RESEARCH PAPER 98/24
13 FEBRUARY 1998

The *Human Rights Bill* [HL]

Bill 119 of 1997-98

The *Human Rights Bill* has passed through its Lords stages (it was introduced as HL Bill 38 on 23 October) and is due to have its Commons second reading debate on Monday 16 February. It seeks to give effect in domestic UK law to the rights contained in the European Convention on Human Rights. This Paper discusses the form and policy of the Bill and includes the history of proposals to incorporate the Convention and the Convention's current status in UK law.

Companion Papers deal with the broader constitutional issues surrounding the Bill, such as its relationship to the doctrines of Parliamentary sovereignty and separation of powers and the effect of the Bill on legislation, including the remedial order mechanism in *clauses 10-12* (RP 98/27), the Bill's privacy implications for the press (RP 98/25) and its possible application to religious organisations and churches (RP 98/26). Earlier relevant Research Papers are cited therein.

Mary Baber

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Summary

The Government's *Human Rights Bill* has completed its passage through the House of Lords and is due to be considered on Second Reading in the House of Commons on Monday, February 16th. In the House of Lords the Bill was supported by the Liberal Democrats but generally opposed by the Conservatives, although they did not vote against it on Second or Third Reading. The Bill is based on proposals set out in the October 1997 White Paper *Rights Brought Home* [CM 3782]. It is designed to give further effect in domestic law to the rights and freedoms guaranteed under the European Convention on Human Rights

This paper considers the current position of fundamental rights and freedoms under UK law and the extent to which the courts are already able to take account of the provisions of the European Convention on Human Rights and other international human rights codes to which the UK is a party. The paper goes on to set out the arguments generally put forward both for and against the enactment of a Bill of Rights for the UK. This is followed by a brief history of proposal to incorporate human rights legislation in general, and the European Convention in particular, into the domestic law of the UK.

The second part of the paper considers the provisions of the Human Rights Bill and the debate on the legislation in the House of Lords. Much of this debate was concerned with the definition of "public authority", which is used for the purposes of establishing liability for actions which are incompatible with convention rights. This debate particularly centred around the position of the press and issues concerning privacy, and the problems which religious organisations feared they might face. This paper also summarises views on the establishment of a Human Rights Commission to enforce convention rights, and the creation of a Parliamentary committee on human rights.

The issues of privacy and the press and the possible impact of the Human Rights Bill on religious groups are considered in Research Papers 98/25 and 98/26. The wider constitutional questions raised by the Bill, such as issues of Parliamentary sovereignty and the separation of powers, are considered in Research Paper 98/27, which also covers the debate on the "fast track procedure provided in the Bill for remedial orders to rectify legislation which is incompatible with the Convention rights.

At the end of this paper there are several appendices, setting out ancillary information and relating to some of the subjects considered in the text, as well as other factual material about the European Convention.

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I Background

A. Fundamental rights and freedoms in UK law

Traditional English constitutional theory stresses the concept of Parliamentary sovereignty rather than the concept of popular rights and popular sovereignty. Under this view, Parliament is seen as having replaced the monarch as the sovereign authority, with the result that the subject cannot possess fundamental rights of the type guaranteed to the citizen under the constitutions of many other countries, as well as by international and European law. *Halsbury's Laws of England* notes that:

> According to this traditional view of parliamentary sovereignty, the liberties of the subject are merely implications drawn from two principles, namely: (1) that individuals may say or do what they please, provided they do not transgress the substantive law, or infringe the legal rights of others; and (2) that public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law (including the royal prerogative) or statute, and in particular may not interfere with the liberties of individuals without statutory authority. Where public authorities are not authorised to interfere with the individual, the individual has liberties. It is in this sense that such liberties are residual, rather than fundamental and positive, in their nature.

A number of general provisions designed to ensure the peaceful enjoyment of rights of property and freedom from illegal detention, duress, punishment or taxation are set out in what Halsbury calls "the four great charters or statutes which regulate the relations between the Crown and people" namely the Magna Carta[1], the Petition of Right[2], the Bill of Rights[3] and the Act of Settlement[4]. Various other legislative provisions confer particular rights, such as, for example the right of a person who has been arrested to have someone informed of his or her arrest[5], which is set out, along with a number of other rights and entitlements, in the *Police and Criminal Evidence Act 1984.* Apart from these provisions, however, there is no express enunciation in any UK law or code of what might be termed the fundamental rights, liberties or freedoms of the individual. This is in marked contrast to the position in most other Western, industrialised countries, which make express provision for such rights and freedoms in their constitutional documents or in separate statutory declarations of rights.

The United Kingdom is party to a number of different international human rights codes and conventions, of which the most significant are the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights and the 1966 International Covenant on Civil and Political Rights. The UK ratified the International Covenant on Civil and Political Rights on May 20th 1976, but has

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1 1297

2 1627

3 1688/89

4 1700/01

5 *Police and Criminal Evidence Act 1984* s.56

not accepted its Optional Protocol which would permit the Covenant's Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of that Covenant by the UK. A more detailed account of the human rights instruments to which the UK is set out in Research Paper 94/10 on *International human rights conventions.*

The European Convention on Human Rights was the first major achievement of the Council of Europe following the Council's creation as a grouping of 10 democratic European states in 1949.[6] The final version of the Convention, which the UK was the first country to ratify in 1951, owed much to British ideas and drafting as far as the definition of rights was concerned but the enforcement mechanism, including the right of individual petition and the creation of a supranational human rights court, owed little to British thinking and had been opposed by British representatives on the drafting committee. The UK signed the convention but exercised its options not to accept individual petition to the European Court of Human Rights or the compulsory jurisdiction of that Court. The Convention entered into force in the UK on 3 September 1953[7]. In 1966 the UK government changed its position on the question of individual petition and exercised its option to accept the right of individual petition to the European Court of Human Rights and the compulsory jurisdiction of the court. Successive governments since then have continued to exercise this option.

Since 1966, individuals who claim that their rights under the European Convention on Human Rights have been violated by the UK government have therefore been able, once they have exhausted their domestic legal remedies, to take their cases to the European Court of Human Rights in Strasbourg. The procedure for taking a case to Strasbourg is set out in an Appendix to this Paper.

The introduction of the right of individual petition to the European Court of Human Rights is one of a number of factors which may be seen as having contributed to the increasing impact of the European Convention on Human Rights from the 1970s onwards. This impact can be seen both in the way the Convention has influenced the UK courts and in an increasing public awareness of the European Court of Human Rights. Some commentators have attributed part of the increase in public awareness of the Convention to publicity surrounding a number of cases in which the European Court has found the UK to be in breach of the Convention[8].

Individuals who claim that their rights under the Convention have been violated by the UK courts are not, however, able to have their rights under the Convention enforced or adjudicated upon directly by the UK courts. The other states which are party to the European

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[6] Library Research Paper 97/68 on *The European Convention on Human Rights* describes the creation and implementation of the Convention in some detail.

[7] G Marston, "The United Kingdom's Part in the Preparation of the European Convention on Human Rights , 1950", *International and Comparative Law Quarterly* Vol 43 (1993), 819-820

[8] see Francesca Klug and Keir Starmer "Incorporation through the back door" – 1997 *Public Law* 232

Convention have generally either incorporated the Convention into their domestic law, or have written constitutions, statutory declarations of rights or other similar measures creating rights similar to those set out in the European Convention on Human Rights. The rights set out in the Convention are therefore already part of their domestic law and may be adjudicated upon and enforced by judges in their national courts. The absence of incorporation by the UK is seen by many commentators as one of the reasons both for the number of cases involving the UK which have been referred to the European Court of Human Rights and for the number of instances in which the European Court of Human Rights and the European Commission on Human Rights[9] have found human rights violations in cases involving the UK[10]. The Convention is seen as having had to be invoked in many significant British cases brought before the European Commission on Human Rights and the European Court of Human Rights where, in the other contracting states, constitutional and administrative courts would have been able to provide an effective remedy. *Halsbury's Laws of England* states that:

> The Convention, like European Community law, has therefore come to underpin the British constitution in protecting human rights and freedoms; and both the European Court of Human Rights and the European Court of Justice have served in place of a British constitutional court, able to review the compatibility of legislation with principles which may be seen as constitutional.

European Community legislation is a source of rights and remedies in some areas, such as equal pay for men and women and equal treatment without sex discrimination in employment and other related matters. Unlike the rights set out in the European Convention these rights can be enforced and protected by the UK courts. In the *Treaty of European Union* the European Union also agreed to respect the fundamental rights contained in the European Convention on Human Rights, although it has not acceded to the Convention[11]. The European Court of Justice has often had regard to the European Convention and the case law of the European Court of Human Rights as a source of general principles of European Community law and its interpretation. In some cases EC legislation has been made specifically subject to the European Convention and for the purposes of these measures the Convention can be seen as having effectively been indirectly incorporated into domestic law and made available to the UK courts as part of the incorporation of EC law[12].

Halsbury's Laws of England suggests that in the absence of an entrenched Bill of Rights for the UK, the fundamental rights and liberties of the individual in England and Wales owe their main legal protection to:

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[9] which receives cases and refers those in which it considers there may have been a breach of the Convention to the European Court

[10] see *Halsbury's Laws of England* Fourth Edition Reissue Volume 8(2) paragraph 103 note 5; Ian Loveland *Constitutional law: A Critical Introduction* (1996) p.589.

[11] *Treaty on European Union* Cm 1934 Title I Article F para.2.

[12] see *Halsbury's Laws of England* Fourth Edition Volume 8(2) paragraph 104 note 22

1) the provisions of the European Convention on Human Rights as applied both in English courts and through the machinery for their enforcement in the European Commission on Human Rights and the European Court of Human Rights in Strasbourg;
2) those provisions of European Community law which protect the rights of individuals,;
3) the development of the action of trespass in its various forms;
4) the prerogative orders, including the writ of habeas corpus;
5) the right to trial by a jury of randomly selected persons, both for serious crimes and for some common law actions involving important rights[13];
6) the fact that all persons other than the monarch, whose person is inviolable and who can do no wrong in the eyes of the law, and judges, who are protected while acting in their official capacity, and magistrates and justices of the peace, who have a limited form of protection, are subject to the jurisdiction of the courts, and may be made liable for any infringements of the rights and liberties of others unless some statutory authorisation for the infringement can be found; and
7) the rule of construction that statutes and other legislative provisions are so far as possible to be interpreted so as not to interfere with the vested rights of the individual. For example in *Metropolitan Asylum District Managers v Hill* [14], Lord Blackburn said "It is clear that the burden is on those who seek to establish that the legislature intended to take away the private rights of individuals to show that by express words or by necessary implication such an intention appears"

B. The European Convention on Human Rights and UK law

As a matter of general principle, the UK courts do not enforce or interpret international treaties, such as the European Convention on Human Rights, unless expressly authorised to do so by an Act of Parliament. The European Convention would therefore require statutory incorporation into domestic law before it could be enforced directly in the UK courts. As neither the European Convention nor the other international human rights codes to which the UK is a party have been incorporated in this way, they do not as such form part of UK law and cannot be directly enforced by the UK courts. The European Convention and the other international human rights codes to which the UK is a party are, however, relevant in establishing the scope of civil rights and freedoms under UK law even though they are not part of UK law. The European Convention has been particularly influential in the UK courts, a fact which commentators tend to attribute to the right of victims of alleged breaches of the Convention, whether by the executive, Parliament, the judiciary or any other public authority within the UK, to have recourse to the European Commission on Human Rights and the European Court of Human Rights if they consider that they have not obtained an effective remedy from the UK courts.

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13 such as certain actions for libel, where questions of freedom of speech might arise although there is no trial by jury for other actions where this might be the case, such as breach of confidence or contempt of court.

14 *(1881) 6 App Cas 193 at 208 HL*

In his maiden speech to the House of Lords on July 3rd 1996 the Lord Chief Justice, Lord Bingham, described the place of the European Convention in UK law and the circumstances in which the UK courts could have recourse to it as follows[15]:

The starting point is, of course, that we are a state that ratified the convention; we are bound in international law to honour the obligations which we have undertaken. When any breach of the convention has been established on the part of any public authority, we are bound to amend our laws and procedures to make good the breach and prevent a recurrence. That is an obligation which has, I believe, been scrupulously observed by successive governments of both political colours.

But the convention is not part of our domestic law. The courts have no powers to enforce convention rights directly. If domestic legislation plainly conflicts with the enforcement of the convention, then the courts apply the domestic legislation. That is a principle which your Lordships' House, sitting judicially, has unambiguously laid down and it is a rule which the courts have loyally observed, despite ingenious and persistent invitations by counsel to depart from it.

In some countries treaties, once ratified, have the force of law. That is not so here and it is that fact which gives continuing vitality to the debate on incorporation. It might be thought to follow from that that the convention is a matter for Parliament and the Government, with which the courts have nothing whatever to do. But that, I suggest, would not be entirely right and I hope that your Lordships will permit me to touch briefly on six respects in which I suggest the convention can, and in practice does, have an influence in our domestic proceedings.

First, as the noble and learned Lord the Lord Chancellor observed, where a United Kingdom statute is capable of two interpretations, one consistent with the convention and one inconsistent, then the courts will presume that Parliament intended to legislate in conformity with the convention and not in conflict with it. In other words, the courts will presume that Parliament did not intend to legislate in violation of international law. That may be thought by your Lordships to be a modest presumption.

Secondly, if the common law is uncertain, unclear or incomplete, the courts have to make a choice; they cannot abdicate their power of decision. In declaring what the law is, they will rule, wherever possible, in a manner which conforms with the Convention and does not conflict with it. Any other course would be futile since a rule laid down in defiance of the convention would be likely to prove short-lived.

There is, of course, one field--freedom of expression--in which respected Members of this House have declared that they see no inconsistency between the common law and the convention. That is reassuring; it is also wholly unsurprising since we have a long record as a pioneer in the field of freedom of expression. But it means that the courts are encouraged to look to the convention and the jurisprudence of the European Court of Human Rights when resolving problems on the common law.

Thirdly, when the courts are called upon to construe a domestic statute enacted to fulfil a convention obligation, the courts will ordinarily assume that the statute was intended to be effective to that end. That is mere common sense, but common sense is the stock-in-trade of much judicial decision-making.

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[15] HL Deb Vol 575 c.1465-1467, 3.7.1996

> Fourthly, where the courts have a discretion to exercise--that is, they can act in one way or another--one or more of which violates the convention and another of which does not, they seek to act in a way which does not violate the convention. That again is usually common sense and requires no elaboration. However, it is not an invariable rule and your Lordships' House, sitting judicially, gave an important judgment only yesterday in which the convention right to privacy was held to be obliged to give way to the greater interests of justice.
>
> Fifthly, when, as sometimes happens, the courts are called upon to decide what, in a given situation, public policy demands, it has been held to be legitimate that we shall have regard to our international obligations enshrined in the convention as a source of guidance on what British public policy requires.
>
> Sixthly and lastly, matters covered by the law of the European Community--that is, the law administered by the European Court of Justice in Luxembourg and not Strasbourg--on occasion give effect to matters covered by convention law. The Court of Justice takes the view that on matters subject to Community law, the law common to the member states is part of the law which applies. All member states are parties to the convention and it so happens from time to time that laws derived from the convention are incorporated as part of the law of the Community. That of course is a law which the courts in this country must apply since we are bound by Act of Parliament to do so, and that is a means by which, indirectly, convention rights find their way into domestic law.

In a number of these cases the courts have expressed the view that the European Convention, and in particular the right of freedom of expression under Article 10, can simply be seen as the articulation of some of the existing principles underlying the common law. As far as new common law rights, such as a right of privacy, are concerned, *Halsbury's Laws of England* suggests that[16]:

> In the absence of legislation incorporating the Convention into English law it seems unlikely that the courts will use the Convention to create entirely new common law rights and obligations. However, the extent to which a right is entirely new, and so incapable of such judicial development, is controversial.

Halsbury's notes[17] that in the case in 1991 involving press photographs of the injured actor Gordon Kaye and the 1979 case of *Malone v Metropolitan Police Comr*[18] the courts felt unable to use the guarantee of respect for personal privacy in Art 8 of the Convention to develop a right of privacy in English law. Some judges and academics have taken the contrary view, namely that the Convention should inform the common law. The question whether a right of personal privacy could be developed in English law by reference to Article 8 of the European Convention was specifically left open by the House of Lords in the 1996 case *R v Khan*[19].

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16 *Halsbury's Laws of England* Fourth Edition Reissue Volume 8(2) paragraph 104 note 13

17 ibid.

18 *Kaye v Robertson* [1991] FSR 62 CA and *Malone v Metropolitan Police Comr* [1979] Ch 344, sub nom *Malone v Metropolitan Police Comr (No 2)* [1979] 2 All ER 620

19 [1996] 3 All ER 289

Where statutory rather than common law provisions are concerned, *Halsbury's* notes the view, expressed by the House of Lords in the case of *Brind*[20], that in the absence of statutory incorporation of the international human rights codes into domestic law it would be a usurpation of the functions of Parliament if the courts were to interpret the statutory powers conferred upon ministers of the Crown as being limited by or subject to those codes. Where fundamental human rights are adversely affected by the administrative decisions of public authorities the courts have, however, felt that stricter judicial scrutiny is appropriate. They have also regarded the European Convention and the other international human rights codes as relevant sources of public policy[21].

There has been some controversy in recent years about whether or not the judiciary is currently attempting either to develop a common law human rights jurisdiction or to effect the "backdoor incorporation" of the international human rights codes to which the United Kingdom is party, such as the European Convention on Human Rights. In an article published in the journal *European Human Rights Law Review* in 1996 Michael J.Beloff Q.C and Helen Mountfield suggested that the more recent cases in which the courts had made use of the European Convention showed the judiciary effectively engaged in "the infusion of the substance of the European Convention into English law", if not the "backdoor incorporation of its text".[22] In a book published in 1997 Murray Hunt expressed the view that what had been taking place was "nothing short of the emergence of a common law human rights jurisdiction", showing a "judicial willingness to develop the common law in a way which provides recognition for and greater protection of fundamental rights"[23].

Francesca Klug and Keir Starmer concluded in an article published in the journal *Public Law* in 1997 that "backdoor incorporation" of the European Convention on Human Rights had not yet taken place. They made the following observations about the use made of the European Convention by the UK courts[24]:

> That the profile of the European Convention on Human Rights has significantly increased in court decisions, particularly in the last five years, is beyond doubt. This is partly due to adverse decisions in Strasbourg and the diligence of some advocates in seeking to widen the scope for recourse to the Convention in domestic law. But it mainly reflects the determination of some senior judges to provide a more substantial foundation for the protection of fundamental rights already recognised by the common law from incursions by the executive.

