Abstract

The present study is an attempt to outline the changes and possible effects of the incorporation of the substantial rights guaranteed in the European Convention on Human Rights into the domestic law of the United Kingdom. This step has been described as one of the most important constitutional changes in the country for more than 300 years.[1] The measure led to some public speculation and controversy concerning the repercussions it could have on Britain's constitutional balance and at the same time considerably increased the public profile of human rights issues.

Chapter 1 will briefly look into the historical context of the Convention and the emergence of an international human rights movement after the Second World War. It will also describe and analyze why it took nearly fifty years before this development found its effective expression in the domestic laws of a country where the rulers and most of the citizens have for so long taken their civic liberties for granted that they had deemed it unnecessary to codify them.

The 1998 Human Rights Act brought the UK a step closer to constitutional models prevalent in most modern democratic nation states. It is one of the cornerstones of New Labour's programme to modernise the constitution of the United Kingdom. The second chapter introduces the main mechanisms of this legal instrument, discusses why these were chosen, and delineates possible consequences for the UK polity and its legal system(s).

Chapter 3 links the Human Rights Act with devolution in Scotland, the other major constitutional experiment Britain has seen over the past five years. It shows that the combined effects of the Human Rights Act and the 1998 Scotland Act worked to impose a human rights regime in Scotland different from the one in operation in the rest of the country. For Scotland the two Acts establish a body of solid constitutional law under which the Scottish Executive and Parliament have to work.

The fourth chapter looks into the emerging body of case law created by UK judges since the HRA became legally binding after October 2000 and offers some conclusions.

---

[1] According to Jack Straw, then Home Secretary and as such largely responsible for the measure. House of Commons Press Release, 18 May 1999.

1. Bringing Rights Home

When the British Labour Party came to power in a sweeping election victory in 1997, a prominent part of its campaign had been devoted to the subject of constitutional reform. Among a number of proposed major constitutional changes, its election manifesto – on the agenda were the devolution of limited legislative powers to Scotland, Wales and Northern Ireland, an end to hereditary peers in the House of Lords and a promise to look into the idea of proportional representation – included the promise to "bring rights home" by incorporating the 1951 European Convention on Human Rights (the Convention) into domestic law.[2]

The Convention is associated with the Council of Europe, an inter-governmental organisation founded by "like-minded" European nations[3] in 1949 with the aim to promote peace and democracy in Europe in order to overcome the horrors of the Second World War and establish a viable post-war order. The Convention was drawn up as an international treaty in 1950 intending to enforce legally "certain of the rights" stated in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations three years earlier.[4] The British government ratified the treaty in 1951 and it came into force two years later. Since then the UK has been legally bound to enforce and guarantee the rights in the Convention. Despite this obligation, successive British governments waited for nearly fifty years before incorporating parts of the Convention into domestic law, a step enabling British citizens to rely on Convention rights in British courts.

For New Labour the commitment to "bring rights home" was a central part of its constitutional reform programme and not surprisingly so, because it was one which was tied up with the so-called "Third Way", stressing the necessity of building a culture of rights and responsibilities. After all, the Convention is a document that not

---

[2] Cf. Jack Straw & Paul Boateng, *Bringing Rights Home. Labour's Plan to Incorporate the European Convention on Human Rights into United Kingdom Law* (Labour Party, 1996). See also Francesca Klug, *Values for a Godless Age. The Story of the UK's New Bill of Rights*, (Penguin: London, 2000) 158 - 63.

[3] The preamble of the Convention specifies: government of Europe which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of the law.

[4] Preamble to the Convention. See also, Klug, op. cit., p. 20.

only guarantees individual rights vis-à-vis the state, but also emphasizes the obligations people have towards their fellow citizens and the public at large.

1.1. Declaring human rights: Dignity, equality and community

As pointed out above, the 1951 Convention was an attempt to legally enforce parts of the "Universal Declaration of Human Rights" (UDHR), which had been proclaimed in 1948 by the General Assembly of the United Nations, and was as such a direct response to the horrors of the Second World War and the Holocaust.[5] Being a declaration the document did not have the force of law, but it soon became the yardstick by which the behaviour of states and their governments were judged and thus provided the foundation of the international human rights movement as it developed from there on. In international law this marked a decisive caesura because the limitations of nation-state sovereignty were acknowledged and a state's treatment of its citizens within its territorial boundaries became a legitimate concern of the international community.[6]

Taking up traditional western liberal values dating back to the Enlightenment, the makers of the UDHR sought to protect individual freedoms and liberty against possible encroachments of the state. In the document they produced, however, they also stressed individual responsibilities and gave expression to the insight that people live in communities and that harmonious social cohesion is based on rights and obligations. The declaration was propelled not only by the desire to protect individuals against dictatorship, but also by the desire to build a better world for all to live in; and the drafters of the UDHR believed that a largely neutral concept like freedom was an insufficient basis on which to create the peaceful and tolerant world they envisaged. The document is informed, as one writer has put it, by

> a sense of moral purpose for all humankind. […] The drafters of international human rights treaties have sought to establish a framework of ethical values driven not just by the ideals of liberty, autonomy and justice but also by such concepts as dignity, equality and community.[7]

---

[5] ibid., p. 94 - 98.

[6] Cf Paul Sieghart, *The Lawful Rights of Mankind*, (Oxford: Oxford University Press, 1986), pp. 32 - 33.

[7] Francesca Klug, "The Human Rights Act – a 'Third Way' or 'Third Wave' Bill of Rights", public lecture, King's College London on 27 March 2001.

The concepts of dignity, equality, and community are central to the idea of human rights as expressed in the Universal Declaration and the Convention and therefore deserve a brief explanation.[8]

Dignity is defined as the inner quality inherent in all human beings – "all human beings are born free and equal in dignity and human rights" – which by itself commands respect and is the foundation for the inalienable human rights everyone possesses. These rights are no longer justified with reference to religious or philosophical ideas of "god" or "a pre-existing state of natural freedom" but flow directly from the concept of an inherent human dignity.[9]

Equality is perceived not only in the sense of equality of everyone before the law but in the sense that every individual has the same inalienable positive rights regardless of national or social origin, sex, race or belief. It is well known that the rights guaranteed in the American Constitution were withheld from the enslaved Afro-American population for over a century and a half – regardless of the progressive 14th amendment ratified in 1868 – with the result that the Americans who most needed the Bill of Rights were denied its protection. In contrast, freedom from any form of discrimination on grounds of racial, social, or religious origin is one of the underlying principles of the UDHR and the Convention.[10]

Three years after the end of the Second World War the Nazi holocaust against the Jews and other minorities strongly influenced the drafters of the UDHR, leading them to stress that this value of equality requires states not only to desist from any acts of discrimination themselves but also to take positive action against racial hatred and discrimination of all kinds in their communities.[11]

The concept of Community plays an important role in the Declaration and reflects the belief that not all individual rights are absolute, but that the social ties with bond people together create rights as well as obligations for the individual. As much as individuals need to be protected from tyranny, it is clear that they can also contribute

---

[8] idem., *Values for a Godless Age*.., op.cit., pp. 98 - 117.

[9] Johannes Morsink, *The UDHR, Origins, Drafting and Intent,* (Philadelphia: University of Pennsylvania Press, 1996), p. 316 ff.

[10] As expressed in Article 2 of the Declaration and Article 14 of the Convention which prohibit discrimination on any grounds.

[11] Morsink, *op. cit.*, pp. 245ff..

to it. That is why the drafters of the UDHR believed that everyone has to be aware of their responsibility for the upholding of human rights. Article 1 of the Declaration commands that "All human beings should act towards one another in a spirit of brotherhood" and Article 29 (first clause) simply states that:

> Everyone has duties to the community in which alone the free and full development of his personality is possible.

This emphasizes that individuals have responsibilities, not only to the political order whose legitimacy (in human rights thinking) depends on it guaranteeing the rights in the UDHR, but also to the group in which they live:

> this provision [Article 29] is of a moral nature in the sense that it lays down a general rule for individual behaviour in the community to which the individual belongs.[12]

Of course, these exhortations are not legally binding – the Declaration is after all only a declaration. The second clause of the same Article 29, however, has found its way in some form or the other into most of the binding treaties linked to the Declaration, including the Convention. It provides the general grounds for limiting individual rights – like protecting the rights and freedoms of others and public order. Whereas some rights of the Convention are absolute or nearly absolute such as the right to life or the prohibition of torture, most Articles of the Convention qualify the individual rights they guarantee with a view to allowing the state, i.e. the law giving bodies of the state, to restrict these rights when this is deemed necessary for the public good.[13]

At the same time, legislatures cannot arbitrarily limit the rights of individuals. They can only do so for aims specifically mentioned in the Convention, like national security or public safety and they can only do so in a prescribed way, namely following the principles of legality, or rule of law and proportionality. This means that restrictions of individual rights need to have a legal basis and follow the rule of law[14]; that they are furthermore necessary to take care of a legitimate social aim and

---

[12] Klug, *op. cit.*, p. 113.

[13] The only true absolute rights included in the Convention are the prohibition of torture (Article 3), the prohibition of slavery and forced labour (Article 4), the right to an effective remedy (Article 13), the prohibition of discrimination (Article 14) and the right to education (Article 2, 1st protocol).

[14] Although it is contentious what a broad conception of "the rule of law" would actually include, most legal commentators seem to agree that the fundamental requirements of the rule of law prescribe procedural and institutional norms that stipulate that all law must be

that they fairly balance the rights of the individual and those of the whole community. The approach also emphasizes the requirement for the restrictions to be "necessary in a democratic society".[15] Domestically, Lord Clyde formulated the criteria under the doctrine of proportionality as such:

> Whether: (i) the legislative object is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[16]

This shows how one of the central concepts of the jurisprudence of the European Court of Human Rights, the institution set up to enforce the Convention, has entered the common law. It also exemplifies the belief of the drafters of the Convention that an effective political democracy was the central prerequisite for ensuring respect for human rights.

The very text of the Convention shows that the legal content of the treaty cannot be separated from the political ideas associated with the Council of Europe, an organisation explicitly set up by "like-minded" countries sharing "a common heritage of political traditions, ideals and freedom and the rule of law," as the preamble of the Convention puts it. The organisation's specific aim was to achieve a closer cooperation of western liberal democracies. This partnership was not only fuelled by common values but also by a common stance against Eastern Bloc countries who they regarded totalitarian. Unsurprisingly the set of rights embodied in the Convention have strong post-war and Cold War overtones. The sponsors of the declaration believed that the major threat for human rights emanated from totalitarian dictatorship and individual rights feature much more prominently than so-called economic, social,

---

general, public, prospective and enforceable by an independent judiciary. The goal is to guarantee the supremacy of regular law over the exercise or arbitrary power. Cf Jeffrey Jowell & D. Oliver, *The Changing Constitution*, (Oxford: Clarendon Press 1985), pp. 5 - 22. For a definition of a "thin" as opposed to a thick conception of the rule of law see also the essay by J. Goldsworthy, "Legislative Sovereignty and the Rule of the Law" in Tom Campbell, K.D. Ewing & Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press 2001), pp. 61 - 78, esp. pp. 64 - 69.

[15] Maureen & John Spencer, *Human Rights Law in a Nutshell* (London: Sweet & Maxwell 2001), p. 17. See also R. Reed & J. Murdoch, *Human Rights Law in Scotland*, (Edinburgh and London: Butterworths 2001), pp. 135 - 140.

[16] Cf *Freitag v. Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69.

or cultural rights, whose incorporation would have necessitated controversial decisions about the distribution and allocation of resources.[17]

Unlike the Declaration, the Convention is an international treaty, which creates legally binding obligations for all signatory states to observe its provisions. It has also established a procedure for supervising and enforcing the application of rights within each country. The task of enforcing the Convention now rests with the European Court of Human Rights in Strasbourg, whose judges are drawn from the states adhering to the Convention. It has jurisdiction over all matters concerning the application of the Convention and hears cases arising from inter-state complaints, individual applications or applications for a ruling on the interpretation of the Convention.[18]

Because the Convention rights are stated in very general terms – in contrast to the detailed provisions to be found in most domestic pieces of legislation – the European Court of Human rights (ECHR) uses its own principles of judicial reasoning to interpret and make sense of the Convention's Articles. The basic principles followed by the ECHR can be found in the Vienna Convention on the Law of Treaties. Article 31 (1) postulates that

> [a] treaty shall be interpreted in good faith in accordance with the ordinary meaning of words to be given to the terms of the treaty in their context and in the light of its object and purpose.

