Common Law &
The Human Rights Act 1998

Af KRISTINE RØBERG

In November 2000 the European Convention on Human Rights was incorporated into British law by means of the Human Rights Act dating from 1998. The intent of this dissertation is to disclose the effects of this incorporation on British common law.

In order to understand the problems arising from the incorporation, the most important and explanatory particularities of the common law system are explained and exemplified. A main point is that traditions of legal reasoning and interpretation regarding human rights and common law are traditionally different in many, but not all, aspects. Methods of interpretation and the significance of precedent are central issues at this point.

It is concluded that as a result of the incorporation, common law will have to undergo a change in order to meet international demands. In the dissertation this change is described as a cultural change.

The main discussion is thus concentrated on the effect of a major and internationally inspired constitutional change in a state, which traditionally solves legal questions differently from international human rights organs and continental civil law countries.

This paper is an abbreviated version of a dissertation completed in the Spring of 2001.

1. INTRODUCTION

The initial scheme behind this dissertation has been to discover the consequences of incorporating the European Convention on Human Rights (ECHR) into a traditional common law system based on case law and precedent.

At this point it is needed to clarify a few terms that will be used several times on the following pages.

First of all, correctly speaking the United Kingdom of Great Britain and Northern Ireland is not a legal unity, but a political union. Common law as a legal system only operates in England and Wales, whereas the legal systems of the remaining parts of the union – Scotland and Northern Ireland – are based on civil law ideas. When using the term "UK common law" in this dissertation, the reference is to common law as applied to in England and Wales. This is justifiable considering that there are strong legal connections within the union, especially considering that the House of Lords is shared as the highest court in the Kingdom. Additionally, UK common law is not to be confused with American common law; these two systems do not share many features and so "common law" in this dissertation only refers to UK common law.

Secondly, when speaking of the Human Rights Act 1998, I am referring to the Bill, which later was passed in the Houses of Parliament. The reason for this approach to the matter is that it is the aim of this dissertation to illustrate the considerations made in connection with the incorporation, and so the final structure of the Act coming into action from October 2000 is not decisive in the context of this dissertation. Nonetheless, it is an important fact that the Act came into force in its original form on October 2nd 2000.[1] This day marks the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

For the purpose of understanding and illustrating the changes in the common law inflicted by the incorporation of the Human Rights Act, I have chosen to elaborate on certain topics that I find necessary to clarify in order to understand the reasons behind the development of a new legal culture in the UK. My intent has been to demonstrate how the common law has been influenced by international law, and in

[1] The Order giving effect to the Human Rights Act 1998:2000 No. 1851 (C. 47), The Human Rights Act 1998 (Commencement No. 2) Order 2000.

order to do so I have chosen some issues that I find obligatory to give details about, for instance history, rules of interpretation, and legal practise.

The centre of the present dissertation will be the collision between old and new, more precisely the confrontation of traditional, historic English common law and a modern treaty in form of the ECHR. The initial background for studying the interaction between human rights and common law is the fact that the UK, as mentioned above, is just about to incorporate the Convention on Human Rights into their national legal system. But even though this was not the case, there would still be many remarks to make about international influence on common law.

English Anglo-Saxon common law is different from Continental Roman-inspired civil law. The historical and social reasons for these dissimilarities will be explained and the most important traits of the common law will be elucidated in order to understand present day public law conditions in the UK.

One of the main points of the dissertation at hand is interpretation of law, considering again that the method of interpreting international law and conventions is different from the way classical common lawyers interpret legal acts. It will be illustrated what these distinctions consist of, and explained why this can be problematic in regard to the incorporation of the Convention. This part of the discussion will also to some extent include an explanation of the so-called White Paper,[2] which has been drawn up as a guide to the incorporation and the consequences thereof. Additionally the particular role of judges will be examined in order to present very different approaches to interpretation. It will be illustrated how international inspired interpretation of law is and will be a challenge to UK judges whose traditional approach to interpretation will have to change to some degree.

The challenge of international law leads to a discussion about the status of UK common law today. Various new tendencies in the legal development of the UK will be studied and an attempt to describe a new legal culture will be made. In its core the theme of such a new legal culture will be that human rights will have effect on every legal activity, and that politicians, judges, and legislators will have to take human rights into consideration.

Finally there will be some comments about possible solutions to how common law will be able to operate alongside the European Convention on Human Rights.

---

[2] The White Paper – Rights Brought Home: The Human Rights Bill. Presented to Parliament by the Secretary of State for the Home Department. October 1997, CM 3782.

2. COMMON LAW

2.1. History[3]

More than any other law system, you have to consider and scrutinise the history and development of common law in order to understand its present structure and condition.

There is probably no doubt that to most people English law and legal institutions seem somewhat old-fashioned and bound by tradition, which in many respects is a correct observation. But no matter how reluctant common law appears to be towards change, it somehow has adapted to present conditions.

Common law has different meanings in different contexts, so when discussing common law it must be recognized that the concept can have more than one meaning. One can speak of three meanings, being 1) the whole of the Anglo-American legal family 2) English case law created by the royal courts as opposed to statutory law 3) the notion of common law as opposed to the doctrine of equity.[4]

If nothing else is declared, the meaning of common law in this dissertation is that of common law as judge-made case law as opposed to statutory law.

Why is it that common law stands out from continental civil law and will it keep this particular position in the future? In the present section I will outline the particular features of common law and to some extent compare it to continental law.

The most important general differences between continental law and common law are that England for a very long period never really got in touch with Roman civil law[5] and never received the idea of codification, which is founded in the Enlightenment and the law of nature based on rationality and rational reasonable systems. On the political front England also experienced a revolution[6] – as e.g. France did – but this did not give rise to a social upheaval, which would call for a radical change into more modern law and law thinking.

The Norman Kings who followed William I after the Norman invation in 1066 a. D. (the Battle of Hasting) introduced and elaborated on the feudal system, which placed the King at the very top of the hierarchy of power. The land was divided between some 1500 feudal lords who externally would protect the country through a military knight service in return for internal protection by the King and State. This constitutes the foundation of an extremely unbending royal authority, and thus central administration became the single most important quality and characteristic of England's position in the early Middle Ages. As an effect of this, by the 14th century royal courts were established, but only at Westminster, which required so-called

---

[3] Based on Zweigert (1998), pp. 180-275.

[4] See p. 17.

[5] Some aspects of the common law actually is highly inspired by Roman Law, e.g. mercantile law in the shape of maritime law.

[6] A civil war between the supporters of the King and the supporters of Parliament broke out in 1642. It was led and won by Oliver Cromwell who supported Parliament.

"travelling judges" who would travel in the countryside in the name of the King and the royal courts and settle legal matters on "circuit", i.e. outside London. This way the law was essentially made common.

Regarding both criminal and civil law, the King had found himself a new income in the form of fines, and thus from this central point, he controlled an enormous area that was widened even more by the control of taxes which the central administration introduced.

In the centuries to come this process gave birth to the unification of English law and the centralization of justice. An early effect of this development was the common law – the royal law of all England which in effect rendered superfluous[7] an actual codification of the law, which had taken place elsewhere on the continent: France obtained its *Code Civil* by the hand of Napoleon and Germany got its Civil Code on the initiative of enlightened philosophers.

It is characteristic how the philosophy of the Law of Reason rooted in the Enlightenment never generally caught on in England;[8] here conservatism and tradition ruled and there was neither room nor need for change, even though it must not be forgotten that the European industrialisation found outset in England. On this note, it would be wrong to neglect the fact that industrialisation and liberal ideas are closely linked.

Tradition is also the key word when considering judges and attorneys who as a class were well structured and managed to generate political influence on an early stage. They gathered in guilds, so-called Inns of Court, all located in London, of which four exist and function even today, namely Lincoln's Inn, Gray's Inn, Inner Temple and Middle Temple. This centralization of the jurists trade attracted other jurists from all over the country and so London naturally became the centre of all kinds of legal minds.

A more particular trait of these guilds was that they were places of legal education. Whereas the continent based its legal education on philosophy and science taking place only at universities attended by professors, English jurists were educated at the Inns of Court under the direction of practitioners who would teach their scholars professional skills rather than science. And so the different approaches to law of continental and English jurists were instituted and manifested in the fact that the Inns of Court were the only place of education in the Middle Ages until the 19th century.

As then, even today judges are recruited from the ranks of the most prominent lawyers who are the very elite of the profession. As one would expect from history, university professors did not gain much recognition – there was simply not much room for theorists when the legal system was based on empirical and singular cases. This

---

[7] Not everybody agreed to this, e.g. the English philosopher and jurist Jeremy Bentham (1748-1832) who held the view that common law was old fashioned, especially regarding criminal law.

[8] The English philosopher John Locke (1632-1704) studied and was a spokesman for the Law of Nature and there is no doubt that he was important in his time.

trademark still clings to the common law even though modern times have required some adaptation to the changing preconditions.

To look at the matter in a sociological way one can turn to the sociologist Max Weber (1864-1920) who analysing common law said that:

> "When legal practice and teaching are purely empirical, legal thinking always moves from the particular to the particular and never tries to rise from the particular case to the general principles from which the decision in the particular case can then be deducted".[9]

This quotation clearly indicates that the essence of common law is induction as opposed to deduction, which generally is practised in the continent. It also explains the lack of a constitution and reception of civil law and why there are relatively few statutory laws[10] in England, not counting "modern" law such as mercantile law dating from the beginning of the 20th century.

Lord Nelson defeated Napoleon in 1805, which fortified England as a world power to a degree that had not been seen before. But internally the country was split because of political and social crises as the result of moving trade and industry to the cities abandoning rural workers. Furthermore the European wars had crushed the export of English products and so the country faced a huge problem of unemployment. Nevertheless taxes stayed much the same and in certain regions of the country the people had to go through actual starvation and a number of strikes, before a reform in 1831-32 introduced political power to the middle classes. This was necessary for other reforms to be moved and endorsed, and so a political corner stone was laid.

An area that was in much need of reform was the court structure; the court system and its procedures were a legal jungle before a reform came into force in 1875.

Until this point in time, the ever-increasing complexity and particularities of procedure and everything linked to it made it very difficult to conduct a case – every step of the procedure had to be taken in the right order and at the right time, and a false step was irreparable. This has to do with the historical "writ" system, which is an important characteristic of common law.

Writs have their roots in the middle ages, and a writ can basically be described as a letter from the King to a relevant official with a short introduction to the case at hand and a command to the official to set the case between the involved parties. Before long the writs were standardised, but their number grew from only 75 to many, many more. The legal official – in this case the Chancellor[11] - was not free to depart from the writs, and so it was very important that the proper

[9] Max Weber in Sweigert (1999) p. 193.

[10] The number of statutory laws is increasing, especially as a consequence of the European Community.

[11] Lord (High) Chancellor is the historic title of the chairman of the House of Lords and the highest judge of Great Britain.

writ was chosen to start with. If not, the immediate consequence was dismissal of the plaintiff.

The writ system was upheld until the reform of 1875 and was much to blame for the confusion and indistinct court system. Even though the underlying idea was practical, it did not meet the changing needs of society.

