



Political and Constitutional Reform Committee

Oral evidence: [The constitutional role of the judiciary if there were a codified constitution](#) HC 802

Thursday 21 November 2013

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Written evidence from witnesses:

- [Professor Andrew Le Sueur](#)
- [Dr Andrew Blick](#)

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Members present: Paul Flynn (Chair); Mr Jeremy Browne; Tracey Crouch; Mark Durkan

Questions 1-37

Witnesses: **Dr Andrew Blick**, Lecturer in Politics and Contemporary History, Kings College London, and **Professor Andrew Le Sueur**, Professor of Constitutional Justice, University of Essex, gave evidence.

Q1 Chair: Could I welcome you here? There is one issue that I almost have to declare an interest in and that is the decision taken in 1952 with the *Magor and St Mellons Councils v. Newport Corporation*. I represent the area that was involved. It is a fascinating story and a nice illustration of whether we follow the literal word of Parliament or whether courts should interpret it in an interesting way. Would one of you like to describe what happened, if you know? Is it a fair question? Dr Blick looks slightly nauseous about the subject.

As I understand, it was a key one because Lord Denning was following what Parliament would probably have intended to do, to compensate the councils, and the Newport Corporation was following what the literal word of the law was saying—that you do not have to compensate new councils that are set up. There was a change of council and boundaries were expanded. Newport should have compensated the new councils, but they said “Ah, the law says you only compensate existing councils, and a new one was formed.” *Magor and St Mellons* became one council rather than two councils as before, and on that basis they were refusing compensation. Lord Denning said that if Parliament had thought of this situation, they would have certainly included this, and it was because Parliament was defective, but the intention would have been to compensate the two councils. There would not have been any

difference because they were split up. But I understand that the House of Lords took the view that this was an attempt by the judiciary to interpret legislation rather than follow the rule.

Professor Le Sueur: I am sure it is an important case, but I have to confess it is several years since I have read it. I think you are quite right to highlight the importance of the interpretive role of judges in relation to legislation and any constitution that might come to fruition. The approach of judges to interpretation has changed hugely over the last several decades from a fairly literal approach, trying to find the intention of Parliament, to a more purposive approach. Then a whole new approach is required under the Human Rights Act, where the judges are not simply looking for the intention of Parliament, as expressed in the words of the specific Act of Parliament, but also have to have regard to convention rights and the case law of Strasbourg.

Q2 Mr Browne: Good morning. A general question to get us rolling. Would you describe for our benefit what the constitutional role of the judiciary is, in your view, in relation to the interpretation of both primary and secondary legislation? For a layman, as a scene-setting beginner question, what is the role of the judiciary in this country?

Professor Le Sueur: I think the role of the British judiciary would be very familiar to western-style democracies with other sorts of constitutional arrangements. Going back to the technicalities of individual cases, I think we can say that judges are involved in adjudicating on legal questions to do with the respective powers of different institutions within the state, between Government and Parliament. I think the judges in this country have had an important part in plugging in European Union law to our national law. The devolution settlements created in 1998 put judges in a key position in determining whether the new executive bodies and legislative bodies in those parts of the UK with devolved powers were acting within those powers. Judges also have an important role in adjudicating on disputes about fundamental rights, not only as a result of the Human Rights Act but through the development of the common law.

Q3 Mr Browne: What do you say to the criticism that is made by some, and probably most keenly felt by politicians, that some judges have decided that being the referee in the football match is an insufficiently glamorous role and they would like to also change some of the rules of football?

Professor Le Sueur: That is a criticism that is made, including by some members of serving judiciary who think that the judges have overstepped their mark. As someone who studies the minutiae of individual judicial review judgments, I think that is not a fair decision. The criticism often insufficiently differentiates between Parliament and Government. A key role of the judges is ensuring that government, whether it is central Government or local government or other public bodies, is working within the confines of the power conferred by Parliament.

Q4 Mr Browne: Do you feel that what I stereotype as the sort of *Daily Mail* view—that these completely out-of-control, out-of-touch judges are making decisions with a nod to the law but beyond what is intended by the law—is an unfair characterisation?

Professor Le Sueur: Yes. I wish *Daily Mail* journalists would actually read cases before indulging in these stereotypes, which I do not think have—

Q5 Mr Browne: If I walk around my constituency, which is down in Somerset, and then I walk around here, I can see the apparatus of the state. There is the Ministry of Defence, Downing Street, armed guards and Parliament. Although we have a democracy, the people in Taunton Deane, which is the area I represent, actually have a very small ability to influence that—every five years they get to vote for their local Member of Parliament. The whole apparatus of the state that we see here—the nuclear weapon systems, the £700 billion of annual public spending—is all dependent on that very thin thread of legitimacy, which is that every five years people go into primary schools in Taunton Deane and vote for me or whoever they think could do the job better than me.

