

1st March 2018

Mackenzie-Stuart Lecture 2018

What price sovereignty? Brexit and Human Rights.

Introduction

I am most grateful for the kind invitation that has been extended to me tonight to give this talk. It is a particular privilege that its name reflects the outstanding contribution Lord Mackenzie-Stuart made to the development of EU law and the work of the European Court of Justice in Luxembourg. As a Scots lawyer he was perhaps ideally placed to bring the breadth of the United Kingdom's legal traditions to the development of EU law. In helping facilitate the court's jurisprudence on market regulation and fair competition he strove to ensure that that the principle of cross frontier freedom to trade and work which underpin the EU would operate in practice as well as theory. His election as President of the Court at a time when it was under considerable pressure, reflected on his abilities and the respect in which our national contribution to its work was held.

I do wonder therefore what he would have made of the circumstances in which we find ourselves today. It is with sadness that I contemplate the events that form the background against which this lecture is taking place. If all goes according to the Government's plan, then by this time next year our participation in the

development of EU law will be approaching its end. Some like my colleague Boris Johnson will welcome this as the necessary step to restoring parliamentary sovereignty and nationhood-it was he who described the referendum result as our “Independence Day”. But others, including myself, will not . To my amusement I have found my concerns as to what is happening and my response to them in Parliament, earning me as an ex Attorney General the labels “rebel commander” and “a bespectacled Che Guevara”. If that is what I have indeed become, then this talk offers me a moment of reflection as to how I have got there and why I consider that we are at risk of losing far more than we will gain from leaving the EU.

There is of course nothing settled about Brexit on which to base some definitive commentary or opinion. Its final form and consequences remain unclear. For twenty months now we have seen the development of an unparalleled political and constitutional crisis for our country. It has precipitated the fall of one government and contributed last June to the failure of another to get a coherent mandate for carrying it out. It divides families, friends, generations and political parties. It is breaking apart the previous broad consensus between the mainstream political parties as to how the economy should continue to be managed. This can be seen in the demand for a return to socialism in large sections of the Labour voluntary party and in the differences of view about free market economics

amongst Brexit supporting Conservatives, all facilitated by the prospect of the removal of the existing EU legal framework. Meanwhile like most revolutionary upheavals it is bringing economic uncertainty in its wake.

It is also accompanied by a crisis of confidence in our political institutions. The public are showing an increasing dissatisfaction with the way our politics are being conducted. There are serious disagreements still being played out at present as to the respective roles that Parliament and the executive should perform in managing and authorising the Brexit process and we have had vitriolic abuse heaped on members of the judiciary for ruling on part of this issue in the Miller case. It also threatens the unity of our country because of divergent views in different parts of the United Kingdom as to how we should proceed.

I mention all these issues because they emphasise for me how the future of human rights after Brexit on which I wish to concentrate this evening cannot be isolated from the wider issues and extraordinary times in which we are living. Brexit constitutes a potentially profound change in our country's relationship with both our own and the international legal order with consequences that may flow from this both domestically and internationally.

In voting to leave the EU, the majority, in its repeated mantra of “taking back control”, was making some form of demand of the government for a change in direction for the United Kingdom in respect of our country’s participation in building supra national legal frameworks and our willingness to be bound by them. The referendum was also a demand concerning what is expected of our unwritten constitution, which has become heavily entwined with the supra national frameworks the UK has helped to build. It is because Brexit has the capacity to affect so many aspects of our national life that I thought it might be worthwhile giving this topic some consideration in the context of human rights. But I wish to emphasise that this is a politician’s view of evolving issues, not an academic’s analysis. I also want to look at how these matters are being played out at present in the debate taking place in Parliament.

BACKGROUND

It is a feature of our current debate on the future direction our country should take that, when one leaves to one side the arguments about the economy and freedom of movement and immigration, there is one thing on which most participants agree, namely the importance of Law for our country in reflecting, developing and protecting our national identity and wellbeing.