With the 1875 reform the many independent courts were joined in one system, the Supreme Court of Judicature, composed of the High Court of Justice and the Court of Appeal both situated in London. A third instance came along in 1876, the special Judicial Committee of the House of Lords – the final resort of law.

Colonial England had influence on many different nationalities, and even today common law someway or other affects one third of the world's population. This is truly remarkable, especially considering that England, as a colonial power never forced the colonies to adopt the common law system.[12] Rather England was interested in keeping customary law intact alongside common law and only let common law fill the gaps in the original law. The most important colonies were North America, India, Australia, New Zealand, and large parts of Africa and South-east Asia.

The colonies were linked to the British court system. The highest court in the Empire was – and in some cases still is – the Judicial Committee of the Privy Council. This is a advisory body and the task of its judicial committee is to give the Queen advise on petition made to her as the fount of justice by parties who have unsuccessfully exhausted the legal procedures in the national courts of Commonwealth countries.

In the present day, many important members of the Commonwealth have abandoned the Privy Council, for instance Canada, India and Australia have all decided to have their own final court of appeal. Even so, the Privy Council is still acting today, and English lawyers still refer to judgments given by this council.

One of the most important events after the Second World War and the independence of most of the colonies was a procedural change in the House of Lords, which took place in 1966.

Until this date, its own precedents bound the House of Lords – the so-called doctrine of binding precedent or stare decisis. It was then and is now a much-discussed area of the UK common law. Then in 1966 the Lord Chancellor gave a "practice statement" saying that the House, and the House only, was to depart from precedent whenever "it appears right to do so".[13]

Finally in 1998 Parliament passed the Human Rights Act, which was to incorporate the European Convention on Human Rights into British domestic law. Incorporation formally took place in October 2000.

---

[12] Indirect rule was practised in Africa, especially after the 1920ties when the project of civilisation was abandoned. English common law was introduced, and today common law generally prevails in Africa.

[13] Zander (1999) p. 196. See below in section 2.2.

2.2. Particularities of Common Law

Binding precedent[14]

Reasoning from precedent is the most characteristic mode of reasoning in the common law system, since common law is defined as judge-made law.

The concept of binding precedent or the doctrine of *stare decisis* is based on the primary idea that like cases should be treated alike. According to this doctrine, if a particular question of law is settled in a case, then the decision of that case should be applied by later courts required to rule on the initial question of law. This is how the first case sets a binding precedent in relation to the initial question.[15]

All legal systems pay more or less attention to precedent, but none to the extent of UK common law: the rule of stare decisis demands that a decision is followed when conditions are right, and so precedent is much more than simply an indication of direction for the ruling judges.

To illustrate the immediate effect of precedent, the cases of *Re Schweppes Ltd's Agreement*[16] and *Re Automatic Telephone and Electric Co. Ltd's Agreement*[17] are fine examples. Here the exact same questions about discovery of documents were dealt with. And here the decision of the second case – given on the same day as the first – was bound by the first, even though the ruling judge did not agree with the principle of the first one. But, as he said: "it seems to me, however, that I am now bound by the decision of the majority of the previous case. In those circumstances, I have no alternative but to concur in saying that the appeal in the present case should be allowed".[18]

The role of precedent is tightly fixed in the hierarchy of courts. According to what level you are at in the system, the rule is very clear. The basic rule is that higher courts bind lower courts, and that all courts are bound by their own decisions.

Before describing the different types of courts in England and Wales, it would be helpful to illustrate how the courts are connected. Essentially, the courts consist of three levels or "tiers".[19] The first level consists of courts of first instance, i.e. trial courts. In general, decisions from the trial courts are not open to appeal, but if they for some reason are, then the first line of appeal will be to one of the second-level courts, which are the Divisional Court and the two Courts of Appeal. From this line, a further appeal may be permitted to the third-level court, the House of Lords. This system implies that precedent may have both vertical and horizontal effect.

---

[14] Based on Zander (1999) chapters 4 and 6.
[15] Adams (1996) pp. 114-115.
[16] [1965] 1 All E.R. 195 (Court of Appeal).
[17] [1965] 1 All E.R. 206.
[18] Ibid. p. 209.
[19] Adams (1996) pp. 116-118.

Hierarchy of Principal Domestic Courts[20]

In short, the rules regarding binding precedent are as follows: all decisions are binding on lower courts, and all courts except the House of Lords are bound by their own decisions.

The decisions of the House of Lords are binding on all lower courts, and until 1996 the Lords were only capable of departing from their own decisions when "it appears right to do so" according to the 1966-Statement.[21]

The Court of Appeal is only bound by the decisions of the House of Lords and with some exceptions also their own decisions. These exceptions are: (1) when the court is entitled and bound to decide which of two conflicting decisions of its own it will follow, (2) when the court is bound to refuse to follow a decision of its own, which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords, and (3) the court is not bound to follow a decision of its own if it is satisfied that the decision has failed to apply a relevant statutory provision or has ignored a binding precedent.

The decisions of trial courts are not binding on that court. Thus the decisions of the High Court are not binding on any High Court judge, and the decisions of the county and the magistrates' courts are not binding on those courts. But magistrates' courts and the county courts are bound by the decisions of the High Court and of all the appellate courts.

The Human Rights Act 1998 marks a major and completely novel development regarding precedent. The implementation in 2000 has given the courts a considerable freedom to ignore precedent when deciding points of law under the ECHR.

Equity and the idea of fairness

Equity is a principle of fairness, of what is just and what is not. The concept of equity does not cover a fixed set of rules in conflict with the common law; it is rather the missing pieces that fill out the gaps of a decision based on common law. The effect of the equity system is that whenever trying a case, it has to be taken into consideration if the case at hand is a matter of common law, statutory law or equity. Obviously this matter has to be decided before going deeper into the case, for the simple reason that the different types of law require different set of rules.

In the Middle Ages the King made certain demands that were not covered by the actions (the writs) of common law. These demands were tried in courts dealing only with matters of equity. This technique was founded in the 14th century when a separate court was given permission to give new actions founded on equity. Accordingly the laws and the courts of equity emerged alongside the common law.

Today all courts apply all the rules of law and equity. For many years the separate courts of equity stood, but they were finally abol-

[20] Ibid. p. 117, Figure 1.
[21] See p. 8.

ished in the Judicature Acts of 1873 and 1875. Hereafter the courts of common law and the Court of Chancery (the latter administrated equity) became divisions of a single High Court. There is a rule however, which is preserved in s. 49 (1) of the Supreme Court Act 1981 that says that where there is any conflict between the rules of common law and equity, equity prevails.

The relation between common law and equity could rightfully, as mentioned, be described not as conflicting, but as a liaison between code and supplement, and so it is clear that equity is not to be confused with common law as such. It is, so to speak, a vehicle to deliver justice and fairness.

Today there are some very important remainders of equity to be found in the English legal system, the most important ones being the rules of trusts and injunctions (remedies in advance).

2.3. How to find the law and how Common Law operates

Considering the importance of precedent, it is remarkable that there is no state control or interest in law reporting. Furthermore, the printed cases are chosen in a very haphazard way; there is no actual system and there seems to be more and more different types of reports, especially of a specialist nature. But fortunately there is an order of seniority in law reporting, which is valuable help when looking through cases relevant to a certain dispute.[22]

If a decision is clear on the facts, there is no problem; then the thing to do is to look for the best precedent. Of course judges on some level do make use of interpretation in straightforward cases, but the application of the law is often very swiftly made. On the other hand, problematic factors often interfere: the relevance of the precedent, which court it comes from and in which period of time it has been decided.

It is only the so-called *ratio decidendi* of a case that has value for future cases. The ratio is the core of the case – the meaning and leading principle, which is tied closely with the ever-important facts. Only the ratio is binding.

A very illustrative example of the ratio of a case is found in *Lloyds Bank Ltd. V. Bundy*.[23] In the leading decision one of the judges makes his final conclusion stating that ”These considerations [four significant points concerning the substance of the case] seem to me to bring this case within the principles I have stated”.[24] Hereby the judge allows the appeal to the House of Lords. Only these ”considerations” form the ratio of the case, and only this will be referred to as ratio decidendi in resembling future cases. This does not mean that there cannot be more than one single ratio in each case; it just illustrates how you have to be very careful when trying to obtain the scope of any given decision.

---

[22] E.g. the Weekly Law Reports come before the All England Law Reports.
[23] [1974] 3 All E.R. 757.
[24] Ibid. p. 766, line 10.

This case also demonstrates the notion of *obiter*, which are considerations made by the judges and Law Lords,[25] but no matter how important they may seem, obiter can never be binding on any court. Obiter is generalisations, but even though they are not binding, there is no rule hindering them from offering some help to judges in the future.

Every case is different and every case has to be dealt with separately. Facts are all-important in this ”game of matching cases”;[26] they are the platform on which the case is built, and no individual case has meaning by itself. And so the most important question will be: what are the special facts of this present case? What the judge does is deciding what is relevant for the case at hand, and only then can he give his decision.

To summarize about ratio and obiter, they reveal the correct level of abstraction, i.e. whether the facts of the case can be used for a wide or a narrow interpretation of the law. It is also clear that the facts of a case point out the law for the interpreter in the common law system, and that the process of understanding the law will depend on comparison and differences. In other words, the ratio of a case depends on its subsequent interpretation.

3. STATUTORY INTERPRETATION[27]

3.1. Introduction to the rules of interpretation

Legal documents can be difficult in their composition and choice of vocabulary and technical terms. Subsequently interpretation is an exceedingly significant task. Often many people with differing opinions have influenced the drafting of the text, which then will result in a compromise that might obscure the initial meaning. Another problem is that the text is intended to describe past, present and future. Certainly the future cannot be foreseen completely, and consequently it is probable that a situation not thought of will arise, and furthermore there are limits to how many circumstances it is possible to take account of.

In the UK of today, large areas of law are to be found in a statutory framework. This is especially the case in more ”modern” areas of law such as social security, company law, taxation, immigration, and race relations.

When accounting for interpretation of legal texts it is important to bear in mind that generally there are two sides or more to such texts. It is not meant for one single person and its object is to operate in situations of conflict between two or more persons. Different kinds of legal document require different kinds of interpretation, and so the differences between contract law, law of inheritance and statutory law

[25] Judges that preside in the House of Lords.
[26] K. N. Llewellyn in Zander 1999, p. 264.
[27] Based on Zander (1999) chapter 3.

regarding interpretation must be kept in mind. This section of the dissertation will concentrate on interpretation of statutory law.

However careful the drafter of a document may be, questions of interpretation often occur. There is no formal way of solving this problem, and in reality much is left to common sense. Sometimes the parties reach an agreement on their own, but not always and then the courts must take over. In this section some basic rules of interpretation will be described, but it is only when a statute is unclear on some matter that it is ripe for interpretation. The rules of interpretation are the result of examining decisions, and in a formal sense none of them is more correct than the other; they only describe how interpretation takes place, they do not directly dictate it.

In theory three different rules of statutory interpretation have been mentioned as the most important ones. These are the ”literal rule”, the ”golden rule” and the ”mischief rule”. Of these three, in practise the first one plays the most important role.

It does not seem entirely clear if these rules of interpretation are to be understood as descriptions of how judges actually interpret statutes, or if the rules describe how statutes ought to be interpreted. Additionally, it is not clarified whether one rule is supplementing the others or if they are competing with one another.

