Introduction

Under the constitution of the United Kingdom, all actions of government are undertaken in the name of the Crown. Any account of the prerogative is an account of power, and the prerogative, historically and contemporarily, concerns the power of the Crown.[1] The prerogative today represents one of the most intriguing aspects of the unwritten constitution. In order fully to appreciate the meaning of the term 'the Crown', an analysis of both who in fact exercises various powers in the name of the Crown, and the source of the power exercised, needs to be examined. The question to be asked is: is the power (to be exercised) a prerogative power or is it the outcome of statute? As will be seen, there is no certainty as to either the existing prerogative powers or the manner in which these may be extinguished. It is, however, clear that no new prerogative powers can be created.

The Prerogative Defined

Blackstone defines the prerogative in his *Commentaries* (1765–69) as:

> . . . that special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology (from *prae* and *rogo*) something that is required or demanded before, or in preference to, all others.

Dicey, on the other hand, describes the prerogative in the following manner:

> . . . the residue of discretionary or arbitrary authority, which at any time is legally left in the hands of the Crown . . . Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of this prerogative. [1885, p 424]

From these differing definitions, the following can be deduced:

(a) that these are powers which are inherent in, and peculiar to, the Crown;
(b) that the powers derive from common law;
(c) that the powers are residual;
(d) that the majority of the powers are exercised by the executive government in the name of the Crown; and,
(e) that no act of Parliament is necessary to confer authority on the exercise of such powers.

Joseph Chitty, whose work remains the most comprehensive account of the prerogative, explains the need for prerogative power in the following manner:

> The rights of sovereignty, or supreme power, are of a legislative and executive nature, and must, under any form of government, be vested exclusively in a body or bodies, distinct from the people at large. [1820, p 2]

In Chitty's analysis, the power of the King is but part of a reciprocal relationship between monarch and subject. To the King is owed a duty of allegiance on the part of all subjects; to the subjects is owed the duty of protection.

1 On the distinctions between the monarch and the Crown, see Marshall, 1971, pp 17–24.

The Prerogative before 1688

Before 1688, the King exercised powers relating to Parliament, law making and the administration of the courts, the regulation of trade, taxation and defence of the realm and miscellaneous other prerogatives. Principal among these powers were the following:

- The King would summon Parliament and prorogue it. The King could suspend Parliament's sittings and dissolve it. The absoluteness of the King's power came to a head in the reign of Charles I (1625–49) when Charles confronted Parliament over taxation to meet the cost of war, imprisoning over 70 people who refused to pay the forced loan, including the 'five knights'[2] who sought a writ of *habeas corpus* against the King. The conflict between the King and Parliament came to a head when in 1629 Charles dissolved Parliament and there commenced an 11-year period of personal monarchical rule. In 1641, under the leadership of Pym, the 'Grand Remonstrance' was drafted – listing the grievances of the country under the rule of prerogative. While the Commons was divided over the Remonstrance, it represented a starting point in history, one which was to lead to the Civil War, Charles's execution and the rule of Oliver Cromwell under the only Republican constitution Britain has ever experienced.[3]
- The King claimed the right to legislate by 'proclamation', thereby usurping Parliament's law making role. This power was challenged in the reign of James I (1603–25) in the **Case of Proclamations** (1611), in which Sir Edward Coke CJ declared that:

  > . . . the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm . . . the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not. . . . Also, . . . the King hath no prerogative but that which the law of the land allows him.

