

The judiciary's self determination, the common law and constitutional change

Boyron, Sophie

License:

None: All rights reserved

Document Version

Peer reviewed version

Citation for published version (Harvard):

Boyron, S 2016, 'The judiciary's self determination, the common law and constitutional change', *European Public Law*, vol. 22, no. 1, pp. 149-168.

<<https://kluwerlawonline.com/journalarticle/European+Public+Law/22.1/EURO2016009>>

[Link to publication on Research at Birmingham portal](#)

Publisher Rights Statement:

Final published Version of Record published in *European Public Law* as above.

Checked March 2016

General rights

Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

- Users may freely distribute the URL that is used to identify this publication.
- Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
- User may use extracts from the document in line with the concept of 'fair dealing' under the Copyright, Designs and Patents Act 1988 (?)
- Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

Take down policy

While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact UBIRA@lists.bham.ac.uk providing details and we will remove access to the work immediately and investigate.

The judiciary's self determination, the common law and constitutional change

Sophie Boyron *

The Brexit debate is often analysed from the perspective of politicians, and in particular their views on and understandings of European law and politics. In contrast, this article concentrates on identifying the views of the senior judiciary. To do so, it analyses five extra-judicial speeches made between October 2013 to February 2014, a period particularly fertile in cases in the UK's top courts concerning the law of the European Union or the European Convention of Human Rights. In doing so the article charts the senior judiciary's vision of Europe. More particularly, it highlights the judiciary's strategies to limit the impact of both European treaties on the British constitution in what might be termed "a search for judicial self-determination". In addition, the article argues that a new extra-judicial process of constitutional change might be emerging. Finally, it concludes on the advantages and drawbacks of such a process of change.

Introduction

In this article, I plan to analyse five extra-judicial speeches¹ to investigate an aspect of the Brexit debate that has yet to be explored. When discussing a possible Brexit, commentators tend to concentrate on the possible economic effects and on the position taken in this debate by individual politicians and political parties. So far, little attention has been given to the views of the senior judiciary. Normally, one would not look to judges as they would be unlikely to share their personal feelings about the matter for fear of compromising their neutrality. However, five senior judges—namely, Lords Reed, Sumption, Mance and Neuberger as well as Lord Justice Laws²—made extra-judicial speeches over a four months period all purporting to map the UK's constitutional relationship with both or either the European Union and the European Convention of Human Rights (thereafter ECHR).³ While no judge pronounced on the matter either way, the speeches—in terms of content, timing and context—were so unusual as to warrant analysis as part of wider debate about Brexit. Not only is five extra-judicial speeches in such a short time all on a European theme a record, but in the same period the Supreme Court decided three key cases touching upon the relationship of the UK constitution with the ECHR or the European Union:

* University of Birmingham (s.n.y.boyron@bham.ac.uk). I am grateful to Alison Young for her comments on earlier versions of this article. All errors remain my own.

¹ The sake of clarity, in this article I will use the term speech to mean extra-judicial speech and I will use the term judgment to indicate a separate judgment in a judicial decision.

² All of the judges are Justices of the UK Supreme Court, with the exception of Lord Justice Laws, who is a judge of the Court of Appeal of England and Wales.

³ The five speeches in question are: Lord Reed 'The Common Law and the ECHR' – 11 November 2013 – Inner Temple; Lord Sumption 'The Limits of the Law' – 20 November 2013 – 27th Sultan Shah Lecture – Kuala Lumpur; Lord Justice Laws 'Lecture III – The Common Law and Europe' – 27 November 2013 – Hamlyn Lectures 2013; Lord Mance 'Destruction or metamorphosis of the legal order?' – 14 December 2013 – World Policy Conference, Monaco; and Lord Neuberger 'The British and Europe' – 12 February 2014 – Freshfields Annual Law Lecture 2014 (University of Cambridge).

namely *Osborn*,⁴ *Chester*⁵ and *HS2*.⁶ As I show in this article, the speeches cast a new light on the Brexit debate. Finally, it could be thought more than a coincidence that all five judges chose to make speeches on either or both European treaties at a time when political discussions on the membership of each was raging.

At this stage, it is necessary to give a warning: while the first two speeches concentrated on the ECHR (Lord Reed and Lord Sumption), the remaining three examined both European treaties together (Lord Justice Laws, Lord Mance and Lord Neuberger). Rather than excluding the first two speeches and trying to limit the analysis to statements concerned exclusively with the European Union in the remaining three speeches, I examine the statements made in relation to both European treaties in all five speeches. Not only is it difficult to separate those comments concerned exclusively with the European Union but, it will be argued that the resulting picture of ‘Europe’ projected by the speeches is a choice. Consequently, an analysis of all five speeches is necessary if the messages of the senior judiciary, or at least some of its members, are to be understood. This examination will be performed in two stages: first, the various pronouncements regarding Europe will be analysed to establish the vision of Europe that they convey; once this is done, it will be possible, in a second part, to concentrate on the aims that were pursued by the senior judiciary when making the speeches.

The UK and Europe: a new judicial vision?

Between November 2013 and February 2014, five members of the senior judiciary made speeches that each aimed to chart the relationship that the UK constitution has with Europe, be that the European Union or the ECHR. This flurry of extra-judicial activity may not be a coincidence: the possibility of a Brexit has been debated for a

⁴ *Osborn v. The Parole Board* [2013] UKSC 61. The judgment was given on 9 October 2013. Osborn was a determinate sentence prisoner who having been released on licence was recalled to custody. However, in doing so, the Parole Board did not give him an oral hearing. The Supreme Court found that the Parole Board had breached the common law standard of procedural fairness. For an analysis of this case see, Phillip Murray *Procedural fairness, human rights and the Parole Board* 73 *Cambridge Law Journal* 5 (2014).

⁵ *R (on the application of Chester) v. Sec. of State for Justice* [2013] UKSC 63. The judgment was given on 16 October 2013. Chester and McGeoch were serving a life sentence for murder: they argued that their disenfranchisement was a violation of their rights under the ECHR (Article 3 Protocol 1). As the ECtHR had found in *Hirst n.2* and *Scoppola n.3* that the UK’s blanket disenfranchisement breached the Convention, the Supreme Court ruled that the Representation of the People Act continued to be in violation of protocol 1 but refused to issue an additional declaration of incompatibility.

