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A Bill of Rights for the United Kingdom: From London to Strasbourg by the Northwest Passage?

Stephen Sedley

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A Bill of Rights for the United Kingdom: From London to Strasbourg by the Northwest Passage?

Abstract

In anticipation of the United Kingdom's patriation of the European Convention on Human Rights, the author explores the possible impact that a Bill of Rights will have on the U.K. system of justice from a European and U.K. perspective. The author argues that, from a European perspective, the U.K. has an established history of yielding to supra-national law given its membership in the European Union. However, from a U.K. perspective, this will present new challenges, as the constitutionality of domestic legislation is subject to increased judicial scrutiny in ensuring conformance with European Convention obligations. The author argues that the pressures on Parliament to remedy domestic legislation as a result of decisions made by foreign judges on the European Court of Human Rights will be a particularly challenging adjustment. He concludes that, while there are lessons to be learned from other countries with bills of rights, the traditional reluctance among U.K. judges to override the will of Parliament will render the impact of such a document unpredictable.

Keywords

Civil rights; Constitutional law; European Union; Great Britain

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A BILL OF RIGHTS FOR THE UNITED KINGDOM: FROM LONDON TO STRASBOURG BY THE NORTHWEST PASSAGE?©

BY MR. JUSTICE STEPHEN SEDLEY*

In anticipation of the United Kingdom's patriation of the *European Convention on Human Rights*, the author explores the possible impact that a Bill of Rights will have on the U.K. system of justice from a European and U.K. perspective. The author argues that, from a European perspective, the U.K. has an established history of yielding to supra-national law given its membership in the European Union. However, from a U.K. perspective, this will present new challenges, as the constitutionality of domestic legislation is subject to increased judicial scrutiny in ensuring conformance with *European Convention* obligations. The author argues that the pressures on Parliament to remedy domestic legislation as a result of decisions made by foreign judges on the European Court of Human Rights will be a particularly challenging adjustment. He concludes that, while there are lessons to be learned from other countries with bills of rights, the traditional reluctance among U.K. judges to override the will of Parliament will render the impact of such a document unpredictable.

En anticipant l'adoption de la *Convention européenne des droits de l'homme* par le Royaume-Uni, l'auteur explore, d'un point de vue britannique et européen, l'impact possible d'une telle convention sur le système de justice britannique. L'auteur soutient que, dans une perspective européenne, le R.-U. a traditionnellement accepté la prédominance du droit supra-national, considérant son adhésion au sein de l'Union européenne. Toutefois, dans une perspective britannique, cette convention présente de nouveaux défis, puisque la constitutionnalité de la législation domestique est soumise à un examen judiciaire élargi, afin d'assurer sa conformité avec les obligations de la *Convention européenne*. L'auteur soutient que les pressions exercées sur le Parlement afin d'ajuster la législation domestique suite aux décisions des juges étrangers siégeant à la Cour européenne des droits de l'homme représente un défi de taille. Il conclut que, tandis qu'il y a des leçons à tirer des autres pays à cet égard, la réticence traditionnelle des magistrats du R.-U. à outrepasser le désir du Parlement rendra imprévisible l'impact de ce texte.

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I. INTRODUCTION

It will seem extraordinary to a Canadian audience that a country small enough to fit twice into Hudson Bay contains three separate legal systems and is shortly to have three, possibly four, different political systems within it. But if there is a country that has always demonstrated what a confidence trick the term "nation-state" is, that country is the United Kingdom. A state we certainly are—a very successful unitary state in many ways, though one that has spent the whole of this century grappling with the problem of a neighbouring country, Ireland, which it annexed six centuries ago and which it can neither wholly govern nor wholly let go. A nation we are not. We are Welsh, Scottish, English, Northern Irish by culture, language, or domicile; by origin we now represent every corner of the globe. We are, as you are, a people both divided and held together by our geography, our history, and our polity.

It is this polity that is now changing shape as we watch. The Labour Party, which with a very large majority now forms the government of the United Kingdom, came into office in May 1997 on a pledge to provide for the devolution of significant powers of government to constituent parts of the United Kingdom—a deliberative assembly¹ for Wales, and a parliament² with limited powers of taxation for

¹ See Secretary for Wales, *A Voice for Wales / Llais dros Cymru*, CM 371 (London: The Stationery Office, 1997). This White Paper was followed by a referendum which, by a very slender majority, approved what the Government of Wales Bill (November 1997) was to characterize as "executive devolution." The Welsh Assembly will have considerable powers of delegated legislation.

² The *Scotland Bill* (December 1997) provides for the transfer of primary legislative powers to a Scottish parliament. But it reserves to the courts, with ultimate appeal to the Privy Council, any issue of legislative competence. Since the *Human Rights Bill* (see below) will be U.K.-wide, it appears that in Scotland, unlike England or Wales, the courts will have the power to disapply Scottish legislation that breaches the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 [hereinafter *European Convention*]. In Northern Ireland, where legislation generally takes the form of Orders in Council, challenges for non-conformity with the *European Convention on Human Rights* were likely to be constitutionally unproblematical, but the impending political settlement there will change all this.

