stances may however arise where this is not the case and obviously amounts received outside the 'duty States' should not be brought into those States for banking unless absolutely essential.

In company restructuring however, the possibility that other States may in turn introduce such a duty must be kept in mind.

The introduction of the duty in Victoria brings with it related reductions and even the abolition of certain other duties. Stamp duty on cheques, promissory notices and bills of exchange (not payable on demand) is to be phased out by 1 July 1983. Stamp duty on credit card transactions is being phased out except where the credit card provider is a registered or exempt financial institution. Credit business duty and instalment purchase duty have been abolished where the business or the instalment purchase is carried on or entered into by a registered or exempt financial institution.

A limited exemption from duty has also been introduced in respect of mortgages for certain eligible first home buyers.

Certain corresponding increases in duty have also occurred. For example, duty has been increased on conveyances where the value of the land exceeds $1,000,000 and in respect of promissory notes payable on demand.

The duty, in sum, is significant for its anticipated wide-spread impact. The amounts to be paid will, more often than not, be small but, it is envisaged, considerable stream-lining in business structures will occur — a result which, the writer believes, will be all to the good of the financial system. The final evaluation of the measure must however come when the two State Governments will be able to positively determine how much the duty will net them in return for the immense effort involved.

''TWAS EASIER SAID THAN DONE': BRITAIN AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

BY JOHN KIDD*

It is all very well to pay lip service to human rights treaties, all too easy to accept their provisions at a theoretical or aspirational level, but it is quite a different, infinitely more difficult, matter to actually submit one's laws and procedures to the detailed scrutiny of international tribunals staffed largely by foreign judges. This comment is prompted by the recent experience of the United Kingdom (Britain) as a party to the European Convention on Human Rights 1953 and its Protocols (the Convention).[1]

As is well known to international lawyers, the Convention marks, on a regional level under the auspices of the Council of Europe, what is very probably the most significant step yet taken towards the practical protection of human rights at an international level. This is because it not only defines the rights to be protected — all the various human rights conventions do that — but, at least as importantly, provides a relatively effective machinery for investigating and enforcing those rights. At the

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[1] The full title of the Convention is the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953. There are four Protocols. The Convention is the subject of a voluminous literature. See *e.g.* Jacobs F. G., *The European Convention on Human Rights* (1975); Fawcett J. E. S., *The Application of the European Convention on Human Rights* (1969); Robertson A. H., *Human Rights in Europe* (1st ed. 1963).

risk of over-simplification[2] it does this by means of two bodies, the European Commission of Human Rights (the Commission) and the European Court of Human Rights (the Court).[3] The Commission has the task of initial investigation of applications alleging Convention violations, whereas the Court has the ultimate task of deciding those few disputes not rejected or settled at the Commission stage, and then referred to it by the Commission or relevant Convention party. Any decision of the Court is binding and final on the state party or parties concerned. Further, all Convention states 'shall secure to everyone within their jurisdiction the rights and freedoms defined . . . [in] this Convention'.[4] Thus, a Convention State, as well as being bound by the Court's decision, is also under a duty to take remedial action to correct any shortcomings in its domestic laws. It should also be noted that the vast majority of Convention States has now accepted the all important optional provisions contained in articles 25 and 46. In other words they have accepted the right of individual petition to the Commission (article 25) and the compulsory jurisdiction of the Court (article 46). The right of individual application is a particularly significant modification of the traditional international customary principle that only States could espouse claims against other States on behalf of their own mistreated nationals. Under the Convention most applications are brought by individuals against their own national or host State.

Britain was in fact, in 1951,[5] the first country to ratify the Convention. At that time there appeared little reason to question the spirit of optimism associated with that event, an optimism exemplified by the contributions of parliamentarians such as Sir Winston Churchill and Sir David Maxwell-Fyfe to the debates in the Consultative Assembly of the Council of Europe which foreshadowed the drafting of the Convention.[6] A country which had been in the vanguard of the struggle for freedom in the recently ended world war, which had the oldest parliamentary democracy in the world as well as being the country of Magna Carta and *habeas corpus*, surely had little to fear from her acceptance of a Convention on Human Rights. Rather, would she not have much concerning human rights to teach others?