⁶ *R (on the application of HS2 Action Alliance Ltd) v. Sec. of State for Transport* [2014] UKSC 3. The judgment was heard on 15-16 October and was given on 22 January 2014. In *HS2*, the Supreme Court reviewed the legality of a project for a high-speed rail link between London and the north of England. Two main grounds were put forward by the appellants: first, the Government had failed to undertake a strategic environmental assessment as required by the EU directive 2001/42/EC and secondly, the hybrid bill procedure chosen by the Government to adopt the project did not comply with the EU directive 1011/92/EU as it requires effective public participation in the decision-making process of projects that are likely to affect the environment significantly. The appellants claimed that the procedure would not ensure appropriate public participation as the parliamentary process is in effect controlled by the Government. While rejecting both claims, the Supreme Court made some key statements regarding the constitutional foundations for the supremacy of EU law, the content of the UK constitution and the cooperation with the CJEU. For further analyses of this case, see Paul Craig *Constitutionalising constitutional law: HS2*, *Public Law* 373 (2014) and Stephen Dimelow and Alison Young *High Speed Rail, Europe and the Constitution*, 73 *Cambridge Law Journal* 234 (2014).

while, and particularly since May 2013 when Tory rebels attempted to inscribe in the Queen's speech of that year the promise made by the Prime Minister, David Cameron, to hold a referendum in 2017 should the Conservative Party win the 2015 general election. Indeed, the debate continued well into early 2014 with an ill-fated European Union (Referendum) Bill sponsored by James Wharton MP.⁷ Lord Justice Laws, Lord Mance and Lord Neuberger acknowledged openly the Brexit debates that were taking place around them (with two stating that they would not and could not take any position on these).⁸ Consequently, the speeches should be read against the danger of withdrawal from the European Union and the more diffuse threat to repeal the Human Rights Act.

Each speech will be presented briefly and in chronological order, taking particular care to highlight the content or messages that relate to 'Europe' or to the European debate. Once this is completed, the various statements on Europe will be analysed in two ways: first, the comparative methodology deployed to arrive at them will be examined and secondly, the judicial vision of 'Europe'⁹ will be depicted.

The European messages of some senior judges

Lord Reed - The Common Law and the ECHR

Lord Reed explores the relationship between the common law and the ECHR. After recounting the differences in working practices that he observed during a two-weeks posting with the criminal chamber of the French *Cour de cassation*¹⁰ and a visit of the Supreme Court justices to the German federal constitutional court,¹¹ he draws two comparative conclusions: first, other contracting states do not rely on the ECHR and the rulings of the European Court of Human Rights (thereafter ECtHR) for their domestic system of rights protection;¹² and, second, the ECHR can be given effect in different ways depending on the contracting states. As a result, Lord Reed suggests that the present approach to the authority of the ECtHR's decisions should be changed. By reviewing a few cases, Lord Reed demonstrates that relying on the ECHR is often unnecessary. He concludes that one should look first to statutes and the common law for rights protection in the UK before relying on Convention rights.

⁷ The Bill's progress was halted in the House of Lords in January 2014, as the Lords refused to schedule any more days to debate the bill. Since, Robert Neil MP introduced another European Union (Referendum) Bill that also failed to progress further than the second reading in the House of Commons.

⁸ See Lord Justice Laws' speech at p. 3, Lord Mance's speech at p. 4 and Lord Neuberger's speech at p. 2. Neither Lord Sumption nor Lord Reed made any reference to those debates.

⁹ Or to use the expression of Lord Mance, of the 'European project,' see Lord Mance's speech at p. 1. He explains that European project rests on the twin foundations of the European Convention of Human Rights and on the European Union'.

¹⁰ This French Supreme court deals with private, criminal and labour law.

¹¹ Lord Hope led a delegation of justices for a three-day visit to the German federal constitutional court in 2012, see also, Alan Paterson *Final Judgment: the last law lords and the Supreme Court* 222 (Hart, 2013).

¹² Lord Reed notes that by contrast, it is commonplace in the UK for decisions of the European Court of Human Rights to be analysed in detail before the courts.

Lord Sumption – The Limits of Law

Lord Sumption is interested in identifying the tasks that can be assigned to judges. As he sees it, this question is particularly pressing in the United Kingdom because of the law-making power recognized to judges and of the growing demand for courts to intervene in controversial social issues. To decide on these tasks, one could resort to the distinction between law and policy, with legal issues to be decided by judges only. However, according to Lord Sumption, courts everywhere tend to transform policy issues into legal questions. Indeed, this phenomenon of ‘conversion’ is particularly prevalent in the context of the ECHR. The depth and degree to which this is happening when interpreting the Convention is problematic: it is not consistent with the standard method of statutory interpretation, it raises issues of democratic legitimacy and leads the ECtHR to make pronouncements in law that were never foreseen, let alone approved by Parliament. Lord Sumption suggests that courts should only tackle ‘cases of real oppression’ and restrict themselves to protecting ‘truly fundamental’ rights.¹³

Lord Justice Laws - The common Law and Europe

Lord Justice Laws explores the threat that both European treaties appear to pose to the common law, and more particularly to the common law’s two main virtues:¹⁴ catholicity and restraint. By catholicity, Lord Justice Laws means the ability of the common law to rely on foreign sources for inspiration. While some people may believe that the integrity of the common law is being undermined by the imports or influences from the ECHR or EU law, the common law has in fact always been inspired by foreign principles.¹⁵ These principles are brought into English law to respond to a need, not to pursue a pro-European policy. Once incorporated into the common law, the UK courts control their content and evolution entirely. Still, Lord Justice Laws is concerned that deep political tensions on the subject of Europe may undermine the faith that people have in the common law. Therefore, he suggests first that one should remember that the supremacy of EU Law is entirely dependent on its recognition by the UK Parliament; and secondly, that UK courts reconsider the *Ullah* principle¹⁶ and change the way they give effect to the ECHR. Instead, UK courts should turn to the common law to develop a protection of fundamental rights.

Lord Mance – Destruction or Metamorphosis of the Legal Order?

