The European Convention on Human Rights

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The Government has announced that it will introduce legislation in this session to incorporate the European Convention on Human Rights into UK domestic law. This paper looks at the history and workings of the Convention and (briefly) at some of the implications of incorporation. As such it replaces the section on the ECHR in research paper 94/10. A further paper will be issued when the Bill reaches the House of Commons.

The European Court of Human Rights should not be confused with the European Court of Justice (which has jurisdiction over the EU treaties and is the subject of Library research paper 96/57: *IGC Issues: the European Court of Justice*).

The potential of the European Convention to serve as a Bill of Rights for the UK is discussed in Library Research Paper 96/82: *The Constitution: Principles and Development.*

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CONTENTS

I Introduction

The new government has confirmed that it intends to introduce legislation to incorporate the main provisions of the European Convention on Human Rights of 1950 into UK law. The UK was one of the ten original signatories of this convention and it has been binding on the UK ever since it entered into force on 3 September 1953, but it has been binding in international law as an external obligation rather than directly as legislation of the British Parliament. The UK and Ireland are alone among the parties to the Convention in not having integrated it with domestic law. Consequently, British citizens are obliged to take their cases to the European Court of Human Rights in Strasbourg to obtain rulings based directly on the Convention and, if they are successful in establishing that the UK is in breach of an article of the Convention, the judgement does not have direct effect, ie it does not automatically over-rule any British law or regulation. Instead it is for the British Government and Parliament to remedy the situation in such a way as to bring British law or practice in line with the Convention, if necessary by means of new legislation.

There have been arguments for many years about the advantages and disadvantages of incorporating the Convention into UK domestic law. For some it would be intrinsically desirable as a substitute for the national Bill of Rights which some other countries have entrenched in their constitution. To draw up a new Bill of Rights from scratch would inevitably be a difficult and controversial process and it could bring conflicts with international agreements such as the European Convention, whereas the Convention is readily available and is already the yardstick against which human rights in the UK, and in most other European countries, are measured. It is also held, by supporters of incorporation, that it would be preferable for the majority of cases involving the Convention to be resolved by British judges in accordance with British approaches to the interpretation of legal texts. For the opponents of incorporation this might be a disadvantage because it could give un-elected judges the power to question and strike down laws passed by Parliament, whereas the present arrangements at least give Parliament some discretion as to how a breach identified in Strasbourg might best be remedied. The evidence from other countries suggests that incorporation might not affect the number of British cases taken to Strasbourg as much as sometimes supposed.

In practice, there have already been cases where British courts have taken account of the Convention to assist in the interpretation of British law and some have argued that incorporation is already almost an accomplished fact. The increasing reliance on the Convention as a yardstick for European Union legislation and the introduction of references to it into the EU treaties (discussed in Part II) are taken as a further pointer in this direction.

It is not possible to make a precise comparison between the human rights performance of the various parties to the Convention in terms of adverse judgements because they have allowed

the right of individual petition for varying periods. Moreover, judgements are not necessarily of equal seriousness. The figures published by the Council of Europe in recent years indicate that British citizens tend to file more petitions than those of other states, but most are not found admissible. In 1996 the Court ruled on 71 cases, 11 of which concerned the UK. Violations by the UK were found in 6 cases. In the same period violations were found in all 8 cases involving Italy, in 5 cases involving Greece and 4 involving France.[1]

However, it is certainly the case that judgements handed down in Strasbourg have already had significant effects on British law and practice and some of these are listed in Part III.

The present paper is concerned mainly with the machinery of the Convention and its impact on the UK to date. The arguments about incorporation will be addressed in greater detail at a later date, along with analysis of the proposed bill and its implications.

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[1] British Institute of Human Rights, *Human Rights Case Digest*, Vol VIII No.4 (April 1997), p308. These figures vary considerably from year to year. The fact that there have been relatively few rulings against Germany is mainly a reflection of the fact that the Federal Constitutional Court applies fundamental rights which in many cases go further than those laid down in the ECHR.

II The European Convention on Human Rights

A. A brief history of the European Convention

The European Convention on Human Rights (ECHR) was the first major achievement of the Council of Europe, the grouping of 10 democratic European states set up in 1949. In the Statute of the Council of Europe the signatories had agreed that:

> Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms...[2]

The Convention which they drafted during 1949-50 was therefore to be not only an affirmation of principles, but also a test which potential members of the Council of Europe would have to pass before being admitted. This has continued to be the case and as the membership of the Council of Europe has swollen from ten to forty, each new member state has been required to sign and ratify the Convention. In 1949-50 the ECHR also served to distinguish the democratic states of Western Europe (and Turkey) from the Soviet occupied and communist states of Eastern and Central Europe.

The Convention was drafted in several stages, first in outline by a committee of the Council of Europe Assembly, then by experts and officials on behalf of the Committee of Ministers. It is often recalled that there was a significant British contribution to this process. The decision to proceed independently of the proposed United Nations covenants[3] was heavily influenced by Sir Winston Churchill, then Leader of the Opposition in the UK, who declared that "a European Assembly forbidden to discuss human rights would indeed have been a ludicrous proposition to put to the world."[4] The Assembly's committee on Legal and Administrative Questions was chaired by a British MP, Sir David Maxwell-Fyfe, who had already contributed to a draft proposed by the European Movement.[5] When the committee of experts began its work the British representative[6] tabled a set of definitions of rights based on the Universal Declaration of 1948. When the draft was presented to the British (Labour) cabinet on 1 August 1950 the Foreign Office Minister of State was able to report that it:

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2 From Article 3, quoted in AH Robertson & JG Merrills, *Human Rights in Europe: A Study of the European Convention on Human Rights*, third edition, p3.