Yet, only thirty years later, Britain has a dubious distinction — that of having had more decisions of the Court given against her than any other Convention State. Of the forty six decisions of the Court given by November 1981 eight were given on applications against Britain of which seven have included important findings against her. And since then there has been a further adverse decision in February 1982 in the case of *Campbell and Cosans v. United Kingdom (Campbell)*.[7] In 1981 alone, three decisions went against Britain, and soon the Court will be hearing other pending cases concerning the rights of prisoners in which the Commission has already reported its opinion that that country, through its Home Office prison rules, is in violation of the Convention.[8] Indeed Britain's list of Court 'convictions' being added to with alarming and snowballing frequency since she first accepted the right of individual application in 1966 and since the first adverse decision as recently as 1975.

[2] A detailed account of the Convention machinery can be found in Laurids Mikaelsen, *European Protection of Human Rights* (1980), as well as the texts referred in n. 1 *supra*.

[3] The procedural aspects of the Convention are contained in articles 19-56.

[4] Article 1.

[5] On 8 March 1951.

[6] For the background to the Convention see the speeches in the Consultative Assembly of the Council of Europe, First Session, 1949, in *Collected Edition of the Travaux Preparatoires* (1975) i, ch. VI.

[7] Decision of 25 February 1982. See also n. 16 *infra*.

[8] See *Silver and Others v. United Kingdom* (1980) 3 European Human Rights Reports 475 (The 'Prisoners' Correspondence' Cases); *Springer and Others v. United Kingdom* 1982, see 132 *New Law Journal* 662; *Campbell and Fell v. United Kingdom* 1982, see 132 *New Law Journal* 1148.

In that first decision, in the case of *Golder v. United Kingdom*,[9] the Court held that Britain was responsible for violations of the Convention constituted by her prison authorities' refusal to permit the prisoner applicant access to a solicitor in order to pursue defamation proceedings against a prison officer. The refusal to permit the applicant to contact a solicitor violated his right of access to a court, contained in article 6(1), and the refusal of permission to write to a solicitor was an interference with the right to respect for correspondence contained in article 8(1).

That first 'conviction' has been so far supplemented by the following Convention violations which are summarised in even briefer form: in *Ireland v. United Kingdom*[10] a violation of article 3 in respect of 'interrogation in depth' techniques used by Northern Ireland security forces against suspected terrorist detainees, which techniques together constituted a practice of 'inhuman and degrading treatment' under that article, although not 'torture'; in *Tyrer v. United Kingdom*[11] a violation, also of article 3, in respect of judicial corporal punishment permitted by, and applied in accordance with, local penal laws in the Isle of Man; in *The 'Sunday Times' v. United Kingdom*[12] a violation of the right to freedom of expression guaranteed by article 10 in respect of an injunction obtained by the Attorney-General restraining, on the grounds of contempt of court, the publication of articles dealing with the background to the 'thalidomide' drug tragedy; in *Young, James and Webster v. United Kingdom*[13] a violation of the right to freedom of association guaranteed by article 11 in respect of the dismissal from their employment of the applicants for their refusal to join trade unions, under a 'closed shop' agreement between the employer and the unions, where the dismissals for such reason were sanctioned under legislation then in force; in *Dudgeon v. United Kingdom*[14] a violation of the right to respect for private life, guaranteed by article 8, in respect of fear and suffering caused to the applicant, a male homosexual, by the threat of prosecution under then existing local laws in Northern Ireland which criminalised homosexual conduct in private between consenting adult males; in *X v. United Kingdom*[15] a violation of the right of a person of unsound mind, compulsorily confined in a psychiatric institution for an indefinite or lengthy period, to have the lawfulness of his continued confinement judicially reviewed at reasonable intervals, which was interpreted as falling within the right of judicial review of lawfulness of detention guaranteed by article 5(4); and in *Campbell*,[16] the last decision to hand, a violation of the right of parents to ensure the education and teaching of their children 'in conformity with their own religious and philosophical convictions', guaranteed by article 2 of Protocol No. 1 to the Convention, constituted by the refusal of a Scottish education authority to accede to the wishes of the applicant parents by withdrawing the sanction of corporal punishment against their children at their local school.

