2008 BRITISH ACADEMY LAW LECTURE

Many Legal Orders, One Law

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I. Introduction

IT IS A GREAT PRIVILEGE, and a great challenge, to give the British Academy lecture on law, which complements the older Maccabaean lecture on jurisprudence.[1] I have to confess first of all that I am not sure how far the distinction between law and jurisprudence can be sustained. Leaving aside the point that 'jurisprudence' has several meanings, and confining it to 'legal theory' or legal philosophy, I note that some of the Maccabaean lectures have been as much on the nuts and bolts of law as on legal philosophy; and it might seem that some of the law lectures will embody legal philosophy. Indeed it might be thought that, by analogy with Molière's Monsieur Jourdain speaking prose without realising it, so the best lawyers when discussing law may, not always consciously, speak jurisprudence.

My bold suggestion is that, for that and other reasons, the distinction between law and jurisprudence is, or at least ought to be, of diminishing significance. Good law embodies jurisprudence. Good jurisprudence is essential for good law.

But I must have regard to the rubric of this lecture:

> **BRITISH ACADEMY LAW LECTURE**
> *The British Academy established a Lecture in Law to be given biennially from 2004 onwards in alternation with the Maccabaean Lecture. It may be upon any legal subject other than jurisprudence.*

So perhaps some parts of this lecture must be disregarded.

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[1] The lecture was delivered on 2 Dec. 2008 but has been updated to take account of the entry into force of the Lisbon Treaty on 1 Dec. 2009.

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Law and values

My next proposition is that law is not, and cannot be, value-free in the way which is sometimes suggested. On the contrary, a legal system today, and the approach of the higher courts to the governing principles, necessarily embodies a system of values. Although the schools of jurisprudence, especially those termed 'positivist', have sometimes sought to suggest the opposite, my proposition, I venture to suggest, hardly needs to be demonstrated today, as might have been necessary in a different age. In any event, it is a theme which runs through, is illustrated by, and if needs be I hope is demonstrated by, the entire lecture. So here again law and jurisprudence are perhaps fused.

In England there has been a tendency for law and jurisprudence, for the academic and the practitioner, to be separate and for interaction to be limited. Happily, in my view, fashions are beginning to change. We now have some judges who were in their previous careers primarily academics. We have perhaps not gone far enough down that route. It has been pointed out for example that the judicial House of Lords might have benefited from the presence of an outstanding scholar, to provide academic expertise in such fields as public law and in criminal law. Indeed English law might in that event have been saved from going down some false tracks.

In other parts of Europe the pattern is different. Continental courts at the highest level are often staffed by judges who have both academic and practical experience. The European Courts—the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ)—are similarly constituted.

In the ECJ the Advocate General will sometimes infuse his or her Opinion, not with doctrinal niceties but with a principled analysis which will guide the Opinion, and sometimes then the judgment, towards a satisfactory practical outcome. It is then academic in what may be one of the best senses. That is one advantage of the single voice of the Advocate General, as distinct from the collective judgment of the Court, the requirement of a single judgment still being justified for practical reasons.

The approach

Although this lecture is for the British Academy, my aim is that it should not be unduly academic. Indeed a part of the specification, part of my brief, was that it should be accessible to the non-lawyer. It will no doubt

be regarded by the stricter academic as too generalised, and insufficiently rigorous. But that may be a price worth paying, if some broader lessons can be found from this essay.

Equally, there is a part of academe today which aims not to be prescriptive, and even to be value-free. Here too I must part company. Having spent so great a part of my time at the coal-face, I confess to feeling slightly frustrated if a scholarly venture leads to no practical outcome.

This goes even for some of the theories of the greatest jurists: Austin, Kelsen, Hart. Austin's theory of law as the command of a sovereign had however a continuing appeal. It reflected a common perception of law as an emanation of the State, and of an authority wielding sovereign power over a defined territory.

To look at the real world, let us start at home, with the English common law. It was not made by a sovereign; it was not derived from a Kelsenite *Grundnorm*. It was developed by the judges. Some parts of it remained rather undeveloped; other parts became a highly sophisticated system. Commercial law in particular proved remarkably successful, partly no doubt because there were judges who understood the needs of commerce.

Yet the common law seems to present a series of paradoxes. First, the law itself is a remarkable construct, but the court system still leaves much to be desired: occasionally, Bleak House almost seems to return from the Dickensian age to haunt us. Something of those anomalies prevails today. You are offered what used to be called a Rolls-Royce system when you may want only to take a bus down the road. As Mr Justice Sullivan (now Lord Justice Sullivan) has recently said, English procedures appear to meet international standards: 'But [as he among others has plaintively enquired] who, apart from the very rich and the very poor, can afford to use them?'[2] In that respect, the system may even raise an issue of compliance with international standards, which may be said to include an effective, rather than illusory, right of access to the courts as a fundamental right.

Second, it is no exaggeration to say that the common law is part of the national culture. Yet it has proved a good export, to the Commonwealth, to some extent to the USA, even to other countries. Third, it is multinational; yet it can also be parochial. It has not been, in the past,

[2] In his 2008 report on *Ensuring Access to Environmental Justice in England and Wales* (<http://www.lawcentres.org.uk/uploads/Access_to_Environmental_Justice.pdf> accessed 7 April 2010). It might be added that the ability of the very poor to use the procedures is rapidly diminishing with the erosion of the legal aid budget.

particularly receptive of international law. Yet international law plays an ever-increasing part in the settlement of disputes.

Nowadays different legal systems are increasingly operating side by side in the same legal space. This was illustrated, in the past, by domestic law and international law, as conflicts arose between the different systems which could not be resolved. The difficulties have grown as the reach of international law has hugely extended in recent years. Moreover new legal orders have developed in Europe: notably the European Convention on Human Rights (ECHR) and the European Union (EU). There can thus be serious conflicts between different legal orders, with no clear way of resolving them. This poses novel and difficult problems for the courts. How can these conflicts be avoided or resolved?

The answer may impose new methods on the courts. It may also require a new concept of law. And the journey requires us to look, however inadequately, at the role of the courts, at the position of judges in a democracy, at the issue of sovereignty, at the need to strike a balance between conflicting fundamental interests; all in a manner which has some semblance of academic respectability while not addressed to the specialist. A challenge indeed.

II. International law

International law provides the archetype of the potential conflict between different legal orders. Judges and jurists have wrestled with the relationship of international law, as essentially the law governing the relations between States, and municipal law, as the domestic, internal law of the State.

On the international level, States have traditionally been seen in roles which are apparently contradictory: as the subjects of international law, having rights and obligations towards other States, yet at the same time as sovereign, the doctrine of State sovereignty being a traditional cornerstone of international law. The State's internal affairs were not traditionally the concern of international law.

Jurisprudence, focusing understandably on domestic law, again has found it difficult to resolve these issues. Austin, Kelsen and Hart each had different responses on the relationship between municipal and international law, but all of them were rather rapidly shown to be unsatisfactory.

Analysts classified municipal legal systems as 'monist' or 'dualist', depending on whether they were inclusive of international law: a single

system or a dual system. In the case of treaties, for example, a monist system would recognise the internal effect of a treaty to which the State was a party, while a dualist system would not recognise the effect of a treaty, subject only to limited exceptions, unless the treaty had been transposed into domestic law, for example in the UK by Act of Parliament. English law was firmly dualist, indeed it sometimes seemed almost 'duellist'—the duel being between municipal and international law, and a strict dividing-line being drawn between them. But in practice monist systems often proved no more successful in giving effect to international law. Neither monist nor dualist systems had a satisfactory response to the relationship between international and domestic law.

For our purposes, it is necessary to outline the main sources of international law, namely custom and treaties, and to suggest briefly ways in which potential conflicts between international law and municipal law might be avoided or resolved. The subject is also a necessary background to our later discussion of the European systems, namely the European Convention on Human Rights and the European Union, both of which systems are founded on treaties—if treaties of an unusual character.

Customary international law

Custom is probably the origin of law in general, and customary law was historically the most important source of law in most societies. The essential idea is perhaps that what is customarily done becomes, over time, socially required, and comes to be accepted as even legally binding.

So custom is an important base of municipal law, as in England it is the base of the common law, which might be regarded as fundamentally a system of custom developed by the courts into a case-law system. But customary law has been especially significant in international law, if only because international law lacks a legislature and, for the most part, a system of courts which can develop a body of case-law.