- The King's assent was needed for the enactment of statutes, but he also had the power to dispense with statutes and suspend their application.[4] The conflict between Crown and the courts in the seventeenth century is illustrated by the cases of **Thomas v Sorrell** (1674) and **Godden v Hales** (1686). In **Thomas v Sorrell**, it was declared that the King could not dispense with a penal law made for the good of the public. However, in **Godden v Hales**, the court accepted that the King could dispense with a penal law – under specific circumstances – where that law fell within his jurisdiction.
- It was within the King's prerogative to establish new courts of justice. The Court of Star Chamber, exercising extensive criminal jurisdiction with little of the formality of judicial proceedings and without the use of juries, was established either under the Statute of 1487 or under the Crown's inherent prerogative: doubt exists as to its source. Unlike the ordinary courts, the Court of Star Chamber used torture. It became one of the most feared and powerful weapons under the control of the Crown until its abolition in 1641.
- The King's claim to dispense justice in his own right and without the judges was dispelled in 1607. In **Prohibitions Del Roy (Case of Prohibitions)** (1607), the King sought to settle a dispute concerning land. In the Resolution of the Judges, Coke declared:

  > . . . that the King in his own person cannot adjudge any case, either criminal, as treason, felony, etc, or betwixt party and party, concerning his inheritance,

For further details, see the Website.

2 **Darnel's Case** (1627).
3 See Lockyer, 1985, Chapters 12–13.
4 **Case of Proclamations** (1611).

> chattels, or goods, etc, but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England; and always judgments are given . . . so that the Court gives the judgment . . .

When, in 1617, the King ordered the Court of King's Bench to adjourn proceedings until he had been consulted, Chief Justice Coke refused, declaring that:

> Obedience to His Majesty's command to stay proceedings would have been a delay of justice, contrary to the law, and contrary to oaths of the judges.[5]

Coke was dismissed from the Bench.

- The King claimed the power to detain a subject free from interference by the courts. Whether a writ of *habeas corpus* would lie against the King was determined in 1627. In ***Darnel's Case*** (the ***Five Knights' Case***) (1627), it was held that, where the King detained a prisoner under special order, the court would not look behind the order. Thus, while the King could not determine cases, he could nevertheless hold a subject free from interference by the judges. The Petition of Right 1628 declared such power to be unlawful, and in 1640, the Habeas Corpus Act guaranteed that *habeas corpus* would lie against the Crown.
- Historically, much of the commerce and trade of the country was under the prerogative of the Crown, but such a power was effectively abolished by statute.
- The King had a duty to protect the realm, a duty which encompassed the powers to restrict imports of raw material of war and the right to erect ports and havens, beacons and lighthouses.
- The Crown's power of taxation is inextricably linked to the notion of the King as ultimate lord of all land. The King was the largest landowner in the Kingdom and exercised his right to collect revenues from the land. In addition, the King received profits from legal proceedings in the form of fees paid by litigants and fines. Pardons were also sold. The granting of supply to the King by Parliament from direct taxation had been established in 1215, from which time it was accepted that the King had no power to levy direct taxation without parliamentary consent.[6] The position of indirect taxation was, however, unclear. The power to regulate trade, including the power to establish, open and close ports, was within the royal prerogative. Accordingly, it could be argued that the correlative power to levy taxes on imports and exports was within the power of the Crown. Indirect taxation was in issue in the ***Case of Ship Money*** (***R v Hampden***) (1637). Hampden had refused to pay taxes levied by Charles I to raise money for the navy in times of emergency. The King argued that it was for the Crown to determine whether or not an emergency situation existed and that this determination was conclusive of his right to exercise his prerogative power to raise revenue. The courts upheld the power of the Crown. The Shipmoney Act of 1640 reversed the decision, and Article IV of the Bill of Rights 1689 declared it illegal for the Crown to raise money without parliamentary approval.

The Bill of Rights 1689, provided, *inter alia*, that there should be regular meetings of Parliament; that elections should be free; that the Crown's power to raise taxation[7] was subject to Parliament's approval, as was the power to maintain an army; that the powers of suspending or dispensing with laws by the Crown[8] were illegal; and, of the greatest significance, that the

5 ***John Colt and Glover v Bishop of Coventry and Lichfield*** (the ***Commendam Case***) (1617).
6 In the reign of Edward I, 1271–1307.
7 ***R v Hampden*** (1637).
8 ***Godden v Hales*** (1686).

'freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of parliament'.[9]

From this time, the supremacy of Parliament over the Crown was established and the prerogative powers of the Crown continued in existence or were abolished or curtailed as Parliament determined. No new prerogative powers may be claimed by the Crown: as Diplock LJ stated in ***BBC v Johns*** (1965): '. . . it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative.'

Miscellaneous prerogatives included the right to raise revenue from the demesne lands of the Crown,[10] to the ownership of tidal riverbeds, and to the land beneath a non-tidal riverbed – provided that it had not become a dry riverbed, whereupon the soil is equally owned by the owners of the adjoining banks. Equally, the King, by virtue of his prerogative, was owner of the shores of seas and navigable rivers within his dominions. The ancient right of the King to wild creatures, to franchises of forest, 'free chase', park or free warren have been abolished[11] with the exception of the right to royal fish (sturgeon) and swans, which is expressly reserved by the 1971 Act. Additionally, the Crown had the right to treasure trove, now regulated under the Treasure Act 1996.[12]

The Prerogative Today

The constitutional questions requiring answer include those relating to the relationship between statute and prerogative and the control, judicial or political, of the prerogative. The most significant question which continues to intrigue and concern constitutional theorists today relates to the very existence and scope of the powers themselves, together with the constitutional implications of this ill-defined reservoir of power. As Maitland observed, and as remains true in the twenty-first century, examination of the prerogative is:

> . . . set about with difficulties, with prerogatives disused, with prerogatives of doubtful existence, with prerogatives which exist by sufferance, merely because no one has thought it worthwhile to abolish them. [1908, p 421]

Under the United Kingdom's constitutional monarchy, the Queen is part of the legislature: Parliament comprises the Crown, Lords and Commons. The Queen is the 'fountain of justice' – and while the Queen has no power to make laws or suspend laws or to act in a judicial capacity,[13] the entire administration of justice is conducted in the name of the Crown.[14] The Queen is Supreme Head of the Church of England.[15] The Queen is Head of State in relation to foreign affairs. The Queen is head of the executive, and all acts of government, whether domestic or foreign, are conducted in the name of the Crown. The right to summon Parliament remains a legal power vested in the Crown. The Queen is the Fountain of Honour, and all honours in the United Kingdom are conferred by the Crown.

9 Bill of Rights, 1689, Article IX, discussed in Chapter 17.
10 Chitty, 1820, p 206.
11 Wild Creatures and Forest Laws Act 1971.
12 See MacMillan, 1996, and ***Attorney General of Duchy of Lancaster v GE Overton (Farms) Ltd*** (1982). Treasure found must be reported within 14 days to the local coroner. Failure to do so will be a criminal offence. A Treasure Valuation Committee has been established which has the duty to value treasure and advise on *ex gratia* payments to the finder.
13 ***Case of Proclamations*** (1611); Bill of Rights 1689; ***Case of Prohibitions*** (1607), respectively.
14 See Blackburn, R (2004) 'Monarchy and the Personal Prerogatives' [2004] PL 546.
15 Act of Supremacy 1558. See Leigh, I (2004) 'By Law Established? The Crown, Constitutional Reform and the Church of England' [2004] PL 266.

While regal powers are exercised in the name of the Crown by the government of the day, the Crown nevertheless retains important residual powers which are discussed below. It must also be recognised that a few powers remain the personal prerogative of the Crown. Illustrations include the grant of honours such as the Order of Merit, and the Orders of the Garter and Thistle. More importantly, there still remains the prerogative notion that the Crown never dies and that the Crown is never an infant (thus ensuring continuity of monarchy), and that the Crown can 'do no wrong', thus placing the Queen outside the jurisdiction of the courts and guaranteeing immunity from prosecution in her own courts. Beyond these limited powers and immunities, the sovereign has, in the words of Bagehot (1867): '. . . under a constitutional monarchy such as ours, three rights – the right to be consulted, the right to encourage, the right to warn.' In legal theory, however, the position is much different. As Bagehot stated:

