

# Lawyers and the Practice of Law in England: An American Visitor's Observations: Part III

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## The Bill of Rights Debate

The first two articles in this series discussed certain features of the English legal profession and the English rules governing discovery and the recovery of counsel fees. It was suggested that English practice in these areas could serve as a model for reforms in American legal education and litigation procedures. This final installment will examine the current British debate regarding proposals for enactment of a Bill of Rights and will discuss the historical background of that debate as well as the relevance of the American constitutional experience.<sup>1</sup>

The Bill of Rights proponents in Britain have called for the adoption of a constitutional instrument which would protect fundamental individual liberties against the exercise of legislative and executive power. They challenge the doctrine of parliamentary sovereignty which now prevails in Britain because that doctrine, in contrast to the American concept of guaranteed liberties and limited government, declares that Parliament's legislative power is supreme and unlimited by any constitutional or judicial restraint. A simple majority of Parliament could abolish even the Magna Carta and the Bill of Rights of 1689 if it chose to do so, because these instruments have no higher standing than ordinary Acts of Parliament. And while British judges have the duty of

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<sup>1</sup>The author wishes to dedicate this series of articles to the memory of the late John B. Backes, Esq., who was his mentor and friend during the author's association with Mr. Backes's firm of solicitors (Kenneth Brown Baker Baker) in London in 1977-1978. The author also wishes to thank Samuel Efron, Esq., Michael E. Jaffe, Esq., Roderick Noble, Esq., and Bruce Macfarlane, Esq., who reviewed and made helpful suggestions on preliminary drafts, as well as F.S. Ruddy, Esq., who gave generous and valuable editorial assistance.

interpreting Acts of Parliament, they are absolutely bound to follow the terms of such statutes so long as the statutes are "sufficiently explicit, unequivocal and comprehensive."<sup>2</sup> Thus, there is no institutional limitation on Parliament's authority, and, as discussed below, Parliament is free to enact legislation which would impair even the individual rights recognized at common law. The Bill of Rights advocates contend that Parliament's unlimited power poses a grave threat to personal liberties, and they therefore seek a constitutional protection of those liberties and a corresponding limitation on parliamentary power.

While the doctrine of parliamentary sovereignty prevails in Britain today, it did not become established until the beginning of the eighteenth century, after it had supplanted two other legal theories which could have supported the concept of a written constitution with guaranteed personal rights. The first of these rival theories was the "natural law" doctrine. The medieval, scholastic formulation of the natural law theory, which was still influential in 1600, stated that the laws of the state were subject to and must accord with the fundamental, divine order decreed by God and revealed to man through Nature and human reason. Although English common-law judges and lawyers in the early seventeenth century did not entirely agree with the scholastic conception of natural law, many of them did assert that the common law was "fundamental" and should prevail over statutory law because it was based upon generations of human reasoning and experience. For example, in *Dr. Bonham's Case*<sup>3</sup> in 1610, Lord Coke refused to enforce an Act of Parliament which he believed to violate the common-law rule that "no man shall be judge in his own case." Coke declared:

[I]t appears in our books that in many cases, the common law will controul Acts of Parliament and sometimes adjudge them to be utterly void; for when an Act of Parliament is against the common right and reason or repugnant or impossible to be performed the common law will controul it, and adjudge such Act to be void.<sup>4</sup>

However, Coke's idea that the common law (including the common-law rights of the subject) was "fundamental" in a constitutional sense and could override statutory law<sup>5</sup> did not long survive his dismissal from the King's Bench in 1616. By 1640, Parliament, rather than the judiciary, was recognized as the chief defense against royal absolutism.<sup>6</sup> And after the Glorious Revolution of 1688, Parliament established its own supremacy at the expense of the courts. Thus, as described by Lord Reid in *British Railways Board v. Pickin*,<sup>7</sup> the idea that the judiciary could uphold "fundamental" legal principles and rights against the will of Parliament was effectively dead by 1700:

<sup>2</sup>N. ANDERSON, *LIBERTY, LAW AND JUSTICE* 9, 35-37 (1978).

