



Political and Constitutional Reform Committee

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

Thursday 5 December 2013

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Written evidence from witness:

– [Stephen Hockman QC](#)

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Members present: Mr Graham Allen (Chair); Paul Flynn; Fabian Hamilton; Mr Andrew Turner

Questions 68-100

Stephen Hockman QC gave evidence

Q68 Chair: Stephen, we are going to crack on because colleagues are very keen to hear the Chancellor's autumn statement, so we are going to get moving. Would you like to say anything to start off or jump straight into questions?

Stephen Hockman: Could I make two very brief observations? First, I would like to say that I am very strongly supportive of the inquiry that you are undertaking on the possibility of constitutional codification, not least because, whether the conclusion is that that is a good thing or a bad thing, the process of discussing the nature and content of our constitution, the process of considering whether it would be beneficial to move closer to codification, is undoubtedly in the public interest. I think that helps to enable everyone—the man in the street and particular groups of individuals—to understand the concepts much better and that has to be a good thing.

Secondly, equally briefly, I am particularly supportive, if I may say so, of the idea of concentrating on the role of the judiciary within that overall context. It is clear from the evidence that you have already received, which I have looked at, that what that is going to enable you to do is to consider what the status of a codified constitution would be and what its nature would be, how it would fit within our overall system of governance. That, I think, too, is very beneficial. Until you understand what the status of a codified constitution would be and what it would amount to, it is very difficult

to come to a conclusion about whether it is a good idea. All in all, as I say, I am very supportive and I feel privileged to be here.

Chair: Thank you, Stephen. It is very good that you are here, and thank you for your long-term commitment to working in this field. It is very instructive.

Q69 Mr Turner: Could you start by giving us a brief overview of the current constitutional role of the judiciary?

Stephen Hockman: Yes. I suppose the traditional analysis is that there are three key elements in the constitution: Parliament—the legislature—the Executive, and the judiciary, and that they all have different functions. Those functions are well known. I think that traditional analysis still holds good.

Q70 Mr Turner: Would you mind setting them out, for my benefit and that of others?

Stephen Hockman: Of course. Parliament makes the law, the judiciary interpret and apply the law to particular factual positions and the Executive administer and enforce the law. That is the way that I would express it, in very simple terms.

I think there is one interesting modern qualification to that. This is something that is still in the course of development. What I think has become increasingly recognised is that inevitably judicial decisions, interpreting and applying the law to particular factual situations, involve statements of principle. At least, the higher up the judicial hierarchy you go, the more likely it is that you will get a statement of principle. That is inevitable and surely appropriate. You don't want judges simply to say, "This is the law that Parliament has made. Applying it to the facts, I think the answer is X or Y". You want judges to explain their reasons and you want them to articulate the principles that they think are relevant to the case in explaining how they are applying the law to the facts.

Once those principles have been articulated by the judges, they become, in themselves, part of our law. They are the principles of case law which are then applied in later cases. That is how our common law has developed. I think there is an increasing understanding of the importance of those principles, as established particularly by the higher courts, as forming part of the corpus of law that applies in our country. The same is true of any other common law system where judicial decisions have the same importance as they have here.

Q71 Mr Turner: Is it that there must be some principles or that there should be some principles behind what lawyers are finding?

Stephen Hockman: I think it is inevitable that the judges will set out the principles upon which they make their decisions. They could not do their job without doing that. Speaking personally, I also think that is a good idea because one of the advantages of judicial decision-making, from a public interest point of view, is that judges do give reasons for their decisions. You can see their principles set out in their decisions, you can see how the judges arrive at those principles, you can critique them and it is entirely transparent.

Q72 Mr Turner: In the paper you co-authored with Professor Bogdanor, you stated, "It has become apparent that we have, in a piecemeal and unplanned way, been codifying our constitution". How do you think these piecemeal changes have affected the judiciary?

Stephen Hockman: A very good example is the way in which our constitution changed between 2003 and 2005. That particular change was one that directly affected the judiciary and, for example, led to the headship of the judiciary passing from the Lord Chancellor to the Lord Chief Justice. It seems to me indisputable that that is an example of our constitution changing in a rather piecemeal and informal way, and in a way that many people regarded as not entirely satisfactory. The outcome may have been very satisfactory.

The key features of the changes that took place there, including the subdivision of the role of the Lord Chancellor, the setting up of a Supreme Court independent of Parliament, the recognition of the status of the Lord Chief Justice as head of the judiciary, are all substantive changes to the constitution that I suspect most people would applaud, but the process by which it happened has been the subject of a fair bit of criticism. One of the benefits of a codified constitution is that change in the future would be much more transparent. A codified constitution obviously would not be unchangeable, it would be capable of being amended, but the process of amendment would be a little more formal than it has been in the past, and therefore more democratic.

Q73 Mr Turner: I don't understand why they are democratic and how they have actually changed. I know they had changed but I don't understand why it was so important that the Lord Chancellor handed over to the senior judge.

Stephen Hockman: Unless you would particularly like me to, I will not dwell on the detail of those changes, but it seems to me that if you disapprove not only of the process by which that happened but of the substantive outcome, there is an even stronger argument in favour of codification. The whole problem about that process was that it took place in a slightly less than transparent way. By the time Parliament came to approve this in the form of the Constitutional Reform Act, everything was pretty well signed, sealed and delivered.

