HOUSE OF LORDS

Library Note

Debate on 20 June: Report of the Commission on a Bill of Rights

This Library Note provides background reading in advance of the debate to be held on 20 June on:

"the report of the Commission on a British Bill of Rights".

The Note contains a brief summary of the development of human rights law in the United Kingdom and previous proposals for a British Bill of Rights, before précising a selection of the findings of the report of the Commission on a Bill of Rights. The Note concludes with an overview of some of the responses to the report.

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1. Introduction

In the 2010 Coalition Agreement, the Government set out its commitment to establish a Bill of Rights that incorporated and built upon the UK's obligation under the European Convention on Human Rights and Fundamental Freedoms.[1] On 18 March 2011, Mark Harper, the then Parliamentary Secretary for Political and Constitutional Reform, announced that an independent Commission had been established to investigate the creation of a UK Bill of Rights, fulfilling the "commitment made in our programme for government".[2] He stated that the Commission would "explore a range of issues surrounding human rights law in the UK", as well "play[ing] an advisory role on our continuing work to press for reform of the European Court of Human Rights in Strasbourg".[3] The Commission held its first meeting on 6 May 2011, and published its final report on 18 December 2012.

Before turning to the report of the Commission on a Bill of Rights, this Note will briefly outline the development of human rights law in the United Kingdom, as well as previous proposals for a Bill of Rights, in sections 2 and 3. Background information on the Commission is then presented in section 4, with a précis of some of the key findings of the report in section 5. The final section looks at a selection of responses to the report.

2. Human Rights in the United Kingdom

2.1 Historical Concept of Rights

The focus of historic Bills of Rights in the United Kingdom, from the Magna Carta in the thirteenth century to those of the seventeenth and eighteenth century, such as the English Bill of Rights of 1689 and the Claim of Right of 1689 in Scotland, was the protection of the individual's liberty against the intrusive and interfering power of the state.[4] Alongside these statutes, the common law developed many protections which would be recognised today as "rights".[5] These common law "rights" included the right of those being brought before the courts to know the charges they faced, to have the evidence against them made public, and to have the opportunity to challenge that evidence.[6]

A report from the Joint Committee on Human Rights in 2008 associated the change in the conception of human rights to the movements of the second half of the twentieth century, and in particular to the 1941 "Four Freedoms" speech of the US President, Franklin D Roosevelt. Delivering his speech to Congress, President Roosevelt argued that "in the future days, which we seek to make secure, we look forward to a world founded upon four essential freedoms": the freedom of speech, the freedom of "every person to worship God in his way", the freedom from want and the freedom from fear.[7] The Joint Committee suggested that this speech was a

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[1] HM Government, *The Coalition: Our Programme for Government*, 2010, p 11.
[2] HC *Hansard*, 18 March 2011, col 32WS.
[3] ibid.
[4] Joint Committee on Human Rights, *A Bill of Rights for the UK?*, 10 August 2008, HL Paper 165-I of session 2007–08, p 9; and Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 9.
[5] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 9.
[6] ibid, pp 9–10.
[7] President Franklin D Roosevelt, *Annual Message to the Congress on the State of the Union*, 6 January 1941.

"significant moment in the history of human rights", because it "redefined freedom to include not merely absence of restraint but absence of want and fear".[8]

Further development occurred following the Second World War. In 1949, the Council of Europe was established in the aftermath of the War.[9] With the United Kingdom as one of its twelve original members, the Council drafted and adopted the European Convention on Human Rights. However, in spite of the developments in the concept of "rights" in Europe, many of the rights in the European Convention on Human Rights can be traced back to the 'classical' Bill of Rights.[10] For example, the Bill of Rights of 1689 contains provisions that "excessive bail ought not be required, nor excessive fines imposed", and also provides that "all grants and promises and fines or forfeitures of particular persons before conviction are illegal and void".[11]

2.2 European Convention on Human Rights

The European Convention on Human Rights, as adopted by the Council of Europe in August 1950, was based largely on a draft produced by, amongst others, David Maxwell-Fyfe, a former Law Officer and later Home Secretary and Lord Chancellor.[12] The Convention was born out of the Council of Europe's desire to avoid a repeat of the atrocities of the war,[13] and it was expected that the main purpose would be to act as an "alarm" system, alerting members to large-scale human rights abuses.[14] The UK was one of the first nations to sign and ratify the Convention, which came into force in 1953. However, it was not until 1966 that the UK allowed individuals the right of access to the European Court of Human Rights.

The Convention is divided into three sections: the first contains a list of rights and freedoms; the second establishes the European Court of Human Rights, which sits in Strasbourg; and the third contains miscellaneous provisions. The Convention also has several protocols.[15]

For a number of decades, there was a relatively small caseload at the European Court. However, the number of cases continued to increase significantly as more countries joined the Council of Europe and ratified the Convention, and as more of them agreed to the right of individual petition.[16] During the 1980s, concerns were raised about the European Court's workload and its ability to deliver judgments efficiently,[17] and in the early 1990s, when the former Soviet bloc countries began to join the Council of Europe and ratify the Convention, the number of cases brought to the Court rose steeply, and a backlog of cases began to emerge.[18] By the end of the 1990s, the backlog had reached approximately 20,000 cases.[19]

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[8] Joint Committee on Human Rights, *A Bill of Rights for the UK?*, 10 August 2008, HL Paper 165-I of session 2007–08, p 10.
[9] House of Lords Library, *Debate on 19 May: European Convention on Human Rights*, 13 May 2011, LLN 2011/017, p 4.
[10] House of Commons Library, *Background to Proposals for a British Bill of Rights and Duties*, 3 February 2009, SN4559, p 9.
[11] ibid.
[12] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 10.
[13] Jacobs, White and Ovey, *The European Convention on Human Rights*, 2010, p 4.
[14] Harris, O'Boyle and Warbrick, *Law on the European Convention on Human Rights*, 2009, p 1.
[15] The Convention is available at: http://echr.coe.int/Documents/Convention_ENG.pdf.
[16] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 11, para 12.
[17] House of Lords Library, *Debate on 19 May: European Convention on Human Rights*, 13 May 2011, LLN 2011/017, p 5.
[18] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 11, para 12.
[19] ibid.

