

# THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE UNITED KINGDOM: IMPLICATIONS FOR CANADA

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## I. INTRODUCTION

Canadian movement towards the internationalization of human rights protection is lamentably slow. Many countries with similar cultural traditions make much greater use of international agencies to enhance the security of human rights within their national boundaries. This is the case, for instance, with most member states of the Council of Europe, which utilize the apparatus of the European Commission and Court of Human Rights.<sup>1</sup> In particular, the active participation of the United Kingdom in this international process of human rights protection should serve as an example to Canada.

Significantly, the United Kingdom boasts the doctrine of parliamentary sovereignty as the dominant characteristic of its constitution. The notion that Parliament has the right to make or unmake any law whatever and that no body has the right to override Parliament<sup>2</sup> has a twofold implication for human rights protection. First, there is no legal necessity that law serve to protect human rights. Second, the courts cannot properly interpret a law which is at odds with the security of human rights so as to avoid its clear intent. Nevertheless, in this legal environment the United Kingdom permits an international forum to consider complaints about human rights violations within its national boundaries, complaints which raise directly the question of the adequacy of British law. International tribunals such as the European Commission and European Court of Human Rights are having a definite impact, both legislative and administrative, on human rights conditions within the United Kingdom.

The constitutional characteristics of Canada are taken from the British form. The doctrine of parliamentary sovereignty<sup>3</sup> is applicable to the federal and provincial legislatures of Canada, albeit each within their

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<sup>1</sup> *I.e.*, those states granting the right of petition to their citizens. Presently this list is comprised of 15 of the 21 members of the Council of Europe: Austria, Belgium, Denmark, Federal Republic of Germany, France, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, United Kingdom.

<sup>2</sup> A. DICEY, *INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION* 40 (10th ed. 1959).

<sup>3</sup> The doctrine is here taken to be the view that legislative authority is not restricted as to substance nor subject to judicial review for the content of legislation.

sphere.<sup>4</sup> This continues to be the case under the new Canadian Charter of Rights and Freedoms<sup>5</sup> which permits the federal and provincial governments of Canada to override "fundamental", "legal", and "equality" rights by ordinary legislation.<sup>6</sup> Regrettably, however, Canada has chosen to invoke the doctrine of parliamentary sovereignty in order to minimize the influence of international authorities on her internal protection of human rights.

This has been part of the Canadian experience, for instance, with the International Covenant on Civil and Political Rights, potentially the most influential international covenant on human rights which Canada has ratified. Ratification required Canada to produce a report detailing Canadian compliance with the Covenant. The report was considered on 25 to 28 March 1980 by the Human Rights Committee set up under the Covenant.<sup>7</sup> The Committee members observed that two articles of the Covenant included grounds of non-discrimination not reproduced in Canadian law.<sup>8</sup> Specifically it was pointed out that Canadian anti-discrimination legislation did not prohibit discrimination on grounds of political or other opinion, language, and property, though these grounds are set out in articles 2 and 26 of the Covenant. One Committee member, Mr. Hanga, called attention to the Canadian report's statement that "a person cannot be discriminated against for any of the above reasons [language, political or other opinion, social origin, property, birth, or social status] under a statute adopted by Parliament unless that type of discrimination is permitted under that statute, . . ."<sup>9</sup> The records of the meeting note, *per* Mr. Hanga: "In as much as there appeared to be the possibility of discrimination authorized by law, he

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<sup>4</sup> See *Murphy v. C.P.R.*, [1958] S.C.R. 626, at 643, 15 D.L.R. (2d) 145, at 153, where Rand J. stated: "It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself." In *Hodge v. The Queen*, 9 App. Cas. 117, at 132, 50 L.T. 301, at 304 (P.C. 1883) (Can.), concerning the provinces and s. 92 of the B.N.A. Act, the Court said: "Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion. . . ." See also P. HOGG, *CONSTITUTIONAL LAW OF CANADA* 198 (1977), where the author states: "Nevertheless, the notion of Parliamentary sovereignty is a pervasive element of Canadian constitutional law." In B. LASKIN, *CONSTITUTIONAL LAW* 900.21 (4th ed. rev. A. Abel 1975) the author states: "In Canada . . . the constitutional issue . . . is simply whether the particular suppression or enlargement is competent to the Dominion or to the Province, as the case may be."

<sup>5</sup> Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada, 1981.

<sup>6</sup> S. 33 of the Charter provides that ordinary legislation can override the Charter simply by including a clause which states that the Act or provision is to operate notwithstanding a provision included in s. 2 or ss. 7-15 of the Charter.

<sup>7</sup> The Committee's Ninth Session.

<sup>8</sup> Arts. 2(1), 26. This is an omission of both Canadian anti-discrimination legislation and the various bills of rights.

<sup>9</sup> INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: REPORT OF CANADA ON IMPLEMENTATION OF THE PROVISIONS OF THE COVENANT 106 (14 Mar. 1979).

requested more information about any such provision and the extent to which they were consistent with the terms of article 26 of the Covenant."<sup>10</sup>

In oral response Mr. McCurdy, a member of the Canadian delegation, is quoted as saying:

[W]ith articles 2 and 26 of the Covenant . . . it was impossible to state categorically that a legal remedy would be available in Canada for every breach of the Covenant. . . . It was, of course, possible for Parliament to enact discriminatory legislation. . . . The point . . . was that the laws must be applied equally to everyone unless Parliament deliberately and publicly provided for distinctions of that nature.<sup>11</sup>

In other words, deliberate parliamentary discrimination, including discrimination prohibited by international agreement, is legally permissible; this is the assertion that the doctrine of parliamentary sovereignty remains operative in Canada despite Canada's ratification of the international human rights treaty.<sup>12</sup>

Since the Canadian constitutional tradition of parliamentary sovereignty is derived from Britain, it is important to consider to what extent Britain submits to international authorities as regards the human rights of those under British jurisdiction.

The significance of British involvement with international human rights protection is not diminished by Canada's federal form of government. It is true that in Canada the treaty-making power is distinct from the treaty-implementation power; though the federal government has the power to make treaties touching areas of both federal and provincial jurisdiction, the implementation of those treaties with respect to matters coming within provincial jurisdiction is dependent upon the will of the provinces.<sup>13</sup> At the same time Canada's international human rights treaties do not contain clauses permitting Canadian obligations to be limited by difficulties uniquely associated with its federal system. On the contrary, the Covenant on Civil and Political Rights, the Optional Protocol thereto and the Covenant on Economic, Social, and Cultural

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<sup>10</sup> Human Rights Committee, Ninth Session, Summary Record of the 206th Meeting, at 2, 25 Mar. 1980 (U.N. Document, CCPR/C/SR. 206).

