Thirdly, *HS2* makes it clear that UK law may not accept that directly effective provisions of EU law override constitutional instruments, constitutional statutes or constitutional principles of the common law.

There have been no cases applying the provisions of the EUA 2011. Commentary on the Act has focused on an assessment of its provisions or on its impact on parliamentary legislative supremacy.¹⁹

1.3.2 There is evidence of a shift in the conceptualisation of sovereignty in UK law. *Factortame II* accepted that any transfer of sovereignty occurred through an Act of the UK Parliament, namely the ECA 1972. This interpretation is confirmed by Sect. 18 of the EUA 2011. This appeared to accept an absolute conception of sovereignty, with the legislature determining the extent to which sovereignty had been delegated to the EU and the UK retaining its political sovereignty over the EU. *Thoburn* can be seen as marking a shift towards the argument that it is the UK courts which determine the extent to which sovereignty has been transferred, albeit whilst paying attention to the intention of the legislature, as the sovereignty of Parliament is a principle of the common law. This interpretation is confirmed by the approach of the Supreme Court in *HS2*. *HS2* can be seen as reconceptualising sovereignty in terms of constitutional pluralism, not only confirming that it is for UK law to determine the extent to which the sovereignty of directly effective EU law is recognised in UK law, but also suggesting that supremacy of EU law may

¹⁷ See Wade 1996.

¹⁸ See Craig 2011a.

¹⁹ See Craig 2011b; Gordan and Dougan 2012, and Peers 2013.

reach its limit where directly effective provisions of EU law override constitutional principles.

1.3.3–1.3.4 There are no express or implied statutory restrictions on the extent to which sovereignty can be transferred or delegated to the EU. The extent to which the UK Supreme Court, formerly the House of Lords, has accepted the supremacy of directly effective EU law over the national constitution is a matter of academic discussion. The leading case on this issue is the recent Supreme Court decision in *HS2*. It could be argued that by accepting the principle of the supremacy of directly effective EU law at all, UK law has already accepted the supremacy of EU law over the national constitution, as this acceptance required a modification to the constitutional principle of parliamentary sovereignty. This is reinforced by the fact that *Factortame II* required the court to grant an injunction against an officer of the Crown, suspending the application of an Act of Parliament. This was a clear change of constitutional principle.

However, the *HS2* case injects a note of caution into this assessment. Statements in the case suggest that although UK law generally accepts that statutory provisions that cannot be interpreted to comply with directly effective EU law can be disapplied, this may not be the case with regard to constitutional statutes, constitutional principles or constitutional instruments. See in particular the statement in the joint judgment of Lord Neuberger and Lord Mance:

It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine), that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act of 1972 did not either contemplate or authorise the abrogation.²⁰

In particular, it may not be the case that directly effective EU law could override Art. 9 of the Bill of Rights 1689 which protects parliamentary privilege, preventing the courts from questioning proceedings in Parliament. Similarly, in the recent *Miller* case, the Supreme Court suggested that directly effective provisions of EU law would not override the requirements of parliamentary sovereignty.²¹

Lord Neuberger's and Lord Mance's statement is clearly dicta. However, it is extremely influential. No conclusive list was provided of the measures deemed to be 'constitutional', although mention was made of the Magna Carta 1215, the Petition of Rights 1628, the Bill of Rights Act 1689 (Claim of Rights Act 1689 in Scotland), the Act of Settlement 1701, the Act of Union 1707, the European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005.

The *HS2* judgment also appears to confirm a shift in attitude of the UK courts towards the adoption of constitutional pluralism. As was the case with the judgment of Laws LJ in *Thoburn*, the Supreme Court is clear to point out that it is for UK law, enacted through valid legislation at Westminster and decisions of the UK courts, to

²⁰ [2014] UKSC 3, para. 207.

²¹ *Miller*, supra n. 5, paras. 60 to 62 and para. 67.

determine the extent to which supremacy is granted to directly effective EU law. Despite this, it is also clear that UK courts, generally, favour EU-friendly interpretations of legislation. However, this friendliness cuts both ways. As *HS2* also illustrates, where there are conflicting interpretations of EU law, one of which would be compatible with the constitution and the other not, UK courts will prefer the interpretation that complies with the national constitution.²²

1.4 Democratic Control

1.4.1 There are two sources of rules concerning the participation of the Westminster Parliament in the EU decision-making process. First, there are statutory provisions found in the *EUA 2011* that require specific participation of the national Parliament before a Minister is able to approve an EU decision. Secondly, there are internal rules of Parliament designed to facilitate the participation of Parliament in the EU decision-making process.

Requirements of the European Union Act 2011 Some decisions cannot be adopted without an Act of Parliament, either on its own or in addition to a referendum. In particular, an Act of Parliament and a referendum are required before a Minister can adopt decisions on common EU defence or adopt decisions under Art. 4 of Protocol 21 on freedom, security and justice (Sect. 6). An Act of Parliament is required to approve of decisions modifying the election of Members of the European Parliament (MEPs); conferring more jurisdiction to the European Court of Justice (CJEU); changing the EU's system of own resources; changing the number of EU Commissioners; restricting the free flow of capital and to replace Protocol 12 (Sect. 7).

The Act also requires an Act of Parliament to approve decisions made under Art. 352 TFEU. This requirement is subject to two exceptions. First, with regard to a matter of urgency, where the measure, and the urgent nature of the measure, have been approved by a resolution of both Houses of Parliament, then the measure need only be laid before Parliament (Sect. 8). Secondly, where the measure taken under Art. 352 is equivalent to a previous measure taken under Art. 352; or prolongs or renews a measure already taken under Art. 352; or extends a measure taken under Art. 352 to another Member State or third country; or consolidates previous measures taken under Art. 352 with no change of substance, then the measure need only be laid before Parliament (Sect. 8).

The Act also requires parliamentary approval of both Houses for measures relating to other areas, including, inter alia, the enhancement of judicial co-operation in civil matters (Sect. 9), the free movement of services and social security provisions (Sect. 10).

²² See the recent lecture by Lord Reed recognising the shift in approach of the Supreme Court: http://www.lincolnsinn.org.uk/images/word/education/euro/EU_Law_and_the_Supreme_Court.pdf.

Requirements of the parliamentary rules The European Scrutiny Committee of the House of Commons scrutinises proposals for legislation, white and green papers from the Commission and also other documents that are laid before Parliament on an ad hoc basis from the Government. The House of Lords European Union Committee scrutinises draft legislation, documents submitted by one institution of the European Union to another, and draft decisions made under Title V and Title VI TFEU.

The Government decides whether an EU document should be presented for scrutiny. This is carried out by the Cabinet Office, assisted by the Foreign and Commonwealth Office for Title V and Title VI TFEU issues, and the Treasury with regard to the EU budget. Each document laid before Parliament is accompanied by an Explanatory Memorandum, written by civil servants, which includes a summary of the EU document, the legal policy, the financial implications, the view of the Government on the measure and also the relevant timetable for the measure before the Council of Ministers.

The European Scrutiny Committee of the House of Commons meets weekly to examine documents and reports to the House of Commons as to whether there is a need for further reconsideration of the document in the Committee, or for further debate on the floor of the House. The Committee cannot require that a debate be held. The Government has to find time to hold such a debate. The Committee can also write reports and frequently questions Ministers on EU issues. In the parliamentary session for 2011–2013, the Committee scrutinised 980 documents, of which 506 were reported as legally or politically important. It held only 38 debates in Committee and 12 debates on the floor of the House.

The European Union Committee of the House of Lords also meets weekly, supplemented by a series of Sub-Committees dedicated to specific areas of EU law, with the Committee also making arrangements to sift documents during the parliamentary recess. The Committee Chair sifts through the documents to determine whether they should be cleared or considered for further debate either in one of the Sub-Committees or on the floor of the House of Lords. If the European Union Committee recommends debate on the floor of the House of Lords, time must be found for this debate. Most documents are either cleared or debated in one of the European Union Sub-Committees.

The House of Commons Scrutiny Reserve Resolution of 17 November 1998 and the House of Lords Scrutiny Reserve Resolution of 16 March 2010 require that a Minister not agree to a decision unless scrutiny has been completed, or that this requirement be waived. For scrutiny to be completed for the House of Commons, the document must either be cleared through Committee, or a debate on the floor of the House must be held and the House of Commons must pass a resolution approving the measure. For scrutiny to be completed by the House of Lords, the measure must either be cleared at the sifting stage, or cleared by a Sub-Committee of the European Union Committee, or a debate on the matter must be held in the House of Lords. However, this requirement is only politically and not legally binding. There is criticism that Ministers often abstain or acquiesce on a measure that has not been cleared, considering this to adhere to the rules, as they have not 'agreed' to the measure.

1.4.2 There have been two referendums in the UK relating to the European Union – the referendum in 1975 on continuing membership and the referendum on 23 June 2016 voting to leave the EU. The 1975 referendum was the first major UK-wide referendum. In addition to referendums concerning EU membership, the UK has held a series of referendums on devolution issues, most recently on Scottish independence, and one referendum on the modification of the voting process to proportional representation.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.3 There have been no EU-specific amendments. The lack of a clear set of EU-related constitutional amendments is due to the ease with which the UK constitution can evolve. This flexibility can be advantageous. However, it means that there can sometimes be little public debate surrounding the relationship between the EU and the national parliaments. A debate on these issues would be welcomed to ensure greater awareness of the role of Europe and to provide greater legitimacy and democratic accountability of the European law-making process.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Fundamental rights are predominantly protected in UK law by the Human Rights Act 1998 (HRA 1998), which incorporates the European Convention on Human Rights into English law. However, the Conservative Government had planned to ‘scrap’ the Human Rights Act and replace this with a British Bill of Rights.²³ Courts do not have the power to strike down legislation enacted by the Westminster Parliament. However, courts must interpret legislation in a manner compatible with Convention rights, so far as it is possible to do so (HRA 1998 Sect. 3). Courts may read words into legislation, as well as read down broad words, to achieve Convention-compatibility.²⁴ Where this is not possible, courts of the level of the high court or above may issue a declaration of incompatibility. This declaration of incompatibility does not affect the legal effect, validity or force of the legislation declared incompatible with Convention rights (HRA 1998 Sect. 4).

²³ Queen’s Speech 2015, <https://www.gov.uk/government/speeches/queens-speech-2015>. Following the snap general election, the current minority Conservative Government has delayed plans to replace the Human Rights Act until after Brexit.

²⁴ See *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 and *Home Department v. AF (No 3)* [2009] UKHL 28.

Legislation declared incompatible may be modified by secondary or primary legislation (HRA 1998 Sect. 10). It is also unlawful for a public authority to act in a manner incompatible with Convention rights (HRA 1998 Sect. 6). The devolved legislatures do not have the power to enact primary or secondary legislation that is contrary to Convention rights (Scotland Act 1998, Sect. 29(2)(d); Governance of Wales Act 2006, Sect. 81; Northern Ireland Act 1998, Sect. 6(2)(c)).

In addition, UK law recognises fundamental/constitutional principles of the common law. These principles extend beyond human rights to incorporate aspects of the rule of law, including legal certainty and non-retroactivity. Constitutional principles are used when interpreting the common law, administrative acts and primary and secondary legislation. In particular, UK courts have developed the principle of legality whereby legislation will only be interpreted in a manner contrary to constitutional principles of the common law where there are clear and precise words to indicate that Parliament specifically intended to legislate contrary to these principles.²⁵ Constitutional principles of the common law are also used to develop specific heads of judicial review. For example, the principle of legal certainty has been used to develop a doctrine of substantive legitimate expectations.²⁶ The principle of proportionality is recognised, but it is not currently a general standard of judicial review in UK law.²⁷ However, there are dicta in recent judgments of the UK Supreme Court which suggest that English law may be on the verge of accepting proportionality as a general standard of review. In *Kennedy*,²⁸ Lord Mance recognised that both proportionality and the traditional test of *Wednesbury*²⁹ unreasonableness require the courts to consider issues of weight and balance when determining whether the outcome of an exercise of discretionary power is unlawful. Moreover, both proportionality and unreasonableness can be applied more or less stringently, depending on the circumstances of the case. Consequently, the real distinction between the two tests is not that a test of proportionality is necessarily more stringent than a test of unreasonableness, but rather that proportionality brings the advantage of structure to the judicial review of discretionality power. Similar dicta is found in *Pham*,³⁰ where Lord Mance repeated his observations in *Kennedy*, with similar statements found in the judgment of Lord Carnwath. In *Keyu* arguments were specifically put to the Supreme Court for the adoption of proportionality as a general test of review.³¹ Nevertheless, the Supreme

²⁵ See *R v. Home Secretary ex parte Pierson* [1998] AC 539, *R v. Lord Chancellor, ex parte Witham* [1998] QB 575, *R v. Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115.

²⁶ *R v. North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.

²⁷ *R (ABCIFER) v. Defence Secretary* [2003] EWCA Civ 473.

²⁸ *Kennedy v. Charity Commission* [2014] UKSC 20.

²⁹ *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.

³⁰ *Pham v. Secretary of State for the Home Department* [2015] UKSC 19.

³¹ *Keyu v. Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.

Court declined the opportunity to adopt proportionality as a general standard of review in English law.³² Lord Neuberger concluded that such a large constitutional change should be made by a court composed of nine as opposed to five Justices of the Supreme Court. Although the judgments in *Keyu* contain references to the dicta found in *Kennedy* and *Pham*, they also contain statements which suggest that the test of proportionality may only be suitable for cases involving rights.³³

It is clear that the test of proportionality is applied by UK courts when applying EU law, when required by Convention rights through an application of the HRA 1998, in applying common law fundamental rights and when determining whether public policy reasons can justify renegeing on a substantive legitimate expectation.³⁴ The UK courts apply a four stage test of proportionality: (i) whether the objective is sufficiently important to justify restricting a fundamental right; (ii) whether there is a rational connection between the restriction placed on the right and this objective; (iii) whether a less intrusive restriction could have been used to achieve this objective and (iv) whether a fair balance was struck between the right and the objective.³⁵ The UK courts use deference when applying the test of proportionality, modifying the stringency with which it is applied according to subject matter, focusing on the relative constitutional and institutional features of the courts, the legislature and the executive. The nature of the proportionality test has been influenced by EU law, the case law of the ECHR and provisions found in other common law countries, particularly Canada.

2.1.2 There is currently no general provision in UK law establishing the extent to which all fundamental rights can be restricted. When applying Convention rights, UK law adopts the proportionality test used to determine the extent to which certain Convention rights may be limited to achieve a legitimate aim.

2.1.3 The rule of law is recognised as a constitutional principle of the common law. Section 1 of the Constitutional Reform Act 2005 states that nothing in the Act affects ‘the existing constitutional principle of the rule of law’. The rule of law is both formal and substantive.³⁶ To date, ‘breach of the rule of law’ is not a head of judicial review in and of itself. Nevertheless, the rule of law is justiciable. The various heads of judicial review exemplify the rule of law, by ensuring that administrative actions are controlled by the judiciary.³⁷ The rule of law is used to interpret the scope of heads of judicial review, to ensure that legal principles prevent arbitrary decision-making by the executive. It is also used as a justification

³² *Ibid.*

³³ This approach is confirmed in *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, paras. 55–56.

³⁴ *R (Nadarajah) v. Secretary of State for the Home Department* [2005] EWCA Civ 1363.

