

The Scottish Parliament

The Information Centre

Research Paper

01/03
15 January 2001

ECHR INCORPORATION INTO DOMESTIC LAW: THE HUMAN RIGHTS ACT 1998 AND THE SCOTLAND ACT 1998

The Human Rights Act 1998, which came into force on 2 October 2000 and incorporates the European Convention on Human Rights into UK law, requires all public authorities (including local authorities) to comply with the provisions of the Convention and enables individuals to enforce Convention rights through the domestic courts in the UK. The main provisions of the Human Rights Act are examined in this Research Paper, as well as some of the main justifications for incorporation. However, this Research Paper does not consider in any detail the arguments made over several decades for and against incorporation of the Convention, although a list of the various Bills introduced seeking incorporation is provided in the appendices to this Paper.

Prior to the Human Rights Act coming into force, the Scottish Parliament and the Scottish Executive were placed under a statutory obligation to comply with the terms of the Convention by virtue of sections 29 and 57 (respectively) of the Scotland Act 1998. The operation of the relevant provisions of the Scotland Act in relation to the Convention, and the impact of these provisions in the first year of devolution, are considered in this Research Paper.

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BACKGROUND

THE COUNCIL OF EUROPE¹

The *European Convention for the Protection of Human Rights and Fundamental Freedoms*, more commonly referred to as the *European Convention on Human Rights* (from hereon ‘the ECHR’ or ‘the Convention’), is a treaty of the [Council of Europe](#), an inter-governmental body founded on 5 May 1949. The founding Statute of the Council of Europe provides that “*The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress...pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms*”.² The Council of Europe now comprises forty-one Contracting States.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The Convention was opened for signature on 4 November 1950, ratified by the UK in March 1951 (the UK being the first Member State of the Council of Europe to ratify) and entered into force on 3 September 1953. It has now been ratified by all forty-one States of the Council of Europe. The Convention was intended to provide a common standard across European nations in respect of the protection of fundamental rights and freedoms. The Articles and Protocols of the Convention contain a mixture of statements of rights and freedoms to be respected by Contracting States and the circumstances in which derogations from these requirements may occur. They also provide the foundation for the mechanisms and procedures for the operation of the Convention.

The Convention, as amended by the Eleventh Protocol, comprises 59 articles divided across three sections. Some Articles and Protocols confer rights, whilst others contain procedural and organisational provisions.

Section 1 of the Convention (Articles 1-18) sets out the rights and freedoms of individuals under the Convention, now supplemented by several Protocols providing further rights, with further Protocols dealing merely with procedural and organisational matters. Article 1 of the Convention places Contracting States under an obligation to “*secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention*”. The rights and freedoms of individuals contained in the Convention’s Articles 2-18 and Protocols No. 1, 4, 6 and 7 are set out below. Whilst the UK has ratified Articles 1 to 18 and Protocols 1 and 6, it has

¹ The Council of Europe, which is **not** a body established under the authority of the EC Treaty, should not be confused with the European Council, a European Community body set up following a meeting of heads of government in Paris in 1974 and receiving formal recognition in the Single European Act 1986. The European Council is a political forum which meets biannually, in which the heads of government and their foreign ministers draw up the political agenda for the European Community in the coming months, with some of the programmes from these meetings then taken up and developed further by the European Commission. Article D of the EC Treaty, as amended by the Treaty on European Union, provides that the role of the European Council is to “provide the [European] Union with the necessary impetus for its development..[and to]...define the general political guidelines”. Neither should the Council of Europe be confused with the Council of Ministers, which is also an organ of the European Community and whose membership comprises members of the governments of EC member states, varying according to the subject matter under discussion. These governmental representatives have the authority to make commitments on behalf of their government (see Article 146 of the EC Treaty).

² Article 1 of the Statute of Council of Europe (ETS No.1), 5 May 1949

not yet ratified Protocol No. 4 (which entered into force on 2 May 1968) and Protocol No. 7 (which entered into force on 1 November 1988).

- Article 2: right to life
- Article 3: prohibition of torture, inhuman or degrading treatment or punishment
- Article 4: prohibition of slavery and forced labour
- Article 5: right to liberty and security of person
- Article 6: right to a fair trial; supplemented by Article 2 of Protocol 7: right of appeal in criminal matters, and Article 3 of Protocol 7: compensation for wrongful conviction
- Article 7: no punishment without law, i.e. prohibition of retrospective criminal law; supplemented by Article 4 of Protocol 7: right not to be tried twice
- Article 8: right to respect for private and family life and correspondence
- Article 9: freedom of thought, conscience and religion
- Article 10: freedom of expression
- Article 11: freedom of assembly and association
- Article 12: right to marry and found a family
- Article 13: right to an effective remedy in relation to a violation of Convention rights
- Article 14: prohibition of discrimination in relation to the rights and freedoms set out in the Convention, supplemented by Article 5 of Protocol 7: right to equality between spouses
- Article 1 of Protocol 1: protection of property, Article 2 of Protocol 1: right to education and Article 3 of Protocol 1: right to free elections
- Article 1 of Protocol 4: prohibition of imprisonment for civil debt
- Article 2 of Protocol 4: freedom of movement
- Article 3 of Protocol 4: prohibition of expulsion of individuals from the territory of the State where he or she is a national and Article 4 of Protocol 4: prohibition of collective expulsion of 'aliens'
- Article 1 of Protocol 6: abolition of the death penalty, but with a possible exception in Article 2 of Protocol 6 allowing a state to make provision for the death penalty in times of war or where there is an imminent threat of war

NATURE OF CONVENTION RIGHTS

Convention rights can be divided into three broad categories on the basis of their nature:

- Absolute rights
- Limited rights
- Qualified rights

Absolute rights

Convention rights falling into the category of absolute rights are those rights which do not contain limiting provisions on the exercise of that right, although they are effectively delimited by the court in the process of judicial interpretation. For example, the rights contained in Article 3 (protection from torture, inhuman and degrading treatment and punishment), Article 4 (prohibition of slavery) and Article 7 (protection from retrospective criminal penalties) are absolute rights.

Limited rights

Convention rights falling into the category of limited rights are those rights which contain limitations, but only in the explicitly defined circumstances set out in the Convention. For example, Article 5 (right to liberty) falls into this category.

Qualified rights

Qualified rights are Convention rights whose application can be qualified in line with certain criteria, for example, where it is argued that a qualification is required in order to achieve a particular aim set out in an Article of the Convention. In other words, in respect of the operation of such rights, each case is judged on its merits, depending on the facts and circumstances of the case. However, the overall scope of the right is not narrowed by a qualification in a particular case. The qualification given merely applies in respect of the individual circumstances of that case.

For qualifications to be acceptable, the qualification to be applied must:

- have a basis in law
- be 'necessary' in a democratic society, ie. must fulfil a pressing social need, must pursue a legitimate aim and must be proportionate to the aim which it seeks to achieve; and
- be related to the legitimate aim set out in the relevant Article

Examples of qualified rights include the rights contained in the following Articles and Protocols of the Convention: Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 11 (freedom of assembly and association), Article 1 of Protocol 1 (protection of property), Article 2 of Protocol 1 (right to education).

INTERPRETATION OF CONVENTION RIGHTS

A number of principles have been developed, to be applied by the courts in relation to Convention rights, as described in Simor and Emmerson's recent publication, *Human Rights Practice*³:

- "(a) *that the rights should be 'practical and effective' - the effectiveness principle*
- (b) *that an autonomous or independent interpretation of certain Convention terms is necessary to ensure uniformity and to prevent the Convention's purpose being frustrated; and*
- (c) *that certain of its terms must be interpreted in a dynamic or evolutive way in order to ensure that rights are effectively protected in the light of social and scientific changes"*

³ J Simor and B Emmerson QC, *Human Rights Practice*, (June 2000), Sweet & Maxwell

Each of these principles encompasses a wide range of concepts. The main concepts applied by the courts are defined below, but it should be noted that this Research Paper does not provide an exhaustive treatment of all the concepts

Effectiveness principle

Implied rights

To ensure that individuals gain effective protection of their Convention rights, it has sometimes proved necessary for the courts to imply rights which are inherent elements of the explicitly stated rights in the Convention. An example of such an implied right can be found in the case of *Golder v UK* (1975) 1 EHRR 524, where the European Court of Human Rights implied a right of access to a court as an inherent element of the Article 6 right to a fair and impartial tribunal. Other implied rights which have been found to be inherent elements of Article 6 include the right to civil legal aid in certain circumstances,⁴ the right to be represented by competent legal counsel,⁵ the right of an accused in a criminal trial to have access to unused evidence in the possession of the prosecution, the right to have a court judgement enforced⁶ and the right against self-incrimination.⁷

However, implied rights are not without limitation. Although in *Golder v UK* the European Court of Human Rights implied a Convention right of access to a court, in *Ashingdane v UK* (1985)⁸ the Court noted that this particular implied right was not an absolute right and could be subject to limitation on the grounds that it required some element of regulation by a public authority which could vary, depending on the requirements of, and resources available to individuals and the wider community.

Positive obligations on Contracting States

The European Court of Human Rights has emphasised in a number of cases the requirement on member states to secure effective freedoms for individuals. Article 1 of the Convention places an obligation on all Contracting States to "*secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention*", thus providing the legal basis for positive obligations. Although some of the Articles of the Convention contain explicitly-stated positive obligations, for example, the statement in Article 2 that "Everyone's right to life shall be protected by law", other Articles express rights under the Convention in negative terms, i.e. freedom from some type of abuse of rights, without reference to the role of the State in protecting this right. In order that individuals receive effective protection of their Convention rights, the Court has read certain rights as imposing positive obligations on the State to take steps to provide such protection.⁹ Where a State fails to take such steps, the infringement of Convention rights will therefore arise in the form of an omission to act effectively.