In international law, customary law develops from the constant practice of States. The standard example is the traditional grant of immunity to the representatives of foreign States. It is easy to see that such diplomatic immunity is reciprocally beneficial, or even essential if any form of discourse between States is to be achieved. More recent examples of rules of international law evolving from State practice include the recognition of an exclusive economic zone extending beyond the territorial waters of maritime States.

Article 38(1) of the Statute of the International Court of Justice, which is widely regarded as specifying the source of international law, directs that Court to apply, inter alia: 'international custom, as evidence of a general practice accepted as law'. The Statute also refers to 'the general principles of law recognized by civilised nations' thus linking custom to State practice.

Treaties

Treaties are—apart from certain basic principles recognised as customary international law—the main source of international law. The Statute of the International Court of Justice, in specifying what the Court shall apply, refers first to 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting states'.

But treaties—as international conventions and agreements are now collectively called—are traditionally an object of suspicion in domestic courts—unless they have been given explicit effect in domestic law by legislation. And even then, it is the legislative act which is likely to be enforced.

Treaties are essentially agreements between States (but international organisations are now often parties), setting out their respective rights and obligations in a particular field. Nowadays they are sometimes multilateral agreements open to many or all States: such treaties usually have special functions, seeking to codify the rules of international law in a particular sector, or setting up an international organisation which may have law-making powers. Most characteristically, however, treaties are bilateral agreements between States, defining the rights and obligations of the parties. Treaties can be compared in this respect to agreements, or contracts, concluded between companies or individuals in the private sphere.

But domestic legal systems have had difficulties in coping with the evolving nature of treaties. The continuing problems were vividly brought home to me when, in preparing this lecture, I went back to a comparative study which I had the privilege of leading some years ago. The study (partly financed by the British Academy) was published as a book under the title *The Effect of Treaties in Domestic Law* (London, 1987).

If I may paraphrase the opening of my introduction to the book:

> Everyday transactions of ordinary life, as well as commercial and financial transactions, international trade, transport and communications, and many other aspects of modern society, are increasingly regulated by treaties. However,

> treaties give rise to unique legal difficulties which often arise in seeking to enforce treaty provisions in the courts. The most glaring example of this may be the case where a party to a transaction, intending that the transaction should be governed by a particular treaty, takes care to ensure that the treaty has been ratified by the State of the other party, but finds when a dispute occurs that the treaty does not form part of that State's domestic law and will not be applied by that State's courts. Yet, by a strange legal anachronism, many States still seem to consider that treaties are a matter for governments alone, and fail to take measures to implement even those treaties which are of their very nature appropriate for enforcement in the courts.

The problems are not confined, however, to those States which have no constitutional principle giving automatic legal effect to treaties binding on the State under international law. To give a striking illustration, let me cite a perhaps surprising source. When looking for an authoritative statement of the law, I often look at Professor H. W. R. Wade's classic textbook *Administrative Law*, even on a topic outside the field of administrative law. On treaties, I find this remarkable statement (admittedly I take the passage somewhat out of context):

> No English court will enforce a treaty, that is to say an agreement made between states rather than between individuals.

There follows a quotation from an authority of 1859:

> The transactions of independent states between each other are governed by other laws than those which municipal courts administer.[3]

Many of the English cases of that period reflected the position of the East India Company at a time when it governed much of India and was acting in effect as a sovereign power. The English courts were very ready to disclaim jurisdiction over transactions between the Company and the native rulers of India. That historical context may have coloured the approach of the English courts to treaties generally. And other systems have other constraints. A prevailing difficulty is the understandable tendency of national courts to interpret terms used in treaties in accordance with their own national law.

But the character of treaties has, as I have suggested, evolved, and the subject of the effect of treaties in domestic law should have moved on correspondingly. It can hardly be right to say today that no domestic court will enforce a treaty. My suggestion is that the traditional approach of domestic law to treaties cannot survive the recent transformation of

[3] H. W. R. Wade and C. F. Forsyth, *Administrative Law*, 10th edn. (Oxford, 2009), p. 717.

international law. International law was historically concerned with relations between States: it had no application to individuals. The exceptional cases where, even in my recollection as a student, international law was concerned with individuals were, broadly speaking, those cases where individuals could be described as 'objects' of international law, rather than its subjects; the classical examples being pirates and slaves—both categories now once again in the news. Slaves, of course, were simply objects of commerce. Pirates could be captured, even on the high seas.

How different is international law today? Many transnational transactions between individuals or corporations are directly regulated by international law. Often there are specific legal regimes, frequently established by multilateral treaties. There may be more or less sophisticated systems of judicial settlement of international arbitration. Whole branches and systems of international law have developed: we have International Economic Law, International Environmental Law, International Human Rights Law, International Criminal Law, and so on.

The International Court of Justice, in a landmark recent decision, has accepted that a treaty can confer rights on individuals.[4] Yet the difficulties remain; and the difficulties remain essentially the same. National courts often remain reluctant to give full effect to treaties, and where they do give effect to them, they often remain reluctant to interpret them in accordance with their aim and intention.

Let me focus here on interpretation, which goes to the root of the problem of developing a single law. Domestic courts sometimes remain impervious to the need for a single interpretation of a disputed text, even where an authoritative interpretation has been adopted by a qualified international body. Indeed the same difficulties arise even in the case of treaties whose very object is to unify aspects of domestic law. One of the most favoured methods of attaining a single law has been by way of treaty. Both on the universal level, and at the level of regional organisations such as the Council of Europe, many treaties have been drawn up whose very aim is to unify the domestic law in particular fields. The international organisation UNIDROIT, the International Institute for the Unification of Private Law, which exists for that very purpose, has drawn up many conventions and other legal instruments to that end. Yet the domestic courts have found difficulties in interpreting even those instru-

[4] Case *LaGrand* (*Germany v. USA*), 27 June 2001, ICJ Reports 2001, p. 466.

ments in a uniform way.[5] As Shakespeare put it, 'men may construe things after their own fashion, clean from the purpose of the things themselves'.[6]

What I would suggest is that many of the profound difficulties in reconciling treaties with domestic law, still widely seen as separate systems, but now manifestly operating in the same space, could be overcome. They could be overcome by what is no more than an appropriate approach to treaty interpretation on the one hand and to the interpretation of the domestic legislation on the other. The treaty is not to be rejected where it appears on its face inconsistent with domestic legislation. On the widely prevailing view, the domestic legislation must be interpreted in the traditional way: rather literally on the traditional English approach to the interpretation of statutes. Only where that interpretation of the legislation leads to a genuine ambiguity—which the legislative draftsman will have taken the greatest pains to avoid—can the treaty be let in by the back door, so to speak.

I would suggest that, on the contrary, the courts have an overriding duty to interpret their legislation, where possible, so as to be consistent with the treaty—a treaty which may not have been expressly incorporated by legislation but which in any event and regardless of that omission is, if duly ratified by the State organs, binding on their State under international law. And one can speak here of a 'duty' precisely because there is a fundamental duty under international law to observe treaty obligations: one of the most fundamental principles of international law—a principle of customary law—is *pacta sunt servanda*, treaties are to be observed. And such fundamental principles of international law, at least, are to be respected by all organs of the States, including their municipal courts. Indeed the duty should extend to all duties arising under international law—including, for example, the duty to respect judgments of international courts giving rise to obligations for the State concerned.

In sum, the correct approach to the treaty is not to be found by starting from domestic law and then considering whether the treaty is compatible with that law. Rather it is to be found by starting from the proper interpretation of the treaty in accordance with the now well-recognised principles of treaty interpretation, themselves the product of customary law as codified by the 1969 Vienna Convention on the Law of Treaties; and where appropriate by looking at the interpretation of the treaty by

[5] M. J. Stanford, 'Unidroit', in Francis G. Jacobs and Shelley Roberts (eds.), *The Effect of Treaties in Domestic Law* (London, 1987), p. 253.
[6] *Julius Caesar*, I. iii. 34, cited by M. J. Stanford, 'Unidroit', p. 253.

the courts of other systems. And the domestic courts then have the duty to interpret their own domestic legislation, where possible, in a manner consistent with the proper interpretation of the treaty.

The principle of 'consistent' interpretation, that is, an interpretation consistent with the treaty, and therefore consistent with the State's treaty obligations, is recognised in many jurisdictions, including the USA—where it is charmingly referred to, after a case name, as the *Charming Betsy* principle.[7] But what does consistent interpretation mean in practice? Does it go far enough, where there is superficially a conflict with domestic legislation?

