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Human Rights: Coming Home To Jersey?

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Introduction

In September 1998 the States agreed to a proposal of the Policy and Resources Committee to incorporate the European Convention on Human Rights into the domestic law of the Island. It is proposed to do so by means of a new Human Rights (Jersey) Law ("the draft Law") which was lodged *au Greffe* on December 14th, 1999, and is due to be debated as this issue goes to print. It will be an important constitutional measure for Jersey with long term and probably wide ranging implications for the Island's administrative, legal and judicial systems. To some extent it will be a leap in the dark. Not all of the possible effects are predictable. However, while it would be easy, and unwise, to underestimate the impact of the draft Law, it should be remembered that Jersey has been signed up to the Convention for over forty years, and in that period only three cases involving Jersey have got as far as the Commission in Strasbourg. In none of those have the claims of breaches of Convention rights been upheld. If the draft Law is passed, it will probably not be brought into force before the end of 2001 because of the need for extensive training and preparation.

As explained below, the draft Law follows closely the philosophy and, to a considerable extent, the form, of the Human Rights Act 1998, which was described in a recent judgment in a case before the House of Lords as "carefully and subtly drafted".^[1]

This is not, however, a case of slavishly following the English Act. The reasons for adopting a similar approach are -

constitutional, (basically, the shared principle of Parliamentary or States sovereignty);

legal, (there are more similarities than differences in the Island's and the UK's legal and judicial systems; common judicial learning throughout the British Isles);

consistency, (the same human rights and remedies should be available to all people wherever they are in the British Isles);

practical, (the Island will be able to take advantage of training offered in the UK and shared administrative experience; there is no need for Jersey to adopt a different approach).

In its long title, the draft Law's purpose is described as being "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights". What follows will describe the two main ways by which the draft Law gives "further effect" to the Convention rights in domestic law, in -

- (a) the relationship it establishes between the Convention rights and other domestic law; and
- (b) the requirement it places on public authorities not to act incompatibly with the Convention rights.

First, there is a brief explanation of the reasons for the draft Law, followed by an outline of the aims and principles which will determine the way it would operate, and a description of "the Convention rights". Last, there is a brief explanation of other provisions of the draft Law.

Background

The European Convention on Human Rights

The European Convention on Human Rights was drawn up after the Second World War. The United Kingdom played a major part in its drafting. It was designed to provide a common standard for the protection of fundamental human rights across Europe. It came into effect in 1953. The United Kingdom's ratification of the Convention was extended to Jersey. It is the United Kingdom which is the party to the Convention, not Jersey itself, and proceedings involving Jersey in the European Court of Human Rights in Strasbourg are actually taken by or against the United Kingdom. Until 1966, it was possible only for other States to bring cases against the United Kingdom whether on its own behalf or on behalf of Jersey in Strasbourg, but since then, individuals as well as other States can bring cases against the United Kingdom. The Convention is recognised as the pre-eminent human rights treaty in Europe. To the 21 original Council of Europe member states who signed there have now been added a further 19 countries.

The Convention is binding on the United Kingdom and on Jersey under international law. If (which has not happened so far) the European Court of Human Rights were to find a violation of the Convention in respect of Jersey, then the United Kingdom must ensure that Jersey takes action to rectify any deficiency in its internal laws or practices so as to bring them into line with the Convention. Of course, if this ever occurred, Jersey would itself take such action without any prompting from the United Kingdom.

Although the Convention is binding under international law, it is not however enforceable in domestic law. The Jersey courts may apply the Convention in limited circumstances: for example, where the courts have a statutory discretion to exercise, they may seek to act in a way which does not violate the Convention and the Convention may be referred to in order to resolve ambiguity in legislation. But the general position is that they are unable either to take account of the Convention in deciding issues before them, or to hear cases based solely on the Convention rights.

