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Application of International Human Rights Law in Britain

Hon Sir John Laws

In this paper I shall discuss the impact of the European Convention on Human Rights on the law of England. I do so because the European Convention has been far and away the most influential international human rights text in English law, save (in relation to asylum cases) for the 1951 Geneva Convention relating to the Status of Refugees.[1]

Human rights law in England has an odd recent history. It is because of two factors: first, the fact that the European Convention forms no part of our municipal law;[2] secondly, because the English judges nevertheless have paid increasing attention to it. Many voices now call for its incorporation. Lord Lester, the most distinguished human rights lawyer in England, has made it his theme for a good number of years. Senior judges, including the present Lord Chief Justice and his immediate predecessor, have publicly commended its incorporation. The present government has steadfastly opposed any such change. The Labour opposition is on the other hand committed to incorporation. In this paper I do not intend to enter into the debate about incorporation, although for what it is worth I am on record as favouring it. What I am concerned with is what the common law has made of fundamental rights absent incorporation.

Attempts to persuade English judges to apply the Convention were already well known in the 1970s. I will start with *Ex parte Bibi*.[3] That was an immigration case. Louis Blom-Cooper QC sought to persuade the Court of Appeal that immigration officers acting under the Immigration Act 1971 ought to act in conformity with the Convention. Lord Denning MR said:

> "I cannot accept this submission. ... The position ... is that if there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the Convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it. Furthermore, when Parliament is enacting a statute, or the Secretary of State is framing rules, the courts will assume that they had regard to the provisions of the Convention, and intended to make the enactment accord with the Convention: and will interpret them accordingly. But I would dispute

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1 Unlike the European Convention, the Refugee Convention has (in effect) been incorporated into English law by Section 2 of the Asylum and Immigration Appeals Act 1993. Since therefore it is part of our municipal law, I shall not deal with it in this paper.

2 [***EDITOR'S NOTE:*** *After this paper was written, the Labour government elected in May 1997 introduced a Human Rights Bill which would essentially incorporate the provisions of the European Convention into domestic law.*]

3 *R v Chief Immigration Officer, Heathrow Airport and Another, Ex parte Salamat Bibi*, [1976] 1 WLR 979.

> altogether that the Convention is part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament. I desire, however, to amend one of the statements I made in the *Bhajan Singh* case [1976] QB 198, 207. I said then that the immigration officers ought to bear in mind the principles stated in the Convention. I think that would be asking too much of the immigration officers. 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."[4]

Mr Blom-Cooper in fact had distinguished support for the position he took, in the shape of dicta by Scarman LJ in two recent cases. In *Bibi*, Roskill LJ (as he then was) noted:

> "In *Ex parte Phansopkar* [1976] QB 606 and again in *Pan-American World Airways Inc. v Department of Trade* [1976] 1 Ll Rep 257, Scarman LJ ... went ... rather further in this connection than did the other two members of the court. Scarman LJ, after a reference to Magna Carta, said [1976] QB 606, 626:
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> > 'This hallowed principle of our law is now reinforced by the European Convention on Human Rights to which it is now the duty of our public authorities in administering the law, including the Immigration Act 1971, and of our courts in interpreting and applying the law, including the Act, to have regard...'
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> With respect, that dictum was obiter. I venture to think it was somewhat too wide and may call for reconsideration hereafter. In his judgment ... in the *Pan-Am* case [1976] 1 Ll Rep 257, a few days later, Scarman LJ ... went on to say very much the same thing as he had said in the *Phansopkar* case ... He said at p. 261:
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> > 'Such a Convention' - and there he was referring to the Convention on Human Rights - 'especially a multilateral one, should then be considered by courts even though no statute expressly or impliedly incorporates it into our law.'
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> There again with great respect I think the matter is somewhat too widely expressed."[5]

Although, as we shall see, the courts have more recently made increasingly uninhibited use of the Convention, the reasoning in *Bibi*'s case has not, so far as I know, itself been questioned. The reason is not I think far to seek. Mr Blom-Cooper's submission was really to the effect that the courts should incorporate the Convention - enforce it directly in municipal litigation. This enterprise was, I think, always doomed to failure on constitutional grounds. The Convention is of course an international treaty; and under our constitutional

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4 Ibid, at 984G-985A.

