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TOWARDS A UNITED KINGDOM BILL OF RIGHTS†

Francis G. Jacobs*

The United Kingdom has no fundamental constitutional instrument. It is in that respect almost unique. Instead it has a fundamental constitutional doctrine: the doctrine of the sovereignty of Parliament. The first paradox of the United Kingdom constitution is that no rules have a constitutional status.

The doctrine of Parliamentary sovereignty entails that all the constitutional rules that, in other countries, would be set out in a constitution are, in the United Kingdom, contained in Acts of Parliament—or in the common law, or in unwritten constitutional conventions or custom; and that any such rules, whether statutory or not, can be repealed or amended by an ordinary Act of Parliament, with no special procedure and no special majority being required. No provisions have constitutional status; still less are any provisions entrenched. There is no “fundamental law.”

Yet the notion of fundamental law was deeply rooted in England and, as Corwin showed in his classic survey,¹ inspired much constitutional thinking in the United States. It was the Revolution of 1688, establishing the supremacy of Parliament over the Crown, which made it politically impossible for the courts to review Acts of Parliament. Political continuity and stability since 1688 have obviated the need for any new constitutional settlement. In France a century later the Revolution made judicial review politically impossible and that legacy has remained. Indeed, judicial review of legislation is generally a rare and recent development throughout Europe.

Although now composed of three principal jurisdictions or “law districts,” namely England and Wales, Scotland, and Northern Ireland, the United Kingdom remains a unitary State, with for almost all purposes a single final court of appeal, the House of Lords. Any mention of the House of Lords as the final

† Thomas M. Cooley Lecture delivered at the University of Michigan Law School on Nov. 2, 1983.

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1. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928).

court of appeal recalls that other familiar paradox, that the United Kingdom is, politically, to some extent, a unitary State, never entirely embracing the separation of powers which a French observer found in the English Constitution² and which became the basis of the United States Constitution.

The formal and rigid separation of the legislative, executive, and judicial branches of the state has, in any event, had very different consequences in different settings: in France, it has been taken, for nearly 200 years, to preclude the development of the judicial review of legislation, while in the United States, for almost as long, it has largely been accepted as requiring it. In the United Kingdom the convention was established only in the last century that the House of Lords, sitting in a judicial capacity, should be composed exclusively of judges. Even today the Lord Chancellor can and frequently does sit, personifying, as a leading member of both the legislature and the executive, the rejection of the principle of the separation of powers.

Apart from such colourful anomalies, the most significant aspect of the rejection of the separation of powers is the predominance of Parliament, founded on a further paradox. The country which can claim to be the home of the idea of fundamental law now has as the cardinal principle of its unwritten constitution—a principle incompatible with a normal constitution, indeed almost the negation of the very idea of a constitution—the principle of the sovereignty of Parliament. This Parliament is not a legislature constrained by a system of checks and balances with the executive branch. Given the predominance of the House of Commons, the system of Cabinet Government, and the extent of party discipline, resulting in the executive exercising control over the legislature, parliamentary sovereignty reflects the sovereignty not of the legislature but of an executive periodically answerable to the electorate, a system eloquently described by the present Lord Chancellor as at least potentially an “elective dictatorship.”³

Parliamentary sovereignty means simply, in concrete terms, that since the eighteenth century no court has claimed jurisdiction to review an Act of Parliament. Cracks in the monolithic structure of the constitution have appeared only where some quasi-federal element appears to threaten the unitary character of the constitution.

A first example is the reverberations of apparently entrenched

2. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, Book XI.

3. LORD HAILSHAM, *THE ELECTIVE DICTATORSHIP* (Dimpleby Lecture 1976).

clauses—and by entrenched I mean protected against amendment by subsequent legislation—in the Treaty of Union between England and Scotland⁴ that in 1707 effected the union of the two countries and of their parliaments. As a Scottish court noted thirty years ago,⁵ there were some clauses in that Treaty of Union which “expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declaration that the provision shall be fundamental and unalterable in all time coming.”⁶ But the court in effect decided that no court exists, either in Scotland or in England, with jurisdiction to declare ineffective any conflicting legislation.

Similarly the Union with Ireland Act 1800⁷ presents apparently entrenched clauses. I take this less well known example from a lecture by Lord Kilbrandon, chairman of the recent Royal Commission on the Constitution.⁸ (Yes, the Constitution has been recognised to the extent of having a Royal Commission to sit on it, although, as is commonly the case, very little has been done to implement its recommendations.⁹)

Sec. I of the Union with Ireland Act 1800 provides that “the said foregoing Articles are hereby declared to be the Articles of Union of Great Britain and Ireland and the same shall be in full force and have effect forever.” Brave words. Now let us look at the fate of one of the Articles. It was enacted by Article 5 “that the Churches of England and Ireland as now by law established be united into one Protestant Episcopal Church to be called the United Church of England and Ireland and that the Doctrine Worship Discipline and Government of the said United Church shall be and shall remain in full force for ever, and that this be deemed and taken to be an essential and fundamental part of the Union.” The main part of this Article suffered painless and unlamented extinction at the hands of the Statute Law Revision Act 1953.¹⁰

“So much,” as the chairman of the Royal Commission on the

4. 5 Anne, ch. 8.

5. *MacCormick v. Lord Advocate*, 1953 Sess. Cas. 396 (Scot. 1st Div.).

6. *Id.* at 411.

7. 40 Geo. 3, ch. 67.