There was not the possibility, I suspect, of any real debate at the outset. There was no Green Paper or White Paper; there was no formal process. It seems to me that someone—I am not one of those; on the contrary, I feel that the outcome was appropriate—who disapproved of the outcome would be all the more strongly in favour of a slightly more formal and transparent process for achieving constitutional change, and that is what codification would provide.

Q74 Chair: I don't know whether you caught Lord Judge's remarks yesterday, which were reported today. They follow on from Lord Laws, Lord Sumption and Lady Hale, all of whom have raised this issue of European judicial activism, and all seem to infer that if there is clarity about what we can do in terms of the British judiciary, that clarity would help put lines in the sand about how far interpretation on things like the European Convention of Human Rights could go. Forgive me if you have not followed that, and I will not pursue it, but if you have followed that debate, what is your view on that? Would it be helpful to define British rights within a European context by having them written down and codified?

Stephen Hockman: Unfortunately I was not able to go and listen to Lord Judge's speech last night and I have not seen a transcript of it yet. I have read reports about it in the newspapers. I have read the recent speech by Lord Sumption and the recent lecture by Lord Justice Laws.

Since you are inviting me to give my own views, perhaps I might do it in this way: I would like to divide this into two parts. Part 1 is international and part 2 is domestic. I think it is important to start with the international aspect, and I am not sure how far this was covered in some of the speeches that I have mentioned. As I see it, the European Convention on Human Rights is an international treaty. We have signed up to that; we are parties to it. From this perspective it is like any other international treaty, and it contains some provisions, including a provision that says that

decisions by the Strasbourg Court are binding in the particular case that the court has been considering.

In theory, we could decide at some point in time to leave the Convention and to cease to be bound by that treaty, but as long as we are bound by the treaty, I think it is extremely important that we uphold its provisions and conform to decisions of the court in particular cases. That is because, if we decide to ignore the provisions of treaties by which we are bound, we can expect other countries to do the same. It would set, in my view, an appalling precedent if other countries refused to extradite people to this country even though there is an extradition treaty, or if trade arrangements were routinely ignored. We simply have to comply with our international obligations. I think that is a point worth making.

Let me move to the second part. I realise Mr Turner wants to question me on the first part but let me just make my second point. Domestically, the situation is different. We have incorporated the Convention into domestic law, using the mechanism of the Human Rights Act. The Human Rights Act provides that our courts have to take into account the decisions of the Strasbourg Court in deciding other cases, but they do not have to regard themselves as bound.

Lord Bingham—who as you know presided over the judiciary committee of the House of Lords for the first 10 years or so of the existence of the Human Rights Act and who is widely regarded as having made an extraordinary contribution as one of our senior judges—expressed the view in more than one case, with the support of the other Law Lords, that generally speaking we should follow decisions of the Strasbourg Court. He did not consider it right for the higher courts in this country to take a significantly independent line. More recently, as, Chairman, you have pointed out, other judges have taken the view that we should take a more independent line, frankly reflecting public and political opinion in so saying. There is nothing in the Human Rights Act that prevents judges from doing that, because the Act simply says you must take into account Strasbourg decisions.

It seems to me that what we are witnessing is an evolution in judiciary thinking. We are witnessing the principles, which I mentioned in an earlier answer, evolving and being adjusted to take into account prevailing socio-political circumstances, and that is one of the strengths of the common law. I see no problem with that, but what is important for present purposes, in answer, Chairman, to your question, is that none of this, to my mind, undermines the notion that we should continue to be bound by the Convention as a matter of treaty obligation. None of it undermines the concept of enforcing the Convention in this country through the Human Rights Act. What it means is that we may choose to apply the Convention in this country in a way that is different from the way in which the Strasbourg Court has recommended. That is permissible under the Act and looks as if it is likely to happen more and more.

Q75 Chair: Lord Judge apparently said last night—and again I am going by reports, not the transcript—that the British courts had supremacy over Strasbourg and should retain that supremacy. I think there are many people in the UK who—in the context of the acceptance of human rights standards of course—would be reassured if that was not a debating point but was written down so that everyone could feel at ease with our own judiciary and not a sense of unease at judicial activism. This is a matter of there will never be certainty, but there can be a degree of clarification, which is where I am leading you, in a sense. Clarification is helpful to all of us in these circumstances.

Stephen Hockman: I accept that. Putting the point that you have made to me in slightly different words, and in the context of constitutional codification, what you might seek to achieve in codifying the constitution in this area—not in changing it, but in codifying it and in clarifying it—would be to incorporate the Human Rights Act into it but, to put what I have just been saying in

even clearer terms, to make it absolutely explicit that, in the general run of cases, the decisions were for our courts to make, that the application of the Convention was for our courts. If, for instance, although I personally would not agree with this, our courts took the view that it was consistent with the Convention to deny prisoners votes, then our courts would be entitled to say that. If in the end our courts thought that the Convention permitted that, they would be entitled to make that ruling.

If a codified constitution were to make that explicit, I agree with you that that would be an additional benefit of codification. The only qualification to all of that is that, as long as we are parties to the Convention, as long as we are bound as a matter of international law by the Convention, then in an individual case, if the Strasbourg Court makes a ruling, we have to accept its authority.

Q76 Chair: If my colleagues will forgive me, I have missed the last two meetings on this and they may have covered this already, but my understanding in respect of the German constitution, for example, is that the German courts are not bound by the supremacy of courts of any other jurisdiction, but that there is a reserve that they are.

