v. *Minister of Agriculture, Fisheries and Food*[39] the House of Lords upheld the award of mandamus, directing the Minister to appoint a committee of investigation under the Agricultural Marketing Act 1958. The court rejected a contention that the Minister had an unfettered discretion in the matter. His reasons for declining to act indicated that he had misdirected himself: in some circumstances he had a duty to appoint a committee, where his refusal to do so would frustrate the milk marketing scheme. In 1951 Lord Goddard C.J. had drawn attention to the power of the High Court to control inferior tribunals in their application of the law. The court could quash by order of certiorari a decision made in excess of jurisdiction; and the same remedy existed where it was apparent on the face of the written determination that there had been a mistake as to the applicable law.[40] Moreover, the Tribunals and Inquiries Act 1958 required the giving of reasons by the majority of statutory tribunals from which there was no provision for appeal on a point of law. An error of law would, therefore, be likely to appear "on the face of the record". Lord Diplock has stated extra-judicially that he would "select as having had the seminal influence upon the subsequent development of a system of administrative law those provisions of the Act which required written reasons to be given for administrative action taken by Ministers after holding a statutory inquiry or in respect of which a statutory inquiry could have been required." [41] The High Court was able to examine the record for errors of law, and the disclosure of the department's policy supplied material from which the court could infer a misunderstanding of the department's statutory powers.

Lord Diplock's second head, "irrationality", encompassed the grounds set out by Lord Greene M.R. in his famous judgment in *Associated Provincial Picture Houses* v. *Wednesbury Corporation*.[42] Here Lord Greene had distinguished between the role of the court on appeal from its function on review: on judicial review the court could not question the merits of the decision made, or action taken, as a matter of policy; but must nevertheless ensure that the discretion conferred on the public authority had been exercised within the limits of the law. The decision-taker must consider the questions relevant to his decision, and he must exclude from his consideration all irrelevant matters. Moreover, an un-

[39] [1968] AC 997.
[40] *R.* v. *Northumberland Compensation Appeal Tribunal, ex p Shaw* [1951] 1 KB 711; [1952] 1 KB 338.
[41] *Op. cit.* [1974] 2 *C.L.J.* 240.
[42] [1948] 1 KB 223.

satisfactory decision could be quashed if wholly unreasonable: "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." [43] "Procedural impropriety", the third limb of Lord Diplock's trichotomy, referred to the principles of natural justice or fairness which any authority taking decisions affecting an individual is required to satisfy. These principles do not apply solely to courts or similar tribunals. In *Ridge* v. *Baldwin* [44] the House of Lords quashed the decision of a watch committee to dismiss their chief constable, who had not been granted a hearing in which he could attempt to meet the criticisms made against him. An officer could not lawfully be dismissed without first telling him what was alleged against him and hearing his defence or explanation. The supervisory jurisdiction of the High Court, and the scope of the prerogative writs of certiorari and prohibition, had been examined by Atkin L.J. in an earlier case:

> Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs...[45]

The requirement that there must be a duty to act judicially did not prevent the application of the principles of natural justice to bodies of merely quasi-judicial or even administrative character. Lord Reid explained that such a duty was simply a corollary of the power to determine questions affecting the rights of subjects. Atkin L.J. and his brethren in the earlier case had "inferred the judicial element from the nature of the power." [46]

Recent developments in English administrative law have also embraced a wider conception of individual rights. The "rights of subjects" are no longer confined to ordinary civil rights primarily enforceable in private law, but encompass a larger sphere of interests protected solely as a matter of public law. In *Council of Civil Service Unions* v. *Minister for the Civil Service* [47] the appellant trade unions were challenging the withdrawal of union membership rights from a certain category of civil

[43] *C.C.S.U.* v. *Minister for the Civil Service, supra,* n. 38.
[44] [1964] AC 40.
[45] *R.* v. *Electricity Commissioners, ex p London E J C (1920) Ltd.* [1924] 1 KB 171.
[46] [1964] AC 40, 76.
[47] Supra, n. 38.

servants without prior consultation. The House of Lords accepted that neither the employees concerned nor their unions had any "legal right" to consultation before their terms of employment were varied. In strict theory, moreover, civil servants could be dismissed by the Crown at will. Nevertheless, the civil service unions could rely on a "legitimate expectation" that they would be consulted, based upon past practice. Failure on the part of the government to undertake the necessary consultation violated that expectation, but was in the circumstances of the case justified by the demands of national security. The foundation for the judgment had been laid by earlier decisions of the highest court. In particular, in *O'Reilly* v. *Mackman*[48] Lord Diplock had set out the basis upon which convicted prisoners could challenge a disciplinary award of forfeiture of remission of sentence made by the prison Board of Visitors. They alleged that the Board had failed to observe the rules of natural justice. It could not, of course, be contended that the Board's decision had infringed any right of the appellants in private law. Each appellant had only a legitimate expectation, based on his knowledge of the general practice, that he would be granted the maximum remission of one-third of his sentence.

> In public law, as distinguished from private law, however, such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board on the ground that in one way or another the board in reaching its decision had acted outwith the powers conferred on it by the legislation under which it was acting; and such grounds would include the board's failure to observe the rules of natural justice: which means no more than to act fairly towards him in carrying out their decision-making process...[49]

The *Council of Civil Service Unions* decision was of particular interest and importance, quite apart from Lord Diplock's systematisation of the grounds of judicial review, because it concerned the exercise of powers under the royal prerogative, not under statute. The royal prerogative consists of the powers and privileges inherently attaching to the Crown at common law, which have not been curtailed or abolished by Parliament powers which Dicey defined as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands

[48] [1983] 2 AC 237.
[49] *Idem*, 275.

of the Crown".[50] Although the courts had long claimed authority to determine the existence and extent of a prerogative power, they had declined jurisdiction to examine its exercise. It had been settled for centuries that the limits of prerogative were a matter of law, as expounded by the courts. Coke C.J. had declared that "the King hath no prerogative, but that which the law of the land allows him".[51] It had long been thought, however, that the mode of exercise of and admitted prerogative, which might for example concern defense of foreign relations or the treaty-making power, could not be subjected to judicial scrutiny.[52] In the *Council of Civil Service Unions* case, however, the government had acted under the authority of an Order in Council, made in the exercise of the royal prerogative.[53] The court did not think that the position could sensibly be distinguished from the erercise of power under a statutory order. The majority held that the previous limits on judicial review of the prerogative must be rejected: they had been "overwhelmed by the developing modern law of judicial review".[54] Provided that the subject-matter of the application was amenable to judicial review —that it could not be set aside as nonjusticiable— the exercise of a prerogative power was subject to review in the courts on the same basis, and in accordance with the same principles, as applied to the exercise of statutory power.

The supervisory jurisdiction of the High Court in respect of error of law was enlarged and strengthened by the decision in *Anisminic Ltd.* v. *Foreign Compensation Commission*.[55] The House of Lords ruled that a clause [56] providing that "the determination by the Commission of any application made to them under this Act shall not be called in question in any court of law" did not preclude the court from setting aside what purported to be a determination, but was in fact a nullity. The Commission had misunderstood the law applicable to its decision and therefore grounded its rejection of the applicant's claim to compensation on matters which were irrelevant to a proper determination. Accordingly, the tribunal had exceeded its jurisdiction, and the ouster clause could not protect from judicial control a decision which was *ultra vires*. The

50 Diccy's definition has been criticised: see Wade, H.W.R., *Constitutional Fundamentals*, The Hamlyn Lectures, 32nd series, p. 49.
51 *Case of Proclamations* (1611) 12 Co. Rep. 74.
52 See eg. *Blackburn* v. *Attorney General* [1971] 1 *W.L.R.* 1037.
53 Civil Service Order in Council 1982, Article 4.
54 [1985] AC 374, 407 (Lord Scarman).
55 [1969] 2 AC 147.
56 Foreign Compensation Act 1950, s. 4 (4).

court denied that its decision conflicted with the intention of Parliament. Lord Wilberforce asked rhetorically: "What would be the purpose of defining by statute the limit of a tribunal's powers if, by means of a clause inserted in the instrument of definition, those limits could safely be passed?" [57] The result of the decision, however, is to narrow, or eliminate, the distinction between error of law made within and error of law outwith jurisdiction: a tribunal which mistakes the applicable law will necessarily embark on an inquiry as to the facts which it has no jurisdiction to entertain. Its effect has been summarised by Lord Diplock:

> It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of *ultra vires*. It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the questions as it has been so defined, and if there has been any doubt as to what that question is this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity.... The breakthrough made by *Anisminic* was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity.[58]

III. The protection of individual rights and civil liberties

Modern developments in English administrative law illustrate the protection afforded the individual by the Rule of Law. In *Anisminic*, the House of Lords refused to accept that the statute had deprived the complainant of recourse to the courts to remedy error of law by the tribunal. The grounds of judicial review set out in *Council of Civil*

[57] [1969] 2 AC 147, 208. See Wade, H.W.R. (1969) 85 *L.Q.R.* 198.
[58] *Re Racal Communications Ltd.* [1981] AC 374, 382.