The Insular Authorities made informal enquiries in 1992 about incorporating the Convention as part of the domestic law of the Island but were discouraged from so doing by the then Conservative Government in the United Kingdom. It was not felt appropriate for the Island to take such action in advance of the United Kingdom.

The Labour Party committed itself in 1993 to incorporating the European Convention into United Kingdom law. They published a consultation paper called "Bringing Rights Home" in December 1996 and made incorporation of the Convention one of their manifesto commitments. Shortly after the general election of May 1997, the new Labour Government decided to bring forward legislation for this purpose in the first session of the new Parliament.

The Human Rights Bill was introduced in the House of Lords in October 1997. A White Paper, "Rights Brought Home",^[2] was published at the same time. The Bill completed its passage through Parliament in October 1998. It received the Royal Assent in November 1998. Some minor provisions of the Act are already in force. The main provisions will come into force in October 2000.

Aims and principles of the draft Law

The key aims of the draft Law are identical to those of the UK's Human Rights Act, that is, to enable the Convention rights to be invoked and enforced in the courts of Jersey in a way which is consistent with Jersey's existing constitutional arrangements and its governmental and legal systems. The principles which underlie the Act, and therefore the draft Law, are as follows -

- (i) Convention rights put "at the heart" of the judicial system. The draft Law integrates the Convention rights into existing procedures and requires all courts (and tribunals) to take account of the Convention rights where relevant. The current feeling, that the Convention rights are separate from (as opposed to complementary to) our own laws, should be removed.
- (ii) Conforming to Jersey traditions and procedures. It was argued against incorporation in the United Kingdom that it would be impossible to introduce a set of fundamental rights in a manner consistent with the United Kingdom's constitutional arrangements. The same argument could be employed in Jersey, and the draft Law has, like the United Kingdom Act, accordingly been framed so as to fit in with the existing arrangements. In particular, the draft Law acknowledges that there is in Jersey no legislation superior to Laws enacted by the States and sanctioned by the Privy Council and Acts of Parliament which apply or are extended to Jersey.
- (iii) Reflecting the Strasbourg position. The draft Law would not create new substantive rights but improve access to existing rights. Although the mechanisms inevitably differ, the draft Law is designed to enable individuals to rely on their Convention rights against a Jersey public authority before the Jersey courts to the same extent as they could rely on them against such an authority in the guise of "the United Kingdom" before the European Commission and Court of Human Rights.
- (iv) Maximising protection for individuals under the Convention rights. Consistent with the constitutional position of the States, the draft Law is designed to provide a strong system for giving effect to the Convention rights.
- (v) A Law of general application. The draft Law is cast in general terms to reflect the universal nature of its subject matter, *viz*, human rights. Exemptions and special provisions have been kept to a minimum.

The Convention Rights

The draft Law is concerned with the substantive rights and freedoms guaranteed by the European Convention on Human Rights and its associated protocols which Jersey, via the United Kingdom, is under an international obligation to secure to individuals within its jurisdiction. It is not concerned with rights in other international human rights treaties, nor does it include any domestically generated rights.

The Convention rights are specified in Article 1 of and schedule 1 to the draft Law. They deal with the right to life (Article 2 of the Convention); prevention of torture or inhuman or degrading treatment or punishment (Article 3); prevention of slavery and forced labour (Article 4); liberty and security of person (Article 5); fair trial (Article 6); retrospective criminal laws (Article 7); respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of peaceful association, including the right to join a trade union (Article 11); the right to marry and to found a family (Article 12); discrimination in the enjoyment of the Convention of

rights and freedoms (Article 14); the right to peaceful enjoyment of possessions (Article 1 of the first protocol); the right to education (Article 2); the right to free elections (Article 3) and the abolition of the death penalty except in time of war or imminent threat of war (Articles 1 and 2 of the sixth protocol).

Articles 16 to 18 of the Convention, which do not confer substantive rights but which deal with the way in which the substantive rights are interpreted, are also included in "the Convention rights".