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20 [1991] 1AC 696

21 *Halsbury's Laws of England* Fourth Edition Volume 8(2) paragraph 104

22 Michael J. Beloff Q.C. and Helen Mountfield "Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales" –[1996] *European Human Rights Law Review* Issue 5 p.467-495

23 Murray Hunt *Using Human Rights Law in English Courts* –1997 p.205

24 Francesca Klug and Keir Starmer "Incorporation through the back door" – 1997 *Public Law* 223 at p.232

In their view, the cases showed that even where the courts were inclined to apply the Convention by adopting the jurisprudential approach of the European Court of Human Rights, they were inhibited by common law practices and procedures which had progressed little over the previous 25 years. They concluded that in practice the Convention was generally only used by the courts as a guide to statutory interpretation where an ambiguity in legislation could be found. Likewise, on those rare occasions when recourse had been had to the Convention in the development of the common law this was still usually restricted to cases involving uncertainty. They added that[25]:

> Cases where the courts have least difficulty in resorting to the Convention tend to fall into fairly clearly identifiable categories: those involving the exercise of the court's own discretion (for example, in grating remedies); those in which a Strasbourg approach has been forced upon the courts by legislation which has been passed, or a power conferred, to comply with an adverse ruling in the European Court of Human Rights; and those where the executive has taken it upon itself to act in conformity with the Convention - through published policy or otherwise. Recourse to the Convention via the application of [European] Community law is, at this stage, still limited.

As has already been noted, the fact that the European Convention has not been incorporated into UK law is often put forward as a reason for the large number of cases in which the European Court of Human Rights has found the UK to be in breach of the European Convention. In the debate on the Second Reading of the *Human Rights Bill* in the House of Lords the Lord Chancellor, Lord Irvine of Lairg, said[26]:

> Our legal system has been unable to protect people in the 50 cases in which the European Court has found a violation by the United Kingdom. That is more than any other country except Italy. The trend has been upwards. Over half the violations have been found since 1990.

Some commentators have, however, suggested that references to the European Court of Human Rights from states which have not incorporated the European Convention into their own law are not disproportionately large[27]. They have suggested that once account has been taken of the relative population size of the various countries which are parties to the Convention and the dates from which those countries accepted individual petition and the compulsory jurisdiction of the European Court, the United Kingdom's record is no worse than that of many other countries. For example, in her speech on the Second Reading debate on the Human Rights Bill introduced by Lord Lester during the 1996-97 session of Parliament the then Conservative Home Office minister Baroness Blatch said[28]:

> Those who suggest that the United Kingdom's record for breaches of the ECHR is the worst in Europe are misinformed. It is important to note that levels of awareness of human rights in this country among the legal profession, active civil liberties, non-governmental organisations and the public at large are far higher than in most, probably any, of the Council of Europe

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[25] ibid

[26] HL Deb Vol 582 c.1228, 3.11.1997

[27] see DJ Harris, M O'Boyle and C Warbrick *Law of the European Convention on Human Rights* (1995) p.23-24

[28] HL Deb Vol 577 c.1751, 5.2.1997. See also Joshua Rezenberg, *Trial of Strength: The Battle between Ministers and Judges over Who Makes the Laws* (1997) p.154

> countries. That is cause for satisfaction but it means that numbers of initial applications tend to be high. In considering the figures for findings of violation, we cannot ignore the fact that the relative population size of different states varies enormously, and that individuals from some states--such as the United Kingdom--have been able to petition Strasbourg for much longer than others. In fact, the UK's record of compliance with the European Convention on Human Rights compares well with the records of many other countries across Europe--countries like Austria, France, Italy, Sweden, Belgium, the Netherlands and Switzerland--when considered in relation to our large population and the 31 years that the right of individual petition has been accepted in this country.

In a chapter in J.P Gardner's book *Aspects of Incorporation of the European Convention of Human Rights into Domestic Law* H.C. Kruger considered whether incorporation of the Convention into domestic law had any impact on the number and nature of applications submitted to the Strasbourg for consideration by the European Commission on Human Rights and the European Court and concluded that incorporation had no significant influence on the number of applications. He said[29] :

> There was a long period when United Kingdom applications seemed to be the most frequent ones, and those which had the best prospects of success. However, recently the number of French cases has overtaken those from the United Kingdom and there have also been several findings of violations of the Convention by France, while the number of admitted applications from the United Kingdom has somewhat dropped.

He found that the same was true of the changing balance between a number of other countries, noting that statistics for States with a comparable population were more or less in the same range and that the tendencies which might influence the number of applications seemed to balance each other out. He added that individual applicants were often unaware of whether or not the Convention was part of the domestic law in their state.

Areas of the law which have been changed through primary or secondary legislation as a result of cases where the European Court of Human Rights has found the UK to be in breach of the European Convention on Human Rights include the following:

- contempt of court (Sunday Times, 1979)
- the closed shop (Young, James and Webster, 1981);
- homosexuality in Northern Ireland (Dudgeon, 1981);
- the right of a mental patient to have a detention order reviewed (X, 1981);
- corporal punishment in schools(Campbell & Cosans, 1982);
- prisoners' correspondence (Silver & others, 1983;McCallum, 1990; Campbell, 1992);
- telephone tapping (Malone, 1984);
- immigration rules (Abdulaziz, Cabales & Balkandali, 1985);
- parental access to children (O, H, W, B & R, 1987);

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[29] H.C.Kruger, "Does the Convention machinery distinguish between states which have and have not incorporated it?" in *Aspects of Incorporation of the European Convention on Human Rights into Domestic Law* – ed. J.P.Gardner 1993 p.26

- access to child care records (Gaskin, 1989);
- arrest under the *Northern Ireland Emergency Provisions Acts* (Fox, Campbell & Hartley, 1990);
- procedures for reviewing discretionary life sentences (Thynne, Wilson & Gunnell, 1990);
- legal aid (Granger, 1990; Boner and Maxwell,1994);
- access to legal advice for fine and debt defaulters (Benham, 1996);
- procedures for review of continued detention of young offenders detained at Her Majesty's pleasure (Hussain & Singh,1996);
- deportation procedures for asylum seekers whose deportation is sought on grounds of national security (Chahal 1996)
- procedure of courts-martial (Findlay, 1997).

C. Arguments for and against a Bill of Rights

As much of the debate tends to be driven by supporters of change, it is relatively rare to find balanced consideration of the argument for and against the adoption of some form of Bill of Rights for the UK. One such summary of the arguments by a proponent is contained in Professor Zander's *A Bill of Rights?*, as its contents page neatly demonstrates:[30]

2. The Arguments for a Bill of Rights Considered

- To bring the United Kingdom into line with most of the rest of the world
- The procedure for the enforcement of human rights in Strasburg is too slow
- The absence of adequate machinery for the enforcement of human rights in Britain means that "dirty laundry" is washed unnecessarily abroad to the detriment of Britain's good name
- A British Bill of Rights would take decisions on matters of importance away from foreign judges
- A Bill of Rights is a flexible and adaptable tool
- A Bill of Rights is an opportunity for developing law and practice beyond what would be likely to occur if left to the executive and the legislature
- A bill of Rights would be needed if there is any significant measure of devolution of legislative powers to regional assemblies
- A Bill of Rights may assist a willing Minister to achieve needed reforms
- A Bill of Rights places the power of action where it belongs with those who claim to be aggrieved
- A Bill of Rights is a major educative force

3. The Arguments against a Bill of Rights Considered

- A Bill of Rights is an "un-British" way of doing things
- A Bill of Rights is not needed-human rights are adequately protected in Britain
- A Bill of Rights is suitable for a primitive or unsophisticated system of law but is not appropriate to a modern, complex society

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[30] 4th ed., 11997 pp.ix-x. See also, for example, *A people's charter: Liberty's Bill of Rights*, 1991, pp8-13

- A Bill of Rights is too powerful a tool to be entrusted to judges and is incompatible with democratic principles
- It is not appropriate for judges to be deciding what laws are "necessary in a democratice society"
- The judges cannot be trusted to get it right
- The professional outlook of judges regarding law-making is not conducive to good decision-making under a Bill of Rights
- A Bill of Rights would "politicise" the judges
- Can the judges give expression to "fundamental human rights" in defiance of statute law ?
- A Bill of Rights needs to he "entrenched" and would thereby restrict Parliament's freedom to legislate in the light of prevailing circumstances whatever they may happen to be
- Bills of Rights prevent the Government from taking necessary action in emergencies
- A Bill of Rights needs special protection against amendment or repeal which would restrict Parliament's freedom to legislate
- A Bill of Rights would further delay the remedy
- Bill of Rights cases would clog an already overloaded court system
- A Bill of Rights would generate a great deal of frivolous litigation
- A Bill of Rights would require elaborate machinery to enforce it
- The time is not ripe for a Bill of Rights
- Having a bill of rights would achieve little - the Canadian experience
- Making people more rights conscious is harmful

A generally recognised convenient examination of both sides of the issue is the 1978 report of the House of Lords *Select Committee on a Bill of Rights.* The report's summary of the arguments for and against a bill of Rights is set out in the Appendix to this Paper[31].

D. Proposals to incorporate the European Convention on Human Rights into UK law

The history of the general debate on whether or not the UK should have a general Bill of Rights and the more specific debate on the possible incorporation of the European Convention on Human Rights into UK law is set out in considerable detail in Michael Zander's book *A Bill of Rights ?,* the fourth edition of which was published in 1997. What follows is a summary of some of the major events.

In 1968 Anthony Lester, now Lord Lester of Herne Hill Q.C., wrote a pamphlet entitled *Democracy and Individual Rights* in which he argued for the establishment of a Bill of Rights for the United Kingdom, through the enactment of the European Convention of Human Rights. In subsequent years the matter was raised on a number of occasions by members of all the major parties inside Parliament, notably in 1969 by the Conservative peer Lord Lambton, the Liberal peer Lord Wade and the Liberal MP Emlyn Hooson Q.C, and in 1971

[31] HL 176, 1977-78 - footnotes omitted

by the future Labour Attorney General Sam Silkin Q.C. In 1969 calls for the introduction of human rights legislation were also made outside Parliament in a Liberal Party pamphlet *A Bill of Rights*, written by John Macdonald Q.C, and a pamphlet entitled *New Charter* by the then Quintin Hogg M.P.

Proposals for the enactment of an entrenched Bill of Rights introduction came to particular public and media prominence with Lord Scarman's call, in his Hamlyn Lectures in December 1974[32], for the introduction of such a measure, and this was followed by the publication in 1975 of a pamphlet entitled *Freedom under Law* by the leading Conservative Sir Keith Joseph, who set out his view that a Bill of Rights was needed to protect the rule of law. A Labour Party pamphlet *Charter of Rights*, which urged the adoption of the European Convention on Human Rights into UK law was published in 1976 as a discussion document, rather than an expression of Labour Party policy. In March 1976 the Standing Advisory Commission for Northern Ireland published a discussion paper on the *Bill of Rights,* which set out the arguments for and against the proposals and described some of the issues which needed to be resolved. The Standing Advisory Commission went on to publish a detailed *Report on the protection of human rights by law in Northern Ireland* in November 1977[33]

In March 1976 the Liberal peer Lord Wade raised the issue of human rights legislation again when he introduced a Bill designed to incorporate the European Convention on Human Rights into UK law. The following month, in a speech at Queen's University, Belfast, the Attorney General, Sam Silkin, suggested that the time was ripe for consideration of the question whether or not the European Convention should be incorporated into UK law. A Home Office discussion document *Legislation on Human Rights: with particular reference to the European Convention* drawn up by an interdepartmental Working Party of senior civil servants was subsequently published in June 1976. The Conservative Opposition Front Bench subsequently decided to support the incorporation of the European Convention, at least in the context of the devolution legislation which was then before Parliament and during the committee stage of the Scotland Bill 1977-78 Leon Brittan, who was then Conservative spokesman on devolution, moved amendments designed to provide Scotland with a Bill of Rights containing the rights set out in the European Convention, with some alterations intended to make them appropriate to a devolved legislature. The amendments were defeated[34]. Michael Zander notes that this was the first occasion on which the House of Commons had voted on the substantive question of the incorporation of the European Convention and also the first and only occasion on which incorporation of the Convention has ever officially been proposed by the Conservative Party[35].

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32 Leslie Scarman, *English Law – The New Dimension* (1974) especially p.18-21
33 Cmnd 7009
34 HC Deb Vol 943 c.491-580, 1.2. 1978
35 Michael Zander, *A Bill of Rights ?* Fourth Edition (1997) p.23

In February 1977 Lord Wade initiated another debate in the House of Lords by moving his Bill, which was designed to incorporate the European Convention into UK law[36]. During the debate Lord Hailsham successfully moved an amendment to refer the matter to a Select Committee, which was duly set up on May 17th 1977. The *Report of the House of Lords Select Committee on a Bill of Rights* was published in May 1978[37]. The committee was agreed that if there were to be Bill of Rights, it should be a Bill based on the European Convention on Human Rights. It was not, however able to agree on whether or not it would be desirable to have such a Bill. Six members of the committee, Lords Blake, Jellicoe, O'Hagan, Redcliffe-Maud, Wade and Lady Gaitskell (three Conservative, one Liberal, one Labour and one cross-bencher) were in favour of a Bill of Rights. Five members, Lords Boston, Foot, Gordon-Walker, Lloyd of Hampstead and Allen of Abbeydale (three Labour, one Liberal and one cross-bencher) were opposed to it. The report of the committee went on to say that[38]:

> To summarise the Committee's review of matters bearing on the scope for a Bill of Rights, they have concluded that the scope for any Bill of Rights within the present constitution would be confined largely to its impact on our existing law. To this they would add that in any country, whatever its constitution, the existence or absence of legislation in the nature of a Bill of Rights can in practice play only a relatively minor part in the protection of human rights. What is important, above all, is a country's political climate and traditions. This is, the Committee think, a common ground among both those who favour and those who oppose a Bill of Rights, and they received no evidence that human rights are in practice better protected in countries which have a code of fundamental human right embodied in their law than they are in the United Kingdom. It is of interest that the Table on page 144 of the Minutes of Evidence shows that the proportion o applications made to the Commission in Strasbourg has not been higher for the United Kingdom then it has been from some other countries where the European Convention is part of the domestic law .
>
> These considerations have led the Committee to the view that, even if on balance a Bill of Rights were thought desirable, too much should not be expected of such a Bill. The Committee think that many of those advocating a Bill of Rights, including a number of witnesses before the Committee, pitch their case too high. Similar considerations equally suggest that the case against a Bill of Rights has also been exaggerated.

In the years immediately following the publication of the House of Lords Select Committee's report there were a number of further, unsuccessful attempts by members of all the major parties, including Lord Wade and the Conservative peer Lord Broxbourne, to introduce legislation enacting a Bill of Rights, usually in the form of legislation to incorporate the European Convention on Human Rights. At the same time, support for such legislation appeared to be growing. The Constitutional Reform Centre set up in 1984 by Richard Holme (later the Liberal Democrat peer Lord Holme of Cheltenham) was instrumental in the development of *Charter 88*, a document advocating, amongst other things, the enshrining of civil liberties in a Bill of Rights. Charter 88 is now a general movement for constitutional reform, which has proposed the incorporation of the European Convention on Human Rights

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[36] HL Deb Vol 389 c.973, 3.2.1977

[37] *Report of the House of Lords Select Committee on a Bill of Rights* HL 176 session 1977-78; *Minutes of Evidence taken before the Select Committee on a Bill of Rights* HL 81 session 1977-78

[38] HL 176 session 1977-78 p.29-30 paras. 30-31

as the first step in a number of proposed reforms, which might later include, as part of a new constitution, the drafting of a Bill of Rights for the UK encompassing a wider range of rights than those set out in the European Convention[39].

In December 1990 Frank Vibert, deputy director of the right-wing think-tank the Institute for Economic Affairs, published a paper, *Constitutional Reform in the United Kingdom– an incremental agenda,* arguing for a Bill of Rights "to protect individuals from over-interference from governments while at the same time providing a guide to activism where action is required in order to secure liberties".

In October 1991 Liberty, which had supported the incorporation of the European Convention into UK law since 1977, published a detailed consultation document entitled *A People's Charter – Liberty's Bill of Rights* advocating a Bill of Rights drawn not only from the European Convention but also from a number of other international human rights documents. In December 1991 the Institute for Public Policy Research (IPPR), an independent left-of-centre think-tank, published a pamphlet entitled *A British Bill of Rights* as the first part of a proposed written constitution for the UK. The pamphlet included a draft Bill based on the European Convention on Human Rights and the International Covenant on Civil and Political Rights and a commentary on the Bill's provisions.

For advocates of the incorporation into UK law of the European Convention on Human the most significant political development in recent years has probably been the support which the support which the Labour Party has given to this proposal since 1993. While the Liberal Democrats have consistently supported incorporation of the European Convention, Labour views have in the tended to be more mixed. Critics of incorporation within the Labour Party have expressed the view that it would confer too much power on an unelected and unrepresentative judiciary. The Convention has also been criticised as having too narrow a focus, being concerned with a relatively limited spectrum of civil and political rights, rather than any wider economic and social entitlements.

In a lecture delivered at Church House under the auspices of Charter 88 on March 1st 1993 the then leader of the Labour Party, Mr John Smith Q.C. spoke of the need to modernise the constitution through a range of measures including the strengthening of people's individual rights. He added that:

> The quickest and simplest way of achieving democratic and legal recognition of a substantial package of human rights would be by incorporating into British law the European Convention on Human Rights.

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[39] see *A Bill of Rights for Britain* – Anthony Lester QC, Charter 88 (1991); *The recovery of the constitution* – Ferdinand Mount, Charter 88 1992; *The crisis facing human rights in Europe: does the British Government really care ?* – Anthony Lester Charter 88 1993; *Reinventing community: The rights and responsibilities debate* – Francesca Klug, Charter 88 December 1996

Mr Smith referred to the slowness of the procedure which British citizens were required to follow if they wished to seek the protection of the Convention adding that:

> The failure to incorporate the Convention into British law has another unwelcome effect. Although the British government is subject to the requirements of the Convention, the present set-up makes the protection of basic rights appear difficult, remote, even foreign. It reinforces an atmosphere that suggests that basic rights are not that important, and that the government regards them as a nuisance rather than, as it should, as a primary obligation.

He went on to say:

> In a modern democracy, Parliament must decide what rights should apply, and should set them out in a manner that citizens can understand for themselves. Under these proposals, it would not be left to the discretion of judges, or to archaeological investigations by legal and constitutional experts, to decide what protections citizens do and do not have.

Mr Smith's view was reiterated in the Labour Party's policy document *A new agenda for democracy: Labour's proposals for constitutional reform*, published in September 1993. When Mr Tony Blair became leader of the Labour Party in July 1994 he committed himself to the same policy, stating in the John Smith Memorial Lecture on February 7th 1996 stating that the European Convention should be incorporated as a first step. He added that:

> People in this country have access to the protection and guarantees of basic human rights that the Convention provides yet to gain access to those rights British citizens must appeal to the Commission and the Court in Strasbourg. It is a long and expensive process and only the most diligent manage to stay the course.
>
> I believe it makes sense to end the cumbersome practice of forcing people to go to Strasbourg to hold their government to account. By incorporating the Convention into British law the rights it guarantees would be available to courts in both Britain and Northern Ireland. This would make it clear that the protection afforded by the Convention was not some foreign import but that it had been accepted by successive British Governments and that it should apply throughout the United Kingdom.
>
> Some have said that this system takes power away from Parliament and places it in the hands of judges. In reality, since we are already signatories to the Convention, it means allowing British judges rather than European judges to pass judgment.