5 Ibid, at 986B-F.

arrangements treaties are generally entered into by the executive. Since, subject to irrelevant exceptions, the executive is not a source of primary municipal law, it follows that a treaty must lack the force of law unless it is incorporated by Parliament.[6] The judges cannot incorporate it ***as a legal text*** into the law of England, for that would be tantamount to a legislative act: in effect, the enactment of a new statute. The position would be indistinguishable from that which would arise if Parliament passed an Act incorporating the Convention. Whatever claims may be made for judicial creativity in the English courts in recent years, plainly the judges cannot usurp the legislative function by, as it were literally, legislating themselves.

But that of course is not to say that the judges cannot make law; and, of course, nothing is more elementary than that the common law is judge-made. There is a world of difference between the incorporation of a text into law and the development of legal principle aided by a text. The real question concerning the impact of the Convention on English law is what use the judges have made of it in developing the common law. As regards that, *Bibi*, while firmly rejecting any notion of judicial incorporation, opens a door to be found in Lord Denning's dictum which I have already set out: "The position ... is that if there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the Convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it". Now, the rule that the courts may look to an international treaty as an aid to the construction of a statute is well established and uncontentious.[7] But the notion that the judges may have regard to such a treaty in resolving uncertainties in the common law is rather more subtle, as I shall try to show.

However, in examining what the courts have done with the Convention in developing the common law, it is first necessary to look at more recent authority. We may come forward several years from the *Bibi* case to *Spycatcher*.[8] I will not rehearse the tortuous history of that litigation, in which Lord Lester and I were opponents at various stages in the proceedings in England. He appeared in a whole series of other jurisdictions where the Crown sought to prevent publication of that book. The first appeal to the House of Lords was concerned with whether an interlocutory injunction should be continued to prohibit certain British newspapers from reporting what the author had said, not least in light of the book's publication in the United States and the seepage of copies from there to the UK. In that case Lord Templeman said:

> "My Lords, this appeal involves a conflict between the right of the public to be protected by the Security Service and the right of the public to be supplied with full information by the press. The appeal therefore involves consideration of the Convention..."

He then set out Article 10, which of course provides:

> "(1) Everyone has the right to freedom of expression. This right shall

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6 *See* Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?", [1993] Pub L 59, p 61.

7 See Lord Diplock in *Garland v British Rail*, [1983] 2 AC 751 at 771B:

> "... it is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it."

8 [1987] 1 WLR 1248.

> include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
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> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[9]

Lord Templeman proceeded to refer to the *Sunday Times*[10] case before the European Court of Human Rights in which the Strasbourg Court, dealing with the question of what kind of circumstances justified reliance on the exceptions under Article 10(2) to the right *prima facie* conferred by Article 10(1), had said:

> "[the Court] is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted ... It is not sufficient that the interference involved belongs to that class of exceptions listed in Article 10(2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it."[11]

As is well known, the Strasbourg Court in that case articulated the "pressing social need" test. What is of interest for present purposes, however, is what Lord Templeman went on to say:

> "The question is therefore whether the interference with freedom of expression constituted by the Millett injunctions [viz. those which had been granted by Millett J at first instance] was, on 30 July 1987 when they were continued by this House, necessary in a democratic society in the interests of national security, for protecting the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary ..."[12]

Next, see what Lord Bridge had to say in *Brind*.[13] He (with their other Lordships' agreement) had rejected an argument to the effect that the terms of a statutory discretion, arising in that case by way of a power conferred on government to control broadcast material in certain circumstances, ought to be confined by reference to Article 10 of the Convention. He said:

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9 Ibid, at 1296F.

10 Judgment of 26 April 1979, Series A No 30; (1979-80) 2 EHRR 245.

11 Ibid, para 65.

12 *Supra*, n 8, at 1297E

13 *R v Secretary of State for the Home Department, Ex parte Brind and Others*, [1991] 1 AC 696.

> "But I do not accept that this conclusion [viz. that there is no presumption that a statutory discretionary power must be exercised within European Convention limits] means that the courts are powerless to prevent the exercise by the executive of administrative discretions, even when conferred, as in the instant case, in terms which are on their face unlimited, in a way which infringes fundamental human rights. Most of the rights spelled out in terms in the Convention, including the right to freedom of expression, are less than absolute and must in some cases yield to the claims of competing public interests. Thus, Article 10(2) of the Convention spells out and categorizes the competing public interests by reference to which the right to freedom of expression may have to be curtailed. In exercising the power of judicial review we have neither the advantages nor the disadvantages of any comparable code to which we may refer or by which we are bound. But again, this surely does not mean that in deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organizations, we are not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it. The primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment."[14]

After this came the judgment of Balcombe LJ in *Derbyshire v Times Newspapers,*[15] which collects much of the recent learning on the use of the Convention in the development of English law. The case concerned the question whether a local authority may sustain a cause of action in defamation. Part of the argument involved Article 10 of the Convention. Balcombe LJ said this:

> "Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law: per Lord Ackner in *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696, 761. Thus (1) Article 10 may be used for the purpose of the resolution of an ambiguity in English primary or subordinate legislation. ... (2) Article 10 may be used when considering the principles upon which the court should act in exercising a discretion, e.g. whether or not to grant an interlocutory injunction .... (3) Article 10 may be used when the common law (by which I include the doctrines of equity) is uncertain. In *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 the courts at all levels had regard to the provisions of Article 10 in considering the extent of the duty of confidence.