Article 13 (right to an effective remedy) is not included in the Convention rights as the draft Law itself gives effect to this Article. Similarly, the draft Law also gives effect to Article 1 (obligation to respect human rights).

There are two other protocols to the Convention, in addition to the first protocol, which contain substantive rights - protocols 4, and 7. They are not included in the Convention rights because the United Kingdom has not ratified them on its own behalf or on behalf of Jersey.

Should the Island decide to ask the United Kingdom to ratify, on behalf of Jersey, any protocol containing substantive rights in the future, for example, protocol 7 (which deals with a number of matters including the right for an alien not to be arbitrarily expelled and rights of appeal in criminal cases), Article 2(2) of the draft Law enables those rights to be added, by Order of the Legislation Committee to the Convention rights.

Derogations and Reservations

A State's international obligations under the Convention can be qualified by derogations from certain Articles of the Convention in time of war or other public emergency threatening the life of the nation. States can also (subject to some restrictions) enter reservations in respect of Articles when a law is not in conformity with a Convention provision, but only when signing or ratifying the Convention or the protocol in question. The United Kingdom has made one derogation on Jersey's behalf in respect of Article 5(3) of the Convention, relating to provisions of the Prevention of Terrorism (Jersey) Law 1994. The second schedule to the draft Law sets out the derogation. There are no current reservations in respect of Jersey.

Article 2(1) of the draft Law provides that the Convention rights are to have effect for the purposes of the Law subject to any "designated" derogation or reservation, which at present is the one derogation referred to above. Articles 14 and 15 of the draft Law make provision for designating any future derogations or reservations for the purposes of the draft Law.

Interpretation of the Convention rights

Article 3 of the draft Law requires Jersey courts and tribunals to take account of the judgments, decisions or opinions of the institutions established by the Convention when determining a question which has arisen in connection with a Convention right.

Relationship Between The Convention Rights And Domestic Law

The Convention rights are, of course, concerned with subject matter already covered by domestic laws, be it legislation, (principal or subordinate) or the customary law. The draft Law therefore has to provide a mechanism for handling potential conflicts between these two bodies of law.

An interpretative model

The key question of principle to be addressed is the relationship between the Convention rights and Laws passed by the States and Acts of Parliament extended to or applying to the Island. Unlike directly applicable EU law, there is no requirement on states which are party to the European Convention on Human Rights to give the Convention rights precedence in domestic law (although they are not precluded from doing so). It would be consistent with Jersey's and the UK's tradition of parliamentary supremacy to protect primary legislation from being set aside by the courts on Convention grounds. Granting the courts power to strike down Laws and Acts of Parliament would have been at odds with our present constitutional arrangements and likely to draw the Royal Court into conflict with the States.

But the draft Law will operate on legislation by using the Convention rights as a powerful interpretative tool. Article 4(1) of the draft Law provides that "So far as it is possible to do so, principal legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights". This goes much further than the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will, once the draft Law comes into force, be required to interpret legislation so as to uphold the Convention rights unless the legislation is so clearly incompatible with the Convention that it is impossible to do so. This applies regardless of how the courts may have interpreted legislation before the draft Law comes into force. For example, the Royal Court would not be bound, even by a decision of the Judicial Committee of the Privy Council made before commencement, if it considered that that decision had given a provision of legislation an interpretation which was incompatible with the Convention rights, and that an alternative construction was possible which was compatible with those rights. The provision applies to both principal and subordinate legislation (terms which are defined in Article 1 of the draft Law), and to both past and future legislation; and it applies to all courts and tribunals. What is and is not principal legislation for the purposes of the draft Law is of central importance to the scheme of the Law. Note that Laws passed by the States, Acts of Parliament which apply directly to Jersey or are extended here by Order in Council and Church Measures are principal legislation.

It is expected that in the great majority of cases a court or tribunal will be able to construe legislation compatibly with the Convention rights. Occasions where there remains a conflict between domestic law and the Convention rights should be few. Nevertheless, the draft Law has to provide a mechanism for dealing with these conflicts when they do arise.