Scotland. These major constitutional reforms are now at the top of the legislative agenda. Together with them stands the renewed possibility of a political and military settlement in Northern Ireland, again carrying with it, if it happens, the near-certainty of constitutional reform in that tormented corner of the United Kingdom.

The Labour Party has also in recent years reversed its longstanding opposition to a bill of rights. Shortly before the 1997 election it published a policy paper, *Rights Brought Home*,³ proposing the patriation of the *European Convention*.⁴ The Liberal Democrat Party, which now forms a quasi-coalition with Labour, has long supported such a move.

These are no more than facts. It is not my concern to evaluate them. But the coming impact of them on our law and on our systems of justice is every British judge's concern. It is a concern that can usefully be addressed in a historical perspective. But the one thing to remember in constructing such a perspective is that history cannot repeat itself: every conjuncture of place and time is unique. There is no fixed historical or political relationship, for example, between a constitution and a bill of rights. A constitution, properly speaking, is the set of arrangements for the distribution and exercise of state power; a bill of rights (traditionally at least) is a series of protections for individuals against the misuse of that state power. But because there are strong constitutional implications in any such regulation of state power, it is legitimate to regard a bill of rights as, potentially at least, a constitutional document.

Constitution-making does not ordinarily create a turning point for a society: more usually it symbolizes a turning point created by other, more decisive, events. England's Bill of Rights of 1689, the American Constitution of 1788 with its subsequent Bill of Rights, the French Declaration des Droits de l'Homme of 1789, the new Constitution of South Africa—these are instruments which have marked the triumph of a new social and political order. The individual rights they have enshrined have for the most part been designed to guarantee that the new order will not slip back into the ways of the old. For this reason,

³ Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill*, CM 3782 (London: The Stationery Office, 1997). The White Paper and the Human Rights Bill which were still awaited at the date when this lecture was delivered were published at the end of October 1997. The Human Rights Bill was introduced very shortly afterwards in the House of Lords and at the time of publication is engaged on its parliamentary passage. It is expected to become an Act during 1998 and to come into effect in 1999 or possibly 2000. Some of its key elements are mentioned in the succeeding footnotes.

⁴ *Supra* note 2.

bills of rights, for all their protestations of universality and of self-evident truth, are tied in large part to their own time and place. While present developments in the United Kingdom cannot claim the epochal character of those I have mentioned, it is likely that they will turn out to have more than the merely cosmetic character of the many constitutions which, seeking in country after country to create the illusion of change where there is none, have sunk with barely a ripple—a fate which befell your 1960 *Canadian Bill of Rights*⁵ and (a stunning miscalculation) was predicted by many in 1982 for Pierre Trudeau's *Canadian Charter of Rights and Freedoms*.⁶ I will return briefly at the end of this paper to this instance of the great conundrum of legal history—why were they so wrong? Why, in other words, as both the friends and the foes of the *Charter* acknowledge, has it changed the face of Canada as its predecessor failed to do? And are there any predictors of what fate awaits the United Kingdom's coming Bill of Rights?⁷

II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The *European Convention*⁸ itself has something of this epochal character I have mentioned. It is technically a treaty signed by member states of the Council of Europe, a grouping of west European states formed in the aftermath of the Second World War. It was written in 1950, drawing heavily on the *Universal Declaration of Human Rights*⁹ adopted in 1948 by the United Nations, in the ashes of a regime which had taken the world to the edge of the abyss of barbarism—indeed, had plunged tens of millions of lives into it. It was among other things an attempt, with a very considerable diplomatic input from Britain, to say “Never again” to the violation by states of the norms of civilization. It was also an attempt to ensure that the regimes that came to power in

⁵ S.C. 1960, c. 44, reprinted in R.S.C. 1985, Appendix III.

⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

⁷ I will continue to use this expression, although the statute will be called the Human Rights Act. The Bill is a model of economical drafting, with only one obscure passage (cl. 6(5), exempting—without defining—the “private” acts of public authorities). It requires *European Convention* rights to be given effect so far as possible in applying primary legislation and unconditionally in applying secondary legislation (save where the empowering statute leaves no option) and in judging the acts of public authorities (which include the courts but exclude Parliament).

⁸ *Supra* note 2.

⁹ UNGA Res. 217(III), UN GAOR, 3rd Sess., Supp. No 13, UN Doc.A/810 (1948).

western Europe did not revert by stealth or inertia to such violations. It is therefore the case today that what the *European Convention* contains, and what it omits, are very much products of the time and situation in which it was written. Its authors were not only looking over their shoulders at the tyranny of Nazism; they were looking ahead at a Europe in which strong pro-Soviet Communist parties were bidding for power. It is unsurprising that, for these and no doubt other reasons, the states that put together the *European Convention* placed their faith in the 19th-century liberal paradigm of the autonomous individual whose natural antagonist is the state; and that the *European Convention* therefore treats the state as a necessary evil in whose favour exceptions have to be made in what are otherwise the absolute rights of individuals. There is no underlying collectivist notion that the state may have positive obligations as a guarantor, if not a source, of individual security and opportunity, and no bedrock of fundamental duties of respect that individuals may owe one another.