The significant rise in workload prompted changes. In November 1998, Protocol 11 to the Convention entered into force. It created a new full-time court, where all applications were to go. Acceptance of the European Court's jurisdiction and the right to individual petition became compulsory features of membership.

2.3 Human Rights Act 1998

Although individuals in the UK were granted the right to take cases of alleged infringement of their rights under the Convention to the Strasbourg Court, the Convention had no internal legal effect in the UK, and was not enforceable. In 1997, the Labour Party made an election manifesto commitment to incorporate the European Convention on Human Rights into UK law:

> Citizens should have statutory rights to enforce their human rights in the UK courts. We will by statute incorporate the European Convention on Human Rights into UK law to bring these rights home and allow our people access to them in their national courts.[20]

The subsequent Human Rights Act, which was enacted in 1998, legislated to make rights under the Convention enforceable in domestic courts. The Act requires ministers responsible for Bills to make statements, before second reading, about their views on the compatibility of the Bill's provisions with Convention rights, and it requires that legislation, as far as possible, be read and given effect in a way compatible with the Convention. The Human Rights Act also made it unlawful for a public authority to act incompatibly with Convention rights, and allowed for a case to be brought in a UK court or tribunal. The Act requires UK courts to take account of the Convention in making decisions. However, domestic courts cannot strike down legislation that conflicts with human rights: the Supreme Court can issue a declaration that certain legislation is incompatible, and it is for ministers to decide whether or not to introduce changes to primary legislation following a declaration of incompatibility.

2.4 Criticism of the Human Rights Act 1998 and Possible Withdrawal from the European Convention on Human Rights

Criticism of the Human Rights Act 1998 has often focussed on the argument that it puts the rights of criminals above those of victims.[21] For example, in 2007 outrage was expressed following the ruling of the Asylum and Immigration Tribunal that the killer of head teacher Phillip Lawrence could not be deported. Commenting in a press notice, the then Leader of the Opposition, David Cameron, stated:

> The fact that the Human Rights Act means he cannot be deported flies in the face of common sense. It is a shining example of what is going wrong in the country.[22]

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[20] Labour Party, *New Labour: Because Britain Deserves Better*, 1997.
[21] House of Commons Library, *Background to Proposals for a British Bill of Rights and Duties*, 3 February 2009, SN4559, p 13.
[22] Conservative Party press release, 'Conservatives would Abolish the Human Rights Act', 21 August 2007.

David Blunkett, as Home Secretary, also made some criticisms of the judiciary. Commenting in 2003, on the relationship between Parliament and the judiciary, he stated that it had:

> ... changed beyond all recognition over the past 30 years, thanks to the use of judicial review—the process by which an individual can ask the court to overturn effect or implementation of a law on their individual circumstance. Judges now routinely use judicial review to rewrite the effects of a law that Parliament has passed.[23]

More recently, in response to the decision of the Supreme Court in 2011, which ruled that denying sex offenders the right to appeal over registering with the local police was incompatible with their human rights, the Prime Minister, David Cameron, said that the judgment was "offensive", and stated that "it's about time we started making sure decisions are made in this Parliament rather than in the courts".[24] The Home Secretary, Theresa May, said that she was "appalled" by the decision, and that the Government would do the minimum to comply.[25] On 9 March 2013, Theresa May also said that the UK should "stop human rights legislation interfering with our ability to fight crime and control immigration", and should consider withdrawing from the European Court of Human Rights and the "Convention it enforces".[26]

However, in October 2012, the Attorney General, Dominic Grieve QC, stated that he believed withdrawal from the Convention could result in the UK becoming a "pariah state" in Europe. He suggested that such an action would place the UK in a group of countries that would "make very odd bedfellows", such as Belarus, the only other European State outside the Convention.[27] The Deputy Prime Minister, Nick Clegg, has also voiced his opposition to withdrawal from the Convention. He told the Liberal Democrats 2013 spring conference that leaving the Convention would not "be on the Cabinet Table so long as I'm sitting around it".[28]

The remainder of the Library Note looks at proposals for a British or UK Bill of Rights, and in particular, focuses on the recent findings of the Commission on a Bill of Rights. It considers proposals for the UK's future commitments to the European Convention on Human Rights, and the future of the Human Rights Act in this context.

3. Proposals for a British or UK Bill of Rights

Following the enactment of the Human Rights Act 1998, discussion has taken place on whether the Act was sufficient legislative underpinning of human rights in the UK, or whether a further step, in the shape of a Bill of Rights, should be taken. Proposals have been made both from those who supported the Human Rights Act, and from those who supported replacing it with a new Bill of Rights.