Service Unions v. *Minister for the Civil Service* can be applied to safeguard important individual rights and freedoms. The doctrine of natural justice ensures compliance with minimum standards of procedural fairness. It had been applied in 1609 in *Dr. Bonham's Case*,[59] where Coke C.J. had expressed the view:

> That in many cases the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: For when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.

No statute could be interpreted as constituting a man judge in his own cause. The modern doctrine of parliamentary sovereignty requires the courts to give full effect and obedience to every Act of Parliament —at least in all ordinary circumstances. No one would argue today that the common law was superior to statute. The interpretative function of the courts, however, is complementary to the legislative supremacy of Parliament: "Although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law shall supply the omission of the legislature." [60] The courts will therefore supplement the procedure laid down in legislation in order to secure procedural fairness, provided that the statutory procedure is insufficient to achieve justice and that the requirement of additional measures would not frustrate the legislative purpose.[61] The important decision in *Ridge* v. *Baldwin* [62] is itself a fine illustration of this process.

The power to review the decisions of inferior tribunals and public officials on the grounds of rationality or reasonableness may also serve to protect important rights and freedoms. In *Wheeler* v. *Leicester City Council* [63] the court condemned a ban imposed by the Council on the use by a local football club of a recreation ground because of its refusal fully to endorse the Council's policy in respect of racial apartheid. The club had not condemned a forthcoming tour of South Africa, in which club players were to take part, in the terms which the Council required. The House of Lords held that the imposition of the ban was

59 (1609) 8 Co. Rep. 107.
60 *Cooper* v *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180, 194 (Byles J.).
61 *Wiseman* v. *Borneman* [1971] AC 297, 308 (Lord Reid).
62 *Supra*, n. 44 and text.
63 [1985] AC 1054.

unreasonable in the *Wednesbury* sense, or if not, could be impugned on the ground of procedural impropriety. The Council could not properly seek to use its statutory powers of management for the purposes of punishing the club, which had done nothing to justify the sanction imposed. The Council had a duty under the Race Relations Act 1976, section 71, to pursue a policy designed to promote good relations between persons of different racial groups. In determining the extent of the Council's powers, however, the statutory provisions had to be construed in the light of the individual's freedoms of speech and conscience. According to Browne-Wilkinson L.J., in the Court of Appeal, it was "undoubtedly part of the constitution of this country that, in the absence of express legislative provisions to the contrary, each individual has the right to hold and express his own views." [64] Since Parliament had not expressly authorised the punishment of citizens who reasonably dissented from the views of a public authority, the Council had acted unlawfully in discriminating against the club. This view was echoed by Lord Templeman, in the highest court, who stated: "A private individual or a private organisation cannot be obliged to display zeal in the pursuit of an object sought by a public authority and cannot be obliged to publish views dictated by a public authority." [65]

The interpretative function of the judges, which Dicey had emphasised as a means of preserving the Rule of Law in the face of the legislative supremacy of Parliament, remains an essential constitutional safeguard today. Accordingly, the application of statutes in the courts is governed by well established and publicly articulated constitutional standards, which seek to ensure that the reasonable expectations of the citizen are duly respected, and that his traditional liberties are curtailed only by clear and deliberate provision. Lord Wilberforce has described the constitutional role of the courts:

> This power which has been devolved upon the judges from the earliest times is an essential part of the constitutional process by which subjects are brought under the Rule of Law —as distinct from the rule of the King or the rule of Parliament... The saying that it is the function of the courts to ascertain the will or intention of Parliament is often enough repeated... If too often or unreflectingly stated, it leads to neglect of the important element of judicial construction; an element not confined to a mechanical

64 *Idem*, 1063.
65 *Idem*, 1080.

> analysis of today's words, but, if this task is to be properly done, related to such matters as intelligibility to the citizen, constitutional propriety, considerations of history, comity of nations, reasonable and non-retroactive effect and, no doubt, in some contexts, to social needs.[66]

The province of the Rule of Law may be illustrated in respect of the criminal law. Penal statutes are in general strictly construed so that the subject will not be entrapped by ambiguous laws. The common law presumption against according retrospective force to any statutory extension of the criminal law embodies the fundamental precept, *nulla poena sine lege*. The clearest statutory words are needed to impose such criminal liability since the courts adopt the view that "it is hardly credible that any government department would promote or the Parliament would pass retrospective criminal legislation." [67] There is a similar presumption that punishment cannot justly be inflicted in the absence of fault: it is a "cardinal principle of our law that *mens rea*, an evil intention or a knowledge of the wrongfulness of the act, is in all ordinary cases an essential ingredient of guilt of a criminal offence." [68] The presumption here is subject to displacement either by the express words of the statute or even by necessary implication. It is, nevertheless, an important contribution to fairness and justice, whose justification has been explained by Lord Diplock as being based on the principle "that it is contrary to a rational and civilised criminal code, such as Parliament must be presumed to have intended, to penalise one who has performed his duty as a citizen to ascertain what acts are prohibited by law (*ignorantia juris non excusat*) and has taken all proper care to inform himself of any facts which would make his conduct lawful." [69]

English criminal law recognises and enshrines the defendant's privilege against self-incrimination or "right of silence". He cannot normally be required to provide an account of his actions to the police, nor is he obliged to give evidence at his trial. If he confesses to the crime charged against him, his confession cannot be received in evidence unless it has been fairly obtained in accordance with legal safeguards.[70] A dispute as to the manner in which his confession was obtained will be settled

66 *Black-Clawson Ltd.* v. *Papierwerke AG* [1975] AC 591, 629-30.
67 *Waddington* v. *Miah* [1974] 1 WLR 683, 694 (Lord Reid).
68 *Sweet* v. *Parsley* [1970] AC 132, 152 (Lord Morris).
69 *Idem*, 163.
70 Police and Criminal Evidence Act 1984, s 76, replacing earlier common law rules requiring that the confession be "voluntary".

by the judge, hearing evidence in the absence of the jury at a voire dire. If the judge rules the confession inadmissible, it will be excluded from the evidence at trial. Moreover, the defendant's own testimony at the voire dire cannot be used against him at the substantive trial, for this would infringe his right of silence.[71] The general principle, that all relevant evidence is admissible to prove that the defendant committed the offence with which he is charged, is qualified in fairness to him. Evidence which has been obtained from him by trickery or deception, in such a way as to invade his privilege against self-incrimination, may be excluded in the judge's discretion.[72] The relevant principles were set out by Lord Scarman:

> No man is to be compelled to incriminate himself: *nemo tenetur se ipsum prodere*. No man is to be convicted save on the probative effect of legally admissible evidence. No admission or confession is to be received in evidence unless voluntary. If legally admissible evidence be tendered which endangers these principles... the judge may exercise his discretion to exclude it, thus ensuring that the accused has the benefit of principles which exist in the law to secure him a fair trial... If an accused is misled or tricked into providing evidence (whether it be an admission or the provision of fingerprints or medical evidence or some other evidence), the rule against self –incrimination– *nemo tenetur se ipsum prodere*, is likely to be infringed.[73]

The interpretation of statute should respect these principles. A refusal to answer questions cannot generally amount to obstruction of a police constable in the execution of his duty within the meaning of the Police Act 1964.[74] Since there is no general police power to detain a citizen for questioning, short of a forma arrest, a suspect who uses force to escape such an unlawful detention cannot be convicted of assaulting a police constable in the execution of his duty under that Act.[75] A statutory power of arrest may itself be lawfully exercised only if the suspect is informed of the offence of which he is suspected. Lord Simonds noted that in many cases the powers of arrest exercised by the police were the same as those of every other citizen:

71 *R* v. *Brophy* [1982] AC 476.
72 *R* v. *Sang* [1980] AC 402. See also Police and Criminal Evidence Act 1984 s 78.
73 *Idem*, 455-56.
74 *Rice* v. *Connolly* [1966] 2 QB 414.
75 *Kenlin* v. *Gardiner* [1967] 2 QB 510.