My Brexit supporting colleagues have in differing degrees signed up to the view that EU membership undermines the sovereignty of Parliament in a manner which is damaging to our independence, parliamentary democracy and our system of Law. This fits in with a national (if principally English) narrative that can be traced back to Magna Carta, Habeas Corpus and the Bill of Rights of 1689. It emphasises the exceptionalism of our national tradition which we can see recognised from a very early date. In the mid 15th century we have it celebrated by Chief Justice Fortescue in his “de Laudibus Legum Angliae” written in 1453. There the use of torture is deprecated and trial by jury and due process praised and with it its uniqueness to England. There is even an excellent section in it which, I suggested in parliamentary debate, might be relevant to who had the power to trigger Article 50. “The King of England” he said “cannot alter nor change the laws of his realm at his pleasure”. A statute requires the consent of the whole realm through Parliament.

And of course to this we can add the Case of Proclamations of 1610 in which Sir Edward Coke repeated what Fortescue had said 150 years earlier , the Petition of Right of 1628, the commentaries of William Blackstone and Lord Mansfield’s ruling in Somerset’s case. This national narrative has proved and is still proving very important. At times it continues to act as an effective restraint on British governments trying to curb freedoms when tempted to do so by threats to public

order or national security, as we saw over 90 and 42 day pre charge detention just a decade ago. It places Parliament as the central bastion of our liberties.

But this comforting political tradition is not necessarily supported by a detailed study of our history. It is possible to find periods and instances where its norms have not been observed, from Northern Ireland to Kenya and to Malaysia. It has also been used to support opinions that are less helpful to the Rule of Law as Lord Bingham defined it in his eight principles which he expounded in his 2006 lecture.

For Parliamentary sovereignty can also be used merely as an assertion of power, particularly when the executive has effective control over Parliament. In theory at least, our constitution is that the Queen acting with the assent of her Lords and Commons should enjoy an exercise of power unlimited by any other lawful authority. This is what the late Lord Hailsham characterised as its capacity for creating “elected dictatorship”. It is what allowed Henry VIIIth in his Act of Supremacy in 1534 to use Parliamentary authority to coerce his subjects on matters of deepest conscience and in the last century enabled the authorisation of detention without charge under the Defence of the Realm Act 1940.

Our EU membership however, provides one example how over more recent British history, but particularly since the end of the Second World War, we have embarked on policies that have developed and changed our laws, not just through domestic mechanisms but also through international engagement. Notwithstanding our pride in our national sovereignty, successive British governments in the last two centuries have sought to make the World a better, safer and more predictable place by encouraging the creation of international agreements governing the behaviour of states. When I was Attorney General, I once asked the Foreign Office to tell me as to how many we were signed up. They were reluctant to go back beyond 1834 but since then they said they had records of over 13,200 that the UK had signed and ratified. Many thousands are still applicable and range in importance from the UN Charter to local treaties over fishing rights. Over 700 contain references to binding dispute settlement through arbitration by a court or tribunal in the event of disagreements over interpretation. And with the passing years, these treaties, be they the UN Convention on the Prohibition of Torture or the creation of the International Criminal Court have dealt not just with inter-state relations, but state conduct towards those subject to its power. So important has been this treaty making that the Ministerial Code, until 2015, referred specifically to the duty of civil servants and ministers to respect our international legal obligations at all times. This was then deleted by the then PM David Cameron, probably in reaction to being reminded of this point

too often. But the deletion could only be cosmetic in its effect. The Cabinet Office had to admit it made no difference to the obligation. It is part of Lord Bingham's eighth principle of the Rule of Law. If it were abandoned we would be sanctioning anarchy on the international stage. In fairness, successive UK governments have, despite some lapses, been pretty consistent in observing its principles. We are after all still in the midst of commemorations of the First World War, which we entered explicitly to honour our international treaty obligations to guarantee Belgian neutrality-what a then German Chancellor was happy to describe as a "scrap of paper".

But that has not prevented us agonising and complaining over its impact, particularly in areas where it places constraints on the United Kingdom's power to legislate at will on domestic matters.

I don't want to get diverted this evening by the history of our adherence to the European Convention on Human Rights and its incorporation into our law through the Human Rights Act, however much it may have had influence on my political career. But I do put it forward as an example of an international treaty that has brought in its wake intense disagreements as to its value.