3 These eventually emerged in the 1960s as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. See Library Research Paper 94/10: *International Human Rights Conventions.*

4 *Debates of the Assembly of the Council of Europe*, 17 August 1949, p.284.

5 a former British (Conservative) Attorney General and future Home Secretary and (as Lord Kilmuir) Lord Chancellor.

6 Sir Oscar Dowson, a former legal advisor to the Home Office.

contains a definition of the rights and limitations thereto which follows almost word for word the actual texts proposed by the UK representatives (Articles 2-17), and which is thought to be consistent with our existing law in all but a small number of comparatively trivial cases.[7]

However, although the final version of the ECHR owed a good deal to British ideas and drafting as far as the definition of rights was concerned, the enforcement mechanism, including the right of individual petition and the creation of the supranational human rights court, owed little to British thinking and had been opposed by the British representatives. Moreover, the cabinet agreed in August 1950 that the Foreign Secretary should try to have the draft remitted for further work, mainly because of perceived threats to the idea of a planned economy (the draft was regarded as enshrining *laissez faire* economics) and to British common law traditions and because the Convention could have a politically unsettling effect in the colonies.[8] The Foreign Secretary (Bevin) missed the cabinet meeting because he was in Strasbourg for the Committee of Ministers, where he was aware that Britain would be alone in opposing the draft. He telegraphed to the prime minister that:

> It appears to have nothing to do with economic planning and I should only look foolish if I tried to oppose it on those grounds.[9]

Bevin therefore accepted the draft convention and a British cabinet committee decided on 18 October 1950 to recommend to the full cabinet that it should be signed by the UK on the understanding that the UK would exercise its options not to accept either individual petition or the compulsory jurisdiction of the court.[10] In the event the UK was to accept these optional arrangements only in 1966. The cabinet was also very clear in 1950 that the ECHR did not require UK legislation - the question of incorporation was given no serious consideration at the time. Consequently, the ECHR had little impact on the UK until the 1970s.

It has sometimes been argued that the wording of Article 1 of the Convention ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention") implied that states *would* incorporate the Convention into their domestic law and that the UK has therefore been in breach of this requirement throughout the history of the Convention. However, the Court has not been prepared to endorse this view, stating only that:

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7 G Marston, "The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950", *International and Comparative Law Quarterly*, Vol 43 (1993), 811.

8 Marston, 813.

9 Marston, 814.

10 Marston, 819-20.

The intention [ie the intention to "secure to everyone etc"] finds a particularly faithful reflection in those instances where the Convention has been incorporated into the domestic law...[11]

Since the signature and entry into force of the ECHR the membership of the Council of Europe has expanded greatly, especially in the 1990s with the arrival of almost all the states of Eastern Europe and successor states to Yugoslavia. There are currently 40 member states and all have either acceded to the ECHR or are in the process of doing so. The Council of Europe normally insists on accession within the first year of membership. Very few cases have yet reached the European Court of Human Rights from the former communist countries but the case-load is likely to grow considerably over the next decade.

The original Convention has been amended or supplemented by a series of Protocols which, as separate agreements, stand to be individually ratified by the parties. Those which have amended or will in future amend the mechanisms of the ECHR have to be ratified by all the parties before entry into force. Others extend the rights covered by the Convention and these may enter into force for those states which have ratified when a certain number (variously five or seven) have done so. The UK has ratified the first, second, third, fifth, eighth, tenth and eleventh protocols, but the last two are not yet in force. The contents of the protocols are described in the next section.

The eleventh protocol provides for a major reform of the institutional structure of the ECHR and is discussed in section I.E below.

B. The rights covered by the Convention and the Protocols

The Convention contains many of the provisions of the United Nations Declaration and Covenants and its wording is identical in some articles.

The main rights protected by the Convention are:[12]

- the right to life, liberty and security of person

- the prohibition of torture, inhuman or degrading treatment or punishment

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[11] from the *Ireland v UK* judgement of 18 January 1978, quoted and discussed in HC Kruger, "Does the Convention machinery distinguish between states which have and have not incorporated it?", in JP Gardner (ed), *Aspects of Incorporation of the European Convention on Human Rights into Domestic Law*, 1993.

[12] The full text of the Convention is available as a pamphlet issued by the Council of Europe. Copies may be obtained from the International Affairs and Defence Section of the Library.

