The European Convention on Human Rights and Administrative Law: First Impressions

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I. INTRODUCTION

In many legal systems today, it is remarkably difficult to disentangle administrative law from the whole legal and constitutional background to governmental action, although this task is somewhat easier in those legal systems which, as in France, have a distinct administrative jurisdiction. The close inter-relation of constitutional and administrative law is one of the themes of this article. In 1968 at an international symposium, “Judicial protection against the Executive”, held in Heidelberg, the President of the German Constitutional Court, Gerhard Muller, defined the constitutional State as “a State in which the system of government is at least in principle, understood as a system ruled by law” and continued: “The most important elements of the constitutional State are the subjection of the supreme power to the law, the separation of powers and the respect for the general, fundamental rights of man.” In Muller’s view, the subjection of the supreme power to the law was closely linked with the legitimation of judicial power; the separation of powers was presupposed when courts granted judicial protection against the Executive; and respect for fundamental human rights was the ultimate justification for the exercise of the supreme power.

In a recent article reviewing the two leading text books on English administrative law D.J. Galligan draws attention to the present perplexing state of the subject in Britain. He distinguishes two senses of administrative law, one referring to “a body of legal principles, created by the courts on the basis of tradition and constitutional understandings, and having common application to all areas of government activity,” the other referring to the law and practice in specific branches of state regulation (welfare, planning, immigration and so on). Adopting the former sense, Galligan suggests that a mixture of gloom and optimism is most pertinent. He offers a critique both of Wade’s Administrative Law, “judicial discretion resting on a shaky theoretical basis, and in danger of being particularistic and unprincipled in practice . . . and

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3 Galligan, supra note 2, at 258.
overly simple framework," and, in more respectful terms, of de Smith's approach in *Judicial Review of Administrative Action*: "the conflict between these two themes, the attempt to formulate general rules and the ubiquitous discretion of the courts, runs throughout de Smith and is never resolved." Galligian argues that the organizing theme for administrative law should be the requirement of rational decision-making and reasoned decisions. He concludes that administrative law "is not a self-contained discipline; it is one of many sub-systems trying to make sense of modern societies."

This last comment would find support from Professor McAuslan, whose own pithy critique of British literature on administrative law was entitled, *Administrative Law and Administrative Theory: the Dismal Performance of Administrative Lawyers*. McAuslan was concerned with the failure of administrative lawyers to discuss fundamental questions about the role that law might play in the relationships between the institutions of the state and society. There are welcome signs that other teachers of administrative law in Britain share the same impatience. To give point to McAuslan's concern, the House of Lords, under Lord Diplock's inspiration, appears to be laying the basis for the rediscovery of public law, without waiting for academic theories to emerge.

Now it may be desirable to place the blame for this situation on the administrative lawyers themselves, but one explanation of the unsatisfactory theoretical state of administrative law is to be found in the constitutional background of the United Kingdom. The orthodox constitutional doctrine of the legislative supremacy of Parliament, together with the prevailing political framework, makes it difficult for the British to understand, in Muller's words, how the supreme power may be considered to be subject to the law. (Muller surely was referring to the supreme power in the state whether exercised by legislative or executive action.) The function of judicial review is not satisfactorily explained by reference to the subordinate role of the courts and the task of statutory interpretation, as British writers are inclined to suggest. A more open approach is strongly to be preferred: in Galligan's words, "... the primary source of principles of good administration lies beyond Parliament, and their justification depends on values in the constitutional order that

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4 Id. at 267.
5 Id. at 269.
6 Id. at 276.
precede the doctrine of sovereignty." Yet this broader view is not universally held. Indeed, the British constitutional framework is vulnerable to those who see no value in the distribution of powers, and prone to the proliferation of infinitely variable arrangements for rule-making and the administrative process. Agencies and procedures are listed seriatim before they can be subjected to appropriate controls: it is in this way that the spheres of operation of the Parliamentary Ombudsman, the Council on Tribunals and the Statutory Instruments Act 1946 are determined. The debilitating effects of reliance on such means of categorizing institutions is seen when the normal props for a decision are absent, as in the unimpressive reasoning of the House of Lords in deciding whether contempt of court applied to an administrative tribunal which the legislation described as a court.

Administrative law in Britain at present is in a perplexing state: there is much judicial activity founded upon a shifting base, lacking an adequate rationale and having an uncertain content. If in this situation it is difficult to articulate the principle that the supreme power is subject to the law, and it is left to others to debate the separation of powers, what of the third essential in President Muller's description of the constitutional State, respect for fundamental human rights?

II. RIGHTS AND CONSTITUTIONAL REFORMS

Respect for fundamental human rights can take many forms and there is no particular correlation between formal constitutional propositions and the actual practice of governments. The British tradition has avoided the solemn enactment of human rights, and has preferred that the individual's liberties and freedoms should be preserved in less obvious but possibly more effective ways. The majority report of the Royal Commission on the Constitution devoted three pages out of nearly 600 to the protection of human rights, rejecting proposals that were made to the Commission (particularly in evidence from Northern Ireland) for accompanying the grant of subordinate legislative powers with guarantees for human rights. The report said: "there is no evidence that the public conscience, as made effective through our existing democratic institutions, is not adequate to provide the protection called for." The Commission's report was published in October 1973. Fourteen months later came Sir Leslie Scarman's Hamlyn lectures, *English Law — the New Dimension*. Scarman passionately asserted the contrary, calling for the power of the legislature to be curbed in order that the concept of fundamental and inviolable human rights might be accommodated within the national legal system. These lectures included a somewhat unspecific plea for reform in administrative law, but in the ensuing debate it was the constitutional protection

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1 Galligan, *supra* note 2, at 262.
12 Tribunals and Inquiries Act 1971, c. 62, s. 1(1)(a) and s. 15(1); Parliamentary Commissioner Act 1967, c. 13, s. 4; Statutory Instruments Act 1946, 9 & 10 Geo. 6, c. 36, s. 1(1).
of human rights that dominated the arguments. As the debate progressed, those who wished to see constitutional reform came to agree that the most pressing need was a new Bill of Rights. In 1978, a select committee of the House of Lords was "irreconcilably" divided on whether a Bill of Rights was desirable, but was unanimous that if there were to be a Bill of Rights it should be a Bill incorporating the European Convention on Human Rights into the domestic law of the United Kingdom. In 1980, on the proposal of a Liberal peer, Lord Wade, the House of Lords gave third reading to such a Bill. The Conservative government, however, has no intention of allowing this initiative to make progress in the Commons.

Recent British discussion about incorporation of the European Convention has concentrated on the problems set for orthodox constitutional doctrine by proposals for enacting a Bill of Rights. Thus, having been advised in this sense by Lords Diplock, Scarman and Wilberforce (Lord Hailsham dabitante), the House of Lords committee concluded that there was no way in which a Bill of Rights could protect itself from encroachment, whether express or implied, by later Acts. The committee gave little consideration to the detailed effects which incorporation might have on the domestic law. Indeed, the committee reported the government's view that it had no reason to suppose that there was a conflict between any of the provisions of the Convention and the law of the United Kingdom or the general rules governing administrative practice in this country. The committee considered that there were "no more than a few marginal situations" (mainly relating to privacy and the prison services) where the incorporation of the Convention might bestow a remedy where the present law did not. The committee also mentioned two aspects of remedies that might cause problems (the availability of damages for a breach of the Bill of Rights, and the granting of injunctions against the Crown), but the committee did not review the implications for administrative law of incorporating the European Convention.

