



Political and Constitutional Reform Committee

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

Thursday 12 December 2013

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Written evidence from witnesses:

- [Sophie Boyron](#)
- [Professor Roger Masterman](#)

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Members present: Mr Graham Allen (Chair); Mr Jeremy Browne; Tracey Crouch; Mark Durkan; Paul Flynn; Fabian Hamilton; Robert Neill; Mr Andrew Turner.

Questions 101-155

Witnesses: **Sophie Boyron**, Senior Lecturer in Law, Birmingham Law School, and **Dr Michael Gordon**, Lecturer in Law, Liverpool Law School, gave evidence.

Q101 Chair: Hello and welcome. It is nice to see you. You know what we are doing here. We are having a broad look at the constitutional role of the judiciary as part of what we are doing looking at the pros and cons of a written constitution. We have taken evidence already from a number of people. We paid a visit to the President of the Supreme Court last week. Colleagues, particularly new colleagues, I would absolutely recommend that you do that. Joanna is arranging for another time for those who were not able to make it. We had a very constructive and very helpful conversation with Lord Neuberger.

Sophie, Michael, do you want to kick us off or do you want to go straight to questions?

Sophie Boyron: I am happy to go straight to questions.

Dr Gordon: Agreed. Yes, absolutely.

Q102 Tracey Crouch: Thank you both for coming this morning. I will start with you, Sophie. In your written evidence, you state that a codified constitution could be framed so as to ensure that the judiciary has the same attributions and the same constitutional position as at present. What role do you think that the judiciary currently plays in the UK constitutional settlement?

Sophie Boyron: The role of the judiciary for the moment is to respect a certain balance between the various institutions and ensure that some important principles of the constitution are respected. For

me, it has both an institutional and substantive role for the moment, and I think it is perfectly possible to inscribe that and protect that from a constitution.

Q103 Tracey Crouch: Michael, do you agree with that?

Dr Gordon: Largely. I would probably define their role more specifically in relation to the functions that they currently have. It is an interpretive role in terms of legislation, applying the rules made by Parliament and then using the processes of judicial review to control the actions of the executive, subject them to the rule of law, ensure they are behaving lawfully. That power is not static. It has increased, I would say, partly at Parliament's invitation in a number of areas, and introduced ideas of constitutional review now under the Human Rights Act and the EU Communities Act as well. But broadly I don't disagree.

Tracey Crouch: You accept that it plays an incredibly important constitutional role?

Dr Gordon: I agree with that. Absolutely, yes.

Q104 Tracey Crouch: What kind of model would you see the UK having to adopt in order to preserve the current constitutional role of the judiciary?

Dr Gordon: I don't know if you want me to start talking about parliamentary sovereignty at the moment and where that might fit in a codified constitution.

Tracey Crouch: We are certainly going to be talking about it later.

Dr Gordon: I suspected so. I think it is very difficult to know in advance and in the abstract how exactly you could design a codified constitution to preserve exactly this current role for the judiciary because, as I just indicated, I think judicial power is not static. It does change and it is very difficult to identify in advance what other conditions may come into play that may cause the courts to develop their own power in certain ways. Certainly there are indications that they may be willing to do that as part of their responsibility for the development of common law principle. I don't think it is necessarily obvious how exactly you could preserve their role by, say, stating in a codified constitution that the courts will have the same role for the future as they have now. I think that would be quite difficult to do, and it would be open to them to think about how they might want to interpret that provision as well. I would look to focus instead on defining very clearly the powers of Parliament. Rather than defining the powers of the courts so directly, focus on the powers of Parliament and define their legislative power and allow the role of the courts to be defined by implication.

Q105 Tracey Crouch: Do you think that by having an unwritten constitution, as we do now, that in itself preserves the constitutional role of the judiciary in its fluidity, flexibility and ultimately progression?

Dr Gordon: I think it does to a large extent but an unwritten or an uncodified constitution is still subject to this idea that judicial power is not static and can change and develop over time. I am not entirely sure whether it is more prone to that than a codified constitution. It would depend on the content of that codified constitution and the content of the uncodified one as well.

Q106 Tracey Crouch: If the judiciary were given a role in upholding a codified constitution, one possible approach would be to have a system of pre-enactment review. Do you think that kind of system could work in the UK?

Sophie Boyron: I am not sold on the idea that pre-enactment review would work in the UK.

Q107 Tracey Crouch: Why not? What are your qualms about it?

Sophie Boyron: I am not sold on pre-enactment review to start with. Pre-enactment review looks, on the face of it, to have great benefits and it might work in the UK for several reasons. One is that it would appear to protect parliamentary sovereignty in the sense that it would happen before the statute or an Act of Parliament came officially into effect, so it would look as if it runs less against parliamentary sovereignty in that sense. It was sold like that in France when it was first introduced. I think that is just an appearance, not a reality, so I do not buy into that idea.

Secondly, it is believed to be beneficial because the intervention of a court or an advisory body, whatever it is going to be, happens before the Act has any legal effect, which means it will avoid what I would call constitutional damage in the sense that no unconstitutionality will have taken place prior to the Bill being declared to be unconstitutional or incompatible. Those are the advantages. The disadvantages are that it is an abstract review. I am not completely convinced that courts can pick up every single point of incompatibility prior to its having been implemented, and prior to having specific factual situations before the courts. That is my big concern. That is a side issue; any drafting can sort it out of course. Also there is then an issue of how you are going to integrate. If you have only pre-enactment review, that is not a problem, but if you have pre-enactment review and post-enactment review, how those work together can give rise to problems. The court may have said something in the pre-enactment review that might have to be contradicted later, and that does give rise to issues of legal certainty and could give rise to issues of the legitimacy of the judicial process if they end up contradicting each other regularly.

Dr Gordon: I agree with that. There do appear to be advantages on the face of it, but, for very similar reasons to Sophie's, I think it might be a problematic mechanism. It could potentially blur the lines between the legislative process and the adjudicative process in perhaps an unhelpful way. This is speculation but I am not even sure that courts would want this power. Under the devolution legislation, the Supreme Court now has the power to assess whether Acts of the Welsh Assembly, Scottish Parliament and Northern Irish Assembly are within legislative competence in advance on a reference. There has now been a case on it. I know it has been referred to in other evidence.

Maybe I am reading too much into it but there are a couple of stages in those judgments where both Lord Hope and Lord Neuberger seem a little bit reluctant about what is going on, not overtly but they say a few things that appear to be managing the expectations of the different parties involved. They sort of say, "Just because the Secretary of State has lost this case doesn't necessarily mean it is a defeat because actually you have kind of won at the same time". Lord Hope goes out of his way to justify the use of the reference procedure and say, "Even though it means that legislation that was perfectly valid already has been delayed in coming into force, hopefully you think it was a useful procedure". Maybe I read too much into it, but I am not entirely sure the courts are wild about that power anyway, probably for very similar reasons.

Sophie Boyron: The little evidence I have in comparative analysis shows that often it is used for political reasons in the sense of the Opposition stopping an Act of Parliament, and sometimes it works and sometimes it doesn't work. It often is given as a protection for the Opposition or a weapon that the Opposition can use. It does not have to be, you don't have to draft it like that, but it has been used to that effect. I am not completely convinced that that would fit in with what I understand to be the British constitution as it stands for the moment.

Q108 Chair: To follow up on one of Tracey's points, isn't it more helpful to have a pre-emptive stage rather than wait until a law is passed and then the judiciary get involved? Isn't it sensible at some point to have the ability to consult to see how this might work and if there might be problems and get them out at an early stage? I understand that in France there is a constitutional court that can have law referred to it for review. Has that been helpful? Has it been the subject of political controversy? Is that one of the countries you were thinking of, Sophie, when you said an Opposition could refer?

Sophie Boyron: That is one of the countries I was thinking of.

Chair: Of course we could draft something that meant politicians could not refer. This would just be a "let's run it by the judiciary before it becomes law just to make sure that things are going to be sound", which may sound on the face of it like a quite sensible thing to do.

Sophie Boyron: It would be unfair to my system to say it has been terribly problematic. It has not been, and, in a sense, it has led to the Conseil Constitutionnel establishing itself as a constitutional court, so that is important. Having said that, I do not see a reason for transporting or transferring that very specific system to the UK. For example, the Opposition chooses which legislation it will fight, but it does use it as a way to try to stop legislation after it has been finally adopted, and that is a strategy. It is a very refined strategy because now that the Conseil Constitutionnel has created so many constitutional principles it tends to decide which legislation it will send to the Conseil Constitutionnel so that it would not necessarily increase the number of principles that the Conseil Constitutionnel creates. It is quite a refined strategy.