> Not to mention other things, she could disband the army [by law, she cannot engage more than a certain number of men, but she is not obliged to engage any men]; she could dismiss all the officers, from the General Commander in Chief downwards; she could dismiss all the sailors too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every parish in the United Kingdom a 'university'; she could dismiss most of the civil servants; she could pardon all offenders. In a word, the Queen could by prerogative upset all the action of civil government within the government, could disgrace the nation by a bad war or peace, and could, by disbanding our forces, whether land or sea, leave us defenceless against foreign nations. [1867, 'Introduction' and pp 287–88]

In order to understand the power of the Crown, it is necessary to look beyond the superficial phrase 'in the name of the Crown'. The actual power which is exercisable by the Crown is limited in two ways. First, by convention, the majority of powers are exercised by Her Majesty's government or Her Majesty's judges in her name. Second, the existence and scope of a purported prerogative power is subjected to the scrutiny of the courts: 'The King has no power save that allowed by law.'[16] However, that should not be considered as equivalent to a power to control the prerogative.[17]

The Prerogative Illustrated

Before examining the nature, scope and constitutional significance of the prerogative, some examples are necessary to indicate the areas of power which fall under the prerogative. Under the United Kingdom's unwritten constitution, there exists no formal and agreed text as to the prerogative. In order, therefore, to ascertain the contents of the prerogative, an examination of the historical attributes of the Crown and the attitude of the courts to the prerogative is required. It is paradoxical – but undeniable – in a modern democracy that there is no comprehensive, authoritative 'catalogue' of prerogative powers.[18]

To make an analysis of prerogative powers manageable, they may be separated into two categories:[19] those relating to foreign affairs and those relating to domestic affairs. Under foreign affairs can be subsumed:

16 ***Case of Proclamations*** (1611)
17 See ***Council of Civil Service Unions v Minister for Civil Service*** (1985), discussed below, pp 103–104.
18 The most recent authoritative account remains that of Chitty, 1820.
19 As does Blackstone, in his *Commentaries*.

- the power to make declarations of war and peace;
- power to enter into treaties;
- the recognition of foreign states;
- diplomatic relations; and
- disposition of the armed forces overseas.

Within the domestic category falls:

- the summoning of Parliament;[20]
- appointment of ministers;
- royal assent to Bills;
- the granting of honours;
- defence of the realm;
- the keeping of the peace;
- the protective jurisdiction of the courts in relation to children: *parens patriae*;
- the power to stop criminal prosecutions – *nolle prosequi*;
- reduction of sentences;
- pardoning of offenders; and
- the right to royal fish and swans.

It can be seen from this list, which is by no means exhaustive, that the powers are wide and diverse.

The Prerogative and Domestic Affairs

The dissolution of Parliament

Prior to a general election being held, it is necessary to bring the life of the existing Parliament to an end. This is done through the dissolution of Parliament. Prior to the Fixed-term Parliaments Act 2011, the Crown dissolved Parliament under the royal prerogative at the request of the Prime Minister. This power gave rise to many doubts and criticisms. The main political criticism was that the Prime Minister could choose the date of a general election when it most favoured the re-election of the government. The Coalition government formed in 2010 introduced a fixed five-year parliamentary term. The Fixed-term Parliaments Act 2011 places the dissolution of Parliament on a statutory basis.

The rules relating to the dissolution of Parliament under the Fixed-term Parliaments Act 2011 are discussed in Chapter 13. Discussion of the Crown's former powers in relation to the dissolution of Parliament is on the companion website.

Appointment of Prime Minister

In constitutional theory, the Queen – under the royal prerogative – may appoint whomsoever she pleases to the office of Prime Minister.[21] In practice, the position is governed by convention and the Queen must appoint the person who can command a majority in the House of Commons; this, under normal circumstances, will be the leader of the political party which secures the greatest number of parliamentary seats at a general election. Several differing

20 Note that prior to the Fixed-term Parliaments Act 2011, the dissolution of Parliament was regulated under the royal prerogative.
21 See, *inter alia*, Jennings, 1959a; Marshall and Moodie, 1971; Laski, 1951; Brazier, 1990, Chapters 1 and 2; Marshall, 1984, Chapter II.