Stephen Hockman: Yes. I would not claim to be an expert on German constitutional law. I think what you may be referring to there is a slightly different point, which is the extent to which, under German law, decisions by the European Court of Justice in Luxembourg are accepted as binding. That is a slightly different issue. I will not expand on that.

Chair: My Clerk informs that we are going to come back to this. We are taking evidence on that very matter in January, which I was not aware of.

Q77 Mr Turner: Just briefly. The trouble is that what you have said is that it is okay for us, i.e. the British, to decide unless they—meaning the Europeans—have already decided. The problem is it is not clear to people like me, and I am sure to most other people, whether we follow the British law or the European law, especially when they say absolutely conflicting things. At the moment, we do not have the position of them saying conflicting things, we have Britain standing back and leaving it to Europe. The problem is, if you say, as you appear to say to me, that a decision by Europe supersedes decisions by Britain, we have no standing.

Stephen Hockman: I have not said that decisions by Europe supersede decisions by Britain. I have said that, in general, Parliament and our courts do have the role of deciding what happens here. I simply made the point that if you as an individual, Mr Turner, felt that our Government had breached your personal human rights, you have the ability to take your case to Strasbourg. If Strasbourg, in your particular case, makes a ruling that your human rights have been breached, for instance that you were held in custody for longer than you should have been for some reason, you have the right to go to Strasbourg, ultimately, and make a complaint and get a ruling.

Q78 Mr Turner: And Europe decides. Are you saying that Europe decides?

Stephen Hockman: In your particular case, Europe would be able to rule that your human rights had been abused.

Mr Turner: In other words, Europe, not Britain, decides.

Stephen Hockman: In that particular case, if you take your case to Strasbourg, being party to the Convention does enable Europe to make that decision. Is it not desirable? I do agree that this ultimately is a political issue. I would not dispute that for a moment, but isn't there room in our

modern, globalised world for a safety valve? Isn't there room, even in our democracy, for the view that there may be some rare, individual cases for which the ability exists for an individual to have his position reviewed—and we are talking about individuals here, we are talking about private individuals. Isn't it right for there to be a safety valve under which an individual can go to Strasbourg?

There have been many cases in the half century or so in which the Convention has applied in this country, long before the Human Rights Act came into force. There have been cases in which most people would agree it has been a good thing for an individual to be able to take his case to Strasbourg. Even if you think that the cases coming from this country where that might be appropriate are very rare, surely everybody would agree that there are other countries, party to the Convention, where it is legitimate for people to be able to do that.

What I am saying to you is that, as long as, in the vast majority of cases, decisions by our Parliament and our courts are those that govern the outcome, as they do, it is, in the end, in the interests of people everywhere in Europe to have a safety valve, to have a fallback position and to be able to say that, in cases of real abuse, there is a remedy. You have to balance these things and ultimately I agree it is for the public to decide whether that ultimate protection of people's liberties is worth having.

Q79 Mr Turner: You seem to me to be saying that if an applicant for the right to vote, who is a prisoner—that decision has been made, there is nothing we can do about it except stand back from the law. Am I right? I just want to know.

Stephen Hockman: Under our international obligations at the moment, in a particular case, if the Strasbourg Court makes a ruling, then as a matter of international law, as I understand it, that is binding on our Government, yes. Of course, it would be open to us—and I would regard this as a very retrograde step—to say that we are leaving the Convention, that we want to turn our backs on that. I think that would set a terrible example in Europe, but this is a political decision that we would have to consider.

Can I just say we seem to have moved quite a long way from issues of codification but I was trying to answer the questions I was asked?

Q80 Chair: It is a very helpful diversion, in many ways, because I was not asking you about the policy. I think that was a matter of politics and elected people should decide those things. I am not involved in one side or the other on a particular case. We all have strong views about particular cases, of course. My point was more about clarity, the fact that I don't know, Mr Turner does not know, the man and woman in the street sometimes don't know, and that trying to make these things more transparent allows us to have a proper political debate. At the moment there are 20 different interpretations, for example on prisoners' rights. There are thousands of different views on this. While you can never have certainty, to have a degree of clarity—my view that I am putting to you is that the more clarity there is, the easier it is for us to make decisions and to understand the consequences of those decisions.

Stephen Hockman: I would agree with that. Can I just say again, bringing out the implications of what you have just said, in relation to the discussion that Mr Turner and I were just having, one of the things that a codified constitution probably ought to clarify—and until we had this discussion I do not think I was clear in my own mind about it as I am now—the relationship between our international obligations on the one hand and binding domestic law on the other. This is an area which it seems to me is definitely ripe for being made more explicit in a codification. It would help Mr Turner and me to be completely clear about the framework for our discussion if we had a six-point, bullet-point summary of what the position is on that. Then we would have that in front of us

and then our decision about the public interest and about the political merits of the argument would be much better informed. We would know exactly what the common ground was. That seems to me to be a very, very strong argument for codification.

Chair: And then our politics could come into play if we were not happy about what our six points were and we could all have a view and change Government policy or whatever people felt was appropriate, but I don't think we are at that point at the moment. It is very confused and very cloudy. I have allowed a bit of a diversion there.

Q81 Paul Flynn: As these points were being made, and they came up last week, would you agree that the whole point of the move in the European courts and the Convention on Human Rights was not to improve law making in this country or the Scandinavian countries, which are probably the exemplar throughout Europe? The whole point of it was to raise the standards for the 800 million people in Europe, where there are outrageous practices on human rights. It was reforming treaties and agreements that went through.