Thus, the substantive rights set out in the *European Convention* are these: the right to life; a prohibition of torture and of inhuman or degrading treatment or punishment; a prohibition of slavery and forced labour; a right to liberty and security of person; a right to a fair trial; a bar upon retrospective criminal legislation; a right to respect for private and family life, home and correspondence; freedom of thought, conscience, religion and expression; rights of peaceful assembly and association; and the right to marry and found a family. The First Protocol,¹⁰ which the United Kingdom has ratified, adds the right to peaceful enjoyment of possessions, to education, and to free elections. The right in the *European Convention* to education is anomalous: it is the only social and economic right in the document; food and shelter, for example, are not there. The right to free elections, while vital, by straining the language of rights illustrates my point about the philosophy of the *European Convention*: for what is here being spoken of is in reality a generalized obligation of the state, not an atomized individual right. If such contemporary elements as a right to a wholesome environment are to be derived from the *European Convention*, it will have to be by the coercive process of reasoning by which the High Court of India during the 1980s managed to extract environmental rights from the constitutional right to life. The *European Convention* is, in short, very much a product of a time and place that will not be in all respects those of the United Kingdom in the twenty-first century.

¹⁰ *Supra* note 2.

The *European Convention* does nevertheless contain three important adjectival provisions: it requires every state signatory to provide a domestic remedy for violations; it forbids the use of *European Convention* rights to undermine the rights of others; and it assures the enjoyment of these rights without discrimination on grounds which include, but are not limited to, sex, race, and opinion. It is to these provisions that I believe we shall need to look repeatedly if we are to avoid the reproach levelled (whether justly or unjustly) at the way the *Charter* has been working—that it has tended to serve disproportionately well those in society whose hands are already on the levers of power.

The European Court of Human Rights (ECHR), which exists to adjudicate complaints that state signatories have violated the *European Convention*, has not been idle in these years. It came into being in 1959, nine years after the *European Convention* itself, recognized initially by only eight of the member states of the Council of Europe. Today, when membership of the Council of Europe has grown to forty and is certain to increase further, it is recognized by all of them. It has developed a sophisticated jurisprudence which has attempted, so far as a case-by-case approach permits, to meet some of the criticisms and repair some of the inadequacies of the *European Convention*. One important, if hesitant, step has been the development of a concept of affirmative state obligation—a duty not merely to refrain from invading individuals' *European Convention* rights but to legislate in order to protect them.¹¹ For example, the ECHR has held that the obligation to respect private and family life may travel beyond simple non-interference by the state and require affirmative legislation governing invasions of privacy by private persons or organizations.¹² The reason why this can be required is that the *European Convention*, although a treaty and not a supranational law, commits the entirety of each state signatory—judiciary, executive and legislature alike—to observe its norms. Not only must executive action conform to it; rules of procedure, common law and equity must do so; and where primary legislation breaches the *European Convention*, the legislature itself comes under a duty to pass an amending measure.¹³ In

¹¹ This is much like the Canadian Supreme Court has recently done by requiring provinces to compel health service providers to make interpretation available for the deaf: see *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624.

¹² See *Airey v. Ireland* (1979), Eur. Ct. H.R. Ser. A, No. 32; and *X and Y v. Netherlands* (1985), Eur. Ct. H.R. Ser. A, No. 91.

¹³ The Bill addresses this obligation by preserving Parliament's immunity from adjudication and providing instead that a superior court, if unable to construe legislation compatibly with the *European Convention*, may make a declaration of incompatibility. A fast-track procedure will then enable ministers to amend the primary legislation by Order in Council; but judicial review of

this respect, the *European Convention* differs fundamentally from the *Charter*, which at least since *RWDSU v. Dolphin Delivery Ltd.*¹⁴ has been known to exempt the court's own orders from *Charter* standards and which of course also permits explicit legislative derogation under section 33. It also differs from the New Zealand model,¹⁵ which requires the enacted rights to yield to primary legislation that cannot accommodate them. The *European Convention* is a treaty that binds the state signatory comprehensively. Being a treaty, it is open in principle to reservations, to derogations, and even to denunciation, but the political and diplomatic disincentives to any such step are very great, and short of these measures there is no proviso behind which a legislature may shelter.¹⁶ It is here that a peculiar problem will await us.

The United Kingdom has no constitutional court, partly because it has no written constitution, but also because it is the ordinary courts which by judicial review of governmental action from day-to-day play a significant part in making and remaking Britain's organic constitution. It is probable that, even if a tribunal such as the Privy Council has to become the tie-breaker in boundary disputes over the newly devolved powers of government, the implementation of the *European Convention* will remain the business of the ordinary courts.¹⁷ But the Bill rejects the North American systems by which the courts themselves are empowered to give effect to their conclusion that a statute is inconsistent with the *European Convention* by disapplying it. Secondary legislation and administrative action of all kinds will of course be directly reviewable on *European Convention* grounds. In relation to primary legislation the superior courts will be empowered to make a declaration of inconsistency, leaving it to Parliament to amend the law in the way it considers best.

