Emphasising Pragmatism Over Principle: Substantive, Procedural and Remedial Deficiencies in the *Human Rights Act* 1998

Sarah Hannett

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Institute of Comparative Law,
McGill University,
Montréal,
Québec,
Canada.

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— ABSTRACT —

This Thesis is an extended analysis and critique of the aims, substantive guarantees, and procedural framework of the *Human Rights Act* 1998. The Act purports to provide the United Kingdom with a bill of rights by incorporation of the *European Convention for Protection of Rights and Freedoms*. However, the substantive guarantees offered by the *European Convention*, and the *Human Rights Act*, are insufficient to effectively protect the wide variety of circumstances in which individual rights can be violated in a modern democracy. Further, the procedural and remedial framework created by the *Human Rights Act* cannot adequately enforce human rights protection. Accordingly, the *Human Rights Act* represents a good starting point in the British bill of rights debate, but an insufficient conclusion. Rather, a novel, uniquely British bill of rights would have been the most appropriate approach.

— ABSTRAIT —

Cette thèse comprend un analyse étendu et critique des buts, des garanties substantielles et de l'encadrement procédural du *Human Rights Act* (*Loi sur des droits de la personne*) de 1998. Cette loi a pour but de donner au Royaume Uni une charte des droits de la personne en incorporant la *Convention européene pour la protection des droits et libertés*. Cependant les garanties substantielles établies par la Loi et par la Convention ne sont pas suffisantes pour assurer une protection efficace contre les violations des droits de la personne, qui sont susceptible d'être violeé dans une démocratie moderne dans plusieurs circonstances variés. Le système procédural et remédial établi par la Loi ne peut pas assurer de façon adéquate la protection des droits de la personne. Il aurait été préférable d'avoir adopté une charte des droits de la personne uniquement britannique.

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— INTRODUCTION —

The *Human Rights Act* 1998[1] represents the culmination of decades of academic speculation,[2] pressure-group urging,[3] extra-judicial comment[4] and parliamentary efforts[5] at enacting a British bill of rights. The *Human Rights Act* will "give further effect to rights and freedoms guaranteed under the *European Convention of Human Rights*",[6] by placing a duty on public authorities to act compatibly with the guarantees of the *Convention*, and by demanding that courts interpret legislation in accordance with the *Convention*.

The substantive rights guaranteed by the *Human Rights Act* mirror those in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,[7] with the exception of Articles 1 and 13.[8] The most cogent summary of the means of enforcement

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[1] *Human Rights Act* (U.K.), 1998, c.42, Appendix II, *infra*.

[2] See M. Zander, *A Bill of Rights?* 4th ed. (London: Sweet & Maxwell, 1997); R. Dworkin, *A Bill of Rights for Britain* (London: Chatto & Windus, 1990); A. Lester, 'Fundamental Rights: The United Kingdom Isolated?' [1984] Pub. L. 46; and J. Jaconelli, *Enacting a Bill of Rights* (Oxford: Clarendon Press, 1980).

[3] See Liberty, *A People's Charter: Liberty's Bill of Rights, A Consultation Document* (London: National Council for Civil Liberties, 1991); Institute for Public Policy Research, *A British Bill of Rights* (London: Institute for Public Policy Research, 1990); and Charter 88, *A Bill of Rights* (London: Charter 88, 1990).

[4] See Lord Woolf of Barnes, 'Droit Public—English Style' [1995] Pub. L. 57; T.H. Bingham, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 L.Q. Rev. 390; Sir J. Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] Pub. L. 59; Sir N. Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] Pub. L. 397; and Sir L. Scarman, *English Law, The New Dimension* (London: Stevens, 1974).

[5] The most extensive history of legislative efforts at a bill of rights is provided by Zander, *supra* note 2, at 1.

[6] *Human Rights Act*, *supra* note 1, at the Preamble.

[7] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 (entered into force September 3 1953), Appendix I, *infra* [hereinafter, the *Convention*].

For comprehensive introductions to the system of human rights protection in the Council of Europe, see D.J. Harris, M. O'Boyle, & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995); P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Deventer: Kluwer, 1990). More generally, see C.A. Gearty, 'The European Court of Human Rights and the Protection of Civil Liberties: An Overview' (1993) 52 Cambridge L. J. 89; C.A. Gearty ed., *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (The Hague: Martinus Nijhoff, 1997); B. Dickson ed., *Human Rights and the European Convention: Effects of the Convention on the United Kingdom and Ireland* (London: Sweet & Maxwell, 1997); M. Delmas-Marty ed., *The European Convention on Human Rights: International Protection versus National Restrictions* (Dordrecht: Kluwer Academic Publishers, 1992); and R.St.J. Macdonald, F. Matscher & H. Petzold eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993).

[8] *Human Rights Act*, *supra* note 1, at section 1(1).

of these rights, and the mechanism through which incorporation has been achieved was given by the Lord Chancellor, Lord Irvine of Lairg:

> The Bill is based on a number of important principles. Legislation should be construed compatibly with the convention as far as possible. The sovereignty of Parliament should not be disturbed. Where the courts cannot reconcile legislation with Convention rights, Parliament should be able to do so—and more quickly, if thought appropriate, than by enacting primary legislation. Public authorities should comply with Convention rights or face the prospect of legal challenge. Remedies should be available for a breach of convention rights by a public authority.[9]

The goals of the *Human Rights Act* were summarised by Jack Straw, the Home Secretary, in the House of Commons Debates. He stated that the *Human Rights Act* would:

> [S]trengthen representative and democratic government. It does so by enabling citizens to challenge more easily actions of the state if they fail to match the standards set by the European Convention.[10]

Two further goals are evident in the comments of government ministers.[11] First, the notion that the *Human Rights Act* forms an essential component of the government's other constitutional reforms.[12] Second, that the *Human Rights Act* is intended to prompt a new era of human rights in the United Kingdom; and to effect a "culture of liberty".[13] Thus, Lord Irvine, the Lord Chancellor, stated that "the effects of incorporation will be felt way beyond the sphere of the application of rights guaranteed by the Convention alone."[14]

This thesis is an analysis of the purposes of the *Human Rights Act*, and a critical—although preliminary—appraisal of the extent to which the substantive content,

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[9] U.K., H.L., *Parliamentary Debates*, vol. 585, at col. 839 (5 February 1998) (Lord Irvine of Lairg, the Lord Chancellor).

[10] U.K., H.C., *Parliamentary Debates*, vol. 306, at col. 769 (16 February 1998) (Jack Straw, the Home Secretary).

[11] F. Klug, 'The Human Rights Act 1998, *Pepper v. Hart* and All That' [1999] Pub L. 246 at 247.

[12] See, *e.g.*, Lord Irvine's comments that the *Human Rights Act* "occupies a central position in our integrated programme of constitutional change." U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1227 (3 November 1997).

[13] Dworkin, *supra* note 2, at 1.

[14] Lord Irvine of Lairg, 'The Development of Human Rights in Britain Under an Incorporated Convention on Human Rights' [1998] Pub. L. 221 at 229. See also, the Lord Chancellor's comments in the Second Reading debate in the House of Lords, "Our courts will develop human rights throughout society. A culture of awareness will develop." U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1227 (3 November 1998) (Lord Irvine of Lairg, the Lord Chancellor).

enforcement mechanisms and constitutional implications of the Act fulfil these aims. My argument is twofold. First, I argue that the substantive rights guaranteed by the *Human Rights Act* are insufficient without modification in a modern democracy. Whilst the *Convention* rights offer a starting point for consensus, they cannot respond adequately to protect fundamental rights. I argue that the justifications invoked for merely incorporating the *Convention* without alteration are weak. Further, given the constitutional significance of a bill of rights and its demarcation of the relationship between citizen and state, I suggest that the legitimacy of a bill of rights, and the role of the courts in interpreting it, is maximised where the bill of rights is conceived through a participatory democratic process.[15]

Second, I analyse the enforcement provisions of the *Human Rights Act*, and the manner in which the Act reconciles enforcement of individual rights with the traditional British vision of parliamentary sovereignty. I argue that the primacy of parliamentary sovereignty in the *Human Rights Act* results in a lack of effective remedies for an individual litigant, and that such remedies can be found only in Strasbourg. Further, the vision of parliamentary sovereignty underpinning and justifying the *Human Rights Act* is archaic. The Diceyan version of legislative supremacy no longer exists. I argue that alternative constitutional models exist which offer effective protection to the modern version of parliamentary sovereignty, but which also guarantee human rights more completely.

In Chapter One, I set the constitutional stage in the United Kingdom. I briefly outline the traditional account of the British constitution, founded on the principles of parliamentary sovereignty and the rule of law. I investigate the approach to freedom taken by the United Kingdom, by which liberty has been conceptualised as negative: that one can do anything as long as the law does not say that one cannot. I argue that the British constitution has undergone a revolution in the past decade or so, fundamentally altering both the legislative capacity of Parliament, and the relationship between the courts and the legislature; a process accelerated dramatically by the constitutional reforms of the current Labour administration. Important factors in this constitutional change include: British

[15] As opposed to a representative democratic process.

membership in the European Union; the willingness of the judiciary to develop a doctrine of judicial review of administrative action; devolution of constitutional authority and an increased judicial rhetoric of rights.

In Chapter Two I turn to the substantive rights guaranteed in the *Convention*. I argue that the *Convention* represents an excellent starting point for democratic discussion involving a Bill of Rights, but that without modification it cannot adequately protect individual rights. Several rights are too limited in their scope, other 'fundamental' rights are absent, and the limitations placed on certain rights are so broad that they threaten to entirely limit the scope of the right guaranteed. I highlight some of these issues, and briefly suggest alternatives. However, the general thrust of the Chapter is to point to the insufficient nature of the *Convention*, and to emphasise the need for democratic consultation on the appropriate content of a bill of rights for Britain.

The incorporation of an insufficient *Convention* is exacerbated by the failure of the *Human Rights Act* to incorporate several key provisions, and its attempts to qualify various *Convention* guarantees. Thus, the Act omits Articles 1 and 13, places qualifications on the right to privacy, and attempts to strengthen the right of religious belief. Chapter Three examines the significance, and the likely consequences, of these modifications to the *Convention* rights.

Chapter Four examines the provisions in the *Human Rights Act* concerned with procedure and enforcement of the Act. I highlight various procedural problems: the test of standing in the Act, the definition of public authorities, and the interpretative obligation on the court. I conclude by flagging the ineffective remedies offered by the *Human Rights Act*, and suggest that this results from a tension between the desire to preserve parliamentary sovereignty and to protect individual human rights.

In Chapter Five, I analyse the substantive rights guarantees and the procedural and remedial framework of the *Human Rights Act*. I examine the arguments generally proffered for incorporation of the *Convention* without modification. I suggest that such

assertions do not stand up to scrutiny. Re-visiting the tension between parliamentary sovereignty and individual rights outlined in Chapter Four, I argue that the purported compromise between parliamentary sovereignty and the protection of human rights in the *Human Rights Act* is heavily tipped towards the former. This is problematic, not only because it leads to ineffective remedies for litigants, but also because the vision of parliamentary sovereignty grounding and justifying the *Human Rights Act* does not reflect the modern constitutional arrangements outlined in Chapter One. I conclude by suggesting several other constitutional models which can offer adequate safeguards for democracy and parliamentary sovereignty, whilst far more effectively preserving individual rights. Finally, I argue that one of the deepest problems of the *Human Rights Act* may be its lack of political and institutional legitimacy. I suggest that the constitutional significance of a bill of rights demands meaningful public participation to ensure political legitimacy, to secure effective protection and enforcement of human rights, and to minimise public resistance.

— CHAPTER ONE —
THE NEW CONSTITUTIONAL ORDER

This Chapter traces the constitutional background at the time of the *Human Rights Act*. I argue that the orthodox notions of British constitutionalism are now obsolete as a result of alterations to parliamentary sovereignty and the relationship between the courts and the legislature. Many of the other constitutional changes initiated by the Labour government reflect these new constitutional relationships. The *Human Rights Act*, however, remains underpinned by a constitutional vision that is both archaic and false.

In the first half of this Chapter, Parts I and II, I outline the traditional understanding of the nature of the United Kingdom constitution, and the problems that this conception has created in a modern democracy. In addition, I focus on the manner in which individual liberties have been preserved in the United Kingdom, and the increasing deficiency of this protection. In the second half of this Chapter, I analyse some of the recent constitutional changes—British membership of the European Union, the rise of judicial review of administrative action and devolution—and assess their impact on both parliamentary sovereignty and the rule of law. I argue that a constitutional revolution has taken place in the United Kingdom, in all but name, and that the notions of parliamentary sovereignty and the rule of law simply do not exist in the manner envisaged by Dicey. Turning to the protection of liberties in the United Kingdom, I suggest that increasingly the rhetoric of positive rights is being used by the courts. This rights discourse stems primarily from European Community law, and from the influence of the *European Convention of Human Rights*. Whilst more judicial discussion of rights does not represent an over-throw of the residual approach to liberty, it demonstrates a more subtle transformation in the method of human rights protection in the United Kingdom, and a willingness by the courts to entertain and adjudicate questions of rights.

I. TRADITIONAL CONSTITUTIONAL VISIONS: PARLIAMENTARY SOVEREIGNTY, THE RELATIONSHIP OF THE JUDICIARY AND PARLIAMENT, AND THE PROTECTION OF FUNDAMENTAL RIGHTS

A. The British Constitution

The United Kingdom remains one of the few countries in the world without a written constitution.[1] Rather, the constitutional sources are to be found in a variety of locations which piece together to form a complete "jigsaw".[2] Despite this unwritten character, two broad theories implicit in British constitutional law can be posited: the sovereignty or legislative supremacy of Parliament, and the rule of law.

The classic exposition of parliamentary sovereignty was elucidated by Dicey:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further that no person or body is recognised by the law of England as having a right to override or set aside the law of Parliament.[3]

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[1] Paine highlights the significance attached to a written constitution:

> A constitution is a thing *antecedent* to a government, and a government is only the creature of a constitution... A constitution is not the act of a government, but of a people constituting a government; and a government without a constitution, is power without a right.

T. Paine, *Rights of Man* (London: Collins, 1944) at 93 and 207. Bradley and Ewing suggest that it was in the 18th Century that the word constitution became identified with a single, written document. They suggest that the making of a Constitution in the modern world tends to follow a fundamental change in political circumstances, for example, revolution, grant of independence to a colony, creation of a new state by the union of two or more previously independent states, or a major reconstruction of a countries political beliefs following a world war. A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law* (London: Longman, 1997) at 5.

[2] B. Thompson, *Textbook on Constitutional and Administrative Law* (London: Blackstone, 1993) at 16. Sources include: (a) legislation: Acts of Parliament and, since 1973, legislation emanating from the European Community; (b) common law of the courts of England and Wales, and, since 1973, the courts of the European Community; (c) non-legal norms such as constitutional conventions, defined by Dicey as "conventions, understandings, habits or practices which, though they may regulate the conduct of the several members of the sovereign power... are not in reality laws at all since they are not enforced by the courts." A.V. Dicey, *Introduction to the Law of the Constitution*, 10th ed. (London: MacMillan, 1960) at 24; (d) the law and custom of parliament; (e) legal and constitutional literature. See generally Bradley & Ewing, *ibid.*, at 12-33.

[3] Dicey, *ibid.*, at 10. Dicey, at 39, describes the principle of parliamentary sovereignty as "the very keystone of the constitution."

From this general principle, three specific propositions can be ascertained: the unlimited legislative power of Parliament, the ability of any Parliament to amend or repeal any legislation, and finally, the respective positions of the judiciary and Parliament.[4]

Parliament of the day has unlimited power to make any law it chooses.[5] In addition, any Parliament may repeal or amend the legislation of a previous Parliament; in short, one Parliament may never bind a successor. Thus, Parliament remains "free, at every moment of its existence as a continuing body, not only from legal limitations imposed *ab extra*, but also from its own prior legislation."[6] From this principle flows the doctrine of implied repeal which states that, "if two inconsistent Acts be passed at different times, the last must be obeyed, and if obedience cannot be observed without derogating from the first, it is the first which must give way."[7]

Finally, the legislative sovereignty of Parliament indicates the place of the courts and the judiciary in the constitutional pecking order. Essentially, "elected accountable representatives of the people collectively in an open Parliament are responsible, in theory, for *making* the law to which the people are subject, and unelected, unaccountable judges

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[4] Other general, inter-related, characteristics of the British constitution which flow from both legal rules and constitutional conventions include: governmental bodies are both democratically and legally accountable (see G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1993); U.K., H.C., "Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions", No.115 (1995-96), The 'Scott' Report); the United Kingdom is a constitutional monarchy; Parliament consists legally of the House of Commons, the House of Lords and the Monarch, but practically consists only of the two former components; there is a permanent, un-elected, independent civil service. See generally Bradley & Ewing, *supra* note 1.

[5] Various Parliaments have enacted legislation that might be thought to represent an inappropriate exercise of power. Parliament has prolonged its own life, particularly during wartime, for example the *Prolongation of Parliament Act, 1940* (U.K.), 1940, c.53, section 1; the *Prolongation of Parliament Act, 1941* (U.K.), 1941, c.48, section 1; the *Prolongation of Parliament, Act 1942* (U.K.), 1942, c. 37, section 1; the *Prolongation of Parliament Act, 1943* (U.K.), 1943, c. 46, section 1; the *Prolongation of Parliament Act, 1944* (U.K.), 1944, c. 45, section 1. Parliament has also acted to reduce its life to five years: *The Parliament Act* (U.K.), 1911, c.13, section 7. Parliament has enacted retroactive legislation, for example the *War Damages Act* (U.K.), 1965, c. 18, under section 1(1) the Crown was not liable to pay compensation for acts done by, or on the authority of, the Crown during war, and under section 1(2) any proceedings instituted prior to the enactment of this Act must be dismissed by the Court. See W. Blackstone, *Commentaries on the Law of England, In Four Books*, Volume I (London: A. Strahan, 1809) at 160.

[6] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 145.

[7] Lord Langdale in *Dean of Ely v. Bliss* (1842) 5 Beav. 574, 582. See also, *Vauxhall Estates Ltd. v. Liverpool Corporation* [1932] 1 K.B. 733 (the provisions of a 1925 Act of Parliament must prevail over an earlier statute insofar as the two were inconsistent); *Ellen Street Estates Ltd. v. Minister of Health* [1934]

should simply *interpret*, but not make the law."[8] In practice, this means that the courts are unable to declare an Act of Parliament invalid, or unconstitutional. Conversely, the executive must respect the domain of the courts; the relationship is symmetrical.[9] The supremacy of Parliament over the other branches of government has no legislative basis; rather it is a rule found in the common law. From the Eighteenth Century onwards, clear judicial support exists for the legislative supremacy of Parliament.[10] Furthermore, the constitution of the United Kingdom does not rely on a theory of the separation of powers between the legislature, the executive and the judiciary, as captured by Locke[11], and as present in most modern democracies.[12] Wade and Bradley state that there "is no formal separation of powers in the United Kingdom. No Act of Parliament may be held unconstitutional on the ground that it seeks to confer powers in breach of the doctrine."[13]

K.B. 590 (Parliament cannot bind itself as to the form of future legislation, and cannot purport to prevent future implied repeal).

[8] U.K., H.C., Research Paper 98/27, *Human Rights Bill: Some Constitutional Considerations* (13 February 1998) (Barry Winetrobe), online: Government Information Service <http://www.parliament.co.uk> (modified daily) at 5.

[9] See *e.g. M v. Home Office* [1992] Q.B. 270. Lord Nolan, at 314, remarks that "[t]he proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is."

[10] See *e.g. Ex Parte Selwyn* (1872) 36 J.P. 54; Lord Reid in *Pickin v. British Railway Board* [1974] A.C. 765 at 782. However, note Coke CJ in *Dr Bonham's Case* (1610) 8 Co. Rep. 113b, "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

[11] J. Locke, *Second Treatise of Government* (London: Dent, 1970) at Chap. XII, para 143: "Therefore in well-ordered commonwealths, where the good of the whole is so considered as it ought, the legislative power is put into the hands of divers persons who, duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them to take care that they make them for the public good."

[12] In the United States the doctrine of the separation of powers can be seen in the U.S. Const.: Art. I allocates "[a]ll legislative Powers herein granted" to Congress; Art. II grants the "executive Power" in the President; and Art. III vests judicial power in "a Supreme Court and such inferior courts as the Congress... may establish." The separation of powers doctrine can be seen most clearly when one arm of government attempts to encroach upon the territory of another: *Prize Cases*, 2 Black 635 (1863) (demonstrates the unwillingness of the Supreme Court to involve itself in the executive's functions, or the role of Congress); *U.S. v. Lovett*, 328 U.S. 303 (1946) (demonstrates the refusal of the courts to allow Congress to usurp judicial authority); and *Immigration and Naturalisation Service v. Chadha*, 103 S. Ct. 2764 (1983) (the President may not act in defiance of the laws).
In Canada, as in the United Kingdom, the fear of concentrating power in the hands of one body has been less prominent. Instead of dividing power, the Canadian approach is to concentrate power in the executive, relying on 'responsible government'. See P. W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992) at Chapter 9.

[13] Bradley and Ewing, *supra* note 1, at 97.

The second broad principle is that of the 'rule of law'. The rule of law, to Dicey, distinguishes the 'English' constitution from all others. Thus, in *Introduction to the Law of the Constitution*, Dicey quotes foreign observers of British constitutional life: "[w]hen Voltaire came to England—and Voltaire represented the feeling of his age—his predominant sentiment clearly was that he had passed out of the realm of despotism to a land where the laws might be harsh, but where men were ruled by law and not by caprice."[14]

Three propositions, which combined to guarantee both procedural fairness and legal certainty, characterise Dicey's rule of law. An individual should not be subject to the exercise of wide discretionary power;[15] the potential evil lying in the chance of arbitrariness, a violation of both legal certainty and procedural fairness. In addition, the rule of law encapsulates the idea that all men are equal before the law.[16] Finally, individual rights are secured by private law remedies—as opposed to a constitutional document—whether the violation was perpetrated by the state or individual citizens.[17]

B. Protection of Fundamental Rights in the United Kingdom

The evolution of liberty protection in the United Kingdom is inevitably linked to the doctrines of parliamentary sovereignty and the rule of law. Again, Dicey has much to say on the protection of liberty in English law. Initially, "[t]he security which an Englishman enjoys for personal freedom does not really depend upon, or originate in any general proposition contained in any written document."[18] Rather, as Dicey asserts, personal freedom is inherent in our constitution; it is not a privilege ensured to citizens above the ordinary law of the land.[19] Further, this liberty is circumscribed only insofar as explicitly

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[14] Dicey, *supra* note 2, at 189.
[15] Dicey, *ibid.*, at 188.
[16] Dicey, *ibid.*, at 193. This principle is famously illustrated in the Canadian Case, *Roncarelli v. Duplessis*, [1959] S.C.R. 121, which emphasised the principle that everyone, even officials, will be liable for acting in excess of their legal powers.
[17] Dicey, *ibid.*, at 196.
[18] Dicey, *ibid.*, at 206.
[19] Dicey, *ibid.*, at 207.

laid down in the law, or insofar as such action impinges upon the legal rights of others.[20] Thus, "the subject [is the] entire master of his own conduct, except in those points wherein the public good requires some direction or restraint."[21] Finally, public authorities may not do anything unless authorised by statute or the common law, and in particular, they may not encroach upon the liberties of individuals unless sanctioned by statutory authority.[22]

Whilst the English approach to liberty leaves no general document in which to determine the scope of rights or liberties, some specific rights are explicitly enshrined in statutory authority,[23] or specifically affirmed in the common law.[24] Despite these specific statements of rights, it remains true that the idea of liberty as understood in English law is residual.[25] Such an understanding contains both a positive and a negative aspect: whilst every invasion of personal liberty by the state is prima facie illegal until proven to be authorised, increasingly it appears that "freedom is what remains after statutory and common law restrictions have been taken into account."[26] Dicey illustrates the practical manifestations of a theoretical conception of rights as residual. In *Introduction to the Law*

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[20] Lord Ellenborough CJ stated that "[t]he law of England is a law of liberty." *R v. Cobbett* (1804) 29 St. Tr. 1 at 49.

[21] Blackstone, *supra* note 5, at 127.

[22] See generally *Proclamations Case* (1611) 12 Co. Rep. 74; Lord Atkin in *Eshugbayi Eleko v. Government of Nigeria* [1931] A.C. 662 at 670.

[23] *Magna Carta* 1297, *The Statutes at Large*, vol. I (Cambridge: Cambridge University Press, 1762) at 1; *Petition of Right* 1627, *The Statutes at Large*, vol. VII (Cambridge: Cambridge University Press, 1762) at 317; *Bill of Rights 1688*, *The Statutes at Large*, vol. IX (Cambridge: Cambridge University Press, 1762) at 1; and the *Act of Settlement 1700*, *The Statutes at Large*, vol. X (Cambridge: Cambridge University Press, 1762) at 300 state general provisions aimed at the protection of property rights and freedom from illegal detention, duress, punishment or taxation. A more recent document, the *Police and Criminal Evidence Act* (U.K.), 1984, c. 60, contains a number of positive rights for those arrested or in police custody. For example, section 28 provides that an arrest is unlawful unless the arrestee is informed that he is under arrest, and of the reasons for the arrest. This requirement was previously stated at common law in *Christie v. Leachinsky* [1947] A.C. 573.

[24] For example, a series of cases held the powers of search and seizure sought to be exercised by general warrant were to be illegal: *Entick v. Carrington* (1765) 19 St. Tr. 1030; *Leach v. Money* (1765) 19 St. Tr. 1002; *Wilkes v. Wood* (1763) 19 St. Tr. 1153. Other common law 'rights' include the right to unimpeded access to the courts (*R v. Secretary of State for the Home Department, ex p. Leech* [1994] Q.B. 198, 210); a right of refusal to answer police questions (*Rice v. Connolly* [1966] 2 Q.B. 464, although note the recent alteration of this right by statute in the *Criminal Justice and Public Order Act 1994* (U.K.), 1994, c. 33, section 34; the right to consult a solicitor when in custody (*R v. Samuel* [1988] Q.B. 615, 630, this right is now protected by the *Police and Criminal Evidence Act*, *ibid*, at section 58); and the privilege against self-incrimination (*Lam Chi-ming v. R* [1991] 2 A.C. 212).

[25] The traditional conception of human rights as 'liberties' rather than as 'rights' emphasises the negative nature of British human rights protection.

of the Constitution, Dicey describes freedom of discussion as "little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written."[27]

The courts have only limited protection to offer against statutory encroachment on liberty.[28] Where a statute permits the government to encroach upon the liberties of the individual, such a statute "ought to be construed strictly against those purporting to exercise those rights."[29] The statute should be interpreted most generously in favour of the rights of the individual.[30]

External influences offer some protection for human rights in the United Kingdom. The United Kingdom remains subject to its obligations as agreed under international law, and has signed a number of international treaties which contain significant human rights guarantees. However, the protection of human rights offered by such Treaties remains hampered by several factors. Firstly, the United Kingdom retains a dualist system of law,[31] which means that even where an international treaty has been signed, if the treaty has not been ratified and incorporated into domestic law by an Act of Parliament, then the

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[26] T.R.S. Allan, *Law, Liberty and Justice* (Oxford: Clarendon Press, 1993) at 135.

[27] Dicey, *supra* note 2, at 246. Personal freedom is "secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in the due course of the law... under some warrant or authority." Dicey, *ibid.*, at 208. About public assembly Dicey commented that:

> It can hardly be said that our constitution knows of such a thing as any specific right of public meeting... There is no special law allowing A, B and C to meet together in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass, and to say what he likes to B so that his talk is not libellous or seditious, the right of B to do the like, and the existence of the same rights of C, D, E, and F, and so on ad infinitum, lead to the consequence that A, B, C, D, and a thousand or ten thousand other persons, may (as a general rule) meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner.

Dicey, *ibid.*, at 271.

[28] C. Turpin, *British Government and the Constitution; Text, Cases and Materials* (London: Butterworths, 1995) at 107.

[29] Purchas J. in *Hill v. Chief Constable of South Yorkshire* [1990] 1 W.L.R. 946 at 952.

[30] *Black-Clawson International Ltd. v. Papierwerke Waldhoh-Aschaffenburg AG* [1975] A.C. 591, at 683 per Lord Diplock: "Parliament, under our constitution, is sovereign only in respect of what it expresses by the words used in the legislation it has passed."

[31] I. Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1998) at 31-56; M.N. Shaw, *International Law* (Cambridge: Cambridge University Press, 1997) at 99-136.

Treaty cannot be considered as part of domestic law.[32] Secondly, even where the United Kingdom has ratified the international Treaty, the procedural mechanism for realising such rights may be ineffectual. For example, the United Kingdom has ratified the *International Covenant on Civil and Political Rights*,[33] but has not accepted the *Optional Protocol to the International Covenant on Civil and Political Rights*,[34] which would allow for individual application to the Human Rights Committee.[35] Finally, in certain areas affecting human rights law, the European Union is a source of both rights and remedies. One revolutionary area has been the right to equal pay for men and women, and equal treatment without sex discrimination in employment and related contexts.[36]

II. PROBLEMS IN THE APPLICATION OF THE DICEYAN CONSTITUTIONAL VISION TO A MODERN DEMOCRACY

This section analyses the problems arising from the traditional Diceyan understanding of parliamentary sovereignty and the rule of law in a modern democracy. Further, I examine the inadequacies of the residual approach to individual liberty.

The vast changes in the composition of Parliament demonstrate that the Diceyan constitutional vision is no longer valid. Much modern constitutional writing has debated the traditional doctrines prescribing parliamentary sovereignty, and Diceyan assertions of the rule of law.[37] Bradley notes that the Diceyan idea of parliamentary sovereignty was underpinned by the idea of democratic control, thus he frames the discussion:

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[32] See *e.g. European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953), Appendix I, *infra* [hereinafter the *Convention*]. But see *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529, in which the Court of Appeal held that customary international law was part of the British common law.

[33] 19 February 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

[34] 19 February 1966, 999 U.N.T.S. 302 (entered into force 23 March 1976).

[35] On individual application to the Human Rights Committee, see D.J. Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 1998) at 624-764.

[36] See e.g. E.C.J. *P v. S & Cornwall County Council*, C-13/94 [1996] ECR I-2143; P. Craig & G. de Burca, *EU Law* (Oxford: Oxford University Press, 1998).

[37] J. Jowell, 'The Rule of Law Today' in J. Jowell & D. Oliver eds., *The Changing Constitution* (Oxford: Clarendon Press, 1994) 57; I. Harden and N. Lewis, *The Noble Lie: The British Constitution and the Rule of Law* (London: Hutchinson, 1988) at Chapter 2, P.P. Craig, *Public Law and Democracy in the United*

> If the perceived nature of the political system in the late nineteenth century was a vital influence on the legal doctrine, any significant change in that system (such as a shift in the balance of power between the executive and the elected House of Commons) requires us to reassess the legal doctrine in the light of the changed political process.[38]

Three shifts in the balance of power are highlighted by commentators. Firstly, the unrestrained nature of executive power. This omnipotence can be explained by the rise in prominence of the political party system. In modern times, the dominance of the executive has been compounded by the vigour of the Whips office, back-bench ambition, governmental control of parliamentary time,[39] and ineffectual Opposition.[40] As a consequence, Parliament itself cannot provide the kind of supervision of the executive that Dicey envisaged. A second, pragmatic factor, is that the government affects the life of its citizens in ways that writers in the time of Dicey could not have imagined. Catalysts have included urbanisation, and the rise of the welfare state. Finally, neither Diceyan rule of law theory, nor the concept of parliamentary sovereignty envisage the use of discretion in administrative decision-making. Such executive discretion is commonly shielded from the scrutiny of Parliament.

The concepts of parliamentary sovereignty, the rule of law and the traditional understanding of rights in the United Kingdom as residual have been critiqued further by human rights advocates. The major criticism levelled is that such an approach places total faith in the will of both the courts and Parliament to act as protectors of liberty. Yet, "nothing in [the Diceyan] framework was designed to stand up for liberty where the legislature saw fit to intervene with new restrictive laws, or where the courts contrived to discover or develop them; Dicey simply assumed that this would not occur."[41] Yet, the trend in the last few decades has been to both legislatively and judicially restrict, rather

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Kingdom and the United States of America (Oxford: Oxford University Press, 1990) at Chapter 2; Allan, *supra* note 26.

[38] A.W. Bradley, 'The Sovereignty of Parliament—in Perpetuity?' in J. Jowell & D. Oliver eds., *The Changing Constitution* (Oxford: Clarendon Press, 1994) 79 at 81.

[39] The executive control of Parliamentary time means that it is able to limit debate where proposals are proving controversial, for example by the use of the 'guillotine motion', see K.D. Ewing & C.A. Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Oxford: Clarendon Press, 1990) at 6.

[40] Ewing & Gearty, *ibid.*, at 5.

