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The *Human Rights Bill [HL]*, Bill 119 of 1997-98: Churches and Religious organisations

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 looks at the possible effects of the Bill on churches and religious organisations, including religious schools and charities, and addresses the relevant amendments passed by the House of Lords. Companion Papers deal with the form and policy of the Bill (RP 98/24), some of the broader constitutional issues surrounding the Bill (RP 98/27) and its privacy implications for the press (RP 98/25).

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Summary

This Paper looks at the possible effects of the *Human Rights Bill* on the main churches in the United Kingdom, as well as on religious schools, charities, courts and legislation. This issue was not addressed in the White Paper on the Bill, and indeed did not appear to arise as a matter of concern until the Committee stage in the House of Lords.

The Paper first describes the protection given to religion in the European Human Rights Convention and the way this has been interpreted in the courts, before looking at the constitutional position of religious bodies in the UK and other countries in Europe.

It then goes on to look at the issues which arose during the House of Lords debates on the Bill. The main consideration was whether churches and other religious bodies would be subject to the terms of the Bill, and if so, when. More particular concerns included the position of religious schools and charities, and the freedom of ministers to refuse to carry out certain marriages on religious grounds. The issues of whether the decisions of church courts would be subject to review by the civil courts, and whether church legislation would be amendable through the 'fast track' procedure provided for in the Bill, also gave rise to considerable debate. Finally the particular questions and concerns relating to the Church of Scotland are addressed.

Contents

I. Introduction

The question of the extent to which churches and other religious organisations would be included in the *Human Rights Bill* did not arise until after the second reading debate in the House of Lords, as they are nowhere mentioned specifically in the Bill. However, the definition of a 'public authority' which would be bound by the terms of the *Human Rights Bill* was very widely drawn, in order to allow flexibility in the future and to avoid the difficulties inherent in a list of bodies to be included or excluded. It included a court, a tribunal and 'any person certain of whose functions are functions of a public nature', [1] and excluded only the Houses of Parliament in certain respects. The White Paper on the Bill simply gave a few examples of what might be considered to be a public authority, mentioning for instance the privatised utilities insofar as they exercise public functions, but it did not specify the Church, or indeed mention religious bodies in any context.[2]

However, during the discussion in the Committee stage in the House of Lords it soon became apparent that the definition was broad enough to include churches and other religious organisations in some circumstances. Religious schools and charities were the obvious examples, but churches in their roles as tribunals, employers, landlords and with regard to marriage might also be considered public authorities. The main concerns expressed by the churches include being required to marry homosexual couples and to accept the ordination of women priests and bishops, and church schools having to appoint non-Christian staff. The prospect was raised of the civil courts deciding in the first instance whether or not such a function was a public function, and then, if it was considered to be so, weighing up the churches' rights against those of individuals. There was a feeling that this would result in judges making moral judgments over the religious bodies.

The Bishop of Ripon said that the Church supported the basic principles of the *Human Rights Bill* (indeed the Archbishop of Canterbury had declared his support for such a Bill to the Council of Europe in Strasbourg in 1993[3]) but believed it was being applied too widely.[4]

In a letter to *The Times*, leading members of the General Synod of the Church of England (supported by at least fifty other synod members[5]) stated that under the Bill secular courts would 'for the first time be given a role in judging moral, doctrinal and spiritual matters'.[6] They urged the Government to provide for safeguards for the rights of religious people to be written into the legislation. The secretary general of the General Synod of the Church of England also expressed his concerns, in a letter to the permanent secretary of the Lord Chancellor's Department:

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1 clause 6(3)(c)
2 paragraph 2.2. For a more general discussion of this issue, see Research Paper 98/24
3 referred to in HL Deb vol. 584, c. 1325
4 'Church aims for freedom from human rights bill', *The Daily Telegraph*, 18 December 1997
5 'Churchmen urge Human Rights Bill rethink', *The Times*, 5 February 1998
6 Letter, *The Times*, 5 February 1998

> Our anxieties arise particularly at the interface between the right to freedom of religion, coupled with the public rights and functions of the Churches on the one hand, and the other rights enshrined in the Convention on the other. We are anxious not to escape our proper obligations under the Convention but to be assured that the Convention and the new Bill cannot be used to require us to act in ways contrary to our religious principles and beliefs, or the beliefs underlying Church bodies.[7]

The Catholic weekly newspaper *The Universe* was of the opinion that the Bill was a threat to the religious freedoms that had been hard won over centuries, and that it would amount to 'the total state control of our religious institutions'.[8] In a letter to Baroness Young, Cardinal Hume expressed his concern that:

> the implementation of the Bill should not have any adverse impact on the mission of the Church or on the freedom of Church bodies supported bu public funds, such as Catholic schools, to continue to serve the needs of people in this country as they have in the past. [9]

The Moderator of the Church of Scotland wrote to the Secretary of State for Scotland expressing his concerns that the Bill derogated from the constitutional settlement between Church and State set out in the *Church of Scotland Act 1921*. This matter is discussed in more detail below.

II. Article 9 of the Convention

Article 9(1) of the European Convention on Human Rights, which enshrines the right to freedom of thought, conscience and religion, and to the manifestation of a religion or belief, is included within the compass of the *Human Rights Bill.*[10] The latter right is subject to the legal limitations 'necessary in a democratic society', whereas freedom of thought cannot be restricted in the public interest. Freedom of religion includes the freedom not to take part in religious activities. Article 2 of the First Protocol to the Convention adds that the State shall respect the right of parents to ensure that their children are educated in conformity with their own religious and philosophical convictions.[11] These provisions are very similar to those in Article 18 of the United Nations Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights.

The European Commission on Human Rights now holds that a church or association with religious or philosophical objects can exercise the rights contained in Article 9 as it is really

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7 quoted in HL Deb vol. 584 c. 1325, 19 January 1998

8 quoted in *ibid*, c. 1337

9 quoted in 'Church aims for freedom from Human Rights Bill', *The Daily Telegraph*, 18 December 1997

10 Schedule 1

11 The United Kingdom has made a reservation stating its acceptance of this Article 'only in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure'. This is set out in Schedule 2 to the *Human Rights Bill.*

no more than the collection of its members.[12] In a recent case, the European Commission of Human Rights accepted jurisdiction in a case concerning a decision of the Consistory Court of the Church of England, following a suggestion that clear evidence of actual bias may be redressed. It considered that 'the applicant's functions as a priest [of the Church of England] are more in the nature of public service that they are of private professional practice'.[13]

In another case, involving the rights of a minister in the Danish state church to set his own rules for baptisms which were contrary to those of the highest church authorities, the Commission accepted jurisdiction but decided that Article 9(1) of the Convention did not grant such a right in the face of the rules of the higher church authorities.[14]

In the first case in which the European Court of Human Rights was required to give a detailed consideration of Article 9, it regarded the rights contained in it as one of the foundations of a democratic society. The majority decision was that the conviction of two Jehovah's Witnesses on charges of proselytism was a violation of Article 9 because it was not justified by a pressing social need.[15]

III. The constitutional position of religious bodies

A. The UK

The only religious bodies to have constitutional rights enshrined in legislation in this country are the Church of England and the Church of Scotland. From the date of its disestablishment,[16] the Church in Wales, as stated in the *Welsh Church Act 1914*, has drawn its authority solely from the mutual agreement of its members. The Roman Catholic Church has been recognised both at common law[17] and in statute[18], but it has been suggested that its present legal position seems to rest on the basis of a 'tacit concordat with the Crown'.[19]

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[12] *App. 12587/86, Chappell v United Kingdom*, 14 July 1987 (1987) 53 DR 241. In previous cases it had held that a legal as opposed to a natural person is incapable of having or exercising these rights - eg. *App. 3798/68, Church of X v United Kingdom*, 17 Dec. 1968, (1969) 12 Yearbook 306.