A brief introduction here of the three rules shall start with the *golden rule*, and as in so many other aspect of UK law, you have to go many years back in time to discover its origins.

The golden rule dates from 1877 when the case of *River Wear Commissioners v. Adamson*[28] was decided. According to Lord Blackburn:

> ”[The] golden rule is … that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear.”[29]

In its essence this decision says that unless the words of the statute are meaningless, these words should be interpreted according to their ”ordinary signification”. This way the golden rule implies that the words of a statute should be given their usual meaning by the courts. This means the way Parliament intended.

It can and will be discussed if this mode of thought is too rigid for a reasonable interpretation of statues. The question is if it is not dangerous for justice to neglect the background and unwritten intentions of the drafters.

The *mischief rule* is the most historic one; its roots can be traced back to a case judged in 1584.[30] Here it was said that:

---

[28] [1877] 2 App. Cas. 743 at pp. 764-5.
[29] Ibid.
[30] [1584] 3 Co. Rep. 7a.

> "The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."[31]

This quotation shows that it is for the judges to carry out the intention of Parliament and in doing so they have to consider the circumstances under which the statute was given. The mischief rule assumes that legislation is aimed at providing a remedy for some "mischief", meaning a problem. Consequently it is the task of the judge to interpret the legislation in a way that holds back the problem and press forward the remedy.

Today the mischief rule is also called the "purposive" approach, which indicates that you have to understand the background of an act before you can make correct use of it.

The *literal rule* gives all weight to the construction of the literal meaning of the words, no matter how absurd they may be. This rule suggests that it is not for the courts to formulate the intention of the Legislature – that should be Parliament's own headache, to put it plainly. Consequently the literal rule does not accept the notion of context as an aid in the process of understanding the will of Parliament.

3.2. The practical use of the rules

Since the beginning of the 19th century the literal rule has been the most visible and used one. It would seem that it is founded in the idea that a statute ought to be so clear in its meaning that judges would not have to figure it out themselves and thereby risking an alteration of the statute. This would be the same as the judges making law.

Additional meaning has absolutely no room under this rule, which is very clear in a decision[32] where one of the judges (Lord Denning) in his dissent said that:

> "… We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it… We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis".

The case went to the House of Lords,[33] but it was not settled according to the dissent. Apparently the House of Lords did not believe in filling gaps. Rather one of the Law Lords, Lord Simmonds, stated that:

---

[31] Zander (1999) p. 111.
[32] [1950] 2 All E.R. 1226 (Court of Appeal). *Magor and St. Mellons v. Newport Corpn*.
[33] [1951] 2 All E.R. 839 (House of Lords).

> "…The duty of the court is to interpret the words that the legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited…"

Here Lord Simmonds gave expression to his opinion that Lord Denning's approach was nothing more than guesswork.

At the time of this judgment, this was a archetypal dispute between the constructionists who believed in a stringent and literal approach to resolve problems regarding the understanding of legal documents, and on the other side judges like Lord Denning who were much more open-minded in terms of understanding the will of Parliament.

Questions of this nature will arise whenever there are two or more possible answers to the interpretation of legal documents. It does not make any difference whether the argument is about a whole section, as the case discussed above, or rather a single expression or word like "coinciding" as in *Re Rowland.*[34] Again this case shows to what extent interpretation of law is a matter of personal attitude and a battle between an old and a new school of legal thinking.

The struggle of *Re Rowland* concerned the interpretation of a will containing the word "coinciding" about the time of death of either husband or wife.

The leading judges held that the "natural and normal meaning" of the word "coinciding" should be decisive for the final judgment. They held that "coinciding" was a strict indication of time, so that it implied simultaneous deaths of the couple. This was based on the fear of simply guessing what the testator might or might not have meant when using those exact words. The problem is that maybe the testator did not even envisage a problem of interpretation when writing "coinciding" in the common will. For the two leading judges there was simply too much uncertainty connected to the phrase to dare venturing into considerations about the personal intention of the testator. It is explained that as long as you do not know positively how far to stretch the words of testator you should refrain from it entirely.

In his dissent one of the judges approaches the question very liberally. His idea of fairness does not correspond to a purely grammatical interpretation of "coinciding", because if simultaneously is the same as coinciding then there will still be a dilemma of proof, because how is it ever possible to prove that the married couple died in the exact same instance and how likely is this prescribed scenario at all? Rather this judge refers to the "ordinary man" as an indicator of the intention of testator. The crucial question would be how would the "ordinary man" conceive the meaning of "coinciding"? And according to the judge this allows for a short interval between the deaths of man and wife. This gives way to what the testator actually meant and not merely to the grammatical meaning of his words.

[34] [1963] Ch. 1 (Court of Appeal).

But there are also pitfalls to consider: the basis of constitutional theory is that it is only for the Legislature, i.e. Parliament, to create new law. The impression is given that the standard meaning of any legal argument is the surest and most liable channel to the underlying meaning of it. By loosening the criteria of interpretation, the deciding judge is left with a responsibility that is likely to result in him innovating new law by means of his final decision.

On their own, both the literal and the more liberal approach would be effective; the problem is that none of the rules are followed consistently, and so there is no certainty in decisions about interpretation. Therefore a muddled picture is showing today.

If the conclusion is that the literal rule does not work in practise, the question is if the *golden rule* can offer any solutions to it.

It is not hard to realize that if the literal rule cannot solve the problems of interpretation, then the golden rule cannot do it either. This is based on the reality that both rules are founded on a strict grammatical approach. Neither of the rules recognises the meaning of context, and so the one does not offer much more than the other. The only difference is that the golden rule accepts that if a literal interpretation leads to absurdity, then the judges must abort it, which would seem only fair. But often absurdities are not the problem of interpretation; rather the problem is choosing between two reasonable arguments.

This leaves us with the *mischief rule* or the so-called ”purposive” approach. The name indicates consideration to the intention behind a legal document, and this is the trademark of the mischief rule. This approach is built on understanding the context of a given document and using it whenever difficulties of interpretation appear. The mischief rule was put forward in the case of *Black-Clawson* in 1975.[35] At this time the traditional literal rule was dominant. Lord Diplock said that:

> “… In construing modern statutes which contains no preambles to serve as aids to the construction of enacting words, the ”mischief” rule must be used with caution to justify any reference to extraneous documents for this purpose.”[36]

To what extent, then, should the courts consider the background of statutes?

It is obvious that both the whole of the statute and its preamble[37] are laid before the court to read. This is to be regarded a minimum.

Marginal notes, headings to sections can give support to the construction of an act, and the general idea is that an act should be read as a whole whenever trying to understand a part of it.

Previous statutes can sometimes shed light on the true meaning of a word or phrase used in a novel act. This would be the case whenever a word has changed its meaning over a period of time. In particu-

[35] [1975] A.C. 591.
[36] Ibid. p. 638.
[37] The inclusion of the preamble was settled in [1957] A.C. 436.

lar this is significant when using phrases concerning morality and ethics.

As mentioned, it is hard to draw any concluding answer to the question of what rule is used in the UK courtrooms of today, but it is apparent that a certain tension is emerging. Essentially, the tension is found between the arguments for and against judicial restraint, respectively so-called purposive formalism and textual formalism.[38]

By and large, though, it could be claimed that the mischief rule is gaining territory over the literal rule, especially concerning the growing influence that interpretation of international law will have on British principles of interpretation.

Summing up, the main difficulty with statutes is that they are subordinate to the limitations of language as a means of communication; there is no guarantee that the legislative intent behind a legal act is complete or even well-thought-out.

The particular rules have been chosen since they are the ones most often referred to in the literature on legal interpretation.[39] There is no official or formally correct approach to such a categorisation.

3.3. The significance of context

In this section it will be discussed to what extent evidence other than statutes and legal decisions can be used in the process of interpreting any given act. It is only when ambiguity appears in an act that this kind of additional interpretation becomes an alternative.

Preliminary legal work concerning an act is considered a part of the actual act in Denmark.[40] Accordingly it is often used when the relevant act does not give a satisfying solution to a problem of interpretation. Preliminary work is not legally binding and the trouble regarding its use is that it is not certain that the preliminary work is relevant to the problem at hand. Additionally it can be hard to decide which part of the legal material is obligatory and which is not. Regarding legal interpretation, the benefit of this system is that there is a close relationship between interpretation and the source of law.

The situation is quite different in the UK; for a long time it has been discussed how to approach this question concerning official reports and other material.

To illustrate the debate, once again the case of *Davis v. Johnson*[41] from 1979 is a good example. When the case was appealed to the House of Lords, all five Law Lords reached the conclusion that it was wrong to use statements pronounced by Parliament. They claimed that it would be too confusing if the judges were demanded to look through all Hansards[42] of all proceedings in order to interpret an act correctly.

---

[38] Adams (1996) p. 97.
[39] E.g. Adams (1996) and Zander (1999).
[40] So-called "*forarbejde"*.
[41] See p. 14.
[42] Hansard Society Commission Report is a review from Government, corresponding to the Danish "Ministerial Times" (Ministerialtidende).

This decision stood until 1993 when the case of *Pepper v. Hart*[43] was tried in the Court of Appeal. Later it made its way to the House of Lords as well. This case is considered a turning point in the development of the English legal system because it rejected the traditional approach to the Hansard and stated that judges could consult it whenever reaching a decision.

In the leading judgment by Lord Browne-Wilkinson it was said[44] that:

> "… Where the words used by Parliament are obscure or ambiguous, the parliamentary material may throw considerable light not only on the mischief which the act was designed to remedy but also on the purpose of the legislation and its anticipated effect."

The conclusion was that whenever parliamentary material is helpful in the process of interpretation, it should be used.

For the first time the intention of Parliament was officially accepted and accentuated as being most central when interpreting an ambiguous legal text in an act. The outcome of the case was affected by the fact that slowly more and more material was taken into consideration when judging a case.

The reason for describing the problems and limitations of interpretation is that the Human Rights Act 1998 is a legal text, which also will be in need of interpretation. And at this point – in relation to interpretation – it should be mentioned that maybe common law and human rights law in this regard have something in common: neither common law nor human rights law make much use of preliminary (parliamentary) work. This could be an advantage for the common lawyers who work with human rights issues.

4. INTERNATIONAL LAW

4.1. What is international law?

International law can be defined as rules applying to states and in a few cases, to individuals as well, e.g. employees at international organs. Regarding the position of the individual, human rights are of a special nature since they give the individual a predominant position in international law.

The concept of international law does not consist of a fixed set of rules; rather it involves a number of topics concerning the relationship between states. The most apparent topics are: sources of international law, the correlation between international and domestic law, jurisdiction, treaty law and protection of fundamental rights, including human rights. In relation to the topics of this dissertation, it must be emphasized that treaties are considered an important legal source in international law. Treaties based on international law are binding on

[43] [1993] A.C. 593 and [1993] 1 All. E.R. 42.
[44] [1993] A.C. 593 at p. 634.

the states involved. There are no legal sanctions, though; international sanctions are of a political nature, but this can be equally strenuous for a state, which in international matters rely on a trustworthy and responsible political system and a reputation to match it.

