DEFINING THE BOUNDARY BETWEEN EUROPEAN AND NATIONAL LAW

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EXECUTIVE SUMMARY

Increasing emphasis has recently been placed by Leave campaigners on the argument that Britain must leave the EU in order to get back control of its own affairs, and to avoid the uncertain future risks of EU interference. This argument gains a traction from the fear, which we consider unjustified, that there is no real boundary to the potential impact of EU laws and action. Therefore, there would be value in measures, if such were possible, which would define more clearly the boundary of EU law. In fact, two proposals which addressed that very boundary were announced by the Prime Minister in the Chatham House speech in November 2015, in which he set out his renegotiation programme. But no detail has subsequently been heard about such proposals, and they have largely been forgotten. If the subsequent silence is attributable to legal advice that the ideas are impossible, we disagree with such advice.

We consider the two main headline ideas to be not only desirable but also legally feasible. The aim of this paper is to show how and why.

A role for UK courts to challenge if the EU exceeds its competence

One of the proposals was to examine introducing in Britain something equivalent to the assertion by the German Constitutional Court of a jurisdiction to review the legality of EU acts. What has been little appreciated is that this does not represent something unique to Germany's constitution. A similar jurisdiction is claimed, expressly or impliedly, by the senior courts in many other countries of mainland Europe, including Denmark, Poland, Italy, France and Spain. One Constitutional Court, that of the Czech Republic, has actually declared a decision of the EU's Court of Justice to be ultra vires.

A crucial issue is whether the EU's Court of Justice has a full *Kompetenz-Kompetenz*, that is a

jurisdiction to make a decision as to the extent of its own powers which would be binding on member states even if their courts considered it outside powers conferred by the EU treaties.

The UK's treaty obligations as a member of the EU have been implemented in the UK by an Act of Parliament of 1972. Despite the apparently unqualified force given by the Act to any decision of the Luxembourg Court, there is a growing trend of thinking amongst senior British judges that the Act may be capable of a less absolute interpretation: that was shown by the judgments of Laws LJ in *GI*, of Lord Mance and others in the UK Supreme Court in *HS2* and *Pham*, and in May 2016 of Elias LJ in *Shindler*. Parliament can, and should, legislate to confirm that EU acts are given force in the UK by the 1972 Act only so long as they are within EU competence in the opinion of the UK court. This would do no more than place the UK in the mainstream of continental Europe's constitutional jurisprudence.

The EU Charter to create no new justiciable rights

The Prime Minister's other proposal was to enshrine in law that the EU Charter of Fundamental Rights creates no new rights. This, too, is both feasible and desirable. Such a UK enactment would say no more than Protocol 30 to the Lisbon Treaty, and the 6th recital to the European Council's "renegotiation" Decision of 19th February 2016; and so it would be perfectly compatible with EU law as correctly understood.

There has been little realisation that a number of recent English cases have in two important respects misunderstood the scope of the EU Charter and applied it more widely than the Luxembourg Court itself would have been likely to do.

Firstly, domestic courts have regarded the Charter as applicable to any situation connected with an area in which there is some EU law. By contrast, the general trend of Luxembourg Court cases has been to adopt the narrower criterion of the actual words of the Charter, namely that it applies only when EU law is being implemented.

Secondly, English courts have applied the Charter "horizontally", that is in private litigation between parties other than the British state. This is contrary to a basic principle of EU law that

it has only "vertical" application, that is between citizens and governments, and contrary also to current Luxembourg Court case-law on the Charter. In consequence, courts have wrongly "disapplied", that is to say declined to enforce, Acts of Parliament.

There has been no public discussion or consultation about the introduction of such a new layer of judicial empowerment in respect of "rights". It would quite consistent with EU obligations for Parliament to give firm direction to domestic courts by enacting a series of provisions:-

(i) that the Charter is to be applied only when interpreting or applying an EU instrument, discharging an EU obligation, or otherwise implementing EU law;

(ii) that courts should not give a remedy in reliance on the EU Charter in respect of UK laws (other than those enacted in order to implement an EU obligation) unless the same would have been given in the absence of the Charter – that is simply enacting what Protocol 30 says;

(iii) that a remedy should not be given in reliance on the Charter other than in litigation to which the Crown or a public authority is a party – in other words, no "horizontal" application;

(iv) that as a matter of procedure, a court contemplating "disapplying" UK legislation should first make a reference to the Luxembourg Court – to avoid a domestic court mistakenly striking down parliamentary enactments.

A Boundary of European and National Law Bill

To identify the theme of all these ideas the implementing statute might be called the Boundary of European and National Law Bill.

INTRODUCTION

In the Chatham House speech[1], in which the Prime Minister announced the four topics on which he would seek renegotiation with the EU, he also made two other proposals for implementation by domestic legislation. Both were on matters of constitutional law. There have been no subsequent official announcements about those ideas. Nor were they mentioned in the recent Queen's Speech, leading to complaints that a Sovereignty Bill had been abandoned. In the meantime, the salience of the role of the EU's Court of Justice has been emphasised in the referendum campaign as it has become a regular target of criticism from Leave proponents.

The suggestion has been heard that the subsequent silence on the Prime Minister's proposals is attributable to advice that they were impractical. If such legal advice has been offered, we disagree with it.

The passage in the Chatham House speech was:-

> "So – as was agreed at the time of the Lisbon Treaty – we will enshrine in our domestic law that the EU Charter of Fundamental rights does not create any new rights. We will make it explicit to our courts that they cannot use the EU Charter as the basis for any new legal challenge citing spurious new human rights grounds.
>
> We will also examine whether we can go one step further. We need to examine the way that Germany and other EU nations uphold their constitution and sovereignty. For example, the Constitutional Court in Germany retains the right to review whether essential constitutional freedoms are respected when powers are transferred to Europe. And it also reserves the right to review legal acts by European institutions and courts to check that they remain within the scope of the EU's powers, or whether they have overstepped the mark. We will consider how this could be done in the UK."

The theme of these proposals is a drawing of the boundary between EU law and national law. We believe it to be both feasible and desirable to define that boundary – desirable because a lack of clarity on this important topic plays into the hands of those who support leaving the EU.

The scope for defining the boundary may be appreciated after two little-known matters are realised. The first is that the German Constitutional Court is not the only national court to claim

[1] 10th November 2015 at https://www.gov.uk/government/speeches/prime-ministers-speech-on-europe

a role in policing EU institutions: a wider review reveals that, although less vigorously proclaimed in most other countries, the assertion of such an ultimate national prerogative is almost the European norm. The second is that, far from the EU's court being in the vanguard of expanding the role of the EU Charter of Fundamental Rights, it is, in fact, our domestic senior judges who have been doing so.

The two authors of this paper, who approach the topic from different positions on the political spectrum and with differing views on the EU Charter of Fundamental Rights, consider that a Boundary of European and National Law Act would be both feasible and desirable. We present this as a contribution to the referendum debate. We hope that it will help to dispel what we see as the mistaken view that UK membership of the European Union is incompatible with our essential national sovereignty.

NATIONAL REVIEW OF E.U. ACTS

The constitutional setting

The European Union owes its existence to international treaties. The United Kingdom is a member because it is a party to treaties. Today the principal documents are called the Treaty on European Union and the Treaty on the Functioning of the European Union. If the states which had agreed them were to revoke them, the European Union would cease to exist. In this respect there is a stark contrast with nation states. If, for instance, the Constitution of the French 5th Republic were to be revoked, there would still be a country called France; France would continue to be a member of the United Nations Organisation, and would continue to be accorded an Ambassador at the Court of St James. Nations do not owe their existence to a legal document; the European Union does.

The UK has given effect to the obligations which it assumed by the treaties in a manner consistent with our own constitutional principle of the sovereignty of Parliament, that is by an Act of Parliament, namely the European Communities Act 1972. That Act's principal provisions are discussed below.

This first and fundamental proposition of the international order, namely that nation states are its principal building blocks, is the starting point for a consideration of how the law of the European Union has force. That law has force, and hence EU institutions have power, only because nation states have so agreed.

From that first proposition there quickly follows a second. The boundaries of the force of European Union law, and of the jurisdiction of its institutions, are those which the member states have agreed.

In theory it would have been possible for the member states of the Union to have agreed to confer complete jurisdiction on the Union. An example of nation states forming such a union was that made between Scotland and England in 1707. The countries forming the European Union expressly chose the different model of limited conferral of competence. This is pronounced at the outset of the Treaty of European Union:-

> "Article 4
> 1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Members States.
> ....
> Article 5
> 1. The limits of Union competences are governed by the principle of conferral. ....
>
> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred on it by Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

Therefore, European Union acts have legal validity only within fields where the nation states by treaty have expressly conferred power upon it.

Those fundamental propositions are balanced by a countervailing principle: that is that within its zones of competence European Union law is supreme. It can be regarded as, first and foremost, a proposition of common sense. With the Union charged with roles as complex and extensive as achieving a single internal market for goods and services, there would chaos if its regulations could be taken to mean different things in different countries. A single internal market cannot be established without laws, and those laws must apply equally throughout.

It is, perhaps, a matter of regret that this necessary principle was not, and still is not, expressly stated in the treaties. Instead, it has been developed by the judges of what was originally the European Court of Justice, and is now the Court of Justice of the European Union: for the convenience of a consistent name we shall throughout refer to this institution by reference to its location as "the Luxembourg Court".