[13] *Re Thomas Tyler*, ECHR, April 1994, 3 *ELJ* (1995) 348 (Application no. 21283/93). The case was not forwarded as the Commission did not in fact find evidence of such bias. It was concerned with a breach of Article 6(1) of the Convention following a charge of 'conduct unbecoming a priest' under the *Ecclesiastical Jurisdiction Measure 1963.*

[14] Case 7373/76 (Denmark) 5 DR 157

[15] *Kokkinakis v Greece*, Judgment of 25 May 1993, Series A, No. 260-A; (1994) 17 EHRR 3977.

[16] 31 March 1920

[17] see for example *R v Registrar General, ex p. Segerdal* [1970] 3 All ER 886; *Re Schoales* [1930] 2 Ch 75; *Re Allen, Faith v Allen*, [1953] 1 Ch 810; *Buckley v Cahal Daly* (1990) NIJB 8

[18] for example in the *Marriage Act 1949* and the *Sharing of Church Buildings Act 1969*

[19] Norman Doe, *The Legal Framework of the Church of England: a Critical Study in a Comparative Context*, Oxford, 1996, referring to the *Ecclesiastical Titles Act 1871*, p. 11. He refers to the *Ecclesiastical Titles Act 1871*, which prescribes that the hierarchy and government of the Roman Catholic Church, and its coercive jurisdiction, are not rendered lawful by the terms of that statute but depend for their legality upon royal approval (preamble and s. 1).

1. England

The Church of England in its present form has been shaped by a series of direct legislative acts by the civil legislature, including Henry VIII's *Supremacy Act* of 1534, which made him head of the Church and repudiated the authority of the Pope. This Act was affirmed, following the reign of the Roman Catholic Queen, Mary of Tudor, by the *Act of Supremacy*, passed in the reign of Elizabeth I in 1558. Through the *Submission of the Clergy Act* of 1533, the Convocations of Canterbury and York received permissions to pass canons, subject to certain restrictions. Then in 1919 the newly-created Church Assembly was given the power to bring forward measures which have the force of primary legislation once they have been approved by Parliament.[20] When the General Synod was created by the *Synodical Government Measure 1969*, it took over the powers of the Convocations and the Assembly with regard to canons and measures.

This state-made law places a series of rights and duties upon the Church of England which are not applicable to other churches. These include the entitlement of some bishops to sit in the House of Lords and the disqualification of ordained ministers from sitting in the House of Commons[21]; the authority of synodical measures as primary legislation and the requirement that it be subject to Parliamentary approval; and the appointment of candidates to episcopal office by the Queen in her position as head of the Church of England.

2. Scotland

From the 1567 *Church Act* until 1921 the Church of Scotland was the established church in Scotland, subject therefore to legislation passed by first the Scottish Parliament and then, following the Act of Union, the United Kingdom Parliament. However, the Church of Scotland claims that its jurisdiction derives only from the Lord Jesus Christ and not from Parliament, and during the eighteenth century began to resent what it saw as the growing interference of the state in spiritual matters. This led to a long period of dispute between Church and State, which ended with the passing of the *Church of Scotland Act 1921*. This Act recognises the exclusive jurisdiction of the Church in spiritual matters.

In preparation for the 1921 Act, the General Assembly of the Church of Scotland set out its constitution in matters spiritual in what are known as the Declaratory Articles, which were appended to the 1921 Act. Section 1 of the Act provides that Parliament recognises that these are lawful articles, and that the rights, powers and freedoms set out in them cannot be limited by any law.

The fourth Declaratory Article defines matters spiritual which should be reserved to the jurisdiction of the Church of Scotland:

> all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution

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[20] *Church of England Assembly (Powers) Act 1919*, s.4

[21] *House of Commons (Clergy Disqualification) Act 1801*, which also applies to clergymen of the Church of Scotland, Roman Catholic Church and Orthodox Church.

and membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers.

It also states that the Church derives its powers to legislate and adjudicate on spiritual matters from Lord Jesus Christ, 'subject to no civil authority'.

The Court of Session, in considering this Act in the case of *Ballantyne v Presbytery of Wigtown,*[22] stated that since the government and discipline of the Church were mentioned in the fourth Declaratory Article, those matters were thereby spiritual matters in relation to which the civil authorities had no jurisdiction.

B. Other countries[23]

1. Germany

The written constitution of Germany, which is hierarchically superior to the European Convention on Human Rights, includes a general guarantee of freedom of religion The main religious denominations also have public law status (which allows them to raise taxes) and entrenched religious freedoms, although there is no state religion. The Roman Catholic Church had signed a concordat with Hitler's Third Reich in 1933 (which was held to be constitutional in a 1957 ruling) which provides for church independence from the state.

2. Holland

The European Convention has not been formally implemented into domestic law in the Netherlands. However, those provisions which are directly applicable possess binding force and may be applied by ordinary courts, according to Articles 65 and 66 of the Dutch Constitution. The force of a treaty such as this is superior to that of the Constitution or of prior or subsequent legislation. Cases have apparently been brought where individuals have sought to use human rights legislation to force religious groups to employ atheists in positions of religious leadership.

3. Italy

There is no established church in Italy, despite the strength of the Roman Catholic Church. In the *Lateran Agreements* of 1929 Mussolini granted the Roman Catholic Church various privileges, following a long battle by the Church to obtain compensation for the annexation of the papal states in the unification of Italy in 1870. This constitutional arrangement was confirmed in the Italian Constitution of 1948, which incorporated a guarantee towards Rome as a city of religious significance, and gave significant tax advantages to Church property. Article 34 preserved the exclusive right of the Church to perform marriages and issue

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[22] 1936 SC 625

[23] see Stewart Lamont, *Church and State: Uneasy Alliances*, London 1989, and Andrew Z. Drzemczewski, *European Human Rights Convention in Domestic Law*, Oxford 1983

annulments. However, a new concordat in 1984 removed the concessions of the 1929 Agreements on matters such as marriage, divorce, contraception and abortion.

The European Convention on Human Rights was incorporated into domestic law in Italy by Article 1 of Law 848/1955, although it does not have any priority over ordinary legislation. Where a conflict arises, it has been suggested that the most recent legislation has impliedly revoked any previous provisions with which it is inconsistent,[24] but the Supreme Court rejects the view that the Convention possesses any constitutional significance.

4. France

A strict separation between Church and State in all matters has been in place since the 1905 Constitution. No church has powers or duties under secular French law.