14 Ibid, at 748F-749B.

15 *Derbyshire County Council v Times Newspapers Ltd and Others,* [1992] 1 QB 770.

> They did not limit the application of Article 10 to the discretion of the court to grant or withhold an injunction to restrain a breach of confidence.
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> Even if the common law is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of Article 10. Thus in *R v Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury* [1991] 1 QB 429, where the issue was whether the common law offence of blasphemy is restricted to Christianity, Watkins LJ, delivering the judgment of a strong Divisional Court said, at p. 449:
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> > '[Counsel] accepted that the obligations imposed on the United Kingdom by the Convention are relevant sources of public policy where the common law is uncertain. But, he maintained, the common law of blasphemy is, without doubt, certain. Accordingly, it is not necessary to pay any regard to the Convention. Nevertheless, he thought it necessary, and we agree, in the context of this case, to attempt to satisfy us that the United Kingdom is not in any event in breach of the Convention'."[16]

The decision was appealed to the House of Lords.[17] Lord Keith (with whom all their other Lordships agreed) said:

> "It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech."[18]

After referring to authority from the United States, he continued:

> "But as is shown by the decision in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 [the final appeal in the *Spycatcher* case] ... there are rights available to private citizens which institutions of central government are not in a position to exercise unless they can show that it is in the public interest to do so. The same applies ... to local authorities. In both cases I regard it as right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech."[19]

Towards the end of his speech, he said:

> "The conclusion must be, in my opinion, that under the common law of England a local authority does not have the right to maintain an action of damages for defamation. That was the conclusion reached by the Court of

16 Ibid, at 812B-G.

17 [1993] AC 534.

18 Ibid, at 547F.

19 Ibid, at 549B-C.

> Appeal, which did so principally by reference to Article 10 of the European Convention [on Human Rights] ... My Lords, I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention."

And he called to mind Lord Goff's opinion in the final *Spycatcher* appeal "that in the field of freedom of speech there was no difference in principle between English law on the subject and Article 10 of the Convention."[20]

I should also mention here another decision, of the Court of Appeal, in *Middlebrook Mushrooms Ltd v TGWU*.[21] This was an appeal against the grant of an interlocutory injunction in a picketing case. I need say no more about the facts. Neill LJ said, obiter:

> "Though counsel for the appellants did not place any specific reliance on Article 10 of the [European Convention] it is relevant to bear in mind that in all cases which involve a proposed restriction on the right of free speech the court is concerned, when exercising its discretion, to consider whether the suggested restraint is necessary."[22]

It is hardly unreasonable to suppose that the Lord Justice regarded his observation as quite uncontroversial.

What have the judges actually been doing in these decisions? They have not sought to ***incorporate*** the Convention. More important, their reasoning is not, surely, about resolving an uncertainty in the common law; it is about developing it. The truth, however, is that this is a distinction without a difference. To see that this is so, we must look at another distinction: that between statutory ambiguity and common law uncertainty. In *Bibi* Lord Denning referred to these two concepts in terms suggesting that there was no logical or legal difference between them. With deference to him, that is not right. A statute may be ambiguous because and only because its words make it so. Ambiguity, where it arises, is a property of a particular form of words and of nothing else. A common law rule cannot be ambiguous, because although (of course) it is articulated in language its sense is not dependent on any particular form of words. It follows that the concept of uncertainty in the common law points to a different idea. What can it be? There is only one candidate. It is a defining feature of the common law that it develops case by case, moulding and adapting old principle to accommodate new facts, if necessary in the light of changing social conditions. The law of negligence and that of judicial review provide prime examples. Thus the proposition that in any given circumstance the common law is uncertain denotes only this: that on the concrete facts of an instant case, there is a question which way the law ought to go. It may arise because the case is not concluded on existing authority or because the House of Lords considers that it might be right to depart from a previous decision of its own under the 1966 Practice Direction. It means that common law "uncertainty", where the Convention may be brought into play, engages issues about the law's substantive content and not about the meaning of words: two very different things.