One of the very first cases concerned the introduction by the Netherlands of a new customs duty on a product called ureaformaldehyde. This was a direct breach of an article of the EEC Treaty which prohibited member states from imposing new tariffs. If this had been regarded as a mere breach of an international obligation, as normally the breach by a nation state of a treaty term would be, the issue might have taken years to sort out. By way of illustration, at any one time many countries adhering to the European Convention on Human Rights are in default of their international obligation to comply with some judgment of the Strasbourg Court. To avoid the undermining of the efficient operation of the single market, in the *Van Gend en Loos* case[2]the Court held that treaty articles, provided they were clear and unconditional, must be given direct effect in national courts. Making the system work efficiently became a theme of much of the work of the Luxembourg Court, and it is one which has been in the clear national interest of a country like the UK which is normally punctilious in compliance with EU instruments.

The Court's principle of the supremacy of European law received one of its most famous statements in the judgment in *Costa v ENEL*[3] in 1964:-

> "By creating a Community of unlimited duration, having ... real powers stemming from a limitation of sovereignty or transfer of powers from the state to the Community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."

In that quotation the words "albeit within limited fields" are important. This principle of the primacy of Union law, though subject to the proviso, implied if not always express, that a field of conferred competence is involved, has been reiterated many times in the Court. It has also

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[2] *N V Algemene Transport Van Gend en Loos v Nederlandse* Case 26/62 (1962): "... the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields ..."

[3] *Costa v ENEL* (6/64) [1964] ECR 585

been acknowledged by the heads of national governments as a "cornerstone principle"[4].

Can European law take on a life of its own?

The model described thus far is straightforward. The source of all power is the nation state; the Union institutions have power only in fields where the nation states have expressly by treaty conferred it; but in those fields Union law is to prevail over any incompatible national law. So long as this applies only within the fields where the member states have agreed to pool sovereignty, then the boundaries of its operation remain defined. But what if the Court whose rulings the members have agreed to accept were to start to issue rulings outside the agreed fields? If in that situation the member states were to be powerless, then, like the spaceship's computer in Kubrick's film, their creation would have taken on a life of its own. If that were so, the member states would have ceased to be the source of power in the same way that the once autonomous state of Virginia is now inextricably part of the United States of America.

Therefore, a fundamental question in determining the political nature of the European Union is: what is to happen if a Union institution asserts that something is with a conferred competence if a nation state thinks it is not? This is also a crucial question in the debate whether UK membership of the European Union involves a surrender of essential national sovereignty. It may be phrased in this way: have the member states committed themselves to accept any and every decision of the Luxembourg Court on the boundary of how much competence they have ceded to the Union? That issue is essentially the topic which the Prime Minister was raising in his reference to the German Constitutional Court.

There is a useful analogy with the question whether an arbitral tribunal can determine the extent of its own jurisdiction. Arbitrators, like the EU, derive jurisdiction only from the agreement of parties to an agreement. Contracting parties, like European member states, agree to accept arbitrators' decisions on a defined field -- in the case of arbitration the field is normally on disputes arising under or in connection with the contract. National legislatures in general have enacted laws requiring national courts to enforce arbitrators' decisions, just as all EU member states have in one way or another enacted observance of the decisions of the Luxembourg Court. But what happens if arbitrators decide that some matter is within their competence when the

[4] Opinion of the Council Legal Service of 22nd June 2007 attached to the Treaty of Lisbon.

national court is inclined to doubt that it is? Is that within arbitrators' jurisdiction? In Germany this is referred to as the issue of Kompetenz-Kompetenz. The House of Lords European Union Committee found it convenient to adopt "Kompetenz-Kompetenz" as a short-hand in the context of its exploration of profound questions about the jurisdiction of the Luxembourg Court in 2004[5]. The position today under English law and in most other legal systems is that arbitrators are afforded an initial Kompetenz-Kompetenz: otherwise an obstructive party might be able to bring an arbitration to an abrupt and premature halt by challenging the arbitrator's jurisdiction. But at the stage of a decision whether the arbitrator's ultimate award is to be enforceable by the national legal system, the award may be upset if the arbitrator has determined something outside his power. In England s.30 of the Arbitration Act 1996 provides that an arbitral tribunal may rule on its own substantive jurisdiction; but s.67 enables a party subsequently to challenge an award on the ground that the arbitral tribunal did not have substantive jurisdiction.

A review of the legal position in a number of major European countries will demonstrate that the theory of their domestic law treats the rulings of the Luxembourg Court in the same way as English law treats decisions of arbitrators – that is to say, in the extreme situation of the Luxembourg Court making a ruling outside the boundary of conferred European Union competences, the national court would not give it effect .

Germany

The Federal Constitutional Court ("FCC") in Germany has said that it regards its self as having competence to review the constitutionality of legal acts of EU organs in several different ways[6]:-

(1) **Rights review.** In 1974 the FCC said it would review whether EU acts accord with fundamental rights guaranteed by the German Basic Law[7]. Subsequently, however, the FCC appears to have said that it no longer needs to carry out this function in view of the recognition of fundamental rights in EU law.

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[5] House of Lords Select Committee on the European Union 6th Report (2004) at http://www.publications.parliament.uk/pa/ld200304/ldselect/ldeucom/47/4702.htm

[6] We are adopting with gratitude the analysis of Dr M Payandeh in his article at CMLR 48 (2011) 9

[7] *Solange I* (1974) BverfGE 37, 271; reported in English at [1974] 2 CMLR 540

(2) **Vires review**. In 1993 the FCC held that one of the reasons why the Maastricht Treaty was compatible with the German constitution was because, if the EU were to act beyond the powers conferred, the FCC would hold such acts to be non binding in Germany[8]. Similarly in 2009, when the FCC upheld the constitutionality of Germany adhering to the Lisbon Treaty, part of the reasoning was this possibility of the FCC: the FCC added that (whatever EU instruments might seem to say) the EU institutions did not have competence to decide on the limits of their own competence[9].

(3) **"Constitutional identity" review.** A further limb of possible review identified by the FCC in the *Lisbon* case was whether EU acts were compatible with the constitutional identity of the German Constitution: this seems to mean that a treaty establishing a full federal European state would not be compatible with the German constitution.

In 1993 when considering the constitutionality of Germany adopting the Maastricht Treaty the FCC said:-

> "The exercise of sovereign power through a system of states such as the European Union is based on authorisations from states which remain sovereign … If European institutions and bodies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Law on Accession, the resulting legislative instruments would not be legally binding within the sphere of German sovereignty. The German state bodies would be prevented, for constitutional reasons, from applying them in Germany. Accordingly the Federal Constitutional Court reviews legal instruments of European institutions and bodies to see whether they remain within the limits of the sovereign rights conferred on them or whether they transgress those limits."

The FCC has never actually exercised its power to declare EU acts invalid for Germany, and when refusing to do so in later cases has suggested that the power would be exercised only in

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[8] BverfGE 89, 155; reported in English as *Brunner v European Union Treaty* [1994] 1 CMLR 57

[9] BverfGE 123, 267; reported in English as *Re Ratification of the Treaty of Lisbon* [2010] 3CMLR 13

extreme circumstances[10]. But that does not necessarily mean that the claim to possess such theoretical competence has been pointless: the development by the EU of its own EU rights law culminating in the EU Charter has been attributed to a desire to head off FCC from subjecting the EU to a German "rights reviews".

In the context of the suggestion that the UK might seek to establish an arrangement similar to that claimed by the FCC, it is worth observing that the FCC does not see its function as peculiar to Germany:-

> "Member States courts with a constitutional function may not, within the limits of the competences conferred on them – as is the position of the Basic Law – be deprived of the responsibility for the boundaries of their constitutional empowerment for integration and for the safeguarding of the inviolable constitutional identity."

The Czech Republic

The Czech Republic is a particularly interesting case, as its Constitutional Court not only claims the right to ignore ultra vires Luxembourg decisions, but it has actually done so. This occurred in the *Slovak Pensions* case[11].

The pensions dispute arose as result of the dissolution of Czechoslovakia. The new states of the Czech Republic and Slovakia made an agreement as to responsibility for paying pensions to former employees of the dissolved former state: the criterion was to be the domicile of the employer at the date of dissolution. Over the years which followed the rates of pensions started to diverge significantly between the Czech Republic and Slovakia. Former employees of a Slovak domiciled employer but who were now living in the Czech Republic found that they were receiving pensions at lower than the Czech rates. To deal with this perceived unfairness the Czech Constitutional Court held in a number of cases that there was an entitlement to a supplementary pension: there were, however, preconditions that the individual was a Czech citizens and resident in the Czech Republic. In 2007, after both the Czech Republic and Slovakia had become members of the European Union a ruling was sought from the Luxembourg

[10] *Re Honeywell* [2011] CMLR 33, and *EURO Bailout* decision of 7th September 2011 discussed in article by B Zwingmann at ICLQ 61 (2012) 665

[11] File no Pl ŰS 5/12

Court whether these preconditions amounted to discrimination which was impermissible under the EC Treaty and a Social Security Regulation[12]. The Court held that it was, indeed, precluded as discrimination on grounds of nationality[13].

The subject came back before the Czech Constitutional Court in January 2012 in a case about the pension of a Czech citizen who had worked for the National Railways in what had become Slovakia. The Czech Court declared that the Luxembourg Court's decision was an excess of jurisdiction and so ultra vires. An article by a senior public service lawyer in the Czech Republic had described the Constitutional Court's reasoning[14]:-

> "In its judgments the Czech Constitutional Court does not dispute the basic power of the CJEU to interpret EU law and its principles; however, it also refers to the doctrine of the legal instrument exceeding the scope of the conferred powers employed by the German Federal Constitutional Court.... According to this doctrine, the constitutional court can, in exceptional circumstances, act as the *ultima ratio* and investigate whether an EU act has exceeded the scope of conferred powers which the Czech Republic had transferred to the EU pursuant to art 10a of the Czech Constitution. It is also possible to point to the jurisprudence of the CJEU itself in relation to the question of deviation from the limits of transferred powers (see C-376/98, *Germany v Parliament and Council*). According to the German doctrine, the ruling of the CJEU could itself be such act capable of being *ultra vires*; the Polish Constitutional Tribunal explicitly excluded the competence of the CJEU to adjudicate on the limits of transfer of powers to the EU, as according to this Tribunal this is a case of interpretation of national constitutional law."

