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 thus[1]:-

> *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 ...

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[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 Nicol[2] 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

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[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.*

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[4] Travaux preparatoire 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 suspects[5]. 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 application[7]. At a

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[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 Ungoed-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,

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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 thew British policy towards the Strasbourg Court and to accept its jurisdiction over individual complaints. Up to that time there had been very 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

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[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

of thinking in European society. The other school considered that the court should restrain itself from going further than protection of the rights which would have been recognised by the drafters of the Convention.

Thus in 1975 in *Golder v UK*[14] the question arose whether the Article 6 right to a fair and public hearing in the determination of civil rights and obligations extended to a right of access to a court. Judges Verdross, Zekia and Fitzmaurice held that if the contracting parties had intended to put a right to a court into the Convention they would have done so by clear words. Judge Fitzmaurice considered that whatever the arguments for creative statutory interpretation in a national court, it was inexcusable in the domain of an international treaty based on and governed by agreement between states. But the majority of 6 judges, whilst acknowledging that there was no express mention of a right to a court, held that they could "read in"such a right to ensure respect for the rule of law.

A similar divergence of approach was found three years in *Tyrer v UK*[15], although by now Judge Fitzmaurice found himself in a minority of one. The case concerned a sentence of birching passed by an Isle of Man Juvenile Court. The case followed an unusual course in that the European Commission of Human Rights, which at that time managed procedural aspects of the Court's work, insisted that the case proceed to, and be considered by, the full Court, even though Tyrer himself wished to withdraw it and took no part in the hearing before the Court. The majority of the Court held that, although Tyrer suffered no severe or long-lasting physical effects, his punishment amounted to "inhuman or degrading" punishment, and hence was a breach of article 3 of the Convention. They considered that the Convention was a living instrument to be interpreted in the light of present-day conditions. By contrast, Judge Fitzmaurice considered that the article 3 had not been intended as a vehicle for penal reform.

This divergence of judicial approach is, of course, reminiscent of the debate between conservative and liberal jurists in the United States of America, where far more attention has paid to the arguments for the rival legal philosophies. Many English Conservatives will sympathise with the finely argued advocacy of judicial restraint of the American Judge Learned Hand. He favoured such restraint because "it would be most irksome to be ruled by a bevy of Platonic Guardians", not least because he would "miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs"[16].

By the early 1980s the judicial philosophy which regarded the Convention as a living instrument capable of different meanings at different periods of time had become firmly established as part of the prevailing orthodoxy of Strasbourg jurisprudence. From the point of view of many Britons it has been this victory of the activist judicial philosophy which has been more responsible than any other single factor for the Convention and now the Human Rights Act becoming controversial.

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[14] (1975) 1 EHRR 524

[15] (1978) 2 EHRR 1

[16] Lectures at the Harvard Law School "The Bill of Rights" (1958)

The changes made by Protocol 11

The British decision in 1965 to accept the jurisdiction of the Court was made for a limited period only. There appears to have been a serious debate during the premiership of Edward Heath whether the acceptance should be renewed. Considerable pressure was brought from supporters of "civil liberties" to retain the Court's jurisdiction. This was done again for a limited period only. Whilst the provisions of the original Convention Treaty were still in place, it remained possible for a signatory State to decide not to renew its acceptance of the Court's jurisdiction. But this position changed when a revision to the Treaty called Protocol 11 came into force.

A consequence is that it is no longer an option for the UK to remain adherent to the Convention Treaty whilst excluding the jurisdiction of the Strasbourg Court. Therefore, those who have suggested, as Lord Hoffmann has (see below), that Britain should rely on its own judges to interpret the Convention, and should end the jurisdiction of the European Court of Human Rights, are, by implication advocating the withdrawal of the UK from the Convention Treaty.

The Human Rights Act

Following the making of the European Convention on Human Rights there were, broadly speaking, two ways in which a member state could discharge its treaty obligation to secure the rights and freedoms defined in it. One method, which was adopted in a number of continental countries, was to enact the provisions of the Convention into national law with an enhanced status, such that in the event of any conflict between the Convention and another national law, the Convention would prevail. This is frequently referred to as "entrenching" the Convention. The other method was on a case by case basis to alter a specific national law or procedure if and when non-compliance with the Convention was found by the European Court of Human Rights.

The UK chose not to entrench the Convention. It would probably be an overstatement to say that Britain consciously chose the second method. As has been shown above, at the outset it was considered improbable that Britain would ever be in breach of the Convention. In the 1950s there was no precedent, such as the European Communities Act 1972 later provided, for the decisions of any international court to be given direct effect in Britain. Moreover, the doctrine of parliamentary supremacy, certainly as then understood, would have been considered to exclude any possibility of future acts of Parliament having to be set aside if considered by any court, whether international or domestic, to be in conflict with a provision in the Convention.