Regarding international protection of fundamental rights, the discussion of today has become much focused on human rights. This is a natural result of the development of especially Western ideas and not least the signing of the European Convention on Human Rights (ECHR), which came into force in 1953 motivated by UN's World Declaration on Human Rights dating from 1948. The Declaration involves civil, political, economic, social, and cultural rights. This development has brought along the current situation where fundamental rights essentially equal human rights, at least in Western or Western inspired states.

4.2. The relationship between international law and domestic law[45]

Even though there are a number of theories as regards the interrelation between international and domestic law, there are especially two groups of theories that call for some particular attention. They both require legal practice to be considered a source of law, which not all states will agree to.

Shortly described, the *monistic theories* state that national and international law constitute one single legal system in which international law is superior to national law. The main point is that international law is given the role of a constitution in states that have no legal means of deciding whether a law is in conformity with the constitution.

The *dualistic theories* say that national legal systems and international law are essentially different, considering that the contents of the law, the legal sources, and the legal subjects are not the same in the two legal systems. In this regard it is said that international law is meant to regulate the relationship between states, while national law mainly aims at regulating the relationship between private citizens and the relationship between citizen and state. As regards legal sources, it is held that the sources of international law mainly are treaties and customs created by international legal decisions and states, while national sources of law mainly are national law and national legal decisions. With regard to the positions of the legal subjects, the states are the legal subjects of international law whereas private citizens are the legal subjects of national law.

From these definitions it can – in a few words – be concluded that the monistic theories consider international law and national law as one single legal system, whereas the dualistic theories consider them as two fundamentally different legal systems.

In the UK, the dualistic theory is predominant. In relation to international (human rights) treaties, this implies that national law is presupposed to be in conformity with international law, and if this for

[45] This section is based on Germer (1996), chapter 6.

some reason is not the case, it is for the state in question to alter domestic law in order to make it in keeping with treaties.

Ways of fulfilling treaties on human rights

There are different ways of fulfilling treaties on human rights and an act of incorporation is just one of them. In most cases a treaty is ratified and after this the treaty is fulfilled under the condition that there is a *harmony of norms,*[46] or the treaty is incorporated into domestic law by an act of parliament. Even after ratification it can become necessary to make use of the just mentioned way of fulfilling a treaty. This will be the case if the dynamic method of interpretation, as used in connection with the Convention, causes an international human rights rule to be inconsistent with national law.

If there is no harmony of norms, *rewriting* can be exercised. In this case national law must be changed, e.g. by altering or repealing an existing rule of law, or by introducing a new one. There are different ways of doing this, and the crucial point is that the final result of the process of rewriting will ensure that the material rules of the treaty are observed. By rewriting, the international law becomes national law. Hereby the national principles of interpretation become more predominant. This is where incorporation differs from rewriting.

In the context of the present dissertation, the most important consequence of incorporation as opposed to rewriting, is that by incorporation the Human Rights Convention in its original form is made a part of national law. This takes place by means of an act or another binding regulation, which prescribes that the treaty in its original form will be used by the national public authorities. When incorporation is used to meet an international obligation, the result is that the authentic language as well as the principles of interpretation relating to human rights will be the basis of decisions made by the national authorities.

4.3. Interpretation of international law

Human rights as described in the Convention are a part of international law. Traditionally international law regulates the legal relationships between states, but over the years some fields have broken away because of their special characteristics, such as international human rights. Human rights concern and protect all individuals in a state, both national citizens and non-national citizens.

Human rights as described in the European Convention are minimum rights, i.e. contracting states are not given a complete guide to the rules – it is up to each state to meet the demands of the Convention, and there is of course nothing hindering them from making ”better” national rules, e.g. require a faster judicial procedure.

[46] A statement of harmony of norms is understood as an evaluation that results in an agreement between national law and the material rules of a treaty. Harmony of norms can be obtained if the judiciary changes their interpretation or changes their use of discretionary authority in relation to existing law.

It is significant that neither the European Court of Human Rights nor the Commission[47] connected to it have any direct sanctions to use against the member states if they violate a section of the Convention. The only thing for the Court to do is to make the violating state alter the conditions relating to the case at hand. The effect is that sometimes the state quashes the original decision and tries the case again, this time respecting the human rights of the Convention. But sometimes the effect of an international decision is a bit more radical – this is when the national legislation in not in accordance with the Convention. In these cases national legislation has to be altered to a point where it is in agreement with the Convention.

Knowing the enormity of the practise of human rights, I have no intention to go into the details of each section and their respective case law and significance. Rather I am interested in the process and difficulties concerning UK's incorporation and interpretation of the Human Rights Act and the Convention.

In an article, Bennion[48] is concerned with what will happen when incorporating an international system like the Convention that approaches questions of interpretation differently from the common law countries throughout the world.

Bennion places British common law opposite to European international treaties and adds the respective modes of interpretation. His article is a good example of how it could be claimed that the sovereignty of a state is altered (according to Bennion it is lost) when the state agrees to respect an international treaty. Here I will discuss the extent of this alteration and conclude that signing a Convention or a treaty is the same as breaking down legal frontiers and let foreign thoughts become an influence. To Bennion the question seems to be if the 1998 Act is enriching the UK, and his conclusion is that the common law mode of handling difficulties of interpretation is better than the teleological model of the Convention.

Shortly described, the starting point of interpretation of international law is literal interpretation with a special regard to context; the complex of the Convention must be regarded as a whole. Preliminary works are seldom used – for the simple reason that there is not much of it – and if they are used it is only because the literal interpretation is unclear, meaningless or unfair.[49]

When the mode of incorporation is used, it involves that the authentic language and the principles of human rights are used as a basis by the UK legal authorities. This is where the source of the problem is – what will happen when traditional common law interpretation meets the teleological and dynamic interpretation founded by the Human Rights Court?

---

[47] On November 1st 1998 the Commission was abolished with the 11th supplementary protocol. With this action the Court was expanded to a full-time court. Now the individual can complain directly to the Human Rights Court.

[48] Bennion (2000).

[49] Cf. articles 31-33 in the Vienna Convention on Treaty Law, dating from May 23rd 1969.

Concerning this question, Mary Arden's article[50] on the division of the common legal world is illustrative. She is discussing the lacking success regarding codifying the law of contract and the criminal law and how statute law has developed and changed in England. As always in this context, the case of *Pepper v. Hart*[51] about the use of preliminary parliamentary work in legal decisions is mentioned, but Mary Arden sees some difficulties attached to the principles drawn from the case:

> "… But unless the principle is kept within strict bounds, and the conditions for its application strictly observed, there are great dangers in it. In particular ministers may prefer to have draft bills which are expressed in general terms and avoid the difficulties which would become apparent if they were more precisely drafted, and hope to make the deficiency good by an appropriate speech in Parliament. Alternatively the executive may try to take short cuts by failing to get the legislation accurate and relying instead of on some statement in (say) the notes on clauses."[52]

To Mary Arden the danger lies in giving the executive an authority that they do not have the fundamental democratic consent for. The question is what will happen if the executive awards its responsibilities.

In relation to purposive interpretation Mary Arden also has some reservations; again she is apprehensive about where to draw the line – when is the purpose of the statute imprecise enough to give way for the purposive approach? The problem is that the solution to this problem sometimes is given in explanatory provisions that might be in conflict with the practical solution of the difficulty. Here there can be no doubt that the practical solution is most likely to prevail.

So on one point regarding interpretation common law and human rights law do have much in common, which should be of some help to common law practitioners; traditionally none of the two systems operate with the aid of preliminary parliamentary work. It is true, however, that since 1992[53] the Hansard has been a potential part of statutory interpretation, but until this was settled there were no other significant means of interpretation other that the actual statute.

Because of the special character of human rights, the now abolished Commission and the Court exercise a so-called *dynamic style of interpretation*. This implies that judgments are given in accordance with the conception of human rights at the time of the judgment. The dynamic style is naturally manifesting itself especially when making use of legal standards such as the "right to a fair trial" in section 6. Already here, a large contrast to the retrospective nature of the common law is seen. With the dynamic style of interpretation it is possible to make use of criteria and concepts formulated in the Convention and at the same time still pay attention to the changing values and social de-

---

[50] Mary Arden (1998) p. 71.
[51] See p. 21.
[52] Mary Arden (1998) p. 71.
[53] About the case of *Pepper v. Hart*, see p. 21.

velopment in the contracting states. Convention precedent is not binding, but modifications will rarely occur, and only if some years have gone by without dealing with the question at hand.

Harmonisation is one of the goals of the Convention. The ambition of harmonising the Convention is realised by an objective *interpretation of purpose* when dealing with legal expressions such as ”witness” or ”law” in section 6 or other technical, medical or scientific words or phrases. The result of this kind of common interpretation is that a harmonisation of the states takes place, and because of this human rights will be developed.

Another special trait of the Convention is the so-called *margin of appreciation*. It is a judge-made principle of interpretation, which implies that the Convention organs in certain cases do not try the legal estimation made by the national authorities. This is especially the case within legal areas connected to specific cultural traditions such as family life and the private sphere, but the states are also given a wide margin of appreciation regarding state security and the judgment of questions of morality, which typically will vary from state to state. A part of this subject is the central principle of proportionality, which is a weighing out of means and ends.

Finally it is characteristic that the judgments made by the Convention organs are very casuistically decided. They seldom include statements that are generally applicable to other cases. This probably has to do with the fact that the Convention organs are to apply the rules of the Convention on a potentially unlimited collection of concrete cases from all the different systems of law in the contracting states.

5. THE HUMAN RIGHTS ACT 1998

The initial background of the Human Rights Convention is World War II and the Universal Declaration of Human Rights from 1948, which was a direct response to the outrages of the war. It was not binding on the states; never the less many at the time considered it a controversial issue.

History is responsible for the making of the Convention, however the past horrors of wars are not directly linked to today’s understanding of the Convention. As it is, the UK Human Rights Act 1998 supplies standards and advances legal accountability as regards violation of elementary freedoms and human rights. In other words it can be said that the Convention contributes to a healthy ethical foundation for political and constitutional decision-making. In an overall view the Convention and its case law maintain and strengthen democracy and national security as collective values.

The Human Rights Convention came into force in 1953, and the UK accepted the right to individual petition in 1966 when it acknowledged the compulsory jurisdiction of the European Court of Human Rights located in Strasbourg.

The Convention outlines fundamental, long-established political and civil rights: right to life, freedom from torture and inhuman or degrading treatment, freedom from slavery or forced labour, freedom of the person, right to a fair trial, prohibition of retrospective criminal legislation, right to privacy, freedom of conscience, freedom of expression, freedom of assembly, the right to marry. These rights are to be protected without discrimination based on ”sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority property, birth or other status”. The Convention does more than protect individuals. One of its particularities is that it seeks to elaborate the conditions in which the state may restrict and interfere with the protected rights.[54] The Convention presents the individual citizen with more than negative rights against the state; the individual citizen becomes a participative individual, taking an active part in the political sphere.