<sup>3</sup>8 Co. Rep. 113b, 77 Eng. Rep. 646 (1610).

<sup>4</sup>*Id.* at 118a and 652 respectively.

<sup>5</sup>For discussions of the natural law theory and its influence upon Coke's doctrine that the English common law was "fundamental," see N. ANDERSON, *supra* note 2, at 15-21, 37-38; C. LOVELL, *ENGLISH CONSTITUTIONAL AND LEGAL HISTORY* 324-35 (1962); A. PASSERIN D'ENTREVES, *NATURAL LAW* 37-49, 93-94 (2d rev. ed. 1970).

<sup>6</sup>C. LOVELL, *supra* note 5, at 324-25, 334-35.

<sup>7</sup>[1974] A.C. 765.

In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.<sup>8</sup>

The second rival theory which succumbed to Parliamentary supremacy was the idea of popular sovereignty based upon a social contract between the people and their governors. The chief exponent of this theory was John Locke, who published his *Second Treatise of Government* in 1689. Relying upon a more modern variation of the natural law doctrine, Locke declared that each social and political community was based upon a consensual "compact" among its members, and that each member retained certain "natural rights" (including the right to be secure in his "property") when he entered into the compact. Moreover, Locke argued, all government derived from the consent, and hence the ultimate sovereignty, of the governed. Although the community necessarily appointed certain persons to govern, these governors stood in a fiduciary position toward the community and could be removed if they abused their trust.<sup>9</sup>

Thus, according to Locke's theory the people, rather than the executive or legislature, were sovereign. Indeed, the events of 1688-1689 supported his theory. The "Convention" of peers and commoners which conferred the crown upon William and Mary after the flight of James II was not a legal Parliament because James had destroyed the writs necessary to call a new Parliament. Therefore, the Convention, with the consent of William and Mary, passed a "bill" which purported to convert its status into that of a regular Parliament and thereafter enacted the Bill of Rights in 1689. This "Parliament" could have justified its actions only under the Lockean theory that it had acted as the representative of the "sovereign" people and the guardian of their "natural rights." However, Parliament did not recognize any sovereignty above its own after 1689. Rather, Parliament established its own supremacy over the monarchy and the nation with the Act of Settlement of 1701, by which it determined the royal succession.<sup>10</sup>

Thus, neither the doctrine of "fundamental law" nor the idea of popular sovereignty based upon "natural rights" prevailed in Britain. Instead, Parliament succeeded in establishing its complete legislative supremacy. For example, while certain personal rights are still recognized at common law (such as, the presumption of innocence in a criminal case; the right against compelled self-incrimination; the rights of peaceful assembly, freedom of association and privacy; and the right to be heard by an impartial judge before one is deprived of liberty or property),<sup>11</sup> these rights do not restrict

<sup>8</sup>*Id.* at 782.

<sup>9</sup>J. LOCKE, *TWO TREATISES OF GOVERNMENT*, II, §§ 95-99, 123-131, 149-158, 221-222, 240-243. See also A. PASSERIN D'ENTREVES, *supra* note 5, at 57-62.

<sup>10</sup>C. LOVELL, *supra* note 5, at 392-96; D. KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, at 269-72 (9th ed. 1969).

<sup>11</sup>See, e.g., Mann, *Britain's Bill of Rights*, 94 *LAW Q. REV.* 512, 514-15 (1978); Ridge v. Baldwin, [1964] A.C. 40; Kanda v. Government of the Federation of Malaya, [1962] A.C. 322 (P.C.).