Any reasoned examination tells one that its impact has been profound and beneficial. Over the years it has produced a number of landmark decisions which have challenged and halted practices which were once considered acceptable in Western democracies but which would now be seen as wholly unacceptable by the overwhelming majority of the British public. Despite difficulties over the enforcement of some of its judgments, particularly in countries where the Rule of Law has previously been non-existent, the Strasbourg Court can show that it has been instrumental in bringing about positive changes of attitude by public authorities with a long track record of serial human rights violations. And since the Brighton Declaration of 2012 negotiated by Ken Clarke and myself, it has improved its processes, reduced its backlog of pending cases and unimplemented judgments and engaged in a constructive dialogue with our own senior courts that is influencing its jurisprudence. On any showing our support for the Convention and the Court has been a major achievement of British soft power on the international stage.

Yet for all this, my Party which supported its creation and the later right of personal petition is still calling for a review, with the possibility of replacing the HRA with a Bill of Rights that might call into question our future adherence to the Convention. I am reasonably optimistic that this will not in fact happen, but it is symptomatic of the discomfort a supra-national court causes and the

continuing dislike by some, of the effect of the Human Rights Act. It is noteworthy that other mainstream parties have at times been less than forthright in upholding the obligations the Convention imposes on us when it might need them to confront adverse public and media comment. Labour's long silence over resolving the issue of votes for some convicted prisoners arising out of the Hirst judgment was telling. It is very welcome to be able to note that both the Government and Labour have shifted their position and that it looks likely that this issue is now resolved.

WHAT HAS THE EU DONE FOR HUMAN RIGHTS ?

It is with these thoughts in mind that I turn to the impact that the EU has had on human rights law.

It is clear that, in the way it has developed, EU law has influenced rights. The legal order under the EU Treaties is of the greatest importance, since it provides the mechanism to ensure that the carefully agreed rules governing the inter-action of nation states and European bodies are respected. As the product of an international treaty, the EU can only be effective and be seen to be legitimate if its own operations are considered to respect the letter and spirit of the Treaties that created it. Furthermore, the ambitious nature of the project has produced a requirement not only for there to be the primacy of EU law over the national law

of its member states in areas of EU competence, but also the creation of parts of that law by its central bodies without the need for any domestically generated primary or secondary legislation at all. It is obvious that such a source of law could operate abusively, whatever the good intentions of its creators might be . The EU's member states clearly wished that EU law should further principles of democracy and the rule of law and values found in the constitutional traditions common to the Member states, including the principles reflected in the European Convention on Human Rights and other international treaties on social and economic rights to which all members are signatories, as set out in the preamble of the Charter of Fundamental Rights. But those general principles therefore need protecting . That is why they are now in a text in the Charter, which also covers the key obligations of member states in respect of the “Four freedoms” conferred on EU citizens in the Treaties.

It seems to me therefore to be rather ironic that the Charter should have been on the receiving end of so much vilification in the United Kingdom. I can see that criticism can be made of its use to claim rights that might be considered to fall outside the scope of the Treaties. I experienced this as Attorney General when I appeared in the Supreme Court for the Government in *Chester and McGeoch* in 2013, where an attempt was made to use the Charter to claim prisoner voting rights in EU elections. It is however noteworthy that this attempt failed. One can

also see that the CJEU may be accused at times of misapplying rights under the Charter through a defect in factual reasoning and perhaps an insufficient regard for the intention of the signatories -the case of *Telesweg and Watson* on Article 8 of the Charter on data retention is such an example. But the critics of the Charter's existence ignore the point that without it and the general principles of EU law it embodies, the risk would have been much greater of seeing EU law being created or applied that did not respect the limits of the Treaties or interfered with fundamental rights and left individuals and legal entities without any means of redress. But recognition of these benefits has been lost in the repeated denunciations of the Charter as an alien document intent on imposing a form of written constitution on us contrary to our principles of parliamentary sovereignty.

On a practical level however the impact of general principles of EU law on our country appears rather different. It has been the principal driver in recent years in promoting the development of equality law and social rights. For example it is due to EU law and Article 21 of the Charter that there are rights to protection against pregnancy discrimination, to equal pay for work of equal value and to protection against discrimination at work on grounds of sexual orientation, religion and age. The Equality Act 2010 may be a piece of parliamentary legislation that would have been supported nationally in any event, but it owes its origins to changes brought about by EU law. In Northern Ireland the lack of an

Equality Act means that equalities protections are an even more direct result of EU membership. It is noteworthy that despite some expressions of concern on the burden on business there has never been any serious resistance to these developments. And of course it is still happening. In the recent Supreme Court decision of *Walker v Innospec*, Mr Walker relied on a Framework Directive, interpreted in line with general principles of EU law of non-discrimination to disapply a provision of national law which restricted the extent to which same sex spouses could receive pension payments from pensions earned by their deceased spouse. At a political level I have not heard one word of criticism about this decision.