Following this guideline the ECHR developed a so-called teleological or purposive approach to the interpretation of the meaning of the Convention. This means that the judges will interpret the provisions in the context of their purpose rather than their literal meaning. Of prime importance is the overriding function of the Convention itself, namely to "protect the rights of the individual" and to "make the protection of

---

[17] Klug, Values for a Godless Age, op. cit., pp. 120-22.

[18] A complex mechanism is in place to deal with the different types of human rights cases that might arise from an individual complaint or an interstate case, there is no room here to describe or explain its functioning nor to go into the details of enforcement procedures. The Council of Europe has a human rights home page at http://www.humanrights.coe.int/ which provides general information on the organisation's human rights work. Access to information on the Court, its functioning and judgments is available at http://www.echr.coe.int/ For an overview see Keir Starmer, *European Human Rights Law, The Human Rights Act 1998 and the European Convention on Human Rights*, (London: Legal Action Group, 1999).

the individual effective".[19] Another important principle is based on the treatment of the Convention as a "living instrument" which means that the Convention is to be interpreted in the light of changing conditions. From this it follows that older decisions – quite contrary to the general principle of precedent found in the common law – can be disregarded, allowing the court for example to take into account changing social attitudes towards transsexuals, homosexuals or corporal punishment.[20]

Taken together the principles mentioned above differ considerably from the approaches traditionally adopted by English or Scottish courts. The de facto incorporation of the Convention into English and Scottish domestic law achieved by the 1998 Human Rights Act and the 1998 Scotland Act will therefore also bring with it new principles of interpretation. But before going specifically into the issue of how United Kingdom judges have dealt with the challenge of using new interpretative tools and concepts, it is necessary to briefly sketch how the Convention found its way into the legal systems of England and Scotland.

1.2. Britain, the Convention and the Human Rights Act

Bearing in mind that the United Kingdom was the first country to ratify the Convention in 1951 – and that British lawyers had played a prominent role in drafting it – it may come as a surprise that the United Kingdom had for so long hesitated to incorporate the Convention into its domestic law. Furthermore, it was not until 1966 that the government gave people the right of individual petition, which enabled United Kingdom citizens to take a case against their state to the ECHR.[21] Most commentators have attributed this reluctance to the prevalent strong belief of the political and judicial establishment in Britain that the domestic arrangements for protecting and enforcing individual rights were sufficient. Some indeed have claimed

---

[19] *Golder v United Kingdom*, in Reed & Murdoch, op. cit., p.113. The case decided the question of whether a prisoner had the right to bring defamation proceedings against an officer who had wrongly accused him of having been involved in a prison disturbance. The Court determined that the right to have access to a court although not specifically mentioned in the Convention follows from Article 6 of the Convention when "read in its context and having regard to the object and purpose of the Convention."

[20] ibid., 117-119.

[21] Cf J. Convey, *Constitutional Law* (Edinburgh: Sweet & Maxwell 2001), p. 67. From 1966 to the end of 1999, more than 6000 applications were made against the UK. In 68 of the decided cases the judges found at least one violation of a convention right. Cf. Klug, op. cit., p. 20.

that the Convention "simply enshrines tenets of classical civil liberties to be found in English common law"[22], so that its incorporation was simply superfluous.[23] It is obvious, however, that the different legal traditions of England and Continental Europe must also account for Britain's long hesitation. In English legal tradition the emphasis had been on "negative" rather than "positive" rights. By administering the common law which over the centuries had evolved to protect individual rights against autocratic tyranny the courts had established what the government was not allowed to do and this "electric fence" approach was thought to be more desirable than the European way of defining a positive set of rights of the individual vis-à-vis the government.

According to the legal philosophical thought behind England's common law tradition, statutes exist to remedy clearly identifiable wrongs. These rules are the outcome of a political process reflecting the wishes of Parliament and are to be interpreted narrowly by the judiciary. Statutes are thus clearly distinguished from rights. Whereas the latter give one the liberty to do things, the former constitute a coercive order determining what one is *not* allowed to do. The consequence is that legal rights allowing one to act in any way that is not unlawful will arise but there is no need for them to be positively enshrined in the legal code. Human rights are, according to this thinking not part of positive law but political claims, which belong to the political sphere. The idea of establishing a body of "higher" or "fundamental" law as a frame in which politics is to be conducted was regarded as being alien to the British constitutional set up where Parliament – expressing the will of the people – was accorded untrammelled legislative power to decide upon the rules of the game.[24]

---

[22] Maureen & John Spencer, op. cit., p. 28.

[23] This argument is weakened by the fact that the United Kingdom has lost more cases in Strasbourg than any other country except Italy. This circumstance, however, should be set against the background that only the judges in Strasbourg could resolve disputes between English/Scottish law and the Convention.

[24] The absence of any strictly legal control of Parliament does not mean that it is not bound by other political principles. In the case of Britain legislative sovereignty is legally, but not morally or politically absolute. It co-exists with powerful constitutional conventions "forcing" Parliament to comply with many principles of political morality including the rule of law. This point will be taken up further below. Cf. Goldsworthy, op. cit., pp. 62- 63.

Hence Bentham's famous dictum that branded the incorporation of rights into the law as nonsense and natural rights expressed in law as "nonsense on stilts".[25]

The conviction that it was not necessary to incorporate the Convention was shared not only by the judicial establishment of senior barristers and judges, but also by both major political parties. The Conservatives openly believed in the superiority of the common law and Britain's constitutional arrangements over anything tried anywhere else – Margaret Thatcher for one was of the opinion that the one Bill of Rights dated 1688 was enough – while Labour did not like the idea of shifting the balance of power further to the judiciary, whom they regarded – quite justifiably – as inherently conservative.

One of the major factors in Labour's warming to the idea of domestic human rights legislation was the long reign of Thatcher and her style of leadership. It was during the Thatcher years – dubbed by some an "elective dictatorship" – that key senior Labour politicians overcame their party's traditional hostility to "Tory judges" and started to believe that the courts could actually act as an important check against a ruthless executive backed by a powerful parliamentary majority.[26] This opinion was strengthened by the development of judicial review, which established that all administrative action (including those based on discretionary powers) is principally reviewable on the grounds of illegality, irrationality, and procedural impropriety. Thus, judges have demonstrated that they can act independently to apply concepts of fairness and justice in the review of administrative action.[27]

The Labour Party conference in October 1993 endorsed a policy proposing a two-stage process to implement legal mechanisms to enforce rights. The first step foresaw

---

[25] Cf Martin Loughlin, "Rights, Democracy and Law" in Tom Campbell et al, op. cit., pp. 41 -60, esp. pp. 54 - 56.

[26] Klug, *Values for a Godless Age*, op. cit., pp. 157-58. Given the iron grip that the government usually exercises over its parliamentary party, Parliament's supremacy had become – according to many observers – government supremacy. This has more to do with the personal character of the serving Prime Minister than his or her party affiliation. Blair's "presidential" style of leadership is a case in point. It remains to be seen whether the new human rights instrument will bite the hand that fed it.

[27] As for example in *CCSU v. Minister for the Civil Service*, [1985] AC 374, this established that decisions made by the executive under the so-called royal prerogative were principally reviewable. In the event, Thatcher's decision not to accept trade union membership of employees working in a security sensitive area of signalling survived the House of Lords only because of the security element involved. The case established that all Government Ministers have to act fairly and reasonably and that all their action is judicially reviewable.

the incorporation of the European Convention on Human Rights into domestic law, and included the entrenchment of this set of rights by the use of a "notwithstanding clause" procedure, which would have led to the Convention overriding domestic law.[28]

The second step committed a future Labour government to set up an all-party commission to consider and draft a homegrown Bill of Rights for future implementation. The conference also supported the establishment of a human rights commission to monitor and promote human rights. Tony Blair MP expressed his support for a Human Rights Bill in 1994, and also approved of the idea of entrenchment. A commitment he withdrew later.

One of the longest campaigners for a new domestic bill of rights, the Liberal Democrat peer Lord Lester of Herne Hill, introduced a private member Bill in November 1994. Although the Bill did not receive government support and some aspects of the proposed legislation were criticised by the Law Lords, they did support incorporation to the extent that it would allow United Kingdom judges to interpret human rights at home, rather than to wait for the judges in Strasbourg to make the decision. Undoubtedly, the fact that a human rights Bill received any welcome, however tentative, from the United Kingdom's senior judges was a significant development.

At the end of 1996, Jack Straw MP and Paul Boateng MP published a paper called *Bringing Rights Home*, outlining the Labour Party's plans to incorporate the European Convention on Human Rights if they won the next general election.[29] The 1997 Report of the Joint Consultative Committee on Constitutional Reform, which announced the joint agreement between the Labour Party and the Liberal Democrats, stated the commitment to incorporation of the Convention into British law.

Some leading Tory figures such as Lord Hailsham and Lord Brittan also strongly supported the Convention's incorporation over the years. But after Tony Blair's election victory and the actual passing of the Act, William Hague's party started to attack the change, claiming it would shift legislative power from Parliament to the

---

[28] Cf John Wadham, "Legal Overview of the Human Rights Act", in *Law Society Gazette,* 1999 (3).

[29] Jack Straw & Paul Boateng*, Bringing Rights Home. Labour's Plan to Incorporate the European Convention on Human Rights into United Kingdom Law* (Labour Party, 1996).

judges and that the public will not support the more controversial judgments. However, Labour's huge parliamentary majority and the broad consensus within the judiciary allowed for a swift passage of the Bill through both houses of Parliament. Opinions like the statement of a senior Scottish judge that the Act would provide "a field day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers"[30] could not prevent the Act finally receiving Royal Assent on November 9, 1998.

The Human Rights Act 1998[31] came eventually into force on October 2, 2000. According to the title, its main aim is to "give further effect to rights and freedoms guaranteed under the European Convention on Human Rights […]". The rights incorporated by the HRA are Articles 2 - 12 and Article 14 of the Convention, as well as Articles 1 -3 from the First Protocol and Articles 1 and 3 of the Sixth Protocol, as read with the Articles 16 to 18 of the Convention.[32]

Articles 2-4 ensure integrity of the person through the right to life and rights against servitude and torture. The values of the "rule of law" are upheld by Articles 5 - 7 which establish the right to liberty and security, the right to a fair trial and the right not to be punished without due process of the law. Family life (Article 8), the right to marry and found a family (Article 12), freedom of expression, assembly and association (Articles 10 and 11) as well as freedom of conscience and religion (Article 9) are also part of the Convention rights as defined in the Act. Article 14 ensures that all rights and freedoms found in the Convention are enjoyed without discrimination on any grounds, especially mentioned are *inter alia* sex, race, colour, language, and religion. The right to the peaceful enjoyment of possessions (1st Protocol) and the abolition of the death penalty (6th Protocol) also belong to the Convention rights as defined by the Act.[33]

Prior to the HRA, litigants who wanted to rely on the rights conferred to them under the Convention had to take their case to the European Human Rights Court in Strasbourg, an undertaking that was, as a rule, a lengthy and costly process. On average, it took parties five years and cost them around £30,000 to have their human

---

[30] made by Lord McCluskey in the Lords, Cf *Times* , October 3, 2000.

[31] 1998 c. 42.

[32] HRA s 1(1)

[33] ibid.

right claims under the Convention assessed and decided by the European Court of Human Rights.[34] Although the United Kingdom is obliged under international law to comply with the Convention rights, courts in the United Kingdom could not directly enforce them, because the Convention was not part of domestic law, a situation pointedly summarised by Lord Bridge in *R. v. Home Secretary, ex p. Brind*

> It is accepted, of course, […] that like any other treaty obligations, which have not been embodied in the law by statute, the Convention is not part of the domestic law, that the courts accordingly have no power to enforce Convention rights, and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it.[35]

Despite this clear rule, courts in the United Kingdom have not remained unaffected by the development of international human rights legislation and acts of the executive could be effectively challenged. This constitutional role of British courts as "watchdogs" of the executive was in fact exercised by the instrument of judicial review jurisdiction. This supervision of executive behaviour and the doctrine of common law rights contributed to the protection of individual human rights in the United Kingdom. Moreover, the judges have in effect given judicial relevance to the Convention by applying it to resolve ambiguities in legislation and by using it to develop the common law where it was incomplete or uncertain.[36]

Still the courts have consistently refused to apply the Convention in a way that would directly limit the decision-making powers of the executive.[37] In doing this – sometimes reluctantly – the judiciary respected Britain's unwritten constitution guaranteeing Parliament's constitutional responsibility for the domestication of international treaties. Consequently it was Britain's Parliament that crucially altered the legal standing of the Convention in domestic law when it passed the HRA, in Jack Straw's words: "the first written Bill of Rights this country has seen for three centuries."[38]

---

[34] Christopher Baker (ed.), *Human Rights Act 1998: A Practitioner's Guide*, (London: Sweet & Maxwell, 1998), p. 2.