The French Constitution of 1958 provides that treaties such as the European Convention on Human Rights (which it ratified on 3 May 1974, stating that it should become the law of the land)[25] are superior to conflicting legislation whether passed before or after the ratification of the treaty.[26] In various cases involving conscientious objectors in which Article 9 of the Convention has been invoked before the French court, they have been prepared to recognise the primacy of the Convention over domestic legislation.[27]

IV. Religious bodies and the *Human Rights Bill*

A. General

1. Second reading debate

The Bishop of Lichfield at first warmly welcomed the *Human Rights Bill*, referring to the spiritual and religious dimension of the Bill.[28] The question of what constitutes a 'public authority' under the Clause 6 of the Bill was brought up by Lord Simon of Glaisdale,[29] and then by Lord Borrie[30] and Lord Donaldson of Lymington,[31] but none of them mentioned the Church or any other religious organisations. The Lord Chancellor, Lord Irvine of Lairg, stated that in deciding what is or is not a public authority, 'the point is not the label or the description; it is the function'.[32]

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[24] Andrew Z. Drzemczewski, *European Human Rights Convention in Domestic Law*, Oxford 1983, p. 143
[25] *Loi no 73-1227*, *Journal Officiel*, 3 January 1974, p. 67
[26] Articles 53 and 55
[27] see the report on the right of conscientious objection to military service (rapporteur M. Péridier), *Parliamentary Assembly of the Council of Europe* (1997), doc. 4027, 15-16, and Andrew Z. Drzemczewski, *European Human Rights Convention in Domestic Law*, Oxford 1983, p. 76
[28] HL Deb vol. 582, c. 1249
[29] *ibid*, c. 1259-60
[30] *ibid*, c. 1277
[31] *ibid*, c. 1292-4
[32] *ibid*, c. 1310

2. Committee stage

In the Committee stage of the debate in the House of Lords, Baroness Young, a former Conservative Leader of the House of Lords, questioned whether the Church or any other religious organisation would be considered a public authority for the purposes of Clause 6 of the Bill. She tabled (and then withdrew) an amendment which sought to exclude religious organisations, hospices, voluntary-aided religious schools and religious charities from the duty to comply with the legislation, giving various examples of situations which she felt would be unfairly dealt with under the Bill as it then stood.[33]

Lord Lester of Herne Hill (a Liberal Democrat peer), in response to this amendment, stated his support for the broadly-drawn nature of Clause 6, saying that it was only possible for the courts to come to a conclusion the nature of a public authority on a case-by-case basis. He referred to the case-law that has already developed in the field of judicial review, mentioning that the courts have held for those purposes that:

> the functions of the Chief Rabbi in interpreting Rabbinical law fall plainly outside the scope of judicial review. Similarly . . . it is quite clear that the decisions of the Synod, or those of the bishops of the Catholic Church, or, indeed, those of any other church organisation or body, would not normally fall within the scope of a public authority.[34]

He felt that the broad, inclusive definition in Clause 6 should stand without the exclusions for religious groups, because he could not foresee many circumstances in which such bodies would be directly liable as a public authority. In those cases that did arise, he felt that it would be difficult to see why they should be immune from liability, and added that the courts would be able to consider those cases in the light of Strasbourg case law and the facts of the case. [35] Clause 2 of the Bill does in fact provide that a domestic court determining a question that has arisen under the Act must take account of the jurisprudence of the European Court of Human Rights, and of its Commission, so far as it is relevant to the proceedings before it.

The Lord Chancellor stated that, under the terms of Clause 6(3)(c), if a body 'has any functions of a public nature, it qualifies as a public authority'.[36] However, he then referred to Clause 6(5) of the Bill, which states that:

> In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(c) if the nature of the act is private.

The effect of these clauses read together is that all the acts of bodies with mixed functions are subject to the prohibition on contravening Convention rights, unless a particular act is of a private nature. Lord Irvine of Lairg stated that the courts would have to apply these statutory principles case by case when issues arose. He saw no objection in principle to the proposition

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33 HL Deb vol. 583 c. 789-91
34 *ibid*, c. 793
35 *ibid*, c. 794
36 HL Deb vol. 583, c. 796

that if any religious body does exercise public functions they are caught by the Convention, because those of its acts which are of a private nature would be excluded.

He reaffirmed the choice made by the Government in deciding to define a 'public authority' broadly, with the focus on their functions rather than their nature. He felt that it would be extremely difficult to preserve the rationale of a list of bodies to which the Bill did or did not apply. It would be particularly hard to justify excluding religious bodies and not others from the terms of the Convention. He stressed that in applying the Convention the courts would be balancing some rights and freedoms against others, and in this context reiterated Articles 8 and 9 of the Convention (on the right to private life and on religious freedom).[37] He stated that the European Court of Human Rights is highly respectful of Article 9, and treats it 'as a charter for religious tolerance'.[38]

The Bishop of Lichfield, however, wanted to see a firm and specific commitment from the government that it would uphold and support religious tolerance and freedom, and in particular a clear idea of where the line between public and private actions would be drawn as regards the Church.[39]

3. Report stage

The Labour peer Lord Williams of Elvel moved an amendment which stated that the remedies available for violation of Convention rights should be 'subject to exemption on grounds of religious law and practice'. He was of the opinion that both the Church of England and the Church of Scotland 'have in many of their functions actions and activities of a public nature'[40], and would therefore qualify as public authorities under Clause 6(3)(c).[41]

Lord Hughes of Woodside, a noted humanist, was alarmed at that this amendment would amount to a blanket exclusion from the provisions of the Bill for any group which called itself a religion, for example the 'Moonies'.[42] Lord Lester of Herne Hill felt that the amendment was unnecessary because Articles 9 and 14 of the Convention gave ample protection to religious practices and procedures, and that it would be wrong in principle to create such an immunity in the Bill where none exists in the Convention itself.[43]

Lord Irvine of Lairg again upheld his adherence to the broad definition of 'public authority' as the Bill was intended to provide 'as wide a protection as possible for the human rights of individuals against an abuse of those rights'. He stated that none of the arguments so far

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37 *ibid*, c. 795-8
38 HL Deb vol. 583, c. 800
39 *ibid*, c. 799-800
40 HL Deb vol. 584, c. 1253
41 *ibid*, c. 1254
42 *ibid*, c. 1254-5
43 *ibid*, c. 1257-8

advanced had persuaded the government to create any exemptions along the lines proposed, and went on to say that:

> The idea that [the basic human rights of the people of this country] should not be available in matters of concern to the Church is one to which I, and no doubt others, find it hard to subscribe.

The amendment was subsequently withdrawn, but Lord Williams of Elvel sought a declaration from the government that the jurisprudence of the European Court of Human Rights upholding religious freedom and toleration would be followed by the UK courts. [44]

Baroness Young proposed another amendment calling for the exclusion of any person exercising functions on behalf of a 'church, religious denomination, mosque, synangogue or temple', or in connection with the Ecclesiastical Courts of the Church of England, from the terms of the Clause 6 of the Bill. She stated that the purpose of the amendment was to maintain the *status quo*, rather than to oppose religious freedom and religious tolerance. A further amendment, tabled by Lord Campbell of Alloway would have exempted altogether the General Synod, church schools and religious bodies recognised as such by the Secretary of State.

Speaking in support of her amendment, Baroness Young gave various examples of how the Bill might operate in practice, were it not amended, for instance where the leases for a shopping centre owned by the Church Commissioners forbid the sale of pornography. Were a newspaper vendor to challenge this, citing his right to freedom of conscience and belief (Article 9 of the Convention), freedom of expression (Article 10) and the right not to be discriminated against (Article 14), the civil courts rather than the Church would decide the matter.[45]

The argument against the exclusion of religious bodies from the terms of the Bill was put succinctly by Lord Goodhart, who, whilst recognising the need to ensure that the constitutional balance between the Church of England and Parliament is not upset by a human rights Bill, did not think that the Church should be able 'to claim the benefits and privileges of established status' while refusing to be bound by what would be the general law of the land. As for other Christian and non-Christian denominations (except the Church of Scotland), he was of the opinion that these are not in themselves public authorities, and that 'religion cannot be exempted generally from the European Convention on Human Rights'. Insofar as they exercise public functions, for example by providing services to the public in co-operation with the Government or with the help of public funds, he would consider it appalling if they were not required to comply with the Convention.[46]

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[44] Clause 2 of the Bill does in fact provide that a domestic court determining a question that has arisen under the Act must take account of the jurisprudence of the European Court of Human Rights, and of its Commission, so far as it is relevant to the proceedings before it.

