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A European Perspective

Laurence Burgorgue-Larsen^{*}

Introduction

For a lawyer brought up on the continent of Europe, an examination of the United Kingdom's legal system, particularly its highest court, the House of Lords, produces something of a shock. There is the initial shock that derives from seeing how two great legal cultures, embodying two distinct modes of thinking about the law, confront each other as they try to embed and extend their influence throughout the world. The sacrosanct dividing line between common law and Romano-Germanic law is a plain fact that cannot be denied and it strikes any casual observer forcibly. But a further shock flows from this first one. It relates to the place of the House of Lords at the heart of European constitutionalism. We all know that the highest British court is not itself a 'Constitutional Court', given that there is no written British constitution. But, notwithstanding the special nature of British constitutional law, the judicial arm of the House of Lords and the Judicial Committee of the Privy Council constitute two bodies, comprising mostly the same judges, which retain the power to interpret laws in the light of constitutional principles, in particular principles of common law, and also the power to control the division of competences between the constituent parts of the United Kingdom.¹ The House of Lords is therefore a kind of constitutional court, but its powers and ways of operating are clearly not within the mainstream which one French constitutional expert describes as 'the European constitutional justice model'.² The essential feature of this 'model' is judicial oversight of what is constitutional. But we should be careful not to delude ourselves. Continental constitutional

^{*} Je tiens ici vivement à remercier Brice Dickson pour avoir assuré une excellente traduction de mon article et de m'avoir indiqué les derniers développements jurisprudentiels de la House of Lords.

¹ C Girard, 'Le réalisme du juge constitutionnel britannique. Un réalisme doucement réformé', *Les Cahiers du Conseil constitutionnel* (Paris, no 22, 2007) 256.

² See L Favoreu, *Les Cours constitutionnelles* (Paris: PUF, 1986). His students, sometimes referred to as representatives of the 'Aix' school, have taken up this vision: see L Favoreu, P Gaia, R Ghevontian, J-L Mestre, O Pfersmann, A Roux, G Scoffoni, *Droit constitutionnel* (Paris: Dalloz, 2008).

justice is heterogeneous in nature: its uniformity is deceptive.³ The European constitutional justice model presents, on the surface, a certain uniformity, but when one looks more closely at European constitutional courts, the key characteristic which comes to the fore is diversity.

It is indisputable that the vast majority of states on the continent of Europe have, in effect, adopted the well-known Kelsen model of constitutional justice whereby responsibility for determining what is constitutional is allocated to an independent body outside the normal judiciary.⁴ This approach demystifies the law, although sometimes history has demonstrated that this may not be a good thing. Parliamentary bodies find themselves subjected to oversight by the guardians of the constitution, with the result that the latter is magnified at the expense of the ordinary law. The House of Lords certainly does not conform to this pattern. The gap is a yawning one, first, because the highest British court is an integral part of the British judicial system—it does not in any way sit outside that system—and second, because parliamentary law, which is an expression of the wishes of the representatives of the people, cannot be challenged in Britain as it has an almost sacred status. The doctrine of Parliamentary sovereignty, developed by the unbending Professor Dicey, still reigns supreme and there is no way of challenging it, at any rate not directly. Today the House of Lords has practically no other function than to deal with appeals brought before it, whether in civil or criminal matters.⁵ On the other hand, what seems normal in London—the establishment of the highest judicial body at the very heart of the parliamentary forum—appears on the continent of Europe to be a clear violation of the doctrine of separation of powers.⁶

If the gap between the House of Lords and continental constitutional courts is huge, we have to remember at the same time that the constitutional history of European states—indeed history itself—has been a powerful factor affecting the heterogeneity of the powers, the oversight mechanisms and, last but not least, the frames of reference for national constitutional courts on the continent. In short, the European ‘model’ of constitutional justice has left its mark on the mosaic. To

³ C Grewe, ‘A propos de la diversité de la justice constitutionnelle en Europe: l’enchevêtrement des contentieux et des procédures’, *Les droits individuels et le juge en Europe, Mélanges en l’honneur de Michel Fromont* (Strasbourg: Presses universitaires de Strasbourg, 2001) 255–6.

⁴ Although some states, like Denmark and Greece, have chosen to put in place a Supreme Court which has the ultimate say over constitutional issues, most countries have opted to create a constitutional court sitting outside the judicial system *stricto sensu*.

⁵ N Lenoir, ‘La Chambre des Lords à propos des projets actuels de réforme constitutionnelle’, *Les Cahiers du Conseil constitutionnel* (1997, no 3) 59.