[35] *R. v. Home Secretary, ex p. Brind* [1991] 1 AC 696, at 747.

[36] Cf. *Attorney-General v. British Broadcasting Corporation* [1981] AC 303.

[37] cf especially *Brind*, op.cit.. See also *R.. v. Ministry of Defence, ex p. Smith* [1996] Q.B. 517. An interesting empirical study is F. Klug and K. Starmer, "Incorporation through the Back Door?" *Public Law* (1997), pp. 223- 238, especially pp. 228-232.

[38] as quoted in Klug, *Values…*, op. cit., p. 21.

2. Constitutional Issues

In order to determine the effects of the HRA on the constitution of the United Kingdom there should first be an attempt to briefly outline the meaning of the term "the United Kingdom Constitution," albeit for the limited purposes of this study. A crude working definition would describe it as the sum total of statutory and common law rules plus the non-legal so-called constitutional conventions which

(i) determine the way in which the United Kingdom is governed and organized as a nation-state and what powers are allocated to the different organs of state,

(ii) prescribe the basic rules which define how the different organs of state may exercise these powers and hereby

(iii) outline the relationship between the state and its citizens.

It is well known that the UK constitution does not exist in the form of a legal document containing the basic outline of all these rules. Furthermore, the actual working of the constitution is regulated largely not by strict law but by rules of political conduct. These so-called constitutional conventions only exist in so far as they are adhered to and their interpretation changes continuously over time. Contributing to this pliability of constitutional arrangements is the fundamental principle of the UK constitution, meaning that:

> Parliament has […] under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament.[39]

The reason for Parliament's supremacy according to this traditional theory paradoxically lies in the only limitation on its absolute legislative authority, namely its inability to bind its successors. It is only the current Parliament that is supreme.

---

[39] in the words of A.V. Dicey, the most famous and influential proponent of this theory. Cf *Introduction to the Study of the Law of the Constitution*, 10th ed, (London: MacMillan, 1967) pp. 39 -40. For a modern critique see Ian Loveland, *Constitutional Law: A Critical Introduction*, (London: Butterworths 1996) pp. 27-63. Britain's judges have frequently upheld this theory in no uncertain terms: "It is often said that it would be unconstitutional for […] Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts could not hold the Act of Parliament invalid." Lord Reid in *Madzimbamuto v. Lardner Burke*, [1969]1 AC 645 at 723, PC.

From this follows that the courts will always have to obey the most recent act of Parliament, assuming that by implication the later Act has repealed the earlier one.[40] This doctrine of parliamentary supremacy is, however, a purely legal construct. It confirms the absence of any legal limitations on Parliament's legislative competence. What it does not argue is that Parliament is unaffected by political or practical pressures. The crucial distinction is the one between "legal formality and political reality".[41]

Parliament's legally unrestricted legislative power does create constant constitutional change. Both houses frequently pass legislation, which has constitutional significance by single majorities. Case law is another major generator of constitutional change. Judges expound and apply the common law and thereby develop, change and clarify rules that have constitutional significance.

When maintaining that the UK knows no constitutionally entrenched guarantees and institutional bulwarks this does not mean that there are no checks against the abuse of power by government. Some rules and practices that restrain abuses of political power have generally been observed. The powers exercised by the government and officials must be rooted in the law, and the law must conform to certain minimum standards of justice, both substantive and procedural, such as fairness or natural justice which guarantees *inter alia* that everyone is the same under the law and that there are safeguards against the abuse of the principles of the rule of law. Nevertheless it was the growing conviction that this approach to the protection of fundamental individual rights was simply not adequate, an opinion voiced by the Lord Chancellor, Lord Irvine, when introducing the Human Rights Bill in the Lords in 1997:

> The traditional freedom of the individual under an unwritten constitution to do himself that which is not prohibited by law gives no protection from misuse of power by the state, nor any protection from acts or omissions of public bodies which harm individuals in a way that is incompatible with their human rights under the Convention.[42]

---

[40] ibid. pp. 42-43.

[41] ibid., p.62.

[42] as quoted in Maureen & John Spencer, op. cit., p. 34.

In view of the constantly changing nature of the UK constitution outlined above, some have claimed that the 1998 Human Rights Act is just another statutory provision adding to the constitutional rules and regulation of the United Kingdom.

But before going into any details it is worth singling out the three major operational principles of the Act by which Convention rights are made enforceable in the UK. These provisions are also the ones that are likely to have the strongest constitutional impact.

(i) The Act establishes an interpretive to duty to read all primary legislation as compatible with the Convention when this can be possibly done.

(ii) Should that fail, courts can grant declaration spelling out the incompatibility of any domestic legislation with Convention rights. It is believed that such declaration would put enough pressure on Parliament to amend the offending piece of legislation.

(iii) The Act establishes that it is unlawful for any public authority (including courts and tribunals) to act in way incompatible with a Convention right. Any victim of such an act can bring proceedings against the public authorities and may be compensated.

Reflecting further on the relationship between the HRA and the constitution of the United Kingdom it is necessary to stress what the HRA is *not*. It is not a piece of constitutionally protected legislation comparable to laws in Continental Europe or the US which protect human rights by entrenching them, i.e. placing them above "normal law" by providing that they can only be repealed by large parliamentary majorities or other institutional processes like referenda aiming at popular discussion and support. Legally the HRA does not stand above other statute and can like any other Act of Parliament be amended or repealed by subsequent legislation requiring a simple parliamentary majority.

It should be clear, however, that an Act aiming at repealing or amending the HRA would need to do so expressly – since any implied repeal would in all likelihood be read down, i.e. ignored following the interpretive duty established in section 3. In any event, the British governments can make use of its restricted right to derogate from its treaty obligations should they wish to legislate against the Convention.[43]

---

[43] Under Article 15 of the Convention the contracting states have the right to derogate from their obligation in times of war or other public emergencies "to the extent strictly required by the exigencies of the situation." Such derogations are recognized in the HRA and will be listed under Sch 3 of the Act. The right of derogation is reflected in sections 1(2), 14 and 16 of the HRA. In the past the United Kingdom has registered derogations in relation to emergency legislation made with respect to its former colonies and Northern Ireland. Until last year Britain had one derogation in place which appeared under Sch 3 of the HRA

The main argument against entrenchment of the Human Rights Act was based on the constitutional theory of parliamentary supremacy: the Government did not want to bind future Parliaments, because this "could not be reconciled with [British] constitutional traditions".[44]

In view of other legislation that effectively bound future Parliaments, this argument is hardly convincing. The principle of Parliamentary supremacy has already been significantly restricted by Britain's joining of the European Economic Community in 1973. The European Communities Act 1972 designed to incorporate the legal obligations arising under accession bound future Parliaments to a considerable degree. According to the European Court of Justice the transfer of the rights and obligations arising under the treaties establishing the EC carried with it a "permanent limitation of [a state's] sovereign rights".[45]

It took the UK judges quite some time to acknowledge the constitutional significance of this transfer. In a landmark case in 1979 Lord Denning was the first senior British judge to recognise the development, when he stated that domestic legislation "should be construed subject to the overriding force of the [EC] treaties".[46] Effectively this meant the end of the doctrine of implied repeal outlined above. The House of Lords confirmed this, when they ruled that section 2 of the 1972 European Communities Act introduced a new rule of statutory interpretation to the effect that UK courts should construe all domestic legislation in a manner consistent with EEC obligations "however wide a departure from the prima facie meaning of the language of the provision might be needed in order to achieve [this]".[47]

The House of Lord's decision in *R v. Transport Secretary ex p. Factortame (No 2)* - denounced by Margaret Thatcher as "a novel and dangerous invasion by a

---

and concerned detention before trial under legislation designed to prevent terrorism. After the coming into force of the new Terrorism Act 2000 the UK government withdrew the derogation and the HRA was amended accordingly. Cf Reed & Murdoch, op. cit, p. 202-203.

[44] Government White Paper: *Rights brought Home: The Human Rights Bill*, October 1997, CM 3782, para 2.16.

[45] *Costa v. ENEL*, [1964], E.C.R. 1141. As quoted in Convery, op. cit., p. 59.

[46] *Maccarty Ltd v Smith*, [1979] 3 All ER 325 at 329. Cf Loveland, op. cit., p. 509-511.

[47] Loveland, op. cit., p. 512.

Community institution of the sovereignty of the UK parliament"[48] - confirmed the supreme status of Community law in express terms:

> [...] whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a UK court […] to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. [49]

Britain's judiciary has it made clear that it will only relieve Parliament from the restrictions it suffers imposed by directly effective EC law, if the UK leaves the Community altogether. A future Parliament could of course – although this is quite unlikely – force any UK government to negotiate the country's exit from the European Community and thereby restore the sovereignty transferred when it acceded.

When comparing the constitutional effects of the HRA to the major legal changes triggered off by the domestic EC legislation and its corresponding case law, one can only conclude that the political and legal bonds created by the Human Rights Act can hardly be stronger than the ones established by the UK's membership of the European Community and Union. In terms of constitutional change, the accession of the UK to the EC in 1973 expressed in the 1972 European Community Act, its commitment to the Common Market 1986 (incorporated into the domestic legal order by the Single European Act 1986) and the Treaty on European Union signed in Maastricht in 1992 were more important events.

Unlike the treaties establishing the EC and the EU the Convention rights have not been directly incorporated into domestic law; as Lord Irvine made clear during the debates in the House of Lords: "The Convention Rights will not […] in themselves become part of our substantive domestic law."[50] Nor has the HRA expressly repealed any earlier legislation incompatible with the Convention, a measure that undoubtedly would have been a convenient way of bringing UK law into harmony with the Convention, if that had indeed been intended.[51]

---

[48] ibid., p. 541.

[49] [1991] 1 AC 603, per Lord Bridge at 658.

[50] *Hansard*, H.L., November 18, 1997, col. 508.

[51] Cf. Michael Beloff, " 'What does it all mean?' Interpreting the Human Rights Act 1998" in Lammy Betten, *The Human Rights Act 1998. What it means*, (The Hague: Martinus Nijhoff, 1999) p. 26.

Instead of relying on the entrenchment or direct incorporation of Convention rights or on the repeal of inconsistent legislation, the makers of the HRA used two other mechanisms of securing enforceability of Convention rights.

2.1. The interpretive duty

The burden to enforce the Convention rights largely falls on two central sections of the Act. Section 3 establishes that

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

and by section 6

> it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

At the same time, however, both sections also guarantee the validity, continuing operation and enforceability of legislation that is prima facie incompatible with Convention rights. The courts have not been given the power to annul primary legislation and therefore formally the HRA does not impinge upon the supremacy of Parliament and it remains the sole privilege of Westminster to repeal or amend any offending statutory provisions.

Judges are, nevertheless, not prevented from striking down or setting aside inconsistent secondary legislation, unless the provisions of the primary parent statute make this impossible.[52] This is similar in effect to the already existing power of courts to declare secondary legislation *ultra vires*, i.e. beyond the powers provided by the primary legislation under which it is made. Section 21 (1) gives definitions of what is to be regarded as primary and secondary legislation for the purposes of the Act. Acts of the Scottish Parliament, as well as instruments made by Scottish Ministers are defined as subordinate legislation, and may therefore be struck down by the courts.[53]

---

[52] HRA s3 (2)(b), (c).