Support for legislation to incorporate the European Convention also came from the senior judiciary. A number of past and current Law Lords expressed support for the *Human Rights Bills* introduced in the House of Lords in both the 1994-95 and 1996-97 sessions by Lord Lester[40]. The then Master of the Rolls, Sir Thomas Bingham (now Lord Bingham, the Lord Chief Justice) had expressed his support for incorporation in an article in the *Law Quarterly*

[40] HL Deb Vol 560 c.1136-1174, 25.1.1995; HL Deb Vol 577 c.1725-1758, 5.2.1997 See Lord Lester "The Mouse that Roared: The Human Rights Bill 1995" – (1995) *Public Law* 198

Review in 1993[41], while the Law Lord, Lord Browne-Wilkinson, had set out his views in the journal *Public Law* in 1992[42].

In an article published on October 21st 1995 the *Economist* also argued for the enactment of a Bill of Rights, stating that as a minimum, the rights set out in the European Convention should be incorporated into British law. The *Economist* noted that opinion polls by MORI in 1995 and for the Rowntree Reform Trust in 1991 found that 79% of respondents were in favour of a bill of rights for all of Britain. It stated that[43]:

> A bill of rights cannot elevate contentious, political issues to an abstract plane beyond the reach of the rest of society. What it can do is to nurture a culture of liberty in a society which already recognises its value, and to create a judiciary which sees the protection of liberty as one of its primary tasks.

An editorial in the *Times* on August 15th 1992 expressing support for incorporation noted that "Almost unnoticed, establishment opinion is moving towards the incorporation of the European Convention on Human Rights into British law".

The Labour Party set out its plans to incorporate the European Convention into UK law in a consultation paper *Bringing Rights Home* published in December 1996. In March 1997 the Labour and Liberal Democrat parties published the report of their joint consultative committee on constitutional reform, in which they agreed that the rights and duties defined by the ECHR and its First Protocol should be incorporated by Act of Parliament into United Kingdom law[44]. Both the Labour and Liberal Democrat manifestos for the 1997 general Election contained proposals to implement the Convention. The Liberal Democrat manifesto stated that this would be a first step towards the establishment of Bill of Rights, while the Labour manifesto said:

> The incorporation of the European Convention will establish a floor, not a ceiling, for human rights. Parliament will remain free to enhance these rights, for example by a Freedom of Information Act.

The new Labour Government set out its plans for incorporation in a White Paper *Rights Brought Home: The Human Rights Bill*[45] which accompanied the publication of the Human Rights Bill designed to implement its proposals. In a chapter in the White Paper setting out its view of the case for change the Government said[46]:

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41 T.H.Bingham ,"The European Convention on Human Rights: Time to Incorporate" (1993) *L.Q.R.* 390

42 Lord Browne-Wilkinson, "The Infiltration of a Bill of Rights" (1992) *Public Law* 397-410

43 "Britain's Constitution: Why Britain needs a bill of rights" – *Economist* October 21st 1995. Reprinted in *Reforming Britain's Constitution* – Economist (1995)

44 *Report of The Joint Consultative Committee on Constitutional Reform* March 1997 p.6

45 CM 3782

46 ibid. para.1.4

The constitutional arrangements in most continental European countries have meant that their acceptance of the Convention went hand in hand with its incorporation into their domestic law. In this country it was long believed that the rights and freedoms guaranteed by the Convention could be delivered under our common law. In the last two decades, however, there has been a growing awareness that it is not sufficient to rely on the common law and that incorporation is necessary.

The White Paper went on to say[47]:

When the United Kingdom ratified the Convention the view was taken that the rights and freedoms which the Convention guarantees were already, in substance, fully protected in British law. It was not considered necessary to write the Convention itself into British law, or to introduce any new laws in the United Kingdom in order to be sure of being able to comply with the Convention.

From the point of view of the international obligation which the United Kingdom was undertaking when it signed and ratified the Convention, this was understandable. Moreover, the European Court of Human Rights explicitly confirmed that it was not a necessary part of proper observance of the Convention that it should be incorporated into the laws of the States concerned.

However, since its drafting nearly 50 years ago, almost all the States which are party to the European Convention on Human Rights have gradually incorporated it into their domestic law in one way or another. Ireland and Norway have not done so, but Ireland has a Bill of Rights which guarantees rights similar to those guaranteed by the Convention and Norway is also in the process of incorporating the Convention. Several other countries with which we have close links and which share the common law tradition, such as Canada and New Zealand, have provided similar protection for human rights in their own legal systems.

The White Paper set out the Government's view of the case for incorporation as follows[48]:

The effect of non-incorporation on the British people is a very practical one. The rights, originally developed with major help from the United Kingdom Government, are no longer actually seen as British rights. And enforcing them takes too long and costs too much. It takes on average five years to get an action into the European Court of Human Rights once all domestic remedies have been exhausted; and it costs an average of £30,000. Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts - without this inordinate delay and cost. It will also mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.

Moreover, in the Government's view, the approach which the United Kingdom has so far adopted towards the Convention does not sufficiently reflect its importance and has not stood the test of time.

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[47] ibid. paras 1.11-1.13
[48] ibid. paras 1.14-1.17

The most obvious proof of this lies in the number of cases in which the European Commission and Court have found that there have been violations of the Convention rights in the United Kingdom. The causes vary. The Government recognises that interpretations of the rights guaranteed under the Convention have developed over the years, reflecting changes in society and attitudes. Sometimes United Kingdom laws have proved to be inherently at odds with the Convention rights. On other occasions, although the law has been satisfactory, something has been done which our courts have held to be lawful by United Kingdom standards but which breaches the Convention. In other cases again, there has simply been no framework within which the compatibility with the Convention rights of an executive act or decision can be tested in the British courts: these courts can of course review the exercise of executive discretion, but they can do so only on the basis of what is lawful or unlawful according to the law in the United Kingdom as it stands. It is plainly unsatisfactory that someone should be the victim of a breach of the Convention standards by the State yet cannot bring any case at all in the British courts, simply because British law does not recognise the right in the same terms as one contained in the Convention.

For individuals, and for those advising them, the road to Strasbourg is long and hard. Even when they get there, the Convention enforcement machinery is subject to long delays. This might be convenient for a government which was half-hearted about the Convention and the right of individuals to apply under it, since it postpones the moment at which changes in domestic law or practice must be made. But it is not in keeping with the importance which this Government attaches to the observance of basic human rights.

The Government went on to say that[49]:

We therefore believe that the time has come to enable people to enforce their Convention rights against the State in the British courts, rather than having to incur the delays and expense which are involved in taking a case to the European Human Rights Commission and Court in Strasbourg and which may altogether deter some people from pursuing their rights. Enabling courts in the United Kingdom to rule on the application of the Convention will also help to influence the development of case law on the Convention by the European Court of Human Rights on the basis of familiarity with our laws and customs and of sensitivity to practices and procedures in the United Kingdom. Our courts' decisions will provide the European Court with a useful source of information and reasoning for its own decisions. United Kingdom judges have a very high reputation internationally, but the fact that they do not deal in the same concepts as the European Court of Human Rights limits the extent to which their judgments can be drawn upon and followed. Enabling the Convention rights to be judged by British courts will also lead to closer scrutiny of the human rights implications of new legislation and new policies. If legislation is enacted which is incompatible with the Convention, a ruling by the domestic courts to that effect will be much more direct and immediate than a ruling from the European Court of Human Rights. The Government of the day, and Parliament, will want to minimise the risk of that happening.

Our aim is a straightforward one. It is to make more directly accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home.

[49] CM 3782 paras 1.18-1.19

II The Human Rights Bill [Bill 119 of 1997-98]

The Bill was introduced in the House of Lords and had its Second Reading there on November 3rd 1997. Opening the debate, the Lord Chancellor, Lord Irvine of Lairg set out the Government's argument for incorporating the Convention as follows[50]:

The traditional freedom of the individual under an unwritten constitution to do himself that which is not prohibited by law gives no protection from misuse of power by the state, nor any protection from acts or omissions of public bodies which harm individuals in a way that is incompatible with their human rights under the convention. Our legal system has been unable to protect people in the 50 cases in which the European Court has found a violation of the convention by the United Kingdom. That is more than any other country except Italy. The trend has been upwards. Over half the violations have been found since 1990. I have no doubt that with his distinguished European background the noble Lord, Lord Kingsland, will reject as absurd the proposition that because we have liberty, we have no need of human rights. This is a Home Office Bill. I invite the noble Lord, Lord Kingsland, to define in his speech what is the policy, what is the position in principle of the Shadow Home Secretary and of the Conservative Party on this Bill.

This Bill will bring human rights home. People will be able to argue for their rights and claim their remedies under the convention in any court or tribunal in the United Kingdom. Our courts will develop human rights throughout society. A culture of awareness of human rights will develop. Before Second Reading of any Bill the responsible Minister will make a statement that the Bill is or is not compatible with convention rights. So there will have to be close scrutiny of the human rights implications of all legislation before it goes forward. Our standing will rise internationally. The protection of human rights at home gives credibility to our foreign policy to advance the cause of human rights around the world.

He went on to make the following remarks about the implications of the Bill for Parliamentary sovereignty and the position of the judiciary[51]:Our critics say the Bill will cede powers to Europe, will politicise the judiciary and will diminish parliamentary sovereignty. We are not ceding new powers to Europe. The United Kingdom already accepts that Strasbourg rulings bind. Next, the Bill is carefully drafted and designed to respect our traditional understanding of the separation of powers. It does so intellectually convincingly and, if I may express my high regard for the parliamentary draftsman, elegantly.

The design of the Bill is to give the courts as much space as possible to protect human rights, short of a power to set aside or ignore Acts of Parliament. In the very rare cases where the higher courts will find it impossible to read and give effect to any statute in a way which is compatible with convention rights, they will be able to make a declaration of incompatibility. Then it is for Parliament to decide whether there should be remedial legislation. Parliament may, not must, and generally will, legislate. If a Minister's prior assessment of compatibility (under Clause 19) is subsequently found by declaration of incompatibility by the courts to have been mistaken, it is hard to see how a Minister could withhold remedial action. There is a fast-track route for Ministers to take remedial action by order. But the remedial action will not retrospectively make unlawful an act which was a lawful act--lawful since sanctioned by statute. This is the logic of the design of the Bill. It maximises the protection of human rights without trespassing on parliamentary sovereignty.

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50 HL Deb Vol 582 c.1228, 3.11.1997

51 ibid. c.1228-9

Replying for the Opposition, the Conservative peer Lord Kingsland said[52]:

> Her Majesty's loyal Opposition will not be voting against the Bill on Second Reading. Irrespective of the success or failure of our amendments thereafter, we will not vote against the Bill on Third Reading. As the Bill was foreshadowed in the manifesto, we are bound by the Salisbury Convention.
>
> If the Bill becomes law it will be a defining moment in the life of our constitution. Perhaps the only other examples this century of such defining moments were the passage of the Parliament Acts of 1911 and 1949. As your Lordships are acutely aware, they had a dramatic effect on the balance of power between your Lordships' House and another place.
>
> If this Bill reaches the statute book it will have an equally defining influence on the balance of power between the legislature and the judiciary. Whatever the inherent merits of its contents, I hope that your Lordships, in formulating your amendments, will be aware of how deep are the implications for that relationship. They lie at the heart of the doctrine of the separation of powers in our constitution, which has been the hallmark of our liberties throughout the centuries.

He added that[53]:

> There are many obvious reasons for wanting incorporation. Many people believe it hypocritical that we send our citizens to Strasbourg to obtain rights to which they are not entitled at home. We know that the convention is judge-driven and we often find that the judges in the court in Strasbourg--brilliant and well-meaning lawyers though they are--lack an understanding of our constitutional ways which are, after all, unique.
>
> Furthermore, the number of countries which have become part of the convention has expanded rapidly in recent years. Often the senior judges from those countries who will sit in Strasbourg have little experience of the jurisprudence of a free society. Until recently the jurisprudence in their countries has frequently been rubber stamping an order of the local commissar. The man behind the guichet was the man who counted. Therefore, in that context, putting the interpretation of the convention in the hands of our own judges has its attractions.
>
> It is also a fact that, for a long time, where there has been ambiguity about a domestic statute and where one acceptable interpretation would be in accordance with the convention, our judges have given our statutes that interpretation. Therefore, to some degree the process of incorporation is already occurring.

Lord Kingsland nonetheless argued that the proposals in the Bill were "constituionally unacceptable for two principal reasons. One was that that UK judges might go beyond existing Convention law when interpreting UK law in the light of Convention rights and thus come into conflict with Parliament[54]:

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[52] ibid. c.1234
[53] ibid. c.1235
[54] ibid. c.1237

> What is the doctrine of the separation of powers in our country? It is that judges do not interfere with the parliamentary process on the one hand and Parliament does not interfere with the judicial process on the other. That principle has stood us in enormously good stead, certainly since the Glorious Revolution more than 300 years ago. To the extent that the judges are not reflecting the jurisprudence of the convention but stating their own view about what the convention says, they are in breach of that doctrine. They are initiating new legislation.
>
> Of course, it is true that Parliament does not have to go ahead and pass that legislation. Indeed, what I fear may flow from a judicial decision of incompatibility is a long and bitter debate in Parliament about whether the judges were right and even if they were right, whether it is right to legislate.

Lord Kingsland's second objection concerned the proposed "fast-track" procedure for amending incompatible legislation[55]:

> What is more, the legislative process which is initiated is not a full primary legislative process. It starts an order in council process. We all know that an order in council cannot be amended; and we know also that it is not usually debated, although of course in this case it will require an affirmative resolution of both Houses of Parliament. That is not proper parliamentary consideration of future legislation.

Later in the debate Lord the Conservative peer Lord Henley reiterated that his party was strongly opposing the Bill, but would not oppose the Second Reading[56].

The Bill was supported by the Liberal Democrats with Lord Lester and Lord Holme of Cheltenham both lending support in the debate. It was also supported by the Lord Chief Justice, Lord Bingham, the former Master of the Rolls, Lord Donaldson and by the retired law lords Lord Scarman, Lord Ackner, Lord Wilberforce and Lord Simon of Glaisdale. It was opposed by, amongst others, the Conservative peers Lord Waddington and Lord Mayhew of Twysden and the cross-bencher Lord McCluskey.

A. "Convention rights"

Clause 1 of the Bill sets out those Articles of the European Convention on Human Rights and the First Protocol to the Convention which are intended to be given further effect by the Bill, unless they are subject to any designated derogation or reservation (a matter dealt with in Clauses 14 and 15). These Articles, which are described as "the Convention rights" are those set out in Articles 2 to 12 and 14 of the Convention and Articles 1 to 3 of the First Protocol, as read with Articles 16 to 18 of the Convention. They are set out in Schedule 1 of the Bill and reproduced in an Appendix to this Paper.

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[55] ibid. c. 1237.

[56] Ibid. c.1306

Clause 1 is also designed to enable it and Schedule 1 to be amended to allow effect to be given to rights contained in a number of additional Protocols of the European Convention, to which the UK is not currently a party, should the United Kingdom accept these Protocols at some future date. It is intended any such amendment should be made by order in the form of a statutory instrument. The order will require the approval of both Houses of Parliament under the affirmative procedure[57]. The Government set out its policy towards the ratification and incorporation of these additional Protocols in the White Paper *Rights Brought Home* as follows[58]:

4.9 Protocols 4, 6 and 7 guarantee a number of rights additional to those in the original Convention itself and its First Protocol. These further rights have been added largely to reflect the wider range of rights subsequently included under the International Covenant on Civil and Political Rights. There is no obligation upon States who are party to the original Convention to accept these additional Protocols, but the Government has taken the opportunity to review the position of the United Kingdom on Protocols 4, 6 and 7.

4.10 Protocol 4 contains a prohibition on the deprivation of liberty on grounds of inability to fulfil contractual obligations; a right to liberty of movement; a right to non- expulsion from the home State; a right of entry to the State of which a person is a national; and a prohibition on the collective expulsion of aliens. These provisions largely reflect similar (but not identical) rights provided under the International Covenant on Civil and Political Rights. Protocol 4 was signed by the United Kingdom in 1963 but not subsequently ratified because of concerns about what is the exact extent of the obligation regarding a right of entry.

4.11 These are important rights, and we would like to see them given formal recognition in our law. But we also believe that existing laws in relation to different categories of British nationals must be maintained. It will be possible to ratify Protocol 4 only if the potential conflicts with our domestic laws can be resolved. This remains under consideration but we do not propose to ratify Protocol 4 at present.

4.12 Protocol 6 requires the complete abolition of the death penalty other than in time of war or imminent threat of war. It does not permit any derogation or reservation. The Protocol largely parallels the Second Optional Protocol to the International Covenant on Civil and Political Rights, which the United Kingdom has not accepted.

4.13 The death penalty was abolished as a sentence for murder in 1965 following a free vote in the House of Commons. It remains as a penalty for treason, piracy with violence, and certain armed forces offences. No execution for these offences has taken place since 1946, when the war- time Nazi propagandist William Joyce (known as Lord Haw-Haw) was hanged at Wandsworth prison. The last recorded execution for piracy was in 1830. Thus there might appear to be little difficulty in our ratifying Protocol 6. This would, however, make it impossible for a United Kingdom Parliament to re-introduce the death penalty for murder, short of denouncing the European Convention. The view taken so far is that the issue is not one of basic constitutional principle but is a matter of judgement and conscience to be decided by Members of Parliament as they see fit. For these reasons, we do not propose to ratify Protocol 6 at present.

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[57] Clause 20(4)

[58] CM 3782 p.17-18

4.14 Protocol 7 contains a prohibition on the expulsion of aliens without a decision in accordance with the law or opportunities for review; a right to a review of conviction or sentence after criminal conviction; a right to compensation following a miscarriage of justice; a prohibition on double jeopardy in criminal cases; and a right to equality between spouses. These rights reflect similar rights protected under the International Covenant on Civil and Political Rights.

4.15 In general, the provisions of Protocol 7 reflect principles already inherent in our law. In view of concerns in some of these areas in recent years, the Government believes that it would be particularly helpful to give these important principles the same legal status as other rights in the Convention by ratifying and incorporating Protocol 7. There is, however, a difficulty with this because a few provisions of our domestic law, for example in relation to the property rights of spouses, could not be interpreted in a way which is compatible with Protocol 7. The Government intends to legislate to remove these inconsistencies, when a suitable opportunity occurs, and then to sign and ratify the Protocol.

The absence of Article 1 and Article 13 of the European Convention from the "Convention rights" set out in the Bill has been the subject of some comment. Article 1 places an obligation on states to secure Convention rights to everyone within their jurisdiction, while Article 13 places an obligation on states to secure effective domestic remedies for violations of Convention rights. The Government's view, set out in the *Notes on Clauses* and elsewhere, is that the inclusion of these Articles is unnecessary as the Bill itself gives effect to these obligations. A number of civil liberties organisations have, however expressed concern about the possible effect of the exclusion of Articles 1 and 13 from the Bill and this issue was raised several times during the Bill's passage through the House of Lords.