<sup>11</sup> Human Rights Committee, Ninth Session, Summary Record of the 211th Meeting, at 12, 28 Mar. 1980 (U.N. Document, CCPR/C/SR. 211).

<sup>12</sup> The statement in Canada's report invoking the doctrine of parliamentary sovereignty was in fact made in the context of the decision of the Supreme Court of Canada in *Attorney General for Canada v. Lavell*, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 (1973). Canada has subsequently been found to be in violation of the International Covenant on Civil and Political Rights (United Nations Information Service, 1 Sep 1981, Press Release HR/1103) in the case of *Lovelace v. Canada* (Communication No. R. 6/24). The *Lovelace* case, like the *Lavell* case, dealt with s. 12(1)(b) of the Indian Act, R.S.C. 1970, c. I-6 under which an Indian woman loses her Indian status after marrying a non-Indian. An Indian male in similar circumstances does not lose his status. The federal government has so far refused to amend the legislation despite the finding against Canada in the *Lovelace* case.

<sup>13</sup> *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.) (Can.).

Rights contain clauses expressly extending their provisions to all parts of federal states without limitations or exceptions.<sup>14</sup> It would not be accurate to conclude that Canada's federal system has served as a significant deterrent to participation in international human rights protection. Canada voted for the Convention on the Elimination of all Forms of Racial Discrimination, the Covenant on Civil and Political Rights, its Optional Protocol, and the Covenant on Economic, Social, and Cultural Rights, all adopted in 1966. Canada also specifically voted for the inclusion of clauses expressly extending the latter three to federal states without limitation. Canada ratified all these conventions after consultation with the provinces as to their willingness to introduce the necessary legislation.<sup>15</sup> Since then, the preparation of reports required by these treaties concerning adherence to their terms has been a co-operative effort on the part of the federal and provincial governments.<sup>16</sup> When introducing Canada's report on observance of the Covenant on Civil and Political Rights to the Human Rights Committee in March 1980, Mr. McPhail, Canada's ambassador to the United Nations, stated:

Thus, while it required an extensive process of consultation, the constitutional division of powers in no way affected the international responsibility of Canada. . . . Canada's accession . . . to the International Covenant on Civil and Political Rights and the Optional Protocol had been preceded by extensive consultations between the federal and provincial authorities and had been undertaken with assurance that the Federal and Provincial Governments were prepared to fulfill the obligations set forth in the Covenant and the Protocol.<sup>17</sup>

Response to individual complaints made by Canadians to the Human Rights Committee under the Covenant on Civil and Political Rights which have arisen in relation to a matter coming within provincial authority, has required and produced federal/provincial co-operation.<sup>18</sup>

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<sup>14</sup> Art. 50, Covenant on Civil and Political Rights; Art. 10, Optional Protocol; Art. 28, Economic, Social and Cultural Rights.

<sup>15</sup> Gotlieb, *The Changing Canadian Attitude to the United Nations Role in Protecting and Developing Human Rights*, in *HUMAN RIGHTS, FEDERALISM AND MINORITIES* 16, at 46 (A. Gotlieb ed. 1970).

<sup>16</sup> Thus Canada's first report to the Human Rights Committee on Canadian measures giving effect to the Covenant on Civil and Political Rights, *supra* note 9, is prefaced with the remark:

The preparation of Canada's report was made possible through the co-operation of the federal and provincial governments. . . . On the provincial side, some of the provinces prepared their own sections which are reproduced in this report. The Department of the Secretary of State . . . prepared the section on the other provinces. . . .

<sup>17</sup> Human Rights Committee, Ninth Session, Summary Record of the 205th Meeting, at 2, 25 Mar. 1980 (U.N. Document, CCPR/C/SR. 205).

<sup>18</sup> An example is the case of Larry James Pinkney, who complained to the Human Rights Committee under the Optional Protocol on a matter concerning his treatment by the criminal justice system as administered by the province of British Columbia (not yet published).

The most significant deterrent to Canadian involvement in international human rights protection has come from an attitude of both federal and provincial authorities that the character of government in Canada is fundamentally engendered by the doctrine of parliamentary sovereignty. Thus, it is important for Canada to appreciate the nature of the process of internationalizing human rights protection which the United Kingdom has undergone. In this context, it is necessary specifically to consider the impact of the European human rights system on the United Kingdom.

Two prefatory points should be noted. First, the impact of the European Convention on Human Rights in the United Kingdom exists without there having been a direct assault on the doctrine of parliamentary sovereignty. It exists despite the fact that successful operation of the European Convention is ultimately dependant on the willingness of a state party to accept and renew the right of individual petition and the compulsory jurisdiction of the court (which Britain did in January 1981), and despite the fact that its effectiveness depends on a state party choosing to accept and implement the decisions of the international bodies set up under the Convention. Second, the Convention has an impact on Britain though the Convention remains, like Canada's international human rights obligations,<sup>19</sup> unimplemented and thus not part of British law.

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS<sup>20</sup>

The United Kingdom ratified the European Convention on Human Rights on 8 March 1951 and it came into force on 3 September 1953. Twenty-one European states have now ratified the Convention.<sup>21</sup>

The Convention, along with two subsequent Protocols,<sup>22</sup> serves to secure a wide range of rights and freedoms: the right to life, freedom from torture and from inhuman and degrading treatment, freedom from slavery and forced labour, the right to liberty and security of person, the right to a fair trial and public hearing in civil and criminal matters, protection against retroactivity of criminal law, respect for one's private and family life and one's home and correspondence, freedom of thought, conscience and religion, freedom of expression, freedom of assembly

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<sup>19</sup> The International Covenant on Civil and Political Rights and its Optional Protocol, the International Covenant on Economic, Social and Cultural Rights and the International Covenant for the Elimination of Racial Discrimination.

<sup>20</sup> For general works on the Convention, see F. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1975); A. ROBERTSON, *HUMAN RIGHTS IN EUROPE* (2nd ed. 1977); J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1969).

<sup>21</sup> Austria, Belgium, Cyprus, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom.