[53] Primary legislation means any public general Act, local and personal Act, private Act and Orders in Council made under the Royal Prerogative, Orders in Council made under section 38 (1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provisions of the Northern Ireland Act 1998 and Orders in Council amending primary legislation. The decision to define Orders in Council made under the Northern Ireland Constitution Act 1973 as primary legislation can be justified on a theoretical level since this legislation would have been enacted by a Parliament of Northern Ireland save for the political turmoil in that region; and since it deals with matters which in England, Scotland and Wales are regulated by primary legislation. On a practical level it makes governing

Similarly, where a public authority acts in a way incompatible with a Convention right or fails to uphold a Convention right, such an act or omission is not unlawful if the authority was forced to do so because of a provision of primary legislation.

The issue of giving judges the power to set aside legislation has been one of the most controversially discussed questions during the debates accompanying the passage of the Bill through Parliament. Those in favour of it, like the civil rights organisation *Liberty*,[54] have argued that this would be the only effective way of guaranteeing that respect for the Convention rights could be secured by the courts. Opponents, on the other hand, maintained that this would shift the constitutional power too much in favour of non-elected judges and believed that the interpretive duty of Section 3 was enough to guarantee the Convention rights.

In the event, the decision to favour the latter approach was widely greeted by the judicial and political establishment as a "characteristically British compromise" between giving human rights more weight while preserving the principle of the legislative sovereignty of the House of Commons.[55] Explaining the constitutional effect, Lord Irvine has spoken of the HRA as a balancing act

> which gave further effect to Convention Rights without interfering with the balance of powers between the legislative, executive, and judicial arms of the State; and with the way in which our common law has developed over the centuries to protect the rights of our citizens and to provide appropriate remedies.[56]

Although the Act gives the higher courts the power to declare an Act of Parliament to be incompatible with the Convention, they cannot render it invalid and Parliament's unrestricted legal right to legislate remains intact:

> It is crystal clear that the carefully and subtly drafted HRA 1998 preserves the principle of Parliamentary Sovereignty. In a case of incompatibility, which cannot be avoided by interpretation under section 3, the court may not disapply the legislation.[57]

Northern Ireland easier. Cf. Baker, *The Human Rights Act: A Practitioner's Guide*, op. cit., p. 15

[54] Cf John Wadham "Bringing Rights Halfway Home", in *European Human Rights Law Review*, (1997) 2, pp. 141-54.

[55] Cf Lord Lester of Herne Hill, "The Art of the Possible: Interpretation of Statutes under the Human Rights Act", *European Human Rights Law Review*, (1998) 3, pp. 665 - 75.

[56] Lord Irvine, "Opening Address" in Basil S. Markesinis (ed.), *The Impact of the Human Rights Bill on English Law. The Clifford Chance Lectures vol. III*, (Oxford: Oxford University Press, 1998) 9 - 14.

[57] R. v. DPP, ex p. Kebilene [1999] 3 WLR 972.

Like the New Zealand Bill of Rights Act 1990 – after which it was modelled – the HRA is largely an "interpretive statute" and the burden of the enforceability of Conventions rights falls to a large extent on the duty established in section 3. It is, in the words of Lord Steyn, "the pivotal provision",[58] because it prescribes a way of statutory construction which forces courts and tribunals to construe domestic legislation, if that can be possibly done without distorting its meaning, in a manner consistent with the Convention rights. This new method of interpretation is complemented by section 6 that imposes a direct and positive obligation on state organs, including courts, to observe Convention rights.

In case a public authority acts in a way inconsistent with the Convention or fails to act in a way required by the Convention only the person who was aggrieved by such an act or omission can challenge this in court. If the challenge is successful, courts can choose to grant the remedies they regard as appropriate; for example, judges might decide to quash a decision of a public authority or to award damages to the aggrieved person.[59]

Scope and aim of section 3 are delineated in a government White Paper published before the enactment of the HRA:

> This rule of construction is to apply to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts will not be bound by previous interpretations. They will be able to build a new body of case law taking into account Convention rights.[60]

This approach is more cautious than outright incorporation; whether it will be as effective remains to be seen. The development foreseen by the government will be incremental: the courts and tribunals of the United Kingdom will adapt their case law step by step to the requirements of the Convention and check whenever necessary if existing statutory provisions are compatible. In creating the new "compatible" body of case law, British judges have to take the decision of the ECHR into account, but its rulings do not create legally binding precedents.[61]

---

[58] Beloff, op. cit., p. 27.

[59] HRA, s 8.

[60] *Rights Brought Home*, op. cit., para. 2.8.

[61] HRA s 2 (1).

Section 19 of the HRA is a provision designed to ensure the compatibility of future legislation with the Convention. It requires a written statement by the minister in charge of a Bill to the effect that all the Bill's provisions are compatible with the Convention. If the responsible minister believes that such a statement is impossible because the effects of the proposed legislation vis-à-vis the Convention are not clear, he or she has to announce that the Government wishes to proceed nonetheless.[62]

2.2. Declarations of incompatibility

In cases where the courts find it impossible to construe legislation meaningfully as compatible with the Conventions rights, judges have by section 4 the discretionary power to make formal "declarations of incompatibility". Such a declaration does not affect the validity, continuing operation, and enforceability of any piece of primary legislation nor is it binding for the litigants.[63] It is nothing more and nothing less than the formal statement of a conflict between Convention rights and primary legislation. According to the White Paper just quoted above, such a judicial finding is believed to create political pressure and as a result "will almost certainly prompt the Government and Parliament to change the law".[64]

In order to effect the necessary adjustments quickly, section 10 provides for a "fast-track procedure" to alter legislation. If a declaration of incompatibility has been made by one of the higher courts of the United Kingdom or if the Human Rights Court in Strasbourg has decided that United Kingdom law breaches the Convention, a Government Minister "may by order make such amendments to the legislation as he considers necessary to the remove the incompatibility."[65] Declarations of incompatibility may be made by the High Court, the Court of Appeal, the Judicial

---

[62] In an interesting comment on the use of Section 19, John Wadham, director of the civil right organisation Liberty, has highlighted how this instrument can nevertheless fail to achieve this objective. The Terrorism Act 2000 contains several provisions giving wide discretionary powers to the police. It is at least very likely that - should the police make use of their discretion – this usage would violate the Convention. Nevertheless, the Bill leading to the Act was still judged compatible with the Convention on the grounds that the police are expected not to use their new discretionary powers. Clearly such an assumption seems to be not only naïve, it also begs the question why the police were given these potentially incompatible powers in the first place. Cf Wadham, "The Human Rights Act: One year on", in *European Human Rights Law Review*, (2001) 6, pp. 620 - 639, p. 624.

[63] HRA s 4 (6) (a) (b).

[64] *Rights Brought Home*, n. 33 above, para 2.10.

[65] HRA s 10 (2).

Committee of the House of Lords, the Judicial Committee of the Privy Council and the Courts-Martial Appeal Court. For reasons not quite clear, Crown Courts have not been granted this power. In Scotland the High Court of Justiciary (not sitting as trial court) and the Court of Session may declare incompatibilities.[66] In cases where courts consider such a step, the Government is entitled to join the proceedings. In all such litigation, the Crown may appeal to the House of Lords against decisions to grant a declaration.[67]

Most commentators have agreed that declarations of incompatibility will be a measure of last resort and argued that the courts will rather stretch statutory construction as far as possible than to grant declarations. The Lord Chancellor expected that "in 99% of the cases […] there will be no need for judicial declarations of incompatibility".[68] Indeed section 3 establishes such a strong duty to find an interpretation consistent with the Convention that some observers have argued that judges may apply the doctrine of implied repeal:

> The command in the Bill […] is so strong that it leaves entirely open the possibility that the courts will in effect use the doctrine of implied repeal […] in order to achieve the correct result which is no mismatch between our statute book and the Convention.[69]

There are, however, obvious limits to the degree that judges are free to interpret legislation; courts cannot contort the semantic content of provisions to produce results consistent with the Convention that depend on implausible or incredible meanings. Since the coming into force of the HRA, judges have established the precise impact of section 3 on a case to case basis and a description of their more important findings will be discussed further below. This brief summary of the constitutional effects of the provisions of the HRA is, however, enough to show that the constitutional balance between the judiciary and the legislative has been crucially altered, a situation described by Lord Hoffmann in one of the first major judgments relying on the new "Bill of Rights":

> In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words

---

[66] ibid s 4(5).

[67] ibid. s 5. 5 (4) refers to criminal proceedings.

[68] *Hansard. H.L.*, 5 February 1998, col. 840.

[69] Lord Lester in the House of Lords as quoted in Beloff, "What Does it All Mean", op. cit., p. 31.

> were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.[70]

These words of a senior British judge seem to validate the assumption that the United Kingdom is shifting from a constitution based on liberal democratic values in which political determination of the law was nearly absolute, to a rights-based model under which a higher law interpreted by judges establishes the principles of the political order. A step bringing the United Kingdom in line with models practised on the European continent, but also so in common law countries such as the USA, Australia, and South Africa.

2.3. Towards a constitutionalization of politics?

The overall picture of the constitutional effects of the Human Rights Act shows that, although the constitutional impact is less dramatic than made out by some interested parties, the measure does establish major changes. By enabling or forcing judges to read all legislation in a way compatible with the Convention, it binds governments politically not to press for laws violating the Convention rights. The right to make declarations of incompatibility will create strong pressure on governments to change legislation found to infringe the Convention. The combined effect of these two provisions shifts the balance of power towards the judiciary although the legal legislative supremacy of Parliament remains intact. The right for individuals to have their Conventions rights assessed by British courts is bound to change the perception of human rights in the public. Although the HRA does strictly speaking not add any rights, it makes it far easier for people to claim them. Politics, in a nutshell, are far more likely to be expressed and to some extent dominated by legal arguments than before.

This process of "constitutionalization" of politics could mean that politics will increasingly be treated as a practice to be conducted within the frame of legal principles established by judges. It will give more political power to judges and lawyers and more force to the law as a medium for shaping political ideas and action. For some this development is a long awaited step to curb the power of both Whitehall and Parliament, for others it seriously undermines the "freedom" of politics as:

---

[70] in *R v. Secretary of State for the Home Department, ex p. Simms* [2000], 2 AC 115, at 131.

> a deliberative activity which performs the vital task of maintaining a vibrant public space within which […] social conflicts are managed effectively. […] Rights discourse can lead to the growth of single-issue agendas, a more adversarial form of politics, and a degree of political fragmentation which makes it much more difficult to build coalitions around some conception of the public good.[71]

What the author obviously fears is that the Human Rights Act could lead to a situation in which political questions will be couched almost exclusively in legal terms and political conflicts which should be decided in the public political sphere will be decided by legal specialists who do not have a public mandate and are not accountable for their actions. To put it differently: is politics which should be free and unhindered in danger of being unduly dominated by an unelected judiciary? The answer to this question can only be found by looking at how the judges have effectively used their new powers and responsibilities.

The "test ground" for challenges under the new human rights legislation and the reaction of the judiciary has been Scotland where most provisions of the HRA came into force earlier than in the other parts of the UK by virtue of the 1998 Scotland Act. For more than one year – between July 1999 and October 2000 – most of the new human rights regime outlined above was in existence in Scotland before Convention rights were actually justiciable in England. The next chapter looks at this Scottish experience and describes the peculiar Scottish human rights regime created by the combined effect of the HRA and the 1998 Scotland Act.

---

[71] Martin Loughlin, op. cit., pp. 57-58.

3. Human Rights and Devolution

It is one of the peculiarities of the constitutional set up of the United Kingdom that Scotland is a separate jurisdiction from England and Wales and Northern Ireland. It has its own distinctive legal history and traditions, its own body of common law and statute law, its own system of courts and its own legal professions. It is fair to assume that this distinctiveness has not diminished in the new constitutional context established by the 1998 Scotland Act and the HRA and the existence of a Scottish parliament has brought about a greater divergence between the law in Scotland and the legislative provisions in force elsewhere in the United Kingdom.[72]

3.1. The 1998 Scotland Act and the HRA

Besides the commitment to incorporate the Convention, New Labour's constitutional reform programme also included the promise of devolution. The Scotland Act and the Human Rights Act are two parts of the same broad political project of constitutional reform. Before the 1998 Scotland Act and the HRA the rights guaranteed in the Convention were – similar to England – not justiciable in Scottish courts. Indeed, it has been claimed that Scots law was even more immune to influences from the Convention than the English common law.[73] Both the coming of devolution and the enactment of the HRA have fundamentally changed this.

