A Threat to the Sovereignty of Courts and Parliaments

On 7th November 2014 the President of the European Court of Human Rights, Dean Spielmann, addressed the Inn on the Court 'as guarantor of a peaceful public order in Europe'. No doubt many in the audience would have wished to ask his views on another topic – the Lord Chancellor's publication *Protecting Human Rights in the UK* (2nd October 2014).

This promises (if the Conservative party wins the 2015 general election) to repeal the Human Rights Act 1998 and to obtain the agreement of the Council of Europe to 'break the formal link between British courts and the European Court of Human Rights' so that 'Britain's courts will no longer be required to take into account rulings from the Court in Strasbourg' and end 'the ability of the ECtHR to force the UK to change the law'. It proposes to limit 'the use of human rights laws to the most serious cases … that involve criminal law and the liberty of an individual'. In the event of Europe's non-agreement, 'the UK would be left with no alternative but to withdraw from the European Convention on Human Rights'. The proposals were described as 'almost puerile' by the former Attorney General, Dominic Grieve (*The Guardian*, 3rd October 2014).

The relationship between the Strasbourg Court and the UK courts (and Parliament) is a hot topic on which many eminent lawyers and judges have recently expressed opinions. Indeed, the President and the former Lord Chief Justice Lord Judge have exchanged views in the pages of *Counsel* magazine, the October edition of which carried Lord Judge's latest salvo. As he says, 'at the root of my disagreement with the President is sovereignty'. He argues that Parliament cannot be trumped by the ECtHR (although it may voluntarily submit).

I do not propose to add to the debate about the status of the ECtHR. Instead, I raise a matter which seems to pose a far graver threat to the autonomy of Parliament and our courts than does Strasbourg. On 26th September 2014, in Ottowa, agreement was reached (subject to legal 'scrubbing') on the text of an agreement between the European Union and Canada (save for a German reservation). It is the 'Comprehensive

Economic and Trade Agreement' (CETA). It is the precursor for a yet bigger agreement currently being negotiated between the EU and the USA called the 'Transatlantic Trade and Investment Partnership' (TTIP). Whilst under negotiation the text of both agreements has been kept secret. Apart from the negotiators, the citizens of the EU – and indeed members of state parliaments and MEPs – have been kept in the dark (other than the representatives of multi-national corporations who have participated in the negotiations). However, on signature, the text of CETA has been published, all 1634 pages of it. It is a revealing document. The wall of secrecy around TTIP remains inviolate.

Nonetheless, concern about TTIP has been growing in Europe. A recent on-line petition against it drew some 500,000 signatures in less than five days. The trade unions in Europe have been vocal against it. Of particular concern in the UK has been the threat perceived to the NHS in that TTIP and CETA would appear to preclude re-nationalisation of the NHS. Concerns have also been expressed over the central thrust of the agreements, which is to remove existing, and to bar new, regulations which are seen to impede free trade. Regulations which protect food standards and the environment are, for example, seen to be at risk. Unions see a threat to established labour rights in European countries.

Such challenges might be thought to be farfetched but it is in the resolution of challenges that the real threat to sovereignty lies. Both CETA and TTIP provide an Investor State Dispute Settlement mechanism (ISDS). This is a system of arbitration by which 'investors' (ie multi-national corporations) can bring damages claims against governments for loss of profit resulting from breach of the agreement.

This dispute resolution system is striking indeed. States cannot sue investors. No citizen has a right of complaint or standing to be heard. Trade unions, for example, will note the 'Trade and Labour' Chapter in CETA. This commits states to respect key principles of the International Labour Organisation. But, not only is the chapter largely aspirational, it applies only to states and not to investors and, most particularly, unions are unable to access the ISDS either to enforce ILO principles or to be heard in cases where they would wish to support a state defendant on ILO grounds. How a quasi-judicial system which gives access to only one category of potential litigant and excludes the bulk of the population as individuals and associations is consonant with the Rule of Law is unclear.

Of course bi-lateral trade agreements are not new, there are apparently

over 2,000 currently in force, worldwide. Many have ISDS mechanisms. The arbitrations which have taken place under them offer an insight into the sort of matter justiciable in them and the impact they can have on parliamentary sovereignty.