If we decide to make a fuss on a matter of microscopic insignificance such as prisoners' votes, it gives an open sesame to other countries, which have terrible standards to human rights, to insist on their traditions as well. Should we not regard these objections, on a matter on which we probably should have taken a hit—prisoners' rights—for what they are, both from the right wing of the Conservative party and from Judge Judge, as unhelpful manifestations, spasms, of English national interest?

Chair: Stephen, if you can answer the generality there rather than go back into a particular case, that would be helpful for the Committee.

Stephen Hockman: Speaking personally, I agree with you, but can I say in relation to codification I think the support that I would express for codification would apply, irrespective of one's position on human rights? You could put aside human rights completely. I think most people who are strong supporters of human rights are likely to support codification as well, but suppose, as some people are, you are sceptical about human rights. Let's say you are a human rights sceptic. I would not suggest that Mr Turner is a human rights sceptic; that would be presumptuous on my part, although I see that he is nodding. Suppose you are a sceptic. You can still, it seems to me, be a strong supporter of codification because of the clarity that would bring.

By the way—and we have not touched on this; I don't think there is time to do so—you could still be a strong supporter of using the mechanism in the Human Rights Act as a technique for introducing a codified constitution. In other words, to give that constitution not a supra-legislative status, not to turn it into something akin to the America constitution, which is almost a religion in its own right, but simply to have a piece of legislation, passed by Members of Parliament, equivalent to the Human Rights Act. If you are the sceptic, it would not contain much about human rights, but it would be a set of rules in which our constitution would become transparent. It could be amended, like any other piece of legislation, but it would collect everything together and everybody would know the rules of the constitution, and the relationship is between the Executive and the judiciary.

According to press reports, Lord Judge has some views about the role that the judiciary should have in relation to funding decisions. It could, if Parliament so approves, contain provisions about that sort of thing. That would be the great benefit of it, and the role of the courts would be no greater than it is under Human Rights Act as it stands at the moment.

Q82 Fabian Hamilton: In your paper *Towards a Codified Constitution* you state there are five broad possibilities for the types of power that judges could have if they deemed a piece of legislation to be unconstitutional. Could you tell us what the main differences are between these options?

Stephen Hockman: I will try. I think that one might simplify it and shorten it in this way. You can boil them down into two. If you are going to have a codified constitution you have two main choices. Either you have a constitution which does have what I referred to a moment ago as supra-legislative status. This is a document that is binding not only on the courts and on individuals, but on Parliament. Unless Parliament passes laws that comply with the constitution, the judiciary can strike them down. That is, broadly speaking, the situation that applies in the USA, as I understand it. You have judicial review of the constitutionality of legislation.

Speaking personally, I do not support that. I don't think there is the slightest chance of such a constitutional measure ever being introduced or accepted in this jurisdiction. It seems to me pointless to go down that route.

Q83 Fabian Hamilton: Let me interrupt you a minute. Is that because at the moment the source of all political authority and constitutional authority is Parliament here?

Stephen Hockman: Correct.

Q84 Fabian Hamilton: Parliament itself would never sacrifice its supremacy to a written document in the way that the United States has?

Stephen Hockman: I think that is true, but the reason for that is because the public will not support it either. It is not overweening arrogance on the part of Parliament; it is because Parliament would be reflecting our traditions and what the public in this country would desire.

The point that those of who support codification would want to make, and if there is one message which in my evidence I can get across to you—and I am not the first person to say this by any means—it is that there is another way, the second way, of establishing a codified constitution that does not involve any diminution in Parliament's power. That is to pass a constitutional statute equivalent to the Human Rights Act. It would include the Human Rights Act, if you are in favour of human rights. If you are not, it could exclude that. Let's not go there, let's not have that argument, let's not allow the constitutional debate to be wrenched out of context by human rights. Let's leave human rights aside for one moment and let's acknowledge that your codified constitutional statute would be a piece of legislation that Parliament could amend. Some people would say that it should be entrenched in the sense that you need a two-thirds major to change it, which might not be a bad idea, but you do not even need to have that.

Just like the Human Rights Act, you could say it can be changed by Parliament but as long as it remains in force what the judges can do is consider whether other statutes, as well as decisions by public authorities—judges can consider whether there is compatibility between other measures and the constitutional statute. That would be the role of the courts in this area. Presented with a piece of legislation or an administrative decision and being asked to decide whether there is compatibility between that measure and the constitutional statute, the judges could say yes or no, and they would be fulfilling their normal interpretative function.

It does not involve any change in the role of the judiciary; it does not involve politicising the judiciary. The role of the judiciary, as lawyers, would be to decide whether the measure—whether it is a statute or a Government decision—is compatible with the constitution or not. If it is not, they

would make that declaration and then leave it to Parliament to take the remedial action that was necessary. That is the mechanism, the system, that the Human Rights Act has introduced. That is what Lord Lester said, rightly, was the British compromise that his ingenuity and the ingenuity of others had arrived at. It is that mechanism, it is that system, which the Human Rights Act has established, which some of us are suggesting could be borrowed and extended and applied for the purposes of a codificatory system.

Q85 Fabian Hamilton: I agree with everything you have said, but let me challenge you on something you said, an assumption you made, which is the public would rather Parliament was the supreme authority for political and constitutional rights than a document. Surely in a climate where there is a very low regard for elected politicians and political parties, don't you think the public might prefer to have a rather more immutable document that is not subject to the vagaries of political chance or electoral fortunes that go to make up the composition of Parliament after every general election and for the next five years? Surely something that is far more stable and does not depend on voting and politicians, who are widely loathed.