<sup>22</sup> The First and Fourth Protocols.

and association (including the right to form and join trade unions), the right to marry and have a family, the right to an effective remedy before a national authority should the rights and freedoms of the Convention be violated, prohibition of discrimination in enjoyment of the rights and freedoms of the Convention,<sup>23</sup> the right to peaceful enjoyment of property, the right to education, the right to free elections,<sup>24</sup> freedom from imprisonment on the ground of inability to fulfill a contractual obligation, the right of free movement within a country and freedom to leave any country, the right of a national to enter and remain in his country and prohibition of the collective expulsion of aliens.<sup>25</sup>

Under the terms of the Convention it is possible for a state to grant to individuals within its jurisdiction the right to petition the European Commission of Human Rights over alleged violations of the Convention.<sup>26</sup> The United Kingdom made a declaration granting such a right on 14 January 1966. In the last three years 300 applications have been registered against the United Kingdom Government.<sup>27</sup>

The nature of the Convention mechanism may be briefly set out as follows.<sup>28</sup> The Convention created, as part of its scheme of implementation, the European Commission of Human Rights. The members of the Commission (one for each state party) sit in their individual capacity and meet in Strasbourg five times per year for two week sessions. They are served by a permanent secretariat which deals with individual applications on a daily basis.

When a complaint is received the Commission has the initial task of determining its "admissibility" or whether to accept it for detailed examination. Over ninety-five percent of complaints registered by the Commission have failed to pass this hurdle. This results from an applicant's failure to meet various conditions set out in the Convention. Most often, this involves failure to exhaust all possible domestic remedies, submission of the complaint more than six months after the final decision on the issue has been taken, or failure to establish a *prima facie* case. In this latter event, the case is considered to be "manifestly ill-founded". The proceedings on admissibility can be very lengthy, and include written observations from the government and the applicant and possibly oral hearings. Often a detailed consideration by the Commission

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<sup>23</sup> European Convention on Human Rights, s. 1, arts. 2-14.

<sup>24</sup> European Convention on Human Rights, First Protocol, arts. 1-3.

<sup>25</sup> European Convention on Human Rights, Fourth Protocol, arts. 1-4. The United Kingdom has not ratified the Fourth Protocol.

<sup>26</sup> The following have made declarations recognizing the competence of the Commission to receive individual petitions under art. 25 of the Convention: Austria, Belgium, Denmark, Federal Republic of Germany, France, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, United Kingdom. This list will soon formally include France.

<sup>27</sup> 23 Y.B. OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1980).

<sup>28</sup> For a detailed account of practice and procedure under the Convention, see O'Boyle, *Practice and Procedure Under the European Convention on Human Rights*, 20 SANTA CLARA L. REV. 697 (1980).

on the question of admissibility will end with a finding of inadmissible as "manifestly ill-founded".

If a complaint is found to be admissible the Commission undertakes a more detailed examination. This may entail an on-the-spot investigation. In one such case the Commission visited the United Kingdom's Broadmoor Hospital for abnormal offenders in response to a complaint concerning the subjection of patients to inhuman and degrading treatment, specifically "being locked up in solitary confinement for five weeks in a dirty cell with a mattress on a stone floor", without adequate ventilation, in pyjamas and without covering for the patients' feet.<sup>29</sup>

At the same time the Commission considers the possibility of arriving at a friendly settlement. If this is impossible the Commission draws up a report which indicates its opinion as to whether there has been a violation of the Convention. The report is then sent to the Committee of Ministers, the governing body of the Council of Europe.

Within three months of the transmission of the report to the Committee of Ministers, certain parties (including the Commission and the state against whom the complaint has been lodged, but not the applicant) can refer the matter to the European Court of Human Rights. If this is done the Commission's report becomes public unless the Court decides otherwise, which it has never as yet done. In October and November 1980, for instance, *The Times* reported three recent findings by the Commission of violations of the Convention by the United Kingdom Government.<sup>30</sup>

The European Court can only hear a case in respect of those states which have accepted its jurisdiction, one of which is the United Kingdom.<sup>31</sup> Upon finding a violation, the Court is able to award "just satisfaction" to the injured party. For example, in November 1980 the Court ordered the British Government to reimburse *The Sunday Times* £22,626 pursuant to its earlier finding of a violation of the Convention's freedom of expression provision.<sup>32</sup>

If the case is not referred to the Court, the Committee of Ministers decides whether there has been a violation of the Convention. A two-thirds majority is required for such a finding. If a violation is found,

<sup>29</sup> *X v. United Kingdom* (Application No. 6840/74), 21 Y.B. OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 250 (1977).

<sup>30</sup> Hodges, *Human Rights Ruling Goes Against Britain*, *The Times* (London), 16 Oct. 1980, at 1; Hodges, *Ulster Homosexuality Law Infringes Human Rights, Commission Says*, *The Times* (London), 4 Nov. 1980, at 3; Berlins, *Parents' Opposition to Strapping Threat in Scots Schools Upheld by European Rights Commission*, *The Times* (London), 7 Nov. 1980, at 4.

<sup>31</sup> The following states have made declarations recognizing the compulsory jurisdiction of the European Court of Human Rights under art. 46 of the Convention: Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom.

<sup>32</sup> Publication of European Court of Human Rights, Judgment (art. 50), 6 Nov. 1980.

the Committee may decide to publish the Commission's report; it may also (without so finding) publish the report with the agreement of the member state. The Committee of Ministers is further charged with two other functions. It supervises the execution of any judgment of the Court, and prescribes the period during which appropriate action must be taken by any state party it has itself found to be in violation of the Convention.

### III. THE IMPACT OF THE CONVENTION ON THE UNITED KINGDOM

#### A. *The Strasbourg Agencies*

The first means by which the Convention has an impact on the United Kingdom is through the proceedings of the Commission, the Court and the Committee of Ministers, or the Strasbourg agencies. To date the United Kingdom has been found by the European Court to be in violation of the Convention in seven cases.<sup>33</sup>

In *Golder v. United Kingdom*,<sup>34</sup> the applicant was detained in a prison where serious disturbances took place. He was accused of having assaulted a prison officer during the disturbances. He wished to bring a civil action for damages for defamation to have his record cleared, but was not allowed by the Home Secretary to correspond with a solicitor to that end. The Commission found a violation of the Convention, article 6(1), which guarantees the right of access to a court for the determination of "civil rights and obligations". There had also been a violation of article 8 guaranteeing the right to respect for (among other things) correspondence. The United Kingdom brought the matter before the Court, which on 21 February 1975 also found breaches of articles 6(1) and 8.

*Ireland v. United Kingdom*,<sup>35</sup> an inter-state case, concerned five methods of interrogation used on persons held under special powers instituted in relation to the emergency situation in Northern Ireland. The five techniques consisted essentially of hooding detainees, subjecting them to a continuous, loud hissing noise, depriving them of sleep, subjecting them to a reduced diet and making them stand for periods of some hours against a wall in a painful posture. The Court held on 18 January 1978 that recourse to the five techniques amounted to a practice of "inhuman and degrading treatment" contrary to article 3.