Introduction

On the philosophy of rights see the Website and see Chapter 3 for an introduction to Social Contract theory.

The protection of the rights and freedoms of citizens and others within their jurisdiction is a fundamental duty of the state. In the majority of democratic states, fundamental rights are defined and protected by law under a written constitution. Under the United Kingdom's largely unwritten (or uncodified) constitution, rights and freedoms have traditionally been protected either by individual Acts of Parliament passed to meet a particular need[1] or by the judges in developing the common law.

One response to the ravages of the Second World War was the formation of the Council of Europe. Under its authority the European Convention on Human Rights and Fundamental Freedoms were designed to guarantee the protection of basic rights against the state. The majority of Member States (formally High Contracting Parties) – of whom there are now 47 – either had a written constitution which protected rights or they had incorporated the Convention rights into their law. For reasons discussed below, the British government remained reluctant, until 1997, to make Convention rights directly enforceable before the domestic courts. Accordingly, until the Human Rights Act 1998 Convention rights could only be enforced before the Court of Human Rights in Strasbourg.[2]

In this chapter we consider:

- the working and scope of the European Convention as enforced by the European Court of Human Rights; and
- the Human Rights Act 1998, its structure and case law.

The Emergence of the Constitutional Protection of Rights

The attempt to protect human rights on an international level began with the founding of the League of Nations after the First World War and the imposition of certain safeguards of human rights in peace treaties negotiated after the war for the protection of minorities. It was not, however, until after the Second World War that the international community became convinced of the real and pressing need to protect and promote human rights as an integral and essential element for the preservation of world peace and co-operation. The United Nations[3] provided the appropriate forum for international quasi-legislative activity. In 1948, the Universal Declaration on Human Rights was adopted, supplemented by two implementing international covenants in 1966: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Taken together, these documents represent an international Bill of Human Rights. Inspired by the United Nations Declaration and Covenants, many other regional conventions were drafted, for example the European Convention on Human Rights and Fundamental Freedoms 1950, the American Convention on Human Rights 1969 and the African Charter of 1987.[4]

Rights and Freedoms in Britain

It has long been a paradox that the United Kingdom – viewed as a liberal democratic state – should have no comprehensive written Bill of Rights.[5] This is especially so given that the

1 For example the Race Relations Acts prohibiting discrimination. See further Chapter 19.
2 The Human Rights Act 1998 came into effect in Northern Ireland and Scotland in 1998, in England and Wales in 2000.
3 Which superseded the League of Nations in 1945.
4 See also the Hong Kong Bill of Rights based on the UN Covenant on Civil and Political Rights.
5 The Bill of Rights 1689, it will be recalled, was concerned with constitutional arrangements between the Crown and Parliament, not with the rights of individuals.

United Kingdom has been responsible for restoring independence to many former colonies and dominions and, in so doing, has conferred upon those states both a written constitution and a Bill of Rights. The Human Rights Act 1998 marks a significant constitutional change in relation to citizens' awareness about rights, and their protection by judges in the domestic courts.[6] The Act and its implications are considered later in this chapter. Prior to incorporation of Convention rights, the judges used the Convention as an aid to interpretation to assist in resolving ambiguities in domestic law. However, given the supremacy of Parliament, the judges previously had no jurisdictional basis on which they could employ the Convention to protect rights. The Human Rights Act confers this jurisdiction, requiring the courts not only to protect Convention rights, but to make 'declarations of incompatibility' wherever domestic law is judicially seen to conflict with Convention rights. By this means, Parliament preserves its supremacy over changes in the law which may be required by judicial evaluation of domestic law against the provisions of the Convention. Before considering the Human Rights Act, however, it is necessary to understand the status and working of the European Convention and the scope and application of the Convention rights which the Act incorporates.