Incompatible principal legislation

As has been explained, the draft Law does not permit the courts to set aside principal legislation. It follows that if such legislation cannot be interpreted compatibly with the Convention rights it must nevertheless be applied. Article 4(2)(b) of the draft Law makes this point clear. But the draft Law enables certain courts to make a "declaration of incompatibility".

Declaration of incompatibility

Article 5 of the draft Law provides that the higher courts - the Royal Court, the Court of Appeal and the Judicial Committee of the Privy Council - will be able to make a declaration that a provision of principal legislation is incompatible with a Convention right. A declaration of incompatibility will not affect the continuing validity of the legislation, but it will draw attention to the incompatibility. It

should be noted that the Royal Court will not be able to make such a declaration in the course of a criminal trial. If it could, the trial could be interrupted and delayed while the procedure relating to declarations is followed. But a defendant in any criminal case is not prevented from asserting his Convention rights during his trial.

Although the States cannot be required to amend legislation which has been declared incompatible, it is likely that they would wish to do so.

Any individuals involved in the case which gave rise to the declaration of incompatibility will not automatically benefit from that declaration. The court will not suspend its decision in the case (or any other case involving that legislation) pending a response by the States to the declaration, but will determine the case in accordance with the law as it stands. However, legislation amending or repealing an incompatible Law can, of course, be made to take effect retrospectively, thus giving an opportunity for individuals affected by the incompatible legislation to pursue their own remedy.

Any individual who remained dissatisfied with the decision of the domestic court and/or the response from the States, would retain the right to petition the European Commission of Human Rights in Strasbourg claiming a violation of his or her Convention rights. Nothing in the draft Law removes a person's right to seek redress in Strasbourg once all domestic remedies have been exhausted.

It is because of the importance of the declaration of incompatibility that, as an exception to the general scheme of the draft Law, its use has been confined to the higher courts. Its importance is further reflected by Article 6 of the draft Law which entitles the Attorney General (or a person nominated by him) to be joined as a party to proceedings where a court is considering making a declaration. This will enable the Attorney to provide the Court with information and argument which may be relevant to its consideration of the compatibility of the legislation in question.

Incompatible subordinate legislation

The courts have no powers to set aside provisions of principal legislation (except where it conflicts with directly applicable EU law), but are able to quash or set aside subordinate legislation on *vires* grounds. Under the draft Law, the courts will, with one exception, similarly be able to disapply subordinate legislation if they cannot interpret it compatibly with the Convention rights. This is because the States and/or Committees will be acting unlawfully under the draft Law if they make subordinate legislation which is incompatible with a Convention right.

But a court could not set aside incompatible subordinate legislation where it is "inevitably incompatible", that is, where the terms of the parent statute are such that any subordinate legislation made under it must necessarily take a form which is incompatible with the Convention rights. In such a case, the higher courts could make a declaration of incompatibility which will usually lead to the amendment or repeal of the principal legislation.

Incompatible customary law

The draft Law does not make explicit provision in respect of the customary law. However, the courts will be obliged to modify the customary law to ensure that it is not incompatible with Convention rights. This arises from the second main way in which the Convention rights are given effect by the draft Law; the requirement on public authorities (including the courts, of course) not to

act incompatibly with the Convention rights. This is developed more fully below.

The Conduct Of Public Authorities And The States Assembly

The second main way in which the draft Law will give effect to Convention rights is through the requirement it places on public authorities, and in two specific cases, the States Assembly, to act compatibly with the Convention rights. The scheme, in outline, is that Article 7 of the draft Law makes it unlawful for public authorities (or the States Assembly in those two cases) to act in a way which is incompatible with a Convention right; Article 8 enables people to rely on the Convention rights in proceedings involving a public authority before a court or tribunal; and Article 9 enables the court or tribunal to provide a remedy where a public authority is found to have acted or to be about to act unlawfully or where the States Assembly, in those two cases, has acted unlawfully.