⁶ The reform of the House of Lords introduced by the Constitutional Reform Act 2005 has definitely attenuated this critique and brings the British system closer to constitutional systems where separation of powers is better exemplified. See A Antoine, ‘La réforme de la Chambre des Lords: chronique d’une révolution au long cours (1999–2007)’ (2008) *Revue de droit public et de science politique en France et à l’étranger* 1331; and by the same author, ‘Les enjeux de la création d’une cour suprême au Royaume-Uni et la Convention de sauvegarde des droits de l’homme et des libertés fondamentales’ (2008) *Revue internationale de droit comparé* 283; Lord Hope of Craighead, ‘The Reform of the House of Lords’ (2008) *Revue internationale de droit comparé* 257.

examine the House of Lords today from the perspective of a continental lawyer is not easy, because the various courts which in general terms can be compared with the Law Lords do not themselves have a great deal in common. In fact, even if we confine ourselves to the extent of their powers, one might wonder what resemblance the French *Conseil constitutionnel* has to the Belgian *Cour d'arbitrage*, recently renamed the *Cour constitutionnelle*.⁷ The former was created in 1958 with the specific aim of serving as a reliable mechanism for ensuring that Parliamentary activity was rational.⁸ In a country which was essentially hostile to any oversight over constitutionality, the *Conseil* waited until 1971 before giving itself the freedom to be the ultimate arbiter of the legislator's output.⁹ It is only very recently, on the occasion of the 24th amendment to France's Constitution of 4 October 1958, that France constructed an indirect mechanism for checking the constitutionality of laws.¹⁰ The Belgian *Cour constitutionnelle*, for its part, was created in 1980 on the occasion of a revision of the Constitution designed to complete the federalisation of the country. Its powers were reduced to those it had first been given, namely overseeing the constitutionality of laws and decrees and supervising the division of responsibilities among the state, the communities, and the regions. In 1988 Parliament decided to enlarge its powers by giving individuals the right to lodge cases and by allowing it to deal with a significant number of constitutional disputes concerning the right to equality, freedom from discrimination, and education.

In the same way, one might ask, what are the links between the constitutional courts of Spain and Poland? On the one hand we have the Spanish Constitutional Court, where each year 98 or 99 per cent of the cases dealt with concern judicial review claims (*amparo*) by individuals arguing that one of their fundamental rights as laid down in the Constitution of 27 December 1978 has been violated.¹¹ In

⁷ In May 2007 the Belgian *Cour d'arbitrage* joined the current mainstream European position whereby judges deciding constitutional issues are seen to be part of the constitutional judicial structure.

⁸ See the special issue of the journal *Pouvoirs*, *Le Conseil constitutionnel* (Paris: PUF, 1991). On the numerous critical analyses of the way the *Conseil constitutionnel* operates, see D Rousseau (ed), *Le Conseil constitutionnel en questions* (Paris: L'Harmattan, 2004).

⁹ *Cons. Const.*, 16 July 1971, *Liberté d'association*, no 71-44 DC.

¹⁰ Article 61 §1 of the French Constitution as amended on 23 July 2008: 'When, during the course of proceedings before them, it is maintained that a legislative provision is in breach of the rights and freedoms guaranteed by the Constitution, this question can be referred to the *Conseil constitutionnel* by the *Conseil d'Etat* or the *Cour de Cassation*, and the *Conseil* must pronounce on the question within a specified time. A constitutive law will set out the conditions subject to which this article will apply.'

¹¹ On the basis of Article 53§2 of the Spanish Constitution: 'Every citizen can invoke the protection of the freedoms and rights recognized by Article 14 and by section 1 of the second chapter before ordinary courts, in accordance with a procedure based on priority and urgency, and before the Constitutional Court through judicial review proceedings (*amparo*). This latter recourse is available when there is a conscientious objection recognized by Article 30.' See, for a summary of the powers of the highest Spanish court, P Bon, 'Le Tribunal Constitutionnel espagnol. Présentation', *Les Cahiers du Conseil constitutionnel* (1997, no 2) 38.

practice, along with the principle of equality (Article 14), it is the right to an effective judicial remedy (*tutela judicial efectiva* according to Article 24) which is the most frequently invoked, thereby transforming the *amparo* process into a mechanism for supervising the work of judges rather than of Parliament. To this must be added the means at the court's disposal for remedying the situation: it can, in effect, invalidate an act which has prevented the claimant from fully exercising his or her right, and can just as easily order the claimant to be returned to the position he or she was in before the right was interfered with. On the other hand, we have the Polish Constitutional Court, which began functioning in 1986 and to which has just been allocated, by virtue of the new Polish Constitution of 2 October 1997, the power to hear, in strictly limited circumstances, constitutional claims lodged by individuals. Such claims can be raised only in relation to the alleged unconstitutionality of the legislative provision underlying the decision which is under challenge. The decision itself cannot be challenged, on the grounds, for example, that the court has misinterpreted the legislation or has violated the claimant's procedural rights. One can see, therefore, that complaints have a much narrower reach than in Spain and that they tend to put in question the legislator rather than the judge, the exact opposite of the position prevailing in Spain.

These few examples serve to show that comparing jurisdictions is not simple. It can even be impossible, unless one chooses a rather specific perspective from which to analyse the situations being compared. Looking at the House of Lords from the point of view of continental European legal systems requires us to identify a link between the various European constitutional courts and the highest British court. Today this link can be found in the overriding duty to respect the rights accorded by the European Convention on Human Rights and Fundamental Freedoms. There is, then, something in common between the various courts: it takes the form of the need to adhere to Convention rights.¹² In this context it is useful to distinguish between the ways in which these rights are integrated into the different constitutional systems and the ways in which they are interpreted.