⁴ *Airey v Ireland* (1979) 2 EHRR 305

⁵ *Artico v Italy* (1980) 3 EHRR 1

⁶ *Hornsby v Greece* (1997) 24 EHRR 250

⁷ *Saunders v UK* (1996) 23 EHRR 313; *Funke v France* (1993) 16 EHRR 297

⁸ *Ashingdane v UK* (1985) 7 EHRR 528

⁹ In the case of *Airey v Ireland* (1979) 2 EHRR 305, in relation to deprivation of a legal remedy due to the lack of legal aid available for a particular case, and in *Golder v UK* (1975) 1 EHRR 524, in relation to a prisoner's rights to have access to a solicitor. In *Artico v Italy* (A/37)(1980) at paragraph 33, in an application alleging violation of Article 6 rights, the Court recalled that the rights guaranteed under the Convention are intended to be applied in an effective manner, rather than being "illusory". In *X and Y v The Netherlands*, the Court held that the state had violated its positive obligation to have respect for the rights in Article 8(1) as it had failed to provide a mechanism in domestic criminal law for the prosecution of a man for an alleged assault against a woman with a mental disability.

The extent of a positive obligation will depend on a number of factors which require to be taken into account, including whether essential elements of a right are being considered, the consequent burden that would be placed on the State required to meet the obligation and the effect that a finding of a positive obligation would have on other Convention rights. Case law of the Court dictates that, in deciding whether a positive obligation exists, the Court will *"have regard to the fair balance that has to be struck between the general interest of the community and the competing public interests of the individual, or individuals, concerned"*.¹⁰ Such an assessment was required to be made in *Osman v UK*,¹¹ where the Court held that the State (via the police) was under a positive obligation by virtue of Article 2 (right to life) to take reasonable steps to prevent a possible murder taking place where it was foreseeable, but balanced this by stating that this obligation should be interpreted so as not to impose an *"impossible or disproportionate burden on the authorities"*.¹²

Autonomous or independent concepts

An autonomous concept under the Convention is a legal term used by the European Court whereby a concept is attributed a meaning which goes beyond its ordinary meaning and exists independently of the meaning given to the term by domestic courts. The use of autonomous concepts in relation to the interpretation of Convention rights is said to ensure uniformity of treatment within national legal systems where there is no equivalent term, and to preserve the effective meaning of the term by preventing encroachment upon it through the actions of national authorities. One example of an autonomous or independent concept under the Convention is the notion of law or legality, as stated by the Court in the *Sunday Times v UK* (a/30)(1979) 2 EHRR 245. Convention law sets out the attributes of what is 'law', with public accessibility and sufficient precision being key attributes, in order to guard against arbitrariness.

In the *Sunday Times v UK* (paragraph 49), the Court stated that:

"[f]irstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail", although acknowledging that "[t]hose consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances".

In *Silver v UK* (A/61)(1983) the Court held that unpublished prison rules governing the treatment of prisoners' correspondence did not meet with the Convention notion of law and could not therefore be used to justify an interference with the Article 8 right to respect for correspondence merely because the interference was in accordance with domestic law. In *Malone v Metropolitan Police Commissioner* [1979] 2 All ER 620, whereas the English courts decided that an action was lawful where it was not specifically prohibited by law, in accordance with the conception of the rule of law, in *Malone v UK* this conception of law was abandoned by the European Court of Human Rights, which said that, for something to be found in accordance

¹⁰ *McGinley and Egan v UK* (1998) 27 EHRR 1

¹¹ (1998) 29 EHRR 245

¹² See also *Rees v UK* (A106) (1986)

with the law, it must coincide with the Convention notion of law, which requires a specific legal rule underpinning an action.¹³

Dynamic interpretation: the Convention as a ‘living instrument’

The Court interprets and applies Convention rights in line with prevailing conditions in Contracting States. This principle of interpretation allows the Convention rights to be adapted as societies evolve. The application of this principle can be seen in the case of *Tyrer v UK* (1978), where the Court decided that judicial corporal punishment was in breach of Article 3 (prohibition of torture), having considered the prevailing standards in European society at that time, and not at the time when the Convention was drafted. The Court expressed the principle of dynamic interpretation in this case by describing the Convention as “*a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present day conditions*”.¹⁴ The application of the principle of dynamic interpretation has also been seen in cases relating to children born to unmarried parents¹⁵ and to relations between homosexuals.¹⁶

VIENNA CONVENTION ON THE LAW OF TREATIES (1969)

In addition to the principles of interpretation mentioned in the preceding sections of this paper, given that the Convention is an international treaty, it is interpreted in line with the principles laid down by the Vienna Convention on the Law Of Treaties (1969) for the interpretation of all international treaties.

General rule for interpretation of treaties

Article 31 of the Vienna Convention sets out the general rule for interpretation of treaties. This principle was first formally accepted by the European Court of Human Rights in the case of *Golder v UK* (1975), where the Court stated that treaties are to be interpreted in good faith, in line with the ordinary meaning of the terms used and having regard to the object and purpose of the relevant treaty provision. Article 31 is set out in full below:

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The Context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
 - (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty.*
3. *There shall be taken into account, together with the context:*
 - (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) *any relevant rules of international law applicable in relations between the parties.*

¹³ See also *Groppera Radio AG v Switzerland* (A/173) (1990)

¹⁴ *Tyrer v UK* A/26 at para 31 (1978)

¹⁵ *Marckx v Belgium* A 31 (1979)

¹⁶ *Dudgeon v UK* A 45 (1981)

4. *A special meaning shall be given to a term if it is established that the parties so intended."*

Where confirmation of a treaty provision is required, Article 32 of the Vienna Convention provides that recourse may be made to the preparatory work of the treaties and the circumstances of its conclusion. In ECHR terms, where an interpretation of a Convention provision has been reached by the other means referred to in Article 31 of the Vienna Convention, but the meaning of that interpretation remains obscure or ambiguous, confirmation of the interpretation may be sought by recourse to the *travaux préparatoires* (preparatory work) of the ECHR, although these sources are not to be used as an independent source for interpretation.

ADJUDICATION BY THE COURTS IN RESPECT OF CONVENTION RIGHTS

Victim test

Article 34 of the Convention lays down the principle that a case can only be brought under the Convention alleging a breach of Convention rights when the party bringing the case is a 'victim' of the rights infringement.

Margin of appreciation

The doctrine of a margin of appreciation in the application of Convention rights means that states have a degree of discretion in setting the boundaries of rights of individuals and obligations of states, depending on the particular right concerned, the prevailing context and the circumstances of the case. This doctrine was explained in *Handyside v UK (A/24)(1976)* at paragraph 48, where the European Court of Human Rights ('the Court') stated that:

"it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them."

However, the Court also noted that this margin of appreciation was not unlimited (paragraph 49), stating that the *"domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'"*.

Necessity

In judging whether an interference with an individual's rights is justified, the Court also assesses whether the action is necessary in a democratic society. In *Handyside v UK (A/24)(1976)*, the following features were said to be signifiers of a democratic society: pluralism, toleration and broadmindedness. These signifiers were also recognised in *Dudgeon v UK (A/45)(1981)*, *Le Compte, Van Leuven De Meyere v Belgium (A/43)(1981)* and *Norris v UK (A/142)(1988)*. The Court has sought to find a European consensus on what rights should be protected in a democratic society, so that it does not merely superimpose its own views over those of domestic states. The meaning of necessity was considered by the Court in *Handyside v UK*,¹⁷

¹⁷ (A/24)(1976), para. 48

where it stated that ‘necessity’ lay somewhere between ‘indispensable’ and ‘useful’. The Court noted that “it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’...”. This definition was developed in *Olsson v Sweden (A/130)*(1988) at 67, where the Court stated that “the notion of necessity implies that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued”.

Proportionality

In assessing what is ‘necessary’ as a justification for interference with a right, a number of factors may need to be assessed, but the doctrine of proportionality plays a large part in the equation. Proportionality tends to be one of the last elements to be assessed by the Court when deciding whether a particular interference is justified by a legitimate aim. The doctrine of proportionality requires that an equitable balance be reached between the protection of individuals’ Convention rights and respect for community interests. The Court has held that an interference is only justified if a relationship of proportionality (or reasonable proximity) exists between the interference with an individual’s rights, the appropriateness and relevance of the action taken and the legitimate aim being pursued. If the action is not appropriate for the pursuit of the stated aim, or if it is disproportionate to the aim, then this imbalance, when taken into account with other factors, will indicate that an interference was unnecessary and establish that a violation has taken place.¹⁸

In *Kokkinakis v Greece* (1993) 17 EHRR 397, a Greek law which criminalised ‘prosletising’ by a Jehovah’s Witness was held to be a violation of the Convention right of freedom of thought, conscience and religion (Article 9), as the restrictions applied to Mr Kokkinakis, including arrest and detention, were disproportionate to the aims of the Greek Government and were not necessary in a democratic society. If an aim can be achieved by a state using a means other than one involving an interference with Convention rights, then the non-violating method should be used.¹⁹ Actions which interfere with Convention rights but serve no purpose in achieving the stated aim can also be judged to be disproportionate and therefore not necessary in a democratic society. In *Observer and the Guardian v UK* (1991),²⁰ the Court found that it was unnecessary for the state to subject applicants to a requirement of confidentiality, thus interfering with their Article 10 right to freedom of expression, where information was already in the public domain (and therefore not really confidential at all).²¹ In relation to respect for private life and correspondence, the UK Government tried to argue, in the case of *Campbell v UK* (1993), that prison authorities were justified in opening letters to a prisoner from the European Commission as they were attempting to prevent a crime by ensuring that the envelopes were not forged. The authorities also argued that they were justified in opening letters between the prisoner and his legal advisers on the grounds that they could contain illicit material. In this case, the Court held that this was an unnecessary interference with the protected rights of the prisoner, as the means constituting the interference were disproportionate to the stated aim.