Denmark

The Danish Supreme Court has adopted a similar position to that of the German FCC. In 1998 the Danish Court, faced with a challenge to the compatibility of Denmark's membership of the European Community with the Danish Constitution, reconciled the two with the explanation:-

> "... the courts of law cannot be deprived of their right to try questions as to whether an E.C. act of law exceeds the limits for the surrender of sovereignty made by the Act of Accession. Therefore, Danish courts must rule that an E.C. act is inapplicable in

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[12] Art 12 EC Treaty, Regulation 1408/71.

[13] *Landtova v CASA* case C-399/09, [2011] ECR I-5573

[14] Dr Lanka Pitrova "The Judgement of the Czech Constitutional Court in the 'Slovak Pensions' Case and its Possible Consequences" in The Lawyer Quarterly vol 3 no 2 (2013) at http://www.ilaw.cas.cz/tlq/index.php/tlq/article/view/70/57

> Denmark if the extraordinary situation should arise that with the required certainty it can be established that an E.C. act which has been upheld by the European Court of Justice is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Act of Accession. Similar interpretations apply with regard to Community law rules and legal principles which are based on the practice of the European Court of Justice."[15]

Poland

The Polish Constitutional Tribunal has followed the German FCC with some enthusiasm. In a case concerning the constitutional compatibility of the Lisbon Treaty it ruled[16]:-

> "... constitutional identity is a concept which determines the scope of 'excluding – from the competence to confer competences – the matters which constitute "the heart of the matter" i.e. are fundamental to the basis of the political system of a given state' ... the conferral of which would not be possible pursuant to article 90 of the Constitution. Regardless of the difficulties related to setting a detailed catalogue of inalienable competences, the following should be included among the matters under the complete prohibition of conferral: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences."

This led to the Professor of European and Comparative Law at Gdansk University criticising the Tribunal as standing for a "classic manifesto of defensive constitutionalism marked by fear, inward-looking and disengagement"[17]. Whether or not that characterisation is entirely justified, the Polish Court's approach certainly adds to the picture of the leading national courts of Europe insisting on their own jurisdiction to police whether the European Union institutions are confining themselves.

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[15] *Carlsen v Rasmussen* reported in an English translation at [1999] 3 CMLR 854

[16] Case K 32/09, judgment of 24th November 2010 at pp.22-23

[17] Professor Tomasz Tadeusz Konciewicz "Polish Constitutional Court in Europe: Player or Spectator?" At http://britishlawcentre.co.uk/wp-content/uploads/2014/04/WARSAW-POLISH-Constitutional-Court-in-Europe-PLAYER-or-Spectator-Koncewicz.pdf

Italy

Italy's constitution and legal system are similar to Germany's. The Italian Constitutional Court has not developed as clear a jurisprudence as its German equivalent. Indeed, one Italian legal scholar has described its case-law in this area as "hopelessly confused"[18]. But it has on a number of occasions[19] expressed severe reservations about an unqualified supremacy of Union law.

A relatively recent occasion was in its decision in 2006 in a case about the privatisation of pharmacies in Milan[20]. The Constitutional Court declared the privatisation legislation, as it stood, unconstitutional. The case returned to the Constitutional Court to consider a challenge that its decision was incompatible with EEC treaty articles on freedom of establishment and free movement of capital. Whether there was, in fact, any such incompatibility was never addressed, because the Italian Court rejected the challenge at the threshold stage. The Court held that its original decision had been based on a right to health safeguarded by art 32 of the Italian Constitution. The Court also refused to make a reference to the Luxembourg Court, on the ground that no finding there could overcome the obstacle raised by the Italian Constitution.

Here, then, was a classic clash between domestic law and, potentially, a finding by the Luxembourg Court. If the Luxembourg Court found that a national decision created an infringement of such important treaty articles as those creating free movement of capital and freedom of establishment, then the EU law theory of its supremacy would certainly expect such finding to prevail over the national decision. The Italian Court, however, insisted that in the event of such a clash on a matter touching the Italian Constitution, the national decision must prevail. The German FCC's rejection of a power in an EU institution to determine the boundary of its own competence is plainly asserted by the Italian Court:-

> "64. ... constitutional law doctrine, while accepting the reduced scope for the verification of the lawfulness of laws of Community origin by the Constitutional

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[18] Dr Marta Cartabia of the Institute of Public Law at Milan University in Michigan Journal of International Law vol 12 no1 p.173 at pp.174, 176

[19] e.g. *FRAGD* judgment of April 21st 1989, Corte cost, 34 Giur. Cost. I 1001

[20] *Admenta v Federfarma* case 4207/05, reported in English at [2006] 2 CMLR 47

> Court, is united in denying, for reasons based on the nature of the legal system, that the Constitutional Court has been rendered completely redundant in relation to the management of Community law."

The Court then cited one of its earlier decisions in 1984 which had spoken of the Constitutional Court "supervising" EU treaty law:-

> "The law implementing the Treaty may proceed subject to its supervision, with respect to the fundamental principles of our constitutional order and to inalienable human rights."[21]

The Italian Court accepted that, like the German FCC, it had never actually exercised a power to reject an EU level decision, but firmly insisted on its jurisdiction to do so:-

> "68. Finally, the community area involves a matter which assumes central importance in the present dispute, a type of competence that the Constitutional Court has continued to claim, but has not actually exercised, relating to the protection of the principles and fundamental rights of our own legal system in the context of the European Community."

Therefore, one can surely add Italy to the list of countries in which domestic courts assert that the ultimate decision on what falls within, and what outside, EU competence, lies with the national court.

France

There has not been the same explicit discussion in France as in the countries mentioned above of the possibility of a national court rejecting an EU level determination. But the existence of such a possibility would seem to be the logical corollary of holdings by senior judicial bodies in France as to the significance of the French Constitution[22]. It has several times been asserted that the French Constitution is higher in the hierarchy than EU law. The most recent occasion of such a proclamation was in August 2012 in connection with the question whether the French Constitution permitted ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. The Conseil Constitutional held that some modest amendments to the Constitution would be required if France was to be able to ratify this the

[21] Judgment no. 170 of 1984

[22] Conseil d'Etat 30th October 1998; Cour de Cassation 2nd June 2000; Conseil Constitutionel decision no 2004-505 of 19th November 2004.

Treaty, and said:-

> "... confirming the place of the Constitution at the pinnacle of the national legal order... ... where the commitments ... contain a clause which is unconstitutional, call into question the rights and freedoms guaranteed by the Constitution or run contrary to the essential conditions for the exercise of national sovereignty, authorisation to ratify them may only be granted after the Constitution has been amended"[23]

Spain

The Constitutional Court of Spain also sees the national constitution as fundamental, and regards the acceptance of European Union law as subject to what the Constitution of Spain allows:-

> "The constitutional transfer [of competences to the EU] ... is subject to material limits imposed by the transfer itself. Said material limits ... which implicitly result from the Constitution and from the essential meaning of the precept itself, are understood as the respect for the sovereignty of th State, or our basic constitutional structures and of the system of fundamental principles and values set forth in our Constitution ..."[24]

The relationship between the Luxembourg case-law and the national courts

It may be thought that the discussion above has demonstrated a full-scale clash of thinking between the Luxembourg Court and some, at least, of the national judiciaries. Whilst there is some tension, it is not necessarily correct to perceive an outright clash. Both the European level jurisprudence and the national level jurisprudence are right in their own terms. What one observes is, rather, the inevitable outcome of a European Union which is more than a mere confederation of sovereign states but less than a sovereign federal state itself. Being something of a halfway house, the Union level law has precedence over the national when they are in conflict in fields of Union competence, but only because the national states have so decided. For a national court to say that it is ultimately a national prerogative to determine the true boundary of such conferral is not so much a challenge to the Union as a manifestation of the very authority to which the Union owes its life.

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[23] Decision no 2012-653 DC of 9 August 2012 , recitals 9, 10. In similar fashion the Conseil Constitutional had held that amendments to the Constitution were required before France could ratify the Lisbon Treaty: Decision no 2007-560 DC of 20th December 2007.

[24] DTC 1/2004, on whether there is a contradiction between the proposed Constitution for Europe and the Spanish Constitution, 13th December 2004

The United Kingdom

The law of the European Union has force in the UK by reason of the European Communities Act 1972 as amended. By s.2(1):-

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly...."

By s.3(1):-

> "For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court."

For many years it was generally assumed that these unquestionably wide provisions had achieved a blanket introduction into domestic law of all EU law, and that in all circumstances EU law would prevail over any domestic law at variance. Whilst it was always seen as possible for the UK Parliament explicitly to legislate a derogation from EU law[25], it was not thought that anything less than such an express exercise of parliamentary sovereignty could displace any element of EU law.

The first notable suggestion that the 1972 Act might not have achieved quite so blanket a result came from Laws LJ in 2013 in *R (GI) v Home Secretary*[26]. GI, who had been born in Sudan, became a naturalised British citizen. The Home Secretary deprived him of his citizenship and then ordered that he be excluded from the country on the ground of terrorist activities. He was already out of the UK, as he had skipped bail. He brought judicial review of the exclusion order on the ground that it was unfair to exclude him, and so deprive him of the advantages of being in the country for his appeal against the citizenship decision. He relied on an Luxembourg

[25] E.g. Per Lord Denning MR in *Macarthys v Smith* [1979] 3 All ER 325 at p.329

[26] [2013] QB 1008

decision *Rottmann v Bayern*[27] which held that citizenship of the EU was the "fundamental status of nationals of member states"; and so that member states must when exercising powers in the sphere of nationality have due regard to EU law. Therefore, GI claimed the benefit of anti-discrimination rights in EU law.