In this lecture, Lord Mance highlights the tensions that arise in a world where supra-national systems flourish. After listing key achievements for each European treaty, Lord Mance analyses the issues that national courts face when cooperating with their

¹³ See Lord Sumption’s speech at p. 10.

¹⁴ In the first Hamlyn lecture, Lord Justice Laws explained that the constitutional balance between law and government and judicial and political power is rooted in the Common Law. He went on to explain that presently the Common Law faced two threats: extremism (the subject of the second Hamlyn lecture) and Europe (the subject of the third Hamlyn lecture).

¹⁵ There he cites: the principles of legitimate expectations, legal certainty and proportionality.

¹⁶ [2004] 2 AC 323. This decision established the principle that ECtHR cases should be regarded as authoritative in English law and should be applied in a manner akin to precedents.

supra-national counterparts. For instance, he notes that concerns about democratic deficit, judicial activism and the invasion of national law by supra-national rules are heard in the UK as elsewhere. UK courts may not be able to rely on the constitution in the same way that other European courts rely on theirs, i.e. to force a dialogue with their supra-national counterparts. Still, UK courts have been able to attract the attention of both the Court of Justice of the European Union (thereafter CJEU) and the ECtHR in the past. For Lord Mance, mutual cooperation is essential to the good functioning of the treaties and the future of the ‘European project’.

Lord Neuberger – The British and Europe

In his Freshfields Annual Lecture, the President of the Supreme Court aims to put the UK membership to both the European treaties in their political and cultural context and to dispel the idea that the common law is adversely affected by civil law notions imported from either the ECHR or EU law. For Lord Neuberger, the reason why British people do not support wholeheartedly the institutions created by either European treaties lies in the specific geography, religion and history of the country. Furthermore, the UK’s legal culture varies greatly from the legal culture found in many European countries. For instance, the UK’s uncodified constitution explains why UK courts are not in the habit of reviewing Acts of Parliament and why the ECHR has had since its incorporation a greater impact in the UK than in other European jurisdictions. Still, for centuries, the common law has been ready to incorporate ideas from other legal systems.

These short presentations reveal that all five judges have clear messages with regard to either or both European treaties. While the content and aim of these messages will be analysed further on in the article, it is the comparative methodology used to arrive at them that will be examined now.

An exercise in comparative re-positioning

The five speeches have one trait in common: many of the messages about either or both of the European treaties are arrived at by resorting to comparative methodology or by citing comparative material. At times, judges find it desirable to rely upon comparative material in judicial decisions.¹⁷ In the main, this material is used as inspiration by judges to address a perceived need in the law. This is sometimes seen as establishing a judicial dialogue across legal orders.¹⁸ Therefore, it is not surprising that this type of reasoning should also find its way in extra-judicial speeches that explore the relationship between national constitutions and supra-national legal orders. However, the nature of the comparative methodology employed in the speeches does not really serve the function identified above. Although the discourse is phrased in the language of comparative law, this is not about learning from the experiences of other jurisdictions, but about re-positioning the UK courts.

¹⁷ See for instance, Martin Gelter & Mathias. M. Siems *Citations to foreign courts – Illegitimate and superfluous, or unavoidable? Evidence from Europe*, 62 *American Journal of Comparative Law* 35 (2014).

¹⁸ These are the functions often ascribed to the use of foreign material in judicial decisions, see for instance, Anne-Marie Slaughter *A global community of courts*, *Harvard International Law Journal* 191 (2003).

Comparative methodology: some issues

In itself, the comparative methodology relied upon in the speeches is revealing: there are sweeping statements of little comparative value and some notable inaccuracies. Examples of the former include Lord Neuberger's assertions that 'Mainland European countries, like almost all other countries across the world, are used to judges overruling legislation enacted by Parliament'.¹⁹ Similarly Lord Sumption suggests that almost 'all written constitutions' entrench a limited number of rights,²⁰ a statement later echoed by Lord Mance: 'Written constitutions, containing fundamental rights chapters, exist in most countries.'²¹ Because of their generality, these statements tend to be uninformative and somewhat inaccurate. The value of comparative law resides in the careful exploration of similarities and differences between legal systems. For instance, the statement by Lord Neuberger about constitutional review in Europe is concerning: not all judges of mainland Europe are used to or able to overrule legislation enacted by Parliament. For instance, there is no constitutional review in the Netherlands – such a review is prohibited by the Dutch Constitution.²² In fact, the Dutch experience of rights protection would be particularly relevant to the UK as the protection of the fundamental rights listed in chapter 1 of the Dutch constitution is largely achieved through compliance with the ECHR. Similarly, the difficult transformation that some Nordic countries, in particular Finland²³ and Denmark,²⁴ have experienced with their recent acceptance of constitutional review belies the representation of a uniform and consensual practice of constitutional review in Europe.²⁵

In addition, there are some inaccuracies. For instance, Lord Sumption explained that the judiciary is not given law-making power in all legal cultures and cites article 5 of the French Civil Code by way of illustration. Unfortunately, Lord Sumption's translation of this provision is incorrect. The provision does not prohibit judges from deciding cases by 'way of statement of general principle or statutory construction'; instead, the provision states: 'Judges are not allowed to decide cases before them by way of general and regulatory provisions'. Furthermore, the evolution of the judiciary's role in France has transformed the meaning of this provision. In reality, 'la jurisprudence'²⁶ has a strong authority and French top courts commonly

¹⁹ See Lord Neuberger's speech at p. 16.

²⁰ See Lord Sumption's speech at p. 10.

²¹ See Lord Mance's speech at p. 3. Before this, Lord Mance explains that: 'In fact, the British common law system has been almost alone in the world in operating on a pure principle of Parliamentary sovereignty, unconstrained by any written constitution.'

²² Art. 120 of the Constitution of the kingdom of the Netherlands 2008: 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts', this is despite the fact that chapter 1 of the Constitution list fundamental rights, see Maartje de Visser *Constitutional review in Europe*, 79 (Hart Publishing, 2014).

²³ See Juha Lavapuro, Tuomas Ojanen & Martin Sheinin *Rights-based constitutionalism in Finland and the development of pluralist constitutional review*, 9 *International Journal of Constitutional Law* 505 (2011).