8. LORD KILBRANDON, *A BACKGROUND TO CONSTITUTIONAL REFORM* (1975).

9. ROYAL COMMISSION ON THE CONSTITUTION, 1969-1973, *REPORT* (1973).

10. LORD KILBRANDON, *supra* note 8, at 16.

Constitution succinctly put it, "for entrenched clauses."¹¹ Would an enacted Bill of Rights suffer a similar fate?

The third example comes from a more recent move towards a union, the accession of the United Kingdom to the European Communities in 1973. The preamble to the Treaty establishing the European Economic Community recites that the founding member States were "determined to lay the foundations of an ever closer union among the peoples of Europe."¹² While some measure of economic integration has been achieved, the goal of political union remains at least as remote as ever, yet economic centralisation and the transfer of power to the Community institutions have had a perceptible impact on political and legal sovereignty. Indeed, it is now open to argument whether, in the developing field covered by Community law, parliamentary sovereignty any longer constitutes the basic norm of the United Kingdom constitution.¹³

In the field of individual rights, the historic guarantees of Magna Carta,¹⁴ of the Petition of Right,¹⁵ and of the Bill of Rights 1689,¹⁶ although still invoked occasionally by the courts, have no constitutional status. Those historic documents may be, and indeed to a considerable extent have been, repealed by subsequent Acts of Parliament.

The United Kingdom is a party to modern international bills of rights: the European Convention on Human Rights,¹⁷ the European Social Charter,¹⁸ the International Covenant on Civil and Political Rights,¹⁹ and the International Covenant on Economic Social and Cultural Rights.²⁰ The status of these bills of rights remains precarious. One consequence of parliamentary sovereignty is that treaties ratified by the United Kingdom but not incorporated do not have the force of law. Although the rights enshrined in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights are, by their very nature ideally suited to be enforced in the domestic

11. *Id.*

12. Mar. 25, 1957, 298 U.N.T.S. 11.

13. See, e.g., Trindade, *Parliamentary sovereignty and the primacy of European Community law*, 35 MOD. L. REV. 375 (1972); Winterton, *The British Grundnorm: Parliamentary supremacy re-examined*, 92 LAW Q. REV. 591 (1972).

14. 9 Hen. 3, chs. 1-37.

15. 3 Car., ch. 1.

16. 1 W. & M. (Sess. 2), ch. 2.

17. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

18. Oct. 18, 1961, 529 U.N.T.S. 89.

19. Dec. 16, 1966, 999 U.N.T.S. 171.

20. Dec. 16, 1966, 993 U.N.T.S. 3.

courts, those instruments, in contrast to the Treaty of Rome, have not been incorporated or given legislative effect, and so do not have the force of law in the United Kingdom. This "dualist" approach to treaties, while it can be given a democratic rationalisation, is perhaps the mark of an insular rather than an internationalist view of the law. It is true that, where a statute allows for more than one interpretation, the courts profess to adopt, as a rule of interpretation, that meaning which "is consonant with the treaty obligations."²¹ (Courts support the approach with the theory that they are giving effect to the intention of Parliament, since Parliament can be presumed not to have intended to legislate inconsistently with a treaty obligation. But the theory can, I shall suggest, be exposed as a legal fiction.) Nevertheless, that rule of interpretation has, at least until very recently, had little effect in relation to the European Convention. Instead, the courts, accustomed to very detailed and elaborate legislation, have said that the Convention provisions are "too vague," "too general," "not the kind of thing we are accustomed to."²² The result is that, while the courts will resist statutory encroachments on the fundamental rights protected by the common law, they are less disposed to give effect to the Convention.

The common law remains, therefore, the principal safeguard of individual rights in the United Kingdom, but the common law too must yield to the express terms of an Act of Parliament. Historically, it could reasonably be argued that the fundamental rights of United Kingdom citizens were more effectively protected by the common law than they were in other systems by codes, catalogues of rights, or legislation. But the fact that the United Kingdom is now the first client in Strasbourg²³ suggests that the position has changed. Several factors may have caused this change. First, other systems may construe fundamental rights more broadly and define permissible limitations more strictly now than they are construed and defined in England. Second, ever-growing encroachments of the legislature and the executive create new threats to human rights. Third, the English courts are less ready to develop new remedies to meet those threats.

The right of peaceful assembly, the right to freedom of associ-

21. *Salomon v. Commissioners of Customs and Excise*, [1967] 2 Q.B. 116, 143 (C.A. 1966) (Diplock, L.J.).

22. *Ostreicher v. Secretary of State for the Environment*, [1978] 1 All E.R. 591 (Q.B. 1977), *aff'd*, [1978] 1 W.L.R. 810 (C.A.).

23. In recent years, more applications have been brought against the United Kingdom than any other State. See COUNCIL OF EUROPE DOC. DH (83) 6.

ation, the right to freedom of the press, the presumption against retroactive penal legislation, the presumption that legislation does not intend to take property without compensation, all these rights (recognised, incidentally, by the European Convention) are protected in England only by the common law, which remains subject to any statutory inroads. Sufficiently explicit legislation can abrogate any of these rights. Similarly, the right to freedom of the person and the famous remedy of habeas corpus originated in the common law, but habeas corpus is now largely regulated by statute and the right to freedom of the person can at any time be abridged by statute. For example, the Police and Evidence Bill²⁴ proposed to increase from twenty-four hours to in some cases thirty-six and in exceptional cases ninety-six hours the period during which a person can be detained without charge. No common law rights are immune from Parliament.