A particularly strong form of the principle of consistent interpretation has been explicitly recognised in the UK by Act of Parliament in relation to the European Convention on Human Rights. There the courts are required by the Human Rights Act to interpret all legislation in a way which is compatible with Convention rights 'so far as it is possible to do so'. It thus adopts a strong form of the principle of consistent interpretation. I will return to this in the context of the Human Rights Act.

But it seems clear today that a strong version of the principle of consistent interpretation should be recognised more generally by the State and by its courts in relation to all treaties in force which the State has ratified and by which it has thereby agreed to be bound. There should be, at the least, a strong presumption that the domestic legislation was intended to be consistent with the international obligations of the State. That would help substantially to give proper effect to the principle *pacta sunt servanda.* There should be recognition of the effect of treaties not only where they have been formally incorporated into domestic law, but also where they have been ratified by the State. And, indeed, even in the absence of ratification, when it can be established that they give treaty recognition to established principles of international law.

Treaties and democracy: the United Kingdom

According to constitutional practice in the United Kingdom, Parliament has no formal role in treaty-making, as the power to conclude treaties is vested in the executive, acting on behalf of the Crown. Where a treaty requires a change in UK legislation or the grant of public money, Parliament may vote in the normal way to make or deny the required pro-

[7] *Murray v. Charming Betsy*, 6. U.S. 64 (1804).

vision; in other circumstances it can overcome the will of the executive to conclude a particular treaty only by using political pressure to change the mind of ministers, or, in the extreme case, by withdrawing its confidence from them.

The lack of formal parliamentary involvement in treaty-making differentiates the British Parliament from most other national legislatures. With few exceptions, most written constitutions stipulate that parliamentary approval of treaties is required before ratification for at least some categories of treaty. The difference between the UK and practice elsewhere is less than it appears, especially since there are several conventions which ensure the prior scrutiny of certain types of treaties by Parliament.

Nevertheless the fact that treaties are generally concluded by the executive without full Parliamentary participation has had the unfortunate consequence that the courts will not normally recognise the effects of an untransposed treaty on the ground that to do so would violate democratic principles. The risk then is that instead of a single law, internal and international, there will be a conflict between the United Kingdom's internal law and its international obligations. A solution would be to involve Parliament more closely in the treaty-making process, as indeed is the case for the European Parliament in the conclusion of treaties by the European Union. Such treaties can take effect in EU law without further legislative procedures.

Treaties and democracy: the United States

The United States Constitution gives the power to make treaties to the executive, in the person of the President, but only with the advice and consent of the Senate, representing in effect the fifty-one States. Two-thirds of the Senators present must concur. The House of Representatives has no formal role. Yet Article VI, clause 2 of the Constitution declares that treaties, together with the Constitution and the laws of the United States, are the supreme law of the land. That contrasts with the situation in the UK, where as we have seen treaties are regarded as international obligations without effect as domestic law until Parliament passes the necessary legislation. Treaties in the USA may therefore be regarded as having legal effect, and where appropriate as being 'self-executing'—a concept similar to that of 'direct effect' in EU law.

However a constitutional practice has developed in the USA of 'Congressional–Executive Agreements' made by President and Congress (comprising the Senate and the House of Representatives) together. Such

Congressional–Executive Agreements have certain advantages. They permit approval in both Houses of Congress by simple majority, eliminating the need for a two-thirds majority in the Senate. They give an equal role to the House of Representatives, refuting the charge of 'undemocratic anachronism' which had excluded it from the treaty-making process. And where the implementation of the treaty requires legislation, it improves the prospect of passage of such legislation through Congress.

Fidelity to international law

So far I have addressed treaty obligations in relation to domestic legislation. But there are of course far broader issues of compliance with international law that fall outside the scope of this lecture which is concerned with the interaction of different legal orders. Beyond that, we have broader issues of respect for international law, where politics is often the paramount consideration. States, it may reasonably be thought, will comply with general international law, except where they consider that their interests are excessively affected; and even then, they seek to argue that they are complying with international law. Recent events suggest that in weighing those interests in the political scale, they may seriously miscalculate. The assessments made by the USA, the UK, and some of their allies in relation to the war in Iraq illustrate that only too well.

Given the vast importance of international law today, a new approach is needed: an approach which shows regard for, and fidelity to, international law, including due respect for the decisions of international courts and tribunals.

III. The European Convention on Human Rights

To explore what lessons can be learned from the European legal orders, I turn next to European treaties, and in particular the European Convention on Human Rights, which illustrate, perhaps better than any other, the issues of separate systems operating within the same space. And indeed, as we shall see, there are even issues of the interaction of the European treaties (the ECHR and the EU Treaties) with each other, and with general international law; so that occasionally our domestic courts may be faced with several legal orders, all potentially applicable to the same dispute yet potentially in conflict. But, as we shall also see, the legislature

and the courts have found ways of reconciling these distinct systems, in the direction of a single law.

Although the European Convention on Human Rights is a treaty concluded among States, and is subject to the usual rules of treaty interpretation—although see below for a qualification of this view—it obviously has a special character which goes beyond merely setting out the rights and obligations of the Contracting States towards one another. It is expressed as obliging the States parties to recognise and protect the rights of individuals. It is therefore one of the first treaties to recognise that individuals have rights under international law. Moreover the Convention is intended to penetrate the national legal orders by requiring the States to behave in particular ways towards their own nationals and indeed to all within their jurisdiction. In addition, it explicitly requires States to provide remedies within their domestic systems for all violations of the Convention which they may commit. And the Convention has been transposed into domestic law in many of the States parties to it, and has in certain States, notably Austria, been given constitutional status, thereby prevailing, in the event of conflict, over ordinary national legislation.

Moreover the European Convention on Human Rights is exceptional in setting up a transnational court, the European Court of Human Rights, to adjudicate on claims against States, and to do so at the suit of individuals—actions by individuals before international courts still being a novelty in international law. As well as hearing applications brought by States, the Court under Article 34 of the Convention may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation, by a State party, of the Convention rights. The potential range of applicants is thus very wide: the categories are sufficiently broad to cover every individual, corporate body, or association, and it is sufficient, in order to have standing, to *claim* to be the victim of a violation, as a result of any measure of any kind on the part of the respondent State. Indeed it can be said that the European Court of Human Rights is the most open court of any—more open, in some respects, than even national courts—to individual claimants.

Thus what was previously treated by international law as matters exclusively within the domestic jurisdiction of States—their treatment of their own nationals—is, under the European Convention on Human Rights, brought within an international system of protection and enforcement.

Approaches to interpretation

There are significantly different approaches to *interpretation* of constitutional and other fundamental texts. Perhaps the main contrast is between a *historical* interpretation, which looks back to the adoption of the text and may seek to ascertain the intentions of the authors; and what might be termed an *evolutionary* interpretation, which regards the text as capable of development in the light of changing circumstances. A leading instance of the historical approach is the view of those who seek the 'original intent' of the US Constitution. The European Courts (ECtHR and ECJ) have generally adopted an evolutionary approach: thus the European Convention on Human Rights is, according to the ECtHR, 'a living instrument'.

It can be argued that the approach to interpretation may legitimately take account of the difficulty of amending the text. Thus both in the case of treaties, and in the case of constitutions and similar texts, it may be very difficult in practice to amend the text. The courts may therefore need a certain licence to, in effect, update the text; on the other hand, they may be criticised for going too far, where the effect of their decisions cannot be reversed.

The US Constitution, which can claim to be both the first modern constitution and the oldest surviving constitution in the world, provides an example. It can be amended only by a cumbersome procedure, requiring the assent not only of Congress but also of three-quarters of the States. In more than 200 years, apart from those constituting the Bill of Rights, there have been only seventeen amendments. Consequently it may prove necessary to reinterpret the Constitution, and to depart from what may have been the original intent; indeed there have been many striking examples of reinterpretation of the US Constitution.

In the case of treaties, especially multilateral treaties, the amendment procedure is also difficult, since it will normally require agreement by all the States parties.

The European Convention on Human Rights can be amended only by Protocols which must be ratified by all States parties (currently forty-seven). Most of the Protocols do not in fact amend the text of the Convention, but make additional provision, for example by recognising additional rights. Adaptation of the core substantive rights of the Convention, the text of which has remained unchanged since 1950, has been largely achieved by the evolving case-law of the Court (and before 1998 the case-law of the European Commission of Human Rights also).