³⁵ *Bank Mellat v. Her Majesty’s Treasury (No. 2)* [2013] UKSC 38, [2013] UKSC 39.

³⁶ *R v. Secretary of State for the Home Department ex parte Pierson* [1998] AC 539, 591 (Lord Steyn).

³⁷ *R (Cart) v. Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, para. 37 (Lady Hale).

for the creation of new heads of judicial review and of the principle of legality.³⁸ However, given the competing principle of parliamentary legislative supremacy, when courts strike down executive measures, it is possible for Parliament to re-enact these measures, even retrospectively.³⁹

Courts will also ensure that administrative bodies take into account possible implications for the rule of law as a relevant consideration. A failure to take into account a relevant consideration may mean that a decision of the administration will be quashed.⁴⁰ However, courts may defer to the executive as regards the extent to which rule of law considerations are to be balanced with other interests, particularly the balance between upholding the rule of law and maintaining national security.⁴¹ The rule of law may also require the administration to produce guidelines explaining how it will exercise its discretion, where discretion is used to mediate the impact of a blanket provision restricting a fundamental right.⁴² Courts may also scrutinise these guidelines to ensure their compatibility with Convention rights.⁴³

The rule of law also underpins the constitutional principle of open justice. This principle requires judicial cases to be heard in public, unless private hearings are strictly necessary to ensure justice between the parties and the requirements of privacy are kept to an absolute minimum.⁴⁴ It also requires disclosure to newspapers of information placed before the court where this is required for serious journalistic purposes.⁴⁵ The principle of open justice can be restricted where there are good reasons, or where its restriction is required by clearly-expressed wording in legislation. It is for courts to determine the scope of the constitutional principle of open justice.⁴⁶

The right to judicial review is regarded as a constitutional principle of the common law. It is a long-standing principle of the common law that courts will require extremely clear words in legislation to oust judicial review of a specific decision.⁴⁷ Although it is possible for legislation to be enacted that does oust

³⁸ See *R v. Home Secretary ex parte Pierson* [1997] UKHL 37; *R v. Lord Chancellor, ex parte Witham* [1998] QB 575, *R v. Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115.

³⁹ *Ahmed v. Her Majesty's Treasury* [2010] UKSC 2, where the courts used the principle of legality to strike down the Terrorism (United Nations Measures) Order 2006. The impact of this decision was reversed, retrospectively, by the Terrorist Asset-Freezing (Temporary Provisions) Act 2010, itself replaced by the Terrorist Asset-Freezing etc. Act 2010 which effectively replicated the executive orders, placing them on a legislative footing and thereby immune from judicial review.

⁴⁰ *R v. Coventry Airport, ex parte Phoenix Aviation* [1995] 3 All ER 37 and *R (Cornerhouse) v. Director of Serious Fraud Office* [2008] UKHL 60.

⁴¹ *R (Cornerhouse) v. Director of Serious Fraud Office* [2008] UKHL 60.

⁴² *R (Purdy) v. DPP* [2009] UKHL 45.

⁴³ *R (Nicklinson) v. Ministry of Justice* [2014] UKSC 38.

⁴⁴ *Bank Mellat v. Her Majesty's Treasury* (No. 2) [2013] UKSC 38, [2013] UKSC 39.

⁴⁵ *R (Guardian) v. City of Westminster Magistrates Court* [2010] EWCA Civ 420.

⁴⁶ *Kennedy v. Charity Commission* [2014] UKSC 20, and *A v. British Broadcasting Corporation* [2014] UKSC 25.

⁴⁷ *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147 and *R (Cart) v. Upper Tribunal* [2011] UKSC 28.

judicial review, such clauses are strongly criticised by the judiciary and academic commentary.⁴⁸ There are also judicial dicta which state that, were legislation to be enacted that abolished judicial review, courts would not recognise such legislation as a valid Act of Parliament.⁴⁹ The Court of Appeal has also recognised access to the court as a fundamental right. This prevents individuals from being impeded in their access to courts, but does not extend to a positive obligation to provide information on legal rights.⁵⁰ The principle may, however, provide a means of challenging restrictions on the provision of legal aid, were this to prevent effective access to the courts.⁵¹ The principle was recently used to prevent the setting of fees that made it practically impossible for individuals to bring a case before a tribunal.⁵²

There is no specific constitutional principle that non-published laws are invalid. However, there is a requirement to publish primary legislation, as well as national statutory instruments. Circulars and policy documents need not be published. However, where a policy has been published, an individual has a right to have his case determined according to the published policy and not according to a secret, unpublished policy that contradicts the requirements of the published policy.⁵³ Also, if a policy informs discretionary decision-making, where those affected by that discretion would expect to have a right to make representations to the public body as to how the public body's discretion should be exercised, then the policy must be made available.⁵⁴ However, it may not be the case that non-publication renders the measure invalid.⁵⁵ UK law has also developed a principle of notice. Notice of an individual decision is required before it can have the character of a determination with legal effect.⁵⁶

Legal certainty is also recognised as a constitutional principle of the common law. There is no specific legal principle of non-retroactivity and it is possible, though rare, for legislation to be enacted with retrospective effect, even if this adversely affects an individual's rights previously upheld by the courts.⁵⁷ However,

⁴⁸ See for example the strongly-worded comments of Lord Woolf, reacting to the proposal to oust judicial review for immigration decisions. <http://www.law.cam.ac.uk/faculty-resources/download/lord-woolf-squire-centenary-lecture-the-rule-of-law-and-a-change-in-constitution-transcript/1415/pdf>. The clause was eventually removed from the Bill.

⁴⁹ *R (Jackson) v. Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para. 102 (Lord Steyn) and at para. 107 (Lord Hope); *AXA General Insurance v. Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868, at para. 51 (Lord Hope).

⁵⁰ *R (Children's Rights Alliance) v. Secretary of State for Justice* [2013] EWCA Civ 34.

⁵¹ *R (Public Law Project) v. Secretary of State for Justice* [2014] EWHC 2365 (Admin).

⁵² *R (Unison) v. Lord Chancellor* [2017] UKSC 51.

⁵³ *Walumba Lumba v. Secretary of State for the Home Department* [2011] UKSC 12.

⁵⁴ *Walumba Lumba v. Secretary of State for the Home Department* [2011] UKSC 12; *R (Reilly) v. Secretary of State for Work and Pensions* [2013] UKSC 68.

⁵⁵ *R (Reilly) v. Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453, para. 65.

⁵⁶ *Anufrijeva v. Immigration Appeal Tribunal* [2002] EWCA Civ 1628.

⁵⁷ Recent examples include the War Damages Act 1965, the War Crimes Act 1991, the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 and the Jobseekers (Back to Work Scheme) Act

recently the High Court, and later the Court of Appeal, declared retrospective legislation incompatible with Art. 6 ECHR in the specific situation where the retrospective legislation enacted had interfered with the outcome of a legal case concurrently being determined by the court.⁵⁸ There is also no specific prevention of the creation of executive actions with retroactive effect, though the existence of retroactivity may be regarded as evidence of an unreasonable exercise of discretionary power.⁵⁹ There is a protection of both procedural and substantive legitimate expectations.⁶⁰ There is a stronger protection of individual substantive representations than of general policy decisions, and it is easier to require public bodies to adhere to a procedural as opposed to a substantive legitimate expectation. Public authorities may renege on an individual representation or a published policy where to do so is for the public good and is a proportionate response. The principle can also be used to ensure that published policies are applied to individuals, again subject to the proviso that the policy may not be applied where this is a proportionate response for good public policy reasons.⁶¹

The Bill of Rights requires parliamentary authority for the imposition of taxation.⁶² This does not extend to the imposition of administrative charges, penalties or obligations. There is also a residual ability of the courts to use the common law to create new criminal offences which have not been established by statute, where this is required to prevent offences that are prejudicial to the public welfare.⁶³

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 The balancing of fundamental rights and economic freedoms in EU law has not raised constitutional issues in the UK. There has, however, been considerable academic criticism of *Viking Line*⁶⁴ and *Laval*.⁶⁵

2013. All of these examples, apart from the War Crimes Act 1991, are retrospective legislative provisions designed to overturn court decisions quashing executive action.

⁵⁸ *R (Reilly) v. Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin) and [2016] EWCA Civ 413. It is believed that the Government will appeal this decision. For commentary see Harlow C, 'Judging Parliament: the Jobseekers case' UK Const. L. Blog (3rd October 2014) <http://ukconstitutionallaw.org>.

⁵⁹ *Congreve v. Home Office* [1976] QB 629.

⁶⁰ *R v. Devon Health Authority ex parte Coughlan* [2001] QB 213.

⁶¹ *R (Nadarajah) v. Secretary of State for the Home Department* [2005] EWCA Civ 1363 and *R (Rashid) v. Secretary of State for the Home Department* [2005] EWCA Civ 744.

⁶² Article 4, Bill of Rights Act 1688.

⁶³ *R v. R* [1992] 1 AC 599.

⁶⁴ Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779.

⁶⁵ Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

2.3 *Constitutional Rights, the European Arrest Warrant and EU Criminal Law*

2.3.1 The Presumption of Innocence

2.3.1.1 The presumption of innocence Article 6(2) of the ECHR provides the presumption of innocence guarantee;⁶⁶ it has been held to be applicable to extradition proceedings where they are a direct consequence, and the concomitant, of the criminal investigation pending against an individual.⁶⁷ At the EU level, the presumption of innocence is clearly set out in Art. 48(1) of the Charter of Fundamental Rights. It is also listed amongst the rights of which individuals must be informed in the letter of rights introduced under the Stockholm Roadmap.⁶⁸

The Framework Decision on the European Supervision Order⁶⁹ (ESO) is an example of how ‘flanking measures’ are assisting in making the operation of the European Arrest Warrant (EAW) increasingly compliant with human rights. The ESO reinforces the presumption of innocence by minimising the risk that non-residents will be remanded for many months in custody pending trial.

The *Nikolics* case was an EAW case on appeal from the District Court, where reliance on the presumption of innocence was unsuccessful. There ‘was a suggestion that the presumption of innocence is not in fact applied to them in the same way as non-Roma defendants’.⁷⁰ The Court found that there was insufficient evidence of discrimination; the argument was not that the issuance of the arrest warrant was for extraneous grounds, but rather the threat of discrimination upon return to Hungary, which could mean an increased likelihood of being held in remand.

2.3.1.2 Preliminary judicial review and review of evidence In England and Wales, a preliminary judicial review takes place; this is essentially an administrative review to ensure that the procedural requirements have been met. However, in its implementing laws the UK has introduced a number of grounds upon which

⁶⁶ *Geerings v. the Netherlands*, no. 30810/03, 1 March 2007. The confiscation order imposed on the applicant was based on a presumption of guilt. ‘It amounts to a determination of the applicant’s guilt without the applicant having been “found guilty according to law”’ (§50). The Court reiterated that this applies to both judicial decisions and statements by public officials. See *Daktaras v. Lithuania*, no. 42095/98, ECHR 2000-X.

⁶⁷ *Ismoilov and Others v. Russia*, no. 2947/06, 24 April 2008. See also *Gaforov v. Russia*, no. 25404/09, § 208, 21 October 2010 referring to *Ismoilov*.

⁶⁸ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, [2009] OJ C 295/01 (Stockholm Roadmap). Specifically, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, [2012] OJ L 142/1.

⁶⁹ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, [2009] OJ L 294/20.

⁷⁰ *Laszlo Nikolics v. The City Court of Szekszard* (A Judicial Authority in Hungary) [2013] EWHC 2377 (Admin) 2013.

surrender can be resisted. These include dual criminality (where required); extraneous considerations; passage of time; human rights; or where the physical or mental condition of a wanted person would make surrender unjust or oppressive.

Even prior to the Framework Decision on the European Arrest Warrant (EAWFD),⁷¹ requesting states did not have to show a *prima facie* case before extradition could be granted. As such, it continues to be the case that a review of the evidence is not undertaken. This is in line with the EAWFD and the principle of mutual recognition, and thus courts do not review the evidence prior to surrendering a person;⁷² it is left for the issuing Member State to be satisfied that sufficient evidence exists for prosecution before they issue an EAW.

In England and Wales, prior to an arrest being made pursuant to an EAW, the National Crime Agency⁷³ conducts an administrative assessment whereby it reviews the form and content of the EAW. The conditions to be satisfied are set out under Sect. 2 Extradition Act 2003 (EA); these are procedural requirements relating primarily to the contents of the EAW, which must contain: either a statement stating that the person in question is accused in the issuing Member State of the commission of a specified offence or a statement that the warrant has been issued for the purposes of arrest and prosecution, including particulars of the person's identity, any other warrant in respect of the offence, the circumstances under which it is alleged the offence was committed or the sentence imposed. If satisfied, the EAW is 'certified' and passed onto the Police who undertake to locate and arrest the requested person. This process looks only at the validity of an EAW and whether the correct boxes have been ticked and completed, but not whether the information contained is correct.⁷⁴

The administrative check does not consider substantive issues which may question the lawfulness of the issuing Member State warrant and could merit the non-execution of the EAW. Pre-arrest, such issues are not considered by a judge, since there is no check similar to that under Sect. 71 EA.⁷⁵ The initial hearing is

⁷¹ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

⁷² *Symeou v. Greece* [2009] EWHC 897 (Admin).

⁷³ The Serious Organized Crime Agency (SOCA) came into force on 1st April 2006 and was replaced by the NCA on 7 October 2013. The NCA and previously SOCA act as the UK point of contact for Interpol, Europol and as the UK Central Authority for all EAWs.

⁷⁴ See *Zakrzewski v. The Regional Court in Lodz, Poland* [2013] UKSC 2, para. 8.

⁷⁵ Section 71A EA (arrest warrant following extradition request) reads:

(1) This section applies if the Secretary of State sends documents to the appropriate judge under Sect. 70.

(2) The judge may issue a warrant for the arrest of the person whose extradition is requested if the judge has reasonable grounds for believing that –

(a) the offence in respect of which extradition is requested is an extradition offence, and
(b) there is evidence falling within subsection (3).

(3) The evidence is – (a) evidence that would justify the issue of a warrant for the arrest of a person accused of the offence within the judge's jurisdiction, if the person whose extradition is requested is accused of the commission of the offence;

also administrative in nature (confirming the identity, setting the date for the hearing, asking if the person consents to surrender and determining if the person is to be remanded in custody or bailed). The first opportunity at which a court can consider whether the issuing Member State's arrest warrant is lawful is during the extradition hearing, at which point the individual will have already been deprived of liberty if held on remand.

Arguments relating to the lawfulness and arbitrariness of an arrest are normally dealt with together with arguments against surrender. Arbitrariness⁷⁶ includes for example where an issuing Member State requests an individual for prosecution, when in reality they are requesting the individual for further investigation or questioning; here they are not using the EAWFD for the intended purposes. English courts have an inherent right to ensure that the process is not abused for a 'collateral and improper purpose'⁷⁷ and in some circumstances 'to question statements made in the EAW'.⁷⁸ According to Lord Sumption in *Zakrzewski*, this is exceptional and subject to four observations, which include looking only at administrative inaccuracies concerning material errors and not factual or evidential challenges of the alleged offence, which is reserved for the issuing Member State.⁷⁹

The English courts have made it clear that 'under the scheme of the Framework Decision the safeguard against the inappropriate issue of an EAW lies in the process antecedent to the issue of the EAW',⁸⁰ and what they receive in an EAW will be taken at face value. This has been confirmed by the Supreme Court, which has stated that there are two safeguards: first 'the mutual trust between states party to the Framework Decision that informs the entire scheme',⁸¹ trusting that the issuing Member State has submitted the truth and, secondly, the restricted abuse of power check discussed above.