Subsidiarity

Subsidiarity is a concept which was applied by the European Court of Human Rights before it was fully recognised in the context of European Community law. In essence, ‘subsidiarity’ means that central authorities should have a subsidiary role, undertaking only those functions

¹⁸ *McLeod v UK* [1998] 2 FLR 1048

¹⁹ *Marckx v Belgium (A/31)*(1979) at para. 40

²⁰ *Observer and the Guardian v UK* (1991), para. 68

²¹ In *Attorney General v Guardian Newspapers Ltd. (No.2)*, one quality of confidential information that was identified was that it could not be information already in the public domain.

which cannot be undertaken at a local level. In the context of the Convention, this principle finds its application in three ways:

1. The list of rights provided in the Convention are a 'floor' rather than a 'ceiling'; i.e. they are meant to provide a level below which a State must not fall whilst providing States with the opportunity to add other rights to the list of Convention rights in their domestic law (see Article 53 of the Convention).
2. The Convention does not lay down standard uniform laws for Contracting States. Instead, it articulates broad rights which States must give effect to, but with the mode of delivery left to the national authorities, resulting in a fuller integration of the rights into domestic law.²²
3. The Court views the national authorities of contracting states to be in a better position to find a balance between protecting individual rights and respecting community interests, as reflected in the doctrine of 'margin of appreciation'.

No fourth instance (*quatrième instance*)

The European Court of Human Rights is not a court of fourth instance in relation to the UK courts, i.e. it is not a court of appeal from the UK courts. Instead, the Court provides an international tribunal set up under an international treaty (the Convention), before which people can bring cases alleging infringement of their Convention rights. Thus, the Court does not question findings of fact and interpretation of national laws by national courts (cases brought which merely question findings of fact will be held to be inadmissible);²³ rather, the Court is concerned with whether a Contracting State has performed its obligations in respect of Convention rights.

THE EUROPEAN COURT OF HUMAN RIGHTS

From 1966 onwards, the UK recognised the compulsory jurisdiction of the European Court of Human Rights, and also the right of individuals to take a case against a Contracting State to the European Court of Human Rights in cases where individuals believed that their Convention rights had been interfered with by a domestic public authority. However, the terms of the Convention mean that a case can only be taken to the Convention authorities once all available domestic remedies have been exhausted. Between 1966 and the end of 1999 over 6,000 applications were brought against the UK. Out of the cases decided in this period, the UK was found to have violated at least one Convention right of the individual concerned in a total of 68 cases.²⁴

Until November 1998, an individual wishing to take a case to the Convention authorities in Strasbourg had to go through a complex procedure involving three institutions:

- European Commission of Human Rights;
- European Court of Human Rights; and
- Committee of Ministers

²² See *Belgian Linguistics Case (No. 2)* (1979) 1 E.H.R.R. 252

²³ See *X v FRG No 254/57*, 1 YB 150 (1957)

²⁴ Source: Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights*, (2000), Penguin, page 20

However, Protocol No. 11 to the Convention, which was opened for signature on 11 May 1994 for those Member States of the Council of Europe who are signatories to the Convention, provides for reform of Convention institutions. The Protocol rationalises the enforcement mechanisms of the Convention, with the disappearance of the European Commission of Human Rights. Alleged violations are now referred directly to a new permanent European Court of Human Rights, comprising a chamber of seven judges for most cases brought before the Court. The new Court has been in operation since November 1988, although the Commission continued to operate until November 1999 to clear the cases with which it was already dealing.

Prior to incorporation of the ECHR into domestic law, UK citizens seeking to enforce their Convention rights were required to exhaust all domestic remedies available before being able to take their case to the Convention authorities in Strasbourg. The provisions in the Scotland Act 1998 and the Human Rights Act 1998, which are examined below, mean that the citizens of Scotland can now enforce their Convention rights directly in domestic courts. However, following the coming into force of the Human Rights Act 1998 and the ECHR compliance provisions in the Scotland Act 1998, individuals can still take a case alleging infringement of their Convention rights to the European Court of Human Rights, provided they meet the procedural requirements of the Convention.

INCORPORATION OF CONVENTION RIGHTS INTO DOMESTIC LAW

A 'Bill of Rights': incorporating legislation as a 'higher law'

With the incorporation of the ECHR into domestic law via the Human Rights Act 1998 (combined with the provisions in the legislation devolving power to Scotland, Wales and Northern Ireland), the UK now has what is effectively a Bill of Rights. This represents a radical shift away from earlier traditional views of the British Constitution, which held that the idea of a Bill of Rights was a potential threat to the sovereignty of Parliament. A report from *The New York Times* ('Britain Quietly Says It's Time to Adopt a Bill of Rights'), carried on 3 October 1999,²⁵ described the process of incorporation of the ECHR in the following way:

"Quietly, doggedly, somewhat nervously, Britain is preparing itself for a constitutional revolution that will profoundly alter its citizens' relationship to the state and to the rule of law. A year from now, when Britain incorporates the European Convention on Human Rights into domestic law, ordinary Britons will for the first time have a set of fundamental rights that can be enforced in British courts..."

Commenting on the effect of the enactment of the Human Rights Act, the Director of the Human Rights Act Research Unit of the Home Office has pointed to the impact of its provisions on UK law, stating that:

"...the Human Rights Act is more than just the incorporation of a regional human rights treaty into UK law, which on the face of it could be a minor technical development. The people of these islands have finally got a bill of rights. Although the ECHR...can be criticised as outdated, the Human Rights Act is of enormous significance in that it has bestowed 'higher law' status on most Convention rights...If the Act works as intended, its values should infuse the whole of public life and aspects of private relations too. In the words of Lord Steyn, one of the senior judges who will be interpreting the Act, it has given rights like free expression 'a higher constitutional or higher legal order foundation'²⁶.

Background to incorporation

A campaign for a Bill of Rights, with support from various political quarters, was undertaken over the course of several decades in the late 20th century, with a number of unsuccessful

²⁵ Cited in Klug, F., (2000), *op cit.*, p 25

²⁶ *Reynolds v Times Newspapers Ltd* [1999], 3 WLR 1030

attempts made to enact rights legislation (see Appendix B for list of Bills). One of the triggers identified by commentators as reinvigorating what was not a new debate came in the form of the Commonwealth Immigrants Act 1968, which was passed by Parliament in just three days. The 1968 Act was intended to prevent British Asians who had been expelled from East Africa from using their UK citizenship to enter the UK.²⁷ A number of lawyers, such as Lord Scarman,²⁸ Anthony Lester²⁹ and John Macdonald,³⁰ and other commentators, began to discuss the extent to which a parliamentary democracy without a bill of rights could adequately protect the interests of minorities. The debate continued from the 1970s onwards, both within and outwith government circles.³¹

The various arguments made in relation to a Bill of Rights are not examined in this paper in any detail, as they have now been largely overtaken by events. However, a useful summary of the arguments made for and against a Bill of Rights over the years is provided in Appendix C to this paper in the form of an extract from Professor Michael Zander's book, *A Bill of Rights?* (3rd ed., 1985).

Government White Paper 'Rights Brought Home: The Human Rights Bill'

On 14 May 1997, the new Labour Government announced in the Queen's Speech that it intended to incorporate the Convention into domestic law within the lifetime of the current Parliament, that is, to give effect to most of the Convention rights in domestic law. It then set out its proposals for incorporation of the Convention in a 1997 White Paper, *Rights Brought Home: The Human Rights Bill* (Cm 3782), along with the rationale behind incorporation, the main points of which are summarised below:³²

"The constitutional arrangements in most continental European countries meant that their acceptance of the Convention went hand in hand with its incorporation into their domestic law. In this country it was long believed that the rights and freedoms guaranteed by the Convention could be delivered under our common law. In the last two decades, however, there has been a growing awareness that it is not sufficient to rely on the common law and that incorporation is necessary. ... The effect of non-incorporation on the British people is a very practical one. The rights originally developed with major help from the United Kingdom Government, are no longer actually seen as British rights. And enforcing them takes too long and costs too much. It takes on average five years to get an action into the European Court of Human Rights once all domestic remedies have been exhausted; and it costs an average of £30,000. ...

For individuals, and for those advising them, the road to Strasbourg is long and hard. Even when they get there, the Convention enforcement machinery is subject to long delays ... We therefore believe that the time has come to enable people to enforce their Convention rights against the State in the British courts, rather than having to incur the delays and expense which are involved in taking a case to ... Strasbourg ... which may altogether deter some people from pursuing their rights. Enabling courts in the United Kingdom to rule on the application of the Convention will also help to influence the development of case law on the Convention by the European Court of Human Rights ... Enabling the

²⁷ David Steel, *No Entry: The Background and Implications of the Commonwealth Immigrants Act 1968*, (1969), C Hurst & Co.

²⁸ Lord Scarman, Hamlyn Lecture 1974, 'English Law: The New Dimension'

²⁹ Anthony Lester, *Democracy and Individual Rights*, (Fabian Society, 1968)

³⁰ John Macdonald, *Bill of Rights*, (Liberal Party, 1969)

³¹ For example, *UK Charter of Human Rights*, (Labour Party 1976); *Legislation on Human Rights: With Particular Reference to the European Convention*, The Home Office, (June 1976); *The Protection of Human Rights by Law in Northern Ireland*, Standing Advisory Committee on Human Rights, (HMSO, 1977) Cm 7009; *Report of the Select Committee on a Bill of Rights*, House of Lords Paper 176, (June 1978); formation of Charter 88; proposed bills of rights published by various groups including the Scottish Council for Civil Liberties, the Northern Ireland Committee for the Administration of Justice and the Institute for Public Policy Research; *A People's Charter*, Liberty (1991); *Human Rights Legislation*, The Constitution Unit/Nicole Smith, (1996);

³² paras 1.4 and 1.14-1.17

Convention rights to be judged by British courts will also lead to closer scrutiny of the human rights implications of new legislation and new policies..."