Since the 2008 review of constitutional reform, the problem has been to make the pre-enactment review with the preliminary constitutional ruling procedure. There has been a bit of tension between the two because the drafters of the constitution have decided that when the legislation has been through pre-enactment review, it can't be reopened later, which means that if there is legislation that might not have been investigated fully by the Conseil Constitutionnel, even though they claim to do so—and I am not saying that they do not, but I have some doubts about that with abstract review—it can't be re-opened later.

Q109 Chair: I think you are making an argument against the French system for pre-emption, but not one that would disqualify us from designing something that would be appropriate to British circumstances perhaps.

Dr Gordon: Does that underestimate the role that select committees are playing in this area? I think they have done this job very effectively and increasingly it is accepted that select committees can play that role, dealing with very sophisticated legal argument as well. It is not just political scrutiny that select committees can provide.

Again, we come back to judicial independence: do the courts really want this power? The Lord Chief Justice has the power under the Constitutional Reform Act to lay written representations before Parliament if they want to make their views known on an issue and he said very recently that he views this as a nuclear option. It does not seem that they want an awful lot of involvement in that legislative process. I think they are concerned about taking steps that would undermine their independence.

Sophie Boyron: Can I add just one thing to that? If I were going to recommend anything, I would advise looking at the Finnish system. They have pre-enactment review via parliament before it even goes to court. I could see it working much better within the British constitutional system than a judicial pre-enactment review, is what I was trying to say.

Q110 Robert Neill: Those last two points raised something that was going through my mind as I was listening. Michael, you made the point about the reluctance. When I was on the Justice Select Committee I remember the President of the Supreme Court saying exactly that. Within our system, as well as the select committees, which is a fair point, we are moving more towards pre-legislative scrutiny by the public bill committees. If that were to become the norm, for example, which some of us might think is a sensible idea, is there some role where within our arrangements you can perhaps craft on duties on the Law Officers to act as facilitators in getting an opinion as to potential compatibility or incompatibility so that it is not being done from a particularly partisan perspective, and it is not even being initiated by the judges, but some duty upon the Law Officers under their broader duty to Government and Parliament to initiate in front of the public bill committees?

Dr Gordon: Perhaps, yes. It would be interesting to see how such a provision could be drafted. It could well work. It would be interesting also to know what the reaction of the judges would be, whether they would be obliged to provide an opinion if requested or whether it was open to them to do so and then who it would be. Would it be the Supreme Court justices? Would it be the Lord Chief Justice? What would the consultation process be among the judges?

Q111 Mr Browne: Good morning. I was going to invite you to think widely and freely about which constitutional events you thought had had the greatest impact on parliamentary sovereignty over the last 50 years? Go in turn. You can name three each.

Dr Gordon: I would say the biggest, which probably then leads to the others, is attempts to reconcile membership of the European Union with the sovereignty of Parliament. I think that is the one that has had the biggest single impact in that it has posed the biggest challenge. There are good arguments, and I would certainly accept that we can understand a reconciliation between EU law having supremacy in the UK for the time being and the sovereignty of Parliament. I would say it is now broadly accepted that there is a stable reconciliation between those two principles. I think there is disagreement about how exactly that reconciliation has been achieved. There is much academic debate about how we have got to the position we are in but I think most people probably accept the endpoint. That in itself has had an impact on the way Parliament thinks about its own power and influenced legislation like the Human Rights Act and the devolution statutes where Parliament sees that it can give power away to some extent without interfering with its sovereignty necessarily. I think it has had an impact on Parliament's view of its own power there, perhaps even extending that to the European Union Act 2011 as well.

Q112 Mr Browne: The EU in all its manifestations. I suppose our membership of NATO potentially obliges us to go to war. What are the implications? You see almost daily in the newspapers that the Home Secretary, for example, is raging—many people may think rightly raging—that she is unable to deport somebody or unable to do something that appears to be in line with the view of the majority of Members of Parliament because a judge has decreed that it is wrong for her to do, and that the authority that he is citing is not one that has been approved by the House of Commons in the first place. I think quite a lot of Government Ministers, and maybe MPs generally, do feel compromised, if you like, that parliamentary sovereignty is being usurped in quite a significant way.

Dr Gordon: Perhaps. I would draw a distinction between Parliament's actual practical power—and the power of the Government as well—to do things and the sovereignty of Parliament in principle. If you draw that distinction, the problems don't disappear but at least the principled objections disappear, I think. I would say pretty confidently as a matter of domestic law that it will be valid if

Parliament chooses to withdraw us from the European Convention on Human Rights and repeal the Human Rights Act. It will be accepted. Similarly, if Parliament chooses not to comply with decisions of the European Court of Human Rights, the UK courts have the option to issue a declaration of incompatibility. They declined to do so in the recent prisoner voting case in Chester and McGeoch on discretionary grounds, effectively. They could do so in the future if the issue is not resolved satisfactorily, but declarations of incompatibility don't affect the validity of legislation.

Q113 Mr Browne: Do you mean that, in other words, the very fact that the House of Commons is elected gives it the moral authority so that, even if in theory it may not be able to do something, in practice it would be able to if it came to the crunch?

Dr Gordon: Yes.

Q114 Mr Browne: The idea that the United Kingdom could not leave the European Union always struck me as fanciful. If the House of Commons voted to do so, a way would be found to do it, it seems to me.

Dr Gordon: Yes.

Q115 Mr Browne: What about the tension between parliamentary sovereignty and a written constitution? A topical example is MPs' pay rises. Here we have something where Parliament has given away the sovereignty to make a decision on this issue and yet all the party leaders, despite having voted for that very decision themselves, assert that the will of Parliament must be heard, that it is not good enough for any rules to get in the way of what they want to do on any given day. That is a micro example but if you get into a written constitution, is there a danger that it all looks fine, it is all codified and then, as the fashions change and you get the ebb and flow of politics, Parliament keeps wanting to do things that it is not allowed to do because of the constitution even though Parliament itself gave its stamp of approval to that very constitution?

Dr Gordon: It is a possibility. It depends how you design that codified constitution, I think, but also just as important—and I think you allude to this in the question—is that rules themselves are not enough. Rules in themselves will not control everything. We have to understand the background conditions and the political and constitutional culture in which those rules are understood to operate, and we can't necessarily control how our constitutional culture will be in 200 years. We can write rules that might preserve what we want to but we don't necessarily know how those rules will be understood in 200 years' time. We can't guarantee it, which is partly why going down the codified route, if you are interested in preserving parliamentary sovereignty, is probably one that needs to be approached with great caution, I would say.

Q116 Mr Browne: But it is possible to reconcile them?

Dr Gordon: I think so, yes.

Q117 Mr Browne: You don't think that the tension is such that the cracks will ripple through this inflexible document when it is exposed to reality?

Dr Gordon: In my mind there would be two models. One would be Parliament enacting a Constitution Act, which by the authority of Parliament presents itself as a codified constitution but

because it is an Act of Parliament it does not have hierarchical status over and above all other legislation. It would be like an Act that guides our understanding of other constitutional rules as well. That would be one model. I think it is much easier to preserve parliamentary sovereignty in that model because the authority for the constitution itself comes from Parliament.

The other approach would be that you adopt a codified constitution not by an Act of Parliament and write into it, "Parliament is still sovereign" or make detailed provision for Parliament having legally unlimited power or design it in such a way as to preserve the existing situation, which could be done. I am sure it would take skilful drafting but it could be done. I think that is much more likely to cause problems in the future.

Q118 Mr Browne: As you say, you can create different degrees of flexibility or authority. This gets to the nub of our ongoing deliberations. What is then the role as you see it for the judiciary when you have a written constitution? There is a slight question as to why you bother going to the effort of getting elected as a Member of Parliament if the judges who have never subjected themselves to any elections at all get to overrule you the whole time. But even if you are not just thinking about yourself and thinking about the interests of your constituents, there is a frustrating sense of having to write back to the constituents saying, "Yes, I do agree with you. What is more, most MPs, as far as I am aware, agree with you but I am afraid we are not able to do anything about it". There is an issue there about whether democracy is functioning properly. I will get to the question. If you have the rules and the judges are enforcing the rules, there is not any scope for irritating impingement of democracy in the views of elected Members of Parliament because that gets you away from the rigid enforcement of the rules. That seems to me the biggest tension.