[41] Ewing & Gearty, *ibid.*, at 9.

than to expand, rights.[42] In such a situation, "[t]he Dicey approach has no answer... The residue of liberty just gets smaller, until eventually, in some areas, it is extinguished altogether, with freedom becoming no more than the power to do that which an official has decided for the time being not to prohibit."[43] Eminent scholars and human rights advocates lament the state of civil liberties in the United Kingdom. Ronald Dworkin suggests that "liberty is ill in Britain"[44], not because Britain has become a police state, but rather as there is a "notable decline in the *culture* of liberty – the community's shared sense that individual privacy and freedom of speech and conscience are crucially important and that they are worth considerable sacrifices in official convenience or public expense to protect."[45] Bradley and Ewing submit that "[f]ew people... have confidence in Parliament's ability to restrain the illiberal tendencies of the executive, or in its ability adequately to attend to civil liberties issues by initiating discrete legislation to create or extend certain fundamental rights."[46]

In the last two sections I have argued that the traditional British constitutional model and the residual approach to liberty do not function adequately in a modern democracy. In the next two sections I analyse some of the fundamental constitutional changes that have

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[42] Some examples of legislative curtailment on individual liberties include (many more abound, see Ronald Dworkin, *A Bill of Rights for Britain* (London: Chatto & Windus, 1990) at 1-12, and Ewing & Gearty, *ibid*, at Chapter 1): privacy (*Interception of Communication Act* (U.K.), 1985, c.56, section 2 allows the police to tap an individual's phone or to read their mail merely with the permission of the Home Secretary, not a judge); non-discrimination (the *Local Government Act* (U.K.), 1988, c. 20, section 28 prohibits "the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship"); public protest or assembly (the *Public Order Act* (U.K.), 1986, c. 64, section 11 requires written notice to a police officer for a public protest or assembly, and makes it a criminal offence to organise one without this); rights of criminal suspects (the *Criminal Justice and Public Order Act 1994* (U.K.), 1994, c. 33, section 34 allows a court to draw such inferences as appear 'proper' from a suspect's silence).
Judicial curtailments include the Spycatcher saga. *A.G. v. Guardian Newspapers (No. 2)* [1990] 1 A.C. 109 [hereinafter *Guardian Newspapers*] (the court granted the government an injunction to restrain publication of Peter Wright's *Spycatcher* even though Britain was flooded with copies purchased abroad); *Duncan v. Jones* [1936] 1 K.B. 218 (conviction for obstruction of an officer in the exercise of his duty to prevent a breach of the peace upheld, even where no breach of the peace committed); *Liversedge v. Anderson* [1942] A.C. 206 (in an action for false imprisonment, the Home Secretary does not have to give reasons for the detention of the appellant under emergency powers); *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 [hereinafter *GCHQ*] (court refused to examine the reasonableness of an executive order banning employees of the government information gathering service, GCHQ, from membership of a union on the invocation by the government of national security considerations).
[43] Ewing & Gearty, *supra* note 39, at 9.
[44] Dworkin, *supra* note 42, at 1.
[45] Dworkin, *ibid.*

occurred, and their impact on the constitutional orthodoxy. At least three of them—devolution, the rise in judicial review and the rise in the discourse of rights—represent attempts to compensate for some of the problems outlined above.

III. ELEMENTS OF THE CONSTITUTIONAL REVOLUTION

This Section analyses the fundamental constitutional changes of parliamentary sovereignty, the rise in judicial review, and Scottish and Welsh devolution. I argue that although their *theoretical* impact on traditional understandings of parliamentary sovereignty, the rule of law, and the residual nature of rights is disputed (and political in nature); the *practical* dismantling of parliamentary sovereignty and the rule of law is demonstrable.

A. British Membership in the European Union

The United Kingdom became a member of the then European Community[47] under the *European Community Act*.[48] Constitutional controversy arises where a conflict occurs between a provision of domestic law and Community law. Section 2(4) of the EC Act deals with such conflicts: "any enactment passed or to be passed... shall be construed and have effect subject to the foregoing provisions of this section." The proper approach for the courts to take where the domestic legislation appears incompatible with European law has been subject to jurisprudence from the European Court of Justice (E.C.J.) and British domestic courts. The E.C.J., from early on in the history of European Community law,

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[46] Bradley & Ewing, *supra* note 1, at 485.

[47] The treaties making up what is now the European Union are the *Treaty establishing the European Economic Community*, 4 July 1957, 298 U.N.T.S. 3, as amended by the *Single European Act*, (1987) 2 C.M.L.R. 741; the *Treaty on European Union*, (1997) I.L.M. 31; and the *Amsterdam Treaty*, 2 October 1997, [1997] O.J. C. 340/1.

[48] (U.K.), 1972, c. 68 [hereinafter the *EC Act*]. Section 2(1) provides that, "All such rights, powers, liabilities, obligations and restriction from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly."

has insisted on the supremacy of European law over incompatible domestic law. Such statements began by an assertion of a unique legal order in which states have "limited their sovereign rights, albeit within limited fields";[49] moving to explicit assertions that incompatible domestic law must be struck down,[50] even when that law is part of the member state constitution.[51] In addition, the European Court has held that all courts, not just the appellate or constitutional courts, have a duty to set aside domestic legislation that conflicts with Community law.[52]

Whilst the appropriate behaviour of the domestic courts was always clearly expressed by the European Court, the United Kingdom courts were somewhat slow in responding.[53] The situation was resolved finally in the *Factortame* litigation.[54] The House of Lords held that not only must a domestic court set aside an Act of Parliament inconsistent with Community law, but that interim relief (in this case an interlocutory injunction against the Crown which the Court had never before granted) *must* be granted where it would be given if it were not for the fact that the relief was sought against an Act of Parliament. The impact on parliamentary sovereignty can be seen further in the closing episode in the *Factortame* story,[55] in which the government was held liable for damage suffered by Factortame and others as a result of the temporary existence of the *Merchant Shipping Act*.[56] In sum, as a result of the *Factortame* litigation, a domestic court is under an obligation to set aside domestic legislation in conflict with Community law; it must grant

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[49] E.C.J. *Van Gend en Loos v. Nederlandse Administratie der Balastingen*, C-26/62, [1963] ECR I-1 at 12.
[50] E.C.J. *Costa v. ENEL*, C-6/64, [1964] ECR I-585.
[51] E.C.J. *Internationale Handelgesellschaft mBH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*, C-11/70, [1970] ECR I-1125.
[52] E.C.J. *Amministrazione delle Finanze dello Stato v. Simmenthal*, C-106/77 [1978] ECR I-629.
[53] See Lord Denning in *Felixstowe Dock and Railway Co. v. British Transport Docks Board* [1976] 2 C.M.L.R. 655 (where a statute enacted after 1972 appears to be incompatible with Community law, Parliament is presumed to have impliedly repealed section 2(4) *EC Act*); Lord Diplock in *Garland v. British Railways Engineering Ltd.* [1983] 2 A.C. 751 (section 2(4) operates as a principles of statutory construction so that subsequent legislation should be construed as far as possible in line with Community law).
[54] The full saga of litigation can be found: *R v. Secretary of State for Transport, ex p. Factortame Ltd. (No. 1)* [1989] 2 C.M.L.R. 353 (CA); [1990] 2 A.C. 85 (HL); *R v. Secretary of State for Transport, ex p. Factortame Ltd. (No. 2)*, C-213/89 [1991] A.C. 603 (ECJ & HL); *R v. Secretary of State for Transport, ex p. Factortame Ltd. (No. 3)*, C-221/89 [1992] Q.B. 680 (ECJ); *R v. Secretary of State for Transport, ex p. Factortame Ltd. (No. 4)*, C-48/93 [1996] Q.B. 404 (ECJ). Additionally, the European Commission initiated proceedings against the United Kingdom under Article 169, see E.C.J. *Commission v. United Kingdom*, C-246/89 [1991] ECR I-4585.
[55] (No. 4) [1996] Q.B. 404.
[56] (U.K.), 1988, c. 12.

interim relief to set aside an Act of Parliament in the circumstances in which it would normally grant such relief; and finally, where the government has enacted a piece of legislation subsequently found to be in breach with principles of Community law, damages may be occasioned in situations where the conditions for state liability are met.[57]

The real impact of *Factortame* on the doctrine of parliamentary sovereignty is the subject of controversy. What remains unclear after *Factortame* is whether Parliament could enact a piece of legislation expressly stating its intention that such legislation violates Community law. One camp asserts that the setting aside of the *Merchant Shipping Act* was achieved purely through the rule of statutory construction in which a court will interpret an Act of Parliament in line with Community law.[58] Thus, whilst Parliament could not evade the implications of the *European Communities Act* impliedly, it could do so expressly. Commentators suggest that judges cling to this analysis of *Factortame* as it "serves to preserve the formal veneer of Diceyan orthodoxy while undermining its substance."[59] Sir William Wade presents the other view; that *Factortame* heralds a "constitutional revolution" as "[t]he Parliament of 1972 had succeeded in binding the Parliament of 1988 and restricting its sovereignty, something that was supposed to be impossible."[60] The House of Lords, in *Factortame* (No. 2) commented on the state of parliamentary sovereignty at that juncture in the litigation. In a much quoted passage, Lord Bridge rejected the argument that the grant of interim relief was a "novel and dangerous invasion" of domestic law by Community law, and stated:

> If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgement, to override any rule of national law found in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the

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[57] E.C.J. *Francovich and Bonifaci v. Italy*, C-6&9/90 [1991] ECR I-5357; E.C.J. *Brasserie du Pêcheur SA v. Germany*, and *R v. Secretary of State for Transport, ex p. Factortame Ltd.*, C-46/93 & C-48/93 [1996] ECR I-1029.

[58] See *e.g.* Sir J. Laws, 'Law and Democracy' [1995] Pub. L. 72.

[59] P.P. Craig, 'Sovereignty of the United Kingdom Parliament after Factortame' (1991) Y.B. Eur. L. 221.

[60] H.W.R. Wade, 'Sovereignty—Revolution or Evolution?' [1996] 112 L.Q. Rev. 568.

> Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be prohibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.[61]

Thus, as Lord Bridge acknowledges, the debate is purely at the theoretical level. For all practical intents and purposes, the United Kingdom has relinquished sovereignty in various fields to the European Union.

In conclusion, parliamentary sovereignty has come under sustained attack from British membership in the European Union. For advocates of a bill of rights this debate is significant. If, as Wade suggests, *Factortame* represents a "constitutional revolution", this is a vivid example of how the British constitution can evolve to accommodate changing times. A constitution that can adopt to fundamental change is vital in a bill of rights debate in which questions of sovereignty and the appropriate relationship between the courts and government take centre stage.

B. The Advent of Judicial Review

Judicial review in the United Kingdom is a recent phenomenon. Lord Diplock noted, in 1982, that "[a]ny judicial statements on matters of public law if made before 1950 are likely to be a misleading guide as to what the law is today."[62] Lord Irvine, the Lord Chancellor, suggests two factors which, in combination, changed the balance between the executive, the government and the court, prompting the response of judicial review of administrative action.[63] Firstly, the change from laissez-faire philosophy to notions of a

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[61] [1991] 1 A.C. 603, at 658.

[62] *R v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Business Ltd.* [1982] A.C. 617, 640 per Lord Diplock. The concept of a 'public lawyer' or even the phrase 'judicial review' are recent phenomenon, M. Beloff, 'Judicial Review—2001: A Prophetic Odyssey' (1995) 58 M.L.R. 143 at 144.

[63] Lord Irvine of Lairg, 'Principle and Pragmatism: The Development of English Public Law under the Separation of Powers' (Lecture at the High Court in Hong Kong, 18 September 1998), online: Lord

welfare state resulted in a vast increase in the interaction of the state with its citizens. Therefore,

> If the state was to exercise greater administrative control over individuals, the courts recognised that it would be necessary to develop some safeguards... [t]hus the courts began to create a corpus of administrative law capable of regulating the evolving relationship between British citizens and the burgeoning state.[64]

A simultaneous factor triggering the action of the courts was the growth in power of the executive. So, "[j]ust as the role of government was expanding, so the ability of Parliament to provide an effective check on the executive began to decline."[65] Parliamentary scrutiny was no longer seen as sufficient, or competent to constrain executive power. Thus the judiciary stepped in, ostensibly to return the balance of power to the status quo. Lester suggests that through the vehicle of judicial review, "[t]he judges have subtly altered the balance of power between the three branches of government, and the relationship of the courts to Government and Parliament."[66] This section examines the doctrine of judicial review, its impact on traditional constitutional doctrine, and recent debates which suggest that its impact could be potentially even more far-reaching.

i. An Overview of Judicial Review

Judicial review in the United Kingdom "provides the means by which judicial control of administrative action is exercised."[67] It is the exercise of the inherent supervisory jurisdiction of the High Court over the lower courts, tribunals, and "other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts or duties."[68] Judicial review is distinct from appeal, in that it is concerned not with the merits of the decision, but with the legality of the decision-making process. A distinction between substance and procedure is maintained, or as Wade states: "[o]n an

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Chancellor's Department <http://www.open.gov.uk/lcd/speeches/1998/hongkong.htm> (last modified 18th September 1998). See also Beloff, *ibid.*, at 144.

[64] Irvine, *ibid.*, at 3.

[65] Irvine, *ibid.*, at 4.

[66] A. Lester, 'English Judges as Law Makers' [1993] Pub. L. 269 at 279.

[67] *GCHQ, supra* note 42, at 408, per Lord Diplock.

appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'"[69]

The grounds on which judicial review may be based were listed by Lord Diplock in the *GCHQ* Case as threefold.[70] The first is illegality of decision-making: that the decision-maker acted *ultra vires*, or improperly exercised his discretion.[71] The second ground is irrationality, or unreasonableness.[72] A final ground of judicial review is procedural impropriety.[73] However, the grounds of judicial review are not closed, Lord Diplock in the *GCHQ* Case suggested that one development was the possible future recognition of proportionality as a ground for judicial review.[74]

Judicial review in the United Kingdom reflects the dominance of Parliamentary sovereignty in British constitutional law. Whilst judicial review now enjoys unfettered supervisory jurisdiction over executive action, primary legislation remains shielded from

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[68] Lord Hailsham of Marylebone ed., *Halsbury's Laws of England*, Volume 1(1), 4th ed (London: Butterworths, 1989) at para 60.

[69] H.W.R. Wade & C.F. Forsyth, *Administrative Law* (Oxford: Clarendon, 1994) at 38. One of the best illustrations of this distinction is found in the judgement of Simon Brown L.J. in the Divisional Court in *R v. Ministry of Defence, ex parte Smith* [1996] Q.B. 517 at 540 (affirmed by the Court of Appeal [1996] Q.B. 551) [hereinafter *Smith*]. The case was an action by way of judicial review to quash the decisions discharging several gay men and lesbians from the armed forces. Simon Brown, whilst stating that the government policy was a wrong view based in the "supposition of prejudice in others and which insufficiently recognises the damage to human rights inflicted" felt himself constrained by parliamentary sovereignty to uphold governmental policy.

[70] *GCHQ*, *supra* note 42, at 410.

[71] Examples of *ultra vires* decision making include *R v. Richmond upon Thames Council, ex parte McCarthy and Stone Ltd.* [1992] 2 A.C. 48 (the levy of a £25 charge for informal planning consultations was held unlawful by the House of Lords as all charges on the public must be grounded in clear statutory authority); *Hazell v. Hammersmith and Fulham Council* [1992] 2 A.C. 1 ('interest swap transactions' by a local council unlawful as inconsistent with the statutory borrowing powers of the council). Examples of improper exercise of discretion include *Padfield v. Minister of Agriculture* [1968] A.C. 997 (minister must exercise discretion in a manner which gives effect to the intention and objects of the Act of Parliament).

[72] The commonly used phrase is 'Wednesbury Unreasonableness' which comes from *Associated Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223 (a court will only interfere with a decision-maker's exercise of discretion where this decision is 'so unreasonable that no reasonable authority could ever have come to it, per Lord Greene M.R.).

[73] This ground examines the procedural requirements that ensure the validity of a decision, and ensure that such requirements (be they statutory or requirements of natural justice) have been observed. See *Ridge v. Baldwin* [1964] A.C. 40 (dismissal of a Chief Constable by Brighton Police Committee without following statutory procedural requirements held unlawful by the House of Lords).

[74] *GCHQ*, *supra* note 42, at 410. although note that more recently, the House of Lords has stated that the principle of proportionality cannot be used to assess the *merits* of an executive decision, *R v. Secretary of State for the Home Department, ex parte Brind* [1991] A.C. 696 [hereinafter *Brind*].

its gaze.[75] So although judicial review allows a court to review the exercise of power deriving from an Act of Parliament, a court may never review the legality, or substantive content of the legislation itself.[76] Furthermore, the source of the power exercised by the decision-maker is irrelevant; the courts examine "the nature of the activity, not the nature of the ancestry."[77] Finally, the 'inner limit' of judicial review lies where the relationship between the decision-maker and the citizen is based exclusively in contract.[78]

Thus, the impact of judicial review on parliamentary sovereignty appears to be more symbolic than meaningful. Further, traditional understandings of judicial review ensure that the courts do not over-step their historical role. However, two recent debates suggest that the potential of judicial review to erode parliamentary sovereignty further has not been fully realised.

ii. Recent Debates in Judicial Review

Two controversial, and inter-related discussions have occurred amongst public lawyers in recent years. Both have vast potential for the protection of fundamental rights, and the erosion of parliamentary sovereignty. The first concerns the extent to which the proper theoretical grounding of judicial review lies in the *ultra vires* doctrine, or whether judicial review is grounded in the rule of law and the protection of fundamental rights. The second debate concerns the appropriate place of the European judicial tool of proportionality in British public law. This Section briefly outlines these debates.

Traditionally, courts, whilst exercising judicial review, have stated that the constitutional basis of judicial review lies in the "sovereignty-based *ultra vires* rule, according to which courts follow the presumed intentions of Parliament in determining whether executive

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[75] The exception is situations of conflict between Community law and domestic law, in which case the Court has a duty to strike down inconsistent domestic legislation. See the *Factortame* litigation, *supra* note 54.

[76] *Smith*, *supra* note 69.

[77] Beloff, *supra* note 62, at 146. See *R v. Panel on Takeovers and Mergers, ex parte Datafin plc.* [1987] Q.B. 815.

[78] Beloff, *ibid.* See *R v. Insurance Ombudsman, ex p. Aegon Life Assurance Ltd.*, *The Times*, 7 January 1994.

action is lawful."[79] Yet commentators and judges have argued that this assertion is false: that Parliament could not possibly hold an opinion on the complex interplay of rules that form modern judicial review, and that the principles of *ultra vires* and natural justice are judicial constructs.[80] Further, the *ultra vires* doctrine cannot account for the judicial review of non-statutory bodies who exercise non-legal powers.[81] Thus the *ultra vires* doctrine should be abolished, and judges should be more candid about what they are really doing through the vehicle of judicial review: ensuring the rule of law, and protecting individual rights. This argument has implications both for the protection of human rights in general, and for a bill of rights. A doctrine grounded in respect for human rights gives the courts far more scope to scrutinise the substance, as opposed to merely the process of administrative decision-making.

The second debate in judicial review flows from the influence of European law. The doctrine of proportionality encapsulates the notion that the state should act only to the extent necessary for it to achieve its stated objective.[82] Beloff suggests the appeal of proportionality to be that it:

> Provides a means by which erroneous, unfair or unreasonable administrative action can be challenged without, on the one hand, staying the judicial hand in respect of any action falling short of perversity but, on the other, not allowing judges impermissibly to substitute their discretion for that of the authorised decision maker.[83]

However, after its brief mention by Lord Diplock in the *GCHQ* Case,[84] proportionality has not lived up to its promise.[85] Lord Irvine summarises the arguments against its

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[79] N. Bamforth, 'Parliamentary Sovereignty and the Human Rights Act 1998' [1998] Pub. L. 572.

[80] See D. Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review?' [1987] Pub. L. 543; P. Craig, 'Ultra Vires and the Foundation of Judicial Review' (1998) 57 C.L.J. 63. But see C. Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review (1996) 55 C.L.J. 122 (arguing that the *ultra vires* principle is indeed the appropriate basis for judicial review).
Judicial comments tentatively arguing for a more realistic grounding for judicial review include Lord Woolf, 'Droit Public—English Style' [1995] Pub. L. 57; and Laws, *supra* note 58, at 72. However, see Lord Irvine of Lairg, 'Judges and Decision-Makers: The Theory and Practice of Judicial Review' [1996] Pub. L. 59 (arguing that *ultra vires* is the appropriate basis for judicial review).

[81] *Ibid.*

[82] As Lord Diplock put it, "a steam hammer should not be used to crack a nut." *R v. Goldstein* [1983] 1 W.L.R. 151 at 155.

[83] Beloff, *supra* note 62, at 151.

[84] *GCHQ*, *supra* note 42, at 410.

transplantation from European law into British judicial review: that proportionality would require judges to enter policy decisions; that such decisions are entrusted by the legislature to the decision-maker, and judicial involvement in their substantive, as opposed to procedural outcome, is inappropriate; that proportionality represents a lower threshold of deference than does the traditional doctrine of Wednesbury reasonableness.[86] In sum, whilst the doctrine of proportionality is not currently widely used by the courts, I argue below that proportionality will be a vital tool for interpretation of the *Human Rights Act*.

In conclusion, the birth of judicial review of administrative action has propelled Parliamentary, and in particular executive, action under the scrutinising powers of the court, and as a result changed the balance amongst the three wings of government. However, the impact of judicial review is limited by the refusal of the courts to analyse the substance of an Act of Parliament, and by the manner in which statutes are increasingly deliberately framed to give wide scope for discretionary action.[87] Thus, although judicial review of administrative action has important implications for the protection of human rights in the United Kingdom—to ensure that discretional decision-making is undertaken in an appropriate manner—it does nothing to challenge the broad power on which this discretion is exercised, or to ensure that the substance of the decisions taken respect the human rights of individuals.

C. Devolution

Devolution has significant implications for the constitutional arrangements of the United Kingdom. It removes sovereignty in certain areas from the Westminster Parliament. Further, it creates novel powers of judicial review for the courts. This section briefly

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[85] Wade & Forsyth, *supra* note 69, at 403, states that whilst claimants have invoked proportionality, it has not succeeded. See in particular, *Brind*, *supra* note 74, in which the use of proportionality was rejected outside of the European context by the House of Lords.

[86] Lord Irvine, *supra* note 80, at 74.

[87] Bradley, *supra* note 38, at 84.

summarises the powers of the new Scottish Parliament,[88] and analyses the effects of these powers on orthodox parliamentary sovereignty and on judicial review.

The *Scotland Act 1998*[89] grants broad legislative powers to the Scottish Parliament, subject to some limitation.[90] These legislative powers include the authority to enact primary legislation.[91] The Act makes provision for legal challenge in situations where the Parliament strays beyond its legislative competence. Accordingly, the courts have jurisdiction to review "devolution issues" which include determining whether an Act of the Scottish Parliament is within its legislative competence.[92]

The *Scotland Act 1998* has significance both for sovereignty, and for judicial review. Turning first to sovereignty, the Act, for the first time, empowers a body other than the Westminster Parliament to make primary legislation. Although the Westminster Parliament retains ultimate parliamentary sovereignty by virtue of section 28(7),[93] the Act does not specify the circumstances in which the Westminster Parliament may legislate in spheres devolved to the Scottish Parliament. This seems to indicate that whilst theoretical sovereignty is being maintained by the Westminster Parliament, in an effort to preserve at least the façade of constitutional orthodoxy, the political implications of such usurpation of Scottish sovereignty by Westminster will be extensive. In addition, a Westminster Parliament attempting to legislate on matters already covered by Scottish legislation

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[88] For reasons of space and complexity I do not consider the arrangements for Northern Ireland, but see R. Hazell, 'Reinventing the Constitution: Can the State Survive?' [1999] Pub. L. 84 at 89. Further, I do not analyse the new powers given to Wales in the *Government of Wales Act* (U.K.), 1998, c.38. The *Government of Wales Act* only empowers the Welsh Assembly to enact secondary legislation, a lesser grant of sovereignty than that handed to the Scottish Parliament. In addition, the judicial review of legislation enacted by the Welsh Assembly—judicial review of secondary legislation—is a task that the courts are used to undertaking. However, the significance of the arrangements in Northern Ireland and Wales should not be under-estimated.

[89] *Scotland Act* (U.K.) 1998, c. 46.

[90] *Scotland Act*, *ibid.*, at section 29(2) and schedule 5.

[91] *Scotland Act*, *ibid.*, at section 28.

[92] *Scotland Act*, *ibid.*, at schedule 6.

[93] The section states that nothing in the *Scotland Act 1998* affects the ability of Westminster to make laws for Scotland.

would trigger a constitutional crisis.[94] Thus, despite section 28(7), the *Scotland Act 1998* represents a practical, if not theoretical, transfer of sovereignty to another body.[95]

The *Scotland Act 1998* allows the courts to review primary legislation, a novel occurrence. Yet in addition, the Act ushers in new notions of federalism.[96] It is undoubted that the courts will become embroiled in determining issues of the allocation of legislative power. Drawing on Anglo-American jurisdictions with strong federal traditions, Craig and Walters conclude that British courts will have to grapple with at least three novel issues.[97] The first relates to the appropriate interpretative approach to be used by the court. Whilst the *Scotland Act 1998* is an ordinary statute, it has immense constitutional significance. Thus, should the *Scotland Act 1998*:

> Be interpreted, according to the normal canons of statutory construction, in a conservative, literal manner which emphasises text above other factors? Or should they be read, as constitutions tend to be read, in a liberal, progressive manner which emphasises not only text but also shifting social and political context?[98]

The second broad issue for the courts relates to the division of legislative power: determination of the manner in which the power is divided and determination of the degree of power granted to the different legislative powers. Finally, the courts must undertake "the unavoidable task",[99] the classification of the legislation in question. The powers of the Scottish Parliament are demarcated by subject matter. Thus, to determine whether a piece of legislation falls within the devolved powers, a court must first classify the legislation by its subject matter.

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[94] R. Brazier, 'New Labour, New Constitution?' (1998) 49 N.I.L.Q. 1 at 18.

[95] Norreen Burrows, however, argues that the effect of section 28(7) is that:

> The UK Parliament is sovereign and the Scottish Parliament is subordinate... The Scottish Parliament is not to be seen as a reflection of the settled will of the people of Scotland or of popular sovereignty but as a reflection of its subordination to a higher legal authority. Following the logic of this argument, the power of the Scottish Parliament to legislate can be withdrawn or overridden... On the one hand New Labour looks to the decentralisation of power as a means to bring the UK constitution into the new millennium. On the other hand, it remains rooted in a conservative, indeed imperialist, past. The Scotland Act does not therefore recognise that devolution has an autochthonous nature; it is instead a reflection of the hegemony of one set of institutions over another.

N. Burrows, 'Unfinished Business: The Scotland Act 1998' (1999) 62 M.L.R. 241 at 249.

[96] This is true equally of the devolved powers to the Welsh Assembly and the Northern Ireland Parliament.

[97] P. Craig & M. Walters, 'The Courts, Devolution and Judicial Review' [1999] Pub. L. 274 at 288.

[98] Craig & Walters, *ibid.*, at 289.

[99] Craig & Walters, *ibid.*, at 297.

Commentators suggest a more far-reaching implication of the *Scotland Act 1998*: the end of the Union.[100] Although the *Scotland Act 1998* is far removed from such an outcome, it may be the first step towards Scottish independence. The success of balancing Scottish autonomy and the unity of the United Kingdom depends, argues Hazell, on the "lead given by the politicians."[101] Accordingly, for devolution to work, "a spirit of trust and generosity [is required] on both sides, in Edinburgh and London."[102] In turn, the interpretation by the courts of the *Scotland Act 1998* will also affect the success of devolution; an expansive interpretation of the reserved matters could leave little legislative space for the Scottish Parliament. Thus:

> The courts are inevitably faced with a grave responsibility: the way they interpret the [*Scotland Act*] may be a significant factor in deciding whether devolution proves to be the reform which cements the union, or whether it is the first step towards its disolution.[103]

IV. THE RHETORIC OF RIGHTS

The intellectual assault on the doctrine of residual liberty has been outlined above. This section argues that in its place a new judicially generated rhetoric of rights is emerging. The source of this discourse is at least two-fold: from the European Union and from the *European Convention on Human Rights*. This section briefly analyses this trend, and suggests that this new rights discourse represents judicial concern over omnipotent executive power, as well as a new willingness to adjudicate on rights issues.

European Community law accords directly effective economic and social rights[104] which trump national laws.[105] Thus the four freedoms of the Community—free movement of

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[100] Scotland and England were united by the *Treaty of Union 1707*, see Bradley & Ewing, *supra* note 1, at 40-42, and 79-82.
[101] Hazell, *supra* note 88, at 87.
[102] Hazell, *ibid.*
[103] Craig & Walters, *supra* note 97., at 303.
[104] See Craig & de Burca, *supra* note 36, at Chapter 4, and the Bibliography at 212.
[105] See Craig & de Burca, *ibid.*, at Chapter 6, and the Bibliography at 294.

goods, services, persons and capital—can be enforced in a domestic court.[106] Any state interference with these freedoms must be justified on one of the enumerated grounds in the Treaty, and the interference must be proportionate, or the least restrictive possible to achieve the stated goal. Thus European Community law requires rights-based adjudication; in particular it requires a court to assess the importance of a stated governmental aim that conflicts with an individual's community law rights, and appraise whether the encroachment is proportionate.

Whilst the *European Convention* is not part of British law, as it has not been incorporated by an Act of Parliament, the United Kingdom has ratified the *Convention* and must honour the obligations flowing from its provisions. Thus, the *Convention* does have some effect on domestic law. This influence is evident in judicial methods of statutory interpretation,[107] development of the common law,[108] the evolution of judicial review,[109] and the exercise of judicial discretion.[110]

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[106] The fundamental rights include (the initial reference refers to the *Amsterdam Treaty*, *supra* note 47, the second to the numbering under the old treaties): Articles 23-25 (formerly 9-17), duties and charges; Articles 90-93 (formerly 95-99), discriminatory tax; Articles 28-31 (formerly 30-36), quantitative restrictions on the free movement of goods; Articles 56-59 (formerly 67-73), free movement of capital and economic and monetary union; Article 39 (formerly 48), free movement of workers; Articles 43-48 (formerly 52-58), freedom of establishment; Articles 49-55 (formerly 59-66), free movement of services.

[107] The most recent summary of the appropriate role of the *Convention* in statutory interpretation was provided by Lord Bridge in *Brind*, *supra* note 74, at 747:

> It is... well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will assume that Parliament intended to legislate in conformity with the Convention, not in conflict with it.

Lord Browne-Wilkinson advocated an approach to statutory interpretation which would provide a "half-way Bill of Rights" under which a strict statutory interpretation favouring human rights would be applied. Lord Browne-Wilkinson , 'The Infiltration of a Bill of Rights' [1992] Pub. L. 397. However, the potential of such an approach has been mitigated by the insistence of the courts on finding an ambiguity, and a corresponding "over-readiness on the part of the courts to hold that the words of a statute are plain and unambiguous." N. Bratza, 'The Treatment and Interpretation of the European Convention of Human Rights by the English Courts' in J.P. Gardner ed., *Aspects of Incorporation of the European Convention of Human Rights into Domestic Law* (London: British Institute of International and Comparative Law and the British Institute for Human Rights, 1993) at 69.

Further, in their extensive analysis of English cases in which the court made reference to the *Convention*, Klug & Starmer conclude that in cases not involving long established common law rights such as access to the courts, "a less generous approach [to statutory interpretation] is likely." Klug & Starmer continue, "of 11 cases involving the interpretation of statutes where the Convention could be said to have influenced the judgment in domestic courts (whether in judicial review proceedings or otherwise), seven involved the interpretation of legislation passed specifically to comply with an adverse ruling by the European Court of Human Rights." F. Klug & K. Starmer, 'Incorporation through the Back Door?' [1997] Pub. L. 223 at 227.

Controversy has arisen as to the extent to which the judiciary are engaging in what Lord Ackner dubbed incorporation through the 'back door',[111] incorporation in all but name. Commentators have written of "the infusion of the substance of the *European Convention* into English law",[112] and of the "emergence of a common law human rights jurisdiction".[113] Others, in particular the judiciary, have been sceptical of this perceived trend.[114] Although some such claims are exaggerated, cases in which the *Convention* is discussed demonstrate a growing comfort amongst the English judiciary with the language of rights. Although historically English courts have utilised rights discourse in certain areas, notably individual property rights, increasingly the language of rights is displacing the more negative conception of liberty. Simultaneously, the judiciary has begun to demand an objective justification for statutory constraints on fundamental rights, and to speak of 'balancing' the fundamental right against the public interest in its curtailment. This must be contrasted with earlier cases in which, however seriously a

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[108] It is well established that where the common law or the doctrines of equity are uncertain, the *Convention* may be used to resolve this uncertainty: *R v. Chief Immigration Officer, Heathrow Airport, ex p. Salamat Bibi* [1976] 1 W.L.R. 979; *Chundawadra v. Immigration Appeal Tribunal* [1988] Imm. A.R. 161; *A.G. v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109; *Derbyshire County Council v. Times Newspapers* [1992] 1 Q.B. 770.
However, the potential for judicial development of the common law has been mitigated by increasing judicial assertions that the common law and the rights guaranteed by the *Convention* are co-existent: *A.G. v. Guardian Newspapers (No. 2)*, *ibid.*, at 203. This argument remains unconvincing given the high number of complaints of *Convention* violations taken to the European Court of Human Rights, and the courts' continued reluctance to develop *Convention* rights through the common law other than those such as freedom of expression with which they are familiar, for example the right to privacy: *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344; *Kaye v. Robertson* [1991] F.S.R. 64.

[109] In *Brind*, *supra* note 74, the House of Lords commented on the permissible impact and limits of the *Convention* on the domestic law of judicial review. Bratza, *supra* note 107, at 74, identifies three stands of principle in the judgements. First, the notion that Parliament must be assumed to have intended to legislate in conformity with the *Convention*. Second, the idea that stricter judicial scrutiny of administrative decision-making is needed where the exercise of discretion affects fundamental rights. Third, some judicial acceptance that scrutiny of an administrative decision requires objective judicial analysis. Although, the House of Lords outlawed the use of proportionality, the difference in substance and effect between proportionality and what they seem to be proposing is hard to ascertain.
However, in practice no administrative decisions have been struck down for unreasonableness as they violate a fundamental right, Bratza, *ibid.*, at 75, Krug & Starmer, *supra* note 107, at 229.