Laws LJ rejected all this. He said that *Rottmann* had no relevance to a case with no EU-cross-border element. He had "some difficulties" with *Rottmann* since under the treaties EU citizenship is merely parasitic on citizenship of a member state. But in any event, even if it had been an EU-cross-border case, he doubted whether an English court was bound to follow it:-

> "[43] ..... The conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation state. They touch the constitution; for they identify the constitution's participants. If it appeared that the Court of Justice had sought to be the judge of any procedural conditions governing such matters, so that its ruling was to apply in a case with no cross-border element, then in my judgment a question would arise whether the European Communities Act 1972 or any successor statute had conferred any authority on the Court of Justice to exercise such a jurisdiction."

The early stirring of doubts whether the 1972 Act had given effect to quite all EU law receive a stimulus, and came to greater prominence, with the Supreme Court decision in *HS2*[28]. Lords Neuberger and Mance, with whom 5 other Justices agreed, said in the context of the rule in art 9 of the Bill of Rights precluding a court from questioning proceedings in Parliament[29],

> "[207] .... It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation."

This line of thinking was developed at considerable length and in stronger language in *Pham v*

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[27] [2010] QB 761

[28] *R (Buckingham CC) v Secretary of State for Transport ("HS2")* [2014] 1 WLR 324

[29] To similar effect were remarks of Lord Reed in his Thomas More lecture 2014 page 8.

Home Secretary[30]. P, who was born in Vietnam, acquired British nationality. The Home Secretary made an order depriving him of his British nationality on the ground of involvement in terrorism. He claimed that the Vietnam government would not comply with its obligation under Vietnam law to restore his Vietnamese nationality. So he claimed he would be rendered stateless. P sought to rely on the EU law. He argued that *GI* was wrong.

Lord Mance, with whom four other Justices agreed, rejected the argument in a lengthy passage from [68] to [92]. Whilst, like Laws LJ, he expressed no final view, his dicta are of great interest:-

> "[76] Laws LJ's remarks in *GI* recognise, correctly, that the question he raised is for a United Kingdom court, ultimately one of construction of a domestic statute, the European Communities Act 1972 . That follows from the constitutional fact that the United Kingdom Parliament is the supreme legislative authority within the United Kingdom. European law is part of United Kingdom law only to the extent that Parliament has legislated that it should be.
> ....
> [82] The breadth of sections 2(1) and 3(1) of the 1972 Act is notable. On one reading, they leave the scope of the Treaty within the sole jurisdiction of the Court of Justice as a question as to its "meaning or effect". Nevertheless, this court in *R (Buckingham County Council) v Secretary of State for Transport* [2014] 1 WLR 324 , paras 207–208 recognised the potential which exists for jurisdictional limits on the extent to which these sections confer competence on the Court of Justice over fundamental features of the British constitution. Questions as to the meaning and effect of treaty provisions are in principle capable of being distinguished from questions going to the jurisdiction conferred on the European Union and its court under the Treaties: compare in a domestic context, the decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 . The principle that the orders of a superior court of record are valid until set aside is not necessarily transposable to an issue of construction concerning the scope of sections 2(1) and 3(1) of the 1972 Act or the Treaty provisions and conferral competence referred to in those provisions.
> ....
> [90] A domestic court faces a particular dilemma if, in the face of the clear language of a treaty and of associated declarations and decisions, such as those mentioned in paras 86–89, the Court of Justice reaches a decision which oversteps jurisdictional limits which member states have clearly set at the European Treaty level and which are reflected domestically in their constitutional arrangements. But, unless the Court of Justice has had conferred on it under domestic law unlimited as well as unappealable power to determine and expand

[30] [2015] 1 WLR 1591

> the scope of European law, irrespective of what the member states clearly agreed, a domestic court must ultimately decide for itself what is consistent with its own domestic constitutional arrangements, including in the case of the 1972 Act what jurisdictional limits exist under the European Treaties and on the competence conferred on European institutions including the Court of Justice."

A further nod in the direction of a less blanket interpretation of the scope of s.2 of the 1972 Act was given by Elias LJ in the judgment on 20th May 2016[31] on the attempt by overseas UK citizens to challenge their exclusion from the franchise in the referendum. They argued that their exclusion was incompatible with the EU treaty obligation of free movement of persons. A necessary first step in their argument was that the EU Referendum Act 2015 fell within the scope of EU law. Lloyd-Jones LJ and Blake J in the Divisional Court had held that the referendum law was within the scope of EU law, although they went on to hold that the franchise rules did not interfere with free movement. The Court of Appeal held against the applicants also on the first step. Lord Dyson's reason for doing so was that art 50 of the treaty on European Union expressly authorised a member state exercising the right to withdraw to adopt its own procedures. Elias LJ had a more fundamental reason: he considered that Parliament in enacting s.2 of the 1972 Act could not have intended that its scope would extend to a UK decision to leave the club. In perhaps the most fulsome approval of the jurisprudence of the German FCC yet to have been heard from a senior British judge he cited with approval its *Lisbon Treaty*[32] decision:-

> "The German government in that case successfully submitted that article 50 was merely confirming the continuing existence of state sovereignty; it was not establishing it. As the German government put it in its submissions, a state 'would remain the "masters of the Treaties" and would not have granted the European Union *Kompetenz-Kompetenz* over the question of withdrawal from the Treaties."[33]

A constructive proposal

The drift of thought seems to be that careful attention has to be paid to the words in s.2(1) of the 1972 Act,

> "All such rights, powers ... created or arising by or under the Treaties ..."

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[31] *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469

[32] [2010] 3 CMLR 13

[33] At [59]

The implication is to pose the questions: do these words that mean all powers which the EU institutions say arise under the treaties? or all the powers which the UK courts find arise under the treaties? Whilst, of course, UK courts will pay great respect to EU institutions, the pointer is to a well arguable case for the latter option.

This brings to mind the leading public law principle in *Anisminic*[34]. The Foreign Compensation Act 1950 had enacted that a "determination" of the Commission should not be called into question in any court. However, the House of Lords held that a decision which purported to be a determination of the Commission would not actually be a "determination" if the Commission had misconstrued its powers. So in the same way one can regard, say, a directive purporting to be within powers conferred not a directive at all if in the opinion of the UK court the EU institutions have misconstrued their competences.

It may be less easy by such a route of judicial interpretation to escape from the obligation to be loyal to a decision of the Luxembourg Court on a question whether an EU act is within EU competence. In general a mistaken decision of a court does not thereby cease to be its decision. On its face s.3 of the 1972 Act looks to create a greater deference to the EU's court than appears to be the norm in continental Euroipe.

The entire issue of the obligation of UK courts in relation to assertions from EU institutions, whether legislative or judicial, which in the opinion of UK courts are outside EU competence, can only be satisfactorily resolved in one of two ways. One would be by a definitive decision of the UK Supreme Court. The other would be Parliament. The Supreme Court, like any other court, has the opportunity only to rule on such matters as are presented by cases which appear in its list. There is no reason to anticipate an early opportunity requiring the Supreme Court to make a decision on the issue. In any event, the topic is of such sensitivity and gravity that it would be much better made by Parliament. For Parliament to do so would demonstrate that the enactment of the 1972 Act was, as we regard it, an exercise of national sovereignty, not a surrender of it.

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[34] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147

A suitable enactment to confirm as correct the provisional thinking indicated by Lord Mance's opinion in *Pham* could be to add "For the avoidance of doubt" provisions to the 1972 Act. An addition at the end of s.2 of the 1972 Act might be something such as:-

> "For the avoidance of doubt, references in sub-section (1) above to rights, powers, liabilities, obligations and restrictions created or arising by or under the Treaties are to, and only to, such as are held by the United Kingdom court to be within the competence of the European Union by virtue of the EU Treaties."

Similarly there might be added to s.3 a clarification such as:-

> "For the avoidance of doubt, references to principles laid down by, and relevant decisions of, the European Court do not extend to any decision of the European Court that an EU instrument or act of an EU institution is within the competence of the European Union if in the opinion of the United Kingdom court such is not within the competence of the European Union by virtue of the EU Treaties."

Such provisions would clarify that if the UK court considered a decision or instrument outside EU competence then the Court should not give it effect. Thereby the normal obligation on the final national court to refer to the Court of Justice of the EU unless a matter is "so obvious as to leave no scope for any reasonable doubt"[35] would not apply. If the rare situation of an outright conflict between judicial decisions at national and EU level should arise, it would be a political issue to be resolved through political processes.

Other similar proposals

The Prime Minister's Chatham House suggestion may, in fact, have a respectable ancestry. In 2004 the House of Lords' European Union Committee, with a distinguished membership which had included Lord Scott of Foscote, Lord Brennan QC, Lord Lester of Herne Hill QC and Lord Neill of Bladen QC, seem to have had something similar in mind[36]:-

> "We do not dismiss the possibility of the argument being advanced that Parliament, when

[35] Art 267(3) requires any question about the interpretation of the treaties or an EU act to be referred to the CJEU by a court against whose decision there is no national judicial remedy. Under the so-called *acte claire* doctrine set out in *CILFIT* (1982) this does not apply if the matter is so obvious as to leave no scope for any reasonable doubt.

[36] House of Lords Select Committee on the European Union 6th report session 2003-2004 paragraph 89

> referring, in section 2(1) of the ECA, to rights, powers etc 'created or arising under the Treaties' under which the Community only has such powers as have been conferred upon Member States did not, notwithstanding Section 3(1), intend the final definition of those powers to be determined by the Court, a body itself dependent on the Treaties for its existence and powers. In short, Parliament did not hand over a blank cheque, legally or politically. **The Government should set out their view on the *Kompetenz-Kompetenz* question clearly to Parliament and to citizens in the UK. This could go a long way in assuring the public that the Union is not some Frankenstein creation over which there may be little or no control.**"

The weakness of that proposal was that it involved only a political declaration by the Government. This would not have the significance than a judgment of a senior court, and could have no effect comparable to that of parliamentary legislation.