The canon of interpretation

The furthest that Britain went prior to 1998 was through action of the judiciary rather than the political establishment. This was by the development of a canon of interpretation of statutes that there was a presumption that Parliament intended to comply with its treaty obligation to comply with the Convention. This was little more than an extension of a long-standing principle in the interpretation of statutes that Parliament would be presumed, in the

absence of a contrary indication, to be legislating in accordance with any treaty obligation[17].

Dicey recognised the correctness of such an approach:-

> *... when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, [the judges] will presume that Parliament did not intend to violate the ordinary rules of morality, or the principles of international law, and will, therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and of international morality*[18]

From there it was just one short step for judges to operate a presumption that Parliament intended to comply with Convention obligations. However, the scope of such presumptions should not be exaggerated. They are part only of a set of policies whose aim to ascertain the true meaning of a statute. In simple terms they come into play only where a statute is ambiguous in the sense that its language could support two different meanings. It is those situations, but, broadly speaking only in those situations, that the presumption of Convention compliance operated.

The nature of the Human Rights Act

The frequency with which it has been claimed that the Human Rights Act made the Convention part of English law might lead the uninformed observer to assume that it had entrenched the Convention in the above-discussed sense of establishing the Convention as superior document, by reason of which an ordinary act of Parliament might be set aside for non-compliance. In fact, it did not do this. Its purpose was to give a greater prominence to the Convention without entrenching it. Even if entrenchment could in some form be reconciled with the doctrine of parliamentary supremacy, as a matter of policy the Labour government did not wish to go down that path.

Granted that, as been mentioned above, it was already part of English practice to construe an act of Parliament, if possible, so as to be Convention compliant, it was wondered by many lawyers what more, short of entrenchment, could be done to "incorporate" the Convention into English law. In the event a Human Rights Bill was drafted with some ingenuity which achieved the aim of giving a new prominence to the Convention by five distinct measures:-

(1) The rule of compatible construction and effect in section 3, which states that, so far as possible, UK legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) The declaration of incompatibility provisions in section 4, which enables the High Court to declare a statute to be incompatible with Convention rights.

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[17] See, e.g. *R v Home Secretary ex p Brind* [1991] AC 696

[18] "Law of the Constitution" p.60

(3) The "Henry VIII" clause empowering ministers by executive order to amend any Act of Parliament so as to remove the ground for a declaration of incompatibility of a domestic court or for a finding of Convention breach by the European Court of Human Rights.

(4) The provision in section 6 that it shall be unlawful for a public authority to act in a manner which is non-compliant with the Convention, and the liability of authorities to pay damages for breach of this requirement.

(5) The requirement in section 19 for a Minister, when introducing a Bill into Parliament to make a statement as to whether, or not, he believes the Bill to be compliant with the Convention.

The Act requires account to be taken of decisions of the institutions of the Council of Europe. It provides by section 2(1):-

> *A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any:-*
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> > *(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights.*

Similar account is to be taken also of opinions and decisions of the Commission of Human Rights and the Committee of Ministers in relation to the Convention.

This falls short of conferring on them the binding effect of decisions made by the European Court of Justice on European Union law. Therefore, in this respect, too, the Human Rights Act can be regarded as something of a compromise. It might, in theory, be possible, for English judges to use the slight leeway allowed by s.2(1) to reject activist decisions of the Strasbourg Court in favour of a more self-restrained jurisprudence. But even if such a course is in theory permissible, the English judges have shown no sign of recognising it, or at any rate, no inclination to adopt it.

A limited exception to that statement may exist in the case of Lord Hoffmann who in a lecture at the Inner Temple in 2002 advocated the withdrawal of British acceptance of the European Court of Human Rights. Having roundly condemned the Strasbourg court's decision in *Osman v UK*, he recalled that the title of the Labour Government's white paper on the Human Rights Act had been "Bringing Rights Home", and suggested that the aim of bringing rights home would be completed by allowing the English courts to interpret the Convention unfettered by a non-domestic court.

It may be observed that a person who welcomes and supports the Convention, with or without the activist judicial philosophy which has become the orthodoxy of the Court, may not necessarily support the Human Rights Act. For, whilst the four above-mentioned measures amount to an ingenious route to "incorporation" without entrenchment, they are each open to a degree of criticism. These four measures are so central to the questions with which this paper is concerned that each merits more detailed examination.

(1) The rule of compatible construction and effect

Section 3(1) states:-

> *So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*

On one view this merely restates the existing canon of interpretation, namely the presumption that Parliament intended to abide by the treaty obligation to comply with the Convention. But if that is all it means, why enact it? Why, moreover, describe it, as Lord Irvine, the Act's pre-eminent author has done, as " a new and powerful tool of interpretation"[19]? Therefore, an alternative view has been that it enables a court to disregard the actual language of a statute which is considered to by non-compliant with the Convention.