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20 Ibid, at 550E and 551F-G.

21 *Middlebrook Mushrooms Ltd v Transport and General Workers Union and Others*, [1993] ICR 612.

22 Ibid, at 620C.

What the judges have done, case by case, is to move towards the articulation of legal principles which recognize and give effect to fundamental rights as a matter of the common law's substance. They have not always deployed the Convention in doing this: see the last citation which I have set out from Lord Keith's speech in *Derbyshire.*[23] But often they have. Sometimes they have taken it as an axiom, not requiring separate demonstration, that the common law marches with the Convention. They have even appeared to indicate that the Convention jurisprudence should be directly considered: see the citations from Lord Templeman in *Spycatcher,*[24] from Watkins LJ in *Ex parte Choudhury* set out by Balcombe LJ,[25] and from Neill LJ in *Middlebrook Mushrooms.*[26] As a matter of strict logic it is difficult to escape the view that the unspoken premise of this latter exercise is the proposition that (in the field in question) breach of the Convention amounts to a breach of English law; but that would in substance amount to *pro tanto* incorporation, and no judge would accept that that was what he was doing. I think many judges might say that the Convention expresses internationally accepted standards of personal liberty and state justice such that it would be surprising if the common law adopted a lesser standard. Thus, subject to the rules of *stare decisis* (short of the House of Lords) and to the dictates of any particular statute, the way is open to the courts to assume that the standards are the same. And as regards statutes, there is the uncontentious rule that an ambiguity will be resolved in favour of a construction which conforms to the United Kingdom's international obligations under the Convention in relation to the subject-matter in question. On this footing, it might appear that the judges are able without committing any constitutional solecism to give effect to Convention standards across the board save only where a statute unambiguously applies a lower standard.

But there remain important difficulties, and what I have so far said perhaps demonstrates that the use which the courts allow themselves to make of the Convention in developing the common law has not been precisely articulated. One difficulty relates to the very concept of statutory ambiguity. I do not know of a case where it has been held that a statutory provision in an area addressed by the Convention is indeed ambiguous, and so falls to be construed conformably with the Convention. Yet it is well known that the UK is a frequent respondent in Strasbourg, and in many of the cases that go there, I think the issue has been the use of statutory power by the UK authorities. Why then has the rule - on its face uncontentious, as I have said - that ambiguous Acts are to be construed consistently with the UK's international obligations not been more effective? I think the reason is that a case of true ambiguity, in a statute dealing with any part of the subject-matter of the Convention, is hard to find. Since in large measure the Convention is concerned with the rights of individuals *vis-à-vis* the state, Acts of Parliament bearing on such rights are apt to involve the conferment of discretionary power, and therefore use such expressions as "The Secretary of State may, if he thinks fit, ...". The term "may", and no doubt similar expressions deployed by the draftsman to confer discretion, is not ambiguous as for instance the word "cleave" is ambiguous (I use this example because "cleave" is the only word I know of in the English language which bears two diametrically opposite meanings - split asunder, and stick fast). "May" simply confers the power to do what is envisaged. The question of what limits the court should impose on that power is not a function of the

23 *Supra*, n 20.

24 *Supra*, n 9-11.

25 *Supra*, n 16.

26 *Supra*, n 21-2.

meaning of the word, which it would be if it were a question about ambiguity. Rather it concerns what standards, procedural and substantive, the court should impose on the decision-maker, what are the legitimate purposes for which the discretion may be exercised, and so forth: in English law terms, application of the *Wednesbury* and *Padfield* principles, and of appropriate requirements of fairness. While any of these judge-made criteria may involve scrutiny of the statutory context in which the discretionary power is granted (and *Padfield* will always do so), that is not because the words conferring the power are ambiguous, but because the power's setting in the Act is highly material to the court's decision as to what is the nature and extent of any public law constraints which ought to be applied to its exercise.

Accordingly the judicial task of ascertaining the limits of a statutory discretion does not consist in the resolution of an ambiguity; rather it involves the elaboration and application of substantive legal principles. It follows that the principle that the Convention may be appealed to in order to resolve an ambiguity has no application, and indeed that any attempt to apply it would be tantamount to judicial incorporation of the Convention into domestic law. This result is plainly reflected in Lord Bridge's reasoning in *Brind*:

> "... it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it. Hence, it is submitted, when a statute confers upon an administrative authority a discretion capable of being exercised in a way which infringes any basic human right protected by the Convention, it may similarly be presumed that the legislative intention was that the discretion should be exercised within the limitations which the Convention imposes. I confess that I found considerable persuasive force in this submission. But in the end I have been convinced that the logic of it is flawed. When confronted with a simple choice between two possible interpretations of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within Convention limits would be to go far beyond the resolution of an ambiguity. It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it."[27]

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27 *Supra*, n 13, at 747H-748D.