During the Second Reading of the Bill in the House of Lords Lord Ackner criticised the omission of Article 13, saying that a failure to provide the means to enforce the rights set out in Schedule 1 would render them useless[59]. The Liberal Democrat peer Earl Russell also expressed concern about Article 13[60]. In his speech at the end of the Second Reading debate the Home Office minister, Lord Williams of Mostyn, said of these concerns[61]:

Our view is, quite unambiguously, that Article 13 is met by the passage of the Bill. The answer to the question is as plain and simple as that.

During the committee stage of the Bill in the House of Lords attempts were made to introduce amendments designed to incorporate Article 13, or to incorporate a purposes clause into the Bill as a means of securing both the Convention rights and an obligation to secure effective domestic remedies. In moving the latter amendment Lord Lester said that if Article 13 were not to be incorporated, from time to time the courts would come across problems where they would need nevertheless to have regard to the Article. He said[62]:

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[59] HL Deb Vol 582 c.1285, 3.11.1997
[60] ibid. c.1288
[61] ibid. c1308
[62] HL Deb Vol 583 c.467-8, 18.11.1997

Perhaps I may give a controversial example to serve for all. The courts already have regard to Article 13 of the convention when developing the common law or deciding the scope of discretionary powers, including their own powers. For example, in Esther Rantzen's libel case the Court of Appeal had regard to Article 13 of the convention in explaining how in future it would interpret Section 8 of the Courts and Legal Services Act--the provision that gives it the power to intervene and overrule excessive damages awards by juries in libel cases. It made it clear that, looking at Article 13 as well as the free speech guarantee in Article 10 of the convention, it was right in future for the courts, as public authorities bound by Article 13, to exercise their discretion so as to avoid unnecessary jury awards for damages in libel cases.

That is one example. Another was in a case a year ago in the House of Lords--ex parte Khan--where several noble and learned Lords in their speeches referred to Article 13 in the context of the protection of the right to privacy guaranteed by Article 8 of the convention. Other amendments will later seek to incorporate Article 13 directly into our law. But if we include a purposes clause, either of the kind that I drafted that includes Article 1 or of the kind drafted by the noble Lord, Lord Mishcon, which incorporates Article 13 as part of a purposes clause, then my difficulty about the Bill as it stands would be met without the need to incorporate Article 13 directly.

Perhaps I may make one or two other points before I sit down. I am troubled, in what is otherwise an admirable Bill, brilliantly drafted and conceived, by the fact that, as drafted, it places some blinkers on the judges in their not being able to have regard to all the relevant provisions of the convention which are not necessarily substantive. One is Article 13. To give two more examples, the convention is equally authentic in English and French and there are rare cases where the judges have to look at both texts. The Bill does not say so. Another example is Article 60, which says that the convention should not be interpreted so as to whittle away existing human rights safeguards. Again, on the Bill as it stands, judges cannot have regard to that.

Lord Ackner suggested that the simplest way to have regard to Article 13 would be to incorporate it in the Bill. He said[63]:

After all the rhetoric which has preceded the White Paper and the publication of this Bill, surely the public are entitled to a clear, concise and unequivocal statement that effective remedies will be provided.

Lord Ackner said he had the following "grounds for suspicion"[64]:

First, what has been proposed is quite unusual. I understand that the right to an effective remedy under Article 13 is a substantive right under the convention which has been incorporated by every contracting state into their domestic law, including those which have done so by statute. So we are departing from what is normally done. That is some basis for suspicion.

Secondly, it may be that the Government, despite the rhetoric, have not quite got their heart--if a government have a cardiac region--in the right place in relation to some remedies. The Committee will recall the debate that we recently had on the crippling court fees which made it impossible for some members of society at the bottom end of the income sphere, to be able

[63] ibid. c.472
[64] ibid c.472-3

to come to court. Those were fees which, for the first time, took into account judges' salaries, pensions, the notional rent and even, so it was said, the office cat. That is a reference which no doubt prompted the irrelevant but no doubt therapeutic confession made by my noble and learned friend the Lord Chancellor as to his success at the Bar at the expense, apparently, of his clients.

Thirdly, there is legal aid which is to be taken away. Nothing is to be put in its place except contingency fees, the application of which is totally absurd to this litigation which will be uncertain and which will not in many cases ask for damages, but if they are obtained, they are so small that with the cap applied to them they will attract no solicitor.

Finally, there is the reference to Article 8, which appears to provide for the first time a right to privacy. It resulted suddenly in an outburst in the media and, if one looks at the report of our Second Reading debate and at the speech of my noble and learned friend the Lord Chancellor, one finds that a very large part of his speech was devoted to trying to pour oil on ruffled waters. The press were so indignant that a right to privacy might appear, that they suggested that Article 8 be omitted. It is no doubt an unworthy thought, but there are people who are unworthy and they take the view that the Government, like all governments, are scared of the media and that they will not do that which they should do in the circumstances. The Government should provide a framework in which the right to privacy should be set out and then applied by the courts; instead of which the matter is to be left somehow to the judges, who will no doubt cope as best as they can, case by case, to build up the jurisprudence on this very important subject.

In speaking against these amendments, the Lord Chancellor, Lord Irvine of Lairg said[65]:

We are not persuaded thus far by the debate that it is either necessary or desirable to amend the Bill in this way. The Bill gives effect to Article 1 by securing to people in the United Kingdom the rights and freedoms of the convention. It gives effect to Article 13 by establishing a scheme under which convention rights can be raised before our domestic courts. To that end, remedies are provided in Clause 8. If the concern is to ensure that the Bill provides an exhaustive code of remedies for those whose convention rights have been violated, we believe that Clause 8 already achieves that and that nothing further is needed.

We have set out in the Bill a scheme to provide remedies for violation of convention rights and we do not believe that it is necessary to add to it. We also believe that it is undesirable to provide for Articles 1 and 13 in the Bill in this way. The courts would be bound to ask themselves what was intended beyond the existing scheme of remedies set out in the Bill. It might lead them to fashion remedies other than the Clause 8 remedies, which we regard as sufficient and clear. We believe that Clause 8 provides effective remedies before our courts. It is noteworthy that those who have supported these amendments have not suggested any respect in which Clause 8 is deficient.

When one comes to Article 13, it provides that:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority"--

that is exactly what Clause 8 provides--

[65] ibid. c.475-476

"notwithstanding that the violation has been committed by persons acting in an official capacity".

The very ample definition of public authority in Clause 6 makes it plain that there is no intention to protect persons acting in an official capacity. On the contrary, our definition of public authority in that clause could not be wider. The noble and learned Lord, Lord Ackner, may nourish suspicions, but I assure him that there is nothing to be suspicious about.

At Second Reading I informed your Lordships that if Parliament chose to establish a committee on human rights the Government would welcome it. I said that one of the functions of that body might be to keep the protection of human rights under review. If for any reason which escapes me--none has been pointed to--it appeared to that committee in the light of the operation of this Bill that the remedial provisions of Clause 8 should be strengthened in some way, the Government would give serious consideration to that. But we would expect that committee to set out clearly the effect that its proposed amendments was designed to have. That is what we have sought to do in the Bill. It is noteworthy by its absence that the arguments put before the Committee by those who propose these amendments fail to state any respect in which Clause 8 is deficient.

In reply to comments from the Conservative peer, Lord Kingsland, the Lord Chancellor said:[66]

At present, I cannot conceive of any state of affairs in which an English court, having held an Act to be unlawful because of its infringement of a convention right, would under Clause 8(1), be disabled from giving an effective remedy. I believe that the English law is rich in remedies and I cannot conceive of a case in which English law under Clause 8(1) would be unable to provide an effective remedy.

However, during the earlier course of the debate I did not say that Article 13 was incorporated. The debate is about the fact that it is not incorporated. In reply to the noble Lord, Lord Lester, I said that in my view the English courts, in the examples which he offered, would be able to have regard to Article 13.

The amendments on this subject were subsequently withdrawn. Lord Mishcon and Lord Lester made a second attempt to introduce a general purposes clause through an amendment moved during the report stage of the Bill in the House of Lords. The Lord Chancellor repeated the Government's view that nothing was to be gained by such a provision and the amendment was withdrawn[67]

[66] ibid. c.479

[67] HL Deb Vol 584 c.1252-1263, 19.1.1998

B. Derogations from the Convention and Reservations

Clauses 14 to 17 of the Bill are designed to include within the framework of the Bill provision for derogations from, and reservations to, Articles of the Convention and for the duration and periodic review of these measures. In the White Paper *Rights Brought Home* the Government made the following comments about the UK's existing derogations and how the provisions in Clauses 14 to 17 were intended to operate[68]:

Derogations

4.1 Article 15 of the Convention permits a State to derogate from certain Articles of the Convention in time of war or other public emergency threatening the life of the nation. The United Kingdom has one derogation in place, in respect of Article 5(3) of the Convention.

4.2 The derogation arose from a case in 1988 in which the European Court of Human Rights held that the detention of the applicants in the case before it under the Prevention of Terrorism (Temporary Provisions) Act 1984 for more than four days constituted a breach of Article 5(3) of the Convention, because they had not been brought promptly before a judicial authority. The Government of the day entered a derogation following the judgment in order to preserve the Secretary of State's power under the Act to extend the period of detention of persons suspected of terrorism connected with the affairs of Northern Ireland for a total of up to seven days. The validity of the derogation was subsequently upheld by the European Court of Human Rights in another case in 1993.

4.3 We are considering what change might be made to the arrangements under the prevention of terrorism legislation. Substituting judicial for executive authority for extensions, which would mean that the derogation could be withdrawn, would require primary legislation. In the meantime, however, the derogation remains necessary. The Bill sets out the text of the derogation, and Article 5(3) will have effect in domestic law for the time being subject to its terms.

4.4 Given our commitment to promoting human rights, however, we would not want the derogation to remain in place indefinitely without good reasons. Accordingly its effect in domestic law will be time-limited. If not withdrawn earlier, it will expire five years after the Bill comes into force unless both Houses of Parliament agree that it should be renewed, and similarly thereafter. The Bill contains similar provision in respect of any new derogation which may be entered in future.

Reservations

4.5 Article 64 of the Convention allows a state to enter a reservation when a law in force is not in conformity with a Convention provision. The United Kingdom is a party to the First Protocol to the Convention, but has a reservation in place in respect of Article 2 of the Protocol. Article 2 sets out two principles. The first states that no person shall be denied the right to education. The second is that, in exercising any functions in relation to education and teaching, the State shall respect the right of parents to ensure that such education and teaching is in conformity with their own religious and philosophical convictions. The reservation makes it clear that the United Kingdom accepts this second principle only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

[68] CM 3782 p.16-17

4.6 The reservation reflects the fundamental principle originally enacted in the Education Act 1944, and now contained in section 9 of the Education Act 1996, "that pupils are to be educated in accordance with the wishes of their parents so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure". There is similar provision in Scottish legislation. The reservation does not affect the right to education in Article 2. Nor does it deny parents the right to have account taken of their religious or philosophical convictions. Its purpose is to recognise that in the provision of State-funded education a balance must be struck in some cases between the convictions of parents and what is educationally sound and affordable.

4.7 Having carefully considered this, the Government has concluded that the reservation should be kept in place. Its text is included in the Bill, and Article 2 of the First Protocol will have effect in domestic law subject to its terms.

4.8 Whilst derogations are permitted under the Convention only in times of war or other public emergency, and so are clearly temporary, there is no such limitation in respect of reservations. We do not therefore propose to make the effect of the reservation in domestic law subject to periodic renewal by Parliament, but the Bill requires the Secretary of State (the Secretary of State for Education and Employment) to review the reservation every five years and to lay a report before Parliament.

C. The Enforcement of Convention Rights

There has been much discussion in the general debate on incorporation of the European Convention about how the Convention rights should be enforced and the possible implications for Parliamentary sovereignty of any power given to the courts to "strike down" provisions in Acts of Parliament which they considered to be in breach of the Convention. The *Report of the Joint Consultative Committee on Constitutional Reform* set up by Labour and the Liberal Democrats stated that the Act incorporating the European Convention would not affect the sovereign powers of Parliament[69]. In the White Paper *Rights Brought Home* the Government set out its views on the approaches taken by a number of other countries in dealing with the effects of court decisions on legislation and its reasons for preferring the arrangements set out in the *Human Rights Bill*[70]:

2.7 A declaration that legislation is incompatible with the Convention rights will not of itself have the effect of changing the law, which will continue to apply. But it will almost certainly prompt the Government and Parliament to change the law.

2.8 The Government has considered very carefully whether it would be right for the Bill to go further, and give to courts in the United Kingdom the power to set aside an Act of Parliament which they believe is incompatible with the Convention rights. In considering this question, we have looked at a number of models. The Canadian Charter of Rights and Freedoms 1982 enables the courts to strike down any legislation which is inconsistent with the Charter, unless the legislation contains an explicit statement that it is to apply "notwithstanding" the provisions of the Charter. But legislation which has been struck down may be re-enacted with a "notwithstanding" clause. In New Zealand,

[69] *Report of the Joint Consultative Committee on Constitutional Reform* March 1997 p.6

[70] CM 3782 p9-10

on the other hand, although there was an earlier proposal for legislation on lines similar to the Canadian Charter, the human rights legislation which was eventually enacted after wide consultation took a different form. The New Zealand Bill of Rights Act 1990 is an "interpretative" statute which requires past and future legislation to be interpreted consistently with the rights contained in the Act as far as possible but provides that legislation stands if that is impossible. In Hong Kong, a middle course was adopted. The Hong Kong Bill of Rights Ordinance 1991 distinguishes between legislation enacted before and after the Ordinance took effect: previous legislation is subordinated to the provisions of the Ordinance, but subsequent legislation takes precedence over it.

2.9 The Government has also considered the European Communities Act 1972 which provides for European law, in cases where that law has "direct effect", to take precedence over domestic law. There is, however, an essential difference between European Community law and the European Convention on Human Rights, because it is a requirement of membership of the European Union that member States give priority to directly effective EC law in their own legal systems. There is no such requirement in the Convention.

2.10 The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty. In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of Parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly, this Government has no mandate for any such change.

2.11 It has been suggested that the courts should be able to uphold the rights in the Human Rights Bill in preference to any provisions of earlier legislation which are incompatible with those rights. This is on the basis that a later Act of Parliament takes precedence over an earlier Act if there is a conflict. But the Human Rights Bill is intended to provide a new basis for judicial interpretation of all legislation, not a basis for striking down any part of it.

2.12 The courts will, however, be able to strike down or set aside secondary legislation which is incompatible with the Convention, unless the terms of the parent statute make this impossible. The courts can already strike down or set aside secondary legislation when they consider it to be outside the powers conferred by the statute under which it is made, and it is right that they should be able to do so when it is incompatible with the Convention rights and could have been framed differently.

Clause 2 of the *Human Rights Bill* seeks to require the UK courts dealing with questions which have arisen under the Bill to take account of relevant judgments, decisions, declarations and opinions made or given by the European Commission and Court of Human Rights and the Committee of Ministers of the Council of Europe. These judgments and decisions will not, however, be binding on UK courts. In response to an amendment from the

Conservative peer Lord Kingsland, which sought to require the UK courts to be bound by the decisions of the European Court of Human Rights, the Lord Chancellor noted that under international law the United Kingdom was not bound to follow the Court's judgement in cases to which it had not been a party. He also expressed the view that it would be strange to require the courts in the UK to be bound by such decisions[71]. Earlier in the same debate the law lord Lord Browne-Wilkinson had stated that were such an amendment to be agreed, the UK would, with the possible exception of Eire, be the only European Union country to regard the decisions of Strasbourg as binding on its courts[72].

Clause 2 also states that rules may provide for the means by which evidence of judgments, decisions and declarations from the Strasbourg institutions is to be given in proceedings in the UK. Where courts are concerned these will be rules of court made under existing powers. In the case of tribunals they will be rules which, as a result of a Government amendment during the Bill's Committee stage in the House of Lords[73], will be subject to parliamentary approval under the negative procedure. The *Select Committee on Delegated Powers and Deregulation*[74] agreed with the use of this procedure.

An amendment successfully introduced by the Conservative peer Baroness Young during the Third Reading debate in the House of Lords, and agreed to on a division in which the Government was defeated, seeks to provide that where a court or tribunal is determining a question which has arisen under the Bill in connection with a Convention right it should be a defence for a person to show that he has acted in accordance with the historic teaching and practice of a Christian or other principal religious tradition represented in Great Britain, other than a teaching or practice which contravenes the criminal law. The Government is to issue a statement concerning this and a series of other related amendments intended to preserve certain religious traditions from the possibility of successful court challenges on the basis of rights set out in the Bill. These amendments are considered in more detail in Research Paper 98/26 which discusses the possible effect of the Bill on religious organisations.

Clause 3 of the Bill is concerned with the relationship between the Convention rights and United Kingdom legislation. It requires that primary legislation and subordinate legislation be read and given effect in a way which is compatible with the Convention rights "so far as it is possible to do so". This requirement is to apply to primary and secondary legislation "whenever enacted" The Notes on Clauses state that this means the Clause applies to both existing and future legislation. They go on to say that:

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[71] HL Deb Vol 584 c.1271 19.1.1998

[72] ibid. c.1269

[73] HL Deb Vol 583 c.1166 27.11.1997

[74] HL Paper 32 session 1997-98 , 5.11.1997 p.25 para. 33

It is not intended that the so-called doctrine of "implied repeal" in relation to pre-Bill legislation should apply (hence the use of the phrase "whenever enacted") But the Bill may well require an interpretation which differs from one previously adopted by a United Kingdom court.

Clause 3 is not intended to affect the validity, continuing operation or enforcement of any incompatible primary legislation, or any incompatible subordinate legislation if primary legislation prevents the removal of the incompatibility. If a court decides that a provision in primary legislation is incompatible with Convention rights, or if subordinate legislation is found to be incompatible and the primary legislation under which it was made does not allow the removal of the incompatibility, it is intended that the legislation should remain valid and enforceable. The courts will, however, be able to "strike down" subordinate legislation where, under the parent Act the subordinate legislation can take a form which is compatible with the Convention rights. The Notes on Clauses state that:

The intention is to underline that, although it is expected that it will normally be possible for legislation to be construed in such a manner[75]there comes a point when an interpretation must yield to the intention of Parliament notwithstanding that, in the result, the legislation is incompatible with the Convention rights. In particular, and as read with Clause 4, the interpretive rule does not empower courts to strike down or ignore legislation, including that enacted before the Bill.

"Primary legislation" is defined in Clause 21 as including any:

- public general Act;
- local personal Act;
- private Act;
- measure of the Church Assembly;
- measure of the General Synod of the Church of England;
- Order in Council made under section 38(1) (a) of the *Northern Ireland Constitution Act 1973;*
- Order in Council made under the exercise of the Royal Prerogative.

It also includes:

an order or other instrument made under primary legislation to the extent to which it operates to bring on or more provisions of that legislation into force or amends any primary legislation.

The *Notes on Clauses st*ate that this last category is being included within the definition of primary legislation because otherwise there would be an indirect way of seeking to set aside primary legislation, such as an Act of Parliament, by, for example, challenging the lawfulness of the making of a commencement order in respect of an Act, a provision of which is (or is claimed to be) incompatible with the Convention rights.