It seems clear that social changes and evolving values require an evolutionary interpretation of the Convention. The text is often sufficiently broad and 'open-textured' to allow this. It cannot be objected that that evolutionary approach extends the obligations of the States beyond the undertakings which they accepted when they ratified the Convention. On the contrary, such an approach is necessary, if effect is to be given to their intentions, in a more general sense. It should be presumed that the States did not intend solely to protect the individual against the threats to human rights which were prevalent when the Convention was drawn up, with the result that, as the nature of the threats changed, the protection gradually fell away. Their intention was to protect the individual against the threats of the future, as well as the threats of the past.[8] Thus the Strasbourg Court has rightly described the Convention as 'a living instrument'.

But evolutionary interpretation has its limits: 'It is true that the Convention and the Protocols must be interpreted in the light of present-day conditions. However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right which was not included therein at the outset.'[9]

The European Union Treaties, which we discuss shortly, have also proved difficult to amend. Again, ratification by all Member States (currently twenty-seven) is required. The founding Treaties of the 1950s were relatively unchanged until the 1980s: the amendments in those decades concerned relatively minor budgetary and institutional provisions. More recently there were more ambitious changes, with the Single European Act, the Maastricht Treaty, the Amsterdam Treaty, and the Nice Treaty. The Constitutional Treaty was rejected by referendum, and the Lisbon Treaty has had a difficult path. But even where there were substantial amendments, they have rarely changed the main provisions of the founding Treaties. They have added new tasks, and introduced new principles (often foreshadowed by the case-law).

Again, therefore, the main task of keeping the EU Treaties up-to-date has fallen to the European Court of Justice, which has performed it remarkably: many examples could be given, such as developments in the principles of equal treatment, fundamental rights, external relations, protection of the environment, and other fields.

[8] See C. Ovey and R. White, *The European Convention on Human Rights*, 4th edn. (Oxford, 2006), chap. 3.

[9] *Johnston v. Ireland*, 18 Dec. 1986, § 53, Series A no. 112.

Some fundamental features of the European Convention on Human Rights should be noticed here, as it both reflects, and contributes to, the development of a shared system of values among the States members of the Council of Europe.

Although some fundamental values are at one level unchanging—as witnessed by the terms of the Convention itself—their understanding may evolve—thus requiring an evolving interpretation of the Convention's provisions. And if it is asked how that is possible, where some rather fundamental differences remain among European societies, the answer is at least partly to be found in the approach of the European Court of Human Rights, which respects a degree of diversity; which recognises pluralism as part of the foundations of modern society; which accepts, at the margins of the Convention rights, a measure of discretion for the national authorities with which it will not interfere; and which is prepared to engage in a continuing dialogue with the national courts—a dialogue of which the English courts provide excellent illustrations since the entry into force in 2000 of the relevant provisions of the UK's Human Rights Act of 1998.

English law and the European Convention on Human Rights

It is just ten years since the passage of the Human Rights Act, and eight years since the 'Convention rights', as they are termed in the Act, became enforceable in the UK Courts.

Before the Act there was the spectacle, sometimes frankly unedifying, of English courts trying with little success to reconcile English law with the Convention. The United Kingdom had long been bound under international law by the Convention (indeed the UK was the first state to ratify it as long ago as 1951) but had not incorporated it into UK law by Act of Parliament. The Convention thus had a perilous status before the courts, and a person claiming Convention rights had regularly to seek a remedy in Strasbourg. Yet the litigant was required, as the Convention reasonably insisted, to exhaust all possible recourse in the domestic system before applying to Strasbourg. There was thus much uncertainty and unnecessary delay and costs. But this was perhaps part of a wider problem: the reluctance on the part of the courts to take a more constructive approach to treaties. The courts could certainly have adopted a more positive line.[10]

[10] For instructive discussion see (before the Act) M. Hunt, *Using Human Rights Law in English Courts* (Oxford, 1997); and for a comparison of the courts' approaches before and after the Act

The situation has changed radically since the entry into force of the Human Rights Act. I will focus here on three aspects—those most relevant to my theme. These are, first, the development of a new relationship between the domestic courts and Parliament; second, a new relationship between domestic courts and the Strasbourg Court; and third, some issues of shared and divergent cultures and values.

Constitutionally the most significant feature is the new relationship between courts and Parliament. As already mentioned, the Act requires the courts to interpret all legislation in a way which is compatible with Convention rights 'so far as it is possible to do so'. It thus adopts a strong form of the principle of consistent interpretation.

The Act also requires the courts to take account of the case-law of the European Court of Human Rights—although that case-law is not made binding on the UK Courts (in contrast to the case-law of the European Court of Justice). The Act thus recognises that conflicts between competing values are justiciable issues, and are indeed well suited for resolution by the courts.

In formal terms, too, there is a new relationship between the courts and Parliament. The Act does not give the courts the power, available under national constitutions in some other jurisdictions, to strike down legislation held to infringe fundamental rights (how could it have done so, given Parliamentary sovereignty?) but instead it gives the higher courts the power to issue a declaration of incompatibility. Where such a declaration is made, the offending legislation may be amended, if the government so chooses, not by the more cumbersome method of a new Act of Parliament but by way of an order adopted by a simplified procedure: but the 'remedial order', as it is termed, must be approved by resolution of each House of Parliament. It is apparent that this mechanism changes the relationship between Parliament, the Government and the Courts. In effect, it empowers the Executive, at the instigation of the Courts, to pass amending legislation without the full panoply of Parliamentary procedures. Several such orders have been adopted.

Indeed the power to issue declarations of incompatibility has been used sensibly, yet perhaps surprisingly frequently: in nine years, there have been about twenty-five declarations, most of which survived on appeal, and several of which led promptly to amending legislation.

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see R. Clayton and H. Tomlinson (eds.), *The Law of Human Rights*, 2nd edn. (Oxford, 2009) and compare with the first edition.

Thus, insofar as there is a conflict between Convention rights and Acts of Parliament, the Human Rights Act gives a powerful role to the courts, yet leaves the last word with the legislature. Indeed the technique of the declaration of incompatibility seems exceptionally well designed: while formally consistent with Parliamentary sovereignty, such a declaration may be even more effective for the protection of human rights than a strike-down power, which might, as the experience of other jurisdictions suggests, be used less frequently. The Act has thus led to a wholly new relationship between the English courts and the Strasbourg Court.

Since the entry into force of the Human Rights Act, and despite the different techniques required to interpret and apply the Convention compared with UK legislation, the courts have proved equal to the task. They have adopted a faithful but not uncritical approach to the Strasbourg case-law, and where there is no such case-law directly in point, they have generally sought to follow the methodology of the Strasbourg Court. As a result, a substantial body of Convention case-law has been developed: in many areas of civil liberties, the law is now clearer, more coherent and more effective. Incidentally the feared abuse of the Act by 'vexatious litigants' or for trivial purposes has not materialised, except in the view of sections of the tabloid press and some political commentators, but not I think in the view of the judges themselves.

Cases involving human rights are now resolved on a principled and systematic basis, as is particularly appropriate to the protection of fundamental rights, rather than on the earlier somewhat haphazard approach based on a patchwork of legislation and common law. At the same time, the courts have become somewhat bolder, but not immoderately so. Judicial review has become significantly less deferential: in sum, it can be said that the courts generally, and properly, exercise a rather more intense and certainly more principled scrutiny of the exercise of public powers.

Moreover, the new case-law of the English courts has become influential. English judgments applying Convention rights are regularly cited both in other jurisdictions and, perhaps more significantly, in Strasbourg by the European Court of Human Rights itself. Frequently they have a persuasive effect on that Court, as indeed was one of the purposes properly pursued by the Human Rights Act.

Indeed it is striking to note that in several significant cases, considered judgments by English courts have persuaded the European Court of Human Rights to revise its own case-law to take account of the concerns advanced by the English judgments.

As the United Kingdom's new Supreme Court has recently put it, normally the requirement in the Human Rights Act that the courts should take account of the case-law of the Strasbourg Court would result in the domestic court applying principles clearly established by the Strasbourg Court. But on rare occasions there might be concerns whether the Strasbourg Court's decision sufficiently appreciated or accommodated the domestic process. The domestic court could then decline to follow the Strasbourg decision, giving reasons for doing so. That would give the Strasbourg Court the opportunity to reconsider so that there took place what might prove to be a valuable dialogue between the domestic and Strasbourg courts.[11]

There are also doubtless very many cases where the availability of Convention rights in the UK courts has made it unnecessary to resort to Strasbourg at all. English courts have had the opportunity in these ways to contribute to the shaping of the Convention system. In particular, they have the opportunity to address the value system which the Convention involves.