Against that background the scene shifts—or rather the camera pans back—to Europe. In recent years, United Kingdom law and institutions have a new dimension, the European dimension. Constitutionally and legally, the United Kingdom is now for the first time part of a Western European polity. Lord Justice Scarman recognised this development in his far-sighted lectures *English Law—the New Dimension* in 1974, the starting point of the recent debate on the adoption of a Bill of Rights in the United Kingdom.²⁵ That European dimension has two aspects: the European Community, which the United Kingdom joined in 1973, and the European Convention on Human Rights, now beginning to have a profound impact on the United Kingdom. The European Communities Act 1972 gives effect to European Community law in the United Kingdom, however, while the Convention remains in a legal limbo.

Yet the United Kingdom Government participated actively in the drafting of the Convention, was one of the original signato-

24. Now the Police and Evidence Act 1984.

25. L. SCARMAN, *ENGLISH LAW—THE NEW DIMENSION* (1974). For the continuation of the debate, see M. ZANDER, *A BILL OF RIGHTS?* (1975); P. WALLINGTON & J. MCBRIDE, *CIVIL LIBERTIES AND A BILL OF RIGHTS* (1976); HOME DEPARTMENT, *LEGISLATION ON HUMAN RIGHTS WITH PARTICULAR REFERENCE TO THE EUROPEAN CONVENTION* (1976); STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, *THE PROTECTION OF HUMAN RIGHTS BY LAW IN NORTHERN IRELAND* 64-74 (1977); Fawcett, *A Bill of Rights for the United Kingdom?*, 1 *HUM. RTS. REV.* 57 (1976); Brown, *A Bill of Rights for the United Kingdom?*, 58 *THE PARLIAMENTARIAN* 79 (1977); Mann, *Britain's Bill of Rights*, 94 *LAW Q. REV.* 512 (1978); N. ANDERSON, *LIBERTY, LAW AND JUSTICE* (1978); DO WE NEED A BILL OF RIGHTS? (C. Campbell ed. 1980); Riedel, *The Bill of Rights Fallacy*, in *IN MEMORIAM J.D.B. MITCHELL* 38 (1983). For earlier discussion, see Mann, *The United Kingdom's Bill of Rights*, 122 *NEW L.J.* 289 (1972); Black, *Is There Already a British Bill of Rights?*, 89 *LAW Q. REV.* 173 (1973).

ries in 1950, and was the first state to ratify the Convention in 1951. The Convention served as a model for the constitutions that the United Kingdom drew up for its colonies when they attained independence, as the Constitution of Nigeria and thereafter the independence constitutions of many Commonwealth countries demonstrate. (I do not refer here to the United States in 1776.) With the understandable exception of the Federal Republic of Germany, the United Kingdom was the first of the big European countries to take the then bold step in 1966 of accepting the competence of the Commission and the compulsory jurisdiction of the Court. But it has never legislated to give effect to the Convention in the United Kingdom. For some years, such inactivity could be viewed indulgently. The Convention, after all, guaranteed only certain elementary rights which were adequately protected by the common law, with its centuries of individualistic and libertarian tradition.²⁶ The Convention was an export model, with left-hand drive, suitable for the European continent and perhaps for the former colonies.

Such complacency should have had some limits even at the outset. For instance, the right to privacy, protected by Article 8 of the Convention, provides one example of a right that has never been protected adequately by the common law or by statute, as the recent case of *Malone* well shows.²⁷ With the development of the case-law of the European Commission and Court of Human Rights, however, the contention that incorporation is unnecessary becomes increasingly hard to sustain. Time and again, in recent years, changes have been made in English law and practice to comply with opinions of the Commission and judgments of the Court: changes in the prison rules; in immigration procedures; in legislation on contempt of court; on mental health; on trade unions; on homosexual relations; on corporal punishment in schools.²⁸ In at least some of these cases, legislation might not have been necessary and the cases might not have reached Strasbourg if the Convention had been given legislative force in the United Kingdom. Other cases might have been resolved in accord with the Convention, even without incorporation, if the courts and the authorities had taken full account of their obligations under the Convention when applying

26. Cf. THE RESPONSE OF THE UNITED KINGDOM OF 13 SEPTEMBER 1966 TO THE REQUEST OF THE SECRETARY GENERAL OF THE COUNCIL OF EUROPE PURSUANT TO ARTICLE 57 OF THE CONVENTION, COUNCIL OF EUROPE DOC. H (69) 9, Second Addendum.

27. *Malone v. Commissioner of Police of the Metropolis* (No. 2), 1979 Ch. 344.

28. For some examples, see A.Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW 186-87 (1983).

domestic legislation.

Admittedly, the United Kingdom is not by any means unique in its failure to adopt legislation to give effect to the Convention. The Convention has the status of domestic law in only two-thirds of the twenty-one states party to the Convention. The seven parties where the Convention does not have the status of domestic law are the four Scandinavian countries (Denmark, Iceland, Norway and Sweden), Ireland, Malta and the United Kingdom.²⁹

Perhaps this political reality influenced the European Court of Human Rights to hold, despite strong evidence to the contrary in the Convention's negotiating history, that the Convention itself imposes no obligation to incorporate the Convention into domestic law. Article 1 of the Convention provides that "the High Contracting Parties *shall secure* to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention," but in the case of *Ireland v. United Kingdom*³⁰ the Court was prepared to hold only that:

[B]y substituting the words "shall secure" for the words "undertake to secure" in the text of Article 1, the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States. That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law.³¹

Yet, as I shall try to demonstrate, to be fully effective, implementation of the Convention does require some form of incorporation.