The above is a brief catalogue of Britain's violations of the Conventions as found by the Court. In addition we should not overlook the fact that, in the case of several other applications which did not reach the Court stage, the Commission has reported

[9] (1976) 1 European Human Rights Reports 524. And see Triggs G., 'Prisoners' Rights to Legal Advice, and Access to the Courts: The Golder Decision by the European Court of Human Rights' (1976) 50 *Australian Law Journal* 229 for a valuable account of the decision and its implications.

[10] (1978) 2 European Human Rights Reports 25.

[11] (1978) 2 European Human Rights Reports 1.

[12] (1979) 2 European Human Rights Reports 245.

[13] (1981) Series A, No. 44.

[14] (1981) Series A, No. 45; 'The *Dudgeon* Case' (1981) 131 *New Law Journal* 1161.

[15] (1981) Series A, No. 46.

[16] Decision of 25 February 1982, see Pogany I., 'Education: The Rights of Children and Parents under the European Convention on Human Rights' (1982) 132 *New Law Journal* 344.

prima facie violations by that country. For example, in the *East African Asians* applications,[17] the Commission, in 1973, reported its opinion that British immigration legislation in force at the time was actuated by motives of racial discrimination, and that its application, to deny immigrant entry to United Kingdom citizens of Indian extraction and expelled from their previous countries of residence in East Africa, had subjected the applicants to racial discrimination, a discrimination which constituted an interference with their human dignity amounting to 'degrading treatment' in violation of article 3.

Can any explanation be given for this embarrassing British record? First, we can offer a plea of mitigation pointing to factors which, at a purely statistical level, go some way to explaining the comparatively large number of applications brought against Britain. These factors include the following:

(a) Britain has one of the largest populations of the Convention States and, for that reason, a comparatively large number of applications could be expected. Thus, in the most recent year for which such statistics are at hand,[18] we find 103 applications against Britain, a figure only exceeded by 106 against the Federal Republic of Germany, another member with a large population. Indeed, apart from the fact that only 31 applications were brought against Italy and only one against Ireland, the figures do, in a rough and ready way, reflect population differences between the Convention States.

(b) A few Convention States either have not yet, or have only very recently, accepted the right of individual application under article 25. For example, Turkey has not accepted this right, and France and Spain refrained from so doing until 1981. At least Britain has, since 1966, been prepared to put its laws to the test of scrutiny by the Convention bodies at the behest of individuals and deserves some credit for so doing.

(c) Unlike several other Convention States Britain has not incorporated the Convention rights into her domestic law. Despite the advocacy of some influential jurists[19] for such a step to be taken by means of a Bill of Rights, the Convention rights remain as treaty rights which must give way to paramount domestic law. For this reason also one could expect more applications against Britain on an international level, given the inability of her courts to give direct effect to those rights, than against those States which have enacted domestic human rights laws.

(d) There are many organisations and pressure groups in Britain, organisations such as the National Council for Civil Liberties, the Freedom Association, Justice, MIND (a mental health association), the Society of Teachers opposed to Physical Punishment, and others, which are dedicated to the dissemination of knowledge of human rights and to their practical legal protection. Several have supported applications to the Commission. Therefore, the very tradition of individual liberty, referred to earlier, which has spawned such groups, might also have encouraged a relatively high level of awareness by Britons of their rights and a corresponding willingness to protect those rights by use of the Convention machinery. This last mitigating factor is suggested by way of conjecture only but, in so far as it has substance, it points to a paradox, a legal 'catch 22' situation — that the more a country promotes awareness of their human rights on the part of its citizens, the more those citizens will pursue protection of those rights through available enforcement machinery.

[17] Extracts from the Commission's Report of 14 December 1973, are to be found in *East African Asian v. United Kingdom* (1981) 3 European Human Rights Reports 76.
[18] 1980, see European Commission of Human Rights, *Annual Review 1980*, Council of Europe, Strasbourg (1981).
[19] *E.g.* Lord Scarman and Lord Hailsham L.C.

Although these four factors perhaps explain the number of applications against Britain, they neither explain the growing number of adverse decisions of the Court nor the consequent problems of compliance with such decisions experienced by that country. It seems to this writer that these problems fall into two categories, one that we shall call the constitutional problem, the other the all important public opinion problem.