Judgments on human rights by English courts under the Human Rights Act have been cited not only in Europe but also outside Europe, notably by courts in Commonwealth jurisdictions and in the USA; many of those jurisdictions have Bills of Rights similar to the provisions of the European Convention on Human Rights. In the case of some Commonwealth countries, their independence Constitutions, drawn up with the assistance of British Governments, included Bills of Rights historically based on the Convention, which was regarded by the UK as a good 'export model'. Some of these Commonwealth courts may find some guidance in the interpretation by the English courts of the European Convention on Human Rights—perhaps more so nowadays than in the more insular English law of civil liberties.

The introduction of the Human Rights Act has also led to the development of a human rights culture—not in the bad sense but in the better sense of a new approach by public authorities which is well documented.

Issues of democracy once again

A major concern is that the courts are taking over a role which at least in the British tradition is a role for parliament: the democratic concern.

[11] *R v. Horncastle and others* [2009] UKSC 14, 9 Dec. 2009.

There are two different issues here: first, the effect of treaties which have not been incorporated into UK law by Act of Parliament—as was the case with the European Convention on Human Rights before the Human Rights Act; second, even where duly incorporated, treaties which are regarded as requiring courts to take decisions which it is thought should be taken by Parliament rather than the courts.

The issues here are too wide-ranging to be addressed in detail but three points should be made. First, we are looking at competing values in specific contexts: that is a task for the courts, as the Human Rights Act in effect acknowledges, rather than for the legislature. The legislature simply cannot draw the line and take over the role of adjudicating between competing interests. Moreover, the specific context is all-important: the balancing of interests must take account of the context, and that will often require anxious consideration of all the circumstances of the particular case. Second, insofar as there is a conflict between Convention rights and legislation, the Act, as we have seen, leaves the last word with the legislature. Third, the Act does not normally interfere with what are truly general policy matters: for example the allocation of finite—currently, very finite—economic resources of the State; these remain a matter for government and parliament.

It has not of course been possible to review all the issues raised. But we can at least see in outline the effect of the Convention as a valuable model for the interaction of interlocking yet independent legal systems.

The ECHR and uniform law

How far then does the ECHR, as interpreted by the Strasbourg Court, lead to uniform law across the forty-seven Contracting States? Once again, the answer is qualified. The answer must take account both of the approach of the Strasbourg Court and of the approach of the domestic courts. As we have seen, the Convention is not intended to establish a complete code of uniform law: rather, it seeks to lay down, in many areas, a minimum standard: the States remain free to go further in their protection of human rights.

The overall picture is not, however, straightforward, and further analysis would be helpful. For our purposes, it may be useful to distinguish three basic categories.

- First, in some cases there may be, in effect, a uniform standard: as where there is an absolute prohibition—for example, a prohibi-

tion of the death penalty, in the thirteenth protocol. Or, to take a less obvious example, a prohibition on criminalising sexual relations between consenting adults, by interpretation of Article 8 of the Convention. In such a case, the Court may take account of the fact that such a prohibition is not found necessary in other States: how then can it be justified where it does exist?

- Second, in other areas, however, the Court expressly allows for a varying standard by leaving the State a 'margin of appreciation'. This doctrine applies particularly where the Convention accepts that the rights guaranteed may be limited on specified grounds. Here, in contrast to the first case, there may also be specific reasons for accepting wider restrictions for reasons specific to a particular State. For example, greater restrictions on free expression might be justified where there are special threats to public order or national security.
- Third, there may be a need for special tolerance where there is a potential conflict between two fundamental rights: for example, between freedom of expression and the protection of privacy.

In such cases, it is unhelpful to think of higher levels of protection, because that would imply giving priority to one fundamental right over another.

IV. EU law

While the relationship of the ECHR and English law is now relatively clear, in other cases potential conflicts between different legal orders remain indefinitely unresolved. Possibly the best example is again to be found in European law, and again in relation to a Treaty: here, not in the ECHR but the EU Treaties, and in the relationship between EU law and national law. Under EU law, that law takes precedence over the laws of the Member States. That precedence was not explicitly laid down by the Treaties establishing the European Communities,[12] or in subsequent treaties (except in the failed Constitutional Treaty), but could rightly be regarded as inherent in their very nature: how could a single market function, how could

[12] The States of Europe were not content to establish a European Community; they established three Communities: the European Coal and Steel Community (Treaty of Paris, 1951), the European Economic Community and the European Atomic Energy Community (Treaties of Rome, 1957).

the Union operate at all if each Member State remained free to override Union law?

Thus the precedence of EU law is not necessarily a consequence of any political or other hierarchy, or of a federal or quasi-federal relationship between the Union and its Member States, but is inevitably a consequence of that feature which is the theme of this study: the theme of a unified law. It can indeed be contended that the need for a unified body of law was sufficient to justify the precedence of that law. The concern of the Treaties for such uniformity was apparent from the outset in the jurisdiction assigned to the ECJ to rule, on a reference from a national court or tribunal, on the interpretation both of the Treaty itself and of EU legislation. It is clear that the purpose of the procedure is to ensure the uniform application of the Treaties and of legislation in all Member States.

The system of references for preliminary rulings has proved a very effective means of unifying the law. It seems clear from the system itself, although again the Treaty is not explicit on the point, that a ruling of the ECJ is binding not only on the national court which referred the question, but also on all courts in the EU confronted with the same question, although a national court in a subsequent case may refer the question anew, if it considers that there are reasons why the ECJ might now give a different answer.

Now it may be thought that EU law, in contrast to the European Convention on Human Rights, is concerned to establish in all cases a single law, uniformly applying across the EU. But just as with the ECHR, the picture is rather more complex. Many of the provisions of the EU Treaties and of EU legislation are indeed to be interpreted and applied uniformly. But in some areas a different approach is accepted.

Let me mention briefly some examples. EU legislation consists primarily of regulations and directives. Whereas regulations are binding in their entirety and directly applicable in all Member States, directives are expressed to be binding only as to the result to be achieved, and leave to the national authorities the choice of form and methods. Yet, although regulations are normally given a uniform interpretation, they may in some circumstances properly be interpreted differently in different parts of the EU, or even within Member States. Moreover directives, which leave Member States the choice of form and methods, are often given by the Court of Justice a binding uniform interpretation. And even the Treaty provisions may be interpreted with different effects for different

Member States: we shall see an example when we look at relations between EU law and the European Convention on Human Rights.

For our purposes however we should perhaps focus on a more fundamental issue affecting the development of a single law within the EU: this is the issue of potential constitutional clashes between national law and EU law. For it is only EU law which raises that problem in a truly fundamental way. Let us return then to the precedence of EU law. That precedence of EU (or Community) law was inevitably deduced by the ECJ some years before the UK joined the Community, was well known and was broadly accepted—even though the British Government's notorious White Paper at the time of accession suggested something different.

The equally inevitable consequence is that from the point of view of EU law national courts, faced with a conflict between EU law and national law, must apply EU law. (According to the ECJ, they are not required to treat national law as invalid, but are required to 'set aside', that is, simply not to apply ('disapply'), the conflicting provisions of national law. That is significant not least because the same provisions might remain applicable in situations where they did not conflict with EU law: for example, a national statute constituting a trade barrier might be inapplicable in the context of trade between Member States, while the same provision might remain applicable in trade with third States.) Thus, although the EU is premised on the primacy of EU law, that primacy is not made explicit in any text other than court decisions—the decisions of the ECJ and of some national courts, including in the UK the House of Lords.

In my view, however, it might have made little difference if precedence had explicitly been laid down in the EC Treaties, or even perhaps if it had explicitly been laid down by UK legislation on accession. That may seem surprising; but the fact is that there is simply no straightforward solution to the problem of resolving the relationship and settling conflicts between what remain separate and autonomous legal orders. What is essential, I suggest, in order to avoid conflicts is a constructive approach by the courts—an approach which reflects the true intentions, and the true interests, of the States. In the absence of such constructive approaches by the courts concerned, the problems seem insoluble.

