PANEL DISCUSSION OF JUDICIAL POWER AND BREXIT

Judicial Power Project, Policy Exchange

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Courts and Brexit

This paper, presented at a seminar on Brexit and Judicial Power in the context of the Judicial Power Project of Policy Exchange, will deal with two linked questions: (1) The contribution that the Court of Justice of the European Union may have made to Brexit, and (2) What Brexit might mean for judicial power within the United Kingdom (UK) in future. For convenience, throughout the paper the terminology of EU (EU) will be used unless wholly inappropriate, while the CJEU, which was previously the European Court of Justice or ECJ, will be referred to throughout as the CoJ.

1. The contribution of the Court of Justice to Brexit

Has the CoJ contributed to Brexit? The short answer is "Yes, and inevitably so". Academic commentators are virtually unanimous in describing the building of the European Community from its earliest days as a process of "integration by law".[1] From the earliest days, the CoJ has been integral to this process and has played a more significant part than courts in the UK are accustomed to do. The mission of the CoJ as currently set out in Article 19(1) TEU is to "ensure that in the interpretation and application of the Treaties the law is observed".

Over the years the CoJ has carved out for itself a role as the Constitutional Court of the EU, a label perhaps justified by the fact that the keystone of the EU legal order, the celebrated "primacy principle" according to which EU law takes precedence over all forms of national law including the national constitution,[2] is itself a court construct. Significantly in the context of this seminar, Judge Pierre Pescatore, an influential judge in the early years of the Court (1967-1985), has written of the *Pain d'épice* case in which the doctrine made its first appearance,[3] that it represented the Court's reaction "against the first manifestations of systematic opposition of the governments regarding the loyal execution of their obligations and against their ignorance of the judicial evolution brought about by the Community treaties",[4] while Professor Bruno de Witte says of the celebrated *van Gen den Loos* decision in which the

[1] Notably by JHH Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403-83, reprinted in JHH Weiler, *The Constitution of Europe: "Do the new clothes have an Emperor?" and other essays on European Integration* (New York: Cambridge University Press, 1999). See also M Cappelletti, M Seccombe and JHH Weiler, *Integration Through Law: Europe And The American Federal Experience. Methods, tools, and institutions* (New York: Walter de Gruyter, 1986).
[2] Joined cases C-188/10, C-189/10 *Aziz Melki and Sélim Abdeli* [2010] ECR I-5667.
[3] Joined Cases 2, 3/1962 *Commission v Luxembourg and Belgium* [1962] ECR 425.
[4] P Pescatore, '*Van Gend en Loos*, 3 February 1963- A View from Within' in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law* (Oxford: Hart Publishing, 2010) at 5.

doctrine was firmly established,[5] that its crucial doctrinal contribution was "the affirmation that whether specific provisions of the EEC Treaty had direct effect was to be decided centrally by the European CoJ itself, instead of by the various national courts according to their own views or national habits on the matter".[6] We should bear in mind in contemplating this famous ruling that three of the six existing Member States argued strenuously against the view that the relevant sections of the EC Treaty created directly applicable rights for individuals; that AG Roemer was minded to agree; and that, in coming to the opposite conclusion, the CoJ did not consider the intentions of the original Treaty-makers.[7] The case in short represented a *Marbury v Madison*[8] *volte face*, which gave the CoJ a policy-making function akin to that of the United States Supreme Court that, even in its early days, attracted academic criticism.[9] This is a very different court from courts in the UK, where a very different relationship exists between courts and Parliament.

A division of judicial responsibilities has now been devised by the CoJ whereby it has the last word on the interpretation of EU law while national courts are responsible for the application of EU law domestically and for the procedural rules of the domestic judicial process (the so-called principle of "procedural autonomy", on which the CoJ frequently encroaches).[10] The Court's mind-set is undoubtedly integrationist; Judge Mancini, also influential in the early years, once called integrationism "a genetic code transmitted to the CoJ by the founding fathers." [11] It has used its position at the apex of a network of member state courts, endowed by the CoJ with the responsibility for implementation of EU law,[12] to set in place principles of interpretation that impinge significantly on the freedom of national courts, such as the principle that national legislation in conflict with EU law must be "disapplied", a doctrine that perhaps first raised national awareness of the wider implications of Community membership during the course of the celebrated *Factortame* saga concerning the rights of Spanish fishermen under UK law.[13]