Dr Gordon: Perhaps, but there is always scope for courts to read extra things in around the rules. A really instructive case in this sense is what has happened in Scotland in relation to the Scotland Act. The Supreme Court in the Axa Insurance case basically say that in section 29 there is detailed provision as to what the legislative competence of the Scottish Parliament should be, but for no reason that was live in the case, as far as I read anyway—there might be debate about that—they also assert a common law jurisdiction that they may need to have the power to review Acts of the Scottish Parliament in exceptional circumstances in the future. So even if you do start defining in relatively detailed terms—and the Scotland Act does define in very detailed terms what legislative competence may be—I am not sure that that can always prevent courts from taking that kind of action to read things in and around the rules.

Sophie Boyron: Can I refine that point? There are two things I want to say with regard to written constitutions. Firstly, having a written constitution does not mean that you won't have tensions. However clever the drafting is, it is likely that some tensions will occur and we can't necessarily plan for those because that is ball gazing. However, a good constitution should be able to create a framework in which those tensions can survive and be resolved at least temporarily on a certain level. Then you move on and different tensions and different resolutions happen. That is how a constitutional system works, whether it is codified or uncoded. That works in codified constitutions so I don't think that is very specific to codified or uncoded constitutions.

However, one other point that I wanted to make with regard to the relationship between a codified constitution and courts is that, depending on what codified constitution or type of constitution you are going to adopt, the power of the court should be matched to that. I think that we should not start discussing separately the powers of the court and then match to that whatever the constitution is going to be. It is the other way round. We need to decide what kind of constitution needs to be adopted, whether codified, rigid or what we call a flat constitution, which would not have hierarchy and in that case the role of the courts would be very different. I think that is how it works rather than the other way round. I would not advise a constitutional court or a constitutional review for a

constitution that has no hierarchical supremacy, for instance. That would make absolutely no sense for me.

Q119 Fabian Hamilton: Do you think it would be desirable for the UK to adopt a constitutional model that limited the scope of the judiciary's role in order to retain parliamentary sovereignty?

Sophie Boyron: Before I answer this question, I would like to know what kind of limits you are thinking of. For instance, repealing the Human Rights Act is the first thing that I think of but that might not be what you were thinking.

Fabian Hamilton: Sophie, in your written evidence you mention using a Bill of Rights as a possible codification model. What would you mean by a Bill of Rights? I am batting it back to you.

Sophie Boyron: What I mean by a Bill of Rights would depend very much on what kind of constitution you want to adopt. My answer is going to be "it depends".

Q120 Fabian Hamilton: In most systems with a written constitution it is the constitution that is the source of executive authority. In our system it is Parliament, so whoever controls Parliament with a majority of seats in Parliament effectively controls the constitution.

Sophie Boyron: I agree.

Fabian Hamilton: Do you think it is right that a written constitution would limit the power of the judiciary as well as limiting parliamentary sovereignty? That is what most constitutions do, don't they?

Sophie Boyron: I think a written constitution, especially if it is given a higher status, because I think that is quite important too, would limit Parliament.

Q121 Fabian Hamilton: Is that desirable? It happens in almost every country in the world, doesn't it?

Sophie Boyron: Yes. Well, in most democracies it works very well, but I can't say that there are not tensions now and then. There are tensions in any constitutional system. There are tensions in Britain without a written constitution.

Q122 Chair: With or without a written constitution there are tensions and it is a very healthy part of democracy that no one should seek to eliminate.

Sophie Boyron: I think it is democracy. That is democracy alive. If there weren't, I think that would be a dead democracy.

Q123 Fabian Hamilton: But surely in a system with a written constitution the court, or the constitutional court if it exists, takes on a far more important role, doesn't it?

Sophie Boyron: Often it doesn't take it on. It has been given that role through the constitution, and I would be happier if that was what was happening rather than the Supreme Court one day declaring that it would go into constitutional review. I think that would be more problematic. But

often it is given the role that it is going to be looking after or protecting a declaration of rights that is usually attached to or included in the constitutional document too.

Q124 Fabian Hamilton: Our discussions with the Supreme Court tell us that certainly at the moment they have absolutely no intention of becoming a constitutional court of any sort, nor do they want to do that and they would be very wary of doing that, but that is in a system where Parliament is sovereign.

Sophie Boyron: It might be also the reaction to what is happening with the Human Right Act. At the moment they are growing into maturity with that. I am reading this and I might be completely wrong, but I think they want time to mature in that position for the moment. I am quite sure that the Supreme Court is telling you exactly what they are feeling, “We don’t want any more for the moment. We are not quite sure we are ready to become the next constitutional court”. That makes sense to me.

Dr Gordon: If you were going to adopt a codified constitution, as I was saying before, rather than looking to make explicit provisions limiting the power of courts, I would prefer a more minimalistic statement that sought to reaffirm the existing powers of Parliament. Courts can find ways out of limits you place on their power. The *Anisminic* case shows that. Parliament tries to oust judicial review; the courts find a way round it. Even in the *Axa* case that I just mentioned, the legislative competence of the Scottish Parliament is clearly defined in rules; they have still found ways to supplement that by treating that legislation as non-exhaustive of conditions for review. I think if you were going to go down that route it would be better just to make reference to the power of Parliament and leave the rest of it to come from implication. If you do start trying to define what the power of the courts is in rules in a way that is absolutely designed to capture things as they are, it is not quite an invitation for them to go and see if they can find clever ways to reimagine those rules but it might be, depending on the culture and background of course.

Q125 Fabian Hamilton: I would love to know your views on this. Isn’t the whole purpose of having a written constitution to remove constitutional issues of rights and responsibilities of citizens from above the day-to-day political frame and the control by any party of the Parliament of the day?

Dr Gordon: I think commonly that is the case. That is what most written constitutions want to do but you could adopt a codified constitution for a range of reasons that are not necessarily oriented towards that. For example, our unwritten constitution is contained in a variety of sources. It is quite confusing, maybe less so now that we have increasing constitutional Acts of Parliament coming through, whatever that means. But one thing you might want to codify for would be to make the thing more accessible and clearer and give the citizens a starting point to try to understand the thing. That would be a perfectly good rationale for codification in my view but it would not necessarily require you to bring in the Bill of Rights, the constitutional power of review for the courts and so on.

Q126 Fabian Hamilton: Wouldn’t codifying our constitution, or having it in a written form in some way or another, finally end the idea of the royal prerogative and the fact that the Prime Minister is exercising the royal prerogative and the decision-making powers of the monarch, in other words end this idea that it is the monarch who is the supreme source of all authority in this country?

Dr Gordon: Absolutely, and I think that would be a very welcome thing for a codified constitution to do in fact, although Acts of Parliament are doing it aside from codification, aren’t they? We are

seeing the Constitutional Reform and Governance Act codifying areas of the prerogative and the Fixed-term Parliaments Act in relation to dissolution as well.

Sophie Boyron: Can I just say that the prerogative might disappear in name but I want to warn you that having some discretion for the executive is often necessary at some time. It will be limited and controlled by courts, but I am not completely sold on the idea that you will do away with those kinds of powers completely. I know a lot of constitutions that tried and still have them in practice for often necessary reasons. I am not completely convinced that you are going to get rid of it in reality. I am sorry.

Q127 Chair: I don't think there was any inference in what Fabian said that we or anybody would want to get rid of executive power any more than we want to get rid of judicial power.

Sophie Boyron: No, I meant discretionary, the type of prerogative powers that—

Chair: I say that because there may be a misunderstanding that somehow a written constitution gives you all the answers; it doesn't. I use this analogy of the boxing ring. It absolutely does not stop the boxers boxing but it tells you a set of rules, and the interplay of politics, executive discretion and judicial review will continue to take place, I would assume, particularly in the sort of models you have been talking about this morning. But that everyone would know the rules to begin with seems to be what you were saying, Michael, about having clarity so that the citizens, and even Members of Parliament, can actually understand what the constitution is. Some Members of Parliament even to this day believe we have parliamentary sovereignty rather than executive sovereignty, so people understanding the rules has to be a helpful thing, hasn't it?

Dr Gordon: Absolutely.

Sophie Boyron: Absolutely. Can I also add that you would have an advantage if you were codifying your constitution—making changes or not, I am not talking about that—because there is already an accepted political culture and I suspect that that constitution would work in this accepted political culture. Often when you have a constitution that is adopted after a break, a revolution and so on, the political culture needs to be built at the same time of changes, and that is not true here. I think you would start from a very strong base.