Ways of integrating human rights

If we have to systematise the ways in which the protection of European Convention rights has been integrated into continental legal systems by constitutional courts, we can differentiate between three effective methods. First, 'autonomous'

¹² Another link, just as important, is that created by Community law through the European Communities Act 1972. But despite the significance of this, not everything can be dealt with within this necessarily restricted framework. For fuller details on the influence in the UK of Community law, see the excellent thesis by J Cavallini, *Le juge national du provisoire face au droit communautaire. Les contentieux français et anglais* (Brussels: Bruylant, 1995).

integration; second, 'auxiliary' integration;¹³ and third, what we might call 'surreptitious' integration. It will be interesting to see whether the way in which the House of Lords functions since the entry into force of the Human Rights Act 1998 on 2 October 2000 puts it into one of these three categories, or whether it falls into a separate category altogether.

Let us begin by looking at 'surreptitious' integration. This occurs whenever there is no reference made at all to the international norm and it does not feature in the reasoning of the constitutional court. This deliberate refusal to make such a reference and the focus instead on national constitutional norms, does not however prevent the court from drawing inspiration from the Convention and from the case law of the Court at Strasbourg. Everyone will recognise that this is the position adopted by the French *Conseil constitutionnel*, which has its own approach to making use of the European Convention, albeit in a very specific legal context. In effect the *Conseil* 'pays regard to' the jurisdictional issues, but only by means of a preliminary abstract assessment of the legislation in question.

'Autonomous' integration occurs whenever the rule which is being contested in front of the constitutional court, whether it is legislative in origin or not, is required to comply with the international norm, without the court having first to consider a national constitutional norm. Such a process always presupposes that international law has been integrated into national law (whether through incorporation or transposition) and that primacy has been accorded to the former over the latter. So in Bulgaria,¹⁴ Hungary,¹⁵ Slovakia,¹⁶ and the Czech Republic,¹⁷ to take just a few typical examples of new constitutions adopted by Eastern European countries after the fall of the Berlin Wall, constitutional courts are empowered, by the Constitution itself, directly to apply international treaties which the state has signed, especially human rights treaties, and above all the European Convention. The national constitution effectively confers on the

¹³ This is a distinction made by M Verdussen (ed), *La justice constitutionnelle en Europe centrale* (Brussels: Bruylant, 1997). He uses the term autonomous and auxiliary 'application', but here I prefer the term 'integration'.

¹⁴ As a result of the combined interpretation of Articles 5§4 et 149§1, para 4c of the Bulgarian Constitution of 13 July 1991, the Constitutional Court has the power to verify the compatibility of national laws with 'the norms of universally recognized international law' and with the treaties binding on Bulgaria.

¹⁵ As a result of Article 1 of Law 32 of 1989 on the Constitutional Court, the Court can be asked to examine the question of whether a legal norm is or is not in harmony with an international treaty.

¹⁶ Article 125 of the Slovak Constitution of 1 September 1992 empowers the Constitutional Court to adjudicate on the conformity of 'general legal rules in relation to international treaties promulgated in accordance with procedures established by legislation'.

¹⁷ It is Article 87§1 of the Constitution of 16 December 1992 which authorises the Court to adjudicate on petitions seeking invalidation of laws, whether based on violation of the Constitution, on violation of a constitutional law, or on violation of an international treaty protecting human rights and fundamental freedoms, on condition that this treaty has been ratified and promulgated in accordance with the requirements of Article 10 of the Constitution. Violations of international law can also be invoked within the framework of 'constitutional complaints' lodged by individuals, when the petitioner can ask for the invalidation of the law in question.

constitutional court the responsibility for ensuring that the Convention is adhered to.

The final way in which the European Convention can operate in Romano-Germanic legal systems in Europe is through ‘auxiliary integration’. This refers to situations where the reference to the international norm takes place through the intervention of a national constitutional norm, the latter restricting the former to a complementary role. In countries where the constitutional courts have not been given the power to ensure that national legislation complies with international treaties, the exercise of the standard function of each constitutional court—to apply the norms derived from the Constitution—can lead it to apply, through the medium of constitutional norms, norms derived from the international legal order. As a result, these latter norms are taken into account in the reasoning which underlies the decisions of the constitutional courts. In this way the interpretation clauses in national constitutions facilitate, or rather lead, the constitutional court to interpret the Constitution’s provisions in the light of international treaties which have been signed and ratified by the state in question and where the European Convention has been given a privileged position. There are countries, such as Austria, Germany, and also Italy, however, where no constitutional provision triggers such an interpretative mechanism. In such cases the constitutional court, more or less easily, more or less readily, with more or less momentum and enthusiasm, manages nonetheless to interpret constitutional provisions in the light of the European Convention and Strasbourg case law. These are examples of ‘spontaneous’ interpretations.