- freedom from slavery, servitude and forced labour
- the right to a fair trial in civil and criminal matters
- prohibition of criminal laws that are retroactive
- respect for private and family life, home and correspondence
- the prohibition of discrimination in the enjoyment of rights and freedoms guaranteed by the Convention
- freedom of thought, conscience and religion
- freedom of expression
- freedom of peaceful assembly and association, including the right to join a trade union
- the right to marry and found a family

The Protocols ratified by the UK add the following rights:

- the right to peaceful enjoyment of possessions
- the right to education
- certain rights concerning elections

The Protocols not ratified by the UK confer the following rights:

- freedom from imprisonment for inability to fulfil a contractual obligation
- freedom of movement and the right to choose where to live
- the right to leave a country, including one's own
- abolition of the death penalty
- the prohibition of expulsion of a state's nationals or denying them entry, or the collective expulsion of aliens
- restrictions on the expulsion of aliens
- the right to have a sentence reviewed by a higher tribunal

- compensation in the case of miscarriages of justice

- equal rights and responsibilities for spouses during marriage

In many cases these rights are qualified by exceptions of a general or specific nature. For example, Article 11 of the main Convention on the freedom of peaceful assembly and trade union membership recognises that restrictions may be necessary in the interests of national security or public safety and restrictions may be imposed lawfully on members of the armed forces, the police and civil servants. Similarly, Article 10 on the freedom of expression recognises that States are entitled to make broadcasting subject to licence. Almost every article is qualified to a greater or lesser extent and for a full understanding of what is covered it is necessary to study the Convention in detail along with the case law which has accumulated since it was adopted. There is now a substantial literature on this subject.[13]

C. Derogations

Under Article 15 the Convention allows parties, in the case of war or public emergency threatening the life of the nation, to derogate from some obligations of the Convention as long as the Council of Europe is kept fully informed of the measures taken. The Court has ruled that it has the power to determine whether or not the circumstances genuinely warrant the status of a public emergency threatening the life of the nation. In 1974 the UK lodged a derogation under this Article with regard to Northern Ireland, in particular as regards the period of detention of suspected terrorists, and the Court accepted the general validity of this in a case of 1978. In 1984 the British Government withdrew the derogation, but in 1988 it informed the COE Secretary General that it would again avail itself of the right under Article 15(1) of the Convention to the extent that the exercise of powers under section 12 of the 1984 Prevention of Terrorism (Temporary Provisions) Act might be inconsistent with the obligations imposed by Article 5(3) of the Convention. This followed an adverse judgement of the European Court of Human Rights in the *Brogan* case.[14]

In a judgement of May 1993 in the *Case of Brannigan and McBride v. the UK*, the Court examined the validity of the UK derogation and decided that the scope of the derogation fell within the "margin of appreciation" which could be left to national governments.[15]

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[13] See the bibliography on p X for selected references.

[14] *Case of Brogan and others*, 10/1987/133/184-187, COE/ECHR/JUD/151

[15] COE/ECHR/JUD/337

The British Government was found to be in breach of Article 2 (right to life) in the case of the suspected IRA terrorists killed by the SAS in Gibraltar in 1988. The question of a derogation did not arise because Article 15 does not allow derogations from Article 2, except for lawful acts of war. Similarly, there can be no derogation from Articles 3 (torture etc), 4.1 (slavery) or 7 (retroactive criminal offences).

D. The Procedure for Individual Application

While the parties to the Convention (ie the States) may bring cases against each other under Article 24, the most frequent kind of complaint is the individual application brought against a state under Article 25 of the Convention, which recognises the competence of the European Commission on Human Rights to consider individual complaints of violations of the Convention. The right of individual petition was a significant innovation under international law and a forerunner of a similar right in the later UN Covenants. The declaration under Article 25 is an important feature of the enforcement mechanism and one which prospective COE members must be prepared to make.

As noted above, the British government decided in 1950 to avail itself of the option not to allow the right of individual petition and it was only in 1966 that this right was established for British citizens, initially for a period of five years. The option under Article 25 has been renewed regularly at five year intervals, but there have been times when British governments have been criticised in Parliament for renewing.

There was a particularly strong and critical reaction to the 1995 judgement on the SAS Gibraltar killings. The Court had decided by a majority of 10 to 9 in a ruling of 27 September 1995 that there had been a violation of Article 2 and that the British Government must pay the applicants costs, but not damages. The decision was based on the argument that the automatic recourse to lethal force by the SAS soldiers failed to allow for a margin of error in the (incorrect) intelligence assessment that the suspected terrorists were about to detonate a car-bomb. In fact, a car hired in the name of one of the suspects was found to contain Semtex and timing devices, but it was still in Marbella at the time of the killings in Gibraltar.[16] British ministers were critical of the decision, but resisted calls to withdraw from the ECHR system. The right of individual petition was renewed for a further five years from January 1996.[17]

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[16] *Case of McCann and Others v. the United Kingdom* (17/1994/464/545).

[17] HC Debates, 7 December 1995, Vol 268, c488; 13 December 1995, Vol 268, c647w and 10 January 1996, Vol 269, c190 and 22 February 1996, Vol 272, c489.

Individuals cannot approach the Court directly. The Commission is the body which examines complaints to determine whether they are admissible or not. Each state which is a party to the Convention is represented by one commissioner. The Commission currently receives over 5,000 individual applications a year of which more than 1,500 are registered and investigated. Only about 10 per cent of applications investigated are declared admissible, and if a petition is rejected there is no right of appeal.