(b) evidence that would justify the issue of a warrant for the arrest of a person unlawfully at large after conviction of the offence within the judge's jurisdiction, if the person whose extradition is requested is alleged to be unlawfully at large after conviction of the offence.

⁷⁶ *Bozano v. France*, 18 December 1986, Series A no. 111; *Čonka v. Belgium*, no. 51564/99, ECHR 2002-I.

⁷⁷ *Zakrzewski v. The Regional Court in Lodz, Poland*, [2013] UKSC 2.

⁷⁸ Per Lord Bingham in *Caldarelli v. Judge for Preliminary Investigations of the Court of Naples, Italy* [2008] 1 WLR 1724 *Criminal Court at the National High Court, First Division v. Murua* [2010] EWHC 2609 (Admin), *Dabas v. High Court of Justice in Madrid, Spain* [2007] 2 AC 31 and *Pilecki v. Circuit Court of Legnica, Poland* [2008] 1 WLR 325.

⁷⁹ *Zakrzewski v. The Regional Court in Lodz, Poland*, [2013] UKSC 2, para. 13: '[I]n considering whether to refuse extradition on the ground of abuse of process, the materiality of the error in the warrant will be of critical importance, whereas if the error goes to the validity of the warrant, no question of materiality can arise. An invalid warrant is incapable of initiating extradition proceedings. I do not think that it is consistent with the scheme of the Framework Decision to refuse to act on a warrant in which the prescribed particulars were included, merely because those particulars contain immaterial errors.'

⁸⁰ Per Lord Philips in *Assange v. Swedish Prosecution Authority* [2012] UKSC 22, para. 79.

⁸¹ *Zakrzewski v. The Regional Court in Lodz, Poland* [2013] UKSC 2, para. 10.

Perhaps the most difficult to reconcile with the executing Member State obligations are judgments such as *Mr. Symeou's*. Mr. Symeou provided evidence that the two key witnesses against him had been held incommunicado and subjected to intimidation before agreeing to sign identical statements in a language they did not understand; statements which were immediately revoked upon return to the UK. The UK courts held that these matters were for the trial judge in the issuing Member State to consider and not factors which could displace the obligation of the UK courts to surrender him under the EAWFD.⁸² Mr. Symeou spent two years in Greece awaiting trial, including almost a year in the notorious Korydallos prison on remand having been denied bail on questionable grounds. The grounds upon which he was refused bail included the fact that he was not a resident of Greece and also that he had not shown any signs of remorse for the crime. Once the trial eventually began the case was dismissed on the basis that there was insufficient evidence, and Mr. Symeou was allowed to return to the UK.

To a certain extent the amendment to the EA attempts to address this issue. According to Sect. 21A, surrender can be refused where no decision has been taken to charge the requested individual, although this section does not create a requirement that the case be ready for trial.⁸³

2.3.2 *Nullum Crimen, Nulla Poena Sine Lege*

2.3.2.1 Double criminality and legality Dual criminality has been interpreted strictly by the courts. This is one example of the principle of mutual recognition applying automatically. Where the offence for which the EAW is issued falls under one of the 32 listed offences, complete trust is given to the issuing Member State that the offence for which request for surrender of a person is made falls within the stated category of offence. Quite a broad margin has been given to the issuing Member State, with courts accepting the 32 offences without review.⁸⁴

What will be noted at first glance is that the list contains a varied spectrum of crimes. Whilst some, such as murder, are easily defined and comparable across the Member States, the definition and classification of others such as swindling and rape⁸⁵ differ across the Member States, and some offences are unique to one Member State.⁸⁶

⁸² *Symeou v. Greece* [2009] EWHC 897 (Admin).

⁸³ A number of amendments to the Extradition Act 2003 were made by the Anti-Social Behaviour, Crime and Policing Act 2014 which came into force on 22 July 2014 (The Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No. 4 and Transitional Provisions) Order 2014, 2014/1916).

⁸⁴ *Julian Assange v. Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

⁸⁵ See *ibid.*

⁸⁶ For example, in the Republic of Cyprus there is a fraud offence which concerns the sale of property in the areas under unlawful Turkish occupation. Whilst the UK has no equivalent offence to the Cyprus offence, this was not a bar to Garry Robb's surrender under the EAW. The reason for this was that the Cyprus offence relating to dealings with property in the territory of Cyprus under

Section 64 EA, which transposes Art. 2 EAWFD, does not require the courts to consider whether the alleged conduct would constitute an offence under the law of the issuing state.⁸⁷ Nor does it require that an EAW be accompanied by a separate document certifying it.⁸⁸

The judgment in the *Assange* case⁸⁹ before the High Court is a good example of the courts' approach to submissions on double criminality. The defence stated that the fourth allegation would not equate to rape under the law of England and Wales, had it been fairly and accurately described. Thomas LJ first ascertained that it is only in exceptional circumstances appropriate for a court to have regard to extraneous material in order to determine the accuracy of the description of the conduct,⁹⁰ the purpose of which was solely to ensure the fairness and accuracy of the described facts and not an enquiry into the decision to prosecute a certain offence. Exceptional circumstances would arise where there has been a fundamental error, unfairness or bad faith by the issuing Member State authorities. No exceptional circumstances were found to exist in the *Assange* case. Nevertheless, having had the material placed before it, the court did express its view as to whether it would have made any difference had it taken the material into account. For Offence 4 the Court held that the description was fair and accurate but that in any case, it is the law of the issuing Member State which governs the classification of rape. Under the EAWFD, dual criminality is abolished for 32 offences (including for rape) and as such an enquiry like this is not ordinarily part of the EAW process. The only question is whether the offence is classified as rape in the issuing Member State. This is not to say that a real issue does not exist and in fact the *Assange* case reignited criticism of the EAW, the use of mutual recognition in criminal matters and the potential abuse that is created with the abolition of dual criminality without any agreed definition of the 32 offences.⁹¹

2.3.3 Fair Trial and *In Absentia* Judgments

2.3.3.1 Trials *in absentia* Originally, Art. 5(1) EAWFD addressed the issue of trials *in absentia*, stating that where a person has been convicted having not been informed of the date and time of the hearing, his surrender may be subject to the

illegal Turkish military occupation fell within the 'fraud' category of offences. Fraud is one of the 32 listed offences in the EAWFD and so dual criminality was not required.

⁸⁷ *Boudhiba v. National Court of Justice, Madrid* [2006] EWHC 167 (Admin). See the judgment of Lord Bingham in *Office of the King's Prosecutor, Brussels v. Cando Armas and another* [2005] UKHL 67.

⁸⁸ *Dabas v. High Court of Justice, Madrid* [2007] UKHL 6. Section 64(3)(b) imposes a double criminality requirement in respect of offences which are not listed in the EAWFD.

⁸⁹ *Julian Assange v. Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), para. 41.

⁹⁰ The Court followed *The Criminal Court at the National Court, 1st Division (a Spanish Judicial Authority) v. Murua* [2010] EWHC 2609 (Admin).

⁹¹ Amongst others see: O'Shea 2011; Marin 2014; Carrera 2014.

issuing Member State giving an assurance that he will have the opportunity to apply for a re-trial of the case.

It is clear that the conditions required by Art. 5(1) EAWFD fell below the standards the European Court of Human Rights (ECtHR) demands. This provision has been deleted and the EAWFD amended by the Council Framework Decision relating to trials *in absentia*, which inserts Art. 4a.⁹² This now sets out the grounds for non-recognition of decisions rendered following a trial *in absentia* and the conditions for its application.

The amended EAWFD requires the issuing Member State to confirm that the individual will be 'expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed'. However, the Executing Member State has no ability or opportunity to assess the realities which will be faced by the individual upon surrender. This assurance still has a narrower scope than envisaged by the ECHR; the Executing Member State has to trust the assurance given by the issuing Member State on the basis of a simple tick on the request form.

In its implementing law, the UK introduced additional guarantees in relation to trials *in absentia*, not envisaged in the EAWFD. Section 20(8) EA provides that if a person has been convicted *in absentia*, the person must be entitled not only to a re-trial but must also be guaranteed,

- (a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;
- (b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

These guarantees have been considered by the House of Lords in *Caldarelli*⁹³ where the relevant provisions are summarised:

14. Section 20 ... if the judge decides that the person had not been tried in his presence, and had not deliberately absented himself and would not be entitled to a retrial or (on appeal) a review amounting to a retrial, he must order the person's discharge.

15. Section 21 requires the judge to consider whether the person's extradition would be compatible with his Convention rights under the Human Rights Act 1998. The section is engaged if the person is accused of the commission of an extradition offence but is not alleged to be unlawfully at large after conviction of it, if the person was convicted in his presence, if the person had deliberately absented himself from his trial or if the person, not having absented himself deliberately from his trial, would be entitled to a retrial or (on appeal) to a review amounting to a retrial.

⁹² Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, [2009] OJ L 81/24.

⁹³ *Caldarelli (Appellant) v. Court Of Naples (Respondents)* [2008] UKHL 51.

In *Bicioc* it was held that according to the proper interpretation of Sect. 23 EA, as a minimum it is required that a trial process must have been initiated from which the appellant has deliberately absented himself. The defendant had not deliberately absented himself from the trial, although he had made it difficult for the authorities to serve him with notice. However, the key point was that,

[i]f he had been entitled unequivocally to a right of retrial or to have his case reheard on the merits of the appeal his extradition could have been ordered. It is only because it is for the time being accepted that Romanian law does not give him that right that I must allow this appeal.⁹⁴

2.3.4 The Right to a Fair Trial – Practical Challenges Regarding a Trial Abroad

2.3.4.1 Assistance to citizens surrendered Public, non-governmental organisations providing assistance exist in the UK. These include Fair Trials International (FTI) which has been the most visible on the issue of the EAWFD. FTI provides legal assistance to individuals arrested abroad through their network of local lawyers. We would support the establishment of a public body providing assistance to residents who are involved in trials abroad, although concerns are already raised in particular in the light of recent cuts in legal aid at the domestic level in the UK. We would also recommend the establishment of EU funds for this purpose. Greater investment should be combined with more extensive use of the possibilities offered by the ESO and other mutual recognition and mutual legal assistance measures.

2.3.4.2 Statistics on outcomes The UK maintains detailed statistics on EAW requests, arrests and surrenders, which are available on the website of the National Crime Agency.⁹⁵

In terms of the number of those surrendered and subsequently found innocent, the UK does not keep such statistics. The *Symeou* case mentioned earlier in the Chapter has been a high profile case concerning the deficiencies of the EAW process where it concerns assessing the strength of the case against the requested individual. However, as already stated above, in the UK this is not unique to the implementation of the EAWFD, since there was previously no requirement to show a *prima facie* case against a requested person.

⁹⁴ *Gheorghe Bicioc v. Baia Mare Local Court Romania* [2014] EWHC 628 (Admin). See also *The Ministry of Justice (Romanian Judicial Authority) v. Ernest-Francisc Bohm* [2013] EWHC 1171 (Admin).

⁹⁵ National Crime Agency Statistics, <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-from-the-uk-european-arrest-warrant-statistics>.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition in EU Criminal Law and Abolition of the Exequatur in Civil and Commercial Matters

2.3.5.1 Mutual recognition and the rule of law Specific reference to the rule of law has been raised in different ways before the courts.

In *Villota*⁹⁶ it was submitted that where a state whose officials have deliberately tortured a person in their custody seeks to use the EAW system, this would be a 'tainted prosecution', which would offend the rule of law. This argument did not succeed, as the Court regarded the Spanish safeguards as sufficient.

Interestingly, in *Stawicki*⁹⁷ it was argued that, in the interests of the rule of law, a person convicted and sentenced should be surrendered irrespective of how much he had changed and turned his life around since conviction. A similar line of reasoning was applied in *Kolec* where the court held that the District Judge was correct 'on the facts of this case the United Kingdom's obligations under international treaties, whose purpose is to underpin the rule of law in Member States, must take priority over the right to respect for family life of the appellant, his partner and his daughter'.⁹⁸

2.3.5.2 Suitability of mutual recognition in criminal matters The debate in the UK has focused more on the suitability of the application of mutual recognition in criminal matters, and whether sufficient mutual trust exists to enable such mutual recognition.⁹⁹ A number of reports and parliamentary inquiries on the extent to which mutual recognition can be applied to extradition have been conducted in the UK in recent years, including the Sir Scott Baker Review on the UK Extradition Arrangements in 2011,¹⁰⁰ the relevant inquiry by the Joint Committee on Human Rights¹⁰¹ and the first inquiry by the ad hoc Parliamentary Committee on Extradition.¹⁰² It is our view that the application of the principle of mutual recognition in criminal matters brings forward legal issues which are qualitatively different to those arising from the application of the principle in the internal market, in particular as regards the impact of mutual recognition on constitutional principles including human rights and the rule of law.

⁹⁶ *Raul Angel Fuentes Villota v. The 2nd Section of the National High Court of Madrid, Spain* [2014] EWHC 2623 (Admin).

⁹⁷ *Stawicki v. Circuit Court of Torun, Poland* [2014] EWHC 3198 (Admin).

⁹⁸ *Dariusz Kolec v. Judicial Authority of Poland* [2014] EWHC 2230 (Admin).

⁹⁹ On the relationship between mutual recognition and mutual trust see Mitsilegas 2012, pp. 319–372 and Mitsilegas 2006, pp. 1277–1311.

¹⁰⁰ Home Office, Independent review of the United Kingdom's extradition arrangements, 18 October 2011.

¹⁰¹ The Human Rights Implications of the UK Extradition Policy, 15th Report, session 2010–2011.

¹⁰² Select Committee on Extradition Law – First Report, The European Arrest Warrant Opt-in, HL Paper 63, Published 10 November 2014.

2.3.5.3 Role of the judiciary Within the framework of the EAWFD, the role of the judiciary has shifted to an administrator whose hands, particularly at first instance, are largely tied by the principle of mutual recognition. However with time, judges have been gaining ‘confidence’ in questioning the presumptions created by mutual recognition.

Some may consider recent cases as a sign of the judiciary softening its stance in relation to human rights arguments resisting surrender. However, when considered in greater detail, this is not the case.¹⁰³ Despite the pilot judgment of the ECtHR in *Torreggiani and others v. Italy*,¹⁰⁴ which identified a systemic problem resulting from a chronic malfunction of the penitentiary system, Lord Justice McCombe has clearly stated that had the Italian authorities provided greater detail in their general letter of assurance, the outcome would have been different:

For my part, I would have expected at least some information as to whether bail might be available to the Appellant in Italy and on what terms, and, if not available or if not likely to be granted, some information as to the specific institution or type of institution in which the Appellant would be confined and some information as to the prevalent conditions in that institution or those institutions.¹⁰⁵

In the common law tradition, judges have been developing jurisprudence applicable to the EAW and mutual recognition in criminal matters more broadly, on a case by case basis. The evidence required to rebut the strong presumption remains high, and something ‘approaching an international consensus is required’.

