

RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL

PRESENTED TO PARLIAMENT BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

BY COMMAND OF HER MAJESTY

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comments

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Preface by the Prime Minister



The Government is pledged to modernise British politics. We are committed to a comprehensive programme of constitutional reform. We believe it is right to increase individual rights, to decentralise power, to open up government and to reform Parliament.

The elements are well known:

- a Scottish Parliament and a Welsh Assembly giving the people of Scotland and Wales more control over their own affairs within the United Kingdom;
- new rights, based on bringing the European Convention on Human Rights into United Kingdom law;
- an elected Mayor and new strategic authority for London with more accountability in the regions of England;
- freedom of information;
- a referendum on the voting system for the House of Commons; and
- reform of the House of Lords.

This White Paper explains the proposals contained in the Human Rights Bill which we are introducing into Parliament. The Bill marks a major step forward in the achievement of our programme of reform. It will give people in the United Kingdom opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Human Rights Commission and Court in Strasbourg. It will enhance the awareness of human rights in our society. And it stands alongside our decision to put the promotion of human rights at the forefront of our foreign policy.

I warmly commend these proposals to Parliament and to the people of this country.

TONY BLAIR

comments

Introduction and Summary

The Government has a Manifesto commitment to introduce legislation to incorporate the European Convention on Human Rights into United Kingdom law. The Queen's Speech at the opening of the new Parliament announced that the Government would bring forward a Bill for this purpose in the current Session. We are now introducing the Human Rights Bill into Parliament. This White Paper explains what the Bill does, and why.

Before the General Election the Labour Party published a consultation document, *Bringing Rights Home*, setting out in some detail the case for incorporation, and its preliminary proposals for the way this should be done. A number of individuals and organisations responded helpfully with a range of comments on the paper, and have continued to make their knowledge and advice available to the Government. The Government's proposals for the Bill take full account of the responses to *Bringing Rights Home*. Any further comments in response to this White Paper or on the Bill should be sent to:

Human Rights Unit
Home Office
50 Queen Anne's Gate
London SW1H 9AT.

We may make any comments we receive publicly available. Respondents who would prefer their comments to be treated in confidence are invited to indicate this expressly.

Chapter 1 of this White Paper explains the content and status of the European Convention on Human Rights and why the Government considers it desirable to give people in this country easier access to their Convention rights.

The United Kingdom is bound in international law to observe the Convention, which it ratified in 1951, and is answerable for any violation. In some limited circumstances, the United Kingdom courts can already take the Convention into account in domestic proceedings. But public authorities in the United Kingdom are not required as a matter of domestic law to comply with the Convention and, generally speaking, there is no means of having the application of the Convention rights tested in the United Kingdom courts. The Government believes that these arrangements are no longer adequate, given the importance which it attaches to the maintenance of basic human rights in this country, and that the time has come to "bring rights home".

Chapter 2 explains the Government's proposals to make the Convention rights enforceable directly in this country. The Bill makes it unlawful for public authorities to act in a way which is incompatible with the Convention rights. This will make it possible for people to invoke their rights in any proceedings - criminal or civil - brought against them by a public authority, or in proceedings which they may bring against a public authority. The Government prefers a system in which Convention rights can be called upon as they arise, in normal court proceedings, rather than confining their consideration to some kind of constitutional court. Courts and tribunals will be able to award whatever remedy, within their normal powers, is appropriate in the circumstances.

Although the courts will not, under the proposals in the Bill, be able to set aside Acts of the United Kingdom Parliament, the Bill requires them to interpret legislation as far as possible in accordance with the Convention. If this is not possible, the higher courts will be able to issue a formal declaration to the effect that the legislative provisions in question are incompatible with the Convention rights. It will then be up to the Government and Parliament to put matters right. The Bill makes a "fast-track" procedure available for the purpose of amending the law so as to bring it into conformity with the Convention.

Chapter 3 sets out the other measures which the Government intends to take to ensure that the Convention rights are taken more fully into account in the development of new policies and of legislation. It also suggests that Parliament should itself establish a new Human Rights Committee. Amongst the matters on which the Government would welcome advice from a Parliamentary Committee is the possible establishment of a Human Rights Commission, but for the time being the Government has concluded that a new Commission should not be set up by means of this Bill.

Chapter 4 reviews the position on the derogation and reservation which the United Kingdom currently has in place in respect of the Convention and its First Protocol. The Government has concluded that these must remain for the time being, but the Bill requires any derogation to be subject to periodic renewal by Parliament and reservations to be subject to periodic review.