[45] *ibid*, c. 1319-1324

[46] HL Deb vol. 584, c. 1330-2

Lord Lester of Herne Hill drew a parallel with the requirement in judicial review cases to consider whether the action complained of was in the exercise of a public function. He said that the case law on this, which has frequently held that religious bodies deciding on religious questions are not public bodies, would in his opinion apply directly to the interpretation of 'public authority' and 'public function' in Clause 6 of the Bill. He felt that the civil courts have 'sensibly drawn the line' when considering such matters. One example he gave was of a case in which a decision of the Imam of a mosque was held not to be open to judicial review because 'the sole source of his power was the consensual submission of the mosque community to the provisions of the mosque constitution and he had no public law function'. [47] It is possible to draw a parallel here with the Church of Scotland, which likewise considers its authority to derive not from Parliament but from the agreement of its members.

By contrast, Lord Alton of Liverpool felt that the Bill 'strikes at the very heart of religious liberty and practice in Britain'.[48]

Earl Russell expressed his concern at the prospect of the Secretary of State deciding what are authorised religions, as was proposed in Lord Campbell's amendment, given the difficulty of trying to define a religion.[49]. He said that in his view the words 'public authority' mean 'as an emanation of the state'.[50] He therefore was of the opinion that the Bill would only affect those Churches that act as 'organs of the state'.[51] He did not consider that the deciding factor was the receipt of money by the state. Indeed, the Lord Advocate later stated, during the debate on the courts of the Church of Scotland, that:

> Clause 6, when read with Clause 2, is of course designed to invite the civil courts of the United Kingdom, as far as possible, to treat as a "public authority" those bodies which the Strasbourg institutions would treat as bodies whose acts engage the responsibility of the state.[52]

The Earl of Longford accepted the concerns of the churches that the Bill as it stood would be damaging to their interests, but brought up the issue of whether these interests should be subordinated to or elevated above other priorities. This he felt concerned the importance of religion as a whole, and Christianity in particular, in Britain today.[53] The proposal that the rights of religious bodies should be accorded statutory protection in preference to those of individuals in the case of a conflict was mooted again during the Third Reading debate, this time by Lord Rochester.[54]

The Lord Chancellor explained the lack of consultation on the subject of whether religious organisations should be covered by the Bill by saying that 'it did not occur to anyone in the government that the Churches would have any particular difficulty in playing their proper

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[47]HL Deb vol. 584, c. 1335-6
[48]HL Deb vol. 584, c. 1336-9
[49]HL Deb vol. 584, c. 1340
[50]HL Deb vol. vol. 584, c. 1339
[51]HL Deb vol. vol. 584, c. 1340
[52]HL Deb vol. 585, c. 794
[53] HL Deb vol. 584, c. 1327
[54] HL Deb vol. 585, c. 783.

part in the enforcement of human rights in Britain'.[55] Having heard the concerns of the churches, he went on to address the particular issues that had arisen, such as religious schools and charities, solemnisation of marriages, and ecclesiastical courts and legislation (for more detail on these subjects, see below). He reasserted that:

> As the Bill stands, a Church which has some public and some private functions will be regarded as a public authority if the courts so decide, although not in respect of its acts which are of a private nature. [56]

However, Baroness Young felt that his statements did not amount to the guarantee she was looking for: that the churches would have nothing to worry about because nobody would take a church or religious body to court under the terms of the Bill.[57] The amendment went to a division, but was defeated by 93 votes to 82.

4. Third reading debate

Lord Campbell of Alloway spoke to another amendment at this stage, following the withdrawal of his earlier similar amendment during the Report stage. He felt that the courts should not be able to make declarations of incompatibility in regard to any spiritual matters, and that they should only be able to refer any alleged breach of the convention to the European Court of Human Rights or its commission. The Secretary of State should have no role in deciding what was a spiritual matter or a religious organisation.[58]

The Bishop of Birmingham, speaking in support of Lord Campbell's amendment, made it clear that he considered this to be an attempt not to protect the privileges of the Church, but to protect pluralism and the rights of conscience.[59]

In response to these statements, Lord Goodhart said that he regarded the Convention as 'one of the most powerful weapons for the protection of religious freedom which has ever been created' and that he was therefore surprised and saddened that so many peers considered it not a defence but a threat to them. He foresaw situations where the amendment tabled by Lord Campbell would do harm to religious freedom and reduce rather than increase the protection given to churches under the Convention.[60]

Lord Lester of Herne Hill joined Lord Goodhart in his recognition of the benefits to churches of the rights enshrined in the Convention, and pointed out that the Bill would simply give to the domestic courts powers already held by the European Court of Justice, which he

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[55] HL Deb vol. 584, c. 1343
[56] HL Deb vol. 584, c. 1345
[57] HL Deb vol. 584, c. 1348-9
[58] HL Deb vol. 585, c. 747-50
[59] *ibid*, c. 750
[60] *ibid*, c. 751

considered had never yet resulted in any harm to any religious group. He referred also to the grave difficulty in deciding which religious organisations should gain the benefit of the special treatment proposed under the amendment, and felt that giving the courts the power to decide upon this would cause many problems between people of different faiths. The Convention itself, in his opinion, offered ample scope for balancing the protection of religious freedom against 'the misuse of powers by the state'.[61]

Lord Irvine of Lairg could not think of any primary legislation other than Measures of the General Synod which both concerned the tenets and rituals of a religion, and raised an issue covered by the Convention. Given that Measures had been exempted from the fast track procedure by a government amendment (for which see below), and that a declaration of incompatibility would not of itself render a provision void, he did not see that the this amendment was necessary. He drew the distinction between a declaration of this type and 'a finding that a public authority has acted unlawfully by breaching the convention right when that breach is not sanctioned by statute'.[62]

When addressing an amendment moved by Lord Renton seeking to exclude churches from the duty not to act incompatibly with the Convention in the exercise of their public functions, the Lord Chancellor felt that this was a matter which the House had determined at the Report stage. He did not believe that the Bill would encourage that ordinary courts to interfere in purely spiritual matters, and agreed with Lord Lester's statement that there is consistent English case-law making it quite clear that the courts would not do so in conflict with the jurisdiction of the courts of any religion.[63]

Baroness Young moved several further amendments at this stage, none of which went as far as the amendments which had failed gain enough support for during the Committee and Report stages, which sought complete exemption from the Bill for religious bodies.[64] One of her new amendments sought to provide a defence for a person who had been pursued in the courts for breach of Convention rights if he could show he was acting in pursuance of a manifestation of religious belief. It referred to the 'principal religious traditions', to allow for the jurisprudence on that phrase in the *Education Act 1996*, s. 375(3) to be taken into account. In cases under the act the phrase has widely been taken to include Christianity, Judasim, Islam, Hinduism, Buddhism and Sikhism.