One of the questions in *Assange* was what was meant by a ‘judicial authority’. In essence, both the Court of Appeal and the Supreme Court determined that it was for each Member State to designate their own judicial authority: ‘It is therefore entirely consistent with the principles of mutual recognition and mutual confidence to recognise as valid an EAW issued by a prosecuting authority designated under Art. 6.’¹⁰⁶ Nevertheless, Thomas LJ also recognised the importance of maintaining public confidence and mutual confidence of citizens with judges and thus accepted the need for a ‘more intense scrutiny ... where a warrant is issued by a “judicial authority” who is not a judge’.¹⁰⁷ In the case of *Assange*, even though the EAW was issued by a prosecutor, Swedish courts had scrutinised the decision and this was sufficient to trust that due process had been followed. This again was an assertion that had already been dealt with by the courts of other Member States (i.e. Cyprus).¹⁰⁸

In *Bucnys*,¹⁰⁹ the Supreme Court in applying *Assange* developed the reasoning to state that an EAW would be valid where issued by a Ministry of Justice, provided

¹⁰³ *Hayle Abdi Badre v. Court of Florence, Italy* [2014] EWHC 614 (Admin).

¹⁰⁴ *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013.

¹⁰⁵ *Badre v. Court of Florence, Italy* [2014] EWHC 614 (Admin).

¹⁰⁶ *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22, para. 41.

¹⁰⁷ *Ibid.*, para. 19

¹⁰⁸ *Ibid.*, para. 44, citing Christou (2010).

¹⁰⁹ *Bucnys v. Ministry of Justice, Lithuania* [2013] UKSC 71.

that it was at the request of a court or judicial authority which did not include a prison authority. In both *Assange* and *Bucnys*, the Supreme Court developed an autonomous concept of 'judicial authority' for the purposes of the Framework Decision. This approach is particularly noteworthy in the light of the limitations to the Court's powers to refer questions for interpretation under the preliminary ruling procedure before 1 December 2014.

2.3.5.4 Proportionality test In March 2014, Sect. 157 of the Anti-Social Behaviour, Crime and Policing Act 2014 introduced proportionality as a ground for refusing to surrender an individual. The Extradition Act 2003 now reads,

Section 21A Person not convicted: human rights and proportionality

- (1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ('D') –
 - (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
 - (b) whether the extradition would be disproportionate.
- (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
- (3) These are the specified matters relating to proportionality –
 - (a) the seriousness of the conduct alleged to constitute the extradition offence;
 - (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
 - (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D

Section 157(4) of the Anti-Social Behaviour, Crime and Policing Act 2014 further states,

In deciding any question whether section 21A of the Extradition Act 2003 is compatible with European Union law, regard must be had (in particular) to Article 1(3) of the framework decision of the Council of the European Union made on 13 June 2002 on the European arrest warrant and the surrender procedures between member states (2002/584/JHA) (which provides that that decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union).

Section 17A of the Practice Directions¹¹⁰ sets out a relatively prescriptive list of the offences for which surrender would be classified as disproportionate unless there are exceptional circumstances, which are listed as a vulnerable victim; a crime committed against someone because of their disability, gender identity, race, religion or belief, or sexual orientation; significant premeditation; multiple counts; extradition also sought for another offence; or previous offending history. Under 17A.5, a table sets out examples of offences:

¹¹⁰ Criminal Practice Directions Amendment No. 2 [2014] EWCA Crim 1569.

Category of offence	Examples
Minor theft (not robbery/burglary or theft from a person)	Where the theft is of a low monetary value and there is a low impact on the victim or indirect harm to others, for example: (a) Theft of an item of food from a supermarket (b) Theft of a small amount of scrap metal from company premises (c) Theft of a very small sum of money
Minor financial offences (forgery , fraud and tax offences)	Where the sums involved are small and there is a low impact on the victim and/or low indirect harm to others, for example: (a) Failure to file a tax return or invoices on time (b) Making a false statement in a tax return (c) Dishonestly applying for a tax refund (d) Obtaining a bank loan using a forged or falsified document (e) Non-payment of child maintenance
Minor road traffic, driving and related offences	Where no injury, loss or damage was incurred to any person or property, for example: (a) Driving whilst using a mobile phone (b) Use of a bicycle whilst intoxicated
Minor public order offences	Where there is no suggestion the person started the trouble, and the offending behaviour was for example: (a) Non-threatening verbal abuse of a law enforcement officer or government official (b) Shouting or causing a disturbance, without threats (c) Quarrelling in the street, without threats
Minor criminal damage (other than by fire)	For example, breaking a window
Possession of controlled substance (other than one with a high capacity for harm such as heroin, cocaine, LSD or crystal meth)	Where it was possession of a very small quantity and intended for personal use

The introduction of this proportionality review was the result of a combination of NGO pressure and the Government's cost-cutting agenda. NGOs such as FTI led campaigns to highlight the injustices resulting from the misuse of the EAW for 'trivial' offences. FTI also drew attention to the intrinsic disadvantages involved in defending oneself in a foreign country:

A single case often suffers multiple failures to respect basic rights, with for example the lack of access to a lawyer or legal aid being exacerbated by the lack of information on rights or on the prosecution case, or the lack of a quality interpreter or translations of important documents, or the inability of suspects to contact friends, family or consular officials as

quickly as possible to help them avail themselves of these other basic measures quickly enough not to have their position irrevocably prejudiced.¹¹¹

To a large extent these shortcomings have been dealt with by the Procedural Guarantee measures adopted under the Stockholm Roadmap.¹¹² Perhaps the tables have turned: with the UK choosing to not opt into the Directive on access to a lawyer, concerns could now be raised about the treatment of individuals surrendered to the UK under an EAW.¹¹³

2.4 The EU Data Retention Directive

2.4.1 Our data protection law is based on EU law and is now the Data Protection Act 2018. The Information Commissioner oversees the law and regulates data holding. Our courts have been notably lukewarm in upholding data protection rights, although a recent decision of the Supreme Court has placed limits on the holding and processing of data.¹¹⁴ Our law of privacy protection is common law- and Human Rights Act-based. Domestic law did not, until comparatively recently, give a high priority to privacy protection. Startling and scandalous abuse of privacy by the UK tabloid press led to the comprehensive Leveson inquiry into press ethics and culture, the major recommendation of which was rejected by Government.¹¹⁵ For over a decade the law has improved under judicial rulings to give greater protection to privacy, very much under the influence of the ECHR.

The 2006 Directive¹¹⁶ was implemented under delegated powers (SI 2009/859). Retention was initially regulated under the Regulation of Investigatory Powers Act 2000 (RIPA) and the Anti-terrorism, Crime and Security Act 2001. The UK

¹¹¹ Fair Trials International (2010) Memorandum submitted to Justice Committee – Written Evidence, Justice Committee Seventh Report, Justice issues in Europe.

¹¹² Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, [2010] OJ L 280/1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, [2012] OJ L 142/1; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] OJ L 294/1.

¹¹³ On the implications of the UK opt-out from the Directive on access to a lawyer for the operation of the European Arrest Warrant, see Mitsilegas 2014.

¹¹⁴ *R (T) v. Secretary of State for the Home Department* [2014] UKSC 35.

¹¹⁵ Leveson Inquiry – Report into the culture, practices and ethics of the press, 29 November 2012, <http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp>.

¹¹⁶ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

Government had been an avid supporter of the EU laws governing retention because retention was a policy it agreed with. The regulations allowed retention by network providers (PCOs) and transfer upon request by the authorities for 12 months. The Interception of Communications Commissioner has oversight of the process of access to data. He has announced (October 2014) an investigation to establish whether the police are using RIPA to circumvent press protection in the Police and Criminal Evidence Act 1984, following complaints that police have accessed electronic records to identify journalists' sources without authorisation by a court.¹¹⁷ The Information Commissioner monitors the security of stored data.

The CJEU decision in *Digital Rights*¹¹⁸ forced the Government's hand. In June 2014, the Home Secretary announced plans to present a Communications Data Bill because existing powers to combat terrorism and serious crime were 'inadequate'. It was criticised by privacy campaigners for being a 'snooper's charter'.

The result was emergency legislation based on domestic law, not EU law. This emerged in the Data Retention and Regulatory Powers Act 2014.¹¹⁹ The 'emergency' action on this Bill was heavily criticised by scholars and backbench Members of Parliament (MPs). For example, fifteen senior UK scholars in technology law, in an open letter to the House of Commons, expressed concern that the Act would increase Government access to communications data and content, for example by expanding the UK's ability to mandate the interception of communications data across the world, which are some of the first powers of their kind globally. The open letter found that the Act 'is far more than an administrative necessity; it is a serious expansion of the British surveillance state', and expressed concern that it was unnecessarily rushed through Parliament.¹²⁰ However, overall the Act is carefully drafted in an attempt to ring all the correct human rights bells and we have no written constitutional guarantee of rights. Before second reading, the Home Secretary stated, as required under the HRA 1998, that in her view, the Bill was compatible with the ECHR. Retention is required for *up to* twelve months. The legislation is to be repealed by 31 December 2016.

Section 1 provides that the Secretary of State may by notice require a public telecommunications operator to retain relevant communications data if the Secretary of State considers that the requirement is necessary and proportionate for one or more specified purposes. The Act has extra-territorial effect (Sect. 4).

¹¹⁷ Wintour, P. (2014, October 12). British police's use of Ripa powers to snoop on journalists to be reined in. *The Guardian*. <http://www.theguardian.com/world/2014/oct/12/police-ripa-powers-journalists-surveillance>. For the report see <http://www.iocco-uk.info/docs/IOCCO%20Communications%20Data%20Journalist%20Inquiry%20Report%204Feb15.pdf>.

¹¹⁸ Joined cases C-293/12 and 593/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

¹¹⁹ <http://www.legislation.gov.uk/ukpga/2014/27/notes/contents>.

¹²⁰ Kiss, J. (2014, July 15) Academics: UK 'Drip' data law changes are 'serious expansion of surveillance'. *The Guardian*. <http://www.theguardian.com/technology/2014/jul/15/academics-uk-data-law-surveillance-bill-rushed-parliament>.

The detail was in regulations (SI 2014/2042). The Act operates in a very British manner. Investigatory powers will be subject to review within a year by the Independent Reviewer of Terrorism Legislation established under the Terrorism Act 2006. The independent reviewer must consider current and future threats to the United Kingdom; capabilities needed to combat such threats; privacy safeguards; challenges faced by changing technologies; transparency and oversight; and the effectiveness of existing legislation and whether there is a case for new or amending legislation. Sections 57 and 58 of RIPA 2000 provide for the appointment of an Interception of Communications Commissioner to carry out a yearly report. The Commissioner is currently a retired senior judge. His remit includes reviewing the Secretary of State's role in issuing interception warrants and the operation of the regime for the acquisition of communications data. The Data Retention and Investigatory Powers Act (DRIPA) ensures that the Commissioner will now be required to report twice a year on these issues. The Ministerial announcement referred to establishing a privacy and civil liberties board on the US model! The Intelligence and Security Committee of Parliament heard evidence on this topic and the Government proceeded with its plan. The plan includes establishing the board as an adviser to the Independent Reviewer of Terrorism Legislation. The terrorist context of these provisions has not caused alarm for their application to *all* communications. There is a trust in authority in the UK that may not be present in countries that have been under totalitarian regimes.

In July 2015, the Administrative Court ruled that Sect. 1 of DRIPA and regulations made thereunder breached EU law, specifically Arts. 7 and 8 of the Charter.¹²¹ This was despite the fact that the UK Government deliberately avoided the EU framework. The Investigatory Powers Tribunal had also been tasked previously with a review of the legality of surveillance practices of General Communications HQ under existing legislation. Assuming that the alleged surveillance had taken place, it found there had been no breaches of Arts. 8 or 10 ECHR in relation to the legislative framework. Specific facts and the proportionality of the surveillance in individual cases were to be subject to further examination in closed hearings. In a subsequent judgment in February 2015, the Tribunal ruled that the practices concerning surveillance prior to the two rulings made in December 2014 and February 2015 breached the Convention because the practices were not in accordance with the law. There was insufficient publicity about safeguards. That deficiency had been rectified by the disclosures to the tribunal in its two hearings.¹²² The decisions did not make reference to the Charter of

¹²¹ *D Davis et al v. Secretary of State for the Home Department* [2015] EWHC 2092 (Admin).

¹²² *Liberty et al v. GCHQ et al* [2014] UKIPTrib 13_77H (5/12/14), <https://www.privacyinternational.org/temporaip.pdf>. The second ruling is [2015] UKIPTrib 13_77H, http://www.ipt-uk.com/docs/Liberty_Ors_Judgment_6Feb15.pdf. Also [2015] UKIPTrib 13_132 H (29 April 2015) and [2015] UKIPTrib_13_77H 2 (22 June 2015). In *Privacy International v. Secretary of State for Foreign Affairs* [2016] UKIPTrib 15_110 CH http://www.ipt-uk.com/docs/Bulk_Data_Judgment.pdf 15-110 CH, the Investigatory Powers Tribunal ruled that it was permissible to use Sect. 94 Telecommunications Act 1984 to obtain bulk communications data

Fundamental Rights. Further rulings of the tribunal held that in one case interceptions involving legally protected privilege breached Art. 8 ECHR, but in another case, MP interceptions were not given a legal immunity.¹²³ The appeal in *Davis* was heard in November 2015. Basically, the Court of Appeal ([2015] EWCA Civ 1185) cast doubt on the Divisional Court's ruling that the CJEU's judgment in *Digital Rights* set down mandatory requirements of EU law for national legislation. The object of the CJEU's criticism was the EC Directive, not national legislation. The court believed that the CJEU's ruling could affect aspects of data retention and use not covered by EU law. This would take the ruling outside EU competence. The Court of Appeal noted that *Digital Rights* also suggested that EU law went further than ECHR protection. In the light of this, the court referred the case¹²⁴ to the CJEU requesting an expedited hearing.

An Investigatory Powers Bill recasting surveillance laws has been published for the UK. The Bill followed a review by the Independent Reviewer of Terrorism Legislation of existing laws of investigatory powers, a review by the Intelligence and Security Committee of Parliament (ISC) and by the Panel of the Independent Surveillance Review convened by the Royal United Services Institute. All three agreed that current powers remained essential for the UK's security. There were also critical reactions in the media.

This Bill introduces the requirement for 'double-lock' approval by a minister and a judge (retired) for certain warrants, i.e. interception, equipment and bulk equipment interference, bulk data and data sets' powers. Warrants may only be issued to nine responsible intercepting bodies under three specified powers: national security, prevention and detection of serious crime and economic well-being in relation to national security. Powers must be proportionate. There is to be oversight by a new Investigatory Powers Commissioner, a senior judge. There are to be special safeguards in 'particularly sensitive material', e.g. involving lawyers, MPs, doctors and journalists. The bill deals with the duration of warrants, which in some cases may only be requested by the intelligence services, e.g. in bulk powers. There will be 'single point contacts', but no warrants, for communications data and intercept

(BCD). RIPA expressly preserved Sect. 94 in Sect. 80. However, the bulk personal data system operated by the intelligence services and General Communications HQ prior to BCDs avowal (publication) in March 2015 did not satisfy ECHR requirements, i.e. it was not 'in accordance with the law'. The bulk communications data system BCD did not satisfy ECHR principles prior to its avowal in November 2015 and the introduction of a more 'adequate system of supervision' at that date. Both bulk personal data and BCD systems complied with the principles after those respective dates. The tribunal still had to consider the question of proportionality and EU law. The question of data transfer was not included. See *Big Brother Watch v. UK* n. 126 below.