Very recently Jesse Norman MP has proposed:

> "Parliament should amend the European Communities Act 1972 to insert a similar 'solange' clause: that the UK will abide by EU treaties *so long as* these do not conflict with a UK constitutional instrument."[37]

This proposal is similar to ours but more limited, as it would constrain the impact of EU law only where there was a conflict with one of our relatively few constitutional statutes; it would not do so where the EU institutions were purporting to act outside a conferred competence. It would address the specific issue discussed in *HS2*, but not the wider issue discussed in *GI* and *Pham.*

LIMITATION ON ROLE OF E.U. CHARTER

We understand the Prime Minister's proposal to be an enactment in the UK Parliament aimed at restraining UK courts from using the EU Charter of Fundamental Rights to justify rulings or remedies where the Luxembourg Court would not have found that the Charter required such. We do not understand the proposal to have been for any change in EU law or practice in respect of the Charter: if that had been intended, the proposal would surely have been part of the letter to Donald Tusk, which contained the topics on which the Government sought renegotiation at EU level.

[37] "The EU Court of Justice and the EU Charter: an Independent View", speech at Social Market Foundation 16th May 2016. The German word "solange" means "as long as".

Would such a limitation on the role of the Charter be desirable?

Our starting point is that the instrument which furnishes the judicial protection of fundamental rights in the UK today is the Human Rights Act. We are both of the opinion that, as unanimously recommended by Sir Leigh Lewis' Commission, there should be no alteration to that Act other than "with full consultation and with great care to avoid creating divisiveness and disharmony"[38]. That principle must apply not only to what might be regarded as watering down judicial protection of rights but also to beefing them up.

It cannot sensibly be contended that prior to the UK's ratification of the Lisbon Treaty there was any consultation or public debate at all about the introduction of a new tranche of rights law over and above any which might be inherent in EU law. Quite the contrary. Tony Blair as Prime Minister famously told the House of Commons in 2007 that the UK had secured an "opt-out" from the Charter[39]. Few would disagree with the assessment of the House of Commons European Scrutiny Committee that the Charter's,

> "... domestic effect has never been clearly and fully communicated, unlike the introduction of the Human Rights Act 1998, by contrast."[40]

Furthermore, unease in sections of the public, whether justified or not, that by some hidden processes Europe has introduced new British laws is likely to contribute to unnecessary resentment at the UK's membership of the European Union. Therefore, we can see positive merit in legislation to ensure that the role of the Charter in UK courts is confined to that genuinely required by EU law.

In fact, for reasons which we discuss below there are grounds on which reasonable people could take the view that British judges have extending the application of the Charter wider than strictly

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[38] Report of the Government Commission on a UK Bill of Rights (December 2012), Overview para 76

[39] 25th June 2007 Hansard HC col 38: "It is absolutely clear that we have an opt-out from both the charter ..."

[40] "The Application of the EU Charter of Fundamental Rights in the UK – a State of Confusion" 43rd Report 2013-2014 session at para 18

required by EU law. Far from the Luxembourg Court being the villain of the piece, as Leave campaigners assert, it may be our judges against whom they should be directing their complaints. To the extent that British courts are using the Charter beyond the requirements of EU law, the public can be reassured that the UK Parliament can stop that continuing.

At the same time there is nothing to be gained from enacting legislation which would compel UK courts to ignore EU law where EU law has direct application. That could lead only to further confusion, political crisis, and ultimately heavy financial penalties being imposed on the UK under the enforcement provisions of the Treaties[41]. Therefore, we cannot support the recommendation of the majority of the House of Commons European Scrutiny Committee that the European Communities Act 1972 be amended so as wholly to exclude the Charter's applicability in the UK. The suggestions which we make for legislation to confine the role of the Charter are intended to avoid any direct conflict between the UK statute and EU law.

To what extent does the Charter apply in the UK?

The significance of the Charter in the UK is now quite widely recognised. It was, perhaps, the unprecedented judgment of the High Court striking down an entire Act of Parliament in July 2015 which most forcefully brought this home[42]. Previously the views that the Charter made no difference to the UK or that we had an opt-out were widely held, including by High Court judges[43]. As recently as 19th November 2013 both the Jack Straw MP and Sadiq Khan MP, then Shadow Secretary of State for Justice, spoke in the House of Commons of the UK having an opt-out from the Charter[44]. So we begin by considering the extent of the Charter's application in the UK in the light of the Anglo-Polish Protocol, Protocol 30.

At different times the interpretations of Protocol 30 have ranged from it constituting a complete opt-out for the UK from the Charter to it doing no more than restate for clarification the normal

[41] Treaty on the Functioning of the EU articles 258-260

[42] *R (David Davis et al) v Home Secretary* [2015] EWHC 2092, [2016] 1 CMLR 13, 17th July 2015

[43] Mostyn J in *R (AB) v Home Secretary* [2013] EWHC 3453 (Admin), 7th November 2013; Cranston J. In *R (NS) v Home Secretary* [2010] EWHC 705 para 155

[44] HC debate col 1087

general effect of the Charter. The complete opt-out theory was decisively rejected by the Luxembourg Court in *R(NS) v Home Secretary*[45] in December 2011. Since then the mere clarification/restatement theory has become the orthodoxy. For example, the possible impact of Protocol 30 has not been discussed at all in any of the recent judgments of UK Courts applying the Charter.

Nonetheless, there may remain some possibility of the true import of Protocol 30 being slightly more than mere clarification. Firstly there must be the question: if what the Protocol 30 says is just repeating in clearer words the meaning of the Charter for everybody else, why is this clarification in a separate Protocol 30 referring to just two countries? Why not put the clearer words in the body of the text, or, at least in the extensive Explanations, which are attached, and which were revised in the process of drafting the Lisbon Treaty?

A further ground for possible doubt as to the correctness of the mere clarification theory has now arisen in consequence of an element of the European Council Decision of February 2016. To explain why that is so, it is necessary to set out parts of the text of Protocol 30.

Article 1.1 of the Protocol reads:-

> "The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or actions of Poland or the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it affirms."

Article 1.2 repeats the same message with particular application to the part of the Charter, called Title IV, covering social and economic rights:-

> "In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law."

It is not entirely easy to work out what art 1.2 is saying in respect of Title IV, which art 1.1 is not

[45] [2013] QB 102; joined cases C 411/10 and C 493/10

saying about the Charter as a whole. If art 1.1 does not mean that no new justiciable rights are created, what does it mean? Art 1.2 begins "In particular, and for the avoidance of doubt", which seem to be signals that art 1.2 is simply a specific instance, mentioned solely to remove any uncertainty, of the application of the general proposition in art 1.1. So there are reasons for regarding art 1.2 as purely illustrative of, and of the same meaning as, art 1.1.

On the other hand, if art 1.2 means only the same as art 1.1, why is there a separate art 1.2? Professor Paul Craig thinks there is a difference: he has expressed the view that art 1.2 is "a substantive limit", and that this is "by way of contrast" to art 1.1[46]. In *R(NS) v Home Secretary* the Luxembourg Court evidently thought that art 1.2 might mean something different from art 1.1, because having held that art 1.1 did not exempt the UK from the obligation to comply with the Charter, went on to say that, since the case before them did not concern Title IV rights, there was no need to rule on the interpretation of art 1.2. In other words the statement that "justiciable rights are not created" at least may mean something more substantive than mere clarification.

Protocol 30 contains one further provision, its art 2:-

> "To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the laws or practices of Poland of the United Kingdom."

Some leading EU lawyers have regarded this as merely a statement of the self-evident. On the other hand, Professor Craig considers that this constitutes a further "substantive limit" on the application of the EU Charter in the UK. On one reading art 2 says that unless a right sought to be derived from the Charter is already and separately a right in UK law, it shall not apply to a national law of the UK. This might be held to mean that in a situation where a litigant had a right to a declaration of incompatibility under s.4 Human Rights Act by reason of an infringement of a Convention right the effect of the infringement of the equivalent right in the Charter should be merely a declaration as opposed to the UK Court striking down the UK statute in question. So far as we are aware there is no authority from any court on that possible argument, and, indeed, no guidance at all on the meaning of art 2.

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[46] Written evidence to House of Commons Committee para 17, January 2014

The relevant element in the renegotiation Decision of the European Council on 19th February 2016 is the 6th recital:-

> "Recalling also the Charter of Fundamental Rights of the European Union has not extended the ability of the Court of Justice of the European Union or any court or tribunal of the United Kingdom to rule on the consistency of the laws and practices of the United Kingdom with the fundamental rights that it affirms (Protocol No 30)"

This recital follows a recitation of other arrangements, in each case identified by a Protocol, which unquestionably do provide distinct treatment for the UK – including its entitlement not to adopt the euro and not to participate in Schengen. This full title of the document, moreover, is "Decision of the Heads of State or Government Meeting within the European Council Concerning a New Settlement for the United Kingdom within the European Union".
All this is gently suggestive that Protocol 30 means something for the UK slightly beyond a mere restatement of what the Charter means for everybody else.

It may be objected that a mere recital in a heads of Government decision cannot affect the meaning of a Protocol to a Treaty. But that would be incorrect. In international law, as understood at high level within the EU, it can affect it. The published Opinion of the Legal Counsel of the European Union describes the February 2016 Decision as,

> "an instrument of international law by which the 28 Member States agree on a joint interpretation of certain provisions of the EU Treaties."