[110] The judiciary may have regard to the *Convention* when deciding whether or not to exercise judicial discretion, for example in the decision whether or not to grant an injunction that would restrict freedom of expression: *Rantzen v. Mirror Group Newspapers Ltd.* [1994] QB 670.

[111] Brind, *supra* note 74, at 762.

[112] M.J. Beloff & H. Mountfield, 'Unconventional Behaviour? Judicial Uses of the European Convention in English Law' [1996] E.H.R.L.R. 467.

[113] M. Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1997) at 205.

[114] See e.g. Neill J. in *Rantzen*, *supra* note 110; Klug & Starmer, *supra* note 107.

right was diminished by the government, the judiciary would defer to the sovereignty of Parliament. Despite this promising rhetoric, the implied consequences of such statements, the negation of an exercise of administrative discretion due to a violation of a fundamental human rights norm, has certainly not materialised. However, the desire of the judges to fill in the gap between the residual approach to liberty, and Dworkin's 'culture of liberty' is encouraging.[115]

V. CONCLUSION

In this Chapter I have argued that a constitutional revolution has occurred in the United Kingdom. The traditional Diceyan notions of parliamentary sovereignty, and courts deferential to that sovereignty have been exploded by devolution and judicial review, and imploded by membership of the European Union. Simultaneously, concerns over the inadequacy of the residual approach to liberty has prompted judicial efforts to consider the *Convention* in domestic law, as well as an increased judicial comfort and familiarity with the discourse of rights.

In the next Chapter I suggest that the substantive rights guaranteed by the Convention, although an excellent starting point for discussion, cannot adequately protect human rights in the United Kingdom. I argue further, that in failing to generate a true public debate on the appropriate content of a British bill of rights, the *Human Rights Act* risks charges of being both anti-democratic and illegitimate.

[115] Dworkin, *supra* note 42, at 1.

— CHAPTER TWO —

THE SUBSTANTIVE RIGHTS GUARANTEES IN THE *EUROPEAN CONVENTION OF HUMAN RIGHTS*

The *European Convention on Human Rights* has been a great success.[1] Described frequently as the "most comprehensive international legal order for the protection of human rights the world has yet seen",[2] and "without a doubt the most successful human rights instrument in the world today",[3] the *Convention* certainly has a proud history and a bright future. However, the document is now almost fifty years old, and inevitably reflects the philosophical and historical context in which it was produced.

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[1] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 (entered into force September 3 1953), Appendix I, *infra* [hereinafter, the *Convention*]. The achievements of the *Convention* can be analysed on several levels.
First, it has made substantial contributions to the international law of human rights. The acceptance of legally binding obligations to secure the enumerated rights to all persons within the jurisdiction, enforceable by individual application is unique in international law. See J.A. Carrillo Salcedo, 'The Place of the European Convention in International Law' in R.St.J. Macdonald, F. Matscher & H. Petzold eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993) at 15.
Second, the *Convention* has influenced national law, by its requirement that following an adverse judgement of the Court or Commission, a member state must change its laws. Thus in the United Kingdom, legislative changes responding to court decisions have included the legalisation of homosexual sodomy in Northern Ireland (*Dudgeon v. United Kingdom* (1981), 45 Eur. Ct. H.R. (Ser. A)) and a fundamental overhaul of the rules governing prisons (*Silver v. United Kingdom* (1983), 61 Eur. Ct. H.R. (Ser. A)). See R. Bernhardt, 'The Convention and Domestic Law' in R.St.J. Macdonald, F. Matscher & H. Petzold eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993) at 25; P. Gardner & C. Wickremasinghe, 'England and Wales and the European Convention' in B. Dickson ed., *Human Rights and the European Convention: The Effects of the Convention on the United Kingdom and Ireland* (London: Sweet & Maxwell, 1997) at 47.
Third, the European Court has provided a remedy for individuals where domestic remedies have failed them, see D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995) at 31. Although note that the *Convention* is increasingly a victim of its own success, with enormous delays for litigants which are only growing with time. Drzemczewski reports that in 1992 the average case took five years and six months to be dealt with in Strasbourg. By 1993 this had reached five years and eight months. And of course, this does not take account of the length of time it took a litigant to exhaust domestic remedies. A. Drzemczewski, 'Putting the European House in Order' (1994) 144 N.L.J. 644 at 645. The proposed reforms of the European Court are aimed at reducing this time delay, see A. Mowbray, 'The Composition and Operation of the New European Court of Human Rights' [1999] Pub. L. 219.
For an extensive, and often critical, account of the Council of Europe's human rights institutions, see A. Tomkins, 'Civil Liberties in the Council of Europe: A Critical Survey' in C.A. Gearty ed., *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (The Hague: Martinus Nijhoff, 1997) 1.

[2] Tomkins, *ibid.*, at 5.

The *Convention* grew out of the carnage of the Second World War as one of several attempts to unify Europe through international affiliation.[4] Further, the *Convention* stemmed from a desire to "provide a bulwark against communism,"[5] and a resurgence of fascism.[6] Thus, the substantive rights in the *Convention* are underpinned by enlightenment notions of individualism. Such an understanding focuses primarily on the autonomy and dignity of individuals.[7] This theoretical grounding of the *Convention* is apparent in the types of rights it seeks to guarantee. Accordingly, the *Convention* focuses on what are commonly known as first generation rights, or civil and political rights. So, for example, the *Convention* guarantees the right to life;[8] the right to remain free from torture or inhuman or degrading treatment or punishment;[9] the right to freedom of expression;[10] and the right to freedom of thought, conscience and religion.[11] In addition, several protocols to the *Convention* list further guarantees, to which a varying number of states are parties.[12]

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[3] B. Dickson, 'The Council of Europe and the European Convention' in B. Dickson ed., *Human Rights and the European Convention: The Effects of the Convention on the United Kingdom and Ireland* (London: Sweet & Maxwell, 1997) at 1.

[4] P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Deventer: Kluwer, 1990) at 1-3.

[5] Harris et al., *supra* note 1, at 2.

[6] G. Robertson, *Freedom, the Individual and the Law* (London: Penguin, 1993) at 499. Justice Stephen Sedley describes these twin influences: "[The] authors [of the *Convention*] were not only looking over their shoulders at the tyranny of fascism; they were looking ahead at a Europe in which strong pro-Soviet Communist parties were bidding for power." S. Sedley, 'A Bill of Rights for the United Kingdom: From London to Strasbourg by the Northwest Passage?' (1998) 36 Osgoode Hall L.J. 63 at 67.

[7] C.A. Gearty, 'The European Court of Human Rights and the Protection of Civil Liberties: An Overview' [1993] Cambridge L. J. 89 at 93.

[8] The *Convention*, *supra* note 1, at Article 2.

[9] *Ibid.*, at Article 3.

[10] *Ibid.*, at Article 10.

[11] *Ibid.*, at Article 9.

[12] *Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, Eur. T.S. 9 guarantees the right to peaceful enjoyment of possessions (Article 1); the rights to education (Article 2); the right to free elections (Article 3). *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 16 November 1963, Eur. T.S. 46 states that no-one shall be deprived of his liberty merely due to an inability to fulfil a contract (Article 1); the right to free movement within a territory for everyone lawfully within that territory, and the right to leave the territory, (Article 2); the right not to be expelled from a state in which an individual is a national (Article 3); the prohibition of the collective expulsion of aliens (Article 4). *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, 28 April 1983, Eur. T.S. 114 abolishes the death penalty (Article 1). *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 22 November 1984, Eur. T.S. 117 provides procedural safeguards against the expulsion of aliens (Article 1); the right of appeal for a criminal conviction (Article 2); equal rights and responsibilities for spouses, to each other and to their children, both during marriage and on dissolution (Article 5).

The appropriate content of a British bill of rights has received little attention, either by commentators, or in the Parliamentary debates.[13] The assumption has been that the *European Convention* provides the obvious model. Yet the substantive content of the *Convention* is problematic on several levels: certain rights guaranteed are inadequate in their scope; several rights are simply not included in the *Convention*; and some limitations on the exercise of the right seem almost to reduce the scope of the right to nothing. However, the *Convention* does offer an excellent starting point towards consensus. With additions, the *Convention* could represent a powerful bill of rights. This Chapter explores these problems and suggests some additions. I draw heavily on the consultation papers of the civil liberties pressure group, Liberty,[14] and the Institute for Public Policy Research.[15] I argue that many of the suggestions made in these consultation papers would both modernise the *Convention*, and afford more extensive human rights protection. I conclude by suggesting that despite the potential for controversy, the content of a bill of rights should flow from extensive public discussion and an informed democratic process. This is a theme I return to in Chapter Three, and develop more fully in Chapter Five.

I. THE SCOPE OF *CONVENTION* RIGHTS

This Section analyses some of the substantive rights in the *Convention*, arguing that many important rights are too narrowly drawn in their scope, or are absent entirely from the *Convention*. I make some suggestions for alteration or addition to modernise the *Convention*, and to improve the protection for human rights offered. However, this

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[13] Almost all treatments of the question of whether the United Kingdom should enact a bill of rights assume that the *European Convention on Human Rights* is the appropriate model. See e.g. M. Zander, *A Bill of Rights? 4th ed.* (London: Sweet & Maxwell, 1997); R. Dworkin, *A Bill of Rights for Britain* (London: Chatto & Windus, 1990); Robertson, *supra* note 6; T.H. Bingham, 'The European Convention on Human Rights—Time to Incorporate' (1993) 109 L.Q.R. 390; Sir L. Scarman, *English Law—The New Dimension* (London: Stevens, 1974).

[14] Liberty, *A People's Charter: Liberty's Bill of Rights, A Consultation Document* (London: National Council for Civil Liberties, 1991) [hereinafter Liberty].

[15] Institute for Public Policy Research, *A British Bill of Rights* (London: Institute of Public Policy Research, 1990) [hereinafter I.P.P.R.].

Section does not attempt to outline a coherent scheme for what rights should be in the *Convention*; for reasons of space, but also because the content of a bill of rights must, to avert accusations of being anti-democratic, stem from a legitimate democratic process. Therefore, whilst I have flagged what I consider to represent the most important omissions from the *Convention*, the detailed content has not concerned me.[16]

A. The Criminal Justice Provisions: Articles 5 and 6

Article 5 of the *Convention* regulates the rights of suspects at the pre-trial stage of proceedings. Conversely, Article 6 applies to any subsequent trial. Both the practical and symbolic importance of criminal justice guarantees enshrined in a bill of rights cannot be over-estimated in the United Kingdom, where a sorry history of miscarriages of justice serves as a potent reminder of the consequences of insufficient protection.[17] Indeed,

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[16] For reasons of space I have not considered the debate on whether economic and social rights should and could be effectively included in a bill of rights. For an outline of the debate on the utility of framing economic and social issues as 'rights', and its application to the *Human Rights Act* see K.D. Ewing, 'Social Rights and Constitutional Law' [1999] Pub. L. 104 (arguing that there is a place in constitutional reform for granting constitutional status to economic and social rights).
The European Court of Human Rights has adjudicated on economic and social issues, insofar as the effective realisation of a *Convention* right has implications of an economic or social nature. In such cases, the Court has stated that "the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention." *Airey v. Ireland* (1979), 32 Eur. Ct. H.R. (Ser. A) at para. 26. However, it must be emphasised that this approach reflects an understanding of economic, social and cultural rights as incidental to the rights contained in the *Convention*, not as free standing rights with their own substantive content. See C. Flinterman, 'The Protection of Economic, Social and Cultural Rights and the European Convention on Human Rights' in R. Lawson & M. de Blois eds., *The Dynamics of Human Rights Protection in Europe, Essays in Honour of Henry G. Schermers* (Dordrecht: Martinus Nijhoff Publishers, 1994); M. Pellonpää, 'Economic, Social and Cultural Rights' in R.St.J. Macdonald, F. Matscher, & H. Petzold eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993).
The Council of Europe, in 1961, enacted the *European Social Charter*, 18 November 1961, Eur. T.S. 35 (ratified by the United Kingdom 11 July 1962, entered into force in the United Kingdom 26 February 1965), as revised, 3 May 1996, Eur. T.S. 163. This provides protection for various economic and social rights, but follows the standard international law method of enforcement: reporting procedures. See D.J. Harris, 'A Fresh Impetus for the European Social Charter' [1992] 41 I.C.L.Q. 659; D.J. Harris, *The European Social Charter* (Charlottesville: University Press of Virginia, 1984).
The European Union remains the largest source of directly enforceable economic and social rights. The treaties making up the European Union are the *Treaty establishing the European Economic Community*, 4 July 1957, 298 U.N.T.S. 3, as amended by the *Single European Act*, (1987) 2 C.M.L.R. 741, the *Treaty on European Union*, (1997) I.L.M. 31; and the *Amsterdam Treaty*, 2 October 1997, [1997] O.J. C. 340/1.

[17] See K.D. Ewing & C.A. Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Oxford: Clarendon Press, 1994) at 252.

safeguards for suspects and those charged with offences seem particularly vulnerable to contraction by the government of the day. Articles 5 and 6 are not fitted narrowly enough to the specific criminal justice circumstances of the United Kingdom, and further, are actually weaker than existing British guarantees. Accordingly, to ensure adequate protection of those in the criminal justice system, several alterations are needed.[18]

The United Kingdom does not guarantee suspects the right to silence. Rather, where a suspect fails to answer questions, the *Criminal Justice and Public Order Act 1994* states that the court "may draw such inferences from the failure as appear proper."[19] Yet the right to remain silent is a fundamental right, recognised as such in international human rights instruments,[20] which should be explicitly affirmed in a domestic bill of rights.

Other pre-trial rights which need emphasis include the unqualified right to consult a solicitor without charge,[21] and the right of a suspect to notify someone of their whereabouts.[22] Further, the Institute for Public Policy Research highlights the right not to be subject to double jeopardy[23]—trial or punishment for the same offence more than once. The current government has suggested that this right should be revisited,[24] emphasising the need for the right to be enshrined in a bill of rights.

Finally, various rights need to be added to Article 6 to ensure sufficient protection of individual rights. Both Liberty and the Institute of Public Policy Research emphasise the

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[18] As well as reference to Liberty and the I.P.P.R., this section draws heavily on J. Wadham, 'Why Incorporation of the European Convention on Human Rights is Not Enough' in R. Gordon and R Wilmot-Smith eds., *Human Rights in the United Kingdom* (Oxford: Clarendon Press, 1996).

[19] *Criminal Justice and Public Order Act 1994* (U.K.), 1994, c. 33, section 34(2).

[20] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [hereinafter the *I.C.C.P.R.*] at Article 14(3)(g).

[21] Liberty, *supra* note 14, at Article 5(2)(b) Whilst this right is contained in the *Police and Criminal Evidence Act* (U.K), 1984, c. 60, at section 58 [hereinafter *P.A.C.E.*], there are various situations in which the police are entitled to delay access to a solicitor.

[22] Liberty, *ibid.*, at Article 5(2)(d). Again this right is guaranteed under *P.A.C.E.*, *ibid.*, at section 56. Again, various limitations apply.

[23] I.P.P.R., *supra* note 15, at 5(6).

[24] The Home Secretary, Jack Straw, has referred double jeopardy to the Law Commission. See Central Office of Information, 'Law Commission to Review Law on Double Jeopardy' (2 July 1999), online: Central Office of Information <http://www.nds.coi.gov.uk> (date accessed 27 July 1999).

significance of public trials except in the narrowest of circumstances.[25] Further, the *Convention* does not guarantee the right to trial by jury in serious criminal cases.[26] This right originated in the *Magna Carta*,[27] and is guaranteed in the *Irish Constitution*,[28] and the *United States Constitution*.[29] Yet, once more this right appears to be threatened by the current government.[30] A domestic bill of rights should uphold the right of an individual to trial by jury in serious criminal cases.

B. Children, Marriage and Family Life

The *Convention* makes no provision for the rights or needs of children. Such rights would include the ability to seek protection by the family or the state; to have equal rights whether born in, or out of wedlock, and to be entitled to citizenship of the United Kingdom simply by birth.[31] Recognition of the rights of children has immense practical and symbolic value, as well as conforming with Article 24 of the *International Covenant on Civil and Political Rights*.[32]

Article 12 limits the scope of the right to marry to "men and women of marriageable age". The wording of Article 12 should be altered to "everyone". This alteration would allow lesbians and gay men to have their unions recognised by the state, as well as

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[25] Liberty, *supra* note 14, at 48; I.P.P.R., *supra* note 15, at Article 5.
[26] Unsurprisingly, since the *Convention* applies to civil and common law systems alike.
[27] *The Magna Carta* 1297, *The Statutes at Large*, vol. I (Cambridge: Cambridge University Press, 1762) 1.
[28] *Constitution of Ireland*, online: University College, Cork: Faculty of Law <http://www.ucc.ie/ucc/depts/law/irishlaw/> (date accessed 27 July 1999), at Article 38.5 (for serious offences).
[29] U.S. Const. Art. III, § 2, cl. 3 (for all offences except impeachment).
[30] The government has made suggestions that would prevent a defendant deciding in 'either way' cases to be tried by a jury, or by a magistrate. See Central Office of Information, 'Venue for Trial: Either Way Offences' (28 July 1998) online: Central Office of Information <http://www.nds.coi.gov.uk> (date accessed 27 July 1999).
[31] A right removed by the *British Nationality Act* (U.K.),1981, c. 61, at section 1(3).
[32] *I.C.C.P.R.*, *supra* note 20, at Article 24. It states that

1. Every child shall have, without any discrimination as to race, colour, sex. Language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have name.
3. Every child has the right to acquire a nationality.

affirming the rights of prisoners to marry.[33] Further, both Liberty and the I.P.P.R. consultation papers emphasise the importance of mutual consent to marriage.[34]

C. The Right to Equal Protection and Non-Discrimination

The level of protection from discrimination provided under Article 14 is inadequate.[35] The problems of Article 14 are several-fold: the parasitic nature of Article 14; the narrow focus on anti-discrimination; the inappropriate outcomes that Article 14 frequently leads to; and the lack of symbolism displayed by Article 14. As it stands, Article 14 adds nothing to the domestic protections against discrimination; providing a lower standard of protection than is already guaranteed under the *Race Relations Act* 1976,[36] the *Sex Discrimination Act* 1975,[37] and under European Community law.[38] This section analyses the problems outlined above, before suggesting several amendments to Article 14 in order to more effectively guarantee equality.

Article 14 is not a free-standing discrimination clause, rather it relies on the enjoyment of one of the rights enshrined in the *Convention*, or is "parasitic".[39] This leads to the first problem flowing from Article 14: in any situation in which the discrimination does not attach to a right within the *Convention*, the state has no obligation to refrain from discrimination, and Article 14 cannot be triggered. Therefore, situations not covered by

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[33] Application 7114/75, *Hamer v. United Kingdom* (1979), 24 Eur. Comm. H.R. D.R. 5 (the United Kingdom prohibition on the prisoners marrying found to violate Article 12).

[34] I.P.P.R, *supra* note 15, at Article 12; and Liberty, *supra* note 14, at Article 12. Liberty note that this would not prevent arranged marriages, insofar as they are undertaken consensually.

[35] On Article 14 see generally, K.J. Partsch, 'Discrimination' in R.St.J. Macdonald, F. Matscher & H. Petzold eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993) at 571; van Dijk and van Hoof, *supra* note 4, at 532-547; Harris et al., *supra* note 1, at 462. For a general overview of discrimination in international law, see A.F. Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law' (1990) 11 Hum. Rts. L.J. 1.

[36] *Race Relations Act* (U.K.), 1976, c. 74.

[37] *Sex Discrimination Act* (U.K.), 1975, c. 65.

[38] See e.g. E.C.J. *P v. S & Cornwall County Council*, C-13/94 [1996] ECR I-2143; P. Craig & G. de Burca, *EU Law* (Oxford: Oxford University Press, 1998).

[39] Harris et al, *supra* note 1, at 463. Although note that the European Court has held that Article 14 can be violated even where another *Convention* provision has not been breached (*Belgian Linguistics Case (No 2)* (1968), 6 Eur. Ct. H.R. (Ser. A), 1 E.H.R.R. 252), and that Article 14 can be applicable insofar as the facts

the *Convention* where discrimination remains common place, such as employment, equal pay, housing or working conditions, cannot give rise to any obligations on the state under Article 14.[40]

Furthermore, Article 14 is narrowly focused, as its obligations protect against discrimination, rather than representing a call to promote equality.[41] Thus, the Article reflects the traditional liberal notions of state responsibility: that the state should merely refrain from acting in a discriminatory manner, and that the goal is merely formal procedural equality. Yet, in modern equality theory, such a minimal role for the state is perceived to be insufficient.[42] Formal equality theory has been discredited as an effective mechanism through which to achieve *real* equality.[43] Theorists (and judges) now speak of the need to achieve 'substantive equality'.[44] An excellent example of this approach can be seen in the jurisprudence of the Canadian Supreme Court on section 15(1) of the *Canadian Charter of Rights and Freedoms*,[45] which demands a purposive contextual

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of the case fall "within the ambit" of one of the *Convention* articles (*Inze v. Austria* (1987), 126 Eur. Ct. H.R. (Ser. A), at para 36; *Van der Mussele v. Belgium* (1983), 70 Eur. Ct. H.R. (Ser. A), 6 E.H.R.R. 163).

[40] Harris et al., *supra* note 1, at 463.

[41] Compare the strong equal protection guarantee in the *I.C.C.P.R*, *supra* note 20. The I.C.C.P.R. states at Article 26, "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Further, the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11 [hereinafter the *Charter*] also contains an equal protection clause at Section 15. It states that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[42] See *e.g.* E.J. Shilton, 'Charter Litigation and the Policy Processes of Government: A Public Interest Perspective' (1992) 30 Osgoode Hall L.J. 653 at 658, "[w]hile some rights may legitimately be seen as best protected by an absence of government regulation, the promotion of equality requires governments to take positive action to bring about social change."

[43] See C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987); C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989); R. West, 'Jurisprudence and Gender' (1988) 55 Chicago University L. Rev. 1; K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfield and Nicolson, 1985); P. Williams, 'The Obliging Shell: An Informal Essay on Formal Equal Opportunity' (1989) 87 Mich. L. Rev. 2128.

[44] See C. Sheppard, "The "I" in the "It": Reflections on a Feminist Approach to Constitutional Theory" in R.F. Devlin, ed., *Feminist Legal Theory* (Toronto: Emond Montgomery Publications Ltd., 1991) 81; M. Minow, *Not Only for Myself: Identity, Politics and the Law* (New York: The New Press, 1997); M.J. Frug, *Postmodern Legal Feminism* (New York: Routledge, 1992).

[45] The *Charter*, *supra* note 41.

approach to equality to allow realisation of the equality guarantee and to prevent the problems arising from a formalistic analysis.[46]

The procedural rather than substantive goal of equality guaranteed in Article 14, what Gearty describes as Article 14's "moral agnosticism",[47] sometimes leads to problematic outcomes. In *Abdulaziz, Cabales and Balkandali v. United Kingdom*[48] the policy of the United Kingdom, which allowed the wives of immigrants to join their husbands, was found to violate Article 14 as husbands were not permitted to join their immigrant wives.[49] The response of British government was to withdraw this entitlement from both men and women. Formal equality was reached, but the outcome sits uncomfortably with both substantive understandings of equality, and other provisions in the *Convention* such as the right to family life.

Finally, Article 14 lacks symbolism. A bill of rights, and an international human rights *Convention*, plays a vital role in educating a population, raising rights consciousness, and stimulating Dworkin's "culture of liberty".[50] Yet Article 14 is symbolically problematic on two levels. Firstly, Article 14 focuses exclusively on anti-discrimination, as outlined above. Secondly, whilst the list of grounds is extensive and includes 'other status', the specific non-inclusion of two common grounds of discrimination, sexual orientation and disability, represents a symbolic exclusion.[51]

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[46] See *Law v. Canada (Minister of Employment and Immigration)* (1999), 170 D.L.R. (4th) 1 (S.C.C.); *M. v. H.* (1999), 171 D.L.R. (4th) 577 (S.C.C.); *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Miron v. Trudel*, [1992] 2 S.C.R. 418; *Mossop v. Canada*, [1993] 1 S.C.R. 554 at 646; *Symes v. Canada (M.N.R.)*, [1993] 4 S.C.R. 695; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Eldridge v. British Columbia (Attorney-General)*, [1997] 3 S.C.R. 624.

[47] Gearty, *supra* note 7, at 115.

[48] (1985) 7 E.H.R.R. 471.

[49] A violation of Article 8 was also found.

[50] Dworkin, *supra* note 13, at 1; F. Klug, 'Human Rights as Secular Ethics' in R. Gordon & R. Wilmot-Smith eds., *Human Rights in the United Kingdom* (Oxford: Oxford University Press, 1996) 37; Zander, *supra* note 13, at 69.

[51] See Wadham, *supra* note 18, at 28. Of course in the drafting of the *Convention* fifty years ago, these were not considered characteristics on which discrimination represented a moral wrong. Yet, this kind of substantive change in what we perceive to be the content of a right represents exactly the reasons why incorporating a fifty year old *Convention* into domestic law without modification is so problematic.
Note that the European Court has included both disability and sexual orientation within the grounds covered by 'other status'. Sexual orientation was included in the 'other status' guarantee in *Dudgeon v. United Kingdom* (1981), 45 Eur. Ct. H.R. (Ser. A), 4 E.H.R.R. 149, but has been narrowly interpreted by the European Court. See R. Wintemute, *Sexual Orientation and Human Rights* (Oxford: Clarendon Press,

In conclusion, section 14 needs several alterations in order to be an adequate protection against discrimination and to promote equality. Firstly, Article 14 must apply to all situations in which a public authority acts, not merely to the rights guaranteed in the *Convention*. Secondly, the text of Article 14 must be modified so as to include anti-discrimination, equal protection, and to act as a textual prompt towards judicial guarantees of substantive equality. The text of section 15 of the *Canadian Charter* is an excellent model.[52] Thirdly, both disability and sexual orientation should be included in the enumerated grounds of Article 14. The maintenance of the open-ended ground 'other status' is appropriate to allow the judiciary to take account of changing social, political and moral circumstances. Finally, Liberty, suggest the following addition to section 14:

> This article shall not preclude any law, programme or activity that has as its objective the amelioration of conditions of individuals or groups disadvantage on any of the grounds listed in this Article. Neither shall it preclude any differential services or entitlements based on special needs or genuine occupational qualifications.[53]

The aim of this clause is to ensure that any positive action programmes would not fall foul of a bill of rights.[54] Further, the clause gives effect to principles in the *International Convention on the Elimination of all Forms of Racial Discrimination*,[55] and the *Convention on the Elimination of All Forms of Discrimination Against Women*,[56] both of which have been ratified by the United Kingdom.[57] Until the measures outlined above

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1995); C. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995). For an overview of political discourse pertaining to lesbians and gay men in the United Kingdom, see D. Cooper & D. Herman, 'Getting 'the Family Right': Legislating Heterosexuality in Britain, 1986-91' in D. Herman & C. Stychin eds., *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (Philadelphia: Temple University Press, 1995) at 162.

Disability was impliedly included by the Commission in Application 21439/93 *Botta v. Italy* (1998), 26 E.H.R.R. 241. See Liberty, *Violence, Harassment and Discrimination Against Disabled People in Great Britain: An Annual Report for the European Disability Forum* (London: National Council for Civil Liberties, 1995).

[52] The *Charter*, *supra* note 41.

[53] Liberty, *supra* note 14, at 70, taken, with adaptation from the *Canadian Charter*, *ibid.*, at section 15(2), the *Sex Discrimination Act*, *supra* note 37, and the *Race Relations Acts*, *supra* note 36.

[54] See V. Sacks, 'Tackling Discrimination Positively in Britain' in B. Hepple & E.M. Szyszczak eds., *Discrimination: The Limits of Law* (London: Mansell, 1992) 357.

[55] *International Convention on the Elimination of all Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195 (entered into force 4 January 1969).

[56] *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res. 34/180, UN GAOR, 1980, Supp. No. 46, UN Doc. A/34/46, 193.

[57] Liberty, *supra* note 14, at 71.

have been implemented, Article 14 of the *Convention* remains an insufficient vehicle through which to ensure equal protection and non-discrimination.

D. Article 15 and Derogations

The *Convention* gives states a wide latitude to derogate from the substantive guarantees. Thus, under Article 15 a state may take measures derogating from the obligations in the *Convention* in times of "war and other public emergency threatening the life of the nation", insofar as such derogations are "strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." The *Convention* does, however, contain certain rights which are non-derogable: Articles 2 (except in respect of deaths resulting from lawful acts of war), 3, 4(1) and 7.[58]

Some form of state derogation or suspension from specific rights in the time of serious public emergency is necessary. Without such permission in a bill of rights, "[t]here is a danger that... the Government would seek to amend the bill of rights instead, leading to a more permanent limitation on the rights it protects."[59] Yet there is a distinction between merely *permitting* derogations or suspensions, and *sanctioning* them.[60] A derogation from a bill of rights should be a rare event, and occur only in the most extreme of circumstances. The history of litigation under the *Convention* demonstrates that times of war and emergency tend to be the times when human rights and liberties suffer the most abuse at the hands of states.[61]

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[58] The *Convention*, *supra* note 1, at Article 15(2).
[59] I.P.P.R., *supra* note 15, at 17.
[60] Liberty, *supra* note 14, at 93.
[61] A clear example is the line of cases against both the United Kingdom and Ireland concerning their treatment of suspected terrorists. See *Brogan v. United Kingdom* (1988), 145 Eur. Ct. H.R. (Ser. A), 11 E.H.R.R. 117, in which the European Court held that the detention of four men under the *Prevention of Terrorism (Temporary Provisions) Act* (U.K.) 1984, c. 8 for periods of up to six days and 16 ½ hours was a violation of Article 5(3). The United Kingdom responded by derogating from Article 5 insofar as this was warranted by the public emergency in Northern Ireland. This derogation was upheld by the European Court in *Brannigan and McBride v. United Kingdom* (1993), 258 Eur. Ct. H.R. (Ser. A), 17 E.H.R.R. 539.
See generally, B. Dickson, 'Northern Ireland and the European Convention" in B. Dickson ed., *Human Rights and the European Convention* (London: Sweet & Maxwell, 1997) 143; C.A. Gearty, 'The United

It follows that any bill of rights must contain certain procedural principles which must be complied with before derogating from, or suspending, *Convention* rights. Rights in the *Convention* which do not contain limits—such as torture or non-discrimination—could not be the subject of a derogation or suspension. Further, any suspension should be passed only by an affirmative resolution by Parliament, and should be temporally limited and/or periodically reviewed.[62] Finally, any derogation or suspension should be subject to the scrutiny of the courts. The domestic courts should employ a more rigorous standard of scrutiny than has been previously applied by the European Court, which has granted a wide margin of appreciation in assessing the decisions of states both in determining the existence of a state of emergency, and in ascertaining the scope of the derogation needed to avoid such an emergency.[63] The invocation of a wide margin of appreciation at both stages, "almost inevitably leads to the Court validating the measures challenged."[64] Clearly, scrutiny of the decisions must be effective scrutiny, and not merely deference to the legislature.

Kingdom' in C.A. Gearty ed., *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (The Hague: Martinus Nijhoff Publishers, 1997) at 53; A. Vercher, *Terrorism in Europe* (Oxford: Clarendon Press, 1992); C. Warbrick, 'The European Convention on Human Rights and the Prevention of Terrorism' (1983) 32 I.C.L.Q. 82; S. Marks, 'Civil Liberties and the Margin: The United Kingdom, Derogation and the European Convention on Human Rights' (1995) 15 O.J.L.S. 69.

[62] I.P.P.R., *supra* note 15, at 18.

[63] *Ireland v. United Kingdom* (1978), 25 Eur. Ct. H.R. (Ser. A), 2 E.H.R.R. 25.

[64] S. Livingstone, 'The State of Emergency and Human Rights: A Historical Perspective on Contemporary Problems' paper presented at W.G. Hart Legal Workshop 'Understanding Human Rights' July 1994 at 9, cited in T.H. Jones, 'The Devaluation of Human Rights under the European Convention' [1995] Pub. L. 430 at 434.

E. Rights of Asylum Seekers, Immigrants and those to be Extradited

The *Convention* provides no protection for immigrants, asylum seekers and those against whom extradition is sought.[65] Liberty and the Institute for Public Policy Research both highlight the necessity of the inclusion in a bill of rights of "the right to seek and be granted asylum in the UK in accordance with the legislation of the UK and international conventions if they are being pursued for political offences."[66] Further, both papers state that no refugee or asylum seeker should be deported to any territory in which their life or freedom is threatened.[67] The latter right has been violated by government ministers,[68] and thus its protection is paramount in guaranteeing the safety and rights of individuals.

The *Criminal Justice Act 1988* removed the requirement that a nation seeking extradition must show an arguable case against an individual.[69] Extradition raises many potential rights violations. Liberty states:

> [T]he difficulties caused to people being tried in other countries—for example being detained considerable distance from family and friends, and having to deal with legal processes in other languages—should only be contemplated if the requesting country can show that there is adequate evidence to proceed. Without this protection individuals may be subject to considerable hardship when there really is no case against them.[70]

A domestic bill of rights must contain adequate safeguards to ensure that individuals are not extradited where there is no arguable case.

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[65] See Wadham, *supra* note 18, at 27. As he points out, the right to submit reasons, the right to review, and the right to representation before expulsion are contained in Protocol 7, *supra* note 12, at Article 1, but this has not been ratified by the United Kingdom. In any case, the potential protection offered by Protocol 7 is mitigated by its acceptance that such protections can be waived where "it is necessary in the interests of public order or is grounded on reasons of judicial review."

[66] Liberty, *supra* note 14, at Article 19(1); I.P.P.R., *supra* note 15, at Article 18(1). Note that Liberty add to "pursuance for political offences", "or have a well-founded fear of persecution for reasons of gender, race, colour, language, religion, political or other opinion, ethnic, national or social origin, nationality or citizenship, mental or physical disability or illness, sexual orientation or gender identity."