Despite my previous criticism it is also clear that another area of importance is privacy law. Article 8 protects personal data and in the matter of David Davis' and Tom Watson's challenge to the Data Retention and Investigatory Powers Act 2014, the Court of Appeal agreed with the Divisional Court that Article 8 of the Charter was more specific than Article 8 of the ECHR. My own opinion that the final decision of the CJEU is deficient in its reasoning does not diminish the importance of this right. In *Google v Vidal Hall* a Directive was interpreted in line with general principles of EU law, the ECHR and the Charter so as to require the payment of compensation for breaches of privacy, even when these breaches could not be shown to have given rise to pecuniary harm. As UK legislation

implementing the Directive could not be interpreted in line with it, the provision restricting compensation to pecuniary loss was disapplied. Again the overwhelming impression I have of public reaction to this outcome was that it was positive, once one excludes the self serving response of sections of the media.

I also can't overlook the recent decision in *Benkharbouche* in the Supreme Court. It held unanimously that two provisions of the State Immunity Act 1978 were inconsistent with Article 6 of the ECHR, interestingly on the basis that those provisions went beyond what was required to give state immunity under customary international law. Ms Benkharmouche's claim for the failure of her employers to comply with employment law ought therefore to proceed. But the ability for this to happen rested on the ability to disapply the legislation immediately because it also breached Article 47 of the Charter. Otherwise the court was left with only being able to make a declaration of incompatibility. At present I have not heard a word of opposition to this decision, or the fact that EU law has overridden a statute that appears on the court's reasoning to have been unnecessarily restrictive in relation to our obligations under international law.

Finally in this brief survey, the Charter has helped guide the legislative process to ensure that areas like worker's rights in Article 27 are kept in mind when the

law is changed. The same applies to environmental protection in Article 37 and consumer protection in Article 38.

I have to accept, of course, that there are some of my colleagues in Parliament who take the view that, at most, the only Human Rights that should be protected are those in the ECHR and even then, some wish any rights protection to be purely domestic and not subject to any international treaty obligation capable of interpretation by an international court. The cross party Commission on a Bill of Rights set up by the Coalition Government of 2010 highlighted a substantial philosophical difference on what constitutes “human” and “fundamental rights” that merit special protection. There may be an important jurisprudential distinction to be drawn between liberties and rights. As a Conservative I have always been cautious about the ability to widen the scope of fundamental rights and some economic and social rights place positive duties on the state that may in theory be important aspirations but are in practise hard to fulfil and involve a difficult and perhaps not readily justiciable balance between competing policy areas. We ought to be careful to ensure that law is not allowed to intrude too far into the realm of political choices. But that said, it is clear that there have grown up in the last half century areas of law particularly around equality and privacy, workers rights and consumer protection that are not well covered by the ECHR and are seen as fundamental rights by an overwhelming section of the public. So

much so indeed that the present Government has been at some pains to emphasise that in leaving the EU, it is not its intention to diminish any of these rights currently enjoyed by UK nationals through the *acquis*.

The problem however is that the approach of the Government as set out in the EU Withdrawal Bill suggests something rather different. Having just spent four months considering the EU Withdrawal Bill, I have to start by applauding the skills of the Parliamentary draughtsmen and women who put it together. I don't think I have ever seen a piece of legislation that conferred such power on the executive to change the law of the land by statutory instrument and where the entire structure was so closely interwoven that the same end could often be achieved by different routes.