It is relevant in the context of Brexit that the first ruling of the CoJ on the availability of interim relief[14] motivated Teddy Taylor MP to request a House of Commons debate on the "the implications for parliamentary sovereignty" of the decision.. The Speaker (Sir Bernard Weatherill) expressed his view that the ruling did indeed constitute "a vital issue affecting the sovereignty of Parliament" but denied the request, a decision that provoked "a flurry of points of order by disgruntled backbenchers", amongst whom we find the names of many longstanding Euro-sceptics. [15] The "bellicose demands for a debate" from backbenchers included a claim that the right to "strike down Acts of Parliament" would, under EC law, extend

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[5] Case 26/62 *Van Gend en Loos v Nederlandse Administratie Belastingen* [1963] ECR 1.
[6] B de Witte, 'The Continuous Significance of *Van Gend en Loos'* in '*The Past and Future'* at 10.
[7] F Mayer, '*Van Gend en Loos:* The Foundation of a Community of Law' in '*The Past and Future'* 16.
[8] *Marbury v. Madison* 5 U.S. 137 (1803).
[9] This has not been without its critics: see notably the debate between H Rasmussen, *On Law and Policy in the CoJ* (The Hague: Martinus Nijhoff, 19860 and J.H.H. Weiler at (1987) 24 MML Rev 556; M. Cappelletti, (1987) 12 EL Rev 3; M. Shapiro (1987) 81 Am J of Int Law 1007).
[10] See generally, D Galetta*, Procedural Autonomy of EU Member States: Paradise Lost?* (New York: Springer Publications, 2009).
[11] F Mancini and D Keeling, "Democracy and the European CoJ" (1994) 57 MLR 175, 186.
[12] I Maher, 'National Courts as EC Courts' (1994) 14 Legal Studies 226; I Maher, 'Community Law in the National Legal Order: A Systems Analysis' (1998) 36 JCMS 237.
[13] Technically, the doctrine was first recognised in *R v Employment Secretary ex p EOC* [1994] UKHL 2 but the case attracted less publicity.
[14] Case C-213/89 *R v Secretary of State for Transport ex p Factortame (No 2)* [1990] ECR I-2433.
[15] See D Nicol, *EC Membership and the Judicialization of British Politics* (Oxford: OUP, 2001) 188 fn.4, citing HC vol 174, cols 923-8 (20, 21 June 1990). Nicol's analysis of the political impact of the *Factortame* litigation is meticulous and all-inclusive.

to "any tupenny ha'penny court in the land".[16] This piece of parliamentary grandiloquence was partially justified by the rule now embedded in Article 267(b) of the TFEU that any court or tribunal in which a question of EU law is raised *may* refer it to the CoJ for a ruling while any court or tribunal "against whose decisions there is no judicial remedy under national law" *must* refer it.

The CoJ is a court with low accountability from which there is no appeal. Although it retains a relationship of comity with the Strasbourg Court of Human Rights (ECtHR), it is not subject to its jurisdiction; indeed, the CoJ has twice ruled against the accession of the EU to the Convention on Human Rights.[17] This was, on the second occasion, in clear defiance of the wishes of the Member States expressed in Article 6(2) of the Lisbon Treaty which provides that the Union *shall* accede to the Convention. Nor is the CoJ bound by rulings of the WTO dispute resolution tribunals, having ruled consistently that the WTO agreements are without direct effect inside the EU.[18] The Court's political accountability is weak because, to overturn its rulings, Treaty amendment or unanimity in the Council of Ministers is normally required. Just such an attempt at limiting the retrospective effect of the Court's decisions was made by the British Government at the 1996 Inter-Governmental Conference, where it argued for modification of the principle of member state liability, which had cost it dearly in the *Factortame* saga and for "an internal appeal procedure".[19] Maastricht, where the Member States when adding the foreign affairs and justice and home affairs pillars did drastically curtail the jurisdiction of the CoJ in these areas, suggests some dissatisfaction with the Court's rulings. The immunity was, however, ended for the JHA by the Lisbon Treaty.