It makes me nervous that that thread is made even thinner when people who have never put themselves forward for any election and have no popular mandate at all—in other words, in this case, judges—decide that they know better than the people who have put themselves forward for election. Do you think that that interpretation would be an overly sensitive one by a politician that we need not concern ourselves with?

Professor Le Sueur: I am afraid I would. If the legitimacy of all of this hangs on people voting, which is a vital part of a democracy, every five years, I think it is a pretty thin thread of legitimacy. What happens in between times? What happens when decisions are made miles away from Parliament that are procedurally unfair? I think your constituents would like to feel that courts are available in order to ensure that they are not dealt with unfairly by public bodies with whom they come into day-to-day contact.

Q6 Mr Browne: I am not saying I necessarily disagree, but your interpretation of democracy is much broader than people voting, even to the point that people who have not been elected curtailing the power of people who have been elected may enhance rather than diminish the legitimacy of democracy.

Professor Le Sueur: My main point is that most of the work of the courts is ensuring that unelected public bodies are staying within the powers that have been conferred on them by Parliament. That is not contrary to the model that you put forward, and that is what judges do.

Q7 Mr Browne: Would codifying the UK's constitution change the current state of affairs, this interpretive role that exists at the moment?

Professor Le Sueur: It all depends—and I think most of the answers to the questions that you are going to ask will begin with “it all depends”—on what goes into the codified constitution.

Dr Blick: I would add, on the point of the expansion of the role of the judiciary, which has taken place in some areas, that a lot of it has been at the invitation of Parliament. We are talking about the European Communities Act 1972, an Act of Parliament, and the Human

Rights Act 1998. In that sense, judges are being invited into what is admittedly an arena of greater political controversy than they may have been in previously, but they are there at the invitation—

Mr Browne: At the behest of Parliament, yes.

Dr Blick: Exactly, yes. They are doing what is required of them by an Act of Parliament that was voted on by elected Members and unelected Lords.

Q8 Mr Browne: In the way you have just described, as a country we have tiptoed down this path, or stumbled down it maybe, without fully appreciating the implications of what we are doing—or we don't mind the implications of what we are doing. Would it be better to go the full hog and to recognise this more formally in a written constitution or code of conduct? In other words, are we in a slightly unhappy limbo, which maybe is what sometimes causes distress to media and others, where Parliament does not feel fully supreme and the balance of powers is not written down, so nobody quite knows where they stand? Is that a fair characterisation?

Dr Blick: I think it is possible to make an argument in favour of a written constitution on the basis that the role of the courts has expanded. Some of it has been through Acts of Parliament that have been passed, some of it has been through the development in the common law and how the judiciary have developed the way in which they carry out judicial review over the years. There could be a case for saying some of this could be written down more clearly in a constitution, and that is what has been done in some constitutions internationally. Certainly that could be a basis for such an argument, yes.

Professor Le Sueur: The other basic point to make is that judges will only get involved when a dispute that is justiciable arises. The real benefit, perhaps, of a written constitution will be that it will reduce potential conflicts and disagreements over what the constitutional rules are and whether a rule has been broken.

Q9 Mr Browne: I have been provided with something in the pack that tells me that there are three possible modes or methods of codification: a non-legal code, a consolidation Act and a fully written constitution. Will you, in simple terms, talk us through the pros and cons of each of those models, if indeed that is correct, please?

Professor Le Sueur: A consolidation, I imagine, would be a process of simply bringing together all of the existing material on the statute book on to the United Kingdom Constitution Act 2015.

Mr Browne: But it is one big document? It is all in there?

Professor Le Sueur: It would be a rather big document, including a lot of detail about how the devolution settlement works. Would you include the Human Rights Act as part of that consolidation? Well, probably you would. I suppose the benefit of a consolidation is that it would possibly make the constitution more accessible as statutory rules, but it would be a very incomplete account of the constitution because many of the most basic rules—for

example, there shall be a Prime Minister and there shall be a Cabinet—are matters of constitutional convention, non-legal rules that do not appear on the current statute book.

Q10 Mr Browne: So that would just bring everything together to save people having to search the internet exhaustively or spend weeks in the British Library trying to find all the different bits and pieces.

Professor Le Sueur: Yes.

Mr Browne: Is a non-legal code that but without any legal force? It is just that somebody has been good enough to gather it all together, but it is not an Act of Parliament, presumably.