Chair: I think we would start with a very British, pragmatic, boring effort rather than one born out of revolution, but let's wait and see.

Michael and Sophie, it has been very interesting and very helpful to the Committee, I think posing more questions than providing answers in many ways, but we are at a very early stage in our consideration and that is exactly the way it should be. Thank you so much for coming this morning. We really appreciate it.

Witnesses: **Professor Roger Masterman**, Gateway Liaison Co-ordinator, Durham Law School, Durham University, **Dr Jo Murkens**, Department of Law, London School of Economics and Political Science, and **Richard Gordon QC**, gave evidence.

Q128 Chair: We are going to move on swiftly and we have Professor Roger Masterman, Dr Jo Murkens and Richard Gordon. Richard, nice to see you again.

Richard Gordon: Thank you, Graham.

Chair: Welcome back. Roger and Jo. Good to see you. Thank you for joining us this morning. You know what we are about. We are looking at the constitutional role of the judiciary, not least in the context of moving towards some sort of codification, possibly as a written constitution, but we are exploring those issues. Would any of you gentlemen like to say anything to start off? Are there any particular comments you want to get on the record immediately?

Richard Gordon: Could I make one comment, which is that apart from being delighted to be here—it is a privilege to be here, as always—having read the evidence that has been given to this Committee and listened a little bit this morning, I do think that it is important to move perhaps from abstract theory to mechanisms and reality. There is undoubtedly a tension at the moment. However one describes it, there is a tension between the senior judiciary and Parliament. It is not overt and it is not continuous but it can explode. I see some form of framework document, whether you call it a constitution, as part of an incremental process to lessen that tension. That is broadly what I wanted to get into my evidence.

Dr Murkens: I would make a comment that is related to that, which is that I think the weight of your question should be on the future role of the courts with or without a written constitution. I think the question of a written constitution is a little bit of a red herring because we don't necessarily know what that written constitution would look like. However, a little bit later, I want to chart the trajectory of the apex court—the House of Lords and now the UK Supreme Court, and to see where that is going with or without a written constitution.

Q129 Chair: That is more about what are the legitimate rights of the judiciary vis-à-vis the executive and vis-à-vis the legislature, whatever circumstances.

Dr Murkens: Yes. Picking up on the tension that Richard Gordon just addressed.

Q130 Chair: Fundamentally, is it fair, appropriate and just that the judiciary has a power to review or intervene in decisions of the legislature or the executive?

Dr Murkens: What we tend to have in mind is US-style striking down of legislation as unconstitutional, but what Professor Masterman and I worked out is that there are more subtle ways in which the courts can intervene that are perfectly compatible with our understanding of parliamentary democracy.

Professor Masterman: I would echo that and say that, with or without a written constitution, I think one of the valuable exercises that can be gone through here is simply to map what we now regard as legitimate judicial interaction with the powers of both the executive and the legislature.

Chair: I think the Committee is thinking along those lines in the sense that there are many options as we go forward, including just mapping what we have now so that people can understand it. That might be an advantage come what may as well as an option of what things might look like if there were changes in those relationships, which is a bit more radical I suspect. Those things are very much in our minds so it is very helpful that you are thinking along those lines too.

Q131 Robert Neill: Thank you very much, gentlemen. Nice to see you all. I had better start with a confession. I learned my English legal system from Bill Cornish and my public law from John Griffith at LSE in the very early 1970s and they would have said to me that the landscape had changed a lot as far as the judiciary was concerned over the first seven decades of the 20th century. I suspect from your written evidence, and from Richard's point about the tension that now exists between the senior judiciary and Parliament, that a lot more has changed even since those times. Politics and

judiciary would be old hat I think now. Could you pull those thoughts together to give us a bit of an overview as to what you see are the key changes that have happened in the role of the judiciary? Where we have moved away from that handmaiden to the will of Parliament scenario to the tension scenario—that you rightly refer to, Richard—what are the key milestones for that and what drives that tension? In practical terms, what is the resolution?

Richard Gordon: Let me try to give you my very brief thoughts on it. I think there are three chronological milestones. The first is the entry into the European Community, as it then was, in 1972. Very little happened between 1972 and 1989. What did happen in 1989, which coincided with the parallel development of judicial review, was the Factortame case where for the very first time judges were able to disapply Acts of Parliament. That was a direct frontal assault on Parliament by the courts but engendered or triggered not by the judges—indeed the judiciary would have been very reluctant to act in that way—but by the Court of Justice. I don't think it is totally accidental that it happened four years after the explosion of judicial review in this country. That arose because of an inquiry by the Law Commission in 1985 that reported recommending a streamlined system of public law in this country. Nothing happened for a few years and then we had *O'Reilly v Mackman*, *Cox v Thanet*, those sorts of cases. The third development, which was much easier to bring in, the first two having occurred, was the enactment of the Human Rights Act.

What has been created in those three developments, incrementally as always, is a culture in which the judges are making political decisions. There is no doubt about that, the judges are making political decisions, and Lord Sumption made that very point in his recent article. However, the point he did not make and the point I think is of critical importance is that this is a development that has not been triggered by the judiciary. It has been triggered by Parliament, and I think it has been triggered by Parliament without knowing what was happening. How could Parliament have realised that the ECJ would develop its jurisprudence? How could Parliament have seen the culture in which judges were suddenly, in substance if not in theory, overturning Acts of Parliament or provisions of Acts of Parliament? That is the reason for the tensions and I know that judges get upset when they are told, "You are subverting Parliament" because they will say, "No, Parliament created the situation". What I really want to say is that this is a dynamic that is inescapable unless there is dialogue between Parliament and the judges, not a formalistic dialogue but an informal dialogue. Unless that happens, this problem is going to get much worse.

Q132 Robert Neill: Do you think the creation of the Supreme Court and the removal from the Upper House has ironically, and probably unintentionally, made that dialogue harder?

Richard Gordon: I am afraid it has. In one sense the Blair Government brought in a range of heady constitutional reforms. We must not forget that the creation of the Supreme Court was not anything other than a really political decision and the dynamics of that decision are themselves interesting. But what it has actually created is a loss of influence by judges in parliamentary affairs in the name of separation of powers. There is a real loss there because judges used to understand at the most senior level how Parliament worked. Now that influence is fast diminishing and that is why I think the need for dialogue is even more important than it has ever been.

Professor Masterman: I would add only one thing to the list of milestones that Richard Gordon has already outlined and that would be the devolution legislation of 1998. Even though we know that decisions involving disputes around the competence of the devolved Administrations vis-à-vis the Westminster Parliament are relatively few and far between, this is still adding an intra-jurisdictional territorial dynamic to the powers of the courts that was previously unknown in this jurisdiction.

Dr Murkens: I can only echo that. My answer could be used to create a broader perspective, which is that in a living constitution—and assuming that we all understand the constitution to be a living thing whether it is written or not—the role of the court will inevitably and naturally change as part of that process. This is true also in the United States. In the infamous Dred Scott decision of the late 19th century the US Supreme Court treated an escaped slave as property that had to be returned to his rightful owner. In the infamous Lochner decision in 1905 the US Supreme Court developed a substantive notion of due process in order to strike down progressive legislation as unconstitutional. That is the same court that after World War II desegregated schools in Brown and legalised abortion in Roe v Wade. The US Supreme Court has changed along with the American constitution, the German Constitutional Court has changed since its inception in 1952, and of course the UK courts at all levels have changed.

The end of World War II is probably a good starting point and the famous Wednesbury case that gave us our modern version of judicial review of Government action in this country is not the same basis for judicial review any more. It is formally the basis but it has been added to and expanded over time. Just to complete this thought, there is an irony potentially that this is a parliamentary committee trying to map out the current and future powers of the senior judiciary and I would like to know what the senior judiciary think of this exercise, going back to a separation of powers and judicial independence type principle.

Q133 Chair: You would like to know what they think? We have been to visit the Supreme Court, so I just put that in as a matter of fact and we will continue to do that, but as people have rightly commented I do not think it is anything to do with the fact that they do not meet in the House of Lords. They are all still Lords. There are many other Lords who have a judicial background, so I think Richard has entered a note of controversy there. But it is absolutely clear that people in the judiciary do not want to be seen to be visibly and publicly interacting either with the executive or with Parliament. At one level I think that is a shame but I think the way we get around that is by having informal discussions and doing the sort of meetings that we did with the President of the Supreme Court, which we must continue to do as a committee if our work is to have the evidence base that is so important. I hope that answers your question, Jo. Bob, I interrupted you.