Suppose then that government disagrees with the domestic court's view that primary legislation conflicts irresistibly with the *European Convention*. At present there is no mechanism by which the government of a state signatory can appeal to the Strasbourg court against a decision of its own courts. There is a power in the Strasbourg court to give advisory opinions, but it has never been used. This apart,

whether, when, or how they do it is expressly blocked.

¹⁴ [1986] 2 S.C.R. 573.

¹⁵ *New Zealand Bill of Rights Act*, 1990, No. 109.

¹⁶ Except insofar as the "margin of appreciation" doctrine (see Part V below) provides a hedge.

¹⁷ This is indeed the underlying policy of the White Paper and the Human Rights Bill, *supra* note 3.

the only way for a government to secure a final ruling will be to decide not to give effect to the court's finding (if necessary by using its majority to vote down any private member's amending Bill) and so provoke—perhaps even invite and fund—an application to the Strasbourg court by one of the individuals affected. This will be an unhappy and cumbersome way of proceeding, but it seems an unavoidable by-product of the history and purpose of the *European Convention*, which was to provide a remedy in the Strasbourg court *for* an individual *against* a state and not vice versa.

III. TWO PERSPECTIVES OF THE U.K. BILL OF RIGHTS

Let me look now at this coming change in our legal culture from two other perspectives—one European, the other that of the Commonwealth. Each has already left its mark on the United Kingdom's proposed Bill of Rights; and each may leave much stronger marks on the jurisprudence of rights which our courts are now to develop. Together, they afford a useful context in which to evaluate what is happening.

A. *The European View*

The adjective European needs some explaining in this context. Most journalists, many politicians, and even some lawyers get confused by the byzantine political structures of this region that proclaims itself a continent but is, in fact, only the westerly end of a far larger land mass. The *European Convention*¹⁸ is a treaty signed by member states of the Council of Europe, a loose political union set up in 1949 and composed of states on the western side of the Iron Curtain. It is, however, an organization which has no independent legislative power or authority over its members. The drafting of the *European Convention* was one of its first acts. The United Kingdom was, in fact, the first state to ratify the *European Convention*, but it was not until 1966 that it accorded its citizens the right of individual petition to the ECHR, and it has declined until now to make the *European Convention* part of its own law.¹⁹

¹⁸ *Supra* note 2.

¹⁹ Although schematically this is so, with the consequence that citizens have had to make the long haul to Strasbourg every time the domestic courts have been unable to satisfy the requirements of the *European Convention*, the pressure towards incorporation has been reflected in a growing

Meanwhile, most other member states have woven the *European Convention* into the fabric of their law—Germany by its Fundamental Law; and France by a rule of domestic law which gives supremacy to treaty obligations. In the United Kingdom a handful of liberals have for almost thirty years argued for us to do likewise. Perhaps the most prominent is Lord Scarman, who for decades now has argued with great force and skill for a written constitution embodying both a Bill of Human Rights and Fundamental Freedoms and a non-enforceable Charter of Social Justice to set standards of economic and social entitlement. The price paid for eventual success by these early advocates of reform has been the scaling down of their project, first to a simple Bill of Rights, then to one that does no more than reproduce the *European Convention*, and lastly to one that is neither entrenched against repeal nor superior to other legislation. This is the same path as was recently trodden in New Zealand, where in 1985, building on Canada's newly enacted *Charter*, a proposal was advanced by the government for an entrenched Bill of Rights having the status of a fundamental law. By the time it reached the statute book in 1990, the Bill had become a simple statute prescribing how the general law is to be modified and how other statutes are to be read if their wording permits it. When, some months before taking office as Lord Chancellor, Lord Irvine of Lairg in a speech to students of the Inner Temple described the *New Zealand Bill of Rights Act*²⁰ as “a uniquely British compromise,” it became clear that if his party won the election it would probably appropriate New Zealand's solution.²¹

There is, anyway, little appetite among Britain's judges, myself included, for a power of life and death over Parliament's primary legislation; though one has to recognize that neither the United States, where early in the Constitution's life the Supreme Court awarded itself this power, nor Canada, where in 1982 the Canadian governments handed it over, has found it unworkable in practice. Nevertheless, to be able to destroy without necessarily having the power to rebuild is not alluring; and for an unelected judge to be able to declare that what a freely elected Parliament has done is not permissible in a democratic society requires a sophisticated understanding of the relationship of the democratic process to the rule of law. But to stop the argument at this

regard shown by English jurisprudence for *European Convention* standards, for example, by resolving any doubt about the meaning of an Act, and any lacuna or obscurity in the common law, in favour of an interpretation or rule which conforms to the *European Convention*.

²⁰ *Supra* note 15.