¹²³ [2015] UKIPTrib_13_77H 2 (22 June 2015) and *Caroline Lucas MP et al v. The Security Service et al* [2015] UKIPTrib 14_79-CH (14 October 2015).

¹²⁴ Case C-203/15 *Tele2 Sverige* [2016] ECLI:EU:C:2016:970. See on return to England *Secretary of State v. T. Watson* [2018] EWCA Civ 70 where the court confined itself to ruling that DRIPA s 1 was inconsistent with EU law where the objective pursued by granting access to data was not restricted solely to fighting serious crime, or where access was not subject to prior review by a court or an independent administrative authority (para. 13).

connection records. The Bill retains the extra-territorial effect of the 2014 Act. Crucially, a right of appeal from the Investigatory Powers Tribunal's decisions to the Court of Appeal is introduced for the first time. The IPT can inform individuals who have been victims of 'serious errors' by surveillance bodies. In some cases existing powers, as in equipment interference, will remain in previous legislation although a new 'more explicit' regime will be introduced. Schedule 6 provides for the making of codes of practice on the operation of the powers. The Bill says nothing about use of informers and other forms of human surveillance.

The ISC of Parliament issued a critical report on the Bill in February 2016. Amongst other criticisms, it recommended laws on universal and not just professional privacy protection and stated that the Secret Intelligence Service's capabilities in equipment interference, bulk data sets and communications data are too broad and lack clarity.¹²⁵ A revised Bill was presented to Parliament and was enacted in late 2016.¹²⁶

2.5 *Unpublished or Secret Legislation*

2.5.1 The Expert is not aware of any specific case in which the constitutionality of unpublished or secret measures has arisen in an EU context within the UK. A Westlaw search shows that neither of the CJEU cases has been considered by English courts.

However, non-publication of determining criteria affecting rights has featured as a principle of constitutional significance in recent UK Supreme Court litigation. First of all, use of unpublished criteria on the basis of which decisions affecting individual entitlement were made was not uncommon in our administrative

¹²⁵ HC 795 (2015–16) Report on the Draft Investigatory Powers Bill.

¹²⁶ For the first Bill see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473770/Draft_Investigatory_Powers_Bill.pdf. For the revised Bill see http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0143/cbill_2015-20160143_en_1.htm and <https://www.gov.uk/government/collections/investigatory-powers-bill> for draft codes and policy statement on the bill. Criticism was made that the Bill was neither consistent with Case C-362/14 *Schrems* [2015] ECLI:EU:C:2015:650 nor *Roman Zakharov v. Russia* [GC], no. 47143/06, ECHR 2015. See *Guardian* Letters 15 March 2016. Following the case of *Tele2 Sverige*, n. 124 above, the English High Court ruled that Part 4 of the Investigatory Powers Act 2016 breaches the EU Charter of Fundamental Rights because access to data was not restricted to fighting serious crime and there was no prior review by a court or independent administrative body before access: *R (Liberty) v Secretary of State for the Home Department* [2018] EWHC 975 (Admin). The CJEU had already referred to it by the Investigatory Powers Tribunal questions on transfer out of the EU of data and notification of data subjects affected. The government also conducted a review of the Act for necessary reforms. The reforms will not address national security matters which the government insists are outside the competence of the EU. The ECtHR ruled that RIPA 2000 breached Arts. 8 and 10 in relation to bulk intercepts and acquisition of communications data: *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13 and 2 others, 13 September 2018.

practice. Discretionary social security payments, prison administration and rights of prisoners were characterised by such practices. Widespread criticism led to publication of such criteria. There was also the risk of invocation of principles of legal certainty (and legal clarity) and legality.

Primary legislation must be published in Bill form for Parliament to consider and approve. Delegated legislation must be published, but it may take effect before publication. However, criminal prosecutions depend on publication. There would be a serious risk of a delegated measure being ruled *ultra vires* if it determined rights and was not published. A famous scandal in the mid-1990s, which helped bring down a Government, involved the collapse of a criminal trial when it emerged that export regulations, on which the prosecution was based, had been changed without notifying Parliament or the public of the changes. A difficult question arises if unpublished criteria that are not based in law are used to influence exercise of a discretion. The courts may take the view that where rights are involved, any unpublished criteria are susceptible to challenge where they influence a decision. Where rights are not involved, it may turn on context.

In *Ahmed*, HM Treasury implemented UN Security Council resolutions under an Act of 1946.¹²⁷ These covered the same subject matter as was covered in *Kadi*, i.e. orders freezing the bank accounts of suspected terrorists. Parliament had not approved the UK implementing measures. The court ruled that the measures in vital respects went beyond the requirements of the resolutions and could not be justified by the general words contained in the 1946 Act in so far as they interfered with the human rights (common law, not ECHR) of the claimants who had been subject to asset freezing orders.

In *Alvi*,¹²⁸ the Supreme Court upheld the quashing (ruling legally invalid) of a decision by the Home Secretary who had relied on materials not approved under the Immigration Act by Parliament to determine whether the alien claimant could remain in the UK. Basically, if the provisions were rules determining a right to remain or not in the UK, the Immigration Act 1971 Sect. 3(2) required that they be approved by Parliament and published. This was to be distinguished from guidance which was not of legal effect:

The Act itself recognises that instructions to immigration officers are not to be treated as rules, and what is simply guidance to sponsors and applicants can be treated in the same way. It ought to be possible to identify from an examination of the material in question, taken in its whole context, whether or not it is of the character of a rule or is just information, advice or guidance as to how the requirements of a rule may be met in particular cases.¹²⁹

¹²⁷ *HM Treasury v. Ahmed* [2010] UKSC 2. See Sect. 2.13 above. The Supreme Court distinguished *Ahmed* in *Youssef v. Secretary of State for Foreign etc Affairs* [2016] UKSC 3.

¹²⁸ [2012] UKSC 33. See *Walumba Lumba v. Secretary of State for the Home Department* [2011] UKSC 12 and *R (Reilly) v. Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin); and generally Sect. 2.13 above.

¹²⁹ *Ibid.*, para. 63 Lord Hope and paras. 41, 53 and 92.

The decision in *Alvi* should be compared with *Munir*¹³⁰ and *New College Ltd.*¹³¹ In both cases, the guidance was published although not approved under Sect. 3(2). In both cases the guidance did not have a coercive effect determining rights, which is a contestable conclusion. They were mere guidance and were not subject to Sect. 3(2).

My appraisal would be, given that the EU courts had upheld the importance of legal certainty in the judgments referred to, domestic UK courts would look askance at any measure taking *legal* effect to interfere with the rights of individuals, unless such measure was properly passed and published and satisfied the requirements of legality.

2.6 *Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality*

2.6.1 The situations in domestic law have invariably involved domestic measures based on EU provisions or the challenge to domestic measures based on EU provisions – often accompanied by arguments based on ECHR Art. 1 Protocol 1. Domestic courts have followed the *Foto-Frost* jurisprudence so as not to rule on EU measures. German constitutional jurisprudence may have an influence in future developments.¹³² Now that it is accepted that the Charter applies to the UK and that no opt-out has been secured, we will see increasing arguments based on the Charter.¹³³

The relevant case law on proportionality, proprietary rights, legal certainty and legitimate expectation has all been developed in relation to domestic measures where laws have been challenged because of breaches of EU general principles and ECHR provisions. A few points need to be made.

First of all, EU general principles and ECHR rights have strengthened immeasurably the armoury of UK judges in judicial review. They have been adapted to domestic contexts. It has been a great success story in the promotion of law's neutrality and challenging arbitrary power.¹³⁴ Furthermore, our membership of the European Union and of the Convention on Human Rights has helped to subject our

¹³⁰ [2012] UKSC 32.

¹³¹ [2013] UKSC 51.

¹³² See *R (HS2) v. Secretary of State for Transport* [2014] UKSC 3. Note Laws LJ's dicta in *Thoburn* in Sect. 3.1.1 below on the limits of the general words of Sect. 2(1) ECA 1972 to authorise unconstitutional EU actions.

¹³³ See Joined cases C-411/10 and C-493/10 *N.S. and Others* [2011] ECLI:EU:C:2011:865 and *EM (Eritrea) v. Secretary of State for the Home Department* [2012] EWCA Civ 1336, paras. 43–48 and *R (AB) v. Secretary of State of the Home Department* [2013] EWHC 3453 (Admin), paras. 7–14. See the Commons European Scrutiny Committee's report HC 979 (2013–14).

¹³⁴ Birkinshaw 2014. See e.g. *R (Miranda) v. Secretary of State for the Home Department* [2016] EWCA Civ 6 where a power to stop persons at ports and airports under the Terrorism Act 2000 Sched. 7 and seize encrypted materials related to journalism (originating from the Snowden

constitution to juridification, a process that will outlive any departure from ‘Europe’ by the UK.¹³⁵ The UK Government has taken measures to check the advance of judicial review.¹³⁶ Secondly, boundary disputes as to when EU law and legal principles apply have become more flexible. Originally, a rather formal approach was taken, so if a matter was not considered an EU matter, EU general principles did not apply.¹³⁷ However, in *Rugby Football Union v. CIS Ltd* ‘the rubric, “implementing EU law” is to be interpreted broadly and, in effect, means whenever a member state is acting “within the material scope of EU law”’.¹³⁸

The decisions involving proprietary rights in English cases have all been challenges to domestic measures based on EU treaty provisions and general principles. The courts have not imposed exacting standards of review and have found no breaches of EU law, but have found transgressions of ECHR law, as in *Roth*,¹³⁹ or courts have allowed public health factors to favour preventative action, as in *Eastside Cheese*.¹⁴⁰ The maintenance of public health had to carry great weight in the balancing process in a proportionality review. The approach to proportionality review in cases launching challenges based on the ECHR or EU law was nicely illustrated in *Sinclair Collis* although the approach has now been criticised.¹⁴¹ This concerned the domestic statutory and regulatory provisions banning the automatic sale of tobacco products from vending machines, which is especially important in public houses and clubs. Articles 24 and 36 EC and Art. 1 Protocol 1 ECHR were invoked. Arden LJ observed that the ECHR may provide greater protection than EC rights. The majority ruled that the ban, despite the widespread redundancy that would ensue, was not disproportionate. The measures were not, per the majority, ‘manifestly inappropriate’ under EU legal principles.

One crucial issue in relation to domestic measures concerns the question of which law applies to a challenge to domestic measures based on EU measures before the English courts. The case concerned the Tobacco Directive which was brought on a preliminary reference to the CJEU by Germany.¹⁴² The CJEU ruled

revelations and material stolen from the US National Security Agency) was ruled a breach of Art. 10 ECHR insofar as the seizure was not authorised by an independent judicial authority.

¹³⁵ Birkinshaw and Varney 2016.

¹³⁶ HL 174 & HC 868 (2013–14) <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/174/174.pdf>. See Criminal Justice and Courts Act 2015, Part 4.

¹³⁷ *R v. MAFF ex p First City Trading Ltd* [1997] 1 CMLR 250 (QBD) Laws J.

¹³⁸ [2012] UKSC 55, para. 28. Followed by *Davis* above [2015] EWCA Civ 1185, paras. 92 and 98.

¹³⁹ [2002] EWCA Civ 158.

¹⁴⁰ [1999] EWCA Civ 1739.

¹⁴¹ [2011] EWCA Civ 437. See Arden 2013. A more subtle approach criticising *Sinclair* was adopted in *R (Lumsdon) v. Legal Services Board* [2015] UKSC 41 where interference with a ‘fundamental freedom’ was involved. See *R (GBGA) v. Secretary of State CM&S* [2014] EWHC 3236 (Admin), paras. 99–110 and *R (BASCA) v. Secretary of State BIS* [2015] EWHC 1723 (Admin), paras. 135–148.

¹⁴² Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453.

for the first time that a directive was *ultra vires* under now Art. 114 TFEU. The proceedings in England concerned delegated legislation based on the (as yet to be ruled invalid) Directive.¹⁴³ The application was to prevent the Secretary of State making the regulations (presenting them to Parliament for approval) because of the allegedly illegal basis of their provenance.

In *R v. Secretary of State for Health*¹⁴⁴ the Court of Appeal overruled a high court judgment which had issued an injunction against the Secretary of State to prevent the making of the regulations implementing the Directive. The majority ruled that the law to govern interim relief was Community law established in the *Zuckerfabrik* decision and not domestic law laid down in a 1975 judgment of the House of Lords for domestic matters. This approach was upheld in the House of Lords by majority. What is of interest is the spirited dissent by Sir John Laws and Lord Hoffmann. For Laws, to refuse to allow the injunction against measures so clearly based on an illegal EC measure was an affront to the rule of law itself. For Hoffmann, the division of responsibilities within a Member State was entirely a matter of domestic law. It was domestic law which ordained the powers of a minister to formulate regulations and the procedure to follow. Community law only became involved on a 'renvoi' from Sect. 2(2) ECA 1972. The substance was governed by domestic law. By general agreement it was easier to succeed in a claim for an injunction under domestic law than under EC law. Both Laws and Hoffmann were instrumental in a new scepticism to EU law and questions of sovereignty.

In *ABNA*¹⁴⁵ the court followed the majority in *Tobacco* and accepted that the governing law was EC law, but found that even so, the balance was in favour of an injunction given the powerful arguments on illegality and the potential serious risks to a firm's 'trade secrets, confidential information and know-how built up over many years', which the draft regulations would require under EC law.

Some see a growing scepticism in recent decisions of the Supreme Court. *Walton v. Scottish Ministers*¹⁴⁶ contains a crucial statement by Lord Carnwath where he states, without hearing legal argument on the point, that provision of public law relief for breaches of EU law is not as of right but at the court's discretion, aligning the position precisely with domestic law.

2.7 The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State

2.7.1–2.7.3 Not applicable, as the UK is not part of the eurozone.

¹⁴³ *R (on the application of Imperial Tobacco Ltd) v. Secretary of State for Health* [2001] 1 All ER 850 (HL) and [2000] 1 All ER 572 (CA).

¹⁴⁴ [2000] 1 All ER 572.

¹⁴⁵ *R (ABNA) Ltd v. Secretary of State for Health* [2004] 2 CMLR 39.

¹⁴⁶ [2012] UKSC 44. See *R (Champion) v. N Norfolk DC* [2015] UKSC 52 in support.

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 There are no easily available statistics listing when preliminary references have been requested by the parties in a decision before a UK court or tribunal. Recent annual reports of the Supreme Court do now include statistics on preliminary reference requests. In 2013–2014, the UK Supreme Court made two preliminary references, with 12 requests not being referred, as the Supreme Court refused permission to appeal the case from the Court of Appeal to the Supreme Court.¹⁴⁷ In 2012–2013, two preliminary references requests were made and 14 refused due to the refusal of the Supreme Court to hear the appeal in the case from the Court of Appeal.¹⁴⁸

According to statistics provided by the CJEU,¹⁴⁹ the number of preliminary references from the UK courts for the relevant period is as follows: 2001–21; 2002–14; 2003–22; 2004–22; 2005–12; 2006–10; 2007–16; 2008–14; 2009–29; 2011–26; 2012–16; 2013–14; Total – 242.