Stephen Hockman: I suppose that a historian would probably answer your question in the affirmative in the sense that there have been examples throughout history of something that is over and above the democratic process—this would not be true of the USA. The United States constitution is probably, most people would agree, rather a splendid example of democracy in action because of their particular history and the achievement of the founding fathers, endorsed by Abraham Lincoln and so on. Nobody would say that was not democratic.

But there have been other examples where, outside the democratic process, something comes into existence, a constitution or an institution or even an individual, into which, for the time being, a vast majority of people place their trust. I would be sceptical of that, personally. I would not want to see a situation in which the scepticism of the public about politics, which I obviously agree we have at the moment, were to be remedied by some sort of supra-political device of the kind that you are referring to. Forgive me for slightly oversimplifying the concept you were putting to me. I don't think that is the way forward at all.

What we need to do, it seems to me, is restore the trust of the public in the political process. My personal view is that moving towards codification, literally by the work that you are doing here, not assuming what the outcome is going to be but engaging in serious and anxious study or scrutiny of the subject, is the way to do it. Anybody who listens to your debates—not to my evidence but to your discussion of the subject—would begin to have their faith in politics restored. That is the way you have to do it. You have to do it by slow and steady and serious work. There is no other way of doing it, and, by the way, not by introducing things like referendums all over the place, because that does not restore faith in politics either, in my opinion.

Fabian Hamilton: Or the recall of MPs.

Stephen Hockman: That is another matter too. I think there is no substitute—it is extremely presumptuous of me to say this—for doing your job seriously and sensibly and carefully and then going out into public arenas and on to the media and explaining what you are doing. That is the only way you will ever do it and it is exactly what you are doing.

Chair: Thank you very much for that confidence.

Q86 Paul Flynn: You are against having a separate constitutional court. Why?

Stephen Hockman: Yes, I am against that personally, because that would only be relevant if you had this biblical document. If you had a biblical document, then you might need a separate court. Even then I suppose the existing Supreme Court could possibly fulfil that role. In most people's thinking a separate constitutional court is completely unnecessary unless you have a separate constitution.

As you know, in the USA, where they have a constitution that has this supra-legislative status, they do not have a separate constitutional court. The Supreme Court in the United States exercises judicial review of legislation, but it also has the slightly more modest functions of our own Supreme Court. I think that to talk about setting up an entirely new constitutional court is quite beside the point. It would be unnecessary; it would be a drain on public funds. I would have thought that was an unnecessary distraction.

Q87 Paul Flynn: You say that you believe that politicians and the people should decide whether we have a codified constitution. I look forward to the day when I march behind you and the Chairman of this Committee with a banner saying, "What do we want? A codified constitution. When do we want it? When it is necessary and required. When will we get it? When we become sufficiently anti-European".

What role do you see the judiciary playing in this, particularly on the grounds that they are probably the only people who will fully understand what is being offered?

Stephen Hockman: Let me make two brief points. First, if the approach that I personally advocate is the correct one, the role of the judiciary will be, as it is now, an important one in interpreting and applying the constitutional statute and in ruling whether other legislation and administrative action are compatible with the constitutional statute or not. That would be their role, the same as it is now.

There is a further point, and this goes back to what I was saying about the developing role of the judiciary in establishing principles. I got the impression that that point was seen as a little surprising and that it was not one that could readily be accepted. I agree that this is something fairly new. It flows to some extent from the growth of judicial review as a legal tool, as a part of our law. Public law, we sometimes call it, or administrative law. It is the judiciary articulating principles that then apply in future cases.

The point I am seeking to make here is that if, as I suspect is the case, the public have respect for the judiciary, if the public approves of that process, if the public welcomes judgments in which principles are articulated and in which they can understand the reasoning behind the decisions, if those decisions clearly reflect the public interest, as many of them do—not all—but if many of them are couched in language and with reasoning that the public can understand—and the decisions of people like Lord Bingham and of the current Supreme Court generally achieve that—that in itself unquestionably enhances public confidence in our system of Government as a whole.

I think that through this developing role of the judiciary, through their increasing importance in our constitutional settlement, we are at the same time helping to re-establish confidence in the political system. What I would say is that alongside the work that you are doing, the serious work that you are doing, alongside attempts by bodies such as this Committee to re-establish public confidence in the system, you should see the judges—again I am sounding rather presumptuous if not pompous in saying this—as your partners in that exercise. You should see the judges as helping to make transparent the principles that ought to apply, as helping to articulate what the public interest is in particular circumstances, not as somehow competing with you, but as complementing the role that you have.

They are doing that, particularly at Supreme Court level, by deciding individual cases on their facts, as they have to do, but doing it in a particular way, doing it by articulating principles and by explaining what the justification for those principles may be.

There was a philosopher who died recently called Ronald Dworkin, who articulated particularly clearly this aspect of the judicial role. It seems to me that it is worth acknowledging that aspect of the judicial role as part of a truly usefully and democratic constitution.

Q88 Paul Flynn: That is very helpful. Just a final point: in the case of *Newport Corporation v Magor and St Mellons Council* in 1952, which I am sure you are very familiar with—

Stephen Hockman: Only from reading the transcript.