5.1. The White Paper – *Rights Brought Home*

The White Paper – *Rights Brought Home*, as Prime Minister Tony Blair called it – dates from October 1997. It is an introduction and clarification of the Bill, which was to incorporate the Convention into domestic law. To put it simply, it explains what the Bill does and why. In Chapter 1, the White Paper describes the legal development in the UK and makes it clear that former arrangements on the human rights area no longer are sufficient. In order to maintain these rights the Government finds that it is necessary to ”bring them home”, that is to incorporate them into national law. It is stressed that given the fact that the human rights now are well tried and tested, it is time to turn them into legal standards. It is no longer sufficient to rely on the traditional common law. The approach, which the UK so far has adopted towards the Convention, does not satisfactorily reflect the importance of the Convention and it has not stood the test of time. The proof is the many cases lost in Strasbourg.

In the Paper it is explained what the convention rights imply and that the UK also is a party to First Protocol of the Convention,[55] and it is made clear that the European Court of Human Rights cannot change domestic law and practice; this remains a matter for the UK Government and Parliament.

It is stated in the White Paper that incorporation is of great importance to the people of the UK, considering that as a consequence of the incorporation they will be able to argue their rights before domestic courts. This way money and time will be saved.

---

[54] To illustrate see Article 8, section 2 of the Convention that says:
“There shall be no interference by a public authority with the exercise of this right except such as 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.”

[55] The First Protocol guaranties the right to a peaceful enjoyment of possessions, the right to education and the right to free elections.

Bringing the human rights of the Convention home will not only imply influence on domestic case law; the case law of the UK also will influence Convention case law accordingly. It is argued that this way the case law of the Convention will become sensitive to and influenced by UK case law.

In Chapter 2 of the White Paper it is explained how the Government intents to enforce the Convention rights.

First of all, the Bill makes it unlawful for public authorities to act in a way, which is incompatible with the Convention rights. It is the intention of the Government that it becomes possible for private persons or organisations to use national courts at any level in matters concerning Convention rights. The national courts will be required to take account of relevant decisions of the European Commission and Court although these decisions, contrary to decisions in the common law, will not be binding on the court. On account of this arrangement, UK judges will be contributing to the dynamic and evolving interpretation of the Convention while building a new body of case law founded on Convention rights.

It is declared in the White Paper that the Bill provides for legislation to be interpreted in accordance with the Convention ”so far as it is possible”.

The concept of incompatibility is then described along with the cases in which Government and Parliament are prompted to change domestic law. At the same time it is said that the Government has come to the conclusion that courts should not have the authority to set aside primary legislation, past or future, on the argument of incompatibility with the Convention. Regarding this very matter Government still holds its sovereignty.

Finally it is pronounced that the Bill provides a ”fast-track procedure” for altering legislation in response either to a declaration of incompatibility from a UK court or to a finding of a violation of the Convention by the Strasbourg Court.

In Chapter 3 of the White Paper it is emphasized that the courts are responsible for the enforcement of Convention rights, whereas the Government and Parliament will have a different but likewise important responsibility of amending legislation where necessary. The duty of the ministers will consists of making human rights transparent whenever they have an implication on proposed Government legislation.

There are other issues debated in the White Paper, but those referred here are the most important ones in the perspective of this dissertation.

As it by now has been established, the Human Rights Convention is a contract between the governments of the signatory states. As an agreement, the Convention imposes obligations of international law on the British government.

In the UK before the Human Rights Act, the function of the Convention was restricted to enlightening problems of interpreting domestic law in the light of the assumption that the law is in confor-

mity with the obligations of the treaty. Thus the Convention affected the status of domestic law before the Act.

By means of the Act the rights and freedoms of the Convention are lifted out of the Strasbourg environment by making "Convention rights" enforceable in domestic law. This is what is meant by *Rights Brought Home* as used in the White Paper.

5.2. The importance of the individual judge

Another of the many facets of legal interpretation is the role of the judges. Traditionally judges are considered and expected to be independent both personally and organizationally. If a judge cannot meet these criteria, he or she is not qualified to sit in a court of law.

Lord Hoffman[56] has made some observations on this matter describing the impact of the current constitutional changes, i.e. the consequences of the Human Rights Act. What will be the future role of the judges in the UK?

Hoffman outlines an evaluation of American, German and British constitutions in order to decide the role of the House of Lords and other supreme courts in international matters. The reason for this exercise is that politically very active members, who give their decisions a highly political content, operate both the American Supreme Court and the Federal Constitutional Court of Germany.

The President of the USA elects American Supreme Court judges whereas the Law Lords of the House of Lords are appointed from within the highest legal ranks in the UK. The question now arising is if the Law Lords regarding convention matters will find themselves resolving matters as politically highly charged as the matters American judges are accustomed to. Apparently some people seem to share the thought that the consequence of international affairs will be that the UK judges will see their work turning in the direction of that of a politician.

Lord Hoffman argues that this is a too unrefined answer to the question, and I would agree. Even though the American common law system originates in the English common law there are great differences to be aware of. On the technical level, the Human Rights Act will only enable courts to declare a domestic legal decision a violation of the Convention. As a comparison, American and German courts can declare acts of the legislature to be unconstitutional and therefore dismiss it.

In many cases American judges are more or less forced to take a radical view. It is an overstatement with some plain truth in it that this was and is the case when the political system allows neither the executive nor the legislators to act according to a needed change in society. This has lead to judge-made changes such as major social reforms.

On the other hand, the UK Parliament is not held back in the same way as the American government can be. From the 1960's and onwards it has met the changing demands of a society undergoing a development resulting in modified beliefs and morality within the so-

[56] Hoffman (1999).

ciety, followed by e.g. criminalizing different types of discrimination and regulating police matters. This is the result of interaction between the people and the Parliament and an enforcement of tradition and history.

Returning to Lord Hoffman, he is not reluctant to implement the Human Rights Act; rather he foresees some changes in certain areas of the national law. These changes will occur when the limits of Parliament are reached, that is in areas of the law where Parliament does not feel on safe ground any more. This could happen regarding questions that implement topics that are very deep-seated in the human integrity, such as questions related to refugees and prisoners who by definition are very exposed to legal damages. From here Lord Hoffman moves on to a discussion about the correlation between the UK courts and the European Court of Human Rights in Strasbourg and the function of the principle of proportionality. He finds it very problematic that:

> ”Under the cover of an Article which says that everyone is entitled to have his civil rights and obligations determined by a tribunal, the European Court of Human Rights is taking upon itself to decide what the content of those civil rights should be.”[57]

Herein lies a concern of the possibility that the individuality and particularities of each member state is neglected and not accounted for, and this is not a predicament for the UK alone. To Lord Hoffman it is problematic that the judges sitting in the European Court of Human Rights have different nationalities and therefore these judges will not be able to completely understand the reasoning of the national judges. One could argue that we do in fact hold a common pan-European moral code. To a great extent that is true on certain levels as we by and large share the same religion, social development and culture. But even though the differences are small on a large scale, they do have an impact on each state and that will show when a question concerns detailed and somewhat technical issues such as the particularities of any given law system. The problem is that when a mode of interpretation is made as tight as the one applying for the European Convention on Human Rights, this style of interpretation is bound to collide with any other style even though they only alter slightly. That is not to say that one system is better than another. As Lord Hoffman put it:

> “We [the British] do have our own hierarchy of moral values, and our own culturally-determined sense of what is fair and unfair, and I think it would be wrong to submerge this under an pan-European jurisprudence of human rights.
>
> The problem about the hierarchy of rights is not the conflict between good and evil but the conflict between good and good.”[58]

The author is not forgetting the so-called ”margin of appreciation”, and that the margin allows for the legislature of states to differ within

[57] Ibid. p. 164.
[58] Ibid. p. 165.

limits. Although it is a discretionary means for the Court to use, there can be little doubt that the margin of appreciation is a principle that will help tie the international law of human rights together.

5.3. Judicial independence

Another author that comments on the issue of the function of the judge is Robert Stevens.[59] His views and concerns are also generated by the potential impact of the incorporation of the Human Rights Act, and he is asking if the separation of powers will be upheld in the future.

So far it has been more or less accepted that the separation of power was incomplete, but the problem at hand is if the judges take on more of the legislative power when judging international cases and if this implies certain problems. Stevens sees it as a matter of keeping the appropriate balance between judicial sovereignty and judicial responsibility. Unlike American politics this theme has never been the core of British political debates and so the British judiciary has never become as strong and independent as the American. This leaves British judicial independence as a somewhat vague concept that is used more as a constitutional ”concept”[60] rather than a political or constitutional fact.

The acceptance of the Human Rights Convention triggered the question if it was democratic to have un-elected judges interpreting a broadly drawn statute like the Convention, and whether it would be possible to keep the judges neutral in their decisions.

Cases to shed some light on these areas under discussion are the *Pinochet* cases[61] about the legal position of Chile’s ex-general Pinochet. In short, this case was appealed to the House of Lords where Lord Hoffmann among others sat as a Law Lord. By reading the Extradition Act more broadly than the Divisional Court did, the House of Lords decided that Pinochet was not to be offered immunity. The outcome of the decision was undoubtedly contentious, but it was interpreted as a triumph for human rights. The only trouble was that Lord Hoffmann had failed to make it known to the public that he was the chair of the charitable wing of Amnesty International, a position that disqualified him from deciding this case in the House of Lords. No matter the details and the outcome of the case, it was now clear that judicial independence is a matter that demanded further scrutiny.

As mentioned, until now the implication of ”independence of the judiciary” has been that of a political rhetoric, where the meaning has not been defined closely. There has never been agreement on the question whether Britain has separation of powers or not, considering that no one will contradict that judges are independant. In this respect it is not very surprising that trouble will appear when the British sys-

---

[59] Stevens, 1999.

[60] Ibid. p. 5.

[61] [1998] All ER 269 (div), *R v. New Street Stipendiary Magistrate*, ex p. Pinochet Ugarte [1998] 4 All ER 897 (HL) and *R v. Bow Street Metropolitan Stipendiary Magistrate*, ex p. Pinochet Ugarte (No. 2) [1999] 1 All ER 577 (HL).

tem is challenged by international law. It is apparent that a clear account must be made of this new status.

Since the 70s the position and perception of the judiciary has undergone a change. The opposition lacking under the Conservative ruled Government and the fading importance of the House of Commons made the relationship between the legislative and then executive very automatic in the sense that government made laws that the Members of Parliament simply supported. This left a political space for judges to fill and accordingly they became more aware of their position and potential power in the vacuum left by politicians.[62]

Even though there are many questions concerned with judicial independence, it is clear that the individual judge – as a principal rule – is organisationally and personally independent; he is not biased and the executive does not pressure him financially or in any other illegal way.

Again international law is causing problems, because what is a judge supposed to do when he is faced with broadly drafted standards like the articles in Human Rights Convention? On the other hand, the judges are given the advantage of already decided human rights cases when incorporating the Convention this late. It is a question if the Convention is hindering absolute judicial independence since the rules provided by the Convention is encouraging judges to think creatively. And what actually makes a judge independent is his creativity. There are gaps to be filled out, and since many areas of the Convention have not been tried extensively there are few guidelines for the judges to refer to. But the practise of the Convention is expanding rapidly, and along with the vast amount of the legal theory on the matter it will soon be possible to draw sharper lines. Already some of the sections of the Convention have been tried so many times that clear general rules can be drawn from them. Obviously this approach of drafting has been chosen in order to protect the individual in each different case as much as possible.