> Is citizen A bound to submit unresistingly to arrest by citizen B in ignorance of the charge made against him? I think, my Lords, that cannot be the law of England. Blind, unquestioning obedience is the law of tyrants and of slaves: it does not yet flourish on English soil... It is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested...[76]

One aspect of the defendant's right of silence at his trial is what Lord Sankey called the "golden thread" of English criminal law: that it is the duty of the prosecution to prove the prisoner's guilt.[77] If it fails to prove the defendant's guilt beyond reasonable doubt, he is entitled to an acquittal. The common law principle, however, is subject to certain exceptions: the defendant bears the burden of proving a defence of insanity since there is a legal presumption in favour of sanity. It is also settled that the burden of proving a statutory defence may lie on the defendant, either if the statute expressly so provides or even by implication. Nevertheless, in deciding where the burden of proof on an issue lies, the court is entitled to consider the position of the defendant, as well as the statutory purpose. How readily would he be able to discharge the borden of establishing the statutory defence? It has been recently stated that "Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute."[78]

The decisions of the courts have not always adequately reflected the strength of these principles, however. Statutes have sometimes been applied harshly, when it might seem that individual liberty could have been more fully protected without flouting legislative supremacy. In *Wills* v. *Bowley*[79] the House of Lords held that the power of a constable under section 28 of the Town Police Clauses Act 1847, to arrest a person who "within his view commits" one of a prescribed series of offences, extended to cases where the constable honestly believed on reasonable grounds that an offence hadbeen committed, even though the suspect arrested was subsequently acquitted. In his dissenting speech, Lord Lowry referred to the famous dictum of Pollock C.B., in a case where the Court of Exchequer had refused to accord a wide interpretation to a statute granting a power of arrest without warrant: "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural

[76] *Christie* v. *Leachinsky* [1947] AC 573, 591. See now Police and Criminal Evidence Act 1984 s 28.

[77] *Woolmington* v. *D.P.P.* [1935] AC 462.

[78] *R* v. *Hunt* [1987] 1 All E R 1, 11 (Lord Griffiths).

[79] [1983] AC 57.

construction of the statute." [80] He rejected the opinion of the majority, citing the speech of Lord Simonds in *Christie* v. *Leachinsky*,[81] in support of his view that the liberty of the subject and the convenience of the police or other executive authority could not be weighed equally in the scales against each other:

> The principle that "ambiguous" statutory provisions, not least those dealing with the power of arrest, should be construed in favour of the liberty of the subject is not a mere incantation to be recited only where its observance can do no possible harm to the cause of public order. It is a real and compelling guide which has been hallowed by authority and usage and we must recognise that its application can have inconvenient consequences.[82]

In *Liversidge* v. *Anderson* [83] the House of Lords considered the powers of the Home Secretary under Defence Regulations, issued under the Emergency Powers (Defence) Act 1939, to order the detention of any person whom he had "reasonable cause to believe... to be of hostile origin or associations." In his famous dissent, Lord Atkin was clear that the Minister must show reasonable grounds for his belief, which could be examined by the court. The statutory requirement of reasonable cause connoted an objective condition, which must be satisfied before any power of detention was given. The majority, however, were persuaded, on consideration of the context of the statute and the regulations, that the Minister's discretion could not be examined in the courts: as long as he acted in good faith, he was answerable to Parliament alone for the performance of his duties. The staute envisaged the exercise of an extraordinary power in the interests of public safety in time of war. Lord Atkin's forceful and eloquent dissenting speech has, nevertheless, made an important contribution to English public law:

> In this country, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecter of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.[84]

[80] *Bowditch* v. *Balchin* (1850) 5 Exch. 378, 381.
[81] *Supra* n. 76.
[82] [1983] AC 57, 88.
[83] [1942] AC 206.
[84] *Idem*, 244.

The highest tribunal has now accepted that Lord Atkin's speech correctly stated and applied the modern law.[85] Even where a Minister is required only to be "satisfied" of the existence of certain matters, it has been held that the court may examine the facts which form the basis of his judgment. It may enquire whether those facts exist and have been properly taken into account by the Minister in reaching his decision.[86] Moreover, the exercise of an executive power may depend, not on an evaluation of relevant facts by the Minister or official, but on the precedent establishment of an objective fact, in the sense that the court may decide whether or not the condition is satisfied on which his jurisdiction is founded. In *Khawaja* v. *Secretary of State for the Home Department*[87] the House of Lords decided that an immigration officer could only order the detention and removal of a person who had entered the country by virtue of an *ex facie* valid permission if the person was an illegal entrant, within the meaning of the Immigration Act 1971. That was a "precedent fact" which had to be established: it was not sufficient that the officer believed him to be an illegal entrant, even on reasonable grounds, if in the view of the court the evidence did not justify his belief. The contrary decision of the House of Lords in *Zamir* v. *Secretary of State for the Home Department*[88] was overruled. The scope of judicial review could not in this instance be confined within the limits of the *Wednesbury* principles; the *Zamir* decision had given insufficient weight to the important consideration that the executive power inevitably infringed the liberty of the individual. That consideration outweighed any difficulties in the administration of immigration control. In cases where a man sought the protection of his liberty by means of an application for *habeas corpus,* the *Wednesbury* principle was displaced, unless Parliament by plain words had provided otherwise. Nor was *habeas corpus* protection limited to British subjects: every person within the jurisdiction enjoyed the equal protection of the laws. Lord Scarman stated the principle of construction: "If Parliament intends to exclude effective judicial review of the exercise of a power in restraint of liberty, it must make its meaning crystal clear."[89]

Many critics of the British Constitution think that there is nevertheless insufficient protection for fundamental rights and basic civil liberties.

85 *IRC* v. *Rossminster Ltd.* [1980] AC 952 at 1011, 1025.
86 *Secretary of State for Education* v. *Tameside MB* [1977] AC 1014.
87 [1984] AC 74.
88 [1980] AC 930.
89 [1984] AC 74, 111.

It is widely argued that the judicial role in interpreting statutes, in which Dicey placed his faith, is too weak to counteract the legislative sovereignty of Parliament, exerted at the behest and direction of government. Representative government, however fair its arrangements for securing democratic accountability, cannot of its nature guarantee the rights and interests of unpopular minorities against curtailment by the majority. human rights against encroachment by ordinary Act of Parliament, was The case for adopting a Bill of Rights, which would protect fundamental argued by Lord Scarman in 1974.[90] He thought *Liversidge* v. *Anderson* the classic example of the weakness of the common law in the face of extraordinary legislation:

> When times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual and respects human personality. But when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it cannot resist the will, however frightened and prejudiced it may be, of Parliament... It is the helplessness of the law in face of the legislative sovereignty of Parliament which makes it difficult for the legal system to accommodate the concept of fundamental and inviolable human rights.[91]

It is not difficult to find other examples to support the argument for constitutional change. In *Inland Revenue Commissioners* v. *Rossminster Ltd.*[92] Lord Scarman declared that the principles stated in *Enticg* v. *Carrington*[93] remained good law: no official could lawfully set his foot upon the premises of any citizen unless he could show some positive law by bay of justification. He nevertheless agreed with the decision of the House of Lords upholding the exercise by Inland Revenue officers of their power, under the Taxes Management Act 1970, to enter premises and seize and remove "any things whatsoever found there" which they had reasonable cause to think might be required as evidence in connection with any offence of tax fraud. The House rejected the submission that the warrants issued under the Act should have given particulars of the offences suspected: it was enough that they named the officers authorised to enter and search the premises which they identified. The legislative purpose might otherwise be defeated, for warrants were issued at the