PART A: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND THE HUMAN RIGHTS ACT 1998

The European Convention on Human Rights and Fundamental Freedoms

Introduction

Europe was one of the principal theatres of the Second World War, following which there was felt to be a great need for European political, social and economic unity. Those objectives were perceived to be promoted, in part, by the adoption of a uniform Convention designed to protect human rights and fundamental freedoms. In 1949, the Council of Europe was established and the Convention on Human Rights ratified by signatory states (formally High Contracting Parties) in 1951, coming into force in 1953.[7] Despite having been instrumental in the drafting of the text of the Convention, the British government had strong reservations about the Convention and its impact on British constitutional law. As a result of such reservations, it was not until 1965 that the government gave individuals the right to petition under the Convention.

The influence of the Convention before the Human Rights Act 1998[8]

The attitude of the United Kingdom courts towards the Convention was, in the past, the traditional one adopted in relation to treaties. Treaties form part of international law and have no place within the domestic legal order unless and until incorporated into law.[9] The courts

6 See the Consultation Paper, *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into United Kingdom Law*, 1996, London: Labour Party. Note that technically the Human Rights Act 1998 does not incorporate the Convention, but rather makes Convention rights enforceable before the domestic courts.
7 For a succinct history of the Convention, see Lester (Lord), 'European human rights and the British constitution', in Jowell and Oliver, 2000.
8 See Browne-Wilkinson, 1992; Bingham, 1993; Laws, 1993.
9 See **Kaur v Lord Advocate** (1980).

regarded the Convention as an aid to interpretation but had no jurisdiction directly to enforce the rights and freedoms under the Convention.[10] This could, however, of itself be significant. For example, in ***Waddington v Miah*** (1974), Lord Reid stated – having referred to Article 7 of the Convention which prohibits retrospective legislation – that 'it is hardly credible that any government department would promote, or that Parliament would pass, retrospective criminal legislation'.[11]

R v Secretary of State for the Home Department ex parte Brind (1991) also illustrates the influence of the Convention. The Home Secretary had exercised his discretionary power under section 29(3) of the Broadcasting Act 1981 to issue a notice prohibiting the broadcasting on television or radio of the voices of any person speaking on behalf of an organisation proscribed under the Prevention of Terrorism (Temporary Provisions) Act 1974. The words used could be reported through the medium of an actor, provided that the voice of the spokesperson was not broadcast. The challenge to this prohibition was, in the House of Lords, based primarily on the argument that it was contrary to the United Kingdom's obligations under Article 10 of the Convention, guaranteeing freedom of expression. It was argued that the Home Secretary should have had regard to the Convention in exercising his discretion under the Broadcasting Act.

The House of Lords was prepared to accept that there was a presumption that Parliament would enact laws that were in conformity with the Convention. Accordingly, it was accepted that where a statute permits two interpretations, one in line with the Convention, the other contrary to it, the interpretation which fitted with the Convention should be preferred. In *Brind*, the court could find no ambiguity in section 29(3) of the Broadcasting Act.[12] The only basis for challenge therefore was that the Home Secretary's decision was unreasonable in the ***Wednesbury***[13] sense: that the decision was so irrational or unreasonable that no rational or reasonable person could have reached the same decision.

A rather different approach to the Convention was adopted in ***Derbyshire County Council v Times Newspapers Ltd*** (1993), concerning the question of whether a local council could bring an action in libel against newspapers (see further below). In the Court of Appeal, Butler-Sloss LJ was forthright in declaring that 'where there is ambiguity, or the law is otherwise unclear as so far undeclared by an appellate court, the English court is not only entitled but . . . obliged to consider the implications of Article 10'. The House of Lords, however, while arriving at the result achieved in the Court of Appeal – namely that local authorities enjoyed no standing to sue in defamation – did so without relying on Article 10 of the Convention, but relying on the common law.