Dr Blick: That could potentially include in it the conventions that were just referred to there, the kind of things that you find in the document we now have, the Cabinet Manual. Some of that could also, alongside reference to the statutes, be included in a non-legal code. In fact, the project of putting the Cabinet Manual together was started by the previous Prime Minister, Gordon Brown.

Q11 Mr Browne: But a non-legal code is a group of people being good enough to undertake the exhaustive task of bringing everything together. A consolidation Act is that but with the stamp of parliamentary approval on it. Is a fully written constitution to start with a blank piece of paper and write, “There will be a Prime Minister, there will be a—” and incorporate all of this stuff into it as well?

Professor Le Sueur: Not necessarily. One question at the design stage would be whether you want a relatively short document, setting out only the very key parts of the constitutional setup, the main institutions and perhaps enumerating people’s rights, but leave all the detail to ordinary legislation. That would be one model. When people use the term “written constitution” I think they are often imagining some revolutionary moment where sovereignty would move from Parliament to the people, the people would adopt the constitution as a higher form of law through a referendum of some sort, and there would essentially be a new system from that point onwards, operating under the rules set out as approved.

Mr Browne: I am wondering whether police and crime commissioner turnout may be even—

Chair: I am curious how we would inflame the excitement of the voters with a codified constitution.

Q12 Mr Browne: There are two models. There is one where you could have a consciously short document that would inspire school children for centuries to come, or you could bring together the whole shebang in some very big document. They serve quite different purposes, though.

Professor Le Sueur: They do, and that is exactly right. My starting point is that we have to ask what is the problem and to what extent could a codified constitution of some sort address that problem. My view is that a useful thing a written constitution could do is differentiate between the rules of the game, to use the metaphor you used before, and the game. I think at the moment it is often unclear when our unwritten constitution is being amended. An Act of Parliament, which would not necessarily be a higher form of law but would set out the main principles of the constitution—the main procedures and institutions—would be helpful in signalling to Parliament, as well as everyone else, when something of constitutional significance was being proposed. To give one practical example, in the summer of 2003 it was announced by the press office at 10 Downing Street that we were going to abolish the office of Lord Chancellor, set up a Supreme Court, change the system of appointing judges and change the method of having a Speaker in the Upper House, and there was very little awareness that what was happening was a proposal of constitutional magnitude.

Mr Browne: Whether the Prime Minister had the power to—well, he obviously did, but you could say, “Says who?”, I suppose.

Professor Le Sueur: It seems to me it is no way to change really important rules of the game.

Mr Browne: Today it would have been tweeted and been even more dispiriting. It is a good point.

Q13 Chair: Is it your view that the change that took place then to the Supreme Court should have been a matter for a public referendum?

Professor Le Sueur: No, not a public referendum. I just think it was a bad process of policy making. It is not at all clear to me that No. 10 Downing Street appreciated that there was a legal system in Scotland and Northern Ireland that was going to be significantly affected by these changes. It is not clear that Downing Street really understood that there were many hundreds of references to the office of Lord Chancellor on the statute book.

Chair: You are questioning the infallibility of Downing Street. It does not come as a great shock to this Committee.

Professor Le Sueur: Well, I am pleased to hear that.

Q14 Tracey Crouch: Dr Elliott of the University of Cambridge told us that codified constitutions are usually hierarchical. You have implied in some of your answers that you don’t think it would be the case that there would be that implied high status in law. If we were to have a fully written constitution, do you think that would have an impact on parliamentary sovereignty?

Professor Le Sueur: That is a matter to be decided. Politicians and the electorate, in a referendum perhaps, need to decide what status they want a constitution to have. When we talk about a higher-order law, I think it is helpful to disentangle the various things that that could mean. One possible meaning is that it is a piece of legislation that is more difficult

to amend than, say, the Dangerous Dogs Act or the Dentist Regulation Act, that there are some procedural safeguards, perhaps the requirement for a referendum to change it, or perhaps, although we have not used this method in this country, a requirement for two thirds of the House of Commons to approve any change to a piece of legislation. Those are all ways of giving an Act of Parliament a higher status.

Q15 Tracey Crouch: You will recognise that we have just done the two thirds on the royal charter on the press. I think that is the first time.

Professor Le Sueur: Yes. That is one possible meaning. Another meaning of a high-order law is to do with the remedies that the courts have. Do you want the courts to be able to strike down ordinary Acts of Parliament that are incompatible in some way with the higher order law?