Chapter 4 also reviews the position in respect of those Protocols to the Convention which guarantee other rights (Protocols 4, 6 and 7) and which the United Kingdom has not so far accepted. The Government does not propose that the United Kingdom should ratify at present Protocol 4 or Protocol 6, but it does propose to sign and ratify Protocol 7 once some existing legislation has been amended.

The **Annex** sets out the text of the Convention rights themselves.

comments

Chapter 1 - The Case for Change

The European Convention on Human Rights

1.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms is a treaty of the Council of Europe. This institution was established at the end of the Second World War, as part of the Allies' programme to reconstruct durable civilisation on the mainland of Europe. The Council was established before the European Union and, although many nations are members of both, the two bodies are quite separate.

1.2 The United Kingdom played a major part in drafting the Convention, and there was a broad agreement between the major political parties about the need for it (one of its draftsmen later became, as Lord Kilmuir, Lord Chancellor in the Conservative Administration from 1954 to 1962). The United Kingdom was among the first group of countries to sign the Convention. It was the very first country to ratify it, in March 1951. In 1966 the United Kingdom accepted that an individual person, and not merely another State, could bring a case against the United Kingdom in Strasbourg (the home of the European Commission of Human Rights and Court of Human Rights, which were established by the Convention). Successive administrations in the United Kingdom have maintained these arrangements.

1.3 The European Convention is not the only international human rights agreement to which the United Kingdom and other like-minded countries are party, but over the years it has become one of the premier agreements defining standards of behaviour across Europe. It was also for many years unique because of the system which it put in place for people from signatory countries to take complaints to Strasbourg and for those complaints to be judicially determined. These arrangements are by now well tried and tested. The rights and freedoms which are guaranteed under the Convention are ones with which the people of this country are plainly comfortable. They therefore afford an excellent basis for the Human Rights Bill which we are now introducing.

1.4 The constitutional arrangements in most continental European countries have 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.

1.5 The Liberal Democrat Peer, Lord Lester of Herne Hill QC, recently introduced two Bills on incorporation into the House of Lords (in 1994 and 1996). Before that, the then Conservative MP Sir Edward Gardner QC introduced a Private Member's Bill on incorporation into the House of Commons in 1987. At the time of introducing his Bill he commented on the language of the Articles in the Convention, saying: "It is language which echoes right down the corridors of history. It goes deep into our history and as far back as Magna Carta." (Hansard, 6 February 1987, col.1224). In preparing this White Paper the Government has paid close attention to earlier debates and proposals for incorporation.

The Convention rights

1.6 The Convention contains Articles which guarantee a number of basic human rights. They deal with the right to life (Article 2); torture or inhuman or degrading treatment or punishment (Article 3); slavery and forced labour (Article 4); liberty and security of person (Article 5); fair trial (Article 6); retrospective criminal laws (Article 7); respect for private and family life, home and correspondence (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of peaceful assembly and freedom of association, including the right to join a trade union (Article 11); the right to marry and to found a family (Article 12); and discrimination in the enjoyment of these rights and freedoms (Article 14).

1.7 The United Kingdom is also a party to the First Protocol to the Convention, which guarantees the right to the peaceful enjoyment of possessions (Article 1), the right to education (Article 2) and the right to free elections (Article 3).

1.8 The rights in the Convention are set out in general terms, and they are subject in the Convention to a number of qualifications which are also of a general character. Some of these qualifications are set out in the substantive Articles themselves (see, for example, Article 10, concerning freedom of expression); others are set out in Articles 16 to 18 of the Convention. Sometimes too the rights guaranteed under the Convention need to be balanced against each other (for example,

those guaranteed by Article 8 and Article 10).

Applications under the Convention

1.9 Anyone within the United Kingdom jurisdiction who is aggrieved by an action of the executive or by the effect of the existing law and who believes it is contrary to the European Convention can submit a petition to the European Commission of Human Rights. The Commission will first consider whether the petition is admissible. One of the conditions of admissibility is that the applicant must have gone through all the steps available to him or her at home for challenging the decision which he or she is complaining about. If the Commission decides that a complaint is admissible, and if a friendly settlement cannot be secured, it will send a confidential report to the Committee of Ministers of the Council of Europe, stating its opinion on whether there has been a violation. The matter may end there, with a decision by the Committee (which in practice always adopts the opinion of the Commission), or the case may be referred on to the European Court of Human Rights [1] for consideration. If the Court finds that there has been a violation it may itself "afford just satisfaction" to the injured party by an award of damages or an award of costs and expenses. The court may also find that a formal finding of a violation is sufficient. There is no appeal from the Court.