Accordingly, there existed (before the Human Rights Act 1998 came into force) no obligation on courts to rely on the Convention if a source of authority could be found within domestic law. Increasingly, however, it appeared that – within certain limits – the judiciary expressed willingness to protect individual liberties and, where a statute was ambiguous, or silent, to construe the statute strictly and in favour of the liberty of the citizen.

However, there were limits to the extent to which judges were able to protect rights, as the case of ***R v Inland Revenue Commissioners ex parte Rossminster Ltd*** (1980) revealed.[14] In ***Rossminster***, the House of Lords ruled that, where the meaning of a statute is clear and unambiguous, the court possessed no jurisdiction to go against its unambiguous words, and was under a duty to uphold the will of Parliament by giving effect to its words.[15] In both ***Attorney***

10 ***Waddington v Miah*** (1974).
11 See further below for the (retrospective) War Crimes Act 1991.
12 On the post Human Rights Act 1998 position and ambiguity, see Lord Irvine, 1998.
13 ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** (1948). See further Chapter 24.
14 See also ***R v Kelly, R v Sandford*** (1998); and ***R v Secretary of State for the Home Department ex parte Hussain Ahmed*** (1998).
15 See also ***R v DPP ex parte Kebeline*** (1999).

General v BBC (1981) and ***Attorney General v Guardian Newspapers (No 2)*** (1990), however, the House of Lords confirmed that it was the duty of the courts to have regard to the international obligations assumed under the Convention, and to interpret the law in accordance with those obligations.

Institutions and procedure under the Convention

The Council of Europe, under which the Convention operates, is constitutionally distinct from the European Union. The Council was founded in 1949, inspired by the United Nations' Universal Declaration of Human Rights of 1948. The Committee of Ministers is the political body, consisting of one representative from each state government (Foreign Ministers). The Parliamentary Assembly of the Council of Europe (PACE) has 636 members representing the countries belonging to the Council of Europe. The Assembly has power to investigate human rights issues, to make recommendations and to advise. Its work is valuable and bodies such as the Parliament of the European Union and other European Union institutions refer to its work. The Assembly elects the Secretary General of the Council of Europe and the judges of the Court of Human Rights. The Court of Human Rights represents the judicial body. Judges are elected for a renewable six-year term of office, and need not be drawn exclusively from the judiciary. To qualify for appointment, a person must be 'of high moral character' and must either possess the qualifications required for appointment of high judicial office or be a jurisconsult of recognised competence.

The right of application

Applications may be brought by states or by individuals. The right of individual petition to a body outside the jurisdiction of states was a constitutional innovation. As noted above, the British government was exceedingly cautious about conceding such a right and only in 1965 did the right of individual application become available to citizens of the United Kingdom. Applications may come from individuals, groups of individuals or non-governmental organisations. The applicant(s) must be personally affected by the issue: complaints involving alleged conduct which does not personally affect the individual complainant are not admissible.[16]

With the Human Rights Act 1998 fully in force, individuals will only make an application to the Court of Human Rights if they fail to secure an effective remedy before the domestic courts.

The procedure

Exhaustion of domestic remedies

Any domestic remedies which are available must be exhausted.[17] Thus, if a remedy is available within domestic law, it must first be sought. Only where there exists no remedy in law, or where the pursuit of a remedy would be unequivocally certain to fail,[18] may an individual lodge a petition.

16 ***X v Norway*** (1960). See also ***Vijayanathan v France*** (1991).
17 ECHR, Article 35.
18 Eg, where there are strong precedents established.