²⁴ See Jens Elo Rytter & Marlene Wind *In need of juristocracy? The silence of Denmark in the development of European legal norms*, 9 *International Journal of Constitutional Law* 470 (2011).

²⁵ Finnish courts were given the power of constitutional review in 2000 (see art. 106 of the Constitution of Finland). Still, constitutional review in Denmark and Finland continue to rely markedly on the ex-ante scrutiny of the parliamentary Constitutional law committee.

²⁶ This can be translated by 'case law.'

decide on ‘arrêt de principe’²⁷ that other courts follow.²⁸ This example is revealing of a superficial comparative methodology.

On the basis of this methodology, it appears doubtful that the authors wished to engage in a rigorous comparative exercise. Instead, these comparative pronouncements were used to portray the UK legal system in a specific manner.

*The divergence discourse*²⁹

On reading the speeches, one is struck by the language of divergence that is found therein. Many of the comparative statements highlight the differences between the UK and ‘mainland’ Europe or even the rest of the world. These differences can be grouped in three (albeit overlapping) categories: the differences between civil and common law jurisdictions; the differences in judicial decision-making cultures; and the differences between codified and uncodified constitutions.

Although Lord Neuberger refers emphatically to the distinction between common and civil law systems,³⁰ this basic difference is implied or touched upon in many of the speeches. For instance, Lord Sumption noted the differences between civil and common law jurisdictions with regard to the doctrine of precedent. Similarly, Lord Reed resorted to his observation of judicial decision-making in France, the UK and Germany to highlight the fundamental differences in the way the cases are handled.

Lord Mance and Lord Neuberger underline the unique position of the UK with its uncodified constitution and its reliance on parliamentary sovereignty. Both explain the difficulties created by these constitutional characteristics:³¹ Lord Neuberger asserts that constitutional review is not a tradition in the UK by contrast to what happens in other European countries. This unique constitutional landscape explains the role played by the ECHR and the inability of the UK courts to emulate the German constitutional court. Lord Mance gives the same analysis of the interactions between the German constitutional court and the CJEU.³² In addition, Lord Neuberger accentuated this message of divergence by explaining the dissimilarity in legal and rights cultures by reference to a separate history, geography, religion etc. This point is also touched upon in Lord Mance’s speech.³³

The comparative analysis deployed in the speeches emphasizes the uniqueness of the UK’s legal system. In doing so, the speeches perform a comparative re-positioning by contrasting the UK’s key characteristics with those of civil law jurisdictions. Still, one needs to be aware of the difficulties that a divergence discourse may engender: for a nuanced and useful comparative analysis, it is necessary to find the appropriate balance between convergence and divergence,

²⁷ This can be translated as ‘decision of principle’; it is the equivalent of a leading case.

²⁸ Furthermore, the rule contained in article 5 has always been construed by reference to article 4 that states: ‘A judge that refuses to decide a case because of the silence, obfuscation or inadequacy of an Act of Parliament will be prosecuted for denial of justice’.

²⁹ The question of divergence or convergence of legal orders has been hotly debated, see Roger Cotterell *Is it so bad to be different? Comparative law and the appreciation of diversity in Comparative Law: A Handbook* 133 (E. Orucu and D. Nelken eds, Hart Publishing, 2007).

³⁰ See Lord Neuberger’s speech pp. 19-20.

³¹ See Lord Mance’s speech p. 9 and Lord Neuberger’s speech at pp. 15-16.

³² See notably the reaction to C-617/10 *Aklagaren v. Hans Akerberg Fransson*.

³³ See Lord Mance’s speech at pp. 2-3.

between similarity and difference. To disregard all similarities undermines the comparative analysis and compromises any benefit that could be drawn from it.

Lastly, despite a relative consensus of all judges on the uniqueness of the UK legal order, Lord Justice Laws and Lord Neuberger take care to explain that legal ‘implants’³⁴ or influences from civilian systems do not have any adverse effect. Neither the constitution nor the common law is being harmed by the influx of civil law principles. They both argue that such implants have been taking place for a long time and that the common law has the necessary flexibility to benefit from them.³⁵ Furthermore, Lord Justice Laws stresses that these implants fill a need and are soon ‘naturalized,’ by becoming an integral part of the UK constitution. By the positive spin given to this phenomenon, they may hope to dispel the more negative ‘isolationist’ aspects of the divergence discourse. Still, the re-positioning of the UK’s legal system and constitution conjured up by the use of comparative law is disquieting. This impression is strengthened by the vision of ‘Europe’ that emerges from these speeches.

A certain vision of Europe

All five judges refer to ‘Europe’ to mean either the ECHR or the European Union or both. The use of the term is rather symptomatic of the tone and content of the speeches: Lord Neuberger may investigate the reasons as to why the English are at odds with their European neighbours, but ‘Europe’ is presented as a single geographical, cultural and legal entity; all of Europe has had a rather unstable history, all countries have a written constitution with a bill of rights and most of these legal systems pertain to the same civilian tradition. There is no cultural, social or geographical differentiation and this is translated into a solid and quite forbidding legal unit. There is no recognition that there are vast differences between the European constitutional orders or any mention of the fact that the label of legal family is a contested one and that in any event the civil law family was never homogeneous.³⁶

Furthermore, the speeches tend to highlight aspects of the European treaties that do nothing to correct this rather ominous impression. All judges deal with some real or apparent negative consequences of the UK’s membership of one or the other European treaty. For Lord Reed, the ECHR has been given a central place in the UK constitution as a result of the way it is relied upon by lawyers. According to Lord Sumption, the ECtHR interprets the Convention in a way that allows the court to make law that should be left to other political institutions. Both Lord Neuberger and Lord Justice Laws acknowledged but combat the view that both European treaties are perceived as the source of destabilizing civilian influences. Even Lord Mance mentions the tensions arising from supra-national organisation.³⁷ In fact, there are

³⁴ These are more commonly called ‘transplants’ in the comparative law literature. The appropriateness of legal transplants has been hotly debated in comparative law circles for a long while now, see Alan Watson *Legal transplants* (Scottish Academic Press, 1974) and Pierre Legrand *What legal transplants? in Adapting legal cultures*, 35 (D. Nelken and J. Feest eds, Hart Publishing, 2001).