Thus the rule that ambiguous provisions in Acts of Parliament are to be construed conformably with the Convention has in practice much less impact than might at first appear; indeed I have discerned no impact so far.

So there is one difficulty. Indeed, I am not sure that the word "difficulty" is right, since, for reasons I have given, I accept entirely that the judges would have no business seeking to incorporate the Convention. But it is a feature to be noticed in any discussion of the extent to which the courts may make use of the Convention, absent incorporation by Parliament.

Let me turn to another problem. Many lawyers working in the fields of administrative law and human rights would I think say that the "pressing social need" test (which by the Strasbourg jurisprudence must be met before exceptions to Convention rights such as are contained in Article 10(2) - compare Articles 8(2), 9(2), and 11(2) - will be applied) may require a state to go further in justifying the merits of its decision to curtail a Convention right than does the traditional *Wednesbury* test in English public law, albeit that the Human Rights Court has recognized that the state enjoys what it calls a "margin of appreciation". Thus "pressing social need" imports a more intrusive form of judicial control of state action than is implied by traditional English doctrines. If that is right, it uncovers what might be described as a constitutional obstacle in the way of adopting, by decisions in the common law courts, an approach to fundamental rights issues which marches in line with Strasbourg. The difficulty is as follows. The very reason why the *Wednesbury* doctrine is as confined as it is arises because the courts recognize that to substitute their own view on the merits of a decision for the view taken by the statutory decision-maker, who is Parliament's delegate, would usurp the democratically elected arm of government. Hence the traditional formulation of the *Wednesbury* rule in terms of an insistence that the decision-maker must act rationally and have regard only to legally relevant considerations; Parliament is assumed to have conferred the power in question on terms that its delegate keep within such bounds, and so for the courts to require him to do so cannot amount to any usurpation of the legislative function. *Wednesbury* may thus be seen as an aspect of the *ultra vires* principle, which as it happens I have attacked elsewhere,[28] but that is a debate beyond the scope of this paper.

The question that does arise, however, is this. How great an inhibition upon the development of a common law of fundamental rights is presented by the apparent mismatch between domestic *Wednesbury* and Strasbourg "pressing social need"? It might be thought that the dicta I have cited from Lord Templeman, Balcombe LJ, and Neill LJ - and Lord Goff's observation in the final *Spycatcher* appeal quoted by Lord Keith - suggest that the mismatch is indeed more apparent than real. But the restrictive nature of the *Wednesbury* rule is a matter of principle, whether or not on a proper analysis it is based on *ultra vires*, and our jurisprudence has to accommodate it.

The answer, I think, is to be found in a recognition that *Wednesbury* does not set a unitary, as it were monolithic, standard. In *Ex parte Smith*[29] (a case about the rules prohibiting homosexuals from serving in the armed forces) the Court of Appeal accepted the approach

28 Michael Supperstone and James Goudie, *Judicial Review* (London: Butterworths 1992), Chapter 4.

29 *R v Ministry of Defence, Ex parte Smith, and other appeals*, [1996] 1 All ER 257.

to the *Wednesbury* test put forward by counsel for the appellants as follows:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."[30]

The Court of Appeal expressly took the view that this formulation was in accordance with *Brind*, and also with the reasoning of the House of Lords in the immigration case of *Bugdaycay*,[31] to which I have not referred.

The appellants' case was rejected in *Ex parte Smith*. But given all the learning I have cited, including the approach taken in that case, I would venture these conclusions as regards the state of the law relating to fundamental rights in England:

1. Not much is to be gained from the rule that ambiguous statutes are to be construed conformably with international obligations.

2. There is no question of the judges incorporating the European Convention (or any other international text) as such into the common law.

3. The use made, and to be made, by the common law of the European Convention is growing, but is a case-by-case exercise. Within that exercise tensions between traditional public law tests of executive action and the more vigorous Strasbourg approach may lessen as the common law courts identify more concretely specific areas in which fundamental rights are in play, and as the concept of fundamental rights is increasingly recognized as belonging to the corpus of the common law.

30 Ibid, at 263C-D.

31 *Budgaycay v Secretary of State for the Home Department*, [1987] 1 All ER 940.