In recent years, and notably since the Scarman lectures of 1974,³² there has been a growing interest in the idea of giving statutory force to the Convention. Each of the main political parties has at various times expressed approval of the idea. A succession of bills to incorporate the Convention has been introduced in the House of Lords and the House of Commons. One such bill successfully completed all the steps in the House of Lords and led to the appointment of a Select Committee to investigate the question. Only the narrowest majority of the di-

29. For a full survey, see A.Z. DRZEMCZEWSKI, *supra* note 28.

30. *Ireland v. United Kingdom*, 2 E.H.R.R. 25 (Eur. Ct. Hum. Rights).

31. *Id.* at 103 (footnotes omitted).

32. L. SCARMAN, *supra* note 25.

vided Committee favoured adoption of a Bill of Rights, although it was unanimous in the view that, if there were to be a Bill of Rights, it should be based on the European Convention.³³ The bill³⁴ which passed through the House of Lords made no headway in the Commons, the Government of the day being unwilling to make government time available to consider the bill.

Within the past ten years, however, without formal incorporation, the Convention has taken faltering steps towards judicial recognition. An English court first invoked the Convention in 1974.³⁵ There it merely reinforced the presumption that criminal legislation does not have retroactive effect. Since then, the attitudes of the judges toward the Convention have been divided and ambivalent in a variety of contexts, notably immigration cases.³⁶ The judicial dicta reveal this division and ambivalence. For example, Lord Denning, having once expressed the view that immigration officers should take account of the Convention in applying the immigration rules,³⁷ subsequently recanted and stated that because immigration officers had a difficult enough task "they cannot be expected to know or to apply the Convention. They must go simply by the immigration rules laid down by the Secretary of State and not by the Convention."³⁸ The full, chequered story of judicial recognition is an unhappy one. Every step forward by one judge is echoed by a judge who dissociates himself from that step.³⁹

Has the time not come for the courts to adopt a more robust approach in place of this delicate two-step? My thesis is that the courts could, without the need for any further legislation, and should, without greatly departing from existing principles, go far beyond their timid advances and embrace the Convention

33. HOUSE OF LORDS, REPORT OF THE SELECT COMMITTEE ON A BILL OF RIGHTS 39-40 (1978). For a different view, see J. JACONELLI, ENACTING A BILL OF RIGHTS 277-81 (1980).

34. L. Wade, *Introducing a Bill of Rights*, in *DO WE NEED A BILL OF RIGHTS?*, *supra* note 25, at 17. Previous attempts to introduce legislation had been made in 1970 and 1975. See J. JACONELLI, *supra* note 33, at 32, 259-61.

35. *Waddington v. Miah*, [1974] 1 W.L.R. 683 (H.L.).

36. *Compare Regina v. Secretary of State for the Home Dep't ex parte Phansopkar*, 1976 Q.B. 606, 626 (C.A. 1975) (Scarman, L.J.) (affirming that courts have a duty to resolve ambiguities or omissions to give effect to or not derogate the Convention) *with Regina v. Chief Immigration Officer ex parte Salamat Bibi*, [1976] 3 All E.R. 843, 847 (C.A.) (Denning, M.R.) (affirming that the Convention is not a part of English law because not incorporated by legislative action).

37. *Regina v. Secretary of State for the Home Dep't ex parte Bhajan Singh*, 1976 Q.B. 198, 207 (C.A. 1975) (Denning, M.R.).

38. *Regina v. Chief Immigration Officer ex parte Salamat Bibi*, [1976] 3 All E.R. 843, 847 (C.A.) (Denning, M.R.).

39. See Duffy, *English law and the European Convention on Human Rights*, 29 INT'L & COMP. L.Q. 585 (1980).

whole-heartedly, even if they cannot give the Convention the special status accorded to Community law by the European Communities Act.

Among the principal reasons for taking this view is a very recent but very compelling one, the emergence in recent years of a coherent and systematic body of case-law developed by the European Court of Human Rights. A series of judgments in the past three or four years is particularly striking. The Court, after a cautious early approach, adopted a dynamic view of the Convention, taking a broad and flexible attitude to the rights guaranteed and a systematically restrictive interpretation of the Convention's limitations clauses. If such statements were unconvincing before, domestic courts should now often find it impossible to say that the provisions of the Convention are "vague" or too imprecise to be of assistance. The Convention is, in this respect, unlike any other treaty to which the United Kingdom is a party. Under international law, it falls to the states which are parties to an agreement, in the absence of a procedure for judicial settlement, to interpret their treaty obligations for themselves. Where the judicial process is available, however, independent and authoritative interpretation of the court must prevail over the unilateral view of each State. This principle also makes possible an evolving interpretation of the treaty, an interpretation that accords with current conditions. The interpretation of the Community Treaties by the Court of Justice suggests itself as a parallel, the only similar case. But the resemblance ends, for the United Kingdom, in the fact that the European Communities Act grants statutory force to the decisions of the Court of Justice.⁴⁰ No such statutory provision exists for decisions of the Court of Human Rights. The Convention is thus unique.

It is not possible, I think, to argue that the Court of Human Rights does not give an "authentic" interpretation of the Convention but merely rules on whether the State concerned has infringed the Convention. Admittedly, the Court's decisions have no automatic "direct effect" within the domestic legal systems; this is true even in those countries where the Convention forms part of domestic law.⁴¹ Such decisions also do not constitute a

40. European Communities Act 1972, § 3(1):

For the purpose of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning and effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).

41. See A.Z. DRZEMCZEWSKI, *supra* note 28, at 260-61. See generally Bossuyt, *The*

form of "judicial review" in the usual sense. The Court does not normally pronounce directly on the compatibility of a municipal law with the Convention; still less could it declare such a law invalid. The Court, at least in cases originating in applications by individuals, decides whether the rights of the individual, as enunciated in the Convention, have been infringed.