The time limit

The application must be made within six months of the final decision of the highest court having jurisdiction within the domestic legal system.[19]

Admissibility

A number of hurdles face the applicant in having his application declared admissible:

(a) a complaint must not constitute an 'abuse of right of complaint'. In essence, this means that the complainant should not be pursuing a remedy out of improper motives – such as political advantage. In short, the complaint must be brought for genuine reasons;
(b) a complaint must not be anonymous;
(c) a complaint must not relate to a matter which has been investigated and ruled upon previously;
(d) a complaint must relate to a right which is protected under the Convention;
(e) a complaint is inadmissible if, although the application relates to a protected right, the state against which the complaint is made has derogated from that provision, or lodged a reservation (see below for further discussion of derogations and reservations);
(f) the application must relate to violation of the Convention by a state which is bound by the Convention, or to an organisation for which the state has responsibility;
(g) the application must not be such that it represents an attack on another right protected by the Convention. Article 17 provides that there is no right to 'engage in any activity or perform any act' which is aimed at the destruction of protected rights;
(h) a complaint must not be 'manifestly ill founded'. By this is meant that the application must be plausible – there must be *prima facie* evidence of a violation.

Once an application is declared admissible, the examination of the merits will commence. The complainant has a limited right to appear where the Court requires further evidence. The Court's decision must be reasoned and, if not unanimous, individual judges may give a separate opinion. Under Article 43(1) of the Convention, any party to the case may, within three months from the date of the judgment of a Chamber (effectively the 'court of first instance' hearing the case), request that the case be referred to the Grand Chamber. If it is not so referred, the judgment becomes final. Alternatively, if referred, the judgment of the Grand Chamber is final (Article 44) and states undertake to abide by the decision of the Court. Compensation can be awarded by the Court.

Enforcing the judgment

As noted above, under Article 46, states are under an obligation to comply with the judgment of the Court of Human Rights. The task of ensuring that the judgment is complied with lies with the Committee of Ministers: the matter is thus returned to the political arena. If a state refuses to comply with the judgment, its membership of the Council of Europe can be suspended or, ultimately, it may be expelled from the Council. Where exercised, this ultimate power has regrettable implications and would remove the protection of the Convention from individuals within the state and thus further damage the protection of rights. Greece withdrew from the Council of Europe following five allegations of persecution against it between 1967 and 1970. In 1974, a new Greek government ratified the Convention once more. However, failure to comply with a judgment will cause adverse publicity for the state and there is thus great political pressure to conform.[20]

19 ECHR, Article 35.

The 'margin of appreciation'

In respect of almost all Articles of the Convention, there is an area of discretion as to the means by which they protect the substantive rights. This margin of appreciation is necessary in order that the Convention can apply in a workable fashion in very diverse societies. It also means, however, that application of the Convention will not be uniform throughout the legal systems and that states may be able to deviate from the protection given.

Whether the state has a margin of appreciation – and the scope of it – is a matter to be determined under the Convention. The doctrine is unpredictable in operation and has become, over the years, applicable to all Articles. Accordingly, it is a concept which is capable of significantly undermining the protection given by the Convention, and has been criticised for so doing.[21]

Derogation and reservation

Where a state finds it impossible or undesirable to comply with specific Articles, it is possible for the state to derogate, or enter a reservation as to the matter. No derogation is permitted in relation to Article 2 (the right to life), other than in war situations. Derogation is not allowed in respect of Articles 3 (freedom from torture), 4(1) (slavery or servitude), and 7 (freedom from retrospective criminal liability).[22] The right of derogation is limited. Article 15 provides that:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

A challenge can be made to the lawfulness of derogation. Following the United Kingdom's derogation after the decision in **Brogan v United Kingdom** (1988), a challenge was lodged, but failed when it was held that the situation in Northern Ireland did amount to a public emergency[23] and was thus within the terms of Article 15.

Article 17: the prohibition of abuse of rights

Article 17 prohibits the state or any 'group or person' from engaging in any activity which is aimed at the destruction of rights and freedoms protected under the Convention, or from limiting the rights and freedoms to a greater extent than is provided for in the Convention.

The Convention protocols

In addition to the substantive Articles of the Convention, there exists a series of Protocols on matters ranging from the right to peaceful enjoyment of possessions (First Protocol,

20 On derogation from Convention right see below.
21 See Van Dijk and Van Hoof, 1990, p 604.
22 But see the War Crimes Act 1991, which provides for the prosecution of war crimes committed during World War II.
23 **Brannigan and McBride v United Kingdom** (1993).