[67] Liberty, *ibid.*, at Article 19(3); I.P.P.R., *ibid.*, at 18(2).

[68] In a more egregious example of this behaviour, the Home Secretary was found to be in contempt of court for failing to comply with a court order to ensure the return to the United Kingdom a citizen of Zaire who had applied for political asylum, but was improperly placed on a flight back to Zaire, *M v. Home Office* [1993] W.L.R. 433.

[69] *Criminal Justice Act 1988* (U.K.), 1988, c. 33, at section 1.

[70] Liberty, *supra* note 14, at 81.

II. LIMITATIONS ON THE EXERCISE OF RIGHTS

A bill of rights must recognise that in certain circumstances, individual rights must be subject to some limitations. Whilst some rights can be uncontroversially described as absolute,[71] other rights inevitably possess the potential to conflict with one another.[72] A bill of rights needs to provide some framework by which to reconcile conflicting rights. Existing bills of rights provide three models by which to implement a framework for the limitation of rights: the *European Convention*, the United States' *Bill of Rights*,[73] and the *Canadian Charter of Rights and Freedoms*.[74]

The *European Convention* adopts the formula of attaching limitations to each right as appropriate.[75] This results in wide limitations which frequently seem to unduly restrict the scope of the right purportedly guaranteed. Further, many of the limitations permitted by the *Convention* appear archaic fifty years after their conception. Vivid examples include the following. A state may use lethal force in order to effect a lawful arrest, prevent the escape of a person lawfully detained, or in lawful action to quell a riot or insurrection.[76] The right to liberty or security of the person can be justifiably limited where the individual is lawfully arrested for the prevention of spreading disease, or where the individual is a drug user or alcoholic.[77] The right to privacy may be limited in order to preserve the "economic well-being of the country".[78] The right to free expression can be justifiably limited in order to maintain "territorial integrity".[79] In addition, articles 8,10 and 11 contain a string of identical limitations: national security or public safety, the prevention of disorder or crime, the protection of health and morals, and the protection of the rights of others. The resulting impression is that the drafters attempted to pre-empt

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[71] Violations of rights which, from a civil libertarian perspective, cannot be justified include the right to be free of torture, slavery, and capital punishment.
[72] A vivid example, discussed in the next Chapter, is the potential conflict between the right to personal privacy, and the right of press freedom of speech.
[73] U.S. Const.
[74] The *Charter*, *supra* note 41
[75] Note that some rights in the *Convention* are absolute.
[76] The *Convention*, *supra* note 1, at Article 2(2).
[77] The *Convention*, *ibid.*, at Article 5(1)(e).
[78] The *Convention*, *ibid.*, at Article 8(2).
[79] The *Convention*, *ibid.*, at Article 10(2).

every conceivable circumstance in which a member state might wish to limit the exercise of the *Convention* guarantees.[80]

At the other extreme sits the United States *Bill of Rights*. This provides no general, all-encompassing limitation on the rights it contains, and few individual qualifications exist in the text. Yet this lack of a limiting framework has led to immense judicial discretion, and swings in jurisprudence as the composition of the United States Supreme Court has altered.[81]

The *Canadian Charter of Rights and Freedoms* provides the third model. Section 1 contains a general limitation clause, which states that the *Charter* rights and freedoms are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." To be justified under section 1, impugned legislation must have as its objective a purpose sufficiently important to override a constitutional guarantee, and the legislation must be proportionate.[82] The problems in the construction of section one are apparent:

> This approach gives some guidance to the judiciary on the boundaries of any limits to rights under the Charter, but the fact that they apply *equally* to most of the Articles inevitably gives the judges enormous discretion. Furthermore, nowhere are the *purposes* for which the limitations can be applied defined.[83]

The United States and Canadian models give vast discretion to the judiciary on the extent to which individual rights can be justifiably limited, without providing firm examples of the purposes for which rights may be limited. The *Convention* model provides nuance, and a detailed framework to prompt the judges in their decision-making. This would be particularly important in the United Kingdom given the novelty of rights discourse and

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[80] Liberty, *supra* note 14, at 17.

[81] The approach of the United States Supreme Court to limitations on abortion rights for women is an excellent example of this. The Court initially implied a right of privacy into the United States Constitution in *Griswold v. Connecticut*, 381 U.S. 479 (1969). This right was used to found the right of a woman to an abortion in *Roe v. Wade*, 410 U.S. 113 (1979). However, subsequent, more conservative Courts have narrowed this right: see *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992). See generally P. Brest & S. Levinson, *Processes of Constitutional Decision-making, Cases and Materials* (Boston: Little Brown, 1992) 982-1018.

[82] *R v. Oakes*, [1986] 1 S.C.R. 103.

'balancing' of rights in judicial decision-making. Further, the use of detailed limitations on rights maximises parliamentary sovereignty, whilst giving the judiciary a broad framework in which to adjudicate on rights. However, as outlined above, the existing limitations are simply too broad in scope. Whilst the format of the *Convention* is helpful, the substantive limitations need alteration.

Therefore, the removal of the anachronistic limitations on Article 2, 5 and 8 should be undertaken as the first steps in the modernisation of the *Convention* limitations. Further, the general limitations on Articles 8, 10 and 11—national security or public safety, the prevention of disorder or crime, the protection of health and morals, and the protection of the rights of others—need to be re-examined, as their width threatens the existence of the right.[84] These rights, of course, present the largest challenge in formulating coherent limitations as they are the rights most likely to conflict with one another.

Liberty concluded that only two general limitations should be placed on Articles 8, 10 and 11: the protection of rights and freedoms of others, and public safety. However, both are subject to further definition. Accordingly, the protection of the rights and freedoms of others applies only to those rights and freedoms already in the *Convention*. Further, the public safety limitation is expressed in two ways depending on the right to which it attaches. The first is protection from imminent physical harm, which may limit the right to manifest religious and other beliefs, freedom of expression, and the freedom of assembly. However, this limitation "implies, as it sounds, a very *immediate* threat to the physical well-being of particular individuals."[85] The second, the protection of public safety, which may in some circumstances justifiably limit the right to public trials, privacy and freedom of information, "encapsulates *long-term* as well as *immediate* threats

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[83] Liberty, *supra* note 14, at 17.

[84] U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1250 (3 November 1997) (Lord Bishop of Lichfield), "is it the case that the terms in which the restrictions on human rights are framed are too sweeping...?" Further, Wadham, *supra* note 18, at 31, comments that "[w]hilst significant numbers of cases against the United Kingdom in Strasbourg have succeeded because the interference with the right was not 'in accordance with law' or the interference was not proportionate—'not necessary in a democratic society'—few have failed because the purported aim of the restriction was outside of the range provided for in the second part of the article."

[85] Liberty, *supra* note 14, at 19.

of physical harm and potentially includes a wider group of people, including the whole of society, than the former term."[86]

The *Convention*'s national security limitation was excluded by Liberty due to its long history of governmental abuse. Traditionally, the invocation of national security by the government has guaranteed minimal scrutiny by the courts in judicial review cases.[87] The collapsing of national security into 'the protection of public safety' recognises the blanket immunity national security has provided governments, and demands a more searching judicial enquiry. The removal of the protection of health and morals is also appropriate in a modern democracy. Its potential application to the right to privacy under Article 8 raises particular concern. Further, matters traditionally protected under the health and morals limitation—such as the regulation of child pornography—could be justifiably regulated by the state under either of the limitations suggested by Liberty: the protection of the rights and freedoms of others, or the public safety and physical harm limitation.

In sum, the necessary steps to renew the *Convention*'s limitations are: the removal of archaic limitations on Article 2, 5, 8 and 10; the removal of the limitations of national security and the protection of health and morals; the distillation of the prevention of disorder and crime and public safety into two more simple grounds, the protection of the rights and freedoms of other, and the protection of the public safety.

III. CONCLUSION

I have argued that the *Convention* represents a good starting point for a United Kingdom bill of rights, but that several modifications and additions are required to ensure the

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[86] Liberty, *ibid.* This second limb may, for example, allow limitations on the freedom of expression where the speech manifests itself as expressions of racial, sexual, religious or homosexual hatred.

[87] The best example of this involves deportation. Under the *Immigration Act* (U.K.),1971,c.77, at section 14(3), an individual deported on the grounds of national security has no right of appeal. This has been strictly applied by the courts: *R v. Secretary of State for the Home Department, ex p. Hosenball* [1977] 3 All E.R. 452; *R v. Secretary of State for the Home Department, ex p. Cheblak* [1991] 2 All E.R. 319. For an overview of national security see A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law* (London: Longman, 1997) at Chapter 24.

adequate protection of human rights. Further, the question of which limitations may be justifiably placed on rights needs more examination; existing limitations are archaic and over-broad. These suggestions would improve the protection of individual rights. However, to command the maximum legitimacy and respect, the content of a bill of rights should stem from an effective, participatory democratic process. I return to this theme in the next Chapter, and in Chapter Five below.

The *Human Rights Act* does not incorporate the *Convention* rights without qualification. Rather, the Act omits to incorporate Articles 1 and 13, and qualifies the rights of privacy and conscience. The next Chapter examines some of the issues arising from what the United Kingdom has *actually* incorporated.

— CHAPTER THREE —
THE SUBSTANTIVE RIGHTS GUARANTEES IN THE *HUMAN RIGHTS ACT* 1998

In the passage of the *Human Rights Bill* through Parliament, and in public discussion of the Bill, four issues concerning the substantive rights guarantees in the *Human Rights Act*[1] and the *European Convention on Human Rights*[2] were seen as problematic. First, the *Human Rights Act* defines 'Convention rights' to be the "rights and fundamental freedoms set out in... Articles 2 to 12 and 14 of the *Convention*... as read with Articles 16 and 18 of the *Convention*."[3] This specifically excludes Article 1 and Article 13. Secondly, in response to press concerns about the consequences of the *Convention* for both self-regulation and freedom of speech, section 12 of the *Human Rights Act* was added to emphasise the importance of press free speech. Thirdly, as a result of misgivings expressed by various religious organisations, in particular the Church of England, the Church of Scotland and the Catholic Church, over the potential applicability of the *Human Rights Act* to their functions, section 13 of the *Human Rights Act* strengthens the protection afforded to religious groups by the *Convention*. Finally, the *Human Rights Act* incorporates only the sections of the *Convention* ratified by the United Kingdom, and maintains existing British derogations.

This Chapter examines the political context in which such differences arose, the textual content of these differences, and the practical impact that such differences could potentially produce. I argue that the failure to incorporate Article 13 both places the domestic courts in a situation of potential conflict with the European Court, and maintains the status quo of process and remedies in judicial review proceedings. Further, the failure to include Article 1, whilst dubbed unnecessary or inappropriate by even the most vociferous human rights advocates, could sharply limit positive duties on the United

[1] *Human Rights Act* (U.K.), 1998, c.42, Appendix II, *infra*.
[2] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 (entered into force September 3 1953), Appendix I, *infra* [hereinafter, the *Convention*].

Kingdom to guarantee the enjoyment of the *Convention* rights. Secondly, I suggest that the concessions made to appease churches and the press will have little practical impact on the operation of the *Human Rights Act* as they add nothing substantive to the content of the *Convention* rights. Thirdly, I argue that the failure to include various *Convention* Protocols represents a missed opportunity to plug some of the gaps in the *Convention* rights guarantees.

I. PARLIAMENTARY "INNUMERACY AND ILLITERACY"?[4] THE OMISSION OF ARTICLES ONE AND THIRTEEN

Article 1 of the *Convention* demands that contracting parties secure to everyone within their jurisdiction the rights under the *Convention*. Article 13 places an obligation on the parties to secure effective remedies for the violation of *Convention* rights. The Government incorporated neither Article for two reasons. Firstly, the Government asserted that the *Human Rights Bill* implicitly gave effect to the guarantees of both Articles 1 and 13. Secondly, the Government expressed concern that the inclusion of Article 13 would result in the courts fashioning novel and unpredictable remedies in response to *Convention* violations.[5] This section examines both the consequences and the possible governmental justifications for not including Article 13, and the implications of the exclusion of Article 1 for the development of a conception of a human rights violation that moves beyond the liberal negative rights paradigm.

The exclusion of Article 13 ensures that its alleged violation is rendered unjusticiable in British courts. Yet, the English courts already utilise Article 13 in the development of the common law or in the determination of the scope of discretionary powers, including their own. Thus, in *R v. Khan*[6] Lord Nolan, in the majority judgement for the House of Lords,

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[3] *Human Rights Act*, *supra* note 1, at section 1.
[4] U.K., H.L., *Parliamentary Debates*, vol. 584, at col. 383 (19 January 1998) (Lord Lester of Herne Hill).
[5] U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 475 (3 November 1997) (Lord Irvine of Lairg, the Lord Chancellor); U.K., H.C., *Parliamentary Debates*, vol. 312, at col. 979 (20 May 1998) (Jack Straw, the Home Secretary).
[6] [1996] 3 All E.R. 289 at 299.

speaks of the need to ensure that a remedy for an alleged breach of Article 8 of the *Convention* (the right to privacy) complied with the demands of Article 13.[7] Lord Lester suggests that it would be "a strange legal solecism if Parliament were now to exclude Article 13 altogether from being considered by the courts when acting in accordance with the functions vested in them by the Bill."[8]

Further, the right to an effective remedy is an independent fundamental right which has been treated as such by the European Court.[9] Harris et al. describe Article 13 as being of an "autonomous but subsidiary character." [10] Thus,

> While a breach of Article 13 does not depend on establishing a breach of another article, what the obligations of a state are under Article 13 can be established only by taking the exact nature of each *Convention* claim into consideration.[11]

Therefore, the exclusion of Article 13 creates a situation in which a *Convention* right is justiciable only in Strasbourg; apparently a contradictory result to the governmental claim to be "Bringing Rights Home."[12] To compound this problem, the *Human Rights Act* states that a domestic court, in the consideration of issues arising under the Act, "must take into account any... judgement, decision or declaration or advisory opinion of the European Court of Human Rights."[13] This section creates a potential conflict for domestic courts between the jurisprudence of the European Court, in which Article 13 is an autonomous fundamental right, and the specific exclusion of Article 13 from the *Human Rights Act.*

Given the potential difficulties for the courts that the exclusion of Article 13 creates, why has the government produced such an inconsistency between the stated intention to bring

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[7] See also *John v. MGN Ltd.* [1996] 2 All E.R. 35; *Rantzen v. Mirror Group Newspapers Ltd.* [1994] Q.B. 670.

[8] U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1243 (3 November 1997) (Lord Lester of Herne Hill).

[9] For example, *Chahal v. United Kingdom* (1996) 23 E.H.R.R. 413 in which both the advisory panel appeal, and judicial review of a decision to refuse asylum and to deport Mr Chahal were held to violate Article 13.

[10] D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995) at 461 [hereinafter Harris et al.].

[11] *Ibid.*

[12] J. Straw and P. Boateng, 'Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into United Kingdom Law' [1997] E.H.R.L.R. 71.

[13] *Human Rights Act*, *supra* note 1, at section 2.

rights home,[14] and the exclusion of the one Article that seems to embody this aim most neatly? Marshall notes that "the White Paper does not quite tell the whole story. It perhaps needs a sub-title—'Rights Brought Home: All Bar One; And That The Most Important.'"[15] Lord Ackner went so far as to express "suspicion" of the motives of the government.[16] The answer seemingly lies in "the possibility of a court reading into Article 13 implications that might expand the scope of judicial review."[17] Crucially, Article 13 represents a potential challenge to current administrative arrangements which do not "embody effective rights of appeal."[18] Marshall cites three administrative procedures with remedies (or lack thereof) that might potentially fail to comply with Article 13. First, decisions taken under the prerogative power of the Crown are immune from scrutiny by the courts.[19] Second, the privileges of Parliament cannot be subject to judicial review.[20] Finally, in the administration of immigration law the courts must refrain from an examination of the substance of the decision, confining themselves to interference only where the decision is manifestly irrational. The combination of minimal judicial scrutiny, and what Robertson dubs "the twin features of modern immigration control"[21]—administrative discretion and administrative secrecy—suggest that individuals frequently do not receive an effective remedy.[22] This reason for the exclusion of Article 13 finds support in the comments of both the Lord Chancellor and the Home Secretary. Jack Straw asserts that amendment of the *Human Rights Bill* to include Article 13 "would either

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[14] U.K., 'Rights Brought Home: The Human Rights Bill', Cmnd 3782 (24 October 1997) at paras. 1.18-1.19 [hereinafter the White Paper]. Available online: CCTA Government Information Service <http://www.open.gov.uk> (modified daily); and Straw & Boateng, *supra* note 12.

[15] G. Marshall, 'Patriating Rights—With Reservations, The Human Rights Bill 1998' in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998) at 77.

[16] U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 472-473 (18 November 1997) (Lord Ackner).

[17] Marshall, *supra* note 15, at 77.

[18] Marshall, *ibid.*

[19] This is in contrast with statutory powers of the executive which must be exercised in accordance with the principles of natural justice and the Wednesbury test. See *e.g. R v. Secretary of State for Foreign and Commonwealth Affairs, ex p. Everett* [1989] 2 W.L.R. 224 (the decision whether or not to issue a passport is an unreviewable exercise of prerogative power); *R v. Secretary of State for the Home Department, ex p. Northumbria Police Authority* [1988] 2 W.L.R. 590 (Home Secretary has the power to issue such items as CS gas to a Chief Constable without the consent of the police authority when exercising the prerogative power to avert a breach of the peace).

[20] See A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law* (London: Longman, 1997) at 233-252.

[21] G. Robertson, *Freedom, the Individual and the Law* (London: Penguin, 1993) at 387.

[22] See Robertson, *ibid.*; I. A. MacDonald & N. J. Blake, *Immigration Law and Practice* (London: Butterworths, 1990).

cause confusion or prompt the courts to act in ways not intended by the Bill—for example, by creating remedies beyond those available in clause 8."[23]

Despite attempts by Lord Lester to include a general purposes clause in the Bill,[24] the government held firm: the *Human Rights Act* does not contain Article 13 or any general purposes clause. However, this result was mitigated to a limited extent by the admission of the Lord Chancellor that the courts may "have regard to Article 13."[25] Such an approach, and thus the specific tenets of Article 13, may find its way into the courtroom by virtue of *Pepper v. Hart*.[26] However, Lord Lester captures the central tension in this outcome: "it is not satisfactory for the citizen to have to read Hansard and a Minister's statement in order to know something as fundamental as the object and purpose of the Bill."[27]

The exclusion of Article 1 was not deemed problematic by most commentators. Lord Lester commented that the omission of Article 1 was appropriate given that it represents "an interstate obligation to secure the rights guarantees."[28] However, Article 1, in combination with the substantive guarantees contained in Articles 2-12 and Article 14, represents the basis for positive duties on the part of contracting parties which go beyond the negative obligations on states generally envisioned by the text of the *Convention*.[29]

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[23] U.K., H.C., *Parliamentary Debates*, vol. 312, at col. 979 (20 May 1998) (Jack Straw, the Home Secretary). See also Lord Irvine, "[w]e also believe 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 clause 8 remedies, which we regard as sufficient and clear." U.K., H.L., *Parliamentary Debates*, vol. 583 at col. 475 (18 November 1997).

[24] See *e.g.* U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 467 (18 November 1997) (Lord Lester of Herne Hill). The aim of such a clause would be to "both secure the [Convention] rights in domestic law and the obligation to secure effective domestic remedies."

[25] U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 477 (18 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).

[26] [1993] AC 593. The House of Lords held that Hansard (the written record of Parliamentary Debates) may be used to aid statutory interpretation where the meaning was ambiguous or obscure.

[27] U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 468 (18 November 1997) (Lord Lester of Herne Hill).

[28] *Ibid.*, at col. 467.

[29] *Belgian Linguistics Case (No. 2)* (1968), 6 Eur. Ct. H.R. (Ser. A), 1 E.H.R.R. 235; *Lingens v. Austria* (1986), 103 Eur. Ct. H.R. (Ser. A), 8 E.H.R.R. 407.

Using these textual suggestions, the European Court has implied various positive obligations on to states.[30]

Accordingly, in fulfilling its obligations under the *Convention*, the state may have a duty to protect an individual's rights from infringement by another individual.[31] However, "[t]he full extent to which the *Convention* places states under positive obligations to protect individuals against infringements of their rights by other private persons has yet to be established."[32] Nevertheless, it is apparent that, "[i]nsofar as the *Convention* touches the conduct of private persons, it does so only indirectly through such positive obligations as it imposes upon a state."[33] Such obligation, therefore, flows from the wording of Article 1, and arises because the state has failed, by insufficient regulation of the private actor, to 'secure' the rights within the *Convention* to individuals. Therefore, the exclusion of Article 1 from the *Human Rights Act* may have implications for the development of a human rights jurisprudence that moves beyond the liberal conceptions of negative rights affecting only direct state action.

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[30] Harris et al, *supra* note 10, at 20. They cite the two early examples of *Marckx v. Belgium* (1979), 31 Eur. Ct. H.R. (Ser. A) and *Airey v. Ireland* (1979), 32 Eur. Ct. H.R. (Ser. A) as cases in which the Court initially expounded implied positive obligations in the Convention. In the former, the Court, in the context of Article 8, stated that in addition to the classic negative duty to refrain from acting, "there may be positive obligations inherent in an 'effective respect' for family life." *Ibid.*, at para. 31; and in *Airey*, the Court found a positive obligation under Article 8 to provide financial aid for a battered wife to apply to court for a separation, at para. 32.

[31] See also, Applications 6780/74, 6950/75 *Cyprus v. Turkey* (1976), 2 Eur. Comm. H.R. D.R. 1 (1976), 4 E.H.R.R. 282 (European Commission found rapes perpetrated by Turkish solders to be imputable to Turkey as inadequate prevention measures were taken, and no disciplinary action occurred against those responsible); *X & Y v. Netherlands* (1985), 91 Eur. Ct. H.R. (Ser. A) (in order to ensure respect for private life, a state may have to take measures even as between individuals); *Young, James and Webster v. United Kingdom* (1981), 44 Eur. Ct. H.R. (Ser. A), 4 E.H.R.R. 38 (positive obligations exist upon a state to ensure that private bodies do not interfere with individual freedom of association).
See generally A. Clapham, 'The "Drittwirkung" of the Convention' in R.St.J. Macdonald, F. Matscher, & H Petzold eds., *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) 163; A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993); A. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (Strasbourg: Council of Europe, 1983); E.A. Alkema, 'The Third-Party Applicability or "Drittwirkung" of the European Convention on Human Rights' in F. Matscher & H. Petzold eds., *Protecting Human Rights: The European Dimension* (Köln: Carl Heymanns Verlag KG, 1988) 33.

[32] Harris et al, *supra* note 10, at 21.

[33] *Ibid.*

In sum, the exclusion of Articles 1 and 13 may present problems for the domestic courts. The next section analyses the concern expressed by the press over the *Human Rights Act*, and the governmental response to these concerns.

II. THE PRESS, PRIVACY AND THE *HUMAN RIGHTS ACT*

The necessity of a statutory or common law of privacy has been the focus of debate in the United Kingdom. United Kingdom law contains no mechanism by which to protect the privacy of its citizens.[34] Yet the creation of a statutory or common law regime to protect privacy is controversial. On the one side are those who argue that the free speech of the press must stay unfettered, and that self-regulation by the Press Complaints Committee (the P.C.C.) remains preferable to control by the courts.[35] In contrast, others cite the

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[34] The most vivid illustration of this hole in English law can be seen in *Kaye v. Robertson* [1991] F.S.R. 62 in which reporters from the *Sunday Sport* illegally entered the hospital room of the actor Gordon Kaye, where he was recovering from a serious car accident, to take photographs and conduct an interview. Justice Porter issued a serious of orders effectively banning the publication of the story. In the Court of Appeal, the court upheld the plaintiff's claim, but given the extent of the privacy law had to issue a more restricted order based on the implication of Kaye's consent in the Sunday Sport's story. The new order allowed the publication of the story and some photographs, insofar as it was made explicit that neither had been obtained with consent, see B.S. Markesinis, 'Our Patchy Law of Privacy—Time to do Something about It' [1990] 53 M.L.R. 802.

Various statutory instruments exist which tangentially impact upon the right to privacy. For example various statutes permit the collection of information, but prohibit its subsequent disclosure: *Interception of Communications Act* (U.K.), 1985, c. 56 (information collected from authorised telephone tapping): *Taxes Management Act* (U.K.), 1970, c. 9 (prohibits the disclosure of information collected to ascertain the appropriate tax levels). See also the *Broadcasting Act* (U.K.), 1996, c. 55 (charges the Broadcasting Standards Commission with drawing up a code to deal with unwarranted invasions of privacy).

The common law remains murky as to the extent of any right to privacy. Generally, the authorities infer that no such right exists: *Malone v. Commissioner of Police for the Metropolis* [1979] 1 Ch. 344 (the right to privacy is novel, and as such remains an issue for Parliament); *Kaye v. Robertson and Sport Newspapers Ltd., ibid.* However, in *A.G. v. Guardian Newspapers Ltd. (No. 2)* [1988] 3 All E.R. 639; Lord Keith of Kinkel suggested that the right to privacy is one that the law should seek to protect.

On privacy in general see: Robertson, *supra* note 21, at Chapter 3; S.H. Bailey, D.J. Harris and B.L. Jones, *Civil Liberties: Cases and Materials* (London: Butterworths, 1995) at Chapter 8; D. Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: Oxford University Press, 1993) at 388.

[35] The P.C.C. is a body set up by newspaper proprietors, chaired by Lord Wakeham, and comprising 15 other members, of whom 8 are unconnected to the press. The P.C.C. polices the Code of Conduct, which comments on privacy at section 3(i): "[e]veryone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent." At section 3(ii) the Code states that "the use of long lens photography to take pictures of people in private places without their consent is unacceptable." The Code establishes a public interest exception to the above. Thus, the public interest includes detecting or exposing crime or a serious misdemeanour; protecting public health and safety; preventing the misleading of the public by an individual

increasingly intrusive behaviour of the media, in particular the tabloid press, in their coverage of the lives of the famous.[36] A series of official reports recommended criminal sanctions for those who obtain information or photographs from improperly used electronic surveillance equipment.[37] However, such recommendations have not been enacted.

The tension between the freedom of the press, and the need for some privacy protection became apparent during the passage of the Bill through Parliament. Concern was expressed by Lord Wakeham, Chairman of the P.C.C., about the *Human Rights Act*, in particular its incorporation of Article 8 of the *Convention*. Lord Wakeham outlined a number of specific issues of consequence. He was first worried that the P.C.C. would represent a 'public authority' for the purposes of the *Human Rights Act*, forcing it to comply with the Act's guarantees.[38] A public authority is defined for the *Human Rights Act* as including "any person certain of whose functions are functions of a public nature..."[39] The government was initially of the opinion that the P.C.C. would not be caught by this definition, and would therefore fall outside the scope of the Act.[40] However, recently the courts have taken an expansive view of which bodies constitute public authorities for the purposes of judicial review; focusing on the functions of the body in question as opposed to the source of the power. Thus, even regulatory bodies which do not derive their power either from statute or from contract have been found to

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or organisation. Further, "in cases involving children editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of the child." Any publication censured by the P.C.C. must print the adjudication in full, and prominently. Online: Press Complaints Commission <http://www.pcc.org.uk/> (date accessed 30 June 1999). See Feldman, *ibid.*, at 586-589; Robertson, *supra* note 21, from 111-116 (arguing that the P.C.C. has failed to achieve any realistic control of the press).

[36] The most recent example is the Sun's publication of a topless photograph of Sophie Rhys-Jones taken twelve years ago, see Guardian Staff, 'Sun Apologises to "Devastated" Sophie' *The Guardian* (26 May 1999), online: The Guardian <http://www.guardianunlimited.co.uk> (date accessed 30 June 1999).

[37] See U.K., *Report of the Committee on Privacy (The Younger Committee)*, Cmnd 5012 (London: Her Majesty's Stationary Office, 1972); U.K., *Breach of Confidence*, Law Commission Report No. 110, Cmnd 8388 (London: Her Majesty's Stationary Office, 1981); U.K., *Report of the Committee on Privacy (The Calcutt Report)*, Cmnd 1102 (London: Her Majesty's Stationary Office, 1990); U.K., *Review of Press Self-Regulation (The Calcutt Report)*, Cmnd 2135 (London: Her Majesty's Stationary Office, 1993).

[38] Note that there was no suggestion at any point that the press itself might constitute a public authority.

[39] *Human Rights Act*, *supra* note 1, at section 6(3).

[40] U.K., H.C., Research Paper 98/25, *The Human Rights Bill: Privacy and the Press* (13 February 1998) (Jane Fiddick), online: C.C.T.A. Government Information Service <http://www.parliament.co.uk> (modified daily) at 19.

be subject to the judicial review powers of the courts.[41] As a result, it became apparent that the courts would, in all probability, view the P.C.C. as a public authority.[42]

If the P.C.C. was indeed a public authority, the implications for self-regulation were seen by Lord Wakeham to be dramatic:

> If the PCC's adjudications on matters of privacy were subject to subsequent action by the courts, my task of seeking to resolve differences, get a public apology where appropriate or if necessary deliver a reprimand to an erring editor would no longer be a practical proposition. This is because voluntary co-operation by editors would open them up to subsequent action in the courts. Material freely volunteered would become part of a legal action. From day one, therefore, the newspapers' approach to any complaint of invasion of privacy would be highly cautious and legalistic—if, indeed they chose to co-operate at all.[43]

Further, despite the failure to incorporate Article 13, the spectre of 'effective remedies' raised its head. The P.C.C. has neither the power to issue pre-emptive injunctions, or to award damages. As a public authority, the courts could potentially demand that it supplies individuals with remedies seen to be effective for the purposes of the *Human Rights Act*. Lord Wakeham asserted that such a requirement would destroy the subtle system set in place by self-regulation.[44] An amendment introduced by Lord Wakeham to exempt the P.C.C. from the terms of the *Human Rights Act* was rejected.[45] Rather, the government affirmed that the P.C.C. was indeed the correct institution to monitor transgressions by the press, but that the remedial and enforcement powers of the P.C.C. needed strengthening. Only where the P.C.C. lacked the necessary powers, or failed to enforce them, were the courts an appropriate body to fill the deficit.[46]

The second major concern highlighted by Lord Wakeham was that the *Human Rights Act* introduced a privacy law by the incorporation of Article 8. The government remained

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[41] *R v. Panel on Take-overs and Mergers, ex p. Datafin plc* [1987] Q.B. 817.
[42] U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 784 (24 November 1997) (Lord Irvine of Lairg, the Lord Chancellor). Various authoritative authors take this position, see S.A. de Smith, Lord Woolf and J. Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) at 182.
[43] U.K., H.L., *Parliamentary Debates*, vol. 585, at col. 832 (5 February 1998) (Lord Wakeham).
[44] *Ibid.*
[45] U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 773 (3 November 1997) (Lord Wakeham).
[46] U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1242 (3 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).

unimpressed by this assertion. The Lord Chancellor commented that the judiciary were "pen-poised, regardless of incorporation of the *Convention*, to develop a right to privacy to be protected by the common law."[47] Further, such development of a common law right to privacy could only be improved by incorporation of the *Convention*, as "the judges will have to balance and have regard to Articles 10 and 8, giving Article 10 its due high value."[48]

Despite the firmness of the government on both of these issues, consultations were held with the P.C.C. and other press representatives.[49] An amendment was subsequently introduced, which became section 12 of the *Human Rights Act*. The section applies to situations where a court remedy under the *Human Rights Act* would affect the exercise of the right to freedom of expression.[50] Where pre-emptive relief is applied for, section 12 places several obstacles in the path of the applicant. First, where the application is made *ex parte*, the court must not grant relief unless the applicant has taken "all practicable steps to notify the applicant"; or "there are compelling reasons why the respondent should not be notified."[51] Second, interim relief should not be granted which would restrain publication unless the court "is satisfied that the applicant is likely to establish that publication should not be allowed."[52] Finally, a court must have "particular regard" to the importance of the *Convention* right to freedom of expression; and where the disputed material appears to be "journalistic, literary or artistic material (or conduct connected with such material)", to the extent to which the material is, or will become, in the public domain, the public interest in material, and the existence of any relevant privacy code.[53] Thus, compliance with the terms of the P.C.C. code by a newspaper would weigh in its favour.[54]

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[47] U.K., H.L., *Parliamentary Debates*, vol. 585, at col. 784 (24 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).
[48] *Ibid.*, at col. 785.
[49] U.K., H.C., *Parliamentary Debates*, vol. 312, at col. 541 (20 May 1998) (Jack Straw, the Home Secretary).
[50] *Human Rights Act*, *supra* note 1, at section 12(1).
[51] *Ibid.*, at section 12(2).
[52] *Ibid.*, at section 12(3).
[53] *Ibid.*, at section 12(4).
[54] K.D. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 M.L.R. 79 at 95.