³⁵ See Lord Neuberger’s speech at pp. 26-28.

³⁶ For such a classification see René David *Les grands systèmes de droit contemporains*, (Daloz, 1964). It is worth pointing out that this classification is strongly contested nowadays, see for a recent discussion Mariana Pargendler *The rise and decline of legal families*, 60 *American Journal of Comparative Law* 1043 (2012).

³⁷ See Lord Mance’s speech at p. 1.

very few positive statements, let alone praise of the European treaties in the speeches, with Lord Mance's speech a notable exception.³⁸

In addition, the solutions to the problems uncovered above do not come from the relevant European systems or treaties.³⁹ The common law holds the key to solving the issues generated by the treaties. Both European systems appear to be lacking mechanisms of self-correction or intrinsic limitations that one normally finds in a legal order. Only Lord Mance stresses that judicial dialogue and the continued engagement of common lawyers in Europe would bring on more fruitful and influential relationship with either supra-national court.⁴⁰

Finally, the acknowledgment by three of the five judges of the political debates concerning a possible Brexit and/or repeal of the Human Rights Act darkens further this European portrait.⁴¹ Overall, these speeches offer a rather negative image of Europe.

Still, the use of comparative law to emphasize the uniqueness of the UK and the rather negative depiction of Europe were not fortuitous. Both serve as justifications for the aims pursued by these extra-judicial speeches: the search for judicial self-determination and the exploration of constitutional change. Only then, will the legal specificity of the UK be protected.

The aims: from judicial self-determination to constitutional change

If one looks to the language and images that judges use in the five speeches, they resemble closely the ideas and concepts that are called upon in public international law when tackling the question of self-determination of a 'people'. To be clear, I should not be taken to suggest that the five judges are putting forward a case for the self-determination of the United Kingdom in the public international law meaning of this term; it is only suggested that the language and image of self-determination⁴² is used in the speeches as a metaphor, consciously or otherwise.

The need for self-determination: A metaphor

First, the meaning of 'self-determination' needs to be clarified to understand the metaphor and the functions it fulfills in the speeches. The right to self-determination is found in article 1 § 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights: *'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'*.

³⁸ See Lord Mance's speech at pp. 2, 4, 5 & 12.

³⁹ The speech by Lord Sumption may be an exception to this.

⁴⁰ See Lord Mance's speech on the negotiation of the Brighton Declaration, p. 13.

⁴¹ See Lord Justice Laws' speech at pp. 3 & 7, Lord Neuberger's speech at p. 2, Lord Mance's speech at pp. 4, 5 & 6.

⁴² In fact, Lord Mance mentioned: 'concerns about identity and self-determination' with regard to the ECHR, see his speech at p. 4.

This provision leaves many unanswered questions, and commentators warn that the content of this right is notoriously difficult to identify in international law.⁴³ While it is beyond the scope of this research to determine the precise steps that will lead to a successful outcome for an international claim of self-determination, it is necessary to elucidate the meaning of this concept further. According to David Raic, the justification and main purpose of the concept of self-determination is: *'the protection, preservation, strengthening and development of the cultural, ethnic and/or historical identity of individuality (the 'self') of a collectivity, that is of a 'people', and this guaranteeing a people's freedom and existence'*.⁴⁴

So, a distinct group of people which claims a right to self-determination seeks to preserve the existence of its separate identity based on ethnicity, culture, language or history. If one peruses carefully the five speeches and isolates the elements that may support a call for self-determination, it is possible to find references to the need for protection of both the 'people' (practising common lawyers and judges) and the legal culture. With regard to the people, Lord Mance may assert that '(...) we, its common lawyers, judges and courts, are [not] about to be over-whelmed or lose our identity in the face of any outside threat',⁴⁵ but Lord Neuberger tempers this optimism by explaining that in Europe common lawyers are 'heavily outnumbered'⁴⁶ and that '(...) the Luxembourg and Strasbourg courts are manned by judges whose knowledge and experience are almost exclusively civilian law rather than the common law'.⁴⁷ This feels only one step away from claiming minority status, a common enough reason for claiming a right to self-determination.

Beyond the claims by Lord Mance and Lord Neuberger that the UK has a different history, religion and geography, all judges point to specific differences of the UK's constitutional order by comparison to those of mainland Europe, be it the lack of constitutional review, the common law tradition, or other aspects that make this system distinct. This follows the comparative re-positioning that emphasised the uniqueness of the UK's legal order. In addition, Lord Justice Laws,⁴⁸ Lord Mance⁴⁹ and Lord Neuberger⁵⁰ clearly identified a separate legal culture for the UK. Lord Neuberger isolated the distinctive traits of this culture: a pragmatic approach, judge-made legal principles and a distinct forensic attitude.⁵¹ Furthermore, one discerns a sense of unease with regard to the preservation of this culture: the speeches of Lord Sumption, Lord Justice Laws, Lord Mance and Lord Neuberger contained references to 'concerns about supranational invasion' (Lord Mance),⁵² to the issue of 'undesirable ... civilian law influences' (Lord Neuberger),⁵³ and 'the threat to the

⁴³ See J. Klabbers *The right to be taken seriously: Self-determination in international law*, 28 *Human Rights Quarterly* 186 (2006): 'The right to self-determination easily qualifies as one of the more controversial norms of international law'.

⁴⁴ See David Raic *Statehood and the law of self-determination* 223 (BRILL, 2002).

⁴⁵ See Lord Mance's speech at p. 13, where he also states: 'Common lawyers are eminently adaptable. Their contribution in co-operation with European supra-national courts and other European national courts has I believe been very fruitful and significant in the past.'

⁴⁶ See Lord Neuberger's speech at p. 20.

⁴⁷ See Lord Neuberger's speech at p. 20.

⁴⁸ See Lord Justice Laws' speech at pp. 3-4.

⁴⁹ See Lord Mance's speech at p. 13.

⁵⁰ See Lord Neuberger's speech at p. 19: 'A second cultural factor which distinguishes the UK from almost all other countries in Europe, is a common law system, whereas they have a civilian law system'.

