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22.9.97

Dear,

We are aware that the White Paper on Incorporation of the European Convention on Human Rights into UK law is near completion.

Enclosed please find a short briefing by Rabinder Singh of 3-4 Gray's Inn Square Chambers and myself on one plank of the proposed 'British model' of Incorporation: **The Power of Declaration.** We suggest what the power might consist of and what its implications are likely to be for the model as a whole.

We hope that you find this helpful. If you would find it useful to discuss any aspect of the briefing please do not hesitate to get in touch.

Yours Sincerely,

Francesca Klug,
Research Fellow, School of Law.

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The British Model of Incorporation: The Power of Declaration.

1. There is a growing consensus amongst human rights NGOs and a group of independent barristers over what form the 'British model' of Incorporation of the European Convention on Human Rights into UK law might take.[1] The assumption is that the model will be an interpretative one, requiring the courts to interpret Acts of Parliament in line with the Convention to the extent that they can. This begs the question of what will happen in the relatively infrequent circumstances where they cannot. With regard to potential **breaches of primary legislation** we make three proposals :

a) If the courts cannot reconcile Acts of Parliament already on the statute book (or more probably sections of such Acts) with the terms of the Incorporated Convention it is proposed that the **doctrine of implied repeal should be allowed to operate** in the usual way. Despite its name - which is somewhat of a misnomer - this does not actually entail the repeal of legislation. It is a doctrine which the courts have developed to give supremacy to parliament where a later Act cannot be reconciled with an earlier one. The earlier legislation is still on the statute book but is effectively disapplied *for the purposes of a particular case or cases*. In most instances it will be possible for the Courts to interpret statutes in the light of the Convention without resorting to this doctrine. Where the doctrine is employed Parliament would, of course, be free to re-enact the statutory provision which has been disapplied with or without amendments. There is, therefore, no need to explicitly oust the doctrine of implied repeal, which is one of the consequences of adopting Section 4 of the *New Zealand Bill of Rights.*

b) With regard to post-incorporation statutes, where the courts cannot interpret them, or any particular section of them, to conform with the Convention it is proposed that they be given a specific **power of declaration**. Under such circumstances the courts could declare that, in their view, an Act of Parliament (or section of it) breaches the Convention. The implications of this are discussed below.

c) Following such judicial declarations a **fast track procedure** should allow speedy amendments of legislation where the Government is minded to do so. The procedures governing deregulation orders provide a possible precedent given that they involve Select Committee as well as parliamentary scrutiny. The case that such a mechanism involves a usurpation of democratic procedures is weakened by the process leading up to the fast track procedure; a judicial declaration that a statute incorporating a ratified treaty has been breached. Under other models, of course, (eg Canada) there would be no necessary parliamentary involvement in the change of law which would follow such a declaration; the courts being free to declare what the law is in such circumstances.

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[1] See *proposal* by Michael Beloff Q.C. et al, *A Bill of Rights for the UK,* Francesca Klug, EHRLR Issue 5 and *Letter* by Justice et al.

2. **The Power of Declaration** would effectively be a new power bestowed on the courts for the specific purposes of incorporating the European Convention in a manner which allowed applicants comparable redress in the domestic courts to that which is available in Strasbourg .

a)As in Strasbourg the courts *would be able* to declare that in their view a statute breaches the Convention and hence, where appropriate, that in their view the rights of an applicant/defendant have been violated. As in Strasbourg they *would not be able* to strike down the law in question or state what the law should be. This would be for the government/parliament to decide. This power of declaration would not, therefore, be the equivalent of the currently available power of declaration, for example the judicial review remedy where the courts declare what the *legal position* of the parties is. The law would remain the same unless or until it was altered by parliament. In effect this new power would be the equivalent of enabling the court to give an advisory opinion, albeit one to which particular weight is likely to be attached.

b)It would be open to the Government to establish a fund to award ex gratia compensation to the applicant/defendant in such circumstances (there is a precedent here under s133 of the *Criminal Justice Act* 1988). Equally it might be possible for the ombudsman to be given the power to recommend compensation where injustice was suffered through maladminstration. In this sense the domestic courts would clearly *not* have equivalent powers to the Strasbourg court which can award 'just satisfaction' directly under Article 50.

d)There need be no radical disturbance to the current rules on legal aid and costs. The practice is already developing under judicial review procedures that it would not be reasonable to award costs where a case is taken in the public interest. It is highly likely that the courts would take the view that a case involving a judicial declaration that a statute breaches the Convention would fall under that category. No changes would be needed to the rules on legal aid.

e) Where the applicant is not satisfied with the government's response he/she remains free to pursue a case to Strasbourg. There can be no automatic assumption the European Court will agree with a declaration by the UK courts, in particular in cases where the 'doctrine of a margin of appreciation' is likely to be applied.

f) It should be open to any court or tribunal in which the issue arises to make a declaration of the type described above. Naturally the normal appeal procedures would be available to ensure points of law were satisfactorily resolved at the appropriate level.

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