

HUMAN RIGHTS ACT -- LEGAL PATHWAYS

I am asked to express an opinion on 7 questions. I shall endeavour to present a concise answer to each at the end of this paper. In order to do so, it is desirable to consider a number of topics. The purpose of this paper is to present as accurate as a possible a legal answer to the questions, unswayed by any personal views as to the desirability or otherwise of the Human Rights Act. It is written with a view to a non-lawyer as well as a lawyer readership.

The 7 questions are:-

- (1) What is the legal status of the Human Rights Act and European Convention on Human Rights?
- (2) Are the European Convention on Human Rights and European Union inextricably linked?
- (3) What, if any, is the impact of the European Convention on Human Rights on the British constitution?
- (4) Is it possible for Parliament to withdraw from the European Convention on Human Rights, establish new reservations or derogations, or include statutory pointers to its domestic interpretation/application?
- (5) Is Parliament able to enact a 2nd Bill of Rights which could overreach the European Convention on Human Rights?
- (6) If a 2nd Bill of Rights were enacted, what would happen to the Human Rights Act and the European Convention on Human Rights?
- (7) Is it possible to entrench a 2nd Bill of Rights, and, if so, how?

The British constitution -- the traditional view

The supremacy of Parliament

The classic traditional exposition of the British constitution is that contained in "The Law of the Constitution" by A V Dicey (1885). He considered its two fundamental principles to be the supremacy of Parliament and the rule of law; and, as between these two, the former overrode the latter. In other words, an Act of Parliament should always be enforced by judges, even if it appears to override some principle, for instance of individual freedom, which the courts would normally apply. He wrote:-

The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions

This approach was memorably characterised by Professor Craig as amounting to the proposition that, if it wished to do so, Parliament could legislate that it be a crime to smoke in the streets of Paris. The theory is also expressed by the often heard maxim: no Parliament can bind its successors.

Until very recently, the doctrine of parliamentary supremacy continued to be regarded as absolute and inviolable. In 1974 Lord Simon said in *Pickin. Board of British Rail* [1974] AC 765: "the courts of this country have no power to declare enacted law to be invalid" (at p.798).

The effect of treaties

Treaties were not regarded as a source of English law. They were agreements between the British government and a foreign government. They were made by way of an exercise of the royal prerogative. No parliamentary approval was required for a government to make a treaty. But neither did a treaty, when made, alter English law.

The conventional view is stated in de Smith's "Constitutional and Administrative Law thus¹:-

Whereas in a number of legal systems (for example, the United States of America, West Germany) a treaty is self-executing -- i.e. it becomes part of the municipal law of the land, as soon as it is finally concluded -- this is not the rule in United Kingdom law. With few exceptions, internationally binding obligations still need to be given legislative effect if they are to be enforced as law by the courts of this country.

This may be regarded as a facet of the sovereignty of Parliament, since treaties can be made by the Crown, acting through ministers, without Parliamentary approval.

The European Convention on Human Rights

The Council of Europe was created in May 1949 in response to the inspiration of, amongst others, Winston Churchill. Its principal organs are a Committee of Ministers, on which each member state has a representative, and a Parliamentary Assembly, composed of representatives chosen by the parliament of each member state. The aims of the Council of Europe were heavily influenced by the determination to avoid any repetition of the Nazi episode, and so the protection of human rights featured prominently in its initial agenda.

On 4 November 1950 the then 15 member states of the Council of Europe signed the document whose full title is The Convention for the Protection of Human Rights and Fundamental Freedoms. It entered into force on 3 September 1953. After a number of recitals, its critical words appear thus:-

The Governments signatory hereto ...

¹ 5th ed p.152, citing *The Parlement Belge* (1879) 4 PD 129 at p.154

Have agreed as follows:

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

Thus, it is, in form, a treaty (hereinafter the "Convention treaty"). . The United Kingdom was one of the original signatories.

Prior to the entering into force of the Convention, a First Protocol had been signed on 20 March 1952, the effect of which was to add three further rights. These were a right to the enjoyment of private property, a right to respect for parents' wishes in respect of education, and a duty to hold free elections with secret ballots. These rights had proved too controversial to be agreed at the time of the drafting of the original Convention.