In view of the general approach taken hitherto by the Member States, whose acceptance of the primacy of Union law is apparent—not least from the fact that they collectively included an explicit primacy clause in the European Constitution, and by the general approach of their supreme and constitutional courts, which have in general entered only somewhat

hypothetical reservations to the primacy of EU law—perhaps the most correct approach is that the fundamental rule in the national laws of the EU Member States recognises the primacy of EU law, although such recognition may not, at least for the time being, be altogether unqualified. At the same time, the prospect of such qualification seems rather remote. It would be most likely, on the indications given by national courts to date, if the EU were to act either wholly outside its competence or in clear violation of fundamental rights.

The first course seems unlikely, since there are multiple checks. The ECJ can hold that measures envisaged would be outside the EU's competence (and as such unlawful and invalid), as the Court has done, for example, on several occasions in relation to the EU's international competence (e.g. the European Economic Area Agreement, the World Trade Organisation Agreement, the ECHR). And it can quash a measure as being outside the EU's legislative competence (as it did in the tobacco advertising case). Moreover any formal extension of the EU's competence requires the agreement of all the Member States: that can be done only by Treaty amendment, which necessitates action by all Member States in accordance with their own constitutional requirements. Otherwise, if the EU wishes to act and the Treaty does not provide the necessary powers, action again requires the agreement of all Member States: such action can be taken, under Article 352(1) of the Treaty on the Functioning of the European Union, only by unanimous decision of the European Council.

It seems unlikely also that the EU would act in clear violation of fundamental rights to such an extent as to compel one or more Member States or their courts to refuse to recognise the act as lawful. That prospect may be even more unlikely after the entry into force of the Lisbon Treaty, not only because that renders legally binding the EU Charter of Fundamental Rights and allows—indeed requires—the EU to accede to the ECHR, but also because the jurisdiction of the ECJ is extended. Among other reforms introduced by the Lisbon Treaty to improve judicial protection, one is particularly noteworthy: in the more sensitive areas of EU action, notably in relation to Freedom, Security and Justice, the necessary jurisdiction for the protection of individual rights is conferred on the ECJ.

So far we have considered possible qualifications of the primacy of EU law in particular instances. A more general revocation by a Member State or its courts of such primacy seems unlikely except in the event of withdrawal of a Member State from the EU. As mentioned above, the Lisbon Treaty makes express provision for withdrawal from the Union. It

requires, however, agreement of all the Member States. A general revocation of primacy without such procedures would probably be regarded as tantamount to a *de facto* (and illegal) withdrawal.

The United Kingdom presents a traditional obstacle to the primacy of EU law, as indeed of law from any other source: the obstacle of the sovereignty of Parliament. As discussed, the effect seems to be that Parliament *cannot* secure the primacy of EU law. By whatever means, and by whatever form of words, Parliament endeavours to secure the primacy of EU law, a subsequent Act of Parliament must, on the accepted doctrine, be given precedence. The sovereignty of Parliament itself entails that the later Act always prevails.

The European Communities Act 1972, drafted by a brilliant lawyer, Fiennes, sought, by an ingenious form of words, to give effect, obliquely, to the primacy of EC law. But was not that formally and technically impossible? Whatever form of words was chosen, would it not be overridden, if only impliedly, by a later Act which conflicted with EU law? What may well seem extraordinary is that, after more than thirty-five years of UK membership, it cannot be maintained that that central issue has been resolved. But it may seem less extraordinary if it is realised that there is simply no clear solution to that issue. Again the problem is that of two autonomous legal systems coexisting in the same space.

The *Factortame* litigation was at one time thought to have resolved the issue definitively—so far as a court decision can do so, it may be said: but my thesis is that it is only court decisions which can resolve such issues, as when the House of Lords (as the final court of appeal) seemed explicitly to accept that EC law prevailed over Acts of Parliament.[13] Lord Bridge in particular made it clear that that was so, and had been the intended result of the 1972 Act.

Remarkably, however, it is still widely considered today that, in terms of Parliamentary sovereignty, nothing has changed. European law is given primacy over an Act of Parliament, it is said, only because Parliament itself had so ordained.[14] Moreover, that result was reached by

[13] *R. v. Secretary of State for Transport (No. 2)* [1991] 1 AC 603.

[14] See Lord Bingham of Cornhill, 'The rule of law and the sovereignty of Parliament', *King's Law Journal*, 19–2 (2008), 223–34 at 223. Recognising that the courts have declined to apply Acts of Parliament, subsequent to the European Communities Act, which conflict with EU law, Lord Bingham adds (at p. 230): 'But the courts act in that way only because Parliament, exercising its legislative authority, has told them to.' However, on the orthodox and hitherto universally accepted doctrine of Parliamentary sovereignty, Parliament cannot bind a future Parliament, and the later Act always prevails.

the courts, it is said, not on the heretical basis that Parliament had succeeded in the EC Act in binding its successors, but rather because the Act included an interpretation clause which requires all statutes to be interpreted as being without prejudice to directly enforceable Community rights. Equally it is said that, since the courts apply EC law only because Parliament requires them to do so, it follows that such observance depends entirely on the will of Parliament, which could, by a new exercise of the legislative power, be reversed.

Is this view, although apparently accepted by many senior judges and some leading academics, not a trifle disingenuous? Does it not disguise (whether or not by intent) the true constitutional position? EU law does of course owe its status in the UK, as a matter of UK constitutional law, to the statutory effect given to it by the 1972 European Communities Act. By the same token, as a matter of UK constitutional law, the 1972 Act could be repealed, and the courts could then be instructed no longer to apply EC law. But until such repeal, the UK courts are declining to apply subsequent Acts of Parliament which conflict with EU law: a clear departure from the traditional doctrine of Parliamentary sovereignty.

In the event of repeal of the European Communities Act, it might be necessary to consider whether such a measure would be lawful under EU law—and which law would prevail in which courts. The logical consequence in the event of repeal of the 1972 Act or its central provisions would be withdrawal from the European Union. Until now, the Treaties contain no provision for withdrawal from the European Union. The failed Constitutional Treaty did contain such provision, and those provisions are maintained by the Lisbon Treaty. So in the future, withdrawal might be facilitated. If Parliament, in a new legislative measure clearly conflicting with EC law, specifically purports to override the provisions of the European Communities Act, that might be regarded as incompatible with continuing membership of the EU.

But this is all a matter of speculation. What is the law at present? It seems to me that, so long as the UK courts are required to apply EU law, it is no mere rule of statutory interpretation—that is, interpretation of Acts of Parliament—which applies. Where there is no scope for consistent interpretation of the UK legislation—that is, in the event of a straightforward clash between an Act of Parliament and EU law—the UK Courts can and must—and indeed they do—apply EU law. It would involve setting aside, as they are required to do, the offending provisions of the Act of Parliament—even one that is subsequent to the European

Communities Act—and thus, in effect, allowing the EC Act of 1972 to prevail over both prior and subsequent Acts of Parliament.

Nor is this a peculiarity of the United Kingdom constitution, even if the reason for it—Parliamentary sovereignty—is peculiar to it. There are certainly similar constitutional conundrums in other Member States, and probably in many of them. Nor—and this is the most striking feature—is it easy, or perhaps even possible, to see how the conflicting constitutional positions could be reconciled. If we take again the example of the United Kingdom, there seems hardly to be even a theoretical solution.

But wait, I hear you cry: did not the failed 'Constitutional Treaty' make express provision for the primacy of EU law? If that Treaty had not been voted down in referendums in France and the Netherlands, and had been duly ratified and transposed into law in all the Member States, would not that have put an end to all uncertainty about the primacy of EU law? Certainly, the now defunct Constitutional Treaty (the Treaty establishing a Constitution for Europe) boldly spelt out, for the first time in a Community text, the primacy of EU law: it would have provided (in Article I-6):

> The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.

The Lisbon Treaty, which replaced the Constitutional Treaty, and which generally is very similar in content though not in form, contains no such provision. Instead, there is a tame statement in a mere 'Declaration concerning primacy' appended to the Treaty, Declaration No. 17. In that declaration 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.' The Declaration also refers to an opinion of the Council Legal Service according to which 'The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.'

However, even in the event of express treaty provisions on primacy, the position is less clear than it may appear at first sight. Let us take first the case of the UK. Even if the Constitutional Treaty had been ratified and given effect in the UK—how else than by Act of Parliament?—the problem would not have been resolved. Parliament would have provided that the Constitutional Treaty would have the force of law in the UK. Conceivably,

it might even have on this occasion explicitly enacted, by separate and express provision, the primacy of EU law. But could Parliament have thereby bound its successors? Not according to the conventional view of the fundamental norm—not to say the *Grundnorm*—of the UK constitution.