Parliament's exercise of its powers. Unlike Congress, which cannot abrogate the personal liberties recognized by the American Constitution, Parliament can pass statutes which deprive a subject of his common-law rights. Thus, in the wartime case of *Liversidge v. Baldwin*,<sup>12</sup> the House of Lords upheld a regulation, issued pursuant to an Act of Parliament, which authorized the Home Secretary to imprison without a hearing any person whom he reasonably believed to be "of hostile associations." Lord Wright's judgment in *Liversidge* sets forth perhaps the starkest exposition of the doctrine of parliamentary sovereignty:

Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament or a statutory regulation . . . is alleged to limit or curtail the liberty of the subject or vest in the executive extraordinary powers of detaining a subject, the only question is what is the precise extent of the powers given. The answer to that question is only to be found by scrutinizing the language of the enactment in the light of the circumstances and the general policy and object of the measure . . . . [I]n the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved . . . .<sup>13</sup>

However, in recent years the doctrine of parliamentary supremacy has come under attack by such eminent British legal figures as Lord Scarman, a Law Lord in the House of Lords, Lord Hailsham of St. Marylebone, the Lord Chancellor, and Sir Norman Anderson, formerly Professor and Director of the Institute of Advanced Legal Studies in the University of London. In their view the "safeguard of British liberty" described by Lord Wright is no longer sufficient to meet the growing threat to personal liberties which, they believe, is inherent in Parliament's unchecked exercise of its legislative powers.

Lord Hailsham contends that parliamentary sovereignty has resulted in an "elective dictatorship" of the House of Commons, and he argues for a comprehensive written constitution which would provide for a Bill of Rights and a bicameral elected legislature with limited powers. Lord Scarman also advocates a written constitution with a Bill of Rights and, like Lord Hailsham and Sir Norman Anderson, proposes a "constitutional court" which would have the power to invalidate Acts of Parliament contrary to the new constitution. All three men agree that the constitution should protect those personal liberties which are considered "fundamental" (for example, freedom of speech, association, travel and emigration; freedom of religion and conscience; the right to habeas corpus, due process and equal protection by the law; and, in criminal cases, the presumption of innocence, a fair trial and freedom from compelled self-incrimination). They also agree that the constitution should

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<sup>12</sup>[1942] A.C. 206.

<sup>13</sup>*Id.* at 260-61.

be "entrenched" so that it could be amended only by an extraordinary majority of Parliament and a popular referendum.<sup>14</sup>

Each of these proposals draws heavily upon the American constitutional model. However, it should be noted that the "American" model derives many of its philosophical foundations from seventeenth-century English ideas. The American political concepts which led to the Constitution and Bill of Rights were based substantially on Locke's ideas concerning popular sovereignty and "natural rights,"<sup>15</sup> and the American principle of judicial review (that is, the power of the judiciary to determine whether legislative acts are contrary to the constitution and therefore invalid) in part traces its roots back to Coke's belief that statutory law should be consistent with "fundamental law."<sup>16</sup> Thus, while the advocates for a British Bill of Rights rely heavily upon the example of the American Constitution, in doing so they are in fact returning to English constitutional theories which were swept aside during the course of Parliament's rise to ascendancy.<sup>17</sup>

Some opponents of a British Bill of Rights, particularly those from the political Left, claim that such a Bill would be an antidemocratic measure which would restrict the exercise of power by Parliament to meet social needs. Others oppose the idea of judicial review on the ground that British judges are too conservative and would not adequately protect personal liberties against encroachments by the State. Certain legal scholars argue that a Bill of Rights is a constitutional impossibility because Parliament lacks the authority to restrict its present sovereignty and thereby bind its successors.<sup>18</sup>

Of these arguments, the last is most significant and raises serious constitutional questions. Because the Bill of Rights proponents appreciate the difficulty of adopting such a Bill as a constitutional measure, they have sought, as a preliminary step, to pass an ordinary Act of Parliament which would incorporate the European Convention on the Protection of Human Rights and Fundamental Freedoms into British law. Although Britain ratified the Convention in 1951, it has never been formally incorporated into British law and cannot be enforced by British courts.<sup>19</sup> Therefore, in 1978 a bill to incor-

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<sup>14</sup>L. SCARMAN, *ENGLISH LAW: THE NEW DIMENSION* (1974); Scarman, *Fundamental Rights: The British Scene*, 78 COLUM. L. REV. 1575 (1978) [hereinafter cited as Scarman, *Fundamental Rights: The British Scene*]; L. HAILSHAM, *THE DILEMMA OF DEMOCRACY* (1978); Hailsham, *Elective Dictatorship* (The Richard Dimbleby Lecture, B.B.C.) (1976) [hereinafter cited as Hailsham, *Elective Dictatorship*]; N. ANDERSON, *supra* note 2, at 13-14, 38, 44-58. See also M. ZANDER, *A BILL OF RIGHTS?* (1975).