But of course the Court's rulings on the interpretation of the Convention do have force beyond the confines of the instant case. Often they demonstrate that a particular statutory provision, not directly in issue before it, does violate the Convention. The state courts may often conclude correctly that continued application of the provisions in the prior fashion will inevitably lead to a finding of a violation of the Convention. Is it not then their duty to avoid applying those provisions?

Yet, in the present state of English judicial attitudes, this view must have its limits. Even where the Court's judgment clearly found a United Kingdom statute inconsistent with the Convention, no English court would accept the argument that it should not apply that statute; the court would feel bound to wait until Parliament had amended or repealed the statute. Nonetheless, several factors should compel English courts to strive to give effect to the Convention. First, under international law, a decision contrary to the Convention would be an immediate violation. This provides a further argument for saying that faithful compliance with the Convention may require giving direct effect to its provisions, as interpreted by the Court. Second, European Community law provides a parallel. The Court of Justice has adopted, in the *Simmenthal* case, the federal doctrine that a state court must set aside, and refuse to apply, any provision of State law which conflicts with Community law.⁴² (English courts, when confronted with that issue, may one day accept the *Simmenthal* doctrine.) Third, at least in those countries where the Convention is part of domestic law, it is possible to argue that the courts may not apply domestic legislation so as to be inconsistent with the judgments of the Court. Fourth, the English courts, if they cannot fly in the face of an Act of Parliament, must do their best to reconcile its terms with the United Kingdom's international obligations. If the courts persist in applying an Act in circumstances which are likely to lead to an adverse

Direct Applicability of International Instruments on Human Rights, 15 REVUE BELGE DE DROIT INTERNATIONAL 317, 323-25 (1980) (discussing the effects of a decision by the European Court of Human Rights that the Convention supercedes conflicting national laws).

42. Amministrazione delle Finanze dello Stato, 1978 E. Comm. Ct. J. Rep. 629.

ruling by the Court of Human Rights, then they engage the international responsibility of the United Kingdom.

In practice, courts may avoid conflict between United Kingdom statutes and the Court's rulings if the English judges are prepared to apply legislation in the light of judgments of the Court. The case of *Attorney-General v. British Broadcasting Corporation*,⁴³ where the question of contempt of court arose after the Court had given judgment in the *Sunday Times*⁴⁴ case, but before the United Kingdom legislation had been amended by the Contempt of Court Act 1981, presented such an opportunity. In *Attorney-General v. British Broadcasting Corporation*, Lord Fraser acknowledged that the courts should give consideration to the provisions of the Convention and to decisions of the Court of Human Rights in cases where the domestic law is not firmly settled.⁴⁵ Lord Scarman appeared to go further, implying that, even when a decision of the House of Lords had established English law, the House should be prepared to reconsider its decision in the light of the Convention and Court decisions applying the Convention.⁴⁶

Very recently the English courts have once again shown a more positive, yet still hesitant, attitude towards the Convention. Several recent House of Lords decisions on freedom of expression exemplify the new tendency. *Attorney-General v. British Broadcasting Corporation* is one example. The *Lemon* case⁴⁷ in 1979, the first prosecution for blasphemous libel in more than fifty years, also demonstrates this new tendency. Mrs. Mary Whitehouse, a well-known self-appointed custodian of public morality, brought a private suit against the editor of *Gay News* who published a poem describing homosexual acts performed on the body of the crucified Christ. The common law offence of blasphemous libel has an uncertain scope. The House of Lords addressed the specific question of whether the prosecution had to prove an intent to blaspheme or only an intent to publish material that was blasphemous. Lord Scarman, among the majority of three to two, relying on the European Convention, considered that an intent to publish was sufficient.⁴⁸ Freedom of religion, in his view, outweighed freedom of expression. Lord Diplock, on the other hand, without expressly advertent to the

43. 1981 A.C. 303 (H.L.).

44. *Sunday Times v. United Kingdom*, 2 E.H.R.R. 245 (Eur. Ct. Hum. Rights 1979).

45. 1981 A.C. 303, 352 (1980) (H.L.) (Lord Fraser).

46. *Id.* at 354 (Lord Scarman).

47. *Regina v. Lemon*, 1979 A.C. 617 (H.L.).

48. *Id.* at 665 (Lord Scarman).

Convention, considered that the majority view would, in effect, make blasphemy an offence of strict liability and that such a retrograde step could not be justified by any considerations of public policy.⁴⁹

A few months later, Lord Diplock took a similar view, this time expressly relying on the Convention, in a case of defamatory libel again arising out of a private prosecution. *Gleaves v. Deakin*,⁵⁰ which concerned evidence given before a magistrate about the bad reputation of the prosecutor, led the courts to consider the rule of English criminal law that the truth of the defamatory statement is not a defence to a charge of defamatory libel. Lord Diplock could find no justification for the rule in the Convention. He suggested that in order to

avoid the risk of our failing to comply with our international obligations under the European Convention, . . . the consent of the Attorney-General [should be required before a] prosecution for criminal libel [is instituted, and that in] deciding whether to grant his consent in the particular case, the Attorney-General could then consider whether the prosecution was necessary on any of the grounds specified in Article 10.2 of the Convention and unless satisfied that it was, he should refuse his consent.⁵¹

If the courts suggest that the discretion to prosecute should not be exercised in such a case, it seems a short step to say that, if there is a prosecution, the courts should not convict. This recalls Professor Weiler's point that one effect of a Bill of Rights may be to transfer an issue from the area of prosecutor's discretion to the area of judicial review.⁵²

Perhaps the most significant recent case concerning English courts' treatment of the Convention is *Malone v. Commissioner of Police of the Metropolis (No. 2)* in 1979.⁵³ Malone, a dealer in antiques, was charged with handling stolen property. During his trial, prosecuting counsel admitted that the police had tapped his telephone with the authorisation of the Home Secretary, to obtain evidence against him. In proceedings against the police

49. *Id.* at 635-39 (Lord Diplock).