⁵¹ See Lord Neuberger's speech at pp. 19-20.

⁵² See Lord Mance's speech at pp. 5 & 6.

⁵³ See Lord Neuberger's speech at p. 3.

common law’ (Lord Justice Laws),⁵⁴ with the most apocalyptic warning to be found in Lord Sumption’s conclusion.⁵⁵ In addition, Lord Neuberger highlighted the risk of this ‘minority’ culture being misunderstood.⁵⁶ Finally, both Lord Justice Laws and Lord Neuberger reproduce in full Lord Denning’s famous quote of the ‘flowing tide of Community law’ with its clear image of invasion and devastation.⁵⁷ It may be over-stating the case to say that this legal culture is depicted as under attack, but all judges either express some concerns themselves or attempt to address fears commonly expressed by others on this subject.

In view of the possible threat to the legal and constitutional system that the metaphor seems to reflect, the senior judiciary would have been justified in devising ways of protecting the specificities of this system. I will attempt to show below that the speeches are part of a complex process of constitutional change that served to secure a degree of judicial self-determination.

Beyond the metaphor: a process of constitutional change?

The metaphor identified above, points to a need, if not a call for judicial self-determination. In this, it provides the impulse for the proposals canvassed in the extra-judicial speeches and for a sophisticated process of constitutional change. To study this process of change, the extra-judicial speeches will be analysed together with the Supreme Court decisions that were at the heart of this dynamic. It will be suggested that the speeches and the decisions combined to form a dynamic that led to a formidable and swift process of constitutional change.

Supreme Court decisions and extra-judicial speeches: dialogues and outcomes

Having analysed the extra-judicial speeches individually at the outset, it is now necessary to analyse them in light of the three decisions of the Supreme Court that led to this flurry of extra-judicial activity. After all, October 2013 was an unusually ‘European’ month for the Supreme Court as it gave judgment on both *Osborn* and *Chester* and heard *HS2*. The confrontation of the extra-judicial writings with the output of the Supreme Court will shed light on an unusual creative dynamic.⁵⁸ While the speeches aimed to explain or comment on *Osborn* and *Chester*, two also mapped the path to a solution in *HS2*. For the purpose of this demonstration, close attention will be given to the authors of the speeches, the creative dialogue that took place via the speeches and finally, the constitutional solutions that emerged from them.

⁵⁴ See Lord Justice Laws’ speech at p. 4.

⁵⁵ See Lord Sumption’s speech at p. 15.

⁵⁶ See Lord Neuberger’s speech at p. 19: ‘This leads to the risk of an approach to our forensic procedures, indeed sometimes to our whole forensic attitude, which, at least from an English lawyer’s perspective, misunderstands our work’.

⁵⁷ This metaphor can be found in the judgment of Lord Denning in *Bulmer v. Bollinger* [1974] Ch. 401.

⁵⁸ I am grateful for the work of Harry Annison *Interpreting the politics of the Judiciary: the British Senior judicial tradition and the pre-emptive turn in Criminal Justice*, *Journal of Law and Society* 339 (2014). While it was not possible to make full use of the careful research methodology applied in the work, it framed my thought process and comforted me in the belief that the extra-judicial speeches needed also to be read as a whole with the three Supreme Court decisions.

Engaging in multiple dialogues

To understand the creative dialogues that the speeches seem to have promoted, it is necessary to begin by identifying the authors of the speeches as they are the main participants to these dialogues. Of the five extra-judicial speeches, only one – the third Hamlyn lecture of Lord Justice Laws – was not delivered by a member of the Supreme Court, but instead by a member of the Court of Appeal who famously advocated the recognition of constitutional statutes.⁵⁹ Among the justices of the Supreme Court that delivered a speech, one finds: Lord Reed, author of the first speech, who delivered the sole judgment in *Osborn* and one of the lead judgments in *HS2*; Lord Sumption, author of the second speech, who delivered an additional judgment in *Chester* and a concurring judgment in *HS2*; Lord Mance, author of the fourth speech,⁶⁰ who delivered the lead judgment in *Chester* and a joint concurring judgment⁶¹ with Lord Neuberger in *HS2*; Lord Neuberger, author of the fifth speech⁶² and president of the Supreme Court, who delivered a joint concurring judgment with Lord Mance in *HS2*. On seeing the authors, their involvement in the cases and the time-line, neither these speeches nor their timing seem altogether random. On close analysis, the five speeches appear to establish different types of judicial dialogue.⁶³

As is usual for these speeches, they were clearly aimed at the specific audiences they were addressing and beyond that at the wider public. For instance, when Lord Reed gave his speech to the Inner Temple, he explained the wider context for the important change of judicial policy contained in *Osborn*. To this effect, he referred to elements that would not have found their way in his judgment, such as his personal experience of judicial decision-making in other European legal systems. In doing so, he provided a more accessible analysis of the case. While the speech was mostly explanatory, it participated in a wider dialogue with the legal professions.

Still, another type of dialogue seems to take place alongside: the speeches provided a form of internal dialogue for the members of the senior judiciary closely involved with one or more of the three Supreme Court decisions. For example, not only did Lord Justice Laws analyse both *Osborn* and *Chester* quoting Lord Reed, Lord Mance and Lord Sumption, but he endorsed also the ruling in *Osborn*.⁶⁴ In addition, he noted and agreed with Lord Reed's extra judicial speech.⁶⁵ This continued with Lord Mance's speech. Not only did Lord Mance endorse Lord Justice Laws' dicta in *Thoburn*,⁶⁶ but he also quotes directly from his Hamlyn lecture⁶⁷ and from Lord Sumption's speech.⁶⁸ These cross-references seem to indicate an intra-judicial dialogue prior to judicial policy choices being made. In fact, Lord Mance's speech was mostly exploratory; he was canvassing possible solutions prior to a judgment in *HS2*.

⁵⁹ See *Thoburn v. Sunderland City Council* [1990] QB 151.

⁶⁰ This was the last extra-judicial speech before *HS2*.

⁶¹ All five other justices agreed with this joint concurring judgment.

⁶² This was produced after *HS2* was handed down.

