
OPINION

1. I have been asked to advise as to whether sections 12-15 (and relevant related sections) of the Draft Constitutional Renewal Bill are ‘constitutional’, such that they are compatible with the UK’s constitution, including the Human Rights Act 1998 and with the standards of international law.

Relevant provisions of the Draft Bill

2. The following is a summary of the relevant provisions in the Draft Bill (set out not always verbatim in order to concentrate on the issues relevant to their constitutionality, and with emphases added).
3. **Section 12** of the Draft Bill provides that the Attorney has the power (a) to direct the abandonment of *investigations* by the *Director of the Serious Fraud Office* (SFO) and (b) to direct that *any prosecutor* not institute or abandon any *legal proceedings*.
4. **Section 12(1)** permits the Attorney to make such directions “if satisfied that it is necessary to do so for the purpose of safeguarding national security”.
5. **Section 13 (5) (a)** seeks to prevent any such possibility of judicial review of the Attorney’s directions under section 12, by providing

that a certificate signed by a Minister of the Crown certifying that the Attorney's direction was "necessary for that purpose" (i.e. to safeguard national security) shall be "*final and conclusive*". **Section 13 (5) (b)** provides that even a document "*purporting*" to be such a certificate shall be received in evidence and treated as being such a certificate unless the contrary is proved.

6. The draft bill seeks to make up for the lack of legal accountability of the Attorney's directions on national security by providing for compensating political accountability. **Section 14(3)** requires the Attorney to lay a report before Parliament on the directions as soon as practicable after issuing them.
7. Exceptions to this requirement are provided in **section 14(3)**, which states that the Attorney may not include information in his report to Parliament if he "is satisfied" that the information could (a) maintain a claim to legal professional privilege, or that - (b) "the inclusion of the information would *prejudice national security* or would seriously prejudice *international relations*", or (c) the information would prejudice the investigation of a suspected offence or proceedings before any court.
8. **Section 17(3)** defines "international relations" as including:
 - (a) Relations between the United Kingdom and any other State;
 - (b) Relations between the United Kingdom and any international organisation or international court;
 - (c) the interests of the United Kingdom abroad;
 - (d) the promotion or protection by the United Kingdom of its

interests abroad.

What is meant by a bill being ‘unconstitutional’?

9. In the absence of a written constitution, is it possible to say that any statute is ‘unconstitutional’? The conventional view holds that it is not possible, because our primary unwritten constitutional principle is the sovereignty of Parliament, which provides that any properly enacted statute has the force of law. If the statute cannot be disapplied by any court, then it is, *ipso facto*, constitutional.

10. This view may prevent the courts from striking down any properly enacted statute (at least outside of European Union Law, under which Parliament has conceded sovereignty to the EU), but does not address the broader question as to whether such a statute may nevertheless offend (a) what are called implied, or unwritten constitutional principles, and (b) the provisions of the Human Rights Act 1998. Account must also be taken of what might be called (c) the radical view that courts do nowadays have the authority to call into question the validity of a statute which fundamentally offends the rule of law, at least to the extent that the statute seeks to oust the jurisdiction of the courts.

11. These three routes to unconstitutionality will now be briefly considered:

(a) Implied constitutional principles

12. In recent years the courts have recognised and endorsed the

existence of a number of unwritten constitutional principles, holding that such principles are implicit in the fact that the UK is a constitutional democracy. These principles include the independence of the judiciary (part of a larger principle of the separation of powers); freedom of expression, equality and, most repeated, the rule of law.

13. When legislation offends principles such as those, and where it is challenged in the courts, in recent years judges have sought to reconcile those principles with the sovereignty of Parliament by means of what has been called the “*principle of legality*”.¹ Under that principle if a Parliamentary statute is ambiguous, or does not clearly seek to contradict the rule of law (or other constitutional principle such as freedom of expression) the rule of law (or other fundamental principle) is presumed to apply.

14. Under the principle of legality, therefore, it is possible to assert that legislation which offends the rule of law is contrary to constitutional principle, whether or not the courts have the power to strike down that legislation.

(b) Statutes with constitutional status: The Human Rights Act

15. In addition to implying that some principles have constitutional status, the courts have recognised that some statutes have constitutional status. As such, they are exempt from the doctrine of implied repeal (in other words, later statutes are presumed not to

13. ¹ [2000] 2 A.C 115.

contradict them, unless this is made clear in the statute itself)².

16. One such statute is the Human Rights Act, 1998 which incorporates the European Convention on Human Rights into UK domestic law to the extent that all action of public officials may be struck down if inconsistent with Convention rights. In respect of legislation, the Act permits the courts to review all statutes for consistency with Convention rights. Although under the Human Rights Act the courts do not have the power to strike down offending legislation, they do have the power to declare it incompatible with Convention rights.