Applicants must show that they have exhausted all domestic remedies in the country of the alleged violation and the application must be made within six months of a final decision by the courts, tribunals or authorities of the state concerned. The complaint must be based on an alleged violation of the Convention or its Protocols of which the complainant has been a victim (complaints about the general principles or provisions of a government's policy or legislation are not acceptable unless the personal rights of the applicant have been affected) and it must have been committed by a public authority such as a local authority, government department or court.

The Commission will often ask the parties involved for information or for observations before it decides on admissibility. Sometimes the parties themselves submit observations at a hearing and it is possible for the parties to agree to a solution even before admissibility has been established. If this is not the case and the application has been accepted, the Commission sets about establishing the facts whilst also trying to secure a friendly settlement. If conciliation fails, the Commission draws up a detailed report on the facts of the case, including a legal opinion as to whether there has been a violation or not.

The report is sent to the COE's Committee of Ministers, which consists of the foreign ministers of the member states, and to the states involved and within three months it may be referred to the Court. The judges of the Court, one for each member of the COE, are elected for a nine-year renewable term by the Consultative or Parliamentary Assembly, which is composed of representatives of the national parliaments of the member states. Article 39 of the Convention sets out the procedure for the election of judges. On the qualifications of judges, Article 39 states:

> The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

For a case to go to the Court the defendant state must have accepted the compulsory jurisdiction of the Court under Article 46 of the Convention or at least to accept the Court's jurisdiction in the particular case. Written and oral arguments are presented to the Court and the applicant may be required to appear as a witness.

The Court's decision is based on a majority judgement. The Court delivers judgements which are final with no right of appeal. The judgement is binding on the state concerned although the Court has no enforcement powers as such and it is the Committee of Ministers which monitors the implementation of the Court's judgements. The Court can award the victim of a violation "just satisfaction" under Article 50 which may include an award of compensation and an order for the reimbursement of costs. If a case is not referred to the Court, the Committee of Ministers decides by a two-thirds majority vote whether or not there has been a violation of the Convention and can recommend that the state award the victim "just satisfaction". Decisions of the Committee are also final and binding on the state concerned.

Under the present two-tier supervisory system, it takes the Court on average five years to reach a decision.

E. Reform of the ECHR machinery

One of the main criticisms of the human rights control procedure in recent years has been the length of time it takes for a case to pass through the two-tier, three-stage supervisory structure in order for the Court or the Committee of Ministers to reach a final decision. It could be argued that the control system has become a victim of its own success, since the long delays are largely the result of a growing Council of Europe membership and the increased use of the right to individual petition under Article 25. A Parliamentary Assembly Recommendation in 1992 predicted that the number of individual applications would increase disproportionately to the population of the new member states, because:

> contrary to older member states, the Council of Europe's system for the protection of human rights constitutes for them an important element for the building-up of fundamental rights, democracy and the rule of law.[18]

The volume of cases referred to the Court doubled between 1988 and 1993 and the backlog of cases pending, especially at the stage of consideration by the Commission of Human Rights, has increased steadily over the years, numbering well over 2,000 each year in recent years. Very few cases have so far been referred from the new member states of the Council of Europe, so a much greater expansion can be anticipated in coming years.

The duplication of work in the existing two-stage process was also criticised by the Parliamentary Assembly. The report acknowledged that "the two-fold examination of the merits of a case offers some advantages, especially for countries which did not incorporate

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[18] COE PA Recommendation 1194 (1992), 6 October 1992.

the convention into their domestic law",[19] but concluded that the COE had to look to the future and to likely developments in Europe. The system had to be replaced "by a more efficient and a more professional system which will have to be full-time and, in addition, should not become too expensive".[20]

Studies of possible reforms to the system had been under way since the mid 1980s, but had made little progress. In 1993 the Committee finally decided to accelerate the process and mandate a committee of experts to prepare a new protocol. Protocol 11 was finally adopted and opened for signature in May 1994. Since it involves a major overhaul of the ECHR system it can only enter into force one year after all of the parties have ratified the protocol - a prospect which still seems some way off, although the UK was among the first to ratify. In the mean time some of the parties (but not the UK) have signed and ratified an interim protocol (Protocol 9) which bypasses the Commission stage for their citizens only.

Protocol 11 combines amendments to the Convention itself with amendments to the Rules of the Court to take account of the new structure and procedures. The following extract from the 1994 *Activities of the Council of Europe* summarises its contents:

> i. *Main aspects of the reform*
>
> 1. The present part-time monitoring institution, *viz* the European Commission of Human Rights and the European Court of Human Rights, will cease to exist. A new Court of Human Rights, operating full-time, will be set up in Strasbourg.
>
> 2. The system will be streamlined and, above all, all applicants will have direct access to the new Court.
>
> Any cases that are clearly unfounded will be sifted out of the system at an early stage by a unanimous decision of the Court, sitting as a three-judge committee (they will therefore be declared inadmissible). In the large majority of cases, the Court will sit as a seven-judge chamber. Only in exceptional cases will the Court, sitting as a Grand Chamber of seventeen judges, decide on the most important issues. The President of the Court and the presidents of chambers will always be able to sit in the Grand Chamber so as to ensure a proper understanding of the legal system under consideration.