The United Kingdom lies at the heart of this last way of applying the European Convention. At the risk of ignoring some important specificities, and of presenting a caricature of the present reality, one might say that before the entry into force of the Human Rights Act 1998¹⁸ the way in which the Convention was applied was similar to the method used in Austria, Germany, and Italy, which, like the United Kingdom, are all dualist legal systems. In fact the House of Lords applied an interpretative approach favouring conformity with the European Convention in the *Brind* case,¹⁹ but this was a case where a piece of national legislation was ambiguous. That meant that, in the presence of a clear legislative provision that was contrary to a relevant human rights treaty, the legislative provision had to take priority over the principles enshrined in the treaty.²⁰ Thus, while in the United Kingdom the dogma of the doctrine of parliamentary sovereignty prevented an interpretative approach being adopted which gave full effect to Convention rights,²¹ in Germany

¹⁸ M Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart, 1997).

¹⁹ *Brind v Secretary of State for the Home Department* [1991] 1 AC 696.

²⁰ See the remarkable thesis by Aurélie Duffy, which fills a wide gap in French doctrinal analysis of common law systems: *La protection des droits et libertés au Royaume-Uni* (Paris: LGDJ, La Fondation Varenne, 2007) 43.

²¹ It should be noted that the obligation to interpret laws in conformity with Community law has revolutionised the British legal system even more drastically. For a recent illustration of this see *Dabas v High Court of Justice in Madrid, Spain* [2007] 2 AC 31, where on 28 February 2007 the House of Lords issued an important decision showing how committed British courts are to the development of

and Italy it is more the importance placed on the notion that a later law supersedes an earlier law which can present a barrier to such an interpretative approach. Be that as it may, all of these dualist systems have permitted courts, of their own motion, mindful of the importance of the obligations assumed by national governments, to try to give effect to Convention rights, without in so doing completely distorting the principles which govern their legal systems.

With the entry into force of the Human Rights Act in October 2000, the situation changed quite radically. This Act did not give to British courts, even the House of Lords, the power to declare pieces of primary legislation invalid (some continental lawyers would say 'still' did not give this power). This remains, and no doubt will remain for some time, a crucial difference between the British constitutional system, which is still based on the doctrine of Parliamentary sovereignty, and the continental constitutional systems. Nevertheless, the procedures introduced by this important piece of legislation, elevated to the level of 'constitutional legislation' in one important case,²² come close in certain respects to the constitutional interpretative systems used in respect of Spanish, Portuguese, and even Romanian fundamental rights by putting in place a duty to interpret legislation in conformity with Convention rights and by giving a privileged status to Strasbourg case law.

Spain, Portugal, and Romania are the three countries in Western Europe which have integrated an interpretation provision into the heart of their constitutional texts. Article 10(2) of the Spanish Constitution of 27 December 1978²³ is

security, freedom, and justice. The House relied on express words used in the *Pupino* case (ECJ, C-105/03, [2006] QB 83), where the principle of interpreting national laws in accordance with EC law was imported into the framework of the EU's third pillar. The case is all the more remarkable in that the British court ignored a condition which Parliament had decided to add at the heart of the national law transposing the EC law and which effectively undermined the mechanism for handing over an alleged criminal. The Spanish claimant, suspected of having participated in the terrorist attacks in Madrid in 2004, contested being handed over to the Spanish authorities. The House of Lords pointed out the crucial objectives of the European Council Framework Decision and concluded that the fact that a Member State had decided, for reasons best known to itself, to subordinate the extradition procedure between states to the satisfaction of additional formalities would risk thwarting the objectives of the Framework Decision. The House went so far as to presume that Parliament could not have intended to produce a conflict between the British rules and the Framework Decision, nor to put in place a less cooperative extradition procedure than that which had existed before. As a result the House concluded that the arrest warrant was enough in itself to constitute the required evidence and that it was not necessary for the Member State issuing the warrant to supply a supplementary document. Lord Bingham's speech is a remarkable example of judicial adherence to the rule of law. He pointed out, at para 5, that Art 34(2)(b) of the EU Treaty makes Framework Decisions binding on Member States as to the result to be achieved but leaves to national authorities the choice of form and methods, but added that '[i]n its choice of form and methods a national authority may not seek to frustrate or impede achievement of the purpose of the decision, for that would impede the general duty of co-operation binding on Member States under Article 10 of the EC Treaty.'

²² *Thoburn v Sunderland CC* [2003] QB 151 (Divisional Court). Sometimes referred to as 'the metric martyrs case'.