(c) The radical view

17. Outside of the declaration of incompatibility under the Human Rights Act, and outside of European Union law, our courts have never struck down a statute as unconstitutional. However, recent *obiter dicta* in the House of Lords have expressed a more radical view, suggesting that the English courts may well possess the authority to strike down a statute that offends the rule of law, and particularly that sense of the rule of law which insists upon access to the courts. In *Jackson v. Attorney- General*³, Lord Steyn (at para.102) said that, although the supremacy of Parliament was still the general principle of the UK constitution:

“The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts

14. ² *Thoburn and others v. Sunderland City Council* [2001] EWHC Admin.934.

³ [2005] UKHL 56; [2006] 1 A.C. 262

may have to qualify [that] principle. [If there were] an attempt to abolish judicial review or the ordinary role of the courts, the [courts] may have to consider whether this is a constitutional fundamental which even a sovereign Parliament . . . cannot abolish”.

Lord Hope said (at para.107):

“The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based”

and Baroness Hale said (at para.159):

“The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers”.

18. To summarise this section

- a. Inherent in our unwritten constitution are principles which, whether or not they involve a challenge to legislation, are expected to be observed.
- b. When there is a clash between legislation and constitutional principle. the courts attempt to resolve it by the principle of legality, which makes the presumption that constitutional principles are expected to prevail but can be overridden by express words or necessary implication.

- c. Under the Human Rights Act 1998, legislation that contradicts Convention rights can be declared incompatible by the courts (although the courts are not conferred the power, under that Act, to strike down the legislation).
- d. Some judges have recently expressed the view, albeit only in *obiter dicta*, that the principle of the rule of law, especially in its sense of requiring access to courts, is so fundamental that any statute contradicting that principle could be declared unconstitutional. Other judges have not accepted that view.

Does the ouster clause offend constitutional principle?

19. The first principle in play is the *separation of powers*, which in general forbids the legislative or executive branch of government from interfering in the area of law-enforcement in respect of individual cases. As a general rule, therefore, the executive branch of government should not seek to interfere in either the investigation of individual crimes or in decisions whether or not to prosecute on a particular case.

20. The constitutional principle of the *rule of law* contains a number of constitutional strictures, of which two are relevant: First, that Parliament's laws should be enforced where practical and second, that a decision of a public official should be open to challenge in the courts and that access to justice should not be denied. Volume 8(2) of Halsbury's Laws of England (1996) under the title, Human

Rights and Freedoms, lists at para.119, “The Right to the Protection of the Law”.

21. De Smith’s Judicial Review⁴ states at para 4-015:

“ . . . [T]he role of the courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of public authorities exercising public functions, and to afford protection to the rights of the citizen. Legislation which deprives them of these powers is inimical to the principle of the rule of law, which requires citizens to have access to justice.”

22. Our courts have taken unusual steps to evade ouster clauses of different kinds, by adopting the presumption that Parliament did not intend such a clause to protect a decision which went outside the decision-maker’s “jurisdiction”.⁵ Jurisdiction is widely defined as encompassing virtually any error of law. It is possible therefore that the courts would, despite section 13 of the Draft Bill, accept a challenge to the Attorney’s decision under section 12, if it were alleged, for example, that, in seeking to prevent a prosecution or investigation, he took into account a consideration irrelevant to national security – such as commercial relations between the UK and a foreign country.

21. ⁴ (6th ed 2007 by H. Woolf, J.Jowell and A. le Sueur)

22. ⁵ *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147. See also *re Racal Communications* [1980] 2 All ER 634, where Lord Diplock considered that although judicial decisions may still be protected under a “conclusive evidence” clause, that protection would not necessarily

23. It is interesting to note that although the European Convention on Human Rights does not specifically mention the rule of law, Article 6 does provide the right to a fair trial, which is put as follows:

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

In *Golder v UK*,⁶ the European Court of Human Rights interpreted that section purposively, holding that :

“ . . . one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.”

Does a decision on national security justify the ouster clause?

24. That part of the rule of law which requires that laws should be enforced where practicable has traditionally been regarded as open to a degree of elasticity (‘selective enforcement’) in exceptional circumstances, one category of which is *national security*. That part of the separation of powers which requires the executive not to interfere in the enforcement of the law is also open to exception where national security is involved.

25. Do the provisions in sections 12 and 13 of the Draft Bill therefore provide a justifiable exception to these principles, or do they (and

extend to decisions of public officials.

⁶ (1975) 1 EHRR 524

the ouster clause under section 13 in particular) violate them?

26. In her evidence to the Justice Committee on 10 June 2008, the Attorney gave the reason for the ouster clause. She said that it merely reflected the legal situation, as adumbrated by Lord Hoffmann in *Secretary of State for Home Affairs v. Rehman* ⁷ at [50] and [62], that decisions about national security are matters for the executive, rather than the courts, to decide.
27. It is important to note, however, that Lord Hoffmann also said in that case that: "This does not mean that the whole decision [on national security] . . . is surrendered to the Home Secretary." He went on, at [54], to say that the factual basis for the decision could be examined by the court (the question of whether there was any evidence to support the decision on national security); as could the issue of its reasonableness, or whether fundamental human rights were in issue (which they were not in *Rehman*).
28. It is also important to note that in *Rehman* Lords Slynn and Steyn (with whom Lord Hutton agreed) were much less emphatic as to whether national security was or was not a matter wholly reserved to the executive. Indeed Lord Steyn said, citing much case-law, that "It is well established in the case law that issues of national security do not fall beyond the competence of the courts" (at [31] – emphasis added). Lord Slynn said that although national security was "primarily" a matter for the executive (at [17]), the minister's decision was open to review, especially on the basis of lack of evidence.