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17 The Bill provided that the Convention should have the force of law and be enforceable by action in U.K. courts (cl. 1); that the provisions of the Convention should prevail in any conflict with any laws enacted before the passing of the Bill of Rights (cl. 2); that in case of conflict between the Convention and subsequent enactments the enactments should be deemed subject to the Convention and should be so construed unless the enactment provided otherwise or the enactment admitted of no compatible construction (cl. 3); and that the Queen in Council could in time of emergency take measures derogating from the Convention (without this affecting international obligation) (cl. 4).


20 Supra note 16, at 33.

21 Nor does Dr. Jaconelli's scholarly study of the problems of enacting a Bill of Rights consider the effects for administrative law, although he mentions in passing points of comparison between judicial review of administrative action and the enforcement of a Bill of Rights, Jaconelli, Enacting a Bill of Rights, The Legal Problems (New York: Oxford University Press, 1980).
The importance of fundamental constitutional questions is often more theoretical than practical (but not always, as the recent history of Canada testifies). Speculative attempts to answer the 64-dollar question ought not to mean that the day-to-day practical consequences of legal change should pass unnoticed. As Professor Tarnopolsky commented, in reviewing Dr. Jaconelli’s book, “for most of the time the important issue concerning a Bill of Rights is not whether it will provide authority for judicial review of legislative action, but rather whether it will induce the judiciary to review and restrain administrative action.” Without pausing to consider whether the conclusions of the House of Lords select committee on the impossibility of entrenchment are justified, this article will examine whether experience of the European Convention provides any support for Professor Tarnopolsky’s comment, and will draw some parallels between that experience and domestic administrative law. Any conclusions that are reached will be tentative; indeed the jurisprudence of the European Court and Commission, after a slow and cautious start, is now in a period of rapid development and extension. The administrative law dimension of the Convention is not stressed in the standard accounts in English of the Convention, but much benefit may be derived from the work of Professor Harris and also that of Mr. Alan Boyle.

III. THE EUROPEAN CONVENTION — A BARE OUTLINE

The Convention is concerned with the relationship between the individual and state power, as is administrative law. It was intended to promote the observance of human rights by European governments having “a common heritage of political traditions, ideals, freedom and the rule of law.” The Convention does not cover the whole field of human rights, most social and economic rights being excluded. Its enforcement machinery consists essentially of the European Commission of Human Rights (hereafter the Commission), responsible for receiving and inquiring into alleged breaches of the Convention; the European Court of Human Rights (hereafter the Court), which decides judicially whether breaches have occurred, and whether “just satisfaction” should be offered to the injured parties; and the Committee of Ministers, which as a political body may deal finally with reports from the Commission that are not referred to the Court, and which also supervises the execution of judgments given by the Court. Complaints of breaches of the Convention may be made against a party state either by another state or, where a state has recognised the competence of the Commission to receive such petitions, by an individual or non-governmental organization claiming to be a victim of a violation of the guaranteed rights. The Court has jurisdiction

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25 Preamble to the Convention.
where the state concerned has accepted the compulsory jurisdiction of the Court or consented to a particular case coming to the Court. The individual petitioner has no right to refer a case to the Court: this may be done only by the Commission or a state. However, by amended rules of procedure, which came into effect in January 1983, the individual may be directly represented in proceedings before the Court.

The status of the Convention in the United Kingdom is that of a treaty, entered into by the Crown. Executive declarations accepting the right of individual petition to the Commission and the compulsory jurisdiction of the Court have been maintained in force since 1966, but no British government has accepted that the Convention should be incorporated into the law of the United Kingdom. Courts may take account of the Convention in interpreting ambiguous legislation enacted since Britain ratified the Convention and for assistance in resolving uncertainties in the common law. But the Convention is not part of the law of the United Kingdom and does not create rights that can be relied on in British courts.

Party states have undertaken to secure to everyone within their jurisdiction the rights protected by the Convention and those whose rights are violated are entitled to an effective remedy before a national authority. In many states (as in the Netherlands and Austria) the domestic courts may enforce the Convention directly, but the Court has held that the Convention lays down for states no given manner for ensuring effective implementation within their internal law of any provision of the Convention. In 1978 the United Kingdom was the only signatory which neither had its own constitutional charter of human rights nor had incorporated the Convention into domestic law. Successive British governments have taken the view that the domestic law of the United Kingdom conforms to the Convention. As human rights were understood in 1950, this may have been the case; but the Court has stressed that the Convention must be interpreted in the light of present-day conditions, and has applied evolving notions of human rights. In the light of cases from the United Kingdom which have gone to Strasbourg since 1966, there is today no room for any British complacency. These cases have had a direct impact on legislation and administrative policies, in regard to such matters as immigration appeals, contempt of court, the prison system and mental health.

IV. STATE RESPONSIBILITY, RIGHTS AND JUDICIAL CONTROL

The concept of the state in the public law of Britain is not well developed. The state as such is not a legal entity. The legal structure of government is

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Byzantine rather than monolithic. A formal separation of powers is not observed, but one function of public law is to differentiate the various institutions of government. In reviewing executive acts, the courts frequently need to define the powers of ministers, departments, local authorities and so on. In such demarcation disputes, "the typical questions in issue are whether the deciding authority is properly constituted, whether it embarks on the right tasks, satisfies any conditions, and finally comes to a decision within the scope of its authority." Are such demarcation disputes a feature of proceedings under the Convention?

Although individuals enjoy rights of access under the Convention, only states are parties to it, and all applications must be directed against one or more of the party states. State responsibility under the Convention applies broadly to the acts of all public authorities within the state, including the legislature, government departments, the courts, police and other agencies. The lack of direct executive control over a particular body provides no defence to a finding that individual rights have been violated, nor does the fact that the action in question was in accordance with national law. (However, as will be considered below, it is a necessary condition of many limitations of protected rights that they are imposed in accordance with the law.) Proceedings under the Convention may bring under examination not merely the ill-treatment of an individual but a whole area of legislative, executive or judicial policy. Indeed, incorporation of the Convention has been attacked for the very reason that this would mean entrusting to the judiciary wide areas of legislative policy. State responsibility as such is not new in international relations: what is novel about the Convention is that once a state has accepted the right of individual petition, the machinery for enforcing the Convention can be set in motion by an individual against the state of which he is a national. Thus by making application to Strasbourg, the individual may be able to overcome obstacles placed in his path by national law.

Decisions of the Court on violations that arose directly from the state of the law include Dudgeon v. United Kingdom (laws on homosexual acts in Northern Ireland held to infringe the right to respect for private life) and Young, James and Webster v. United Kingdom (enforcement of closed shop agreement by British Rail leading to dismissal of three employees for refusal to join the union). In that case, the government conceded and the Court declared that the responsibility of the state for the violation was engaged since "it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained."

Decisions of the Court have also concerned alleged violations caused by judicial decisions. The best-known examples are The Sunday Times v. United Kingdom (a decision by the House of Lords to uphold an injunction violating

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35 Galligan, supra note 2, at 261.
36 Supra note 16, at 32.
39 Id. at 52.
the freedom of expression) and the case of the Little Red Schoolbook, *Handyside v. United Kingdom.* In that case a conviction and forfeiture order under the *Obscene Publications Act 1959* had been upheld on appeal, and the European Court considered the outcome to fall within the "margin of appreciation" allowed to national authorities in deciding whether a restriction on freedom of expression was necessary for the protection of morals.