²³ This reads: 'The norms relating to fundamental rights and freedoms recognized by the Constitution must be interpreted in conformity with the Universal Declaration of Human Rights and with the international treaties and agreements having a bearing on the same issues that have been ratified by Spain.'

probably the best known of these provisions. It is a provision which, according to Eduardo García de Enterría,²⁴ gives a direct constitutional value to the European Convention, which Spain ratified on 10 October 1979. This rule of interpretation has led the Spanish Constitutional Court to take into account not just the letter of the Convention but also the interpretation given to the Convention by the Court in Strasbourg when dealing with complaints lodged against Spain, even if it has to be remembered that non-compliance with the Convention cannot be directly invoked within the Spanish national legal framework because the Constitution is the only 'parameter of constitutionality'. For its part, Article 16(2) of the Portuguese Constitution of 2 April 1976 mentions both the duty to interpret laws in conformity with Convention rights and also the duty which flows from that, the duty to *apply* laws in conformity with Convention rights. However the Portuguese provision mentions only a soft law text, the Universal Declaration of Human Rights, which does not of itself have any binding force.²⁵ The Romanian Constitution must surely have been based on both the Spanish and Portuguese precedents because it amounts to a synthesis of each of them. Article 20(2) of the Constitution of 8 December 1991 effectively provides that the constitutional provisions relating to citizens' rights and liberties must be interpreted and applied in conformity with the Universal Declaration of Human Rights but also with the Covenants and other international treaties to which Romania is a State Party.²⁶

The documents produced prior to the Human Rights Act show that the procedures currently in place in continental European constitutional systems were not at the centre of Tony Blair's thinking when his government introduced the reform. At that time fundamental rights were under severe attack in the United Kingdom.²⁷ It was, more logically, common law systems which influenced the thinking of Parliament, in particular the Canadian, New Zealand, and Hong Kong systems. It is clear, for example, that the ministerial 'statement of (in) compatibility' required by section 19 of the Human Rights Act 1998, takes its inspiration from section 7 of New Zealand's Bill of Rights Act 1990, which obliges the Attorney General 'to bring to the attention of the House of Representatives any provision in [a Bill] that appears to be inconsistent with any of

²⁴ E García de Enterría, 'Valeur de la jurisprudence de la Cour européenne des droits de l'homme en droit espagnol' in F Matscher and H Petzold (eds), *Protection des droits de l'homme: la dimension européenne. Mélanges en l'honneur de Gérard J Wiarda* (Cologne, Berlin, Bonn, Munich: Carl Heymanns, Verlag KG, 1990) 222.

²⁵ This reads: 'The constitutional and legislative norms relating to fundamental rights must be interpreted and applied in conformity with the Universal Declaration of Human Rights.'

²⁶ This reads: 'The constitutional provisions relating to the rights and liberties of citizens must be interpreted and applied in conformity with the Universal Declaration of Human Rights and with the covenants and other treaties to which Romania is a state party. If there is a conflict between the covenants and treaties relating to fundamental rights . . . and the internal laws, the international rules take priority.'

²⁷ K Ewing and C Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford: Clarendon Press, 2nd edn 1990).

the rights and freedoms in this Bill of Rights'.²⁸ Similarly, the declaration of incompatibility which section 4 of the Human Rights Act allows for is analogous in certain respects to the provision in the Canadian Charter of Rights and Freedoms of 1982. It does not go so far as to allow the invalidation of a piece of primary legislation, but all of the declarations so far endorsed by the House of Lords have resulted in a change of law or practice. The most remarkable illustration of this is its 2004 decision in *A v Secretary of State for the Home Department*,²⁹ where a bench of nine Law Lords held, with only one dissenting voice, that indefinite detention without trial of non-British nationals was incompatible with the Convention right not to be deprived of liberty, and as a result Parliament allowed the offending legislative provision to lapse.³⁰ These various control mechanisms have no precise equivalents in continental legal systems. In fact the only relationship that can really be established is that between sections 2(1)³¹ and 3³² of the Human Rights Act and the provisions in Spanish, Portuguese, and Romanian law. There is an obligation on constitutional courts to interpret their constitutional provisions in the light of human rights law. Britain has requirements that Strasbourg jurisprudence be taken into account (section 2) and that legislation be interpreted so as to make it consistent with human rights (section 3)—though not with international human rights treaties in general, because the Act is focused on the European Convention and its Protocols, while other countries require compliance even with *soft* law. But the logic underlying the provisions is the same as in those other countries. The court has to do all that is possible to interpret the catalogue of constitutional rights in accordance with the catalogue of Convention rights as interpreted by the Court in Strasbourg. That is where the difficulties arise, because in spite of these interpretation clauses, the particularities of each legal system produce the variations in the way the content and reach of rights is interpreted nationally, as the next section of this chapter makes clear.

It should also be noted, however, that the House of Lords has given signs in recent times that, even in situations where the Human Rights Act does not apply, the courts are able to mine the resources of the common law in order to protect human rights. In *A v Secretary of State for the Home Department (No 2)* their Lordships held, reversing the Court of Appeal, that, when hearing an appeal under section 25 of the Anti-terrorism, Crime and Security Act 2001 by a person certified and detained under sections 21 and 23 of that Act, a court could not

²⁸ Duffy (n 20) 105. ²⁹ [2005] 2 AC 68.

³⁰ Replacing it with the Prevention of Terrorism Act 2005, ss 1–9, which allow 'control orders' to be issued against suspected terrorists. Some of these control orders have themselves been held by the House of Lords to be in breach of the right to liberty: see *Secretary of State for the Home Department v JJ* [2008] 1 AC 385.

³¹ As a result of s 2(1), courts and tribunals determining a question which has arisen in connection with a Convention right must 'take into account' the judgments, decisions, declarations, and advisory opinions of the Court at Strasbourg.