Effect of a Court judgment

1.10 A finding by the European Court of Human Rights of a violation of a Convention right does not have the effect of automatically changing United Kingdom law and practice: that is a matter for the United Kingdom Government and Parliament. But the United Kingdom, like all other States who are parties to the Convention, has agreed to abide by the decisions of the Court or (where the case has not been referred to the Court) the Committee of Ministers. It follows that, in cases where a violation has been found, the State concerned must ensure that any deficiency in its internal laws is rectified so as to bring them into line with the Convention. The State is responsible for deciding what changes are needed, but it must satisfy the Committee of Ministers that the steps taken are sufficient. Successive United Kingdom administrations have accepted these obligations in full.

Relationship to current law in the United Kingdom

1.11 When the United Kingdom ratified the Convention the view was taken that the rights and freedoms which the Convention guarantees were already, in substance, fully protected in British law. It was not considered necessary to write the Convention itself into British law, or to introduce any new laws in the United Kingdom in order to be sure of being able to comply with the Convention.

1.12 From the point of view of the **international** obligation which the United Kingdom was undertaking when it signed and ratified the Convention, this was understandable. Moreover, the European Court of Human Rights explicitly confirmed that it was not a necessary part of proper observance of the Convention that it should be incorporated into the laws of the States concerned.

1.13 However, since its drafting nearly 50 years ago, almost all the States which are party to the European Convention on Human Rights have gradually incorporated it into their domestic law in one way or another. Ireland and Norway have not done so, but Ireland has a Bill of Rights which guarantees rights similar to those guaranteed by the Convention and Norway is also in the process of incorporating the Convention. Several other countries with which we have close links and which share the common law tradition, such as Canada and New Zealand, have provided similar protection for human rights in their own legal systems.

The case for incorporation

1.14 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. Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts - without this inordinate delay and cost. It will also mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.

1.15 Moreover, in the Government's view, the approach which the United Kingdom has so far adopted towards the Convention does not sufficiently reflect its importance and has not stood the test of time.

1.16 The most obvious proof of this lies in the number of cases in which the European Commission and Court have found that there have been violations of the Convention rights in the United Kingdom. The causes vary. The Government recognises that interpretations of the rights guaranteed under the Convention have developed over the years, reflecting changes in society and attitudes. Sometimes United Kingdom laws have proved to be inherently at odds with the Convention rights. On other occasions, although the law has been satisfactory, something has been done which our courts have held to be lawful by United Kingdom standards but which breaches the Convention. In other cases again, there has simply been no framework within which the compatibility with the Convention rights of an executive act or decision can be tested in the British courts: these courts can of course review the exercise of executive discretion, but they can do so only on the basis of what is lawful or unlawful according to the law in the United Kingdom as it stands. It is plainly unsatisfactory that someone should be the victim of a breach of the Convention standards by the State yet cannot bring any case at all in the British courts, simply because British law does not recognise the right in the same terms as one contained in the Convention.

1.17 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. This might be convenient for a government which was half-hearted about the Convention and the right of individuals to apply under it, since it postpones the moment at which changes in domestic law or practice must be made. But it is not in keeping with the importance which this Government attaches to the observance of basic human rights.

Bringing Rights Home

1.18 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 the European Human Rights Commission and Court in Strasbourg and 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 on the basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the United Kingdom. Our courts' decisions will provide the European Court with a useful source of information and reasoning for its own decisions. United Kingdom judges have a very high reputation internationally, but the fact that they do not deal in the same concepts as the European Court of Human Rights limits the extent to which their judgments can be drawn upon and followed. Enabling the 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. If legislation is enacted which is incompatible with the Convention, a ruling by the domestic courts to that effect will be much more direct and immediate than a ruling from the European Court of Human Rights. The Government of the day, and Parliament, will want to minimise the risk of that happening.

1.19 Our aim is a straightforward one. It is to make more directly accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home.

[1] Protocol 11 to the Convention, which will come into force on 1 November 1998, will replace the existing part-time European Commission and Court of Human Rights with a single full-time Court. *Back*

Chapter 2 - The Government's Proposals for Enforcing the Convention Rights

2.1 The essential feature of the Human Rights Bill is that the United Kingdom will not be bound to give effect to the Convention rights merely as a matter of international law, but will also give them further effect directly in our domestic law. But there is more than one way of achieving this. This Chapter explains the choices which the Government has made for the Bill.