The Bill proposes to take a snap shot of EU law, as it stands on exit day, and import it into our law. Thus EU Directives implemented by either primary or secondary legislation, to be known as “EU derived domestic legislation” (clause 2) ; EU Regulations referred to as “direct EU legislation” (clause 3) and directly effective provisions of EU law (clause 4) are all to be retained in so far as not replaced by primary UK legislation on matters such as immigration, trade, customs, agriculture and fisheries that the government intends to enact before exit day. But at the same time, the Government is then excluding the Charter of

Fundamental Rights which is not to be part of domestic law after exit day (clause 5(4)), nevertheless allowing general principles of EU law to survive along with the ability to make continued reference to the Charter, in so far as it is necessary to interpret retained EU law. The principle of the “supremacy” of EU law will continue post exit day but only as regards laws enacted prior to exit day or modified after exit day, where the modification clearly intends to preserve that supremacy (clause 5(1) to 5(3)). But Schedule 1 paragraph 3(1) makes clear that from exit day there will be no right of action in domestic law for any failure to comply with any of the general principles of EU law. These general principles are not defined. Paragraph 3(2) then states that after exit day “no court may disapply, quash or decide that action is unlawful because it is incompatible with general principles of EU law”.

The Government thus intends to reduce both the Charter and general principles of EU law to no more than interpretative aids to retained EU law. The protective rights previously provided to challenge any abuse arising from the operation of EU law evaporate, leaving only the possibility of a challenge under the Human Rights Act if protections covered by the ECHR are subverted. From speaking to Ministers and looking at government statements, the justification tendered for this is that it would be wrong, as we are leaving the EU, to allow any element of judicial supremacy inherent in the way EU Law has operated to survive, as it

offends the parliamentary sovereignty we are supposed to have lost and are now restoring. The alternative of allowing our own Supreme Court to fulfill this role, after exit day, has been dismissed.

It is the anomaly of the result that troubles me. One of the principal complaints concerning EU law is that it was either forced on Parliament, which has been obliged to enact statutes or statutory instruments, as necessary, to meet the EU 's requirements or worse, have been directly imposed on us by the Commission acting on the authority we surrendered to the EU in the Treaties. Furthermore to try to maintain predictability we are preserving its supremacy in relation to pre Brexit enacted primary domestic legislation. More remarkably still we are going to treat all Direct EU legislation as Primary for the purposes of the Human Rights Act (Schedule 8, Paragraph 19) even though a lot of it has the character of secondary legislation and is technical-there are 615 implementing regulations in the area of the environment, consumers and health protection alone. Implementing regulations are made by the EU Commission using delegated authority to enact EU measures and can therefore be argued to be similar to secondary legislation in the UK. Paragraph 19 of Schedule 8 has the consequence that at most such implementing regulations can be subject to a declaration of incompatibility. It may be many years indeed before it is all replaced with new domestic laws. In the meantime those subject to retained law, have very limited

means to challenge it. In a remarkable arrogation of power, Paragraph 1 (2)(b) of schedule 1 leaves open the possible creation of a right to challenge retained EU law for being invalid at the date of exit but only if the challenge is “of a kind described or provided for in regulations made by a Minister of the Crown”. I can think of no other example of a legal right being created or denied in such a fashion by the executive. And while this is all being sanctioned by Parliament in the Withdrawal Bill itself, its immense scope does not provide reassurance that its full effect has been considered.

As has been much commented on, the Bill also provides for some of the most extensive Henry VIII powers to change primary legislation by statutory instrument. This may be inevitable in order to bring Brexit about within the time constraints under which we are operating. And there are sunset clauses for the use of Statutory Instruments. But it does mean that important primary legislation such as the Equality Act could be amended by this method within the permitted period. Then there was Clause 9, which before we amended it in the Commons allowed the Government to start enacting Statutory instruments to take us out of the EU in furtherance of a Withdrawal Agreement even before we know what it is, even changing if necessary any part of the Withdrawal Bill itself.

The same features can be seen in other legislation linked to Brexit. The Trade Bill and Taxation (Cross border trade) Bill all propose to hand unaccountable law making power to the executive on the same justification. Taken together they constitute an undermining of the Rule of Law because they substitute executive discretion on questions of legal right and liability, rather than enacting and defining in law the criteria for resolving questions of how the law should be interpreted.

The complexity of what is being attempted creates uncertainty as to how the law will operate. This may bring the legal professions a lot of work, but it is not what Lord Bingham recommended in his first principle of the Rule of Law that : “the law must be accessible and so far as possible intelligible, clear and predictable”. One area in particular looks problematical. It is not at all clear whether the continuing supremacy of retained EU law post exit allows for quashing of pre exit domestic legislation, nor what particular weight should be given to post exit CJEU authorities by our courts, assuming an intention by the Government to mirror areas of EU law to maintain compatibility, for the sake of a post exit agreement governing our future relationship with the EU. If such an agreement is reached it may well be that a whole new set of rules will be required. I don’t find it surprising that members of the senior judiciary have expressed concern over having to make rulings on issues that may have great political sensitivity, as well

as economic consequences if the choice facing a court is between regulatory consistency or divergence in an area of trade between the UK and the EU.