Violations of rights may also arise directly from the exercise of executive power. The first decision of the Court in a United Kingdom case concerned the Home Secretary's refusal to permit Golder, a convicted prisoner, to obtain legal advice on a possible action against a prison officer for defamation. This refusal, authorized by statutory Prison Rules, was held by the Court to violate Article 6(1) of the Convention, on the ground that access to the courts was guaranteed, and Article 8 (unjustified interference with correspondence).

In law, the Home Secretary's refusal could have been challenged in an English court as an improper use of his discretion under the Prison Rules; alternatively, the Rules themselves could have been challenged as *ultra vires.* It is most doubtful, however, whether such a challenge would have been successful at that time. Significantly, the same Prison Rules have recently been held *ultra vires* by the House of Lords on the ground that the *Prison Act 1952* did not authorize interference with a citizen's right of access to the courts. In 1978, executive action of a different kind, in-depth interrogation of detainees in Northern Ireland, was held by the European Court to amount to inhuman and degrading treatment, contrary to Article 3 of the Convention; the methods of interrogation were also plainly unlawful by the law of Northern Ireland, and liability to compensate the victims was accepted by the United Kingdom government.

Other cases involving executive or administrative action which have come to the Commission in recent years (not all from Britain) have concerned the refusal by prison authorities to register a prisoner's religion or to allow a prisoner to marry, the refusal by registration authorities to register the new sex of a transsexual, the refusal by a consul to make known to a citizen the address of his former wife, the failure of the ministry of health to give adequate warning to the parents of young children about the risks of vaccination, the reorganization of secondary schools, the refusal of legal aid and

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42 7 & 8 Eliz. 2, c. 66.
45 15 & 16 Geo. 6 and 1 Eliz. 2, c. 52.
birth certificates to a band of gypsies, an order banning an insurance company from accepting fresh business, an education authority's refusal of permission to a Moslem teacher to attend worship on Fridays, and a claim for compensation for noise generated by a motorway and airport. In a recent case from Sweden the European Court had to decide whether approval for expropriation and a ban on redevelopment maintained for a long period over land in Stockholm were in breach of the Convention. Such cases are very like the kinds of case that arise within the administrative law of many European states. In principle, the possibility of judicial review of such cases already exists in national law. Whereas a national court or tribunal will apply its own domestic criteria of legality, for the Commission and Court at Strasbourg what matters is compliance with the Convention. Although the two processes may sometimes produce widely differing results, it will be suggested below that the two levels of supervision have much in common in addition to subject matter.

The rule requiring exhaustion of domestic remedies before recourse to Strasbourg will be discussed below. That rule is not so extreme that theoretical rights of judicial review have to be exhausted. Accordingly, applications concerning executive action may go directly to Strasbourg without judicial review having been sought in British courts. Other applications may go to Strasbourg having already failed in proceedings in British courts. Thus foreign scientologists who were refused permission to stay in the United Kingdom failed in their challenge to the Home Secretary's decision in the English courts, and also failed in their attempt at Strasbourg to challenge the decision to withdraw recognition of the scientology college as an educational establishment. So too the Moslem teacher refused permission to attend worship during his employment failed both in the English Court of Appeal against his employers and in the Commission against the government. An application arising out of a telephone tapping case that failed in the High Court was declared admissible by the Commission. In this case Sir Robert Megarry, Vice-Chancellor, had held that tapping was not unlawful where there was nothing, such as trespass, to make it unlawful, and that English courts could not recognize any rights created by the Convention. It is certain that the European Court will apply different criteria and will decide whether the status of telephone-tapping in English law conforms to the Convention's own requirements of legality.

Scrutiny of national law by the Commission and the Court has already had dramatic consequences in revealing areas of executive action where (for

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60 Sporrong and Lönnroth, supra note 59, where one issue was whether Swedish administrative law provided adequate judicial review of the decisions in question.
61 Schmidt v. Home Secretary, [1969] 2 Ch. 149; and 12 European Yearbook 306, criticized by Jacobs, supra note 23, at 148.
one reason or another) the general principles of administrative law have failed to provide adequate protection. Standard accounts of administrative law tend to avoid the problem of unequal application of principles of review. Narrow legal explanations of the problem are likely to be inadequate. As Galligan has said, "different judicial policies prevail in different areas of public power." 65

Two areas where legal protection has been inadequate are prisons and mental hospitals. Numerous individual applications to the Commission come from those detained in such institutions. The controlling techniques of administrative law appear to have been used lightly in respect of powers affecting individual liberty. In 1982, Wade wrote "The writ of habeas corpus plays a part, though not a large one, in administrative law, since some administrative authorities and tribunals have powers of detention." 66 Until recently, however, few administrative lawyers examined the extent of these powers and the legal control over their exercise. In this they were following the lead of the judges. In Arbon v. Anderson it was held that neither the Prison Act nor the rules made thereunder were intended to confer any rights upon prisoners; 67 and in Becker v. Home Office Lord Denning M.R. said, "If the courts were to entertain actions by disgruntled prisoners, the governor's life would be made intolerable. The discipline of the prison would be undermined. The Prison Rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action." 68 Such a state of affairs was not confined to English law, 69 but that particular judicial outlook seems to be becoming a thing of the past, in the face of the remarkable progress made in the last ten years in Britain by the prisoners' rights movement. 70 To mention two of the most notable decisions: in R. v. Board of Visitors of Hull Prison, ex p. St. Germain the Court of Appeal established that the supervisory jurisdiction of the High Court extended to the disciplinary powers of prison boards of visitors and thus that these boards could be required to observe natural justice. 71 In Raymond v. Honey, 72 a convicted prisoner, said the House of Lords, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication. 73 In the area of prison administration, the Convention has been and continues to be a strong and positive influence on English judicial attitudes. 74

65 Supra note 2, at 263.
72 Supra note 46.
73 Citing the Hull case, supra note 71, Solosky v. R. (1979), 105 D.L.R. (3d) 745 at 760. For other recent cases see Halsbury's, supra note 70.
The situation is somewhat similar with respect to mental patients, although it may be doubted whether English judicial attitudes were ever as strongly opposed to mental patients' rights as they were to prisoners' rights. The decision of the High Court to grant *habeas corpus* to a mental defective in *R. v. Board of Control, ex p. Rutty* led to the release of over 3,000 patients who had been detained in a similar manner, and contributed to the reform of the law made by the *Mental Health Act 1959*. That Act created mental health review tribunals with power to decide on the discharge of civilly committed patients, but with power only to advise the Home Secretary on the discharge of patients whose detention had been ordered by a criminal court to be subject to restriction. According to Gostin, since the 1959 Act was passed there have been no reported cases where the courts have been willing to examine the substantive justification of a detention or have ordered the patient's discharge.

The powers and procedures created by the 1959 Act came under scrutiny by the European Commission and Court in *X v. United Kingdom*, *X*'s application to the Commission being brought after he had unsuccessfully challenged his detention in the English High Court. In *Winterwerp v. Netherlands* the European Court had previously laid down minimum conditions for the detention of persons of unsound mind under Article 5(1)(e) of the Convention, but had left open the question whether the review by a national court of the lawfulness of a detention covered substance as well as procedure. *X v. United Kingdom* arose out of the exercise by the Home Secretary of his discretionary power to recall a convicted offender who three years previously had been released from a secure hospital. The European Court held that the *habeas corpus* application that *X* had made after his recall did not enable the English High Court to make due inquiry into the existence of the substantive grounds for detention. The European Court also found that where detention took place in England by means of the exercise of statutory discretion, the scope of review was largely governed by the terms of the Act and did not extend to the merits.