Summary of incorporating legislation

The [Human Rights Act 1998](#), which came into force on 2 October 2000, requires all public authorities in the UK (including local authorities and private bodies to the extent that they are undertaking a public-authority related function) to comply with the provisions of the Convention. In addition, as already mentioned, the Act enables individuals to enforce these rights through the domestic courts in the UK, whilst preserving their right to take a case to the European Court of Human Rights in Strasbourg in appropriate circumstances.³³ In deciding cases, courts must interpret legislation in line with Convention requirements, where this is possible.

However, before the Human Rights Act 1998 came into force, the [Scotland Act 1998](#) placed both the Scottish Parliament and Scottish Executive under a legal duty to comply with the terms of the Convention in the exercise of their respective powers and functions. The relevant sections of the Scotland Act (section 29(2)(d) in relation to the Scottish Parliament and section 57(2) in relation to the Scottish Executive) became effective from the time that the Parliament and Executive assumed their powers under the Scotland Act which, for most purposes, was 1 July 1999. By extension, because the Lord Advocate has the dual role of being responsible for the system of public prosecutions in Scotland and being a member of the Scottish Executive, the provisions of section 57(2) of the Scotland Act 1998 also apply to criminal proceedings in the Scottish courts, where an accused can challenge actions of the prosecutor on the grounds that they are in breach of the ECHR.

The effect of each of these Acts is examined below.

THE SCOTLAND ACT 1998

Under the terms of the Scotland Act 1998, the Scottish Parliament and the Scottish Executive, in the exercise of their powers, must comply with the rights of individuals contained in the Convention. The provisions in the Scotland Act relating to the Scottish Parliament and compliance with ECHR came into force on 1 July 1999 when the Scottish Parliament assumed its powers. Most of the provisions in the Scotland Act requiring the Scottish Executive to comply with the ECHR came into force on 6 May 1999, with the exception of the public prosecution system operating under the authority of the Lord Advocate, where devolved responsibility, and therefore the requirement to comply with the ECHR, took effect from 20 May 1999.

THE SCOTTISH PARLIAMENT AND SECTION 29

Under section 29(2)(d) of the Scotland Act, an Act of the Scottish Parliament must not be incompatible with any of the Convention rights of individuals. Before an Executive Bill is introduced in the Scottish Parliament, or upon its introduction, the Scotland Act requires that a member of the Scottish Executive must state that the Bill is within the Parliament's legislative competence, including confirmation of its compatibility with the Convention. In respect of all Bills introduced into Parliament, the Presiding Officer of the Parliament must consider whether a Bill is within the Parliament's legislative competence and provide a statement setting out his or her decision.

³³ The Government's White Paper, 'Bringing Rights Home', did not mention that the European Court of Human Rights in Strasbourg retains a residual jurisdiction for hearing cases where individuals believe that their Convention rights have been breached. However, notwithstanding the incorporation provisions in the Human Rights Act and the Scotland Act, individuals can still take a case to the Strasbourg Court where the incorporating legislation does not cover the alleged claim, or where the UK courts have decided a case but the claimant is not satisfied with the judgement.

THE SCOTTISH EXECUTIVE AND SECTION 57

Section 57(2) of the Scotland Act provides that, “A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights...”. The Scottish Executive, referred to collectively as ‘the Scottish Ministers’, comprises the First Minister, Ministers appointed by the First Minister under section 47 of the Scotland Act, the Lord Advocate and the Solicitor General for Scotland.³⁴

CIRCUMSTANCES ALLOWING AN ECHR CHALLENGE UNDER THE SCOTLAND ACT

1998

An action taken under the Scotland Act 1998 raising a question of whether the Scottish Parliament or the Scottish Executive is acting outwith its competence under the terms of the Scotland Act is referred to as a ‘devolution issue’. One application of this term is the question of whether an Act of the Scottish Parliament or an action of the Scottish Executive is in breach of the ECHR obligations. Paragraph 1 of Schedule 6 to the Scotland Act defines a ‘devolution issue’ as:

- “(a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament,
- (b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is a function of the Scottish Ministers, the First Minister or the Lord Advocate,
- (c) a question whether the purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, within devolved competence,
- (d) a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the **Convention rights** or with Community law,
- (e) a question whether a failure to act by a member of the Scottish Executive is incompatible with any of the **Convention rights** or with Community law
- (f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters”.

PARTIES RAISING ‘DEVOLUTION ISSUES’ IN PROCEEDINGS

The Lord Advocate and the Advocate General for Scotland

In recognition of the special interest that the Lord Advocate and the Advocate General may have in seeking to resolve a devolution issue, paragraph 4(1) of Schedule 6 to the Scotland Act 1998 provides for either the Lord Advocate or the Advocate General to institute proceedings to determine a devolution issue.

Other parties to proceedings

Devolution issues can be raised by parties in any legal proceedings, be they proceedings specifically taken to determine a devolution issue, or proceedings where the initial purpose was not to determine a devolution issue but that issue has arisen during the course of proceedings. Devolution issues can be raised in both civil and criminal courts, of any level. Thus, in criminal cases, devolution issues can be raised in the district court, sheriff court and High Court of Justiciary, and in civil cases in the sheriff court, Court of Session and House of Lords.

For a devolution issue to be raised, the parties to the proceedings do not need to include the Advocate General or the Lord Advocate. However, intimation of a party’s intention to raise a

³⁴ See section 44 of the Scotland Act 1998

devolution issue in proceedings must be given to both the Advocate General and the Lord Advocate if they are not already a party to the proceedings. Upon such intimation, either of these officeholders may become a party to the proceedings to the extent that the proceedings deal with a devolution issue.

In accordance with section 100 of the Scotland Act, such challenges can only be made by a person claiming to be a 'victim' of a violation of their Convention rights, as stated in Article 34 of the Convention, and restated in section 7 of the Human Rights Act 1998. Paragraph 2 of Schedule 6 to the Scotland Act provides that a devolution issue cannot be taken where it appears to the court or tribunal before which proceedings are taking place that the proceedings are "*frivolous or vexatious*". Schedule 6 also sets out the procedural framework for raising devolution issues in Scotland.

PROCEDURES FOR RAISING A 'DEVOLUTION ISSUE' IN LEGAL PROCEEDINGS

References in civil proceedings

In respect of civil proceedings, a form of subordinate legislation used to make rules for the Court of Session, known as an Act of Sederunt, sets out the procedure for raising a devolution issue in a civil case.

Court of Session

Act of Sederunt (Devolution Issue Rules) 1999, S.I. 1999 No 1345 provides for Rule 25A of the Rules of the Court of Session, which requires that a devolution issue must be raised in the pleadings of a case, with the facts, circumstances and contentions of law specified in sufficient detail to allow the Court to determine whether a devolution issue arises.³⁵ This must be done before any evidence is led, unless the Court, on cause shown, decides otherwise.³⁶ Intimation that the devolution issue is to be raised must be given to the 'relevant authority', i.e. the Lord Advocate and Advocate General, who then have fourteen days, or such other period as the Court determines, to decide whether they should take part in the proceedings,³⁷ with a further seven days for them to lodge a minute of written submissions.³⁸ The devolution issue will then be dealt with at a hearing before the 'proof'.³⁹

Sheriff Court

Where civil proceedings are being heard in the sheriff court, the Act of Sederunt (Proceedings for Determination of Devolution Issues Rules) 1999 sets out the procedure for raising a devolution issue. A party must raise a devolution issue before the formal hearing of evidence before the sheriff (known as the 'proof' hearing) commences, unless the sheriff determines otherwise. As with cases heard in the Court of Session, a party proposing to raise a devolution issue in the sheriff court must serve notice on the 'relevant authority' (Lord Advocate and Advocate General for Scotland) intimating this intention. The intimation of a devolution issue will specify that, if the 'relevant authority' wishes to enter an appearance as a party in the proceedings, this must be done within 14 days of intimation, or other such period as the sheriff determines.

³⁵ Rule 25A.4.(1)

³⁶ Rule 25A.3.(1)

³⁷ Rule 25.A.5

³⁸ Rule 25.A.6

³⁹ In this context, a 'proof' refers to the formal hearing of evidence in a civil case by the court at 'first instance'. The court hearing the case at 'first instance' means the court first hearing the case, as opposed to a court of appeal.

References in criminal proceedings

In respect of either solemn⁴⁰ or summary⁴¹ criminal proceedings, a form of subordinate legislation known as an Act of Adjournal sets out the procedure for raising a 'devolution issue'. Act of Adjournal (Devolution Issue Rules) 1999 No. 1346 (S.101), which came into force on 6 May 1999, amended the Act of Adjournal (Criminal Procedure Rules) 1996 by adding a new chapter (Chapter 40) containing rules for the regulation of devolution issue procedure within the meaning given in Schedule 6 to the Scotland Act 1998.

Solemn proceedings

Rule 40.2 provides that a party to solemn criminal proceedings who intends to raise a devolution issue must give written notice of this intention to the clerk of the court in which the trial will take place no later than seven days after the date on which the indictment was served, copied at the same time to all other parties to the proceedings and to the 'relevant authority', i.e. the Lord Advocate and the Advocate General for Scotland.