In conclusion, the concerns elucidated by Lord Wakeham seem overstated. Press self-regulation has not proved a satisfactory solution to the increasing hounding of public persons, and the printing of information that cannot be described as being in the public interest, caused by tabloid circulation wars.[55] The right to freedom of expression is not absolute. Article 10(2) allows the curtailment of the scope of Article 10 in the interests of the rights of others. The weighing of these rights, where they conflict, must be done by an independent body, not by an organisation such as the P.C.C. with vested interests on one side of the balance. Nonetheless, the jurisprudence from the European Court suggests that the press has little to fear from court adjudication on the correct balance between privacy and free expression. Under the *Convention* any restriction on freedom of expression must be prescribed by law, necessary in a democratic society, and fall within one of the justificatory categories in Article 10(2). The burden on the state of proving necessity is a heavy one, the court's jurisprudence indicating that freedom of expression should generally be given primacy over competing interests.[56]

Section 12 represents a clever concession by the government; an appeasement of the press which in practice adds little to the *Human Rights Act* above the existing content of Articles 8 and 10. Whilst section 12 highlights the special concern the courts must display for prior restraint, what Lord Lester describes as the "most draconian form of interference in free speech",[57] this analysis is apparent on the face of Article 10. The European Court itself has displayed an aversion to prior restraint. Such action will be subject to intense scrutiny by the European Court, with the burden of proving necessity a heavy one.[58] Further, although commentators suggested that the section 12(4) would push the press to develop more effective methods of enforcing privacy codes,[59] section 12 does not render compliance with the P.C.C. Code sufficient in all circumstances. Rather,

> Although this gives an important legal status to the industry's own procedures, the courts are not bound by it. So the extent to which a newspaper has complied

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[55] For a description of the record of the P.C.C. since its inception, see Robertson, *supra* note, at 111-116.
[56] See *Handyside v. United Kingdom* (1976), 24 Eur. Ct. H.R. (Ser. A); *Sunday Times v. United Kingdom* (1979), 30 Eur. Ct. H.R. (Ser. A).
[57] U.K., H.L., *Parliamentary Debates*, vol. 593, at col. 2114 (29 October 1998) (Lord Lester of Herne Hill).
[58] *Observer and Guardian v. United Kingdom* (1991), 216 Eur. Ct. H.R. (Ser. A).
[59] U.K., H.L., *Parliamentary Debates*, vol. 593, at col. 2114 (29 October 1998) (Lord Lester of Herne Hill).

> with the P.C.C. Code may not be a decisive factor if the courts take the view in any case that the Code itself falls short of acceptable standards.[60]

Therefore, the section still implicitly accepts that where self-regulation fails, it is the job of the courts to fill in the gaps.

III. CHURCHES, RELIGIOUS ORGANISATIONS AND THE *HUMAN RIGHTS ACT*

From the birth of the *Human Rights Bill* support was forthcoming from representatives of many religious organisations.[61] In the Second Reading Debate in the House of Lords, the Lord Bishop of Lichfield expressed his support adding that the Bill possessed a "spiritual and religious dimension, as well as a legal and human dimension."[62] However, after the Second Reading Debate it became apparent that the wide definition of 'public authority' in the Bill could include churches and some religious organisations in certain circumstances. Specifically, the religious organisations expressed concern over the potential for secular court adjudication on matters traditionally reserved to the religious sphere. Thus, the possibility of requiring the church to perform marriages between, and approve adoptions by, lesbians and gay men, to ordain women and force church schools to appoint non-Christian staff were themes running through the Parliamentary debates.

Several amendments were tabled and subsequently withdrawn or defeated: seeking various exemptions of churches, religious organisations, and religious schools from the ambit of the *Human Rights Act.*[63] However, Baroness Young eventually succeeded in

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[60] Ewing, *supra* note 54, at 95.

[61] For an overview of religious rights in the United Kingdom see P. Cumper, 'Religious Human Rights in the United Kingdom' (1996) 10 Emory Int'l L.R. 115; and A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993).

[62] U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1249 (3 November 1997) (Lord Bishop of Lichfield).

[63] Attempts to exempt churches and religious organisations from the *Human Rights Act* included: U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 789-91 (24 November 1997) (Baroness Young of Old Scone) (sought to exclude religious organisations, hospices, voluntary-aided religious schools and religious charities from the scope of the *Human Rights Act*), withdrawn at col. 802; U.K., H.L., *Parliamentary Debates*, vol. 584, at col. 1253 (19 January 1998) (Lord Williams of Elvel) (remedies available for violation of the *Human Rights Act* should be subject to an exemption on the grounds of religious beliefs and

passing a blanket amendment in the Third Reading Debate in the House of Lords. On the scope of 'public authority', the amendment created a defence of religious belief for *Convention* violations.[64] Concerning religious schools, the amendment confirmed the ability of a church school or schools with religious foundations to select teachers on the basis of their beliefs, and to "dispense with the services of a person in the position of headmaster, deputy headmaster or other senior post whose beliefs and manner of life are not appropriate to the basic ethos of the school."[65] Additionally, the amendment guaranteed the rights of religious charities to select senior positions according to their religious beliefs and practices, and to sack those individuals in senior posts whose beliefs and practices are not in sync with the ethos of the charity.[66] Responding to fears that the *Human Rights Act* could compel the Church to marry lesbians and gay men, the amendment confirmed that a minister had no obligation to administer a marriage contrary to his religious beliefs.[67] Further, the amendment excluded the ecclesiastical courts from the definition of a public authority.[68]

Government consultation with the major British religious organisations occurred simultaneously as the move of the Bill from the House of Lords to the House of Commons, following the admission of Lord Irvine that "it did not occur to anyone in the

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practices), withdrawn at 1262; U.K., H.L., *Parliamentary Debates*, vol. 584, at col. 1319-1324 (19 January 1998) (Baroness Young of Old Scone) (exclusion of persons exercising functions on behalf of a 'church, religious denomination, mosque, synagogue or temple' from the definition of 'public authority'), went to a division: defeated by 93 votes to 82; U.K., H.L., *Parliamentary Debates*, vol. 585, at col. 747-750 (5 February 1998) (Lord Campbell of Alloway) (courts should be excluded from making any declaration of incompatibility on spiritual matters, any alleged breach of the substantive *Convention* rights should be referred to the European Court of Human Rights), withdrawn at col. 760.
Currently, schools in England and Wales with voluntary or grant-maintained schools which were established, or have been maintained on a religious basis, may consider religious opinions and practices in the appointment of all teachers, *Education Act* (U.K.), 1996, c.56, sections 146, 304, 306; similar provisions exist in Scotland, *Education (Scotland) Act* (U.K.), 1980, c.44, section 21 (2A). See U.K., H.C. Research Paper 98/26, *The Human Rights Bill: Churches and Religious Organisations* (13 February 1998) (Arabella Thorp), online: C.C.T.A. Government Information Service <http://www.parliament.co.uk> (modified daily) at 17. One amendment was introduced and subsequently withdrawn referring to religious schools: U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 790 (24 November 1998) (Baroness Young of Old Scone) (exclusion of religious schools from the definition of 'public authority' in the Bill'), withdrawn at col. 820.

[64] U.K., H.L. *Parliamentary Debates*, vol. 585, at col. 771-773 (5 February 1998) (Baroness Young of Old Scone).

[65] *Ibid.*

[66] *Ibid.*

[67] *Ibid.*

[68] *Ibid.*

government that the Churches would have any particular difficulty in playing their proper role in the enforcement of human rights in Britain."[69] In the House of Commons, Jack Straw summarised the response of the government to the amendments from the House of Lords. Firstly, the government expressed concern that the amendments might in themselves violate the *Convention* by preventing a remedy in the United Kingdom that could be gained in the European Court.[70] Further, the potential for uncertainty and discrimination in deciding which religions in the United Kingdom represented principal religions would be problematic, as well as displaying potential for involving the courts in "doctrinal issues".[71] The government proposed a new clause 9 (subsequently section 13 of the *Human Rights Act*), which states that where the determination of issues arising under the Act by a court "might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right."[72] In introducing the new clause, Jack Straw noted that the clause does not "exempt Churches and other religious organisations from the scope of this Bill... any more than from that of the Convention. It is to reassure them against the Bill being used to intrude upon genuinely religious beliefs or practices."[73]

The concerns expressed by religious organisations seem overstated. Several reasons support this conclusion. First, whilst the definition of 'public authority' in the *Human Rights Act* seems almost certainly to include Churches and religious organisations in particular circumstances, the *Human Rights Act* would apply to them only in the exercise of public functions. Lord Irvine in the House of Lords, and Jack Straw in the House of Commons both emphasised this point. Thus, "[a]s the Bill stands, a Church which has

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[69] U.K., H.L., *Parliamentary Debates*, vol. 584, at col. 1343 (27 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).
[70] U.K., H.C., *Parliamentary Debates*, vol. 312, at col. 1019 (20 May 1998) (Jack Straw, the Home Secretary).
[71] *Ibid.*
[72] *Human Rights Act*, *supra* note 1, at section 13.
[73] U.K., H.C., *Parliamentary Debates*, vol. 312, at col. 1021 (20 May 1998) (Jack Straw, the Home Secretary).

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."[74] In practice,

> [M]uch of what the Churches do is, in the legal context and in the context of the European Convention on Human Rights, essentially private in nature, and would not be affected by the Bill even as originally drafted. For example, the regulation of divine worship, the administration of the sacrament, admission to Church membership or to the priesthood and decisions of the parochial church councils about the running of the parish church are, in our judgement, all private matters... On the occasions when the Churches stand in the place of the state, convention rights are relevant to what they do. The two most obvious examples relate to marriages and the provision of education in Church schools. In both areas, the Churches are engaged... in an activity which is also carried out by the state, and which, if the Churches were not engaged in it, would be carried out directly by the state.[75]

Second, the *Human Rights Act* does not place British churches and religious organisations under any additional obligations. Alleged violations of the *Convention* by a religious organisation may already be the subject of a complaint to the European Court in Strasbourg. The difference lies merely in the venue; under the *Human Rights Act*, such actions may be heard in a domestic court. Further, the *Convention* itself contains strong protections for religious beliefs and practices in Article 9. Such rights apply both to individuals and the church as a whole:

> When a Church body lodges an application under the Convention, it does so in reality on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Art. 9(1) in its own capacity as a representative of its members.[76]

In addition, Article 9 arguably imposes a positive duty on the state to "protect manifestations of religious belief."[77] Where the rights of the Church and the rights of an individual conflict, the scenario stimulating the most concern from the Churches and religious organisations, the European Court has tended to weigh the rights within Article

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[74] U.K., H.L., *Parliamentary Debates*, vol. 584, at col. 1345 (27 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).

[75] U.K., H.C., *Parliamentary Debates*, vol. 312, at col. 1015 (20 May 1998) (Jack Straw, the Home Secretary).

[76] Application 7805/77, *Pastor X and the Church of Scientology v. Sweden* (1979), 12 Y.B. Eur. Conv. H.R. 244 at 246.

[77] Harris et al, *supra* note 10, at 359. They cite *Otto-Preminger-Institut v. Austria* (1994), 295 Eur. Ct. H.R. (Ser. A) at para. 47, "the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the *responsibility* of the state." [emphasis added]

9 more heavily.[78] Thus in *Otto-Preminger-Institut v. Austria*[79] the government seized a film considered offensive to the large majority of Catholic inhabitants in the region in which the film was to be shown. Such action constituted a violation of the applicant's freedom of expression under Article 10, but was justified by the need for the protection of the religious rights and freedoms of others. Finally, the exceptions to the scope of Article 9 contained in Article 9(2),[80] have been infrequently invoked given the reluctance of the Court to narrow the parameters of Article 9(1).[81]

The result of section 12 mirrors that of section 13, appeasement without substantive compromise. Just as section 13 adds little to Article 10, section 12 adds nothing to Article 9. It must be noted, however, that religious organisations enjoyed far more sympathy and support in their quest for exemption from the *Human Rights Act* than did the press. The success of the blanket amendment of Baroness Young's amendments in the House of Lords Third Reading Debate bears testament to this support. In light of this, that the government kept the Churches and the religious organisations within the scope of the *Human Rights Act* is laudable, and also necessary given the entwining of Church and State in the United Kingdom. Where the Church performs functions of a public nature, particularly where the Church is acting in replacement of, or on behalf of the State, the case for its compliance with the guarantees of the *Human Rights Act* is compelling.

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[78] Harris et al., *ibid.*
[79] *Otto-Preminger*, *supra* note 77.
[80] Limitations prescribed by law which are necessary in a democratic society in the interests of public safety, the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
[81] Harris et al., *supra* note 10, at 366.

IV. DEROGATIONS, RESERVATIONS, OTHER PROTOCOLS AND THE *HUMAN RIGHTS ACT*

Finally, the *Human Rights Act* maintains the existing derogations under Article 15, reservations, and non-ratifications of protocols.[82] The United Kingdom currently maintains a derogation to Article 5(3) for provisions in the *Prevention of Terrorism Act*,[83] retained in the *Human Rights Act* at section 14.[84] This derogation expires at the end of five years,[85] unless the Home Secretary orders a further five year extension.[86] Article 15 allows derogations only in times of war or other public emergency threatening the life of the nation. It is arguable that given the current peace-process in Northern Ireland, the situation cannot constitute a public emergency threatening the life of the nation.

The United Kingdom has a reservation in place for the Article 2 of the First Protocol.[87] The White Paper summarises the stated justifications for this:

> 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 rights 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.[88]

This reservation is preserved by section 15(1)(a) of the *Human Rights Act*. Further, the White Paper makes it clear that the government has no plans for reconsideration, or periodic review beyond the five yearly preparation of a report to be laid before Parliament by the Secretary of State for Education and Employment.[89]

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[82] *Human Rights Act*, *supra* note 1, at section 14 (definition of derogations); section 15 (definition of reservation); section 16 (period for which the derogations have effect); and section 17 (periodic review of reservations).

[83] *Prevention of Terrorism (Temporary Provisions) Act* (U.K.), 1984, c. 8.

[84] See *Brogan v. United Kingdom* (1988), 145 Eur. Ct. H.R. (Ser. A), 11 E.H.R.R. 117, *Brannigan and McBride v. United Kingdom* (1993), 258 Eur. Ct. H.R. (Ser. A), 17 E.H.R.R. 539, see Chapter Two, above.

[85] *Human Rights Act*, *supra* note 1, at section 16(1).

[86] *Ibid.*, at section 16(2).

[87] *Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, Eur. T.S. 9.

[88] The White Paper, *supra* note 14, at para 4.5.

[89] *Ibid.*, at para. 4.7 and 4.8.

The White Paper rejects ratification of any additional Protocols to the *Convention*. The Fourth Protocol, whilst signed by the United Kingdom, has not been ratified due to concerns over the "exact extent of obligation regarding a right of entry [to the State of which a person is a national]."[90] Specifically, several categories of British nationals do not currently have a right of entry, including British dependent territory citizens, British overseas citizens, British subjects and British nationals overseas.[91] An attempt to include the Fourth Protocol in the *Human Rights Act* was rejected in the House of Lords.[92] The Seventh Protocol[93] was felt to "reflect principles already inherent in our law."[94] However, the ratification of the Protocol could not proceed due to potential conflicts with domestic law. Happily the government intends to "legislate to remove these inconsistencies, when a suitable opportunity occurs, and then to sign and ratify the Protocol."[95]

One unexpected consequence of the *Human Rights Act* will be the ratification of Protocol 6: the prohibition of the death penalty. Ratification of Protocol 6 was rejected by the government in the White Paper. It was felt 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."[96] However, a Commons amendment was introduced and passed at the Committee stage.[97] Now section 1(1)(c) of the *Human Rights Act* includes the guarantees of the Sixth Protocol in the rights protected by the Act.

The maintenance of the reservations, derogations and failure to ratify the *Convention* Protocols represents a missed opportunity to plug some of the holes in the substantive

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[90] *Ibid.*, at para. 4.11.

[91] U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 504 (18 November 1997) (Lord Williams of Mostyn, Parliamentary Under-Secretary of State, Home Office).

[92] U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 492 (18 November 1997) (Earl Russell). This amendment prompted Lord Browne-Wilkinson to state, "let us not try to protect for the time being every human right that anyone can think of." *Ibid.*, at col. 498.

[93] *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 22 November 1984, Eur. T.S. 117

[94] The White Paper, *supra* note 14, at para. 4.15.

[95] *Ibid.*, at para. 4.15.

[96] *Ibid.*, at para. 4.13.

[97] U.K., H.C., *Parliamentary Debates*, vol. 312, at cols. 987-1012. The death penalty remained in the United Kingdom for treason and piracy, but both offences had been recently abolished in the *Crime and Disorder Act* (U.K.), 1998, c. 37, section 36. The effect of the ratification of the Sixth Protocol is to remove

rights guarantees in the *Convention*. Given that the propagation of new Protocols keeps the *Convention* itself up to date;[98] the non-ratification of these Protocols reflects a failure to modernise the rights guarantees in the *Convention*.

V. CONCLUSION

I argued in Chapter One that the substantive rights guaranteed in the *Convention* were insufficient to effectively protect individual rights. In this Chapter, I have suggested that the *Human Rights Act* does nothing to ameliorate this problem. Indeed, by failing to incorporate Articles 1 and 13, and the Protocols to the *Convention*, and by modifying the privacy and religious conscience provisions, the *Human Rights Act* actually offers weaker protection than the *Convention* itself.

In the next Chapter I discuss the procedural and remedial framework created by the *Human Rights Act*. I explore the tension in the Act between individual rights protection and the preservation of parliamentary sovereignty, suggesting that the emphasis on parliamentary sovereignty in the Act compromises the effective protection of human rights.

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the possibility of the re-introduction of the death penalty, unless the United Kingdom derogates or reneges on its Treaty obligations.

[98] P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Deventer: Kluwer Law and Taxation Publishers, 1990) at 3.

— CHAPTER FOUR —
THE PROCEDURAL AND REMEDIAL FRAMEWORK CREATED BY THE *HUMAN RIGHTS ACT* 1998

The previous Chapters have focused on the substantive content of the *Human Rights Act*. Of course, in order to guarantee that substantive rights are realised, a bill of rights must provide for effective procedural mechanisms and remedies. Further, a bill of rights, as a document that demarcates the relationship between the state and its citizens, must be accessible to all citizens; even those with limited financial resources. Liberty, in its consultation paper, highlights this theme:

> [T]o be more than a statement of intent a Bill of Rights must be enforceable by individuals through the courts. A Bill of Rights which does not provide people with remedies against abuse of authority where none now exist... would fail to achieve the fundamental aim of empowering those whose rights are most vulnerable to abuse.... Likewise, we recognise that for the rights in this Bill to be realisable it is essential that access to legal aid is available.[1]

The procedural tools set up by the *Human Rights Act* reflect the tension between the desire to preserve parliamentary sovereignty and the concern for the protection of individual human rights. This friction is examined further in Chapter Five. However, at the beginning of this Chapter it is important to emphasise that each enforcement procedure mirrors this tension. In particular, as will be argued in the next Chapter, the procedural mechanisms are underpinned far more by a concern to maintain parliamentary sovereignty than with the desire to *effectively* uphold individual rights. Accordingly, throughout this Chapter it will be apparent that the effective enforcement of substantive *Convention* rights, and the goal of matching rights violation to remedy, remains illusory.

At the centre of the *Human Rights Act* are two legally enforceable obligations: a duty of Convention compliance by public authorities, and a duty of statutory interpretation on the courts. These are the twin pillars around which the procedural mechanisms and remedies are structured.

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[1] Liberty, *A People's Charter: Liberty's Bill of Rights, A Consultation Document* (London: National Council for Civil Liberties, 1991) at 24.

This Chapter turns first to the provisions in the *Human Rights Act* for pre-legislative scrutiny. Such scrutiny has a vital role in a system for the protection of human rights that has not relinquished full power of adjudication to the courts; as Parliament remains the only entity empowered to fully determine legislative compatibility with the *Convention*. However, such scrutiny must be independent, consistent, informed and effective. I argue that the existing regime, even with the small adjustments made by the *Human Rights Act*, does not meet these criteria.

Part II explores who can rely on the *Human Rights Act* in court. I argue that the standing rules in the *Human Rights Act* narrow the existing standing test for judicial review, with detrimental consequences for the involvement of public interest groups in human rights litigation.

In Part III I examine the duty placed on public authorities by the *Human Rights Act*. I suggest that the problems identified in the House of Lords Debates concerning the scope of the definition of 'public authority' can be evaded using existing jurisprudence on the definition of public body in judicial review cases. Similarly, the uncertainty as to the extent to which the *Convention* may be relied on in litigation between non-state actors, may be eased by examination of the jurisprudence of the European Court of Human Rights, and recent cases of the English Court of Appeal.

I turn next, in Part IV, to an investigation of the interpretative obligation placed on the courts by the *Human Rights Act*. I submit that the interpretative obligation in section 3 presents significant scope for purposive interpretation and rights maximising. Further, any limitations placed on section 3 by a judicial unwillingness to 'strain' the meaning of legislation, can be partially mitigated by the interpretative technique of reading legislation down. Where a legislative provision cannot be read compatibly with the *Convention*, a court must then decide whether or not the violation represents a justifiable limitation on a *Convention* right. To do so, domestic courts must develop a coherent standard of

deference to the legislature. I argue that the appropriate standard must be the doctrine of proportionality.

Part V investigates the remedial provisions in the *Human Rights Act*. The remedy provided where primary legislation contravenes the *Convention*—a declaration of incompatibility—does not provide the immediate litigant with an effective remedy. Further, it does not necessarily lead to any amendment to the offending legislative provision. Whilst the provision of damages in public law cases is to be welcomed, the circumstances in which a litigant could be awarded damages are highly circumscribed.

Finally, I briefly investigate some of the problems of access to justice. The governmental refusal to set up a Human Rights Commission, in combination with recent overhauls of the legal aid system, imply that for many would-be litigants the guarantees in the *Human Rights Act* will remain illusory.

I. PRE-LEGISLATIVE SCRUTINY UNDER THE *HUMAN RIGHTS ACT*

Pre-legislative scrutiny is a necessary component of a holistic approach to the protection of human rights. It aims to detect, and to prevent the promulgation of legislation that would violate *Convention* rights. Further, it represents an over-arching attack on human rights violations, rather than the ad-hoc, fact specific prevention offered by the courts. The goals of pre-legislative scrutiny are particularly acute in a human rights protection system that, in the preservation of parliamentary sovereignty, maintains the final word of compatibility for the legislature. Nonetheless, such a program must be effective. The aim of the pre-legislative scrutiny regime in the *Human Rights Act* was stated by the government to "make the human rights implications of proposed Government legislation more transparent."[2] This section examines whether or not this aim will be realised by the

[2] U.K., 'Rights Brought Home: The Human Rights Bill', Cmnd 3782 (24 October 1997) at paras. 3.2. [hereinafter White Paper]. Available online: CCTA Government Information Service <http://www.open.gov.uk> (modified daily).

new scheme, but also investigates how the *Human Rights Act* could play a more proactive role in helping to prevent the enactment of legislation incompatible with the *Convention*.

Two major problems are apparent in the existing (pre-*Human Rights Act*) scheme of pre-legislative scrutiny; a procedure described as "ill-equipped to prevent, or often even to detect, potential breaches of the Convention as the pre-enactment stage."[3] Firstly, Parliament has displayed a poor understanding of the consequences of decisions of the European Court and the Commission, even when such decisions are taken against the United Kingdom.[4] Thus, in the absence of improved independent advice explaining decisions both against the United Kingdom and other Council of Europe members, an increase in the rate of legislative compliance looks unlikely. Second, where a Minister is unable to make a statement of compatibility, either because the government is unclear whether the legislation in question would be compatible with the *Convention*, or where the government is aware that the legislation raises a potential incompatibility, but intends to proceed nonetheless,[5] the Bill would be subject to "intense" scrutiny by Parliament.[6] However, the strength of executive power, at least where the government commands a majority in the Commons, leads to an almost guaranteed passage of legislation through Parliament.[7] This is exacerbated as much legislation passes in the form of delegated legislation, in which the government is granted discretion in the manner in which policies are implemented.[8] Therefore, the intensity and effectiveness of Parliamentary scrutiny cannot always be guaranteed.

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[3] D. Kinley, *The European Convention on Human Rights: Compliance without Incorporation* (Aldershot: Dartmouth, 1993) at 173.

[4] Kinley, *ibid.*, at 176, citing the five successive decisions by the European Court against the United Kingdom, concerning similar provisions of the Prison Rules, that were necessary before Parliament acted appropriately. See *Golder* v. *United Kingdom* (1975), 18 Eur. Ct. H.R. (Ser. A); *Silver v. United Kingdom* (1983), 61 Eur. Ct. H.R. (Ser. A); *Campbell & Fell v. United Kingdom* (1984), 80 Eur. Ct. H.R. (Ser. A); *Boyle & Rice v. United Kingdom* (1988), 131 Eur. Ct. H.R. (Ser. A); *McCallum v. United Kingdom* (1990), 183 Eur. Ct. H.R. (Ser. A).

[5] K. D. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 M.L.R. 79 at 96.

[6] U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1233 (3 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).

[7] Ewing, *supra* note 5, at 97; Kinley, *supra* note 3, at 175.

[8] Kinley, *ibid.*, at 175.

Section 19 of the *Human Rights Act* adds to the existing pre-legislative scrutiny procedure.[9] Each time a Minister places a piece of legislation before either House of Parliament, he or she must make a statement, either to the effect that the provisions of the Bill are compatible with the *Convention* rights (a 'statement of compatibility'),[10] or to state that although the Minister is unable to make a statement of compatibility, the government wishes to proceed with the Bill.[11] Where the responsible Minister is unable to make a statement of incompatibility, "Parliament would expect the Minister to explain his or her reasons during the normal course of the proceedings on the Bill. This will ensure that the human rights implications are debated at the earliest opportunity."[12] Taggart contrasts this procedure unfavourably with the position in New Zealand under the *New Zealand Bill of Rights Act*,[13] where the Attorney-General has the duty to make such statements, as opposed to the Minister responsible for the Bill. The Attorney-General is generally a lawyer, and "in theory and practice... must exercise independent judgement in matters such as section 7 review."[14] It follows that the "absence from the [*Human Rights Act*] of a consistent, expert and independent voice on (in)compatibility is disappointing."[15]

In addition, the *Human Rights Act* contains no demand for the scrutiny of secondary legislation; yet *Convention* breaches are equally likely to flow from secondary legislation.[16] A coherent system of pre-legislative scrutiny must scrutinise both primary and secondary legislation.

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[9] Similar regimes exist in New Zealand under the *New Zealand Bill of Rights Act*, 1990, No. 109, at section 7; and under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11 [hereinafter the *Charter*]. The Canadian arrangements for pre-legislative scrutiny are contained in the *Canadian Charter of Rights and Freedoms Examination Regulations*, C.R.C., c. 2561, sections 3a, 4a and 6 (1985). Currently in the United Kingdom, the Ministerial Code demands that Ministers must take the Convention into account when considering legislative options, *Ministerial Code: A Code of Conduct and Guidance on Procedure for Ministers* (London: Cabinet Office, 1997).

[10] *Human Rights Act* (U.K.), 1998, c.42, Appendix II, *infra*, at section 19(1)(a).

[11] Human Rights Act, *ibid.*, at section 19(1)(b).

[12] White Paper, *supra* note 2, at para. 3.3.

[13] *New Zealand Bill of Rights Act*, *supra* note 9.

[14] M. Taggart, Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990' [1998] Pub. L. 266 at 272.

[15] *Ibid.*

The *Human Rights Act* adds little to the existing pre-legislative scheme. The problems of a lack of a non-partisan, consistent voice on compatibility, executive grip on Parliament and poor parliamentary understanding of European human rights law are not improved merely by a Ministerial statement of compatibility at the beginning of the parliamentary debate. However, the government has suggested one palliative solution: a parliamentary committee on human rights.[17] Such a committee would assist Parliament by playing a leading role in protecting fundamental human rights, performing such functions as conducting enquiries and issuing reports on human rights issues.[18]

At least in the abstract, a parliamentary committee presents an opportunity to correct some of the problems identified above. The very existence of a parliamentary committee, with the ability to scrutinise proposed legislation, could provide governmental incentives to ensure that legislation did indeed comply with the *Convention.*[19] The Committee, as with select committees which are comprised of a small group of back-bench MPs, would provide a more considered, and non-partisan consideration of civil liberties issues than can occur in the larger forum of Parliament.[20] Select Committee reports are taken seriously in Parliament, and may go some way to prevent executive passage of legislation likely to violate the *Convention.*[21] Further, committee scrutiny, through the process of enquiry, and the publication of reports, could perform an educative function, both for Parliament, and the general public.[22] However, both the form and the functions of any proposed parliamentary committee are vital in ascertaining its potential for improving the compatibility of proposed and existing legislation, and *Convention* rights. A parliamentary committee on human rights must have as its primary function the screening

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[16] Kinley, *supra* note 3, at Chapter 4

[17] White Paper, *supra* note 2, at 3.6. Such a solution is not contained in the *Human Rights Act* as it would not require legislation or any change of Parliamentary procedure to establish.

[18] White Paper, *ibid.*, at 3.7.

[19] M. Ryle, 'Pre-Legislative Scrutiny: A Prophylactic Approach to Protection of Human Rights' [1994] Pub. L. 192 at 194.

[20] Liberty, *supra* note 1, at 27-28.

[21] See A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law* (London: Longman, 1997) at 228-232, in particular at 231.

[22] Ryle, *supra* note 19, at 195.

of both primary and secondary legislation to ensure compliance with the *Convention*, and the provision of non-partisan and independent advice to Parliament.[23]

The governmental proposals for the creation of a parliamentary committee had not firmed up at the time of the debates on the *Human Rights Bill*. While welcoming the concept of a parliamentary committee on human rights,[24] Lord Irvine expressed uncertainty as to the exact composition and functions of such a committee. In addition to conducting enquiries and issuing reports on human rights issues,[25] a parliamentary committee for human rights could "be in the forefront of public education and consultation on human rights. It could receive written submissions and hold public hearings at a number of locations across the country."[26] Such suggestions would go far towards a more consistent system of pre-legislative scrutiny.

II. THE TEST OF STANDING UNDER THE *HUMAN RIGHTS ACT*

Section 7 of the *Human Rights Act* states that a person may rely on the *Convention* where "he is (or would be) a victim of the unlawful act."[27] This test flows from the wording of Article 34 of the *Convention*, which requires an applicant to be "the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the

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[23] Kinley, *supra* note 3, at Chapter 6-7 recommends the creation of two joint Committees. Both would examine proposed legislation for consistency with the *Convention*, one committee to examine Bills, the other statutory instruments. Liberty, *supra* note 1, at 27, suggests the creation of a joint parliamentary committee whose members would be elected rather than appointed, with no one political party dominating. Their primary function would be to scrutinise prospective legislation. Where a two-thirds majority of the committee make a declaration that a Bill complies with a bill of rights, confirmed by a simple majority of both houses, no court could decline to apply the Act. Conversely, where the committee holds by a two-thirds majority that the Act violates the bill of rights, the government could only enact the legislation using a 'notwithstanding procedure' modelled on the *Charter*, *supra* note 9, at section 33.

[24] Lord Irvine commented that a parliamentary committee would be a "natural focus for the increased interest in human rights issues which Parliament would inevitably take when we have brought rights home." U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1234 (3 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).

[25] White Paper, *supra* note 2, at 3.7.

[26] *Ibid.*

[27] *Human Rights Act*, *supra* note 10, at section 7(1).

protocols thereto."[28] The standing test in the *Human Rights Act* both widens and narrows the scope of standing for judicial review. The test is widened by the inclusion of those who have the potential to be a victim. Such an approach mirrors the jurisprudence of the European Court.[29] However, the standing requirement of the *Human Rights Act* results in problems in the area of judicial review. The *Human Rights Act* states that in proceedings for judicial review, "the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act."[30] Yet, the test for standing in judicial review cases generally is far wider. An applicant must have a "sufficient interest in the matter to which the application relates."[31]

The impact of the narrower standing test under the *Human Rights Act* will be felt primarily by public interest groups, in particular non-governmental organisations and statutory bodies such as the Equal Opportunities Commission. Under Article 34 of the *Convention*, non-governmental organisations may bring an application, but only where they can show that they are affected by the measure in question.[32] In contrast, the English courts have recently widened the ability of groups to bring an action in their own name.[33]

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[28] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 (entered into force September 3 1953), Appendix II, *infra* [hereinafter, the *Convention*] at Article 34. The reproduction of the wording of Article 34 in the *Human Rights Act* lays to rest the discussion as to whether legal persons such as companies may rely on the Convention rights. Under Article 34, organisations such as churches, newspapers and trade unions can be victims of a rights violation. See e.g. Application 7805/77 *X & Church of Scientology v. Sweden* (1979), 16 Eur. Comm. H.R. D.R. 68. Further, companies may possess certain rights under the Convention, see D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995) at 634 [hereinafter Harris et al.].

[29] See *e.g. Dudgeon v. United Kingdom* (1981), 45 Eur. Ct. H.R. (Ser. A), and *Norris v. Ireland* (1988), 142 Eur. Ct. H.R. (Ser. A). In both cases the applicant had not been prosecuted under the laws prohibiting sodomy, but both applicants as gay men were at risk from prosecution. Therefore the laws directly affected the private lives of the applicants.

[30] *Human Rights Act*, *supra* note 10, at section 7(3).

[31] *Supreme Court Act* (U.K.), 1981, c. 54, section 31(3), R.S.C. Ord. 53, rule 3(7) in Sir J. Jacob et al., *The Supreme Court Practice* (London: Sweet & Maxwell, 1990) at 815.

[32] Harris et al., *supra* note 28, at 634. They cite Application 10581/83 *Norris v. Ireland* (1985), 44 Eur. Comm. H.R. D.R. 132 in which the National Gay Federation could not be regarded as being a victim of the Irish prohibition on homosexual acts.