In the same Command paper, the UK Government had promised to submit a memorandum arguing for a Treaty definition of the subsidiarity principle, the main Treaty protection over illegitimate expansions of the Union's competences. The Court has never taken this principle seriously, as comparative lawyer Professor George Bermann has trenchantly argued. Bermann saw the avowed purpose of the CoJ at the time of Maastricht as being to establish 'all those constitutional premises that it considered necessary in order for Community policy to be fully effective in the Member States', adding that it would be difficult to find 'a clearer example of instrumentalist judicial decision-making'.[20] He blamed the CoJ for fostering integration at the expense of subsidiarity, noting that failure to take subsidiarity seriously was fuelling a demand for the idea among the European people and that the Court of' Justice was contributing to a sense of erosion of local political autonomy.[21] This was a percipient remark in the light of the growth of right-wing, anti-European Union political movements later in the twentieth century. Less rigorously, Judge Vassilios Skouris, the previous President of the CoJ, speaking extra-judicially, admitted that the subsidiarity principle, although it "should perhaps play a pivotal role with regards to the proceedings of the Court", had not left any remarkable traces in its rulings; he was, however, quick to defend the Court's reticence and clear preference for the proportionality principle on the ground that there were stringent criteria for harmonisation

[16] Ibid, citing HC vol 174, cols 115-1121 (21 June 1990).
[17] Opinion 2/94 of 28 March 1996 [1996] ECR I-175; Opinion 2/13 of 18 December 2014 CLI:EU:C:2014:2454
[18] C-149/96 *Portugal v Council* [1999] ECR I–8395. See further V Kosta, N Skourtaris, V Tzevelekos, *The EU Accession to the ECHR* (Oxford; Hart Publishing, 2014).
[19] *A Partnership of Nations - The British Approach to the EU Intergovernmental Conference 1996* Cm 3181 (1996). And see J Tallberg, 'Supranational influence in EU enforcement: the ECJ and the principle of state liability' (2000) 7 JEPP 104, 114.
[20] G Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Col Law Rev 331, 353.
[21] Ibid at 377.

with which the Court had to comply….[22] Article 69 TFEU now makes national parliaments the guardians of subsidiarity. There are some signs that national parliaments may be taking the new procedures seriously but how effective they will prove remains to be seen.[23]

2. What might Brexit mean for judicial power in the UK?

(a) post-referendum but prior to Brexit

My assumption is that the European Communities Act 1972, which implements UK accession to the Communities, will remain in force until Article 50 TEU has been triggered and until an appropriate agreement has been negotiated with the EU and approved by Parliament. Thus section 2, which provides for directly effective EU regulations to take effect in the UK "without further enactment" and allows the use of Order in Council to introduce other instruments that create EU rights, will also remain in force. In addition, section 3 of the Act, which provides for a national court faced with "any question as to the meaning or effect of any of the Treaties or of any EU instrument" either to decide the case "in accordance with the principles laid down by and any relevant decision of the CJEU" or to make a preliminary reference to the CoJ, will also remain in force. In the post-referendum period, a case law might certainly be produced that impinges on national policy.

In *Digital Rights Ireland,*[24] for example, the CoJ ruled that the Data Retention Directive (Directive 2006/24/EC) was invalid on the ground that it contravened Articles 6, 7, 8 of the Charter of Fundamental Rights (ECFR) in respect of privacy and data protection and that it was a disproportionate use of legislative powers. Apparently concerned about the validity of RIPA (the Regulation of Investigatory Powers Act 2000 (RIPA), which allowed given public authorities to "obtain and use communications data", the UK Government introduced a Bill that became the Data Retention and Investigatory Powers Act 2014 (DRIPA), which added a national security provision to the list of situations when these powers could be used. David Davis MP and Tom Watson MP challenged DRIPA on the ground that it violated EU law. The Divisional Court granted a declaration to the effect that section 1 of DRIPA was inconsistent with EU law but the Court of Appeal preferred to refer the question to the CoJ. [25] In his recent Opinion, A-G Suagmandsgaard has conceded that data retention of the DRIPA type "may be" compatible with EU law but subject to stringent EU requirements. The powers must be contained in legislative or regulatory measures "possessing the characteristics of accessibility, foreseeability and adequate protection against arbitrary interference"; they must respect the essence of the relevant Charter rights; there must be is an objective of general interest; and interference with private rights must be 'strictly necessary in the fight against serious crime. It will now be for the Court of Appeal to decide whether DRIPA fulfils these criteria. What of the boasted UK opt out from the ECFR?[26]

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[22] Judge Vassillios Skouris, 'The role of the principle of subsidiarity in the case law of the European CoJ', Keynote Speech at European Conference on Subsidiarity (04.5.06).

[23] T Raunio, 'Destined for Irrelevance? Subsidiarity Control by National Parliaments' (WP) (Madrid: Elcano, WP 36/2010); P Kiiver, 'The early-warning system for the principle of subsidiarity: the national parliament as a Conseil d'Etat for Europe' (2011) 36 E.L. Rev. 98.