Summary proceedings

Rule 40.3 provides that a party to summary criminal proceedings who proposes to raise a devolution issue must give written notice of this intention to the clerk of the court before the accused is called upon to plead or, where there is more than one accused, before any accused is called upon to plead. This written notice must be copied at the same time to all other parties to the proceedings and to the Lord Advocate and the Advocate General for Scotland.

APPEALS TO A HIGHER COURT

Criminal proceedings

The Scotland Act⁴² provides for any criminal court, for example, the district court, sheriff court or High Court of Justiciary in its capacity as a trial court (with the exception of a court comprising two or more High Court of Justiciary judges), to have the power to refer any devolution issue arising in proceedings to the High Court of Justiciary for determination.

A criminal court comprising two or more High Court of Justiciary judges may refer any devolution issue to the Judicial Committee of the Privy Council. It would appear that the intention of this provision is for the High Court only to refer a devolution issue to the Judicial Committee where the issue has arisen either before the court sitting in its appellate capacity, or where the court has been considering an application to use its *nobile officium* power.⁴³ However, this rule appears to contain an anomaly, as the High Court can sometimes, in exceptional cases, sit with two or more judges as a trial court, which does not appear to be taken into account in this rule.

Civil proceedings

Where a devolution issue arises in civil proceedings in a court or tribunal, other than in the House of Lords or a court comprising three or more Court of Session judges, Schedule 6 to the

⁴⁰ Solemn procedure refers to a trial, on indictment, before a judge and jury.

⁴¹ Summary procedure refers to a trial heard before a judge, sheriff, stipendiary magistrate or lay justice, but with no jury.

⁴² Para. 9 of Schedule 6 to the Scotland Act 1998

⁴³ The power of *nobile officium* refers to the ultimate equitable power of the High Court of Justiciary, and also of the Court of Session which, although seldom used, may be employed by the court in strictly limited circumstances to modify the otherwise stringent application of the common law and also to achieve fair provision in circumstances where the law currently makes no provision.

Scotland Act⁴⁴ provides that a reference may be made by the court or tribunal concerned to the Inner House of the Court of Session, even from a tribunal where there is usually no further appeal. Where a devolution issue arises in legal proceedings in the House of Lords or a court of three or more Court of Session judges, a reference may be made to the Judicial Committee of the Privy Council with the leave of the court concerned, failing which, with special leave from the Judicial Committee itself.

Direct references to the Judicial Committee of the Privy Council

Although the Privy Council is part of the executive, it also has a judicial function, undertaken by its Judicial Committee.⁴⁵ The Judicial Committee of the Privy Council is concerned with appeals from a number of Commonwealth countries, certain professional bodies and ecclesiastical courts, and now also with determining devolution issue challenges in respect of the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly. The first devolution issue appeal under the Scotland Act to be determined by the Judicial Committee was heard in July 2000. As already mentioned, Schedule 6 to the Scotland Act 1998⁴⁶ provides that the Judicial Committee of the Privy Council will serve as the court of last resort in the determination of devolution issues in relation to the Scottish Parliament and the Scottish Executive. The circumstances in which such appeals can be made in criminal and civil proceedings are set out in the preceding sections of this Research Paper.

In addition to the powers given to the Lord Advocate, Advocate General, Attorney General or Attorney General for Northern Ireland by Schedule 6 to the Scotland Act enabling them to require any court or tribunal to refer a devolution issue raised in proceedings to which he or she is a party to the Judicial Committee,⁴⁷ Schedule 6 also enables these named law officers to refer any devolution issue which has not arisen in legal proceedings to the Judicial Committee of the Privy Council, for example, in relation to an action by the Scottish Executive which is believed to be in contravention of ECHR requirements in section 57(2) of the Scotland Act.

Pre-enactment scrutiny of Scottish Bills

In respect of Bills which have been passed by the Scottish Parliament but which have not yet received Royal Assent, section 33 of the Scotland Act gives each of the above-named law officers the power to make a direct reference to the Judicial Committee to determine whether the legislative provision is within the competence of the Parliament, including ECHR compliance considerations. However, such a reference must be made within four weeks of the passing of the Bill.⁴⁸

⁴⁴ Para 7 of Schedule 6 to the Scotland Act 1998

⁴⁵ This judicial jurisdiction of the Privy Council “rests on the ancient prerogative of the Sovereign as the fountain of justice throughout Her dominions”, although the current membership of the Judicial Committee and the regulation of its powers and procedures is governed by the Judicial Committee Act 1833, as amended. (Source: Privy Council Office Briefing, December 1999). Membership of the Committee comprises the Lord Chancellor and former Lord Chancellors, and other Privy Counsellors under the age of 75 years who hold, or have held, high judicial office in the UK courts (with Privy Counsellors who hold or have held high judicial office in certain Commonwealth countries also being eligible to serve in the Judicial Committee).

⁴⁶ Para 33 of Schedule 6 to the Scotland Act 1998

⁴⁷ paragraph 33

⁴⁸ Ordinary citizens may also challenge Scottish Parliament legislation on the grounds that it is *ultra vires* (i.e. outwith the Parliament’s competence). However, such challenges may only be made once a provision has received Royal Assent and become an Act, and must be done through the ordinary devolution issue procedure.

REMEDIES AVAILABLE UNDER THE SCOTLAND ACT

Power of court to disapply legislation of the Scottish Parliament

Where a court or tribunal finds that a provision of an Act of the Scottish Parliament or subordinate legislation is *ultra vires* under the Scotland Act, i.e. outwith the Parliament's legislative competence, for example where it does not comply with ECHR requirements, the court or tribunal has the power to disapply the legislation. However, it may make an order to remove or limit the retrospective effect of that decision, or suspend the effect of the decision so as to allow the Scottish Parliament time to remedy the defect in order to bring it into line with the Parliament's competence.

Power of court strike down actions of Scottish Executive

If a court or tribunal finds that an action of the Scottish Executive fails to comply with ECHR requirements, for example, in judicial review proceedings against the Executive or in criminal proceedings in respect of the Lord Advocate, the court or tribunal has the power to strike down the offending action.

Awarding of damages to 'victim'

Where a court or tribunal finds that a party bringing proceedings has had his or her ECHR rights breached by legislation of the Scottish Parliament or by actions of the Scottish Executive, it has the power, as it thinks appropriate, to award damages (known as 'just satisfaction') to the party whose rights have been breached. In awarding such damages, the court will have regard to the principles applied by the European Court of Human Rights in awarding 'just satisfaction'.⁴⁹

In some cases, the Court has judged that a finding of a violation of a party's rights is, in itself, 'just satisfaction' for the party concerned. However, in other cases, the Court has found it necessary to award varying sums of money in damages, in line with what it judges to be an equitable amount in the circumstances. Losses for which the Court has awarded damages can generally be divided into three categories:

- Pecuniary loss, where causation is shown between the violation of rights and the pecuniary loss by the 'victim'
- Non-pecuniary loss, where causation is shown between the violation of rights and the mental or physical harm resulting in pain and suffering experienced by the 'victim'
- Costs and expenses, i.e. legal costs and expenses incurred by a 'victim' of a breach of Convention rights in bringing the case through the courts to enforce their Convention rights

NUMBER OF ECHR ISSUES RAISED AGAINST LORD ADVOCATE IN FIRST YEAR OF DEVOLUTION TO SCOTLAND

The Scottish legal system

Most of the ECHR-related devolution issues raised under the Scotland Act in the first year of devolution relate to the Scottish legal system, in particular, criminal prosecutions. Prominent cases included those concerning legal aid fixed fees, the impartiality of temporary sheriffs and the use of evidence obtained under section 172 of the Road Traffic Act 1988. According to the

⁴⁹ Article 41 of the Convention states that, "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

Crown Office, a total of 587 devolution issue minutes were served on the Lord Advocate between 20 May 1999 and 20 May 2000. Sixteen of the devolution issues arising in this period were decided against the Crown, although one of these was won by the Crown on appeal to the Judicial Committee of the Privy Council (*PF Dunfermline v Margaret Anderson Brown*,⁵⁰ concerning section 172 of the Road Traffic Act 1988) and one is currently on appeal to the Judicial Committee of the Privy Council (*PF Fort William v Norman and Peter McLean*, concerning legal aid fixed fees). Appendix A to this Research Paper contains details of these, and other, challenges in the first year of devolution.

More recently, the Lord Advocate provided information about devolution issue challenges in the first eighteen months of devolution. In response to a parliamentary question tabled for written answer (S1W-04775), seeking details of ‘devolution issues’ raised in Scottish courts since the incorporation of the European Convention on Human Rights into Scots law via the Scotland Act 1998, the Lord Advocate provided the following response:

“Between 20 May 1999 and 29 November 2000, a total of 969 devolution issues were served on the Lord Advocate at the Crown Office. Of those, the statistics available indicate that:

- *2 (0.21%) raised issues in terms of Article 3 (of the) ECHR;*
- *42 (4.33%) raised issues in terms of Article 5;*
- *824 (85.04%) raised issues in terms of Article 6;*
- *10 (1.03%) raised issues in terms of Article 7; and*
- *71 (7.33%) raised issues in terms of Article 8.*

Of the total number of devolution issues served on the Lord Advocate, thirty-seven (3.82%) were decided against the Crown. Of those:

- *36 (3.72% of the total number served) related to issues under Article 6 (of which 30 (3.1% of the total number served) related to the guarantee of ‘trial within a reasonable time’); and*
- *1 (0.1% of the total number served) related to an issue under Article 7.*

The above statistics have been collated from various Crown Office sources. Information is not available to break down numbers of devolution issues raised by Sheriff Court jurisdiction and date, or to allow specification of the current stage each challenge by devolution issue minute has reached.”