It is on these matters that the debate in Parliament has been focussed. Apart from its defeat on Clause 9, the Government listened to some of the concerns around the Henry VIIIth powers to remedy deficiencies in Clause 7 and further agreed a sifting mechanism for deciding if Statutory instruments made under the Bill should be dealt with by the affirmative or negative procedure. But I was disappointed that I wasn't able to do more to persuade the Government to move further to, at least, allow challenges to the operation of retained EU Law to be brought for breach of General principles of EU law. I saw this as a stop gap following the removal of the right to do this under the Charter. We shall have to wait and see what approach is taken to this issue in the House of Lords.

The EU has been both an important source of law and an important field of legal co-operation for us during the course of our membership. It has helped to develop and promote the Rule of Law for our own benefit and that of fellow member states. Our departure leaves a lot of unresolved issues as to how that co-operation can be maintained.

It is noteworthy, in this context, that the Prime Minister has recognised the importance for us, as well as for the EU, of continuing to participate in areas of justice and home affairs including the European Arrest Warrant and the Schengen Information System needed to support law enforcement co-operation across the EU. There are also the agreements such as those to manage Asylum applications contained in the Dublin Framework which have underpinned attempts at creating some order in a complex and difficult field and enabled us to return a significant number of asylum seekers to other EU countries. Equally important are the civil law measures which include matters as diverse as high value commercial litigation and contact arrangements for children. The recast Brussels Regulations have created rules to ensure uniformity and certainty for litigating parties including the mutual recognition of judgments and their enforceability in member states including the use of injunctions. They have been of the greatest benefit in making the UK an attractive place to litigate.

The Government's position towards some of these latter measures appears to be ambivalent as it has been suggesting it may ask for new arrangements for our participation in substitution for the present ones.

The intention however is of wanting to remain in these types of arrangements after Brexit. The possibility of doing this is reinforced by the fact that other non

EU states have been able to participate in some of them. It is arguably, very much in the interests of the EU that we should continue to do so. But it seems very likely that we are going to do this as associates or observers. Our ability to shape the continuing development of these laws and frameworks is going to be reduced, all in fields of co-operation where our well established Rule of Law tradition means that we have hitherto been able to lead on them. We are going to be rule takers not makers. I see this as one of the most serious side effects of Brexit. As an example we have rightly indicated our concern about how EU Data Sharing law has been developing. We are enacting primary legislation to give effect to the new General Data protection Regulation of the EU, to which we have provided input, in a Data Protection Bill . But once outside the EU our ability to contribute to further changes will be gone, although we will still be required to observe those changes in all data exchanges with EU countries and ultimately it will be the CJEU that will in practice determine what is permissible and what is not.

Although the EU may be secondary to the role played by the Council of Europe in promoting human rights more generally on our continent, its role has been substantial. The EU Fundamental Rights Agency founded in 2007 works to promote human rights within the EU, playing an important role in member states where democracy and the rule of law are still newly established. It has used UK NGOs and institutions to help it with its work. The Balance of Competences

Review in 2014 carried out by the government described the Agency's output as accurate and of good quality. But after Brexit we will no longer be able to play any formal role in its work. A useful element of UK soft power projection in promoting human rights will be lost. So will our ability to use our EU membership for the promotion of human rights and the Rule of law outside the EU. It is easy to overlook the EU's role in doing this. But it has had considerable leverage. Council Regulation 1236/2005 banned the export of instruments of torture and is now extended to death penalty drugs. Negotiations of trade deals with third countries have included provisions requiring human rights issues to be addressed. Turkey's abolition of its death penalty in 2004 was a requirement for the conclusion of its engagement with the EU in deepening relations with a view to eventual membership.