[33] This process began in *R v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed* [1982] A.C. 617 at 644. Lord Diplock commented that:

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a public-spirited tax payer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

As is the case with individuals, the group must meet the 'sufficient interest' requirement.[34]

The narrower standing test in the *Human Rights Act* introduces a cleavage between general judicial review and judicial review which relies on the *Convention.* It means that in an action for judicial review brought by a non-victim with a 'sufficient interest', the litigant "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."[35] In addition, this approach could hinder an "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."[36] In response, however, the government maintained that public interest groups could still bring actions where they were victims of a *Convention* violation, and could fund individual victims to apply for judicial review.[37]

The maintenance of judicial review action by public interest groups in their own name should be preserved. Such litigation facilitates access to justice by enabling individuals to

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More recent cases include: *R v. Secretary of State for Social Security, ex p. C.P.A.G.* [1990] 2 Q.B. 540; *R v. Her Majesty's Inspectorate of Pollution, ex p. Greenpeace* (No. 2) [1994] 4 All E.R. 329; *R v., Secretary of State for Employment, ex p. Equal Opportunities Commission* [1995] A.C. 1; *R v. Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement Ltd.* [1995] 1 W.L.R. 386.
See also, U.K. Law Commission Report, *Administrative Law: Judicial Review and Statutory Appeals*, No. 226 (London: Her Majesty's Stationary Office, 1994) (concluding that where the applicant is not directly affected, the court should have discretion to decide if it is in the public interest to have the case heard); Justice, *A Matter of Public Interest* (London: Justice, 1996).
But see *R v. Secretary of State for the Environment, ex p. Rose Theatre Trust Co.* [1990] 1 Q.B. 504 (a non-profit company formed to protect a Shakesperean theatre did not have standing to challenge the decision of the Secretary of State not to award the theatre historical site status).

[34] Significant factors suggesting that a group has sufficient interest are the importance of maintaining the rule of law, the importance of the issue raised by the applicant, the likely absence of any other responsible challenger, the nature of the breach of duty against which relief was sought and the qualifications and experience of the applicant. *R v. Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement Ltd.* [1995] 1 W.L.R. 386 at 395-396, 403.

[35] Justice, *Parliamentary Briefing on the Human Rights Bill* (London: Justice, 1997), cited in U.K., H.C. Research Paper 98/24 *The Human Rights Bill* (18 February 1998) (Mary Baber), online: C.C.T.A. Government Information Service <http://www.parliament.co.uk (modified daily) at 47. See also Liberty, *Parliamentary Briefing on the Human Rights Bill* (London: National Council for Civil Liberties, 1997) at para. 5.1, cited in Baber, *ibid.*, at 47.

[36] Justice, *ibid.*

[37] U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 831 (24 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).

partake in the civil justice system;[38] a process particularly important in the times of reduced legal aid.[39] Additionally, it potentially ameliorates the administration of justice by allowing similar complaints to be heard at once.[40] Finally, and most controversially, collective judicial review by public interest groups utilises the courts as alternative forums to parliament in order to both raise publicity about a specific issue, and perhaps to force a change of law in a particular area.[41]

A further method by which public interest groups may have their views heard in court is through the mechanism of third party intervention. There are varying situations in which third party intervention could be appropriate:

> A group may want to intervene in an application begun by another person because it may have been begun without the support or even knowledge of an interested group which may want to offer its support to the applicant and/or assist the court; it may raise issues affecting the group's purposes which require *opposition* by the group; or the group may have particular expertise that should be placed before the court because otherwise the full significance of the issues will not be appreciated.[42]

In Canada, where the standing requirements for groups seeking to litigate in their own name are demanding,[43] the mechanism of third party intervention has mitigated some of the detrimental consequences of the strict standing rules.[44] In the United Kingdom, the scope for third party intervention remains extremely narrow.[45] In combination with strict standing requirements, this serves to keep third parties out of the courtroom. However, third party intervention has proved to be an invaluable source of information and support to a court, particularly in areas of human rights adjudication where a decision will have

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[38] P. Cane, 'Standing Up for the Public' [1995] Pub. L. 276 at 277.
[39] *Infra* note 144
[40] Cane, *supra* note 38, at 277.
[41] Cane, *ibid.*
[42] R. Singh, *The Future of Human Rights in the United Kingdom: Essays on Law and Practice* (Oxford: Hart Publishing, 1997) at 117.
[43] See *Thorson v. Canada (Attorney General) (No. 2)*, [1975] 1 S.C.R. 138; *Nova Scotia (Board of Censors) v. McNeil*, [1976] 2 S.C.R. 265; *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; and *Canadian Council of Churches v. Canada (M.E.I.)*, [1992] 1 S.C.R. 236; S. Lavine, 'Advocating Values: Public Interest Intervention in Charter Litigation' (1992-3) 2 N.J.C.L. 27; N. Sharp, 'L.E.A.F. and Equality-Seeking Charter Litigation: An Assessment to Date and Proposals for Some Future Directions' (Unpublished, 1998).
[44] See *e.g. Canadian Council of Churches v. Canada (M.E.I.)*, *ibid.* at 256.
[45] In the Court of Appeal, R.S.C. Ord. 59, rule 8(1) in Jacob et al., *supra* note 31, at 926; in the House of Lords, Practice Directions and Standing Orders Applicable to Civil Appeals, House of Lords (January 1996) Direction 34.1.

far-reaching social, economic or environmental consequences. It follows that the United Kingdom courts could gain much from loosening the intervenor status requirements.

In conclusion, both the standing requirements in the *Human Rights Act*, and the virtual presumption against third party intervention keep public interest groups out of the court on *Convention* issues. Yet the distinction created by the *Human Rights Act* between the standing in general judicial review cases and *Convention* cases makes no theoretical sense, and will have detrimental results in practice. The courts would be well served to open up both the standing requirements and the test for intervenor status. This would aid both adjudicators, and potential litigants.

III. THE DUTY ON PUBLIC AUTHORITIES

The *Human Rights Act* places a new duty on public authorities to act in a manner consistent with the *Convention.*[46] If an individual alleges that a public authority has acted incompatibly with the *Convention* guarantees, he may seek judicial review of the act in question,[47] or rely on the *Convention* right in any legal proceedings.[48] Where the public authority has acted in violation of the *Convention*, the court is empowered to grant such relief as would be just and appropriate.[49]

The *Human Rights Act* defines 'public authority' as including a "court or tribunal, and... any person certain of whose functions are functions of a public nature."[50] The lack of definition of 'public authorities' perturbed many members of Parliament; in particular, concern was expressed over the phrase "any person certain of whose functions are functions of a public nature." The stated governmental position was that 'public authorities' should be "widely defined",[51] not listed,[52] and in general, should remain a

[46] *Human Rights Act*, *supra* note 10, at section 6.
[47] *Ibid.*, at section 7(1)(a).
[48] *Ibid.*, at section 7(1)(b).
[49] *Ibid.*, at section 8(1).
[50] *Ibid.*, at section 6(3). However, both Houses of Parliament are excluded from this definition.
[51] White Paper, *supra* note 2, at 2.2.

question for the courts.[53] The White Paper does, however, list entities which the government felt should fall within the definition of a 'public authority',[54] and Lord Irvine attempted to clarify the private/public functions distinction by using two examples. A doctor with both private and National Health Service patients would be exercising public function in her dealings with the latter but not the former. Similarly, Railtrack, who deal with both railway safety and developing railway property, would be exercising public functions only when acting in the former capacity.[55]

Whilst the majority of the bodies envisaged as falling within the *Human Rights Act* definition were 'official' or 'governmental' in nature, the functions limb of the definition indicates a broader role envisaged for the *Human Rights Act*. Such a flexible approach does not present the problems envisaged by many commentators;[56] particularly given that the courts already successfully apply a functions test to determine the status of a body in applications for judicial review. Mirroring the definition of 'public authority' in the *Human Rights Act*, when analysing whether an entity constitutes a 'public authority' for judicial review, the courts have focused on the functions of the bodies in question as opposed to the source of the power.[57] Thus a body of jurisprudence exists already in this area.[58]

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[52] U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 796 (18 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).

[53] See, U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1309-1310 (3 November 1997) (Lord Williams of Mostyn, the Home Office Minister).

[54] White Paper, *supra* note 2, at para. 2.2. The listed examples include central government (with the exception of executive agencies); local government; the police; immigration officers, prisons, courts, tribunals, and to the extent that they are exercising public functions, companies responsible for areas of activities that were previously within the public sector.

[55] U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 811 (24 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).

[56] See *e.g.* G. Marshall, 'Patriating Rights—With Reservations, The Human Rights Bill 1998' in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998) at 79; Sir W. Wade, 'The United Kingdom's Bill of Rights' in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998) at 62.

[57] *R v. Panel on Take-overs and Mergers, ex p. Datafin plc* [1987] Q.B. 817.

[58] Thus in recent years such organisations as self-regulating organisations under the *Financial Services Act* 1986, the Bar Council, the Advertising Standards Agency, and the Association of the British Pharmaceutical Industry have been held to be judicially reviewable. See respectively, *R v. Lautro, ex p. Ross* [1993] Q.B. 17; *R v. The Bar Council, ex p. Percival* [1991] 1 A.B. 212; *R v. Advertising Standards Authority Ltd., ex p. The Insurance Service plc* (1990) C.O.D. 42; *R v. Code of Practice Committee of the Association of the British Pharmaceutical Industry, ex p. Professional Counselling Aids Ltd.* (1991) C.O.D.

Under section 6, the definition of 'public authority' includes a court or tribunal.[59] It follows that a duty exists on the courts to both develop the common law, and to exercise its discretion according to the principles in the *Convention*. Difficulties arise, however, when neither party before the court is a 'public authority', or where the case involves no (in)action by the state. Traditionally, a bill of rights has circumscribed the relationship between an individual and the state.[60] In modern times, legal theory and practice has begun to suggest circumstances in which positive duties exist on a state to ensure that one individual's rights are not infringed by another individual.[61] Both the European Court of Human Rights and the English courts have applied the *Convention* in situations of horizontal effect. As outlined in Chapter Three above, the European Court has imputed an obligation on the state to protect an individual's rights from infringement by another individual.[62] However, this obligation is underpinned by state action, and arises because the state has failed to regulate the conduct of the private actor in manner that secures the individual rights of the *Convention*. In the United Kingdom, the emphasis on state action is rather more murky. In *Rantzen v. Mirror Group Newspapers Ltd.*[63] Neill L.J., in the Court of Appeal, stated that the courts must, to comply with Article 10 of the *Convention*, subject the unfettered discretion of juries to consider libel damages to scrutiny. Further, in *Middlebrook Mushrooms v. TGWU*,[64] in considering whether to exercise the discretion of

228. Compare *R v. Jockey Club, ex p. Aga Khan* [1993] 1 W.L.R. 909 in which the Court of Appeal held that decisions of the Jockey Club were not open to judicial review.
See also M. Beloff, 'Judicial Review – 2001: A Prophetic Odyssey' (1995) 58 M.L.R. 143; N. Bamforth, 'The Scope of Judicial Review: Still Uncertain' [1993] Pub. L. 239; D. Pannick, 'Who is Subject to Judicial Review and in Respect of What?' [1992] Pub. L. 1.

[59] *Human Rights Act, supra* note 10, at section 6(3)(a).

[60] This understanding can be described as vertical effect. Advocates of a strict interpretation of vertical effect generally premise their view on a "rigid distinction between the public and the private sphere [which] presupposes that the purpose of fundamental rights protection is to preserve the integrity of the private sphere against coercive intrusion by the state." M. Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] Pub. L. 423 at 424.

[61] This understanding can be described as horizontal effect. Those in favour of horizontal application of human rights ground this understanding in "the insight that the state is constitutive of all legal relations, because law itself is largely a construct of the state." Hunt, *ibid.*
In Canada, the Supreme Court held that the *Charter* does not apply to private action, *Retail, Wholesale and Department Store Union v. Dolphin Delivery*, [1986] 2 S.C.R. 573; P.W. Hogg, '*The Dolphin Delivery Case*: The Application of the *Charter* to Private Action' (1987) 51 Sask. L. Rev. 273.

[62] See Chapter Three, above.

[63] [1994] Q.B. 670 at 692. Confirmed in *John v. Mirror Group Newspapers Ltd.* [1996] 2 All E.R. 35.

[64] [1993] I.C.R. 612.

the court to grant injunctive relief in a dispute between a trade union and a private company, Neill L.J. commented:

> Though Counsel for the defendants did not place any specific reliance on Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms... it is relevant to bear in mind that in all cases which involve a proposed restriction on the right of free speech the court is concerned, when exercising its discretion, to consider whether the suggested restraint is necessary.[65]

In both cases, the state was not a party, and state responsibility was not suggested. Therefore, the potential for some horizontal effect for the *Human Rights Act* is apparent.

Clearly, the *Human Rights Act* lies somewhere on the spectrum between the poles of vertical and horizontal applicability. However, the exact positioning remains uncertain. Government statements confounded, rather than clarified, the position. The Lord Chancellor at times seemed to envisage the *Human Rights Act* as applying only in situations in which one party was a 'public authority.'[66] Yet the government resisted an amendment which would have effectively excluded any litigation in which neither party was a public authority.[67] Further, the inclusion of courts and tribunals in the definition of 'public authority', indicated a concern not only to ensure that court discretion was exercised in accordance with the *Convention*, but also to guarantee the development of the common law along *Convention* lines, including situations in which the litigation arises purely between private parties. The Lord Chancellor explicitly acknowledged this in the Committee Stage of the House of Lords:

> We also believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention, not only in cases involving other public authorities but also in developing the common law in cases between individuals... In preparing this Bill we have taken the view that it is the other course, that of excluding convention considerations altogether from cases between individuals, which would have to be justified. We do not think that it would be justifiable; nor, indeed, do we think it would be practicable.[68]

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[65] *Ibid.*, at 620.

[66] See U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1231 (3 November 1997) (Lord Irvine of Lairg, the Lord Chancellor), for the sentiment that the obligations under the *Human Rights Act* "should apply only to public authorities... and not to private individuals."

[67] U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 754 (24 November 1997).

Drawing on previous jurisprudence of domestic tribunals and the European Court, and parliamentary statements, several principles can be ascertained. Firstly, an applicant can rely on the *Convention* where she alleges that her *Convention* rights have been violated by a rule or practice of a 'public authority'. Secondly, an applicant can rely on the *Convention* in litigation in which she alleges that her *Convention* rights were infringed by a private party, but that a positive duty existed on the state to ensure her enjoyment of the *Convention* rights.[69] Finally, where litigation arises between two private parties, the court *must* use the *Convention* to develop the common law, and in exercising its discretion, but the *Convention* may not form the cause of action.[70] It is important to note the imperative nature of the duty on the courts, so that following the *Human Rights Act*, the court:

> Will not merely have the power to 'consider' the Convention when interpreting the common law in private law disputes, nor will they merely have an obligation to take into account Convention 'values'. Rather they will be under an unequivocal duty to act compatibly with Convention rights.[71]

In construing this new duty, it remains to be seen how adventurous the courts will be in developing the common law, particularly in how far the *Convention* will apply between private parties.

IV. THE INTERPRETATIVE OBLIGATION ON THE COURTS

This Section analyses the interpretative obligation on the courts. I assess the potential for individual rights protection offered by section 3, and suggest that its limitations might be ameliorated by the constitutional technique of 'reading in'. Further, I examine some of the appropriate techniques for a court to use in the determination of legislative compatibility with the *Convention*.

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[68] U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 783 (24 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).

[69] In which case the respondent would be the state, and the applicant would be asserting an indirect violation of her Convention rights.

[70] Ewing, *supra* note 5, at 89.

[71] Hunt, *supra* note 60, at 441.

A. Section 3 of the *Human Rights Act*

The interpretative obligation placed on a Court by the *Human Rights Act* demands that legislation be read "so far as it is possible to do so" in line with *Convention* rights.[72] Currently, the courts may take the *Convention* into account when considering legislative ambiguity. The White Paper claims that section 3 "goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision."[73] Following the *Human Rights Act*, a court does not have to justify the use of the *Convention* by invocation of an ambiguity. But the obligation on the courts is far stronger than this: "the courts will be required to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so."[74]

The interpretation of a bill of rights generally demands a different approach to statutory interpretation than the one traditionally undertaken by the courts.[75] This has been acknowledged by the Privy Council, sitting as the final constitutional court for some Commonwealth nations, stating that interpretation of a bill of rights calls for a "generous interpretation", which must avoid the "austerity of tabulated legalism."[76] Accordingly, several factors suggest that section 3 will be read both expansively and purposively to maximise rights protection under the *Human Rights Act*: the swell of support for the *Human Rights Act* from senior members of the judiciary; the purposive approach to interpretation taken by the European Court of Human Rights; the infiltration of a purposive approach to statutory interpretation through European Community law, including a willingness to read legislation up or down; and the experience of 'interpretative' clauses in the bills of rights of other Commonwealth jurisdictions.

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[72] *Human Rights Act*, *supra* note 10, at section 3(1).
[73] White Paper, *supra* note 2, at para. 2.7.
[74] Lord Irvine of Lairg, 'The Development of Human Rights in Britain Under an Incorporated Convention on Human Rights' [1998] Pub. L. 221 at 228.
[75] For an account of the traditional British approach to statutory interpretation see S.H. Bailey & M.J. Gunn, *Smith & Bailey on the Modern English Legal System* (London: Sweet & Maxwell, 1991) at 315; R. Cross, *Statutory Interpretation* (London: Butterworths, 1976).
[76] *Minister of Home Affairs v. Fisher* [1980] A.C. 319 at 328 (P.C.). See also *A-G v. Momodou Jobe* [1984] A.C. 689 at 700 (P.C.) in which Lord Diplock states that a "constitution, and in particular that part of it

As previously documented in this thesis, members of the senior judiciary had expressed strong public support for the incorporation of a bill of rights.[77] Indeed the judiciary has been described as "straining at the leash" to give effect to the *Convention*.[78] Sir John Laws and Lord Woolf went to far as to suggest that where Parliament legislated to remove fundamental common law rights, the courts should disapply the statute in question.[79] This judicial context implies that the specific duty placed on the courts by the *Human Rights Act* will be utilised in a manner which seeks to maximise the individual rights of the litigants.

Section 2 of the *Human Rights Act* empowers a court to take into account any judgement or decision of the European Court of Human Rights. The European Court's jurisprudence will be a vital interpretative tool for domestic courts in analysing the rights in the *Human Rights Act*. At a general level, the *European Convention* is an international treaty, to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[80] Additionally, the jurisprudence of the European Court identifies the following specific interpretative principles.[81] The Court approaches the *Convention* in a teleological fashion,

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which protects and entrenches fundamental rights and freedoms to which all persons in the State are entitled, is to be given a generous and purposive interpretation."

[77] T.H. Bingham, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 L.Q.R. 390; Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] Pub. L. 397; Sir J. Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] Pub. L. 59; Sir J. Laws, 'Law and Democracy' [1995] Pub. L. 72; Sir Leslie Scarman, *English Law, The New Dimension* (London: Stevens, 1974); S. Sedley, 'Human Rights: A Twenty-First Century Agenda' [1995] Pub. L. 386; S. Sedley, 'A Bill of Rights for the United Kingdom: From London to Strasbourg by the Northwest Passage' (1998) 36 Osgoode Hall L.J. 63; Lord Woolf of Barnes, 'Droit Public—English Style' [1995] Pub. L. 57.

[78] M. J. Beloff & H. Mountfield, 'Unconventional Behaviour? Judicial Uses of the European Convention in English Law' [1996] E.H.R.L.R. 467 at 495.

[79] Laws, 'Law and Democracy', *supra* note 77, at 84; Woolf, *supra* note 77, at 69.

[80] *Vienna Convention on the Law of Treaties*, 23 May 1969, U.K.T.S. 7964 No. 58 (entered into force 27 January 1980) at Article 31.

[81] On interpretation of the *European Convention* generally, see: Harris et al, *supra* note 28, at 5-19; F. Matscher, 'Methods of Interpretation of the Convention', in R.St.J. Macdonald, F. Matscher & H. Petzold eds., *The European System for the Protection of Human Rights* (Dordrecht: M. Nijhoff, 1993); Peter Duffy, 'The European Convention on Human Rights, Issues Relating to its Interpretation in the Light of the Human Rights Bill' in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998).

emphasising the objects and purposes of the *Convention* in its interpretation.[82] In addition, the *Convention* must be analysed as a 'living instrument' and be interpreted in the light of modern social, moral and economic developments.[83] Further, the rights guaranteed by the *Convention* must be effective: the Court is concerned with the substance of rights violations, rather than their form.[84] Finally, the notion that the *Convention* represents a subtle balance between the rights of individuals and the rights of the community as a whole is apparent in the jurisprudence of the European Court.[85] This manifests itself in interpretative tools such as the principle of proportionality, and the margin of appreciation.

In addition, the influence of European Community law has promoted a more purposive approach to statutory interpretation by the United Kingdom courts.[86] In such cases,

> [D]ecisions of our courts already show that interpretative techniques may be used to make the domestic legislation comply with the Community law, even where this requires straining the meaning of words or reading in words which are not there.[87]

For example, in *Litster v. Forth Dry Dock and Forth Estuary Engineering*[88], the House of Lords added (or implied) words into the *Transfer of Undertakings (Protection of Employment) Regulations*[89] expanding the class of individuals to whom employment protection was offered. This was stated to be a "purposive analysis"[90] which gave the

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[82] See *Kjeldsen v. Denmark* (1976), 1 E.H.R.R. 711; *Soering v. Uinted Kingdom* (1989), 11 E.H.R.R. 439; *Wemhoff v. Austria*(1968), 7 Eur Ct. H.R. (Ser. A). See also C. Warbrick, 'Federal Aspects of the European Convention on Human Rights' (1989) 10 Mich. J. Int'l Law 698 at 709; D. Pannick, 'Principles of Interpretation of Convention Rights Under the *Human Rights Act* and the Discretionary Area of Judgement' [1998] Pub. L. 545.

[83] *Tyrer v. United Kingdom* (1978), 2 E.H.R.R. 1 at 10.

[84] *Airey v. Ireland* (1979), 2 E.H.R.R. 305.

[85] *Sporrong and Lonroth v. Sweden* (1982), 5 E.H.R.R. 35.

[86] In *Da Costa en Schaake N.V. v. Nederlandse Belastingadministratie* (1963), C.M.L.R. 224 at 237, the European Court of Justice held that the meaning of Community laws must be deduced from the "wording and spirit of the Treaty." The United Kingdom courts have embraced such interpretation in the context of Community law. In *Bulmer v. Bollinger* [1974] Ch. 401 at 406, Lord Denning MR said that English courts must look to the "purpose or intent" of the EEC Treaty.

[87] Lord Irvine, *supra* note 74, at 228

[88] (1990) 1 A.C. 546, cited by Lord Irvine, *ibid.*

[89] *Transfer of Undertakings (Protection of Employment)*, S.I. 1981/1794).

[90] *Litster*, *supra* note 88, at 558 (per Lord Templeman).

regulation a construction compatible with the decisions of the European Court of Justice.[91]

The *New Zealand Bill of Rights Act*[92] contains a similar interpretative provision to the *Human Rights Act*. The experience of the New Zealand courts, both in interpreting the *Bill of Rights Act*, and in reading legislation down, provides a useful case-study for the possible approaches of the British judiciary. Section 6 of the *New Zealand Bill of Rights Act* states:

> Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning should be preferred to any other meaning.[93]

Despite early interpretative enthusiasm by the New Zealand Court of Appeal,[94] the jurisprudence suggests that the courts are reluctant to 'strain' the meaning of legislation. This approach was summarised by Cooke P. in *Ministry of Transport v. Noort*:[95]

> The [section 6] preference will come into play only when the enactment can be given a meaning consistent with the rights and freedoms. This must mean, I think, can reasonably be given such a meaning. A strained interpretation would not be enough.[96]

However, the potential limitations placed on section 3 by a judicial refusal to strain legislative meaning could be mitigated by the technique of reading legislation down. Rishworth explains this approach in the context of the *New Zealand Bill of Rights Act*:

> By 'reading down', I mean interpreting legislation so as to depart from its clear words which are necessary if the legislation is to operate without infringing rights. I believe that [section 6 of the *New Zealand Bill of Rights Act*] can properly be taken to justify this approach to interpretation where it is necessary to do so to uphold a right guaranteed by the Bill, and where the legislative purpose of the enactment is not frustrated by so doing. This differs from simply preferring one possible interpretation of the words to another, since the effect of

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[91] *Litster*, *ibid.*, at 554 (per Lord Keith of Kinkel).
[92] *New Zealand Bill of Rights Act*, *supra* note 9.
[93] *Ibid.*, at section 6.
[94] See *Flickinger v. Crown Colony of Hong-Kong* [1991] 1 N.Z.L.R. 439 (a statutory provision was given a meaning consistent with the Bill of Rights despite a long standing interpretation pointing to an opposite meaning).
[95] [1992] 3 N.Z.L.R. 260.
[96] *Noort*, *ibid.*, at 272. See also *R v. Phillips* [1991] 3 N.Z.L.R. 175 (the Court of Appeal refused to apply an interpretation of a statute which would have complied with the *Bill of Rights Act*, as it would have resulted in a "strained and unnatural interpretation", per Cooke P. at 177).

> reading down is to imply limitations on the scope of the statute that are simply not articulated in the statute at all.[97]

Reading down does not give the court license to frustrate parliamentary legislative supremacy. Rather, it can be justified by understanding that a bill of rights expresses the intention of Parliament to guarantee fundamental rights and that such intention should be given effect to, unless Parliament enacts a statute stating expressly—or necessarily implying—otherwise. Reading down presents judges with a powerful tool for the protection of human rights which does not, at least in the abstract, encroach upon the sovereignty of Parliament.[98] Taggart comments that:

> Denied the constitutional kryptonite necessary to disempower Superman legislatures from infringing rights, such techniques allow the courts to tug pretty hard on Superman's cape—if they are disposed to do so.[99]

Of course, despite a purposive and expansive analysis by the courts there will be situations in which a piece of legislation cannot be read compatibly with the *Convention*. The next section turns to the options for the court in this situation.

B. Assessing Compatibility

Once a legislative provision has been interpreted "as far as it is possible" in line with the *Convention*, there are three possible outcomes. First the impugned legislation could be deemed compatible with the *Convention* rights; either because the legislation can be read compatibly with the rights in the *Convention*, or because the scope of the legislation does not affect the rights in the *Convention*. Second, the impugned legislation could violate the *Convention*, but may be a justifiable limitation of a right in the *Convention*.[100] This

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[97] P.T. Rishworth, 'The Potential of the New Zealand Bill of Rights' [1990] N.Z.L.J. 68 at 69. Note that alongside reading down is the technique 'reading up', by which legislation deemed to be under-inclusive is read more expansively. This is far more controversial, as it appears to encroach more on the legislative mandate of Parliament. See N. Duclos & K. Roach, 'Constitutional Remedies as 'Constitutional Hints': A Comment on R v. Schacter' [1991] 36 McGill L.J. 1 at 7.

[98] For a speculative analysis of how British courts could use 'reading in' see M. Childs, 'Constitutional Review and Underinclusive Legislation' [1998] Pub. L. 647.

[99] Taggart, *supra* note 14, at 284.

[100] Although note that several rights in the Convention cannot be limited. Accordingly, where a statute violates such a right, no limitation can be justified.

section concerns itself with this possibility. Finally, the legislation may constitute a rights violation which cannot be justifiably limited under the *Convention*. This is considered in the next section.

The first task for domestic courts is to develop a standard of deference by which to judicially review the legality of limitations placed on rights by the government. The mechanism developed by the European Court of Human Rights is the doctrine of the 'margin of appreciation'. This doctrine represents an attempt by the European Court to define the level of scrutiny to which member state limitations on rights should be subjected.[101] The margin of appreciation is the vehicle through which the Court balances the superior ability of member states to evaluate their local needs and conditions, and "European supervision."[102] The margin of appreciation doctrine patrols the edges of the supervisory jurisdiction of a supra-national court. This focus renders the doctrine inappropriate for use by a national court.[103] Yet domestic tribunals need some mechanism through which to determine the appropriate level of deference to grant Acts of Parliament when applying the *Human Rights Act*. Pannick states that:

> Just as there are circumstances in which an international court will recognise that national institutions are better placed to assess the needs of society, and to make difficult choices between competing considerations, so national courts will accept that there are circumstances in which the legislature and the executive are better placed to perform those functions.[104]

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[101] See R.St.J. Macdonald, 'The Margin of Appreciation' in R.St.J. Macdonald, F. Matscher & H. Petzold eds., *The European System for the Protection of Human Rights* (Dordrecht: M. Nijhoff, 1993) at 83; P. van Dijk & G van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd ed. (Deventer: Kluwer Law and Taxation Publishers, 1990) at 583-606; D. Feldman, 'Human Rights Treaties, Nation States and Conflicting Moralities' (1995) 1 Contemporary Issues in Law 61; S. Marks, 'Civil Liberties at the Margin: The United Kingdom Derogation and the European Court of Human Rights' (1995) 15 O.J.L.S. 69; T.A. O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 Hum. Rts. Q. 474; C. Warbrick, 'Federal Aspects of the European Convention on Human Rights' (1989) 10 Mich. J. Int'l. L. 698; H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague: Kluwer Law International, 1996).

[102] *Handyside v. United Kingdom* (1976), 1 E.H.R.R. 737 at 754.

[103] *A-G of Hong-Kong v. Lee Kwong-kut* [1993] A.C. 951 at 966 (P.C.), per Lord Woolf, in applying the margin of appreciation, the European Court "is not concerned directly with the validity of domestic legislation but whether, in relation to a particular complaint, a state has in its domestic jurisdiction infringed the rights of the complainant under the European Convention."

[104] Pannick, *supra* note 82, at 549.

The obvious contender to replace the margin of appreciation is the doctrine of proportionality. This is the familiar tool used by domestic courts in the context of European Community law. In addition, the courts have started to make use of it in judicial review.[105] The doctrine of proportionality was explained more fully in Chapter One above. However, the doctrine of the margin of appreciation offers several broad principles which could be used by domestic courts to refine proportionality. The jurisprudence of the European Court has imbued the margin of appreciation with a certain amount of subtlety. Accordingly, the margin of appreciation grants the Court differing levels of scrutiny depending on which right is claimed to be violated; the justification for violation invoked by the state; and the context of the litigation.

The European Court has inferred that certain rights are particularly important, and alleged violations should be examined more aggressively.[106] The *Convention* itself accords priority to certain rights which are non-derogable.[107] In addition, Yourow points to various articulations of 'priority rights' by the Court. In *Sunday Times v. United Kingdom*, the Court refers to the right of freedom of expression as "one of the essential foundations of a democratic society;"[108] the *Dudgeon* Court describes the kind of right violated by the criminalisation of sodomy between consenting adults as a "most intimate aspect of private life;"[109] and in *Abdulaziz, Cabales and Balkandali v. United Kingdom*, the Court states that "very weighty reasons" were needed to justify sex discrimination.[110]

Simultaneously, a differential analysis of the justifications proffered by the state can be identified in the jurisprudence of the Court. Thus, whilst the Court has been sympathetic to states in derogations under Article 15,[111] where states have invoked the justification of national security[112] or the protection of public morals,[113] more rigorous scrutiny has been

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[105] See Chapter One, above, at Part III (B).
[106] Yourow, *supra* note 101, at 191; Pannick, *supra* note 82, at 549-551.
[107] Articles 2, 3, 4(1) and 7.
[108] *Sunday Times v. United Kingdom* (1979) 30 Eur. Ct. H.R. 1(Ser. A) at para. 65.
[109] *Dudgeon v. United Kingdom* (1981) 45 Eur. Ct. H.R. (Ser. A) at para. 52.
[110] (1985), 7 E.H.R.R. 471 at 501.
[111] *Ireland v. United Kingdom* (1971), Eur. Ct. H.R. (Ser. A) 25; Harris et al, *supra* note 28, at 14.
[112] *Leander v. Sweden* (1987), 116 Eur. Ct. H.R. (Ser. A); Harris et al, *ibid.*
[113] *Handyside*, *supra* note 102; Harris et al, *ibid.*

undertaken where the invoked justification for limitation is the "protection of the reputation of the judiciary."[114]

Finally, if the litigation at hand reflects an area in which the court considers itself to have special expertise, generally the European Court has displayed less deference to the legislature.[115] Conversely, where the litigation raises issues traditionally in the domain of the legislature, such as questions with dramatic economic and social consequences, the European Court has shown more deference.[116]

In conclusion, the interpretative obligation in the *Human Rights Act* offers an opportunity for the judiciary to infuse the Act with meaning and effectiveness. One useful tool may be the technique of reading legislation down, already used by the courts in the context of European Community law, and applied by Commonwealth constitutional courts. Further, one of the first interpretative tasks for the domestic courts will be to develop an appropriate standard of judicial scrutiny of legislation. I suggest that proportionality would be the most appropriate, and familiar model.

V. REMEDIES FOR CONTRAVENTION OF THE *HUMAN RIGHTS ACT*

Everyone whose rights under the *Human Rights Act* are violated must be entitled to an effective remedy before an independent tribunal or court.[117] This goal was a central objective of the *Human Rights Act*; the notion of 'bringing rights home' implies the corollary: 'bringing remedies home'.[118] This section analyses the extent to which the *Human Rights Act* meets this aim.

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[114] *Sunday Times*, *supra* note 108; Harris et al, *ibid.*
[115] Pannick, *supra* note 82, at 550. For example, where the rights violations pertains to criminal matters, the court tend to feel more comfortable and less deferential to the legislature. See Harris et al, *ibid.*, at 273.
[116] Pannick, *ibid.*
[117] Liberty, *supra* note 1, at 86.
[118] White Paper, *supra* note 2.

The *Human Rights Act* offers several remedial tools. First, where a court finds a legislative provision to violate a *Convention* right, it may make a declaration of that incompatibility.[119] Second, in response to any act of a public authority found by the court to violate *Convention* principles, a court may "grant such relief or remedy, or make such order, within its powers as it considers just and appropriate."[120] Damages may be awarded by a court, but only in specifically defined circumstances.[121]

I turn first to court-ordered declarations of incompatibility, arguing that such orders create a 'remedy gap': effectively depriving a 'successful' litigant of the protection of their rights, and forcing that litigant to Strasbourg for realisation of their substantive rights. Further, I analyse the provision for general remedies under the *Human Rights Act*, noting that the tenor of the Act is to discourage the award of damages. Instead, the *Human Rights Act* should encourage a culture in which a breach of *Convention* rights results in an appropriate damages award.