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[19] Doc. 6659, p.7.
[20] *ibid.*

3. All allegations of violations of individuals' rights will be referred to the Court; the Committee of Ministers will no longer have jurisdiction to decide on the merits of these cases, though it will retain its important role of monitoring the enforcement of the Court's judgments.

4. It has been decided that the right of individual petition will be mandatory and that the Court will have jurisdiction over all interstate cases.

ii. *Operation of the new procedure*

As under the present system, individual applications and interstate applications will exist side by side. As the secretariat of the Commission does at present, the registry of the Court will establish all necessary contacts with the applicants and, if necessary, request further infomation.

Then, the application will be registered by a chamber of the Court and assigned to a judge-rapporteur. It will subsequently be considered by a three-judge committee, including the judge-rapporteur, which will either declare it admissible or reject it. The committee may, by a unanimous decision , declare the application inadmissible; this decision will be final.

When the judge-rapporteur considers that the application raises a question of principle and is not inadmissible, the application may be referred direct to the Chamber. (This procedure matches the system currently in force before the Commission.)

The chambers, composed of seven judges, will decide on the merits of applications. The judge-rapporteur will prepare the case-file and establish contact with the parties. The parties will then submit their observations in writing. A hearing will take place before the chamber, which may place itself at the parties' disposal with a view to a friendly settlement. If no friendly settlement can be reached, the chamber will deliver its judgment.

The chamber may decide *proprio motu* to refer a case to the Grand Chamber when it intends not to follow the Court's previous case-law or when a question of principle is involved. This procedure may be adopted on condition that none of the parties objects to it (see new Article 30 of the European Convention on Human Rights).

Once the judgment has been delivered the parties will have three months to request that the case be referred to the Grand Chamber. However, this procedure will be restricted to exceptional instances, that is when a case raises a serious question concerning the interpretation or application of the Convention and its protocols or a matter of general interest. A panel of five judges of the Grand Chamber will determine whether the request for a re-hearing is admissible (Article 43).

> The chamber's judgment will become final when there is no further possibility of a referral to the Grand Chamber. The Grand Chamber's judgment will be final and, as at present, binding in international law. As under the current system, the Committee of Ministers will supervise the execution of the Court's judgment.[21]

The Court will continue to consist of a number of judges equal to that of the states parties to the Convention, but they will be elected for a six-year renewable term instead of the current nine-year period. Since the new Court will function on a permanent basis, a retirement age for judges at 70 will be introduced (Article 23.6).

The judgment of a Chamber, unlike that of the Court under the present system, will not be immediately definitive, but will become so under Article 44.2 once a number of conditions have been fulfilled requiring further referral to the Grand Chamber. Only Grand Chamber judgments are final with immediate effect.

In a significant departure from the present Convention, the Protocol provides in Article 43 for a re-hearing of a case "in exceptional cases ...if the case raises a serious question affecting the interpretation of application of the Convention or the protocols thereto, or a serious issue of general importance".[22] The COE booklet on Protocol 11 and explanatory report (1994) considers what might be defined as serious questions:

> 100. Serious questions affecting the interpretation of the Convention are raised when a question of importance not yet decided by the Court is at stake, or when the decision is of importance for future cases and for the development of the Court's case-law. Moreover, a serious question may be particularly evident when the judgment concerned is not consistent with a previous judgment of the Court.
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> 101. A serious question concerning the application of the Convention may be at stake when a judgment necessitates a substantial change to national law or administrative practice but does not itself raise a serious question of interpretation of the Convention.
>
> 102. A serious issue considered to be of general importance could involve a substantial political issue or an important issue of policy.

Article 34 of the new Protocol replaces Article 25 of the Convention. It removes the optional nature of the granting of the right to individual petition and makes the jurisdiction of the Court mandatory on states parties for individual applications. This means that the issue of periodic renewal, which has occasionally been controversial in the UK, will no longer arise

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[21] *Activities of the Council of Europe 1994 Report*, Council of Europe, 1995.

[22] See also Article 5.2(2) of Protocol 9 to the Convention.

once the eleventh protocol is in force. The British Government opposed this change, but finally acquiesced in order to allow the other institutional reforms to proceed.[23]

Following dissatisfaction in the UK with several ECHR judgements, including that in the case of the SAS Gibraltar killings (see above), the British Conservative Government put forward proposals for further reform of the ECHR system. Among the proposals was one that the Court should make known its main areas of concern early enough for them to be addressed in hearings by the government concerned and the idea that the parliamentary assembly should be given more information about the nominees for election as judges. The submission also urged that the Court should make more account of national perceptions of moral and social issues and of the ability of democratic national institutions to resolve them.[24]

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[23] HC Deb, 19 April 1994, c460W.

[24] DEP/3 3297, *European Court and Commission of Human Rights: Note on the position of the British Government,* FCO, April 1996. The Court already applies a concept known as "the margin of appreciation" whereby it will recognise the judgement of the national authorities within a certain area of tolerance and not interfere with actions which are within the margin. See Jacobs and White, p37. See also TH Jones, p449, who argues that "the general effect of permitting national authorities a margin of appreciation can only be to devalue Convention rights and freedoms at the expense of the limitations".