In April 2014 the UN Conference on Trade and Development (UNCTAD) published its annual note *Recent Developments in Investor-State Dispute Settlement* revealing that the number of such claims has steadily risen over 20 years to 57 made in 2013. The damages claimed ranged from a mere US$27m to US$1bn. Of cases decided in 2013 most were decided against the state, in one of which an award of US$935m was made (*Al-Kharafi v Libya*, 22nd March 2013).

Claims made in 2013 included claims for alleged losses arising from the imposition of levies on solar power plants in the Czech Republic and from a reduction of subsidies for renewable energy in Spain. There was a claim (for €824m) against Cyprus for increasing its stake in the Cyprus Popular Bank as a stability measure in the crisis. A claim was made for the equivalent of an injunction against the Slovak Republic for proposing legislation said to involve the expropriation of a privately held stake in a Slovak health insurer. Canada is being sued by one company for compensation for the loss of its gas exploration permits as a consequence of Quebec's moratorium on fracking, and by an electricity supplier for contractual losses arising from Ontario's moratorium (on health and environmental grounds) on offshore wind-farms. Developers sued Costa Rica for expropriating land to build an ecological park; Croatia was sued by developers who bought land after what they claim were misleading assurances by the local planning office that residential development would be permitted. Swedish power company Vattenfall has brought a claim against Germany for €4.7bn for lost profits caused by Germany's decision to phase out nuclear power stations.

Amongst some 568 ISDS claims against 98 states which UNCTAD has reported over the years, it notes that 'cases where investors challenge the conduct of the domestic courts of the host state are not infrequent'. A case in point is the decision of the High Court of Australia in *JT International SA v Commonwealth of Australia* [2012] HCA 43; 86 ALJR 1297 to reject a challenge to the validity of the Tobacco Plain Paper Packaging Act 2011 on the grounds that the requirement to use plain paper expropriated the manufacturers' intellectual property rights in their cigarette packaging. Transnational cigarette manufacturer Philip Morris Asia Ltd then made a claim against the Australian Government (under the Australia–Hong

Kong Promotion and Protection of Investments Agreement) for billions of Australian dollars – to be heard by arbitrators in Singapore in February 2015. The claim repeats the allegation of expropriation decided by the High Court and adds a claim of failure to fulfil the requirement, typical of these agreements, of 'fair and equitable treatment'.

Similarly, the drug company Eli Lilly has sought $500m compensation against Canada (under the ISDS of the North America Free Trade Agreement) by way of challenge to Canadian judicial decisions that patents on two drugs were invalid for want of utility.

The point will not be lost on those following the Strasbourg debate that this means that the arbitrators under these agreements have arrogated to themselves the right to overturn decisions of the highest state courts – and, it must be assumed by the same logic, regional courts such as the ECtHR or the Court of Justice of the EU. This power is not confined to cases where it is alleged that the national court was 'so egregiously wrong' or behaved so unfairly as to breach fair and equitable treatment (see *Arif v Moldova*, 8th April 2013). The power to override national and regional courts will apply whenever such a court upholds national or regional law (such as EU Treaties and Directives or the European Convention) which, in the view of the arbitrators, impacts on the profit of a foreign investor.

Of course, of yet more fundamental constitutional importance than preserving the sovereignty of the courts is the preservation of democracy itself – the very foundation of Lord Judge's arguments. The challenges by foreign corporations through the medium of ISDS constitute a frontal attack on the citizens of Europe and their democratic national institutions. What government will not think twice about the risk of multi-million pound claims before fulfilling democratic mandates such as, for example, to ban fracking, wind-farms or nuclear power stations; or to purchase property compulsorily to create a new high speed railway line, widen a road or build more public housing? And how can an arbitral injunction on even debating proposed legislation in a national parliament be compliant with the essentials of democracy? Ignore for the moment the negotiation of an agreement in total secrecy from the parliamentary representatives of the citizens, and the lack of any apparent EU mandate to commit member states to an agreement by which (it is mooted) the states will be bound but which they will not ratify since the European Commission will do so.

These are fundamental issues which require urgent consideration, not

least by the judiciary. This is a point made by the Chief Justice of the High Court of Australia, RS French AC, in a speech to the Supreme and Federal Courts' Judges Conference of Australia (Darwin, 9th July 2014). He concluded: 'We are, I suspect, a little behind the wave-front of these developments. It is time to start catching up.' Spielmann P and Lord Judge will no doubt be equally concerned.

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