The constitutional problem

Two of the court's decisions, *Tyrer*[20] and *Dudgeon*,[21] highlight this problem. In both these cases, the violations of the Convention resulted from local laws of local parliaments, in the Isle of Man and Northern Ireland respectively.

In *Tyrer*, the local law sanctioning the use of judicial corporal punishment, impugned by the Court as being in violation of the Convention, was one enacted by the Tynwald (the Isle of Man legislature). That body has important law making powers for the Isle particularly in the fields of penal law and income tax law.[22] Although it is subject to the overall constitutional control of the Westminster Parliament, as a practical matter it would be difficult indeed to contemplate Westminster intervening to override its local legislation. In 1948 the Tynwald refused to follow the British mainland where that punishment was abolished by Westminster legislation. Thus, because internationally she is responsible for Manx affairs, Britain had the unenviable task in *Tyrer* of attempting to justify a punishment long since abolished on the mainland and in the other Convention States; and where, without the co-operation of the Manx authorities, she was practically powerless to prevent a recurrence of the alleged Convention breach. Indeed, since the *Tyrer* decision, the Tynwald, in the face of local opinion, has refused to formally abolish judicial corporal punishment, despite it having been held to be 'degrading punishment' by the Court. However, the influence of the decision is perhaps shown by the fact that, since it was given, no such punishment has been imposed by any Manx court. Yet the constitutional problem remains.

Similarly, in *Dudgeon* the law in dispute was one prevailing at the time in Northern Ireland, then subject to the local authority of the Stormont Parliament. Again, that parliament had refused to follow legislation of the Westminster Parliament which, in 1967,[23] had decriminalized homosexual acts in private between consenting adult males. However, because the province is now subject to 'direct rule' from Westminster, Britain was able to give effect to the Court's decision in *Dudgeon* and appropriately amend the offending local law.[24]

The problem of public opinion

Public opinion, or, more particularly, the effect of powerful and influential sectional or group interests, is the major problem which has faced Britain in adapting to the Convention. There will always be some opinion opposed to any amendments to domestic law necessitated by, or thought to be necessitated by, compliance with human rights treaties. Where that opinion is that of a minority with little political or economic influence it poses a minimal threat to the necessary remedial steps being taken. Thus, the amendments to domestic law which followed the decisions in *Golder*,[25] the

[20] *Supra* n. 11.
[21] *Supra* n. 14.
[22] For a detailed account of the constitutional status of the Isle of Man see *Halsbury's Laws of England* (4th ed. 1974) vi, para. 879.
[23] See the Sexual Offences Act 1967 (Eng.).
[24] See the Homosexual Offences (N.I.) Order 1982, S.I. 1982/1356 (U.K.).
[25] *Supra* n. 9; followed by amendments to the Home Office Prison Rules.

'Sunday Times' case,[26] and *X v. United Kingdom*[27] were effected with relative ease. The procedural legal rights of prisoners (*Golder*) and the institutional rights of the mentally ill (*X*) are not matters of any great general public concern; and the amendments to the contempt laws flowing from the *'Sunday Times'* decision were in fact supported by a powerful sectional interest in the form of the Press. Indeed, even where the matter concerned is of more widespread and controversial interest, but which directly affects only a few, a government with the desire and will to enact remedial legislation can utilise the treaty obligation to divert from itself some of the potential flak of public reaction. The adverse court decision can serve to diffuse a potentially embarrassing political situation by taking the matter out of the political arena into the sounder based, and hopefully less controversial, legal arena. The amendments to the law flowing from *Dudgeon* perhaps illustrate this point, given the fact that majority opinion in Northern Ireland seems to have supported the former impugned law.[28]

On the other hand it takes a particularly brave government to act in the face of the passionately held opinion of a majority or of powerful sectional interests. The electoral risks in a democracy are obvious. And if a government, in taking action, too readily attributes responsibility for that action to its obligations under the treaty then it runs another risk, that of an inflamed public opinion demanding repudiation of the treaty. In such areas of sensitivity a government must tread warily and with considerable skill, as also should an international tribunal called upon to interpret a human rights treaty. It might occasionally behove the latter, in the light of local opinion and tradition, to follow the practical and possible, rather than the idealistic but impossible, interpretative path.