Q16 Tracey Crouch: Just on that point, you did mention in your evidence that we could have a declaration of incompatibility so that it would not affect the validity of primary legislation. Could you explain in more detail the advantages and disadvantages of that particular approach?

Professor Le Sueur: A possible advantage is that it is a relatively tried and tested constitutional mechanism. It is the mechanism that was used in the Human Rights Act. If a judge is unable to interpret a provision of an Act of Parliament so that it is compatible with convention rights, the judge has to say, “I have stretched the words as much as I can. I have thought about inserting implying words into the Act of Parliament, but I simply can’t, within the meaning of interpretation, make the Act of Parliament compliant. I will therefore make a declaration of incompatibility”. That does not affect the parties to the case in which that is made, it does not affect the continuing enforceability of the law, but what it does do is signal very clearly to Government and Parliament that there is a problem that needs to be rectified, so the ball is thrown back into the parliamentary arena. It is quite difficult to count but I think we have had in the low 20s of declarations of incompatibility since the Human Rights Act came into force in 2000.

My suggestion is that that is a model that has worked quite well. It retains Parliament as the institution having the final say on whether law should be changed, but it also provides rigorous legal analysis of a problem, which Parliament will obviously want to bear in mind.

Q17 Tracey Crouch: Rather than codifying our constitution, do you not think that Parliament should make better legislation?

Professor Le Sueur: That is exactly right, if you don’t mind me saying so. That is exactly why I argue that a constitutional code would be helpful. I gave the example earlier of the real dog’s breakfast of policy making in relation to the 2003 judicial reforms, but there are many other examples that I could give you. I think that the Legislative and Regulatory Reform Act, which was a huge Henry VIII clause, taking legislative power away from Parliament and giving it to Ministers, was brought forward with a real lack of awareness

of the constitutional implications. My modest suggestion is that if we set down some of the principles of the constitution, some of the institutional arrangements, policy advisers, civil servants and Ministers who are bringing forward legislation might actually make better legislation. They might consult more carefully and Parliament might scrutinise legislation of that sort more carefully.

Q18 Tracey Crouch: Dr Blick, that is a point that you make as well in your evidence, is it not? You think that even without codification it is conceivable that future judicial review could develop a more clearly constitutional character by using the subtext that the professor has just outlined, arguing that it would create that legitimate expectation around certain procedures in decision-taking. Do you think it is likely that the role of the judiciary could change in that way?

Dr Blick: I think that when you look at all the texts, and these kind of codes that the Executive and other institutions are issuing, often they don't have a statutory basis but they do have an official status. This is a fairly recent phenomenon, but we now have a lot more official accounts out there of how the Executive says it is going to behave in certain areas and what it thinks its rules are. It is quite possible that a court at some point, a clever lawyer—and lawyers are clever people, they come up with good arguments—will find a way of arguing that a legitimate expectation has not been fulfilled, and that could be a way into judicial review. That does not mean that an Act of Parliament could be struck down or anything like that, but it does mean you could introduce clearer constitutional—or closer to fully constitutional—principles into the actual conduct of public authorities. That is a possibility. That would be a long-term development. It would take a while to really develop, but if we look at the way judicial review has developed over past decades, there is no reason to suppose it is not going to continue in the future to develop in the direction I have just outlined.

On the point of parliamentary sovereignty, I would like to point out that some people would say parliamentary sovereignty does not exist already, so even before we get to a constitution some people argue that the doctrine does not make any sense anyway. Some people argue it did once exist but in the post-European Communities Act, post-Human Rights Act era, parliamentary sovereignty as conceived of by people like Dicey, does not exist any longer. If we talk about a codified constitution as something that might do away with parliamentary sovereignty, it is important to be aware that that is quite a complex concept, and some people would say you can't do away with something that does not exist anyway.

Q19 Tracey Crouch: But others would argue that the notion of subsidiarity protects parliamentary sovereignty.

Dr Blick: That is certainly an argument that could be put forward. I am aware that we don't necessarily want to turn this into a philosophical debate about parliamentary sovereignty, but some people would argue that if you do not have implied repeal any longer, and that the Human Rights Act and the European Communities Act are protected from implied repeal by later Acts of Parliament, then you do not have parliamentary sovereignty any longer. That is one possible interpretation.

Tracey Crouch: We take parliamentary sovereignty very seriously in this place.

Professor Le Sueur: Could I add a footnote to that? The judicial review case law, as it is at the moment, shows that the judges are really respectful of statements in executive documents that a document is not legally binding. To give one practical example, the Government issues a code of conduct on consultation, but it is quite clear that that code of conduct, it says, is not legally binding. When a challenge was made by solicitors arguing that the code had not been followed, the court was clear that there was no legitimate expectation that it would be followed. It was not something that was legally enforceable.