29. Indeed Lord Hoffmann directly challenged the government's judgment on national security in the later, famous *Belmarsh Prison* case.⁸

30. With respect, contrary to the Attorney's assertion in her evidence on 10 June, in recent years the courts have been anxious to limit the opportunity for any governmental official to plead national security in the absence of evidence supporting the fact that national security is genuinely at risk. This approach accords with an increasingly rigorous "culture of justification" under which all public decision-making is required to be based on cogent evidence and argument.⁹ Three particular developments in respect of the Attorney's role should be noted:

a. Whereas in the past the 'prerogative' power of the Crown was considered immune from judicial review, this is no longer automatically the case.¹⁰ The Attorney-General's prerogative prosecutorial power (as a Law Officer of the Crown) is, similarly, now subject to judicial review.

b. The courts no longer accept the mere say-so of the government, through the Attorney, that matters of national security are in jeopardy. Although the courts may or may not probe deeply into the credibility of that evidence, at least

26. ⁷ [2001] UKHL 47

27. ⁸ *A v. Minister of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C.

28. ⁹ Woolf, Jowell and Le Sueur, *de Smith's Judicial Review*, (6th.ed. 2007); chapter 11, entitled: Substantive Review and Justification".

¹⁰ *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374. (The GCHQ case).

some evidence must be produced to justify the Attorney's claim of risk.¹¹

- c. Moreover, in a number of situations, where the rule of law or fundamental rights (including Convention rights) are on their face compromised, the Attorney General will be required to show that her actions are not 'disproportionate', on the basis of a series of structured tests to ensure that the means justify the ends and the measure is "necessary [and not merely "desirable"] in a democratic society" or "strictly required by the exigencies of the situation".¹²

31. This approach is supported by the jurisprudence of the European Court of Human Rights (ECHR) and the International Court of Justice (ICJ).

32. In *Tinelly and Sons Ltd. V UK*¹³ the ECHR had to consider public interest immunity certificates involving national security considerations issued by the Secretary of State in discrimination proceedings. The Court observed (at 290 para.77):

“. . . the conclusive nature of the . . . certificates had the effect of preventing a judicial determination of the merits of the applicants' complaints . . . The Court would observe that such a complaint can properly be submitted for an independent judicial determination even if national security

¹¹ *Ibid.*

¹² See most graphically in the Belmarsh detention case, footnote 5 above.

¹³ (1998) 27 EHRR 249

considerations are present and constitute a highly material aspect of the case. The right guaranteed under Article 6(1) of the Convention to submit a dispute to a court or tribunal in order to have a determination on questions of both fact and law cannot be displaced by the ipse dixit of the executive”

33. In *Case Concerning Oil Platforms (Iran v. USA)*¹⁴ the ICJ considered the right of defence in international law where the USA had used force, which it considered necessary for the protection of its essential security interests. The Court said, at para. 43:

“ . . . As the Court emphasized, in relation to the comparable provision of the 1956 United States/ Nicaragua Treaty in the case concerning Military and Paramilitary Activities in and against Nicaragua, “the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be ‘necessary for that purpose’; and whether a given measure is “necessary” is “not purely a question for the subjective judgment of the party (ICJ Reports 1986 p.141, para.282), and may be asserted by the Court. . . .As the Court observed in its decision of 1986 the criteria of necessity and proportionality must be observed.”

34. Conclusions

(a) Under the common law, the Human Rights Act and the standards of international law, decisions by the

33. ¹⁴ Judgment of ICJ 6 November 2003

executive on national security are amenable to judicial review at least for lack of evidence, but also for review for error of law, unreasonableness and proportionality.

- (b) The ouster of judicial review, even in cases where national security is in issue, violates the fundamental constitutional principle of the rule of law which is implied in the UK constitution.
- (c) If the Draft Bill were enacted into law, the ouster of judicial review under section 13 could be construed narrowly by our courts, to the extent at least of permitting a challenge on the ground of the Attorney's taking into account a factor outside of the accepted definition of 'national security', or acting otherwise unfairly or unreasonably.
- (d) The ouster of judicial review under section 13 is vulnerable to challenge under the Human Rights Act, leading to a declaration of incompatibility.
- (e) Under the radical view, where the rule of law is regarded as the "ultimate controlling factor on which our constitution is based", the ouster clause could be disapplied by the courts. But this would be a dramatic step for the courts to take and there is still strong judicial reticence about taking that step.

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