⁶³ Here the definition of 'dialogue' is taken from the Oxford dictionary: 'discussion between two or more people, especially one directed towards exploration of a particular subject or resolution of a problem.' It is used in a similar way as in the work of Alan Paterson *Final Judgment: the last law lords and the Supreme Court* 9 (Hart, 2013).

⁶⁴ See Lord Justice Laws' speech at p. 10.

⁶⁵ See Lord Justice Laws' speech at p. 8.

⁶⁶ See Lord Mance's speech at p. 10.

⁶⁷ See Lord Mance's speech at p. 3.

⁶⁸ See Lord Mance's speech at p. 3.

In addition, an attentive perusal of the speeches reveals a probable engagement with the wider judicial community. For instance, when Lord Justice Laws commented on *Ullah* he stated: ‘I have in common with others come to think that this approach represents an important wrong turning in our law;’⁶⁹ For his part, Lord Mance speaks of ‘the expression of concern from some judicial colleagues’ regarding the more controversial EU legislation or case of the CJEU or ECtHR.⁷⁰ It is suggestive of other discussions happening in the background.

Finally, the speeches have also been attempts at a dialogue with the ECtHR and the CJEU. Each speech contained clear messages for one or both courts. According to Alan Paterson, one objective of the Supreme Court has been to establish appropriate dialogue with the courts in Europe.⁷¹ He adds that while exchanges with the ECtHR are common and take various forms (including extra-judicial speeches), the situation is different with the CJEU.⁷² Consequently, the relevant speeches and *HS2* should be analysed together as an attempt to establish a dialogue with the Luxembourg court.

Finding constitutional solutions

The speeches did more than simply allow senior members of the judiciary to exchange ideas. It gave them a forum to identify and sketch possible answers to the issues in *HS2*. In fact, it is possible to see in the speeches, the burgeoning of solutions later used in the judgments.

As a result of the substantive grounds argued by the appellants, the Supreme Court was faced with significant constitutional issues. For this reason, *HS2* contained three key pronouncements on the constitutional foundations for the supremacy of EU law, the cooperation with the CJEU and the recognition of constitutional instruments and principles. As their roots can be traced to the speeches, it may help an understanding of *HS2* to explain the origins of these judicial pronouncements.

First, the decision in *HS2* aimed to clarify the constitutional foundations for the relationship between UK and EU law and therefore for the supremacy of EU law in the United Kingdom. These points were canvassed in the extra-judicial speeches of both Lord Justice Laws and Lord Mance. Lord Justice Laws noted that the supremacy and reach of EU law in the UK rested entirely on the European Communities Act 1972 and was ‘ultimately a function of Parliament’s will’. He also quoted the doubts that he had expressed in *Thoburn*⁷³ that the ECA 1972 may not be sufficient to allow the incorporation of a EU provision in direct conflict with a UK constitutional or fundamental right. He added in his lecture that Parliament should not be assumed to have given ‘carte blanche’ to the European legislature.⁷⁴ As for Lord Mance, he began by noting that the German federal constitutional court (thereafter Bundesverfassungsgericht) has had a leading role in defining the legal relationship

⁶⁹ See Lord Justice Laws’ speech at p. 9.

⁷⁰ See Lord Mance’s speech at p. 3.

⁷¹ Alan Paterson *Final Judgment: the last law lords and the Supreme Court* 221 (Hart, 2013).

⁷² *Idem*, pp. 223-224.

⁷³ *Thoburn v. Sunderland City Council* [2003] QB 151.

⁷⁴ See Lord Justice Laws’ speech at p. 7. Previously, he had suggested a different approach by equating EU legislation to secondary legislation as secondary legislation cannot ‘abrogate a fundamental or constitutional right’ in the absence of express authorisation.

between European and national legal systems: while the Bundesverfassungsgericht had been careful to give effect to the decisions of the CJEU, it had fought to ensure that the CJEU remained within the limits of its powers.⁷⁵ Interestingly, Lord Mance referred also to the more recent skirmish between the two courts: in a judgment of April 2013,⁷⁶ the Bundesverfassungsgericht reacted to the CJEU's claim made two months earlier that the Charter of fundamental rights applied whenever a Member State acts within the scope of EU law.⁷⁷ Even though Lord Mance underlined the difficulties of using the German example as a model for the UK constitution,⁷⁸ it may have served as inspiration⁷⁹ for the pronouncements in *HS2* on supremacy and reach of EU law by Lord Reed on the one hand and Lord Neuberger and Lord Mance on the other. In fact, Lord Mance indicated in his extra-judicial speech that both constitutional statutes and fundamental common law rights would impose a limit to the supremacy of EU law.⁸⁰ This is barely a step away from the pronouncements in *HS2* that any conflict between EU law and a UK constitutional principle, statute or fundamental right were to be resolved by reference to the UK constitution⁸¹ and that the relationship between the United Kingdom and the European Union was determined by reference to UK constitutional law.

Similarly both Lord Justice Laws and Lord Mance touched upon the content of the UK constitution in their speeches when tackling the issue of the relationship of the UK with the EU. Lord Justice Laws had been the first in *Thoburn* to suggest that there existed a category of constitutional statutes⁸² that could not be impliedly repealed. He returned to this analysis in the Hamlyn lecture. Similarly, Lord Mance having searched to limit the supremacy of EU law cites constitutional statutes and fundamental common law rights but admits that these are not as efficient as a written constitution.⁸³ On comparing the two extra-judicial speeches with the analysis in Lord Neuberger's and Lord Mance's concurring judgment on the content of the UK constitution, it appears that on this point, the content of the judgment is close to the proposals found in the extra-judicial speeches.

⁷⁵ See the decision of the Bundesverfassungsgericht in *Solange I* (*Internationale Handelsgesellschaft* [1974] CMLR 540) and *Solange II* (*Re Wuensche Handelsgesellschaft* [1987] 3 CMLR 225) that aimed to protect the effectiveness of the German constitution and its protection of fundamental rights.

⁷⁶ Judgment of 24 April 2013 1 BvR 1215/07. Interestingly, this decision of the Bundesverfassungsgericht was referred to by Lord Neuberger and Lord Mance in their concurring judgment to support the idea of a cooperative relationship between the CJEU and national constitutional or supreme courts.

