The Influence of the European Convention on Human Rights on English Criminal Law and Procedure

I. INTRODUCTION

English writers have seldom charted in detail the actual or potential influence of the European Convention on Human Rights on English criminal law and procedure. This may be attributable to the fact that for the first quarter-century of its life the Convention essentially applied to matters at or apparently at the margin of criminal procedure, and in particular to prisoners' rights and to the rights of persons detained for questioning under emergency procedures. Articles 5 and 6 after all reflect common law principles concerning human rights in criminal procedure though they are also compatible with the traditions of the mixed inquisitorial - accusatorial systems which apply in other States signatory to the Convention.

Furthermore, Britain did not concede the right of individual petition until 1966. This, originally, would have limited the range of cases brought before the Commission and ultimately the Court.

Of recent years the Convention has increasingly been referred to in relation to English criminal law and procedure. The reasons for this are obvious. For a litigant who remains dissatisfied with the result obtained in English law, the Convention offers a functional supra-national standard which evolves over time and which is untrammelled by classifications of procedure contained in English domestic law. This phenomenon illustrated clearly by the Ozturk case which treated Ordnungswidrigkeiten as criminal procedures for the purposes of Article 6, can also be seen in such English cases as Monnell and Norris v. United Kingdom concerning whether loss of time pending appeal forms part of the criminal appeal process, and Campbell and Fell concerning whether disciplinary procedures are sufficiently criminal in essence to attract the fair trial guarantees in the Convention. Inevitably, the

1. Prof.dr. L.H. Leigh is Professor of Criminal Law at the London School of Economies and Political Science, London, United Kingdom.
United Kingdom seeks to bring its domestic law into conformity with the Convention in order to avoid any disparity of standards between the latter and domestic law.

II. THE STATUS OF THE CONVENTION IN ENGLISH LAW

English constitutional law specifies that an international instrument cannot be a source of rights and obligations in domestic law until such time as it has been implemented by apt legislation. The European Convention has never been so implemented. It follows that the European Convention cannot be a source of rights as such, nor can it be invoked as a challenge to the validity of legislation. These principles were discussed in Ex p. Brind concerning the validity of certain broadcasting restrictions imposed upon radio and television by the Home Secretary and which had the effect of preventing the media from broadcasting the precise words used by members of the IRA and their sympathizers. The petitioners alleged a breach of Article 10. Their Lordships conclude that the European Convention may be prayed in aid to resolve any ambiguity in legislation. This follows from the presumption that the United Kingdom does not intend to legislate or act in breach of its international obligations. In this instance there was no ambiguity. Indeed, this canon of interpretation, while generally accepted, rarely succeeds. While the Home Secretary, in exercising his discretion ought, it was held, to consider Article 10, his decision need not be in conformity with it. To hold otherwise would be to incorporate the Convention into English law indirectly: the courts would have in each case to ask whether the restrictions were necessary in a democratic society applying the principles enunciated in the Convention. In criminal cases, as the report of the Soering case makes clear, the United Kingdom goes no farther than to say that the English courts can review an administrative decision, for example to extradite, in the light of factors which might be relied upon were the case brought under the Convention. This is simply to assert that such principles are compatible with domestic ideals of fairness; it does not follow that the Convention is relevant as such. Indeed, in Ex p. Brind Lord Donaldson M.R., in the Court of Appeal, roundly declares that the duty of English courts is to apply English law. It follows that it is even more doubtful whether administrative officers are bound to exercise discretionary powers in the light of the Convention. While Lord Denning suggested that immigration officers ought, for example, to perform their duties having regard to the principles stated in the Convention, he was obliged to concede that a statute or, it would follow a statutory instrument, cannot be invalid for want of conformity with the Convention. It follows that the Convention serves neither as a shield nor a sword in criminal proceedings. It could not, for example, be relied upon as an argument for extending the crime of blasphemous libel to protect religious doctrines of churches other than the established Church of England.

The Convention could have an effect on English law and practice in other ways. English law can and does incorporate in amending legislation values specified in the Convention.

---

9. This presumption, it may be noted, is rebuttable and has been departed from in time of war: see Cooperative Committee on Japanese Canadians v. Attorney-General of Canada, [1947] A.C. 87.