Ten cases heard by the CJEU in the period 2006–2013 concerned the validity of an EU measure in a preliminary reference sent by the UK courts. Twenty questions lodged before the CJEU by the UK courts for a preliminary reference in the period 2001 to 2013 concerned the validity of an EU measure. Of those 20, 13 were challenges to regulations and seven to directives. Only one case in 2006–2013 resulted in the annulment of the EU measure – C-351/04 *IKEA Wholesale*, where anti-dumping regulations were declared invalid as disproportionate and contrary to WTO findings.¹⁵⁰ Only four cases raised human rights issues, all relating to property rights.¹⁵¹ Most challenges concerned procedural issues, breaches of international law and proportionality. Two challenges were based on a lack of competence of the EU, specifically relating to the regulation of the internal market under Art. 114 TFEU.

What is the most striking constitutional issue is that challenges have mostly been brought by large corporations protecting their commercial interests. In particular, challenges were made to: taxation issues;¹⁵² environmental

¹⁴⁷ Annual Report of the UK Supreme Court 2013–2014, HC 36. <http://www.supremecourt.uk/docs/annual-report-2013-14.pdf>.

¹⁴⁸ Annual Report of the UK Supreme Court 2012–2013, HC 3, <http://www.supremecourt.uk/docs/annual-report-2012-13.pdf>.

¹⁴⁹ Court of Justice of the European Union, Annual Report 2013, Luxembourg 2014, p. 106. <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf>.

¹⁵⁰ C-351/04 *IKEA Wholesale* [2007] ECR I-07723.

¹⁵¹ Case C-154/04 *Alliance for Natural Health and Others* [2005] ECR I-06451; Case C-453/03 *ABNA and Others* [2005] ECR I-10423; Case C-210/03 *Swedish Match* [2004] ECR I-11893; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*, supra n. 142.

¹⁵² Case C-134/13 *Raytek and Fluke Europe* [2015] ECLI:EU:C:2015:82; Case C-215/10 *Pacific World and FDD International* [2011] ECLI:EU:C:2011:528; Case C-372/06 *Asda Stores* [2007] ECR I-11223, Case C-58/01 *Oce van der Grinten v. Commissioner for Inland Revenue* [2003] ECR I-09809.

measures;¹⁵³ the classification of products as dangerous substances and therefore requiring greater regulation;¹⁵⁴ regulations designed to protect consumers;¹⁵⁵ the establishment of regulatory bodies;¹⁵⁶ regulation of fish stocks;¹⁵⁷ competition protections;¹⁵⁸ and the regulation of food products.¹⁵⁹ One challenge was brought by an individual concerned with the compatibility of regulations governing residence requirements for welfare provisions with citizenship and free movement provisions.¹⁶⁰

2.8.2–2.8.3 In some respects, the EU has a higher standard of review than UK law, as it adopts proportionality as a general head of review. However, there is academic concern that the EU has a lower standard of review in practice, particularly as regards the lower proportion of human rights challenges with regard to EU acts in EU law.¹⁶¹ Statistical surveys reveal that leave to appeal has been more readily granted by the House of Lords on human rights challenges, although these challenges were statistically less likely to succeed than other challenges.¹⁶² Most UK judicial review challenges do now raise human rights issues. There remains concern that the CJEU prioritises commercial interests and the free movement provisions over fundamental human rights. This would suggest a need for the CJEU to strengthen its standard of judicial review in human rights cases.

It is not possible to make a fair comparison of the review of legislative acts in the EU with the review of legislative acts in the United Kingdom. With regard to challenges under the Human Rights Act, the high rate at which the Government responds to declarations of incompatibility and the rigorous reports of the Joint Committee of Human Rights would suggest a willingness to provide a stringent

¹⁵³ Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755; Case C-308/06 *Intertanko* [2008] ECR I-04057.

¹⁵⁴ Case C-15/10 *Etimine* [2011] ECR I-06681; Case C-14/10 *Nickel Institute* [2011] ECR I-06609; Case C-343/09 *Afton Chemical* [2010] ECR I-07027.

¹⁵⁵ Case C-58/08 *Vodafone* [2010] ECR I-04999; Case C-344/04 *International Air Transport* [2006] ECR I-00403.

¹⁵⁶ Case C-558/07 *SPCA* [2009] ECR I-05783.

¹⁵⁷ Case C-388/04 *South Western Fish Producers' Organisation and Others* [2006] ECLI:EU:C:2006:82, removal from the Register, 6 February 2006; Case C-535/03 *Unitymark* [2006] ECR I-02689.

¹⁵⁸ Case C-351/04 *IKEA Wholesale*, supra n. 150.

¹⁵⁹ Case C-154/04 *Alliance for Natural Health* [2005] ECR I-06451, Case C-453/03 *ABNA and Others* [2005] ECR I-10423; Case C-210/03 *Swedish Match* [2004] ECR I-11893; Case, C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*, supra n. 142; Case C-329/01 *British Sugar* [2004] ECR I-01899.

¹⁶⁰ Case C-537/09 *Bartlett v. SS for Work and Pensions* [2011] ECR I-03417.

¹⁶¹ Chalmers et al. 2011, pp. 241–248; Williams 2004; Douglas-Scott 2002, pp. 460–461 and pp. 454–458.

¹⁶² Shah and Poole 2009.

review of human rights.¹⁶³ There would also appear to be a growing willingness of the UK courts to go beyond the requirements of the judgments of the European Court of Human Rights to provide a stronger protection of human rights in areas where the Strasbourg Court grants a wide margin of appreciation.¹⁶⁴

With regard to the review of administrative actions, figures vary according to judicial review actions in the courts and the review of immigration and social and welfare cases through the tribunal system. In 2013 there were 15,700 applications for judicial review in the courts of England and Wales. Of 1,513 cases eligible for a final hearing in 2013, only 232 had reached a decision with 66% being found in favour of the applicant.¹⁶⁵ With regard to immigration cases, of the 67,449 cases determined in the Immigration and Asylum Chamber of the First-tier Tribunal in 2013/14, 56% were dismissed and the remaining 44% were upheld. In the area of Social Security and Child Support, 40% of cases determined in 2012–2013 were decided in favour of the applicant. With regard to benefit applications, 44% of Employment Seekers Allowance, 42% of Disability Living Allowance, 19% of Job Seekers Allowance and 26% of Personal Independence Payments were decided in favour of the applicant.¹⁶⁶ These figures would suggest that the UK courts are less deferential than the CJEU when reviewing administrative actions. They support the call for a stronger standard of judicial review by the CJEU, particularly with regard to the protection of human rights.

2.8.4 The UK courts have not adopted a position on the extent to which they review measures implementing EU law. UK courts would only be able to review implementation measures achieved through secondary legislation or implemented by the devolved legislatures.

2.8.5 No concerns have been raised with regard to a resulting gap in judicial review given the lack of scrutiny of legislative acts in the UK. Concerns might arise, were there to be disparities between directly effective EU law and Convention rights. Here, it is possible that the UK courts would apply Convention rights over directly effective EU law, were the two to diverge. However, it is likely that in this case EU law would be interpreted so as to be compatible with Convention rights.

2.8.6 No issue has arisen in the UK regarding the lack of equal treatment between those falling under domestic law and those falling under EU law.

¹⁶³ Ministry of Justice, Responding to Human Rights Decisions, Cm 8727 October 2013. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252680/human-rights-judgments-2012-13.pdf.

¹⁶⁴ *R (Nicklinson) v. Ministry of Justice* [2014] UKSC 38.

¹⁶⁵ Ministry of Justice, Court Statistics Quarterly, January to March 2014. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321352/court-statistics-jan-mar-2014.pdf.

¹⁶⁶ Ministry of Justice, Tribunals Statistics Quarterly, January to March 2014. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319488/tribunal-statistics-quarterly-january-march-2014.pdf.

2.9 *Other Constitutional Rights and Principles*

2.9.1 Concerns have been expressed by the Constitutional Committee of the House of Lords as to the breadth of Henry VIII clauses which enable the executive to modify primary legislation. These concerns are expressed generally, including, though not specifically focusing upon, the Henry VIII clause found in the European Communities Act 1972. These are perhaps minimised, as the EU Committee of the House of Commons and the European Scrutiny Committee of the House of Lords would be able to raise concerns about the use of secondary legislation to implement EU law, were they to consider that this gave rise to constitutional issues.

2.10 *Common Constitutional Traditions*

2.10.1 The principles of *nulla poena sine lege* and of 'open justice' can both be regarded as constitutional principles of the common law, forming part of the constitutional traditions of the UK. Privacy is an emerging principle. It would not extend to the protection of a general freedom not to be recorded.

There would be merit in national courts referring both to the ECHR and to national constitutional law protections. There is a recent trend in the case law of UK courts to place greater emphasis on the constitutional principles of the UK as opposed to the ECHR. Often these principles are cited in tandem. It may be harder to refer to constitutional principles in other legal systems of the EU. UK law, in particular, is more likely to refer to principles found in the common law of the UK, US, Australia, Canada and New Zealand.

2.11 *Article 53 of the Charter and the Issue of Stricter Constitutional Standards*

2.11.1 The UK has not seen a large amount of academic discussion as to whether the CJEU should set the standard of Charter rights in line with, or go beyond, the standard of the ECtHR. Nevertheless, there is discussion as to the extent to which UK law should mirror interpretations of Convention rights provided by the ECtHR.¹⁶⁷ UK courts have been prepared to go beyond ECtHR judgments, providing a higher protection of rights, where there is no clear case law from the ECtHR and where there is a broad margin of appreciation.¹⁶⁸ This is regarded as a power but not an obligation of the court.¹⁶⁹ Courts have provided a lower protection

¹⁶⁷ See, for example, Wright 2009; Irvine 2012 and Sales 2012.

¹⁶⁸ *P v. Cheshire* [2014] UKSC 19.

¹⁶⁹ *R (Nicklinson) v. Ministry of Justice* [2014] UKSC 38.

of rights where there are fears that the ECtHR has not appreciated the specific common law context in its judgment and where the ECtHR decision that the UK courts refuse to follow is in the process of being appealed to the Grand Chamber.¹⁷⁰

In the opinion of the author of this section of the report, there is a need for a higher degree of deference to be paid by the CJEU to the decisions of the national constitutional courts and for a greater ability for national courts to provide a higher protection of rights than that found in the Charter or in general principles of Community law. However, this is subject to two provisos. First, there is a need to take account of whether the EU has itself enacted measures which provide greater clarity than the Convention rights, providing a democratically agreed EU specification of a particular right or of the resolution of a potential conflict of rights. The Charter does not provide this level of clarity, being a combination of broadly expressed rights and principles, although some Charter provisions may provide the requisite level of clarity. In these instances, there should be less scope for deference to the national constitutional courts. Secondly, human rights adjudication in the European Union works best when it facilitates dialogue between the CJEU and the national constitutional courts. Dialogue is harmed where there is the ability for either the CJEU or the national constitutional courts to always have the last word. Therefore, whilst dialogue requires greater deference, this needs to be deference as respect, based on the reasoning of the national courts and their greater expertise in areas of national interpretations of rights as opposed to deference as submission. Moreover, there should be no absolute rules as to whether national constitutional courts or the CJEU should always have the final say as to the authoritative determination of human rights.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1 There was public debate on the introduction of the European Arrest Warrant and at the time of the enactment of the implementation measures. There were also campaigns citing concerns over the civil liberties implications by human rights organisations – e.g. Liberty,¹⁷¹ Justice,¹⁷² and Fair Trials International.¹⁷³ These concerns were also reflected in parliamentary debate on the implementation measures, specifically regarding the lack of double criminality, the lack of clarity regarding the speciality rule, bail provisions, the definition of a judicial authority

¹⁷⁰ *R v. Horncastle* [2009] UKSC 14.

¹⁷¹ <https://www.liberty-human-rights.org.uk/tags/european-arrest-warrant>.

¹⁷² <http://www.justice.org.uk/pages/european-arrest-warrant.html>.

¹⁷³ <http://www.fairtrials.org/justice-in-europe/the-european-arrest-warrant/>.

and the potential lack of a right of appeal, and the lack of a guarantee of a retrial for those convicted *in absentia*.¹⁷⁴

There was less concern raised with regard to the Data Retention Directive. The UK initially lobbied the EU to adopt the Data Retention Directive. There was little scrutiny over the Data Retention (EC Directive) Regulations 2007, which implemented the Directive's requirement with regard to land lines and mobile phones, although concerns were raised in the House of Commons and the House of Lords as to the content of the Data Retention (EC Directive) Regulations 2009 and their implications for privacy. There have, however, been campaigns from civil liberties groups,¹⁷⁵ in addition to recent criticism from the Joint Committee on Human Rights over the Data Retention and Investigatory Powers Act 2014.¹⁷⁶

2.12.2 Although these issues do not arise specifically in the UK, concern has been expressed by parliamentarians and public interest groups that there is frequently insufficient time for parliamentary debate when implementing EU measures that raise constitutional issues.¹⁷⁷ This concern is exacerbated by the narrow standing requirements for direct challenges, particularly as regards the standing of public pressure groups, the use of indirect challenges through Art. 267 TFEU to predominantly protect commercial as opposed to constitutional rights, and the low level of annulment of EU measures.

2.12.3 I would support the adoption of a process to suspend the application of EU measures, pending an investigation into the legality of the measure, where important constitutional issues have been raised by a number of constitutional courts. I would also recognise the defence of unconstitutionality during an infringement proceeding. I would also support the adoption of a process of greater pre-legislative scrutiny over EU measures that raise constitutional issues. A good model for this could, perhaps, be the work of the Joint Committee of Human Rights in the Westminster Parliament, particularly if this body were able to consult widely and receive information from human rights groups and constitutional courts. This body could either be formed as a Committee with the European Parliament or a

¹⁷⁴ Broadbridge S. The Introduction of the European Arrest Warrant. House of Commons Library Paper, SN/HA/1703. <http://www.parliament.uk/business/publications/research/briefing-papers/SN01703/the-introduction-of-the-european-arrest-warrant>.

¹⁷⁵ <https://www.liberty-human-rights.org.uk/campaigning/no-snoopers-charter>. Statewatch tried to challenge the Data Retention Directive, but was not granted standing. It did, however, make submissions to the CJEU in the Case C-301/06 *Ireland v. Council* [2009] ECR I-00593 challenge to the Directive; see <http://www.statewatch.org/news/2008/apr/eu-datret-ecj-brief.pdf>.

¹⁷⁶ http://www.parliament.uk/documents/joint-committees/human-rights/Letter_to_Rt_Hon_Theresa_May_MP_160714.pdf.

¹⁷⁷ See, for example, the criticisms of slow response times from the Government and the lack of time for debate from the House of Lords European Union Committee, Report on 2013–14, 2014–15 HL paper 6, and its report on The Role of National Parliaments in the European Union, 2013–14, HL paper 151, and the criticisms of the House of Lords during the 2nd and 3rd reading of the Data Retention and Investigatory Powers Bill 2014 in the House of Lords (Hansard HL 16 July 2014, cols 600–665).

body at the EU level but outside of the formal EU framework. This would encourage greater dialogue to avoid constitutional crises and work towards developing a European human rights culture.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1 I share concerns about the potential for an overall reduction in the standard of protection of constitutional rights and the rule of law in the context of EU law. I believe that this potential reduction in the standard of protection is due to a lack of wider awareness and the difficulties of protecting rights in a system of multilevel governance. These difficulties are exacerbated by the general consensus surrounding abstract rights – such as expressed in the Charter – coupled with divergence as to how these rights should apply in particular circumstances. In particular, divergence can arise due to the relative historical importance of the protection of particular human rights in different Member States.