³² s 3(1) provides: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

consider evidence which may have been procured by torture inflicted by officials of a foreign state.³³ In coming to this conclusion, the House found precedents not in the judgments of the European Court of Human Rights, nor in customary international law, but in the principles of English common law. Similarly, in *Jackson v Attorney General*, where the legality of the Hunting Act 2004 was under challenge because it had been passed without the agreement of the second chamber of Parliament, two Lords of Appeal said that they could conceive of situations (though this case was not one of them) where they would be entitled to strike down an Act of Parliament, or part of it, as unconstitutional.³⁴ Lord Steyn (who has since retired) could hardly have been more explicit: 'The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom . . . It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism'.³⁵

Ways of interpreting human rights

Whether we are considering continental constitutional courts, which have an interpretation clause at their disposal, or the Law Lords (since the entry into force of the Human Rights Act), the requirement to interpret legislation in a way that conforms with Convention rights and gives priority to the rights jurisprudence taken into account, this does not solve all the problems. There are not always systematically harmonious interpretations, despite the courts' efforts in that regard. Even if the reasons for divergences in the content and reach of human rights are to be found in the particularities of each constitutional system, it is nevertheless the case that these interpretative differences are a feature common to all legal systems, whether they are common law or civil law systems: interpretation of national constitutions does not always exactly coincide with interpretation of Convention rights.

The differences between different systems have many causes—the way judges are trained, the monist or dualist character of the constitution, the specificity of permitted constitutional review, the presence or absence of provisions requiring interpretation in compliance with rights, etc. These differences feed a constant dialogue with the European Court. In this regard one must keep in mind that a 'dialogue', a word with roots in the Latin term 'dialogus' which refers to a philosophical conversation in the manner of Plato's dialogues, is above all an exchange of views, a discussion, a conversation between two or more people.³⁶

³³ [2006] 2 AC 221.

³⁴ [2006] 1 AC 262, *per* Lord Steyn (para 102) and Lord Hope (paras 107 and 120).

³⁵ *ibid.*

³⁶ See A Rey (ed), *Dictionnaire historique de la langue française* (Paris: Editions Le Robert, 2006) *sub verbo* 'Dialogue'.

Given this, and contrary to received wisdom, it can provoke just as much opposition, contradiction, and even discord as agreement. This is how today's relationship between the Strasbourg Court and constitutional courts can be characterised, including when the constitutional courts have to apply interpretation provisions. In order to appreciate this fact fully it is useful to look more closely at one of the three systems which, as we have seen, have constitutional courts which are particularly 'open' given that there is an interpretation provision in Article 10(2) of the Constitution—the Spanish system. The *Moreno Gomez* case,³⁷ which is about protection of the right to a healthy environment,³⁸ demonstrates the point perfectly.

Article 45(1) of the Spanish Constitution provides: 'Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it.'³⁹ This is located in Part I of the Constitution, 'Fundamental Rights and Duties', in Chapter 3, which is headed 'Principles governing economic and social policy'. On account of this it benefits from only a small amount of protection, as provided by Article 53(3).⁴⁰ This means that it is impossible to resort to judicial review proceedings (*amparo*) in order to complain about a violation of the right to an appropriate environment. The Constitutional Court made this point in its decision of 3 December 1996,⁴¹ where the claimant was complaining about how the criminal authorities, without having pursued them very strenuously, had classified the actions taken against the owners and exploiters of a petrol refinery in Galicia that was particularly pollutant.⁴² The Constitutional Court recalled that, even though the right to an appropriate environment has taken on a special importance in contemporary society, it was only a 'principle' requiring public authorities to take care to ensure that all natural resources were rationally used so that the quality of life and of the environment could be protected and improved.⁴³ Notwithstanding this constitutional architecture, a

³⁷ *Moreno Gómez v Spain* (2005) 41 EHRR 40.

³⁸ For an analysis of comparative law which confirms that the environment is often linked by courts with the right to a private and family life, see L Burgorgue-Larsen, 'L'appréhension constitutionnelle de la vie privée. Analyse comparative des systèmes allemand, français et espagnol' in F Sudre (ed), *Le droit à la vie privée au sens de la Convention européenne des droits de l'homme* (Brussels: Bruylant, 2005) 69–115.

³⁹ Art 45 continues: '(2) The public authorities shall watch over a rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on an indispensable collective solidarity. (3) For those who break the provisions contained in the foregoing paragraph, criminal or, where applicable, administrative sanctions shall be imposed, under the terms established by the law, and they shall be obliged to repair the damage caused.'

⁴⁰ This reads: 'Recognition, respect and protection of the principles recognized in Chapter 3 shall guide legislation, judicial practice and actions by the public authorities. They may only be invoked before the ordinary courts in accordance with the legal provisions implementing them.'

⁴¹ Spanish Constitutional Court, 3 December 1996, no 199/1996.

⁴² E Alberti, P Bon, and F Moderne, 'Chronique de jurisprudence constitutionnelle—Espagne' *Annuaire international de justice constitutionnelle* (1996) 611.

