

EUROPEAN CRIMINAL BAR ASSOCIATION

AUTUMN CONFERENCE, 2 - 3 OCTOBER 2015

**Court of Justice of the European Union
Luxembourg**

**Working Group to oppose the UK's rejecting the jurisdiction
of the European Court of Human Rights**

The Task at Hand

1. The Conservative and Unionist Party, which forms the current government, declared its intention before the last election to make the domestic courts the ultimate arbiters of human rights in the United Kingdom in place of the European Court of Human Rights (HRC). To bring about such a change the UK intends to reject the jurisdiction of the HRC.
2. Much has been written about this policy and most if not all authors have been openly critical of it on legal and political grounds. It is hard to find anyone, other than extremists, who thinks it is a good idea. The policy has not, however, been withdrawn.
3. Legally the policy is indefensible for many reasons, not least because if the UK decided that the Convention no longer applied, it would infringe the Belfast Agreement 1998, the international treaty which restored peace to Northern Ireland, and it would also collide with the Scotland Act 1998 which restored the Scottish Parliament. In addition and no less importantly, the policy is difficult to reconcile if not wholly incompatible with EU membership and with the UN Charter.
4. Politically the policy is wholly irresponsible.
5. In domestic terms the policy would, if implemented, risk a major constitutional crisis in the UK because the Scottish Government, which would have to be consulted in terms of the Scotland Act and its implementing conventions, has declared that it would not agree to any rejection of the HRC.

6. In international terms, if the UK rejected the jurisdiction of the HRC and thus automatically the application of the Convention to it, it would be signalling to the rest of the world that, for it, no rights are inalienable, not even rights recognised as fundamental by the Convention. No state espousing such an attitude has any moral right to any role in international government, let alone permanent membership of the UN Security Council.
7. It is difficult to grasp how the government of a mature democracy can conceive of such a policy, displaying as it does a total disregard for and/or complete ignorance of the nature and purpose of fundamental rights. In their essence fundamental rights mark the boundary of state power. They comprise natural rights, deriving ultimately from, and designed ultimately to uphold, human dignity. As such they constitute a legal dimension in which the individual is supreme, or sovereign, and with which the state may not legally interfere under any circumstances.¹
8. The UK Constitution does not recognise fundamental rights, however, because, pursuant to the doctrine of parliamentary sovereignty, no authority, not even the highest domestic judicial authority, may override the authority of Parliament. In terms of constitutional principle, therefore, the UK Parliament may set aside rights which are treated by the Convention and elsewhere as fundamental and thus inalienable and this it may do by simple majority vote. Constitutionally speaking, then, the UK Parliament, and not the courts, is already the ultimate arbiter of all rights, including Convention rights, in the UK. Rejecting the Convention and/or the HRC would not change this. For these reasons natural rights, in the form of a

¹ See the judgment of 15 February 2006 of the German Constitutional Court in case 1 BvR 357/05, in which it declared unconstitutional and irreconcilable with the right to life and human dignity, the power granted by the Aviation Security Law (Luftsicherheitsgesetz) 2005 to shoot down civilian aircraft where they were being used as a terrorist weapon; see also the brief commentary by Crosby, 'Counter-terrorism and Human Rights – A Short Sequel on Human Dignity, *Journal of European Criminal Law*, Volume 3, Issue 4, 2009. The Constitutional Court holds that human dignity is absolute so that, in this case, the state may not take the lives of the few in the air to save the lives of the many on the ground. All state action must be conducted in accordance with that absolute principle. A case such as case 1 BvR 357/05 could not be brought in the United Kingdom. However, a law such as the Aviation Security Law could be adopted by the UK Parliament. There is an English language version of the judgment on the website of the Constitutional Court.

domestic law or the Convention itself, are protected in the UK only at the discretion of a majority of Members of Parliament.

9. This brings us to the heart of the matter. The core or origin of the problem is the constitutional defect of non-recognition of fundamental rights. If the British Constitution acknowledged the inalienable nature of fundamental rights and shielded them from Parliamentary interference, or changes in governmental policy, the current problem would not arise for two reasons. *Firstly*, if the rights protected by the HRC were also entrenched in the Constitution, then even if the UK left the Convention or repudiated the HRC, the rights would remain intact. *Secondly*, if these rights were in any case entrenched in the Constitution, it is unlikely that the government of the day would raise problems with the HRC, because either way it could not interfere with them. To that it is relevant to add that entrenchment could give rise to the creation of a UK constitutional court. Such a court would protect the Convention and the rights it declares and the UK would have the beginnings of a modern constitution, that is one which limited the power of the state.
 10. For the above reasons the UK Human Rights Working Group needs first and foremost to address the core problem, namely the failure to protect fundamental rights in the UK by entrenching them constitutionally. If these rights were entrenched in the domestic constitution, the matter would end there. However, until and unless these rights are entrenched, the problem could arise at any time in the future.
 11. The task is therefore to entrench fundamental rights. The challenge is to change the mind-set.
 12. It would be a mistake, lastly, to characterise this matter as an internal UK problem only. The fact is that the Convention derives its force in part from the fact that it disciplines the large states as it does the small states. If a large state, such as the UK, rejected the Convention and/or the HRC the whole system would be seriously undermined and weakened. So it is in the interests of everyone to ensure that the UK government abandons not the Convention, but its intention to do so.
- Brussels, 23 September 2015, Scott Crosby