90 *English Law - The New Dimension* (The Hamlyn Lectures, 26th series).
91 *Idem*, p. 15.
92 [1980] AC 952.
93 *Supra* n. 18 and text.

stage of investigation when secrecy might be vital to the success of detection. The court further held, however, that the Revenue need not specify the particular tax offences suspected when the validity of the warrants and the legality of the seizure were challenged on judicial review. In a civil action for trespass, the Revenue could claim a public interest immunity from disclosure of the grounds of their belief that the documents might be evidence required to prove an offence involving tax fraud, at least until sufficient time had elapsed to complete the investigation and institute criminal proceedings. Such immunity from disclosure could not be circumvented by an application for judicial review: the presumption that the Revenue had acted *intra vires* could only be displaced by evidence of facts inconsistent with there having been reasonable cause for the belief that the documents might be required as evidence. The eighteenth century cases on the illegality of "general warrants", of which *Entick* v. *Carrington* is the most famous example, had been cited by Lord Denning in support of the contrary opinion of the Court of Appeal. In the higher court, however, the approach of the common law, jealous of the subject's rights, gave way to the obligation to give full effect to the statutory purpose of combatting offences involving tax fraud.[94]

IV. The European Convention on Human Rights in English Law

There is an interesting contrast between the British approaches to the protection of civil liberties in domestic and in international law. The European Convention on Human Rights, drafted under the auspices of the Council of Europe and drawing inspiration from the United Nations Universal Declaration of Human Rights, was ratified by the United Kingdom in 1951. Although the Convention is therefore binding on the United Kingdom government as a matter of international law, it forms no part of English domestic law since no treaty or convention can achieve legal status within the real unless approved and enacted by Parliament. The Convention requires that states which are parties to it must secure to everyone within their jurisdiction the rights and freedoms declared, and they must provide an effective remedy before a national authority for the violation of these rights.[95] Accordingly, the government must seek legislation to ensure that English law conforms with the requirements of the Convention, when it appears that any of the specified

[94] See especially Lords Scarman and Diplock. Compare the decision of the Court of Appeal [1979] 3 All E R 385.

[95] Articles 1 and 13.

rights are inadequately recognised in existing domestic law. For example, in 1973 the House of Lords upheld the grant of an injunction restraining the proprietors of the *Sunday Times* from publishing an article relating to pending civil actions for negligence concerning the manufacture and sale of the drug thalidomide.[96] Despite the strong public interest in the outcome of the negligence proceedings, the House of Lords held that it was a contempt of court to publish material prejudging their result by attributing blame to one party. The European Court of Human Rights at Strasbourg, empowered to interpret the Convention, subsequently held that the injunction could not be justified: it was not necessary in a democratic society for maintaining the authority of the judiciary —one of the qualifications, stipulated in Article 10 of the Convention, to the right to freedom of expression.[97] The Contempt of Court Act 1981 was enacted partly to bring United Kingdom law into conformity with the Convention. The *sub judice* rule now prohibits only publications which create a substantial risk that the course of justice in the relevant proceedings will be seriously impeded or prejudiced.[98]

The Convention may, however, have a more indirect effect on the scope and character of individual rights in municipal law. There is a presumption that "Parliament does not intend to act in breach of international law".[99] In interpreting a statute, therefore, the court will prefer a meaning which does not contradict the international obligations of the United Kingdom government under the Convention. Lord Reid referred to the Universal Declaration of Human Rights and the European Convention when declining to accord retrospective force to an offence under the Immigration Act 1971.[100] Lord Denning has stated that in any case of uncertainty or ambiguity, the court could look to the Convention as an aid to construction, seeking to bring legislation into harmony with it.[101] In a case where a citizen of Bangladesh, seeking to enter the United Kingdom, obtained an order of mandamus requiring the Secretary of State to hear and determine her application for a certificate of patriality, the Court of Appeal supported her statutory right to enter the country[102] by reference to her right to respect for private and family life under Ar-

96 *Attorney General* v. *Times Newspapers Ltd.* [1974] AC 273.
97 (1980) 2 EHRR 245.
98 Section 2 (2).
99 *Salomon* v. *Commissioners of Customs and Excise* [1967] 2 QB 116, 143 (Diplock L.J.).
100 *Waddington* v. *Miah* [1974] 1 WLR 683.
101 *R* v. *Chief Immigration Officer, ex p Salamat Bibi* [1976] 1 WLR 979.
102 Immigration Act 1971, s. 1.

ticle 8 of the Convention, and to the principle, derived from Magna Carta 1215, that justice delayed is justice denied.[103]

> It may, of course, happen under our law that the basic rights to justice undeferred and to respect for family and private life have to yield to express requirements of a statute. But... it is the duty of the courts, so long as they do not defy or disregard clear unequivocal provision, to construe statutes in a manner which promotes, not endangers, those rights. Problems of ambiguity or omission, if they arise under the language of an Act, should be resolved so as to give effect to, or at least so as not to derogate from, the rights recognised by Magna Carta and the European Convention.[104]

The court's suggestion, however, that the executive should have regard to the Convention in administering the Act was subsequently disapproved: immigration officers should simply apply the immigration rules laid down by the Secretary of State pursuant to his powers under the statute.[105] A similar result obtained where an applicant, who faced extradition to California to stand trial for murder, sought judicial review of the Minister's warrant ordering his surrender, which was issued while his application under the European Convention was still pending.[106] He argued that infliction of the death penalty, involving inordinate delay, if he were convicted in California, would amount to inhuman and degrading treatment within the provisions of the Convention. The court refused the application on the ground that, when exercising his powers under the Extradition Act 1870, the Home Secretary was not obliged to consider the requirements of the Convention since it formed no part of municipal law. His decision to order extradition could not therefore be impugned on *Wednesbury* principles governing the exercise of executive discretion.

Moreover, the influence of the European Convention as an indirect source of law seems to be largely confined to statutory interpretation. It is doubtful how it can legitimately alter the development of the common law:[107] although increasingly frequent reference to the Convention

[103] *R* v. *Secretary of State for the Home Department, ex p Phansopkar* [1976] QB 606.

[104] *Idem*, 626 (Scarman L.J.) Magna Carta contained a statement of grievances and set out certain rights against the arbitrary power of the Crown.

[105] *Ex p Salamat Bibi, supra.*

[106] *R* v. *Secretary of State for the Home Department, ex p Kirkwood* [1984] 2 All E R 390.

[107] But see *Ahmad* v. *ILEA* [1978] QB 36, where Scarman L.J. stated that the courts

in the courts may serve to strengthen existing rights and freedoms, it cannot authorise the recognition of new ones. In *Malone* v. *Metropolitan Police Commissioner (No. 2)*[108] the plaintiff sought declarations to the effect that his telephone had been unlawfully tapped in connection with a police investigation into offences of handling stolen property. He sought to rely, in part, on Article 8 of the Convention, which guarantees everyone "the right to respect for his private and family life, his home and his correspondence." Sir Robert Megarry V-C accepted that the absence of English authority was not in itself a barrier to recognition of the right to privacy for which the plaintiff contended: if the principles of English law, based on analogies from existing rules, together with the requirements of justice and common sense pointed firmly to such a right, the court could properly recognise it. He did not think, however, that the case for it had been made out. In the absence of legislation, Article 8 of the Convention could make little difference to the judge's view of the applicable law:

> I readily accept that if the question before me were one of construing a statute enacted with the purpose of giving effect to obligations imposed by the Convention, the court would readily seek to construe the legislation in a way that would effectuate the Convention rather than frustrate it. However, no relevant legislation of that sort is in existence. It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations...[109]

V. Political Responsibility and Democratic Control

The efficacy of a model of responsible government cannot be judged in legal terms alone. The maintenance of constitutional government requires that legal control be supplemented by political accountability. It has been explained that the doctrine of ministerial responsibility, in both its collective and its individual aspects, traditionally operates to meet this need. In matters of policy and administration, the government must submit to the scrutiny of Parliament, and a wise government will

"will interpret statutory language and apply common law principles, wherever possible, so as to reach a conclusion consistent with our international obligations..."