The Decision is in the same form as that made in 1992 on problems raised by Denmark after its rejection of the Maastricht Treaty in its first referendum thereon: that Denmark Agreement was accepted by the Luxembourg Court as properly to be taken into consideration in the interpretation of the Treaties[47]. That approach is in line with the Vienna Convention principle that parties to a Treaty may subsequently agree a joint interpretation of their treaty[48].

It is neither necessary for present purpose, nor possible, to determine exactly how far, or, indeed,

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[47] *Rottmann v Freistaat Bayern* [2010] QB 761 at [40]

[48] Vienna Convention on the Law of Treaties 1969 art 11, art 31; Opinion of the EU Legal Counsel para 4, 5.

whether, the UK has special treatment. Ultimately, that can only be determined at some future date by the Luxembourg Court. All that the present discussion here seeks to establish is that, by reason of Protocol 30 and its recitation in the 2016 Renegotiation Decision there may be some doubt as to the correctness of the assumption that the Charter applies to the UK to unqualified extent and in unvarnished manner

The meaning of "implementing EU law"

If there is any qualification to the blanket application of the Charter to the UK it certainly will not be in modifying the Charter's effect as an aid to interpretation of articles in the treaties or provisions in Regulations or Directives. The notion that primary or secondary Union legislation can mean X in one member state and Y in another is inherently antithetical to whole concept of the Union. That is one of the reasons why the theory that the UK could have had a general opt-out from the Charter was always, in fact, unreal.

A more plausible area where Protocol 30 might make a difference, if it makes any difference at all, is in cases which at first sight one might not expect to fall within the zone of application. The Charter states its Field of Application thus in Article 51.1:-

> "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union ... and to Member States only when they are implementing Union law."
> (emphasis added)

The sources of Union law are regarded as being: the treaties and subsidiary conventions; acts of members states (of which the February 2016 Decision is an example); regulations; directives; binding decisions issued by the Commission; case-law of the Luxembourg Court; and possibly soft law sources such as recommendations and opinions. So if a UK court is called upon to implement any of those, the Charter applies. That, the reader of art 51.1 might think, is where the Charter would stop.

What introduces doubt is the Explanation note to art 51 which states:-

> "As regards the Member States it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on Member States when they act in the scope of Union law"

(Emphasis added)

To the ordinary reader the phrase "in the scope of Union law" may sound like the same thing as "when implementing Union law"; but it has been suggested that it brings in a much wider range of situations. For instance, it is suggested that it brings in the action of member states where an EU legislative instrument states that an area of activity is left to member states.

The potential for the "scope of Union law" note to bring in a situation where EU law was not being implemented, at any rate not in any direct sense, was illustrated by a first instance decision of Lloyd Jones J in *R (Zagorski) v Secretary of State for Business*[49]. This was an application by judicial review challenging the Minister's failure to impose an export ban on the sale of an anaesthetic, which had a range of possible uses, to US states who planned to use it in a cocktail of lethal injection drugs for executions. The claimant advanced various arguments, all of which failed. Before, however, rejecting the argument based on the Charter, the judge addressed the preliminary question of whether the Minister's decision was one taken when implementing EU law. The relevant EU Regulations, which in general strongly favoured free trade, allowed a discretion to member states whether to impose bans on various grounds of public policy. It was in exercise of that discretion that the British Minister decided not to impose an export ban. The imposition of prohibitions on exports was held by the judge to be "an area subject to close and detailed regulation by the EU". However, so far as EU Regulations were concerned, the Minister was free to choose to ban, or not to ban, export to the USA of this anaesthetic. Despite that, the judge held that in his failure to impose a ban the Minister was implementing EU law. To some people it will seem rather curious that when the EU says something is <u>not</u> being dealt with by the EU but rather being left to member states, the states are held by courts to be implementing EU law.

The weight to be attached to the "scope of Union law" phrase in the Explanation may be considered to be reduced when it is observed that early drafts of the Charter contained "scope of Union law", and that the apparently narrower phraseology of "implementing Union law" became substituted in the approved draft. If parties in the course of travaux preparatoires change from

[49] [2010] EWHC 3110 at [66] to [70]

a broader wording to a narrower wording, a court may well subsequently consider the change to the narrower wording indicative of the parties' intention.

The Explanation note cites three pre-Charter cases of the Luxembourg Court. One is *Wachauf*[50], which concerned the meaning of the EEC Milk Quota Regulation: it is hard to see how this supports matters left to members states being "within the scope" of EU law. In another, *Annibaldi*[51], the Court held that a national law creating special planning rules within a regional cultural park had nothing to do with EU law and could not infringe the EU principle of equal treatment. It is only *ERT*[52] which can possibly provide a precedent for the principle that when a member state acts within the scope of a derogation from EU law, it is nonetheless acting within the scope of EU law. *ERT* is the one and only case cited by Lloyd Jones J. The question in *ERT* was whether a television monopoly created by the Greek state infringed treaty articles requiring freedom to provide services. The Court held that to bring itself within the scope of a derogation which the treaty allowed on grounds of public policy the ECHR art 10 right of freedom of expression must be considered. Therefore, *ERT* regards the situation as within the scope of EU law because the member state had to make good its case justifying escaping a normal EU rule. None of these cases seem to support a general policy of regarding an area of decision-making, which EU law leaves to unfettered national discretion, as within the scope of EU law.

The idea seems to be becoming established in UK legal circles that anything loosely connected with the EU's fields of activity is within the scope of the Charter. Lord Kerr of Tonaghmore in the UK Supreme Court in *Rugby Football Union v Consolidated Information*[53] said:-

> "The rubric "implementing EU law" is to be interpreted broadly and, in effect, means whenever a member state is acting 'within the material scope of EU law': see eg *R v (Zagorski)* ..."

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[50] *Wachauf v The State* [1991] 1 CMLR 328

[51] *Annibaldi v Commune di Lazio* [1998] 2 CMLR 187

[52] *Elliniki Radiophonia Tileorassi v Pliroforissis* [1994] 4 CMLR 540

[53] [2012] 1 WLR 3333 at [28]

This was little more than a passing remark in the course part of setting out the background to a case in which reliance of an article in the Charter failed. But it has been repeated a number of times in subsequent judgments, as authority for an expansive application of the Charter.

For example, the Divisional Court judgment in the case about the UK's Data Retention Act quoted Lord Kerr's words, and then crisply dealt with the applicability of the Charter by simply saying,

> "Data protection has been within the scope of EU law for 20 years"[54].

Very similar words to Lord Kerr's were used in the Court of Appeal's judgment in that same case[55]. There is a striking contrast with the approach of the German Federal Constitutional Court when in April 2013 it was considering a challenge to Germany's Counter-Terrorism Database Act: it held that since the German Act was not within the Charter because,

> "... there is no provision of Union law that obliges the Federal Republic of Germany to establish such a database, impedes it from doing so, or prescribes anything about the content of such a database."[56]

Parliament may be concerned at excessive importance being attached to Lord Kerr's fairly vague comment, and one for which there is slender support from the Luxembourg Court.

Since the Lisbon Treaty there have been two important Luxembourg case on the meaning of "implementing EU law", of which one at least has been controversial. But neither on proper examination point to a general case-law of regarding anything, which is loosely connected with EU activity, as being within the Charter.

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[54] Op cit at [6]. The full title of the statute was Data Retention and Investigatory Powers Act 2014. There was a separate, far more compelling, reason why the Charter was applicable in that case. That is because the EU's e-Privacy Directive expressly required that national measures for the retention of data must be justified inter alia by reference to art 6(1) of the Treaty on European Union, which is the art which gives effect to the Charter.

[55] [2015] EWCA Civ 1185 at [92]

[56] 1 BvR 1215/07 at [90].

NS[57]concerned an Afghan national who arrived in the United Kingdom via Greece and then claimed asylum. In accordance with the Dublin procedures the Home Secretary called upon Greece to consider his application: Greece would normally have been responsible. The relevant EU Regulation, having established the normal procedures, went on to provide that "by way of derogation" from them, any member state could consider an application for asylum. The applicant asked the Home Secretary to consider his application on the ground that his Charter rights would be at risk of infringement if he were returned to Greece. She declined to do so. He sought judicial review of her decision. The Court of Appeal referred questions to the Luxembourg Court. In addition to holding that Protocol 30 did not create a general opt-out for the UK, the Court held that the regulation created a discretionary power, that this was part of the whole mechanism for determining asylum applications, and that, therefore, a state exercising the discretionary power "must be considered as implementing EU law". The Court did not use the phrase "scope of EU law" or say anything to suggest that the wider phrase was the appropriate test.

The second, and more controversial Luxembourg decision was *Åklagaren v Åkerberg Fransson*[58]. Here the Luxembourg Court, rejecting the advice of its Advocate-General, did adopt "scope of EU law" as its test; or at any rate repeatedly used the phrase in its judgment. The case concerned the imposition in Sweden of both an administrative penalty and a criminal penalty on a trader for VAT fraud. He claimed that the latter penalty infringed his right under the Charter not to be prosecuted twice for the same offence. The penalties were part of the general Swedish tax code. They were not enacted in order to transpose into domestic law the EU requirement of VAT. Therefore, several member states, the European Commission and the Advocate-General all argued that the penalties did not represent implementation of EU law. Nonetheless, the Court held that the Charter did apply.

The *Åkerberg Fransson* decision has been explained on the basis that although the Swedish law in issue had not been enacted in order to implement the EU's VAT Directive, it was being used to implement an obligation which flowed from the Directive, namely enforcement of VAT-

[57] Cited above

[58] [2013] 2 CMLR 46

paying obligations. Thus, yet again, we have a situation far closer to the implementation of EU law than the wide formulation in the English cases of a broad interpretation within the material scope of EU law.

