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THE 'INCORPORATION' OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
INTO UNITED KINGDOM LAW

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THE 'INCORPORATION' OF THE
EUROPEAN CONVENTION ON
HUMAN RIGHTS ACT INTO
UNITED KINGDOM LAW

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ASIL REGIONAL MEETING/ 10th ANNUAL
FULBRIGHT SYMPOSIUM
GOLDEN GATE UNIVERSITY
SCHOOL OF LAW SCHOOL

Friday 17 March 2000

HUMAN RIGHTS ACT 1998

1. Constitutional Significance.

2. Entry into force -

- sections 18, 19, 20 and 21(5) are in force.
- S.19: 'Statements of Compatibility'
- Substance of HRA: 2 October 2000
- following coming into force, an individual may rely on Convention rights in any legal proceedings, including appeals; and
- any proceedings brought by or at the instigation of a public authority whenever the act in question took place (sections 7, 22(4)): cf. *R v DPP ex parte Kebiline and Others*, The Times, 31 March 1999.

3. How does the Act work? Main principles-

A. “Incorporation”?

The “incorporated” Convention rights “... *are to have effect for the purposes of this Act...*”

Section 1(2)

- in fact this is not full incorporation. The rights only have the effect which the Act gives them
- they are not entrenched and the doctrine of implied repeal does not apply

B. Interpretative obligation: Imposes an interpretative obligation in respect of all legislation:

“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 3(1)

- Obligation applies to all courts [and beyond?]
- No need to find ambiguity; cf *Brind*.
- What does “possible” mean?
 - ‘A court or tribunal determining a question which has arisen in connection with a convention right must **take into account** any’ Convention jurisprudence of Court, Commission, Committee of Ministers.
- Statements of compatibility: s.19
- Subordinate legislation can be declared *ultra vires*, e.g. bye-laws.

C. Empowers higher courts to make ‘Declaration of Incompatibility’: section 4.

May be made:

By a higher court i.e. High Court and above - including Courts-Martial Appeal Court [note: NOT MAGISTRATES OR CROWN COURT]

In respect of provisions of

- primary legislation (including Orders in Council made under the Royal Prerogative)
- secondary legislation (but see also the *ultra vires* rule)

Declaration of Incompatibility -

where the court is satisfied

- that it is incompatible with a Convention right;
- and (for secondary legislation) that the primary legislation concerned prevents removal of the incompatibility

The Crown has a right to be joined: section 5

Effects of a Declaration of Incompatibility: section 4(6) -

- does not affect the validity, continuing operation or enforcement of the provision(s) [Cf. EC law]

is not binding on the parties to the proceedings in which it is made (Cf. Consider *R v DPP ex parte Kebiline and Others*, The Times, 31 March 1999). How does a criminal court deal with incompatibility arguments?

- but triggers the remedial power under section 10: [Sch. 2, para. 1(1)(b): retrospection]

D. Statutory Duty

Act creates an enforceable duty on ‘public authorities’ to act in a manner which is compatible with convention rights:

1. Unlawful acts - the duty

“It is unlawful for a public authority to act in a way which is incompatible with a Convention right”

Section 6(1)

2. Unlawful acts – the parties

“Public authorities”

- core public authorities
- courts and tribunals
- *“any person certain of whose functions are of a public nature”*

(but not in relation to their private acts)

3. Unlawful acts – parties

“Victims”

- only a person who claims to be a “victim” of the unlawful act may make a claim in respect of an unlawful act.

“if the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.”

Section 7(3)

“Victims”

includes natural or legal persons, non-governmental organisations or groups of individuals who:

- * - are directly affected by the unlawful act;
- * - belong to a class or people who are potentially affected by the act in question.
- * - are members of the family of the person directly affected.

4. Limitation Period: section 7(5): ONE YEAR from date on which act took place OR such longer period as the court or tribunal considers equitable having regard to all the circumstances. May be stricter periods imposed by particular procedures, e.g. judicial review.

5. Unlawful acts - remedies

“In relation to any act (or proposed act) of a public authority which a court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate”

Section 8(1)

6. Unlawful acts - damages

Limits on awards of damages

- may only be awarded by a court which has power to award damages or compensation **in civil proceedings**

- may not be awarded in respect of judicial acts done in good faith, except to the extent required by Article 5(5) of the Convention [unlawful detention]

- may not be awarded unless the court is satisfied that it is necessary to afford “*just satisfaction*” to victim

- the court must take account of all the circumstances of the case, including:
 - any other relief, remedy or order made (by that or any other court);
 - the consequences of any decision (by that or any other court) in respect of the unlawful Act

The two big questions:

1. **Any possibility of horizontal effect?**

2. **Will the UK courts use the ‘margin of appreciation’ doctrine?**

Margin of appreciation doctrine used in reference to interpretation of rights and their limitations.