FINANCIAL PROVISION FOR ECHR INCORPORATION IN SCOTLAND

In response to a parliamentary question (S1W-2571)⁵⁰ asking the Scottish Executive what estimates were made during 1997-98 and 1998-99 in relation to the cost of the civil and criminal justice systems in Scotland of implementation of the ECHR, the Deputy First Minister and Minister for Justice, Mr Jim Wallace, provided the following response:

“Following the Comprehensive Spending Review in 1998, provision was made for the Crown Office, the Legal Aid Fund and the Scottish Courts Service to take account of the cost of ECHR issues arising in criminal and civil proceedings under the Scotland Act

⁵⁰ Scottish Parliament Written Answers, Monday 6 December 1999

and the Human Rights Act. The total provision which was made for these services principally in respect of the ECHR was £6.5 million in 1999-2000; £10.6 million in 2000-01; and £8.9 million in 2001-02.”

In reply to a separate parliamentary question (S1W-2572) requesting information on the actual costs of implementing the ECHR, incurred “*during 1997-98, 1998-99 and 1999-2000 to date*”, Mr Wallace responded that the information requested was not available, as the “*costs resulting from the consideration of ECHR issues cannot readily be disaggregated from other costs which are incurred in civil and criminal proceedings, including Legal Aid, prosecution and court costs*”.⁵¹

THE HUMAN RIGHTS ACT 1998

The Human Rights Act 1998, which received Royal Assent on 9 November 1998 and came into force on 2 October 2000, is effectively a Bill of Rights for the UK, incorporating the European Convention on Human Rights into domestic law. The main effects of the Act are to require the interpretation of legislation, where possible, so as to give effect to Convention rights, to provide procedures for rectification of legislation which infringes Convention rights, and to require public authorities to act in a way which complies with the Convention. The operation of these provisions is examined below, with particular attention to how these provisions will apply in a Scottish context.

For the purposes of the Human Rights Act, the 'Convention rights' incorporated into UK law are those rights contained in the following parts of the Convention, as listed in section 1 of the Act and set out in full in Schedule 1 to the Act:

- Articles 1 to 12
- Article 14
- Articles 1 to 3 of the First Protocol
- Articles 1 and 2 of the Sixth Protocol

as read with Articles 16 to 18 of the Convention.

However, sections 14 and 15 of the Act provide that the Convention rights set out in section 1 of the Act are subject to the designated derogations and reservations of the UK from the Convention. The current derogations relate mainly to the Prevention of Terrorism (Temporary Provisions) Act 1984 and associated Prevention of Terrorism Orders, and the reservations relate mainly to education legislation. The UK's designated derogations and reservations are set out in detail in Schedule 3 to the Act

COMPLIANCE OF LEGISLATION WITH CONVENTION RIGHTS

Statements of ECHR compatibility

As with the requirement in the Scotland Act for Scottish Ministers to provide a statement of legislation competence (including ECHR compliance) on the introduction of a Scottish Executive Bill to the Scottish Parliament, similarly before a UK Government Bill introduced in the UK Parliament reaches its Second Reading, section 19 of the Human Rights Act requires the relevant UK Minister, in relation to Bills introduced in the House of Commons or House of Lords, to provide a written statement that the legislation complies with Convention rights.

⁵¹ *Scottish Parliament Written Answers, Wednesday 26 January 2000*

Where UK Ministers are unable to provide a statement of compatibility, they must state in writing that they cannot provide such a statement but that they wish the legislation to proceed nonetheless.

Judicial interpretation in accordance with Convention rights

Section 2 of the Human Rights Act places UK courts and tribunals under an obligation to take into account Convention law and Convention principles of interpretation when making a determination on a Convention rights issue. Section 3 of the Human Rights Act, which applies to all legislation regardless of whether it was enacted before or after the 1998 Act, requires that, *"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights"*. Section 21(1) of the Human Rights Act defines primary legislation and subordinate legislation for the purposes of the operation of the Act, as set out below.

Primary legislation is defined as follows:

- public general Acts of the UK Parliament
- local and personal Acts of the UK Parliament
- private Acts of the UK Parliament
- Measure of the Church Assembly
- Measure of the General Synod of the Church of England
- Order in Council, either made:
 - in exercise of the Royal Prerogative,
 - under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or
 - amending an Act of the UK Parliament

and includes other orders or instruments made under primary legislation by the UK Parliament (but not by the National Assembly for Wales, a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland government department), to the extent that the order or instrument operates to bring into force one of the provisions of the primary legislation or to amend another piece of primary legislation.

For the purposes of the Act, the following are defined as subordinate legislation:

- Order in Council other than one-
 - made in exercise of a Royal Prerogative
 - made under section 38(1) of the Northern Ireland Constitution Act 1973 or the corresponding provision in the Northern Ireland Act 1998
 - amending an Act of the UK Parliament
- Act of the Scottish Parliament
- Act of the Parliament of Northern Ireland
- Measure of the Assembly established under section 1 of the Northern Ireland Assembly Act 1973
- Act of the Northern Ireland Assembly

and various other Orders, rules, regulations, schemes, warrants, bylaws and instruments.

Prior to the introduction of the incorporating legislation, the Convention was merely to be taken into account when interpreting legislation and resolving any ambiguities. A practical consequence of courts being required to read and give effect to Convention rights when

interpreting legislation is that they will not necessarily be bound by judicial interpretation of legislation in previous cases where Convention rights were not taken into account.

CONSEQUENCES FOR INCOMPATIBLE LEGISLATION

Primary legislation

Where a provision of primary legislation passed by the UK Parliament is found by the courts to be incompatible with Convention rights, section 4 of the Act allows the higher courts operating across the UK to issue a 'declaration of incompatibility' in respect of the infringing provision. For the purposes of the Act, the courts which have such powers are as follows (as set out in section 4(5) of the Act):

- the House of Lords
- the Judicial Committee of the Privy Council
- the Courts Martial Appeal Court
- the Court of Session and the High Court of Justiciary in Scotland
- the High Court and the Court of Appeal in respect of England and Wales, and Northern Ireland

However, a declaration of incompatibility does not affect the current validity, operation or enforcement of the provision of UK primary legislation to which it applies and is not binding in the parties to the proceedings in which it was made.⁵² Instead, it provides the signal to the Government that a remedial order requires to be made to bring the infringing legislation into compliance with Convention rights. In a case where a court is considering making a declaration of incompatibility, the Act requires that the court give the Crown notice of this intention, so that the Crown has the opportunity to become a party to the proceedings and to be represented in the court prior to such a declaration being made.⁵³

Subordinate legislation

In respect of UK subordinate legislation found to be incompatible with Conventions rights, in most cases the courts may quash the infringing provision. However, where the provision has to do what it does based on a provision in UK primary legislation, the court may not quash the provision and must instead issue a declaration of incompatibility in relation to the piece of primary legislation upon which the subordinate legislation is based. In respect of Acts of the devolved Parliaments and Assemblies, these are classed as subordinate legislation for the purposes of the Human Rights Act, and may therefore be quashed by the courts in the same way as UK subordinate legislation. For example, if a court finds a provision in the Adults with Incapacity (Scotland) Act 2000 to be incompatible with Convention rights, it may quash that provision.

POWERS OF UK MINISTERS TO RECTIFY INCOMPATIBLE LEGISLATION

Remedial orders

Where a declaration of incompatibility has been made under section 4 in respect of a provision of UK primary legislation, or subordinate legislation made because of incompatible primary legislation, section 10 of the Human Rights Act provides a discretionary power for the relevant UK Minister to make a remedial order to amend or repeal the infringing legislation. Section

⁵² Section 4(6)

⁵³ Section 5(1)

10(2) of the Act provides that this power can only be used where the Minister decides that there is a compelling case for action. A resolution giving effect to such a remedial order must receive the approval of both the House of Commons and the House of Lords. This process can also be used where a UK Minister takes the view that legislation is incompatible with Convention rights as a result of a decision European Court of Human Rights, but only in respect of decisions which the Court has made after section 10 came into force.

This section 10 power has a parallel in section 107 of the Scotland Act 1998, which gives a UK Minister (but not a Scottish Minister) the power use a remedial order to amend or repeal an Act of the Scottish Parliament, a provision of an Act of the Scottish Parliament, or acts by the Scottish Ministers, where they fail to comply with the Convention.

POWERS OF THE SCOTTISH MINISTERS TO RECTIFY INCOMPATIBLE LEGISLATION

Remedial orders

The powers to rectify incompatible legislation, which are given to UK Ministers under section 10 of the Human Rights Act, are only available to the Scottish Ministers in limited circumstances. The powers conferred on UK Ministers by virtue of section 107 of the Scotland Act also do not currently apply to the Scottish Ministers.

Convention Rights (Compliance) (Scotland) Bill

In recognition of the limited powers currently available to Scottish Ministers to rectify legislation that is found to be incompatible with the Convention, the Scottish Executive proposes to include a provision in the Convention Rights (Compliance) (Scotland) Bill (SP Bill 25), introduced in the Scottish Parliament on 10 January 2001. The Policy Memorandum accompanying the Bill (SP Bill 25 PM) sets out the aim of the provision contained in Part 6 of the Bill:

“The Executive proposes to confer a new power on the Scottish Ministers, which will extend the range of circumstances under which they are able to make remedial orders to remedy actual or perceived incompatibilities with ECHR. Provision has therefore been made in the Bill for a general remedial power.