A new requirement on public authorities

2.2 Although the United Kingdom has an international obligation to comply with the Convention, there at present is no requirement in our domestic law on central and local government, or others exercising similar executive powers, to exercise those powers in a way which is compatible with the Convention. This Bill will change that by making it unlawful for public authorities to act in a way which is incompatible with the Convention rights. The definition of what constitutes a public authority is in wide terms. Examples of persons or organisations whose acts or omissions it is intended should be able to be challenged include central government (including executive agencies); local government; the police; immigration officers; prisons; courts and tribunals themselves; and, to the extent that they are exercising public functions, companies responsible for areas of activity which were previously within the public sector, such as the privatised utilities. The actions of Parliament, however, are excluded. 2.3 A person who is aggrieved by an act or omission on the part of a public authority which is incompatible with the Convention rights will be able to challenge the act or omission in the courts. The effects will be wide-ranging. They will extend both to legal actions which a public authority pursues against individuals (for example, where a criminal prosecution is brought or where an administrative decision is being enforced through legal proceedings) and to cases which individuals pursue against a public authority (for example, for judicial review of an executive decision). Convention points will normally be taken in the context of proceedings instituted against individuals or already open to them, but, if none is available, it will be possible for people to bring cases on Convention grounds alone. Individuals or organisations seeking judicial review of decisions by public authorities on Convention grounds will need to show that they have been directly affected, as they must if they take a case to Strasbourg.

2.4 It is our intention that people or organisations should be able to argue that their Convention rights have been infringed by a public authority in our courts at any level. This will enable the Convention rights to be applied from the outset against the facts and background of a particular case, and the people concerned to obtain their remedy at the earliest possible moment. We think this is preferable to allowing cases to run their ordinary course but then referring them to some kind of separate constitutional court which, like the European Court of Human Rights, would simply review cases which had already passed through the regular legal machinery. In considering Convention points, our courts will be required to take account of relevant decisions of the European Commission and Court of Human Rights (although these will not be binding).

2.5 The Convention is often described as a "living instrument" because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention. In particular, our courts will be required to balance the protection of individuals' fundamental rights against the demands of the general interest of the community, particularly in relation to Articles 8-11 where a State may restrict the protected right to the extent that this is "necessary in a democratic society".

Remedies for a failure to comply with the Convention

2.6 A public authority which is found to have acted unlawfully by failing to comply with the Convention will not be exposed to criminal penalties. But the court or tribunal will be able to grant the injured person any remedy which is within its normal powers to grant and which it considers appropriate and just in the circumstances. What remedy is appropriate will of course depend both on the facts of the case and on a proper balance between the rights of the individual and the public interest. In some cases, the right course may be for the decision of the public authority in the particular case to be quashed. In other cases, the only appropriate remedy may be an award of damages. The Bill provides that, in considering an award of damages on Convention grounds, the courts are to take into account the principles applied by the European Court of Human Rights in awarding compensation, so that people will be able to receive compensation from a domestic court equivalent to what they

would have received in Strasbourg.

Interpretation of legislation

2.7 The Bill provides for legislation - both Acts of Parliament and secondary legislation - to be interpreted so far as possible so as to be compatible with the Convention. This goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.

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

A declaration of incompatibility with the Convention rights

2.9 If the courts decide in any case that it is impossible to interpret an Act of Parliament in a way which is compatible with the Convention, the Bill enables a formal declaration to be made that its provisions are incompatible with the Convention. A declaration of incompatibility will be an important statement to make, and the power to make it will be reserved to the higher courts. They will be able to make a declaration in any proceedings before them, whether the case originated with them (as, in the High Court, on judicial review of an executive act) or in considering an appeal from a lower court or tribunal. The Government will have the right to intervene in any proceedings where such a declaration is a possible outcome. A decision by the High Court or Court of Appeal, determining whether or not such a declaration should be made, will itself be appealable.

Effect of court decisions on legislation

2.10 A declaration that legislation is incompatible with the Convention rights will not of itself have the effect of changing the law, which will continue to apply. But it will almost certainly prompt the Government and Parliament to change the law.