6. A CHANGE OF LEGAL CULTURE

As it has been demonstrated the UK legal structure is retrospective. It has also been established that this particular trait in the legal system does not imply an inoperative method. And even though the common law of the UK unhurriedly is taking on some modifications, e.g. in the form of statutory law, it does not indicate that common law as a legal design is being renounced. Common law is just another way of solving legal questions and in a general sense this individual manner is neither more nor less just than any other legal system. Moreover it cannot be denied that common law despite its tendency to look back instead of forward has been able to keep up with changes in history, society and politics. In a democratic state a legal method only stands as long as it is appreciated.

---

[62] Ibid. p. 29.

For the last half-century or so the UK common law has been forced to come to terms with international law as a result of the founding and elaboration of the European Community in relation to both private and public or administrative issues. The European Convention on Human Rights is one such issue that demands something rather extraordinary of the common law.

Although the implementation and eventually the incorporation of the Convention has been prepared and discussed for many years, it has entered and become a part of UK common law relatively rapidly; common law traditionally is a very slow adaptor of changes because of its retrospective nature. In a sense it could be asserted that the Convention anticipates events and thereby rushes the common law to adapt to it. This is where the notion of a legal culture enters the picture; the correct preconditions have to be readily available before a given change of any culture can be crafted. The question now is what will be needed in terms of a constitutional reform, and how it will affect the already established common law.

6.1. A new legal culture

It is reasonable to claim that the ratification of the Human Rights Convention coming into force in 1953 and the Human Rights Act 1998, which incorporates the Convention into British law, are the first premeditated and deliberate constitutional modifications in the UK since the Bill of Rights.[63] In the period in-between, changes in the constitution took place without having to resort to legislation.

In the context of constitutional changes, the Act is merely a part of a more wide ranged restructuring in Britain. The Act was launched along with the reform of the House of Lords, the promised Freedom of Information Act, devolution to Scotland, Wales and Northern Ireland, and the concept of elected mayors.

In this section it will be discussed what kind of legal change is required in order to meet this reform, and if a human rights culture will be established as a result of the Human Rights Act.

As pointed out earlier, the Act does more than install individual rights. From the state's perspective it is important to accentuate that all rights in the Convention are more or less subjected to limitations.[64] Thus the Convention holds a collaborative system that on the one hand gives emphasis to the rights of the individual and on the other hand gives the state a dominant but not oppressive position, which along with other components is demanded of every democracy.

The alleged human rights culture finds its fertile soil in the statement that once the Convention is incorporated, it "will place respect for human rights at the centre of any legal dispute".[65] This is a sign that each time a statute is given by the legislature and each time a decision is given by the judiciary, it has to be considered if the action

[63] The last major change came with the Bill of Rights dating from 1627 and 1689. These written rights concerned different aspects of freedom.
[64] E.g. Article 8 on the right of privacy limited in the article's section 2.
[65] Clements and Young (1999) p. 2.

is compatible with the Convention. The Act sets new norms and enhances the role of the judiciary.

Compatibility is a keyword in this respect. The particular law has to be just in order not to be in breach of the Convention, and if the Court in Strasbourg finds that a decision is not in concurrence with the Convention, the Court has the supremacy to declare the law ”incompatible” with the Convention. However the Court cannot strike down primary legislation, but if the violating state wants to meet the declaration of incompatibility it is obligated to establish a statutory adjustment.

Evidently many political debates have come of the Act and the Convention, but the discussion of the political position and arrangement of the Act in practice will be left out here. What is more interesting in connection with the examination of a cultural development, is how a political change has taken place in Britain since 1949 when the Council of Europe was instituted. Instead of practical political affairs it will here be discussed how political philosophy has undergone an alteration on account of the ratification and implementation of the Convention.

The Council of Europe became the precursor of pan-European integration[66] and from this time forth politicians were split in their beliefs, and as a result the Human Rights Convention to some extent is a compromise. This process was evidently the result of growing liberal inspiration and the fact that most of Europe had suffered during World War II and now sought support and initiative from across national borders.

After thirteen years of Conservative dominion, Labour came to power in 1964 and the right to individual petition was acknowledged in 1966. Then as now, incorporation was a hot political subject, but it was not a significant issue for any of the two major political parties in Government until the general election in 1992. This year Labour was defeated and after this Labour changed its attitude towards the Convention. From now on incorporation was clear Labour policy,[67] a policy that New Labour under Tony Blair elaborated upon. Until 1992 anyone connected to the Convention were lawyers from the top ranks. The Convention was their domain and that somehow made it difficult for outsiders, even judges, to come through with arguments of their own. New Labour took this privilege away.

Especially the Law Lords and other superior judges had their say in this matter. Like politicians, judges also had undergone a change because although Britain had not incorporated the Convention, other states of Europe already had and so the Court in Strasbourg was already effective. Along with the European Court of Justice this had an impact on UK courts that could not be ignored, especially not by the courts themselves.

---

[66] Young (1999) p. 28.
[67] Ibid. p. 33.

Yet another factor in the influence on the judges was the initial consequence of the case of *Pepper v. Hart* from 1993.[68] This case was the first step for judges on the way to become accustomed to more or less foreign traditions and approaches to law, precedent and statutory interpretation.

6.2. What kind of change can be expected?

The incorporation of the Human Rights Act in October 2000 is the single most important movement towards a cultural change. The most interesting question is how fast the UK common law system will acclimatise to its new position and what the outcome of the Act will be. Still, the reality of the European Community already has resolved in some changes; many non-conservative judges and practitioners have specialised in the law of the EC and human rights as well, and so there is a great awareness concerning these matters to be found among certain jurists.

Until the coming of the Act, the UK had no strong national law on human rights even though international human rights mechanisms had bound the UK to some extent. The dualistic mode of national and international law is responsible for this state of affairs. Additionally the UK constitution is built on a bureaucratic foundation of a ”representative majoritarian democracy and responsible government”, [69] which does not allow for much change. And in order to point it out once again, the Convention is all about values and specific intentions and standards:

> ”The Act’s ability to inject values which could fill the ethical vacuum at the heart of public life depends on the perceived legitimacy of the Convention rights, which in turn depends on their capacity to accommodate the most important elements of the United Kingdom’s constitutional heritage. In the absence of popular enthusiasm for root-and-branch constitutional change, the new values in the Act will have to interact with existing institutions. Change will result, but continuity will be observable: we will experience evolution, not revolution.”[70]

The Act creates and presses forward the principles of human rights, which UK law is short of. The Act fills out the gaps of common law in the same way as traditional equity does. It could be argued that the Convention once incorporated will be a new and radical equity; as equity trumped the common law, Convention submissions will now take precedence and even render statutes vulnerable to summary revision.[71] Section 3 of the Act compels all courts to understand legislation so as to support the Convention rights and this rule of construction will be relevant to future as well as past legislation. On this account the higher courts will be obliged to revisit and possibly reverse their previous decisions, and accordingly it is possible that the concept of judicial precedent will be eroded. On the other hand a more systematic ba-

---

[68] See p. 21.
[69] Feldman (1999) p. 166.
[70] Ibid. p. 174.
[71] Clements (1999).

sis for protecting human rights values such as autonomy, dignity, respect, status and security will be provided through the Act. These particular rights are protected through domestic law, but especially for the public it will be more efficient and simple to look in only one place in order to decide one's rights and obligations.

This is why common law is required to be developed by the courts with the aid of new solutions or old principles with a new perspective. Additionally section 3 of the Act provides that legislation must be interpreted "so far as possible" so as to be compatible with Convention rights, which also will give the judges and the courts a new starting point in their decisions.

Accordingly it will take some time before the true effect of the incorporation will manifest itself with the population of the UK. Once more it is illustrated how common law moves with very modest paces towards any given change, and that is especially the case when the change is a major one.

This concern for the democratic processes is a manifestation of the fact that consciousness about legal matters is well rooted in the common law tradition. In a way it is a question of attitude; in legal affairs the British have an exceptionally definite profile compared to the states of the European continent, which share more similar legal traditions different from the common law.

In this section it is illustrated that no change in the British legal constitution will take place over night. A change will eventually come, but it will happen gradually as the judges of the courts learn to adapt to the standards and influence of the Convention. There will be an evolution, not a revolution.

6.3. Section 3(1) of the Human Rights Act 1998 and judicial precedent

The Human Rights Act 1998 is divided into sections and headlines. The headlines are: *introduction, legislation, public authorities, remedial action, other rights and proceedings, derogations and reservations, judges of the European Court of Human Rights, parliamentary procedure*, and *supplemental*.

For the purpose of this dissertation the sections under *legislation* are the most interesting. Section 3(1) says:

> "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."

Accordingly section 3(1) demands that courts and tribunals must interpret all legislation, whether passed before or after the 1998 Act, in such a way as to make it compatible with Convention rights "so far it is possible to do so". Where it is impossible to interpret provisions in primary legislation to be compatible with Conventions rights, section 3(2)b provides that the primary legislation must be given effect, whether the legislation in question pre-dates the Act or is made after it has come into force. In a sense, the Act is less powerful than a normal

statute, since the doctrine of understood revocation of previous inconsistent legislation does not apply to it. This is the result of a compromise between the legislative supremacy of Parliament and the protection of human rights.[72]

At this point the question is how to fit section 3(1) into traditional common law interpretation, and if it is possible to do so without abandoning long-established common law rules on interpretation.

In order to solve this problem it is necessary to return to the more general matter of interpretation of statutes in common law compared to continental law and repeat some of the statements made previously.

Concerning international influence, the UK has undergone a change since World War II.[73] Intermingling has come in the form of international obligations such as the European Union, which operates on Community law based primarily on civil law. And now the Human Rights Act is about to give the Convention full impact in the UK. Until the incorporation, the influence of the Convention was less apparent even though the practical results of the actual Convention rights are the same. It cannot be denied that UK law has lost its homogeneity as Bennion claims,[74] but in this context it must be remembered that he is a dedicated political conservative. Accordingly, international intervention in UK law is not necessarily a negative development, as Bennion would allege. International law creates a hierarchy in national law and constitutions, and so the primary concern for national authorities is to make sure that no violation will come of a given act.

It is true that international obligations make a legal system multiplex, but instead of regarding obligations as obstructive, they should be considered a guarantee that certain standards are kept intact by a powerful state.

Returning to principles of interpretation, it has already been mentioned that common law methods traditionally disagree with continental methods. With the increasing amount of civil law elements in common law a solution must be found so that they can work together with as few compromises as possible. In his article Bennion is on the search for a new method of statutory interpretation that will accommodate both civil law and common law. The traditional basis of statutory interpretation must not be lost according to Bennion who believes that the so-called global method of interpretation is the most significant and revealing feature of the common law. Now that Community law has been transposed into the national law of the UK by means of the Human Rights Act, common law principles must be set aside to some degree.

The dilemma is well illustrated in this quote about the Court of Justice of the European Communities (CJEC):

---

[72] Feldman (1999) p. 179.
[73] Bennion (2000) p. 78.
[74] Ibid. p. 78.