Q20 Tracey Crouch: Are you suggesting that when a Parliament passes an Act of legislation, the guidance that is often issued with it is irrelevant to those who are interpreting it, or is that an extreme example? Would it be that they do follow that but what they are really looking at is what is on the face of the statute?

Professor Le Sueur: There are two things. The starting point in any judicial review challenge is always what was the intention of Parliament, what powers did Parliament confer, what procedure did Parliament envisage being used, and most of the work of the judges is ensuring that that is followed. If a public body of its own volition says, “This is how we are going to deal with a particular matter”, then in some cases legitimate expectation, a legal concept, has been used by the courts to say that that undertaking or that policy guidance has to be followed, unless there is some overriding public policy consideration that could justify departing from it, and it would not be unfair to the individual concerned to do that.

Q21 Tracey Crouch: If an Act of Parliament is going through and I, as a backbencher, table amendments to that piece of legislation and the Minister on the Front Bench stands up and says that it does not need to be on the face of the Bill but it will be covered by guidance, I should still be reassured that that would be interpreted in the future in any—

Professor Le Sueur: Yes, but you don’t know what the content of the guidance is going to be.

Q22 Tracey Crouch: So what you are saying is that I really should get any amendments on the face of the Bill and not rely on Minister’s guidance.

Professor Le Sueur: This is an easy fob-off, I think, by Ministers who don’t want things on the face of the Bill. One of the important constitutional roles of parliamentarians, if I may say so, is to ensure that what needs to be on the face of the Bill is on the face of the Bill. Apart from anything, Ministers are not in office indefinitely, and an assurance from this Government may not be applicable in 10 or 15 years time when the same legislation is still being used.

Q23 Tracey Crouch: But that is the case anyway, no Act is binding.

Dr Blick, my final question. You said something interesting in your written evidence: that it could be argued that the lack of a codified constitution could make it more likely that courts may seek to assert an even greater role than they already possess with regards to the review of primary legislation when applying what they see as fundamental constitutional principles. Could you explain why you think that?

Dr Blick: This is a matter of controversy within the judicial community, as I understand it, but there are some judges who are of the view that parliamentary sovereignty is in fact the creation of common law, that it came into being because the judiciary recognised it as existing. Consequently, according to this theory—which I stress is a controversial theory, but nevertheless has been expressed by some members of the judiciary, including in comments in judgments—the judiciary, since they created parliamentary sovereignty, could at some point uncreate it and replace it with something else. As I say, this is an apocalyptic scenario, but it is not completely out of keeping with what some judges have said—that at some point something that Parliament does is regarded as so objectionable to fundamental principles that a court decides to put aside the doctrine of parliamentary sovereignty and put something else in its place. I would say that if we ever got to that position it would be a very bad position to have got to. An argument that could be constructed in favour of a written constitution is that it might be able to set down certain principles in advance that stop that kind of scenario from coming about.

Q24 Tracey Crouch: If we were to pass the hypothetical Let's Put Babies on Spikes Bill, what you are saying is that the judiciary itself would be able to say, "Forget parliamentary sovereignty, that is incompatible with various other bits of legislation" and everything else. We could not pass it anyway, because it would be incompatible, but is that what you are saying—that under a codified constitution, on an extreme example, the judiciary would be able to say that?

Dr Blick: I don't believe anyone in here in either Chamber would vote for putting babies on spikes, but there are other scenarios in which an Act of Parliament—and this is more real—tries to prevent judicial review from being exercised in relation to certain legislation, say on immigration, and tries to stop judges from reviewing decisions by immigration authorities. That is getting a bit more real. In that scenario some members of the judiciary—Andrew may have a more informed opinion on this than me—may regard that as not being actually constitutional and may regard themselves as able to exercise judicial review, even though they are told not to. Then you have a problem and you have a clash.

Chair: Thank you very much, Tracey. We hope that is hypothetical and not a leak of what is in the mind of the far right of the Tory party.

Tracey Crouch: Yes, I am not that extreme.

Q25 Chair: One is never too astonished in this place about what parties might have in mind, but I don't expect that Bill to be part of the manifesto of any party in the next election.

The Bill that you mentioned, the Legislative and Regulatory Reform Bill, is the stuff of legends among the staff here, particularly in the Library, because it was not the judiciary who

interpreted the Bill. It was the Library who were asked to explain it, and they came to the conclusion, after studying it carefully, that it was totally incomprehensible, and a new Bill was put in a few years later to explain what the other Bill meant. We don't have a brilliant record. Lord Armstrong told us that he put a question asking how many Bills there had been in the life of the previous Government that went through the whole process but were never fully implemented. The total was 75 pieces of legislation that went through but actually changed very little or nothing. There might well be a strong case for somebody outside to have a second look, whether it is the judiciary or someone else, but Parliament does not have a brilliant record. Would you agree with that?