The third case, *Tyrer*,<sup>36</sup> involved a resident of the Isle of Man, who, when aged fifteen, was sentenced by the local juvenile court to three strokes of the birch for an offence of assault causing bodily harm. The sentence was pronounced in accordance with Isle of Man legislation. An

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<sup>33</sup> As of Jul. 1981, 42 cases had been referred to the European Court.

<sup>34</sup> European Court of Human Rights, Series A, Vol. 18.

<sup>35</sup> European Court of Human Rights, Series A, Vol. 25.

<sup>36</sup> European Court of Human Rights, Series A, Vol. 26.



appeal to the High Court of Justice of the Isle of Man was dismissed. After the Commission had refused a request by the applicant to withdraw his application, the Court held on 25 April 1978 that birching amounted to "degrading punishment" within the meaning of article 3.

In the fourth case, *The Sunday Times*,<sup>37</sup> the Court held that an injunction restraining the publication in *The Sunday Times* of an article tracing the history of the testing, manufacture and marketing of the drug "thalidomide" amounted to a violation of the freedom of expression provision, article 10. The injunction had been confirmed by the House of Lords on the ground that the article would be in contempt of court.

The fifth case, *Young, James & Webster*,<sup>38</sup> concerned the institution of the "closed shop" and the dismissal of three employees of British Rail for refusing to join a trade union. Young and Webster objected to trade union activities and Mr. Young to the political affiliations of the unions concerned. The Commission decided that there had been a violation of the Convention, article 11, which guarantees "freedom of association, including the right to form and join trade unions for the protection of [the individual's] interests". The Commission attempted to confine its decision to the facts of this case, which concerned employees engaged prior to the introduction of the closed shop agreement. The Commission referred the case to the Court, which on 13 August 1981, with similar qualifications, found the United Kingdom to be in breach of article 11.

In the sixth case, *Dudgeon v. United Kingdom*,<sup>39</sup> the Court considered Northern Ireland laws which made homosexual relations, whether committed in private or in public, between consenting adult males a criminal offence. Homosexual acts between consenting adult females were not criminal offences. On 22 October 1981 the Court held that the legislation, in so far as it had the general effect of criminalizing private homosexual relations between consenting adult males, violated the applicant's right to respect for private life under article 8 of the Convention.

The seventh case, *X v. United Kingdom*,<sup>40</sup> concerned a man who had been conditionally discharged from Broadmoor Hospital for abnormal offenders by the Home Secretary but arrested and returned three years later. The applicant did not know that his recall resulted from a complaint about his condition made by his wife to the probation officer. The Court found, on 5 November 1981, that there had been a violation of the Convention, article 5(4), namely the right to have the lawfulness of one's detention speedily decided by a court. Article 5(4), the Court said, required a procedure permitting a court to examine whether the patient's

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<sup>37</sup> European Court of Human Rights, Series A, Vol. 30.

<sup>38</sup> (Application No. 7601/76). Judgment of European Court of Human Rights, 13 Aug. 1981.

<sup>39</sup> (Application No. 7525/76). Judgment of European Court of Human Rights, 22 Oct. 1981.

<sup>40</sup> (Application No. 6998/75). Judgment of European Court of Human Rights, 5 Nov. 1981.

disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety.

The Court's finding of a violation in these cases has had a number of results within the United Kingdom. Following *Golder*, instructions were given by the Home Secretary for the introduction of new procedures in prisons. Those procedures stated that where an inmate applied to consult a solicitor to obtain advice about instituting civil proceedings he would be granted such facilities subject to the condition that where the proposed proceedings were against the Home Office or its servants, and connected with his imprisonment, he had ventilated the complaint internally. He would still have the right to external facilities after the internal investigation had been completed. Since *Golder*, however, numerous other prisoners have complained to the Commission about interference with their correspondence, and the "prior ventilation" rule is now the subject of further litigation before the European Court.<sup>41</sup>

The United Kingdom Government, during the Commission's consideration of the *Ireland* case, gave an undertaking not to permit or condone the use of the five techniques in the future. A series of measures, such as medical examinations of persons held for questioning by the police, were adopted, and instructions were given to the security forces. The fourteen applicants concerned brought civil actions for damages and were given compensation ranging from £10,000 to £25,000.

In the birching case, the Committee of Ministers decided<sup>42</sup> that its duty of ensuring the execution of the Court decision was met by the United Kingdom's communication of the Court decision to the government of the Isle of Man and by the Chief Justice of the Isle of Man's bringing to the attention of all persons who could pass a sentence of birching that judicial corporal punishment was in breach of the European Convention. The legislation was not changed, though no one has since been sentenced to birching.

In *The Sunday Times* case the newspaper was awarded £22,626. Legislation reforming the law of contempt of court came into force on 27 August 1981.<sup>43</sup>

With respect to the decision of the Court in *Young, James & Webster*, the issue of what will constitute "just satisfaction" in

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<sup>41</sup> *Silver v. United Kingdom* (Application Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75).

<sup>42</sup> Committee of Ministers, Resolution 78(39), 13 Oct. 1978.

<sup>43</sup> Contempt of Court Act 1981, U.K. 1981, c. 49. See also *Law Must Uphold Public Confidence in Courts*, *The Times* (London), 3 Mar. 1981, Parliamentary report, at 7, col. 3. This Parliamentary report quotes Sir Michael Havers as saying: "The Government view was that implementation of Phillimore would suffice to bring the law of contempt into line with art. 10 of the European Convention on Human Rights as interpreted by the court."

accordance with article 50 remains open.<sup>44</sup> However, the relevant legislation in the case, The Trade Union and Labour Relations Act, 1974,<sup>45</sup> was amended subsequent to the lodging of the applications. The 1980 Act<sup>46</sup> changes the result for persons now making the same objections to trade union membership in similar circumstances.