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[75] i.e.one which is compatible with the Convention rights

"Subordinate legislation" is defined in Clause 21 as any:

- Order in Council other than one made under the Royal Prerogative or under section 38(1)(a) of the *Northern Ireland Constitution Act 197;*
- Act of the Parliament of Northern Ireland;
- Measure of the Northern Ireland Assembly;
- Order, rules, regulations, scheme, warrant, byelaw or other instrument made under primary legislation (except to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation);
- Order, rules, regulations, scheme, warrant, byelaw or other instrument made under an Act of the Parliament of Northern Ireland or a measure of the Northern Ireland Assembly

Clause 4 seeks to give the higher courts a discretionary power to make a "declaration of incompatibility" in cases where primary legislation cannot be read in a way which is compatible with Convention rights, or where the removal of an incompatibility in subordinate legislation cannot be effected under the terms of the parent Act under which it was made. The courts to whom it is intended that this power should be available are:

a) the House of Lords;
b) the Judicial Committee of the Privy Council;
c) the Courts-Martial Appeal Court;
d) in Scotland the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session; and
e) in England and Wales or Northern Ireland the High Court or the Court of Appeal

The White Paper *Rights Brought Home* noted that a decision by the High Court or the Court of Appeal, determining whether or not a declaration of incompatibility should be made, would itself be appealable.[76]

The *Notes on Clauses* states that:

> The power to make a declaration is confined to the higher courts (as it is in many other contexts) because it will be a very important statement: the Government and Parliament will wish to consider very seriously how to respond to any declaration.

Clause 5 is designed to give the Crown the right to have notice that a court is considering whether or not to make a declaration of incompatibility. It also seeks to give the Crown the right to be joined as a party to the proceedings, enabling it to make representations to the court on the issue. The Crown will be able to make an application to the court to be joined as a party at any time during the proceedings.

[76] CM 3782 para. 2.9

In his speech opening the Second Reading Debate on the Bill in the House of Lords the Lord Chancellor, Lord Irvine of Lairg emphasised that declarations of incompatibility were serious and expressed the view that cases in which the courts made them would be rare.[77]

Clause 4(6) is designed to ensure that a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given and is not binding on the parties to the proceedings in which it is given. The *Notes on Clauses* states that the same principle underlies this subsection as underlies Clause 3, namely that incompatible primary legislation should not cease to be valid or effective by virtue of any incompatibility with the Convention rights. It adds that:

> The legislation will continue to apply until such time as it may be amended or withdrawn (as to which see Clauses 10-12) Making the declaration not binding enables the Government to continue to argue, for example in Parliament or in Strasbourg, that the legislative provision is not incompatible.

During the Bill's committee stage in the House of Lords the former law lord Lord Simon of Glaisdale moved an amendment which was intended to preserve for the purposes of the Human Rights Bill what he described as

> the rule of law that if a provision of an earlier statute is inconsistent with that of a later statute the former is impliedly (if not expressly) abrogated.

He said[78]:

> In framing this Bill, the Government were faced with a jurisprudential difficulty; namely, how to reconcile the importation of a supervening code of human rights with the doctrine of parliamentary sovereignty. While I am on the subject of parliamentary sovereignty, perhaps I may say that it tends to be exaggerated because our Parliament is not really sovereign in a global sense since it is amenable on appeal to the decrees of the European Court of Human Rights and, indeed, the European Court.
>
> One must not exaggerate parliamentary sovereignty when Parliament is so much under the thumb of the Executive. That is nothing new. It has been going on for more than a decade, but it is perhaps more marked now when we have a Government of a distinctly dictatorial temper and aspect.
>
> However, the Government were faced with trying to reconcile the patriation of the convention with domestic parliamentary sovereignty. So far as future legislation is concerned, I think their ingenious scheme, even if somewhat circuitous and cumbrous, must be accepted. It relies on the court making a declaration of incompatibility, whereupon the machinery to galvanise Parliament into bringing our domestic law into line with the convention rights is set in motion. But that is entirely unnecessary so far as pre-existing legislation is concerned because parliamentary sovereignty is, as I have suggested, completely vindicated by the doctrine of implied abrogation of an earlier provision by a later one with which it is inconsistent.

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77 HL Deb Vol 582 c.1231, 3.11.1997

78 HL Deb Vol 583 c.518-9, 18.11.1998

Therefore it is quite absurd for the Government, wedded as they are to their own drafting, to insist that a quite unnecessarily cumbrous and circuitous process should be set in motion as regards preceding legislation when the existing doctrine of implied repeal is available. My noble and learned friend has now taken off his wig and therefore he can, if he wishes, scratch his right ear with his left hand. But that is not a sensible way to set about it, nor is the extremely burdensome, circuitous and drawn out process of reconciling parliamentary sovereignty with the convention rights so far as pre-existing legislation is concerned. That is quite unnecessary. The amendment states,

"Nothing in this Act affects the rule of law that if a provision of an earlier statute is inconsistent with that of a later statute the former is impliedly (if not expressly) abrogated".

I ask my noble and learned friend to say whether that is not a correct statement of the existing law and why, if it is, it should not be applied to statutes that have been passed before the court finds that the convention rights override the earlier decision or the earlier decision is inconsistent with the convention rights which are made part of English law by this Bill.

In rejecting the amendment the Lord Chancellor, Lord Irvine of Lairg said it would destroy the intended purpose of Clause 3 and the scheme of the Bill. He emphasised that under the method adopted by the Bill to give effect to the Convention rights it was not relevant to cite the doctrine of implied repeal, adding that[79]:

The convention rights will not, as I have already said when responding to a previous amendment in the name of the noble and learned Lord, become part of our domestic law, and will therefore not supersede existing legislation or be superseded by future legislation. In both cases the convention rights will be used to interpret and give effect to that legislation.

The Lord Chancellor went on to say[80]:

I do not accept that the Bill adopts a scheme which is cumbrous and circuitous. On the contrary, I believe that the scheme is right. It rests happily with our traditions. It is intellectually coherent and, with respect to the parliamentary draftsman, it is also elegant. The scheme of this Bill is that if statutes are held incompatible on convention grounds, then it is for Parliament to remedy that. We do not wish to incorporate the convention rights, and then, in reliance on the doctrine of implied repeal, allow the courts to strike down Acts of Parliament.

The intended scheme of this Bill rests more comfortably with our tradition of parliamentary sovereignty. I believe also that this is a scheme of incorporation which is welcome to the higher judiciary. The doctrine of implied repeal is not without its own difficulties, but I have no quarrel with the noble and learned Lord's short statement of that doctrine. We are, by Clause 3, inviting Parliament to accept a wholly different scheme of incorporation. It is one which rejects the route of the doctrine of implied repeal, which, together with express incorporation of the convention rights, the noble and learned Lord would prefer us to follow, but it is one which we do not intend to follow.

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[79] HL Deb Vol 583 c.522, 18.11.1997
[80] ibid.

D. The responsibilities of "public authorities"

Clause 6 of the Bill seeks to make it unlawful for a public authority to act in a way which is incompatible with Convention rights, unless its acts come within two specified exceptions. These are where as a result of primary legislation it could not have acted differently, or where it was acting to give effect to provisions of, or made under primary legislation which cannot be read or given effect in a way which is compatible with convention rights. An "act" includes a failure to act but does not include a failure to introduce in, or lay before Parliament a proposal for legislation, nor does it include a failure to make any primary legislation or remedial order. The *Notes on Clauses* comment that it is not intended, for example, that a decision of the Government not to introduce legislation to correct an incompatibility should be capable of being challenged in the courts.

Clause 6 (3) provides that:

(3) In this section, "public authority" includes-
a) a court or tribunal, and
b) any person certain of whose function are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

For these purposes "Parliament" does not include the House of Lords in its judicial capacity. Clause 6(7) provides that in relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

The *Notes on Clauses* make the following comments about the definition of "public authority":

The need to look at the detailed provisions which appear in paragraphs (a)[and](b)[…]only arises if the person or body in which one is interested is not clearly recognisable as a public authority (eg a Government department, minister of the Crown or local authority) In other words, the Clause proceeds on the basis that some authorities are so obviously public authorities that it is not necessary to define them expressly. The Bill does, however, need to make clear what the position is with regard to those persons who are not among this core group. This is done in subsection (3), which makes clear that those described in paragraphs (a)[and](b) are included in the definition of public authority and so join those who are automatically.

The *Notes on Clauses* also state that:

> Parliament is excluded because it would be contrary to the principle of Parliamentary sovereignty if actions of Parliament became subject to challenge in the courts.

During the debate on the Third Reading of the Bill in the House of Lords the Conservative peer, Lord Mackay of Drumadoon, successfully moved an amendment designed to exclude courts or tribunals exercising "jurisdiction recognised but not created by Parliament, in matters spiritual" from those courts or tribunals which are to be regarded as public authorities for the purposes of the Bill. He also successfully moved an amendment which provides that "In relation to a particular act, a person is not a public authority by virtue only of Clause 6(3) (b) if the act is done by or on behalf of a religious body exercising a jurisdiction, recognised but not created by Parliament, in matters spiritual"[81]. In the current version of the Bill these amendments are now set out in Clause 6 (5) and (6). The impact of the Bill on religious groups and the background to and effect of these and other similar amendments relating to religious organisations and traditions are discussed in more detail in Research Paper 98/26.

The question of what is likely to constitute a "public authority" for the purposes of the Bill is probably the aspect of the Bill which has attracted the most interest and comment, particularly in relation to the position of organisations such as the Press Complaints Commission and other non-statutory bodies. (The possible implications of the Human Rights Bill for the press are discussed in more detail in Research Paper 98/25.) Commentators have also devoted much attention to the implications of the courts themselves being considered "public authorities", with an obligation to act in a way which is compatible with convention rights, where this is possible.

In his speech opening the debate on the Bill's Second reading in the House of Lords the Lord Chancellor, Lord Irvine of Lairg said[82]:

> We decided, first of all, that a provision of this kind should apply only to public authorities, however defined, and not to private individuals. That reflects the arrangements for taking cases to the convention institutions in Strasbourg. The convention had its origins in a desire to protect people from the misuse of power by the state, rather than from the actions of private individuals. Someone who takes a case to Strasbourg is proceeding against the United Kingdom Government, rather than against a private individual. We also decided that we should apply the Bill to a wide rather than a narrow range of public authorities, so as to provide as much protection as possible to those who claim that their rights have been infringed.

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[81] HL Deb Vol 585 c.805, 5.2.1998

[82] HL Deb Vol 582 c.1231-1232, 3.11.1997

Clause 6 is designed to apply not only to obvious public authorities such as government departments and the police, but also to bodies which are public in certain respects but not others. Organisations of this kind will be liable under clause 6 of the Bill for any of their acts, unless the act is of a private nature. Finally, Clause 6 does not impose a liability on organisations which have no public functions at all.

During the Second Reading debate a number of peers suggested that it was not entirely clear what was meant by a "public authority". Lord Donaldson of Lymington, the former Master of the Rolls, said[83]:

I just wonder what are,

"functions of a public nature"?

I turned to the White Paper for assistance and at paragraph 2.2, it states:

"The definition of what constitutes a public authority is in wide terms. Examples of persons or organisations whose acts or omissions it is intended should be able to be challenged include central government (including executive agencies)"--

of course, that is understandable--

"local government; the police; immigration officers; prisons; courts and tribunals"--
and, again, I understand that. But then the White Paper says;

"and, to the extent that they are exercising public functions, companies responsible for areas of activity which were previously within the public sector, such as the privatised utilities".

What has the fact that an activity was originally in the public sector got to do with the definition that we find in the Bill of people carrying out,

"functions of a public nature"?

I do not believe that every activity by a publicly-funded or publicly-run agency in the past has necessarily been of a public nature. When one thinks of organisations like the BBC, which of course is not yet privatised, one has to admit that it clearly carries on functions of a public nature. Therefore, it is clearly subject to that definition. There cannot be any difference between the BBC, the ITV company or commercial radio. Therefore, I take it that they are all included in the definition of a "public authority".

Then we have to consider not the origin of people's functions but what the functions are today. I genuinely want to know what is a,

"function of a public nature".

If we consider the press, it is obvious that one could not find a function which is of a more public nature. Whether or not an organisation is in the private or public sector, it is clearly dealing with the public in general and not particular members of the public.

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[83] ibid. c.1293

That promptly put me in mind of Safeways; for example, is Safeways conducting a business of a public nature? It may be said that it is not but I am not quite sure why. There must be a better way of defining what is meant by a "public authority". It is quite clear that it does not mean a public authority; indeed, this is a pure term of art. Whatever the definition, it must be made clear that it is only a term of art. Various possibilities are open to us but I shall not labour them, save to say that one could start putting examples in of what are and what are not functions of a public nature, thus leaving it to the courts to draw the final line between the two.

One could resolve what looks to me very much like an inter-governmental conflict of view as to what was meant to be covered by this legislation, which has been papered over by this very clever formula. I must sincerely hope that that will be resolved by the Government before we reach the Committee stage. It is for them to say what the Bill is meant to cover and not a matter for Cross-Benchers, Back-Benchers, or whatever.

Lord Borrie also expressed concern about the position of the privatised utilities under the Bill, saying[84]:

The phrase "public authority" includes,

"any person certain of whose functions are functions of a public nature".

According to the White Paper, that includes companies that were previously in the public sector, such as the privatised utilities. That strikes me today, in 1997, as a little odd because some of those private utilities--for example BT and British Gas--in providing their services to the UK public, are competing with other companies and that competition is encouraged. It is odd if one company in the field is considered to be a "public authority" and one of its competitors is not.

Then I wonder how far it is intended that the definition of "public authorities" in the Bill is meant to be paralleled with the range of public bodies that the courts have said in recent years are subject to proceedings for judicial review on the basis that they have a "public element". In the presence of the noble and learned Lord, Lord Donaldson of Lymington, I am bound to mention the City Takeover Panel which was regarded as one of those bodies. I mention too the Advertising Standards Authority, which is a self-regulatory authority presided over by the noble Lord, Lord Rogers of Quarry Bank.

Those bodies are performing functions that would be performed by statutory public bodies if the private self-regulatory bodies did not exist. The Advertising Standards Authority exercises an important jurisdiction. It has a lot of power over advertisements that are said to offend against the well-known rubric that advertisements must be,

"legal, decent, honest and truthful".

Since the European Court of Human Rights has ruled in the past that freedom of expression in Article 10 includes the freedom of commercial expression--the freedom to advertise one's goods--I wonder whether its rulings could be challenged as not complying with the convention.

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[84] ibid. c.1277

Responding to these concerns in his speech at the end of the Second Reading debate the home office minister Lord Williams of Mostyn said[85]:

> The noble and learned Lord, Lord Simon of Glaisdale, asked what would or would not be a public body. He rightly conjectured that we would anticipate the BBC being a public authority and that Channel 4 might well be a public authority, but that other commercial organisations, such as private television stations, might well not be public authorities. I stress that that is a matter for the courts to decide as the jurisprudence develops. Some authorities plainly exercise wholly public functions; others do not. There is no difficulty here.
>
> There is no difficulty in the questions put by the noble Lord, Lord Borrie. Perhaps I may cite Railtrack as a simple example. It is the statutory safety regulator, but equally it carries out private functions of property development or property acquisition. It is perfectly easy for a judiciary, which is as well accustomed as is ours to questions of judicial review, to resolve such problems. It is a mistake to think that we are hobbling authorities because they are now private whereas they used to be public utilities. The point is not the label or description; it is the function. I hope that I have made that plain.

Lord Donaldson of Lymington went on to ask whether or not a newspaper which had never been publicly funded would come within the definition. In reply, Lord Williams said[86]:

> Subject to the cautious proviso that this is a matter for the courts to determine in due time, it is our belief that a newspaper is not a public authority. A court is a public authority which is obliged to act lawfully. I have developed that point in the context of the question about the press and privacy.

The question of what might constitute a "public authority" for the purposes of the Bill was further considered in the context of the press and privacy, as well as religious bodies, during the debates on the committee and report stages of the Bill and at third. These debates are considered in more detail in Library Papers 98/25 and 98/26.

E. The "Victim Test": Standing to bring proceedings on convention rights

Clause 7 of the Bill seeks to enable a person who claims that a public authority has acted, or proposes to act, in a way which is unlawful because it is incompatible with a Convention right, to bring proceedings against the authority in the appropriate court or tribunal, or rely on the Convention right or rights concerned in any legal proceedings. The "appropriate court or tribunal" is to be determined by rules. A Government amendment introduced by the Home Office minister Lord Williams of Mostyn during the Bill's report stage in the House of Lords is designed to enable tribunal jurisdiction to be extended by order made by statutory instrument so as to allow a particular tribunal to determine questions relating to the Convention rights[87].

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[85] ibid. c.1309-1310

[86] ibid. c.1310

[87] HL Deb Vol 584 c.1360-1362, 19.1.1998

The *Notes on Clauses* state that:

> In most cases it is likely that an existing cause of action or other legal challenge (such as judicial review) applicable to a person's claim will be open to him and it is therefore also likely that Convention points will be taken in courts and tribunals which deal with such existing causes of action or challenges. However, under the Bill it will also be possible for a victim of an alleged unlawful act to initiate court proceedings against a public authority on convention grounds alone, though the expectation is that this will only happen where no existing means of legal challenge is open to the individual.

Under Clause 7 only a person who is, or would be, a victim of the unlawful act will be entitled to bring proceedings, whether by way of judicial review or otherwise, or rely on the Convention right. Clause 7(6) adds that:

> For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act

One consequence of this is that the ability to apply for judicial review on Convention grounds will be narrower than for judicial review applications otherwise. The ability to bring proceedings on Convention grounds or rely on Convention rights in legal proceedings will, however be subject to the same test of standing or locus as applies to people who wish to bring complaints to the European Court of Human Rights.

In its *Parliamentary Briefing on the Human Rights Bill* the civil rights organisation Liberty noted that, on the basis of Strasbourg case-law concerning who could be regarded as a "victim", the effect of adopting the definition set out in Clause 7 would be to widen to some extent the categories of people who were able to bring proceedings in the UK courts. People who were at risk of being affected by a particular practice, who could not at present bring proceedings in the UK courts, would be able to do so under the Bill[88]. On the other hand, as has already been noted, the Strasbourg definition of victim provides standing for a somewhat narrower range of complainants than the range which is currently permitted under the rules concerning standing for judicial review. Lord Lester drew attention to this in the debate on the Bill 's Second Reading debate in the House of Lords, when he said[89]:

> My second concern is that Clause 7(1) confines the standing of those seeking to review the allegedly unlawful acts of public authorities to victims, as defined under the convention. That seems to me to be too restrictive and likely to result in undue procedural complexity and unfairness. Section 31(3) of the Supreme Court Act 1981, and Order 53, Rule 3, of the Rules of the Supreme Court, impose a jurisdictional requirement of "a sufficient interest" for an applicant to apply for judicial review. That test of sufficient interest, coupled with the requirement to obtain leave to apply for judicial review, and the courts' other discretionary powers, provide sufficient safeguards against any abuse of judicial review by interfering

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88 Liberty, *Parliamentary Briefing on the Human Rights Bill*, October 1997 para.5.1
89 HL Deb Vol 582 c.1243, 3.11.1997

busybodies or those without a sufficient interest. I hope that the Government upon further reflection will agree that it is unnecessary and undesirable to impose a more restrictive test where what is at stake is an alleged breach of human rights rather than ordinary administrative wrongdoing.