In a series of cases the House of Lords has grappled with the question how far the courts may go in giving statutes meanings which do not appear on their face in order to reconcile them with rights which either English judges or the Strasbourg Court hold to be conferred by the Convention. In *R. v.A (No.2)* [2002] 1 AC 45 the House of Lords considered s.41 of the Youth Justice and Criminal Evidence Act 1999 which completely prohibited the complainant in a rape trial being cross-examined about her previous sexual conduct, even with the leave of the court, other than in one unusual situation. However, the members of the House of Lords hearing the appeal considered this it to be an infringement of the right to a fair trial under article 6 since it purported to require a judge to exclude evidence even when its exclusion endangered a fair trial. Therefore, they held that s.41 could not mean what it purported to say, and, using section 3 of the Human Rights Act, construed it so as to allow cross-examination of a complainant where the judge considered such in the interests of justice. This clearly had not been Parliament's intention. Lord Steyn's justification was that the 1999 Act had not expressly stated that it was abridging an article 6 right. So the position now seemed to be that unless an Act stated in terms that it was limiting a Convention right, its wording, no matter how clear, would be disregarded if the court detected infringement of a Convention right.

This approach raised a number of eyebrows and in the next few decisions the House of Lords took a more restrained approach. In *re S (Minors) (Care order: Implementation of Care Plan)* [2002] 2 AC 291 Lord Nicholls, delivering the leading speech of a unanimous House, deplored courts amending, as opposed to merely, interpreting statutes. In *R (on the application of Anderson) v Home Secretary* [2003] 1 AC 837 the House of Lords was concerned with the Home Secretary's power to fix the tariff of life sentences under s.29 of the Criminal (Sentences) Act 1997. They considered that this power infringed article 6 of the Convention in a case where the Home Secretary fixed a tariff in excess of that recommended by the trial judge and the Lord Chief Justice. But they declined to use s.3 of the Human Rights Act to read into s.29 any restriction on the Home Secretary's discretion. Lord Steyn, who had been party to the decision in *R v A,* now held that to do so would be not interpretation, but interpolation.

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[19] Inaugural Irvine Human Rights lecture delivered at Durham Human Rights centre on 1st November 2002, published at [2003] PL 308.

The same restrained attitude was demonstrated again by the House of Lords in *Bellinger v Bellinger* [2003] 2 AC 467, in which the question was whether "Mrs Bellinger", a male-to-female transsexual, was validly married to Mr Bellinger. Section 11 of the Matrimonial Causes Act 1973 requires the parties to a valid marriage to be respectively male and female. There was clear earlier clear case-law that a person could not alter his or her gender for this purpose by undergoing gender re-assignment surgery. Despite being persuaded that this position in law infringed a transsexual's Convention rights, the House felt unable to hold that "Mrs Bellinger" was female within section 11, and declined to use section 3 of the Human Rights Act to stretch the section's interpretation.

Finally, the House gave full consideration to the two differing approaches in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. The case concerned the provision in the Rent Act by which a surviving spouse is entitled to succeed to the protected tenancy of a deceased spouse. The statute extends the meaning of spouse to include a person living with the deceased "as his or her wife or husband". The question was whether a homosexual partner could succeed to the tenancy under this provision. On the ordinary meaning of the words of the statute the answer had to be "No". However, all five members of the House considered that this would be to treat homosexual partners less favourably than heterosexual partners without any rational or fair ground for the distinction. The issue, then, was whether the meaning of the Rent Act could be stretched to embrace homosexual partners. Four members of the House held that it could. Lord Nicholls explained his approach thus:-

> *29. ... the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may non the less require the legislation to be given a different meaning. ...*
> *30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear....*
> ....
> *32. ... Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is possible, a court can modify the meaning, and hence the effect, of primary and secondary legislation.*

However, Lord Nicholls went on to say that the courts should not adopt a meaning inconsistent with a fundamental feature of a statute: if words are implied into an Act, they must "go with the grain of the legislation". Lord Steyn in the same case said that section 3 should be regarded as the prime remedial remedy in order to bring rights home. In an appendix to his opinion he listed 10 cases in which courts had used section 3 to give a new meaning to a statute, in order to achieve Convention compliance, and 10 other cases in which courts had felt unable to do so, and had accordingly made declarations of incompatibility.

Therefore, after a period in which the House of Lords was reluctant to interfere too blatantly with the original meaning of statutes, we have now reached a situation in which the

Human Rights Act can be seen to have had a radical effect on the way in which legislation will be interpreted. There may be a number of lawyers who will feel that there has proved to be some justification for the fears expressed on the passing of the Human Rights Act by Mr Francis Bennion, the author of the leading textbook on statutory interpretation, that section 3 would make the search for order increasingly difficult[20].