The 1998 Scotland Act that granted limited devolution to Scotland legally linked the two issues by establishing that the Scotland Parliament would have no competence to legislate in contravention of the Convention.[74] The right of the Scottish

---

[72] Cf. Michael O'Neill, "Great Britain: From Dicey to Devolution" in O'Neill & D. Austin (eds.) *Democracy and Cultural Diversity*, Oxford: Oxford University Press, 2000, pp. 68-95.

[73] Cf Lord Hope of Craighead, "Devolution and Human Rights", in *European Human Rights Law Review*, (1998) 4, pp. 367 - 379.

[74] Cf Reed & Murdoch, op. cit., pp. 11-13. The same is true of the Northern Ireland Assembly. This study, however, restricts itself to processes and effects in England and Scotland since the picture in Northern Ireland with its long history of conflict in civil war is politically and legally - for example the involvement of the Republic of Ireland under the Belfast Agreement - very complicated and different. The devolutionary process in Wales involved a very limited transfer of power. For the present purposes it is sufficient to say that the Welsh National Assembly has a duty to act compatibly with Convention rights.

Parliament to make laws to be known as Acts of the Scottish Parliament[75] is restricted by the next provision which establishes that such an Act is not law when any of its provisions are "outside the legislative competence of the Parliament".[76] In turn a list of conditions is given that determine when this is the case. With regard to the general scheme of devolution, the legislative restrictions of this list concerning reserved matters are undoubtedly the most important ones. Since human rights are not included in the list of reserved matters, this is of little interest for the present purpose of establishing the relationship between the HRA and the 1998 Scotland Act. For that matter the central stipulation consists in the provision that an Act is outside the legislative competence of the Scottish Parliament when any of its provisions are "incompatible with any of the Convention rights".[77] Convention rights are defined as having the same meaning as in the HRA.

Under schedule 4 to the 1998 Scotland Act certain statutory provisions not relating to reserved matters and therefore not immune to be repealed or amended by the Scottish Parliament are "entrenched" against amendment or repeal by the Scottish Parliament as well. Among these protected "constitutional Acts" is the HRA.

The Scotland Act 1998 also contains provisions that prescribe the scrutiny of Bills before their introduction in the Scottish Parliament and before they receive Royal Assent.[78] In this way the compatibility of any Bill with the Convention will be scrutinised under a legislative device similar to section 19 of the HRA. Any member of the Scottish executive in charge of a Bill is obliged to make a statement that in his or her view the provisions of the Bill would be within the legislative competence of the legislature. Once a Bill is passed, the senior Scottish Law Officers can refer a Bill to the Judicial Committee of the Privy Council for a decision on whether the Bill in question is within the legislative competence of the Parliament.[79] To complement this scrutinising mechanism the Scotland Act also provides for the possibility of challenging the legal competence of an Act of the Scottish Parliament after it has received Royal Assent in ordinary proceeding, including judicial review. Schedule 6,

---

[75] s 28(1)

[76] s 29(1).

[77] s 29 (2)(d).

[78] s 31(1), (2).

[79] s 33 (1) and (2)(a).

pt. I, of the 1998 Scotland Act defines all questions of whether Acts of the Scottish Parliament are within the competence of the legislature and likewise whether any acts or failures to act of the Scottish Executive are within their devolved competence, as devolution issues. It follows that under this scheme questions of "Convention compatibility" can be classified as devolution issues. All devolution issues are ultimately to be decided by the Judicial Committee of the Privy Council.[80]

The Scotland Act 1998 also transfers functions formerly exercised by the central government in London to the newly created Scottish Executive. This "devolved competence" is established under the sections 53 and 54 of the Scotland Act. It is, however, restricted by reference to the Scottish Parliament's legislative competence. The provisions are designed to ensure that the functions transferred to the Scottish executive do not include any functions not in line with the legislative competence of the Scottish Parliament. Since the legislative competence of the Parliament is restricted by its inability to lawfully pass any legislation violating the Convention, it follows that the Scottish executive cannot legally have nor exercise functions which are incompatible with the Convention.

In addition to the provisions mentioned above, the 1998 Scotland Act provides that a member of the Scottish Executive has no power to make any subordinate legislation or do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.[81] Violations of the conventions made by members of the Scottish Executive can be defined as devolution issues and are justiciable in court proceedings.[82]

3.2. The human rights regime in Scotland

So far no Act of the Scottish Parliament has been struck down on human rights grounds but a large number of challenges based on Article 6 of the Convention were made with regard to Scotland's system of courts and tribunals[83] and some have led to significant changes in the existing institutions and practices. The most important of

---

[80] s 98 and Schedule 6, i.

[81] s 57(2).

[82] s 98 and Schedule 6, i.

[83] Over 900 devolution issues have been raised, all based on Convention rights issues and nearly all in relation to alleged violations of the Convention in criminal proceedings. Cf Chris Himsworth, "Rights versus Devolution", in Campbell, op. cit., pp. 145 - 162, p. 157.

these cases, *Starrs v Ruxton* [84], brought an end to the practice of appointing temporary sheriffs in Scotland and put the whole criminal justice system of the country under considerable pressure.[85]

Starrs v Ruxton concerned a temporary sheriff appointed under the Sheriff Courts (Scotland) Act 1971.[86] Under the Act temporary sheriffs are appointed by the Executive for an initial period of one year and the appointment is subject to recall by the Executive at any time and for any reason. Moreover, the appointment could in practice be recalled by not allocating any work to the temporary sheriff. Over the years it had also become the norm for permanent sheriffs to be appointed from among the temporary sheriffs, i.e. serving as a temporary sheriff had effectively become the prerequisite for an appointment as a permanent sheriff.

In their judgment the High Court judges held that although the initial appointment of temporary sheriffs was not per se incompatible with the Convention, the combination of all the above-mentioned factors amounted to "an absence of any security of tenure" for temporary judges. This insecurity of tenure made the whole process of appointing temporary sheriffs incompatible with Article 6 of the Convention, guaranteeing the right to a fair trial before an independent and impartial tribunal established by law.[87] This was so because judges holding office under the insecure tenure described above would not be independent and impartial enough. The decision, moreover, endangered the legal safety of all decisions made by temporary sheriffs. It ultimately led to the enactment of new legislative provisions which abolished the office of temporary sheriff and created in its place "part-time" sheriffs whose tenure is more secure.[88] Another consequence was that the equivalent arrangements for part-time judicial appointments in England and Wales came under review.[89]

---

[84] *Starrs v. Ruxton* , [2000] SLT 42

[85] Cf *Scotsman*, 25 Aug. 2000.

[86] s 11(2).

[87] Cf Reed & Murdoch, op. cit., p. 15-16 as well as Convery, op. cit., pp. 46 - 47.

[88] s 7 of the Bail, Judicial Appointments etc (Scotland) Act inserted a new s 11a to that effect to replace the offending provision of the 1971 Act.

[89] Cf Jeremy Croft, "Whitehall and the Human Rights Act 1998", in *European Human Rights Law Review*, (2001) 6, pp. 392- 408, p. 403.

The judgment also illustrated the limited sovereignty of the Scottish Executive. After the court's decision the Scottish Executive could no longer lawfully appoint temporary Sheriffs, because the right to do so, formerly exercised by the Secretary of State, was not transferred to the Scottish executive due to its violation of the Convention.[90] The right, however, did not vanish but was retained by the Crown, i.e. the UK government which can exercise powers incompatibly with the Convention when this is backed by primary legislation.[91]

As shown above the 1998 Scotland Act imposes a number of "human rights" restrictions on the legislative competence of the Scottish Parliament and the executive competence of the Scottish Executive. The way in which these restrictions have been made, however, creates a number of potentially difficult scenarios. Both the HRA and the Scotland Act rely on the concept of Convention rights and deal with possible infringements of Convention rights by domestic legislation. Obviously, the complex interlinkage of the two Acts presupposes a common interpretation of those rights. If, however, Convention rights questions are treated as devolution issues they might finally be decided by the Judicial Committee of the Privy Council, whereas the same question – coming from Scotland or elsewhere – taken as an "ordinary" human rights issue under the HRA will be determined by the House of Lords, or in Scottish criminal cases by the Court of Session.[92] Furthermore, since human rights do not belong to the list of reserved matters the Scottish Parliament may legally create human rights legislation parallel to the HRA, which could lead to some confusion.[93]

To sum up, the Scotland Act 1998 and the HRA make a number of provisions which impose human rights limitations on the legislative competence of the Scottish Parliament and the behaviour of Scottish Ministers. Ultimately this reflects the simple

---

[90] Cf s 53 and 54 of the Scotland Act.

[91] Cf s 6 of the HRA. See also Reed & Murdoch, op. cit., p. 15 - 16.

[92] See the comment by Lord Hope of Craighead, "Devolution and Human Rights", op. cit., pp. 375-76. Moreover, two different interpretive duties are in place. When deciding whether an Act of the Scottish Parliament is within its legislative competence, courts have to follow the principle laid down by s 101 of the Scotland Act stating that "where any provision in such legislation could be read in such a way as to be outside competence, it is to be read as narrowly as is required for it to be within competence, if such a reading is possible." Under the HRA, however, it could be necessary to construe the same legislation under he interpretive duty of s 3 of that Act. Depending on the circumstances one or the other, or both principles could be relevant.

[93] Cf Chris Himsworth, "Rights versus Devolution", op. cit., pp. 145 - 162, p.155.

fact that the Scottish Parliament is – unlike Westminster – not sovereign. It operates within what Lord Hope of Craighead has described as the legal triangle of the Community law, Convention rights and the list of reserved matters set out in the 1998 Scotland Act.[94] In this sense, the constitutional system in Scotland resembles the system which is known as "constitutional sovereignty" in the rest of Europe and throughout most of the Commonwealth. The powers of the Scottish Parliament and Executive are defined and limited by a body of fundamental law which includes the Conventions rights as defined by both the HRA and the Scotland Act. The last word as to the "constitutionality" of Scottish law, i.e. law made by the Scottish Parliament, will reside now with the Judicial Committee of the Privy Council which has for all practical ends and purposes assumed the role of a constitutional court of Scotland. This human rights regime imposed on the Scottish legal and political system is different from the model in force with respect to the whole of the UK whose practical operation will be looked at in the next chapter.

[94]Devolution and Human Rights", op. cit., pp. 378-79.

4. The HRA in Practice

Since October 2000 UK courts have exercised their new powers in numerous legal disputes, creating a body of case law which illustrates the practical functioning of the HRA. By far the largest number of cases[95] involving human rights issues have centred on Article 6 of the Convention which guarantees the right to a fair trial. Among the first successful challenges to Acts of Parliaments under the new Act were two planning cases, *County Properties*[96] in the Court of Session in Scotland and *Alconbury*[97] in the Divisional Court in England. Both cases relied on Article 6 of the Convention. The similar issues were whether decision-making processes of the Secretary of State for the Environment, Transport and the Regions were consistent with Article 6 of the Convention which establishes that

> in the determination of his civil rights and obligations or under a criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

At first instance the respective courts decided that the processes by which Ministers take planning decisions are incompatible with Article 6(1) of the Convention, because the Secretary – the ultimate decision taker – was neither independent nor impartial. In fact as the Divisional court put it "[h]e was a party to the cause in which he was also the judge"[98] and therefore did not comply with the requirements of Article 6(1).

In the Scottish case it was even conceded by counsel for the Scottish Executive that the tribunal would be neither independent nor impartial. According to the precedents decided in the European Court in Strasbourg, however, the Convention requires that if the jurisdictional organs making a decision do not comply with the requirements of Article 6(1) then they would have to be subject to the control of a judicial body that would do so. The question to be decided by both courts was

---

[95] The impact of the HRA is monitored by E.M. Salgado & Claire O'Brien, members of the Human Rights Act Research Unit, Kings College Law School, London, who regularly publish a "Table of Cases under the Human Rights Act" in the *European Human Rights Law Review*, the latest in (2001), 6, pp. 677 - 704.

[96] [2000] SLT 965.

[97] [2001] WLR 1389. *Times Law Report* January 24, 2001.