At all events *Åkerberg Fransson* may prove the high water mark of Luxembourg extension of the scope of the Charter. It is one of the most heavily criticised decisions ever given by the Luxembourg Court. In a lecture delivered in Lincoln's Inn the President of the German Constitutional Court described the case as a "bone of contention". He said:-

> "The prospect of a European guardian of fundamental rights may seem attractive to an EU Member State with a weak constitutional jurisdiction or a low standard of fundamental rights; for a country such as Germany, which enjoys a very high standard of fundamental rights that is appreciated throughout the world, it most certainly does not."[59]

Åkerberg Fransson has not dissuaded Professor Margot Horspool and Professor Matthews Humphreys from their opinion that art 51(1) "usually means" that the Charter applies to members states only "when they implement EU legislation domestically"[60].

A trio of recent Luxembourg decisions provides support for the assessment that the Court is pulling back from *Åkerberg Fransson*, and will not in general be adopting the test of "implementing EU law" rather than the broader "scope of EU law" criterion. In *Dano v Jobcenter Leipzig*[61] a Romanian woman who had moved to Germany claimed state benefits for herself and her son. She was refused on the basis of national legislation which excluded from benefits foreign nationals whose right of residence arose solely out of the search for employment. One of the issues raised by her challenge was whether this German law infringed her Charter rights. In November 2014 the Grand Chamber, rejecting that challenge, stated that the Charter applied to member states only when implementing Union law, and that states had competence to determine the conditions for such social benefits. Accordingly it held not merely that the

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[59] "European Integration and the Bundesverfassungsgericht" Prof Dr Andreas Voßkuhle, Sir Thomas More lecture, Lincoln's Inn 31st October 2013

[60] "European Union Law" Horspool & Humphreys 8th ed 2014

[61] [2015] 1 WLR 2519

applicants' challenge failed, but declared that the Court did not even have jurisdiction to answer the question referred as to the application of the Charter. Bearing in mind that as early as 1971 the EEC had had adopted a Social Security Regulation[62] to coordinate social security as it affected workers exercising the right of free movement, one might think that if the broader "scope of EU law" criterion had been adopted the facts of the case would almost certainly have fallen within the Charter. Therefore, not merely do the words of this judgment adopt the "implementing Union law" test, but the implication of the application to the facts appears to reject the broader approach.

In September 2015 the Grand Chamber followed *Dano* in another case concerning the German legislation excluding foreign nationals from benefits[63]. Finally, in February 2016 *Dano* was followed by the First Chamber in a third case brought by non-German EU citizens seeking social benefits[64]. Altogether no fewer than 20 of the Court's 28 judges were involved in this trio of decisions.

There is, therefore, scope, consistently with UK obligations to honour EU law, for Parliament to enact that the Charter is to be applied by UK courts only when "implementing EU law". Whilst Parliament could not properly itself provide a definitive elaboration of the meaning of "implement" – only the Luxembourg Court can do that – it could perfectly properly give a steer by directing attention to the interpretation of the German FCC. A possible clause would read:-

> "Courts in the United Kingdom shall apply the Charter of Fundamental Rights of the European Union only when,
>
> (a) interpreting or applying
> (i) the EU Treaties,
> (ii) an EU instrument,
> (iii) UK primary or secondary legislation to the extent that it discharges an EU obligation; or

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[62] Regulation 1408/71. The current secondary legislation discussed in the *Dano* case is *Regulation (EC) no 883/2004 and Directive 2004/38/EC* .

[63] *Jobcenter Berlin v Alimanovic* [2016] QB 308

[64] *Jobcenter Recklinghausen v Garcia-Neto*, judgment 25th February 2016, C-299/14

(b) otherwise implementing EU law."

"Horizontal" application of the Charter

The legislative institutions of the European Union, that is the Council and the European Parliament, are empowered by the treaties to make legislative instruments of two kinds, "regulations" and "directives". The treaties describe the difference: regulations take immediate direct effect as part of EU law. Directives, by contrast, merely create an obligation on member states to produce a result: the manner and form of achieving that result are left to the member states. Typically the UK fulfils its obligations under directives by enacting Acts or making statutory instruments. If a member state fails to give effect to a directive fully or at all, there is what is called "state liability": an individual who suffers loss by reason of the state's failure may claim *Francovich* damages[65] against the state. If the individual ought under the directive to have had a cause of action against the state or a public authority which is an emanation of the state, then the state or authority is estopped from saying it failed fully to implement the directive: it cannot take advantage of its own wrong. But if the cause of action which the directive ought to have created for an individual is against a private person, a court cannot pretend that the unimplemented directive has been given effect[66]. The individual's remedy is *Francovich* damages. Thus it is said that unimplemented directives have "vertical" effect, but not "horizontal" effect. All this is basic and longstanding EU law.

In two recent decisions the Court of Appeal has ignored these principles of EU law and applied the Charter in a manner which appears to be in conflict with Protocol 30.

On 5th February 2015 the Court of Appeal gave its decision in *Benkharbouche v Embassy of Sudan*[67]. The case concerned claims by employees at foreign embassies in London against their employers. Some of their complaints, such as unfair dismissal, related solely to domestic UK law. Others, specifically infringement of the Working Time Regulations 1998, racial

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[65] *Francovich and Bonifaci v Italy* [1991] ECR I-5357

[66] On the non-existence of direct horizontal effect between private citizens, see *Marshall v Southampton Health Authority* [1986] ECR 723.

[67] [2016] QB 347 CA (Lord Dyson MR, Arden, Lloyd Jones LJJ)

discrimination and harassment, related to domestic law which implemented EU measures. By virtue of s.16 State Immunity Act 1978 sovereign states are immune from the jurisdiction of UK courts in respect of claims by employees of their diplomatic missions. Most of the argument in the case was as to whether international law required so wide an immunity. The Court eventually concluded that it did not. If the Court had then held that the 1978 Act was contrary to a Treaty article, the course for the English court would have been straightforward: in line with the House of Lords decision in *Factortame*[68] it should have held the 1978 Act pro tanto inapplicable. That is because treaty articles do have direct effect. But no such conflict with a treaty article seems to have been suggested. What was suggested was that the provision of the State Immunity Act meant that the UK had not properly implemented one or more Directives. So the remedy ought to have been a claim for *Francovich* damages against the UK.

Instead the Court was led to giving an immediate remedy to the claimants by the route of art 47 of the Charter, which in terms akin to art 6 ECHR, declares a right to a fair hearing. On this basis the Court of Appeal "disapplied" s.16 of the State Immunity Act, that is proclaimed it of no effect. This route appears to have been in contravention of the clarification of the Charter provided by Protocol 30 (which was not mentioned in the judgment). There being no finding that such "disapplication" could been arrived at under normal EU law without praying in aid the Charter, the Charter should not have been used to turn allegedly inadequate implementation of a Directive into a directly justiciable right.

Six weeks after *Benkharbouche* the Court of Appeal gave judgment in *Vidal-Hall v Google Inc*[69]. The claimants alleged that Google had misused their private information as to internet usage and thereby breached s.13 Data Protection Act 1998. At an interlocutory stage the issue arose whether the effect of s.13 of the Act was to exclude damages where there was no pecuniary loss. The 1998 Act implemented the EU's Data Protection Directive. The first question, on which there was no Luxembourg Court authority, was whether the Directive on its true interpretation required member states to provide compensation for non-pecuniary distress. The Court of

[68] *R v Secretary of State ex p Factortame* [1991] 1 AC 603, where the Merchant Shipping Act 1988 was in conflict with what is now art 49 TFEU on the freedom of establishment.

[69] [2015] 3 WLR 409 Court of Appeal (Lord Dyson MR, McFarlane, Sharp LJJ). On 23rd July 2015 the UK Supreme Court granted permission to appeal; the appeal has not yet been determined.

Appeal relied on articles 7 and 8 of the Charter which proclaim rights of privacy and to protect personal data as an aid to interpreting the Directive as requiring compensation for non-material loss. Thus far the Court was using the Charter exactly as it should be, that is as an aid to interpreting an EU instrument. This led the Court to conclude that the 1998 Act had failed fully to implement the Directive.

Like the Embassy cases, this case was between private individuals, not a claim against a public authority of a member state. So on conventional EU law principles Vidal-Hall would have had no justiciable right against Google, and the remedy would have been a claim against the EU for *Francovich* damages (which in a case of only non-pecuniary loss would presumably have been very modest). However, the Court of Appeal following *Benkharbouche* held that article 7 and 8 of the Charter required the existence of a justiciable right against Google, and the consequent "dis-application" and setting aside of s.13(2) of the 1998 Act. For the same reasons as explained above in relation to *Benkharbouche* this involved using the Charter in a manner contrary to the Protocol 30 clarification.

There is little foundation in Luxembourg jurisprudence for the Charter to create directly enforceable horizontal rights where they would not otherwise exist[70]. In *NS* Advocate-General Trstenjak said:-

> "... article 1(2) of Protocol 30 first reaffirms the principle, set out in article 51(1) of the Charter, that the Charter does not create justiciable rights as between private individuals."[71]

In 2014 in *Association de mediation sociale v Union CGT*[72] the Luxembourg Court found that France had failed fully to implement an employment directive in respect of the manner of

[70] There is a slightly distinct short stream of Luxembourg case-law allowing the direct applicability of a general principle of EU law (rather than expressly relying on the Charter) in two age discrimination cases, the highly controversial decision *Mangold v Helm* [2006] All ER (EC) 383 and *Kűkűkdeveci v Swedex* [2010] All ER (EC) 867. Lord Mance in *USA v Nolan* [2015] UKSC 63 observed at [43] that it was unclear whether that line of law applied outside age discrimination cases. He also left open the question of horizontal reliance on the Charter.