(2) The declaration of incompatibility

Section 4 of the Human Rights Act applies where a court determines whether or not a provision in primary legislation is compatible with a Convention right. Section 4(2) states:-

> *If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.*

Such a declaration may made only by the High Court, not by lower courts. As has already been mentioned, at the time of the *Ghaidan* decision there had been 10 such declarations.

The declaration is of no direct assistance to the litigant who is found to be the victim of the infringement of the Convention. The victim litigant still loses his case. The declaration of incompatibility is, thus, unique amongst remedies which an English court can grant in that it has no effect on the parties to the instant proceedings.

But the making of a declaration has profound significance for society at large. Its effect goes far beyond a mere formal statement of opinion from the judge or judges hearing the case. For the making of the declaration opens up an avenue for an accelerated change in domestic law.

(3) The Henry VIII clause

Once a declaration of incompatibility has been made, any minister of the crown has power under section 10(2) to make amendments to primary legislation by an order. The section 10 power may also be exercised in the event of the European Court of Human Rights in Strasbourg ruling that some provision in a British statute is inconsistent with Convention rights. It is expressly enacted that such orders may have retrospective effect[21].

Such orders are normally to require an affirmative resolution of both Houses of Parliament. But if the Minister declares that the matter is urgent, the order takes effect at once, without the need then or ever for any approval by Parliament[22]. It is a requirement that the Minister considers there to be compelling reasons for proceeding by this order route, but there appears to be no way in which either parliament or the courts can restrain a Minister who uses

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[20] "What interpretation is 'possible' under section 3(1) of the Human Rights Act 1998" article by Francis Bennion, former parliamentary counsel, in [2000] PL 77

[21] Human Rights Act schedule 2 paragraph 1(1)(b)

[22] Human Rights Act schedule 2 paragraph 2

the order procedure without compelling reasons.

Accordingly, the Human Rights Act contains a new species of what public lawyers call a "Henry VIII clause" -- that is, a clause in an Act of Parliament which empowers some person or body other than Parliament to amend or repeal the Act. The origin of the expression was the Statute of Proclamations in 1539 which granted to the King the power to make proclamations which would have the same force as a properly enacted statute. Such clauses have caused concern to many commentators. For example, the Donoughmore Committee in 1932[23] advised that they should be used only in an emergency or in order to facilitate the bringing into operation of a statute which Parliament had passed.

In this instance, the Henry VIII clause is of the most far-ranging kind, because it applies not only to one specified Act, or even to all Acts extant at the date of its enactment, but it applies also to all future Acts of Parliament. So it is a prospective Henry VIII clause which may be used to fetter Parliament's future enactments. It follows that, so long as s.10 of the Human Rights Act remains on the statute book, the sovereignty of future parliaments is constrained.

The history of decisions of the Strasbourg Court over the last two decades contains many examples of decisions holding that a feature of a member state's laws, which had been considered unobjectionable, at any rate in human rights terms, in fact, infringed the Convention. It would be hard for anybody to predict what decisions might be made 20 years into the future. Therefore, it is impossible to predict what features of our present statute book, or what features of statutes enacted next year, may become liable at some more distant date to be altered by a mere ministerial fiat. It is perfectly possible that such fiat would be used in a situation where the minister would be unable to command a majority in Parliament for the change.

One academic, who appears to hold strong general sympathy for the aims of the European Convention on Human Rights, has suggested that there should be a more mature recognition of the political nature of human rights decisions. Mr D Nicol, of the University of Westminster, has described the "one correct answer" paradigm of human rights adjudication as primitive. He has argued that a more advanced model would acknowledge that, whilst judges should fearlessly throw down challenges to legislators in defence of fundamental freedoms, the right of Parliament to reject the judges' ideas should be more frankly recognised. Accordingly, he has proposed repealing the s.10 fast-track method of law reform, permitting Parliament to debate s.4 declarations of incompatibility without the need for the government to take the initiative in proposing a change of law, encouraging Parliament to publish its reasons if and when it disagrees with a judicial declaration of incompatibility, and reframing s.3 to discourage "judicial vandalism".

Refreshing as those ideas for a recognition of the political nature of many human rights decisions may seem to some people, the adoption of the above set of proposals would do

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[23] Report of the Committee on Ministers' Powers ("Donoughmore Report") (Cmnd 4060, 1932)

nothing to eliminate the risk, in a situation where Parliament had[24], for full published reasons, disagreed with a judicial view that an English law infringed the Convention, of the Strasbourg court preferring the view of the English judge to that of the British Parliament. If that occurred, Britain would be under a treaty obligation to change its law.