In its briefing on the Bill Justice suggested that the adoption of the Strasbourg definition of "victim" would restrict the ability of public interest groups with a sufficient interest to bring proceedings for judicial review on Convention points, a development which, it believed would have two practical consequences:

First, it could inhibit early challenge, on behalf of a class of person covered by a regulation or decision, and where an early resolution of the *vires* issue could clarify the law so as to make further challenge unnecessary or unlikely to succeed. Second, it would mean that where such cases were brought by judicial review by third parties, they would be able to raise issues of irrationality and unlawfulness but not any Convention points, which would have to be litigated later, when a suitable victim had been found. Both are surely undesirable in practice, as well as in conflict with the general aim that the Convention should be arguable in any litigation against public authorities which can now take place.

In its briefing Liberty said[90]:

Despite the suggestion in the earlier Labour Party consultation paper *Bringing Rights Home*[91] that the rules of standing might be widened (or at least maintained as they are), the Government proposes to reduce the scope of standing to bring proceedings invoking the European Convention. We believe that there is no justification for such a retrograde step and that it is essential that statutory bodies such as the EOC, and NGOs, continue to be able to bring proceedings in the circumstances already established by the High Court. Such organisations can play a vital role in bringing matters if important public interest before the courts. The proposals would mean that an organisation such as the EOC would have standing to bring proceedings in which domestic and/or European Community law was invoked, but not if the Convention were invoked. That would be a nonsensical situation. It cannot be justifiable for one effect of the incorporation of the Convention to be a serious restriction on access to justice in the way we have outlined above.

At both the Bill's committee stage in the House of Lords and its third reading Lord Lester moved amendments which were intended to remove what he considered to be the unnecessarily legalistic restrictions on the standing needed to apply for judicial review where convention rights were at stake. In rejecting the first of these amendments, which was later withdrawn, the Lord Chancellor, Lord Irvine of Lairg, said[92]:

I acknowledge that a consequence of that approach is that a narrower test will be applied for bringing applications by judicial review on convention grounds than will continue to apply in applications for judicial review on other grounds. But interest groups will still be able to

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[90] Liberty, *Parliamentary Briefing on the Human Rights Bill*, October 1997 para. 5.1

[91] Labour Party, *Bringing Rights Home: Labour's plans to incorporate the European Convention on Human Rights into UK law*, December 1996 para.4

[92] HL Deb Vol 583 c.831, 24.11.1997

provide assistance to victims who bring cases under the Bill and to bring cases directly where they themselves are victims of an unlawful act.

I also point out that Clause 7, consistently with the position in Strasbourg, also treats as victims those who are faced with the threat of a public authority proposing to act in a way which would be unlawful under Clause 6(1). So potential victims are included. Interest groups will similarly be able to assist potential victims to bring challenges to action which is threatened before it is actually carried out.

My noble friend, Lord Williams of Mostyn, reminded the House, both at Second Reading and on our first Committee day, that I am committed to implementing measures that will improve access to justice, and that I am giving serious consideration to Sir Peter Middleton's proposal that there should be a separate fund for public interest cases, including those involving convention rights.

I said in my speech to the Law Society's annual conference at Cardiff on 18th October that I believed it right to make special arrangements for cases that raise issues of wider public interest and that I intended to consult about the details. I am planning to issue a consultation paper early next year, but my officials have already begun informal discussions with various interest groups. That will of course include those bodies such as the Public Law Project, Justice, Liberty and the Child Poverty Action Group which regularly support applicants in the courts.

The amendment to Clause 7 moved by Lord Lester during the Bill'd third reading was supported by the law lord, Lord Slynn of Hadley and two retired law lords, Lord Simon of Glaisdale and Lord Ackner, amongst others. The Lord Chancellor reiterated the arguments he had put forward during the Bill's committee stage, adding that he hoped to publish at theend of February a consultation document on Sir Peter Middleton's proposal that there should be a separate legal fund for public interest cases, including those involving rights under the Human Rights Bill[93]. The amendment was negatived on a division[94].

Paragraphs (8) to (10) of Clause 7 are intended to prevent ministers and officials of the principal religious traditions in the UK from being required to administer marriages contrary to their religious doctrines and traditions and to prevent religious schools and charities from being restricted in their abilities to select senior staff on the basis of their religious beliefs. These provisions were amendments successfully introduced by the Conservative peer Baroness Young during the third reading debate on the Bill in the House of Lords. They are discussed in more detail in Research Paper 98/26

93 HL Deb Vol 585 c.810, 5.2.1998

94 ibid c.811-2

F. Powers of the UK courts to offer relief and remedies.

Clause 8 is designed to enable a court or tribunal which finds that a public authority has acted unlawfully to provide any remedy which is available to it and which appears just and appropriate. No award of damages is to be made, however, unless the court is satisfied that an award is necessary to afford just satisfaction to the person concerned. Any other relief or remedy granted in respect of the act in question must be taken into account. On this point the *Notes on Clauses* states that:

> An example where a court would need to take account of other relief granted is where a person is pursuing two claims in respect of an act of a public authority, one under this Bill (that is an unlawful act under clause 6(1)) and one under an existing cause of action (eg. unlawful arrest). Any damages awarded for the non-Convention claim would be a relevant consideration for the court in considering if there was also a need to compensate for the Convention violation. There will be cases, however, where it will be sufficient for the court simply to quash an executive decision or to make a declaration as to its illegality.

Under Clause 8(4) it is intended that in determining whether to award damages and the amount of an award the court should be required to take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the European Convention. The *Notes on Clauses* state that Article 41 will itself be amended by the 11th Protocol. They add that:

> Such awards tend to range from £5,000 to £15,000 and do not follow automatically upon the finding of a violation

In its briefing on the Bill Liberty reports that[95]:

> Awards in Strasbourg have been relatively infrequent and lower than comparable awards might have been in our domestic courts. Indeed, the European Court will not infrequently find that the finding of a violation of the Convention is itself "just satisfaction" for the applicant.

G. Judicial acts and immunities

Under Clause 9 it is intended that a person wishing to bring proceedings under Clause 7 against a court or tribunal should have to proceed by way of appeal or an application for judicial review, or, following an amendment introduced by the Lord Chancellor during the Bill's report stage[96], in such other forum as may be prescribed by rules. Clause 9 also seeks to preserve the rule of law under which courts may not be the subject of judicial review As originally drafted, Clause 9 also provided that damages could not be awarded in proceedings under the Act in respect of any act of a court, while nothing in the Bill was to make a person

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[95] Liberty, Parliamentary Briefing on the Human Rights Bill, October 1997 para 6.1
[96] HL Deb Vol 585 c.388, 29.1.1998

personally liable in relation to the exercise of purported exercise of the jurisdiction or administration of a court.

Concern about the restrictions which Clause 9(3) placed on liability for judicial acts were expressed by Justice[97] and others, who drew particular attention to Article 5(5) of the Convention. This provides an enforceable right of compensation for everyone who is the victim of arrest or detention in contravention of the Convention. Lord Meston moved an amendment on the subject of Clause 9(3) during the Bill's committee stage[98] and the Lord Chancellor responded by saying that the Government were alive to the need to make appropriate provision for the requirements of Article 5(5). The Lord Chancellor went on to move a Government amendment during the Bill's report stage which is now set out as Clause 9(3),(4) and (5) of the Bill[99]. These provisions seek to ensure that in proceedings under the Bill in respect of judicial acts done in good faith damages are not awarded except to compensate a person to the extent required by Article 5(5). An award of damages permitted in these circumstances is to be made against the Crown, although no award may be made unless the appropriate person, if not a party to the proceedings, is joined as a party to them.

H. Safeguards for existing rights

Clause 13 is designed to ensure that a person's reliance on a Convention right does not restrict any other right or freedom conferred on him, or his right to make any claim or bring any proceedings which he could make or bring under provisions other than those set out in Clauses 7 to 9. It is intended to mirror Article 60 of the European Convention. As the Notes on Clauses observe, rights available outside the Bill may in some cases be more generous than those available under it.

During the report stage of the Bill the Home Office minister, Lord Williams of Mostyn, successfully moved an amendment designed to clarify the purpose of Clause 13. He said[100]:

> It is there to ensure that if a person has existing rights, nothing in this Bill shall detract from them in any way.

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[97] see Justice, *Human Rights Bill: Justice briefing for the Second reading in the House of Lords*, October 1997:

[98] HL Deb Vol 583 c.856-7, 24.11.1997

[99] HL deb Vol 585 c.388-393, 29.1.1998

[100] HL Deb Vol 585 c.410, 29.1.1998

Lord Lester the European Convention contains a floor of minimum rights guaranteed under international law, but does not create a ceiling. He added that[101]:

> Therefore, if Parliament chooses to go further or if the common law goes further in protecting our basic rights and freedoms, which are inherent in us as citizens and human beings, the convention and the Bill are not to restrict that. The fact that that is a minimum and not a maximum is made clear in the convention itself. It does not mean that there will never be conflict and difficult questions to be resolved as a result of people arguing that, say, the Race Relations Act is an infringement of some basic right in the convention, or other such points. It is important that one does not concentrate only upon the convention as a guarantee of rights. As the amendment makes clear, the common law will continue to develop in a creative way and no doubt the convention will be used, as the Bill makes clear, in the course of developing the common law.
>
> I, for one, believe that one should approach convention rights through out common law and through the statute book, not round the common law or the statute book. That is to say, one intertwines convention rights into our domestic legal system. One of the many virtues of the Bill is the fact that those who have thought it through and drafted it have found ways to create very subtle connections between convention rights and our own statute law and common law.

I. Judicial appointments

Clause 18 is intended to enable judges in the Court of Appeal or the High Court in England and Wales and Northern Ireland, or circuit judges in England and Wales, judges of the Court of Session or sheriffs in Scotland, or county court judges in Northern Ireland, to become judges of the European Court of Human Rights without being required to relinquish their judicial office in this country. They will not be required to perform the duties of their office while they are judges of the European Court. As a result of a Government amendment introduced by the Lord Chancellor during the Bill's report stage[102] there is also provision for the relevant minister, usually the Lord Chancellor, to make a pensions order, in the form of statutory instrument subject to the negative procedure, concerning pensions payable to or in respect of any holder of a judicial office who serves as a judge at the European Court of Human Rights.

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101 ibid. c.411
102 HL Deb Vol 585 c.412-415, 29.1.1998

J. Remaining issues: a Parliamentary Committee on Human Rights and a Human Rights Commission

A Parliamentary Committee on Human Rights

In the December 1996 consultation paper *Bringing Rights Home* the Labour Party said[103]:

> We consider it essential to distinguish the responsibility of the Executive to ensure that new legislation brought forward does not breach human rights obligations, from Parliament's responsibility to scrutinise draft legislation for conformity with those obligations.

The paper added that:

> Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy.

The paper proposed that a new Joint Committee on Human Rights of both Houses of Parliament be established, saying[104]:

> This would have a continuing responsibility to monitor the operation of the new Act and other aspects of the UK's human rights obligations. It would have the power of a select committee to compel witnesses to attend
>
> Where new legislation was identified as having an impact on human rights issues it could be subject to scrutiny by the Joint Committee. The committee would be able to call on other bodies in discharging its responsibilities
>
> More detailed work would need to be undertaken on how the Joint Committee would work in practice, should this proposal be adopted by Parliament

In the White Paper *Rights Brought Home* the Government commented on the proposal for a parliamentary committee, emphasising that it was a matter for Parliament itself to decide[105]:

> 3.6 Bringing Rights Home suggested that "Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy". How this is achieved is a matter for Parliament to decide, but in the Government's view the best course would be to establish a new Parliamentary Committee with functions relating to human rights. This would not require legislation or any change in Parliamentary procedure. There could be a Joint Committee of both Houses of Parliament or each House could have its own Committee; or there could be a Committee which met jointly for some purposes and separately for others.

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103 *Bringing Rights Home; Labour's plans to incorporate the European Convention on Human Rights into UK law*, December 1996 ;p.11

104 ibid. p.12

105 Rights Brought Home: The Human Rights Bill CM 3782 p.14

3.7 The new Committee might conduct enquiries on a range of human rights issues relating to the Convention, and produce reports so as to assist the Government and Parliament in deciding what action to take. It might also want to range more widely, and examine issues relating to the other international obligations of the United Kingdom such as proposals to accept new rights under other human rights treaties.

A Human Rights Commission

In its consultation paper *Bringing Rights Home* the Labour Party discussed methods of enforcement and scrutiny of legislation to ensure compliance with human rights and suggested that one way forward would be to establish a Human Rights Commission. It added that this would, however, require careful consideration of the implications for the Equal Opportunities Commissions for Great Britain and for Northern Ireland, the Commission for racial Equality, the national Disability Council and the fair Employment Commission for Northern Ireland. The paper went on to say that Labour would want to hear views on these arrangements before deciding what provision should be made.

In the White Paper *Rights Brought Home* the Government said[106]:

3.8 Bringing Rights Home canvassed views on the establishment of a Human Rights Commission, and this possibility has received a good deal of attention. No commitment to establish a Commission was, however, made in the Manifesto on which the Government was elected. The Government's priority is implementation of its Manifesto commitment to give further effect to the Convention rights in domestic law so that people can enforce those rights in United Kingdom courts. Establishment of a new Human Rights Commission is not central to that objective and does not need to form part of the current Bill.

3.9 Moreover, the idea of setting up a new human rights body is not universally acclaimed. Some reservations have been expressed, particularly from the point of view of the impact on existing bodies concerned with particular aspects of human rights, such as the Commission for Racial Equality and the Equal Opportunities Commission, whose primary concern is to protect the rights for which they were established. A quinquennial review is currently being conducted of the Equal Opportunities Commission, and the Government has also decided to establish a new Disability Rights Commission.

3.10 The Government's conclusion is that, before a Human Rights Commission could be established by legislation, more consideration needs to be given to how it would work in relation to such bodies, and to the new arrangements to be established for Parliamentary and Government scrutiny of human rights issues. This is necessary not only for the purposes of framing the legislation but also to justify the additional public expenditure needed to establish and run a new Commission. A range of organisational issues need more detailed consideration before the legislative and financial case for a new Commission is made, and there needs to be a greater degree of consensus on an appropriate model among existing human rights bodies.

3.11 However, the Government has not closed its mind to the idea of a new Human Rights Commission at some stage in the future in the light of practical experience of the working of the new legislation. If Parliament establishes a Committee on Human Rights, one of its main tasks might be to conduct an inquiry into whether a Human Rights Commission is needed and how it should operate. The Government would want to give full weight to the Committee's report in considering whether to create a statutory Human Rights Commission in future.

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[106] CM 3782 p.14-15

> 3.12 It has been suggested that a new Commission might be funded from non- Government sources. The Government would not wish to deter a move towards a non- statutory, privately-financed body if its role was limited to functions such as public education and advice to individuals. However, a non-statutory body could not absorb any of the functions of the existing statutory bodies concerned with aspects of human rights.

A number of organisations and commentators have argued strongly for the establishment of a Human Rights Commission. In a pamphlet published in October 1997 the Institute for Public Policy Research (IPPR) argued that such a Commission would be essential if the new law were to be effective[107]. In its briefing for the Second Reading debate in the House of Lords the civil rights and law reform organisation Justice also expressed strong support for the creation of such a body[108].

In his speech opening the Second Reading debate on the Human Rights Bill the Lord Chancellor, Lord Irvine of Lairg, said the Government had decided against creating a human rights commission for the time being, although he added that the Government had not ruled out the possibility of establishing one in the future[109]:

> Lastly, the Bill does not provide for the establishment of a human rights commission. I appreciate that this will cause disappointment to some. It is suggested that a commission would have a useful role to play in promoting human rights and advising individuals how to proceed if they believe their rights have been infringed. Although we have given this proposal much thought, we have concluded that a human rights commission is not central to our main task today, which is to incorporate the convention as promised in our election manifesto. There are questions to be resolved about the relationship of a new commission with other bodies in the human rights field; for example, the Equal Opportunities Commission and the Commission for Racial Equality. Would a human rights commission take over their responsibilities, or act in partnership with them, or be an independent body independent of them? We would also want to be sure that the potential benefits of a human rights commission were sufficient to justify establishing and funding for a new non-governmental organisation. We do not rule out a human rights commission in future, but our judgment is that it would be premature to provide for one now.

This announcement was followed be expressions of disappointment from several peers, including Baroness Amos (a former Chief executive of Equal Opportunities Commission) and the Liberal Democrat peers Lord Lester and Lord Holme of Cheltenham. During the Bill's committee stage in the House of Lords the cross-bench peer Lord Molyneaux of Killead moved an amendment designed to create a Standing Advisory Commission on Human rights for the whole of the UK. The amendment was subsequently withdrawn.. During the third reading debate Lord Lester moved an amendment intended to create a Human Rights Commissioner with powers to provide advice and assistance to persons involved in proceedings involving Convention rights, bring proceedings in certain cases, undertake research and educational activities, and carry out other tasks in relation to rights under the European Convention. Lord Lester's amendment was negatived on division[110].

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[107] IPPR, *A Human Rights Commission: the Options,* October 1997

[108] Justice, *Human Rights Bill: Justice briefing for the Second Reading in the House of Lords* October 1997 p.6

[109] HL Deb Vol 582 c.1233, 3.11.1997

[110] HL Deb Vol 585 c.820-829, 5.2.1998

Appendix I

Articles of the European Convention on Human Rights which are intended to be given further effect by the Human Rights Bill

***Human Rights Bill* [H.L Bill 119 of 1997-98] Schedule 1**

Rights under the Convention

Article 2 : Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

   (a) in defence of any person from unlawful violence;
   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3: Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

   (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
   (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
   (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
   (d) any work or service which forms part of normal civic obligations.

Article 5: Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6 : Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the

interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 : No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10: Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11: Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12:Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14: Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 16: Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17: Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18: Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Rights under the First Protocol

Article 1: Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2: Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3: Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Appendix II

Extract from *Rights Brought Home* on the enforcement of rights under the convention

Interpretation of legislation

2.13 The Bill provides for legislation - both Acts of Parliament and secondary legislation - to be interpreted so far as possible so as to be compatible with the Convention. This goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.

2.14 This "rule of construction" is to apply to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts will not be bound by previous interpretations. They will be able to build a new body of case law, taking into account the Convention rights.

A declaration of incompatibility with the Convention rights

2.15 If the courts decide in any case that it is impossible to interpret an Act of Parliament in a way which is compatible with the Convention, the Bill enables a formal declaration to be made that its provisions are incompatible with the Convention. A declaration of incompatibility will be an important statement to make, and the power to make it will be reserved to the higher courts. They will be able to make a declaration in any proceedings before them, whether the case originated with them (as, in the High Court, on judicial review of an executive act) or in considering an appeal from a lower court or tribunal. The Government will have the right to intervene in any proceedings where such a declaration is a possible outcome. A decision by the High Court or Court of Appeal, determining whether or not such a declaration should be made, will itself be appealable.