⁴³ For a similar decision see Spanish Constitutional Court, 26 June 1995, no 102/1995.

mechanism of indirect protection has been developed, European case law having been a powerful prompt in this regard. So there is justiciability, since judicial review proceedings can be taken, but it is an indirect form of justiciability. Proceedings can be taken only on the basis of the subjective rights in the Constitution (Articles 14 to 30), and not on the basis of the right to an appropriate environment. In this context, the decision of 24 May 2001 of the Constitutional Court is exemplary.⁴⁴

In the *Moreno Gomez* case the claimant accused the municipality of Valencia of being responsible, due to its carelessness, for noise pollution generated by various establishments (bars and discotheques) situated in the immediate vicinity of his home. The claimant brought judicial review proceedings to the Constitutional Court complaining of a violation of both Article 15 (the right to physical and moral integrity) and Article 18 (right to personal and family privacy) of the Constitution. The decision in the case is quite remarkable for the broad scope it gives to the protection accorded by Articles 15 and 18 by extending them to cases of noise pollution, referring, as it does so, to the express words used in the Strasbourg cases of *López Ostra v Spain* and *Guerra v Italy*.⁴⁵ In this way the 'accidental protection' of rights has made an appearance in Spanish constitutional jurisprudence. The change of approach adopted by the guardian of the Constitution is totally exceptional in view of the initial conception of the right to an appropriate environment, which was as a simple 'directive principle' not capable of being protected through judicial review. The court actually said: 'One can conclude that prolonged exposure to clearly determined levels of noise which can be objectively classified as inevitable and unbearable, deserves the protection accorded to the fundamental right to personal and family privacy within the home, to the extent that the noise prevents or renders especially difficult the free development of the personality and this is the result of the acts of omissions of public bodies.'⁴⁶

The Spanish Constitutional Court, therefore, thanks to the interpretative possibilities provided by Article 10(2) of the Constitution, considers the decisions of the Strasbourg Court as providing a criterion for interpreting the constitutional provisions protecting fundamental rights, being careful at the same time to emphasise the autonomy of the Spanish system. In fact this does not presuppose that the international norms have been transposed through being imitated, for the system of Convention rights pays no regard to the normative differences between the Spanish Constitution and the European Convention on Human Rights or to 'the need to restrict the scope of judicial review proceedings to its core functions'. These two points, which ensure the autonomy of the Spanish constitutional system as regards the interpretation of fundamental rights, help to explain the

⁴⁴ Spanish Constitutional Court, 24 May 2001, no 118/2001.

⁴⁵ *López Ostra v Spain* (1994) 20 EHRR 277; *Guerra v Italy* (1998) 26 EHRR 357.

⁴⁶ Spanish Constitutional Court, 24 May 2001, no 118/2001, at FJ no 6.

minimalist interpretation adopted in the end by the Constitutional Court in this case. Besides demanding 'serious and immediate' effects on health, the Court opted for a selective approach to protection against nuisances. One of the two dissenting judges did not want the Court's approach to be so narrow: he argued for a more innovative global approach to the range of exigencies in environmental matters.⁴⁷ And so, after a radical change of perspective in the indirect use of judicial review proceedings to protect the right to an appropriate environment, the Court dismissed the claimant's case and did not allow judicial review. Doubtless frightened by their own audacity in saying what they did about the relevant principles, the judges succumbed to the common temptation not to draw the practical consequences from their changed stance. In the end they chose a pusillanimous solution by rejecting the claimant's claim.

His claim having been dismissed by the Spanish Constitutional Court, the claimant naturally turned towards Strasbourg. What was that Court's decision? The scope of the Constitution's protection of the environment, through Article 18 of the Spanish Constitution, was not judged by the Strasbourg Court to be as restricted. The decision of 24 May 2001, which was for the Constitutional Court the means whereby it could align itself with the mechanism for indirectly protecting the environment developed by the European Court, was also the decision which suffered a buffeting from the European Court itself. That Court, in its decision in *Moreno Gómez v Spain*, pushed to one side the Spanish constitutional interpretation.⁴⁸ So, while the highest Spanish court rejected the claimant's request to be allowed to resort to judicial review proceedings, the Strasbourg Court declared her application admissible; and while the Spanish Constitutional Court adjudged that there had been no violation of Article 18 of the Spanish Constitution, the European Court held that there had been a violation of Article 8 of the European Convention.

The Strasbourg case law shows, time and time again, that a tradition of constitutional review is by no means the same thing as a tradition of human rights review, even when, paradoxically, the two courts refer to the same sources. Interpretative autonomy, and the internal constraints inherent in each legal system, inevitably introduce an element of chance.⁴⁹ Logically, the position can hardly be any different in the United Kingdom.

Analyses of the attitudes of British courts since the entry into force of the Human Rights Act have brought to light a rather exemplary consideration of

⁴⁷ E. Alberti, P. Bon, P. Cambot, and J-L. Requejo Pajes, 'Chronique de jurisprudence constitutionnelle—Espagne', *Annuaire international de justice constitutionnelle* (2001) 513–56, esp 542ff.