(4) The exposure of public authorities to damages for acting in breach of the Convention

By s.6 Human Rights Act it is unlawful for a public authority to act in a manner infringing a person's Convention rights. Any victim, that is any person whose Convention rights are infringed by a public authority, is entitled to seek a remedy from the courts. This remedy can include an order for the payment of damages. A claim for such remedy can be brought up to ... years after the act of infringement.

(5) Ministerial statements of compliance

By s.19 Human Rights Act a Minister must before the second reading of a Bill make a statement either that in his view the provisions of the Bill are compatible with the Convention, or that the government wishes the House to proceed with the Bill, notwithstanding that he is unable to make such a statement.

The restrictions on devolved assemblies.

Whilst it is often remarked that the Human Rights Act leaves Parliament free to legislate incompatibly with the Convention, if it wishes, it is rarely observed that the same is not true of the Scottish Parliament, the Welsh Assembly or the Northern Ireland Assembly. In respect of all three of those devolved assemblies, the Convention is entrenched. In each case the competences of the assembly are so defined that it is outside the assembly's powers to make an enactment which does not comply with the European Convention on Human Rights. For example by s.29(2)(d) of the Scotland Act it is provided that an act is outside the competence of the Scottish Parliament if it is incompatible with any Convention right.

There is a similar provision in respect of measures of the Welsh Assembly by s. 94(6) of the new Government of Wales Act 2006, and a similar provision for the Northern Ireland Assembly by s. 6 of the Northern Ireland Act 1998.

A consequence of this arrangement would seem to be that if a Scottish court makes a declaration of incompatibility under s.4 Human Rights Act in respect of legislation passed by the Scottish Parliament, the statute is immediately unenforceable and void. In the same way, when the Welsh Assembly uses its new powers to enact legislation for Wales, if the High Court makes a declaration of incompatibility the legislation will be of no effect. Quite apart from the procedure under s.4, there is an avenue for challenge to the lawfulness of Scottish legislation to the Privy Council, and on a number of occasions there have been just such challenges based on alleged incompatibility with the Convention.

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[24] [2006] PL 743 "Law and Politics after the Human Rights Act" D. Nicol

European Union

The founding treaties of the European Communities were silent as to human rights and fundamental freedoms. In so far as they touched on rights of the individual, for instance in respect of free movement of peoples, the purpose of the original treaties was to confer on citizens of Community countries rights which were particular to Community members, rather than to declare any form of universal rights. For many years it was European orthodoxy that human rights was the subject of another European organisation, namely the Council of Europe, just as, say, defence was the subject of the Western European Union, rather than the European Communities.

However, the renewed momentum of the European Communities in the late 1980s led to proposals for human rights to become a focus of the European Community. In part, the argument was that if the Community concerned itself with something valued by European peoples, such as human rights, the Community would become more popular. An early indication of this new emphasis was the provision in article 7 of the Maastricht treaty providing for the suspension of a member state from membership for "serious and persistent breach" of the principle of respect for human rights and fundamental freedoms.

In 1996 there was a proposal that the European Union, as the organisation was now called following the Treaty on European Union, should accede to the European Convention on Human Rights. However, the European Court of Justice held that the Union had no jurisdiction to accede to the Convention.

In June 1999 the European Council (i.e. the heads of government) meeting in Cologne agreed to draw up a Charter of fundamental rights "in order to make their overriding importance and relevance more visible to the Union's citizens". No decision was taken then as to whether the Charter should be integrated into the Treaties so as to become binding on all member states. Any such development would require unanimity, as it would involve an amendment to the treaties. A Convention, chaired by Dr Roman Herzog was established to draft the Charter.

In December 2000 the European Council meeting in Nice agreed that the Charter should not be binding. But it has subsequently been cited on different occasions by all the Advocates-General of the European Court of Justice, by the European Court of Human Rights[25], and by the English High Court[26].

In December 2001 the European Council meeting at Laeken set up a Convention on the Future of Europe under the chairmanship of Valery Giscard d'Estaing Amongst the tasks entrusted to this Convention were whether the Charter of Fundamental Rights should be included in the text of a European constitution, and whether the European Union should be authorised to accede to the European Convention on Human Rights. The Convention established 11 working

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[25] *Goodwin v UK* (2002) 35 EHRR 18 at [58] and [100]

[26] *R (on application of Robertson) v Wakefield MDC* [2002] QB 1052 at 1070; *R (on application of Howard League for Prison Reform) v Secretary of State* [2003] 1 FLR 484 at [45] -[68]

groups, of which one was charged with the topic "Incorporation of the Charter/accession to the European Convention on Human Rights". The Convention decided to reproduce the full text of the Charter in the Constitution, including a preamble. The Convention also decided to add a sentence stating that the Charter was to be interpreted by the courts of the Union and member states with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter. These explanations had been published in October 2000. This may be viewed as a limited attempt to pre-empt decisions on the meaning of the Charter.