III The ECHR and the EU

The ECHR is the creation of the Council of Europe and predates the creation of the European Community and European Union. For most of their existence the two systems of European co-operation and jurisdiction have remained distinct, with different, albeit overlapping memberships. From the very beginning all of the member states of the European Community/European Union have also been members of the Council of Europe and parties to the ECHR. The European Community was for many years predominantly concerned with economic relationships, while the Council of Europe dealt mainly with human rights and cultural issues. Both systems had supranational courts, but the EC Court of Justice in Luxembourg had different procedures and developed a body of law quite separate from the work of the European Court of Human Rights in Strasbourg.

The sharp distinction has long since become blurred and the expansion of the activities and competence of the three pillars forming the European Union have brought them into a close engagement with human rights as defined by the ECHR in many areas. As Bernard Robertson points out, although the ECJ is not formally concerned with human rights, it has "to find a background of generally accepted principles of law against which to interpret the Community laws. Increasingly it has turned to the Convention [ie, the European Convention] as evidence of these generally accepted principles, so in a way the Convention is becoming part of EC law".[25]

The Treaty of Rome of 1957 did not refer explicitly to human rights although it did affirm the willingness of member states to safeguard peace and freedom, to improve living standards and abolish discrimination on the grounds of nationality between citizens of the member states. It also created rights such as the freedom of workers to move between member countries and establish themselves in the country of their choice, with equality for men and women in the workplace and equal treatment for immigrant workers. The Single European Act of 1986 amended the Treaty of Rome by the inclusion of Article 118A on encouraging improvements in the working environment "as regards the health and safety of workers". In its Preamble the Act reaffirmed the determination of EC member states "to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice".

For many years there was discussion within the EC/EU about the possibility of collective accession to the ECHR in parallel to the national commitments of the member states. A

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[25] "Which European Court?", *Justice of the Peace*, 24 March 1990.

Commission Communication of 19 November 1990,[26] drew attention to a "conspicuous gap in the Community legal system" which could be filled by Community accession to the European Convention. It argued that this would provide better protection of the fundamental rights of Community citizens and would be a complementary rather than an alternative measure for review and enforcement.

The issue has remained controversial. The creation of the pillar structure under the European Union in 1993 raised the prospect that any entrenched EC relationship with the ECHR might also be applied to the two inter-governmental pillars. The Justice and Home Affairs pillar in particular clearly deals with areas in which human rights issues arise and on which the ECHR has already developed significant case-law. However, the idea of institutional accession to the ECHR raised numerous problems. The European Union created by the Maastricht Treaty does not have legal personality, unlike the European Community which can and does enter into international agreements. Moreover the European Court of Justice delivered a negative opinion in March 1996 on the possibility of the Community acceding to the ECHR.

An alternative approach is to reinforce the responsibility of the European Court of Justice to apply the fundamental rights guaranteed by the ECHR to the activities of the EU. The draft text proposed by the Dutch presidency to the IGC in March 1997 would give the Court of Justice jurisdiction over the fundamental rights article in the overarching EU treaty. It is difficult to predict quite what effect this would have. The two courts are unlikely to become involved in a head-on conflict of jurisdiction, but the relationship between them could become problematic. It remains to be seen how the issue will develop in the final stages of the IGC.

[26] CONS DOC 10555/90, 4 December 1990

IV The UK and the ECHR

As a general principle, British courts do not enforce or interpret international treaties unless expressly instructed to do so by an Act of Parliament. It therefore has fallen to the British government and parliament to give effect to decisions of the European Court of Human Rights, if necessary by changing the law.

Areas of the law which have been changed as a result of cases where the Court has found in the UK to be in breach of the ECHR include the following:[27]

the closed shop (Young, James and Webster, 1981)
homosexuality in Northern Ireland ((Dudgeon, 1981)
the right to have a detention order reviewed (X, 1981)
corporal punishment in schools (Campbell & Cosans, 1982)
telephone tapping (Malone, 1984)
parental access to children (O, H, W, B & R, 1987)
access to child care records (Gaskin, 1989)
arrest under *Emergency Provisions Act* (Fox, Campbell & Hartley, 1990)
discretionary life sentences (Thynne, Wilson & Gunnell, 1990)
right of appeal against life sentences (Hussain & Singh,1996)
access to legal advice for fine and debt defaulters (Benham, 1996)
procedure of courts-martial (Findlay, 1997)[28]

There have also been occasions when administrative rules or regulations have been changed as a result of a ruling. For example,

prisoners' correspondence (Silver & others, 1983; McCallum, 1990; Campbell, 1992)
immigration rules (Abdulaziz, Cabales & Balkandali, 1985)
Scottish legal aid (Granger, 1990)

Although the European Convention is not part of UK law, British courts have on occasion taken it into account when reaching a decision, and it has been used to help clarify ambiguities in UK law. For example, Article 10, on freedom of expression, has been cited as an expression of a principle of British law on various occasions: in the so-called *Spycatcher*

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[27] based on HC Deb, 17 December 1993, cc963-96)

[28] law changed by Armed Forces Act 1996 in anticipation of ruling - see the evidence given to the Defence Committee on *Defence Statutory Instruments*, HC 393i of 1996-97, QQ 1250-1265.