[24] Joined Cases C/293/12 and C/594/12 *Digital Rights Ireland Ltd v Minister for Communications*, *Marine and Natural Resources & Others* and *Seitlinger and Others* (judgment of 8 April 2014, ECLI:EU:C:2014:238).

[25] *Davis and Watson v Home Secretary* [2015] EWCA Civ 1185.

[26] Art 1(1) of the Protocol to the Lisbon Treaty states that the "Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or actions of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms". But P Craig and G de Búrca, that, as the CoJ already had the power to make such findings, it was

Other areas in which there might be an indirect impact of CoJ case law on UK interests are worth a brief mention. Significantly, these include both cases involving regulation of financial activities, which cover all Member States, and decisions concerning the Eurozone, which may have serious indirect impacts on non-members. For example, the UK recently challenged the validity of an EU Regulation on short selling, concerned at the very wide discretion vested in the European Securities and Markets Authority (ESMA) with respect to implementation and regulation of this practice. This the UK reputedly saw as a threat to the orderly functioning and integrity of financial markets with unfortunate implications for the City of London. Despite the strength of the argument that the breadth of the discretion offended EU law on delegation to agencies, the case was lost. [27]

Similarly, a restriction placed on access to welfare benefits by non-British EU citizens resident in the UK came before the CoJ in the form of infringement proceedings taken against the UK by the Commission. Notably, the Court in dismissing the infringement proceedings ruled that the tax credits and benefits were social security benefits falling within the meaning of EU law.[28] This case is significant as reflecting a number of CoJ rulings on social security and nationality, both subject areas of high political sensitivity that Member States see as primarily within national competence and a source of grievance over EU intervention. In terms of the Brexit discourse, they are examples of areas where CoJ jurisprudence can be seen as impinging on "national sovereignty".

The extent to which environmental policy is today governed by EU laws dealing with waste disposal, habitat protection and procedure in environmental cases is perhaps hardly recognised. It is nonetheless an area for important judicial decision-making.[29] The tendency of the CoJ to impose the procedural requirements of the Aarhus Convention on Member States *via EU law* is therefore significant and may impinge quite widely on the autonomy of national procedures such as rules of locus standi, interim relief or the costs of judicial review proceedings[30] which, in respect of the UK, have recently been the subject of infringement proceedings.[31]

Briefly to summarise, much EU law and regulation, together with much CoJ case law, will continue to bind UK courts and public authorities by virtue of the ECA 1972. During the interim period, it will be impossible to avoid this position, as Sir William Cash observed during the House of Commons debates on DRIPA. Speaking of *Digital Rights Ireland*, he warned that:

The only way in which we can avoid running into difficulties with European Court judgments that we do not want—which, clearly, is what the Bill is about—is by using primary legislation,

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"unlikely that [the protocol] will have any significant effect in practice (*EU Law. Text, Cases and Materials* (Oxford: OUP, 5th edn, 2011) p.395.

[27] Article 28 of Regulation No 236/2012; Case C-270/12 *UK v the EP and Council* ECLI:EU:C:2014:18. And see Alex Barker, 'European court rejects UK challenge against EU short-selling ban' FT online, 22 January 2014.

[28] Case C-308/14 *Commission v UK* (judgment of 14 June 2016).

[29] See R Moules, *Environmental Judicial Review* (Oxford: Hart Publishing, 2011).

[30] See Case C-416/10 *Križan v Slovenská inšpekcia životného prostredia* ECLI:EU:C:2013:8; Case C-396/92 *Bund Naturschutz in Bayern v Freistaat Bayern* [1994] ECR I-3717. And see J Maurici and R Moules, 'The influence of the Aarhus Convention on EU Environmental Law' Part 1 (2013) Journal of Planning and Environmental Law 1496, Part 2 (2014) JPEL 181.

[31] Case C-530/11 *Commission v United Kingdom* ECLI:EU:C:2014:67. And see Case C-260/11 *Edwards and Pallikaropoulos* ECLI:EU:C:2013:2212013.

such as this Bill, to disapply the provisions of European law that come through sections 2 and 3 of the European Communities Act, and that it has to be notwithstanding those provisions.[32]

In the light of Brexit, it is pertinent to observe that this Bill was treated by the Government as emergency legislation and "fast tracked" through Parliament in four days. Quite apart from the fact that governments may have hidden motives (such as a wish to evade the outcome of a pending judicial review application),[33] "fast track procedure" is something that in general does not recommend itself to the House of Lords Constitution Committee [34] even if it may be voted through Parliament. Parliament has the last word but it is not always in the right.