The d'Estaing Convention also reopened the issue of the EU acceding to the European Convention on Human Rights. Art 1-7(2) of the Constitution stated that the EU should seek accession to the ECHR. Art III-227 stated that the Council, acting unanimously, must authorise the opening and closing of negotiations. An argument in favour of such accession is that it would introduce an element of external supervision over the EU and European Court of Justice. An argument against is the resulting confusion of appeals and references between the two supernational courts, in view of the number of potential cases which might raise one issue relevant to the European Convention on Human Rights and another issue turning on the interpretation of EU treaties or, if it were adopted, the European Constitution.

Meanwhile the idea that human rights ideas are relevant to EU law has been steadily gaining ground in the European Court of Justice. In *Roquete Freres v Directeur General de la Concurrence des fraudes* [2003] 4 CMLR 1 at [25] the ECJ held that national rules falling within the scope of Community Law must be interpreted and applied in accordance with the fundamental rights upheld by the Court. In *Wachauf v Federal Republic of Germany* the ECJ held that the general principle of respect for fundamental rights binds member states both when implementing Community law and when relying on a derogation for which Community law provides.

New thinking on the supremacy of Parliament

In the course of his opinion in *Jackson v Attorney-General* [2006] 1 AC 262, the fox-hunting challenge concerning the Parliament Act 1949, Lord Steyn said:

> *... the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998 created a new legal order. One must not assimilate the ECHR with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom.* (para 102)

That is a radical statement[27]. Some other judicial utterances in recent years have also suggested

[27] Lord Steyn has been somewhat inconsistent. In *Anderson* he explained why he would not use s.3 to produce a Convention-compliant interpretation by stating that "the supremacy of Parliament is the paramount principle of our constitution" (at para 39) His *Anderson* stance, in turn, was inconsistent with his enthusiasm in *R vA* to use s.3 in a creative manner, on the theory that it was permissible to change the meaning of a statute so long

a reluctance to accept the doctrine of the supremacy of parliament in its traditional form. In *Jackson* Lord Hope said:-

> *Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute ... It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament, which Dicey derived from Coke and Blackstone, is being qualified.*
> (para 104)

At another point Lord Hope remarked that the fact of the House of Lords hearing the appeal indicated that the courts had a part in "defining the limits of parliamentary sovereignty"[28]. If all he meant was that the very nature of examining the question whether the Parliament Act 1949 had validly reduced the length of the House of Lords' delaying powers involved such definition, then the remark is unexceptional. But the adoption of the expression that the courts define limits of Parliament's sovereignty could be seen as a conscious challenge to the traditional doctrine.

Also of note are Lord Hope's remarks about the "rule of law". It was observed at the beginning of this paper that Dicey identified two principles of our constitution, namely Parliamentary supremacy and the rule of law, but, of the two, considered that Parliamentary supremacy overrode the rule of law: Lord Hope appears to suggest reversing that order of priority:-

> *The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based .....*
> (para 120)

In the context of Lord Hope's opinion in *Jackson* it may not be fanciful to imagine the argument being raised that Parliament itself has downgraded its sovereignty by the seemingly innocuous statement at the commencement of the Constitutional Reform Act 2005 that the Act would not affect the existing constitutional principle of the rule of law.

The *Jackson* case was not the first occasion on which senior judges had expressed doubts about the Dicey's doctrine of Parliamentary supremacy. In an article as long ago as 1995 Lord Woolf wrote:-

> *ultimately there are ... limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold.*[29]

In the same year Sedley LJ said extra-judicially:

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as Parliament had not expressly said that it intended to infringe a Convention right.

[28] para 107

[29] Lord Woolf "Droit Public English style" [1995] PL 57

We have today ... a new and still emerging constitutional paradigm, no longer Dicey's supreme Parliament ... but a bi-polar sovereignty of the Crown in Parliament and the Crown in the courts .....[30]

Against the knowledge of those views, it seems reasonable to perceive the same challenge to Dicey's principle in these dicta expressed judicially by Sedley LJ in his judgment in *R v Commissioner for Standards ex p Al-Fayed* [1998] 1 WLR 669 when he spoke of the relationship between the courts and Parliament as a mutuality of respect between two constitutional sovereignties.

Other judges, however, have continued to support the traditional Dicey doctrine. In *Jackson* Lord Bingham said:-

The bedrock of the British constitution is, and in 1911 was, the supremacy of the Crown in Parliament... Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. statutes, formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority

Lord Hutton is another law lord to have supported the traditional position, and, interestingly, he relied on the terms of the Human Rights Act itself as indicating that Parliament intended that Act to leave its supremacy untrammelled. Section 4(6) of the Human Rights Act states in terms that a declaration of incompatibility does not prevent a statute remaining in force; and s.6(3) excludes Parliament from the scope of the provisions affecting public "authorities", which makes it clear that Parliament is not acting unlawfully if it enacts a law which is incompatible with the European Convention on Human Rights.