Paul Flynn: I am particularly interested because it is the area that I now represent. It was a fascinating decision in that Lord Denning took the view that the situation was unprecedented and it had not been foreseen by Parliament, and if Parliament had foreseen it, they would have taken a certain view, which he supplied. This was overturned by the House of Lords, which said the judiciary is making the law instead of Parliament making the law. Where do we get to the idea that depending on politicians, the people in Parliament, we elevate Parliament to a role and we give them infallibility, which no one deserves? We know the imperfections of our legislative process.

Where should that line be drawn in having an immutable code that is laid down and common sense decisions, depending on unprecedented situations that arise?

Stephen Hockman: Lord Denning was at the height of his powers when I started in practice 40-plus years ago, so I remember those days quite well. What I have been saying is that I think this conception of the role of the judiciary is a relatively recent one. If you go back to the days of Lord Denning, Lord Denning's creativity as a judge was rather unusual. The idea of a judge who went a little further than simply applying black-letter law and who articulated principles that were consonant with the public mood was a somewhat unusual notion in those days, which is why Lord Denning appeared to be an exceptional figure and perhaps sometimes an unorthodox and controversial figure.

It seems to me, being no less presumptuous than I have been in my earlier answers, that we have moved forward a good deal since then. We have moved to a situation where the judges generally feel much more comfortable in, to some extent at least, doing exactly what Lord Denning did—being independent minded, articulating principles that apply to cases, but at the same time doing so while giving full respect to legislation and to the decisions of Parliament and working alongside Parliament. I think they have become more Denning-like in their approach but without contradicting the will of Parliament. That is where we are now.

Chair: Stephen, that is incredibly helpful. Thank you very much indeed. As clear and articulate as always. We appreciate your testimony this morning.

Examination of Witness

Witness: **Nat Le Roux**, Director, Constitution Society, gave evidence.

Q89 Chair: Nat, glad to see you here. Welcome. Sorry that we have kept you. We had a little journey to Europe and back, which I thought was helpful because I think there are issues there that do need to be addressed by the Committee. My apologies for missing your event a week or so ago. I was ill unfortunately, but I shall get to the next one.

Did you want to say anything to kick us off or are you happy to jump straight into questions?

Nat Le Roux: Let's just go straight to questions.

Q90 Mr Turner: Could you briefly describe the role of the judiciary in the UK's current constitutional arrangements?

Nat Le Roux: The current role of the judiciary in judicial reviews is essentially ensuring that Central and Local Government and public bodies act within the powers conferred on them by Parliament. That is filtered through the judges' idea of the rule of law, rather as the previous witness was describing. The best short formulation of what it seems to me the judiciary in general thinks about this is in Lord Bingham's book on the rule of law, where he says, and this is how the rule of law applies to this particular context, "Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably." That is a general statement of what one imagines is going through the judiciary's mind when they are making decisions in these cases.

Q91 Mr Turner: One of our witnesses, Dr Elliott, drew a distinction between a flat and a hierarchical constitution. Which is more appropriate to the UK?

Nat Le Roux: I use a different language from that. If we are talking about some form of codification, there are two possible methods. One is to go back to the drawing board and write something like the new South African constitution of 20 years ago, where effectively we reform the state and lay out in great detail the powers of different organs of state and how they relate to each other and so on.

The second approach is to gather existing constitutional material into one place, metaphorically in a large, leather-bound volume, and label that material as being constitutional. There are some quite significant practical problems with that. I think we all know what the major constitutional statutes are, but there are lots of things of constitutional importance that are buried in other statutes. There is lots of non-statutory material, the *Cabinet Manual*, for example, and to what extent is that part of the constitution, and there are lots of arrangements that are purely customary. That is a practical difficulty.

Going on from that, the idea that judges might get involved in assessing the validity of primary legislation against some constitution I think is a separate issue to that of codification. The best example of that is in Israel. Israel has no codified constitution, but a practice has developed whereby their legislature labels or certifies some laws as being constitutional and, should there be a conflict, the Israeli courts will then give primacy to those constitutional or so-called basic laws over other laws. That is an example on the one hand.

On the other hand we have the Dutch constitution, which although it is codified in the conventional sense and all the rules laid out, it specifically forbids the judiciary from opining on the validity of primary legislation. These two issues, although often wrapped into one, I think are in principle separate.

Q92 Mr Turner: If the UK adopted a codified constitution, would that give it a higher status or not?

Nat Le Roux: I think there are two or three different things that could happen. The simplest thing that Parliament could do is to do what happens in Israel and say that from now on we are going to label certain laws as being constitutional laws, which does not happen at the moment. All laws, once passed, are the same, at least in theory. If that happens, the judiciary would no doubt, over time as cases came to them—because of course an important point with understanding judicial review is its haphazard nature. It is not as if the judges can wake up and decide to go and review something that they do not like the look of. They have to wait for an applicant and a justiciable issue and a case.

That would be the simplest thing. Effectively collecting together some laws currently on the statute book and calling them constitutional would over time have the same effect, because very likely the judges would take notice of that. If you had a fully codified constitution and it was a new constitution along the lines that most countries have, that constitution would have rules in it about the circumstances in which judges could review legislation, or indeed it might not have such rules, because, contrary to what is generally believed, the US constitution does not provide for judicial review. The role that the Supreme Court took on, going back to *Marbury v Madison*, which is the famous case at the beginning of the 19th century, was to adopt for themselves this power to review legislation. It is not in the constitution.