2.11 The Government has considered very carefully whether it would be right for the Bill to go further, and give to courts in the United Kingdom the power to set aside an Act of Parliament which they believe is incompatible with the Convention rights. In considering this question, we have looked at a number of models. The Canadian Charter of Rights and Freedoms 1982 enables the courts to strike down any legislation which is inconsistent with the Charter, unless the legislation contains an explicit statement that it is to apply "notwithstanding" the provisions of the Charter. But legislation which has been struck down may be re-enacted with a "notwithstanding" clause. In New Zealand, on the other hand, although there was an earlier proposal for legislation on lines similar to the Canadian Charter, the human rights legislation which was eventually enacted after wide consultation took a different form. The New Zealand Bill of Rights Act 1990 is an "interpretative" statute which requires past and future legislation to be interpreted consistently with the rights contained in the Act as far as possible but provides that legislation stands if that is impossible. In Hong Kong, a middle course was adopted. The Hong Kong Bill of Rights Ordinance 1991 distinguishes between legislation enacted before and after the Ordinance took effect: previous legislation is subordinated to the provisions of the Ordinance, but subsequent legislation takes precedence over it.

2.12 The Government has also considered the European Communities Act 1972 which provides for European law, in cases where that law has "direct effect", to take precedence over domestic law. There is, however, an essential difference between European Community law and the European Convention on Human Rights, because it is a **requirement** of membership of the European Union that member States give priority to directly effective EC law in their own legal systems. There is no such requirement in the Convention.

2.13 The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty. In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of Parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly, this Government has no mandate for any such change.

2.14 It has been suggested that the courts should be able to uphold the rights in the Human Rights Bill in preference to any provisions of earlier legislation which are incompatible with those rights. This is on the basis that a later Act of Parliament takes precedence over an earlier Act if there is a conflict. But the Human Rights Bill is intended to provide a new basis for judicial interpretation of all legislation, not a basis for striking down any part of it.

2.15 The courts will, however, be able to strike down or set aside secondary legislation which is incompatible with the Convention, unless the terms of the parent statute make this impossible. The courts can already strike down or set aside secondary legislation when they consider it to be outside the powers conferred by the statute under which it is made, and it is right that they should be able to do so when it is incompatible with the Convention rights and could have been framed differently.

Entrenchment

2.16 On one view, human rights legislation is so important that it should be given added protection from subsequent amendment or repeal. The Constitution of the United States of America, for example, guarantees rights which can be amended or repealed only by securing qualified majorities in both the House of Representatives and the Senate, and among the States themselves. But an arrangement of this kind could not be reconciled with our own constitutional traditions, which allow any Act of Parliament to be amended or repealed by a subsequent Act of Parliament. We do not believe that it is necessary or would be desirable to attempt to devise such a special arrangement for this Bill.

Amending legislation

2.17 Although the Bill does not allow the courts to set aside Acts of Parliament, it will nevertheless have a profound impact on the way that legislation is interpreted and applied, and it will have the effect of putting the issues squarely to the Government and Parliament for further consideration. It is important to ensure that the Government and Parliament, for their part, can respond quickly. In the normal way, primary legislation can be amended only by further primary legislation, and this can take a long time. Given the volume of Government business, an early opportunity to legislate may not arise; and the process of legislating is itself protracted. Emergency legislation can be enacted very quickly indeed, but it is introduced only in the most exceptional circumstances.

2.18 The Bill provides for a fast-track procedure for changing legislation in response either to a declaration of incompatibility by our own higher courts or to a finding of a violation of the Convention in Strasbourg. The appropriate Government Minister will be able to amend the legislation by Order so as to make it compatible with the Convention. The Order will be subject to approval by both Houses of Parliament before taking effect, except where the need to amend the legislation is particularly urgent, when the Order will take effect immediately but will expire after a short period if not approved by Parliament.

2.19 There are already precedents for using secondary legislation to amend primary legislation in some circumstances, and we think the use of such a procedure is acceptable in this context and would be welcome as a means of improving the observance of human rights. Plainly the Minister would have to exercise this power only in relation to the provisions which contravene the Convention, together with any necessary consequential amendments. In other words, Ministers would not have carte blanche to amend unrelated parts of the Act in which the breach is discovered.

Scotland

2.20 In Scotland, the position with regard to Acts of the Westminster Parliament will be the same as in England and Wales. All courts will be required to interpret the legislation in a way which is compatible with the Convention so far as possible. If a provision is found to be incompatible with the Convention, the Court of Session or the High Court will be able to make a declarator to that effect, but this will not affect the validity or continuing operation of the provision.