As a direct result of that decision, the *Mental Health (Amendment) Act 1982* included provisions designed to bring English law into line with the Convention's requirements: in particular it enlarged the power of mental health review tribunals in the case of restricted patients such as *X*, from merely advising the Home Secretary to making the actual decision.

A further area of governmental power which directly affects individual liberty arises from the *Immigration Act 1971*. Even though the United

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76 7 & 8 Eliz. 2, c. 72.
78 (1981), 4 E.H.R.R. 188.
80 C. 51.
82 C. 77.
Kingdom has not ratified the fourth Protocol to the Convention, which precludes a state from expelling or refusing to admit its own nationals, many individual applications have gone to Strasbourg from would-be immigrants and members of their families. For present purposes, it is sufficient to refer to recent uncertainty about the extent of judicial review which is available by recourse to habeas corpus in the case of those who seek permission to enter the country or are detained with a view to their deportation. At least until a decision by the House of Lords in 1983, it seemed that habeas corpus had ceased to be an effective remedy for reviewing Home Office decisions regarding the status of illegal entrants. In Caprino v. United Kingdom the Commission had accepted as admissible a complaint that English law did not afford adequate review of an Italian’s detention in connection with a deportation order; but in its final report the Commission took the view that Caprino should have used the remedy of habeas corpus, even though it was “open to dispute” whether habeas corpus would always be sufficient for the purposes of Article 5(4). If such uncertainty in this branch of law continues (the case-law has been said to be riddled with contradictions), this will continue to generate problems for Britain under the Convention. It is ironic that it may be the Strasbourg authorities who are requiring the British judges to reassume their historic role as protectors of individual liberty.

An area of public power which has not received systematic attention from an administrative law viewpoint is that of police powers in enforcing the criminal law. Police powers have usually been studied in the context of civil liberties and criminal procedure, although judicial review has sometimes been sought in questions concerning the legality of police action. Such instances include the review of prosecution policies and the banning of public processions under the Public Order Act 1936. The police do not have a monopoly of law enforcement powers, and discretionary decisions by government departments in enforcing the law may raise rights issues. By contrast, the regulation of business and industry and the exercise of disciplinary powers over professions and occupations frequently give rise to actions seeking judicial review, but legal protection of the individual is relatively

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underdeveloped in regard to such matters as privacy and parental rights in the state educational system.

It is now proposed to examine more closely some aspects of the Convention that have a special application to administrative law.

V. ADMINISTRATIVE RIGHTS AND OBLIGATIONS, AND THE RIGHT TO AN INDEPENDENT TRIBUNAL

In 1961, the Whyatt Report examined a wide range of discretionary decisions taken by British government departments for which there was no appeal to a tribunal. It considered that the individual is in principle entitled to have an impartial adjudication of his dispute with authority unless there are overriding considerations which make it necessary, in the public interest, that the minister should retain responsibility for making the final decision. New tribunals have been established since 1961, but the Whyatt principle of impartial adjudication for all discretionary decisions has never been accepted by successive governments. Article 6(1) of the European Convention contains a provision which potentially could establish that principle in Britain. However, in the light of the complex jurisprudence which now exists, it is unlikely that the development will in fact go so far as to judicialise all discretionary decisions. Because of differences in the French and English texts of the Convention, both versions of the first sentence of Article 6(1) need to be read:

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

Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur des droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle.

[The second sentence of the paragraph requires that judgments be pronounced publicly, and sets out various exceptions to the rule of publicity.]

With their experience of the expression “property and civil rights” in section 92 of the Constitution Act 1867, Canadian lawyers will not be surprised that difficulties have been met in the interpretation of the phrases underlined. Elsewhere in the Convention (in Article 5 and the rest of Article 6) detailed guarantees are given for the individual’s right to due process of law in criminal matters, but the words quoted give the sole guarantee for a just trial and an independent judiciary in non-criminal matters (except for matters related to loss of liberty, where Article 5(4) is also relevant). At its broadest, “civil rights and obligations” could refer to all rights and obligations other than criminal

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89 Supra note 63.


91 For a full discussion, see Harris and Boyle, supra note 24. And see Fawcett, supra note 23, at 120-60; Jacobs, supra note 23, at 76-111; and Castberg, supra note 23, at 111-26.


93 30 Vict., c. 2.
charges. At its narrowest, it might be confined to matters regulated by *le droit civil*. An intermediate interpretation is to distinguish with a broad brush between public law and private law and to hold that “civil rights and obligations” should be confined to the latter. The *droit civil* and private law interpretations would each mean that due process of law would not be guaranteed in many areas of governmental power that directly affect the legal position of individuals. The private law interpretation could present special difficulty for the United Kingdom and Ireland, since the common law tradition eschews a formal distinction between public and private law. Whichever approach prevails, there will be difficulty in promoting uniform minimum standards across a score of jurisdictions that have no consistent classification of law amongst themselves.

The general approach under the Convention appears to be that “civil rights and obligations” refers broadly to matters of private law and not public law. The concept is autonomous and not determined by the practice of any existing legal system. Article 6(1) has been applied to disputes about parental access to children, a worker’s rights to holidays and sick pay, negligence by a hospital or prison doctor, the wrongful dismissal of a state teacher and (because of the impact on property rights) questions concerning the valuation of land subject to expropriation. Article 6(1) has been held *not* to apply to disputes about taxation and social security, war pensions, claims under nationality and immigration laws, extradition, bail applications and matters concerning the status of civil servants and members of the armed forces. But what of public powers that directly affect private rights?

The leading decision of the Court on administrative matters is *Ringeisen v. Austria*, where Article 6(1) was held to apply to decisions taken by a regional commission under legislation which required official consent for the transfer from one private person to another of land for development. The Court reasoned that for Article 6(1) to apply it was not necessary for both parties to the dispute to be private persons, nor was it decisive that the giving of consent was subject to Austrian administrative law. What mattered was that the regional commission’s decision to grant or withhold consent was decisive for the relations in civil law between the contracting parties. Applying Article 6(1) to the facts, the court held that there had been no breach, since the regional commission was a tribunal within the meaning of the Convention; it was independent of the executive and of the parties, and the proceedings before it conformed to the necessary procedural guarantees.

In this decision, the Court deliberately took a wider approach than the majority of the Commission, whose opinion was that “civil rights and obligations” referred to relationships between private individuals, to the exclusion of legal relations in which the citizen is confronted by the exercise of public authority; the Commission did not consider that Article 6(1) had been intended to lay down minimum standards for judicial review of administrative action.

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94 But see Article 18 of the Anglo-Scottish Treaty of Union 1707, which gave a degree of protection to Scots law based on the distinction between “laws concerning public right, policy and civil government, and those which concern private right” on which see *Gibson v. Lord Advocate*, [1975] S.L.T. 134. And see, *supra* note 9.

95 See, e.g., *Neumeister v. Austria* (1968), 1 E.H.R.R. 91.

In a more recent decision, Sporrong and Lönroth v. Sweden, the Court by a 12-7 majority held that an owner whose land was adversely affected by an approval for expropriation and a ban on development was entitled by Article 6(1) to have questions of domestic law regarding the legality of those measures decided by a court or tribunal.\(^7\)

In Ringeisen's case, the private law contract was enforceable only if public consent was given to the land transfer, and there was an obvious public law intrusion into the private law of freedom of contract. Did it follow that all public powers of regulating private activities were thereby brought within Article 6(1)?