Q134 Robert Neill: The change of attitude is interesting. You said the American Supreme Court had changed, but is that strictly right or is it actually that the composition of the court had changed, essentially? A much more socially conservative group of judges had been replaced by a far more broad-minded and socially liberal group of judges, ironically as the result of political action because of appointments by the President, confirmed by Congress. You might say that is an example of a politicised court changing in its way. Its constitutional powers and its jurisprudence have reflected its political philosophy.

Dr Murkens: I don't disagree with you. I think a key difference between the US Supreme Court and the UK Supreme Court is that the US Supreme Court is a political court in a way that the UK Supreme Court is not and does not want to be.

Q135 Robert Neill: I would not think Karlsruhe would regard itself as political either, or maybe a bit more. Is it somewhere in the middle?

Dr Murkens: Yes, it does deal with complex questions of political morality that the Parliament does not want to resolve so they just get sent to Karlsruhe. I don't think that is the case currently, although I was thinking about this question before coming here. By political I mean I don't think we will see a case like Roe v Wade or Bush v Gore in the UK Supreme Court. A challenge for the

UK court may be assisted suicide and after last year's decision in the Tony Nicklinson case I think this is a question that may come back to court. From a legal perspective or constitutional perspective, I think the courts rightly said that this was a question for Parliament to decide but that is the cut-off point where the judges say, "This is not a legal question for us to decide. It is a political question for Parliament to decide". I think this question and similar questions may come back to the UK Supreme Court, raising questions about its nature.

Q136 Robert Neill: Roger and Jo, in your written evidence you state that the UK Supreme Court can be seen to discharge some of the functions of a constitutional court. You are quoting Lord Phillips in his lecture broadly around that, aren't you? You classify them into two kinds. One is those that Richard referred to where there has been a specific delegation by Parliament, more or less intended, which has given the court a role that is then asserted and filled. Then you talk in your paper about a second type, which is the common law constitution idea and you make reference to Simms, Anisminic and so on. The point is clearly made in the first case, I think—Richard has already articulated it—but can you expand a bit more on the second? Might that second in particular, where this is not Parliament having delegated but the judges asserting and Simms and Lord Hoffmann speak, for example, be seen as an example of where you are saying the courts will wriggle out of attempts to control their power? Could you expand on that a bit?

Richard Gordon: Could I give a few thoughts on that? I haven't written about it but Jo and Roger have. There is nothing sacrosanct about the common law. Historically it was one of many systems of law. It grew up to its position of power through a degree of political assertion on the part of the judges. It trumped equity in the end. So the common law has come to have a kind of mystical significance in the language of the judiciary that it has not always had. I think that the way our constitution operates, and I think will always operate whether you have a written constitution, codified constitution or anything, is by recognition—Hart would call it rules of recognition—among the three organs of state. In other words, Parliament, the executive and the judiciary rub along in an informal way knowing the proper bounds. They know how far they can go to—or do they?—but broadly they want to know how far they can go. This echoes something I think Graham said a bit earlier. You need to know what the rules of the game are, and Parliament itself, committees of Parliament, are in danger of sometimes breaking the rules. I don't accuse this Committee of that but there are one or two committees that are acting in a way that is causing concern within Parliament. I have written about select committees. If there was a framework of rules I think that would happen, which is why I think a framework document—I wouldn't necessarily call it a constitution—would be a good idea so that we knew the basic rules.

You are quite right to say, I think, that Parliament has not delegated some of the common law documents that are coming out. However, you should remember that in a case like Simms—and Pierson is another one—the principle of legality is not some freestanding common law doctrine. It is a principle of statutory interpretation but the judges have created it. So there is that tension there and that is why again I think one needs to be very careful. If you regard the constitution as power players jostling for amity or comity, the power word of the judges is the common law. We saw that recently in John Laws' lecture, the Hamlyn Lecture. The power word of Parliament is parliamentary sovereignty, although actually it is executive sovereignty. By all means keep the language, but one does need to keep one's feet on the ground and not regard parliamentary sovereignty as the only card in the deck. It may be the trump card but it is sometimes quite dangerous to start producing trump cards. One has to get along with all players in the state.

Q137 Robert Neill: One might say that one of the problems in that relationship is precisely that parliamentary sovereignty in practice means executive sovereignty and it might be easier to have a tripartite arrangement where there was a real distinction in the framework.

Richard Gordon: That is what I believe we should have. I think there is a great danger when the executive starts pulling out trump cards. With great respect to the Secretary of State for Justice, he is pulling out a trump card at the moment, precisely in the area of judicial review, with reforms that the senior judiciary and lawyers are very troubled by. He can say this is parliamentary sovereignty, but it is going further than any Government has ever done before and that is when things begin to become destabilised.

Q138 Robert Neill: That is the context in which you envisage the framework document that you talk about?

Richard Gordon: Exactly.

Robert Neill: Jo and Roger?

Dr Murkens: I think your question goes to the heart of the question that Roger and I are interested in. It is not an academic question because it has been raised in the House of Lords and in the Supreme Court in cases like Jackson and Axa Insurance and just a few months ago in the Chester case where the senior judiciary asked themselves, “What shall we do with legislation that is enacted by Parliament that is, to quote Lord Steyn, oppressive and wholly democratic?” We are talking about legislation that would abolish judicial review or disenfranchise a group within society. There seem to be three responses, two of which are unsatisfactory.

The first response is to say that any Bill that Parliament enacts is presumptively democratic and presumptively legal and legitimate and therefore, going back to your handmaiden point, the courts’ hands are tied and they have to apply the statute. The alternative, which is similarly unsatisfactory, goes back to this common law romanticism that Richard Gordon spoke about, which is to say that the judges essentially take the law into their own hands and disapply the statute or strike it down and impose their own values on those of Parliament. That is also unsatisfactory and, as I said earlier, not compatible with our constitutional model.

The middle ground that Roger and I worked out is to fine tune the response. I don’t know if I should hand over to you at this point. We fleshed that out, but one of the solutions that we suggest is that in the same way that equity mitigates the rigours of the common law, the courts’ own democratic conception of the rule of law can smooth the edges of some of the repercussions of parliamentary legislation. They can’t strike it down but they can make it work to further equality and liberty and promote individual rights, which is after all the constitutional role of the court.

Professor Masterman: I was just going to head back briefly to your point about Simms that initially you asked us to elaborate a little on. It shows both the brilliance and the powerlessness of the courts in many respects because it shows that the common law is able to incrementally develop to the extent that it can purport to place limitations on Parliament’s ability to legislate freely, albeit limitations expressed through the interpretative power of the courts, but also at the same time maintains the parliamentary sovereignty that the clear language of the statute that does not admit of any ambiguity is still sacrosanct. It shows this tension at its best, perhaps, because it shows that the courts are conscious of their overriding role to vindicate the rule of law but know also that this needs to be balanced against the democratic imperative in parliamentary legislation.

Q139 Robert Neill: Given that you say it already covers some of the functions of the Supreme Court, if you went down a codification route—I take Richard’s point that you might not need to do that if you have a framework document—where are the further areas beyond that specific one where there is parliamentary delegation and so on? What are the other areas where you think the Supreme Court’s activity would expect to expand under a codified constitution, or is that very speculative?

Professor Masterman: That depends very much on the terms of the constitution itself. You could say, for instance, that economic and social rights should be included and that would further expand the courts’ role.

Richard Gordon: I think it is possible to star gaze a little bit in the sense that you can’t find the answer to your question from first principles. Where I think the judiciary will react badly is if they perceive their power to be slipping. If they perceive their power, whether it be a constitution or simple executive acts of Parliament, to be diminishing vis-à-vis the executive and Parliament I think you will get the kind of legislative techniques we have seen and referred to earlier, Anisminic, reading down statutes in evocation of the common law. In that context, the rule of law is such an abstract concept that Parliament has not even currently attempted to define it, but there are two versions of the rule of law. One is the thin version and the other is the thick version. I am assuming members of this Committee will have been filled in on that.

Chair: We will come to that in a little while, Richard.

Richard Gordon: But just to say that the thin version is often the language of the executive and the thick version is often the language of the judges. The question is, how do you penetrate that kind of discord?

Robert Neill: Gentlemen, thank you very much. That is all I am going to ask at the moment. That is very helpful.