Public authority

What is a public authority for the purposes of the draft Law? This is an important question and the answer is not straightforward. A number of factors need to be taken into account.

Firstly, the Convention has its origins in a desire to protect the individual against abuse of power by the state, rather than to protect one individual against the actions of another. The draft Law, like the UK Act therefore provides that the Convention rights should be available in proceedings involving what might be very broadly described as "the state", but that they should not be directly justiciable in actions between private individuals.

Secondly, a wide-ranging definition of the state provides a correspondingly wide protection against an abuse of human rights. Accordingly, liability under the draft Law goes beyond the narrow category of the States administration, the Parochial authorities and the States and Honorary police which, on a minimalist view, constitute "the state" in Jersey.

Thirdly, the principle behind the UK Government's approach in its white paper, which is also the approach taken in the draft Law, suggests that liability in domestic proceedings should, so far as possible, lie with domestic bodies in respect of whose actions the United Kingdom is answerable in Strasbourg (although legislation which provides for challenges to actions of public authorities in domestic courts cannot exactly replicate the conditions in Strasbourg where it is the United Kingdom Government, not a particular body, which is charged with contravening its obligations, including its positive obligations, to guarantee the Convention rights).

Therefore, the draft Law, like the UK Act, approaches the issue by reference to the concept of a public function. After stating that it is unlawful for a public authority to act incompatibly with a Convention right (which, save for some exemptions relating to the making of legislation, includes a failure to act), Article 7 provides that a public authority includes a court or tribunal, and "any person certain of whose functions are functions of a public nature". The effect of this is to divide the world into three parts.

The first part contains organisations which might be termed "obvious" public authorities, all of whose functions are public. Examples of bodies likely to fall within this category are States' Committees and their administrative departments, the Parishes and the police forces. The Jersey Financial Services Commission, though independent of the States, exercises regulatory powers which are public functions and will also fall into this category. All the acts of such bodies must

comply with the Convention rights. The second part contains organisations with a mix of public and private functions. There are few of these in Jersey at present; perhaps the utility companies, to the extent that they are engaged in supplies to the public at large. Possibly, in the future, some incorporated States' departments such as Jersey Post, Jersey Telecoms or the Airport may be given some functions to perform on behalf of the States, in addition to acting as a commercial undertaking. The liability of these bodies, unlike those of "obvious" public authorities, is limited to their public acts - their private acts are excluded from the scope of Article 7. The third part contains bodies (such as most private businesses) which have no public functions and which fall outside the scope of Article 7 of the draft Law.

It will be for the courts to determine, in the cases that come before them, whether or not an organisation is a public authority. In some cases it will be obvious. In others the courts will need to consider whether an organisation has any public functions. The concept of what is a public function is familiar to the courts, notably in the context of judicial review, and it is expected that they will take as a starting point the kind of tests applicable in determining susceptibility to review in that context. Looking at the nature of the body and the activity in question, they might consider, for example, whether but for the existence of a non-statutory body the States would intervene to regulate the activity in question; whether the States had provided any under-pinning for the activities of the body; and whether the body exercised extensive or monopolistic powers.

An alternative approach to the question of what constitutes a public authority might have been to provide a list of such organisations. This approach would provide greater certainty, but was rejected because it has several serious weaknesses in the present context. Firstly, given the wish to have a wide-ranging definition of "the state", it would be impossible to produce a list which was comprehensive, fair and accurate. Secondly, such a list would be too static - ideas about what constitutes a public authority change over time. Thirdly, having a specific list of bodies (or having a general definition with specified bodies exempted from it) would not be consistent with the generalist nature of the draft Law.

Instead, the approach taken in the draft Law, following that in the UK Act, aims to combine the best of both worlds; a principled definition of a public authority, and the sensitive application of that principle by the courts, taking account of the individual circumstances of each case.