Effect of court decisions on legislation

2.16 A declaration that legislation is incompatible with the Convention rights will not of itself have the effect of changing the law, which will continue to apply. But it will almost certainly prompt the Government and Parliament to change the law.

2.17 The Government has considered very carefully whether it would be right for the Bill to go further, and give to courts in the United Kingdom the power to set aside an Act of Parliament which they believe is incompatible with the Convention rights. In considering this question, we have looked at a number of models. The Canadian Charter of Rights and Freedoms 1982 enables the courts to strike down any legislation which is inconsistent with the Charter, unless the legislation contains an explicit statement that it is to apply "notwithstanding" the provisions of the Charter. But legislation which has been struck down may be re-enacted with a "notwithstanding" clause. In New Zealand, on the other hand, although there was an earlier proposal for legislation on lines similar to the Canadian Charter, the human rights legislation which was eventually enacted after wide consultation took a different form. The New Zealand Bill of Rights Act 1990 is an "interpretative" statute which requires past and future legislation to be interpreted consistently with

the rights contained in the Act as far as possible but provides that legislation stands if that is impossible. In Hong Kong, a middle course was adopted. The Hong Kong Bill of Rights Ordinance 1991 distinguishes between legislation enacted before and after the Ordinance took effect: previous legislation is subordinated to the provisions of the Ordinance, but subsequent legislation takes precedence over it.

2.18 The Government has also considered the European Communities Act 1972 which provides for European law, in cases where that law has "direct effect", to take precedence over domestic law. There is, however, an essential difference between European Community law and the European Convention on Human Rights, because it is a requirement of membership of the European Union that member States give priority to directly effective EC law in their own legal systems. There is no such requirement in the Convention.

2.19 The Government has reached the conclusion that courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the Government attaches to Parliamentary sovereignty. In this context, Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of Parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly, this Government has no mandate for any such change.

2.20 It has been suggested that the courts should be able to uphold the rights in the Human Rights Bill in preference to any provisions of earlier legislation which are incompatible with those rights. This is on the basis that a later Act of Parliament takes precedence over an earlier Act if there is a conflict. But the Human Rights Bill is intended to provide a new basis for judicial interpretation of all legislation, not a basis for striking down any part of it.

2.21 The courts will, however, be able to strike down or set aside secondary legislation which is incompatible with the Convention, unless the terms of the parent statute make this impossible. The courts can already strike down or set aside secondary legislation when they consider it to be outside the powers conferred by the statute under which it is made, and it is right that they should be able to do so when it is incompatible with the Convention rights and could have been framed differently.

Entrenchment

2.22 On one view, human rights legislation is so important that it should be given added protection from subsequent amendment or repeal. The Constitution of the United States of America, for example, guarantees rights which can be amended or repealed only by securing qualified majorities in both the House of Representatives and the Senate, and among the States themselves. But an arrangement of this kind could not be reconciled with our own constitutional traditions, which allow any Act of Parliament to be amended or repealed by a subsequent Act of Parliament. We do not

believe that it is necessary or would be desirable to attempt to devise such a special arrangement for this Bill.

Amending legislation

2.23 Although the Bill does not allow the courts to set aside Acts of Parliament, it will nevertheless have a profound impact on the way that legislation is interpreted and applied, and it will have the effect of putting the issues squarely to the Government and Parliament for further consideration. It is important to ensure that the Government and Parliament, for their part, can respond quickly. In the normal way, primary legislation can be amended only by further primary legislation, and this can take a long time. Given the volume of Government business, an early opportunity to legislate may not arise; and the process of legislating is itself protracted. Emergency legislation can be enacted very quickly indeed, but it is introduced only in the most exceptional circumstances.

2.24 The Bill provides for a fast-track procedure for changing legislation in response either to a declaration of incompatibility by our own higher courts or to a finding of a violation of the Convention in Strasbourg. The appropriate Government Minister will be able to amend the legislation by Order so as to make it compatible with the Convention. The Order will be subject to approval by both Houses of Parliament before taking effect, except where the need to amend the legislation is particularly urgent, when the Order will take effect immediately but will expire after a short period if not approved by Parliament.

2.25 There are already precedents for using secondary legislation to amend primary legislation in some circumstances, and we think the use of such a procedure is acceptable in this context and would be welcome as a means of improving the observance of human rights. Plainly the Minister would have to exercise this power only in relation to the provisions which contravene the Convention, together with any necessary consequential amendments. In other words, Ministers would not have carte blanche to amend unrelated parts of the Act in which the breach is discovered.
Scotland

2.26 In Scotland, the position with regard to Acts of the Westminster Parliament will be the same as in England and Wales. All courts will be required to interpret the legislation in a way which is compatible with the Convention so far as possible. If a provision is found to be incompatible with the Convention, the Court of Session or the High Court will be able to make a declarator to that effect, but this will not affect the validity or continuing operation of the provision.

2.27 The position will be different, however, in relation to Acts of the Scottish Parliament when it is established. The Government has decided that the Scottish Parliament will have no power to legislate in a way which is incompatible with the Convention; and similarly that the Scottish Executive will have no power to make subordinate legislation or to take executive action which is incompatible with the Convention. It will accordingly be possible to challenge such legislation and actions in the Scottish courts on the ground that the Scottish Parliament or Executive has incorrectly applied its powers. If the challenge is successful then the legislation or action would be held to be unlawful. As with other issues concerning the powers of the Scottish Parliament, there will be a procedure for inferior courts to refer such issues to the superior Scottish courts; and those courts in turn will be able to refer the matter to the Judicial Committee of the Privy Council. If such issues are decided by the superior Scottish courts, an appeal from their decision will be to the Judicial

Committee. These arrangements are in line with the Government's general approach to devolution. Wales

2.28 Similarly, the Welsh Assembly will not have power to make subordinate legislation or take executive action which is incompatible with the Convention. It will be possible to challenge such legislation and action in the courts, and for them to be quashed, on the ground that the Assembly has exceeded its powers.

Northern Ireland

2.29 Acts of the Westminster Parliament will be treated in the same way in Northern Ireland as in the rest of the United Kingdom. But Orders in Council and other related legislation will be treated as subordinate legislation. In other words, they will be struck down by the courts if they are incompatible with the Convention. Most such legislation is a temporary means of enacting legislation which would otherwise be done by measures of a devolved Northern Ireland legislature.

Appendix III

Attempts to introduce human rights legislation since 1970

- Ben Smith, Reference and Reader Services Section

Bill	Number	Sponsor
Protection of Human Rights Bill	Bill 52 1970/71	S Silkin
Northern Ireland Bill of Rights (HL)	HL Bill 157 1970/71	Lord Brockway
Northern Ireland Bill of Rights (HL)	HL Bill 128 1971/72	Lord Brockway
Bill of Rights	Bill 214 1974/75	A Beith
Bill of Rights (HL)	HL Bill 92 1975/76	Lord Wade
Bill of Rights (Northern Ireland) (HL)	HL Bill 102 1975/76	Lord Brockway
Bill of Rights (HL)	HL Bill 11 1976/77	Lord Wade
Bill of Rights (Northern Ireland)(HL)	HL Bill 80 1976/77	Lord Brockway
Bill of Rights	Bill 138 1978/79	Sir F Bennett
Bill of Rights (HL)	HL Bill 54 1979/80	Lord Wade
Bill of Rights (HL)	HL Bill 4 1980/81	Lord Wade
European Human Rights Convention Bill	Bill 73 1983/84	R Maclennan
Human Rights and Fundamental Freedoms Bill (HL)	HL Bill 21 1985/86	Lord Broxbourne
Human Rights Bill	Bill 19 1986/87	Sir E Gardner
Human Rights Bill	Bill 37 1988/89	G Allen
Human Rights Bill	Bill 50 1989/90	G Allen
Human Rights Bill	Bill 39 1990/91	G Allen
Protection of Fundamental Rights and Freedoms Bill	Bill 76 1991/92	R Maclennan
Human Rights Bill	Bill 39 1992/93	G Allen

Human Rights (No 2) Bill	Bill 219 1992/93	G Allen
Human Rights (No 3) Bill	Bill 251 1992/93	G Allen
Human Rights Bill	Bill 30 1993/94	G Allen
Human Rights Bill (HL)	HL Bill 5 1994/95	Lord Lester
Human Rights Bill (HL)	HL Bill 11 1996/97	Lord Lester
Human Rights Bill (HL)	HL Bill 38 1997/98	Lord Irvine

Appendix IV

Form of the Bill and Commons Proceedings
- Barry Winetrobe, Home Affairs Section

The *Human Rights Bill [HL]*, which is due for its second reading debate on Monday 16 February, is relatively short, the Bill as brought from the Lords has 22 clauses and 3 schedules. This Bill may well be regarded as a 'constitutional bill', perhaps even one of 'first class constitutional importance', and as such would normally be expected to have its Commons committee stage entirely on the floor of the House. At the time of writing, ministers had not yet reached a decision on whether all or part of the Bill's committee stage is to taken on the floor. In business questions on 12th February the Leader of the House, Ann Taylor, said[111]:

> I know that there are differing views in different parties in the House about the way in which the Human Rights Bill should be handled. Some believe that splitting consideration of significant legislation often benefits the House, enabling hon. Members to scrutinise it properly and to achieve the right balance between decisions made on the floor of the House and decisions made in Committee. No final decision has been made, but we are listening to representations.

The theory and practice of this 'convention' is considered in more detail in Research Paper 97/53, *The Commons committee stage of 'constitutional' bills*, 20.5.97. There was speculation before, during and since the general election that the Government may seek to minimise potential difficulties in both Houses by not following such 'conventions' in order to enact its significant programme of constitutional legislation in this Parliament.[112] It was even thought by some that its 'modernisation' programme, to be set in train at the outset of this Parliament, was designed in part to institute new procedures or practices which would smooth the passage of likely contentious legislation.[113]

The Modernisation Committee, which reported on 29 July (two days before the summer recess), did indeed examine the committee stage of 'constitutional' bills, and decided to propose no immediate action on this matter, but said that it would return to it in due course.[114] It emphasised that there was no agreed definition of a 'bill of first class constitutional importance', and that technically such bills were no different from any other bill. The Committee did accept that there were "two firmly held and contrary views" on the treatment of such bills, either that the Floor of the House committee stage practice should continue, so that all Members could have the opportunity of participating in consideration of proposals which could affect the powers of Parliament itself (para 78), or that, while matters of

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[111] HC Deb Vol 306 c.558, 12.2.1998

[112] See further on the Parliamentary passge of constitutional legislation in Research Paper 97/97.

[113] On Commons modernisation, see Research Paper 97/107.

[114] *The legislative process*, First report of the select committee on the modernisation of the House, HC 190 of 1997-98, July 1997

constitutional principle could be determined in this way, "detailed and technical issues" would be better dealt with in a committee-type forum (para 79).

The report concluded that "whilst we see no reason why a programme for the passage of such a bill could not be agreed, if agreement were impossible, the Government of the day would presumably feel obliged to fall back upon a traditional timetable motion" (para 80). It would appear, in effect, that the Government and Opposition agreed to differ on this matter, but not allow it to breach the consensus on the Committee on the rest of its proposals, as consensus is generally seen to be valuable (if not essential) to successful change in Parliamentary procedure and practice.

When the House debated the Committee's report in November[115], the Leader of the House, Ann Taylor, emphasised how existing procedures already contain scope for flexible approaches to the legislative process,[116] and did not refer expressly to the committee stage of 'constitutional' bills. However the Shadow Leader of the House, Gillian Shephard, made it clear in her speech that the Opposition would "strongly resist any suggestion that there should be any change" to exist practice (c1071):

> Our view to that effect is recorded in the Committee's report. We reject suggestions from some that there might somehow be problems with definition or with ordering such business or that the House is incapable of scrutinising such Bills adequately and in detail ... We on the Opposition Benches accept the report, while putting down a marker about our reservations on the treatment of constitutional Bills.

After the *Government of Wales Bill* obtained a second reading on 9 December 1997, the Government moved that the committee stage of the Bill be split, with 6 clauses[117] to be taken on the floor of the House, and the remainder in standing committee:[118]

> **Mr. Win Griffiths**: …From the outset, it was the Government's proposition that consideration of the Bill would be split between a Committee of the whole House and Standing Committee. My right hon. Friend the Secretary of State made it clear yesterday that we intended that the clauses which raised key points of principle would be debated by a Committee of the whole House. That remains our position. [Interruption.]
>
> We appreciate that a great number of technical matters were raised in yesterday's and today's debates. We believe that it is more appropriate that those matters are dealt with upstairs in Committee, where detailed scrutiny can be carried out. [Interruption.] Report and Third Reading will of course be taken on the Floor of the House.

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115 HC Deb vol 300 cc1061-1129, 13.11.97. The report was agreed to without a division.

116 In particular, in the present context, *S.O. no. 63(3)* permits the splitting of the committee stage between the floor of the House and standing committee, a technique used notably for Finance Bills. See chap IV of Research Paper 97/53.

117 Clauses 1 (creation of the Assembly), 4 (Assembly voting system), 22 (transfer of functions), 58 (executive committee), 80 (finance) and 118 (WDA).

118 *Op cit*, cc 900-902, extracts. It was approved by 359-159, a majority of 200, c903

None the less, the Government recognise the concerns raised by the official Opposition, and the motion responds to that. I regret, however, that it was not possible to reach agreement through the usual channels on a reasonable timetable to consider the Bill in its entirety on the Floor of the House -- [Interruption.] ….The motion will allow key clauses to be debated in a Committee of the whole House. Those will be clause1, on the assembly itself, which the Opposition specifically requested to be taken on the Floor of the House; clause 4, on the membership of and election to the assembly; clause 22, on the functions to be exercised by the assembly; clause 58, which deals with internal working procedures of the assembly; clause 80, on the assembly's financial arrangements; and clause 118, on the reform of the Welsh Development Agency.

We believe that, in selecting those clauses, we have taken account of views expressed during debates on matters of import by Members on both sides of the House. We have heard much about such matters already. We hope that the proposed motion will allow the House full and proper opportunity to subject the Bill to detailed scrutiny on the Floor of the House, in Committee, and back on the Floor of the House.

Mr. Michael Ancram (Devizes): This motion is quite simply a disgrace. I am not surprised that the monkey rather than the organ grinder has moved it. I remind the House that, yesterday, the Secretary of State asked me whether I would
"give an undertaking that, if the Government were not minded to have the Bill considered in Committee upstairs, he would agree with the Government, through the usual channels, to have an agreed timetable to take the matter entirely on the Floor of the House". -- [Official Report, 8 December 1997; Vol. 302, c. 691.]
Today, I put forward a proposal for seven days in Committee on the Floor of the House and two days on Report -- compared with 17 days in total on the equivalent Bill in 1978. That suggestion has just been brushed aside. The right hon.Gentleman never meant those weasel words yesterday, and that is why he has got his hon. Friend the Under-Secretary to move the motion.

The Government of Wales Bill is the first constitutional Bill ever to be divided in such a way. Such division is a very serious breach of constitutional convention. It casts aside the main check that we have in this Parliament on constitutional legislation. Where other legislatures have weighted votes or referendums with thresholds, in this House we have always taken such Bills in Committee on the Floor of the House so that they could be properly scrutinised.

We are told that the only reason for moving the Bill Upstairs is administrative convenience. We should not use the procedures of the House for the administrative convenience of the Government, because the procedures of the House are here for the Members of the House.

The motion is also in breach of what the Secretary of State for Wales said in the press conference when he launched the Bill. He said:
"it is, of course, also open to any MP to put forward changes to the Bill, and to have these explored in detail through open debate".
How will that occur if the Bill is considered in Committee Upstairs?

…. The motion is a contempt of Parliament, because it covers only six clauses out of 149 clauses and 14 schedules. Enormous areas of the Bill will not be considered on the Floor of the House, although they are of significant interest to all hon. Members.

The nuts and bolts of how the proportional representation list system will work will not be considered on the Floor of the House, because clauses 5, 6 and 7 will not be considered on the Floor of the House. The right of the members of the assembly to set their salaries -- a matter of considerable interest to Hon. Members -- will not be considered on the Floor of the House.

Provisions relating to cross-border regulations, which will affect England, will not be considered on the Floor of the House. The provision to allow the assembly to apply European law in a different way to that in which it is applied in the rest of the United Kingdom will not be considered on the Floor of the House. Most extraordinary of all, the schedules contain provisions that will affect England, Scotland and Northern Ireland, and they also will not be considered on the Floor of the House.

The motion may appear innocuous, and our time for debate is short, but the impact on how the House undertakes constitutional reform is enormous. We well know the contempt that the Secretary of State of Wales and the Government have for the House, and the motion is another example.

….. I seriously ask all hon. Members who value the procedures of the House as the means of checking the executive and safeguarding our constitution to realise that tonight they are being asked to breach a convention that has served the House and our constitution well. We shall oppose the motion. It is an act of constitutional vandalism, and I ask all those who cherish our rights in the House to join me in dividing the House on the motion.

Matters progressed somewhat differently over the *Scotland Bill*. The main parties reached an agreement to take the whole of the committee stage on the floor of the House, and that the Bill would be 'programmed', so that the timetable for its Commons stages would be arranged in advance, with around 8 days in Committee of the Whole House:[119].

Following discussions between the Government and opposition parties, agreement has been reached on a programme for the committee and remaining stages of the Scotland Bill. They will be debated on the Floor of the House of Commons.

The Rt Hon Donald Dewar MP, Secretary of State for Scotland today welcomed this cross-party agreement on the scrutiny of the Scotland Bill. He said:

"This agreement takes forward the new inclusive approach which was pioneered during the Referendum campaign and we are determined to continue it through the work on the procedures of the Scottish Parliament.

The Scotland Bill itself is a major and far-reaching piece of legislation. It will establish the framework for the Government of Scotland for decades ahead. I want it to be scrutinised thoroughly and constructively in Parliament over the coming months. But I want the debate to be conducted in a spirit of co-operation which recognises that the establishment of a Scottish Parliament is now the settled will of the Scottish people.

"I am delighted therefore that the other parties have agreed that the committee stage of the Bill should be taken on the Floor of the House. This is entirely appropriate for a Bill of this nature. The cross-party agreement on a programme will ensure that it is scrutinised in an enlightened way. Most importantly this agreement is good for the people of Scotland. It will ensure that the legislation reaches the statute book in the best possible shape."

[119] "Scotland Bill set for debate on floor of House of Commons," Scottish Office PN, 19.12.97

The Conservatives were quoted as being pleased at this development.[120] Following a two-day debate on 12-13 January, the defeat of an Opposition reasoned amendment, and a second reading without division, a 'programme motion' was agreed to without division setting out the timetable for the remaining Commons stages.[121] This was the first such programme motion, as a Cabinet Office press notice explained:[122]

FIRST EVER ALL PARTY PROGRAMME MOTION

A programme motion to ensure proper Parliamentary consideration of the Scotland Bill by setting the amount of time spent on each part of it will be a key step in fulfilling the government's plans to modernise the workings of the House of Commons, if it is passed tonight.