The proposed new power will make available to the Scottish Ministers, remedial powers similar in scope to those already available to UK Ministers under section 107 of the Scotland Act. At present, for example, if a provision in an Act of the Scottish Parliament or subordinate legislation made by the Scottish Ministers or any exercise of functions by the Scottish Ministers was either found by a court, or was thought to be, incompatible, only UK Ministers would be in a position to make a remedial order to rectify this. The proposals in the Bill are therefore intended to put the Scottish Ministers on a similar footing with UK Ministers”.

The proposals contained in the Convention Rights (Compliance) (Scotland) Bill, and the procedures for making a remedial order, are considered in more detail in **SPICe Research Note, Convention Rights (Compliance) (Scotland) Bill**.

COMPLIANCE BY 'PUBLIC AUTHORITIES' WITH CONVENTION RIGHTS

Section 6 of the Human Rights Act 1998 makes it unlawful for public authorities in the UK to act in a way which is incompatible with Convention rights. However, it is not unlawful for a public authority to act in contravention of the Convention rights where it could not have acted any differently because of primary legislation, or because of an obligation placed on it to enforce incompatible measures in either primary or secondary legislation which were made under such

primary legislation.⁵⁴ The Act does not provide a specific list of public authorities covered by the Act. Instead, section 6 gives a broad definition of 'public authority', as follows:

"6 (3) In this section, "public authority" includes-

- (a) a court or tribunal, and*
- (b) any person certain of whose functions are functions of a public nature*

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament"

However, the exemption given to Parliament in section 6(3) does not include the House of Lords when it is sitting in its judicial capacity.

A guidance note on the Human Rights Act, produced for distribution to public authorities by the Home Office's Human Rights Task Force,⁵⁵ has provided some clarification of what the Act's definition of a public authority covers:

"Public authorities are not defined exhaustively but the term covers three broad categories:

- obvious public authorities such as a Minister, a Government Department or agency, local authorities, health authorities and trusts, the Armed Forces and the police. Everything these bodies do is covered by the Act. Parliament, though, is not a public authority for the majority of its functions.*
- courts and tribunals*
- any person or organisation which carries out some functions of a public nature. Under the Act, however, they are only considered a public authority in relation to their public functions. So, for example, Railtrack is a public authority in relation to its work as a safety regulator for the railways, but not when acting as a commercial property developer".*

The guidance note acknowledges that, in some circumstances, determining whether something is to be classed as a public authority will be problematic. However, it provides a list of 'key characteristics':

- "the body performs or operates in the public domain as an integral part of a statutory system which performs public law duties*
- the duty performed is of public significance*
- the rights or obligations of individuals may be affected in the performance of the duty*

⁵⁴ For these purposes, the term 'act' is used to describe either an act or an omission to act (with the exception of an omission to make primary legislation or remedial orders, so that proceedings will not be brought against the Government should it fail to legislate).

⁵⁵ Human Rights Task Force, 'A New Era of Rights and Responsibilities: Core Guidance for Public Authorities', Human Rights Unit, Home Office, London

- *an individual may be deprived of some legitimate expectation in performance of the duty*
- *the body is non-statutory but is established under the authority of government or local government*
- *the body is supported by statutory powers and penalties*
- *the body performs functions that the government or local government would otherwise perform*
- *the body is under a duty to act judicially in exercising what amounts to public powers"*

Persons believing their rights to have been infringed by a public authority in the UK can seek to enforce their Convention rights directly in the UK courts, although they will still be able to take a case to the European Court of Human Rights in Strasbourg, provided they have leave to do so and have exhausted all possible domestic remedies.

LEGAL STANDING TO BRING PROCEEDINGS UNDER THE HUMAN RIGHTS ACT

Section 7 of the Act provides that, in accordance with Convention principles (see Article 34 of ECHR), only persons who are classed as 'victims' of infringements of Convention rights may bring a case under the Human Rights Act or raise Convention rights in other legal proceedings. Section 7 also sets out the time period within which such proceedings must be brought. Where proceedings are brought with the initial purpose of challenging the action of a public authority in relation to Convention rights, they must be brought within one year of the alleged infringing act taking place, although a court may determine that a longer period should apply for reasons of fairness. However, the time limit in this type of action may be subject to stricter limitations when another rule requires this, for example, where actions are brought under the judicial review procedure, stricter time limits may apply.

REMEDIES AVAILABLE TO THE COURTS FOR BREACHES BY PUBLIC AUTHORITIES

Where a public authority within the terms of the Act has acted, or proposes to act, in a way which is not compatible with Convention rights, section 8 of the Act allows a court or tribunal to grant relief or remedy, including:

- in respect of civil proceedings, damages or compensation (within that court's powers)
- in respect of criminal proceedings, quashing of indictments, staying proceedings and excluding evidence

Where damages are awarded by the court, the Act provides that this must be done in line with the Convention principles, in particular, that of 'just satisfaction' (see Article 41 of the Convention), and at a level commensurate with that which the European Court of Human Rights would award.

HUMAN RIGHTS ACT 1998 – A QUICK GUIDE

The summary of the Human Rights Act 1998 set out below is a quick reference guide to the sections of the Act which contain the **main** provisions of the legislation. The guide is extracted from the *Core Guidance for Public Authorities* (Annex A), produced by the Human Rights Unit of the Home Office.

“Section 1: specifies which of the Convention rights are covered by the Human Rights Act.

Section 2: requires courts or tribunals determining questions which have arisen in connection with the Convention rights to take into account the decisions of Strasbourg (the European Court and Commission of Human Rights and the Committee of Ministers) so far as is relevant.

Section 3: requires legislation to be interpreted as far as possible in a way which is compatible with the Convention rights.

Section 4: allows the higher courts to make a ‘declaration of incompatibility’ where they find that primary legislation is incompatible with a Convention right. The continuing validity and enforcement of the legislation is not affected by such a declaration.

Section 5 states that when a court is considering making a declaration of incompatibility, the Crown is entitled to notice and to be joined as party to the proceedings. This will enable a Minister to provide the court with information which may be relevant to the issue in question.

Section 6: defines a public authority and makes it unlawful for a public authority to act in a way which is incompatible with a Convention right unless it is required to do so by primary legislation or inevitably incompatible secondary legislation.

Section 7: victims may rely on the Convention rights in legal proceedings in UK courts and tribunals or institute separate proceedings. Separate proceedings must be brought within one year (or less) of the date on which the act complained of took place or after a longer period if the court or tribunal judges that to be fair under the circumstances. Shorter time periods may also apply. For example, if proceedings were brought by judicial review, then the shorter judicial review time limit would apply.

Section 8: the court may grant such relief as it considers just and appropriate, provided they are within its powers.

Section 9: concerns methods of challenging acts of courts and tribunals which are alleged to be incompatible with a Convention right.

Section 10: the relevant Minister may by order amend infringing legislation following a declaration of incompatibility or a finding of the European Court of Human Rights if he is satisfied that there is a compelling reason to do so.

Section 11: makes it clear that the Act does not restrict any existing rights that an individual might have under UK law or his right to bring proceedings under existing law.

Section 12: contains safeguards concerning court or tribunal orders (particularly injunctions [for Scotland, interdicts]) which might breach the right to freedom of expression.

Section 13 obliges the courts to have particular regard to the importance of the right to freedom of thought, conscience and religion.

Section 19: requires that when [UK] legislation is introduced into either House for a second reading, the Minister responsible must make a written statement that he considers the Bill is compatible with the Convention rights or that he is unable to make such a statement but wishes Parliament to proceed with the Bill anyway.

Section 21: interpretation section, in particular defining the meaning of primary and subordinate legislation.

Section 22: ensures that victims can rely on their Convention rights in proceedings brought by a public authority, even if the act in question took place before section 7 (came) into force.”

APPENDIX A: 'DEVOLUTION ISSUES' RAISED AGAINST THE CROWN OFFICE DURING FIRST YEAR OF DEVOLUTION TO SCOTLAND

TABLE 1: DEVOLUTION ISSUE CHALLENGES BETWEEN 20 MAY 1999 AND 20 MAY 2000: BY COURT

| Proceedings | No. of Minutes Raised | Percentage of total number of such proceedings |
|--|-----------------------|--|
| High Court | 68 | 11.5 |
| Appeal Court | 18 | 3.06 |
| Sheriff and Jury | 122 | 20.78 |
| Petition Proceedings | 13 | 2.21 |
| Confiscation Proceedings | 5 | 0.85 |
| Petitions for Specification (High Court) | 3 | 0.51 |
| Sheriff Summary | 305 | 51.95 |
| District | 54 | 9.19 |

Source: The Crown Office (July 2000)