Two subsequent Court decisions, Konig v. Federal Republic of Germany\(^8\) and Le Comte and others v. Belgium\(^9\) were concerned with regulation of the practice of medicine. In the first case, Konig's licence to run a private clinic had been withdrawn and later his practising certificate had been cancelled, on each occasion by decision of a public law authority. Konig had challenged each decision in the administrative courts and his complaint to Strasbourg was of the excessive length of the procedure in those courts. The European Court refused to decide the application of Article 6(1) by reference to the classification of these disputes in German law, and considered that both running the clinic and the practice of medicine involved rights of a private nature, though these rights were subject to supervision in the public interest. On the merits, the Court held that both in respect of the clinic and the practising certificate, the administrative court proceedings had been unreasonably delayed.

In the second case, Le Comte and two other doctors were suspended from practising medicine by a disciplinary tribunal of the medical profession. The Court held that Article 6(1) applied since the dispute over the suspension decisively affected the private right to practise medicine. The Convention did not require each stage in the Belgian procedure to be conducted before a tribunal meeting the requirements of Article 6(1). The right to judicial determination of the dispute covered questions of fact as well as questions of law, and in this instance the right was met by taking together both the Appeals Council of the medical profession (dealing with questions of fact) and the proceedings before the Cour de Cassation, concerning issues of law. The Appeals Council and the Cour de Cassation each satisfied the test of independence and impartiality, but the Court held that there had been a breach of Article 6(1) since the Appeals Council had by its usual practice heard the applicants in private and had refused their request for a public hearing. An earlier decision of the Court, Engel v. Netherlands, had concerned disciplinary proceedings within the armed forces.\(^10\) The Court had held that although disciplinary proceedings in general fell outside Article 6(1), the nature of particular penalties might render it necessary for the proceedings to be supervised as if they concerned criminal charges. The majority of the Court in Le Comte ruled that disciplinary proceedings could also come within Article 6(1) where they led to a dispute (contestation) over "civil rights and obligations."\(^11\)

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\(^7\) Supra note 59.


\(^10\) (1976), 1 E.H.R.R. 647.

\(^11\) And see Sporrong and Lönroth, supra note 59.
These decisions of the European Court leave open the question whether rights and obligations in public law may yet be brought within Article 6(1). To date, the approach has been to bring public law procedures within Article 6(1) by virtue of their effect on the private law rights and obligations of the individuals concerned. A further point is that Ringeisen, König and Le Comte all concerned decisions taken by tribunals, courts and other bodies with a judicial character. How far, if at all, does Article 6(1) apply to a decision taken by a government department or other body which in its personnel and procedure may be very far from having the character of a court or tribunal?

In Kaplan v. United Kingdom\textsuperscript{102} the Secretary of State for Trade imposed an order restricting an insurance company from taking on new business, after an administrative procedure in which notice had been given and Kaplan's representations had been considered. The Commission held that such a restriction order affected the company's rights and obligations within Article 6(1) since the company had a right to conduct insurance business; but further held that Article 6(1) did not apply to the acts of an administrative body like the Department of Trade exercising such powers. The Commission justified its decision by the argument that an initial decision to impose restrictions was not the "determination" of civil rights and obligations. A "determination" would be made within Article 6(1) only when a dispute (contestation) arose through the individual seeking judicial review of the administrative decision. In the Commission's view, Article 6(1) entitled Kaplan to seek judicial review (a matter that was not contested by the British government) but not to a fresh discretionary decision on the merits. The Commission said, "It is . . . almost a corollary of the grant of discretionary powers, that the scope of judicial review of the relevant decisions is limited."\textsuperscript{103} Article 173 of the EEC Treaty was cited to illustrate the limited scope of judicial review typical in the administrative law of many European states.

According to one British comment, "At best the distinction drawn in Kaplan is a convenient but somewhat arbitrary and artificial way of excluding executive and other administrative bodies from the immediate ambit of Article 6(1) when there is nothing resembling a lis inter partes."\textsuperscript{104} If the Commission had held that the company was entitled to a decision by a court or tribunal on whether the facts justified the restriction, this would have been tantamount to barring government departments from exercising powers vested in them. The common law doctrine of natural justice does not go to that extreme. But Kaplan may not be the last case in which there is pressure for further judicialization of the administrative process. It must also be remembered that in any event Article 6(1) does not apply to those many administrative decisions which concern the granting of benefits rather than the imposition of restriction upon private activities. The European Convention has yet to experience its Goldberg v. Kelly.\textsuperscript{105}

Two further comments may be made. First, it would appear both from Kaplan and from Sporrong and Lönroth v. Sweden that it would violate Article 6(1) for national authorities to seek to exclude judicial review of ad-

\textsuperscript{102} (1980), 4 E.H.R.R. 64, as discussed by Boyle, supra note 24.
\textsuperscript{103} (1980), 4 E.H.R.R. 64 at 89.
\textsuperscript{104} Boyle, supra note 24, at 223.
\textsuperscript{105} 397 U.S. 254 (1970).
ministrative decisions concerning “civil rights and obligations.” While the claim to foreign compensation which was the subject matter of 

Anisminic Ltd. v. Foreign Compensation Commission\(^{106}\) might have been outside Article 6(1), the property rights involved in expropriation cases such as Smith v. East Elloe R.D.C.\(^{107}\) and in R. v. Secretary of State, ex p. Ostler\(^{108}\) would fall within it. In those two cases, the English courts upheld as absolute statutory clauses excluding judicial review after a six week period during which there was a right to seek review. At Strasbourg, the six week right to sue would undoubtedly be a material consideration in favour of the exclusion clause; but what of the position where that period has expired before the individual has the possibility of finding out that there were grounds for review (as in the Smith and Ostler cases)?

Secondly, many administrative tribunals in Britain (for example, the Lands Tribunal, rent assessment committees, and industrial tribunals) exercise jurisdiction which falls within Article 6(1). They are subject to the supervision of the Council on Tribunals and, since the Franks Report 1957, have been accepted as forming part of the machinery for adjudication rather than being appendages of government departments. Their continuing independence and impartiality are now also subject to protection under Article 6(1). In Zand v. Austria, the Commission concluded that, while the Federal Minister of Justice had power to delineate the districts of the Austrian labour courts, this did not deprive them of their independence provided that the judges were irremovable during their term of office.\(^{109}\)

While Article 6(1) provides for scrutiny of the independence and impartiality of tribunals, it also requires hearings to be held and decisions given in public. For these reasons it has been suggested that a more flexible guarantee for administrative justice would be preferable.\(^{110}\) In another recent decision, the Commission declared admissible a Dutch application concerning the withdrawal of a licence for a liquid gas installation: this application called into question the adequacy and impartiality of the procedure by which the Dutch Council of State had given its advice on the matter.\(^{111}\) In its report in Campbell and Fell v. U.K., the Commission held that the boards of prison visitors which impose disciplinary penalties on prisoners are not “independent and impartial” tribunals, since they do not have the necessary independence of the prison administration; Article 6(1) is also violated because the boards sit in private and legal representation is excluded.\(^{112}\) In September 1983 these matters were under consideration by the Court.

In regard to the loss of liberty it is particularly important to set minimum standards of judicial procedure and to prevent their erosion by administrative considerations. Under Article 5 the decision of a court is required both for a conviction leading to a detention (Article 5(1)(a) ) and when a detainee

\(^{106}\) [1969] 2 A.C. 147.


\(^{110}\) Harris, supra note 24.

\(^{111}\) Benthem v. Netherlands, application 8848/80, not yet reported, Oct. 20, 1982.