case,[29] in the Esther Rantzen libel damages case[30] and in *Derbyshire County Council v Times Newspapers Ltd*.[31] In *Waddington v Miah*,[32] the House of Lords referred to Article 7 of the Convention on the prohibition of retroactive criminal laws to clarify an aspect of the Immigration Act 1971. With cases such as these as evidence, it has thus been argued that the Convention is gradually becoming part of UK law, although it cannot be relied upon in the courts. E.C.S.Wade and A.W.Bradley, summarise the current situation as follows:

> So far as the common law is concerned, the courts are unwilling to rely on the Convention to create new common law rights and duties where none exist, but where there may be an obvious gap which needs to be filled. So in *Malone v Metropolitan Police Commissioner*, ([1979] Ch 344) the Vice-Chancellor (Sir Robert Megarry) preferred not to fashion a new common law right to privacy from Art 8 of the Convention in a case involving the tapping of a private telephone by police officers on the authority of a Home Secretary's warrant, issued without statutory authority. On the other hand, the courts may refer to the Convention to help develop and clarify existing common law rules. So in *Attorney-General v BBC* ([1981] AC 303) Lord Fraser said that the courts should have regard to the Convention and to the decisions of the European Court in cases where "domestic law is not firmly settled"... (...) Finally, it appears that the courts may properly have regard to the Convention in exercising their discretion in the law relating to remedies.[33]

Some have gone further and argue that the courts should interpret the Convention on the presumption that Parliament does not want to legislate contrary to the UK's international obligations.[34]

It will be seen from the above discussion that the ECHR has had an impact on UK law and practice in a great many areas. Jacobs and White note that one of the areas of greatest impact, not only on the UK, but on European states in general, has been in the treatment of those who threaten or appear to threaten the state and national security:

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[29] *Attorney General v Guardian Newspapers* [1987] 3 All E.R. 316

[30] *Rantzen v Mirror Group Newspapers, NLJ Law Reports*, 9 April 1993, p507

[31] [1993] 2 WLR 449, 451

[32] [1974] 1 WLR 683

[33] *Constitutional and Administrative Law*, 1993, p.422-3.

[34] Deryck Beyleveld, "The Concept of a Human Right and Incorporation of the European Convention on Human Rights", *Public Law*, Winter 1995

> The definition of torture and inhuman and degrading treatment under Article 3(9) have shaped State conduct, particularly in the methods for dealing with the threats of terrorist activity, and in procedures for considering the deportation or extradition of individuals.[35]

Jacobs and White identify many other areas where the Convention has been influential and conclude:

> There is hardly an area of State regulation untouched by standards which have emerged from the application of Convention provisions to situations presented by individual applicants.[36]

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[35] FG Jacobs & RCA White, *The European Convention on Human Rights*, second edition, 1996, 406. A case brought against the British Government by the Irish Government and adjudicated in 1978 had established that 5 interrogation techniques practised in Northern Ireland until discontinued in 1972 had constituted inhuman and degrading treatment in violation of Article 3 - ibid, 53.

[36] ibid

V The argument about incorporation

It is fairly clear what is meant by the statement that the ECHR has not been incorporated into UK domestic law. As noted above, the UK has a long-standing dualist approach to international law. A classic statement of this was made by Lord Atkin for the Privy Council in 1939:

> so far... as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law.[37]

It is somewhat more difficult to define what exactly incorporation may involve. As AZ Drzemszewski commented in his survey of how the ECHR had been incorporated in the other parties,

> there is a variety of methods by which the substantive provisions of international agreements can be incorporated into domestic law: treaties may be given the rank of constitutional law by means of legislative enactment (and also possibly through judicial interpretation to this effect): they can acquire a rank equal to that of other legislation; certain of their provisions may be applied by courts which consider them to be "directly applicable", or alternatively cited by them as persuasive authority. Likewise, the provisions of international agreements can serve as guidelines for the drafting of bills - to both the legislature and the administrative authorities - and they can also be assumed to form part and parcel of "general principles of law" or the domestic *"ordre public"* (in certain instances through the medium of customary international law) thereby influencing and modifying not only the practice of domestic courts and tribunals, but also the action of executive and administrative authorities. It follows that there exist substantial differences and diversity of constitutional techniques employed...[38]

All the other member states, including Ireland, have constitutional guarantees of human rights for which there is are established judicial processes. In many cases these rights duplicate those of the European Convention, in others they supplement them by referring to specific cultural, social or ethnic circumstances in the country concerned. Where human rights have been guaranteed by constitutionally entrenched provisions, legislation or penal codes, or the accepted principles of law, it is difficult to assess the legal implications of the European Convention independently of an assessment of the protection of human rights generally. However, it is generally the case that the law of the ECHR takes precedence over any contrary provision, often by virtue of an assertion to that effect in the constitution.

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[37] *Chung Chi Cheung v R* [1939] AC 160, at 167-8.

[38] AZ Drzemczewski, *European Human Rights Convention in Domestic Law*, 1983, 60.