A. Declarations of Incompatibility

This section discusses the consequences of a determination by a court that a legislative provision is incompatible with *Convention* rights. The *Human Rights Act* does not impliedly repeal any previous legislation incompatible with the *Convention*. This was highlighted in the White Paper:

> 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.[122]

Further, the inapplicability of implied repeal was repeatedly emphasised in the parliamentary debates by the government, because the *Convention* rights have not been expressly incorporated into domestic law through the *Human Rights Act*. Thus:

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[119] *Human Rights Act*, *supra* note 10, at section 4(2).
[120] *Human Rights Act*, *ibid.*, at section 8(1).
[121] *Human Rights Act*, *ibid.*, at section 8(3).

> The Convention rights will not... become part of our domestic law, and will therefore not supersede existing legislation or be superseded by future legislation. In both cases, convention rights will be used to interpret and give effect to that legislation.[123]

Therefore, an alternative remedial vision was created by the government to cover situations in which a court felt a legislative provision contravened the *Convention*. The new mechanism, a court 'declaration of incompatibility', focuses most sharply the procedural deficiencies in the *Human Rights Act*, in particular the discordance between the aim of the government to "bring... rights home"[124] and the actual ability of litigants to rely on *Convention* rights in the courts. Further, it clearly demonstrates the primacy of the constitutional principle of parliamentary sovereignty over the protection of individual rights.

Where a court has considered a provision of primary or subordinate legislation, and is "satisfied that the provision is incompatible with a Convention right," the court may make a declaration of that incompatibility.[125] This declaration does not affect the continuing validity of the legislation, and is not binding on the parties to the proceedings in which it is made.[126] The effect of a declaration of incompatibility, whilst not in itself changing the law, would "almost certainly prompt the Government and Parliament to change the law."[127] Where a court has made a declaration of incompatibility, generally the offending legislation should be remedied by new primary legislation. However, section 10 empowers the relevant Minister to make such amendments to legislation, by order, where there are 'compelling' reasons for doing so.[128] The power to amend legislation by order extends only to the extent necessary to remove an incompatibility, although a remedial

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[122] White Paper, *supra* note 2, at para. 2.14.
[123] U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 522 (18 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).
[124] White Paper, *supra* note 2, at para. 1.19.
[125] *Human Rights Act*, *supra* note 10, at sections 4(1)-(4).
[126] *Human Rights Act*, *ibid.*, at section 4(6).
[127] White Paper, *supra* note 2, at para. 2.10.
[128] *Human Rights Act*, *supra* note 10, at section 10(2). See Ewing, *supra* note 5, at 93-93 for an account of the Parliamentary alterations to the content of the *Human Rights Bill* in this area.

order may apply to legislation other than the piece to which the declaration of incompatibility was made.[129]

The key problem in this circuitous route of ensuring compatibility is the 'remedy gap'. The litigant with a prima facie *Convention* violation is left with no effective remedy, and the allegedly violative legislation remains in operation. Even where Parliament acts subsequently to amend the impugned legislation, the individual litigant in the case at hand gains no meaningful remedy. Accordingly, the frequency with which such a declaration will be sought must be open to question. Further, given both the lack of remedies and that only the higher courts have the power to make declarations,[130] "there is little incentive for litigants to appeal where they have lost under legislation which may infringe a Convention right, but which the lower court has no authority to determine."[131]

Two further areas of inconsistency are apparent. First, no obligation exists for a court to make a declaration of incompatibility, even where a legislative provision is stated to violate the *Convention*; although admittedly the duty on the court as a public authority to exercise its discretion in a manner consistent with *Convention* rights indicates that the court *should* make such a declaration.[132] Second, the *Human Rights Act* implicitly envisages situations in which Parliament would not act to amend the offending legislation; amendment of offending legislation is not mandatory.[133]. Whilst some amendments will be straightforward, others may involve controversial social and moral

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[129] *Human Rights Act*, *ibid.*, at schedule 2.
[130] *Human Rights Act*, *ibid.*, at section 4(5).
[131] Ewing, *supra* note 5, at 88.
[132] The government resisted an amendment that would have removed the discretion of the court, and made such a declaration mandatory where a violation was apparent. U.K., H.L., *Parliamentary Debates*, vol. 583, at col. 545 (18 November 1997).
[133] See U.K., H.C., *Parliamentary Debates*, vol. 314, at col. 1121 (24 June 1998) (Jack Straw, the Home Secretary):

> In most cases, a Minister's view is endorsed by Parliament, and if a Minister decides that it is not appropriate for the Government to take action in respect of the declaration of incompatibility, no action need be taken. In controversial cases, the Minister's decision might have to be endorsed by the House. Indeed, the Opposition could force it to be endorsed, so it would always be subject to that possibility, which is right.
>
> Nor is there any obligation on the Government to remedy any incompatibility by means of a remedial order. We expect that the Government will generally want to do so, just as successive Governments have sought... to put right any declaration by the Strasbourg court by way of legislation or Executive action in the United Kingdom.

issues. Still more may involve issues dividing down party lines, ensuring that the government of the day effectively decides the outcome. The procedure for declarations of incompatibility reflects the tension between the maintenance of parliamentary sovereignty and a concern for individual rights. Marshall asserts that:

> The rights principle is in essence anti-majoritarian. You cannot successfully combine the effective protection of rights against the majority with unfettered Parliamentary supremacy.[134]

This charge can be fairly levelled at the procedures set up in the *Human Right Act*. The remedy of a declaration of incompatibility does not match the government's purported aim to "make more directly accessible the rights which the British people already enjoy under the Convention."[135] More effective mechanisms to disapply an Act of Parliament by a court, whist maintaining parliamentary sovereignty, will be considered in Chapter Five.

B. Judicial Remedies Under Section 8 of the *Human Rights Act*

This section analyses the orders available to the court where a public body has acted in contravention of the *Human Rights Act*. Section 8 preserves the general orders available in judicial review cases.[136] These orders are discretionary in nature. This is appropriate to "ensure that the process of judicial review is able to take account of the wider public interest as well as of particular rights and freedoms."[137]

Appropriately, the *Human Rights Act* does not follow the traditional rule that there is no right to damages for loss cause by wrongful administrative action, unless the conduct falls into a recognised common law category such as negligence, breach of statutory duty,

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[134] Marshall, *supra* note 56, at 83.
[135] White Paper, *supra* note 2, at 1.18.
[136] The orders of *certiorari*, *mandamus*, prohibition, and where appropriate, an injunction. Note that following the decision of the House of Lords in *M v. Home Office* [1993] 3 W.L.R. 433, an injunction can be granted by the court against Crown.
[137] Institute for Public Policy Research, *A British Bill of Rights* (London: Institute for Public Policy Research, 1990) at 22 [hereinafter I.P.P.R.].

trespass or misfeasance in public office.[138] In recognising the importance of state responsibility for breaches of fundamental rights, the *Human Rights Act* mirrors the approach of the European Court of Human Rights,[139] the European Court of Justice,[140] and other Commonwealth jurisdictions.[141]

However, the situations in which a court may award damages are severely constrained, and the *Human Rights Act* appears to envisage damages as an exception rather than a rule. The *Human Rights Act* states:

> No award of damages is to be made unless, taking account of all the circumstances of the case, including—
>
> (a) any other injunctive relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
>
> (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.[142]

This is too cautious an approach to awarding damages. The theoretical principle underpinning an award for damages under the *Human Rights Act* should be that anyone who has suffered quantifiable loss as a result of a rights violation should be compensated for this loss. Singh points out that "[t]his is not only fair to that person (who may have lost his or her livelihood), it also encourages respect for and compliance with the rights in the ECHR."[143]

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[138] See Lord Lester of Herne Hill, 'The Mouse that Roared: The Human Rights Bill 1995' [1996] Pub. L. 198 at 200, I.P.P.R., *ibid.*, at 21; M. Zander, *A Bill of Rights? 4th ed.* (London: Sweet & Maxwell, 1997) at 153. For an argument in support of the traditional position see Lord Woolf of Barnes, 'The Civil Justice Framework for the Incorporation of the European Convention' (1997) 32 Tex. Int'l L.J. 427 at 432.

[139] The *Convention*, *supra* note 28, at Article 50.

[140] The European Court of Justice has held that where a member state acts in violation of the Treaty, it may be liable in damages: E.C.J. *Francovich and Bonifaci v. Italy*, C-6&9/90 [1991] ECR I-5357; E.C.J. *Brasserie du Pêcheur SA v. Germany*, and *R v. Secretary of State for Transport, ex p. Factortame Ltd.*, C-46/93 & C-48/93 [1996] ECR I-1029.

[141] The following countries award damages for the breaches of constitutionally guaranteed rights and freedoms: Canada, *R v. Schacter*, [1992] 2 S.C.R. 679; India, *Nilabati Behera v. State of Orissa* (1993) 2 S.C.C. 746; New Zealand, *Simpson v. Attorney-General [Baigent's Case]* [1994] 3 N.Z.L.R. 667; United States, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1970), *Carlson v. Green*, 446 U.S. 14 (1980), *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); Ireland, *Meskell v. CIE* [1973] I.R. 121. Cited in Lester, *supra* note 138, at 200.

[142] *Human Rights Act*, *supra* note 10, at section 8(4).

[143] Singh, *supra* note 42, at 32.

In conclusion, the remedies available under the *Human Rights Act* highlight the imbalance between the protection of parliamentary sovereignty on the one hand, and the protection of individual rights on the other. This theme is expanded in Chapter Five.

VI. SHOULD THERE BE A HUMAN RIGHTS COMMISSION?

Much concern was expressed in the Parliamentary debates at the failure of the *Human Rights Act* to propose the creation of a Human Rights Commission (H.R.C.). Coupled with the proposed changes to legal aid, this failure was seen by many to have very serious implications for access to justice.[144] In the most substantial study of this question, the Institute for Public Policy Research recommended that a British H.R.C. should be concerned primarily with enforcement of a bill of rights, with advice and education as secondary functions.[145] A H.R.C. should be empowered to bring actions, as well as support individual litigants and act as an intervenor in suitable cases. This role of enforcement is vital to ensure effective access to human rights legislation for everyone.

The government, in the White Paper, stated that more work needed to be done to determine the use and effectiveness of a H.R.C.[146] Mike O'Brien, under-secretary of state at the Home Office, reiterated the standard government response on this issue:

> The Government do not have a closed mind on a commission—we have made our position clear. Different interest groups—the Commission for Racial Equality, the Equal Opportunities Commission and so on—have different views on whether a human rights commission would be a good thing, so the best that we can do at the moment is to ensure that the convention is accepted as part of

[144] On reforms to legal aid see the *Access to Justice Bill* (Report Stage and Third Reading in the House of Commons 22 June 1999); Consultation Paper, *Access to Justice with Conditional Fees* (London: Her Majesty's Stationary Office, 1998); M. Zander, 'The Government's Plans on Legal Aid and Conditional Fees' (1998) 61 M.L.R. 538.

[145] Institute for Public Policy Research, *A Human Rights Commission for the United Kingdom—Some Options* (London: Institute for Public Policy Research, 1996). See also U.K., H.L. *Parliamentary Debates*, vol. 582, at col. 1248 (3 November 1997) (Baroness Amos, the former Chief-Executive of the Equal Opportunities Commission). This primary role is consistent with the functions of both the provincial and federal human rights commissions in Canada, see W. Tarnopolsky and W.F. Pentney, *Discrimination and the Law* (Toronto: Carswell, 1995) at Chapter 14. But see the recommendations of Liberty, *supra* note 1, at 100, who suggest that the primary role for a H.R.C. should be advice and scrutiny.

[146] White Paper, *supra* note 2, at paras. 3.8-3.12.

> our law. After that, the need for a human rights commission may be the subject of a future debate—we shall have to see how that develops.[147]

However, many commentators emphasise that the primary utility of a H.R.C. would be in the early stages of the *Human Rights Act*. Singh suggests that without the input of a H.R.C., "the attempt to graft a human rights culture onto existing legal and political arrangements could go sadly wrong."[148]

VII. CONCLUSION

This Chapter has demonstrated the procedural and enforcement inadequacies in the *Human Rights Act*. Such inadequacies stem largely from an inappropriate balancing of parliamentary sovereignty and individual rights, in which the balance is tipped heavily towards parliamentary sovereignty. In the next Chapter I suggest that the conceptual basis on which this understanding of parliamentary sovereignty is based is flawed, and further that other constitutional models exist which provide more effective protection for individual rights, whilst preserving parliamentary sovereignty.

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[147] U.K., H.C., *Parliamentary Debates*, vol. 314, at col. 1087 (24 June 1998) (Mike O'Brien).

[148] Singh, *supra* note 42, at 36. See also U.K., H.L. *Parliamentary Debates*, vol. 582, at col. 1248 (3 November 1997) (Baroness Amos, the former Chief-Executive of the Equal Opportunities Commission).

— CHAPTER FIVE —

FASHIONING A BRITISH BILL OF RIGHTS: RECONCILING THE TENSION BETWEEN PARLIAMENTARY SOVEREIGNTY AND INDIVIDUAL RIGHTS PROTECTION

The *Human Rights Act* purports to achieve a compromise between the often conflicting goals of protecting individual rights and preserving parliamentary sovereignty.[1] Lord Irvine spoke of the need to "deliver a modern reconciliation of the inevitable tension between the democratic rights of the majority to exercise political power and the democratic need of individuals and minorities to have their human rights secured."[2] Therefore the Act aims to "enable people to enforce their *Convention* rights against the state in the British court,"[3] whilst refraining from "trespassing on parliamentary sovereignty."[4]

This compromise must still guarantee sufficient rights, and additionally afford adequate procedural mechanisms by which to realise the substantive *Convention* rights. However, as outlined in the last three chapters, the substantive rights guarantees are deficient, and both the procedural and remedial provisions in the *Human Rights Act* are inadequate.

In this Chapter, I argue the following. First, I suggest that given the inadequacies of the rights guarantees in the *Convention*, a uniquely British bill of rights is appropriate. But this option was not debated in Parliament, and almost all commentators implicitly

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[1] U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1229 (3 November 1997) (Lord Irvine of Lairg, the Lord Chancellor); U.K., 'Rights Brought Home: The Human Rights Bill', Cmnd 3782 (24 October 1997) at paras. 2.10-2.16 [hereinafter the White Paper]. Available online: CCTA Government Information Service <http://www.open.gov.uk> (modified daily); Lord Irvine of Lairg, 'Opening Address to the Conference on Constitutional Reform in the United Kingdom' in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998) 1 at 2.

[2] U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1234 (3 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).

[3] White Paper, *supra* note 1, at para. 1.18.

[4] U.K., H.L., *Parliamentary Debates*, vol. 582, at col. 1229 (3 November 1997) (Lord Irvine of Lairg, the Lord Chancellor).

assumed that incorporation of the *Convention* was the only conceivable rights model. I analyse the stated justifications for incorporation of the *Convention* without modification, and argue that the arguments do not stand up to scrutiny. Indeed, I suggest that the advantages of creating a new bill of rights out-weigh the stated disadvantages.

Second, I suggest that the procedural and remedial aspects of the *Human Rights Act* are ineffective. In contrast, parliamentary sovereignty—the power of Parliament to enact or repeal any legislation it chooses, and the inability of any other entity to strike down an act of parliament—remains intact, particularly where the alleged violation stems from a primary legislative provision. The *Human Rights Act* reflects less of Lord Irvine's purported compromise than a subjugation of individual rights to parliamentary sovereignty. Although parliamentary sovereignty has been preserved, practically this has been at the expense of the effective protection of individual rights. I argue further that the theoretical vision of parliamentary sovereignty underpinning the *Human Rights Act* reflects outdated assumptions about the relationship between Parliament and the judiciary. Moreover, various constitutional models that would both protect parliamentary sovereignty, and provide far more effective remedies for human rights violations were rejected with insufficient justification.

Finally, I develop a theme that has reappeared throughout this thesis. I suggest that the greatest justification for a British bill of rights is that such a bill of rights would require extensive public consultation and consensus building. I briefly outline the significance and consequences of this kind of public participation in creating a bill of rights.

I. A BRITISH BILL OF RIGHTS?

That a different rights model could be a more appropriate British bill of rights was not even the subject of debate in Parliament. Despite the almost universally unstated assumption that incorporation of the *Convention* was the only conceivable rights model,[5] three broad arguments against a novel bill of rights can be gleaned from academic comment.

A. The Time Argument

A common justification for not attempting a unique British bill of rights is that building a bill of rights from scratch takes time. A long-lasting and detailed Royal Commission Report would be necessary, and that the requisite public consultation would be time-consuming and difficult.[6] Yet, time, careful consideration, and public consultation represent requisite ingredients for a credible, legitimate and successful bill of rights. If invoking time as a potential problem manifests a concern for the violation of liberties in the intervening period, incorporation of the *Convention* now, pending consideration of a British bill of rights, could provide a temporary solution.

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[5] Almost all treatments asking whether Britain should have a bill of rights conclude or presume that the *Convention* is the appropriate model. See *e.g.* M. Zander, *A Bill of Rights?* 4th ed. (London: Sweet & Maxwell, 1997); R. Dworkin, *A Bill of Rights for Britain* (London: Chatto & Windus, 1990); G. Robertson, *Freedom, the Individual and the Law* (London: Penguin, 1993); T.H. Bingham, 'The European Convention on Human Rights—Time to Incorporate' (1993) 109 L.Q.R. 390; and Sir L. Scarman, *English Law—The New Dimension* (London: Stevens, 1974).
Notable exceptions include J. Wadham, 'Why Incorporation of the European Convention on Human Rights is Not Enough' in R. Gordon and R Wilmot-Smith eds., *Human Rights in the United Kingdom* (Oxford: Clarendon Press, 1996); Liberty, *A People's Charter: Liberty's Bill of Rights, A Consultation Document* (London: National Council for Civil Liberties, 1991); Institute for Public Policy Research, *A British Bill of Rights* (London: Institute for Public Policy Research, 1990).

[6] Zander, *ibid.*, at 140.

B. The Dissent Argument

The second argument against a domestic bill of rights offered is that of dissent: that agreement on such a document would never be possible.[7] Again, this seems a weak assertion. Consensus may indeed be difficult, but at least any resulting document would rise out of the legitimacy of the democratic process. Zander, who argues against a unique bill of rights, acknowledges that "[n]o doubt the process of discussion and debate during the time of [consultation] would be beneficial from the point of view of educating the public, the lawyers, judges and politicians on the issues involved." I would suggest that Zander misses the significance of such discussion and public involvement. I return to the importance of public consensus in Part III below.

C. The 'Revolutionary' Argument

The final assertion frequently made against a unique bill of rights is that such documents arise from fundamental changes in the constitutional, legal and political fabric of a nation: in short, at times of revolution or major political upheaval.[8] This assertion depends on two assumptions. Firstly, that creating a domestic bill of rights is unwise or impossible without such a political back-drop. Yet Commonwealth nations with a similar constitutional, political and social environment to the United Kingdom have achieved successful novel bills of rights in situations in which no revolutionary conditions existed.[9] Secondly, the assertion assumes that no revolutionary situation exists in the United

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[7] U.K., H.L., *Report of the Select Committee on a Bill of Rights*, No. 176 (1978) at 21, who concluded that "to attempt to formulate *de novo* a set of fundamental rights which would command the necessary general assent would be a fruitless exercise." See also Zander, *ibid.*, at 140.

[8] S. Kentridge, 'The Incorporation of the European Convention on Human Rights' in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998) 61. For example, the *Constitution of South Africa 1997*, which can be found online: International Constitutional Law <http://www.uni-wuerzburg.de/law/home.html> (date accessed: 27 July 1999); the constitution of Germany, *Basic Law for the Federal Republic of Germany* Promulgated by the Parliamentary Council on 23 May 1949, as amended by the Unification Treaty of 31 August 1990, and the Federal Statute of 23 September 1990, online: International Association of Constitutional Law <http://www.eur.nl.frg/iacl/> (date accessed: 27th July 1999). See Justice R.J. Goldstone, 'The South African Bill of Rights' (1997) 32 Tex. Int'l. L.J. 451.

[9] Canada is an excellent example.

Kingdom today. However, it would not be hyperbolic to suggest that a British constitutional revolution is underway. The elements are both contemporary and modestly historical,[10] for example: the relinquishing of parliamentary sovereignty to the European Union by the *European Communities Act* 1972,[11] the devolution of parliamentary sovereignty to regional assemblies in Northern Ireland, Scotland and Wales;[12] and the proposed reforms of the House of Lords.[13] Not only do such developments imply a constitutional revolution—a prudent analysis of such constitutional reforms would suggest that our unwritten constitution may be insufficient to cope with the balance of power issues raised by devolution, and that a home-made bill of rights may be necessary to both circumscribe the powers of the regional assemblies, and to ensure that their power is not encroached upon by the Westminster Parliament.[14]

In conclusion, I believe that the commonly invoked arguments against a novel, uniquely British bill of rights fail even the most cursory scrutiny. In the next section I argue that the constitutional framework envisaged by the *Human Rights Act* is obsolete, and that alternative constitutional frameworks exist which both preserve parliamentary sovereignty and effectively protect human rights exist. Finally, in Part III, I rehearse the most compelling argument for a British bill of rights: that a home-grown bill would be more legitimate, and democratically credible than the *Human Rights Act*.

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[10] See Chapter One, above.

[11] *European Communities Act* (U.K.), 1972, c.68.

[12] See Chapter One, Part III, Section C, above, and *Referendums (Scotland and Wales) Act*, 1997 (U.K.), c. 61 (authorising the referendums on devolution in both Scotland and Wales); *Northern Ireland (Elections) Act*, 1998 (U.K.), c.12 (authorising the elections in Northern Ireland); *Regional Development Agencies Act*, 1998 (U.K.), c.45 (establishing the preliminary steps towards regional government in England). See further the substantive content of the *Government of Wales Act*, 1998 (U.K.), c.38; *Scotland Act*, 1998 (U.K.), c.46; *Northern Ireland Act*, 1998 (U.K.), c. 9. In general, see R. Hazell, 'Reinventing the Constitution: Can the State Survive?' [1999] Pub. L. 84; Constitution Unit, *Constitutional Futures* (London: The Constitution Unit, 1999).

[13] The Government has set up a Royal Commission to investigate reforms of the House of Lords, U.K., H.L., *Parliamentary Debates*, vol. 593, at col. 926 (14 October 1998) (Baroness Jay).

[14] This argument was first suggested by Lord Scarman, *supra* note 5, at 65-68.

II. PARLIAMENTARY SOVEREIGNTY AND THE PROTECTION OF INDIVIDUAL RIGHTS

In this Section I re-visit the tension between parliamentary sovereignty and the protection of human rights. I argue that the *Human Rights Act* protects parliamentary sovereignty at the expense of effective individual rights protection. This is particularly problematic given the obsolete vision of parliamentary sovereignty invoked by the *Human Rights Act*. Finally, I suggest that various other constitutional models exist, which are more protective of individual rights, and uphold the primacy of parliamentary sovereignty.

A. The Goals of the *Human Rights Act*: A Clash Between the Protection of Individual Rights and the Preservation of Parliamentary Sovereignty?

The *Human Rights Act* does not place any fetter on the ability of Parliament to pass any piece of legislation it chooses, beyond those already existing.[15] Indeed, the *Human Rights Act* specifically envisages that a government might wish to sponsor future legislation which it acknowledges to be in violation of the *Convention*.[16] Therefore, the *Human Rights Act* does not affect the legislative omnipotence of Parliament.

Similarly, the relationship between the judiciary and Parliament remains, at least in practice, largely unaffected. The *Human Rights Act* empowers the courts to interpret legislation according to the rights contained in the *Convention*, and to make a declaration

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[15] *European Communities Act*, *supra* note 11, section 2 limits the power of Parliament to legislate in a manner violating contrary to the *Treaty establishing the European Economic Community*, 4 July 1957, 298 U.N.T.S. 3. Further, if Parliament legislates contrary to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 (entered into force September 3 1953) [hereinafter, the *Convention*], it runs the risk of an adverse judgement from the European Court of Human Rights in Strasbourg forcing amendment or repeal of the offending statute.

[16] *Human Rights Act* (U.K.), 1998, c.42, Appendix II, *infra*, at section 19(1)(b). Although see N. Bamforth, 'Parliamentary Sovereignty and the Human Rights Act 1998' [1998] Pub. L. 572 (concluding that section 19 was not judicially enforceable as a restraint on the manner and form by which legislation must be passed).

of incompatibility in circumstances where the legislation violates the *Convention.*[17] However, the courts cannot declare an Act of Parliament unlawful, or require its repeal or amendment. Indeed, section 3 explicitly preserves the validity and enforceability of any legislative provision, even in the face of a declaration of incompatibility. Any repeal or amendment of legislation remains the domain of Parliament, and at the discretion of Parliament, even where a declaration of incompatibility has been granted by a court. The *Human Rights Act* excludes the failure to pass legislation in light of a declaration of incompatibility from scrutiny by the courts.[18] Empowering the courts to make a declaration of incompatibility is merely a theoretical alteration in the relationship between the judiciary and Parliament: the practical effects are minimal. A declaration of incompatibility is simply a power of referral back to Parliament for amendment or repeal, and despite governmental assurances that such declarations will be followed,[19] "[t]he ultimate decision to amend legislation to bring it into line with the *Convention*... will rest with Parliament."[20]

In contrast, individual human rights protection has been subjugated to the maintenance of existing constitutional principles. The scheme of pre-legislative scrutiny remains insufficient to effectively prevent the promulgation of legislation incompatible with the *Convention.* It certainly does not hamper a government wishing to pass incompatible legislation. Further, the remedies necessary to ensure anything more than illusory human rights protection simply do not exist in situations where the source of the *Convention* violation is found in a provision of primary legislation. As outlined above, even where the court feels that a violation of the *Convention* has occurred, a declaration of incompatibility is only discretionary. Even where a declaration of incompatibility is made, the impugned legislation continues to apply. Parliament has no obligation to

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[17] *Human Rights Act*, *ibid.*, at section 3 and 4 respectively.
[18] *Human Rights Act*, *ibid.*, at section 6(6).
[19] See the comments of the Lord Chancellor in the Report Stage of the Bill in the House of Lords, that in the face of a declaration of incompatibility, "it is likely that the Government and Parliament would wish to respond to such a situation and would do so rapidly." U.K., H.L., *Parliamentary Debates*, vol. 306, at col. 780 (16 February 1998) (Lord Irvine of Lairg, the Lord Chancellor).
[20] Lord Irvine of Lairg, 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights' [1998] Pub. L. 221 at 224.

respond to a declaration of incompatibility, but where it does, this does not affect the litigant in the original case. The consequences of this approach for the court and the litigant are summarised by Marshall:

> If the citizen has argued successfully that the UK law offends against the Convention, the continuing operation or enforcement of the relevant Act of Parliament implies that the court must say, "You should win your case. The Act is incompatible with the Convention and the public authority invoking its terms against you is infringing your rights. But, unfortunately, we cannot give you a remedy."[21]

As in the days before the *Human Rights Act*, the only effective remedy lies in Strasbourg. Yet this is precisely the situation supposedly cured by the *Human Rights Act*. Finally, the absence of a human rights commission, or any other similar enforcement mechanism, coupled with the sweeping changes to the legal aid scheme, suggest that the guarantees in the *Human Rights Act* cannot be realised by the poorest of citizens.

The compromise attempted between parliamentary sovereignty and individual rights demands judges to be guardians of both principles, placing them in a "Janus-like role."[22] Butler highlights this problem in the context of the *New Zealand Bill of Rights Act*,[23] concluding that:

> To expect the judges to act as both guardians of parliamentary sovereignty and human rights is to require of them a near impossible task. The better alternative is to make the judges the guardians of one or the other. This method preserves the legitimacy of their adjudicative function.[24]

The *Human Rights Act* places the judges in a similar position; if the judges attempt to construe the Act creatively, so as to create real remedies for victims of rights violations they will be seen to be usurping the legitimate authority of Parliament. Yet, if the courts follow the *Human Rights Act* slavishly, its lack of effective remedies suggests that the courts would lay themselves open to a charge of failing to protect individual human rights.

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[21] G. Marshall, 'Patriating Rights—With Reservations, The Human Rights Bill 1998' in The University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998) 73 at 75.

[22] A.S. Butler, 'The Bill of Rights Debate: Why the New Zealand Bill of Rights Act 1990 is a Bad Model for Britain' (1997) O.J.L.S. 323 at 337.

[23] *New Zealand Bill of Rights Act*, 1990, No. 109.

[24] Butler, *supra* note 22, at 338.

The failure of the *Human Rights Act* is compounded by its reliance on an antiquated perception of the meaning of parliamentary sovereignty. The next section analyses the vision of parliamentary sovereignty relied on by the *Human Rights Act*, and re-visits the true nature of parliamentary sovereignty today.

B. The Obsolete Vision of Parliamentary Sovereignty Underpinning the *Human Rights Act*

The focus on parliamentary sovereignty in the *Human Rights Act* is theoretically and practically problematic, for the concept of parliamentary sovereignty it invokes relies on traditional Diceyan understandings. Parliament is understood as omnipotent; scrutiny of Parliamentary legislation is outside the appropriate realm of the court. The White Paper, in considering the constitutional back-drop to the bill of rights, states:

> 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... 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.[25]

This section argues that governmental assertions of the vitality of traditional Diceyan parliamentary sovereignty are inaccurate, and further, that they mask the real question in this debate: what constitutional mechanism would maximise both parliamentary sovereignty and the protection of individual rights?

Parliamentary sovereignty has evolved: it bears little resemblance today to the concept outlined by Dicey.[26] The governmental claim that the judiciary cannot set aside an Act of

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[25] White Paper, *supra* note 1, at para. 2.13.

[26] Bradley sums up the evolution thus, "the orthodox doctrine of the sovereign Parliament is not an immutable part of British constitutional law." A.W. Bradley, 'The Sovereignty of Parliament—in Perpetuity?' in J. Jowell & D. Oliver eds., *The Changing Constitution* (Oxford: Clarendon Press, 1994) 79 at 107.

Parliament has been proved false by the *Factortame*[27] litigation arising out of the *European Communities Act*.[28] The White Paper attempts to differentiate the framework created by the *European Communities Act* from that envisaged under the *Human Rights Act* in the following way:

> There is... 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.[29]

This argument obscures the real policy debate, which is not whether Parliament *can* give power to strike down primary legislation to the judges—the *European Communities Act* demonstrates that Parliament can—but rather whether Parliament *wishes* to cede such power. Therefore:

> It is precisely because the European Convention does not require there to be directly enforceable remedies in the UK that the issue of incorporating it has arisen and has been hitherto presented as offering a remedy for that precise disadvantage. The present issue is not whether it is necessary but whether it would be best, or right, or advantageous to allow British judges to give priority to the Convention. But it is hard to see how the fact that the Convention itself does not make it obligatory to do so can be adduced as a conclusive reason, or any sort of reason for doing it.[30]

The government further side-stepped the debate by stating that "this Government has no mandate for any such change" a claim that looks dubious both as a result of the *European Communities Act*, and in the context of Labour's other sweeping constitutional changes.

The argument that Parliament does not have the power to grant the judiciary authority to effectively scrutinise primary legislation cannot stand. The real question should be framed: do we want the courts to have more power than the *Human Rights Act* concedes?

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[27] The full saga of litigation can be found: *R v. Secretary of State for Transport, ex p. Factortame Ltd. (No. 1)* [1989] 2 C.M.L.R. 353 (CA); [1990] 2 A.C. 85 (HL); *R v. Secretary of State for Transport, ex p. Factortame Ltd. (No. 2)*, C-213/89 [1991] A.C. 603 (ECJ & HL); *R v. Secretary of State for Transport, ex p. Factortame Ltd. (No. 3)*, C-221/89 [1992] Q.B. 680 (ECJ); *R v. Secretary of State for Transport, ex p. Factortame Ltd. (No. 4)*, C-48/93 [1996] Q.B. 404 (ECJ). Additionally, the European Commission initiated proceedings against the United Kingdom under Article 169, see E.C.J. *Commission v. United Kingdom*, C-246/89 [1991] ECR I-4585.

[28] *European Communities Act*, *supra* note 11.

[29] White Paper, *supra* note 1, at para. 2.12.

[30] Marshall, *supra* note 21, at 76.

The answer must be a cautious yes, for several reasons. First, the supposed compromise between parliamentary sovereignty and individual rights is too heavily tilted towards parliamentary sovereignty. Second, the incongruity between adhering to remedial orders from the European Court of Human Rights, but preventing such action from domestic courts in the name of parliamentary sovereignty makes no theoretical or practical sense. However, in granting the courts additional powers of scrutiny, considerations of democracy and legitimacy must be maintained. Parliamentary sovereignty must still be balanced with the protection of individual rights. The next section examines various other constitutional models considered and rejected by the government, and argues that paradigms exist which maintain parliamentary sovereignty whilst granting effective remedial protection for individual rights.

C. Alternative Constitutional Visions

Anglo-American legal systems around the world provide templates for a bill of rights. Various balancing arrangements between majoritarian parliaments, and the rights of individuals have been set up, with varying success and outcomes.[31] This section examines the spectrum of constitutional models, and argues that at least two examples of bills of rights exist where the sovereignty of parliament is appropriately balanced with the effective protection of individual rights.

At one extreme of the spectrum of bills of rights lies what Bradley dubs an "*Interpretation Act*".[32] Such a bill of rights would provide that past and future legislation should be interpreted consistently with a bill of rights, but that in situations of conflict, the impugned legislation overrides the provisions of the bill of rights.[33] This model

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[31] Not all of the jurisdictions analysed operate in constitutional parameters set by parliamentary sovereignty. This section merely examines the model in the abstract, and questions its suitability for transplantation into a British context of parliamentary sovereignty.