\(^{112}\) (1983), 5 E.H.R.R. 207.
challenges the legality of his detention (Article 5(4)). But the decision to remand an accused person in custody or to release him on bail may be made by "a judge or other officer authorised by law to exercise judicial power" (Article 5(3)). In Schiesser v. Switzerland, the Court held by a majority that a district attorney had sufficient independence of the executive to make such a decision in a case in which he was not acting as public prosecutor: in Swiss law the district attorney was subordinate to the Department of Justice and the chief public prosecutor, but in practice no instructions as to the exercise of his discretion in particular cases were given to him. A similar test of de facto independence was applied in Delcourt v. Belgium, where a member of the Procureur Général's department had attended the private deliberation of the Cour de Cassation on a criminal appeal. But in De Wylde v. Belgium, three persons detained as vagrants were held to have suffered a violation of Article 5(4): the magistrate who ordered their detention, while a "court" from an organizational point of view and independent both of the executive and the parties, did not in vagrancy cases follow a procedure which satisfied the guarantees of judicial procedure in criminal matters. Similarly in Winterwerp v. Netherlands the Court held that the Dutch authorities had failed to provide for an independent decision on the necessity for the continued detention of a mental patient; and that to satisfy Article 5(4) in the case of mental patients, not only must the deciding authority be a court in organizational terms and enjoy due independence, its procedure must also be of judicial character and the individual must have a fair hearing. In X v. United Kingdom, recall by the Home Secretary of a convicted prisoner to a secure mental hospital was plainly an administrative decision; while a mental health review tribunal might in terms of status and procedure be regarded as a "court" under Article 5(4), the tribunal's powers were in law purely advisory and it could not order release of the prisoner.

Decisions such as these in respect of criminal procedure and the loss of liberty could be drawn upon in future interpretation of Article 6(1). They indicate a flexible rather than a rigid notion of a court (the French text throughout uses tribunal, whereas the English text uses variously court and tribunal), but nonetheless seek to maintain a definite distinction between judicial and administrative decisions.

In one important respect the Court has been prepared to read down the scope of Article 5(4), which guarantees to one deprived of his liberty the right to have the lawfulness of this detention decided speedily by a court. Where the decision to detain is taken by a court at the close of judicial proceedings, the Court has held, in an obiter dictum, that there is no further right of recourse under Article 5(4) "since the supervision required by Article 5(4) is incor-
European Convention on Human Rights

porated in the decision.’’ The Court has emphasized that this is conditional on
the procedure followed having a judicial character and giving the individual
due guarantees. In view of this condition, a judge’s decision to order some-


120 10 & 11 Geo. 6, c. 44.


122 Fawcett, supra note 23, at 74.

123 Id. at 159. Cf. Zand v. Austria, supra note 102.

124 Fawcett, supra note 23, at 194.

In view of this condition, a judge’s decision to order someone’s detention would not satisfy Article 5(4) where he acts on impulse and without any consideration of the limits of his power, as in the English case of Sirros v. Moore. In that case, Sirros was released on habeas corpus proceedings nine days later, but failed to recover damages for his unlawful detention because of the Court of Appeal’s view that judicial immunity applied equally to judges of superior and inferior courts. Since the detention of Sirros was in plain breach of Article 5(1)(f), Article 5(5) would give him an enforceable right to compensation, yet judicial immunity bars personal liability, and vicarious liability on the part of the Crown is excluded by the Crown Proceedings Act 1947. On somewhat similar facts, in a case from Trinidad and Tobago, a majority in the Privy Council awarded damages against the government of Trinidad and Tobago, relying upon a constitutional provision that guaranteed redress to those whose fundamental rights had been infringed. Compliance in Britain with Article 5(5) of the European Convention would seem in such cases to require legislation: reliance on the Crown making an ex gratia payment would not satisfy Article 5(5).

VI. LEGALITY, DISCRETION AND REMEDIES

There are three other aspects of the Convention which will be considered from the viewpoint of administrative law.

A. “Prescribed by law” (prévu par la loi)

The Convention provides in a number of articles that a restriction or limitation on a guaranteed right is justifiable if it satisfies certain criteria. These criteria include the requirement that the restriction is “prescribed by law.” Thus in Article 5(1) arrest or detention of a person is justified “to secure the fulfilment of any obligation prescribed by law.” In Article 8 interference by a public authority with the right to respect for private life, home and correspondence must be “in accordance with the law” (prévu par la loi). Restrictions on the freedom of expression must be “prescribed by law” (Article 10(2) ). By these requirements, the Convention seeks to exclude arbitrary interference with the guaranteed rights. According to Fawcett, “prescribed by law” suggests specific provisions imposed by law, usually in statutory form. In the case of tribunals required to be established by law, this “plainly prohibits the establishment of extraordinary courts by mere executive order.” In the case of powers of search, however, Fawcett considered that the requirement of “in accordance with law” would accommodate a general power of police search, without warrant or specific statutory authority. On the ques-
tion of how conformity to law is decided, Jacobs concluded that the Commission and the Court must accept the interpretation of national law adopted by the national courts, for the reason that questions of municipal law are, for the Convention organs, questions of fact. But subsequent cases involving the United Kingdom suggest that the Court and the Commission prefer to apply their own standards of legality.

In *Sunday Times v. United Kingdom*, the Court held that the common law basis of contempt of court in England did not prevent the issuing of an injunction to ban publication of a newspaper article being “prescribed by law,” provided (a) that the law was reasonably accessible, in the sense that a citizen could obtain an indication of the applicable legal rules, and (b) that the rules in question were formulated with sufficient precision to enable the citizen to decide his course of action, or at least he must be reasonably capable of foreseeing the consequences of given action. On the facts of the case, these requirements were met.

But if the common law of contempt satisfied the test, two important areas of state action have come under review at Strasbourg. In English law the legal basis for telephone tapping is doubtful. Such doubt was not dispelled by the Birkett Committee’s reasoning in 1957: “It is difficult to resist the view that if there be a lawful power to intercept communications in the form of letters and telegrams, then it is wide enough to cover telephone communications as well.” In *Malone’s case* Sir Robert Megarry’s judgment rested in part on the proposition that tapping was not lawful when there was nothing such as trespass to make it unlawful. He further considered that it was for Parliament and not the courts to lay down new rules of law to regulate such a complex field. However, the government later decided that legislation on telephone tapping was not desirable and made changes in the arrangements for reviewing the operation of telephone tapping. When *Malone’s case* reached Strasbourg, the Commission declared the complaint admissible: given the extent to which the system for the interception of communications was regulated by administrative arrangements rather than by rules of law, an important question arose as to whether tapping was “in accordance with the law.”

The censorship of prisoners’ correspondence also gave rise to the question whether what passes for legality in the United Kingdom satisfies the standards set under the Convention. In *Silver v. United Kingdom*, the Commission held that such censorship must, under Article 8(2), be in accordance with the law. In a significant passage, the Commission stated the phrase “in accordance with the law” was not merely a reference to a state’s domestic law, “but also a reference to the rule of law, or the principle of legality, which is common to democratic societies and the heritage of member states of the Council of

125 Jacobs, supra note 23, at 196-97.
128 Supra note 63.
Although the Prison Act 1952 and the Prison Rules 1964 were accessible, censorship was essentially based on detailed rules contained in unpublished standing orders. These were considered by the Commission to be lawful within Article 8(2) only so far as the restrictions they imposed could be deduced from the terms of the enacted legislation. A wide variety of restrictions contained in the standing orders failed this test and was therefore declared to be in breach of Article 8. Even before the case reached the Court, the government’s response was to make and publish a new standing order containing revised censorship rules. However, when Silver’s case reached the Court, the Court did not accept an argument for the prisoners that the rules for the censorship of letters had all to be published and must have the force of law. The Court doubted whether in this field it would be “possible to formulate a law to cover every eventuality.” Rules made under wide discretionary authority were acceptable, provided that the citizens affected had sufficient knowledge of their content to foresee the consequences of certain action. On this basis, some but not all of the censorship rules were held to be “in accordance with the law.”