2.13.2 Accession of the EU to the ECHR will not resolve these issues, as illustrated by the tension in UK law as to the extent to which the UK should interpret Convention rights differently from the ECtHR. I believe a better solution can be found in creating more effective means of dialogue between national courts and the CJEU, and between national parliaments and the European Parliament. This will, in turn, require greater deference to national constitutional courts, but also, in addition, greater deference by national constitutional courts to democratically determined European solutions to specific human rights issues.

I would also advocate greater pre-legislative scrutiny of human rights. However, I would prefer for this to be performed by a body similar to the Joint-Committee on Human Rights found in the Westminster Parliament and for the body to be formed at the EU level. First, this institution consults more widely than current constitutional tribunals and so is able to provide better-informed analyses. Secondly, the Joint Committee performs a less abstract form of scrutiny and is more capable of suggesting possible solutions. Thirdly, the Joint Committee is more likely to provide reasoned conclusions, which can facilitate political debate and also democratic dialogue between courts and legislatures, and between national constitutional courts and the CJEU.

2.13.3 I would advocate a change in the style of judgment of the CJEU, both allowing for dissenting opinions and encouraging greater explanation of the reasoning deployed to reach particular conclusions. I would also advocate greater attention to be paid to the arguments of the parties, particularly when dealing with constitutional issues raised by national constitutional courts or by the parties to the proceedings.

3 Constitutional Issues in Global Governance

3.1 *Constitutional Rules on International Organisations and the Ratification of Treaties*

3.1.1 The UK remains in essence a dualist state. International agreements have no effect in domestic law until implemented, usually by legislation. This doctrine pays obeisance to parliamentary sovereignty. Provision is sometimes made for implementation by regulations – usually a statutory Order in Council. There are many cases on interpreting domestic law in accordance with international obligations in treaties and in accordance with customary international law. There is, despite the dualist philosophy, a great degree of influence of international law in the UK domestic courts.¹⁷⁸ However, the basic approach is that the UK Government may enter whatever international agreements it wishes (see Sect. 3.2.1 below). There are no constitutional impediments to entering treaties. There are legal procedures involving ratification (see Constitutional Reform etc Act below), but treaties have no domestic effect until implemented by legislation or statutory regulations. If the Government were to enter into a very unpopular treaty, it would have to face the political consequences in Parliament, the press and media and from the public.

Outside EU areas, relevant provisions contain no references to the objectives sought by international co-operation, set no limits to the delegation of powers, and/or values and principles that ought to be upheld by the state when participating in international co-operation.

Until the Constitutional Reform and Governance Act 2010, treaties did not have to be laid before Parliament by law. Since the 2010 Act, treaties, subject to the conditions below, must be laid before Parliament.

Under Sect. 20, treaties may not be ratified unless (a) a Minister of the Crown has in the first instance laid before Parliament a copy of the treaty, (b) the treaty has been published in a way that he or she thinks appropriate and (c) a period (21 days which may be extended by 21 days or less (Sect. 21)) has expired without either House having resolved that the treaty should not be ratified. Subsection (3) then explains that a further procedure, which is set out in subsections (4) to (6) (see below), will apply if the House of Commons resolves that the treaty should not be ratified (whether or not the House of Lords did the same). There are exceptions to this provision. Subsection (4) provides that a treaty may still be ratified if, after the House of Commons has resolved that a treaty should not be ratified during period above, (a) a Minister of the Crown has laid before Parliament a statement explaining why the treaty should nevertheless be ratified, and (b) a 'period B' has

¹⁷⁸ Bingham 2010, Chap. 10. See Birkinshaw 2015 pp. 47–85. See Lord Mance in *Keyu et al v. Secretary of State for Foreign etc Affairs* [2015] UKSC 69, paras. 144–151 and *R (Wang Yam) v. Central Criminal Court* [2015] UKSC 76, paras. 35–38 for qualifications; see *R (Bashir) v. Secretary of State for the Home Department* [2018] UKSC 45, para. 7.

expired without the House of Commons having (again) resolved that the treaty should not be ratified.

Section 22(1) provides that the procedure under Sect. 20 does not apply if a Minister of the Crown is of the view that, exceptionally, a treaty should be ratified without the conditions of that section having been met. However, a treaty may not be ratified by virtue of subsection (1) after either House has resolved, as mentioned in Sect. 20(1)(c), that the treaty should not be ratified.

The United Nations Act 1946 (see the *Ahmed* case above) allows for the implementation of Security Council resolutions. The use of that Act in relation to asset freezing orders was noted above. The International Criminal Court Act 2001 gives effect to the Statute of the International Criminal Court and makes provision for offences in the Statute to become crimes under domestic law.

The Human Rights Act 1998 made provision for giving ‘further effect to rights and freedoms guaranteed under the ECHR’ but involved no transfer of power – apart from that given to domestic judges!

International obligations are implemented in a very pragmatic manner. There are no accompanying grand statements of principle, merely an attention to practical and procedural detail.

3.1.2 Not applicable.

3.1.3 There are no constitutional texts in the UK, if that means a written constitution. The Supreme Court in the *Ahmed* case,¹⁷⁹ observed how disparities may emerge between international measures imposing sanctions and domestic orders where there is an absence of scrutiny by Parliament.¹⁸⁰ The Foreign Affairs Committee had over a decade earlier recommended that any sanctions approved by Government should be notified to the select committee. The Government declined to accept the recommendation. The Supreme Court noted how overseas regimes had introduced procedures in primary legislation to ensure human rights protection and express authorisation for delegated powers in such cases.¹⁸¹ This has not occurred in the UK.

Ahmed was decided on domestic law. The Supreme Court rejected an application by the Government to defer the coming into force of the judgment pending amending legislation.¹⁸² The CJEU in *Kadi* had deferred the effect of its judgment. The Government response was to present a bill to Parliament to reverse the effects of the judgments by legislation which was enacted within days of the judgments.¹⁸³ Ten months later, the regime was contained within legislation which also provided fuller judicial protection to those subject to sanctions orders.¹⁸⁴

¹⁷⁹ *Ahmed* [2010] UKSC 2 and above n. 127.

¹⁸⁰ Second Report of the Foreign Affairs Select Committee on Sierra Leone HC 116-I and Government Reply Cm 4325, (1999).

¹⁸¹ *Ahmed* [2010] UKSC 2, paras. 48–50.

¹⁸² *Ahmed No. 2* [2010] UKSC 5.

¹⁸³ Terrorist Asset Freezing (Temp Provs) Act 2010. See generally Walker 2011.

¹⁸⁴ Terrorist Asset Freezing etc. Act 2010.

In UK law, the emphasis is once again on practicalities and efficacy rather than high principle.

3.1.4 With a constantly evolving constitution based on judicial decision, convention, legislation and parliamentary procedure it is not easy to identify any relevant material in response to this question regarding the role of the national constitution in the context of international law and global governance. UK courts take inspiration from other common law jurisdictions in formulating responses to human rights claims. Recent case law has emphasised this influence at a higher level than ECHR jurisprudence.¹⁸⁵ The UK Judicial Committee of the Privy Council has a long, sometimes controversial history (now in decline) of adjudicating constitutional case law from the Commonwealth and the written constitutions of the member countries. Appeals still concern cases dealing with capital punishment.

Parliament's primary focus is on domestic affairs. It holds the Government accountable for foreign policy (below). It now operates under a convention whereby hostilities in foreign countries by the armed forces have to have parliamentary approval after a Commons vote. Memories are still very fresh of such a vote being used to authorise invasion of Iraq in order, inter alia, to lead 'to a representative government which upholds human rights and the rule of law for all Iraqis'.¹⁸⁶

My belief is that such initiatives are more likely to come from academic input and through the Foreign Office¹⁸⁷ and bodies such as the British Council and interest groups promoting principles of good governance, access to justice and transparency.¹⁸⁸

3.2 *The Position of International Law in National Law*

3.2.1 Relevant legislation has been outlined above in Sect. 3.1.1.

Constitutionally, international law does not have any effect within the UK or its component countries until it is implemented by domestic legislation. However, a treaty may not violate statutory or common law rights.¹⁸⁹ Such violation could prevent ratification.¹⁹⁰

¹⁸⁵ *Kennedy v. The Charity Commission* [2014] UKSC 20.

¹⁸⁶ Hansard HC Debs 18 March 2003.

¹⁸⁷ <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2013/human-rights-and-democracy-report-2013> See *HMG Strategy for Abolition of the Death Penalty* (2011) FCO which includes increasing the number of abolitionist countries. See Simpson (2004). See Birkinshaw *supra* n. 178.

¹⁸⁸ Baroness Hale has written on the helpful interventions of NGOs in litigation involving terrorist detention cases both at home and abroad: <https://supremecourt.uk/docs/speech-131214.pdf>, p. 13.

¹⁸⁹ *Walker v. Baird* [1892] AC 491.

¹⁹⁰ *Rees-Mogg v. Secretary of State for Foreign Affairs* [1994] 1 All ER 457. For the EU Act 2011 and an unsuccessful challenge, see *R (Wheeler) v. Prime Minister* [2014] EWHC 3815 (Admin).

Although courts will not invoke treaty obligations directly in municipal law, domestic courts will interpret legislation implementing treaty provisions in a manner that is consistent with treaty provisions.¹⁹¹ A common law presumption exists that Parliament will act consistently with international obligations. Even where a treaty is not implemented, it may be used to assist in interpretation of legislation.¹⁹² This is especially so in the case of human rights conventions.¹⁹³ In *Oppenheimer v. Cattermole*,¹⁹⁴ Lord Cross said that ‘the courts of this country should give effect to clearly established rules of international law’. In *Kuwait Airways Corp.*,¹⁹⁵ Lord Nicholls continued: ‘This is increasingly true today. As nations become ever more interdependent, the need to recognise and adhere to standards of conduct set by international law becomes ever more important.’

If a statute is clear and allows no scope for the international principle to be applied then it will not be so invoked.¹⁹⁶ There is nothing that the international obligation can clarify. If the statute is clear then any exercise of discretion under the statute could not be affected by the international obligation constituting a ‘relevant consideration’ for the decision-maker.¹⁹⁷ It must be said that this approach must be questioned now. Pure dualist theories have been heavily attenuated.

Where a measure can be interpreted consistently and inconsistently with an international obligation, the former should be adopted.¹⁹⁸ The principle also applies to the interpretation of the common law.¹⁹⁹ On this basis, the ECHR had a role, although the courts oscillated in its application, in assisting the interpretation of domestic law before its formal incorporation by the HRA 1998. However, the courts could not use the ECHR directly to create rights and duties before it was implemented.

Treaties are usually implemented by legislation, or by delegated instruments. Parliament has a variety of methods to give effect to treaties by use of legislation. Implementation by delegation would invariably be by a statutory Order in Council (see above Sect. 3.1.1). Such orders are subject to light-touch scrutiny and approval.

In interpreting treaties so implemented, the courts are not constrained by the usual techniques of interpretation but apply broad principles of general acceptance

¹⁹¹ *Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116 (CA).

¹⁹² *Corocraft v. Pan American Airways Inc.* [1969] 1 QB 616, 653B-C (CA). See the diametrically opposed judgments of the Supreme Court on whether the UN Convention on the Rights of the Child could be used to assist interpretation of domestic regulations capping welfare payments. The majority ruled they could not because they were not relevant. See the powerful dissent of Baroness Hale and Lord Kerr: *R (SG) v. Secretary of State for Work and Pensions* [2015] UKSC 16.

¹⁹³ Hunt 1997, Chaps. 4, 5 and 6.

¹⁹⁴ [1976] AC 249, 278.

¹⁹⁵ [2002] UKHL 19, para. 28.

¹⁹⁶ *R v. Home Secretary ex p Brind* [1991] 1 AC 696 and Hunt 1997; *Salomon v. Comrs of C & E* [1967] 2 QB 116; see *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22.

¹⁹⁷ *R v. Home Secretary ex p Brind* [1991] 1 AC 696.

¹⁹⁸ See Lord Bingham in *Garland v. BREL* [1982] UKHL 2.

¹⁹⁹ *Pan-American World Airways v. Dept of Trade* [1976] 1 Lloyd’s Rep 257.

approaching a provision as an 'internationally agreed instrument' and not a national regulatory instrument.²⁰⁰ The Vienna Convention provides basic principles.²⁰¹ The context may determine whether a term employed by the treaty is to be interpreted in a manner determined by the international obligation (*autonomous/sui generis*) or by domestic usage.²⁰²

The Human Rights Act 1998 makes special provision for interpretation of implemented ECHR rights by UK courts.

3.2.2 *In extremis*, dualism holds that international law and domestic law occupy different and hermetically sealed space. As such, the doctrine is simply not correct. The relationship is described by Feldman as 'a semi permeable membrane'.²⁰³ The doctrine has been subject to criticism for many years, but the concept still contains a kernel of truth. The reason for the UK approach is to deprive the executive of the ability to change the law of the land by prerogative power alone and without Parliament. This is a legacy of the struggle between Crown and Parliament in English constitutional history. Domestic courts will not adjudicate on claims that arise from the existence and interpretation of treaties until they are implemented into domestic law.²⁰⁴ Treaties are executive acts and cannot assume the place of legislation.²⁰⁵ UK courts will not interpret international instruments that operate within the field of international law alone.²⁰⁶

There are well known qualifications to this theory of dualism which are brought about by *ius cogens* and customary international law.²⁰⁷ In the latter case, for an English court to apply the doctrine, a rule has to have 'attained the position of general acceptance by civilised nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decision'.²⁰⁸ English courts have shown a reluctance to give a generous

²⁰⁰ *Buchanan & Co v. Babco Ltd* [1978] AC 141, at 152, *R v. Home Secretary ex p Adan* [2001] 2 AC 474, at 515.

²⁰¹ Brownlie 2012.

²⁰² *Al Sirri v. Secretary of State for the Home Department* [2012] UKSC 54; *R v. Guy* [2013] UKSC 64. See *Assange v. The Swedish Prosecution Authority*, supra n. 196. On Julian Assange see UN WGAD, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17012&LangID=E>.

²⁰³ Feldman 2011, Chap. 5, p. 142.

²⁰⁴ *Rayner (Mincing Lane) Ltd v. Department of Trade* [1990] 2 AC 418, 499. See *Keyu and Wang Yam* supra n. 178.

²⁰⁵ *Thomas v. Baptiste* [2000] 2 AC 1 (PC) (Lord Millet).

²⁰⁶ *R (Corner House Research) v. DSFO* [2008] UKHL 60, paras. 43–46 (Bingham) and paras. 59–68 (Brown). Nor will they recognise internationally defined crimes as domestic crimes until implemented under legislation: *R v. (M Jones)* [2006] UKHL 16. See, however, *Youssef*, supra n. 127.

²⁰⁷ See Bingham 2010, Chap. 10; Greenwood 2013, Ch. 14.