[71] [2013] QB 102 at p.141, AG [173]

[72] [2014] ICR 411

ascertaining whether the number of employees sufficient to bring certain obligations into play, and that this entailed a breach of employees' rights to consultation contrary to Charter art 27. Nonetheless, the Court rejected its Advocate-General's suggestion that it should use the Charter to permit a direct action by an employee against a private sector employer: it held that art 27 of the Charter could not be invoked to disapply national legislation, and that the employee's remedy lay in *Francovich* damages.

Prof Craig has concluded:-

> "I think it very unlikely that the CJEU will interpret the Charter so as to render its provisions in general directly applicable as between private parties. There will not in the jargon of the trade be direct horizontality flowing from the Charter, whereby individuals could use the Charter as the cause of action so as to impose obligations on other private parties."[73]

Some people will feel inclined to welcome the direct horizontal enforceability of Charter rights as extensions of rights. But that it is just as arguable that a jurisprudence which elevates the rights of individuals should reject such horizontality. One of the highest rights of an individual in Britain is to assume that where the law has not intervened he is free to act as he pleases. As Sir John Laws said in his recent Law and Government lecture:-

> "To the individual citizen, everything that is not forbidden is allowed; but to the authorities of the state, everything that is not allowed is forbidden."[74]

It may be that our hearts do not bleed at the tearing up of statutes which would have benefited Google and the Sudanese Government. But another principle treasured by a jurisprudence which elevates rights is that the rights of unpopular persons are as important as those of the popular.

Dr Sara Drake[75], an academic specialising in EU law, has been led to comment that in respect of these decisions' horizontal application of the Charter the English courts have become more

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[73] Supplementary written evidence to H of C Committee page 4

[74] Inner Temple, February 2016

[75] Lecturer in EU law at Cardiff University and author of "New Directions and Effective Enforcement of EU Law and Policy", speaking at Roehampton University on 17th May 2016 "Human Rights in Transition" seminar

"communitaire" than the European Union's Court. To similar effect, a recent article on the UK Constitutional Law Association blog[76] concluded that *Benkharbouche* and *Vidal-Hall* were neither required by the CJEU case-law, nor in any other way by the UK's membership of the EU.

It is perfectly open to Parliament, if it does not wish it to continue, to legislate in unambiguous terms to stop it. A possible clause would be:

> "No court in the United Kingdom shall give any relief or remedy, other than in litigation to which the Crown or a public authority is a party, by application of the Charter of Fundamental Rights of the European Union."

A general prohibition of new rights

In the light of Protocol 30 the distinguished EU law expert, Professor Derrick Wyatt QC[77], saw the Prime Minister's Chatham House speech proposal to enact that the Charter creates no new rights as utterly straightforward:-

> "As regards the first point, about introducing UK legislation to ensure that the EU Charter of Fundamental Rights does not create any new rights, I shall be brief. The preamble to Protocol no 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom states that the Charter 'does not create any new rights or principles'. Article 1.1 states that the Charter does not extend the ability of the CJEU or UK courts to find that the laws of the UK are inconsistent with the rights, freedoms and principles that it affirms. On the face of it, the UK is free to adopt UK legislation to the same effect."

Professor Steve Peers, who is Professor of EU and Human Rights Law at Essex University, was of the same opinion about this proposal:-

> "At first sight, it is not really any different from Article 1(1) of the special Protocol on the role of the Charter in the UK and Poland."

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[76] Joshua Folkard at https://ukconstitutionallaw.org/2015/09/23/joshua-folkard-horizontal-direct-effect-of-the-eu-charter-of-fundamental-rights-in-the-english-courts/

[77] "What can the UK Reform/renegotiation Package Really Hope to Achieve?" Paper delivered at the seminar for the Durham Law Institute on 17th November 2015

Having quoted from the Protocol he went on:-

> "So the Prime Minister's commitment to change UK law could be met simply by making express reference to these provisions of the Protocol – or by incorporating their wording – in an Act of Parliament. This would simply reiterate the application of these rules to the UK, given that the Protocol already applies in UK law by virtue of the European Communities Act."

Therefore, in addition to the clauses suggested above, it would be perfectly open to Parliament to enact a general provision such as that is, save when acting in the circumstances described in the section confining the Charter to the implementation of EU law:-

> "... no court or tribunal in the United Kingdom shall give any relief or remedy by reference to, or in reliance upon, the Charter of Fundamental Rights of the European Union in respect of any laws, regulations or administrative provisions, practices or actions of the United Kingdom unless the court or tribunal would have given the same relief or remedy in the absence of the Charter."

In keeping with our general policy of respect for EU sources, this could be buttressed by express reference to Protocol 30 and to the February 2015 Decision in such terms as these:-

> "(1) Protocol 30 to the Lisbon Treaty, as set out in Appendix 1 hereto, shall have effect.
> (2) The sixth recital to the Decision of the European Council on 19th February 2016, as set out in Appendix 2 hereto, shall have effect as an aid to the interpretation of the text in Appendix 1."

<u>Procedure for disapplying Westminster statutes</u>

There has been mention above of three occasions in 2015 on which UK courts "dis-applied" UK statutes, that is to say ruled them as of no effect. These decisions, which the court had power to make only if so compelled by EU law, were made without checking with the Luxembourg Court by way of a reference whether EU law did so require. There was no such reference in either *Benkharbouche* and *Vidal-Hall.* In the case concerning the Data Retention Act the Divisional Court, which made an order for dis-application, did not make a reference. The Court of Appeal, which doubted the correctness of the decision to dis-apply, on appeal did decide to make a reference to the Luxembourg Court. Bearing in mind that a UK court has no power to ignore a UK statute unless compelled so to do by the European Communities Act, this rash of decisions to take the rare and extreme step of disapplying Westminster statutes can raise concerns

that our courts have become a little trigger-happy.

There might be much to be said for a procedural rule requiring a reference to the Luxembourg Court first[78], at any rate in Charter cases, if on its preliminary view a court is minded to disapply a statute. Such a rule would be consistent with our policy that UK law should not be out of line with the EU, and consistent also with a public concern to avoid unjustified "rights" decisions. In the seminal dis-application case of *Factortame*[79] the dis-application was directed only after a reference to Luxembourg. A possible procedural provision would be:-

> "A United Kingdom court shall not make an order disapplying all or part of United Kingdom primary legislation by application of the Charter of Fundamental Rights of the European Union unless it shall first have referred to the Court of Justice of the European Union the question whether European Union law compels such dis-application."

This would not affect the UK court's substantive powers: it would be a purely procedural measure. It could cause no friction with EU obligations – rather the reverse – but at the same time ought to make disapplication an even rarer occurrence.

Illustrative draft clauses

The illustrative draft clauses suggested in the course of this paper have been collected together in an Appendix. The statute might be called a Boundary of European and National Law Act. We are not parliamentary draftsmen and are not purporting to present a polished Bill. What we hope to show is that there is real scope, consistent with the country's EU obligations if the result of the referendum is to remain a member, for Parliament to define the limits of EU law.

[78] Under art 267 TFEU any national court may refer a question as to the interpretation of the treaties and EU acts.

[79] *R v Secretary of State ex p Factortame* [1992] QB 680

THE BOUNDARY OF EUROPEAN AND NATIONAL LAW BILL 2016
– ILLUSTRATIVE DRAFT CLAUSES

1. Add at the end of section 2 of the European Communities Act 1972 a new subsection:

> "(7) For the avoidance of doubt, references in sub-section (1) above to rights, powers, liabilities, obligations and restrictions created or arising by or under the Treaties are to, and only to, such as are held by the United Kingdom court to be within the competence of the European Union by virtue of the EU Treaties."

2. Add at the end of section 3 of the European Communities Act 1972 a new subsection:

> "(6) For the avoidance of doubt, references to principles laid down by, and relevant decisions of, the European Court do not extend to any decision of the European Court that an EU instrument or act of an EU institution is within the competence of the European Union if in the opinion of the United Kingdom court such is not within the competence of the European Union by virtue of the EU Treaties."

3. Courts in the United Kingdom shall apply the Charter of Fundamental Rights of the European Union only when,

   (a) interpreting or applying
      (i) the EU Treaties,
      (ii) an EU instrument,
      (iii) UK primary or secondary legislation to the extent that it discharges an EU obligation; or

   (b) otherwise implementing EU law.

4. Save when acting in the circumstances described in the preceding section, no court or tribunal in the United Kingdom shall give any relief or remedy by reference to, or in reliance upon, the Charter of Fundamental Rights of the European Union in respect of any laws, regulations or administrative provisions, practices or actions of the United Kingdom unless the same the court or tribunal would have given the same relief or remedy in the absence of the Charter.

5. (1) Protocol 30 to the Lisbon Treaty, as set out in Appendix 1 hereto, shall have effect.

   (2) The sixth recital to the Decision of the European Council on 19th February 2016, as set out in Appendix 2 hereto, shall have effect as an aid to the interpretation of the text in Appendix 1.

6. No court in the United Kingdom shall give any relief or remedy, other than in litigation to which the Crown or a public authority is a party, by application of the Charter of

Fundamental Rights of the European Union.

7. A United Kingdom court shall not make an order disapplying all or part of United Kingdom primary legislation by application of the Charter of Fundamental Rights of the European Union unless it shall first have referred to the Court of Justice of the European Union the question whether European Union law compels such disapplication.

8. In this Act the following expressions shall have the following meanings:-

"EU treaties"	the same meaning as given by section 1 of the European Communities Act 1972 as amended
"EU instrument"	the same meaning as given by Schedule 1 of the European Communities Act 1972 as amended
"EU obligation"	the same meaning as given by Schedule 1 of the European Communities Act 1972 as amended
"Lisbon Treaty"	the same meaning as in the European Union Act 2011

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