> "The [CJEC], in contrast to English courts, applies teleological rather than historical methods to the interpretation of the Treaties and other Community legislation. It seeks to give effect to what it conceives to be the spirit rather than the letter of the Treaties; sometimes, indeed, to an English judge, it may seem to the exclusion of the letter. It views the Communities as living and expanding organisms and the interpretation of the provisions of the Treaties as changing to match their growth."[75]

The differences are obvious, which will lead on to the attempt to find the correct understanding of section 3(1).

Bennion's thoughts on interpretation are founded on the idea of defining UK law as "law as integrity".[76] Inspired by Dworkin he maintains that declarations and claims of law are interpretive judgments, and consequently they are a combination of looking backwards and forwards. Legal claims "interpret contemporary legal practice seen as an unfolding political narrative".[77] And this is where Bennion has to bring to an end his unsuccessful attempt to find a new way of interpreting section 3. In his view this contemporary structure of law in the UK is coherent with the method used in connection with interpreting the Convention, i.e. if the enactment in question is construed according to the Convention method. And so no new method has to be developed in order to interpret section 3(1); the old one have to be modified with the purpose of making the Act operable.

To an outsider this construction may seem somewhat strained, but Bennion is strongly influenced by his political beliefs. As a conservative his undertaking will be to protect British common law against too weighty international influence, given that he sees European co-operation as an unnecessary task, taking into account that allegedly the UK is able to protect its own interests on it own without any interference from other states.

On the other hand Bennion clarifies that the approach to legal interpretation is not as undemanding as section 3(1) of the Act might indicate; there is more to it than a simple question of interpretation. Bennion sees two stages. The first one considers the question whether there is doubt about the legal meaning at all. This has to be decided on an informed basis,[78] and if there are no uncertainties to be found then interpretation will not take place. The second stage only comes into use if a doubt can be established. Then, and only then, there is room for actual interpretation.

Bennion's point must be that a lot of legal questions will not pass on to the second stage of interpretation. It could be expected that Bennion would take a literal approach to interpretation and thereby override a more extensive interpretation.

Feldman has another perspective on section 3. He asserts that:

> "Encouraging courts to be creative in the interpretation and application of Convention rights and legislation which affects them, the 1998 Act may lead

[75] Bennion (2000) p. 81, quoting Lord Diplock.
[76] Ibid. p. 83.
[77] Ibid. p. 84.
[78] Ibid. p. 89.

> to an interpretation of legislation which is directly contrary to that intended by the promoters and drafters of other Acts."[79]

According to Feldman the problem is that section 3(1) is not intended to solve questions of interpretation and textual ambiguities in the legislation. Consequently it will be strained to rely on legislative intention in order to validate judicial action in such cases. The preceding use and development of Convention rights will be changed, but strictly speaking the problem is not as threatening to parliamentary sovereignty as it may seem. The fact is that Parliament itself has declared that judges should work in harmony with section 3, and that settles the question.

On the matter of parliamentary sovereignty it must be mentioned that in fact it is the parliamentary sovereignty that marks out common law from civil law. Parliamentary sovereignty implies that Parliament is able to create a legal Act at will and there is no actual constitution to limit this access. At this place it is a very important point to make that the Human Rights Act changes the position of Parliament. After the incorporation of the Act, Parliament is legally forced to consider the Human Rights Convention before the passing of an Act. Consequently the sovereignty of Parliament will be reduced on all areas that potentially involve human rights issues.

A declaration of incompatibility according to section 3 has another and much more far reaching effect on parliamentary sovereignty than the just above-mentioned, namely that section 3 allows for judges to tell Parliament that it has acted erroneously.

Prior to the 1998 Act it was understood that Parliament was autonomous on a number of aspects. First of all there is the statement that nothing Parliament does can be legally wrong. Parliament and its staff are immune to legal process, but of course that does not mean the same as pure absence of wrong. Another aspect is that no act from Parliament can be legally incorrect. This too is a mistake in disguise. International law and European Community law have showed differently in cases taken to international tribunals and courts, e.g. the European Court of Human Rights. This is where the ministerial remedy of amending parliamentary legislation comes into the picture.

This is one mode of regarding the position of Parliament. If the picture were turned upside down, the allegation would be that parliamentary sovereignty does not allow for a national court to nullify provisions in an Act of Parliament in confidence of national law, as opposite to international law. Interesting as it may be, this is a more academically founded question, which will not be elaborated upon here.

Another aspect of section 3 is the danger of moving the political debate into the courtrooms.[80] This is not to say that politics and the execution of law are not connected, because they most certainly are. But there is a risk that turning rights into legal matters might weaken politics if the courts take part in the political discussions. If this hap-

[79] Feldman (1999) p. 185.
[80] Ibid. p. 168.

pens the whole scheme of an elected Parliament will lose some credence. In order to prevent this from happening, it has been ensured that the power of the judges is weak in relation to primary legislation. In addition, it is a minister who is responsible for making a statement of incompatibility in the process of making a Bill, according to section 19 of the Act.

It is necessary to make some comments as well on the matter of judicial precedent. The method of interpretation connected to the Convention no doubt pays less regard to precedent than a common law judge would. As it has been described previously in this text, teleological interpretation represents a mode of legal thought that a common law judge is not accustomed to, and probably he is sometimes even somewhat reluctant to make use of in his courtroom.

Alternatively it would be an obvious mistake to claim that the European Court of Human Rights neglects precedent. As a matter of fact the ”rule of law” first of all prescribes certainty in the law, and the most important aspect of this certainty is that like cases should be treated alike. Consequently precedent cannot be disregarded. Of course no cases are completely alike, especially considering that the Convention is much concentrated around the individual, but along with a growing number of cases from both the former Commission and the Court, standards and general principles will evolve. At present day, some articles of the Convention have been tried extensively enough to lay down positive criterions, e.g. article 6 on the right to a fair trial, which is the most tried article. Still, the exact line between the minimum and the maximum of a right or an obligation in any given article has not been given, and is not supposed to be given. This has to be seen in the light that the rules are flexible so as to pay regard to the individual and the state’s margin of appreciation.

An approach to the Convention rights as described here is not very different from that of the common law, in the respect that both systems scrutinise and analyse precedent in order to find standards, or ratio of a case.

As a result of the above-mentioned, the pure doctrine of binding precedent is not relevant in Convention matters after the incorporation of the Convention. In future, Convention rights and national rights must be regarded as two different sets of rules that require two different types of interpretation. If human rights of any kind are brought into a courtroom it will primarily be Convention practise and interpretation that determine the outcome of the case, even though domestic organs and not the European Court of Justice deal with the matter.

It must be expected that international law as found in the Convention will have an effect on domestic law. As mentioned already, the British legal system is undergoing a change, and one change will undoubtedly be on the area of interpretation of legal documents. It has already been illustrated how this alteration has had an impact on the traditional literal approach to statutory interpretation, and unquestionably the incorporation of the Convention will provoke and urge like changes in the future.

In a sense, the Human Rights Act 1998 is no ordinary statute. It could be said that it contributes to a framework that forms the interpretation and implementation of other legislation. The Act is installed with substantive values that are given an privileged but not an unchallengeable place among multiple principles, policies, and values, which enlighten and inspire legal development and improvement.

7. POSSIBLE SOLUTIONS, A CONCLUSION AND A SHORT SUMMARY

7.1. The problems facing the common law of the UK

As it already has been established, there are similarities between human rights law in the form of the Convention and the common law system: an essential remedy to understand the standards of the Convention is its case law, which common law also operates on to a great extent. Concerning interpretation of law, neither the Convention nor common law traditionally rely on the preliminary work of the law, which could be an advantage for common law jurists who are to make use of the Convention.[81]

At this point it would be appropriate to make some comments about the main disadvantages concerning incorporation of the Convention in the UK.[82]

On the subject of the common law system, the most important argument seems to be that common law ensures individual freedoms and rights better than a broad declaration of principle encoded in the Convention. The explanation for this statement is that the common law holds an immense richness of accumulated experience in the form of legal decision-making over hundreds of years. The argument is that tradition and experience together have more to offer than modern principles with no secure rooting in history. Furthermore, incorporation is by some even seen as a threat to the advantages of tradition, in as much as Parliament has a large share of this tradition of sovereignty; traditionally Parliament is the protector of rights and liberties.

As regards consequences for the common law judges, it is held that their independent institution is risking politicisation if Parliament loses its sovereignty, as described above. If this happens, the consequences will be that the legislative power of Parliament and the judicial power of the courts and judges are confused. Subsequently the judicial power will lose its authority as a ”watchdog” in relation to the activities of Parliament.

Concerning refusal of the right of individual redress to the Court in Strasbourg, the argument has been that it is a doctrinaire principle that only states can be subjects of international law.

---

[81] According to Article 32 in the Vienna Convention, preliminary work can only be used as a supplementary means of interpretation in order to verify the outcome of interpretation, or if there is an uncertainty after interpretation, of if interpretation leads to an unfair result.

[82] Young (1999) pp. 29-30.

Some thoughts about the democratic aspects of incorporation have also been promoted over the years. It has been claimed that the protection of rights is a Parliamentary prerogative for the reason that Parliament is elected. Judges, on the other hand, are not elected and therefore they have no democratic legitimacy. And consequently they should not be construing general rights.

With reference to the above-mentioned arguments, it is apparent that they mostly are concerned with the future position of Parliament, which is understandable since one of the most fundamental doctrines of the common law is the sovereignty of Parliament. This sovereignty is a part of the idea of separating powers in order to let the executive, the judicial, and the legislative power hold each other in check. The question is, then, how much power actually Parliament should have; since nobody I have come across has asked if Parliament has too much power this question will be asked here. On the one hand, there does not seem to be any signs that Parliament is misusing its power, but on the other hand it is debatable if it is constructive for Parliament to keep its present power after the incorporation of the Convention. Maybe better results will be reached if Parliament commences trusting the judicial power with these matters, considering that the judges are the ones who deal with the Convention in practical life. With the Act of incorporation, the Convention is brought to the local domestic courts, and one would expect that this is where the use of the Convention is controlled most straightforwardly.

I find it unlikely that the history and the richness of the common law system will be lost on this account since international law is a whole other legal system, which will be able to operate alongside the common law. The effect on the common law will be that of considering human rights issues whenever a judgment is delivered or whenever a statute is drafted. It is not a drag on the system, but rather it gives individuals a priority.

It is true that the UK judge will have to settle some points regarding the standards and principles of the Convention, but in doing this he is not becoming a politician; he is restricted by the precedent of the Convention and ultimately controlled by the Court in Strasbourg.

The opposite views in favour of incorporation of the Convention are concentrated on liberal ideas, which make individual rights the central issue. The basic intention is to protect the individual from arbitrary encroachment carried out by the state, and thereby protect and enforce the rule of law. With reference to the separation of powers, it is trusted that the executive will not inhibit the judicial power, and additionally on a ideological level it is assumed that judges are not likely, as politicians may be, to yield to popular opinions and powerful authorities.

On the subject of the relationship between common law and incorporation of the Convention, this dissertation has primarily given attention to changes in the legal culture of the common law. There are of course many and very technically detailed legal difficulties arising as a result of the incorporation. The intention, though, has not been to

analyse specific details, but rather to give an overall view of changes needed in the legal culture as a whole.

