UKAEL SEMINAR: "UNTYING THE KNOT WITH EUROPE" – SOME COMMENTS

General – the quest for UK autonomy

1. Perhaps a better title might be: "putting the genie back in the bottle" or "turning back the tide":

    a. Lord Denning MR in *Bulmer v. Bollinger* [1974] Ch 401;

    b. King Canute – is it the mark of a wise UK sovereign to seek to turn back "the tide" (http://en.wikipedia.org/wiki/King_Canute_and_the_waves)?

2. Serious issues:

    a. Rt Hon William Hague, Secretary of State for Foreign and Commonwealth Affairs, now Leader of the House of Commons and formerly leader of the Conservative Party, July 2012, launching the "Balance of Competences" review:

        > "We are committed to playing a leading role in the European Union in order to advance our national interest. The single market is one of the greatest forces for prosperity the continent has ever known and that is why we will continue to push an ambitious programme of deepening the single market while seeking to reduce unnecessary burdens in EU legislation".

    b. Barack Obama, 5th June 2014:

        > "I think it is also hard for me to imagine it would be advantageous for Great Britain to be excluded from political decisions that have an enormous impact on its economic and political life".

    c. For the UK to leave the EU would be probably the greatest constitutional reversal since the restoration of the monarchy in 1660 – here, the UK has just celebrated 40th anniversary of membership of the EU and 20th anniversary of the single market of which it was a principal driving force, so it would be an exceptionally difficult process to undo 40 years of detailed legislation and case law - certainly much more difficult than the decision before the UK when the previous referendum was held in 1975.

    d. As the Scottish referendum showed, there would also be a serious risk to the Union were an anti-EU majority in England to seek to override a pro-EU majority in Scotland, Wales and/or Northern Ireland. It would also reopen the Irish question were Ireland to remain within the EU but Northern Ireland to leave.

    e. As such, it is not a question to be decided on the basis of advice from "a man in a pub". One would need to find a fundamental legal or constitutional issue to justify such a radical legal and political change.

f. In preparation for this seminar, I revisited Enoch Powell speeches from the early 70s (http://www.enochpowell.net/speeches.html) – these speeches set out the basic case for UK "exceptionalism" – it is remarkable how little the essential debate has moved on in the United Kingdom in 40 years of membership – the fundamental argument is exactly the same, that the depth of roots of UK autonomy (of the Queen in Parliament) make UK submission to EU law constitutionally unacceptable – then as now, there was also a strong focus on restrictions on free movement of persons, though it is the distinctive contribution of UKIP to have introduced this element into the anti-EU debate.

g. In a legal context, "autonomy" is a preferable term to "sovereignty" – "sovereignty" is an imprecise term including the powers of a hereditary monarch and the powers of peace and war – "autonomy", the ability to determine one's own laws, is both more precise and focuses on the relevant issues.

3. The basic issue therefore is whether UK can credibly hope to recapture its autonomy from EU law, and international constitutional law more generally, or whether this is a dangerous fantasy for a medium sized country in a globalised (and post-Imperial) world order, where (i) the autonomy of the EU itself is increasingly threatened by the economic power of US and the rise of China, India, Brazil etc.; (ii) the EU is the obvious international forum for the UK to maintain its influence; and (iii) all our principal and natural allies, inside and outside the EU, consider that this would be strongly contrary to our national interest.

Specific issues

4. There are various categories of UK autonomy that could in principle be "recovered" if UK left EU:

   a. Autonomy of the UK courts in the field of EU law – no more preliminary rulings; CJEU rulings no longer binding on the UK courts.

   b. Autonomy of Parliament – no more direct effect/supremacy of EU Treaty provisions and Regulations; no more implementation of directives by secondary legislation.

   c. Autonomy of UK public law – no more proportionality or general principles of EU law.

5. Autonomy of courts:

   a. What happens to the celebrated *Samex* principles articulated by Bingham J (*Commissioners of Customs and Excise v Samex Aps* [1983] 1 All ER 1042) – it would still be the case that CJEU has substantial advantages in interpreting the EU Treaties – cf. the Supreme Court judgment in *Assange* [2012] 2 AC 471 (the UK courts were not ***bound*** by the approach of the CJEU but they still followed that approach) – would the UK Courts in fact refuse to follow CJEU rulings as to the interpretation of EU law?

b. What would happen if UK Courts did take a different view from CJEU – in so far as rulings impact on international trade, for example in the major commercial fields considered below, presumably they would be of limited value?

c. What happens if UK Courts are uncertain as to the correct interpretation of EU law – will this lead to ***more*** internal appeals on points of EU law? Will we have to wait for a preliminary ruling from a remaining Member State to decide the issue? What if the CJEU subsequently rules on the point in a different sense from the UK domestic courts – would it be an abuse of process to challenge the earlier domestic ruling?

d. What happens to specific areas of UK law governed by EU law, e.g. Competition Act 1998, § 60? Will these provisions be repealed – or would the UK Courts remain bound to follow CJEU guidance (without a power in the Courts to make preliminary rulings and without the UK having any right to make submissions on the law)?