In 2006, following his election as Leader of the Conservative Party, David Cameron advocated replacing the Human Rights Act with a "modern British Bill of Rights to define the core values which give us our identity as a free nation".[29]

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[23] David Blunkett MP, 'I won't give in to the judges', *Evening Standard,* 12 May 2003.
[24] HC *Hansard*, 16 February 2011, col 955.
[25] ibid, col 959.
[26] Brian Brady, 'Theresa May's Speech Leaves Tories in no Doubt—She's After the Top Job', *Independent*, 10 March 2013.
[27] Holly Watt, 'Britain Could Become Belarus if it Abandons Human Rights Legislation, Warns Attorney General', *Telegraph*, 9 October 2012.
[28] Speech by Nick Clegg to Liberal Democrat Spring Conference 2013, March 2013, accessed 12 June 2013.
[29] *Guardian*, 'Balancing Freedom and Security: A Modern British Bill of Rights', 26 June 2006.

However, in 2007, the then Labour Government published the Green Paper, *Governance of Britain*, in which they argued against calls for the Act to be repealed:

> The effect of repealing the Human Rights Act would be to prevent British citizens from exercising their fundamental rights in British courts and lead to lengthy delays for British citizens who would need to appeal to Strasbourg to assert their rights. In addition, the European Court of Human Rights would be less likely to take into account the specific British context in making its decisions.[30]

The paper also proposed developing a British statement of values and a British Bill of Rights and Duties.[31]

In the subsequent 2009 Green Paper, *Rights and Responsibilities: Developing our Constitutional Framework*, the Labour Government reiterated that the Human Rights Act had been an important first step, and stated that "any new Bill of Rights and Responsibilities might subsume the Human Rights Act, or might preserve it as a separate Act".[32] The paper also suggested that a fuller articulation of British values would protect "fundamental freedoms and foster mutual responsibility".[33]

In a report published in 2008, the Joint Committee on Human Rights supported the view that any Bill of Rights should not dilute any of the current rights enjoyed in the UK under the Human Rights Act, or retract any of the Convention rights.[34] They concluded that a UK Bill of Rights and Freedoms was "desirable in order to provide necessary protection to all, and to marginalised and vulnerable people in particular".[35] The Committee made recommendations for a Bill of Rights and Freedoms that was "inspirational in nature" and which set out a "shared vision of a desirable future society".[36]

The 2010 election manifestos of both the Conservative and the Liberal Democrat Party contained pledges concerning the protection of human rights in domestic law. The Conservative Party made a pledge to replace the Human Rights Act with a UK Bill of Rights, to "protect our freedoms from state encroachment and encourage greater social responsibility".[37] The Liberal Democrats, on the other hand, undertook to "ensure that everyone has the same protections under the law by protecting the Human Rights Act".[38]

[30] Ministry of Justice, *Governance of Britain*, July 2007, Cm 7170, p 61.
[31] ibid, pp 58–61.
[32] Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework*, March 2009, Cm 7577, p 10.
[33] ibid, p 3.
[34] Joint Committee on Human Rights, *A Bill of Rights for the UK?*, 10 August 2008, HL Paper 165-I of session 2007–08, pp 93–4.
[35] ibid, p 5.
[36] ibid.
[37] Conservative Party, *An Invitation to Join the Government of Britain*, 2010, p 79.
[38] Liberal Democrats, *Liberal Democrat Manifesto*, 2010, p 94.

4. Commission on a UK Bill of Rights

In the Coalition Agreement, the Government made the commitment to establish a Commission to:

> ... investigate the creation of a Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and extends British liberties.[39]

In November 2011, Ken Clarke, the then Lord Chancellor and Secretary of State for Justice, reiterated the Government's commitment to build on those rights protected in the Convention, stating that the "Coalition Government do not intend to withdraw from the European Convention on Human Rights".[40] This commitment was confirmed when Mark Harper, the then Parliamentary Secretary for Political and Constitutional Reform, set out the Commission's terms of reference as follows:

> The Commission will investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties. It will examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties.
>
> It should provide interim advice to the Government on the ongoing Interlaken process to reform the Strasbourg Court ahead of and following the UK's Chairmanship of the Council of Europe. It should consult, including with the public, judiciary and devolved Administrations and legislatures, and aim to report no later than by the end of 2012.[41]

The members of the Commission were: Jonathan Fisher QC; Martin Howe QC; Baroness Kennedy of the Shaws QC; Lord Lester of Herne Hill QC; Philippe Sands QC; Anthony Speaight QC; Professor Sir David Edward QC; Dr Michael Pinto-Duschinsky; and it was chaired by Sir Leigh Lewis KCB, a former Permanent Secretary at the Department for Work and Pensions.[42] Dr Michael Pinto-Duschinsky resigned in March 2012, citing the Commission's intention "all along to issue a report in favour of the status quo", and their engagement of an agenda which is "sidelining not only Parliament but the Prime Minister", as his reasons.[43] He was replaced by Lord Faulks QC.

The Commission published two consultation papers. The first, published in August 2011, was entitled, *Do we need a UK Bill of Rights?*, and sought views on: whether the UK should have a Bill of Rights; what the respondents thought a UK Bill of Rights should contain; and whether it should apply to the UK as a whole. [44] The second paper was published in July 2012, with the purpose of exploring areas of further enquiry which the Commission had identified from the responses to its 2011 discussion paper.[45] The Commission agreed from the outset that it would be important to ensure its work was informed by the views of the UK public, and that it would

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[39] HM Government, *The Coalition: Our Programme for Government*, 2010, p 11.
[40] HC *Hansard*, 23 November 2011, col 154.
[41] HC *Hansard*, 18 March 2011, col 32WS.
[42] ibid.
[43] BBC News website, 'Sunday Politics', 11 March 2012.
[44] Commission on a Bill of Rights, *Do we need a UK Bill of Rights?*, August 2011.
[45] Commission on a Bill of Rights, *A Second Consultation*, July 2012.