Professor Le Sueur: I think Parliament has got considerably better than it used to be at spotting constitutional problems. That happens in this House and it also happens through Committees in the other House. The House of Lords Constitution Committee has made an important contribution in the routine constitutional scrutiny of all Government Bills that are coming before that House.

Q26 Mark Durkan: Before I come on to questions about the Constitutional Reform Act 2005, I want to ask, in relation to some of the questions that you have already addressed, about the prospect of judicial intervention to the point of overreach in the event of a written constitution. In Northern Ireland, for example, you will find cases taken to the judiciary essentially on a constitutional basis, because obviously a large part of the devolved constitutional arrangements are there in statute, and it is to that extent a written constitution. How far have you looked at how the judiciary has responded when such cases with some political sensitivity have come to it, and how it has manifested its reluctance to be drawn too far into matters political?

Professor Le Sueur: I think people who are sceptical or concerned about the possible impact of a UK written constitution should take some comfort from the experience under the devolution Acts, because those are essentially written constitutions for those parts of the United Kingdom. There has been remarkably little judicial involvement in dispute resolution. Almost all the devolution cases have come from Scotland and have really been to do with convention rights and whether the Executive is breaching what in a UK context would be the Human Rights Act. But in terms of the powers of the legislatures in those parts of the UK, there have been only one or two cases where that has ended up in the courts.

Q27 Mark Durkan: As in coming here to the Supreme Court? Cases have gone to the court in Northern Ireland, including Ministers versus Ministers, taking matters—

Professor Le Sueur: Yes, but not all of those were devolution issue cases.

Mark Durkan: A Minister took a case contesting the fact that I was elected as Deputy First Minister, and David Trimble as First Minister. That was a pretty political case to go to the court and it was presented to the Northern Ireland judiciary. The judiciary clearly were deft in trying to make sure that they did not get sucked into the politics and the various political contentions. There were very much issues about—to take up the Chairman's point earlier—the rules of the game, such as that the rules say there have to be so many Nationalists, so many Unionists, and people being redesignated and contested and all of that.

There were issues about what the Secretary of State's role had been in some of this, and all the rest of it. They weren't minor questions. Happily I was not called to give any evidence in that, and I am not sure that my evidence would have been helpful to those who were trying to defend my position. But the fact is that quite political cases have already gone to the courts, and the courts have been assiduous and very self-conscious in limiting the terms in which they are making judgments.

Professor Le Sueur: I am sure every judge approaching a politically sensitive case is acutely aware of the constitutional limits of what courts ought to be doing. In constitutional matters, the role of the judges is to decide questions of law, and those questions will relate, in the devolution context, to the devolution Acts.

Q28 Mark Durkan: But also, given the point that Tracey referred to earlier and addressed to Dr Blick, using other texts such as ministerial codes, the ministerial code in Northern Ireland has been at the core of several cases that have been taken, including one recently against the Minister of Health in relation to the gay blood donation ban and so on. So the ministerial code has—

Dr Blick: I believe the ministerial code in Northern Ireland has a statutory basis whereas the UK ministerial code does not. That may be a reason for that variation in practice there—because it is created under the devolution legislation, or it is provided for in it.

Q29 Mark Durkan: Yes, but if part of your suggestion is that one possibility is that things like the ministerial code become part of what could be used to show that there is a more constitutional character there, we have some examples of where a ministerial code has been the subject of court reference already. It is about seeing whether or not there are any fears or assurances that could be derived from looking at some of those preliminary examples of where the ministerial code has triggered judicial consideration.

If I can move then to the Constitutional Reform Act 2005, that removed the odd sort of swinging door arrangement, with the Lord Chancellor heading the judiciary in the Executive and in the legislature. Some people suggest that there has been something lost in not having that direct interface embodied between the Executive and the judiciary. Do you have any assessment as to the effect of that change? Has something been lost, or is it better that people know which lane they are driving in and stick to it?