In *Dudgeon* as well as in *X* the issue of just satisfaction according to article 50 has not yet been dealt with. The Government has, however, introduced The Mental Health Amendment Bill<sup>47</sup> which incorporates many changes in the system of detention, including increased accessibility to the Mental Health Tribunal. Newspaper reports indicate that it is expected that the Government will now be forced to include curbs on the Home Secretary's powers to detain patients.<sup>48</sup> For the moment, proposed amendments have not satisfied the national association for mental health, MIND, the organization which brought the case of *X* to Strasbourg. MIND has announced that it will bring four additional cases to the European Commission of Human Rights in order to force the Government to introduce procedural reforms in the operation of the Mental Health Review Tribunal and to permit patients to obtain redress in certain cases of unjustified detention.<sup>49</sup>

The measures which have been taken as a result of adverse decisions of the Court have been limited in extent. However, the number of cases coming before the Court is increasing. At present the Court is considering two further cases against the United Kingdom. These cases involve the following issues:

(a) whether in Scottish schools corporal punishment against the wishes of parents is degrading treatment or contrary to the right to education which respects the philosophical convictions of the parents (article 2, protocol 1);<sup>50</sup>

(b) whether censorship of correspondence by prison authorities (addressed to M.P.'s, relatives, solicitors, *etc.*) on different subjects (prison conditions, legal proceedings, family and private matters) is an unjustified interference with article 8 (right to respect for correspondence) and, in some of the cases, article 6(1) (right of access to a court).<sup>51</sup>

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<sup>44</sup> This question was reserved and referred back to the Chamber originally constituted to examine the case but which had relinquished jurisdiction in favour of the plenary court in 1980.

<sup>45</sup> U.K. 1974, c. 52.

<sup>46</sup> The Employment Act 1980, U.K. 1980, c. 42.

<sup>47</sup> The Bill was introduced in the British Parliament during the week of 16 Nov. 1981.

<sup>48</sup> See Ballantyne & Hencke, *Britain Condemned on Case for Mentally Sick*, The Guardian (Manchester), 15 Nov. 1981, at 5. See also Hencke, *MIND Again Indicts UK Before European Court*, The Guardian (Manchester), 22 Nov. 1981, at 4.

<sup>49</sup> Hencke, *id.*

<sup>50</sup> Campbell v. United Kingdom (Application Nos. 7511/76, 7743/76).

<sup>51</sup> Silver, *supra* note 41.

The Committee of Ministers has itself found the United Kingdom to be in violation of the Convention. At its 332nd meeting on 2 April 1981, the Committee of Ministers found Britain to have violated the Convention's guarantee of the right to marry, article 12, in the cases of *Hamer v. United Kingdom*<sup>52</sup> and *X v. United Kingdom*.<sup>53</sup> These cases both involved prisoners prevented by law from marrying in prison. Temporary release so that they could each be married elsewhere was also denied, by the Home Secretary and the prison authorities.

The Committee of Ministers subsequently decided, in view of information supplied by the British Government, that no further action was called for in either case. The Government submitted that

it had changed its practice with regard to the marriage of prisoners . . . serving a determinate custodial sentence, that a decision had been taken to prepare legislation to amend the marriage laws so as to allow prisoners to be married in prison, that it hoped that there would be an early opportunity to introduce this legislation after the passage of which it intended to allow prisoners' marriages without the restrictions and delays which at present apply.<sup>54</sup>

In addition to the impact of these processes, the finding of a violation by the Commission or a finding of admissibility is also significant. Changes in procedure and legislation are often made in the course of Commission proceedings. An example is the *East African Asians v. United Kingdom* case<sup>55</sup> where, after a finding of admissibility by the Commission and various other pressures, Britain took measures to increase the number of entry vouchers granted to East African Asians. The Commission adopted a report on the case in December 1973.<sup>56</sup> The case went to the Committee of Ministers where, in a resolution of 21 October 1977, the Committee took note

with satisfaction of the measures adopted by the United Kingdom Government. . . . [A]ll 31 applicants are now settled in the United Kingdom. . . . [T]he annual quota, having been initially fixed at 1,500 heads of household, was increased progressively to 5,000 by 1975. . . . [S]pecial vouchers enabling heads of households and their families to enter the United Kingdom for settlement are now available on demand in East Africa. . . .<sup>57</sup>

In *Mohamed Alam v. United Kingdom*<sup>58</sup> a friendly settlement was reached which resulted in the United Kingdom granting entry to certain

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<sup>52</sup> (Application No. 7114/75), Resolution DH(81)5, Council of Europe Doc. DH(81)4, at 19.

<sup>53</sup> (Application No. 8186/78), Resolution DH(81)4, Council of Europe Doc. DH(81)4, at 21.

<sup>54</sup> *Hamer*, *supra* note 52, at 20.

<sup>55</sup> 13 Y.B. OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 928 (1970).

<sup>56</sup> Commission's report adopted 14 Dec. 1973 (unpublished).

<sup>57</sup> Committee of Ministers, Resolution 77(2), 20 Y.B. OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 642, at 644 (1977).

<sup>58</sup> (Application No. 2991/66), 10 Y.B. OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 478 (1967).

individuals. The United Kingdom Immigration Act, 1971<sup>59</sup> granted to aliens the right of appeal to a court against deportation decisions of immigration officers.

A further example is the case of the British applicant<sup>60</sup> who complained of living conditions as a mental patient in Broadmoor Hospital. A friendly settlement resulted in the patient receiving monetary compensation.

Findings of violations by the Commission are well reported in the British press.<sup>61</sup> Such publicity clearly contributes to private and public vigilance, even if the number of cases where there is an actual finding of admissibility or of a violation is small.<sup>62</sup>

## B. *British Courts and the Convention*

The right of individual petition and the accompanying decisions of the Commission and the Court, though central, are not the only methods by which the Convention is having an impact on the United Kingdom. Another method is through the British courts themselves.

In this respect a distinction must be made between Britain's international obligations and the obligations of national courts. Article 1 of the Convention states: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in s. 1 of this Convention." This article places an obligation on state parties to secure the rights and freedoms of the Convention. There is therefore an obligation on the United Kingdom to ensure conformity of British law

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<sup>59</sup> U.K. 1971, c. 77.

<sup>60</sup> *Supra* note 29.

<sup>61</sup> The importance of informing the public and stimulating public interest, particularly in the realm of international human rights protection, should be strongly emphasized. Governmental response to human rights concerns and adherence to international human rights standards remains, to a large degree, a function of the ability of the human rights agency to promote the "organization of shame". See Humphrey, *The Revolution in the International Law of Human Rights*, 4 HUMAN RIGHTS 205, at 216 (1974-75) where the author states that "the most important international sanction for the promotion of respect for human rights is the force of public opinion and the organization of shame. . . ." For some recent headlines in *The Times*, see note 30 *supra*. Also reported are announcements that complaints are simply lodged with the Commission. For instance, *The Times* reported *Women Fight Immigration Rules* (Hodges, *The Times* (London), 7 Aug. 1980, at 4). This report noted that complaints against new British immigration rules, which allowed women to bring their husbands or fiancés to join them in Britain under stricter conditions than those applying to men, were brought to the Commission. Similarly, *The Times* reported: *Police Telephone Tapping Expected to go Before European Commission of Human Rights* (Gibb, *The Times* (London), 5 Nov. 1980, at 6).