²¹ Though, as this article argues, any true analogy with New Zealand is exploded by the treaty obligation, reflected in the Bill, for the legislature itself to conform to the enacted standards.

familiar meeting point of constitutional and political discourse is not to face up to the arguments of legal principle which point the other way. In particular it is not good enough to say, as is repeatedly said in this debate in the United Kingdom, that a fundamental law to which other statutes must yield is contrary to our tradition of democracy. One reason why this is so is that we do already have a fundamental law to which all others must yield. This is not Magna Carta; it is not the Bill of Rights 1689; it is not the Act of Union 1707 which united England and Wales with Scotland; it is the *European Communities Act 1972*.²²

The European Communities in 1972 were the economic treaty organizations to which only the most prosperous handful of western European states initially belonged. The first was the European Coal and Steel Community, set up in 1951.²³ Then in 1957, by the *Treaty Establishing the European Economic Community*,²⁴ the original six states pledged themselves not only to economic cooperation but to a measure of joint government that necessarily involved a limited surrender of their political and economic autonomy. The city of Brussels has become the capital of a transnational governmental organization, now known as the European Union (EU), which has, at present, fifteen members and applications pending from eleven further states, mostly from the former Communist bloc. The United Kingdom entered this organization following a referendum in 1972. To do so, it was required to legislate to give primacy to the legislative measures of the European Economic Community (EEC), and to accept as binding the decisions of the Community's judicial tribunal, the European Court of Justice (ECJ), which sits not in Strasbourg but in Luxembourg.

It is only in recent years that the character of this commitment has been driven home. In 1988 the U.K. Parliament passed a *Merchant Shipping Act*,²⁵ which had the effect of limiting the number of foreign vessels, including those of other member states of the EU, that could register in Britain and fish in its waters. The ECJ held that this violated the rights of Spanish fishermen under the *Treaty of Rome*,²⁶ and the House of Lords in its judicial capacity was compelled to strike down as

²² (U.K.), 1972 c. 68.

²³ *Treaty Establishing the European Coal and Steel Community*, 18 April 1951, 261 U.N.T.S. 140.

²⁴ 25 March 1957, 298 U.N.T.S. 11 [hereinafter *Treaty of Rome*].

²⁵ (U.K.), 1988 c. 12.

²⁶ *R. v. Secretary of State for Transport, Ex parte Factortame Ltd. and Others*, [1989] E.C.J., C-221 (LEXIS/NEXIS).

much of the *Merchant Shipping Act* as was incompatible with the *Treaty*. You will not find anywhere in the House of Lords' decision²⁷ the phrase "fundamental law" or any homonym for it, but their decision—which flowed inexorably from what Parliament itself had enacted in 1972—was that the law of the EU now overrode all domestic laws; was, in fact, a fundamental law by which Parliament itself was bound and of which the courts were the custodians.

So the constitutional situation into which our new Bill of Rights is to be introduced is far from the uncomplicated paradigm of Dicey's imagining. The deference historically accorded by the courts to Parliament's legislation has been breached a quarter of a century since, by Parliament's own election to defer to the law of the EU. This shift has one particular implication which, though it sounds dry and technical, is of radical importance: it has destroyed the doctrine of implied repeal.

The underlying objection in the United Kingdom to a fundamental law has for generations been the democratic one that no parliament should be able to bind its successors. It is for this reason that if two statutes are found to be inconsistent with one another, the later one prevails: the hands of the later parliament, in other words, are not to be tied by its predecessors. The *European Communities Act 1972*, for reasons I have explained, changed all that, so that the Parliament which in 1988 passed the *Merchant Shipping Act* had been divested by its predecessor of the power to do so.

The *New Zealand Bill of Rights Act*,²⁸ as I mentioned, reached the statute book not only without the status of a superior or entrenched law—neither of which is known there—but without even the support of the doctrine of implied repeal. Instead, by section 4, it expressly forbade the courts to treat it as overriding any earlier inconsistent legislation. I am not going in this paper to attempt an evaluation of the success of the New Zealand measure—which in the circumstances has been surprising—but it is relevant to my theme that the price paid for it has included a reversal of the very constitutional principle which it was being sought to uphold. For by entrenching all previous, as well as future, legislation to the precise extent to which it violates recognized human rights, the New Zealand Parliament has actually reversed the principle of implied repeal.

When the United Kingdom began to face up to the fact that in 1997 Hong Kong would be reverting to Chinese rule, it set about trying

²⁷ *Factortame Ltd. and Others v. Secretary of State for Transport*, [1990] 2 A.C. 85.

²⁸ *Supra* note 15.

to establish a set of human rights in that vibrant but often corrupt colony. A Bill of Rights based (as in New Zealand) upon the *International Convention on Civil and Political Rights*²⁹ was drafted. By a fine stroke of irony, the legislature that adopted it³⁰ in 1991 was itself largely unelected. But it dealt in a principled way with the issue of implied repeal and entrenchment. It explicitly overrode all prior inconsistent legislation, but it was made to yield to any future legislation that could not be construed conformably with it. Hong Kong, however, had Royal Letters Patent which did service as its constitution, and by amending these to forbid any future laws from infringing the new rights the United Kingdom effectively entrenched them, at least for so long as the People's Republic of China was prepared to respect them.