A middle position has been taken by Laws LJ, a judge who has taken a great interest in public law. In *International Transport Roth v Secretary of State* [2003] QB 728 he spoke tantalisingly of the British system standing at "an intermediate stage between parliamentary supremacy and constitutional supremacy. However, his recent extra-judicial remarks confirm that which seems clear from two of his particular judgments, namely that he acknowledges the continuing supremacy of Parliament, and believes it to be qualified only to the extent that express words are required to modify both constitutional statutes and fundamental rights. In *Thoburn v Sunderland City Council* [2003] QB 151, the "metric martyrs" case, he formulated the theory that there are two levels of statute. He said:-

... the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental.... from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were ordinary statutes and constitutional statutes"
(para 62)

However, Laws LJ did not go so far as to assert that constitutional statutes necessarily overrode

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[30] "Human Rights: a twenty-first century agenda" [1995] PL 386 at 389

ordinary statutes. His only conclusion was to the possibility of implied repeal -- ordinary statutes can be impliedly repealed, whereas constitutional statutes cannot. He has earlier expressed a similar theory in *R v Lord Chancellor ex p Witham* [1998] QB 575:-

> *The common law does not generally speak in the language of constitutional rights, for the good reason that in the absence of any sovereign text, a written constitution which is logically and legally prior to the power of legislature, executive and judiciary alike, there is on the face of it no hierarchy of rights such that one of them is more entrenched than any other. ..... In the unwritten legal order of the British state, at a time when the common law continues to accord legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament.... General words will not suffice.*
> (at p.518C-F)

Lord Hoffmann offered a similar identical assessment in *R v Home Secretary ex p Simms* [2000] 2 AC 115:-

> *Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power... But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. ... In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. .*
> (at p. 131F-J)

The most probable reconciliation today of the very different emphasis in the dicta of, on the one hand, traditionalists, like Lords Bingham and Hutton, and, on the other hand, of constitutionalists, like Lords Hope and Steyn, may be considered to be the analysis offered by Laws LJ and Lord Hoffmann. Nonetheless, one cannot ignore the possibility that senior judges may seek in some future case, where the issue arises directly for decision, push the requirements for clear words if Convention rights are to be removed, to the point where such removal almost ceases to be possible.

Answers to the 7 Questions

With the benefit of the above explanations I now offer the following answers to the 7 questions posed.

(1) What is the legal status of the Human Rights Act and European Convention on Human Rights?

The European Convention on Human Rights is a treaty. As such it had no direct impact on English law. However, there has for many years been a principle of the interpretation of statutes that, in dealing with an apparent ambiguity, a court will lean, other things being equal, to an interpretation which does not involve conflict with the treaty obligation to respect Convention rights.

The Convention now has, by virtue of the Human Rights Act, relevance in respect of five specific measures introduced by that Act: (i) the s.3 principle of interpretation, which the House of Lords now regards as permitting the courts to modify the meaning of legislation; (ii) the s.4 power of the Court to grant declarations of incompatibility with Convention rights; (iii) the s.10 Henry VIII clause establishing the power to amend statutes by executive order so as to remove a ground for a declaration of incompatibility from a British court or for a finding of Convention infringement by the European Court of Human Rights; (iv) the liability of public authorities to pay damages for acting in breach of the Convention; (v) the requirement for a Ministerial statement in respect of every Bill as to its Convention compatibility.

The Human Rights Act is an Act of Parliament, which can be repealed or amended by Parliament at any time provided clear and express words are adopted to do so. It cannot be impliedly repealed, in whole or in part.

Provisions in Acts of Parliament, which are found by either a British court or the European Court of Human Rights to be incompatible with Convention rights, may be modified by the courts. But the courts will not modify a statute in this way so as to adopt a meaning inconsistent with a fundamental feature of the legislation.

In Scotland, Wales and Northern Ireland the Convention has a greater role. The Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly are all bound by the ECHR in the sense that they have no power to legislate in a manner inconsistent with Convention rights. Therefore, in Scotland the Convention is entrenched save in respect of matters which are reserved to the Westminster Parliament. And in Wales and Northern Ireland the Convention will come to have a position of similar significance as and when their assemblies acquire legislative competence.

(2) Are the European Convention on Human Rights and European Union inextricably linked?