Chair: I think Andrew is chafing to ask about the thin and the thick, and so am I.

Q140 Mr Turner: I was going to ask what is the difference and, more to the point, where do the two branches come together?

Richard Gordon: I think the answer to that question is this: the rule of law is a much more complex concept than it is often understood to be. The judiciary for the most part have a very broad conception of the rule of law and different judges have different conceptions, but the thick version is effectively, as Sir Sydney Kentridge has termed it, the rule of justice. The jurist Ronald Dworkin would have said judges themselves are responsible for developing substantive principles of justice. The thin version is the version that simply says that provided a law is enacted and there is conformity with the law then the rule of law is satisfied. The problem with the thin version of the rule of law is that it undoubtedly allows for the executive to exempt itself from it, because if you pass a law that exempts the executive and comply with that law you are of course complying with the rule of law in that sense. There is, however, a third version of the rule of law that is neither thick nor thin but which one might call populist or *Daily Mail* and often invoked by Government for no doubt popular support.

My feeling is that there needs to be dialogue about what really should be fashioned in terms of a societal consensus or, if you like, consensus between the organs of state, as to what we really do mean when we talk about the rule of law. This can’t be done in any formal way but if it was done in an informal way so that parliamentarians got an idea of where the judges were really coming from—it is difficult because we have had four lectures recently from judges and two of them have

said completely different things. John Laws, for example, believes so strongly in the common law that, although he ends up by saying we don't have to follow Strasbourg, he is really saying that the judges hold the whip hand, whereas Sumption is saying completely the opposite and saying you don't have to follow Strasbourg because it is going beyond the text of the convention, that actually a lot of the questions that judges are deciding are political questions and they should not have to decide these questions. If you have that consensus between the organs of state you are beginning to be able to have a framework document with a framework that we could operate by.

Q141 Mr Turner: I was not quite clear when you say this is the third version, the *Daily Mail* version. Are those two things the same?

Richard Gordon: The populist version of the rule of law to my mind is broadly, "Why are scroungers given benefits?", "Why is that a human right?", that kind of broad language. It is not a juristic concept at all. It is just that a lot of the public can't understand what our courts are doing. The judges would defend it by saying, "We are simply applying the rule of law, the rule of justice, we are applying the European Convention", whatever it might be, and Parliament, or rather the executive, I think would say, "You are going too far". I don't think the executive would go as far as the populist conception but I think the executive is much closer to the thin version of the rule of law than the thick version. There are no absolute positions in this regard. It is simply a spectrum.

Q142 Mr Turner: Let me try to put that into my own language. We have the thick version, the thin version and the *Daily Mail* version over there, not that the *Daily Mail* is halfway between?

Richard Gordon: I see the court of public reaction as the most extreme end at the moment.

Q143 Mr Turner: Is it unnecessary to try to solve these?

Richard Gordon: I think it is necessary. Let us consider, for example, the first section of the Constitutional Reform Act, or rather let us consider the Lord Chancellor's oath, which is to respect the rule of law. That is an oath, it is a promise. What does the rule of law mean? If you don't have a rule for what the rule of law means, some kind of broad yardstick for what it means, you are going to get the judges possibly being able to hold, in some shape, size or form, that the rule of law is not being upheld in certain contexts and that paves the way for tension. All I am suggesting is that we need more understanding of each other's position.

Chair: Could we bring Jo and Roger in on that one?

Dr Murkens: I would like to go back to this thin concept, also known as the formal concept of the rule of law, and it is an ideal. The rule of law is not a rule and it is not always about law but it is a constitutional principle. It is an aspiration, it is an ideal and it is an ideal for Government, the ideal that the Government has to act according to law. It cannot act in an arbitrary way. It is also an ideal for law, which means that when Parliament enacts law substantively it is without legal limits. Parliament can enact legislation on any topic it likes but, according to the rule of law, the laws that Parliament enact have to be clear, precise, especially in criminal law forward looking, not retrospective, those kind of formal standards that parliamentary legislation has to meet. The problem with that, as is also well known, is that any self-respecting dictator can satisfy the formal precepts of the rule of law. The apartheid system, for instance, made sure that its laws were accessible, clear and forward looking.

The problem that Roger and I have with the thin conception of the rule of law is that we don't see how it operates in a democracy or how it makes a material difference to a Western liberal

democracy that we imagine the United Kingdom to be. When I earlier referred to the courts' democratic conception of the rule of law, we are drawing on dicta by judges in the House of Lords and the Supreme Court but also in lectures where they have said we need to hold parliamentary legislation to a slightly higher account or slightly higher benchmark than just is it clear, is it precise, is it forward looking, but also is it compatible with a Western liberal democracy, whatever that means. That is a slightly different question than the formal questions that we have tended to ask in the past.

Professor Masterman: I agree with Jo, obviously. The point that Richard makes is an excellent one and well made, because the difficulty, of course, of trying to argue that the courts' role is to vindicate this thing called the rule of law is that the rule of law ends up just being an empty vessel into which individual judges' perceptions and views of what society should look like are poured. Another kind of core aim of any initiative like this should be to unpack what we mean by these statements. Nobody doubts that *Entick v Carrington* is good law, nobody doubts that the rule of law is a constitutional fundamental, but there is considerable doubt as to what the term actually means, what it requires in practice, even if you go beyond simply outlining the kind of procedural and maybe substantive characteristics of what something called the rule of law would require. What are the consequences if those requirements are not satisfied? Do you then go down the alleyway that says that judges should be able to strike down legislation that contravenes these standards, or are we talking about something slightly different? Maybe we will come to the remedial aspect of this in a few minutes.

Dr Murkens: Can I add one thing? I am struck by the tapestry behind you and it contains quite a few values such as freedom of speech and suffrage, vote, liberty, equality, that many people would say are values that the rule of law should be upholding.

Q144 Mr Turner: You have referred to this thing called the unthinkable. What you think is unthinkable and I think is unthinkable may be different. Assuming for a moment we are both important judges rather than occupying the positions we do, take an example—and it is probably one that would not be appropriate—that we won't allow people who are prisoners to vote. Many people think we must allow them to vote. You and I may have different views, we may have the same views, but the question is, who prevents this passing of legislation?

Dr Murkens: Who prevents it?

Mr Turner: Who decides what they are going to prevent?

Dr Murkens: Is that a question for me?

Richard Gordon: The answer is very simple, isn't it? The European Court has told us what the law is and we have signed up to the convention.

Mr Turner: Yes, but we can pull out.

Richard Gordon: Of course, absolutely.

Q145 Mr Turner: What I am trying to work out is who prevents it. I can say we are going to prevent it, we are going to withdraw, and you can say we are in the European Union, we don't want to withdraw, but somebody has to make the rules, or perhaps they have not.

Dr Murkens: I think Roger has an interesting example that he can bring in in a minute to do with the dialogue between the European Court of Human Rights and the UK Supreme Court. But I want to answer your question, not necessarily about prisoners' voting rights but about if Parliament did the unthinkable.

Let us just think this through for a minute. If the Government introduced into Parliament a Bill that infringed a fundamental right, whereas in the United States and in France these constitutional controls are extra-parliamentary—whether it be the Conseil Constitutionnel in France or the US Supreme Court in America—in Britain the controls are intra-parliamentary. I think Lord Lester explained this in his evidence here. Under section 19 the Minister has to declare that the Bill is incompatible with the Human Rights Act. There is the Joint Parliamentary Committee on Human Rights. There is the Lords Constitution Committee. They would all be looking at this Bill and saying, “We have a problem, what is the Government going to do about it?” This is also a defence of parliamentary sovereignty rather than executive dominance because the Government still has to work through Parliament in order to get legislation passed. Can the Government, if it really wants to, get the Bill through? Yes, we know that it can, but there is also an orderly parliamentary process

Richard Gordon: Can I just expand on that? What Jo is saying is in a different way exactly what I have tried to say, which is that Parliament can do anything it wants provided it can practically achieve it. So it can't remove Canadian independence but it could certainly withdraw from the European Convention, and that is what may happen if one party gets in next time. It would be a manifesto commitment. But I am afraid the problem is that it will be perceived by a large section of the organs of state as going too far, I think, in the sense that there is very strong support for the progress we have made since enacting the Human Rights Act.