In reply to this amendment, Lord Goodhart again stated that he felt the Convention protected churches rather than threatened them.[65] Earl Russell pointed out that 'the only choice we face in the whole of this Bill is whether we shall have the rights under the Convention, to which we are already committed, in British courts or at Strasbourg'. He also drew attention to the

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[61] *ibid*, c. 752-4
[62] HL Deb vol. 585, c. 758-9
[63] HL Deb vol. 585, c. 759-60
[64] HL Deb vol. 584, c. 1344 and 1346
[65] HL Deb vol. 585, c. 778-9

difficulties in defining which religions should be 'principal religions', and stated his misgivings in 'the attempt to use the authority of Parliament, which is, I may say, not a spiritual authority, to try to make a distinction between first-class and second-class religions'.[66]

The Lord Chancellor felt that the amendment to a large extent simply allowed religious bodies to invoke their rights under Article 9 of the Convention, and that where it went beyond that it was unhelpful, especially in its reference to employment rights, which are not specifically covered by the Convention.[67]

However, following a division on Baroness Young's paving amendment which sought to insert this and other derogations into Clause 1, which was passed by 168 votes to 131, this amendment was accepted. It had the effect of inserting the following sub-clauses to Clause 2:

> (4) Where a court or tribunal is determining a question which has arisen under this Act in connection with a Convention right it shall be a defence for a person to show that he has acted in pursuance of a manifestation of religious belief in accordance with the historic teaching and practices of a christian or other principal religious tradition represented in Great Britain.
>
> (5) For the avoidance of doubt, the teaching and practices referred to in subsection (4) above do not include any teaching or practice which contravenes the criminal law.
>
> (6) Subject to subsection (5) above, the teaching and practices referred to in subsection (4) above shall include teaching or practice in accordance with a relevant historic creed, canon, confession of faith, catechism or formulary.
>
> (7) In this section "manifestation of religious belief" shall be taken to include actions such as worship, observance, conformity to a moral or ethical principle, practice, teaching and employment policies.

B. Religious schools

Current education legislation for England and Wales allows governing bodies in voluntary aided schools and those grant-maintained (GM) schools which were formally voluntary (aided or controlled) or established as new GM schools with a religious basis to take into account religious opinions and practice in appointing *all* teachers.[68] Similar provisions in Scotland allow the approval of teachers in denominational schools as regards their religious belief and character by representatives of the church or denominational body.[69] The English and Welsh provisions are restated in the current *School Standards and Framework Bill*[70] with regard only to voluntary aided schools. Foundation schools with a religious character will be

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[66] HL Deb vol. 585, c. 779
[67] HL Deb vol. 585, c. 784
[68] *Education Act 1996* s.146 & 304-306
[69] *Education (Scotland) Act 1980* s.21(2A) as amended
[70] Bill 95 of 1997/98

in the same position as voluntary controlled schools are now in only being able to consider the religious opinions of those "reserved" teachers of religious education (RE).[71]

Baroness Young, during the debate in Committee, referred to the existing freedom of religious denominations to employ staff who adhere to a particular faith. She felt that this freedom might be under threat were religious schools to be considered 'public authorities' under the Bill.[72] An amendment tabled by her at this stage had sought to exclude such schools from the definition of a public authority in Clause 6, but was unsuccessful.

The Bishop of Lichfield felt that the Lord Chancellor had not adequately addressed the issue of the freedom to choose a child's school on religious grounds in his statements on the nature of a 'public authority'.[73]

In response to another amendment moved (but in the end withdrawn) by Baroness Young during the Report stage, which referred to the exclusion of those representing religious schools from the definition of a 'public authority', Lord Goodhart stated that the European Court of Human Rights had upheld the right of parents in Belgium to send their children to religious schools if they wished to do so.[74] Article 2 of the First Protocol to the Convention enshrines the right of parents to choose their child's education 'in conformity with their own religious and philosophical convictions'. Moreover, since the Convention does not include any specific employment rights, and the anti-discrimination clause in Article 14 covers only the rights and freedoms mentioned in the Convention, in his opinion there would be no breach of the Convention in the refusal to consider someone who was not a communicant member of the Church of England for the post of head teacher of a Church school.[75]

Lord Goodhart felt that an element of public funding was not essential in order for a religious school to be considered to be carrying out a public function, as the provision of education was in itself a public function.[76] He also felt that the matter of the staff of church schools was already governed by legislation on race relations, sex discrimination and employment rights, and added that this legislation had gone virtually unchallenged.[77]

Baroness Carnegy of Lour was nevertheless concerned about the position of the Roman Catholic state schools in Scotland, which are run by the local authorities who always accede to the insistence of the Church that the head teachers of these schools be Roman Catholic themselves.[78]

The Lord Chancellor responded to the concern over the appointment of teachers of a particular belief in church schools, by saying that it was certainly not the government's

[71] Clauses 56-58
[72] HL Deb vol. 583, c. 790
[73] HL Deb vol. 583, c. 799-800
[74] *Belgian Linguistics Case (no. 1)*, Judgment of 9 Febreaury 1967, Series A, No. 5, (1979-80) 1 EHRR 241; *Belgian Linguistics Case (no. 2)*, Judgment of 23 July 1968, Series A, No. 6, (1979-80) 1 EHRR 252. This case actually referred to the right of parents to choose education according to their philosophical convictions under Article 2 of the First Protocol, here relating to the language used.
[75] HL Deb vol. 584, c. 1331
[76] HL Deb vol. 584, c. 1331
[77] HL Deb vol. 585, c. 778-9
[78] HL Deb vol. 584, c. 1341

intention for the Bill to have the effect of outlawing this practice. This was because the convention rights protected under the Bill did not in his view include the right to be appointed to any particular post. In his view, Article 14 of the Convention (on religious discrimination) therefore did not stand in the way of religious schools appointing people whom they considered appropriate for religious reasons.[79]

Baroness Young's amendments introduced at the Third Reading stage again included one which sought to ensure that religious schools or charities would not be challengeable under the Bill in relation to the appointment or dismissal of their senior officers.

The Lord Chancellor considered the anxieties addressed by this amendment to be unfounded, given the legislation referred to by Lord Goodhart, and the fact that the Bill would not enable any legislation to be directly struck out. He said he did not feel that the Bill should attempt to anticipate every conceivable outcome by creating statutory exceptions, and added that making the proposed exceptions would be most unsatisfactory in the scheme of the Bill.[80]

However, at this stage the amendment was agreed to, as a result of the earlier division on Baroness Young's paving amendment which was won by 168 votes to 131, and led to the insertion of the following sub-clause into Clause 7:

> (9) In relation to-
>
> (a) a church school;
>
> (b) a school or college with a religious foundation or trust deed or, as the case may be, memorandum or articles of association,
>
> nothing in this Act shall be used to affect its ability to select for the position of headteacher, deputy headteacher or other senior post people whose beliefs and manner of life are appropriate to the basic ethos of the school and to dispense with the services of a person in the position of headteacher, deputy headteacher or other senior post whose beliefs and manner of life are not appropriate to the basic ethos of the school.