No. The EU does accord a role in human rights by, (i) the European Court of Justice attaching weight to fundamental rights in interpretation of EU legislation; (ii) the EU's non-binding Charter which declares support for human rights in terms akin to, but not identical to, the ECHR; (iii) the power for a member state of the EU to be suspended from membership for serious and persistent breach of human rights. But there is no obligation on a member state either to entrench the ECHR or to accord it the prominence conferred by the Human Rights Act. By way of example, the Republic of Ireland has neither entrenched the Convention, nor enacted an equivalent to the Human Rights Act. Thus, it would be perfectly possible for the UK, consistent with EU membership, to return to its pre-1998 mode of honouring its treaty obligation in respect of Convention rights.

(3) What, if any, is the impact of the European Convention on Human Rights on the British constitution?

See answer to question 1.

(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?

It is not possible for the UK to make any new reservation from the Convention:

it is far too late to do so, as such would have had to be made before the Convention treaty was ratified. There is a limited right for the UK to make derogations from the Convention, but only on the limited grounds of war or public emergency threatening the life of the nation.

It is also too late for the UK to withdraw its acceptance of the jurisdiction of the European Court of Human Rights on individual petitions from the UK. Although originally the jurisdiction of the Court was optional, since the acceptance by the UK and all other member states of protocol 11 the Court has been an integral part of the Convention treaty: opting-out of the Court is not now possible.

On the other hand, it would be perfectly possible, and fully compatible with international law and the obligations of the Convention treaty, for the UK to exercise its right under article 58 of the treaty to withdraw. This would require only the giving of 6 months notice.

(5) Is Parliament able to enact a 2nd Bill of Rights which could overreach the European Convention on Human Rights?

In theory, yes. Parliament is supreme. Therefore, Parliament can, for instance, repeal the Human Rights Act and enact a slightly, or, indeed, wholly, different set of fundamental rights, and establish for such rights all five of the special features accorded to the ECHR by the Human Rights Act. However, such legislation would not affect the United Kingdom's treaty obligation to ensure Convention rights in the UK, nor the right of individual petition from Britain to the European Court of Human Rights.

There would be an extra complication in the case of Scotland, if it were wished to un-entrench the ECHR, since it might be contended that this would involve an interference by the Westminster Parliament with the devolution settlement. However, since the actual nature of the change would be the removal of a fetter on the competence of the Scottish Parliament -- i.e. the removal of the provision stating that the Scottish Parliament has no power to legislate contrary to the ECHR --. such a change could be presented as a further extension of devolution, There would to some extent be the same complication in the case of Wales and Northern Ireland, but also the same scope for presentation as an extension, rather than a curtailment, of the powers of the devolved assemblies.

(6) If a 2nd Bill of Rights were enacted, what would happen to the Human Rights Act and the European Convention on Human Rights?

This would depend entirely on how the 2nd Bill of Rights was framed. One can imagine inter alia the following models:-

(A) The Human Rights Act remains unaltered. The 2nd Bill of Rights merely add certain additional rights, to which are accorded broadly similar privileges to the 5 special measures for Convention rights in the Human Rights Act. Under this model the Human Rights Act and European Convention on Human Rights would not be affected at all.

(B) Having enacted a 2nd Bill of Rights, and accorded to the rights enshrined in it protection, possibly similar to that conferred by the Human Rights Act on Convention rights, the UK withdraws from the Convention treaty and repeals the Human Rights Act.

Under this model the Human Rights Act and European Convention on Human Rights cease to have any impact on the UK, save to the limited extent that the Convention, and its interpretation by the Strasbourg court influence the decisions of the European Court of Justice on EU law.

(C) The UK does not withdraw from the European Convention on Human Rights treaty. But the Westminster Parliament repeals the Human Rights Act in its present form, and enacts in its place a 2nd Bill of Rights. This 2nd Bill of Rights contains essentially all the Convention rights, but in some cases in expanded form -- for instance by elaboration of punishments which would, and of other punishments (e.g. parents smacking children with their hands) which would not, constitute degrading treatment. One can imagine that the 2nd Bill of Rights might not only eschew such unappealing features of the Human Rights Act as the Henry VIII clause, but might make a positive virtue of this course of action by declaring that all prospective Henry VIII clauses were contrary to the Bill of Rights.

(7) Is it possible to entrench a 2nd Bill of Rights, and, if so, how?

It is not possible, consistent with the doctrine of Parliamentary supremacy, to enshrine a 2nd Bill of Rights such that it is completely outside the power a future Parliament to alter it. It would, however, be possible to enact that all past statutes be construed such that any provisions in them which were incompatible with the Bill of Rights would cease to be of effect. This would need specific phraseology in relation to "constitutional" acts, such as the European Communities Act. It would also be possible to enact a strong presumption of interpretation that all future statutes be construed, if possible, such that any provisions in them which were incompatible with the Bill of Rights would be of no effect.

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