[98] ibid.

whether the powers of judicial review exercised by the High Court in England or the Court of Session in Scotland were sufficient in order to comply with Article 6(1).[99]

The power of judicial review of the High Court in a planning case is limited. It can only review the legality of the decision made, but it cannot examine the evidence to form its own view about the substantial facts of the case. According to the judges, this could not render the process compatible with the Convention, especially when bearing in mind that the Secretary will ultimately make the decision about the planning case in question. Consequently, the court held that the provisions of primary legislation involved were incompatible with the Convention and made a declaration to that effect.[100]

The judges in the Court of Session reached a similar decision. Since the statutory appeal procedure does not allow for review on the substantial merits of a planning case but can only review the legality of the decision finally made by the Scottish Minister, the whole planning process was incompatible with the Convention. The court, therefore, quashed the decision made by the Scottish minister to withdraw the planning application in question.[101]

These very two similar cases illustrate the difference between the powers of the respective courts under the Scotland 1998 Act and the HRA. Under section 57 of the Scotland Act, no member of the Scottish Executive has the power to act inconsistently with any Convention right and any such acts must be reduced, i.e. quashed by the courts. The situation with regard to decisions of the Secretary of State, however, is different. Here section 6(2) of the HRA allows such decisions to be legally effective despite their incompatibility with the convention. The only thing the court can do – and in this case did – is to make a declaration of incompatibility.

In the end, both the decision of the Court of Session and the decision of the Divisional Court were reversed by higher courts. In the Alconbury case the House of Lords held that:

---

[99] ibid. See also Mark Poustie, "The Rule of Law or the Rule of Lawyers? Alconbury, Article 6(1) and the Role of Courts in Administrative Decision-Making" in *European Human Rights Law Review*, (2001) 6, pp. 657 - 676.

[100] Cf *Times Law Report* January 24, 2001. The declaration concerned the Town and Country Planning Act 1990, the Transport and Works Act 1992, the Highway Act 1980 and the Acquisition of Land Act 1980.

[101] Cf Poustie, op. cit., p. 660.

> the Divisional Court erred in concluding that Article 6 (1) [of the Convention] prohibited the Secretary of State from being both a policy maker and a decision taker.[…] In the democratic system of government in England a minister [can] properly perform both functions because he [is] answerable to Parliament as regards the policy aspects of his decisions and answerable to the High Court as regards the lawfulness and fairness of his decision making process.[102]

The House Lords quite emphatically confirmed the right for a member of the executive to make a political decision concerning planning rights, as long as his decision would be subject to judicial review. As Lord Nolan put it the HRA was "no doubt intended to strengthen the rule of the law but not to inaugurate the rule of lawyers."[103] This statement was undoubtedly directed at those observers who had feared an encroachment of politics by the judiciary.

One of the most interesting questions in the run up to the enactment of the HRA had been the speculation surrounding the interpretive duty under section 3 of the Act. Three cases recently decided by the Court of Appeal and the House Lords showed how far the judges were prepared to go.

4.1 Incompatibility avoided

In *Donoghue v. Poplar Housing Association*[104] the Court of Appeal established some rules with regard to the method that should be used when deciding the limits of the interpretive duty established by section 3. Lord Justice Woolf stated that section 3 forced the courts to change their traditional role which has been to identify the legislative intent of parliament. Instead the courts would now have to view legislation passed before the HRA as being "subsequently amended to incorporate the language of section 3".[105] Interpretation of legislation under the HRA should follow a three-step approach:

(i) not considering the HRA the court should first ask itself whether the legislative provision in question violates any articles of the Convention

(ii) if there is a breach, the court has to delimit the scope of change required to achieve a meaning of the provision which is compatible with the Convention and

---

[102] as quoted in Poustie, op. cit., p. 671.

[103] [2001] 3 WLR 42.

[104] [2001] 3 WLR 183.

[105] ibid. at 203. Cf Salgado & O'Brien, "Table of Cases under the HRA : A Commentary", in *European Human Rights Law Review*, (2001), 6, pp. 677 - 704, p. 677-78.

(iii) the court has to decide whether the modified meaning is a "possible" one. In doing this the court is "not entitle[d] to legislate […] its task is still one of interpretation"[106]

In short, the courts have to decide whether they are still interpreting or already legislating. But where does interpretation end and legislation begin? The difference hinges ultimately – despite the precise language being used by the judges – upon a value judgment made by the court. To illustrate this, the landmark case of *R v A* will be looked at in some detail.

The central question decided in *R v. A* (respondent)[107] was whether a section of the Youth Justice and Criminal Evidence Act 1999 could be interpreted in a way that was compatible with Article 6 of the Convention. In the present case the defendant was charged with rape. His defence was that the sexual intercourse in question had occurred with the consent of the complainant or failing that, that he believed she had given her consent. In order to establish this defence the lawyers for the defendant applied for leave to cross-examine the complainant about an alleged consensual sexual relationship the complainant and defendant had had before the incident charge.

Relying on a section of the Youth Justice and Criminal Evidence Act 1999 which only allows such evidence under special circumstances, the trial judge decided that the complainant could not be cross-examined and that no evidence concerning the alleged sexual relationship could be used.

The defendant appealed against this and the Court of Appeal ruled that evidence concerning the alleged previous sexual relationship may be relevant with regard to the partial defence that A had believed in the consent. If the 1999 Act totally prevents the usage of such evidence, this might violate the defendant's right to a fair trial under Article 6 of the Convention.[108]

Section 41 of the 1999 Act imposes wide restrictions on evidence and questioning relating to the sexual behaviour of complainants in rape trials. The court may only give leave to such evidence or such questioning if

> the sexual behaviour of the complainant […] is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused or

---

[106] ibid.

[107] [2001] 3 All ER 1. See also *Times Law Report*, May 24, 2001.

[108] Cf *Times Law Report*, February 13, 2001.

> (c) the sexual behaviour of the complainant […] is alleged to have been, in any respect, so similar –
>
> (i) to any sexual behaviour of the complainant which took place as part of the event [which is the subject matter of the charge] or
>
> (ii) to any other sexual behaviour of the complainant which took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.[109]

Paragraph 3 of Article 6 of the Convention establishes a number of rights for everyone charged with a criminal offence. *Inter alia,* he or she has the right to

> examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.[110]

According to the jurisprudence of the European Human Rights Court, all the rights conferred under Article 6 must be given a broad and effective interpretation, because the fair administration of justice "holds such a prominent place in a democratic society that a restrictive interpretation would not conform to the aim and purpose of Article 6."[111] The Court of Appeal decided in a judgment in January 2001 that the far reaching "rape-shield provisions" quoted above would seem to offend against these broad principles of Article 6 and therefore considered making a declaration of incompatibility. Because of this possibility the Home Secretary's petition to join as a party was granted and the Department of Public Prosecution was given leave to appeal to the House of Lords.[112]

In delivering his opinion for the House, Lord Steyn said that the 1999 Act had had the aim of correcting a "serious mischief" prevalent in common law rape cases, namely the practice of forcing complainants to give unnecessary, misleading and painful evidence about sexual behaviour unrelated to incident charges. According to him such practices had reproduced "outmoded" beliefs about women and their sexual behaviour. He favourably quoted a Canadian Judge who said that the twin myths – "unchaste women were more likely to consent to intercourse and in any event, were

---

[109] s 41 (3)(b)(c)

[110] Art 6 (3)(d).

[111] Cf. Jason Coppel, The Human Rights Act 1998. Enforcing the European Convention in the Domestic Courts, (Chichester: John Wiley & Sons, 1999) pp. 237 ff.

[112] Cf *Times Law Report*, March 21 2001.

less worthy of belief"[113] – were now entirely discredited. In the past, however, defensive strategies based on evidence referring to prior sexual conduct of complainants were successfully used to discredit the complainant's case. This had resulted in "an absurdly low conviction rate in rape cases" and had furthermore "inflicted unacceptable humiliation on complainants in rape cases".[114]

The 1999 Act had sought to redress this situation. By establishing a blanket exclusion of any prior sexual history between the complainant and an accused, however, this provision - interpreted normally, i.e. without the duty imposed by section 3 of the HRA - violates the right of a defendant to a fair trial. This is so because evidence of a prior sexual relation between a defendant and a complainant in rape cases is "a species of prospective evidence which might throw light on the complainant's state of mind" when the alleged rape happened. Accordingly, such a prior sexual relationship might sometimes be relevant as evidence in order to find out what decision the complainant made on the occasion in question. Banning it entirely constituted a restriction of the right to a fair trial.

The question now to ask was whether such a restriction could nevertheless be justified in light of the "legislative purpose" of the provision, i.e. the protection of women from giving painful and unnecessary evidence in rape cases. The right to a fair trial is in itself an absolute right and can only be balanced by determining the concept of what a fair trial includes, and in determining this the interests of the accused, the victim and society have to be taken into account. Here the so-called doctrine of proportionality, which is probably the most significant principle of interpretation of the Convention, comes into play. This doctrine establishes that even where there is a legitimate ground for limiting rights the court had to ask itself whether the legislative objective was

(i) firstly important enough to justify limiting a fundamental right;

(ii) whether secondly the legislation designed to meet that objective was logically linked to it; and

(iii) whether thirdly the provisions it used were no more than necessary to achieve the objective.

---

[113] *R v. Seaboyer* [1991] 83 DLR (4th) 193, at 258. The judge goes on to say that "[t]he fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar."

[114] [2001] 3 All ER, at 9.

According to the judges the third criterion was the decisive one. Bearing in mind the centrality of the right to a fair trial, but also considering the important legislative goal of protecting victims of rape, the normal interpretation of the restrictions imposed by section 41 still constituted an unjustified inroad into the guarantees of a fair trial.

The judge went on to consider the scope of the interpretative obligation established by section 3 of the HRA. When applying ordinary methods of statutory interpretation judges could only depart from the literal meaning of a statute to avoid absurd consequences, but the rule of construction under the HRA went beyond that:

> In accordance with the will of Parliament as reflected in section 3 it will be sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a clear limitation on Convention rights is stated in terms, such impossibility will arise.[115]

In the present case such impossibility did not exist. Adopting the rule of interpretation demanded by section 3 of the HRA, Lord Steyn found it necessary to "subordinate the niceties of language" of the sections in question to broader considerations. It was possible to read these provisions in such a way that "sometimes logically relevant sexual experiences between a complainant and an accused" might be admitted as evidence. Under what circumstances such evidence would be admissible must be decided by the trial judges, but in their unanimous decision the House of Lords gave them the standard test which they will have to apply in future cases:

> The effect of the present decision is that under section 41(3)(c), construed where necessary by applying the interpretative obligation under section 3, and due regard always being paid to the importance of seeking to protect the complainant from indignity and humiliating questions, the test of admissibility is whether the evidence, and questioning in relation to it, is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6. If that test is satisfied the evidence should not be excluded.[116]

The obvious conflict between the defendant's right to a fair trial and the complainant's statutory right to be protected from unfair and humiliating questions

---

[115] ibid.at 17.

[116] ibid. 18.

could be resolved only by reading down the express language of section 41 and by implying extra provisions into it. Whether this is still interpretation or already judicial law making is difficult to decide. The case showed that judges – when seemingly fulfilling an obligation, i.e. adhering to the interpretive duty of section 3 and avoiding a declaration of incompatibility – exercise in fact considerable positive powers.

To illustrate the boundaries of section three and in order describe the process of making a declaration of incompatibility a different case will now be considered.

4.2. Incompatibility decided

In *R. v Mental Health Review Tribunal, North and East London Region and Another ex p. (H)* [117] the issue was whether section 73 of the Mental Health Act 1983 was inconsistent with Article 5 of the Convention which guaranteed the right to liberty. H, a mental patient convicted of manslaughter in September 1988 was ordered to be detained as a restricted patient in Broadmoor Hospital under the 1983 Act. In December 1999 he applied to the Mental Health Tribunal for discharge pursuant to section 73 of the Act. The decision of the Tribunal was not to discharge H and he applied for judicial review. His application was dismissed and it was refused to grant declaratory relief as to the incompatibility of section 73 of the Act with Article 5(1) and (4) of the Convention. Subsequently the appellant obtained leave to appeal against these decisions.

Before the Court of Appeal the only issue in question was whether section 73 could be interpreted in a way compatible with the Convention.

Article 5 of the Convention states

> (1) 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: […] (e) the lawful detention of […] persons of unsound mind.
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful.