Elsewhere in the Commonwealth, the United Kingdom has had no difficulty in entrenching human rights as part of a constitutional settlement. To take only one example, when Trinidad and Tobago received their independence they were given a constitution, drafted in Whitehall, which entrenched a series of fundamental rights against any invasion by the state, the legislature included, and gave redress for any violation.³¹ The justification, no doubt, was that after generations of colonial rule such countries had little experience of democratic processes. But the entrenchment of individual rights is not principally a shield against autocracy, since autocracy by definition pays little regard to law. It is a hedge against one of the sidewinds of democracy itself—the neglect by the majority of the rights of minorities, and above all of the most important of all minorities, the minority of one.

B. *The U.K. View*

Let me return now to the United Kingdom, whose situation is not that of any of those countries I have touched upon. For example, while we have accommodated ourselves without openly saying so to the concept of a fundamental law, the *European Communities Act 1972*, that law itself is probably capable of being repealed without any special

²⁹ 16 December 1966, U.K.T.S. 6 (1977) [hereinafter *ICCPR*].

³⁰ See the *Hong Kong Bill of Rights Ordinance*, 1991 (Cap 383).

³¹ See *R.L. Maharaj v. A-G of Trinidad and Tobago*, [1979] A.C. 385 (H.L.). By a fine stroke of historical irony, Mr. Maharaj is now the attorney general for Trinidad and Tobago.

majority if Britain should ever decide to withdraw from the EU.³² The political reality is that no law is so fundamental that it can never be changed.

But of more immediate importance is the fact that the non-entrenchment and ostensibly attenuated status of the United Kingdom's Bill of Rights will not be—as it is in New Zealand—the end of the story. Where the New Zealand model requires the citizen to live with the fact that his or her statutory rights cannot be upheld because another Act of Parliament trumps them, if either the domestic courts or the Strasbourg court hold our primary legislation to be deficient, Parliament itself, as an emanation of the Crown, will come under a treaty obligation to remedy the defect. In this respect patriation, though taking the ostensibly weak New Zealand form, will, it seems, give the *European Convention* a force that even the *Charter* lacks.

The new Bill of Rights will call upon the courts to interpret any domestic legislation so far as possible so as to conform with the *European Convention* before falling back on a declaration of inconsistency. This has, of course, always been a canon of construction of statutes passed subsequently to the signature of a material treaty, but it will acquire a new urgency when the court's inability to make a statute fit the *European Convention* has direct repercussions for the legislature. If one goes by plain and ordinary meaning alone, in the great majority of cases there will be no room for movement or reinterpretation. It will only be in the rare case where there is no plain meaning that the *European Convention* right will serve as a tie-breaker—assuming that at least one of the possible meanings has a human rights dimension. So either this new canon of construction will be of only occasional relevance, or we shall need to adopt a new approach—not of asking first and foremost what the words mean, but of asking whether they can be made to bear a meaning consistent with the *European Convention*.³³ In answering the question the courts will not, of course, be obliged to distort the drafter's language; but to the extent that they decline to do so they will be compelling Parliament to bring in amending legislation or to expose the United Kingdom to censure in Strasbourg. The choice itself

³² I say "probably" because the Australian attorney general has advised that the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, art. 54, prevents unilateral withdrawal from international covenants which do not themselves permit withdrawal. The *Treaty of Rome*, like the *ICCPR*, does not permit withdrawal; the *European Convention* does.

³³ A bold approach to this problem has now been commended by the Lord Chancellor, Lord Irvine of Lairg, in his Tom Sargant Memorial Lecture 16 December 1997, (1998) P.L. 221. He instances the strongly purposive construction given by the House of Lords in its judicial capacity to domestic legislation in order to secure conformity with European Union requirements.

is likely to be problematical; the option of forcing a statute to speak words which it does not contain, even more so.

This is what gives its attraction to a paper³⁴ submitted by a group of barristers who are among the most experienced English human rights practitioners. They have urged government to take a road which is closer to Canada's than to New Zealand's, though closest of all to Hong Kong's, by enacting a double-barrelled interpretation clause: all existing statute law is to have effect subject to the *European Convention*—in other words, to the extent that it is incompatible, the doctrine of implied repeal will operate; and all future statute law is, if possible, to be similarly construed—meaning that if there is plain inconsistency the will of the later Parliament prevails. The first limb of this provision would eliminate the need for verbal casuistry in respect of pre-existing legislation: if it did not fit intelligibly with the *European Convention* it would have to yield. The second limb would affect only legislation passed in the presence of the Bill of Rights, so that to apply a presumption of compatibility would be to give effect to Parliament's known intention—save where the conflict was so sharp that the intention must have been for the later legislation to override the earlier. The attraction of this proposal is that it arguably respects our constitutional conventions, an aim that government understandably prioritizes, more faithfully than does the "infiltration" model which has so far been preferred. The efficacy of it is that, without insult to the particular manner of British parliamentary drafting, it would steer the courts between the Scylla of impotence and the Charybdis of verbal casuistry.