[32] Bradley, *supra* note 26, at 102.

[33] This suggestion is modelled on the *New Zealand Bill of Rights Act* 1990, *supra* note 23. Section 6 states that:

strongly maintains parliamentary sovereignty: any parliament could disregard the *Convention* terms merely by passing legislation conflicting with the bill of rights. However, the "*Interpretation Act*" model does not present the courts with any real tools to remedy violations of human rights contained in parliamentary legislation.[34] With the addition of the 'declaration of incompatibility' mechanism, this is the model adopted by the United Kingdom. For the reasons outlined in both this Chapter and Chapter Four, such a model insufficiently protects individual rights.[35]

At the opposing end of the spectrum, is an omnipotent bill of rights, with which all legislation must be compatible.[36] Such bills of rights tend to be entrenched in the legislative schema by requiring special procedure for amendment,[37] and are policed by the judiciary, who hold the power to strike down, or amend legislation which violates the tenets of the bill of rights.[38] This approach represents a vast restraint on parliamentary

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> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

However, section 4 asserts that:

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),
>
> (a) Hold any provisions of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment – by reason only that the provision is inconsistent with any provision of this Bill of Rights.

For an overview of the *New Zealand Bill of Rights Act* see P. Rishworth, 'The Birth and Rebirth of the Bill of Rights' in G. Huscroft & P. Rishworth eds., *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Wellington: Brooker's, 1995) at 1.

The *Human Rights Act* mirrors this model, although the *New Zealand Bill of Rights Act* contains no equivalent to the court ordered 'declaration of incompatibility' in the *Human Rights Act*. Prior to the *Human Rights Act*, the *New Zealand Bill of Rights Act* was touted as an appropriate model for the United Kingdom, see Lord Woolf of Barnes, 'Droit Public—English Style' [1995] Pub. L. 57 at 70. But see Butler, *supra* note 22; Emmerson, 'Opinion: This Year's Model—The Options for Incorporation' [1997] E.H.R.L.R. 313 at 323 (both arguing that the United Kingdom should not imitate the *New Zealand Bill of Rights Act*).

[34] Although note the establishment of a public law action for compensation for breach of the *Bill of Rights Act* by the New Zealand Court of Appeal in *Simpson v. Attorney-General [Baigent's Case]* [1994] 3 N.Z.L.R. 667.

[35] A concrete example of the failure of an interpretative bill of rights is provided by the *Canadian Bill of Rights*, R.S.C. 1970, Appendix II. This failure has been extensively chronicled by B. Hovius, 'The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter' (1982) 28 McGill L.J. 31.

[36] U.S. Const.

[37] U.S. Const. art. V.

[38] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

sovereignty; Parliament is prevented from legislating in any manner contrary to the bill of rights, and the judiciary is presented with enormous powers, which arguably usurp the democratic mandate of Parliament. Given the constitutional tradition of the United Kingdom, grounded as it is in the primacy of parliamentary sovereignty, this is an inappropriate model for a British bill of rights.

Between these extremes, lie two models which ensure protection for individual rights, whilst upholding the principles of parliamentary sovereignty: the *Hong Kong Bill of Rights Ordinance*,[39] and the *Canadian Charter of Rights and Freedoms*.[40] The Hong-Kong model provides that the *Bill of Rights Ordinance* overrides any earlier inconsistent legislation; for subsequent legislation, a rule of interpretation applies: legislation must be interpreted in line with the *Ordinance*.[41] At least in the abstract, in combination with effective pre-legislative scrutiny procedures, the Hong-Kong model ensures the protection of individual human rights.[42] Simultaneously, the *Hong-Kong Bill of Rights Ordinance* does not hamper the legislative capacity of any future Parliament, and operates on the principle of implied repeal, a principle derived from Diceyan understandings of Parliamentary sovereignty.

Pushing the limits of parliamentary sovereignty a little further, all past and future legislation must comply with the *Canadian Charter*.[43] Courts have the power to strike

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[39] *Hong Kong Bill of Rights Ordinance 1991*, can be found online: International Constitutional Law <http://www.uni-wuerzburg.de/law/home.html> (date accessed: 27 July 1999)

[40] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

[41] *Hong Kong Bill of Rights Ordinance*, *supra* note 39, at sections 3(1), 3(2) and 4. See J. Allen, 'A Bill of Rights for Hong-Kong' [1991] Pub. L. 175; Y. Ghai, 'Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights' (1997) 60 M.L.R. 459; Zander, *supra* note 5, at 115; Bradley, *supra* note 26, at 102.

[42] The efficacy of the *Hong Kong Bill of Rights Ordinance* has been seriously impeded following the 'immigrant children' cases. In January 1999, the Hong Kong Court of Final Appeal ruled that all descendants of Hong Kong residents, including illegitimate offspring, have the right of abode in Hong Kong, *Ng Ka Ling v. Director of Immigration (sub-nom: Cheung Lai Wah (An Infant) v. Director of Immigration)* [1999] 1 H.K.L.R.D. 315; *Chan Kam Nga v. Director of Immigration* [1998] 1 H.K.L.R.D. 304. However, in June 1999, China's Parliament ruled that large numbers of mainland immigrants would not be eligible to join parents resident in Hong Kong, effectively overturning the decision of the Court of Final Appeal. See D. Rennie, 'Hong Kong Rule of Law Damaged by Beijing' (28 June 1999), online: Electronic Telegraph <http://www.telegraph.co.uk> (date accessed: 6 August 1999).

[43] See P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1996).

down inconsistent legislation; section 52(1) of the *Constitution Act* governs the *Charter*, stating in relevant part: "[t]he Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution, is to the extent of the inconsistency, of no force or effect." The *Charter* contains a wide range of remedies for an individual whose constitutionally guaranteed: the court may award "such remedy as the court considers appropriate and just in the circumstances" as well as granting courts a discretion to exclude evidence gathered in an manner infringing the rights and freedoms in the *Charter*.[44]

However, a balance with parliamentary sovereignty is maintained by the inclusion of section 33, which allows legislatures to legislate contrary to the provisions of the *Charter*, but only expressly by the invocation of the 'notwithstanding clause.'[45] Further, even where legislation has been struck down by the courts, legislatures may re-enact the offending provision by invoking the 'notwithstanding clause.' The notwithstanding clause in the Canadian context has "more symbolic than practical importance, particularly because of the high political price likely to be paid for flying in the face of a clear cut court decision which has struck down a statutory provision because it violates a constitutionally guaranteed right or freedom."[46] An good example of government unwillingness to invoke the notwithstanding clause was demonstrated by the events unfolding after *Vriend v. Alberta*.[47] In *Vriend* the Supreme Court declared

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[44] The *Charter*, *supra* note 40, at section 24. See *e.g. R v. Schacter*, [1992] 2 S.C.R. 679.

[45] Section 33 states in relevant part:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

[46] R. Penner, 'The Canadian Experience with the Charter of Rights: Are there Lessons for the United Kingdom?' [1996] Pub. L. 104 at 111. Section 33 has never been used by the federal government, and only once effectively by a provincial government: Quebec, following the decision of the Canadian Supreme Court in *Ford v. Quebec*, [1988] 2 S.C.R. 712 (Quebec legislation prohibiting the use of any language other than French on commercial signs struck down), re-enacted the offending legislation using the notwithstanding clause. Outside of Quebec, the notwithstanding power has been used only once, in Saskatchewan, to enforce back to work legislation which the Saskatchewan Court of Appeal had held to be in violation of the *Charter*, *R.W.D.S.U. v. Saskatchewan* (1985), 39 Sask. R 193. The provincial government's use of section 33 was unnecessary, as the Supreme Court subsequently overturned the decision of the Court of Appeal, *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460.

[47] [1998] 1 S.C.R. 877.

unconstitutional a provision of the Alberta *Individual's Rights Protection Act*,[48] as it failed to prohibit discrimination on the ground of sexual orientation. Despite considerable public pressure, the conservative provincial government in Alberta did not invoke the notwithstanding clause.

The notwithstanding clause has not been without controversy. When the *Charter* was enacted, the notwithstanding clause was denounced by some, arguing that permitting "legislative bodies to invoke section 33 to override the rights and freedoms to which it applies in all circumstances, even where such use of section 33 would shield indiscriminate and capricious restrictions, the initial value of entrenchment of those rights would be frustrated."[49] However, perhaps due to the minimal usage of section 33, commentators suggest that section 33, in combination with section 1 of the *Charter*, result in a "dialogue" between the courts and the legislatures, rather than one governmental branch dictating the approach of the other.[50] Further, the *Charter* has shifted the parameters of political legitimacy, so that a government invoking the notwithstanding clause actually appears illegitimate.

The advantage of the notwithstanding clause is that Parliament must be transparent in passing legislation deemed to violate the *Convention*. As Dworkin commented, whilst this may prevent Parliament passing some legislation it might otherwise have enacted, the point is to force Parliament to work harder to pass legislation conflicting with a bill of rights:

> Forcing Parliament to make the choice between obeying its international obligations and admitting that it is violating them does not limit Parliament's supremacy, but only its capacity for duplicity. Candour is hardly inconsistent with sovereignty.[51]

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[48] R.S.A. 1980, c. 1, section 2.
[49] D.J. Arbess, 'Limitations on Legislative Override under the Canadian Charter of Rights and Freedoms: A Matter of Balancing Values' (1983) 21 Osgoode Hall L.J. 113 at 117.
[50] See P.W. Hogg & A.A. Bushell, 'The *Charter* Dialogue Between Courts And Legislatures (Or Perhaps The *Charter Of Rights* Isn't Such A Bad Thing After All' (1997) 35 Osgoode Hall L.J. 75; L. Eisenstat Weinrib, 'Learning to Live with the Override' (1990) 35 McGill L.J. 540.
[51] Dworkin, *supra* note 5, at 31.

Further, the Canadian model conforms with the existing situation where a adverse judgement against the United Kingdom is issued by the European Court of Human Rights. Parliament, in order to comply with the *Convention*, must amend or repeal the law unless it enters a derogation.[52] Thus, a precedent for this model already exists in the United Kingdom.

In conclusion, therefore, the *Human Rights Act* enacts the weakest rights protection model, despite the existence of alternative models maintaining parliamentary sovereignty. The White Paper presents each of the options above, but dismisses each with no discussion other than the appeal to parliamentary sovereignty.[53] The inadequacy of this assertion is merely compounded by the false notions of parliamentary sovereignty invoked. Either the Hong-Kong, or the Canadian model would provide stronger individual rights protection whilst upholding parliamentary sovereignty.

III. LEGITIMACY, DEMOCRACY AND THE *HUMAN RIGHTS ACT* 1998

The paucity of the rights guarantees in the Convention, the spectre of problems raised by concurrent constitutional reform, and the emphasis on parliamentary sovereignty all suggest that the *Human Rights Act* cannot sufficiently protect human rights in the United Kingdom. Yet there is one further deficiency in the creation of the Act which promises to exacerbate these problems. This Section briefly examines some of the problems of political and institutional legitimacy that may arise from the *Human Rights Act*.

The *Human Rights Act* was the result of normal Parliamentary procedures. Public notification and consultation preceding the introduction of the *Human Rights Bill* was limited to the White Paper, although this did not alter the substance of the Bill. In contrast, the *Government of Wales Act*[54] and the *Scotland Act*[55] were preceded by

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[52] See Chapter Three above.
[53] White Paper, *supra* note 1, at paras. 2.11-2.15.
[54] *Government of Wales Act*, *supra* note 12.

referenda.[56] Yet, the *Human Rights Act*, for all its constitutional conservatism, stimulates constitutional change. It does allow the judiciary to pronounce on the legality of an Act of Parliament. Further, it introduces, in concrete legislative form, the language of positive rights, and of 'rights-balancing'.

This (at least perceived) shift in power from the legislature to the judiciary may be controversial, as it more openly involves the judiciary in questions of policy.[57] The traditional concerns over providing the judiciary with such an expanded role may be raised. Such concerns have typically been two-fold: the legitimacy of the judiciary to play such an expanded role, given its unelected and unaccountable nature, and also more pragmatic concerns as to the homogenous nature of the judiciary and the narrow echelons of society which feed it.[58] These concerns are issues of legitimacy; and such legitimacy questions undermine protection and enforcement of human rights, and simplify resistance.

In looking at the experiences of other nations in building bills of rights, it is apparent that a bill of rights garners the most public legitimacy where it arises out of extensive consultation. Where a community is consulted effectively, the values in a bill of rights stem from a notion of consensus and compromise. Such grassroots involvement, as opposed to hierarchical rights imposition, stimulates public internalisation of the values contained in a bill of rights. Further, the unifying and symbolic effect of a bill of rights

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[55] *Scotland Act*, *ibid.*

[56] *Referendums (Scotland and Wales) Act*, *ibid.*

[57] Although the popular myth of judges declaring, as opposed to making, the law has been pilloried in the academic literature for many decades, the "fairy tale" lives on, Lord Reid, 'The Judge as Law Maker' (1972) 12 J. of Public Teachers of Law 1 at 22. See also, A. Lester, 'English Judges as Law Makers' [1993] Pub. L. 269; R.S. Abella, 'Public Policy and the Judicial Role' (1989) 34 McGill L.J. 1021.

[58] These concerns have been apparent in critiques of the *Canadian Charter*: see J. Fudge & H. Glasbeek, 'The Politics of Rights: A Politics with Little Class' (1992) 1 Social and Legal Studies 45; J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997). See also the extensive bibliography in R. Sigurdson, 'The Left Legal Critique of the Charter: A Critical Assessment' (1993) 13 Windsor Y.B. Access Just. 117 at 118.
In the United Kingdom, see K.D. Ewing & C.A. Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Oxford: Clarendon Press, 1990).

created in this manner is vital in cementing the importance of human rights in a democracy.[59]

The best example of creating a bill of rights out of participatory rather than representative democracy is the *Canadian Charter*. In describing the Canadian experience in creating the *Charter of Rights and Freedoms*, Penner suggests that the *Charter* was "forged in... a 'democratic crucible'."[60] He suggests this to have been vital for formulating democratic legitimacy, credibility and effectiveness; thus, the judiciary breathed real substance into the *Charter* guarantees as the people took up the promise of the *Charter*. This can be contrasted with the experience of the *Canadian Bill of Rights*,[61] which was largely a failure.[62] Penner strikes a warning chord, that:

> This might well be the most important lesson to be learned from the Canadian experience. A minimalist bill of rights passed quietly, purely as a parliamentary measure without popular backing and substantial consensus, may not be given its full weight by the judiciary.[63]

The enthusiasm and creativity with which the British judiciary will approach the *Human Rights Act* is unclear. However, in enacting the *Human Rights Act* as a mere Parliamentary measure with none of the extensive consensus building described by

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[59] For an account of the political hope that the *Charter* would be a unifying force in Canada, see P.H. Russell, 'The Political Purposes of the Canadian Charter of Rights and Freedoms' (1983) 61 Can. Bar Rev. 30.

[60] Penner, *supra* note 46, at 107. Penner states, "[d]uring nationally televised hearings of a joint parliamentary committee, over 1000 individuals and 300 groups petitioned for changes and additions and the Committee, after 60 days of hearings, successfully proposed to Parliament some 65 substantial amendments to the Government draft."

[61] *Canadian Bill of Rights*, *supra* note 35.

[62] Berend Hovius notes that:

> The Supreme Court of Canada has heard approximately thirty cases in which the interpretation and application of the *Canadian Bill of Rights* was a key issue. The general approach exhibited in these cases, evidenced not only by the results but also by the reasons given, was one of judicial restraint. Only once did the Court actually hold that a provision in a federal statute was rendered inoperative by the Bill. Moreover, even when using the Bill as a rule of interpretation or as a guide to the judicial review of administrative action, the Court refused to protect creatively and vigorously individual rights and freedoms. This cautious approach was not dictated either by the status or wording of the Bill. Rather, it was the result of an underlying philosophy of government adopted by the majority of the judges on the Court, a philosophy which holds that an elected legislature is the only appropriate forum for policy formation. [footnotes omitted].

Hovius, *supra* note 35, at 32.

[63] Penner, *supra* note 46, at 107.

Penner in the context of the *Charter*, the government has missed an opportunity to give the Act real democratic credibility. The significance of this failure will only become apparent once adjudication on the *Human Rights Act* begins.

— CONCLUSION —

In the Introduction I highlighted the stated goals of the *Human Rights Act*: to strengthen democracy by allowing citizens to assert their rights in British courts; and to usher in a new atmosphere of liberty. Although the Act's substantive, procedural and remedial frameworks contain positive elements, overall the Act falls far short of effective rights protection.

The substantive rights in the *Human Rights Act* represent an excellent starting point for further discussion. However, without stronger protections in several areas, notably criminal justice, the family and children, anti-discrimination, derogations, and the rights of refugees and asylum seekers, the *Human Rights Act* is simply insufficient to cope with many of the human rights violations occurring in the modern state.

Similarly, some of the procedural guarantees in the *Human Rights Act* are helpful to an expansive protection of human rights. The definition of public authority is appropriately broad and the interpretative obligation on the courts is widely framed. However, many of the procedural criteria established by the *Human Rights Act* operate so as to keep various groups of people from relying on the Act. In particular, the absence of any provision for a Human Rights Commission, in combination with increasing limitations on the provision of legal aid, suggest that access to the *Human Rights Act* may be the preserve of the rich.[1] Of course, whilst such a charge may be levelled at all areas of law, universal access to justice in the arena of human rights is particularly significant. Further, the method of pre-legislative scrutiny created by the Act, so vital in a scheme for the protection of human rights which maintains parliamentary sovereignty, adds little to the pre-existing system which is riddled with inadequacies.

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[1] For similar assertions in the Canadian context see J. Fudge & H. Glasbeek, 'The Politics of Rights: A Politics with Little Class' (1992) 1 Social and Legal Studies 45; J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997). See also the extensive bibliography in R.

Finally, although the *Human Rights Act* creates novel public law remedies such as damages, the remedial framework set up by the Act does not invariably supply effective remedies for individual litigants. Indeed, in cases where a declaration of incompatibility is granted by the court, the litigant leaves court with no realisation of his or her rights. This kind of remedy gap risks fundamentally undermining the legitimacy of the *Human Rights Act*, and rendering it useless to litigants in court. Yet the constitutional vision underpinning this circuitous remedy is obsolete, and the government rejected various other constitutional models that would have provided stronger individual rights protection whilst maintaining parliamentary sovereignty.

In sum, I would argue that the provisions of the *Human Rights Act* fail to realise the goals that inspired passage of the Act. However, this remains an abstracted assessment: the judges have yet to adjudicate. Judicial approaches in other Commonwealth nations have led to different results. Bills of rights have been rendered ineffective by judicial interpretation. The *Canadian Bill of Rights*,[2] a minimalist measure passed quietly without broad public consultation, failed entirely to effectively protect human rights. Conversely, dynamic judicial interpretation has the potential to salvage more effective rights protection from a flawed bill of rights. The creative approach of the New Zealand Court of Appeal in *Simpson v. Attorney-General*[3] in carving out a public law action for compensation for breach of the *New Zealand Bill of Rights Act*,[4] or the approval of the Canadian Supreme Court of the technique of 'reading in' wording to underinclusive legislation in *Vriend v. Alberta*[5] demonstrate that judicial creativity may enhance human rights protection.

Comments by senior members of the judiciary in recent years give hope that the *Human Rights Act* will be read expansively and effectively. The advent of the *Human Rights Act*

Sigurdson, 'The Left Legal Critique of the Charter: A Critical Assessment' (1993) 13 Windsor Y.B. Access Just. 117 at 118.

[2] R.S.C. 1970, Appendix II.

[3] *[Baigent's Case]* [1994] 3 N.Z.L.R. 667.

[4] 1990, No. 109.

[5] [1998] 1 S.C.R. 877.

suggests that the rights discourse recently employed by the judiciary, largely at the level of rhetoric, may now be used to practical effect.

— APPENDIX I —

THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

This Appendix extracts the relevant Articles of the *European Convention of Human Rights*.

ARTICLE 1: OBLIGATION TO RESPECT HUMAN RIGHTS

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this 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 13: RIGHT TO AN EFFECTIVE REMEDY

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

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.

— APPENDIX II —

THE *HUMAN RIGHTS ACT* 1998

This Appendix lists the relevant sections of the *Human Rights Act* 1998.

Preamble

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.

The Convention Rights.

1. (1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in-

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Articles 1 and 2 of the Sixth Protocol,

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The Secretary of State may by order make such amendments to this Act as he considers to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) "protocol" means a protocol to the Convention-

(a) which the United Kingdom has ratified; or

(b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

Interpretation of Convention rights.

2. (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any-

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section-

(a) by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland;

(b) by the Secretary of State, in relation to proceedings in Scotland; or

(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland-

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force.

Interpretation of legislation.

3. (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section-

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Declaration of incompatibility.

4. (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied-

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section "court" means-

(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;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

(6) A declaration under this section ("a declaration of incompatibility")-

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

Right of Crown to intervene.

5. (1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

(2) In any case to which subsection (1) applies-

(a) a Minister of the Crown (or a person nominated by him),

(b) a member of the Scottish Executive,

(c) a Northern Ireland Minister,

(d) a Northern Ireland department,

is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2)may, with leave, appeal to the House of Lords against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)-

"criminal proceedings" includes all proceedings before the Courts-Martial Appeal Court; and

"leave" means leave granted by the court making the declaration of incompatibility or by the House of Lords.

Acts of public authorities.

6. (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if-

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes-

(a) a court or tribunal, and

(b) any person certain of whose functions 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.

(4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity.

(5) 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.

(6) "An act" includes a failure to act but does not include a failure to-

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

Proceedings.

7. (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of-

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) "legal proceedings" includes-

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) 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.

(8) Nothing in this Act creates a criminal offence.

(9) In this section "rules" means-

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,

(b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,

(c) in relation to proceedings before a tribunal in Northern Ireland-

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force,

rules made by a Northern Ireland department for those purposes,

and includes provision made by order under section 1 of the Courts and Legal Services Act 1990.

(10) In making rules, regard must be had to section 9.

(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to-

(a) the relief or remedies which the tribunal may grant; or

(b) the grounds on which it may grant any of them.

(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13) "The Minister" includes the Northern Ireland department concerned.

Judicial remedies.

8. (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including-

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining-

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be treated-

(a) in Scotland, for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;

(b) for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section-

"court" includes a tribunal;

"damages" means damages for an unlawful act of a public authority; and

"unlawful" means unlawful under section 6(1).

9. (1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only-

(a) by exercising a right of appeal;

(b) on an application (in Scotland a petition) for judicial review; or

(c) in such other forum as may be prescribed by rules.

(2) That does not affect any rule of law which prevents a court from being the subject of judicial review.

(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.

(4) An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.

(5) In this section-

"appropriate person" means the Minister responsible for the court concerned, or a person or government department nominated by him;

"court" includes a tribunal;

"judge" includes a member of a tribunal, a justice of the peace and a clerk or other officer entitled to exercise the jurisdiction of a court;

"judicial act" means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge; and

"rules" has the same meaning as in section 7(9).

Power to take remedial action.

10. (1) This section applies if-

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies-

(i) all persons who may appeal have stated in writing that they do not intend to do so;

(ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or

(iii) an appeal brought within that time has been determined or abandoned; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers-

(a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and

(b) that there are compelling reasons for proceeding under this section,

he may by order make such amendments to the primary legislation as he considers necessary.

(4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister proposes to proceed under paragraph 2(b) of Schedule 2.

(5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.

(6) In this section "legislation" does not include a Measure of the Church Assembly or of the General Synod of the Church of England.

(7) Schedule 2 makes further provision about remedial orders.

Safeguard for existing human rights.

11. A person's reliance on a Convention right does not restrict-

(a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or

(b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.

Freedom of expression.

12. (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied-

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to-

(a) the extent to which-

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section-

"court" includes a tribunal; and

"relief" includes any remedy or order (other than in criminal proceedings).

Freedom of thought, conscience and religion.

13. (1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

(2) In this section "court" includes a tribunal.

Derogations.

14. (1) In this Act "designated derogation" means-

(a) the United Kingdom's derogation from Article 5(3) of the Convention; and

(b) any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.

(2) The derogation referred to in subsection (1)(a) is set out in Part I of Schedule 3.

(3) If a designated derogation is amended or replaced it ceases to be a designated derogation.

(4) But subsection (3) does not prevent the Secretary of State from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.

(5) The Secretary of State must by order make such amendments to Schedule 3 as he considers appropriate to reflect-

(a) any designation order; or

(b) the effect of subsection (3).

(6) A designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation.

Reservations.

15. (1) In this Act "designated reservation" means-

(a) the United Kingdom's reservation to Article 2 of the First Protocol to the Convention; and

(b) any other reservation by the United Kingdom to an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.

(2) The text of the reservation referred to in subsection (1)(a) is set out in Part II of Schedule 3.

(3) If a designated reservation is withdrawn wholly or in part it ceases to be a designated reservation.

(4) But subsection (3) does not prevent the Secretary of State from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.

(5) The Secretary of State must by order make such amendments to this Act as he considers appropriate to reflect-

(a) any designation order; or

(b) the effect of subsection (3).

Period for which designated derogations have effect.

16. (1) If it has not already been withdrawn by the United Kingdom, a designated derogation ceases to have effect for the purposes of this Act-

(a) in the case of the derogation referred to in section 14(1)(a), at the end of the period of five years beginning with the date on which section 1(2) came into force;

(b) in the case of any other derogation, at the end of the period of five years beginning with the date on which the order designating it was made.

(2) At any time before the period-

(a) fixed by subsection (1)(a) or (b), or

(b) extended by an order under this subsection,

comes to an end, the Secretary of State may by order extend it by a further period of five years.

(3) An order under section 14(1)(b) ceases to have effect at the end of the period for consideration, unless a resolution has been passed by each House approving the order.

(4) Subsection (3) does not affect-

(a) anything done in reliance on the order; or

(b) the power to make a fresh order under section 14(1)(b).

(5) In subsection (3) "period for consideration" means the period of forty days beginning with the day on which the order was made.

(6) In calculating the period for consideration, no account is to be taken of any time during which-

(a) Parliament is dissolved or prorogued; or

(b) both Houses are adjourned for more than four days.

(7) If a designated derogation is withdrawn by the United Kingdom, the Secretary of State must by order make such amendments to this Act as he considers are required to reflect that withdrawal.

Periodic review of designated reservations.

17. (1) The appropriate Minister must review the designated reservation referred to in section 15(1)(a)-

> (a) before the end of the period of five years beginning with the date on which section 1(2) came into force; and
>
> (b) if that designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).

(2) The appropriate Minister must review each of the other designated reservations (if any)-

> (a) before the end of the period of five years beginning with the date on which the order designating the reservation first came into force; and
>
> (b) if the designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).

(3) The Minister conducting a review under this section must prepare a report on the result of the review and lay a copy of it before each House of Parliament.

Statements of compatibility.

19. (1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill-

> (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or
>
> (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed

with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

Orders etc. under this Act.

20. (1) Any power of a Minister of the Crown to make an order under this Act is exercisable by statutory instrument.

(2) The power of the Lord Chancellor or the Secretary of State to make rules (other than rules of court) under section 2(3) or 7(9) is exercisable by statutory instrument.

(3) Any statutory instrument made under section 14, 15 or 16(7) must be laid before Parliament.

(4) No order may be made by the Lord Chancellor or the Secretary of State under section 1(4), 7(11) or 16(2) unless a draft of the order has been laid before, and approved by, each House of Parliament.

(5) Any statutory instrument made under section 18(7) or Schedule 4, or to which subsection (2) applies, shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) The power of a Northern Ireland department to make-

(a) rules under section 2(3)(c) or 7(9)(c), or

(b) an order under section 7(11),

is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979.

(7) Any rules made under section 2(3)(c) or 7(9)(c) shall be subject to negative resolution; and section 41(6) of the Interpretation Act Northern Ireland) 1954 (meaning of "subject to negative resolution") shall apply as if the power to make the rules were conferred by an Act of the Northern Ireland Assembly.

(8) No order may be made by a Northern Ireland department under section 7(11) unless a draft of the order has been laid before, and approved by, the Northern Ireland Assembly.

Interpretation, etc.

21. (1) In this Act-

"amend" includes repeal and apply (with or without modifications);

"the appropriate Minister" means the Minister of the Crown having charge of the appropriate authorised government department (within the meaning of the Crown Proceedings Act 1947);

"the Commission" means the European Commission of Human Rights;

"the Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the United Kingdom;

"declaration of incompatibility" means a declaration under section 4;

"Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975;

"Northern Ireland Minister" includes the First Minister and the deputy First Minister in Northern Ireland;

"primary legislation" means any-

(a) public general Act;

(b) local and personal Act;

(c) private Act;

(d) Measure of the Church Assembly;

(e) Measure of the General Synod of the Church of England;

(f) Order in Council-

(i) made in exercise of Her Majesty's Royal Prerogative;

(ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or

(iii) amending an Act of a kind mentioned in paragraph (a), (b) or (c);

and includes an order or other instrument made under primary legislation (otherwise than by the National Assembly for Wales, a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department) to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation;

"the First Protocol" means the protocol to the Convention agreed at Paris on 20th March 1952;

"the Sixth Protocol" means the protocol to the Convention agreed at Strasbourg on 28th April 1983;

"the Eleventh Protocol" means the protocol to the Convention (restructuring the control machinery established by the Convention) agreed at Strasbourg on 11th May 1994;

"remedial order" means an order under section 10;

"subordinate legislation" means any-

(a) Order in Council other than one-

(i) made in exercise of Her Majesty's Royal Prerogative;

(ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or

(iii) amending an Act of a kind mentioned in the definition of primary legislation;

(b) Act of the Scottish Parliament;

(c) Act of the Parliament of Northern Ireland;

(d) Measure of the Assembly established under section 1 of the Northern Ireland Assembly Act 1973;

(e) Act of the Northern Ireland Assembly;

(f) 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);

(g) order, rules, regulations, scheme, warrant, byelaw or other instrument made under legislation mentioned in paragraph (b), (c), (d) or (e) or made under an Order in Council applying only to Northern Ireland;

(h) order, rules, regulations, scheme, warrant, byelaw or other instrument made by a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department in exercise of prerogative or other executive functions of Her Majesty which are exercisable by such a person on behalf of Her Majesty;

"transferred matters" has the same meaning as in the Northern Ireland Act 1998; and

"tribunal" means any tribunal in which legal proceedings may be brought.

(2) The references in paragraphs (b) and (c) of section 2(1) to Articles are to Articles of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.

(3) The reference in paragraph (d) of section 2(1) to Article 46 includes a reference to Articles 32 and 54 of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.

(4) The references in section 2(1) to a report or decision of the Commission or a decision of the Committee of Ministers include references to a report or decision made as provided by paragraphs 3, 4 and 6 of Article 5 of the Eleventh Protocol (transitional provisions).

(5) Any liability under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 to suffer death for an offence is replaced by a liability to imprisonment for life or any less punishment authorised by those Acts; and those Acts shall accordingly have effect with the necessary modifications.

SCHEDULE 2: REMEDIAL ORDERS

Orders

1. (1) A remedial order may-

(a) contain such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate;

(b) be made so as to have effect from a date earlier than that on which it is made;

(c) make provision for the delegation of specific functions;

(d) make different provision for different cases.

(2) The power conferred by sub-paragraph (1)(a) includes-

(a) power to amend primary legislation (including primary legislation other than that which contains the incompatible provision); and

(b) power to amend or revoke subordinate legislation (including subordinate legislation other than that which contains the incompatible provision).

(3) A remedial order may be made so as to have the same extent as the legislation which it affects.

(4) No person is to be guilty of an offence solely as a result of the retrospective effect of a remedial order.

Procedure

2. No remedial order may be made unless-

(a) a draft of the order has been approved by a resolution of each

House of Parliament made after the end of the period of 60 days beginning with the day on which the draft was laid; or

(b) it is declared in the order that it appears to the person making it that, because of the urgency of the matter, it is necessary to make the order without a draft being so approved.

Orders laid in draft

3. (1) No draft may be laid under paragraph 2(a) unless-

(a) the person proposing to make the order has laid before Parliament a document which contains a draft of the proposed order and the required information; and

(b) the period of 60 days, beginning with the day on which the document required by this sub-paragraph was laid, has ended.

(2) If representations have been made during that period, the draft laid under paragraph 2(a) must be accompanied by a statement containing-

(a) a summary of the representations; and

(b) if, as a result of the representations, the proposed order has been changed, details of the changes.

Urgent cases

4. (1) If a remedial order ("the original order") is made without being approved in draft, the person making it must lay it before Parliament, accompanied by the required information, after it is made.

(2) If representations have been made during the period of 60 days beginning with the day on which the original order was made, the person making it must (after the end of that period) lay before Parliament a statement containing-

(a) a summary of the representations; and

(b) if, as a result of the representations, he considers it appropriate to make changes to the original order, details of the changes.

(3) If sub-paragraph (2)(b) applies, the person making the statement must-

(a) make a further remedial order replacing the original order; and

(b) lay the replacement order before Parliament.

(4) If, at the end of the period of 120 days beginning with the day on which the original order was made, a resolution has not been passed by each House approving the original or replacement order, the order ceases to have effect (but without that affecting anything previously done under either order or the power to make a fresh remedial order).

Definitions

5. In this Schedule-

"representations" means representations about a remedial order (or proposed remedial order) made to the person making (or proposing to make) it and includes any relevant Parliamentary report or resolution; and

"required information" means-

(a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and

(b) a statement of the reasons for proceeding under section 10 and for making an order in those terms.

Calculating periods

6. In calculating any period for the purposes of this Schedule, no account is to be taken of any time during which-

(a) Parliament is dissolved or prorogued; or

(b) both Houses are adjourned for more than four days.

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