It was in fact the latter obligation that had led to the enactment of sections 72 and 73 of the 1983 Act, prior to which mental patients detained in a hospital had no

---

[117] [2001] 3 All ER, 512.

possibility to review the lawfulness of their continued detention.[118] Section 73 (1) is aimed at establishing the right of periodic review for the mentally ill who are compulsorily confined in a hospital for an indefinite or lengthy period of time. It provides that an application for discharge of a restricted patient shall be granted if the tribunal is satisfied

> (a)[119] that he is not then suffering from mental illness, psychopathic disorder, severe mental impairment, or mental impairment or from any of those forms of disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospitable for medical treatment; or that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment […]
>
> (b) that it is not appropriate for the patient to remain liable to be recalled to hospitable for further treatment.

In the submission made on behalf of H, counsel argued that this section reverses the burden of proof and is therefore incompatible with the patient's rights under Article 5 (1) and (4) of the Convention. The burden of proof is reversed because the patient must actually prove that the criteria for continued admission are not satisfied, whereas he should be discharged if the tribunal cannot demonstrate that the criteria are satisfied.

The Secretary of State principally accepted this opinion, but contended that the relevant section could be read in a way that would not reverse the burden of proof and consequently not infringe Article 5. The Court of Appeal decided that such a reading was impossible and that the appellant had made out his case for a declaration of incompatibility.

Giving reasons for the judgment of the court Lord Phillips acknowledged that it was the duty for the court to strive to interpret statutes in a manner compatible with the Convention and that this sometimes "involved straining the meaning of ordinary language". In the present case, however, this was impossible. Even straining the meaning of words, could not enable the court to

---

[118] Under the Mental Health Act 1959 a patient could only enforce the hearing of his case by a tribunal which would then advise the Secretary of State on the question of release. The Secretary of State was not required to act in accordance with the Tribunal's finding. In *X v. UK* [1981], A 46, 4 E.H.R.R., the Human Rights Court decided that this was inconsistent with Article 5(4) of the Convention. For the scope of Article 5 and the right to challenge the lawfulness of detention, see Coppel, op. cit., pp. 207 ff., especially pp. 228 - 229.

[119] identical to s 72 (i) and (ii). s 72 deals with the discharge of unrestricted patients, whereas s 73 is pursuant to the release of restricted patients.

> interpret a requirement that a tribunal must act if satisfied that a state of affairs does not exist as meaning that it must act if not satisfied that a state of affair does exist. The two are patently not the same.[120]

As shown above the former requirement actually does reverse the burden of proof, while the latter does not.[121] As a result the Court of Appeal granted a declaration of incompatibility and a remedial order under section 10 of the HRA. The offending section of the Mental Health Act will be amended soon, since a Government White Paper on reforming the Mental Health Act has just been published.

4.3. Horizontal Effects

The issue of possible horizontal effects of the HRA was widely discussed before its implementation. By horizontal effects lawyers understand the possible application of the HRA in law cases involving private parties. It is beyond doubt that the HRA has some indirect horizontal effects since section 6 requires public bodies, including courts to act consistently with the Convention. Quite clearly, this duty can arise in private law cases.[122]

In *Wilson v The First County Trust Ltd (No 2)*[123] the Court of Appeal ruled that section 127(3) of the Consumer Credit Act 1974 was incompatible with Article 6 of the Convention and with Article 1 of its 1st Protocol. Although this was a private law case, the human rights issue arose because under the 1974 Act the court was obliged to make a declaration to the effect that the defendant, a pawn-brokers company could not enforce their credit agreement with the claimant. Such a declaration, however, violated both the right to a fair trial (guaranteed under Article 6) and the right to peacefully enjoy one's possession, protected by Article 1 of the Convention's First Protocol. The judges held that it was not possible to read the relevant provisions of

---

[120] [2001] 3 All ER 512, at 518.

[121] Admittedly in most cases where tribunals decide whether to release patients or not, they actually do rely on positive findings that patients are still suffering from mental illnesses. But a consistent practice cannot of course justify inconsistent legislation.

[122] For a wider discussion of the "horizontal effects, see inter alia R. Buxton, "The Human Rights Act and Private Law", in *Law Quarterly Review*, " 2000 (116) and N. Bamforth, "The True 'Horizontal Effect' of the Human Rights Act 1998" in *Law Quarterly Review*, 2001 (117).

[123] [2001] 3 WLR 42.

the 1974 Act in a way that would allow the court to act compatibly with Convention rights and therefore made a declaration of incompatibility.[124]

The scope of the duty under section 6 of the HRA was recently set out in a spectacular High Court judgment, *Venables v News Group Newspapers Ltd.*[125] The background of the case was the murder of James Bulger in February 1993 committed by Robert Thompson and Jon Venables when they were both ten years old. Because the circumstances of the killing were particularly shocking, the event itself and the subsequent trial attracted a lot of media attention. In November 1993 they were convicted of murder and sentenced to be detained at her Majesty's pleasure. At the end of the trial, the judge imposed injunctions that restricted the publication of any information about the claimants other than their names and backgrounds at the time of the killing.

In August 2000 Venables and Thompson reached the age of 18 and shortly afterwards it was announced that the Parole Board would make a decisions about the release of the two in 2001. Subsequently they sought permanent injunctions protecting

(i) information regarding changes in their physical appearance since detention
(ii) their new identities and
(iii) information about their existing placement and the time they had spent in secure units between February 1993 and August 2000.

Their lawyers argued that the press intended to publish such details and that the publication of such information would endanger the lives and physical integrity of the claimants because of the numerous violent threats that had been made against them by members of the public. Counsel for the newspapers argued that the court had no power to grant injunctions of this kind for adults. In their response, the claimants relied on the law of confidence – to be found in the common law – and various provisions of the HRA in combination with Article 2 (right to life) and Article 3 (prohibition against torture or inhuman or degrading treatment) of the Convention. The newspapers in turn tried to invoke s 12(4) of the HRA which forces judges to pay special attention to the right of freedom of expression under Article 10 of the Convention.

---

[124] ibid., See also *Guardian*, "Credit Act denies fair deal", May 3, 2001 and *The Times Law Report*, Wednesday May 16 2001.

[125] *Venables and another v. News Group Newspapers Ltd and others*, [2001] 1 All ER, 908.

In her decision, Elizabeth Butler-Sloss, England's most senior family judge, held that the court has in some cases the power to extend the confidentiality of information and can impose wide ranging restrictions on the media. This was justified where a failure to do so could lead to serious physical harm or to the death of the persons seeking confidentiality. The judge established that the Convention applies to this private law case indirectly, because as a public body the court itself must act in a way that is compatible with the Convention. Referring to previous cases Dame Elizabeth said that there is no valid argument "that a court is not to have regard to the Convention in private law cases".[126]

She granted a lifetime injunction banning publication of any material that might reveal the new identities or the whereabouts of the killers of James Bulger. Furthermore, no information may be published for 12 months concerning the eight years Jon Venables and Robert Thompson spent in local authority secure units. The court order was the first of its kind granted to adults and Dame Elizabeth based her decision on the claimant's common law right to confidence and on the duty imposed by section 6 of the HRA which, according to her, included a requirement for the court to act in order to protect the lives of Venables and Thompson. Since their lives and physical safety were in real danger from vigilante attacks, it was necessary to secure their anonymity:

> Although the crime of these two young men was especially heinous, they did not thereby forfeit their rights under English law and under the Convention on Human Rights. […] In order to give them the protection they need and are entitled to receive, I am compelled to grant injunctions.

The court also accepted that it was necessary to apply Article 10 of the Convention which guarantees the freedom of expression and which is given special recognisance in section 12 of the HRA, but found that in this exceptional case the risks to the lives and to the physical safety of the claimants were so real that it was necessary to place their rights above the defendant's right to freedom of expression.

4.4. The "new" power of the judges: some conclusions

The cases examined in this chapter allow for the making of some preliminary conclusions about the way in which the Courts have used the new powers. The *Alconbury* case demonstrated that the House of Lords was very cautious not to give

---

[126] ibid. at 917.

the impression of infringing the right of the executive to make political decisions, as long as these were judicially reviewable by the courts. In that respect some fears that the judiciary will unduly influence the political process might have been too pessimistic.[127]

One of the practical merits of the HRA – as shown by the Lords' decision in *R v. A* – is that it provides certainty in cases which would otherwise remain in the legal doldrums. Without the provisions of the HRA, the Lords would certainly have applied a much stricter interpretation of the "rape-shield" provisions with the possible result that a breach of the Convention might have been certified by the Human Right Courts in Strasbourg years later. In the mean time, numerous similar cases would have been left in legal uncertainty and a number of unsafe decisions would in all likelihood have been made. By resolving and deciding human rights issues at home, the HRA produces much desired and welcomed legal certainty. It will almost certainly also reduce the number of legal defeats by the UK in Strasbourg and therefore spare the government some embarrassment.

The decision of the Lords in *R v A*, however, also shows some of the problems created by the HRA when the Lords made full use of their new power to read legislation in a way compatible with the Convention. The judges, all of them male, decided a very delicate issue involving a basic right of complainants in rape cases who are in nearly all cases women. They have subordinated the protection of traumatised witnesses to a "higher" principle established by the Convention. It is as if Parliament's will when it passed the HRA is more relevant than the intention it had when it passed the 1999 Act. This has indeed the effect of entrenching the HRA: all Acts are equal but some are more equal. The HRA has practically elevated the status of the House of Lords to an unofficial supreme constitutional court deciding on the "constitutionality" of domestic legislation. In doing so they arguably exercise powers which blur the distinctions between interpreting and changing legislation.

It has been argued that section 3 of the HRA has simply added another rule of statutory interpretation to the already existing set. There is, however, a crucial difference between "ordinary" rules of interpretation of statutes such as the mischief rule or the golden rule, and the duty established by section 3. Whereas the former can only be used in instances of ambiguity to give a sensible meaning to provisions, the

---

[127] See page 23 above.

latter must always be used for one positively defined end, namely compatibility. Likewise the possibility of using parliamentary material as an aid to statutory interpretation made possible by the decision in *Pepper v. Hart* [1993] AC 593 is restricted to circumstances where the legislation is unclear or where the literal meaning produces absurdities.

Section 3 also goes further than the "purposive approach famously set out by Lord Denning ("the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it")[128], because design and purpose are now objectively stated, so as not to breach the Convention rights. To seek the intention of Parliament was the established method of interpreting statutes, now judges will always have to assume that Parliament has intended not to breach the Convention, unless the breach is stated in clear terms.

In fact the new rule of interpretation established under section 3 of the HRA is very similar to the one formulated with respect to the 1972 European Communities Act stating that judges should strive to construe all domestic legislation in a manner consistent with EEC obligations, even if this involves "a wide departure from the prima facie meaning of the language of the provision."[129]

R. v Mental Health Review Tribunal, North and East London Region and Another ex p. (H) has shown the limits of section 3 of the HRA. The interpretative duty cannot force judges to distort the clear wording of a statute. The only remedy under such circumstances is a declaration of incompatibility. According to one commentator, this case was "the high water mark of the [Human Rights] Act's potential [where] the Act's delicate scheme worked with precision."[130] More so, since the government decided to take action and did not wait for the victim to go to the Strasbourg court.

---

[128] Lord Denning in *Buchanan & Co v. Babco Ltd*, as quoted in his book *The Discipline of Law*, (London: Butterworths, 1979) 20. This approach was accepted and taken over by the House of Lords. It established the rule that the courts should approach legislation determined to give effect to the intentions of Parliament.

[129] Cf note 47, p. 17 above.

[130] Wadham, "The Human Rights Act One Year on", op. cit., p. 638.

Conclusion

A lot has been said and written about the fundamental changes the Human Rights Act will bring about. "Nothing will ever be quite the same again" one liberal commentator claimed jubilantly, now that a "Quiet Revolution" had finally secured "our fundamental rights"[131]; while at the other end of the spectrum the *Daily Mail* expected the coming of a "new tyranny of human rights" under which "Parliament will no longer decide on crucial matters of moral and social policy" and the European Human Rights Court will act as a "Supreme Court".[132] Looking at the evidence so far proponents and sceptics have both exaggerated their case.