The legality of the trade union 'closed shop' under article 11 of the Convention, raised in *Young, James and Webster*,[29] exemplifies these problems. The 'closed shop' has long played an important, though controversial, role in British industrial relations. Although opposed by much public opinion, it has always been regarded by the powerful trade union movement as an indispensible ingredient of union solidarity and strength — witness the successful opposition to the attempts made to modify it in the short lived Industrial Relations Act 1971 (Eng.). Article 11(1) guarantees the right of freedom of association 'including the right to form and join trade unions'. One possible interpretation of this provision argued before the Court, and supported by seven of the eighteen judges in the majority, is that, by necessary implication, a right to join a trade union embraces a correlative right not to join such an association. At a purely logical and jurisprudential level there is much to be said for such an interpretation. However, it would have led to a conclusion that the closed shop system itself is outlawed by the Convention (unless a particular closed shop can be justified under article 11(2)). Perhaps such an interpretation leading to such a conclusion would have exemplified the idealistic yet impractical (given the potential passionate union opposition) approach. Instead, the majority of the Court preferred not to decide the negative right issue, confining themselves to saying that the particular closed shop agreement before them, involving the dismissal of employees who had commenced their employment before the agreement between their employer and the trade unions was made, violated the applicants' freedom of association.

[26] *Supra* n. 12; followed by the Contempt of Court Act 1981 (Eng.), s. 2(2).
[27] *Supra* n. 15; followed by the Mental Health (Amendment) Act 1982 (Eng.), s. 28 and Schedule 1.
[28] Before *Dudgeon*, in 1978, the British government had proposed legislation to 'harmonize' the law in Northern Ireland with that on the British mainland. However, a year later the proposal was withdrawn following consultations with the local population. See 'The *Dudgeon* Case' (1981) 131 *New Law Journal* 1161.
[29] *Supra* n. 13.

In *Campbell*,[30] on the other hand, the Court arguably pursued the impractical path. And it is significant that, whereas the closed shop system in Britain has been subjected to legislative modification,[31] the *Campbell* decision has not, as yet, been followed by such action (except on the part of a few local education authorities which have now banned corporal punishment in schools). The implications of the decision seem to be either that education authorities provide two sets of schools, those which permit, and those which do not permit, corporal punishment (surely both impractical and too expensive — and what of other forms of school discipline to which parents might 'philosophically' object?), or that corporal punishment is legislatively abolished in all state schools. The latter option is vehemently opposed by most British teaching organisations as well as by much parental opinion. For it to be seen to be taken in the light of a decision of 'foreign' judges would be to even further diminish public respect for, and acceptance of, the Convention.

This reference to 'foreign' judges highlights another and final aspect of this problem. That is the impact upon a nation with a common law tradition, with its piecemeal pragmatic approach, of a Conventional law which resolves disputes in an *a priori* manner by recourse to broad statements of principle. The continental European nations, with their civil law tradition, are more familiar with the Convention approach, and the majority of the Court's judges are drawn from those nations. In view of this, it was always going to be particularly difficult for Britain to adjust to the Convention approach. Experience has borne this out. For example, on the most recent occasion[32] when Britain renewed its acceptance of the right of individual petition (under article 25) there was considerable debate as to the advisability of so doing before a seemingly hesitant government did so.[33] And since then, one is not surprised to find hostility, sometimes vehement, to the Convention expressed by some British politicians and other opinion moulders;[34] hostility particularly to a situation where foreign judges trained in that different tradition, can, in effect compel changes in British law. Whether that hostility will threaten future British adherence to the Convention and its enforcement machinery only time can tell.

[30] *Supra* n. 16.
[31] See the Employment Act 1980 (Eng.), s. 7.
[32] January 1981.
[33] See *e.g.* a leading article in *The Times*, 'The Right to go to Strasbourg', 22 September 1980, referring to the debate, and calling upon the Government to renew the right of petition.
[34] Perhaps the most vehemently opposed are Mr Enoch Powell, M.P., and a leading political journalist, Mr Ronald Butt. See *e.g. The Times*, 28 October 1982, for an article by the latter.