There has been a long-running debate in the UK about the merits of incorporation. Since the UK has no other constitutionally entrenched guarantee of human rights, the argument has been closely associated with the more general case in favour of a "Bill of Rights". Some have argued that a Bill of Rights for the UK should include some rights not included in the ECHR, but there has been a general consensus that the ECHR should provide the core. A special House of Lords *Select Committee on a Bill of Rights* set out the arguments for and against incorporating the ECHR as a Bill of Rights in 1978.[39]

One of the most enthusiastic campaigners for incorporation has been Lord Lester of Herne Hill (formerly Anthony Lester QC). During the 1996-7 session he made his second unsuccessful attempt to pilot a *Human Rights Bill* through Parliament, declaring on second reading in the House of Lords:

> I submit that almost half a century after the United Kingdom became the first country to ratify the convention and 30 years after the United Kingdom accepted the jurisdiction of the European Court of Human Rights, the time is over-ripe to domesticate what are or should be British civil rights and liberties and to bring them home to British courts in a way that ensures effective access to justice.[40]

In the same debate Baroness Blatch set out the Conservative Government's view:

> the Bill would introduce a major change in our long-standing constitutional arrangements, bringing with it a number of potential hazards, for little advantage... (...) The fact is that whether or not the convention has been incorporated into the domestic law of a country has little bearing on how well that country affords legal protection for its people.[41]

Her greatest objections were, however, that the Bill as drafted would draw the courts into decisions of public policy hitherto decided by Parliament and that, despite changes by comparison with Lord Lester's earlier bill, it would still be ambiguous as to what would happen should a court find itself incapable of interpreting a UK enactment in such a way as to be consistent with the ECHR:

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[39] The committee's summary of the arguments is given in full in House of Commons Library Research Paper 96/82: *The Constitution: Principles and Development* by Barry Winetrobe (on pp 48-52). The paper also reviews the history of attempts to incorporate the Convention by means of private members' bills etc over the past twenty years and examines some of the political arguments on both sides.

[40] HL Deb, 5 February 1997, c1730.

[41] ibid, 1750.

> In the government's view, it remains a vital merit of our constitutional arrangements that Parliament decides public policy affecting the rights and freedoms of the individual and, equally, that it decides how, and when to change that policy, whether as the result of the evolving needs of our society, or evolving Strasbourg jurisprudence. In doing so of course it must have regard to many things including our international obligations, the judgements of our own courts, and judgements by the European Court of Human Rights. Nevertheless, the final decision remains with Parliament.[42]

Much the same case had been made in 1993 by the then Home Office Minister the Earl Ferrers to a question from Lord Kirkhill:

> ... the individual person can always seek justice. It may be difficult if one has to go to a European Court or Commission but it can be done. The view we take is that the incorporation of the Convention would undermine our constitutional tradition. Parliament has supreme responsibility for enacting and changing our laws. Therefore, while we are in accord with the Convention and have signed and ratified it, because Parliament is supreme we do not believe that it is right to put it into legislation.[43]

In December 1996 the Labour Party issued a consultation paper entitled *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law*. The paper sets out the now familiar arguments in favour of incorporation, including the cost and difficulty involved in obtaining judgements in Strasbourg and the potentially damaging effects on Britain's international standing. It also puts forward ideas on the preservation of parliamentary sovereignty by leaving it to the Government of the day and to Parliament to decide on the action which should be taken in response to a judicial declaration of breach. The paper also made detailed proposals for new machinery to scrutinise the workings of the proposed legislation and the application of the ECHR to the UK.[44]

The new Government has announced that it will introduce legislation to incorporate the European Convention on Human Rights in the present session of Parliament. This was welcomed by the Leader of the Liberal Democrats who pointed out that it had long featured in Liberal Democrat proposals.[45] The former Attorney General, Sir Nicholas Lyall MP, speaking from the Conservative back benches, pointed out that opinion on the issue was divided in his own party and said that he personally was not opposed in principle to

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[42] ibid, 1754.

[43] HL Deb, 19 November 1993, c714

[44] Jack Straw MP and Paul Boateng MP, *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law*, December 1996.

[45] HC Debates, 14 May 1997, c72.

incorporation. However, he warned the House that "real dangers must be addressed and real questions must be answered before we incorporate the convention in our domestic law".[46]

It is not the purpose of the present paper to examine the forms which UK legislation on incorporation might take. However, it is already apparent from the debates on Lord Lester's bills, from the Labour Party document and a similar one produced by the Constitution Unit,[47] and from the literature on the subject, that there will be a number of areas for debate and clarification. In particular:

- how much of the text of the Convention and protocols should be incorporated?

- how should permissable derogations be dealt with?

- should the courts have the power to strike down an Act of Parliament?

- should Parliament retain the right to over-ride the ECHR in any circumstances?

- what parliamentary machinery is needed to scrutinise new legislation from the perspective of the ECHR?[48]

- should there be a Human Rights Commission - and if, so how would it relate to existing commissions in related areas (eg racial equality, equal opportunities)?

- what provision should there be for legal aid in ECHR cases?

- in what circumstances would cases still be taken to Strasbourg?

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[46] HC Deb, 16 May 1997, c300 and c303.

[47] The Constitution Unit, *Human Rights Legislation*, 1996

[48] For a full academic treatment of this issue see D Kinley, *The European Convention on Human Rights: Compliance without Incorporation*, 1993. This study proposes a system of enhanced pre-legislative scrutiny as a potential alternative to incorporation, but the same mechanisms could also be combined with incorporation, as most recent advocates have assumed would be necessary.

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