⁷⁷ See Case 617/10 *Aklagarren v. Hans Akeberg Fransson*.

⁷⁸ See Lord Mance's speech at p. 10. He concludes that the situation is very different in the UK as the ECA removed any constitutional obstacles to the supremacy of EU law, and to the point that the ECA as a constitutional statute is itself protected. He notes that presently there are 'few limits to the dominance of EU law.'

⁷⁹ In fact, there may be a precedent for that: the Bundesverfassungsgericht may have served in the past as inspiration to establish a better dialogue between the Supreme Court and the ECtHR, see Alan Paterson *Final Judgment: the last law lords and the Supreme Court* 233 (Hart, 2013). Finally, the reference to the Bundesverfassungsgericht's decision of April 2013 in Lord Neuberger's and Lord Mance's concurring judgment shows reliance on the decisions of the Bundesverfassungsgericht.

⁸⁰ See Lord Mance's speech at p. 10.

⁸¹ See Lord Reed at p. 29 [§ 79]: 'if there is a conflict between a constitutional principle, such as embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom' and see the more thorough analysis by Lord Neuberger and Lord Mance at p. 72 [§ 206-208].

⁸² The ECA 1972 was identified as one of the constitutional statute.

⁸³ See Lord Mance's speech at p. 10.

Finally, Lord Neuberger and Lord Mance drafted their joint concurring judgment to contest the interpretation by the CJEU of the relevant directives. Although the substantive analysis could not have been predicted,⁸⁴ an attempt at dialogue ought to have been expected. Not only did the subject of dialogue arise obliquely in Lord Justice Laws' lecture⁸⁵ but Lord Mance praised judicial dialogue as a way for national courts to influence the case law of the CJEU in his extra-judicial speech.⁸⁶ What is interesting however, is the reference in the judgment to the risks that these 'creative' interpretations of the CJEU may lead to: a lack of legal certainty, a loss of confidence in EU legislation, the compromise of judicial cooperation, the negative impact on subsequent legislative processes. The concerns expressed by both justices reflect for a large part those expressed by the members of the senior judiciary in their extra-judicial speeches: the legitimacy of the EU and its activity (whether legislative or judicial) was considered a challenge by Lord Mance and Lord Justice Laws.

This analysis tries to show that the extra-judicial speeches should be regarded in this context at least, an integral part of this judicial decision-making process and unusual process of constitutional change.

Extra-judicial speeches and constitutional change: grand design and judicial self-determination

Beyond the pronouncements explained above, I will argue that the decision in *HS2* may have been part of a 'grand design': a programme of constitution building that was used to secure judicial self-determination.⁸⁷ Indeed, on reading *Osborn*, *Chester* and *HS2* together with the five extra-judicial speeches, one wonders whether the court may have mapped a two-phase programme. With *Osborn*, the Supreme Court may have aimed to 'repatriate' fundamental rights by encouraging lawyers (and presumably judges) to look for rights and freedoms in the common law first. Reading the sole judgment delivered by Lord Reed⁸⁸ together with his extra-judicial speech⁸⁹ gives credence to this interpretation. Not only would this recognition avoid too great a reliance on the ECHR but it would also increase the substantive content of the constitution. In effect, this would really 'bring home' to the United Kingdom the protection of fundamental rights.

When presented in this light the policy pursued in *Osborn* fits well with the pronouncements made five months later in *HS2*, the second phase of this possible programme of constitution-building. There, the Supreme Court elaborated further on the content of the UK constitution: not only did it recognise the category of constitutional statutes that was first discussed in *Thoburn* but it added fundamental rights and constitutional principles arising from the common law. Although the decision contained few details as to the practicality of this recognition, the court took steps to protect these newly discovered constitutional statutes, principles and fundamental rights. By proclaiming the superiority of the UK constitution over EU

⁸⁴ The relevant directives were not even mentioned in any of the speeches.

⁸⁵ See Lord Justice Laws' speech at p. 9 where he quotes Lord Neuberger who warned against systematic acquiescence to the Court of Justice's rulings for fear of destroying the ability to engage in a constructive dialogue with the Court.

⁸⁶ See Lord Mance's speech at pp. 12 & 13.

⁸⁷ Of course, there would have been a degree of serendipity with regard to the extra-judicial speeches.

⁸⁸ See Lord Reed at pp. 22-25 [§54-63]. It is notable that the judgment was agreed to by all four other justices and that the panel included both the President and the Deputy President of the Supreme Court.

⁸⁹ See the entirety of Lord Reed's speech.

law in the event of a conflict, the Supreme Court in effect created a constitutional hierarchy of norms. This should bring some emancipation from EU law and its doctrine of Supremacy.⁹⁰

Should this programme of constitution building be put into full effect, the Supreme Court would certainly regain a degree of constitutional autonomy from both the ECHR and the European Union. In addition, the Supreme Court would recover some control over the evolution of the UK's process of legal and constitutional development and a chance to shape the UK constitution for the future. Indeed, the 'grand design' has the potential to deliver the judicial self-determination that the senior judiciary feel they need to combat the negative aspects of the present supra-national era.

Conclusion

In view of the potential transformation that was achieved, this process of constitutional change has some notable advantages: this was concluded swiftly and with minimum risk as the speeches allowed ideas and solutions to be canvassed ahead of their adoption. Furthermore, the process itself was more transparent and seemingly more inclusive than simply departing from existing precedent. Finally, it allowed the senior judiciary to show that they were aware of the political debates around them and to adopt a coherent but flexible policy by way of response. Only the future will tell whether this unusual process will be used again and whether it has engineered lasting change. One may wonder what impact, if any, these Supreme Court's innovations are likely to have on the Brexit debate. Still, they may help address the concerns and frustration that are palpable from reading the speeches and that are seemingly shared by the senior judiciary and probably by the larger judicial community.

⁹⁰ In doing so, the Supreme Court approved the ruling in *Factortame* except in the event of a conflict between EU law and UK constitutional law, or more precisely when the UK's 'constitutional identity is or may be engaged', see Lord Mance in *Pham v. Sec. of State for the Home Department* [2015] UKSC 19.