6. Autonomy of Parliament:

a. As above, what happens to regulatory regimes that have been adopted by the UK in order to implement EU law: competition law, telecoms law, pharmaceutical law?

b. The Medicines Act 1968 was based on the regime established by Directive 65/65/EEC even before the UK joined the EEC – would that in fact be repealed/modified? Would it be credible for UK to develop a distinct system of medicines regulation? Would anyone welcome such an approach? What happens if the EU regime is modified? Would it be in the UK national interest for the European Medicines Agency to leave Canary Wharf?

c. The Communications Act 2003 – detailed implementation of EU telecoms Common Regulatory Framework based on free movement of telecoms services – would that be modified? Would the amendments to the 2003 Act made by secondary legislation still have effect or would it require primary legislation to amend the UK telecoms regime to align it to EU law developments? Would that be welcomed by anyone?

d. Competition Act 1998 and Enterprise Act 2002:

i. Would Parliament break the link between concepts of EU and UK competition law: s. 60?

ii. Would the CMA or the UK Courts still be bound by decisions of EU Commission, eg on mergers with an EU dimension? If not, what practical difference would that make if large scale mergers with an EU dimension were cleared/blocked under the Merger Regulation?

iii. Would the UK Courts and authorities effectively be bound by EU law in any event? *Cf* UEFA/FIFA and regulation of European football – it has been clear since Case C-415/93 *Bosman* [1996] ECR I-4921 that UEFA and FIFA are bound in practice by EU rulings, although both are based in Switzerland.

iv. Would anyone welcome the uncertainty over the operation of the law of a new power in Parliament or the CMA to diverge from EU competition policy or legislation?

7. Autonomy of public law:

   a. Concepts of EU public law are increasingly entrenched in UK public law: legal certainty, proportionality, equality of treatment, sound administration: cf. common law right to privacy developed in parallel to Article 8 ECHR.

   b. In its case law under ECA 1972 and in its submissions before the CJEU, the UK Courts and UK have been important contributors to the development of EU public law. Likewise, since 1990, under the Human Rights Act 1998, the UK Courts have been important contributors to the detailed development of these concepts not only in ECHR but also EU law (see Lord Bingham, *The European Convention on Human Rights: Time to Incorporate,* reprinted in *The Business of Judging*, OUP 2005 at p. 131, 140: "the faith, which our eighteenth and nineteenth century forebears would not for an instant have doubted, that these were fields in which Britain was the world's teacher, not its pupil").

   c. It is well known that the House of Lords and Supreme Court have drawn on EU principles in development of public law (and common law): *Woolwich v. IRC* [1993] AC 70 and *M v. Home Office* [1994] 1 AC 377 – *cf.* Supreme Court in *Kennedy v. Charity Commission* [2014] UKSC 20; Court of Appeal in *R v. Secretary of State for Health ex p Eastside Cheese* [1999] 3 CMLR 123) have found that there is a substantial overlap between traditional concepts of domestic constitutional law and concepts of EU law.

   d. Absorption of EU principles is part of a wider trend of cross fertilisation of different legal traditions – would this process be reversed or restricted in the field of EU law/more generally?

8. In summary, there has been, since 1973 but in particular since 2000, a common theme of increasing globalisation and reduced significance of national rules as against aligned international standards seeking to advance the rule of law. One excellent source of guidance on these issues is Sir Francis Jacobs QC's Hamlyn Lectures on *The Sovereignty of Law, the European Way*, CUP, 2007. As that series of lectures explains, the EU is in the vanguard of such a process (e.g. a "magnet" for other European countries (pp. 122ff.) and a "model" globally for the rule of law (pp. 131 ff.)). It would be a bold and counterintuitive move for the UK, a country with a proud constitutional tradition as one of the original and foremost guardians of the rule of law both domestically and internationally, to set itself in opposition to this trend.

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28 October 2014