The amendment extends to the governing bodies of all church schools and all maintained schools or colleges with a religious foundation the right to take into account "the beliefs and manner of life" of applicants in making senior appointments. Church schools are only defined in legislation in relation to the Church of England.[81] It is the nearly 3,000 governing bodies of Church of England and Church of Wales voluntary controlled schools who will be most affected by this new power where they have previously been under a duty not to consider religious opinions and practice in appointments other than those of RE teachers. Voluntary controlled governing bodies have only a minority, typically a quarter, of foundation governors i.e. representing the denomination. The Prime Minister has promised a Government statement on this amendment "as soon as possible".[82]

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[79] HL Deb vol. 584, c. 1344-5
[80] HL Deb vol. 585, c. 783-6
[81] *Diocesan Boards of Education Measure 5.10*, as amended
[82] HC Deb vol. 306, c.367 (11 February 1998)

C. Religious charities

Baroness Young first drew attention to the possible effects of the Bill on charities, particularly those that are partly publicly funded, during the Committee stage in the House of Lords. She wondered whether a religious hospice that was partly government funded would be considered a public authority for the purposes of the Bill, and if so whether it would be obliged to accept, for instance, information about voluntary euthanasia.[83] She sought to exclude hospices and religious charities from the ambit of Clause 6 in an amendment introduced at this stage.

Lord Irvine of Lairg stated that the nature of the functions of a charity (presumably rather than whether it received any public money or not) would determine whether it would be considered a public authority. He suggested that charities which deal with homelessness, for example, do exercise public functions, and also referred to the statutory functions of the NSPCC, which he considered to be of a public nature. He saw nothing wrong in the courts deciding that these bodies might on some occasions be exercising a public function, and felt that the public would have confidence in such decisions.[84]

In suggesting which actions of charities might be considered to be of a public nature, Lord Goodhart referred to those which provide services to the public in co-operation with the Government, and often with the benefit of public funding.[85]

During the Third Reading of the Bill Baroness Young's paving amendment, which referred to a provision on the exemption of charities, was passed by 168 votes to 131 on a division. It had the effect allowing this amendment to pass, which inserted the following sub-clause to Clause 7:

> (10) In relation to a charity which has as one of its aims the advancement of religion, nothing in this Act shall be used to affect its ability to select for the position of chief executive, deputy chief executive or other senior post people whose beliefs and manner of life are appropriate to the basic ethos of the charity and to dispense with the services of a person in the position of chief executive, deputy chief executive or other senior post whose beliefs and manner of life are not appropriate to the basic ethos of the charity.

D. Marriage

There was considerable debate in the House of Lords on whether the Bill would affect the lawfulness of refusals by ministers of religion (or equivalent) to carry out certain marriages

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[83] HL Deb vol. 583, c. 790
[84] HL Deb vol. 583, c. 800
[85] HL Deb vol. 584, c. 1332

on religious grounds. Again, Baroness Young was instrumental in drawing attention to this matter and to the conflict of rights that might thereby arise.[86]

Lord Lester of Herne Hill stated that, in the matter of religious marriages of homosexual couples, the question is whether the functions performed by the person solemnising the marriage are or are not functions of a public nature. Therefore, in his opinion, if a Church body refused to marry a homosexual couple, it would not itself be liable as a public authority. The matter of whether the UK would itself be liable on the international plane under Article 8 of the Convention if it were to prevent the marriage (or equivalent) of homosexual couples is, he felt, a different question.[87]

Lord Alton of Liverpool believed that the refusal of the Catholic Church to allow remarriage after divorce would be open to attack if the Bill as it stood became law, because he considered this to be a public matter.[88] However, Earl Russell pointed out that in a Catholic marriage the functions of the state are carried out not by the priest but by the registrar, and that therefore the priest would not be considered a public authority when conducting a marriage ceremony.[89] In any case, he felt that the Roman Catholic Church could not be considered a public authority for any purposes in this country.[90]

The Lord Chancellor addressed the issue of churches being forced to marry homosexual couples or divorced people, referring to Article 12 of the Convention which gives men and women of marriageable age the right to marry. He stated that the European Court of Human Rights has held, in a case brought against the UK, that Article 12 of the Convention applied only to 'the traditional marriage between persons of the opposite biological sex',[91] and that therefore it did not extend to a marriage between two men or two women. He was also of the opinion that it did not amount to a right to marry in a particular place or a particular manner.[92] In any case, as domestic law in the UK states that a marriage is void if the parties are not respectively male and female, no church would be in a position to marry two men or two women unless the law were changed. As regards the remarriage of divorced people, he added that under section 8 of the *Matrimonial Causes Act 1965* clergymen of the Church of England and the Church in Wales cannot be compelled to solemnise such marriages, and that no other clergymen have any legal obligation to conduct marriages.[93]

An amendment introduced by Baroness Young at the Third Reading stage sought to give statutory effect to assurances, made by the Lord Chancellor during the report stage, that the Bill was not intended to compel any church to solemnise a marriage contrary to their beliefs. It referred to the 'principal religious traditions', again to allow for the jurisprudence on that phrase in the *Education Act 1996*, s. 375(3) to be taken into account. It was accepted, after Baroness Young's paving amendment had been agreed to on division by 168 votes to 131, and had the result of adding to Clause 7:

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[86] HL Deb vol. 583, c. 791
[87] HL Deb vol. 583, c. 794
[88] HL Deb vol. 584, c. 1338-9
[89] HL Deb vol. 584, c. 1339
[90] HL Deb vol. 584, c. 1340
[91] *Rees v UK*, A 106 (1986) Com Rep para. 49 (1986)
[92] HL Deb vol. 584, c. 1345-6
[93] HL Deb vol. 585, c. 757-8

> (8) Nothing in this Act shall be used to compel any minister, official or other person acting on behalf of a christian or other principal religious tradition represented in Great Britain to administer a marriage contrary to his religious doctrines or convictions.

E. Religious courts

During the Report stage, Lord Lloyd of Berwick spoke to that part of Baroness Young's amendment which sought to exclude ecclesiastical courts from the ambit of the Bill. He considered that they decide only spiritual matters, which he felt should be beyond the jurisdiction of the secular courts. He made particular reference to the Court of Ecclesiastical Causes Reserved, which decides questions of ritual and doctrine of the Church of England. At present there is only one method of appeal from this court; but Lord Lloyd considered that treating this court as a public authority under the Bill would result in its decisions being subject to those of the civil courts for the first time.[94]

By giving the example of a hearing in a church court regarding the alleged misconduct of a minister, Lord Goodhart showed that in his view it would be unfair to exclude church courts from the operation of the Bill. In such a case, it would result in deny the minister the protection of Article 6 of the Convention, which grants the right to a hearing by an independent and impartial tribunal.

Lord Irvine of Lairg could see no reason either, in principle, for treating such courts, including the Court of Ecclesiastical Causes Reserved which was in his opinion indeed a court, differently from any other courts of the land. He nevertheless found it very difficult to envisage a situation in which church courts would contravene the Convention.[95]

The amendment was unsuccessful at that stage, but Lord Lloyd supported a later successful amendment, moved by Lord Mackay of Drumadoon during the Third Reading, which would exclude from the ambit of the Bill any court, tribunal or religious body exercising a jurisdiction recognised but not created by Parliament in matters spiritual. Lord Lloyd stated that as the Bill stood it would alter the present position whereby ecclesiastical courts are not subject to review by the secular courts. He suggested that if ecclesiastical courts were not removed from the legislation altogether, they should at least be designated the appropriate court to hear claims brought against religious bodies for breach of Convention rights.[96]

The Lord Chancellor said that his position on religious courts had not changed since his statements in the Report stage,[97] and he stressed again that he did not believe that the Bill would encourage the ordinary courts to interfere in purely spiritual matters. In any case, given the way the amendment was worded, he considered that it would not have any effect in

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[94] HL Deb vol. 584, c. 1334-5
[95] HL Deb vol. 584, c. 1346
[96] HL Deb vol. 585, c. 780-1
[97] HL Deb vol. 584 c. 1346

relation to the jurisdiction of the courts of the Church of England, which was created by Parliament in the *Ecclesiastical Jurisdiction Measure 1963*.[98]

Nevertheless, the amendment was accepted, against the government's wishes, without a division, and had the effect of adding the following sub-clauses to Clause 6:

> (5) In subsection (3) "court or tribunal" does not include any court or tribunal when it is exercising a jurisdiction, recognised but not created by Parliament, in matters spiritual.
>
> (6) In relation to a particular act, a person is not a public authority by virtue only of subsection (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.