The original intentions of the drafters of the Convention

The intentions of the drafters of the Convention are of some interest, and, arguably, direct importance, to the questions with which this paper is concerned.

Considerable light on this topic has been shed by a recent learned article by Mr D Nicol² in the journal *Public Law*³. His analysis of the *travaux preparatoires* reveal that there were two very different schools of thought. The State of the Council of Europe had declared as one of the aim of the Council was the achievement of greater unity between its members and that one of the ways by which that aim was to be pursued was by,

the maintenance and further realisation of human rights and fundamental freedoms

Therefore, it was a given that the Council should promulgate a document of some form towards the achievement of that objective. But there was no consensus as to how this was to be done.

The British and some other negotiators saw the exercise as being concerned to assure European citizens that the terrors of totalitarian regimes should never again overwhelm them. Since all the signatories were free, parliamentary democracies, the aim was, as they saw it, essentially static -- to preserve the status quo, to prevent any slipping back into fascism or any encroachment of totalitarian communism. To them the requisite list of rights to be protected would be a relatively short one, and would contain only what might be called political rights. The minimalist approach was summarised thus by the British delegate, Mr Ungoed-Thomas, who became successively Solicitor-General and a Chancery Division judge:-

It is no part of our purpose to interfere with the different ideas of different countries, or even different internal arrangements of those countries, not even with the cases of injustice that might occur within these countries It is of the utmost importance that we

² Reader in law, London Metropolitan University

³ [2005] PL 152

*should confine ourselves to the essential rights to secure that the member states of the Council of Europe remain democratic states.*⁴

At the other end of the spectrum were negotiators who were keen to establish rights which might not yet exist, or, at any rate, not exist as fully as they hoped. On the list of such negotiators were economic and social rights, going as far as a greater equality of wealth. Others wished to recognise the rights of women, or of minorities. Such negotiators wanted a Convention which would be a dynamic, living instrument, rather than a static inoculation against a return of totalitarianism.

This difference of approach led the minimalist school to seek far more precisely drafted rights than the maximalist school, who would have preferred a mere "enumeration" of general principles. This was not, of course, because the maximalists wanted a vagueness which would facilitate evasion: it was because they were happy for the elaboration of the general principles to be in the hands of a court. The outcome of this debate was a victory for the precise definers. One can illustrate this by a comparison of the European Convention on Human Rights with the Universal Declaration of Human Rights, which had been adopted in 1948 by the General Assembly of the United Nations. Take, for instance, their respective provisions on the right to liberty of the person. Art. 9 of the Universal Declaration of Human Rights starkly states:

No one shall be subjected to arbitrary arrest, detention or exile.

By contrast, art.5 of the European Convention on Human Rights goes into this degree of detail:-

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a. the lawful detention of a person after conviction by a competent court;*
- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
- c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence of fleeing after having done so;*
- d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
- e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
- f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country of a person against whom action is being taken with a view to deportation or extradition.*

⁴ Travaux préparatoire II p.60-62, quoted by D Nicol at [2005] PL 157-8

The victory of the minimalists in securing precise definition rather than mere enumeration led the maximalists to push strongly for an obligation to accept the decisions of a court, to which there would be a right of petition by an individual citizen. This was a very controversial idea. The UK considered that since Western Europe already enjoyed human rights, all that was needed was an organisation to take action if political changes in a country threatened those rights. The eventual compromise was that a court would be established, but it would be optional whether a state accepted its jurisdiction, and optional whether a state permitted individual petition.

Reservations, derogations and denunciations

A reservation in international law is a statement made by a country when acceding to a treaty whereby the country excludes or modifies the effect of part of its provisions in relation to that country. Article 57 of the Convention treaty expressly provides that a state may make a reservation when signing the treaty, or when depositing an instrument of ratification. The UK accepted the Convention treaty without qualification. In the case of the First Protocol, however, it made one reservation: this was in respect of the right of parents to education for their children in accordance with their religious convictions, stating that the UK accepted this only in so far as it was compatible with efficient teaching and the avoidance of unreasonable public expenditure.