2.21 The position will be different, however, in relation to Acts of the Scottish Parliament when it is established. The Government has decided that the Scottish Parliament will have no power to legislate in a way which is incompatible with the Convention; and similarly that the Scottish Executive will have no power to make subordinate legislation or to take executive action which is incompatible with the Convention. It will accordingly be possible to challenge such legislation and actions in the Scottish courts on the ground that the Scottish Parliament or Executive has incorrectly applied its powers. If the challenge is successful then the legislation or action would be held to be unlawful. As with other issues concerning the powers of the Scottish Parliament, there will be a procedure for inferior courts to refer such issues to the superior Scottish courts; and those courts in turn will be able to refer the matter to the Judicial Committee of the Privy Council. If such issues are decided by the superior Scottish courts, an appeal from their decision will be to the Judicial Committee. These arrangements are in line with the Government's general approach to devolution.

Wales

2.22 Similarly, the Welsh Assembly will not have power to make subordinate legislation or take executive action which is incompatible with the Convention. It will be possible to challenge such legislation and action in the courts, and for them to be quashed, on the ground that the Assembly has exceeded its powers.

Northern Ireland

2.23 Acts of the Westminster Parliament will be treated in the same way in Northern Ireland as in the rest of the United Kingdom. But Orders in Council and other related legislation will be treated as subordinate legislation. In other words, they will be struck down by the courts if they are incompatible with the Convention. Most such legislation is a temporary means of enacting legislation which would otherwise be done by measures of a devolved Northern Ireland legislature.

comments

Chapter 3 - Improving Compliance with the Convention Rights

3.1 The enforcement of Convention rights will be a matter for the courts, whilst the Government and Parliament will have the different but equally important responsibility of revising legislation where necessary. But it is also highly desirable for the Government to ensure as far as possible that legislation which it places before Parliament in the normal way is compatible with the Convention rights, and for Parliament to ensure that the human rights implications of legislation are subject to proper consideration before the legislation is enacted.

Government legislation

3.2 The Human Rights Bill introduces a new procedure to make the human rights implications of proposed Government legislation more transparent. The responsible Minister will be required to provide a statement that in his or her view the proposed Bill is compatible with the Convention. The Government intends to include this statement alongside the Explanatory and Financial Memorandum which accompanies a Bill when it is introduced into each House of Parliament.

3.3 There may be occasions where such a statement cannot be provided, for example because it is essential to legislate on a particular issue but the policy in question requires a risk to be taken in relation to the Convention, or because the arguments in relation to the Convention issues raised are not clear-cut. In such cases, the Minister will indicate that he or she cannot provide a positive statement but that the Government nevertheless wishes Parliament to proceed to consider the Bill. Parliament would expect the Minister to explain his or her reasons during the normal course of the proceedings on the Bill. This will ensure that the human rights implications are debated at the earliest opportunity.

Consideration of draft legislation within Government

3.4 The new requirement to make a statement about the compliance of draft legislation with the Convention will have a significant and beneficial impact on the preparation of draft legislation within Government before its introduction into Parliament. It will ensure that all Ministers, their departments and officials are fully seized of the gravity of the Convention's obligations in respect of human rights. But we also intend to strengthen collective Government procedures so as to ensure that a proper assessment is made of the human rights implications when collective approval is sought for a new policy, as well as when any draft Bill is considered by Ministers. Revised guidance to Departments on these procedures will, like the existing guidance, be publicly available.

3.5 Some central co-ordination will also be extremely desirable in considering the approach to be taken to Convention points in criminal or civil proceedings, or in proceedings for judicial review, to which a Government department is a party. This is likely to require an inter- departmental group of lawyers and administrators meeting on a regular basis to ensure that a consistent approach is taken and to ensure that developments in case law are well understood by all those in Government who are involved in proceedings on Convention points. We do not, however, see any need to make a particular Minister responsible for promoting human rights across Government, or to set up a separate new Unit for this purpose. The responsibility for complying with human rights requirements rests on the Government as a whole.

A Parliamentary Committee on Human Rights

3.6 *Bringing Rights Home* suggested that "Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy". How this is achieved is a matter for Parliament to decide, but in the Government's view the best course would be to establish a new Parliamentary Committee with functions relating to human rights. This would not require legislation or any change in Parliamentary procedure. There could be a Joint Committee of both Houses of Parliament or each House could have its own Committee; or there could be a Committee which met jointly for some purposes and separately for others.

3.7 The new Committee might conduct enquiries on a range of human rights issues relating to the Convention, and produce reports so as to assist the Government and Parliament in deciding what action to take. It might also want to range more widely, and examine issues relating to the other international obligations of the United Kingdom such as proposals to accept new rights under other human rights treaties.

Should there be a Human Rights Commission?