[108] [1979] Ch 344.

[109] *Idem*, 379.

often allow Parliament to exert an important influence on the formation of policy. Central to the relationship between government and Parliament is the party system. It is an essential function of Parliament not merely to criticise but also to sustain the government: the electorate is able to judge between the various political parties; the party which wins a parliamentary majority is expected to form a government committed to the implementation of its policies.[110] The individual Member of Parliament is considered to be a representative of his constituents, and not a delegate committed to the support of any particular cause.[111] However, the government generally assume that it has a mandate to implement the major parts of its party manifesto at the general election; and it is widely thought to be unconstitutional (in the conventional sense) for important changes to be effected to which the electorate has not been asked to consent.[112] The domination of Parliament by party alliances, however, also permits systematic criticism of, and opposition to, the elected government. The official Opposition occupies an accepted and established position within the constitutional system:

> The Opposition is at once the alternative to the Government and a focus for the discontent of the people. Its function is almost as important as that of the Government. If there be no Opposition there is no democracy. "Her Majesty's Opposition" is no idle phrase. Her Majesty needs an Opposition as well as a Government.[113]

Sir Ivor Jennings considered that the duty of the Opposition to attack the government was the major check which the Constitution provided upon corruption and defective administration.[114] The leaders of the Opposition and the chief party whips in each House of Parliament are paid salaries out of the Consolidated Fund. There is normally co-operation between government and Opposition as regards parliamentary business: the minority agrees that the majority must govern, and the majority agrees that the minority should criticise.[115] Nineteen days are allocated in each Session for debates on subjects chosen by opposition parties: by

110 See Colin Turpin, *British Government and the Constitution*, p. 365.
111 Edmund Burke, Speech to the Electors of Bristol 1774 (*Works*, 1826 ed. vol. III, pp. 19-20).
112 Ivor Jennings, *Cabinet Government* (3rd ed. 1959), pp. 503-509.
113 *Idem*, p. 16.
114 *Idem*, p. 499.
115 *Idem*, p. 500.

convention the official Opposition consults with minor opposition parties and allocates some of the days to them.

Although debates on the floor of the House form the principal instrument for waging the party battle, they are supplemented by other means of scrutiny and control. Backbench Members, and Opposition spokesmen, may ask questions of Ministers relating to matters for which those Ministers are responsible. The Home Secretary may questioned, for example, in his capacity as police authority for the Metropolitan Police, but cannot generally comment on operational matters which are the responsibility of the Police Commissioner. The device of the "open Question", followed by a supplementary question, is often used to elicit the Prime Minister's response to current events and matters of topical interest. An important recent development is the establishment in 1979 of fourteen Select Committees of the House of Commons, charged with the examination and scrutiny of the expenditure, administration and policy of each of the principal government departments. Each committee concentrates on the work of a particular department or departments, and the Foreign Affairs, Home Affairs, and Treasury and Civil Service Committees are empowered to establish sub-committees. The committees are staffed by Bacybench Members, drawn from all the parties; but they have often adopted a non-partisan stance, adopting a unanimous report critical of government policy in their field of concern. Permitting more rigorous and sustained scrutiny of the administration than is possible through intervention on the floor of the House, the committees have wide powers, supported in the last resort by the jurisdiction of the House to determine a charge of contempt. A committee has power to "send for persons, papers and records": both Ministers and senior civil servants are questioned in detail, although certain categories of information are never disclosed. The importance and influence of the new departmental committees cannot be compared with the powerful committees of Congress in the United States of America; unlike the role of congressional committees in the context of the American separation of powers, the British parliamentary committees operate within a system in which the initiative in legislation and policy remains with the government. They do, however, afford a means for enhancing the Member's role —enabling Members of Parliament to extract information from government and to develop an expertise in their own field of enquiry. The general verdict on the first few years of the committee's work, from within Parliament, was that it had "considerably extended the range of

the House's activity, strengthened its position relative to that of the government, and deepened the quality of its debates." [116]

In addition to the new committees, the Public Accounts Committee, established by Gladstone in 1861, continues to examine the expenditure of government departments. Assisted by the Comptroller and Auditor-General, who is independent of government as an officer of the Commons,[117] this influential Select Committee has extended its auditing role to encompass investigation of administrative efficiency, economy and effectiveness. Its unusual strength derives from its exceptional freedom from the normal party divide: "The success of the Public Accounts Committee lies essentially in its ability to function as a reasonably unified group of parliamentarians, jealous of the role of Parliament as guardian of the taxpayer and the citizen." [118] Extensive powers to summon witnesses for examination, and to require the provision of information and documents, are also possessed by the Parliamentary Commissioner for Administration (or "Ombudsman"). He is empowered, under the Parliamentary Commissioner Act 1967 to investigate complaints of injustice resulting from "maladministration" by government departments, and further assists the work of Parliament in its scrutiny of the executive. A report on his work is made to the House of Commons by the Select Committee on the Parliamentary Commissioner, which considers whether the injustices which he has disclosed have been satisfactorily remedied by the departments concerned. The Commissioner is strictly concerned neither with the legality of administrative action and decision making nor with its merits: there may be administrative failure without abuse of power in the legal sense and where any relevant policy has been properly authorised. However, an inference of maladministration may sometimes be drawn where a decision is quite unreasonable or "thoroughly bad in quality".[119]

Informed and effective scrutiny of the exercise of power, by the public as well as by Parliament, depends on the availability of information. British government has been frequently and justly criticised for excessive secrecy: the decision-making process has often been hidden unnecessarily from public view. Since 1977 government departments have been instructed to publish more of the factual and analytical material used as the

116 First Report from the Liaison Committee (1982-83) HC 92, para 6.

117 National Audit Act 1983.

118 Douglas Wass, *Government and the Governed*, BBC Reith Lectures 1983, p. 67. See also Drewry, Select Committees and Back-bench Power, *The Changing Constitution* ed Jowell and Oliver, Ch. 6.

119 See generally Turpin, *op. cit.*, Ch. 7.

background to major policy studies.[120] In the absence of any legal right of access to information, which the citizen may assert, however, its provision remains dependent on government discretion. The doctrines of individual and collective ministerial responsibility are considered to demand the protection of official advice given to Ministers and of Cabinet papers and minutes. Neither the parliamentary Select Committees nor the Parliamentary Commissioner may demand evidence relating to the work of the Cabinet or of Cabinet committees. The courts have recognised a public interest in the maintenance of confidentiality in respect of Cabinet discussion.[121] Although it may be legitimate to protect the privacy of high level policy formation, at least in ordinary circumstances, the existing law is widely thought to encourage unnecessary secrecy. In particular, section 2 of the Official Secrets Act 1911 makes it unlawful for an official to disclose a wide range of material without authorisation: indeed it is a criminal offence to disclose any information which he has obtained by virtue of his holding office under the Crown. Whether or not a legal right to information is accorded the citizen, it is now widely considered that such Draconian penal provisions are unacceptable and should be repealed or amended. The statute provides a defence to the unauthorised disclosure of information by an official where communication is to someone "to whom it is in the interest of the State his duty to communicate it".[122] It is doubtful, however, whether the defendant can rely on any civil or moral duty or public interest beyond his official duty as a government employee and the public interest as interpreted by the government of the day.[123] Moreover, although a public authority is now no longer automatically accorded a public interest immunity in litigation, there remains judicial disagreement on the respective values of secrecy and openness as regards the working of government.[124]

Finally, in the context of political accountability, the recent use of the national referendum of public opinion must be recorded. Although an exceptional feasure, in a system of representative democracy, the referendum device was first used to obtain popular approval of continued

120 The Croham Directive, 6 July 1977: quoted by Turpin, *supra,* 465-66.

121 *Attorney General* v. *Jonathan Cape Ltd.* [1976] QB 752.