be important to consider fully the views of devolved administrations and legislatures.[46] In September 2011, the Commission also published its interim advice to the Government on the reform of the European Court of Human Rights, ahead of the UK's chairmanship of the Council of Europe which was to start in November 2011.[47]

5. Findings of the Commission

On 18 December 2012, the Commission delivered its final report. However, the nine commissioners did not reach a consensus in their findings. Seven of the Commission's nine members, including its chair, concluded that "on balance, there is a strong argument in favour of the UK Bill of Rights".[48] However, two of its members, Baroness Kennedy of the Shaws QC and Philippe Sands QC, disagreed with this conclusion, arguing that the time was "not ripe" for a new UK Bill of Rights. They stated that the majority had failed to "identify or declare any shortcomings" in the Human Rights Act.[49] The Commission's report was published in two volumes, and contained in the second volume were eight individual papers authored by members of the Commission, including a report from Baroness Kennedy QC and Philippe Sands QC.

The Commission drew a number of further conclusions on the creation of a UK Bill of Rights, including: its relationship with the Human Rights Act 1998, the European Convention on Human Rights and the European Court of Human Rights; the scope for including additional rights to those contained in the Human Rights Act; public understanding of the UK's present human rights structure; devolution in the UK and the effect this would have on the timing of the creation of a Bill of Rights; and the ongoing reform process of the European Court of Human Rights. The following sections will look at these conclusions in more detail.[50]

5.1 A UK Bill of Rights, the Human Rights Act 1998 and the European Court of Human Rights

In response to the Commission's first consultation paper, approximately a quarter of the respondents called for a UK Bill of Rights, just under half opposed such a Bill and the remainder were neither clearly for nor against such a Bill. The Commission stated that there was "no doubt that the arguments that have been put to us against a UK Bill of Rights are substantial", and "perhaps the strongest argument, is that the UK already has a bill of rights in the shape of the 1998 Human Rights Act".[51] The argument was put, for example, by JUSTICE, who, in their response to the first consultation paper, said that:

> ... the HRA 1998 satisfies the basic, core criteria which characterise all bills of rights: it represents a commitment to the human rights considered of particular importance to the UK; it binds the Government and can only be overridden with considerable difficulty. It provides an essential means of redress for violations of rights within the UK. It was described, on its introduction, as a 'bill of rights' for the UK.[52]

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[46] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 40, para 1.3.
[47] Commission on a Bill of Rights, *Reform of the European Court of Human Rights: Our Interim Advice to the Government*, September 2011.
[48] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 28, para 78.
[49] ibid, p 31, para 88.
[50] An extensive summary of the Commission's findings can be found in the report's overview: Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, pp 8–39, paras 1–112.
[51] ibid, p 26, para 68.
[52] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 2, p 8, para 10.

However, some of the respondents who advocated a UK Bill of Rights did so because they "believed it would give Parliament the opportunity to provide greater clarity and/or certainty about some aspects of the Human Rights Act", such as the balance to be struck between rights which may be in competition, for example, the right to privacy and the right to freedom of expression.[53]

In response to the issue of whether to modify the provisions of the Human Rights Act in respect of a declaration of incompatibility and the striking of a balance between the ultimate sovereignty of the UK Parliament and the duty of the courts to declare and enforce the law, 60 percent wanted to leave the balance as it stood in the Human Rights Act, while 30 percent wished to change it.[54] The majority of the respondents also favoured maintaining the requirement in the Human Rights Act for UK courts to take into account relevant judgments of the European Court of Human Rights. However, a number of those taking this view did so on the basis that the courts correctly interpreted the Act's wording in this respect.[55] In their response on this issue, the Law Society of England and Wales said that:

> ... the Law Society's position is that [declarations of incompatibility] are the best way to adjudicate human rights while still preserving the tradition of parliamentary sovereignty. If the courts were to be given power to strike down or suspend incompatible legislation, this would unsettle the UK's constitutional balance.[56]

The Commission concluded that while "individually some of us have reservations—in some cases serious ones", the Human Rights Act is a "carefully drafted piece of legislation, which has been in place for approaching 15 years".[57] Nevertheless, the report also stated that the "conclusion of the majority" of the Commission was that:

> ... the case has been made out in principle for a UK Bill of Rights protecting everyone within the jurisdiction of the UK. In accordance with the Commission's terms of reference this conclusion is put forward on the basis that such a Bill would incorporate and build on all of the UK's obligations under the European Convention on Human Rights.
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> ... it is essential that it provides no less protection than is contained in the Human Rights Act and the devolution settlements, although some of us believe that it could usefully define more clearly the scope of some rights and adjust the balance between others.[58]

However, the report also stated that views within the Commission "differed sharply" on the matter of the jurisprudence of the European Court of Human Rights.[59] For instance, in one of the individual papers contained within the report, Lord Faulks QC and Jonathan Fisher QC stated that:

> Instead of enhancing respect for human rights in the UK, the incorporation of the Convention into domestic law by the Human Rights Act 1998, carrying with it what has been interpreted as an obligation by the UK Courts to apply the judicially creative

[53] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 18, para 40.
[54] ibid, p 22, para 55.
[55] ibid, p 22, paras 55–6.
[56] ibid, p 22, para 55.
[57] ibid, p 26, para 68.
[58] ibid, p 30, para 84.
[59] ibid, p 24, para 64.