3.8 *Bringing Rights Home* canvassed views on the establishment of a Human Rights Commission, and this possibility has received a good deal of attention. No commitment to establish a Commission was, however, made in the Manifesto on which the Government was elected. The Government's priority is implementation of its Manifesto commitment to give further effect to the Convention rights in domestic law so that people can enforce those rights in United Kingdom courts. Establishment of a new Human Rights Commission is not central to that objective and does not need to form part of the current Bill.

3.9 Moreover, the idea of setting up a new human rights body is not universally acclaimed. Some reservations have been expressed, particularly from the point of view of the impact on existing bodies concerned with particular aspects of human rights, such as the Commission for Racial Equality and the Equal Opportunities Commission, whose primary concern is to protect the rights for which they were established. A quinquennial review is currently being conducted of the Equal Opportunities Commission, and the Government has also decided to establish a new Disability Rights Commission.

3.10 The Government's conclusion is that, before a Human Rights Commission could be established by legislation, more consideration needs to be given to how it would work in relation to such bodies, and to the new arrangements to be established for Parliamentary and Government scrutiny of human rights issues. This is necessary not only for the purposes of framing the legislation but also to justify the additional public expenditure needed to establish and run a new Commission. A range of organisational issues need more detailed consideration before the legislative and financial case for a new Commission is made, and there needs to be a greater degree of consensus on an appropriate model among existing human rights bodies.

3.11 However, the Government has not closed its mind to the idea of a new Human Rights Commission at some stage in the future in the light of practical experience of the working of the new legislation. If Parliament establishes a Committee on Human Rights, one of its main tasks might be to conduct an inquiry into whether a Human Rights Commission is needed and how it should operate. The Government would want to give full weight to the Committee's report in considering whether to create a statutory Human Rights Commission in future.

3.12 It has been suggested that a new Commission might be funded from non- Government sources. The Government would not wish to deter a move towards a non- statutory, privately- financed body if its role was limited to functions such as public education and advice to individuals. However, a non-statutory body could not absorb any of the functions of the existing statutory bodies concerned with aspects of human rights.

comments

Chapter 4 - Derogations, Reservations and other Protocols

Derogations

4.1 Article 15 of the Convention permits a State to derogate from certain Articles of the Convention in time of war or other public emergency threatening the life of the nation. The United Kingdom has one derogation in place, in respect of Article 5(3) of the Convention.

4.2 The derogation arose from a case in 1988 in which the European Court of Human Rights held that the detention of the applicants in the case before it under the Prevention of Terrorism (Temporary Provisions) Act 1984 for more than four days constituted a breach of Article 5(3) of the Convention, because they had not been brought promptly before a judicial authority. The Government of the day entered a derogation following the judgment in order to preserve the Secretary of State's power under the Act to extend the period of detention of persons suspected of terrorism connected with the affairs of Northern Ireland for a total of up to seven days. The validity of the derogation was subsequently upheld by the European Court of Human Rights in another case in 1993.

4.3 We are considering what change might be made to the arrangements under the prevention of terrorism legislation. Substituting judicial for executive authority for extensions, which would mean that the derogation could be withdrawn, would require primary legislation. In the meantime, however, the derogation remains necessary. The Bill sets out the text of the derogation, and Article 5(3) will have effect in domestic law for the time being subject to its terms.

4.4 Given our commitment to promoting human rights, however, we would not want the derogation to remain in place indefinitely without good reasons. Accordingly its effect in domestic law will be time-limited. If not withdrawn earlier, it will expire five years after the Bill comes into force unless both Houses of Parliament agree that it should be renewed, and similarly thereafter. The Bill contains similar provision in respect of any new derogation which may be entered in future.

Reservations

4.5 Article 64 of the Convention allows a state to enter a reservation when a law in force is not in conformity with a Convention provision. The United Kingdom is a party to the First Protocol to the Convention, but has a reservation in place in respect of Article 2 of the Protocol. Article 2 sets out two principles. The first states that no person shall be denied the right to education. The second is that, in exercising any functions in relation to education and teaching, the State shall respect the right of parents to ensure that such education and teaching is in conformity with their own religious and philosophical convictions. The reservation makes it clear that the United Kingdom accepts this second principle only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

4.6 The reservation reflects the fundamental principle originally enacted in the Education Act 1944, and now contained in section 9 of the Education Act 1996, "that pupils are to be educated in accordance with the wishes of their parents so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure". There is similar provision in Scottish legislation. The reservation does not affect the right to education in Article 2. Nor does it deny parents the right to have account taken of their religious or philosophical convictions. Its purpose is to recognise that in the provision of State-funded education a balance must be struck in some cases between the convictions of parents and what is educationally sound and affordable.