Two further points about the operation of Article 7 of the draft Law should be noted. Firstly, there are some limits to the liability created by it. As mentioned above, consistent with maintaining the concept of parliamentary supremacy, the States Assembly (i.e. the States sitting as a legislative assembly and not the States as an administration) is largely outside the scope of Article 7. The courts are given power to intervene in only two of its functions and then only after the event. Thus, even though the States Assembly is not made a public authority under the draft Law, Article 7(4) makes it unlawful for the Assembly to make subordinate legislation (i.e. regulations made under a Law) and to make decisions to acquire land by compulsory purchase which are incompatible with a Convention right. The States Assembly has other functions which are not of a strictly parliamentary nature - appointments to certain offices, for example - which will be outside the scope of the Law but which can be added if at a later stage that seems to be necessary (Article 7(5)). If the States Assembly were not given this privilege the way might be open to challenge in the courts the action of the States in enacting legislation which was thought to be incompatible with the Convention rights. For similar reasons, public authorities do not act unlawfully if they are acting so as to give effect to incompatible principal legislation. Otherwise, Laws and Acts of Parliament having effect in Jersey which were incompatible with the Convention rights could effectively be nullified since public

authorities could not put them into operation. Overall, then, the fundamental position of the States as a quasi-sovereign body is preserved in so far as that is consistent with the requirements of the Law to ensure that Convention rights are observed. With the exception of the matters mentioned above, the courts will, as now, be unable to interfere in the business of the Assembly. Subject to those two exceptions, the draft Law puts the States in the same position, in this respect, as the UK Parliament under the Human Rights Act 1998.

Secondly, making the courts and tribunals public authorities for the purposes of the draft Law has a number of important consequences. They will be required to comply with the Convention rights in all proceedings before them, even if neither party is a public authority. That means that the draft Law is going to have at least an indirect impact on private law rights. The Courts will be required to apply the law generally in a way which is compatible with the Convention rights except where statute otherwise precludes this course. As noted above, that has implications for the doctrine of precedent and for the development of the customary law.

Relying on the Convention Rights

If people believe that a public authority has violated their Convention rights, what can they do about it? Article 8 of the draft Law offers them two avenues of redress. They may rely on the Convention rights in the course of any other proceedings which involve a public authority and to which they are a party. So, for example, in defending criminal proceedings, or in contesting any civil action involving a public authority, or in an appeal against the decision of the court or tribunal, or in seeking judicial review, it will be possible to add arguments based on the Convention rights to any other arguments being adduced. Alternatively, they may bring proceedings against a public authority on the sole ground that it has acted unlawfully, that is, in a way which is incompatible with the Convention rights. Rules of court will be made to determine the appropriate court or tribunal for the bringing of cases in the latter category.

The draft Law does not specify which of these two routes is to be taken in preference to the other in any particular case, but the expectation is that people will initiate court proceedings against a public authority on Convention grounds alone only where no existing means of legal challenge is open to them.

The draft Law is designed to enable persons to rely on their Convention rights before the courts in the Island in the same circumstances as they can rely upon them before the Strasbourg institutions. Article 8 of the draft Law accordingly mirrors the approach taken in Strasbourg: reliance on the Convention rights is restricted to the victims (or potential victims) of unlawful acts and the definition of a "victim" for this purpose is tied to Article 34 of the Convention (as amended by the 11th Protocol).

Although Strasbourg case-law provides, in several respects, a fairly wide definition of a "victim", the "victim test" is nevertheless a narrower one than the sufficient interest test currently applicable in judicial review. Interest groups will not therefore be able to bring cases on Convention grounds unless they themselves are a victim of an unlawful act. But it will still be possible for such groups to assist and advise persons who bring an action themselves, and perhaps to make submissions to the court, for example through the filing of *amicus* briefs.