IV. THE EUROPEAN COURT OF HUMAN RIGHTS

I want to turn now to a distinct but ultimately related question, the composition and functioning of the ECHR. It is composed of one judge for each member state.³⁵ There is no agreed career pathway to this particular bench. Each state is asked to nominate three candidates, from whom the Parliamentary Assembly is expected to select the first-named—itself an unfortunate charade of choice. Naturally enough, each

³⁴ M. Beloff *et al.*, *Incorporating the European Convention on Human Rights: A Proposal* (Submission to the Secretary of State, July 1997) [unpublished]. The *White Paper*, *supra* note 3, however, rejected this approach.

³⁵ Since the *European Convention* does not require judges to be citizens of the state they represent, Liechtenstein has taken the shrewd step of nominating a distinguished Canadian judge, Ronald St. John Macdonald, as its member of the court.

member state has different bases of nomination. The United Kingdom has so far not sent any of its professional judges to sit in Strasbourg. In fact, one side-effect of the externality of the *European Convention* has been that it is the Foreign and Commonwealth Office that is responsible for Britain's relations with the Court, and not the Home Office or the law offices of the Crown or the Lord Chancellor's Department which between them do the work of a ministry of justice. But the candidates have been chosen, as our judges are chosen, solely on professional merit and with a rigorous disregard of their politics. Other member states, Germany for example, find this remarkable: the first question they ask about a candidate for judicial office is what is his or her political affiliation. The shock this sends through a British, and probably too a Canadian, lawyer's frame may be salutary. Do professional judges have a moral monopoly on human rights issues? Are political criteria of choice necessarily inimical to judicial quality? One has only to think of Bora Laskin, a distinguished academic appointed directly to high judicial office, to realize that there are more paths to judicial wisdom than the conventional career path; and one has only to think of Earl Warren, a Republican governor placed in the chief justice's chair of the United States Supreme Court by way of a political deal, to appreciate the reality of a judicial autonomy that defies both predictions and politics.

But it is a long stride from such accidents of history to the kind of systematic political jobbery that once tainted both the English and the Canadian bench, and no one could regard with equanimity the possibility of judges joining the ECHR as part of a member state's system of political rewards. A perhaps more immediately troubling illustration of the want of agreed nomination criteria and procedures is the fact that there is still only one woman on the court. One has an uncomfortable feeling that, in most member states, men in government are still nominating other men to sit on the court.

Until now the judicial structure in Strasbourg has been unwieldy. Claims have gone first to a judicial commission which reports its initial view. Three-quarters of all cases are sifted out at this stage as unarguable. Those cases in which the commission concludes that there has been a violation of the *European Convention* go on to the court for a full hearing unless meanwhile the member state and the complainant reach an accommodation. Under the new Eleventh Protocol³⁶ all this is to be replaced by a unitary court that will sit in much smaller divisions than hitherto. Its membership will be restricted to the thirty-six Council of Europe members who have signed up to the *European Convention* in

³⁶ *Supra* note 2. The Eleventh Protocol will take effect 1 November 1998.

full, which at present excludes Russia, Ukraine, and Croatia. At present, a decision is made sometimes by a chamber of nine but more commonly by between twelve and twenty judges sitting in banco, with the occasional reference of a major case to a Grand Chamber of twenty-one or more judges. Under the new structure, the Court will consist of committees of three to decide on admissibility and chambers of seven or nine to decide substantive cases, with a Grand Chamber of between seventeen and twenty-one to take referrals of particularly important cases and to hear appeals. This division of labour has been made possible principally by the accession of a large number of new states to the Council of Europe and to the *European Convention*, a number that is now heading into the forties.

While the consequent multiplication of tribunals will be of practical value in shifting what is at present an unacceptably slow-moving workload, its other consequences are more uncertain. The first thing every practitioner before your courts and ours wants to know is which judges are going to be trying the case. So far this has tended not to be so in Strasbourg, where personalities and nationalities have been eclipsed by the sheer size of the tribunal. But when the court consists of seven judges, who they are and where they come from may start to matter. I do not suggest that it is going to determine outcomes: judicial independence is as real in Strasbourg as elsewhere. But the welcome given in, say, Denmark to a decision as to whether the Danish state has violated someone's freedom of conscience, taken by a court composed of judges from (to take seven state signatories at random) Turkey, Andorra, Cyprus, Slovenia, Latvia, Malta, and Romania may not be exactly warm. We have already seen examples of this in the United Kingdom, where the court's decision by a majority of one that Britain had breached the *European Convention* when undercover soldiers in Gibraltar shot dead three IRA terrorists was greeted with anger by much of the British press. Journalists discovered—what every informed person had known for some time—that judges from former Communist states were sitting on the court, and for the tabloids this afforded a handy explanation of the outcome. One of them explained that these were judges who had no tradition of independence and were used to deciding whatever their political masters told them to decide. A second tabloid explained that these were judges who were heady with their new freedom from political control and were ready to criticize any government for doing anything. The moral, I think, is that while it is not helpful to personalize the decisions of the ECHR, the experience of bowing to the decisions of foreign judges on how we should treat our own citizens is one that will become both increasingly familiar and on

occasion increasingly painful as the jurisprudence of the *European Convention* flows into the veins of our legal and administrative systems.