⁴⁸ *Moreno Gómez v Spain*, European Court of Human Rights, decision of 16 November 2004. For a commentary in English see Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 MLR 183, 187–91.

⁴⁹ This was disclosed, very lucidly, by the former vice-president of the Spanish Constitutional Court: see F. Rubio Llorente, 'La relation entre les juridictions espagnoles et les juridictions européennes', *Renouveau du droit constitutionnel. Mélanges en hommage à Louis Favoreu* (Paris: Dalloz, 2007) 1387, esp 1399.

Strasbourg case law by every level of jurisdiction in the United Kingdom, including the House of Lords. In fact, Strasbourg case law has in reality been directly applied,⁵⁰ rather than just being taken into account in compliance with the restrictive wording of section 2(1). This is all the more remarkable in that it has permitted the British courts to take into consideration the economic and social extensions to numerous rights, and to revisit areas where up to now there has been good protection, such as the area of freedom of expression (to the detriment of the right to privacy).⁵¹ It is nonetheless the case that certain particularities of the British legal system still constitute barriers to a complete 'interpretative osmosis'. Aurélie Duffy has identified four such barriers which affect the level of protection of rights, whether they are civil and political or economic and social. The first relates to the fact that the Human Rights Act is not retroactive in effect, as was made clear in *R v Lambert*.⁵² The second relates to the particular situation of certain holders of rights, such as detainees and foreigners; the third to the details of guaranteed rights in criminal matters; and the fourth to the need not to increase public expenditure.⁵³ Taken in the round, British case law is less protective of rights because in the midst of legal disputes it accords a certain 'deference' to the actions of public authorities. The result is that British courts—with the House of Lords at the top—give themselves a certain margin of appreciation when interpreting Convention rights, which guarantees the preservation of an autonomous approach. Certain authors have seen in that approach the mark of something specifically British—the court has been able to 'personalise' the list of rights.⁵⁴ But it is an odd way to personalise a list by opting for a reduction in the protection of rights. In this writer's opinion, more than the display of a mad desire to preserve a judicial space, these divergences in

⁵⁰ R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford: OUP, 2nd edn 2008); Lord Lester and Lord Pannick (eds), *Human Rights Law and Practice* (London: LexisNexis, 3rd edn 2009).

⁵¹ Analysis of recent case law shows, however, that there are still differences as regards the basis for protecting private life. The decision of the House of Lords in *Douglas v Hello! Ltd* [2008] 1 AC 1 obviously fits within this remodelling of the British judicial landscape, even if the highest court has still not yet recognised a right to one's image. The case concerned two stars of the big screen, the husband and wife couple Michael Douglas and Catherine Zeta-Jones. While preparing for their wedding they sold to the magazine *OK!* the exclusive right to photograph the festivities, warning all the guests that no other photography would be allowed. But some photographs of the wedding were then published in a rival magazine—*Hello!*. The House of Lords, affirming the Court of Appeal, ruled that *Hello!* was bound by a duty of confidentiality with regard to *OK!*. And it considered that this latter magazine, which had spent almost 1.5 million euros for the exclusive photography rights, had the right to protect itself and to seek redress from a court if a third party intentionally violated it. The reader can get some idea of the distance still remaining between the British and continental approaches from reading the speech of Lord Bingham (esp para 124), even if the particularities of the facts of the case serve to explain the position he took. It is not private life as such, and even less so the right to one's image, that was in the end protected, but only some information (the marriage of the two stars) which had to benefit, in conformity with the exclusive deal in question, from the law on confidentiality.

⁵² *R v Lambert* [2002] 2 AC 545.

⁵³ Duffy (n 20) 260ff.

⁵⁴ F Klug, 'The Human Rights Act—A "Third Way" or "Third Wave" Bill of Rights' [2001] EHRLR 370.

interpretation derive, as they do in the remainder of European states, from the particularities of the British legal system—such as the attachment, indeed the (excessive?) deference, to the place of public authorities and the non-retrospectivity of the Human Rights Act—which it is difficult for a court readily to brush aside with a wave of the hand.

Conclusion

The United Kingdom has not wholly joined the continental system for protecting rights. Although the House of Lords is a constitutional court (some of whose members have suggested a new hierarchy of norms with their pronouncements in *Jackson*), many differences remain. Its methods for choosing cases, the way it is composed, its mode of reasoning, its inability to invalidate primary legislation, etc, still make it distinct from continental constitutional courts. Nevertheless, despite the particularism of the British system, firmly and definitively anchored as it surely is in the common law, the influence of the Human Rights Act in the legal landscape across the Channel has also anchored it, to a degree, in a universe which is common to all European courts—that of the European Convention on Human Rights. Under the impact of House of Lords' decisions of recent years, the duties flowing from sections 2(1) and 3 of the Human Rights Act have brought the British system closer to the continental systems in that they impose, at the end of the day, the same constraint, namely, to respect and to apply the list of Convention rights. Despite the multitude of particularities peculiar to each constitutional system, the most important feature to note, without a doubt, is that they are all committed to a text which embodies 'common values'.