To give you a graphic example, when I went to Singapore a year ago I looked at their constitution and I also looked at the cases that have been brought before their courts and talked to the Attorney General's chambers. Oddly enough when I got back from Singapore I was briefed by the leader of the Opposition and I said to him that he had a strong case that he was bound to lose. He said, “How can that be?” and I said, “Because there has never been a successful constitutional challenge in Singapore. Statistically you have no hope whatever”. That is a different legal culture, but the point is that all the rules in Singaporean administrative law, you could go back in this country 30, 40 years and they were our rules: ultra vires, the dominant principle, and so on.

I think shifting from the convention would send a huge political signal to the Council of Europe members; it would endanger our relationship with the EU and it would cause a constitutional destabilisation. But the answer to your question is that Parliament holds the trump card. There is no doubt about that. My point is that holding the trump card in a constitution such as we have is not enough. It is the sensible application of a consensual set of rules that will produce stable government.

Professor Masterman: All I can add to that is that it is perhaps one of the unfortunate consequences of parliamentary sovereignty that the idea of unlimited legal power, and maybe unquestionable legal power, has been allowed to survive for this long. The difficulty of course is that it does not give rise to anything approaching a meaningful dialogue. It simply results in one party to the dispute saying, “I have an unquestionable legal right to do this”, which is no kind of working towards a consensus on anything.

Q146 Mark Durkan: I suppose it partly takes us back to the question of looking at issues at a pre-enactment stage. There is the option obviously in pre-enactment review of that being done on the basis of referral, perhaps by Parliament as a result of pre-legislative scrutiny. If there is that referral the issue then is does whoever is giving it judicial consideration simply determine whether something is compatible with whatever constitutional principles or provisions are in question, or do we leave it that

there is no such review or reference in advance but in the event of a codified constitution the judiciary can subsequently strike down legislation?

Richard Gordon: I originally was a great advocate of referral. I am now much less of an advocate. I am acting at the moment for the National Assembly for Wales and the Counsel General is referring a Bill at the moment.

I think it is quite dangerous because it leads the judiciary in the abstract to pronounce on the legality of a Bill that has not yet come into law and it could affect the position later. They might declare a Bill to be lawful and you might get a challenge later. Later events come into play and it is quite difficult then for the judges to pronounce it unlawful. I think there are problems with references. I also happen to think there are problems with simply striking down legislation and I do not think it is solved remedially by prospective declarations, which have caused all sorts of problems in Hong Kong, for example.

My current thinking, having started off as a huge advocate of a classic codified constitution, is to say it should all be done incrementally. I would love to see a codified constitution. It will happen at some stage, maybe 100 years down the line, but you have to do these things incrementally. I do not think you can do more at the moment—but I think you should go this far—than to draft a framework that sets out the essential concepts and rules that the judiciary have a hand in formulating. That is how I think the thing should happen but that is only a personal view.

Q147 Mark Durkan: Do we not find ourselves between pre-enactment review and post-enactment strike-down, that when you think of either you prefer the other? Is there a way in which we can have a sensible option of both?

Richard Gordon: You have it at the moment. You have the very ingenious solution of the declaration of incompatibility. It does not affect an Act of Parliament. It goes on, it is valid, but it sends a warning shot and in all cases but one—

Mark Durkan: Even with a codified constitution we can keep that element?

Richard Gordon: You can keep that and in only one case, I think, has the Government not made a remedial order and that was because it was academic. I cannot remember the case now, but in every case the Government has ultimately acted.

Professor Masterman: I think the declaration of incompatibility—or unconstitutionality as you might call it in the event of a written constitution—is an excellent proposal and something that deserves further thought. It is the remedy that effectively straddles the ideas of the rule of law and the ideas relating to parliamentary sovereignty because it respects the democratic will of the legislature by not affecting the validity of the legislation—or at least not explicitly doing so—yet allows the courts to vindicate the rule of law by saying that there is an issue here of compatibility with the constitution or the convention rights or whatever objective standard you are hoping to balance legislation against. So it is the mechanism that arguably in theory allows for this dialogue, allows for a collaboration between the branches of government, that does not necessarily result in one always having a trump card to play.

Dr Murkens: This dialogue is not just a matter of institutional comity; it is a matter of necessity because of the breadth of law. If we think about this, when Parliament legislates, it legislates for the nation. Parliament is the forum of the nation. It cannot ever anticipate all the individual repercussions that will emerge somewhere down the line. That is for the courts to solve. The courts are there to protect individual justice. That bias is ingrained in the judicial system. When the courts say that we have an issue here with individual justice that has emerged further down the line and

that therefore shines a negative light on the integrity of the statute as a whole, the judges have to have some mechanism in which to say a constitutional issue has arisen. Right now—but only since 2000—that mechanism is built into the Human Rights Act. But as we say, and others have pointed out as well, we could create a common-law declaration of unconstitutionality that would preserve parliamentary sovereignty but would also allow the judges to say an issue has emerged after the fact, and this is how we highlight it.

Q148 Mark Durkan: As legislators it might sometimes occur to us that issues arise that could end up being the subject of challenge and therefore vexed judicial consideration. I give you the example of 2008 counter-terrorism legislation, the big question of 42-day detention. The safeguards that the then Government were building into that Bill around 42-day detention was that the power would only be activated on request to the Home Secretary by a chief constable, and so on, and be subject to parliamentary approval. But that parliamentary approval in itself was going to put Parliament in a position of almost being a grand jury in relation to specific cases that would obviously be the subject of media coverage and stories being told to MPs about what was involved, what the terrorist threat was. If Parliament had acted as a grand jury, that was subsequently going to have implications in relation to any fair trial.

Some of us tried making those arguments in the Commons because at that stage there was still an ability for judicial insight to percolate into thinking via the Lords and obviously through their own challenge via the executive. Some of those issues did seem to weigh; similarly with another section of that legislation dealing with inquests where the Secretary of State was going to have the right to sack coroners during an inquest, appoint anybody, not even a qualified lawyer, to then take over the inquest and do all or part of that inquest in private or whatever. Again some of us tried to raise these issues in the Commons but the focus was on the 42-day detention. There was a sense then—of course this was prior to the Supreme Court and the separation that we had in 2009—that at least some judicial insight did feed back into the executive to bring forward amendments.

We do not have that sort of situation at the minute where if that sort of situation arose again where those concerns, which I would have regarded as being fundamentally constitutional concerns about the rights of individuals in relation to trial—

Chair: Are we getting towards a question here?

Mark Durkan: How do we do that in the future if we have a codified constitution? How do we create a position whereby if legislators have a genuine question that might best be resolved by judicial insight we can get to it? How do we recruit judicial insight and not just rely on judicial oversight?

Richard Gordon: The only mechanism I can think of is informal dialogue, because if you have formal dialogue you have the danger that the judges will think it is an assault on their independence and you have to be very careful how this dialogue is organised. I have not yet worked out what I think is good mechanism. But you must have judicial insight somewhere in the way in which legislation is framed and applied. Whether that insight comes pre-enactment, which I think is in many ways desirable, or in the courts afterwards, you simply cannot rely upon the written word—and legislation is now incredibly complex—to say we have resolved all problems. However ingenious the draftsman, there are always going to be problems and individual situations. There is always going to be a need for an exception. Somebody mentioned earlier today the need for executive discretion. There is also a need for a residual judicial flexibility. But if the judges apply judicial flexibility in one area, because of our doctrine of precedent they may apply it in an area that upsets the executive. These are problems. They are genuine issues and I do not think they can be resolved by an abstract solution. I think it has to be incremental and hopefully crystallising into

some kind of document that lays down a broad framework of rules. That is the only way I can see it. Others may have other ideas.

Dr Murkens: Speaking from memory there was also the Immigration and Asylum Bill 2008 in which Parliament tried to introduce an ouster clause to prevent appeal and courts from hearing cases. The judges made their views known loud and clear and the provision was dropped.

Q149 Mark Durkan: Do you think that is missing now?

Dr Murkens: No. It has never struck me before because I think the courts are an outside body. They are not part of Parliament. Government working through Parliament is responsible for the content of laws. This was an egregious case where Lord Woolf in particular but other senior judges as well made known their views, but I do not think they need to be included in every single Bill that goes through Parliament. I have not thought about this but it strikes me that this is again a separation-of-powers argument.

Professor Masterman: One of the striking things about the example that you mention, Jo, was that as well as the interim parliamentary input from judges at that time, it was the extra-parliamentary contributions of the judges that were almost as forthright, if not more so, especially the speech that was given by Lord Woolf.