V. FUTURE OUTLOOK

This brings me to the final matter on which I want briefly to reflect. It is without doubt possible to discern in the decisions of the ECHR, over time, changes in the direction and tenor of its jurisprudence. One of the sharpest has been its recent shift towards according the United Kingdom a generous margin of appreciation in the observance of *European Convention* standards. The margin of appreciation is the leeway allowed by the court between the strict application of the *European Convention* and the degree of autonomy accepted as appropriate to a member state's own traditions and situation. The shift followed open protest and pressure by the United Kingdom government in the mid-1990s, backed by domestic urgings to withdraw from the *European Convention* if the tide of adverse decisions did not recede.

The occurrence of larger mood-swings within legal systems is well known. Why they happen is not. There is a readily explicable tendency to put it down to personalities, for the giving of reasoned judgments makes it easy to allocate particular judicial views to particular judges. Supporters of the *Charter*, I know, have been going through such a process as—for many liberals—disappointment has followed disappointment in the Supreme Court of Canada's decisions.

I would caution against such an analysis, at least as an exhaustive explanation of mood-change. It assumes that individual judges are a fixed quantity, when experience repeatedly shows that many, perhaps most, of them are not. It was of the great American civil rights judge, Hugo Black, who in his youth had belonged to the Ku Klux Klan, that someone remarked: "He began by putting on a white robe and scaring black folks; he ended by putting on a black robe and scaring white folks."

Judges have a stony path to tread between independence of judgment and sensitivity to public feeling. Like others they can be misled into confusing the background noise made by a vocal segment of the press with public opinion. The escalation of sentencing since 1992, which has now filled Britain's gaols to bursting point, appears to be an artefact of just such a phenomenon. Yet, to ignore such sounds would be equally mistaken. It is only because we have listened to public concerns about the level of sentencing in rape cases that, with the support of the Court of Appeal, English trial judges now impose reasonably tough sentences on rapists.

But it is something different and more profound that shapes the jurisprudence of supreme and superior courts over time. The conventional wisdom is that it was the sudden conversion of the United States Supreme Court to racial integration in education³⁷ which in 1953 sparked the civil rights movement. The truth is almost certainly the reverse. Similarly, the courts that throughout the common law world had spent decades sabotaging legislation designed to give women the vote and the right to enter the professions were only finally brought into line with reality when in 1929 the Privy Council in London declared on an appeal from the Canadian Supreme Court that women were "persons" and so eligible for appointment to the Senate. It was in giving the Privy Council's decision that Lord Sankey, the Lord Chancellor, coined the metaphor which your Supreme Court has made part of its *Charter* jurisprudence—the image of the Constitution as a living tree "capable of growth and expansion within its natural limits."³⁸

There is another aspect of the metaphor, however, that deserves attention in this context. A tree has seasons of growth and greening; from time to time it has to shed dead wood; and seasonally—the maple most strikingly of all—when its leaves have first turned to flame and then fallen, it might be taken for dead. There can be, I believe, a cyclical element in a court's thinking, of which the court itself will not necessarily be fully conscious. It becomes concerned at the expansiveness of its growth and seeks security in retrenchment; or it becomes embarrassed at its conservatism and breaks out with brave new doctrines. These are not regular or spontaneous cycles. They are situations which develop and, like all fixed states, become ripe for change; but in which change comes only when the winds bring it.

VI. CONCLUSION

So the only thing that can, I think, be safely predicted as the United Kingdom adopts its own Bill of Rights is that its enactment will not be followed by a linear progression from a system without inbuilt human rights to a system with them. Partly this is because of the unique situation in which a supra-national instrument is being patriated; partly because of the jurisprudential mechanism by which it is to be given effect; but mainly because the experience of other countries with whom we share a legal tradition, Canada prominent among them, tells us that

³⁷ See *Brown v. Board of Education of Topeka*, 345 U.S. 972 (1954).

³⁸ *Edwards v. Attorney General of Canada*, [1930] A.C. 124 (P.C.) at 136.

you can predict neither whether the wind will be there to fill the sails of a new rights instrument, nor when or why it may find itself becalmed or possibly even grounded. Canada has now, in the view of many commentators, experienced both the wind and the calm. If we knew why the *Charter*, which came in on the back of no new constitutional settlement, had taken on such a vigorous (if controversial) life, or why it seems now to have entered a more cautious phase (middle age, you might say), it might be easier to make predictions about how the United Kingdom will fare with its Bill of Rights. As it is, I can only say that to travel the short distance from London to Strasbourg by way of the Northwest Passage is not a fool's errand. It takes us not only close to Canada but enables us to make landfalls in other places, from all of which the United Kingdom can learn something of value. What we make of it, however, will be our own responsibility, and Canadians, I hope, will watch our efforts in a spirit of not too patronizing interest.