> jurisprudence of the Court, has served to undermine and diminish the cause of human rights in a corrosive and divisive manner.[60]

They further argued that "there are strong arguments that the cause of human rights, both in the UK and internationally, would be better served by withdrawal from the Convention and the enactment of the Bill of Rights".[61] Moreover, Baroness Kennedy QC and Philippe Sands QC stated in their paper, 'In Defence of Rights', that this view was not confined to Lord Faulks and Jonathan Fisher, but that "a significant number in the majority" favoured withdrawal.[62] They suggested that the "fault lines" amongst the Commission were "real and deep", and could be attributed to the:

> ... failure to grapple with the content of such a Bill and its purpose, the underlying desire by some to decouple the UK from the European Convention and the jurisprudence of its Court, and the inability to recognise that the days when Westminster can impose its will on these matters across the whole of the United Kingdom are long gone.[63]

In his assessment of the Commission's final conclusions on this issue, Mark Elliott, a Reader in Public Law at the University of Cambridge, stated that:

> ... far from reflecting an anodyne consensus that an HRA-style system (if not the HRA itself) should remain, the Report in fact conceals fundamental disagreement about the nature of a future Bill of Rights. The majority thus represents a fragile coalition of views united around conceptions of a domestic Bill of Rights so different from one another as to render any consensus wholly illusory.[64]

He highlighted that in addition to the papers authored by Fisher and Faulks, and by Kennedy and Sands, two other individual papers written by members of the Commission were "particularly noteworthy in this regard".[65] Firstly, he examined Martin Howe QC's paper, which set out his own draft of a Bill of Rights and proposed that in determining the lawfulness of restrictions upon rights, courts should be entitled to have "regard... to the extent of the fulfilment of their responsibilities by those affected by the restriction". [66] Elliott argued that "Howe's position—like that adopted by Faulks and Fisher—is clearly incompatible with a Bill of Rights that fully gives effect to the ECHR".[67] Secondly, Elliot identified Anthony Speaight QC's paper on the mechanisms of a UK Bill of Rights, which proposed that courts should presume that legislation is intended to be compatible with rights: but that this principle ought not to detract from the courts' duty to give legislation its "ordinary and natural meaning".[68]

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[60] Lord Faulks QC and Jonathan Fisher QC, 'Unfinished Business', *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 185.
[61] ibid.
[62] Baroness Kennedy of the Shaws QC and Professor Philippe Sands QC, 'In Defence of Rights', *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 227.
[63] ibid, p 230.
[64] Mark Elliott, 'A Damb Squib in the Long Grass: The Report of the Commission on a Bill of Rights', *University of Cambridge Faculty of Law Research Paper No 8/2013*, February 2013, p 8.
[65] ibid, p 7.
[66] Martin Howe, 'A UK Bill of Rights', *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 213.
[67] Mark Elliott, 'A Damb Squib in the Long Grass: The Report of the Commission on a Bill of Rights', *University of Cambridge Faculty of Law Research Paper No 8/2013*, February 2013, p 1.
[68] Anthony Speaight, 'Mechanisms of a UK Bill of Rights', *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 261.

Elliott concluded that the majority lacked the "quality of homogeneity", and suggested that a number of the individual papers in the report indicated that some members of the Commission saw in a UK Bill of Rights the potential basis for a "very different, and greatly diminished" domestic legal regime for the protection of human rights.[69]

5.2 Additional Rights

The Commission also investigated whether any UK Bill of Rights should contain additional rights to those in the European Convention on Human Rights. Of those who responded to the two consultations, 80 percent advocated one or more additional rights. However, over half of these respondents were either opposed to or equivocal about such a Bill in principle. The most frequently supported proposal put forward by those advocating additional rights was for a UK Bill of Rights to explicitly incorporate the rights in other international instruments, such as the United Nations Convention on the Rights of the Child, which the UK has signed but not incorporated into domestic law. The next most strongly supported categories were socio-economic rights (including the environment), and equality rights. Of those opposed to additional rights, concerns ranged from their potential cost to the practical difficulties associated with them, with some respondents stating that existing rights were sufficient.[70]

The Commission stated that while they did not oppose the concept of additional rights in principle, and recognised that society had moved "on very considerably" since the drafting of the European Convention on Human Rights, they did not believe that:

> ... it would be right for our Commission to reach firm conclusions in this respect both because in a number of areas we lack expertise... and more fundamentally, because we are not agreed on whether a case for the UK Bill of Rights has been made.[71]

The majority of the members of the Commission also expressed the opinion that it was:

> ... undesirable in principle to open up to decisions of the judiciary issues which are better left, in their view, to elected legislatures. In the view of these members what are termed 'socio-economic' rights—such as a right to health care or education—in practice often involve very difficult choices over the allocation of scarce resources... All other things being equal a majority of members believe that such choices are better made by Parliaments rather than judges.[72]

However, "those members not taking this view" noted that the "law in the United Kingdom and under the European Convention already recognises and gives practical effect to socio-economic rights, and this has not given rise to notable difficulties before the courts".[73]

Commenting on the Commission's conclusions, Mark Elliott, a Reader in Public Law at the University of Cambridge, described the acknowledgement that it lacked expertise and

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[69] Mark Elliott, 'A Damb Squib in the Long Grass: The Report of the Commission on a Bill of Rights', *University of Cambridge Faculty of Law Research Paper No 8/2013*, February 2013, p 7.
[70] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 21, paras 52–3.
[71] ibid, pp 33–4, paras 90–1.
[72] ibid, p 34, para 91.
[73] ibid.

experience needed to make firm recommendations as an "extraordinary concession", and stated that it "does not reflect well on the Commission" and the "way it was established".[74]

5.3 Public Ownership of a UK Bill of Rights

The majority of the members of the Commission concluded that one of the "most powerful arguments" presented for a new constitutional instrument was the "lack of public understanding and ownership" of the Human Rights Act and the European Convention on Human Rights.[75]