4.7 Having carefully considered this, the Government has concluded that the reservation should be kept in place. Its text is included in the Bill, and Article 2 of the First Protocol will have effect in domestic law subject to its terms.

4.8 Whilst derogations are permitted under the Convention only in times of war or other public emergency, and so are clearly temporary, there is no such limitation in respect of reservations. We do not therefore propose to make the effect of the reservation in domestic law subject to periodic renewal by Parliament, but the Bill requires the Secretary of State (the Secretary of State for Education and Employment) to review the reservation every five years and to lay a report before Parliament.

Other Protocols

4.9 Protocols 4, 6 and 7 guarantee a number of rights additional to those in the original Convention itself and its First Protocol. These further rights have been added largely to reflect the wider range of rights subsequently included under the International Covenant on Civil and Political Rights. There is no obligation upon States who are party to the original Convention to accept these additional Protocols, but the Government has taken the opportunity to review the position of the United Kingdom on Protocols 4, 6 and 7.

4.10 **Protocol 4** contains a prohibition on the deprivation of liberty on grounds of inability to fulfil contractual obligations; a right to liberty of movement; a right to non- expulsion from the home State; a right of entry to the State of which a person is a national; and a prohibition on the collective expulsion of aliens. These provisions largely reflect similar (but not identical) rights provided under the International Covenant on Civil and Political Rights. Protocol 4 was signed by the United Kingdom in 1963 but not subsequently ratified because of concerns about what is the exact extent of the obligation regarding a right of entry.

4.11 These are important rights, and we would like to see them given formal recognition in our law. But we also believe that existing laws in relation to different categories of British nationals must be maintained. It will be possible to ratify Protocol 4 only if the potential conflicts with our domestic laws can be resolved. This remains under consideration but we do not propose to ratify Protocol 4 at present.

4.12 **Protocol 6** requires the complete abolition of the death penalty other than in time of war or imminent threat of war. It does not permit any derogation or reservation. The Protocol largely parallels the Second Optional Protocol to the International Covenant on Civil and Political Rights, which the United Kingdom has not accepted.

4.13 The death penalty was abolished as a sentence for murder in 1965 following a free vote in the House of Commons. It remains as a penalty for treason, piracy with violence, and certain armed forces offences. No execution for these offences has taken place since 1946, when the war- time Nazi propagandist William Joyce (known as Lord Haw-Haw) was hanged at Wandsworth prison. The last recorded execution for piracy was in 1830. Thus there might appear to be little difficulty in our ratifying Protocol 6. This would, however, make it impossible for a United Kingdom Parliament to re-introduce the death penalty for murder, short of denouncing the European Convention. The view taken so far is that the issue is not one of basic constitutional principle but is a matter of judgement and conscience to be decided by Members of Parliament as they see fit. For these reasons, we do not propose to ratify Protocol 6 at present.

4.14 **Protocol 7** contains a prohibition on the expulsion of aliens without a decision in accordance with the law or opportunities for review; a right to a review of conviction or sentence after criminal conviction; a right to compensation following a miscarriage of justice; a prohibition on double jeopardy in criminal cases; and a right to equality between spouses. These rights reflect similar rights protected under the International Covenant on Civil and Political Rights.

4.15 In general, the provisions of Protocol 7 reflect principles already inherent in our law. In view of concerns in some of these areas in recent years, the Government believes that it would be particularly helpful to give these important principles the same legal status as other rights in the Convention by ratifying and incorporating Protocol 7. There is, however, a difficulty with this because a few provisions of our domestic law, for example in relation to the property rights of spouses, could not be interpreted in a way which is compatible with Protocol 7. The Government intends to legislate to remove these inconsistencies, when a suitable opportunity occurs, and then to sign and ratify the Protocol.

4.16 The Secretary of State will be able to amend the Human Rights Act by Order so as to insert into it the rights contained in any Protocols to the Convention which the United Kingdom ratifies in future. The Order will be subject to approval by both Houses of Parliament. The Bill also enables any reservation to a Protocol to be added, but as with the existing reservation it will have to be reviewed every five years if not withdrawn earlier.

Annex - The Convention Rights (Relevant Articles of the European Convention on Human Rights)

Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term "forced or compulsory labour" shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 16

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

The First Protocol

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

comments