F. Measures of the General Synod of the Church of England

Under Clauses 10-12 of the Bill, Ministers would be given the power to amend or repeal primary and secondary legislation which has been subject to a declaration of incompatibility with the Convention by the domestic courts. Such remedial orders would be subject to affirmative resolution by Parliament. This has become known as the 'fast track' procedure, and is discussed in more depth in part II of Research Paper 98/27.

The Bishop of Exeter, in a speech during the Committee stage of the Bill, pointed out that if this provision were to apply to Measures of the General Synod of the Church of England, which are considered primary legislation, it would not be in accordance with the present constitutional position under which a Church measure can only be entirely accepted or rejected, and not amended, by Parliament.[99] He later pointed out that all the work on such Measures is currently carried out by the General Synod. It is then scrutinised by the Parliamentary ecclesiastical committee and not on the Floor of the House (unless Members desire that). He felt that the Bill as it stood would also disrupt this arrangement also.[100]

The Lord Chancellor at first stated only that, in the unlikely case of the need for remedial orders concerning ecclesiastical legislation, the government would first consult the Church. However, he went on to say that he 'would have thought that the better course would be for the Church . . . to amend its measures itself, subject to parliamentary approval'.[101]

Lord Williams of Elvel called for the legislation of the Church of England (and of the Church of Scotland) to be exempt from the fast-track procedure, and for amendments to Measures only to be made by further Measures which go through the normal synodical process.[102] The

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[98] HL Deb vol. 585, c. 783-6
[99] HL Deb vol. 583, c. 794-5
[100] HL Deb vol. 583, c. 1115-6
[101] HL Deb vol. 583, c. 1118
[102] HL Deb vol. 584, c. 1252-4

Bishop of Ripon felt that this Bill was taking back certain freedoms that had been granted to the Church of England.[103]

The Government took the Church's concerns on this matter into consideration, after discussion in the standing committee of the General Synod on the matter. It felt that it would be inappropriate to give Ministers a power which Parliament as a whole does not have, and that the General Synod would speedily consider any measure which had been subject to a court declaration of incompatibility with the Convention without any need for the order-making provisions of the Bill. During the Report stage, Lord Williams of Mostyn, Parliamentary Under-Secretary of State at the Home Office, therefore moved an amendment to Clause 10 to exclude Church of England Measures from the provisions for revision by means of a ministerial remedial order.[104] This amendment was intended to preserve the constitutional position of the Church of England as regards its legislation, and was agreed to.[105]

G. The Church of Scotland

1. Committee stage

In Committee, Lord Mackay of Drumadoon attempted to provide that the courts of the Church of Scotland be given the power to make a declaration of incompatibility of primary legislation with Convention rights under Clause 4 of the Bill. When speaking to this amendment he also raised the issues of whether the courts of the Church of Scotland would have to comply with Clause 3(1) and interpret primary and secondary legislation as far as possible in line with the Convention; and whether the definition of 'public authority' would include either the General Assembly of the Church of Scotland in its legislative role, or the church courts and those who have a duty to refer and present disciplinary cases to those courts.[106]

Lord Lester of Herne Hill felt that it was unlikely that the courts would consider the decisions of the Church of Scotland on spiritual matters to be the actions of a public authority, and found it difficult to imagine any situation in which the bodies referred to by Lord Mackay would be in breach of the Convention.[107]

The amendment was disagreed with by the Lord Chancellor, who said that he considered that only the highest secular courts, and not, therefore, the courts of the Church of Scotland, should be given the power to make a declaration under Clause 4.[108] He did not at that stage look at the broader issues brought up by Lord Mackay.

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[103] HL Deb vol. 584, c. 1261
[104] HL Deb vol. 585, c. 395-8
[105] It adds Clause 10(6)(b) to the Bill, which states that in Clause 10, "legislation" does not include a Measure of the Church Assembly or of the General Synod of the Church of England.
[106] HL Deb vol. 583, c. 552-3
[107] HL Deb vol. 583, c. 553
[108] HL Deb vol. 583, c. 553-4

2. Report stage

During the Report stage in the House of Lords, Lord Mackay of Drumadoon spoke to two further amendments dealing with the position of the Church of Scotland. The first of these he had tabled himself, and sought to exclude the *Church of Scotland Act 1921* from the terms of Clause 3 of the Bill, which requires legislation to be interpreted by the courts so far as possible in a way which is compatible with Convention rights. The other, tabled by Lord Steel of Aikwood who could not be present during the debate, wished to add to Clause 3 the provision that nothing in the Act should affect the separate and independent government and jurisdiction of the Church of Scotland in spiritual matters, as enshrined in the *Church of Scotland Act 1921*.[109]

Lord Mackay stated that neither of these amendments were seeking a blanket exclusion for the Church of Scotland from the terms of the Bill, but merely a safeguard for the jurisdiction of the Church courts to legislate and adjudicate upon spiritual matters. He stated that the Church of Scotland is content that the Bill should apply to the other activities in which it is engaged as a public authority, and gave the examples of its work in running old folks' homes and clinics for drug addicts,[110] and in implementing the provisions on care in the community which is funded by central or local government.[111]

The reason behind the amendments was that the Church of Scotland had become concerned that the Bill as it stood would undermine the constitutional settlement enshrined in the 1921 Act. In a letter to Lord Mackay of Drumadoon following the debate in Committee, Lord Williams of Mostyn apparently acknowledged that the courts of the Church of Scotland would appear to be courts for the purposes of the Bill and therefore ought to be regarded as public authorities and subject to the relevant provisions of the Bill.[112] Lord Mackay considered that this amounted to regulation of the church courts in matters spiritual, which conflicted with the terms of the 1921 Act. He feared that this could lead to a court making a declaration of incompatibility in relation to the 1921 Act, and therefore hoped that the Government would make it clear whether this result was intentional.[113]

Baroness Young supported these amendments, being of the opinion that Clause 6 as it stood was in conflict with the 1921 Act as it restricted the freedoms enshrined in the Act and overrode the constitutional agreement reached in it.[114] Lord Clyde felt that the scope of Clause 6 ought to be limited to exclude the internal operations of ecclesiastical bodies generally.[115]

The objection to this amendment raised by Lord Goodhart was that if such an exemption was given to the Church of Scotland, it should also be given to the Church of England, and the door would then be opened to other religious bodies to seek the exemption.[116]

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[109] HL Deb vol. 584, c. 1272-5
[110] HL Deb vol. 585, c. 799
[111] HL Deb vol. 584, c. 1273
[112] referred to at HL Deb vol. 584, c. 1274-5
[113] HL Deb vol. 584, c. 1272-5
[114] HL Deb vol. 584, c. 1276
[115] HL Deb vol. 584, c. 1282
[116] HL Deb vol. 584, c. 1276-7

In response to Lord Mackay's amendment, the Lord Advocate, Lord Hardie, stated that the Bill would not interfere with the Church of Scotland in its dealing with matters spiritual. He explained this by saying that so long as the Church and its courts, in the exercise of their public powers, did not depart from the concept of human rights, there would be no conflict between church and state. In the event of a conflict, it was the government's opinion that the (secular) courts will prevail; but they would not, and would not wish to, deal with matters of the spiritual government of the Church.