Admittedly it is no small matter that judges now have the power to formally declare that Acts of Parliament breach rights protected by the Convention, and more so since they are no longer bound to interpret legislation literally but have been forced or empowered - depending on one's viewpoint - to take human rights principles into account. Nevertheless, it is still Parliament that will ultimately decide whether to change the offending law or not.

A lot has also been made of the fact that parliamentary supremacy was not touched by the Act. This supremacy, however, is largely a legal construct that does not take into account political pressure and the *fait accompli* of the substantial transfer of sovereignty to the European Union that has been going on for almost twenty years.

Taking a provisional account of the emerging body of case law, it is possible to conclude that British judges are willing to adopt the interpretive principles of the European Human Rights Court and would rather stretch the interpretation of domestic legislation to its limits than declare an incompatibility. The boundaries between interpreting legislation in order to achieve the desired result of compatibility and effectively changing existing statutory provisions are fluid and involve a considerable degree of value judgment. So far, the judiciary has exercised restraint when respecting the politicians' right to make political decisions as the *Alconbury* case has demonstrated and only made declarations of incompatibility as a measure of last resort.

---

[131] Klug, *Values for a Godless Age*, op. cit., p. 19.

[132] *Daily Mail*, 30 March, 2000.

With regard to Scotland the changes brought about by the combined effects of the HRA and devolution have established a human rights regime which does indeed effectively curb the power of both the Scottish Parliament and the Scottish Executive. Here the Convention rights are part of a body of higher law that can effectively be upheld by the judiciary.

The HRA has made it easier for people in Britain to claim their Convention rights simply because they no longer have to trek all the way to Strasbourg to claim them. It has also created public awareness about the fact that there are effective checks on executive as well as legislative powers. At the same time the British government backed by a strong parliamentary majority always can always try to derogate from its human rights obligations in times of emergency and in the wake of the events of September 11th the government did exactly this.

Two months after the terrorist attack against the United States, Home Secretary David Blunkett introduced a "tough" new anti-terrorist Bill which when becoming law would enable the UK to detain suspected foreign terrorist without trial for an indefinite period of time. Because this is in conflict with the government's obligation under the Convention and the HRA, he laid before parliament and the European Court of Human Rights in Strasbourg a "designated derogation order" with respect to Article 5 of the Convention, claiming that the events of September 11 and Britain's involvement in the war in Afghanistan mean that there is a "threat to the life of the nation" which justifies such emergency measures.[133]

Blunkett's Bill was passed shortly afterwards with some concession having been made in the face of strong opposition by Labour backbenchers and the Liberal Democrats. However, the new law still depends on the judiciary's verdict on the legality of Britain's derogation from Article 5 and confirmation is far from certain. England's most senior judge, Lord Chief Justice Woolf only recently voiced his "concern" about the measures and remarked that "[o]bviously [this] is something which I don't want happening for any longer than is absolutely necessary." He also indicated that a legal challenge to the legislation under the HRA would be accepted by the judiciary.

> If someone suggests that Parliament has not enabled the government to do what it is seeking to do they can bring it before the courts and […]if

[133] Cf *The Guardian*, November 13, 2001

> there is not justification for infringing these rights then it is the judiciary's job to say so.[134]

In this possible clash between Britain's judges and the government over human rights the new provisions of the HRA would be tested and it looks as if the government might well face defeat over its decision to suspend human rights in favour of national security.[135] In any case, the decision has already given some credit to the critics who have suggested that some of the hopes concerning the HRA were overoptimistic.

Whatever the outcome of this latest legal battle over human rights will be, it should be clear by now that the HRA is only one among several important constitutional changes that have occurred since Labour came into power almost five years ago. Devolution on the one hand and further transfer of power to supra-national institutions on the other will probably have a greater impact on Britain's changing constitution than the Human Rights Act. As such the enactment of a new "British Human Rights Bill" was a major constitutional change - but not necessarily one of epic historic proportions.

---

[134] Lord Woolf in a BBC 4 interview on New Year's Eve last year. Cf *The Guardian*, January 1, 2002.

[135] ibid. Lawyers have started to challenge the new law after David Pannick, a leading QC who often represents the government, stated his opinion that the derogation may well be unlawful. The barrister claimed that the government has failed to show that an emergency situation - "a threat to the life of the nation" necessary to justify the derogation - exists. Especially because the Home Secretary Mr Blunkett admitted in October "that there was no intelligence pointing to a specific threat to the UK".

Table of Legal Instruments, Cases, Websites and Literature

Legal Instruments

Acquisition of Land Act 1980.

Bail, Judicial Appointments etc (Scotland) Act 2000

Consumer Credit Act 1974

Highway Act 1980

Human Rights Act 1998

Scotland Act 1998

Metal Health Act 1983

European Communities Act 1972

European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)

Terrorism Act 2000

Town and Country Planning Act 1990

Transport and Works Act 1992

Vienna Convention on the Law of Treaties

Youth Justice and Criminal Evidence Act 1999

Cases

AC = Appeal Cases; All ER = All England Law Reports; QB = Queens Bench; SCCR = Scottish Criminal Court Report; SLT = Scots Law Times; WLR = Weekly Law Report. Another source used was *The Times Law Report* regularly published with *The Times*

Attorney-General v. British Broadcasting Corporation [1981] AC 303

Brown v. Stott [2000] SCCR 314; reversed [2001] 2 All ER 817

CCSU v. Minister for the Civil Service [1985] AC 374

County Properties v. Scottish Ministers [2000] SLT 965; reversed [2001] SLT 1125

R v. Transport Secretary ex p. Factortame (No 2) [1991] 1 AC 603

Freitag v. Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing [1999] 1 AC 69

Maccarty Ltd v Smith [1979] 3 All ER 325

Madzimbamuto v. Lardner Burke, [1969]1 AC 645

Pepper v. Hart [1993] AC 593

R v. A [2001] 3 All ER; [2001] 1 WLR 789

R v. DPP, ex. parte Kebilene [1999] 3 WLR 972; [2000] 2 AC 326

R v. Mental Health Review Tribunal, North and East London Region and Another, ex parte (H), [2001] 3 WLR 512; Times Law Report, April 2, 2001

R. v. Ministry of Defence, ex parte Smith [1996] QB 517

R v. Transport Secretary ex parte Factortame (No 2) [1991] 1 AC 603

R v. Secretary of State for the Evironment, Transport and the Regions, ex parte Alconbury [2001] WLR 1389 [2001] 2 All ER. 929; Times Law Report, May 10, 2001

R. v. Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696.

R v. Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115

Starrs v. Ruxton [1999] SCCR1052 [2000] SLT. 42

Venables and another v. News Group Newspapers Ltd and others [2001] 1 All ER 908

Wilson v. First County Trust (No 2) [2001] 3 WLR 42.

Websites

General:

The Guardian, London http://www.guardian.co.uk/

The Times, London http://www.thetimes.co.uk/

Human Rights Websites:

Liberty, http://www.liberty.co.uk/

Council of Europe, http://www.humanrights.coe.int/

European Human Rights Court, http://www.echr.coe.int/

United Nations, http://www.un.org/

British Government, http://www.humanrights.gov.uk/

UK Parliament, http://www.parliament.co.uk/selcom/hrhome.htm

Home Department, http://www.homeoffice.gov.uk/

Scottish Human Rights Unit, http://www.scotland.gov.uk/justice/humanrights/

Legal

Stationery's Office, http://www.legislation.hmso.gov.uk/acts.htm

The Law Society, http://www.lawsoc.org.uk/

The Scottish Court Service http://www.scotcourts.gov.uk/

British and Irish Legal Information Institute http://www.bailii.org/

British law reports http://www.lawreports.co.uk/

Literature

Baker, Christopher (ed.): *Human Rights Act 1998: A Practitioner's Guide*, London: Sweet & Maxwell, 1998.

Bamforth, N.: "The True 'Horizontal Effect' of the Human Rights Act 1998" in *Law Quarterly Review*, 2001 (117)

Betten, Lammy (ed.): *The Human Rights Act 1998. What it means*, The Hague: Martinus Nijhoff Publishers, 1999.

Buxton, R.: "The Human Rights Act and Private Law", in *Law Quarterly Review* 2000 (116)

Convery Jane: *Constitutional Law*, Edinburgh: Sweet & Maxwell 2001.

Coppel, Jason: *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts*, Chichester: John Wiley & Sons, 1999.

Croft, Jeremy: "Whitehall and the Human Rights Act 1998", in *European Human Rights Law Review*, (2001) 6, pp. 392- 408.

Dicey, A.V.: *Introduction to the Study of the Law of the Constitution*, 10th ed, London: MacMillan, 1967.

Klug, Francesca: "The Human Rights Act - a 'Third Way' or ,'Third Wave' Bill of Rights", public lecture, King's College London on 27 March 2001.

- : *Values for a Godless Age. The Story of the UK's New Bill of Rights*, London: Pengiun 2000.

Goldsworthy, J.: "Legislative Sovereignty and the Rule of the Law" in Tom Campbell, K.D. Ewing & Adam Tomkins (eds), *Sceptical Essays on Human Rights*, Oxford: Oxford University Press 2001, pp. 61 - 78.

Government White Paper: *Rights brought Home: The Human Rights Bill*, October 1997, CM 3782.

Himsworth, Chris: "Rights versus Devolution", in Tom Campbell, K.D. Ewing & Adam Tomkins (eds), *Sceptical Essays on Human Rights*, Oxford: Oxford University Press 2001, pp. 145 - 162.

Jeffrey Jowell & D. Oliver, *The Changing Constitution*, Oxford: Clarendon Press 1985

Lord Denning: *The Discipline of Law*, London: Butterworths, 1979.

Lord Hope of Craighead: "Devolution and Human Rights", in *European Human Rights Law Review*, (1998) 4, pp. 367 - 379.

Lord Irvine of Lairg: "Opening Address" in Basil S. Markesinis (ed.), *The Impact of the Human Rights Bill on English Law. The Clifford Chance Lectures vol. III*, Oxford: Oxford University Press 1998.

Lord Lester of Herne Hill: "The Art of the Possible: Interpretation of Statutes under the Human Rights Act", *European Human Rights Law Review*, (1998) 3, pp. 665 - 75.

Loughlin, Martin: "Rights, Democracy and Law" in Tom Campbell, K.D. Ewing & Adam Tomkins (eds), *Sceptical Essays on Human Rights*, Oxford: Oxford University Press 2001, pp. 41 - 60.

Ian Loveland, *Constitutional Law: A Critical Introduction*, London: Butterworths 1996.

Markesinis, Basil S.(ed.): *The Impact of the Human Rights Bill on English Law*, Oxford: Oxford University Press, 1998.

Morsink, Johannes: *The UDHR, Origins, Drafting and Intent,* Philadelphia: University of Pennsylvania Press, 1996.

Poustie, Mark: "The Rule of Law or the Rule of Lawyers? Alconbury, Article 6(1) and the Role of Courts in Administrative Decision-Making" in *European Human Rights Law Review*, (2001) 6, pp. 657 - 676.

Raz, J.: *The Authority of Law* Oxford: Clarendon Press, 1981.

Reed, R. & J. Murdoch: *Human Rights Law in Scotland*, Edinburgh and London: Butterworths 2001.

Salgado E.M. & Claire O'Brien: "Table of Cases under the Human Rights Act: A Comment", in *European Human Rights Law Review*, (2001) 6, pp. 677 - 704.

Sieghart, Paul: *The Lawful Rights of Mankind*, Oxford: Oxford University Press, 1986.

Spencer, Maureen & John Spencer: *Human Rights Law in a Nutshell*, London: Sweet & Maxwell 2001

Starmer, Keir: *European Human Rights Law, The Human Rights Act 1998 and the European Convention on Human Rights*, London: Legal Action Group, 1999.

Straw, Jack & Paul Boateng: *Bringing Rights Home. Labour's Plan to Incorporate the European Convention on Human Rights into United Kingdom Law*, London: Labour Party, 1996.

Wadham, John & Mountfield J: *Blackstone's Guide to the Human Rights Act,* London: Blackstone Press 1999.

Wadham, John: "Bringing Rights Halfway Home", in *European Human Rights Law Review*, (1997) 2, pp. 141-54.

- : "The Human Rights Act: One year on", in *European Human Rights Law Review*, (2001) 6, pp. 620 - 639.