Indeed it is not clear whether any solution could be found to the conflicts of separate legal orders, other than by a wholly new constitutional settlement, perhaps with a new written constitution, adopted or given effect by some even more solemn method than a traditional Act of Parliament.

Let it be noted that problems of this kind are not unique to the peculiarities of the UK Constitution, but are found in other systems even where there is a full constitutional text. A particularly illuminating example is the case of the Federal Republic of Germany. Here the traditional, if largely hypothetical, question of possible conflict between EC law and the fundamental rights protected by the German Basic Law (its constitutional text) would not, as it seems to me, be resolved even by incorporation into the German Constitution of a clause providing for the primacy of EU law. That is because the Constitution itself, in the interest of giving fundamental rights the most secure anchorage, also provides that its provisions on fundamental rights are not amendable. So even an amendment to the German Constitution, purporting to give precedence to EU law, would not succeed in resolving the problem. Alleged infringements of those rights by EU provisions would still fall to be considered by the German Constitutional Court, notwithstanding a constitutional guarantee of the primacy of EU law.

German constitutional law in its approach to EU law raises two main issues: apart from the fundamental rights issue, there is the issue of what competences have been transferred to the EU. This issue, described as the issue of *Kompetenz-Kompetenz* (who has the final say as to the demarcation between the competence of the EU and the competence of the Member States), may also—like the fundamental rights issue—be invoked to challenge the validity of EU measures. But here the challenge would be on the ground that the EU has acted outside the competences transferred to it by the Federal Republic. Just as the Constitutional Court claims the final say on fundamental rights, so it claims to decide on the scope of the EU's competences. That claim does however seem contestable: again, it is difficult to see how the Union could function if each Member State could decide for itself what was the scope of the Union's competence. Moreover the scope of the Union's competence is clearly assigned to the jurisdiction of the ECJ under the Union Treaties: 'lack of

competence' has from the outset been the first ground on which the Court may quash an EU measure.

In relation to the issue of fundamental rights, however, a certain accommodation has been established between the ECJ and the Federal Constitutional Court—and indeed, as we have seen, the European Court of Human Rights. The approach of the ECJ has been outlined above. The Federal Constitutional Court, for its part, has developed the s*olange* doctrine, which seems to preserve a degree of harmony between the *Grundgesetz* and EU law. According to this doctrine, developed by the German Constitutional Court, *solange* (so long as) EU measures might not be subject, within the EU, to the same standard of review as prevailed under the German Basic Law, such measures could be controlled by the German Constitutional Court.

The concerns of the German Constitutional Court first surfaced in 1974, where it introduced the s*olange* doctrine. In understandable reaction to the atrocities of the Nazi era, the German Constitution (the *Grundgesetz* or 'Basic Law'), the German Federal Constitutional Court and German scholars generally attach greater significance to fundamental rights issues than is the case in most other States.

In the context of EU law, such rights have often been invoked in a commercial context, by traders in a challenge to Community legislation, just as they were accustomed to challenging domestic legislation as infringing such rights. The first leading case in Germany on Community legislation was *Internationale Handelsgesellschaft*, decided by the Constitutional Court in 1974. A trader challenged certain EU regulations as infringing its fundamental rights. When the case reached the Constitutional Court, it first considered the relationship between German constitutional law and EU law. It took the view that EU law 'is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source'.[15] The Court went on to hold that, so long as EU law did not contain provisions on fundamental rights measuring up to those in the German Basic Law, it would be competent to review EU measures for compliance with fundamental rights: not with a view to ruling on the validity of an EU measure, but possibly that such a measure could not be applied in Germany. The s*olange* doctrine was refined in later cases (*Solange II* and *III*).[16]

[15] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

[16] See *Solange I* (BVerfGE 37, 271), *Solange II* (BVerfGE, 73, 339), and *Solange III* (BVerfG, 2 BvL 1/97).

Difficulties of a similar kind have surfaced from time to time in the Constitutional Courts or Supreme Courts of other Member States. Such courts may take what can be described as a dogmatic view of the relation between their own Constitution and their own law on the one hand, and EU law on the other hand. I do not use the term 'dogmatic' here in a pejorative sense; rather, it reflects an adherence to a particular doctrine to which the courts, and many jurists, may be understandably wedded, but which is increasingly difficult to reconcile with the changing character of law and the emergence of what may be described as multipolar systems. Indeed in some instances the doctrine seems to go back as far as the Westphalian system, and the traditional model of the sovereign State.

The conclusion which seems to follow is that there is no formal, even theoretical, solution to the interaction of different legal orders; such solutions can and must be found, pragmatically, by the courts. I would suggest that, faced with apparently conflicting obligations, the courts have some form of obligation to find a constructive resolution of these conflicts. It would not be an obligation of domestic law, nor of international law, but one which might be described as a meta-legal obligation.

The recent approach of the French courts has been elegantly synthesised by Jean-Marc Sauvé, who presides over the French Conseil d'État:

> This new approach helps us greatly to open the way to a system aimed at *combining* instead of *opposing* European law on the one hand, constitutional rights and liberties on the other hand. This seems consistent with the fact that, when it comes to implementing European law, you simply no longer have the domestic judge on the one hand, the ECJ and the European Court of Human Rights on the other hand. The domestic judge is himself a European judge. . . . The way we look at EU law has . . . changed greatly over the past 10 or 20 years. We no longer look at EU law as an *external* source of law; it is simply part of the legal norms that we must implement daily in our courts . . .[17]

Those views were held in the past by some European law scholars as a statement of aspiration. Today such views are increasingly expressed by senior judges themselves.[18]

The courts, since they have ultimately to resolve conflicting obligations, thereby necessarily have a choice. The reality is that they may adopt

[17] Jean-Marc Sauvé, 'Judging the administration in France', in M. Andenas and D. Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law* (Oxford, 2009), p. 327. Jean-Marc Sauvé is Vice-President of the Conseil d'État but effectively its president, the titular president being the President of the Republic.

[18] For the views of English judges, see my paper 'European law and the English judge', in Andenas and Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law*, pp. 419–38.

an interpretation of their basic constitutional texts which enables those to coexist with their treaty obligations—as the House of Lords did in *Factortame*, and as other supreme and constitutional courts have done. Or they may consider themselves free to ignore that obligation: put on their internal constitutional spectacles and refuse to look beyond the confines of their own system as traditionally conceived and interpreted. But if they do that, then they will succeed only in generating conflicts between different legal systems: conflicts which will generate profound legal confusion, which run deeply counter to legal clarity and legal certainty, and for which there is no resolution.

The conclusion I reach is that, just as treaties can find no complete solution to the relation between treaty and domestic law, so domestic law too can find no complete solution. The courts are under an obligation to find a solution to what in formal terms may be irreconcilable conflict. To a great extent, in the context of EU law, they have succeeded in doing so.

V. EU law and ECHR: Strasbourg–Luxembourg

There are as we have seen not one but two separate systems of transnational European law: European Union law, overseen by the European Court of Justice, and the European Convention on Human Rights, overseen by the European Court of Human Rights. Although the two systems, and the two Courts, emerged independently, the overall pattern, while it did not result by design, seems rather appropriate. The jurisdiction of the two Courts is wholly distinct, since the function of the ECtHR is essentially to receive applications alleging breach of the ECHR after all domestic remedies have been exhausted, while the ECJ has no specific human rights jurisdiction but may apply principles of respect for fundamental rights in the context of its various heads of jurisdiction, notably on references from national courts and tribunals.

Moreover the Courts themselves are entirely separate and independent, and the organisations within which they operate are different and have different membership. Each organisation has grown remarkably in coverage of European States: the EU from six to twenty-seven Member States; the Council of Europe has no fewer than forty-seven members (including some mini-States).

Nonetheless the resulting structure can be seen as rather appropriate to the developing European legal family. Indeed both the separate development of each organisation and their mutual relations may suggest a

form of organic development or evolution: organisations, no less than individuals, may respond to the pressures and needs to which they are subject, and the European Union and the Council of Europe may reflect those processes.

Yet difficulties might have been anticipated where these separate systems of law, operating under the aegis of independent courts, have jurisdiction over the same territories and the same legal space. The ECJ and the ECtHR are independent and there is no formal provision for their interaction. The EU is not, as yet, subject to the ECHR although the EU Member States are all parties to the Convention; the Council of Europe, within which the ECtHR operates, is an organisation entirely separate from the EU. In practice, such difficulties have largely been avoided: partly at least by the Courts listening and responding: by processes of judicial dialogue.