<sup>62</sup> See also *The Times* (London), 4 Mar. 1981, at 1, col. 7 concerning a report by Lord Diplock on telephone tapping. The National Council for Civil Liberties remarked that forced legislation may be the outcome of the European Commission's consideration of a United Kingdom telephone tapping case. The remark was made in the context of heavy criticism of the Diplock report.

with the Convention's provisions. This is stated explicitly in various Commission and Court decisions.<sup>63</sup> It is also indicated by article 57, which provides: "On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention." The only general request, made in 1964, was met by Britain with a fifty page memorandum explaining the relevant provisions of the common law and statute law.<sup>64</sup> It included, for instance, the following comment with respect to article 8 (the right to respect for private and family life, home and correspondence): "Any power a public authority may have to interfere with a person's right to respect for private and family life, his home and his correspondence must be provided by law." Such a statement, as Jaconelli points out, neither meets article 8 nor considers, for example, the legal hiatus with respect to telephone tapping.<sup>65</sup>

However, although Britain is under a duty in international law to bring its municipal law into conformity with its treaty obligations, the method whereby this should be achieved is not prescribed. Britain is not under an obligation to make the Convention itself part of its internal law.<sup>66</sup> At the same time, in Britain as in Canada, the treaty itself has no direct effect on municipal law unless the legislature specifically implements it.<sup>67</sup> Britain has chosen not to implement or incorporate the European Convention into British domestic law and the consequence is that the Convention cannot be directly invoked before British courts.

Nevertheless, to stop there would be to ignore the possible uses British courts can and do make of a treaty which the United Kingdom is bound to apply. In particular the Convention has been used for the interpretation of British statutes. Most of such usage is carried on in the context of ambiguous legislation. The English case of *Salomon v. Commissioners of Customs & Excise* suggests that in interpreting statutes whose terms are capable of more than one meaning, the courts should apply a presumption that the legislature intended not to breach international law.<sup>68</sup>

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<sup>63</sup> See De Becker (Application No. 214/56), 2 Y.B. OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 214, at 243 (1958).

<sup>64</sup> A summary of the replies has been published by the Council of Europe, Doc. H(67)2, 10 Jan. 1967.

<sup>65</sup> J. JACONELLI, ENACTING A BILL OF RIGHTS: THE LEGAL PROBLEMS 255-56 (1980).

<sup>66</sup> See A. ROBERTSON, *supra* note 20, at 27.

<sup>67</sup> The Parlement Belge, 4 P.D. 129, [1874-80] All E.R. Rep. 104 (C.A. 1879); *Cheney v. Conn*, [1968] 1 All E.R. 779, [1968] 1 W.L.R. 242 (Ch. 1967).

<sup>68</sup> "But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations. . . ." [1967] 2 Q.B. 116, at 143, [1966] 3 All E.R. 871, at 875 (C.A. 1966).

The rule has been applied specifically with respect to the European Convention. In the case of *Waddington v. Miah*<sup>69</sup> the rights set out in article 7 of the European Convention were used in deciding a question of statutory construction presented by Britain's 1971 Immigration Act.<sup>70</sup> The use of the European Convention was broadened beyond *Waddington* by the subsequent cases of *Birdi v. Secretary of State for Home Affairs*<sup>71</sup> and *Regina v. Secretary of State for Home Affairs; ex parte Bhajan Singh*.<sup>72</sup>

In *Birdi* the Court of Appeal rejected the assertion of the applicant that the immigration procedures used against him constituted a violation of article 6(1) of the Convention. In *Bhajan Singh*, Lord Denning suggested that in cases involving a statute affecting the rights and liberties of the individual, British courts should take cognizance of the European Convention when interpreting the statute.<sup>73</sup>

In *Regina v. Secretary of State for the Home Department; ex parte Phansopkar*,<sup>74</sup> decided after *Bhajan Singh*, Lord Scarman equated the European Convention with the Magna Carta and suggested that the Convention, like the Magna Carta, incorporated principles which are to be protected by English law.<sup>75</sup> His Lordship further stated that it would take "clear unequivocal provisions" of statute law to override them, thus appearing to put the onus on those disputing the rights to show clear statutory intention that they should be overridden.

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<sup>69</sup> [1974] 2 All E.R. 377, [1974] 1 W.L.R. 692 (H.L.). In this case the House of Lords had to interpret ss. 24(1)(a) and 26(1)(d) of the Immigration Act, 1971, U.K. 1971, c. 77. In deciding that these sections (relating to illegal entry into the U.K.) should not have retrospective effect, Lord Reid cited the European Convention.

<sup>70</sup> Immigration Act, 1971, U.K. 1971, c. 77.

<sup>71</sup> The Times (London), 12 Feb. 1975, at 8.

<sup>72</sup> [1976] Q.B. 198, [1975] 2 All E.R. 1081 (C.A. 1975). This case affirmed *Birdi*. The applicant had entered the U.K. illegally and was arrested and detained with the intention of deporting him. While in custody he requested facilities to marry and was refused. The Court of Appeal upheld this result stating that art. 12 of the European Convention (the right to marry) had to be read in conjunction with art. 5(1)(f) (the right to deprive a person of his liberty when lawfully detained with a view to deportation).

<sup>73</sup> The Court stated:

The court can and should take the convention into account. They should take it into account whenever interpreting a statute which affects the rights and liberties of the individual. It is to be assumed that the Crown, in taking its part in legislation, would do nothing which was in conflict with treaties. So the court should now construe the Immigration Act 1971 so as to be in conformity with a convention and not against it.

*Id.* at 207, [1975] 2 All E.R. at 1083.

<sup>74</sup> [1976] Q.B. 606, [1975] 3 All E.R. 497 (C.A. 1975). In this case the wife of a patril was allowed to obtain a certificate of patriality and was therefore allowed to enter the U.K. immediately rather than being sent back to India for this purpose.

<sup>75</sup> *Id.* at 626, [1975] 3 All E.R. at 511.

In *Phansopkar*, judicial enthusiasm for utilizing the European Convention appeared to have reached a peak.<sup>76</sup> In *Regina v. Chief Immigration Officer; ex parte Salamat Bibi*<sup>77</sup> Roskill J. disapproved of Lord Scarman's wide language in *Phansopkar*, though Scarman J. expressed a similar opinion in *Ahmad v. Inner London Education Authority*.<sup>78</sup> There are, nevertheless, a few British cases each year which take the European Convention — an unimplemented treaty — into account. They do so in a variety of ways.<sup>79</sup> These include use of the Convention beyond the context of ambiguous legislation. With respect to non-ambiguous legislation, one court denied that the Convention had the

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<sup>76</sup> For a detailed review of British case law touching the Convention up to a point shortly thereafter. see Watson, *The European Convention on Human Rights and the British Courts*, 12 TEXAS INT'L LAW J. 61 (1977) and Jaconelli, *The European Convention on Human Rights — The Text of a British Bill of Rights?*, [1976] PUBLIC LAW 226.