A rather similar case more recently was in Denmark. The Danish constitution says nothing about judicial review but the Danish courts have started in practice to review legislation in that US sort of way. There are no hard answers to any of these questions.

Q93 Mr Turner: I think I heard you say the judges cannot wake up one morning and decide to look at this. They can only do so if somebody else has tried to change the law. Is there anything that prevents them from doing so?

Nat Le Roux: Judges in our jurisdiction, and it is the same in the US, only get to hear cases if an appellant brings a case to them. The judiciary cannot create its own cases.

We have a different situation in the minority of countries that have proper constitutional courts, i.e. the Austrian model, where there is a specific court, as we were hearing earlier, which does not try normal cases. Its role is to opine on the constitutionality of all new legislation, but that is quite unusual and certainly very far from where we are in the UK at the moment.

Q94 Fabian Hamilton: Mr Le Roux, Professor Le Sueur told us that were the UK to adopt a codified constitution, he, “would like to see the preservation of the principle of Parliamentary supremacy so our elected representatives in Parliament would have the final say on the content of legislation, rather than constitutional supremacy in which a judicial body would have a veto on unconstitutional legislation.” I wondered what your view was.

Nat Le Roux: I think it is rather difficult and it is made more difficult by the fact that there is not very much consensus at the moment, as far as I can see, as to what the exact relationship between the role of the judiciary and Parliament’s role is. You hear some extreme statements, which most people would say were incorrect. We had the view of two judges, famously in the Jackson case a few years ago, to the effect that parliamentary sovereignty is a creation of the common law. In other words, in extreme circumstances the Supreme Court can strike down legislation. Probably the majority of judges do not think that. We don’t know; we only have these two judges who said that.

On the other hand you sometimes hear the view, perhaps from Members of this House, that Parliament can legislate as it likes without restriction. If you examine that, a number of questions come up. The first point that I would make is that there are clearly practical restrictions on Parliament's ability to legislate as it would like. It would be rather difficult, to reverse Scottish devolution at this stage, in practice.

Q95 Fabian Hamilton: It is technically possible, isn't it?

Nat Le Roux: Indeed. It is technically possible for the British Parliament to decide that Canada's independence is to be withdrawn. What would follow from that, one may ask. I think you are asking whether there are also legal or normative restrictions on parliamentary sovereignty, and here we get into much more contested territory. Going back to the previous discussion, I think most people would say that the UK does have obligations under international law that Parliament cannot vary in the context of international law. For example, Parliament might take the view that embarking on a particular war was a legal and proper thing to do, but that would not, at an international level, prevent that war from being held to be illegal.

The question that I always ask people, to pin them down when they express a strong support for parliamentary sovereignty, is, do they believe that citizens have rights that Parliament cannot take away, or do they not believe that? The logic of the position is that they must believe that citizens have at least one right, which is the right to vote. The whole intellectual underpinning of the modern doctrine of parliamentary sovereignty is democratic legitimacy. It was not so in the 19th century. Indeed, most people, when asked the question in a neutral way, would say that they did have rights which Parliament could not or ought not to be able to take away. There is no way you can go away and look up the answer to this question. What we see in all of these situations is just a reflection of the general view mutating over time.

Coming to the particular issue here, who owns the rule of law? Is there some higher principle of the rule of law which in certain circumstances might trump parliamentary sovereignty? The difficulty there is that the judges and Parliament, or the Government, might have different views about what the rule of law meant in certain particular circumstances.

Going back to our recent events, the practical question here is if Parliament were to introduce primary legislation that the judges believed to be contrary to the rule of law, as they understood it, what would they do about it? That is the particular difficulty we might be confronting at the moment with the current Government consultation exercise.

Q96 Fabian Hamilton: We have discussed already this morning, and you, in reply to Mr Turner, mentioned judicial review and some of the processes in the UK. I wonder how judicial review here differs from countries where there is a codified constitution.

Nat Le Roux: As I understand it, the great majority, probably all countries which are essentially democratic, rule-of-law jurisdictions, have some form of judicial review whereby appellants can go to the court and say, "This official has acted beyond his appropriate powers or he has behaved unfairly". How likely those applications are to succeed is another matter. I think I am right in saying that in Singapore, in the whole history of the republic, there has been no successful application for judicial review despite the fact that that process exists in principle. That form of judicial review against the actions of officials is quite general.

The other sort of judicial review, which is judicial review of legislation, can only happen if there is some higher benchmark against which to judge its legitimacy. That higher benchmark normally in

most states is a codified constitution. As I said earlier, it does not need to be. In the case of Israel we just have two different sorts of law, which have different priority.

Q97 Paul Flynn: On the question of irreversible changes taking place, I recall that Enoch Powell went to see Prime Minister Winston Churchill and urged him to re-colonise India, so there are people who do have ambitions to change what to most of us would seem irreversible.

Could we take up a point made by our previous witness in saying that he did not think we would achieve a codified constitution, but it is beneficial, certainly educational to MPs, to discuss this and to consider the consequence of it? What is your view? Are we going to get there?

Nat Le Roux: If you look at international comparators, when countries come up with brand new constitutions it is in the context of some sort of general political crisis that requires a reformation of the state, in other words a change from one regime to another or the granting of independence of the settlement of a civil war of something of that nature. South Africa is a good example. I would rephrase the question and ask how likely it is that something like that is going to happen in the UK in the foreseeable future. It is probably unlikely, although Scottish independence, if it happened, might just be such an event, so it is not to be completely ruled out.