The motion has been put down jointly by the Secretary of State for Scotland, Donald Dewar, Leader of the House of Commons, Ann Taylor, Shadow Leader of the House, Gillian Shephard, Paul Tyler for the Liberal Democrats and Margaret Ewing for the Scottish National Party. It includes the following proposals:

- eight days will be spent on the committee stage on the floor of the House

- three more days will be spent on the report stage and third reading

- the distribution of time between parts of the Bill will be decided by a Business Committee with cross party representatives.

Mrs Taylor said today:

"If this motion is passed it will benefit all concerned, ensuring better scrutiny of the Bill and more reasoned debate. It is a key step in our strategy for modernising the legislative process."

The programming of Bills was recommended in the first report of the House of Commons Select Committee on Modernisation, chaired by Mrs Taylor. The report was published on 29 July 1997 and it called for "arrangements for programming legislation which are more formal than the usual channels but more flexible than the guillotine".

Following this arrangement for the *Scotland Bill*, a programme motion was rapidly moved and agreed to for the *Government of Wales Bill*, and the earlier committal motion was discharged, on 15 January.[123] The effect of programme motions on the progress of legislation was noted during business questions that day, in an exchange between the shadow Leader of the House and the Leader of the House:[124]

Mrs Shephard: …..In the right hon. Lady's statement, the House will have discerned the influence of the work of the Modernisation Select Committee in connection with the programming arrangements made for handling the Scottish devolution Bill on the Floor of the House. As she knows, we oppose the principle of the Bill on constitutional and other grounds, but we welcome the agreement reached on the way in which it should be debated. If the House agrees later today the arrangements for handling the Welsh Assembly Bill, that, too,

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[120] "Dewar deal on Scotland Bill will cut debate", *Scotsman*, 20.12.97
[121] HC Deb vol 304 cc254-5, 13.1.98
[122] CAB 10/98, 13.1.98
[123] HC Deb vol 304 cc498-9, 15.1.98
[124] op cit, cc486, 487.

will be owing in part to the work of the Modernisation Committee, as well as in part to a change of heart……

Mrs. Taylor: I am grateful to the right hon. Lady for her initial comments, especially her praise of the work of the Modernisation Select Committee. I hope that the fact that we are both members of that Committee need not prevent us from being pleased when our proposals are accepted by the House. The programming resolutions that we have been able to put forward with all-party support represent important steps forward. Credit goes to all the Members from all parties who serve on the Committee.

The present position on the treatment of 'constitutional bills' in the Commons appears to be rather fluid at present, as, at this early point in the new Parliament, various novel legislative techniques and procedures are either still under consideration (by ministers and by the Modernisation Committee, for example), or are in their early stages of operation. It remains to be seen whether or not ministers regard the practice of taking committee stages of 'constitutional bills' entirely in the Chamber as still operative as a general rule, or whether each bill is to be looked at on its own merits. The adoption of the 'programme motions' mechanism (a technique which may not, and need not, be restricted to 'constitutional bills') may well have an impact on these considerations, as they would presumably subsume committee stages within their provisions, and would be presumed to remove, in general, the need for formal guillotine motions. Some idea of ministerial thinking can be gleaned from comments made by the Leader of the House during business questions on 15 January:[125]

I agree that programme motions can be important and can help the House to secure proper scrutiny of legislation. I also agree that there is a role for splitting Bills between the Floor of the House and a Standing Committee, but each Bill should be considered on its merits, and if we can accommodate the wishes of the House, we shall try to do so.

[125] *Op cit*, c488

Appendix V

Dates of ratification by Council of Europe member states of Article 25 and Protocol 11 of the European Convention (right of individual petition etc.)

- **Vaughne Miller, International Affairs and Defence Section**

The status of Article 25 and Protocol 11 ratifications is in the table below. Once Protocol 11 comes into force, Article 25 of the Convention will become redundant, as the right to individual petition will become compulsory for participating states. Protocol 11 is due to come into effect at the end of this year.

Ratification of European Convention on Human Rights and Protocol 11, Declaration made under Article 25 on the right of individual petition:

Member state	date of signature	date of ratification	Protocol 11 (ratification)	Article 25 *
Albania	13.7.95	2.10.96	2.10.96	2.10.96
Andorra	10.11.94	22.1.96	22.1.96	22.1.96
Austria	13.12.57	3.9.58	3.8.95	3.9.58
Belgium	4.11.50	14.6.55	10.1.97	5.7.55
Bulgaria	7.5.92	7.9.92	3.11.94	7.9.92
Croatia	6.11.96	5.11.97	5.11.97	6.11.96
Cyprus	16.12.61	6.10.62	28.6.95	24.1.95
Czech Rep.	21.2.91	18.3.92	28.4.95	18.3.92
Denmark	4.11.50	13.4.53	18.7.96	13.4.53
Estonia	14.5.93	13.3.96	16.4.96	16.4.96
Finland	5.5.89	10.5.90	12.1.96	10.5.90
France	4.11.50	3.5.74	3.4.96	7.2.85
Germany	4.11.50	5.12.52	2.10.95	5.7.55
Greece	28.11.50	28.11.74	9.1.97	20.11.85
Hungary	6.11.90	5.11.92	26.4.95	5.11.92
Iceland	4.11.50	29.6.53	29.6.95	3.9.58
Ireland	4.11.50	25.2.53	16.12.96	25.2.53
Italy	4.11.50	26.10.55	1.10.97	1.8.73
Latvia	-	27.6.97	27.6.97	27.6.97
Liechtenstein	23.11.78	8.9.82	14.11.95	8.9.82
Lithuania	14.5.93	20.6.95	20.6.95	20.6.95
Luxembourg	4.11.50	3.9.53	10.9.97	28.4.58
Macedonia (FYROM)	9.11.95	10.4.97	10.4.97	10.4.97
Malta	12.12.66	23.1.67	11.5.95	1.5.87
Moldova	13.7.95	12.9.97	12.9.97	-

Netherlands	4.11.50	31.8.54	21.1.97	1.9.79
Norway	4.11.50	15.1.52	24.7.95	4.12.56
Poland	26.11.91	19.1.93	20.5.97	1.5.93
Portugal	22.9.76	9.11.78	14.5.97	9.11.78
Romania	7.10.93	20.6.94	11.8.95	20.6.94
Russia	28.2.96	-	-	-
San Marino	16.11.88	22.3.89	5.12.96	22.3.89
Slovakia	21.2.91	18.3.92	28.9.94	18.3.92
Slovenia	14.5.93	28.6.94	28.6.94	28.6.94
Spain	24.11.77	4.10.79	16.12.96	15.10.85
Sweden	28.11.50	4.2.52	21.4.95	13.5.66
Switzerland	21.12.72	28.11.74	13.7.95	28.11.74
Turkey	4.11.50	18.5.54	11.7.97	28.1.87
Ukraine	9.11.95	11.9.97	11.9.97	-
UK	4.11.50	8.3.51	9.12.94	14.1.66

* Declarations are made for different periods such as three or five years renewable, or indefinitely. The dates given are those on which the Declaration was first made.

Appendix VI

Application to the European Commission on Human Rights

- **Vaughne Miller, International Affairs and Defence Section**

The Council of Europe booklet, *The Council of Europe and the Protection of Human Rights in Europe* (November 1993), describes the machinery for the protection of human rights and the procedure to be followed by individuals submitting an application to the European Commission of Human Rights under Article 25 of the European Convention on Human Rights.

The complaints mechanism is to be changed in line with a decision of the COE's Committee of Ministers and a subsequent new Protocol 11, which will simplify the procedure and speed it up. Protocol 11 is due to come into force at the end of this year, but in the meantime the machinery as it is described below is still operative.

In the UK individuals wishing to make an application cannot directly approach the **Court of Human Rights**.[126] The Commission is the body which examines each application to determine whether it is admissible under the terms of the Convention, and if so, subsequently carries out a detailed examination of the case and attempts to bring about a friendly settlement between the parties involved. If the attempt at conciliation fails, the Commission produces a report on the facts of the case, including a legal opinion as to whether there has been a violation of the Convention. This report will then be an important document in the final decision-making procedures of the Committee of Ministers or the Court of Human Rights.

For an application to be accepted by the Commission, certain conditions must be fulfilled. In particular the following should be noted:

1) Applicants must base their complaint on the alleged **violation of a right mentioned in the Convention or its Protocols**. An application will not be declared admissible by the Commission unless there is `prima facie' evidence that the Convention has been violated.

2) The alleged violation of the Convention must have been committed by a **public authority** (such as a Government department or court).

3) The applicant (or close relative) must have been the victim of the violation he complains of: that is to say that a complaint against the general principles or provisions of Government policy or legislation would not be acceptable, unless the **personal rights** of the applicant were affected.

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[126] Protocol 9 to the Convention provides for direct access to the Court by individuals but the UK is not a party to this Protocol and so its provisions do not apply.

4) Before applying to the Commission, the applicant must have **exhausted all domestic remedies** (ie application must have been made to all national authorities, up to the highest level, with the power to remedy the grievance in question).

5) The application must be submitted no later than **six months** after the final decision by the highest competent national authority.

It is never possible to say with certainty whether the Commission will find a particular application admissible: even if all the other conditions are fulfilled, acceptance depends ultimately on the Commission's legal interpretation of the Convention. The method of making an application is described in *The Council of Europe and the Protection of Human Rights in Europe*.

Appendix VII

Arguments for and against a Bill of Rights: Extract from the *Report of the House of Lords Select Committee on a Bill of Rights*[127]*:*

The Arguments For and Against

32.The Committee summarise in this paragraph the most important arguments (as they see it) put to them in favour of a Bill of Rights.

(a) The individual citizen might be better off, and could not be worse off, if the European Convention were made part of United Kingdom law, since in the event of conflict between the Convention and other provisions of United Kingdom law whichever was more favourable to the plaintiff would prevail.

(b) Embodying the Convention in our domestic law would provide the individual citizen with a positive and public declaration of the rights guaranteed him, thus complementing the United Kingdom's traditionally "negative" definition of his common law rights. This would have special value at the present time for the many individuals and groups who tend to feel impotent in the face of the size and complexity of the public authorities which seem to dominate their lives.

(c) Although when the United Kingdom acceded to the Convention, and thus allowed the right of individual petition to the Court at Strasbourg, it was believed that our law had nothing to fear from any appeal to the Articles of the Convention, a number of doubts have emerged since that time. Experience has shown that there are a number of areas where the British subject must at present take the long road to Strasbourg as a court of first instance as Golder did, since the domestic law provides no remedy in the courts of the United Kingdom.

(d) The Commission and Court at Strasbourg were not established as a "court of first instance", but rather as a "court of appeal" to which the citizen can have recourse only when domestic procedures have been exhausted. Although there is no obligation on a Member State to incorporate the Convention, the Strasbourg Court has said that the intention of the drafters of the Convention that the rights set out should be directly secured to anyone within the jurisdiction of the contracting States finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law. The United Kingdom is at present the only signatory which neither has a charter of fundamental human rights nor has incorporated the Convention into domestic law. So long as the Convention remains only an international treaty and forms no part of United Kingdom law, it suffers from the disadvantage of being both remote and expensive. Moreover the United Kingdom is exposed to unflattering world publicity. Our compliance with the Convention can already be tested judicially at Strasbourg. There is no reason to suppose that our own courts are not equally capable of determining these issues. Any uncertainty there may be about the impact of the Convention on our domestic law already exists and can be argued out at Strasbourg. Why not in the Strand ?

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[127] HL 176 session 1977-78 p.30-34

(e) An Act incorporating the Convention would not be an alternative to the continued exercise by Parliament of its traditional sovereignty, but would complement other Acts by which Parliament may wish to make law affecting human rights, including any amendment of the law that Parliament thinks desirable in the light of a United Kingdom court decision. Meanwhile, however, the Convention, if embodied in our domestic law, would, in Lord Scarman's words, "freshen up the principles of the common law" and when read with the common law would "provide the judges with a revised body of legal principle upon which they could go on slowly developing the law, case by case, as they have been doing for centuries", without waiting until the opportunity for legislation occurred.

(f) Our membership of the European Economic Community reinforces the value of the European Convention on Human Rights and makes it the more desirable that United Kingdom citizens should become increasingly aware of the European dimension. It is therefore all the more important that our legal system and jurisprudence should be developed as part of the European Community and not in splendid isolation.

(g) The Act would constitute a framework of human rights guaranteed throughout the United Kingdom and this would have special value if Scottish and Welsh Assemblies are established with powers devolved from Westminster, to ensure the exercise of such powers (e.g. those respecting local government and education) by the Assemblies with due regard to the United Kingdom's international commitments under the Convention. Significance is attached to the unanimous recommendation of the Northern Ireland Standing Advisory Commission on Human Rights favouring the incorporation of the Convention into legislation applying to the whole of the United Kingdom. This the Northern Ireland Commission believed to be in the long-term interests of that province.

(h) The incorporating Act, though not limiting Parliamentary sovereignty, would nevertheless be a continuing reminder to legislators of the international commitment undertaken when the United Kingdom government ratified the Convention. Indeed, the Convention seems likely to have far more practical effect on legislators, administrators, the executive, the judiciary and individual citizens as well as legislators if it ceases to be only an international treaty obligation and becomes an integral part of the United Kingdom law, guaranteeing the citizen specific minimum rights enforceable in the first instance in the United Kingdom courts.

33. The Committee now summarise in this paragraph the arguments against a Bill of Rights which seem to them to be the most important.

(i) Incorporation of the Convention would be to graft on to the existing law an Act of Parliament in a form totally at variance with any existing legislation and indeed incompatible with such legislation. Hitherto, it has been an accepted feature of our constitution that Parliament legislates in a specific form and that it is the role of the courts to interpret such legislation. Incorporation of the Convention would, for the first time, open up wide areas in which legislative policy on such matters as race relations, freedom of speech, freedom of the press, privacy, education and forms of punishment would be effectively handed over to the judiciary. All these are matters which our constitution has hitherto reposed in the hands of the legislature.

(ii) Nor is it right to say that the role the courts would have under a Bill of Rights would be no more than the kind of role they have always had under the common law. Under the common law the courts have developed legal principles slowly and empirically, from case to case. Under a Bill of Rights they

would start with principles of the widest generality and would have a free hand to decide how those principles operated in the cases that came before them.

(iii) Parliament has on numerous occasions shown its readiness to intervene in new areas where fresh social problems have arisen, and it is better for Parliament to enact detailed legislation as it has done, for instance, on such matters as race relations and sex discrimination, rather than to look to the unelected judges to develop both the policy on such matters and the way in which it should be dealt with.

(iv) So far as possible, the law should be clear and certain, whereas if the European Convention, framed as it is in broad and general terms capable of a variety of interpretations, were to become part of our domestic law, it would introduce a substantial and wide-ranging element of uncertainty into our law. (The same would be true of a Bill not based on the European Convention because it is in the nature of any Bill of Rights to be framed in the same sort of way as the Convention.) Individuals and companies would no longer be able to obtain confident advice as to what their rights, powers, obligations and liabilities were. That in itself would be a price too high to pay for flexibility-and answers the point that the individual citizen could not on any footing be worse off with a Bill of Rights. The uncertainty thus brought into our law would itself afford opportunity for exploiting endless challenges in the courts or before any tribunal to the validity of the existing laws. No one would know where he stood until each question had been tested afresh, and the least that can be said is that there is the prospects of a very great extension of litigation in the courts.

To take only one example, the introduction of Article 10 of the European Convention into our domestic law would introduce serious doubts into such important areas of the law as those relating to defamation and contempt of court, and official secrets.

(v) It is fallacious to suggest, as some witnesses suggested, that to make the Convention part of our domestic law would simply to be give to our judges the same sort of role, in relation to the Convention, as is played by the judges in Strasbourg. There is a great difference between the Commission or the Court at Strasbourg from time to time measuring our domestic law against the yardstick of the Convention, and the United Kingdom courts applying the Convention as an instrument of our domestic law. As a set of principles of domestic law, the Convention would have a life of its own quite independent of its international existence. The Convention could then be invoked daily in our Courts and they would constantly have to give decisions on it without any guidance from the jurisprudence at Strasbourg (where the number of cases adjudicated is very limited). Moreover, our Courts would be free to give the Convention a wider effect than was required by such Strasbourg jurisprudence as was available. In doing so they would be acting quite consistently with our international obligations.

(vi) The present situation in the United Kingdom is in accord with the original philosophy of the European Convention. The Convention was intended to lay down minimum standards of human rights which it was assumed would be in accord with the spirit of all the legal systems of the signatories to the Convention. It was always contemplated, as in fact has proved to be the case, that from time to time there would be conflicts between the domestic laws of the signatory states and the Convention, and for this reason the Convention set up machinery by way of the European Commission and the European Court to deal with such cases. Such conflicts have inevitably arisen in all signatory states, whether or not the Convention is part of their domestic law. It is in accordance with the spirit of the Convention that, when it emerges that there is such a conflict in the case of the United Kingdom, this should be put right.

Where necessary this can be done by legislation, but often the deficiency will call for no more than a change of administrative regulation or instructions. But it is no more unflattering to this country than it is to any other signatory of the Convention if the kind of dispute contemplated by the drafters of the Convention from time to time goes to Strasbourg for argument; and it is not the case, as some of the witnesses assumed, that relatively more cases have gone to the Commission from the United Kingdom than from other countries.

(vii) Even on the most unfavourable view of the extent to which United Kingdom law at present falls short of the standards of the Convention there are no more than a few marginal situations where the incorporation of a Bill of Rights might bestow a remedy where present law does not do so. They have mainly related to privacy and the conduct of the prison services. As to privacy, this has already been the subject of a thorough investigation by the Younger Committee, which made various suggestions for reform but came down against a general law of privacy. As to the conduct of the prison services, there has been one case so far, the *Golder* case, where a complaint has succeeded, and where the matter was dealt with by a change in the relevant regulations. The Committee are aware that there are several other cases now before the Commission but cannot properly comment on these.

(viii) There is no reason for supposing that the Government, and Parliament, are likely to proceed in ignorance of the country's international commitments; and indeed the Committee were given examples of proposals which had been modified by the Government in their preliminary stage to take account of our commitments under the European Convention. It is not realistic to fear that there is any risk of this country-whether at Westminster or in a devolved assembly -legislating in "splendid isolation" and without regard to the treaty provisions by which we are bound. The effect of incorporating the Convention into United Kingdom law in the event of devolution to Scotland would be to introduce similar uncertainties into the operation of any legislation emanating from the Scottish Assembly to those injected into the law of the United Kingdom generally.

(ix) It is felt that adequate weight is not given in the Report of the Northern Ireland Standing Advisory Commission to the arguments against incorporation from the point of view of its effect on the legal system as a whole; and that the argument that what is good for Northern Ireland must be good for the United Kingdom as a whole is unproven.

34. The two foregoing paragraphs briefly summarise the main arguments for and against a Bill of Rights which were reviewed by the Committee. Much has been written in the various publications but the Committee hope that they have picked out those arguments which will seem to the House to be the most important. Which of the arguments have the greater force, as has already been indicated, is a question on which the Committee are irreconcilably divided.