50. 1980 A.C. 477 (H.L. 1979).

51. *Id.* at 482 (Lord Diplock).

52. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REF. 51, 72-73 (1984).

53. 1979 Ch. 344.

challenging the legality of the police practice Malone relied on Article 8 of the Convention, which guarantees the right to respect for private life and correspondence. Because English law provides no general right of privacy, the judge's reaction acquires particular significance. He stated at the outset of a very careful discussion of the relation of the Convention and English law⁵⁴ that he was prepared to take account of the Convention and of the interpretation adopted by the Court of Human Rights in the *Klass* case,⁵⁵ in which the Court had stated that such interception of communications was permissible only if accompanied by stringent legal safeguards. In *Malone* the English court acknowledged that if a question of statutory construction existed, the court would readily seek to construe the legislation in a way that would give effect to, rather than frustrate, the Convention. But in the absence of any legislation, it could not give effect to the Convention. "Any regulation of so complex a matter as telephone tapping is essentially a matter for Parliament, not the courts; and neither the convention nor the *Klass* case can, I think, play any proper part in deciding the issue before me."⁵⁶

This judgment contains a number of striking features. First, *Malone* presents the clearest recognition that English law is not in accordance with the Convention. Not only was there no general protection of privacy under English law; it was clear to the court, from the *Klass* case, that the Court of Human Rights would find that English law violated the Convention.

[I]t is impossible to read the judgment in the *Klass* case without it becoming abundantly clear that a system which has no legal safeguards whatever has small chance of satisfying the requirements of that court, whatever administrative provisions there may be [and that it is] impossible to see how English law could be said to satisfy the requirements of the Convention, as interpreted in the *Klass* case⁵⁷

The *Malone* opinion effectively torpedoes the view, if it was ever tenable, that incorporation of the Convention is unnecessary because English law already gives the Convention full effect. Not

54. *Id.* at 366.

55. *Klass v. Federal Republic of Germany*, 2 E.H.R.R. 214 (Eur. Ct. Hum. Rights 1978).

56. *Malone*, 1979 Ch. at 380.

57. *Id.* at 379-80.

surprisingly, the case has now been referred to the European Court of Human Rights.

Second, the case provides an interesting indication, of some general importance, of why the traditional common law approach to the protection of civil liberties is no longer adequate. That approach is based on the idea that anything which is not prohibited is permitted; therefore, no need exists for any instrument expressly conferring individual rights. (This idea contrasts with the approach of less favoured countries in which everything not expressly permitted is prohibited.) Yet the *Malone* case stands the principle on its head. Because everything is permitted except that which is expressly prohibited, telephone tapping is not unlawful.

Third, a curious paradox follows from the failure to incorporate the Convention; a matter regulated by English law can be treated in accordance with the Convention, while in the absence of any relevant domestic law the Convention cannot be invoked at all. This paradox appears in the judge's approach in *Malone*. The judge states that he will give the Convention due consideration in discussing English law on the point, yet when he comes to the point and finds no English law, he considers himself unable to apply the Convention.

English judges, however, no longer always regard the absence of legislation as a reason for not intervening. The House of Lords has experienced a fundamental change of attitude over the past twenty years. The 1960's witnessed a legal as well as a social turning point in England. As the study of *The Law Lords* by Alan Paterson,⁵⁸ based on an extensive series of interviews, documents in fascinating detail, "for the first time the Law Lords as a body began to discuss judicial law-making and policy issues openly in a series of cases."⁵⁹ Concomitantly, fundamental changes were made in the judicial law-making functions: the rule that the House of Lords was bound by its own decisions was within limits overturned; a more purposive approach was adopted to legislation and even to treaties; and, in particular, the fact that Parliament had not legislated was removed as a reason for judges to maintain the status quo. The argument from parliamentary inactivity found favour with few of the Law Lords interviewed as a reason for judicial restraint. Lord Denning replied with characteristic candour:

58. A. PATERSON, *THE LAW LORDS* (1982).

59. *Id.* at 154.

Well, we use it when it suits our book. . . . I use it if I don't want it altered, but, on the other hand if it doesn't suit our book, I can say, "Oh, well, Parliament can't notice everything and doesn't notice everything and they haven't got time to do it."⁶⁰

Certainly, Parliamentary inactivity has many causes other than satisfaction with the existing law; this points to a fourth lesson from the *Malone* case. Ordinary legislation constitutes an inadequate substitute for a Bill of Rights because Parliament will legislate only under extreme pressure. As a leading authority on the subject, Professor Harry Street, has said in this context, "the Englishman who is the victim of abuse of this tapping power remains without remedy in English courts. Not until the European Court forces a change . . . is a United Kingdom Government likely to improve his lot."⁶¹ And again in the same context, Professor Street has commented that "one of the dominant characteristics of British Governments is that they resist any legal restrictions on the exercise of their powers: at all costs they will do no more than make *ex gratia* concessions of no legal effect."⁶² Yet the courts' new approach points the way to a new approach to the Convention. The absence of legislation giving effect to the Convention could, with an additional but limited stretch of the judicial imagination, be discounted as a reason for disregarding its provisions. The judges could fill the legislative lacuna.