In another censorship case, the Commission found that the power of British customs to open mail from abroad was in accordance with the law, since it was exercised under a scheme contained in delegated legislation which did not go beyond the possibilities envisaged by the parent Act. The requirement of “prescribed by law” thus helps to ensure that an exercise of power that might infringe the guaranteed rights should be carried out on the basis of enacted law rather than of secret, unpublished administrative rules. The view of Jacobs mentioned above that the Commission and the Court must simply accept the interpretation of national law adopted by the national courts has been overtaken by events. It is, however, a matter for regret that the Court in Silver’s case did not make greater inroads into the fortress of executive discretion by requiring all operative rules for prison censorship to be published and to have the force of law. Seldom can Fuller’s second way of failing to make law (that is, a failure to make available to the affected party the rules he is expected to observe) have been more aptly illustrated than by the facts in Silver’s case.

B. Supervision of the exercise of national discretion

In regard to the conduct of civil or criminal trials which are alleged to have been unfair, the Convention organs have often adopted what is known as the “fourth instance” doctrine, resisting the pressure from applicants simply to enter into the merits of a judgment or a conviction. The need for this can be readily understood, although to a common law lawyer this does seem sometimes to be carried to an excess, given the less satisfactory features of

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132 Supra note 45.
133 Supra note 44.
137 Supra note 23.
foreign procedure. The Court has more than once stressed that the machinery established by the Convention is subsidiary to the national systems for safeguarding human rights. In Handyside the Court declared that the Convention allows a margin of appreciation, given both to the legislator and to the national authorities that interpret and apply the laws. Moreover, phrases in the Convention such as "within a reasonable time" and "necessary in a democratic society" allow for wide discretion both in their interpretation by national authorities and in their application by the Court and Commission. In a recent immigration case, the Commission emphasized that its task was that of a "subsidiary organ of control" — not to take the place of the national authorities but to review whether in the exercise of their functions those authorities acted outside what might reasonably be expected of them under the Convention. But as Silver's case showed, when the Commission and the Court scrutinized the record of prison censorship very closely indeed, the process of review may be so detailed as to amount to taking again decisions that the national authorities had made.

One test that is applied in this process is that of proportionality, derived from German public law and the decisions of the European Court of Justice. As explained by the Court in Handyside, any interference with the freedom of expression must be "proportionate to the legitimate aim pursued." The test of proportionality is a means of reviewing the executive's own assessment of what a particular situation requires, and if that seems excessive, substituting a different opinion. But to apply the test of proportionality does not exclude the margin of appreciation. Proportionality has been claimed to resemble the test of reasonableness as a ground for judicial review of discretion in English law: but it is certainly not open to the interpretation of unreasonableness as an abstract issue of vires, which is one possible interpretation of the leading English decision, A.P. Picture Houses Ltd. v. Wednesbury Corporation.

C. Remedies

It is only possible to mention some aspects of the complex law of the Convention related to remedies. In keeping with the view of the Convention as a system of control subordinate to national legal systems, Article 26 requires that "all domestic remedies have been exhausted according to the generally recognized rules of international law" before the Commission can deal with an application. This question is usually dealt with when the Commission is considering the admissibility of an individual petition.

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139 Consider the astonishing decision in X v. Belgium (1979), 16 D.&R. E.C.H.R. 200, where the right of an accused person to examine witnesses against him (Art. 6(3)) was denied by the admission of seriously prejudicial hearsay evidence.

140 See, e.g., Belgian Linguistic Case (No. 2) (1968), 1 E.H.R.R. 252 at 296.

141 (1976), 1 E.H.R.R. 737 at 754.


143 See also Bonnechaux v. Switzerland (1979), 18 D.&R.E.C.H.R. 100.


146 See discussion in Jacobs, supra note 23, at 40-51, and Mikaelson, European Protection of Human Rights (Germantown, Md.: Sijthoff & Noordhoff, 1980).
tion requires only that applicants make use of existing national remedies that are capable of providing an effective and sufficient means of redress; proceedings need not be taken nor rights of appeal exercised if there is no reasonable chance of success. in Donnelly v. U.K.,147 in proceedings brought by individual applications challenging the interrogation methods used against I.R.A. detainees, the Commission laid down criteria for deciding whether the detainees could have been expected to bring actions for damages in respect of their unlawful treatment. In the circumstances of Northern Ireland, the Commission concluded that the domestic courts were capable of dealing effectively and impartially with the various claims for compensation.

As regards administrative law remedies, it will depend very much on the circumstances of a case whether exhaustion is required. Where a person complained of decisions taken by the Danish Ministry of Justice but failed to seek review in the administrative court, her application was held not admissible.148 The same was held when an English solicitor complained of a decision by the Law Society but had not sought judicial review.149 In the Commission's view, the procedure was clearly available even though the scope of review was disputed. But an applicant was not required to appeal to the Court of Appeal in Guernsey where no similar case had ever been taken to the courts before.150 Certiorari was not considered an appropriate remedy to deal with an alleged error of fact by the (British) Immigration Appeal Tribunal, since it was not being claimed that the tribunal had made a decision on the facts which no reasonable authority could have made.151 Nor was certiorari considered an effective remedy for disciplinary punishment imposed by a prison governor in connection with the I.R.A. "dirty protest,"152 the Commission noting that in R. v. The Board of Visitors of Hull Prison, ex p. St. Germain,153 which had established that boards of visitors were subject to certiorari, doubts had been expressed as to whether the remedy would lie in respect of a governor's disciplinary decisions.

In Caprino v. United Kingdom, where an Italian complained of his detention pending deportation, the Commission decided that while the detainee was entitled by habeas corpus to judicial review of the grounds for detention, the scope of review was uncertain and might not be sufficient; nonetheless the detainee was required to exhaust the remedy or show reasons why limited scope of review by habeas corpus would not help him.154 An individual will not be required to exhaust remedies where he shows that his attempts to complain have been obstructed by the authorities.155 Special rules apply in the case of in-
terstate applications, particularly where the complaint is of an administrative practice incompatible with the Convention, that is, an accumulation of similar breaches sufficiently numerous to amount to a pattern or system of which the higher authorities in a state must be taken to be aware.156

Comparison may be made between decisions such as Caprino, where the scope of habeas corpus is examined for the purposes of the domestic remedies rule, and the evaluation of habeas corpus that is made under Article 5(4) when it has to be decided whether a detainee had access to a court decision on the lawfulness of his detention.157 Administrative complaints and other remedies that may need to be exhausted under the domestic remedies rule are not, however, relevant to questions arising under Article 5(4), since the provision requires the decision of a court.