Professor Le Sueur: I am sure many senior members of the judiciary feel that something important has been lost. At the time when the constitutional reform legislation was being drafted, all the attention was very much on separating out functions and powers, and I think not enough attention was paid to channels of communication. It is important that parliamentarians are aware of the views of judges on important matters affecting the courts. One remarkable change that has happened in the UK is the frequency with which judges appear before Select Committees, and I think that has not been the result of conscious constitutional design. This is very much a product of our flexible constitution whereby parliamentarians have felt the need to seek the opinions of judges. The most senior judges with peerages no longer have a direct platform on the floor of the House of

Lords to raise issues. So I think Committees such as this have gone a considerable way to plugging what might otherwise have been a gap in the chains of communication.

Q30 Mark Durkan: If I can give a legislative example, there were proposals in 2008, and not just the 42-day detention issue, about which there were various rumours at the time. We were hearing that members of the judiciary had some issues of their own about how the Government were proposing to provide for 42-day detention, including almost putting Parliament in the role of acting as a grand jury in deciding when these powers were to be extended to 42-day detention. People had all sorts of issues as to how Parliament could be convened to trigger the extension of these powers, which was going to be in relation to some specific cases. That would be the subject of all sorts of press coverage, and if anyone was subsequently standing trial, there were going to be all sorts of issues. Are you saying that the concerns that were having to be picked up through the ether and in other ways are exactly the sort of things that would have been conveyed directly through the previous usual channels that existed prior to the 2005 Act, when the judiciary had very significant concerns and sensitivities, not just in relation to their own rules but in relation to the rights of people they were going to be dealing with, who were going to be dealt with differently?

Professor Le Sueur: The senior judiciary have to be very careful about intervening in political debates about legislation, because they may well find themselves sitting in a challenge under that legislation in years to come. If they have expressed strong views, I think it may well disqualify them from taking part in that adjudication. I think it is also important to bear in mind that it is not only judges who are capable of interpreting the constitution and that parliamentarians have a role as well in identifying problems, which is exactly what did happen in relation to the Bill that you are describing.

Q31 Mark Durkan: Another aspect of that Bill, of course, was the then Government's proposal to be able to stop inquests, shut them down, sack a coroner during an inquest and appoint somebody else. At one stage the somebody else did not have to have any legal qualification; anybody could have been appointed by a Minister. That is the sort of area that some of us believe should be deemed as being of some constitutional import. As a legislator who was opposed to that legislation, I found it very difficult to ring any constitutional alarm bell that this should be deemed to be a matter of constitution rather than just another piece of legislation.

Professor Le Sueur: Maybe the House of Commons needs a constitution Committee of the sort that is at the other end of the corridor, so that if a Bill starts in the Commons, there is some early advice and considered opinion about the possible consequences.

Q32 Mark Durkan: Again, some of us had the sense that there were members of the judiciary, and not always the senior judiciary, who were aghast at that proposal and its implications but, as you say, felt constrained. They were not able to share that in any kind of publicly referenceable way. Would you envisage that if there were some sort of constitutional code, that would be the basis on which Committees could then invite judges to give assessments as to what might be the working implications of any legislative proposal?

Professor Le Sueur: I think parliamentarians need to be very careful about what it is they want of judges who are appearing before them. If it is opinion—and it would only be opinion—on the constitutional acceptability of a piece of legislation, for the reasons that I gave, perhaps senior judges are not the right people to do that. There are other experts on constitutional matters who I think could identify the concerns and brief Committees on what those were. The job of judges is to adjudicate when disputes arise. It is not to advise Parliament, and I think Parliament needs to assure itself that it has good-quality advice about constitutional implications of bills that are before it.

Q33 Mark Durkan: In the event of a written constitution or otherwise codification, surely the issue may not necessarily just be that judges would be put in a position of appearing to strike down legislation. I don't have the *Daily Mail* fear of judges doing all sorts of drive-by interventions, striking down legislation here, there and everywhere, but in cases where there are written constitutions, such as in the south of Ireland, often the judgments are actually calls to the legislature to legislate where there are particular gaps. In some cases where you have a written constitution, the effect of it is not for the courts to make the law themselves but to essentially refer matters back to the legislature.

Professor Le Sueur: The job of a judge is to identify an incompatibility. It will then need to be for Parliament, in some way or other, to decide how to respond to that in the longer term, what rules to change.

Q34 Mark Durkan: I accept that in the Irish context that is partly because the constitution in some areas provides for rights and in other areas provides for the rules of the game, so it depends on the type of case. In terms of the type of constitution that the UK adopts, you have said in your written evidence that would depend on efficacy and political acceptability. Colour those in for us.