Another new strand in the argument derives from the complex interrelationship between English law, the Convention, and European Community law. While European Community law has and the Convention has not been given the force of statutory law in the United Kingdom, the Convention does have a certain status in European Community law. The Court of Justice of the European Communities has increasingly, over the past ten years, acknowledged that the principle of respect for fundamental rights forms part of the general principles of law that must be observed in the application of Community law.⁶³ These general principles include such fundamental axioms as the principles of non-discrimination and proportionality, as well as respect for individual rights. In relation to individual rights, however, the

60. *Id.* at 181.

61. H. STREET, *FREEDOM, THE INDIVIDUAL AND THE LAW* 52 (5th ed. 1982).

62. *Id.* at 53.

63. See Mendelson, *The European Court of Justice and Human Rights*, 1 Y.B. EUR. L. 125; A.Z. DRZEMCZEWSKI, *supra* note 28, at 229-59.

Convention, together with constitutional principles of the member States, serve merely as material sources of those general principles. The Convention would be a formal source of Community law only if the Court were to take the further step of holding that the Convention binds the Community or if the Community itself were to accede to the Convention, as has been officially proposed.⁶⁴ And even if the Convention were to become part of Community law and thereby become capable of being invoked in the English courts, it could be invoked only in relation to Community measures and not in relation to English law at large.

But the argument does not stop there. Because the Court relies on the Convention as evidence of the general principles of law, the courts of the member States can already rely on the Convention in the same capacity when the state authorities apply a Community provision. They, therefore, must consider the Convention. Whatever the status of the Convention in English law, the English courts are not only permitted, but are required, to consider it if it should be relevant to an issue of Community law. They must interpret Community measures as would the Court of Justice.⁶⁵ Here, again, the picture has changed. The Convention has become a source of a supranational European law and as such has some application in the legal systems of all the member States of the Community.

It is difficult to see why there should not be some spillover from the general principles of law into other areas outside the field of Community legislation. Why should English courts adopt one approach in reviewing the conduct of public authorities where the authorities are applying Community law and a different approach where the same authorities, in a related field, are applying domestic legislation? Immigration officers must apply the Community rules on free movement in accordance with the Convention: why not also the domestic rules? Even in the short term such judicial schizophrenia seems unsatisfactory. In the longer term, just as the courts in the past adopted the rules of customary international law, and a common commercial law, the courts may also recognise the emergence of European customary

64. The proposal by the Commission of the European Communities that the Community should accede to the Convention was published in Memorandum of Apr. 4, 1979, BULL. EUR. COMM. (Supp. 1979-80) (No. 2/79). See HOUSE OF LORDS, SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, HUMAN RIGHTS (1979-80 H.L. 362); McBride & Brown, *The United Kingdom, the European Community and the European Convention on Human Rights*, 1 Y.B. EUR. L. 167, 176-92 (F. Jacobs ed. 1981).

65. European Communities Act 1972, § 3(1). See *supra* note 40.

law, a common core of general principles of general application.

European Community law supports the application of the Convention in three further ways. First, the history of application of European Community law helps to dispose of the argument that the provisions of the Convention are too general and too vague to be enforceable. The provisions of the Community Treaties are also often framed in a very general way. For example, the EEC Treaty provisions on competition, Articles 85 and 86, the common market anti-trust law, present such broad provisions. Article 86 prohibits any abuse of a dominant position in a substantial part of the common market. Although the examples of abuse listed in Article 86 and the case-law of the Court of Justice create some specificity, the basic concepts remain remarkably porous and open-textured. Yet the courts enforce the prohibition of Article 86, and do so in cases requiring both findings on complex questions of fact and an evaluation of problematical economic issues, which may tax the courts more seriously than the application of the Convention in cases of fundamental rights. Generality is no longer an excuse.

Second, ten years' experience in the handling of Community law demonstrates that Parliamentary sovereignty is not the stumbling-block it might, and did, seem. The courts, untroubled by theoretical constitutional issues, have accustomed themselves to the primacy of Community law. Only if an Act of Parliament expressly purported to override Community law would that difficulty be real; although such an eventuality cannot be excluded altogether, it is perhaps even less likely that an express overriding of the Convention would prove necessary.

Third, the Community Treaties constitute the only European example, apart from the Convention, of procedures for international judicial determination of the rights of individuals against states. Because the very object and purpose of the Convention, in comparison with the Community Treaties, is to accord the individual enforceable rights, there can be no warrant for giving less effect to the Convention than to the Community Treaties.

The existence of judicial interpretation also assists in disposing of the argument that the courts, in interpreting an Act of Parliament consistently with the Convention, are doing no more than giving effect to the intention of Parliament. That argument, designed to reconcile the international obligations of the United Kingdom with the doctrine of Parliamentary sovereignty, is when applied to the Convention exposed as a fiction. Taken strictly, the argument would be difficult to apply to Acts of Parliament enacted before ratification of the Convention, because it

is difficult to contend that Parliament did not then intend to legislate inconsistently with the Convention.⁶⁶ But it becomes impossible to reconcile with an evolving interpretation of the Convention by the Court of Human Rights. The true explanation must be found in the principle, also correct under international law, that all organs of the State, the courts as well as the legislature, are bound by treaty obligations. And in the special case of the Convention, the obligations are to be interpreted in accordance with the judgments of the Court.