²⁰⁸ *The Christina* [1938] AC 485 at 497; *Trendtex Banking Corp v. Central Bank of Nigeria* [1977] QB 529 (CA); *J H Rayner (Mincing Lane) Ltd v. DTI* [1990] 2 AC 418.

accommodation to the principle²⁰⁹ despite an old approach that regarded such rules as a part of (or a source of) the common law.²¹⁰ Professor Feldman has written how domestic courts and Parliament have sieved international law before invoking its principles in domestic litigation or legislation.²¹¹ Feldman has also described how in cases reported in England and Wales in 2001 and 2002, only two international conventions apart from the ECHR were considered in a total of six cases.²¹² The position was broadly comparable in 2010. The UN Convention against Torture was considered in 2005 by the House of Lords and Court of Appeal.²¹³ The Supreme Court from its inception in 2009 until July 2014 (318 cases) has considered international law other than EU or ECHR provisions in 23 cases. This does not include references to other national law such as French, German, Belgian, etc.

3.3 Democratic Control

3.3.1 Negotiation and ratification are for the Crown alone but may be subject to statutory requirements. Parliamentary approval, where statutorily or, post *Miller*, constitutionally required, will make matters conditional and justiciable.²¹⁴

Parliament, both Houses, has an array of select committees. These can be very effective scrutineers of policy, and in some cases finance and administration. They investigate the substance of policy. The Foreign Affairs Committee of the House of Commons examines the Foreign and Commonwealth Office (FCO), diplomatic service, bodies in receipt of funds from the FCO and FCO responsibility for UK participation in international and regional multilateral organisations such as the United Nations, the OECD, NATO and the European Union. The Committee chooses its own inquiries, and calls witnesses and evidence. Witnesses in a typical inquiry include ministers and officials from the FCO, and a range of other witnesses depending on the nature of the inquiry; this may include representatives from academic and research institutions, interest groups, international organisations, former diplomats as well as journalists. Committees are often advised by expert advisers.

The usual culmination of a Foreign Affairs Committee inquiry is a report made to the House and published in hard copy and on its website.²¹⁵ The Committee

²⁰⁹ *A v. Secretary of State for the Home Department* [2004] EWCA Civ 1123 and [2005] UKHL 71.

²¹⁰ *Triquet v. Bath* (1764) 3 Burr 1478 and Blackstone *Commentaries* iv, 67.

²¹¹ Feldman 2011. See Sales and Clement 2008.

²¹² Feldman 2011, p. 156. He compares this paucity with the constitutional duty on South African judges in cases concerning constitutional rights to consider international law and a power to consider 'foreign law' under the South African Constitution Sect. 39(1).

²¹³ *Supra* n. 211. See *Jones v. Ministry of Interior etc.* [2006] UKHL 26.

²¹⁴ *Rees-Mogg v. Secretary of State for Foreign Affairs* [1994] 1 All ER 457; *Miller supra* n. 5.

²¹⁵ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/foreign-affairs-committee/inquiries1/>.

reaches conclusions and makes recommendations to the Government in its reports. The Government has undertaken to give a detailed response to the Committee's reports within two months of publication. The Committee's reports are 'often debated' either in the House or in Westminster Hall within the Houses of Parliament.²¹⁶

The Public Accounts Committee has undertaken inquiries into Government expenditure and is the most formal of parliamentary committees. One very famous inquiry and report on Pergau Dam produced evidence of Government misspending on overseas aid, which was crucial in a judicial review on the legality of aid expenditure.²¹⁷ The objects of the expenditure were not legally sanctioned.

3.3.2 There is no relevant legislation or practice on referendums with regard to international organisations other than the EU.

3.4 Judicial Review

3.4.1 Courts do not adjudicate on treaties in a UK context until the treaty is implemented by domestic law.

The *Ahmed* case had within its sights the domestic regulations implementing the UN Security Council resolutions – although some of the UK judges were very critical of Security Council practices. One must be clear. It is not an international measure that is subjected to legal scrutiny but the domestic implementing measure. However, the international measure may be examined to assess the domestic measure's meaning or legality. Has the domestic measure gold-plated the international provision impermissibly? With what has been said already, the focus is on Parliament and the common law, not the treaty.

3.5 The Social Welfare Dimension of the Constitution

3.5.1 This has not been an issue for the courts. Charities and Parliament have raised concerns about the UK Government being in breach of international human rights law in relation to disability (e.g. the public interest group Just Fair).²¹⁸ The UK has not ratified the International Covenant on Economic, Social and Cultural Rights and was notably hostile to the Charter of Fundamental Rights, particularly Part IV on solidarity – although it is acknowledged that the Charter is binding on the UK. UK

²¹⁶ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/foreign-affairs-committee/role/>.

²¹⁷ *R v. Foreign Secretary ex p World Development Movement* [1995] 1 All ER 611.

²¹⁸ http://just-fair.co.uk/hub/single/disabled_failed_by_savage_cuts/ See also *R (SG) v. Secretary of State for Work and Pensions* [2015] UKSC 16.

Governments have been reluctant to promote economic, social and solidarity rights to the lexicon of human rights.

The EU/US Transatlantic Trade and Investment Partnership (TTIP) met with hostile reaction in some sections of the quality press because of its alleged undermining of national democracy, legality and judicial protection.

The proposals have led to considerable concerns about democracy and legality, which have led to Early Day Motion 793 in Parliament, signed by 38 MPs from all parties,²¹⁹ a scholarly letter to the European Commission signed by 120 senior academics (including 45 from different UK universities),²²⁰ campaign groups' petitions to the Department of Business, and debate in mainstream newspapers (including the *Independent* and the *Guardian*).

The Early Day Motion by MPs has called for the removal of the Investor-State Dispute clauses, on the grounds that these

would enable foreign investors to file complaints against a national government whenever investors perceive a violation of their rights and that these complaints are filed directly to international arbitration tribunals and completely bypass national courts and the judicial system; [...and that] there is a real risk that these provisions in the TTIP could overturn years of laws and regulations agreed by democratic institutions on social, environmental and small business policy.

One specific area of concern highlighted by healthcare workers, patients' groups and trade unions has been that the TTIP may render irreversible the privatisation of parts of the National Health Service; to this end campaigners note that Slovakia was forced to pay \$22m (£13.4m) in damages after the Government reversed the liberalisation of its health insurance market.²²¹

3.6 *Constitutional Rights and Values in Selected Areas of Global Governance*

A useful starting point is Sir Peter Gibson's 'The Report of the Detainee Inquiry' (December 2013) into allegations of security and intelligence services' involvement in abusive detention of suspected terrorists overseas.²²² In *Abdul-Hakim Belhaj*

²¹⁹ <http://www.parliament.uk/edm/2013-14/793>. See further <http://ukconstitutionallaw.org/2015/01/24/david-hart-qc-ttip-more-foreign-judges-critising-our-laws/>.

²²⁰ See https://www.kent.ac.uk/law/isds_treaty_consultation.html.

²²¹ For coverage, see Wright, O., Morris, N. (2014, January 14) British sovereignty 'at risk' from EU-US trade deal: UK in danger of surrendering judicial independence to multinational corporations, warn activists. *The Independent*. <http://www.independent.co.uk/news/uk/politics/british-sovereignty-at-risk-from-euus-trade-deal-uk-in-danger-of-surrendering-judicial-independence-to-multinational-corporations-warn-activists-9057318.html>.

²²² <http://www.detaineeinquiry.org.uk/>. See also *Hakim Belhaj v. Straw, the Intelligence Services etc* [2017] UKSC 3 on the alleged respondents' (including the former foreign secretary) participation in the unlawful abduction, detention and rendition of the appellants and the claim's permission to proceed.

v. Straw,²²³ the Court of Appeal, allowing the appeal in relation to justiciability, gave the appellants permission to proceed in their action alleging the respondents' (including the former foreign secretary and the security and intelligence services) participation in the unlawful abduction, detention and rendition of the appellants by US agents overseas. The case reflects an interesting development on inroads into the Act of State doctrine, and the Supreme Court upheld the judgment of the Court of Appeal ([2017] UKSC 3).

Also of use is the Home Affairs Committee's report on Counter-Terrorism²²⁴ and reports by the Independent Reviewer of Terrorism Legislation.²²⁵

It should be noted that the UK-US Extradition Treaty²²⁶ and international arrest warrants²²⁷ have caused concern. While the Home Secretary's decision not to extradite Gary MacKinnon, described by the US authorities as 'the biggest military computer hack of all time', met with approval from civil liberties groups, especially because of his Asperger's syndrome, there was criticism from Labour MPs and accusations of inconsistency in treatment. Islamic prisoners with the same condition had been extradited. The Home Secretary spoke of introducing a 'forum bar' to prevent prosecutions overseas where prosecution was possible in the UK. Courts would make orders where it was not in the interests of justice to allow a prosecution overseas.²²⁸ Any such bar would provoke trenchant criticism from US authorities. A forum bar has meanwhile been introduced and was successfully relied on in the *Love* case involving the Asperger syndrome victim Lauri Love who was wanted by the US authorities on suspicion of hacking into FBI and other computer systems. Love will not be extradited and it is unknown whether he will face charges before English courts.²²⁹

²²³ [2014] EWCA Civ 1394. See also: *Yunus Rahmatullah v. Ministry of Defence etc* [2017] UKSC 1 and placing limitations on acts of state in contemporary litigation. See further *Shergill v. Khaira* [2014] UKSC 33.

²²⁴ HC 231 (2013–14). See also: *Yunus Rahmatullah v. Ministry of Defence etc.* [2017] UKSC 1.

²²⁵ <https://www.gov.uk/government/publications/terrorism-acts-in-2013>. See further the Intelligence and Security Committee Detainee Mistreatment and Rendition HC 1113 (2017-19).

²²⁶ See with regard to a Kent businessman, Akwagyiram, A. (2012, April 27) Christopher Tappin: Why was a retired Briton extradited to US? BBC News. <http://www.bbc.co.uk/news/uk-17865761>. See inter alia: *R (Razgar) v. Secretary of State* [2004] 2 AC 368; *Norris v. Government of the USA* [2010] UKSC 9; *Zoumbas v. Secretary of State* [2013] UKSC 74; *HJ (Iran) v. Secretary of State* [2010] UKSC 31 – deportation and fear of gay persecution.

²²⁷ (2013, November 27). Interpol accused of failing to scrutinise red notice requests. The Guardian. <http://www.theguardian.com/uk-news/2013/nov/27/interpol-accused-red-notice-requests>.

²²⁸ See with regard to Gary MacKinnon suffering from Asperger's syndrome, (2012, October 16) extradition to US blocked by Theresa May. BBC News. <http://www.bbc.co.uk/news/uk-19957138>.

²²⁹ *Love v. Government of the USA* [2018] EWHC 172 (Admin). Controversy has arisen over the case of two UK nationals fighting for ISIS who were captured by Syrian Kurdish forces in Syria when correspondence was published in the British press between the UK Home Secretary and the US Attorney General. The correspondence revealed that the UK would provide evidence to the USA for a prosecution in the USA carrying a possible sentence of death. This was alleged to be in breach of the UK's international legal obligations. A judicial review of the Home Secretary's action was commenced in England. The two men had their UK passports and UK nationality

Postscript: The impact of the UK referendum decision to leave the European Union

It is hard to summarise the constitutional implications for the UK constitution of the referendum result to leave the European Union. Some of the consequences could be extremely far-reaching – the change in the nature of the relationship between the UK and the EU, the potential splitting of the Union given the majority of votes being cast in favour of remain in Scotland and Northern Ireland, not to mention the potential consequences for parliamentary sovereignty and the protection of human rights. Nicola Sturgeon, the Scottish First Minister, called for a second referendum on Scottish independence, giving rise to a vote of the Scottish Parliament in favour of a second referendum; although this has now been left on the back-burner pending the Brexit negotiations.

The one point of constancy is that the UK does indeed remain a nation with an evolutionary and flexible constitution. The constitutional and legal debate surrounding the referendum result have brought the advantages and disadvantages of this form of constitutional design into the spotlight. With no clear legal answer to the constitutional requirements needed to trigger Art. 50 TEU, there were answers ranging from the need for an exercise of the prerogative only, the prerogative combined with a potential convention for parliamentary resolution or debate, the need for an Act of Parliament and even the need for a second referendum. There were also arguments as to whether, legally or constitutionally, the UK has to adhere to the referendum, the lack of detail in the EU Referendum Act 2015 pointing to the conclusion that the referendum is advisory only. Whilst this may encourage normative debate, the uncertainty also has consequences, particularly in times of political uncertainty, following the resignation of the Prime Minister following the referendum result. The Supreme Court clarified in the *Miller* decision that legislation was required, although there was no legal requirement for legislation to be subject to a legislative consent motion from the devolved legislatures.²³⁰ The European Union (Withdrawal of Notification Act) 2017 received the royal assent on 16 March 2017, paving the way for Theresa May to notify the European Council of the UK's intention to withdraw from the European Union on 29 March 2019.

In terms of the issues covered in this report, we concluded that whilst the need to incorporate the primacy of directly effective EU law may have been a catalyst for the modification of parliamentary sovereignty, the real modification to sovereignty stemmed from the courts regarding the concept as a principle of the common law and the creation of constitutional statutes, which may not be subject to implied repeal and which can place restrictions on the extent to which sovereignty is transferred to the EU. This juridification of constitutional law was also exemplified

revoked: See Bowcott, O. (2018, October 9). Javed 'appeased US' on death penalty in Isis suspects' trial. *The Guardian*.

²³⁰ *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 1 All ER 593.

in the development of the principle of legality, in the growing adoption of proportionality and the protection of human rights through the common law. Whilst *Miller* confirmed the primacy of directly effective EU law in the UK, and recognised the unique constitutional significance of the UK's membership of the EU, grafting a new source of law into domestic law, it focused more on this being achieved through Parliament's intention in the European Communities Act 1972. However, it also stressed the importance of constitutional statutes and the principle of legality.

The European Union (Withdrawal) Bill proposes that the Charter will no longer have effect in UK law post Brexit.²³¹ The Act 2018 will transform current EU law into 'EU-derived' laws. The supremacy of these EU-derived laws will continue to apply as regards legislation enacted prior to, but not after, Brexit.²³² This may weaken the remedies available to protect human rights. The Human Rights Act 1998 does not allow for legislation which contravenes human rights to be struck down by the courts, and it is unlikely that this will be included in any forthcoming British Bill of Rights. Nevertheless, the growing juridification of the UK constitution, influenced by both the European Union and the European Convention on Human Rights, may continue to grow, particularly in these confusing times when the constitution is in flux and with the mass media coverage of the UK Supreme Court's decision in *Miller*.²³³ The Supreme Court and Court of Appeal have both accepted the possibility that, in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law would be able to declare such legislation unlawful.²³⁴ It may be that the longer lasting legacy of the UK's relationship with the European Union is a growing desire for constitutionalism, be this through the growing influence of the courts or through a growing awareness of the importance of informed political debate and constitutional safeguards.

²³¹ European Union (Withdrawal) Act 2018, Clause 5(5).

²³² *Ibid.*, Section 5(4) and see Section 5(5).

²³³ See Sect. 2.6.1 above.

²³⁴ *Moohan v. Lord Advocate* [2014] UKSC 67, para. 35 per Lord Hodge with Baroness Hale and Lords Neuberger, Clarke and Reed and *Shindler v. Chancellor of Duchy of Lancaster* [2016] EWCA Civ 469, paras. 49–50 and *R (Public Law Project) v. Lord Chancellor* [2016] UKSC 39, para. 20.

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