Sections 1(2) and 15 of the Human Rights Act create, on one reading, the impression that a British Minister can make fresh reservations. That is incorrect. It is now too late for the UK to make further reservations to the Convention as it stands. In the event of a new treaty by way of a protocol, amending or adding to the present Convention, a reservation would be possible, unless the terms of that protocol excluded such; but, of course, it would also be possible of any present Convention country not to accede to a future proposed protocol at all..

A derogation is a facility provided within a treaty for a signatory state at a subsequent date to be released from part of its provisions. The Convention treaty made provision for signatory states in certain circumstances to step aside from the obligations thereunder. Therefore, it is not too late for the UK to achieve relief from parts of the Convention by use of derogation. However, the Convention's "derogation" provision was to apply in only special circumstances. Article 15 of the Convention states:-

1. *In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*
2. *No derogations from Article 2 [right to life] , except in respect of deaths resulting from lawful acts of war, or from Articles 3 [torture and inhuman punishment] , 4 (paragraph 1)[slavery] and 7 [retrospective criminal legislation] shall be made under this provision*

Therefore, the circumstances in which a derogation is permitted are quite circumscribed. The British government, however, invoked Article 15 in relation to the troubles in Northern Ireland. It did so after the European Court of Human Rights had held that it had

violated the rights of terrorist suspects⁵. A challenge to the derogation was unsuccessful.

By sections 1 and 14 Human Rights Act a Secretary of State is empowered to make derogation orders. In *A v Home Secretary* [2005] 2 AC 68 it was conceded by the government that this power could be exercised only in the same circumstances as Article 15.

By Article 16 it is provided that nothing in Articles 10, 11 or 14 shall be regarded as preventing states imposing restrictions on the political activity of aliens. This provision might be of use in relation to foreigners suspected of terrorist sympathies, but seems not to have been relied upon to date.

International law does not recognise a right for one signatory state to a treaty unilaterally to withdraw from a treaty, in the absence for a provision in the treaty permitting withdrawal. In the case of the Convention treaty there is such a provision. By what is now Article 58 a contracting state may "denounce" the Convention after the expiry of 5 years from the date when it became a signatory. Six months prior notice of intention so to do must be given to the Secretary General of the Council of Europe. Such a "denunciation" does not relieve a state from an obligation in respect of any violation of Convention rights prior to the date when the denunciation became effective.

The British attitude to the outcome of the Convention debates

Whatever the detailed textual outcome of the debates on the Convention, the widespread impression in Britain was that breaches of the Convention would be rare and that its scope was limited. Lord Hoffmann, who enjoys a reputation as a keen defender of human rights, speaking extra-judicially, put it thus:-

*When we joined, indeed, took the lead in the negotiation of the European Convention, it was not because we thought it would affect our own law, but because we thought it right to set an example for others and to ensure that all the member states respected those basic human rights which were not culturally determined but reflected our common humanity.*⁶

In similar vein Michael Howard MP in the House of Commons, after the Strasbourg court's judgment in the Thompson and Venables case, complained that anybody who had signed the Convention in the wake of the horrors of the Second World War would have reacted with utter disbelief at the Court's insatiable compulsion to intervene.

Recent academic research has confirmed that official thinking in Britain at the time of entering the Convention did, indeed, see it as instrument of limited application⁷. At a

⁵ *Brogan v UK* 11 EHRR 117

⁶ "Human Rights and the House of Lords" (1999) 62 MLR 159

⁷ Elizabeth Wicks "The UK Government's Perceptions of the ECHR at the Time of Entry" [2000] PL 438. Her conclusions were confirmed by thorough chronological surveys by Mr Brian Simpson published in "Human

ministerial meeting in October 1950 the Attorney-General, Sir Hartley Shawcross, said,

*These Conventions were, in essence, statements of the general principles of human rights in a democratic community, in contrast with their suppression under totalitarian government.*⁸

Mr Ungood-Thomas, a delegate who was then a Labour MP and who has already been quoted above, said,

*What we are concerned with is not every case of injustice which happens in a particular country, but with the question whether a country is ceasing to be democratic.*⁹

That point of view today appears surprising, since it is now recognised that very frequently human rights issues arise when there is a conflict between an individual and the majority; and any enforceable human rights' treaty is liable to restrict the scope of the majority to legislate in accordance with its wishes. manner thus the protection of Convention rights.