In the result, the scene has changed dramatically. In outline, since the original Treaties contained no provisions on human rights, the ECJ initially rejected attempts to challenge EU measures as contrary to the fundamental rights protected by the constitutions of the then Member States. The ECJ apparently feared that challenges based on national law would threaten the primacy of EU law and so endanger the whole system. But when national courts suggested that they could not apply EU measures contrary to fundamental rights, the ECJ changed tack, partly perhaps again to avoid threats to the primacy of EU law; the ECJ now stated that there was 'an analogous guarantee inherent in Community law'. In a judgment delivered in 1970 the Court first restated its original approach as follows:

> Recourse to the legal rules or concepts of *national* law in order to judge the validity of *Community* measures would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to fundamental rights as formulated by the Constitution of that State[19].

'However', the Court now added by way of an important qualification, 'an examination should be made as to whether . . . any analogous guarantee inherent in Community law has been disregarded.' And here, the Court produced a new principle: 'In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the

[19] Case 11/70 *Internationale Handelsgesellschaft*, para. 3.

Court . . .' So, a remarkable innovation. But there was a caveat; it would be for the Court to determine the scope of such protection: 'The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.'[20] So it was ultimately for the ECJ to strike the balance.

From the point of view of our theme, that turning-point in the case-law of the ECJ was a significant development in the direction of a single body of law, both in relation to the ECHR and in relation to the constitutional principles of the Member States.

However, the early case-law following that judgment showed rather little propensity for rigorous scrutiny of Community measures and was even considered by some critics as paying only lip-service to the protection of fundamental rights. Gradually the case-law developed, and the Court took the ECHR as the prime point of reference, increasingly referring also to the case-law of the Strasbourg Court. A practice of dialogue, formal and informal, developed between the European Courts in Strasbourg and Luxembourg. The Strasbourg Court, in a remarkable judgment in the *Bosphorus* case, accepted that the review by the ECJ of compliance with fundamental rights made it unnecessary for the Strasbourg Court to conduct its own scrutiny.

The European Court of Justice, for its part, has developed an approach which seems in harmony with that of the Strasbourg Court. A striking example of the new approach of the ECJ is the *Omega Spielhallen* case.[21] Here the German authorities had banned a game played in a laserdrome operated by the applicant company, which involved the simulated killing of humans using laser guns. The company, Omega, challenged the ban as contrary to the freedom to provide services, since the equipment and technology were supplied by a British company.

The case again raised the issue of a conflict between fundamental economic freedoms under the Treaty and fundamental human rights, since the German courts upheld the ban on the ground that the commercial exploitation of a game involving simulated homicide was an affront to human dignity protected by the German Basic Law. The ECJ customarily applied a rigorous scrutiny to restrictions on freedom to supply goods and services—the core of the internal market—requiring the most compelling justification and insisting on the need for uniformity.

[20] Case 11/70 *Internationale Handelsgesellschaft*, para. 4.
[21] Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609.

In *Omega*, however, on a reference from the German court, the European Court of Justice accepted that the restrictions on the freedom to provide services satisfied the principle of proportionality: they did not go beyond what was necessary to protect the values in question. Moreover the Court expressly accepted—and here the ruling perhaps goes further than the previous case-law—that the outcome did not depend upon all Member States having a shared conception of the scope of the fundamental rights to be protected. The Court here recognises the possibility—or even perhaps the merit—of value diversity.

(But it is not only a two-way dialogue: there is a triangular dialogue, involving the national Court as well as the two European Courts. As one might say, a *ménage à trois*?)

So the first part of the solution is judicial dialogue. But there is also the substantive question: how—in which direction—are the different systems to be reconciled? As we have seen, even identical provisions can be interpreted in different ways, perhaps especially where courts are required to balance competing interests. Here we are driven to consider the basic values which do—and should—drive the solutions. Where these values are shared, common solutions can be found. And perhaps shared values can increasingly be found today.

This may be true to some extent even on the broadest global level. The developing principle of respect for human rights, despite gross and spectacular failures, provides an illustration. The basic notion is not seriously contested: a minimum level of treatment must be guaranteed to all individuals, by virtue of the fact that they are humans. Of course standards vary around the world—sometimes unforgivably, but sometimes understandably. To take one of the less controversial examples, free speech is more strongly protected in the US under the First Amendment than it generally is in Europe. In Europe, privacy is more protected, at least until recent tolerance, at least by the executive, of increasing incursions into private life in the interest of 'security'.

Bills of rights, or statements of fundamental human rights, present one of the best illustrations of the point that it is the way the courts interpret what may be a very similar wording which ultimately counts, and that that interpretation may reflect the political and social values of the jurisdiction concerned. But in Europe, at least, there seems increasingly to be common ground, and so a single law.

VI. Concluding remarks

In conclusion, I turn to the story by Antoine de Saint-Exupéry, *Le petit prince*, a fable especially relevant to our time. The prince, rather bored by being alone on his own small planet, and curious to see more, decides to visit other planets. But he finds his curiosity is not shared. To his surprise and disappointment, the inhabitants of these planets are wholly absorbed in their domestic affairs, with no wish to look beyond their limited horizons.

On Earth, there are different approaches in different courts, and even by different judges in the same court. Notoriously a battle has raged in the US Supreme Court between those who are ready to look at other systems, and those who refuse to do so. Refreshingly, the Chief Justice of the Court, John Roberts, very recently stated (extra-judicially) that this was a false debate: it was obvious that the courts must look at other systems.[22] In England, the courts have more generally been ready to follow the little prince, and to accept, as Shakespeare's *Coriolanus* puts it, that 'There is a world elsewhere.'[23]

Today, it is no longer a matter of chance, or even discretion: the supreme courts, at least, of all our countries have a duty to look beyond their immediate horizons. Even if that duty cannot be characterised as a legal duty, explicitly imposed on the courts by their own domestic legal systems, it does seem some form of prudential duty.

But we must draw a distinction between two very different situations. In one, the courts may be encouraged to look at other systems, at their discretion, so as to learn from their experience, and perhaps to avoid unnecessary divergences. But in another situation, where two independent systems, both applicable in the same legal space, may conflict, it seems to me that there is a clear duty on the courts to seek to avoid such a conflict. Any other solution is likely to put States, or indeed those subject to the legal systems in question, under irreconcilable obligations.

I would suggest that there may be a new role both for judges and for academics. The role of judges is changing: they are also more conscious of their role, more conscious of making choices, and of the need to make

[22] Statement at the public session of the Judicial and Academic Conference on the role of Supreme Courts, held at King's College London, July 2009.

[23] The title of Tom Bingham's F. A. Mann lecture of 1991, in which he expressed one of his own outstanding qualities: his openness to new ideas from other quarters and other sources. See T. Bingham, *The Business of Judging* (Oxford, 2000), p. 87.

informed choices. They are also increasingly ready to discuss their tasks: to engage in discussion with judges from other jurisdictions, and with academics.

The role of academics, in some ways, is what it has always been: it includes understanding, explaining, guiding. But now, perhaps more specifically, further functions can be identified:

1. since different models are now more readily available, to evaluate them and draw attention to those which might be useful;
2. to criticise: an important resource for the judges, and perhaps also a restraint for them, to meet the risk that, in their new, less restrained, functions, they may go too far—or perhaps not far enough; and
3. to explain, if I am right, what may be needed: no less than a new conception of law itself. But that might be to embark on the prohibited territory of jurisprudence.

I will only say this by way of general conclusion. International law and European law are increasingly invoked in our courts. But possible conflicts between different legal systems can be resolved in part by new techniques: courts in different systems are increasingly listening to one another, as if working together. This 'judicial dialogue' is necessary where there is no formal means of resolving conflicts. Moreover the courts, especially in Europe, are able to rely increasingly on shared values, and indeed are contributing to the development of these values. The English courts are playing an especially important role under the Human Rights Act; in other fields, they are able to use valuable inputs from other European systems. They are able to take advantage of the experience of other systems, to see how defects in their own might be cured. Thus although the legal scene is now more complex, with the courts having to consider the impact of international law and European law, there are also advantages for the mutual benefit of the different systems. And increasingly, in Europe at least, the different legal systems are moving, as the need arises, towards a single law.