They stated that in the view of some of the respondents to the Commission's consultations, the appropriate response to any such lack of "ownership" was for there to be increased public education on the benefits of the Act, and of the European Court and Convention.[76] For example the British Institute of Human Rights in their response to the first consultation said:

> ... rather than reinventing the wheel with a Bill of Rights, we believe the Commission should focus on recommending the need for an appropriate and accessible programme for public education on human rights and the HRA to show that the law works and is working well.[77]

The Commission agreed that there was "a role for better public education".[78] However, the majority of the members found it "hard to persuade themselves that public perceptions are likely to change in any substantial way, as a result, particularly given the highly polemical way in which these issues tend to be presented by both some commentators and some sections of the media". [79] Speaking to the House of Commons Political and Constitutional Reform Committee in June 2011, Lord Lester of Herne Hill QC reiterated this view:

> Some sections of the media—self-interested, God bless them—have campaigned vigorously against the Human Rights Act, totally unscrupulously, completely unfairly, mischaracterising everything as being a result of the Human Rights Act. That I expect to continue and I have already seen that they seek to rubbish the Human Rights Commission as part of their campaign.[80]

The majority of the Commission proposed that:

> ... given that for the members concerned the key argument is the need to create greater public ownership of a UK Bill of Rights than currently attaches to the Human Rights Act, it would clearly in their view be desirable in principle if such a Bill was written in language which reflected the distinctive history and heritage of the countries within the United Kingdom.[81]

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[74] Mark Elliott, 'A Damb Squib in the Long Grass: The Report of the Commission on a Bill of Rights', *University of Cambridge Faculty of Law Research Paper No. 8/2013*, February 2013, p 1.
[75] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 28–9, para 80.
[76] ibid, p 29, para 81.
[77] ibid.
[78] ibid, p 29, para 82.
[79] ibid.
[80] House of Commons Political and Constitutional Reform Committee, *UK Bill of Rights Commission—Oral and Written Evidence 16 June 2011*, 19 July 2011, HC Paper 1049–ii of session 2010–12.
[81] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 30, para 86.

Helen Fenwick, a Professor of Law at the University of Durham, stated that these proposals made by the majority of the Commission would be unlikely, if realised in practice, to address this issue when taking into account the "apparently deep dissatisfaction" with the Human Rights Act. She argued that the proposals are "so modest and cautious", that:

> ... they might be said to amount in effect to a proposal to re-badge the HRA in a Bill of Rights, despite the Commission's acceptance that it has become discredited in the eyes of the public. A key question, unexplored in the Report, is—why is there dissatisfaction with the HRA? Of course there was no public information campaign prior to its introduction, leaving a vacuum which created room for a narrative hostile to the HRA to take hold.[82]

She further argued that if a Bill of Rights was introduced, "based on these proposals, which would play a role very similar to that of the Human Rights Act, it would appear probable that parts of the media might attack it as a merely re-badged Human Rights Act, leading again to public dissatisfaction with the new Bill of Rights".[83]

Baroness Kennedy QC and Philippe Sands QC did not concur with the conclusion of the majority, and expressed a "fear that the single argument relied upon by the majority—the issue of public ownership of rights—will be used to promote other aims", including the diminution of rights available to people, and a decoupling of the United Kingdom from the European Convention on Human Rights.[84]

5.4 Devolution

The members of the Commission were united in the opinion that any future debate on a UK Bill of Rights must be sensitive to the issues of devolution, and in the case of Scotland, to possible independence. They concluded that it would be "essential to await the outcome of the referendum [on Scottish independence] before moving towards final decisions on the creation of a UK Bill of Rights".[85] The Commission also recognised the "distinctive Northern Ireland Bill of Rights process and its importance to the peace process in Northern Ireland", under the terms of the Belfast/Good Friday Agreement.[86]

The report stated that the members of the Commission were "surprised by the strong degree of opposition" which they encountered. This was put forward not only on the basis that there was "simply no demand for such a measure in the respective countries but also on the basis that this was no longer something which could be imposed by Westminster on the other countries of the UK".[87] For instance, the Scottish Human Rights Commission wrote in response to the second consultation paper:

> ... as the 'observation and implementation' of the ECHR has been devolved, the consent of the devolved nations in relation to any amendment to, or repeal of, the HRA and/or

[82] Helen Fenwick, 'The Report of the Bill of Rights Commission: Disappointing Conservative Expectations or Fulfilling Them?', UK Constitutional Law Group blog, 21 March 2013.
[83] ibid.
[84] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 32, para 88 (vii).
[85] ibid, p 27, para 74
[86] ibid, p 27, paras 73–5.
[87] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, pp 26–7, para 71.

> legislation enacting a bill of rights, covering the devolved jurisdictions, would be needed as a matter of constitutional convention.[88]

The Commission's Advisory Panel members from Wales also commented in response to the same paper:

> There is a separate question as to whether it is constitutionally and politically appropriate or desirable for matters affecting devolved legislatures in the exercise of their primary law-making powers to be determined by a UK Bill of Rights enacted by the Westminster Parliament rather than legislation enacted by the relevant devolved legislatures within the United Kingdom.[89]

However, in a separate paper, which was included in the report, Anthony Speaight QC argued that there were a number of options that were consistent with the Sewel Convention,[90] by which a Bill of Rights could continue to be pursued in respect of UK-wide and other non-devolved functions.[91] He stated that it "is becoming increasingly clear that in the UK, distinct rights agendas have started to develop" in Northern Ireland, Scotland and Wales: in the case of Northern Ireland, there had been an "explicit and formal recognition of the desirability of a distinct Northern Ireland Bill of Rights" in the Good Friday Agreement; in Scotland, the Scottish Commission for Human Rights Act was enacted in 2006 with the duty to promote human rights contained not only in the Convention, but also other rights contained in other international documents ratified by the UK; and in Wales, in March 2012, the Welsh Government launched a consultation on creating a separate legal jurisdiction for Wales.[92] He concluded that there would be nothing "inherently undesirable" about an asymmetry of rights across the UK, highlighting that it was common in other countries with a multi-level government.[93]