A more far-sighted delegate was a young Labour MP who voted against the Consultative Commission's report. This was Mr Will Nally MP, who opposed the Convention precisely because he forecast that it would be "just as much at the service of democracy's enemies as of its friends".

Several other Labour politicians also opposed the Convention. The Chancellor of the Exchequer argued in a Cabinet meeting against Britain acceding to it: he feared it would interfere with the "economic planning" he wanted. The Lord Chancellor, Lord Jowitt, was also firmly opposed. In his case it was not because he feared interference with radical socialist economic policies but on grounds which have a far more contemporary ring today. He saw its wording as so vague and woolly as to be capable of meaning almost anything, and foresaw that it might be interpreted to mean that it would compel Britain to alter its laws. As an examples of the latter he cited the detention by US forces in Britain of their own servicemen, and the fact that an outside body would become the judge of whether an emergency was sufficiently serious to justify emergency provisions. In short, he thought the Convention could "jeopardise our whole system of law, which we have laboriously built up over the centuries".¹⁰

By contrast the Conservative Party at the time was apparently enthusiastic about these developments at the Council of Europe. Certainly the Leader of the Opposition was. Churchill had been a great inspirer of the Council of Europe, and Attlee feared his criticism if the Labour government rejected the Convention. Attlee wrote in his memoirs that Churchill,

Rights and the End of Empire" (OUP 2001).

⁹ Quoted by E Wicks at p.442

¹⁰ Quoted by E Wicks at p.445-6

.... appeared at the Assembly, spoke with great enthusiasm, encouraging the Continentals to expect a wide measure of participation by Britain. Returning to Westminster, he attacked the Labour Government for dragging its feet instead of marching forward boldly.¹¹

Accordingly, the Labour Government seems to have considered that for domestic political reasons it must not reject the Convention. They were unalterably opposed to jurisdiction of the Strasbourg Court over Britain and to any right of individual petition there for British residents. They tried, but failed, to have these provisions deleted completely. However, having succeeded in making them optional, they regarded the Convention as acceptable. Most members of the government felt that in practice the Convention would prove diplomatic hot air, and would never have any direct impact on the internal affairs of Britain. The British government, of course, chose not to accept the jurisdiction of the Court.

The UK's decision to accept the Strasbourg Court

In 1965 Harold Wilson's Labour Government decided to change their British policy towards the Strasbourg Court and to accept its jurisdiction over individual complaints. Up to that time there had been very few cases taken to the Court, and it was easy to hold the view that there would be few future cases and the acceptance of the Court would make very little difference. Both the President of the Strasbourg Court and the Secretary-General of the Council of Europe were strongly urging Britain to accept the Court. Even so, the Home Secretary, Sir Frank Soskice had doubts about the wisdom of the proposal:-

The Convention itself recognises that restrictions of certain rights may be admissible in certain circumstances, and these can only be judged on political considerations. If we are to avoid grave embarrassment I am convinced that we should keep the utmost flexibility in defending ourselves against individual petitions ...¹²

The majority view amongst senior ministers, however, was that there was little to lose and political credit to gain. The Lord Chancellor, Lord Gardiner, wrote:

I do think that this would cost us nothing and would show that a Labour Government is not anti-Europe as such ...¹³

Activists versus Self-restrainers in the Strasbourg Court

The divergence of approach between minimalists and maximalists, which had been a feature of the debates at the time of drafting the Convention, reappeared in early judgments of judges sitting in the European Court of Human Rights. One school of judges favoured an activist court, which would develop human rights in Europe in line with evolution

¹¹ C R Attlee "As it Happened" (1954) p.173

¹² Letter from Home Secretary in Foreign Office files, quoted by E Wicks at [2000] PL 453

¹³ Letter to Foreign Secretary quoted by E Wicks at [2000] PL 454