In the absence of that, is anything in the codification direction very likely to happen? I think there is some merit in assembling the obvious constitutional legislation and putting a big constitution label on the cover. How far that takes us I am not sure. The change that I would like to see, and I have argued this before this Committee before, is a much simpler one, where Parliament itself simply starts labelling, when appropriate, new laws as being constitutional.

Q98 Paul Flynn: Lord Lester last week resisted the idea that Parliaments here of all parties have become more willing to release power through the devolution process to Scotland, Wales and Northern Ireland and to Europe as well. He gave an example of that—possibly that is not going on—that Parliament is as power retentive as ever. He used the example of prisoners' rights to vote. Do you find that the process is going on and it is a slippery slope and that it will continue and that power will be devolved from Parliament in the way that it has been over the last 20 years?

Nat Le Roux: It is a complex question because several different things seem to me to be happening at once. One thing, as you say, is it is in line with Britain's relative decline in the world and the process of accession to the EU that Parliament has sacrificed, in practice if not in theory, an area of authority to other jurisdiction. It has also sacrificed authority within the UK to other jurisdictions through the process of devolution.

In the core area, over which Parliament still appears to have an untrammelled authority, there are further difficulties, again referred to in previous evidence, trying to pin down what the extent of that sovereignty is, when the courts are becoming perhaps more assertive in talking about principles rather than simply the interpretation of legislation. I think that in turn reflects a general decay in relations between the law and Parliament that has been going on for some time. Some of that is just the general siloing of elites that seems to have occurred over the last 50 years or more. At one time, the mythical golden age, there were quite a lot of MPs who worked as QCs in the morning and then came to Parliament in the afternoon. Those people existed but there aren't very many of them anymore.

I think a significant event in that process of breakdown of relationships was the Constitutional Reform Act of 2005, which, on paper, looked quite sensible because it removed this rather anomalous position of the Lord Chancellor and seemed to be a move towards the full separation of powers which would be normal in most countries. But the effect of it was further breakdown in communication, I believe, because of this rather odd position that the Lord Chancellor had was an

important link between the legislature and the judiciary and a safety valve when things went wrong. Now the Lord Chancellor is just another Minister who is not even a lawyer at the moment. At the same time, the senior judiciary, while they are still on the bench, no longer sit in the Lords, although they come back afterwards.

At one time, and this is caricaturing it slightly, this country was run by an establishment of people who might have gone to the same schools and had similar ideas about how things ought to work, and a lot of that was never written down in any formal way. Those understandings, for good or ill, are breaking down.

Q99 Paul Flynn: I am sure you are encouraged, as we are, by the evidence of increased public interest in a codified constitution: what has happened behind you since you started to speak. A final question: how would the current model for judicial review in the United Kingdom be likely to change if a codified constitution was adopted?

Nat Le Roux: I think, as we were saying earlier, it would very much depend what that codified constitution was. The mere effect of labelling some legislation as being constitutional, even if it is existing legislation, opens the doors for the court to review other legislation against it, and I think that that would happen. If we were to go the full-blown new constitution route, I think it would be sensible for that constitution to say something about what the role of the judiciary ought to be.

Q100 Fabian Hamilton: Thank you, Nat. Is there anything that you would like to say, anything left unsaid? This is your moment?

Nat Le Roux: Just at the risk of advertising our own activities, I will go back to the seminar that you were not able to attend, Chairman. Something that is going on at the moment that is highly relevant to this is the Government consultation exercise on the scope of judicial review. Some of that is about administrative tidying up and efficiency and is uncontroversial, but some of it is not. Two proposals particularly are, I think, worrying in their implications.

One is the on the question of standing. At the moment, even an unaffected party may apply for judicial review if there is a public interest involved. The people who make these applications are typically NGOs. The suggestion in the consultation exercise is that that should be stopped. In other words, someone has to have a direct interest where they have been personally affected before they may apply.

At the same time there is another proposal in the consultation exercise whereby protective costs orders—the orders that immunise the applicant from picking up the defence costs, the Government costs, if he loses—should only be available if people do not have a direct interest. You can see how the combined effect of those two measures would very severely reduce the set of people who were ever capable of applying for judicial review. They would have to be wealthy people with a direct interest.

What is the reaction of the judiciary going to be if these measures are introduced? It is far from certain that they will go along with it. They may take the view that in this particular instance there is a higher principle of rule of law that they will use as a way of, in effect, not accepting this. We have had other examples of that in the past where ouster clauses in legislation—a clause in a statute that says the courts may not review the validity of this act or the legality of this action—have been politely ignored by the judges.

This comes back to the question not what is the truth of it, because the truth of it is what people believe. What do judges believe—that they are guardians of something called the rule of law,

which sits separate to the authority of Parliament? I personally believe it is the proposition that is best not tested. If these Government proposals go ahead it is going to be tested.

Chair: That is very thought provoking. I shall think about what you have said and at the very least I think we will clip that piece of your evidence and make sure that our colleagues on the Justice Committee, who may well be looking at this matter, I am sure they are, have that in front of them. It is a matter for them if they wish to call you, of course, but I will bring that to the attention of my fellow Chair of that Select Committee.

Thank you so much. I hope you did not feel this was too truncated and that you have been able to say everything you wanted to. I know that colleagues are very keen to leave the Committee and hear the Chancellor's autumn statement, so I had better close the Committee proceedings now.