<sup>77</sup> [1976] 1 W.L.R. 979, [1976] C.L.Y. 16 (C.A.).

<sup>78</sup> [1978] Q.B. 36, [1978] 1 All E.R. 574 (C.A. 1977).

<sup>79</sup> In *Ahmad, id.*, the Court of Appeal affirmed that the Convention would be taken into account in the case of a muslim school teacher denied Friday afternoons off for prayer. However, in the instant case, art. 9 of the Convention, in view of the limitation clause provided therein, offered the appellant no assistance. In *Ostreicher v. Secretary of State for the Environment*, 20 Y.B. OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 825 (1977), the Court stated there had been no contravention of the European Convention and that art. 9 was of no assistance to the appellant who had failed to inform the administration of religious objections to attending an inquiry, which then took place in her absence. In *Regina v. McCormick*, [1977] N.I. 105 (C.C.A.), the Court interpreted a provision of the Northern Ireland (Emergency Provisions) Act 1973, U.K. 1973, c. 53 as in some degree implementing legislation of the European Convention. It incorporated certain similar words to art. 3 of the Convention and was passed by the U.K. at a time when a complaint on a similar subject matter concerning the U.K. was before the European Commission. Having found it to be implementing legislation the Court interpreted the words of the internal law by looking to European Court of Human Rights decisions on their meaning. In *Regina v. Greater London Council; ex parte Burgess*, *The Times* (London), 18 Apr. 1978, at 7, col. 8, the Court refused to consider the European Convention with respect to the closed shop, noting the Convention was not part of English law and "[i]f there was a conflict between the Convention and the statute, the statute must prevail, as the Convention was so far unadopted." In *Uppal v. Home Office*, 21 Y.B. OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 797 (1978), the Court referred to art. 25 of the European Convention (protection from interference with the effective exercise of the right of individual petition). It found that in the present circumstances, in which the applicants' complaint against deportation was being considered by the European Commission at the time it came before the court, failing to stay the deportation order was not a breach of art. 25. In *Allegemeine Gold Und Silberscheideanstalt v. Customs & Excise Commissioners*, [1980] Q.B. 390 (C.A.), the Court declined to refer the case to the European Court of Justice as it found no question of interpretation of the Treaty of Rome to be required, the European Convention not being an implied article of the Treaty of Rome. In *Malone v. Commissioner of Police of the Metropolis*, [1979] 2 All E.R. 620, [1979] 2 W.L.R. 700 (Ch.), the Court expressed the opinion that with respect to telephone tapping regulation in the U.K., Britain was in contravention of the European Convention. It noted at the same time though, that the Convention was not part of British law and it would not be appropriate to try to use the common law to develop regulations with respect to the complex issue of telephone tapping.



force of law in British courts but nevertheless went on to consider the result suggested by the Convention.<sup>80</sup> In most of these cases the courts state that under the Convention there would have been no violation.

However, in one recent case,<sup>81</sup> which has since gone to the European Commission of Human Rights and been found admissible,<sup>82</sup> the High Court came to the opposite conclusion. *Klass v. Federal Republic of Germany*,<sup>83</sup> a decision of the European Court concerning telephone tapping in West Germany, was considered. The plaintiff's telephone had been tapped by police. The West German system had a number of statutory safeguards. The British court stated:

Not a single one of those safeguards is to be found a matter of established law in England. . . . [I]t is impossible to read the judgment in the *Klass* case without it becoming abundantly clear that a system which has no legal safeguards whatever has a small chance of satisfying the requirements of that Court, whatever administrative provisions there may be. . . . English law compares most unfavourably with West German law; this is not a subject on which it is possible to feel any pride in English law. I therefore would find it impossible to see how English law could be said to satisfy the requirements of the Convention. . . .<sup>84</sup>

*The Times*,<sup>85</sup> referring to a government-sponsored review of the interception of communications, particularly telephone communications, reported: "The Home Office initiated the review after Sir Robert Megarry, the Vice-Chancellor, said in the High Court in a case of tapping brought against the Metropolitan Police, that the situation 'cries out for legislation'."

The Convention, then, is being used in British courts in various ways with consequent political results, despite the absence of implementing legislation.

### C. European Economic Community Law and the Convention

There is another way in which the Convention may have an impact on Britain, namely via European Economic Community law. When France ratified the Convention in 1974, all the member states of the European Community were bound by the Convention. According to the United Kingdom statute, The European Communities Act, 1972,<sup>86</sup>

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<sup>80</sup> See *Uppal*, *id.* See also *Ostreicher*, *id.* at 827, where the court stated: "In refusing the applicant's request the minister had not failed to comply with . . . the European Convention on Human Rights."

<sup>81</sup> *Malone*, *supra* note 79.

<sup>82</sup> (Application No. 8691/79). Human Rights News, Council of Europe Press Release C(81)41, 17 Jul. 1981.

<sup>83</sup> Council of Europe Press Release, Human Rights News C(78)37, 6 Sep. 1978.

<sup>84</sup> *Malone*, *supra* note 79, at 648, [1979] 2 W.L.R. at 732.

<sup>85</sup> Gibb, *supra* note 61.

<sup>86</sup> U.K. 1972, c. 68, s. 2(1).

directly applicable Community law is to be given legal effect or is to have the force of law in the United Kingdom.

Ultimate responsibility for the interpretation of Community law rests with the European Court of Justice in Luxembourg. In two decisions in 1960 and 1970 the European Court of Justice held that respect for fundamental rights forms an integral part of the general principles of law, the observance of which it had to ensure.<sup>87</sup> In 1974 the Court of Justice declared that "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can also supply guidelines which should be followed within the framework of Community law".<sup>88</sup> Since then, the European Court of Justice has referred directly to the terms of the Convention in interpreting and applying Community law, which, as has been noted, in the case of directly applicable provisions, then has the force of law in the United Kingdom.<sup>89</sup>

#### D. *Legislative Innovations*

Lastly, the Convention has an impact on the United Kingdom as an impetus for future legislation. Mention has been made of the *Malone* decision by which the Bench identified a need for the introduction of wiretapping legislation. In addition, the Convention specifically encourages the introduction of a British bill of rights. This occurs, for example, as a result of publicity surrounding cases going to the Strasbourg agencies. In March 1981, during which month the European Court of Human Rights heard the closed shop case against the United Kingdom,<sup>90</sup> 120 British M.P.'s pressed the British Government to debate a private member's bill which would have made the European Convention enforceable in British courts. Referring to the applicants in the closed shop case, Mr. Alan Beith, M.P.,<sup>91</sup> stated "Quite apart from the merits of the case, they ought to be able to test the principles of the European Convention in our courts."<sup>92</sup>

It is generally believed by advocates of a British bill of rights that such a bill should take the form of an incorporated European Conven-

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<sup>87</sup> *Stauder* case 29/69, [1969] E.C.R. 419, [1970] C.M.L.R. 112; *International Handelsgesellschaft* case 11/70, [1970] E.C.R. 1125, [1972] C.M.L.R. 338.