Nevertheless, the Committee concluded that:

> To come to pass successfully, a UK Bill of Rights would have to respect the different political and legal traditions within all of the countries of the UK, and to command public confidence beyond party politics and ideology. It would also, as a technical matter, involve reconsideration of the scheme of the devolution Acts, which limit the powers of the devolved legislatures and governments expressly by reference to respect for 'Convention rights'.
>
> Whatever the outcome of the independence referendum in Scotland, it seems likely that there will subsequently be proposals for changes in the relationship of the nations that will then comprise the United Kingdom be that within a Constitutional Convention, as the Prime Minister has suggested, or in some other forum. Such a forum would be the most desirable place to consider the promotion of a UK Bill of Rights within the context of a wider constitutional review.[94]

[88] ibid, p 27, para 71.
[89] ibid, p 27, para 72.
[90] By which UK Parliament does not in practice seek to legislate in devolved areas without the consent of the devolved legislature—Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee, September 2012, para 14 of the Memorandum of Understanding.
[91] Anthony Speaight, 'Devolution Options', *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 256.
[92] ibid, pp 246–7.
[93] ibid, p 256.
[94] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 28, paras 76–7.

Baroness Kennedy QC and Philippe Sands QC also expressed concerns that a "premature move to a UK Bill of Rights would be contentious and possibly even dangerous, with unintended consequences". They argued that any Bill of Rights and any proposals would have to "reflect the changing allocation of powers in the reconfiguration of the United Kingdom".[95]

Speaking in the House of Commons on 1 March 2013, Damien Green, the Minister for Policing and Criminal Justice, expressed the Government's support for the Commission's finding that it would be necessary to wait for the referendum in Scotland before making any final decisions on the creation of a UK Bill of Rights. He stated that he:

> ... hop[ed] the House would agree that it is difficult to fault the logic of that conclusion, which provides a persuasive reason as to why now is not the time to embark on wholesale changes to the human rights framework.[96]

This view was reiterated by Chris Grayling, the Lord Chancellor and Secretary of State for Justice, while giving evidence on the Government's human rights policy to the Joint Committee on Human Rights, stating that he did not think it was "realistic to believe that it is either a good idea or feasible to start, for example, moving ahead with a British Bill of Rights before the date of the Scottish referendum".[97]

5.5 Reform of the European Court of Human Rights

The Commission's terms of reference stated that it was to investigate the creation of a UK Bill of Rights that built on the UK's obligations under the European Convention of Human Rights, and the Commission confirmed that there was "no discussion in this report of whether the UK should consider any option other than continuing adherence to the Convention on the present basis".[98] However, the Commission was also tasked with providing advice to the UK Government, in advance of its Chairmanship of the Council of Europe, on the reform of the European Court of Human Rights. In their advice, the Commission highlighted the "serious challenges created by the Strasbourg Court's ever growing caseload" and urged the Government to pursue three areas of fundamental reform: to reduce significantly the number of cases that reach the Court by enhanced screening of cases; to reconsider the relief that the Court is able to offer and the extent to which the Court should be required to calculate the amount of financial compensation; and to enhance the procedures for nomination and appointment of well-qualified judges.[99] The Government welcomed the Commission's advice, and stated that it was "immensely influential", not just in Government but also among other signatories to the Convention.[100] The UK Chairmanship culminated in a declaration adopted unanimously by the member states of the Council of Europe at a conference in Brighton in April 2012.[101]

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[95] Baroness Kennedy of the Shaws QC and Professor Philippe Sands QC, 'In Defence of Rights', *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 225.
[96] HC *Hansard*, 12 March 2013, col 636.
[97] Joint Committee on Human Rights, *The Government's Human Rights Policy—Uncorrected Transcript of Oral Evidence*, 12 February 2013, p 16.
[98] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 24, para 64.
[99] ibid, p 37, para 104.
[100] House of Commons Political and Constitutional Reform Committee, *The Coalition Government's Programme of Political and Constitutional Reform: Oral and Written Evidence*, 20 June 2012, HC 358-iii of session 2010–12, p 43.
[101] Further information on the Brighton Declaration can be found in the House of Commons Library Note, *The UK and Reform of the European Court of Human Rights*, 27 April 2012, SN6277.

The Commission's report "applaud[ed]" the efforts made by the Government in seeking to advance the reform of the European Court during its chairmanship. However, a number of members believed that the Declaration failed to "secure the fundamental reforms of the Court", while "other members of the Commission" stated that the Brighton Declaration was a "useful step forward", but that "the full effects of which cannot yet be finally assessed".