3. *Après la deluge*: some thoughts on the constitutional implications of Brexit

Thus far in this I have focused (as I was asked to do) on the more pragmatic aspects of the likely effects of Brexit on judicial power. This follows a longstanding British – or perhaps only English – preference for practical, ad hoc solutions to practical, ad hoc problems. It would nonetheless be appropriate to end this paper with a few more general speculations on the possible impact of Brexit on judicial power. The CoJ is, as I have taken pains to emphasise, a powerful court with significant policy-making functions and the impact of its centralising decisions on the domestic legal orders of EU Member States has inevitably been considerable. The effect has also been double-edged. On the one hand, the integrationist jurisprudence of the CoJ, aimed at securing a measure of legal harmonisation (a sort of "legal level playing field") across the EU has had the effect of sucking power from the domestic legal order. On the other hand, the CoJ is a court with a strong commitment to the rule of law, whose judgments have helped to underpin and even enhance judicial power in the Member States. To revert briefly to the specific, it was the CoJ that took the first steps to constitutionalise within the EU a right of access to justice, in a case, incidentally, where the British Government had attempted to stand on an ouster clause.[35] This support will now be withdrawn. In guaranteeing this important right, which may be purely speculative in English law,[36] UK courts may now have to depend largely on the weaker guarantee afforded by Article 6(1) ECHR. Again, the power to "disapply" Acts of Parliament derives from the jurisprudence of the CoJ and will vanish with repeal of the ECA 1972. The courts will again be left with the power to issue a declaration of incompatibility where legislation falls foul of the ECHR as embodied in the HRA1998 – a much weaker power when up against a determined government, as the DRIPA affair or the long-running *Reilly* saga have recently demonstrated. [37]

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[32] HC Deb, vol 584, col 765 (15 July 2014), cited by C Harlow and R Rawlings, '"Striking Back" and Clamping Down": An Alternative Perspective on Judicial Review' in J Bell, M Elliott, J Varuhas and P Murray (eds), *Public Law Adjudication in Common Law Systems* (Oxford: Hart Publishing, 2016) 301, 317.

[33] *Cosgrove v Home Secretary* CO/7701/2011 had been stayed pending the CoJ judgment in *Digital Rights Ireland*.

[34] See Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, HL 116-I (2008/09).

[35] Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 1651. The right is now embedded in Art. 47 ECHR.

[36] See *R (Jackson) v Attorney General* [2005] UKHL 56 and notably the controversial speech of Lord Steyn at [71]- [128]. And see *R v Lord Chancellor ex p Witham* [1997] 2 All ER 779, which however concerned only the validity of ministerial regulations.

[37] *R(Reilly and Wilson) v Work and Pensions Secretary* [2012] EWHC 2292 (Admin); *R(Reilly) v Work and Pensions Secretary* [2013] EWCA Civ 66; *R(Reilly & another) v Secretary of State for Work and Pensions* [2013] UKSC 68; R(*Reilly (No 2) and Hewstone) v Secretary of State for Work and Pensions* [2014] EWHC 2182); *R (Reilly (no.2) and Hewstone) v Secretary of State for Work and Pensions* [2016] EWCA Civ 413.

It is true that some, though only a little, of the rhetoric of the "Leave" campaigners in the recent referendum was aimed at the CoJ. In this, the campaign drew on recent anti-judicial policies promoted by the Conservative Party; it must be borne in mind, however, that these were aimed specifically at the Court of Human Rights and based largely on the two specific incidents of the "prisoners' right to vote" cases and case law concerning the right to deport "suspected terrorists such as Abu Qatada". [38] Hostility to the CoJ is, however, part of wider discontent with the EU as part of a system of globalised governance, seen to represent a steady hollowing out of the national institutions of democracy and substitution of governance by unaccountable regulators, experts, bureaucrats - and judges: "attenuation of democracy and extension of administrative rationality" as Martin Loughlin has recently written. This is a governance system or "cosmopolitan constitution" in which:

> The "will of the people", whether as the constituent power that enacts the constitution or the majority that makes legislation, is displaced by the reasoning of a judiciary working through transnational networks to determine how rights will be protected, together with continual deliberation among government bodies over the rationality and proportionality of government action.[39]

In the Brexit referendum, the people (or more correctly some of them) have demonstrated their displeasure.