122 Section 2 (1) (a).

123 *R* v. *Ponting* [1985] Crim L R 318; *Chandler* v. *DPP* [1964] AC 763; Drewry [1985] Public Law 203; Thomas [1986] Crim L R 491. See generally Williams, Official Secrecy and the Courts in Glazebrook (ed) *Reshaping the Criminal Law.*

124 Compare the views of Lord Wilberforce and Lord Scarman in *Burmah Oil Co Ltd.* v. *Bank of England* [1980] AC 1090, 1112 and 1144. *Cf.* Lord Keith, *supra,* n. 27 and text.

United Kingdom membership of the European Economic Community in 1975. Following the publication of the Kilbrandon Report on the Constitution in 1973,[125] the government considered proposals for the further devolution of power from Westminster to Scotland and Wales. The Scotland Act 1978 and Wales Act 1978 were subsequently passed, establishing Scottish and Welsh Assemblies: the Scottish Assembly was to have legislative powers over matters of particular Scottish concern. The sovereignty of Parliament over the whole of the United Kingdom would remain unchanged, and no revenueraising powers were granted to the new bodies. The schemes were submitted to referendums of the Scottish and Welsh electorates, in accordance with the provisions of the respective Acts, but did not obtain the stipulated forty per cent approval, and the Acts were duly repealed. It should be noted also that the Northern Ireland Constitution Act 1973 provides, in section 1, that Northern Ireland shall not cease to be part of the United Kingdow without the consent of the majority of the people of the province voting in a referendum.

VI. Constitutional Monarchy

The theory of the modern Constitution is that the powers and prerogatives of the monarch are exercised on the advice of her Ministers, who are responsible to Parliament. The Sovereign's personal influence is, in most circumstances, confined to the exercise of three rights identified by Bagehot —the right to be consulted, the right to encourage, and the right to warn—.[126] It remains, however, a matter of dispute whether there are any circumstances in which the Sovereign would be entitled to disregard the advice of her Ministers. For example, it is sometimes argued that the Queen would be constitutionally entitled to refuse a request to create Peers, where the purpose was to secure a majority in the House of Lords in favour of its abolition —at least if abolition of the upper House had not been endorsed by popular mandate as the result of a general election fought on that issue—. Admittedly, an undertaking was given by George V to create sufficient Peers, if it became necessary, to ensure the passing of the Parliament Act 1911. A similar undertaking had also been given reluctantly by William IV to ensure that the Reform Bill might be passed against the wishes of the Lords in 1832. However, the effect of the Parliament Acts 1911 and 1949 is to prevent the possibi-

125 Report of the Royal Commission on the Constitution (Cmnd 5460 and 5460-1).
126 Walter Bagehot, *The English Constitution*, 2nd ed., p. 75.

lity of constitutional deadlock between the two Houses: the upper House can now delay a Bill (other than a Bill to extend the duration of Parliament beyond five years) but cannot prevent its receiving the royal assent against the continued wishes, confirmed in the following session, of the Commons. It would therefore be possible to achieve the reform, or abolition, of the House of Lords even against its wishes if that were desired.

It is also widely thought that there would be some circumstances in which the Queen could properly refuse to accept the Prime Minister's advice to dissolve Parliament. In particular, a minority government would not automatically be entitled to seek a majority at a general election if an alternative government might be able to command the support of the House of Commons, at least where a previous election had been recently held. Although no Sovereign would today refuse a dissolution at the request of a government enjoying majority support in the lower House, in the event of a government formed by a minority party or by a coalition of such parties, there are no settled conventions which apply. The Governor-General of Canada in 1926 and the Governor-General of South Africa in 1939 refused their Prime Minister's requests for a dissolution, but these examples are not considered good precedents for the position of the Monarch in the United Kingdom.[127] It would seem, however, that there must be at least a realistic possibility of an alternative government being able to obtain a working majority before such a request could properly be refused.

Constitutional deadlock between the Lower House and the Senate, comparable perhaps with the crises in England of 1832 and 1911, was offered as justification for the dismissal of the Whitlam Government by the Governor-General of Australia in 1975. The Senate had refused to pass Appropriation Bills providing supply for the Government, but Sir John Kerr's decision to dismiss the Government has remained controversial.[128] Once again, such events are not necessarily a good precedent for the role of the Monarch in the United Kingdom, but they are consistent with the view that a government which was acting unlawfully might properly be dismissed as an act of last resort, or perhaps if the government were defeated on a motion of confidence but declined to resign or advise a dissolution of Parliament.[129] The possibility of dismissal was

[127] Marshall and Moodie, *Some Problems of the Constitution* (5th ed., 1971), pp. 40-41.

[128] See Howard and Saunders in Evans (ed.) *Labour and the Constitution* 1972-1975; Sir John Kerr, *Matters for Judgment*.

[129] See Marshall, *Constitutional Conventions*, pp. 25-28.

debated at the time of the crisis over the Bill to grant Home Rule to Ireland in 1913, when Dicey argued that the King would be entitled to dismiss his Ministers if he thought their policy did not have the approval of the people. Sir Ivor Jennings expressed a more cautious view:

> The Queen's function is, it is suggested, to see that the Constitution functions in the normal manner. It functions in the normal manner so long as the electors are asked to decide between competing parties at intervals of reasonable length. She would be justified in refusing to assent to a policy which subverted the democratic basis of the Constitution, by unnecessary or indefinite prolongations of the life of Parliament, by a gerrymandering of the constituencies in the interests of one party, or by fundamental modification of the electoral system to the same end. She would not be justified in other circumstances; and certainly the King would not have been justified in 1913.[130]

The personal prerogatives are now few and rarely exercised, although not limited to hypothetical instances of illegality or unconstitutional behaviour on the part of the government. The Queen may confer certain honours at her own discretion, and may (it is thought) decline to accept the advice of the Prime Minister on the award of others. Moreover, since a retiring Prime Minister cannot give binding advice on the appointment of his successor, the Sovereign may sometimes exercise a personal choice. To that extent, she retains a personal prerogative in the appointment of Ministers. Since the Queen chose Lord Home to succeed Harold Macmillan in 1963, all the major parties have adopted formal procedures for the election of party leaders, and the monarch is naturally expected to appoint the party leader. If, however, a General Election were to produce a Parliament in which no single party had an overall mayority, the Queen might still have to exercise an independent judgment in her choice of Prime Minister. The claims of the leader of the largest party to appointment might be balanced by those of someone else who appeared likely to be acceptable to majority of the House of Commons as leaders of a coalition.[131] It is generally agreed that political intervention of any kind by the monarch should today be avoided whenever possible. What was debateable in 1913 may well be quite unacceptable in 1987. Nevertheless, it cannot be denied that limited personal

[130] *Cabinet Government* (3rd ed. 1959), pp. 411-12. The King's role in the crisis is fully treated in Nicolson, *King George V: His Life and Reign*.

[131] Marshall, *Constitutional Conventions*, pp. 29-35.

prerogative powers remain, whose exercise cannot attract ministerial responsibility. The former view, for example, that an incoming government must accept responsibility for the Sovereign's dismissal of its predecessor must be rejected, as Jennings rejected it, as a fiction without legal or political foundation.[132]

VII. The Modern Constitution: Legal Doctrine and Political Principle

It is a consequence of the development of administrative law, and the enlargement of the scope of legal control of government, that there has been a increasing conjunction of legal doctrine and political principle. Matters which Dicey might once have assigned to the realm of convention or political practice, with only marginal effect on the rules of Constitution law, have come to be debated in the courts. The legal status of the mandate, and the legitimate role in government of the party election manifesto, may be taken as an example. The courts have been obliged to consider the weight which an elected local authority may lawfully attribute to the manifesto which had formed the basis of the majority party's election campaign. In the *Fare's Fair* case[133] the House of Lords held unlawful a supplementary rate precept levied by the Greater London boroughs to finance the cost of reducing fares on public transport in London by twenty-five per cent in accordance with the Labour Party's manifesto. The court held that the levy was made in breach of the Transport (London) Act 1969. Lord Diplock accepted that a Council member should give considerable weight to approval of the manifesto by the electorate when deciding whether the policies in question should be implemented. The majority party on the Council had erred in law, however, by regarding themselves as irrevocably committed to the fare reduction. He endorsed the traditional view that the Council member once elected was not the delegate of those who had voted in his favour, but was the representative of all the electors in his ward. Accorringly, there was no difference between those Councillors who were members of the majority party and those of a minority:

> In neither case when the time comes to play their part in performing the collective duty of the Greater London Council to make choices of policy or action on particular matters, must members

[132] *Op. cit.*, pp. 448-50.
[133] *Bromley LBC v. Greater London Council* [1983] AC 768.