The domestic remedies rule is concerned with the requirement of exhaustion, and imposes no obligation on states to see that remedies are available. However, by Article 13, states are under an obligation to provide an effective remedy for persons whose rights are violated. This controversial article has been interpreted as requiring states to provide remedies for persons claiming to be victims of a violation.158 Since the United Kingdom has not incorporated the Convention in its domestic law, it is open to question whether the United Kingdom is in a position to comply with Article 13, except where the remedy in national law (for example, an action in damages for false imprisonment) coincides with the obligations under the Convention (in this case Article 5(5)). Even where there is a substantial equivalence of remedy, the national rules of liability may not be identical with the international duty to provide an effective remedy. In particular, the special protection against liability afforded to those acting under the Mental Health Act 1959159 by section 141 (no liability unless bad faith or lack of reasonable care; prior leave of the court required to both civil and criminal proceedings) could well obstruct an action for damages in circumstances where a breach of the Convention may have occurred.160

VII. CONCLUSIONS

First, as regards the role of law in a constitutional state, as outlined by President Muller in the opening section, the Convention evidently contributes to the protection of fundamental rights, but it also bears upon subjection of sovereign power to law, which it tackles by creating international machinery for reviewing the practice of national systems of government. At first sight the emphasis in the Convention system on state responsibility might seem to weaken the separation of powers within the state by pinning liability on the government for every infringement of rights that occurs. But if the case law is studied this is not the case, since the Convention attaches importance to the

158 Klass, supra note 64, at 238.
159 7 & 8 Eliz. 2, c. 72.
notion of judicial power and judicial independence, and prefers legislative to executive rule-making.

Secondly, to a surprising extent there are points of comparison and resemblance between administrative law and the Convention system. Thus a central problem in administrative law — the extent to which the exercise of executive discretion may be reviewed — arises often under the Convention. So too the extent to which the factual basis of executive decisions can be reviewed appears in both systems. Under Article 5, for example, when individuals have been detained as vagrants, mental patients or in connection with pending extradition or deportation, the question has arisen whether the Court and Commission may review the findings of fact on which national decisions were based. Again, the Convention provides a means of assessing the effectiveness of national remedies in enabling there to be judicial review of executive decisions. Remedies which the national system has to offer (such as habeas corpus) may be too limited in scope to protect the individual’s rights under the Convention. The liability of public authorities for a failure in a public service may arise both in administrative law and under the Convention. Similarly, the duty to give reasons for administrative decisions arises in both systems; under the Convention this is linked to the individual’s right to a judicial decision on the lawfulness of his detention and to his right to a fair trial. Here again shortcomings in the present state of English law are exposed: as the court said of the unsuccessful habeas corpus proceedings taken by the applicant in X v. United Kingdom, “It is clear from the evidence that lack of information as to the specific reasons for the recall, a matter almost exclusively within the knowledge of the Home Secretary, prevent X’s counsel, and thus the Divisional Court, from going deeper into the question.”

One comparison which is not dealt with in this article concerns locus standi, for example, the interest which an individual must show before he can challenge general laws that adversely affect him, and the extent to which representative organizations may initiate proceedings on behalf of their members. A comparison of a different kind may be made between the work of the Parliamentary Ombudsman in reviewing the activities of a government department when a citizen complains of excessive delay in the handling of his affairs, and the work of the Court and Commission in reviewing the acts of national authorities when an applicant complains of excessive delay in the conduct of judicial proceedings affecting him. The context and procedures may be different, but broadly the same process of scrutiny and evaluation is at work.

161 Supra note 157.
162 See, e.g., Artico v. Italy (1980), 3 E.H.R.R. 1 (Failure by government to take positive action to ensure that A’s right to criminal legal aid was effective.)
163 Supra note 157.
164 Id. at 212.
165 See, e.g., Klass, supra note 61, and Dudgeon, supra note 37.
The main reason for these resemblances must be that both under administrative law and the Convention, the process is one of *ex post facto* review of the policies, decisions and procedures of public authorities in the state. As they develop experience in this process, the Convention organs are (whether consciously or not) drawing far more upon the experience of national systems of public law than upon the doctrines of customary international law. Thus the requirement in Article 26 that exhaustion of domestic remedies should be "according to the generally recognized rules of international law" gives limited guidance to the Court and Commission in their present work, much of which is very different from the classical operation of international law. Two further lessons may be drawn for the United Kingdom from experience under the Convention. First, that those who teach or practise domestic public law neglect the Convention at their peril; secondly, that within domestic public law no gap should be allowed to appear between administrative law and the law of civil liberties.

To establish or explain these resemblances is not to say that the Convention system merely replicates the national system of public law. The strengths and weaknesses of the Convention system are not identical with the strengths and weaknesses of any one national system. There are political and diplomatic reasons why the Convention organs may exercise an authority which is often greater than that of national courts, but which may in some respects be less. The international composition of the Court and the Commission should ensure that their decisions draw upon a broader experience than is possible within a national court. It is difficult to believe that English courts alone would have initiated the process of reforming the administrative law of the prison system that has been inspired by the Strasbourg authorities. Just as the Parliamentary Ombudsman may in one sense be said to have brought a "new equity" into the control of administrative authorities, so could the Convention system be said to have loosened the arteries of national public law, and to have established a form of "public law litigation" not hitherto possible in the United Kingdom. Not all the Strasbourg decisions will stand the test of time, but they provide a course of new principles, values and techniques (such as proportionality) that may enrich national systems. In particular, so far as the United Kingdom is concerned there is value in establishing certain rights and freedoms as positive goods, and in laying to rest the merely residuary character of rights and freedoms which is assigned them by British tradition. For example, it seems fundamental to an understanding of *Silver*’s case that at the outset the Commission declared that a prisoner has the same right as a person at liberty to respect for his correspondence. In another case of prison censorship, the House of Lords came remarkably close to this position in declaring that a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication.


170 This followed the Court’s decision in *Golder*, supra note 43.

One practical objective of the Convention system is to enable attention to be drawn to shortcomings in the national system of legal protection for the individual. In the field of criminal process, United Kingdom practice would seem to stand comparison with that in many other European countries. But in the administrative law that governs the detention of prisoners and mental patients, the exposure of weaknesses in the British system has already been salutary. Developments at Strasbourg may stimulate administrative lawyers to look again at such problems as executive discretion, bureaucratic secrecy and the provision of compensation for those who suffer a failure of justice.

For reasons explained above, this article has not entered the constitutional debate for and against the incorporation of the Convention within United Kingdom law. On the basis of this selective survey of Convention practice, the author considers that incorporation would be of value even without attempting to curb the legislative supremacy of Parliament. A statute of incorporation should as a minimum require all those entrusted with statutory powers or duties to have regard to the rights protected by the European Convention. This would then enable the courts to review delegated legislation, administrative policies and individual decisions for non-compliance with the Convention. It would also be desirable to include a provision on the lines of section 3 of the European Communities Act 1972, requiring the courts to decide questions affecting the Convention in accordance with the principles laid down by the Strasbourg Court. It would also seem necessary, so as to give effect to Articles 5(5) (enforceable right to compensation) and 13 (effective remedy before a national authority), to empower the courts to award compensation where an individual's rights under the Convention had been violated by executive or other subordinate action and where the law did not otherwise provide a remedy.

It may be argued that such limited incorporation would be worthless unless the legislative supremacy of Westminster were also curbed, since a decision given by English courts applying the Convention to strike down a cherished executive practice could always be overridden by Act of Parliament. The theoretical power of Westminster to legislate to this effect would indeed be there; but it is doubtful whether a future government would be eager to introduce legislation reversing a decision by British courts applying the European Convention unless it were at the same time willing to terminate United Kingdom acceptance of the individual right of petition to Strasbourg and the compulsory jurisdiction of the European Court. The possibility of express reversal is not so remote that one can say in Lord Sankey's renowned words, "but that is theory and has no relation to realities." However, it would be unfortunate if the perceived constitutional difficulty were to be a total bar to all movement towards better protection of the individual in United Kingdom law.

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172 See, e.g., supra note 139, and the delay cases, supra note 167.
173 Cf. European Communities Act, 1972, c. 68, s. 2(2).
174 C. 68.