What will happen in the courts after Brexit is clearly speculative. Many questions could arise, some significant, many trivial. What, for example, will be the status of legislation previously disapplied? How should the many EU laws and regulations that the UK will no doubt wish to retain on the statute book be interpreted? Would EU regulations made as Orders in Council made under s2 of the 1972 Act fall retrospectively with the parent Act, causing what Sir Stephen Laws has described as "legal confusion" and "chaos".[40] The simple two-clause Bill or "transitory patch – keeping most things in place, with general transitional modifications" that he recommends would be likely to create a range of interpretative questions for our courts. Brexit might also bring a flood of so-called "public interest litigation", designed to bring pressure to bear on political actors and so to reverse the outcome of the referendum. The question of who can trigger Article 50 is indeed already before the courts, referred by a somewhat heterogeneous group of clients coordinated by Mishcon de Reya. With Sir Stephen Laws, I "hope and expect that the courts will exercise restraint", as traditionally they have usually done.[41] A more serious addition to the judicial workload might come through the transfer to the domestic courts of challenges by MNEs to merger and competition control, products safety, and other forms of risk regulation. This could prove testing. Some think that

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[38] Conservative Party, *Protecting Human Rights in the United Kingdom, The Conservatives' Proposals for Changing Britain's Human Rights Laws* (2014); The Conservative Party Manifesto 2015 at 63. And see *Hirst v UK (No 2)* (2006) 42 EHRR 41; *Othman (Abu Qatada) v UK* (2013) 55 EHRR 1. Both affairs are discussed in 'Striking Back', above, at 320-325.

[39] M Loughlin, 'The End of Avoidance', *The London Review of Books* (28 July 2016) 12-13, citing A Somek, *The Cosmopolitan Constitution* (Oxford: OUP, 2014). Unsurprisingly, there is a wide literature on this subject: see, eg, P Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford: OUP, 2010); C Harlow and R Rawlings, *Process and Procedure in EU Administration* (Oxford: Hart Publishing, 2014); P Cerny, 'Globalization and the End of Democracy' (1999) 36 European Journal of Political Research 1; R Dahl, 'Can International Organizations be Democratic? A Skeptic's View' in I Shapiro and C Hacker-Cordon (eds), *Democracy's Edges* (Cambridge: CUP, 1999).

[40] S Laws, 'Article 50 and the Political Constitution' U.K. Const. L. Blog (18 July 2016), available at: https://ukconstitutionallaw.org/

[41] As, eg, in *Jackson* (above n. 36) and in *Rees Mogg v Foreign Secretary* [1993] EWHC Admin 4.

only US Supreme Court and CoJ, to which this work is currently outsourced, are strong enough to deal with this determined and often aggressive American-style "adversarial legalism". [42]

By and large, however, I am sanguine about the changes and challenges to judicial power posed by Brexit. I believe that our courts are fully capable of dealing with them. I am more or less happy with the understated 'dialogue model' adopted in our Human Rights Act and the balance that it strikes between judicial and legislative power.[43] My main concern would be for the impact that Brexit might have on devolution. Clearly, changes in the very delicate balance of the constitutional arrangements in Northern Ireland or Scotland could result in a total re-structuring of our established court system and the possible dismantling of our Supreme Court as it presently stands. In my view, this would be a most unfortunate outcome and one that would present a truly serious threat to judicial power and authority. I can only hope that, in such an eventuality, our lawmakers would find inspiration in the precedent of the Judicial Committee of the Privy Council as for many years a final appeal court and arbiter of the common law in the Commonwealth. It should never be forgotten that "the power of a government with a large majority in the House of Commons is redoubtable"[44] and needs to be balanced by a strong and independent judicial system.

[42] On which see R Kagan, 'Should Europe Worry About Adversarial Legalism?' (1997) 17 Oxford Journal of Legal Studies 165; R Kagan, 'Globalization and Legal Change: The "Americanization" of European Law?' (2007) 1 Regulation and Governance 99; RD Kelemen, 'Suing for Europe: Adversarial Legalism and European Governance' (2006) 39 Comparative Political Studies 101; RD Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge: Harvard University Press, 2011); R D Kelemen, 'The Americanisation of European Law? Adversarial Legalism à l'Européenne' (2008) 7 European Political Science 32.

[43] C Harlow, 'The Human Rights Act and "coordinate construction": Towards a 'Parliament Square' axis for human rights?' in N. Barber, R. Ekins, and P. Yowell (eds), *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016).

[44] Lord Steyn in *Jackson* above n. 36.