> treat themselves as irrevocably bound to carry out pre-announced policies contained in election manifestos even though, by that time, changes of circumstances have occurred that were unforeseen when those policies were announced and would add significantly to the disadvantages that would result from carrying the out.[134]

A moderate form of the doctrine of mandate has therefore received judicial approval: the party manifesto is a factor which may properly be weighed in the balance of competing considerations in settling policy; but it must not be allowed to fetter the decision-making process by imposing a binding commitment on elected representatives whose duties should be performed in the interests of the electorate as a whole.

The practice of ministerial responsibility to Parliament has also been accorder judicial recognition. Where a statute confers powers on a Minister, they may be exercised in his name by officials of his department: he cannot be expected personally to carry out all the functions of his office. The Minister nevertheless remains accountable to Parliament for the decisions of his officials.[135] In *Liversidge* v. *Anderson*[136] the majority of the House of Lords, in denying the power of judicial review, attached some importance to the duty of the Home Secretary to report regularly to Parliament on the cases of detention under the Defence Regulations. Similarly, the court has declined to give relief under the Extradition Act 1870 for a breach of natural justice by the foreign state requesting extradition, where the Home Secretary had discretion whether or not to permit extradition, and was responsible to Parliament.[137] Ministerial responsibility has thus formed part of the constitutional background against which statutes have been interpreted by the courts. The doctrine of collective responsibility took centre-stage, however, in *Attorney- General* v. *Jonathan Cape*.[138] The Attorney General sought an injuction to restrain the publication of the diaries of a former Minister on the ground that the disclosure of the views of Ministers, expressed in Cabinet, was contrary to the public interest. Lord Widgery C.J., considered that the equitable doctrine that a man shall not profit from the wrongful publication of information received in confidence could apply to protect

134 *Idem*, 829. See also Lord Brandon at 853; Oliver L.J. in the Court of Appeal at 789-793. Compare *Tameside* case [1977] AC 1014, 1051.

135 *Carltona Ltd.* v. *Commissioners of Works* [1943] 2 All E R. 560.

136 *Supra* n. 83 and text.

137 *Atkinson* v. *U.S.A. Government* [1971] AC 197, 232-33 (Lord Reid).

138 [1976] QB 752. Compare Dicey, p. 325, where the responsibility of Ministers to Parliament is described as a "matter depending on the conventions of the constitution with which the law has no direct concern."

public, as well as commercial, secrets. He also rejected the contention that the obligation of a Cabinet Minister was merely a "gentleman's agreement" to refrain from publication:

> The general effect of the evidence is that the doctrine is an established feature of the English form of government, and it follows that some matters leading up to a Cabinet decision may be regarded as confidential. Furthermore, I am persuaded that the nature of the confidence is that spoken for by the Attorney General, namely, that since the confidence is imposed to enable the efficient conduct of the Queen's business, the confidence is owed to the Queen and cannot be released by the members of Cabinet themselves... The maintenance of the doctrine of joint responsability within the Cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual Ministers.[139]

Accordingly, the Lord Chief Justice held that publication could be restrained by the court when that was clearly necessary in the public interest. It was not necessary, however, in that case since the relevant events had taken place ten years ago and the confidential character of the information had lapsed. The Attorney General had not persuaded the judge that publication of the diaries would inhibit free and open discussion within the modern Cabinet. nor could the court restrain publication of advice given by senior civil servants. which the diaries also disclosed.

The case perhaps casts some doubt on the distinction, made by Dicey, between law and convention: the latter, a set of rules which "consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the courts".[140] Lord Widgery seemed to think that the convention of collective ministerial responsibility might be enforced in a suitable case, albeit by application of the equitable doctrine of breach of confidence. The House of Lord's decision, in *Council of Civil Service Unions* v. *Minister for the Civil Service,* that civil servants, who had no legal right to consultation before their terms of employment were varied, could nevertheless rely on a legitimate expectation based on past practice and good administration, might also be viewed, in one

[139] *Idem,* 770-71.
[140] Dicey, p. 24.

sense, as a judicial acknowledgement of the force of convention.[141] In strict constitutional theory, however, mere convention, rooted in political practice, cannot limit the sovereignty of Parliament. Before the unlawful declaration of independence by the Government of Southern Rhodesia in 1965, the convention existed that Parliament would not legislate for Southern Rhodesia on matters within the competence of the Rhodesian Legislative Assembly except with the Government's consent. Nevertheless, that convention could not curtail the power of Parliament at Westminster to pass the Southern Rhodesia Act 1965, removing all further legislative power from the Rhodesian legislature.

> It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.[142]

Sir Robert Megarry V-C took a similar view in a subsequent case, in which it was contended that Parliament had no power to legislate for Canada without the consent of the Dominion, meaning the consent of all the constituent constitutional fractions of the country, including the Indians.[143] It was argued that the Statute of Westminster 1931, section 4, requiring an express declaration of consent to legislation on the part of a Dominion, stated a binding convention which had already ripened into law. In rejecting this contention, the Vice Chancellor held that an English court was bound by the "simple rule that the duty of the court is to obey and apply every Act of Parliament, and that the court cannot hold any such Act to be *ultra vires*... once an instrument is recognised as being an Act of Parliament, no English court can refuse to obey it or question its validity".[144]

It cannot be doubted that the sovereignty of Parliament remains a basic tenet of British constitutional government: here Dicey's scheme survives intact. Nevertheless, as a result of modern international arrangements, the doctrine is under threat. By the Treaty of Brussels 1972 the United Kingdom acceded to the European Economic Community, created

141 See Allan, Law, Convention, Prerogative [1986] *C.L.J.* 305.
142 *Madzimbamuto* v. *Lardner-Burke* [1969] 1 AC 645, 723 (Lord Reid).
143 *Manuel* v. *Attorney General* [1983] Ch. 77.
144 *Idem*, 86.

by the Treaty of Rome 1957. The Community constitutes a supranational legal regime, in which its executive and legislative organs exercise wide powers within the territories of the member countries. In particular, Regulations made by the Council of Ministers are directly applicable in all member States, without further national implementation. Moreover, provisions of the Treaty of Rome and other Community measures may in certain instances create rights which can be enforced by individuals in national courts. The European Court of Justice, which has jurisdiction to determine questions of the validity and interpretation of Community law, has declared that:

> The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States, but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.[145]

Rules of Community law having direct application within member States, or conferring rights directly on individuals, are given effect in United Kingdom law by virtue of the European Communities Act 1972, section 2 (1). There is, however, a conflict between the doctrine of parliamentary sovereignty, which requires the courts to recognise and apply every Act of Parliament, and the principle of the primacy of Community law, asserted by the European Court: Regulations and Treaty provisions cannot be overridden by domestic law in view of their special and original nature.[146] Admittedly, the European Court's interpretation of Community law is binding on United Kingdom courts under section 3 of the 1972 Act: to this extent the principle of primacy is also received into domestic law. However, the traditional doctrine of sovereignty requires the court to give effect to the most recent statute, any earlier statute or legal rule which is inconsistent being taken as pro tanto repealed or abolished. It is an aspect of the sovereignty doctrine that no Parliament can bind its successors by imposing special restrictions or conditions on future enactments: "the legislature cannot, according to our Constitution, bind itself as to the form of subsequent legislation."[147]

145 *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] ECR 1.
146 *Costa* v. *ENEL* [1964] ECR 585; *Italian Finance Administration* v. *Simmenthal* [1978] ECR 629.
147 *Ellen Street Estates* v. *Minister of Health* [1934] 1 KB 590, 597 (Maugham L.J.).