TABLE 2: DEVOLUTION ISSUE CHALLENGES BETWEEN 20 MAY 1999 AND 20 MAY 2000: BY ISSUE

| Article | Description of Issue | No. of Minutes served on Lord Advocate | % of total of Minutes served on Lord Advocate |
|---|--|--|---|
| 1. ARTICLE 6 Article 6(1), 3(c), 3(d) <i>Admissibility questions</i> | Access to solicitor at interview/identification parade | 54 | 9.1 |
| | Hearsay Evidence/use of section 259 of the Criminal Procedure (Scotland) Act 1995 | 13 | 2.21 |
| | Entrapment and use of undercover officers/use of pseudonyms | 35 | 5.96 |
| | Section 172 of the Road Traffic Act 1988 | 40 | 6.47 |
| | Trial within a trial - attempts to invoke procedure | 5 | 0.85 |
| Article 6(1) <i>"independent and impartial tribunal"</i> | Temporary Sheriffs (1) That not independent court | 35 | 5.11 |
| | Temporary Sheriffs (2) Retrial cases – where issue raised related to fact that witnesses in earlier trial before temporary sheriff had remained in court and heard evidence of other witnesses – plea in bar of later retrial before permanent sheriff | 10 | 1.7 |

| | | | |
|--|--|-----------|-------|
| | Temporary Sheriffs (3) Appeals attacking convictions obtained before temporary sheriffs prior to Starrs and Chalmers decision in which accompanying devolution issue minute served | 18 | 3.06 |
| | Impartiality of High Court judge | 1 | 0.17 |
| | Impartiality of jury | 1 | 0.17 |
| | Challenges to compatibility of District Court composition and practice | 17 | 2.89 |
| Article 6(1) "hearing within a reasonable time" | Delay cases | 100 | 17.03 |
| | | | |
| Article 6(3)(b) and (c) | <i>Legal Aid – Compatibility of Fixed Fees in summary Cases</i> | 47 | 8 |
| | <i>Legal Aid – Solemn cases where complaint related to failure of Scottish Legal Aid Board to grant legal aid inter alia for defence experts and/or Senior or Junior Counsel</i> | 17 | 2.55 |
| Article 6(1) and 6(3)(b) | Disclosure (equality of arms) Including complaints about lack of facilities for defence post mortems due to body previously being released for burial; attempts to secure disclosure of medical records; attempts to secure disclosure of previous convictions and police statements of witnesses | 35 | 5.96 |
| Article 6(3)(a) | Attack on latitude taken re date in charges | 2 | 0.34 |
| Article 6(1) | Separation of charges | 1 | 0.17 |
| | Separation of Trials | 2 | 0.34 |
| | Evidence of crimes not charged/libelled/use of Section 119 notices | 2 | 0.34 |
| | Use of Section 6 of the Road Traffic Offenders Act 1988 (time-bar certificate) | 3 | 0.51 |
| | Miscellaneous general fair hearing challenges | 20 | 3.4 |
| Article 6(1) | Prejudicial pre-trial publicity | 4 | 0.68 |
| Article 6(1) and (2)/Article 1 Protocol 1 | Confiscation case points – compatibility of statutory assumptions etc. | 10 | 1.7 |
| Article 6(1) and (2) | Compatibility of libelling of bail aggravations | 5 | 0.85 |
| Article 6(1) | Accused previously interviewed as complainer in police complaint | 3 | 0.51 |
| | Decision to refer case to Reporter | 1 | 0.17 |
| Article 6(1) and (2) | Shifting burden of proof | 1 | 0.17 |
| Article 6(1) | Use of compulsory powers other than Section 172 | 1 | 0.17 |
| | | | |
| Article 6(1) | Ability of accused to understand charges and thus effectively participate | 3 | 0.51 |
| | Prosecution of children | 3 | 0.51 |
| | | | |
| 2. ARTICLE 5 | Absolute prohibition on bail in murder cases | 6 | 1.02 |
| Article 5(3) | | | |
| Article 5(3) and (4) | Disclosure of further inquiries at CFE | 4 | 0.68 |
| | Challenge to sufficiency of evidence in custody statement | 2 | 0.34 |
| | Miscellaneous Article 5 Including attempts to use allegations of unlawful detention as plea in bar of trial | 21 | 3.57 |

| | | | |
|--|---|----|------|
| ARTICLE 7 | Attack on intermediate diet legislation due to retrospectivity | 1 | 0.17 |
| | Attack on breach of the peace as being too vague a crime | 4 | 0.68 |
| | Attack on shameless indecency as too vague a crime/attempts to extend unduly | 2 | 0.34 |
| | Attack on special condition of bail as being unlawful | 1 | 0.17 |
| ARTICLE 8 | Anonymous witness search warrants | 20 | 3.4 |
| | Intrusive surveillance | 3 | 0.51 |
| | Miscellaneous including attacks on evidence alleged to have been obtained unlawfully by the police and routine stops of motor vehicles under Section 163 of the Road Traffic Act 1988 | 30 | 5.11 |
| ARTICLE 10 | Attempt by BBC to screen Lockerbie trial | 2 | 0.34 |
| ARTICLE 14 | | 1 | 0.17 |
| ARTICLE 4(1) of 7th PROTOCOL | | 1 | 0.17 |
| Miscellaneous Relatively unfocused issues | | 9 | 1.5 |

Source: The Crown Office (July 2000)

APPENDIX B: PREVIOUS PARLIAMENTARY BILLS RELATED TO HUMAN RIGHTS (SINCE 1970)

| Short title of Bill | Member introducing Bill | Parliamentary session |
|--|-------------------------|-----------------------|
| Protection of Human Rights Bill [Bill 52] | Sam Silkin MP | 1970/71 |
| Northern Ireland Bill of Rights [HL Bill 157] | Lord Brockway | 1970/71 |
| Northern Ireland Bill of Rights [HL Bill 128] | Lord Brockway | 1971/72 |
| Bill of Rights [Bill 214] | Alan Beith MP | 1974/75 |
| Bill of Rights [HL Bill 92] | Lord Wade | 1975/76 |
| Bill of Rights (Northern Ireland) [HL Bill 102] | Lord Brockway | 1975/76 |
| Bill of Rights [HL Bill 11] | Lord Wade | 1976/77 |
| Bill of Rights (Northern Ireland) [HL Bill 80] | Lord Brockway | 1976/77 |
| Bill of Rights [Bill 138] | Sir F Bennett MP | 1978/79 |
| Bill of Rights [HL Bill 54] | Lord Wade | 1979/80 |
| Bill of Rights [HL Bill 4] | Lord Wade | 1980/81 |
| European Human Rights Convention Bill [Bill 73] | Robert Maclennan MP | 1983/84 |
| Human Rights and Fundamental Freedoms Bill [HL Bill 21] | Lord Broxbourne | 1985/86 |
| Human Rights Bill [Bill 19] | Sir E Gardner MP | 1986/87 |
| Human Rights Bill [Bill 37] | Graham Allen MP | 1988/89 |
| Human Rights Bill [Bill 50] | Graham Allen MP | 1989/90 |
| Human Rights Bill [Bill 39] | Graham Allen MP | 1990/91 |
| Protection of Fundamental Rights and Freedoms Bill [Bill 76] | Robert Maclennan MP | 1991/92 |
| Human Rights Bill [Bill 39] | Graham Allen MP | 1992/93 |
| Human Rights (No 2) Bill [Bill 219] | Graham Allen MP | 1992/93 |
| Human Rights (No 3) Bill [Bill 251] | Graham Allen MP | 1992/93 |
| Human Rights Bill [Bill 30] | Graham Allen MP | 1993/94 |
| Human Rights Bill [HL Bill 5] | Lord Lester | 1994/95 |
| Human Rights Bill [HL Bill 11] | Lord Lester | 1996/97 |
| Human Rights Bill [HL Bill 38] | Lord Irvine | 1997/98 |

Source: House of Commons Research Paper 98/24, *The Human Rights Bill [HL]*, 13 February 1998

APPENDIX C: ARGUMENTS FOR AND AGAINST A BILL OF RIGHTS

Source: Michael Zander, *A Bill of Rights?*, (3rd ed., 1985)

"The Arguments for a Bill of Rights Considered

- To bring the United Kingdom into line with most of the rest of the world including the Commonwealth
- The procedure for the enforcement of human rights in Strasbourg is too slow
- The absence of adequate machinery for the enforcement of human rights in Britain means that "dirty laundry" is washed unnecessarily abroad to the detriment of Britain's good name
- A Bill of Rights is a flexible and adaptable tool
- A Bill of Rights is an opportunity for developing law and practice beyond what would be likely to occur if left to the executive and the legislature
- A Bill of Rights may assist a willing Minister to achieve needed reforms
- A Bill of Rights places the power of action where it belongs with those who claim to be aggrieved
- A Bill of Rights is a major educative force
- A Bill of Rights would be needed if there is any significant measure of devolution of powers to regional assemblies.

The Arguments against a Bill of Rights Considered

- A Bill of Rights is an "un-British" way of doing things
- A Bill of Rights is not needed - human rights are adequately protected in Britain
- A Bill of Rights is suitable for a primitive or unsophisticated system of law but is not appropriate to a modern, complex society
- A Bill of Rights is too powerful a tool to be entrusted to judges and is incompatible with democratic principles especially where the government of the day is to the left of centre
- English judges are too executive or Establishment minded to be entrusted with a Bill of Rights
- Bills of Rights are only as good as those who interpret them and our judges are not equipped for the task
- A Bill of Rights would 'politicise' the judges
- A Bill of Rights needs to be 'entrenched' and would thereby restrict Parliament's freedom to legislate in the light of prevailing circumstances whatever they may happen to be
- A Bill of Rights would lead to a multiplicity of actions
- A Bill of Rights would require an elaborate machinery to enforce it
- A Bill of Rights would encourage "troublemakers"
- A Bill of Rights is not needed - devices short of that would suffice
- The time is not ripe for a Bill of Rights
- Having a Bill of Rights would achieve little or nothing"

USEFUL SOURCES OF INFORMATION ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS

OFFICIAL PUBLICATIONS

European Convention on Human Rights, as amended by Protocol No. 11, Directorate of Human Rights, Council of Europe, 1998

Human Rights in Scotland: The European Convention on Human Rights, the Scotland Act and the Human Rights Act, The Scottish Executive. Web site: <http://www.scotland.gov.uk>

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The UN and the Human Rights Responsibilities of a Scottish Parliament, *Scottish Human Rights Centre*, 1998

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| Council of Europe site: | http://www.coe.fr |
| Council of Europe Human Rights Directorate: | http://www.dhdirhr.coe.fr |
| European Court of Human Rights: | http://www.dhcour.coe.fr |
| Human Rights Unit of the Home Office: | http://www.homeoffice.gov.uk/hract |
| Scottish Courts Administration: | http://www.scotcourts.gov.uk |
| Scottish Human Rights Centre: | http://www.dspace.dial.pipex.com/shrc/ |

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