1. Limitations on rights: approach is relatively formulaic:

- Is there an interference with the right?
- Is the limitation 'prescribed by law' or 'authorised by law'? = accessible, foreseeable
- Is the interference based on one of the grounds of limitation set out in the convention, e.g public morals?
-
- Is the limitation 'necessary in a democratic society'? – 'pressing social need', justification 'relevant and sufficient', 'proportionality'

The famous 'margin of appreciation' –

Essence of it is this: (*Handyside v UK* (1976), European Court of Human Rights:

'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 ... 'necessity' of a 'restriction' or 'penalty' ... 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' in this context.

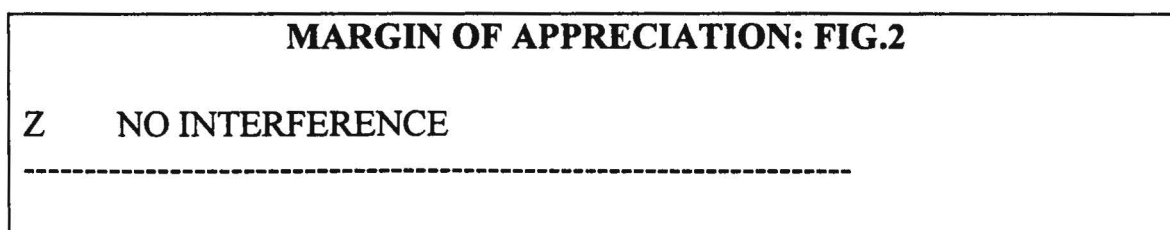
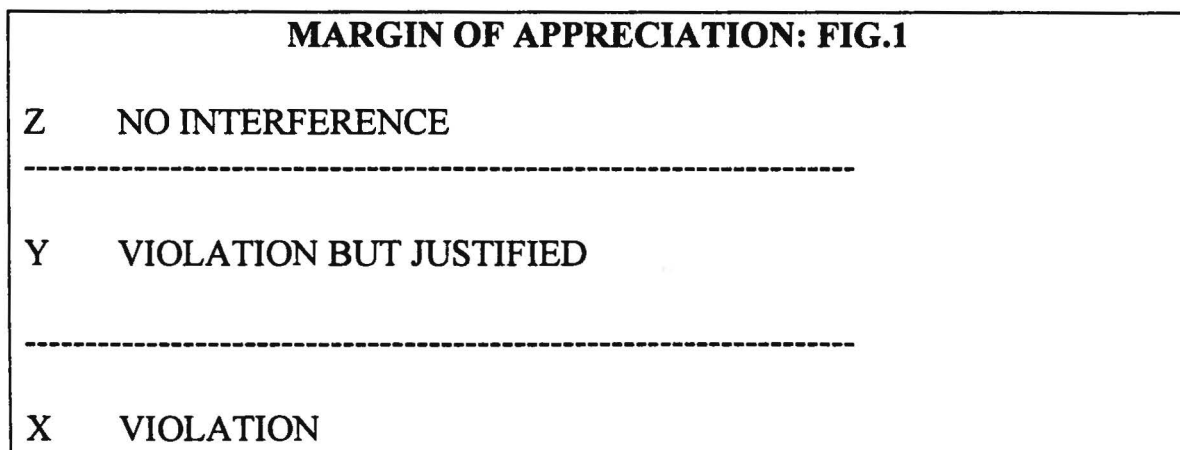
*Consequently, Article 10(2) leaves to the contracting states a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force
Nevertheless, Article 10(2) does not give the contracting states an unlimited power of appreciation'*

Points to note:

- ◆ European Court ultimately judges
- ◆ Relevance of consideration by the national courts
- ◆ Margin is different for each of the grounds of limitation: consider *Brown v UK (morality)*
- ◆ Look to European legislation and practice to assess the standards: any 'European consensus?'
- ◆ Margin can change over time – effect on s.2

Will the UK courts use the 'margin of appreciation' doctrine?

The three logics:



Y	NO VIOLATION

X	VIOLATION

NO MARGIN OF APPRECIATION: FIG.3	
Z	NO INTERFERENCE
Y	NO VIOLATION

X	VIOLATION

HOW BIG A DIFFERENCE WILL THE HUMAN RIGHTS ACT MAKE?

1. ***Cf de facto* incorporation?**
2. **Only higher courts can make declaration of incompatibility – rare anyway.**
3. **Key will be the interpretative obligations and the duty on public authorities and those exercising public functions.**

4. **Public/ private divide**
5. **In criminal cases – from discretion to duty?**
6. **Any possibility of horizontal effect?**
7. **Will “margin of appreciation” continue to apply?**
8. **Test cases; Human Rights Commission; Legal Aid?**
9. **Public debate. Change of consciousness.**

Life of its own!