Where, therefore, an Act of Parliament, enacted since the European Communities Act 1972, is inconsistent with Community law, the court would appear bound to apply the British statute, notwithstanding the primacy (in Community doctrine) of European law. European Community law derives its authority, as a matter of United Kingdom constitutional law, from its recognition by the European Communities Act alone, an Act which, in municipal law, has no greater legal authority than any other statute.

In *Macarthys Ltd.* v. *Smith* [148] the Court of Appeal seemed to decide that Article 119 of the Treaty of Rome, establishing the principle that men and women should receive equal pay for equal work, prevailed over inconsistent British legislation.[149] Lord Denning stated that "the provisions of Article 119 of the EEC Treaty take priority over anything in our English statute on equal pay which is inconsistent with Article 119". On the other hand, the court expressed the view that *ultimate* sovereignty remained unimpaired: Parliament retained the power to repeal the European Communities Act, and could also legislate inconsistently with Community law by express provision. The solution emerging is therefore akin to that afforded the problem of legislation conflicting with the European Convention on Human Rights. Although Parliament retains its legislative supremacy, whenever possible the courts will *interpret* a statute so as to be in accordance with the international obligations undertaken by the United Kingdom under the European Convention and under the Treaty of Rome. In *Garland* v. *British Rail Engineering Ltd.*[150] the House of Lords held that an ambiguous section of the Sex Discrimination Act 1975 must be construed so as to be consistent with Article 119, relying on the direction in the European Communities Act 1972 section 2(4) that "any enactment passed or to be passed... shall be construed and have effect subject to the foregoing provisions of this section". Although the ultimate tension between the legislative supremacy at Westminster and the overriding authority of European Community law remains unresolved, it is clear that the courts will in practice admit the contradiction only where it is impossible to interpret a statute in accordance with Community law. Lord Diplock's refusal to pronunce on the result of an irretrievable conflict of laws contained an important statement of the present judicial approach:

148 [1979] 3 All E R 325; Allan (1983) 3 Oxford J Legal Stud 22.
149 Equal Pay Act 1970, amended by the Sex Discrimination Act 1975.
150 [1983] 2 AC 751.

> The instant appeal does not present an appropriate occasion to consider whether, having regard to the express direction as to the construction of enactments "to be passed" which is contained in section 2 (4), anything short of an express positive statement in an Act of Parliament passed after January 1, 1973, that a particular provisions is intenred to be made in breach of an obligation assumed by the United Kingdom under a Community treaty would justify an English court in construing that provision in a manner inconsistent with a Community treaty obligation of the United Kingdom however wide a departure from the *prima facie* meaning of the language of the provision might be needed in order to achieve consistency.[151]

Finally, we should return to Dicey's insistence that Britain knew no system of administrative law and that Ministers and officials were subject to the ordinary law which governed the private citizen: his contention that "the Constitution is the result of the ordinary law of the land".[152] It is presently a matter of some contention between public lawyers as to the merits of accepting a sharp distinction between public and private law. Recognition of the special role of public law in protecting expectations which have no basis in private law, as in the *Civil Service Unions* case, has been accompanied, as we have seen, by modification of the rules of ordinary civil liability where they apply to local authorities and other governmental bodies. In applying the law of negligence, in *Anns* v. *Berton London Borough Council,*[153] Lord Wilberforce considered that special rules were necessitated by the "essential factor... that the local authority is a public body, discharging functions under statute: its powers and duties are definable in terms of public not private law."[154] Traditionally, English law distinguishes between public and private law at the remedial level: the prerogative remedies of certiorari, prohibition and mandamus lie only to public bodies, or bodies with a significant public character, or to enforce a public duty. The rigidity of this distinction prevented an applicant from seeking both the prerogative orders and also the remedies of injunction and declaration in the same proceedings, despite the utility of the latter remedies in public as well as private law litigation. Nor could the litigant combine a claim for prerogative relief with an action for damages. The procedure was reformed in 1977:

151 *Idem*, 771; [1982] Public Law 562.
152 Dicey, p. 203.
153 [1977] 2 *WLR* 1024, *supra* n. 22 and text.
154 *Idem*, 1034.

the High Court now has power to grant any appropriate remedy on an application for judicial review; and damages may also be awarded if the court is satisfied that they could have been obtained by an ordinary action.[155] The initial consequence of the procedural reform seems, however, to be to entrench the separation of public from private law since the House of Lords has held that it is no longer open to a litigant, in a public law case, to commence his action by writ.[156] Where he challenges the decision of a governmental authority on the ground that it has infringed his rights in public law, he is obliged to make an application for judicial review under the new procedure. Lord Diplock justified making the application an exclusive remedy on the ground of its containing measures to protect the public authority from vexatious claims which might impede performance of its statutory functions. The applicant must obtain leave to pursue his claim, which must be supported by affidavits verifying the facts relied on. He must normally apply for leave within three months of the decision he wishes to challenge.

The exclusivity of the application for judicial review procedure has been condemned by many commentators, afraid that complainants may fail to secure relief because they chose the wrong form of action.[157] More recent decisions, however, have tended to dilute the strict dichotomy which had formerly been established. Where the tenant of a council flat sought to resist an action by the local authority to recover arrears of rent on the ground that, in increasing the rent payable, the authority had acted *ultra vires,* the House of Lords refused to strige out the defence as an abuse of process.[158] Although the case would have an important effect on the financial administration of the Council, affecting both Council tenants and ratepayers, the defendant was entitled to resist the claim for arrears without resorting to judicial review. The reasons for according public authorities the special protection of the judicial review procedure must be set against the need to preserve the ordinary rights of private citizens to defend themselves against unfounded claims. Other decisions, at the highest judicial level, confirm this trend away from strict procedural dichotomy. A parent who wished to challenge the legality of a memorandum of advice from the Department of Health and Social Security to area health authorities, on the ground that it infringed her rights in relation to her child, has been held entitled to proceed by

155 Supreme Court Act 1981 s 31; R.S.C. Order 53.
156 *O'Reilly* v. *Mackman* [1983] 2 AC 237.
157 E.g. Wade, H.WR., "Procedure and Prerogative in Public Law", 101 *L.Q.R.* 180.
158 *Wandsworth LBC* v. *Winder* [1985] AC 461.

way of an ordinary action rather than by way of judicial review.[159] Although on one view,[160] the claim was one made in public law, its "private law content" was sufficient to permit an exception to the rule.[161] Her rights of custody and guardianship in respect of her children were threatened by the guidance given by the Department to area health authorities and doctors. The case illustrates the difficulty of maintaining a clear division between public and private law rights. It may be doubted, therefore, whether English law will come to embrace a wholly separate administrative law jurisdiction: at both substantive and remedial levels, public and private law remain intertwined.[162] Lord Wilberforce has recently restated the basic principles in terms reminiscent of Dicey's exposition:

> The expressions "private law" and "public law" have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. No doubt they are convenient expressions for rescriptive purposes. In this country they must be used with caution, for, typically, English law fastens not on principles but on remedies. The principle remains intact that public authorities and public servants are, unless clearly exempted, answerable in the ordinary courts for wrongs done to individuals... We have not yet reached the point at which mere characterisation of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary courts: to permit this would be to create a dual system of law with the rigidity and procedural hardship for plaintiffs which it was the purpose of the recent reforms to remover.[163]

These words demonstrate that modern changes and developments in constitutional law and practice have taken place within the general scheme expounded by Dicey. The judicial fashioning of a system of administrative law has been a fine illustration of the creative strength of the common law in the face of the expansion of the power of central government. The European dimension, in which the European Convention and membership of the European Economic Community have each exercised a profound influence on our polity, has similarly been accom-

159 *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] AC 112.
160 *Idem*, 192 (Lord Bridge).
161 *Idem*, 178 (Lord Scarman).
162 See Harlow (1980) 43 MLR 241; Beatson (1987) 103 *LQR* 34. Compare Sir Harry Woolf [1986] Public Law 220.
163 *Davy* v. *Spelthorne B.C.* [1984] AC 262, 276.

modated —up to the present time at least— within the existing constitutional framework. The tension between the sovereignty of Parliament and the principle of the Rule of Law, identified by Dicey, continues in ever-changing form: its resolution by the judges, in each case in which the exercise of power is challenged, constitutes the distinctively British contribution to modern constitutionalism.