On this background the principal challenge to the common law has been to give up traditional statutory interpretation and commence looking forward instead of backward in time and history. The result is discarding for instance the doctrine of binding precedent and thereby abandoning the backbone of the common law. So changes will come as the result of foreign and international influences such as the Convention, which introduces a new type of law consisting for the most part of principles and legal standards.

Judges are probably more than anybody faced with new challenges after the incorporation: the Convention is the result of a political agreement, and so decisions made according to it will – as you would expect – be politically charged. Traditionally it has been proclaimed that courtroom activity has nothing to do with politics and that judges are motivated merely by the law and not by current politics. Obviously there is much truth to such a declaration, but there can be little doubt that law and politics are two sides of the same coin. Additionally the Convention is a relatively young legal document and many substantial questions are still unclear and still some articles have never been tried before a court. So with their decisions, UK judges will automatically contribute to the development of human rights and thereby create law as a parallel to law made by politicians.

Another challenge for UK judges – and other judges for that matter – is to become acquainted with the concept of teleological interpretation. In the courtrooms the task of the judge will be to simulate and imagine how the decision of the Court in Strasbourg would be if this institution were confronted with the same questions as the national judge. National judges have to ask themselves what the intention behind a specific rule has been and then give a decision that is correct in relation to the spirit of the Convention. Here the word spirit should not be understood as a loose idea with no legal reality or foothold, but rather as a binding legal scheme to be observed whenever taking a legal step on a domestic level.

In other words, the idea of the Human Rights Convention has to be incorporated not only into the UK law system, but also incorporated and integrated into the mentality and consciousness of the judges and the law-making authorities.

British interpreters of law are traditionally bound by a more literal approach to legal documents that are not clear in their meaning. Though, as it has been illustrated, the literal rule of interpretation has recently lost some field, and as a result attention to the context of legal texts is beginning to appear in decisions, most obviously in the case of *Pepper v. Hart* about preliminary legal work.

Regarding the importance of precedent, again common law traditions are different from civil law traditions. Evidently precedent plays an important role in continental civil law systems a and a court rarely sets precedent aside, but it is not binding to the same extent as

in the common law system. The 1966 Statement[83] regarding binding precedent in the House of Lords was a step on the road to softening the otherwise very rigid system, but it has also been proved that the Statement has not had a full impact yet. On the other hand UK jurists are used to working with and scrutinising vast amounts of legal precedent, and that will be an advantage in relations to the Convention since the somewhat indistinct rules of the Conventions are defined and refined through case law.

7.2. Summary

As described in the introduction, the intention of the present dissertation has been to comment on the effects of introducing an international legal document to a nation that legally speaking has been historically and traditionally secluded from the rest of the European continent.

In order to accomplish this, the history and development of the English and Welch common law system has been explained on certain relevant points, which as a whole illustrate the legal method of common law. This legal method has shown to be of an inductive nature rather than a deductive one, and it is indicated that the facts of a common law case are all-important. It has also been established that precedent has a very significant role to play in this system.

For these reasons it is fair to conclude at this stage that the common law system is functioning very differently from typically civil law inspired continental law. The way of reaching the correct answers, i.e. reaching a fair legal decision, is apparently not the same as in civil law countries. But even though the legal methods are different from each other, it does not indicate that one of these methods is wrong or unjust to its users. It simply illustrates that there is no single acceptable technique to reach the objective of an ultimately fair decision.

It has also been demonstrated that other factors can make a legal system unique and consequently complicated to introduce to new ideas. One such factor is traditional methods of interpretation of legal documents.

It has been illustrated through case law that common law judges traditionally are very reluctant to give a legal document a wide meaning. Rather they stay on safe ground and make their interpretation essentially literal. It has also been established, though, that the traditional literal approach to interpretation has been altered, most prominently with the case of *Pepper v. Hart* from 1993. This case institutes the right to look through preliminary work in order to clarify a misunderstanding or an ambiguity in a text. With this case, parliamentary material was authorised as a source of law. But even today the matter is not fully clarified. It seems to be a discussion between an old and a new school; the old school is still claiming that a literal approach will generally give the legally most correct answer to a problem, and the new school is thinking more along the lines of context. To the new

[83] See p. 8.

school, context or the circumstances of the case has to be recognised in order to find out the intention of the lawmaker. It is difficult to give an accurate position of current legal interpretation, but it should be apparent by now that the importance of context is gaining territory. This is an expected development since international modes and rules of interpretation are pointing in the same direction.

In order to bring the question of interpretation to a close, it would be fair to conclude that the so-called mischief rule with its predominately purposive approach to unclear legal matters has more to offer in a modern legal system than the literal rule has. And it would seem that UK interpreters of law are aware of this and therefore make use of the purposive approach. A very important factor in this conclusion is the reality of the Convention on Human Rights since the Act of incorporation brings about the dealing of human rights issues in domestic courtrooms. It has been suggested that the Court of Human Rights interpret in very broad terms, so to speak. Most weight is given to the purpose of the rule or standard in question by exercising the principle of teleological interpretation. Interpretation of the Convention has probably most precisely been described as dynamic in the sense that it constantly adapts to the changes in the society surrounding it.

So there appears to be little doubt that this mode of interpretation will have to have some effect on the interpretation of UK national law, and one thing is certain after the incorporation: national lawmaking has to take place in the spirit of the Human Rights Convention and according to the Human Rights Act.

Given the lack of detailed restrictions in the Convention, it is for the national judges to figure out the intention behind it in cases that are not clear. Consequently the national judge is faced with the particular technique of interpreting Convention rules and standards. Especially judges educated in the common law tradition have to recognise their potential of creating rules and giving unprecedented decisions within the scope of the Convention.

The fact that common law judges will have to adapt to new possibilities regarding interpretation, also tells us something about a more wide-ranging change in the UK legal culture. The Convention introduces the magnitude of purpose and it encourages looking forward in time instead of backward. This is the quite opposite of how traditional common law operates.

With the incorporation in October 2000, the human rights spirit or culture will be more evident in the UK, and that is also one of the main purposes of actually incorporating the Convention. An Act of incorporation will make the Convention much more noticeable, and again another purpose of incorporation is to establish the importance of human rights and make both politicians, lawyers and the people in the street aware of them. The intention is to make human rights a part of the common moral standards in a society. If this proves to be achieved successfully, the natural consequence will be a changed legal culture.

On a more strict legal level this change will come about by means of the Act of incorporation, and Section 3 of the Act ensures that national legislation is compatible with Convention rights. With the aid of Section 3, human rights will gradually find their way into the UK courtrooms. But incorporation is a major constitutional step, and knowing the unhurried nature of common law, the change in the legal culture will come little by little and probably even hesitantly.

So what can be expected of the British legal authorities in the future? First of all it should not be forgotten that they are no strangers to the Convention; it has been implemented and therefore exercised for a long time in the UK. The difference is that after the incorporation it is to be put into effect in the national courtrooms. The question is if UK authorities are actually determined enough to fulfil the Convention in order to slowly, but steadily, give it its intended effect. Given the fact that they have gone as far as to in fact incorporate the Convention by means of a national Act should tell us something about their commitment.

Common law is almost notoriously conservative and therefore every change will develop slowly and in a pace, which gives everybody affected by it time to adapt to the change. Making human rights effective as prescribed by the Convention is no exception, and so it cannot be expected that the Convention will be fully efficient in the UK at the early stages of incorporation. But the exercisers of law in the UK are far from blind to international law, and of course many UK lawyers practise European Community law. Consequently there are some who are no strangers to international principles of law and interpretation. These lawyers will be the ones to try cases in national courtrooms and so it seems only fair to assume that they will be prepared for the task of interpreting human rights correctly.

The overall intention of the dissertation at hand has been to illustrate the consequences of introducing an international human rights treaty to the traditional common law system of the UK. On the areas of legal interpretation and legal culture it has been demonstrated that incorporation demands certain undeniable changes in the legal methods of practitioners and lawmakers. The purpose of this dissertation has been to foresee the nature of such changes.

Now only time can disclose the actual consequences of incorporating the Convention on Human Rights into the common law of the United Kingdom.

BIBLIOGRAPHY

Adams, John N. and Roger Brownsword, 1996: *Understanding Law*, Sweet & Maxwell.

Arden, Mary, 1998: Modernising Legislation, *Public Law*, spring, pp. 65-76.

Bennion, Francis, 2000: What interpretation is ”possible” under section 3(1) of the Human Rights Act 1998?, *Public Law*, spring, pp. 77-91.

Buxton, Sir Richard, 2000: The Human Rights Act and Private Law, *The Quarterly Law Review*, vol. 116, January.

Childs, Mary, 1998: Constitutional Review and Underinclusive Legislation, *Public Law*, winter, pp. 647-658.

Clements, Luke, 1999: The Human Rights Act – A New Equity or a New Opiate: Reinventing Justice or Repacking State Control?, *Journal of Law And Society*, vol. 26, no. 1, March.

Clements, Luke and James Young, 1999: Human Rights: Changing the Culture, *Journal of Law and Society*, vol. 26, no. 1, March.

Feldman, David, 1999: The Human Rights Act 1998 and constitutional principles, *Legal Studies*, vol. 19, no. 2, June.

Germer, Peter, 1996: *Indledning til folkeretten*, Jurist- og Økonomforbundets Forlag, 2nd edn.

Grosz, Stephen et al., 2000: *Human Rights. The 1998 Act and The European Convention.* Sweet & Maxwell Ltd., London.

Lord Hoffman, 1999: Human Rights and the House of Lords, *Modern Law Review*, vol. 62, no. 2, pp. 159-166.

Hunt, Murray, 1998: ”The ”Horizontal Effect” of the Human Rights Act”, *Public Law*, autumn, pp. 423-443.

Hunt, Murray, 1999: The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession, *Journal of Law and Society*, vol. 26, no. 1, March.

Lord Irvine of Lairg, 1998: The Development of Human Rights in Britain, *Public Law*, summer, pp. 221-236.

Kahn-Freund, O., 1974: On Uses and Misuses of Comparative Law, *The Modern Law Review*, vol. 37, No. 1, pp. 1-27.

Klug, Francesca, 1999: The Human Rights Act 1998, *Pepper v. Hart* and All That, *Public Law*, summer, pp. 246-273.

Laws, Sir John, 1998: The Limitations of Human Rights, *Public Law*, summer, pp. 255-265.

McHarg, Aileen, 1999: Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights, *The Modern Law Review*, vol. 62, no. 5, pp. 671-696.

Stevens, Robert, 1999: A Loss of Innocence?: Judicial independence and the Separation of Powers*.

Twinning, William, 1986: Introduction, *Legal Theory and Common Law*. Ed. by William Twinning, Oxford Blackwell, pp. 1-25.

Young, James, 1999: The Politics of the Human Rights Act, *Journal of Law and Society*, vol. 26, no. 1, March.

Zander, Michael, 1999: *The Law-Making Process*, Butterworths, 5th edn.

Zweigert, K. & H. Kötz, 1998: *An Introduction to Comparative Law*, Claredon Press, Oxford, 3rd edn.

*A copy is available if requested. The pages referred to are invented by me; the front page is page one.