Richard Gordon: I think it is worth noting in the context of that particular example that this was an attempt, seen by the judiciary, to abolish certain parts of judicial review. That is why they were up in arms about it. Their insight was adventitious, it was lucky, but it is not the only area you need it in.

Q150 Mark Durkan: As we heard earlier from Bob, part of more pre-legislative scrutiny could be to prompt or request some sense of judicial insight without it being a full pre-enactment referral.

Richard Gordon: Provided the judges are on board and do not see it as a diminution of their independence. That is why I say it has to be handled very sensitively.

Dr Murkens: Parliamentary committees could invite judges to act as expert witnesses, could they not?

Chair: We could invite anyone. Whether they will accept the invitation is another matter. I would think to send—who is it that goes out there with his sword and wearing his garters and whatever to pull somebody—I do not think the judiciary would like that and I think even Richard has not formulated a way to do that. But it is a very serious problem at lots of levels where one does not get an informal view—even in the local context may I say, and I have experienced that—when it would be incredibly helpful. But that principle of independence has moved into one of separation, which I think is potentially quite unhealthy and we need to think through how we could do this effectively.

Q151 Mark Durkan: The Constitution Society's report, *Judicial Review and the Rule of Law*, says that it would be unwise for Government and Parliament to assume simply because the judiciary have so far not purported to review primary legislation for its compliance with constitutional principles that this is a fixed constitutional arrangement. Can you envisage circumstances where the judiciary would review primary legislation for its compliance with constitutional principles?

Richard Gordon: I think that is very much the end of the extreme spectrum, but this is not a new concern. This was voiced by Lord Woolf many years ago in an extracurricular lecture where he said that if Parliament did the unthinkable—and someone today has said, “Well, it all depends what you mean by unthinkable”. What is unthinkable to a judge may not be unthinkable to a lot of other people.

Q152 Mark Durkan: In that review, again going back to the issue of is it the balance between pre-enactment proofing as opposed to the power of striking down on a post-enactment challenge, does that apply either way?

Richard Gordon: I think so.

Q153 Mark Durkan: We have talked about these issues as a way of maybe putting some conditions on Parliament and how it legislates, having regard to any constitutional principles that are codified. For many of us those constraints on Parliament are essentially intended as constraints on the executive, which would be in the main driving and sponsoring such legislation. But could a codified constitution be used to clarify and qualify the judiciary’s part as well?

Richard Gordon: Yes. A codified constitution or framework document can have in it whatever Parliament wants to put in it, but my only caveat is whatever you put in it must be the product of a dynamic interaction—if that is not too pompous a way of putting it—between the three organs of state. That is how I see it. But theoretically you can put anything in the constitution.

Dr Murkens: I am trying to think how you would phrase it. I think anything other than “the role of the judiciary is to uphold the rule of law” is going to be problematic because you do not want to tell the judiciary what to do. As we have already discussed, there has to be scope for flexibility and evolution and it must respect the principle of judicial independence.

Q154 Chair: Thank you. I am going to ask Bob, who is our newest member, to have the last word. But just before he does, a question that I have asked a number of witnesses—while I have you, Jo, in particular, because I understand you have some expertise that could help me—is that I understand the German courts are not bound by courts of other jurisdictions. Am I accurate there?

Dr Murkens: Do you mean foreign jurisdictions?

Chair: Yes and thinking particularly about European judgments, that they reserve unto themselves ultimately the decision to be made by German courts, obviously taking cognisance of other jurisdictions but not being overruled or bound by them.

Dr Murkens: I think what you are referring to is a case a few years ago by the German Constitutional Court. It was in the context of the ECHR. In that case the court for the first time hinted at a reserve power for itself. It used the phrase “sovereignty,” which is an unusual word in the German context because, as you may remember, Germany was not a sovereign nation until about 1990 and so the whole talk of sovereignty is relatively new. There is that reserve power but of course it has as a matter of fact treated ECHR case law as binding in the German courts. So it has been followed. This was the first occasion where they said, “We will not necessarily slavishly follow the ECHR”. There is that ultimate reserve power.

I should also say in the context of the European Union that the German Constitutional Court has never referred a case to the Court of Justice of the European Union, which again indicates loud and clear that the Federal Constitutional Court sees itself as having the final word, thank you very much.

Richard Gordon: I think it is worth mentioning that the EU case that I am thinking of is a case called *Solange* where the German Constitutional Court defied Europe in its own court and said, “We are going to have, and our constitution gives a right here—” and it is an object lesson perhaps for brave hearts in the Government that Europe backed down. That case was the beginning of the development of human rights in the EU. The EU had previously said, “Our law is supreme and we are not interested in any competing rights” and then slowly over the years it has developed a very strong human rights doctrine.

Professor Masterman: It is worth just pointing out as a final point on this that there is a UK parallel with the German case that Jo mentioned in the Supreme Court decisions in *R v Horncastle*, which demonstrates quite effectively that UK courts are not bound to implement decisions of the European Court of Human Rights no matter what the circumstances. For a constitutional dialogue to really effectively work we need to be thinking outside of the jurisdiction as well as within it.

Chair: In so many ways you are all describing what happens in the British courts anyway but the Germans seem to have done it a little more starkly and defined it a little more clearly. We still seem to be in a large degree of confusion, and someone has raised the prisoners’ rights question. It seems to go on and on and there seems to be lots of different interpretations whereas perhaps the Germans have been a bit clearer than we have, I don’t know.

Dr Murkens: The premise is a little different. The Germans have always been concerned with upholding the sovereignty of their constitution, and this does indeed go back to the 1970s because the German constitution includes a catalogue of basic rights. The Constitutional Court looked at the European Community of the 1970s and found human rights protection to be lacking and therefore said, “If we are going to give effect to community law it will have to be compatible with our constitution” and hence the human rights dimension.

The British courts, or the United Kingdom, in comparison is more concerned with parliamentary sovereignty and who has the final word in that. That is a content-neutral debate. It is more about the locus of power rather than the content of legislation. So the situation is a little different in both countries.

Chair: That is very helpful, Jo.

Q155 Robert Neill: I think in a sense what you have all said brings us to the point that there has been a growing assertiveness—and I do not mean that necessarily in an aggressive way, more an awareness perhaps of the opportunities and a willingness to seize them in the UK as much as anywhere else—by the Supreme Court in the context of the points you made about it acting in some respects like a constitutional court, ranging from the very specific like the devolution jurisdiction through ECHR and so on. I suspect the answer is pretty obvious, but if you were to create be it a constitution, be it a framework document, that said there shall be a form of constitutional court, however you dress it up, do you think by now there is enough expertise and awareness of the issues entrenched in the current Supreme Court to make that fairly easy to move over into that form?

Richard Gordon: I think it would be very easy to do it but I think it would send out all sorts of signals. When I wrote my book on the Crown Office—this is when the judicial review was just beginning—I had to have each chapter vetted because it was not allowed to contain any reference to an administrative court, it being thought that if you did that you would be assaulting Dicey, who said that all our courts dealt with the same law. It was only quite recently that we called it the Administrative Court. There was a lot of sensitivity about that. So I think if you called it a constitutional court, that might send signals now. We do not need to do it but it would be very easy to do, given the current experience of constitution and so on.

Professor Masterman: I agree. Asking a constitutional court comprised perhaps of some of the judges, maybe even the same judges, as we have in the Supreme Court at the moment would cause no great problems whatsoever, but maybe the difficulty would arise in the label.

Chair: So, let us stick with Supreme.

Dr Murkens: Can I just add one maybe related thought? My worry about constitutional reform is summed up with this notion of tinkering with the constitution. I think introducing constitutional reform piecemeal, like creating a supreme court or creating a constitutional court, or introducing an alternative vote system in the electoral process, without thinking about the implications or taking the bigger picture into account, is potentially dangerous because it creates unintended consequences and knock-on effects that are not immediately clear. So again I would think about the constitutional picture as a whole rather than individual aspects of it. It is beyond your remit I think.

Chair: But it is not beyond our intellectual capabilities. Some of us may appear to be piecemeal but still have a master plan in mind. Others of us botch along depending on what the political winds are and what expedience can deliver for us. I am not sure in which camp I or my Committee sit but I can guarantee you that we will do the best we can. Since we are much better informed after this morning, I think we will do a reasonable job at the end of the day. Roger, Jo, Richard, thank you so much. That was an absolutely fascinating session. I learned an incredible amount and I am sure you will see your influence at play in our ultimate work. Thank you so much for coming this morning.