THE CHALLENGE FOR THE FUTURE

At the inevitable risk of being characterised as a "Remoaner", I am afraid that the analysis I have tried to carry out of the consequences of Brexit on human rights law does not make me enthusiastic for its alleged benefits. There may be a bright economic future for us somewhere outside the EU, but in terms of the development of our Law and of the maintenance of the Rule of law both here and abroad it is a revolutionary event, the creator not of some new order but of potential chaos which the convolutions and oddities of the EU Withdrawal Bill

only serve to emphasise. It is a profoundly un conservative act. For those ideological purists who are convinced that our laws will be improved by the removal of forty five years of foreign and new fangled accretions, I fear there will be disappointment. The ghosts of those accretions will be poltergeists lurking around to haunt them with random and unpleasant consequences for many years, and the substantial legal benefits that have come from them for the majority of citizens risk being diminished or lost in uncertainty.

Nor do I think that this will be the end of the matter. The reality is that over the years of our EU membership we have inevitably acted at an EU level on matters which would otherwise have featured as part of a domestic national conversation in any event. It may be EU membership that has entrenched certain equality, privacy and social rights in our country to the disgust of believers in untrammelled Parliamentary sovereignty. But might this not have happened anyway? It is true that in the Human Rights Act we proceeded with respect for our constitutional traditions in deciding on the mechanism of declarations of incompatibility rather than creating strike down powers. But the idea that in 2017 we should now relegate EU derived rights to a wholly unprotected status, flies in the face of evolutionary changes in human society. Doubtless any of our forebears at the court of Henry VIIIth might have been surprised and appalled if they had

seen an advance copy of the Bill of Rights of 1689, but that does not mean their descendants in 1689 got it wrong.

It must at least be possible therefore that our departure from the EU and the loss of the entrenched protections it entails is going to lead to a debate on how we go forward. The proposal of a domestic Bill of Rights with protections additional to the Human Rights Act which could adequately cover equality and privacy laws might help address this issue. Doubtless the debate will have at opposite poles, those resolutely opposed to any laws enjoying a special status and those for whom the Charter of Fundamental Rights was the first step to an overarching architecture of entrenchment of fundamental rights and judicial supremacy in their application. As a Conservative this latter view is certainly not mine, but I am concerned that some of my colleagues have not even noticed the existence of this lobby or the extent to which such rights have become accepted by the general public as of great importance even if the public have had no reason to consider their origin or how they are secured.

As Brexit proceeds this debate will not be confined to Westminster. The return of powers from the devolved administrations to Whitehall and Westminster provided for in clause 10, 11 and Schedule 2 of the Bill is a source of political controversy because of the way Clause 11 prevents the devolved legislatures

enacting any laws thereafter to modify retained EU law even if it falls within their devolved area of competence. Equal opportunities (except in Northern Ireland) and data protection have always been reserved matters but there is no doubt that the Scottish Government and the Welsh Assembly Government have shown no hostility to rights entrenched by EU membership. Indeed, one view of the devolution settlements of Wales and Scotland is that human rights are a devolved matter and Wales has incorporated the UN Convention on the Rights of the Child into its domestic law through the Rights of Children and Young Persons (Wales) measure 2011. In the Northern Ireland context we continue to have the unresolved issue of implementing a special Bill of Rights additional to the Human Rights Act that was provided for in the Good Friday agreement but has never been carried forward. All these issues are likely to have a bearing on any debate on EU derived rights and the removal of protection from them as we leave. I would not wish to speculate as to where it will all end up.

CONCLUSION

“Taking back control’ is a powerful idea in conditions where the decline in general confidence in institutions both national and supra national has become so marked. But in an increasingly interdependent World what constitutes the benefit of exclusive control becomes harder and harder to identify. The risk is that it is largely a mirage that leaves individuals in practice fewer opportunities to enjoy a

good quality of life or obtain redress for administrative failings. It is also a uniquely disruptive form of change that precipitates the very reverse of “quiet government”, which the Book of Common Prayer has long enjoined us to pray for and which the United Kingdom has traditionally aspired to deliver to its citizens. The principal short term beneficiary of this is the Executive as a result of its accruing more power in response to the disruption. Those of us who believe that a lively, free and therefore successful democratic society thrives on checks and balances, are going to have to work hard to ensure that we protect and preserve a legacy of international co-operation and engagement that has done all of us in this country very little harm and undoubtedly a great deal of good.

DOMINIC GRIEVE QC MP.