If Parliament decided to adopt a Bill of Rights—and here it must be said that a decision is not much closer than it was ten years ago—should it be the Convention or a tailor-made Bill, more suited to domestic conditions, perhaps even fuller and more up-to-date than the Convention? In my view, a number of arguments, individually strong and cumulatively overwhelming, support the adoption of the Convention as the text of a United Kingdom Bill of Rights.⁶⁷ Some of the arguments also demonstrate that incorporation of the Convention would overcome obstacles which would otherwise attend the adoption of a Bill of Rights.

First, legal obligation compels at least partial incorporation of the Convention. Courts cannot now give full effect to the United Kingdom's Convention obligations without some form of incorporation of that text.

Second, there is the weighty practical consideration that the Convention commands a wide measure of cross-party support. It would be difficult if not impossible to achieve a similar measure of consensus on a new Bill of Rights. The difficulties of drafting a new Bill of Rights can hardly be overstated. The exercise would open up a veritable Pandora's box of political controversy, which could take years to resolve, with no certainty of a successful outcome.

Third, a new Bill of Rights would raise problems of overlapping provisions. The coexistence of a new Bill of Rights, directly enforceable, and an indirectly enforceable Convention would be a recipe for confusion, if not chaos.

Fourth, there is the European dimension: incorporation of the Convention would achieve the adoption of a common European standard at a stroke of the legislative pen.

66. See Duffy, *English Law and the European Convention on Human Rights*, 29 INT'L & COMP. L.Q. 585, 591-93 (1980).

67. I note, but do not find convincing, Jacconelli's objections to adoption of the Convention. See J. JACONELLI, *supra* note 33, at 277-81.

Fifth, a new Bill of Rights would deprive the courts of the guidance of the Strasbourg case-law. Experience shows that the courts would have genuine difficulties in coping with constitutional style provisions. If, on the other hand, the Bill of Rights were drafted in greater detail, in a style to which the courts are accustomed, it would lose the advantages of flexibility, adaptability and permanence, and would perhaps encourage a narrow approach to its interpretation. One leading advocate of a Bill of Rights, Anthony Lester, has warned that it might take years to persuade the courts not to approach a Bill of Rights in the same way they approach a taxing statute.⁶⁸ Such a danger is obviated, in the case of the Convention, by the availability of the Strasbourg case law.

Sixth, and perhaps of greatest importance, the Convention would provide the required balance between Parliament and the courts and go far to resolve the central dilemma which is the principal theme of the debate: the role of judicial review in a democratic society. The overt intrusion of the courts into politics, and the spectre of political appointments of judges, raise particular difficulties in the United Kingdom. The Convention has successfully maintained the balance between the effective protection of human rights and the preservation of political consensus. Its acceptability in so many European democracies would both reassure those who genuinely regard any dilution of Parliamentary sovereignty as undemocratic and also provide a measure of protection for the courts. It would minimize what in the United Kingdom may be seen to be the greatest risks attendant on the introduction of a Bill of Rights: the twin dangers of judicial interference in the political process and the possibility of political interference with the independence of the judiciary.

But I have sought to suggest that, even without legislation and quite apart from any general arguments about the desirability of adopting a Bill of Rights, the United Kingdom courts can and should currently give full effect to the Convention. This may not be an entirely satisfactory alternative to formal incorporation of the Convention by Act of Parliament. Such incorporation could put the Convention on a firmer legal basis; it would have a valuable declaratory and promotional effect; and it might even, by

68. A. Lester, *DEMOCRACY AND INDIVIDUAL RIGHTS* (1969) (Fabian Tract No. 390), cited in J. JACONELLI, *supra* note 33, at 178. For the most recent contribution to the debate, see Lester, *Fundamental Rights: The United Kingdom Isolated?*, 1984 PUB. L. 46.

analogy with the European Communities Act, give the Convention some special status without formal entrenchment.

It has to be accepted that full entrenchment is not at present a realistic option. Full entrenchment would be difficult without a wholly new constitutional settlement, which is normally a response to political crisis and renovation, as is underscored by the examples of the United States, Canada, the Federal Republic of Germany, and indeed by the Magna Carta and the 1689 Bill of Rights. In the United Kingdom today, however, the customary lack of interest in our constitutional arrangements, and even less interest in constitutional theory, remains pervasive. Additionally, no widespread view exists that fundamental rights are inadequately protected. Every society has its blind spots; and in the United Kingdom there is a blindness to all issues of constitutional principle, the product, no doubt—for it was not always so—of a long period of political stability and the absence of dissatisfaction with the existing level of protection of human rights.

But entrenchment of a Bill of Rights may not be a pressing need, even if the present state of the law is recognised as unsatisfactory. Even incorporation of the Convention by ordinary legislation, although desirable, need not be treated as indispensable. The courts could do much to fill the legislative gap and to give effect to the Convention: by construing other legislation restrictively; by following the example of the Court of Human Rights in giving fundamental rights a broad interpretation and scrutinizing rigorously the justification for all restrictions; by applying the principles of necessity and proportionality; by developing judicial remedies even in the absence of legislation; and by drawing attention forcefully to what may prove to be the rare cases where an Act of Parliament by its terms leaves them no choice but to ignore the Convention.

It is striking to look back ten years to a time when the Convention was almost unknown in the United Kingdom and had never been cited in a judicial decision. In the past decade, the interpretation of the Convention has made great advances and a substantial European law of human rights has developed. Will the next decade see similar advances? By giving effect, *de facto*, to the Convention, the United Kingdom courts could bring the United Kingdom into step with other European countries, with many Commonwealth countries, and with other democratic societies committed to the effective protection of human rights. The courts could develop, over the forthcoming years, on the basis of the Convention, a new Bill of Rights for the United Kingdom.