In its final report, the Commission was in agreement that more "fundamental reforms of the Court" were required. In particular they called for: new screening mechanisms to be introduced in order to reduce "very significantly" the number of cases that reach the Court; a reconsideration of the relief the Court is able to offer; and for the procedures for the selection of well-qualified judges to be enhanced.[102]

However, Jonathan Fisher QC and Lord Faulks QC also argued that the outcome of the Brighton conference was "predictable in the face of strong opposition from the Court", and suggested that in "these circumstances, one possibility open for discussion is renegotiation on the terms of the UK's membership of the Convention, to allow the UK to remain a signatory to the Convention but with its domestic courts not subject to the Court's jurisdiction".[103] They argued that a "full and frank discussion" on this matter needed to take place.[104]

6. Responses to the Report

Writing ahead of the report's publication in December 2012, Chris Grayling, the Lord Chancellor and Secretary of State for Justice, wrote in the *Daily Telegraph* that he hoped the work of the Commission would help the Government to "take further steps to improve the [human rights] situation". However, he also stated that there were "limitations to what can we can do as part of a Coalition. Whether we like it or not, both Labour and the Lib Dems disagree with us about the scale of change that is needed. So I will read and digest the report of the Commission, and will see what help it gives me to deliver change in the short term".[105] Sadiq Khan, the Shadow Justice Secretary, writing on the day of the report's publication, argued that the Commission was a "classic political fudge", and predicted that given the "rift within the Government, it's unlikely there'll be any changes to the law before the next election".[106] The Deputy Prime Minister, Nick Clegg, also "acknowledg[ed]" the "difference of opinion" that existed "between those of us who believe that the basic rights and responsibilities offered to every British citizen in the European Convention as reflected in British law in the Human Rights Act, should be a baseline of protection for everybody, and others who wish to see that changed".[107] However, he stated that the "disagreement was openly, and in a perfectly grown-up way, reflected in the conclusions of the Commission".[108]

Mark Elliott, Reader in Public Law at the University of Cambridge, concluded that the "divisions within the Coalition Government that were reflected in the Commission's membership meant

[102] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, pp 38–9, para 108.
[103] Lord Faulks QC and Jonathan Fisher QC, 'Unfinished Business', *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, pp 188–9.
[104] ibid, p 190.
[105] Chris Grayling, 'Bill of Rights: Let us Concentrate on Real Human Rights', *Daily Telegraph*, 17 December 2012.
[106] Sadiq Khan, '*Comment on the Report of the Commission on a Bill of Rights*', Labour Party website, 18 December 2012.
[107] HC *Hansard*, 12 February 2013, col 697.
[108] ibid.

that the report was never likely to contain clear cut proposals of straight forward implementation".[109] He also stated that:

> The bigger point, however, is that the majority failed to engage in any meaningful way with the European dimension of the Bill of Rights question. That deficiency is attributable to some extent... to the Commission's terms of reference; yet it is a deficiency—and a substantial one—nonetheless. The elephant in the room—albeit one that is firmly eyeballed by some Commission members in their individual papers—is the overarching question whether the UK should remain a party to the ECHR.[110]

Helen Fenwick, a Professor of Law at the University of Durham, concurred with this assessment, stating that the report:

> ... is an odd document, dominated by the lack of agreement as to the role that any human rights instrument in Britain should play. That was unsurprising since at the inception of the Commission the Coalition partners appeared to want it to play two different roles—defending or attacking the HRA.[111]

It was noted in the Commission's final report that:

> Some of our members regret that the terms of reference were limited in this way and believe that this has excluded from the Commission's deliberations an important element of public debate... these members would have wished to have been free to have considered the merits of a UK Bill of Rights without this constraint.[112]

However, Adam Wagner, a barrister and an editor of the Human Rights blog, argued that leaving Europe aside:

> ... the Commission on a Bill of Rights has not been a complete waste of time. It has produced an interesting health check of the human rights system as it is functioning today.[113]

On 22 January 2013, Damian Green, the Minister for Policing and Criminal Justice, announced in the House of Commons that no formal response would be made by the Government.[114] However, in February 2013, in his evidence to the Joint Committee on Human Rights, Chris Grayling provided further information on the Government's position:

> It is clear that the Coalition Government's commitment is to remain a part of the Convention and the Convention system and to explore whether we have a case for bringing forward a Bill of Rights in this country. What is also clear is that there are differences of opinion between the coalition partners about the future of our

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[109] Mark Elliott, 'A Damb Squib in the Long Grass: The Report of the Commission on a Bill of Rights', *University of Cambridge Faculty of Law Research Paper No. 8/2013*, February 2013, p 1.
[110] ibid, p 8.
[111] Helen Fenwick, 'The Report of the Bill of Rights Commission: Disappointing Conservative Expectations or Fulfilling Them?', UK Constitutional Law Group blog, 21 March 2013.
[112] Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us*, December 2012, vol 1, p 24, para 64.
[113] Adam Wagner, 'The Bill of Rights Commission Report: a Modest Proposal', Human Rights blog, 18 December 2012.
[114] HC *Hansard*, 22 January 2013, cols 215–6W.

> relationship with the human rights framework, but that is part of a political debate that will have to await the next election.[115]

In a piece published on the London School of Economics blog, Amy Williams stated that the Government's position could be "welcomed" if it reflected the realisation that "berating the European Court of Human Rights and human rights protection for unpopular groups on the one hand, whilst promising a UK Bill of Rights that 'builds on all our obligations under the ECHR' on the other, simply does not add up".[116] Helen Fenwick said that the majority of the Commission, which proposed a new Bill of Rights, had created a momentum behind the Bill of Rights idea which might be advantageous post-2015 to a Conservative Government if one was returned.[117]

[115] Joint Committee on Human Rights, *The Government's Human Rights Policy—Uncorrected Transcript of Oral Evidence*, 12 February 2013, p 3.
[116] Amy Williams, 'The Two Coalition Parties are Sorely at Odds over Human Rights', London School of Economics blog, 27 February 2013.
[117] Helen Fenwick, 'The Report of the Bill of Rights Commission: Disappointing Conservative Expectations or Fulfilling Them?', UK Constitutional Law Group blog, 21 March 2013.