<sup>15</sup>See E.S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-1789*, at 74-75, 88-89 (1956); A. PASSERIN D'ENTREVES, *supra* note 5, at 51-52, 57-63; G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 283 (1969).

<sup>16</sup>See, e.g., R. BERGER, *CONGRESS v. THE SUPREME COURT* 23-28 (1969).

<sup>17</sup>See, e.g., N. ANDERSON, *supra* note 2, at 37-38.

<sup>18</sup>For a summary of the arguments against a British Bill of Rights, see M. ZANDER, *supra* note 14, at 26-52.

<sup>19</sup>While the European Convention has not been incorporated into British law, it can be enforced against Britain by the European Court of Justice and the European Commission by virtue of Parliament's passage of the European Communities Act of 1972. Scarman, *Fundamental Rights: The British Scene*, *supra* note 14, at 1579-83; Mann, *supra* note 11, at 517-24.

porate the Convention into British law was introduced in the House of Lords, and that House voted to urge the Government to introduce a similar bill in the House of Commons.<sup>20</sup> Because of the dissolution of Parliament, the 1978 bill did not proceed further, but in July 1979 a new bill was introduced before the House of Lords of the present Parliament. Neither the 1978 bill nor the 1979 bill would "entrench" the Convention against repeal by a simple majority of Parliament, but each bill would give the Convention precedence over prior statutes and would direct the courts to construe future Acts of Parliament in accordance with the Convention unless such a construction were impossible.

Additionally, many Bill of Rights advocates do not accept the argument that the British constitution does not permit a restriction of Parliament's legislative sovereignty by an "entrenched" Bill of Rights. Indeed, this argument presents a logical and historical inconsistency. If Parliament cannot now restrict its legislative power and that of its successors, then how were William and Mary able to diminish the power of the monarchy when they accepted the constitutional settlement of 1688-1689? The answer may well be that in fact British constitutional precedents support the proposition that ultimate sovereignty resides in the nation rather than in Parliament. Such an interpretation would be consistent with the events of 1688-1689 and would permit the British nation to adopt a new constitutional settlement which would restrict parliamentary power.<sup>21</sup> Lord Hailsham, for example, believes that Parliament and the Queen should summon a constitutional convention (similar to the "Convention" of 1688) which would be empowered to draft a written constitution, including a Bill of Rights, for approval by Parliament and popular referendum.<sup>22</sup>

In sum, the case for a British Bill of Rights appears to derive persuasive support from historical English concepts of law and politics as well as the American constitutional model. Moreover, in this age where social problems have become increasingly complex and have called forth an ever-expanding bureaucracy to solve them, the demands of society and the State threaten to overwhelm the rights and dignity of the individual. In Britain, as in the United States, the best guarantee of human rights is a constitutional commitment which cannot be changed at the whim of a transitory legislative majority.<sup>23</sup> However, in Britain this guarantee does not exist, because the doctrine of parliamentary sovereignty permits a bare majority in Parliament to interfere with even those personal liberties which are recognized at common law. Therefore, it seems clear that the time has come for the adoption of a British Bill of Rights which would restrict the authority of Parliament and give constitutional protection to fundamental individual liberties.

<sup>20</sup>Scarman, *Fundamental Rights: The British Scene*, *supra* note 14, at 1585 n.38.

<sup>21</sup>See, e.g., N. ANDERSON, *supra* note 2, at 37-38, 53-56.

<sup>22</sup>Hailsham, *Elective Dictatorship*, *supra* note 14, at 14-16.

<sup>23</sup>See Scarman, *Fundamental Rights: the British Scene*, *supra* note 14, at 1585-86; N. ANDERSON, *supra* note 2, at 51-58; Hailsham, *Elective Dictatorship*, *supra* note 14.