<sup>88</sup> *Nold* case 4/73, [1974] E.C.R. 491, [1974] 2 C.M.L.R. 338.

<sup>89</sup> It might be noted that the E.E.C. Commission in May of 1979 decided that the Community itself should become a party to the Convention. This proposal is under active consideration. Also, the kinds of rights which may be pleaded in Luxembourg are not limited to those of the Covenants.

<sup>90</sup> *Supra* note 38.

<sup>91</sup> Liberal.

<sup>92</sup> *Gibb, 120 M.P.'s Form Campaign for Bill of Rights*, *The Times* (London), 5 Mar. 1981, at 4.

tion.<sup>93</sup> The unanimous conclusion of a select committee of the House of Lords in 1978 was that, if there was to be a bill of rights, it should take this form.<sup>94</sup> There are objections to the European Convention being the text of a British bill of rights. They are based primarily on the shortcomings of the actual terms of the Convention. For example, the exemptions are too wide, the provisions are not all compatible with the British social setting, and the drafting is too loose or vague for the British judge. The main argument in favour of the form of an incorporated Convention is that it provides the only real hope of a British bill of rights being enacted.<sup>95</sup>

#### IV. CONCLUSION: IMPLICATIONS FOR CANADA

There is no doubt that the impact of the European Convention on the United Kingdom is limited by a number of factors upon which an international human rights protection system could improve, in particular the length of time it takes for a case to be considered both by the Commission on admissibility and the Court or Committee of Ministers on the merits. Further, the European Commission is not a permanent body. The provision for individual complaints is optional and ratification is a periodic and relatively frequent process. There is no provision for the Commission to order interim remedies such as the granting of injunctions.<sup>96</sup> The individual does not have standing before the European Court<sup>97</sup> and cannot refer a case to the European Court. Not all cases are referred to the Court, so that decisions are sometimes taken by a political body, the Committee of Ministers. Decisions can only be taken by the Committee of Ministers with a two-thirds majority.

The capacity for improvements and for increasing the dimensions of the Convention's impact do not, however, detract from the reality of its effect on human rights protection within the United Kingdom. The European Convention is an international instrument which concerns itself with the rights of individuals within the nation state. The United Kingdom's adherence to this system of supervision of human rights is a

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<sup>93</sup> For a history of the Bill of Rights debate in Britain between 1968 and 1979, see M. ZANDER, *A BILL OF RIGHTS?* (2nd ed. 1979). For a consideration of the European Convention as the text of a British Bill of Rights, see also J. JACONELLI, *supra* note 65.

<sup>94</sup> REPORT OF THE SELECT COMMITTEE ON A BILL OF RIGHTS (H.L. Paper 176 Jun. 1978).

<sup>95</sup> *Id.* at 21, para. 10. See also M. ZANDER, *supra* note 93.

<sup>96</sup> In practice, the Commission can and does make periodic use of Rule 36 of its Rules of Procedure which states: "The Commission or where it is not in session, the President, may indicate to the parties any interim measure the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it."

<sup>97</sup> In practice, the Commission invites the individual to assist it in its appearance before the Court.

policy decision which it would find very difficult to reverse, particularly in the context of a broader policy commitment towards European integration. The United Kingdom has now permitted an international commission and court to supervise human rights protection of persons within its own jurisdiction. These international bodies have made decisions whose results have been at variance with those of the highest British courts;<sup>98</sup> they have encouraged British courts to speak out about violations of human rights which come before them for which there is no internal remedy.<sup>99</sup>

In contrast, Canada's international human rights obligations have had little influence on legislative organs.<sup>100</sup> Canada has, for instance, been found to be in violation of the International Covenant on Civil and Political Rights by the United Nations Human Rights Committee in the case of Sandra Lovelace.<sup>101</sup> The federal government has responded to the finding of a violation with the announcement that it will have to evaluate the cost before amending the discriminatory provision.<sup>102</sup> Nor have Canada's international human rights treaties had much effect on the courts.<sup>103</sup>

There is no doubt that Canada's international human rights treaties are considerably weaker instruments than the European Convention on Human Rights. Rather than detailing their weaknesses, however, it can be concluded that in so far as Canada has neglected partnership in a stronger and more cohesive international human rights alliance, and the impact of Canada's present covenants has been limited by a fear of internationalizing human rights protection, the example of the United Kingdom is compelling. A country of similar legal traditions has permitted its human rights situation to come under the scrutiny of an international organization and the consequence has not been unproductive, or punitive, international embarrassment. It has essentially been a restitutive process, which has encouraged public responsiveness, private vigilance, and international co-operation. A further internationalization of human rights protection in Canada would be a positive reform.

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<sup>98</sup> See, e.g., *The Sunday Times case*, *supra* note 32.

<sup>99</sup> *Malone*, *supra* note 79.

<sup>100</sup> It is true that the Canadian Charter of Human Rights has been referred to as an attempt to meet requirements of Canada's international covenants.

<sup>101</sup> *Supra* note 12.

<sup>102</sup> *Indian Act Changes Delayed Again*, *The Globe and Mail* (Toronto), 1 Dec. 1981, at 11.

<sup>103</sup> One could mention a reference to the International Civil and Political Covenant in the decision of a human rights tribunal set up under the Canadian Human Rights Act, S.C. 1976-77, c. 33. In *Bailey v. M.N.R.*, [1980] 1 C.H.R.R. 193, at 209, the tribunal chairman stated: "Resort can be had to international law and international obligations assumed by Canada, in interpreting the meaning of the *Canadian Human Rights Act*." Citing *Salomon*, *supra* note 68, the tribunal chairman quoted arts. 2, 3, 23 and 26 of the Civil and Political Covenant as one of a number of factors supporting his conclusion that the Canadian Human Rights Act applied to statutory provisions.