Remedies

Article 9 of the draft Law provides that if a court or tribunal finds that a public authority has acted unlawfully, it will be able to award whatever remedy within its normal powers seems to it just and appropriate. Depending on the circumstances, this might include ordering a person's release from detention or ordering the payment of compensation. In deciding whether to award compensation and the amount of any award, courts and tribunals will be required to take into account the principles applied by the European Court of Human Rights. The European Court does not automatically award compensation and, when it does, the awards tend to be modest.

Judicial Acts

Article 10 of the draft Law makes certain qualifications to the operation of Articles 8 and 9 of the draft Law as applied to the judicial acts of a court or tribunal. In essence, the purpose of the Article is to protect the special rules existing under our law in relation to judicial acts, so far as this can be done consistently with the Convention rights. The general position that damages cannot be awarded against courts in respect of judicial acts is maintained, but damages may be awarded against the States to the extent required by Article 5(5) of the Convention (which requires an enforceable right to compensation in respect of unlawful detention).

Other Provisions Of The Draft Law

Other measures to promote human rights

Article 16 places a requirement on States' Committees to publish a statement on the compatibility with the Convention rights of any *Projets de Loi* which they present to the States. A statement of compatibility will not, of course, determine in law whether or not legislation is compatible with the Convention rights: that will be up to the courts. But it will mean that Committees have to make their legislation compatible as far as they are able to do so, or else have a very good reason which the Committee can give to the States to justify its possible incompatibility.

No diminution of existing rights

Article 11 saves more generous rights of individuals which are available apart from the Human Rights (Jersey) Law. This mirrors at the domestic level Article 53 of the Convention (as it will be once the 11th Protocol comes into force).

The churches and the media

Churches may, in a very limited number of circumstances, be public authorities for the purposes of the draft Law, for example, when conducting marriages or running schools. Courts and tribunals will be required by Article 13 of the draft Law, when determining any question which might affect the exercise by a religious organisation of the Convention right to freedom of thought, conscience and religion (Article 9 of the Convention) to have particular regard to the importance of that right. The intention is to highlight the Strasbourg case-law which is to the effect that religious organisations as well as individuals are able to rely on Article 9 rights. They can receive protection from those rights as against individual members who seek to act in a way which is contrary to the preponderant views of that organisation. This provides added reassurance that the draft Law will not afford protection to individuals who dissent from the mainstream teachings of the religious organisation to which they belong, while denying it to the religious organisation itself.

In relation to the media, in case Article 8 of the Convention (right to respect for private and family life) might make it easier to obtain injunctions restraining publication and might inhibit investigative journalism, Article 12 of the draft Law, among other things, will require courts, when considering granting a remedy which might affect the Article 10 right to freedom of expression, to have particular regard to the importance of that right. Again, this reflects Strasbourg jurisprudence which has consistently given a high value to Article 10.

Some Practical Implications Of The Human Rights (Jersey) Law

General impact on judicial system

At one level, the straightforward concept underlying the draft Law and the relative simplicity of its design might suggest that its effect will be correspondingly limited. The draft Law does not create new substantive rights. It does not allow our courts to strike down principal legislation. Nor does it create a Constitutional Court to determine Convention issues but, wherever possible, utilises existing court procedures to resolve Convention arguments. There are, for example, no fast-track referral mechanisms to determine Convention issues.

Implanting the Convention rights in the heart of the judicial system will, however, make them easily accessible to individuals. It is to be expected that, especially in the early days before a body of precedent is built up, extensive reliance will be placed on the Convention rights - for example, by defendants in criminal cases, and by individuals making applications for judicial review. In volume of business terms, at least, the draft Law is therefore likely to have a considerable effect - not so much in an increased number of cases, but in more legal arguments being raised in individual cases.