He went on to explain that the government had no intention of interfering with the religious freedoms of the Church of Scotland. He stated that the Bill did not conflict with the provisions of the 1921 Act preserving the independence of the Church on spiritual matters. In those circumstances where the courts decide that the Church is acting as a public authority in a particular case, he did not feel that the Church would 'wish to maintain that breaches of human rights by its institutions are purely matters of spiritual concern which should be excluded from the jurisdiction of the ordinary courts'.[117] On the other hand, he was certain that the courts would 'continue to respect the spiritual independence to which the Church of Scotland properly attaches great importance'.[118]

Lord Hardie stated that the ordinary courts would not be entitled to review a decision of the Church courts on matters spiritual because of the constitutional relationship between Church and state. However, he declined to give any guidance on what would happen were a court not to decline jurisdiction on a spiritual matter. He therefore felt that, given the scheme of the Bill, and the protection for religious rights enshrined in Article 9 of the Convention, it would not be right to exempt the Church of Scotland Act 1921 from it in the manner proposed in the amendment. Nor would it be appropriate, in his opinion, to exempt any kind of religious court from the definition of 'public authority' in Clause 6.[119]

The amendments were withdrawn, but the Government did subsequently agreed to a meeting between the Secretary of State for Scotland, the Lord Advocate and the Moderator of the General Assembly of the Church of Scotland. However, following that meeting, the Secretary of State for Scotland stated to the Moderator that the Government felt unable to bring forward any amendment relating to the Church of Scotland 'without undermining the purpose or integrity of the *Human Rights Bill*'.[120] The Moderator's response to this includes the following:

> While I appreciate your having replied so promptly, I have to place on record our extreme disappointment at this response, especially as we understand that there is no dispute between us that the Bill in its present form is inconsistent with the provisions of the Church of Scotland Act 1921. We are dismayed that the Government apparently intends that this inconsistency should remain. You state that you do not feel there is any amendment which would meet our requests without undermining the purposes and integrity of the Human Rights Bill. Our concern is that the Bill in its present form undermines the purposes and integrity of the constitutional settlement between Church and State, which the 1921 Act enshrines. It is a

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[117] HL Deb vol. 584, c. 1286
[118] *ibid*
[119] HL Deb vol. 584, c. 1284-8
[120] HL Deb vol. 585, c. 776

matter of particular regret to us that such a worthy measure as the Human Rights Bill, and one which the Church welcomes, should have such an effect.[121]

3. Third reading debate

The Bishop of Ripon referred to the position of the Church of Scotland again during the Third Reading debate, as he felt it should be given the same benefit as accorded to the Church of England under the Government amendment on church legislation.[122] However, that amendment simply exempted Church of England Measures from the fast track procedure, to which legislation of the Church of Scotland would not have been subject anyway as it is not enacted in the same way. The Lord Advocate replied to the Bishop in that vein, and hoped that therefore the Government amendment would not be considered partisan.[123]

Baroness Young's successful Third Reading amendments, discussed above, would apply to the Church of Scotland, its courts and officers, and any schools or charities connected with it. In the debate on these amendments, Lord Mackay of Drumadoon was therefore fully in support of these amendments as they would address the concerns of the Church of Scotland.[124] He nevertheless went on to table two further amendments of his own during the Third Reading, which were very similar to those to which he spoke during the Report stage, in order to discuss the matters raised by the Moderator's letter.

The Lord Advocate gave a lengthy speech in response to these amendments. He moved on from his statements in the Report stage and those of Lord Williams of Mostyn (in a letter to Lord Mackay of Drumadoon[125]) by saying that in the government's 'reconsidered' [126] view, 'the courts of the Church of Scotland are not courts for the purposes of this Bill'.[127] He explained this statement by saying that, as a result of the 1921 Act, these courts 'operate in relation to matters which are essentially private' - they do not carry out any judicial functions on behalf of the state, and do not have the right to compel the production of evidence. He went on to say that:

It would seem to me illogical to say that the state had no interest or jurisdiction over the affairs of the Church and its courts while at the same time saying that those courts were nevertheless courts for the purposes of a public general Act.[128]

However, Lord Hardie made it clear that, in stating that these church courts were not courts for the purposes of the Bill, he did not mean that they might not, in some circumstances, be considered public authorities under Clause 6(3)(c) of the Bill (as it stood before amendment on the Third Reading stage). He mentioned the fact that those who represented the Church of

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[121] quoted in HL Deb vol. 585, c. 777
[122] HL Deb vol. 585, c. 775
[123] HL Deb vol. 585, c. 798
[124] HL Deb vol. 585, c. 776-7
[125] written following an undertaking by the Lord Chancellor to write to Lord Mackay (HL Deb vol. 583 c. 552). This letter stated that 'the courts of the Church of Scotland would appear to be courts for the purposes of the Human Rights Bill . . .in most respects, there is no reason to distinguish between these courts and the civil courts.'
[126] HL Deb vol. 585, c. 800
[127] HL Deb vol. 585, c. 794
[128] HL Deb vol. 585, c. 794

Scotland at the recent meeting with the Secretary of State could not suggest a 'concrete example' of what these circumstances might be. He stated that the Government too had been unable to come up with a case that might be caught; but that the 'least unlikely' case might be that disciplinary action against a minister before a kirk session could be subject to the requirements in Article 6 of the Convention. This refers to 'a fair and public hearing by an independent and impartial tribunal established by law', and it may be possible to argue that the courts of the Church of Scotland are not established by law, or that they do not appear to be sufficiently independent and impartial. However, Lord Hardie appeared to be in some doubt over whether a minister's relationship with the church would give him any civil right under the Convention. As far as he was aware, no such cases had ever been taken to the European Court of Human Rights; and the Bill was simply intended to allow the domestic courts to hear matters that currently have to go to the European Court. Lord Hardie felt that it might be considered an advantage by the Church for such a case, if it ever did occur, to be heard in Scotland rather than Strasbourg.

Lord Hardie also addressed the fear of the Church that its independence would be threatened if the Bill were to pass at it stood. The Church, in rejecting the power of Parliament to force it to change its procedures to be compatible with the Convention, considered that the most Parliament could do would be to ask the Church to reconsider the matter. Any change would take approximately three years; and if the ultimate decision were that the procedure should not be changed, Lord Hardie stated that Parliament would then have to consider what amendments were required to the 1921 Act. This was a result of the United Kingdom's international obligations under the Convention to guarantee convention rights to everyone in the country. These obligations would produce the same result were the European Court of Human Rights to find that the United Kingdom was in breach of the Convention by reason of the actions of a Church court.

When put to a division, the amendment was disagreed to by 109 votes to 57. Lord Mackay's amendment seeking to add to Clause 3 the provision that nothing in the Act should affect the separate and independent government and jurisdiction of the Church of Scotland in spiritual matters, as enshrined in the *Church of Scotland Act 1921*, was not moved. However, another amendment tabled by him, which sought to exclude all courts, tribunals and religious bodies exercising a spiritual jurisdiction from the description of a public authority, was more successful. This amendment was not limited to the Church of Scotland, and was passed without a division, despite opposition from the Government.[129]

[129] see above