Professor Le Sueur: With efficacy, the question is, what do you want a codified constitution to do? My own view is that we don't live in revolutionary times. There is no public or political appetite for a completely fresh start with a secular republic or whatever else some supporters of a written constitution want. For me the problem is a quite specific one, which is that I think we often get bad policy and inadequate parliamentary scrutiny of legislation involving matters of constitutional importance. I think having some sort of document that would lay down the basic institutional arrangements, some of the basic principles and procedures, would help clarify what is a rule of the game and what is not a rule of the game. If something is a rule of the game, I think that should trigger some enhanced form of parliamentary scrutiny of a proposal.

Q35 Chair: The recent experience has been that bodies are very reluctant to give away power. They are very power-retentive, and the devolution settlement is seen to be a grudging gift. The recent experience in Wales is that we have had the novelty of having the first laws passed on Welsh soil since the splendid laws of Hywel Dda in the 10th century. The result was that two of them were challenged by Government and taken to the courts. In each case the five judges found in favour of the Welsh Assembly Government rather than the national Government. If the judiciary were to have a role in upholding a written constitution,

do you think there would be a need for a special constitutional court that would be separate? Do you think the Supreme Court, in its short existence, has developed sufficient constitutional expertise to function as a form of constitutional court?

Dr Blick: That is one point. I think the Supreme Court is already doing some of the things that a constitutional court does, particularly in relation to devolution. It has that role under some of the legislation, so in some sense we are already edging in that direction. I will now hand over to the other Andrew.

Professor Le Sueur: I agree with that. I think our courts already deal with public law matters that have a constitutional character about them. We already have a procedure for bringing public law matters to court—the judicial review procedure, with an appeal from the Administrative Court to the Court of Appeal and there on to the Supreme Court. I would have thought that there would be great advantages in terms of the legitimacy of both the adjudicatory body and the codified constitution if we used existing procedures and institutions to deal with disputes.

Q36 Chair: Thank you for your written submissions, which will be greatly valuable to us. Dr Blick, you say in yours that in some models for a codified constitution, the judiciary may not be given a prominent role in the upholding of the constitution and may not have the power to void primary legislation. You quote that the Nordic countries, for example, restrict the courts in this regard. Could you expand on this?

Dr Blick: Sometimes it happens for cultural reasons that in theory the courts might have this power but they never ever use it, or very rarely use it in some Nordic countries. I believe not a Nordic country but the Netherlands prohibits constitutional review of Acts of Parliament, so there is a clause in the constitution that says that it can't be done. In the Nordic countries, I think in Finland it was prohibited but it is not any longer. There is a bit of a pressure in all of those territories to change this rule but it has been, as I say, in the ones I am aware of, the Nordic countries and the Netherlands, that for cultural reasons the courts don't do it. The constitution might not even mention it. It might not even say that this can be done, and they just don't do it or very rarely do it. In some countries it is specifically prohibited by the constitution. So in some ways they have a better defence of parliamentary sovereignty than we have in the UK, because it is actually written down somewhere that you can't do it. That is how it tends to work. It is a cultural and sometimes a formal prohibition.

Chair: Do any of my colleagues have any more questions?

Q37 Mark Durkan: Just on those examples that you referred to, the Nordic countries and the Netherlands. In the Irish constitutional provision the President, before signing a Bill, may refer it to the Supreme Court to test its constitutionality. I think you have to consult the Council of State and the Council of State, away from the President, makes the decision. So a Bill can be referred in the Irish situation to the court in advance of it being signed into law to test its constitutionality. If that happens forever and the court opposes it, and even if it is only referred on one point in the Bill, if the court opposes its constitutionality, once it is passed into law nobody else can ever challenge its

constitutionality. So the President, in exercising that power, is potentially also—and would be conscious of it, I am sure—depriving other people of the power to take a case. Have you looked at anything like that? Is that replicated anywhere else that you have looked at?

Professor Le Sueur: There is a similar arrangement under the devolution legislation in the UK where the UK Law Officers can refer a piece of legislation before it is promulgated. I think that arrangement would be a thoroughly bad idea for the UK written constitution for at least two reasons.

Mark Durkan: It is not a republic.

Professor Le Sueur: First, it would undo some of the work of disentangling judicial and legislative functions that the Constitutional Reform Act 2005 put in place. Secondly, I am not sure it would actually work in preventing people from bringing later applications about the concrete application of the legislation to the specific facts of their case rather than just whether the legislation is, in an abstract sense, compatible or not compatible. My view is that it would not work.

Chair: Thank you very much, gentlemen. We didn't get on to the royal prerogative either, which is taking place in some other investigations we are having. We are very grateful to you for your evidence and allowing us to learn from your expertise and learn from other members of the Committee. It has been a very educational session. I am grateful to you, Dr Blick and Professor Le Sueur.