Everyone involved with the judicial system will be affected by the Convention rights. It will be possible for litigants to rely directly on them in any proceedings involving a public authority before any domestic court or tribunal. Furthermore, because the courts are themselves public authorities, they will be required to apply the Convention rights in determining all the cases they hear. All courts and tribunals, and all the lawyers appearing before them, will need to become familiar with the Convention rights, and to acquire an understanding of the concepts which Strasbourg uses to interpret the Convention. For example, the concept of equality of arms, which is the Strasbourg equivalent of a level playing field, is particularly relevant to criminal cases. The concept of proportionality, namely that any interference with a Convention right has to be proportionate with the aim pursued is also important, as is the interpretation of the term "necessary in a democratic society" which is included in Article 8 to 11 of the Convention as one of the requirements that must be met if the rights in those Articles are to be restricted in some way.

Impact on Government lawyers and administrators

The effects of the Human Rights Law will be widely felt by States' departments. Anyone working in an area of the States administration preparing new legislation will have to be aware of the Convention. Anyone whose work is in an area governed by legislation (a much wider group of people) will also have to be aware of the Convention. So too will anyone taking, or advising on, executive decisions; and anyone responsible for non-departmental public bodies, whose actions will also be subject to the terms of the draft Law.

Importantly, the draft Law will place a general requirement on public authorities not to act incompatibly with the Convention rights, so everyone in the States administration (as a public

authority) should acquire some awareness of the Convention.

The draft Law is expected to heighten awareness of the Convention rights outside the States administration. This applies most obviously to those working in the legal profession, but members of the public are also likely to become much more ready to raise Convention points in their dealings with public officials. Although the draft Law is not creating any new substantive rights, it will inevitably make the existing Convention rights a more common feature of everyday life. Committees and States' departments and other public authorities will need to be in a position to respond to this development.

How relevant are the Convention rights?

For some Committees and States' departments, and for the departments concerned with the administration of justice, the relevance of the Convention rights will be immediately apparent. For example, the Home Affairs Committee with responsibilities for the police, immigration and prison, clearly has a strong interest in a number of the Convention rights, such as Article 3 (prohibition of torture), Article 5 (right to liberty and security), Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life). For some other Committees and departments, the relevance of the Convention rights may appear less obvious, but the reach of those rights is greater than initial thoughts might suggest.

Article 6, for example, has a very wide application. The right to a fair trial applies not only to criminal charges but any case involving the determination of a person's civil rights and obligations. Although current Strasbourg case law is to the effect that internal procedures relating to civil servants are not covered by Article 6, many States' departments have dealings with the public that involve the determination of such rights and obligations and which are therefore covered by that Article. A second example is Article 10 on the right to freedom of expression. This will be relevant to the Human Resources Committee and departmental personnel units on issues such as the handling of whistleblowers. More generally, as an "obvious" public authority, all the acts of a States' Committee or department will need to comply with the Convention, including acts on employer-employee issues. Another important right is that in Article 1 of the first protocol (protection of property). Again, many Committees and departments are involved in activities which impinge upon individuals' use of their property.

Much of the activity of the States administration is therefore in areas where the Convention and hence the draft Law is applicable. Administrators and lawyers working in those areas will need to be familiar with how the Convention rights impact on their area of work.

Convention concepts

The concepts of equality of arms and proportionality have been mentioned in relation to those involved in the judicial process. Committees and departments will also need to become familiar with these concepts, which are likely to have a significant impact on the way the courts consider the actions of the States administration. A further concept is that of legal certainty. Any infringement of the rights set out in Articles 8 to 11 of the Convention must, among other things, be "in accordance with the law". Committees and departments will have to be satisfied that actions which impinge on these rights meet this requirement, which means that there must be some specific legal rule or regime authorising the interfering act. The European Court of Human Rights has been reluctant to treat administrative guidelines as "law" for this purpose. Departments will, for example, need to

consider whether they may be vulnerable to challenge in areas where they operate purely under non-statutory guidance. Even where the activity in question does have a legal basis, the rule or regime will meet the Convention requirement only if it is accessible and sufficiently precise to enable an individual potentially affected to regulate his conduct in conformity with it.

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[1] *R v DPP ex parte Kebeline*, per Lord Steyn, October 28th, 1999, English unreported

[2] Cmnd 3782

